[SUPREME COURT OF NEW SOUTH WALES]

AITON AUSTRALIA PTY LTD v TRANSFIELD PTY LTD [1999] NSWSC 996

Einstein J

26 July, 1 October 1999

Contracts — Building, engineering and related contracts — Dispute resolution clauses — Agreement to negotiate in good faith before resort to litigation or alternative dispute resolution — Whether clause unenforceable for uncertainty — Whether clause amounting to an "agreement to agree" void for uncertainty — Whether "good faith" requirement imports uncertainty into clause — Whether absence of stipulation determining mediator's remuneration imports uncertainty — Whether mediation clause severable from negotiation clause — Content of the requirement to act in "good faith" — Whether dispute resolution process properly invoked — Native Title Act 1993 (Cth), s 31(1)(b) — Industrial Relations Act 1988 (Cth), s 170QK(2) — Farm Debt Mediation Act 1994 (NSW), s 11.

Practice and Procedure — Stay of proceedings — Application for contract containing dispute resolution clauses — Whether court will stay proceedings for lack of compliance with clause.

The plaintiff and the defendant contracted for the plaintiff to conduct certain works on a construction project. The plaintiff asserted that the defendant made representations during the tender process and in the course of construction which were misleading or deceptive, and which caused the plaintiff to be unable to complete the contracts in the manner, and for the price, provided for in the contracts. The relevant contract provided for a dispute resolution process which the plaintiff invoked with respect to some, but not all of the disputes between the parties. The plaintiff commenced proceedings against the defendant for damages. The defendant brought this notice of motion seeking a stay of the proceedings, contending that the dispute resolution procedures provided for by the contract had not been carried out prior to the commencement of proceedings.

Held: (1) Equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the court to determine that the clause is enforceable. The Court may, however, order that proceedings commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed.

Hooper Bailie Associated Ltd v Natcon Group Pty Ltd (1992) 28 NSWLR 194, applied.

Townsend v Coyne (1995) 6 BDR 13,935, considered.

(2) A dispute resolution clause does not offend the general tenet of the law that it is not possible to oust the jurisdiction of the Court, as the clause acts, in effect, as a mere postponement of a party's right to commence proceedings.

Scott v Avery (1856) 10 ER 1121, followed.

(3) The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently detailed to be meaningfully enforced.

Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd (1995) 36 NSWLR 709; *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201, considered.

(4) Provided that no stage of the dispute resolution mechanism is itself an agreement to agree and therefore void for uncertainty, there is no reason why, in principle, an agreement to negotiate a dispute may not itself constitute a stage in the process.

Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 WLR 297; [1975] All ER 716, not followed.

(5) As a minimum requirement of an enforceable mediation clause, inter alia, the administrative processes for selecting the person to conduct any dispute resolution process, and to determine his or her remuneration, should be provided for in the dispute resolution clause.

(6) Before a term may be implied into a contract, its implication must, inter alia, be so obvious that "it goes without saying". In this case the basis on which the mediator's remuneration would be paid was not sufficiently clear to justify the implication of a term.

Codelfa Construction Pty Ltd v State Rail Authority (NSW) (1962) 149 CLR 337, applied.

MOTION

This was an application by the defendant for a stay on proceedings brought by the plaintiff for substantive relief on the basis that express procedures for the resolution of disputes between the parties and contained in the contract between them had not been carried out.

R W Hunt, for the plaintiff.

M G Rudge, for the defendant.

Cur adv vult

1 October 1999

EINSTEIN J.

The motion

1 The motion before the Court is for a stay of proceedings.

2 The defendant seeks the stay on the basis that the contracts pleaded by the plaintiff, forming the basis of the plaintiff's claim, contain express procedures for dispute resolution to be followed prior to either party commencing proceedings. (The precise words used in the relevant clause are set out below.) The defendant asserts that such procedures have not been carried out, and therefore, the Court ought stay the proceedings until the procedures have been followed. If successful, this application would amount to an indirect enforcement of those express procedures.

The proceedings

3 The proceedings were commenced by the plaintiff, Aiton Australia Pty Ltd, by summons dated 21 May 1999. They concern the Osborne Co-Generation Project, a turn-key construction project for Osborne Co Pty Ltd, an independent power producer situated in Adelaide, South Australia. In May and June of 1997 the plaintiff and the defendant, Transfield Pty Ltd, entered into three contracts in relation to the construction of the project. It is these contracts, and the tender

negotiations leading up to the execution of the contracts, from which the dispute between the parties arises.

