

NEGOTIATE IN GOOD FAITH*

Wellington City Council v Body Corporate 51702 (Court of Appeal, New Zealand, 7 August 2002 CA 264/01)

Negotiate in good faith – Process contract enforceable?

Background

The Wellington City Council is appealing from a High Court judgment which held that Council had breached what the High Court judge had called a “process” contract.

Facts

The respondent was wishing to purchase the freehold of a rental property. The respondent had some detailed discussions with Council and Council wrote the respondent a letter which under the heading “process” the Council wrote: “Council officers will negotiate, in good faith, sales of Council’s leasehold interests to existing lessees at not less than the current market value of those interests”.

The High Court found that the Council had offered to negotiate in good faith, which the respondent accepted by its conduct in entering into negotiations on that basis. Each party provided consideration to the other by their mutual exchange of promises. The High Court found that a legally enforceable “process” contract had been made. The respondent argued that the High Court had been correct in holding that an enforceable “process” contract came into existence in these circumstances. The Council appealed.

Judgment

The Court of Appeal disagreed with the High Court. The appeal reviewed the New South Wales Court of Appeal case of *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*¹ and the UK House of Lords case of *Walford v Miles*² in some detail. The court, reiterated that for their to be an enforceable contract the parties must have reached consensus on all essential terms or at least an objective means of sufficient certainty by which those terms may be determined. The court believed that the same theory of consensus applies by analogy to a process contract that provides all parties to negotiate in good faith. The Court of Appeal held that “good faith” in this context is essentially a subjective concept, as the House of Lords pointed out in *Walford*. There is thus no sufficiently certain objective criterion by means of which the Court can decide whether either party is in breach of the good faith obligations. The court accepted that in some circumstances a process contract is enforceable. The court in those cases requires the parties to follow agreed procedure. However the present commitment to act in “good faith” was insufficiently definitive of the parties obligations and therefore unenforceable.

PRE-EMPTIVE RIGHTS

R J Ord and C M Fenton v Calan Healthcare Properties Ltd (High Court of New Zealand, unreported, 23 December 2003 CIV 2003-404-5297)

Pre-emptive rights – Meaning of the word “transfer” – Change of trustee triggering the same

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¹ (1991) 24 NSWLR 1.

² [1992] 2 AC 128.