

Coal Cliff Collieries Pty. Ltd. and Another

*V Sijema Pty. Ltd. and Another*¹

M. HOWARD*

Contract - Complex mining venture - Agreement to negotiate 'in good faith' - Whether an enforceable contract.

This was an appeal from a decision of Clarke J., as he then was, in the Commercial Division in which he held an agreement, to negotiate a coal mining joint venture 'in good faith', to be enforceable.

In *Courtney & Fairbairn Ltd. v Tolaini Brothers (Hotels) Ltd.*² Lord Denning said: "It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract." This principle was recently applied by the House of Lords in *Walford and Others v Miles and Another*.³ However, Kirby P., with whom Waddell A-JA agreed, did not share the opinion that no promise to negotiate in good faith would ever be enforced by a court: "I reject the notion that such a contract is unknown to the law, whatever its terms. I agree with Lord Wright's speech in *Hillas* that, provided there was consideration for the promise, in some circumstances a promise to negotiate in good faith will be enforceable, depending upon its precise terms. Likewise, I agree with Pain J., in *Donwin* that, so long as the promise is clear and part of an undoubted agreement between the parties, the courts will not adopt a general principle that relief for breach of such a promise must be withheld."⁴

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1 (1991) 24 NSWLR 1. An application for special leave to appeal to the High Court has been filed.

2 [1976] 1 WLR 297.

3 [1992] 1 All ER 435, at 459.

4 (1991) 24 NSWLR 1, at 26.

Kirby P. then emphasised the underlying principle:⁵ "I believe that the proper approach to be taken in each case depends upon the construction of the particular contract. In many contracts it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should be then held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties." In contrast to this situation, Kirby P. pointed out⁶ that "the promise to negotiate in good faith will occur in the context of 'an arrangement' (to use a neutral term) which by its nature, purpose, context, other provision or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable. In the present case, with every respect to Clarke J., I am of the opinion that this contract should be so classified ... Therefore, although I agree with Clarke J. that some contracts to negotiate in good faith may be enforceable by our law, this was not such a contract."

5 Ibid., at 27.

6 Ibid., at 27.