4 The plaintiff asserts inter alia that the defendant made representations to the plaintiff during the tender negotiations which were misleading and deceptive. In consequence, the plaintiff claims to have been unable to execute the works in the manner, sequence, and within the duration and for the tender price provided for by the contracts. Further, the plaintiff asserts that the defendant made representations to the plaintiff during the performance of the works which were misleading and deceptive. In consequence, the plaintiff claims to have performed additional work and worked according to a different completion period.

5 The plaintiff puts its case in terms of ss 52 and 53 of the *Trade Practices Act* 1974 (Cth) and/or ss 42 and 44 of the *Fair Trading Act* 1987 (NSW) or ss 56 and 58 of the *Fair Trading Act* 1987 (SA). The plaintiff claims damages said to be incurred by reliance on the representations.

6 The plaintiff further claims damages for delay and disruption to the works arising from the acts or omissions of the defendant and an entitlement to be paid for additional works pursuant to the contracts, collateral contract or on a quantum meruit.

The contracts

7 The contracts referred to above, forming the basis of the plaintiff's claim, are contract C11/1 dated 23 May 1997; contract C7 dated 20 June 1997 and contract C11/2 dated 24 June 1997. Each contract contained an express term and condition for dispute resolution procedure, in the terms of cl 28.

8 Clause 28 of the contracts provides:

> "28. Dispute resolution
>
> 28.1 General
>
> The Purchaser [Transfield] and Supplier [Aiton] shall make diligent and good faith efforts to resolve all Disputes in accordance with the provisions of this Section 28.1 [General] before either party commences mediation, legal action or the expert Resolution Process, as the case may be.
>
> If the representatives of the parties are unable to resolve a Dispute within 15 days after Notice from one Party to the other of the existence of the dispute (the "Dispute Notice") and after exchange of the pertinent information, either party may, by a second Notice to the other Party, submit the Dispute to the Designated Officers of Supplier and Purchaser. A meeting date and place shall be established by mutual Contract of the Designated Officers. However, if they are unable to agree, the meeting shall take place at the Site on the 10th business day after the date of the second Notice. The Designated Officers shall meet in person and each shall afford sufficient time for such meeting (or daily consecutive meetings) as will provide a good faith, thorough exploration and attempt to resolve the issues. If the Dispute remains unresolved 5 Business Days following such last meeting, the Designated Officers shall meet at least once again within 5 Business Days thereafter in a further good faith attempt to resolve the Dispute.
>
> For any Dispute which is unresolved at the conclusion of such meeting, each Party shall submit within 10 days thereafter a written statement of its

position to the other party and the Dispute shall be immediately submitted to mediation pursuant to Section 28.2 [Mediation].

28.2 Mediation

If the Dispute is not resolved pursuant to the process established in Section 28.1 [General], either Purchaser or Supplier shall submit the same for mediation and the parties expressly agree upon the following process and subject to Section 28.5 [Limitation Periods] agree that Mediation shall be compulsory before either Party may commence legal action or initiate the Expert Resolution process, as the case may be:

(a) The Party initiating mediation shall provide Notice of that request to the other Party, including a summary of the Dispute, a written statement of its position and a list of 4 mediators acceptable to it.

(b) Within 5 business days following receipt of the above Notice, the recipient Party shall provide the other Party with a written statement of its position on the Dispute, any objections and amendments that it may have to the other Party's above mentioned summary of the Dispute and a list of 4 mediators acceptable to it if it does not accept an individual from the other Party's list.

(c) If the Parties are unable to agree on a mediator within 5 business days following delivery of the material mentioned in Subsection (b) above, then either Party may apply on an expedited basis to have the mediator appointed by the President for the time being of the New South Wales Bar Association (or paramount officer of any successor organisation). The mediator shall have suitable qualifications and standing to mediate the Dispute.

(d) The place of any mediation proceeding shall be Sydney, New South Wales.

(e) The mediator may conduct the proceedings in any manner he considers appropriate, taking into account the circumstances of the Dispute, any desires expressed by the Parties, and the desire for speedy resolution of the Dispute The mediator may communicate with the Parties orally or in writing and may meet with the Parties together or individually. The Party initially referring the Dispute to mediation is entitled to make the first opening statement to the mediator.

(f) The mediator shall not act as a representative or witness of either Party or otherwise participate in any Expert Resolution or judicial proceedings related to a Dispute that was the subject of mediation.

(g) Statements made by either Party or the mediator in the course of the mediation process shall not be disclosed to any third party and shall not be introduced by either Party in the Expert Resolution process or judicial proceedings, whether or not those proceedings relate to the Dispute that was the subject of the mediation.

(h) The Parties agree to use all reasonable endeavours in good faith to expeditiously resolve the Dispute by mediation.

(i) If the Dispute has not been resolved by the mediation process within 28 days of the appointment of the mediator or such other period as is subsequently agreed to by the Parties, then either Party shall have the right to initiate the Expert Resolution process or judicial proceedings, as the case may be.

28.3 Expert

Where the Parties agree to submit a dispute or difference to the Expert Resolution Process, such dispute or difference shall be resolved in the following manner:

(a) An Expert will be appointed by the Parties, or in default of Contract upon such appointment, either Party may refer the appointment to, in the case of financial matters, the President for the time being of the Institute of Chartered Accountants in Australia, in the case of technical matters, the President for the time being of the Institution of Engineers in Australia and, in the case of any other matters (including a dispute as to the interpretation of this Contract) the President for the time being of the Institute of Arbitrators in Australia. In all events, the Expert must have reasonable qualifications and commercial and practical experience in the area of Dispute and have no interest or duty which conflicts or may conflict with his function as an Expert.

(b) The Expert will be instructed to:

(i) promptly fix a reasonable time and place for receiving submissions or information from the Parties or from any other Persons as the Expert may think fit;

(ii) accept oral or written submissions from the Parties as to the subject matter of the Dispute within 10 Business Days of being appointed;

(iii) not be bound by the rules of evidence; and

(iv) make a determination in writing with appropriate reasons for that determination within 20 Business Days of the date referred to in Subsection 28.3(b)(ii).

(c) The Expert will be required to undertake to keep confidential matters coming to the Expert's knowledge by reason of being appointed and the performance of his duties.

(d) The Expert will have the following powers:

(i) to inform himself independently as to facts and if necessary technical and/or financial matters to which the dispute relates;

(ii) to receive written submissions sworn and unsworn written statements and photocopy documents and to act upon the same;

(iii) to consult with such other professionally qualified persons as the Expert in his absolute discretion thinks fit; and

(iv) to take such measures as he thinks fit to expedite the completion of the resolution of the dispute.

(e) Any person appointed as an Expert will be deemed not to be an arbitrator but an expert and the law relating to arbitration including the *Commercial Arbitration Act* 1986 (SA) and the

New South Wales equivalent, as amended, will not apply to the Expert or the Expert's determination or the procedures by which he may reach his determination.

(f) The Dispute resolution will be held in Sydney, New South Wales unless the Parties otherwise agree.

(g) In the absence of manifest error, the decision of the Expert will be valid, final and binding upon the Parties.

(h) The costs of the Expert and any advisers appointed pursuant to Subsection 28.3(c)(iii) will be borne by Purchaser or Supplier or both as determined in the discretion of the Expert taking into account the Expert's decision in the dispute.

(i) The Parties will give the Expert all information and assistance that the Expert may reasonably require. The Parties will be entitled to be legally represented in respect of any representations that they may wish to make to the Expert, whether orally or in writing.

28.4 Work to Continue

Notwithstanding the status of the progress of any Dispute whether it be under discussion between the Parties or the Designated Officers or in mediation, litigation or the Expert Resolution Process and regardless of the basis thereof or the grounds therefor, Supplier shall, unless the Contract has been lawfully terminated, diligently continue to prosecute the Work and comply with its Warranty Obligations, all in accordance with the terms of this Contract.

28.5 Limitation Periods

Notwithstanding anything contained in Section 28.1 [General] and Section 28.2 [Mediation] each Party retains the right to commence legal action or initiate the Expert Resolution Process as the case may be, to preserve that Party's rights to prevent the elimination of such rights by a limitation period prescribed by Law.

28.6 Designated Officers

The Designated Officers are:

Purchaser: Chief Executive Officer of Transfield Pty Ltd.

Supplier: The most senior officer of the Supplier at the Supplier's address stated on the Purchase Order.''

9 The definition of ''Dispute'' is provided in cl 1.1 of the contracts, being ''any claim, dispute, disagreement or other matter in question between Purchaser and Supplier that arises with respect to the terms and conditions of this Contract or with respect to the performance, non-performance or breach by the Purchaser or Supplier of their respective obligations under this Contract''.

The facts

10 The history of the various claims made by Aiton to Transfield prior to service of the summons, is set out in the affidavits of Mr Neil Price, sworn 2 July 1999 and Mr Keith Walker-Smith, sworn 6 July 1999. Mr Price has been involved with the Osborne Co-Generation Project since 21 July 1997 and has been project manager for Aiton since November 1997. Mr Walker Smith was the general manager of Aiton from October 1991 to February 1999 and managing director from February 1999 to 1 May 1999.

11 On the evidence of Mr Price, the following can be seen as heads of claim

pursued by Aiton against Transfield during the period from 1997 to 1999: (1) extension of time and costs due to inadequate isometric drawings being provided by Transfield; (2) wage rates variations associated with an additional over-award weekly payment to the labour force; (3) work involved with the installation of cooling water piping, being work outside the contract price; (4) hourly rates site variations for work performed outside the contracts; and (5) work involved with the installation of trimmer steel, being work outside the contract price.

12 On 30 March 1999 Aiton made a consolidated claim which is later reflected in the summons. Presumably, the pleaded consolidated claim, totalling $11,897,529 once broken down, may be directly correlated with the separate heads of claim detailed in Mr Price's affidavit. It is convenient, therefore, that the heads of claim, having separate claim histories be dealt with separately.

13 As to the isometric drawings claims, Aiton gave Transfield a notice of dispute pursuant to cl 28.1 on 20 March 1998 (NEP4). Following requests for further information from Transfield, Aiton submitted its quantified claim, incorporating previous interim claims, and supporting documentation to Transfield on 1 December 1998. On the evidence of Aiton, Aiton's subsequent attempts to discuss the claim were frustrated by the conduct of Transfield: communication by Transfield to the effect that Transfield did not intend to make further payments to Aiton; cancellation of the 20 January 1999 variation claims meeting at which the claims were proposed to be discussed; failure to prepare for the 28 January 1999 meeting; failure to respond. It appears that Aiton did not submit a second notice of dispute in relation to these claims as per the procedure stipulated in cl 28.1.

14 As to the wage rates variations, Aiton notified Transfield on 12 November 1997 at a variation claims meeting that such variations were in dispute, this notification being confirmed by facsimile dated 29 November 1997 (NEP9). On the evidence of Aiton, no further steps were taken pursuant to cl 28 in view of Transfield's apparent acceptance of the claim, subject to documentary substantiation, by facsimile dated 11 February 1998 (NEP12). On 19 August 1998 Aiton submitted its particularised claim with supporting documentation to Transfield. Thereafter, Transfield advised Aiton that the claim was under review, until on 28 January 1999 Transfield advised Aiton that it had difficulties with the claim and was reviewing the earlier correspondence.

15 As to the claims arising from the cooling water piping, Aiton notified Transfield on 12 November 1997 at a variation claims meeting that such variations were in dispute, this notification being confirmed by facsimile dated 29 November 1997 (NEP18). On the 16 October 1998 Aiton gave Transfield a second notice pursuant to cl 28.1. Thereafter, Aiton made numerous requests that the parties' chief executive officers meet to discuss the claim, being the designated officers as required by the dispute resolution procedures in cl 28.1. On the evidence of Aiton, given the consistent failure of Transfield to meet these requests, it was agreed that such meeting be convened between the respective general managers of each party. On 9 November 1998 Transfield agreed to pay $68,800 of the $80,380 originally claimed.

16 As to the hourly rates site variations, Aiton gave Transfield notice of dispute pursuant to cl 28.1 on 23 September 1998 (NEP46). By facsimile dated 8 October 1998, Transfield requested further information, stating further that given that "there are some 348 claims which make up Aiton's labour claims

for site variations'', the procedures for exchange of information effectively outlined in cl 28.1, are unacceptable and are not ''realistic or practical''. On the evidence of Aiton, thereafter followed a series of meetings between officers of the plaintiff and the defendant at which a number of Aiton's claims were settled, payment having not yet been received.

17 As to the claims arising from the installation of trimmer steel, being work said by the plaintiff to be outside the contracts, Aiton's solicitors sent a letter of demand to the defendant on 26 June 1998. On the evidence of Aiton, while Transfield has advised Aiton on numerous occasions that a site report prepared by Transfield in respect of these claims would be made available to Aiton, no such report has been made available.

18 On 30 March 1999, Aiton forwarded to Transfield a letter containing a consolidated claim, inviting Transfield to contact Aiton within 15 days to negotiate a programme for resolution of the claim. Aiton further stated that if Transfield did not respond within that time or if the parties were unable to agree, Aiton would assume the parties were in dispute as to the consolidated claim. Argument as to production of information ensued, Aiton forming the view in May 1999 that Transfield had failed to act in a bona fide manner with respect to the resolution of disputes.

19 Subsequent to the filing of the summons by Aiton on 21 May 1999, the plaintiff's solicitors, acting on the instructions of the plaintiff, sent to the defendant's solicitors a facsimile dated 7 June 1999 containing a proposal for mediation. By facsimile of the same day, the solicitors for the defendant responded to that proposal, asserting that it was at best, ''a truncated and inadequate version of the dispute resolution process recommended in the contract''.

20 On the evidence of the defendant, the procedures following notice of dispute outlined in cl 28.1 of the contracts have not been complied with in respect of the issues raised in the proceedings, nor have the mediation procedures referred to in cl 28.2 been initiated or complied with in relation to the issues raised in the proceedings (affidavit of Mr Paul Finnerty 17 June 1999, pars 6 and 7). This is notwithstanding the defendant's assertion that it is ready and willing to do everything necessary for the proper conduct of the dispute resolution procedures, including mediation (outline of defendant's submissions, par 7).

21 In the result, the defendant seeks a court order staying the proceedings, thereby indirectly enforcing cl 28, compliance with which is expressed to be a condition precedent to commencing litigation or arbitration.

22 In my view, on the evidence, the defendant has sought to frustrate the plaintiff's attempts to regularly invoke the provisions of cl 28. Whilst the correspondence and communications between the parties are open to more than one construction, I see as made out the plaintiff's submission that the defendant has not complied with the spirit and intent, let alone the words, of cl 28 on the occasions where the plaintiff sought to invoke the provisions of the clause.

23 It has to be said that there has been a progression and expansion of claims with the expansion of time and that in my view, on the evidence, the defendant's earlier responses to the separate heads of claim bespeak a most negative attitude indeed to submitting to the agreed cl 28 procedures.

24 Notwithstanding this, it must also be said that, on the evidence, Aiton itself failed to adhere to the agreed cl 28 procedures in seeking to invoke those procedures in relation to *all* the separate heads of claim or to it's consolidated

claim. It may be that in view of Transfield's previous responses, Aiton ultimately gave up on making further attempts to invoke the agreed dispute resolution procedure.

25 It is trite to observe that parties ought be bound by their freely negotiated contracts. As Kirby P, as he was then, stated in *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 332, the "courts should be the upholders, and not the destroyers, of commercial bargains". Similarly, in *Meehan v Jones* (1982) 149 CLR 571 at 589, Mason J referred to the "traditional doctrine that courts should be astute to adopt a construction which will preserve the validity of the contract".

Stay of proceedings

26 Equity will not order specific performance of a dispute resolution clause, notwithstanding that it may satisfy the legal requirements necessary for the Court to determine that the clause is enforceable. This is because supervision of performance pursuant to the clause would be untenable: see *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 210. The Court may, however, effectively achieve enforcement of the clause by default, by ordering that proceedings commenced in respect of a dispute subject to the clause, be stayed or adjourned until such time as the process referred to in the clause, is completed.

27 The Court's power to order a stay of proceedings is derived from its inherent jurisdiction to prevent abuse of its process: cf *Supreme Court Rules* 1970 (NSW), Pt 13, r 5.

28 As Giles J observed in *Hooper Bailie*, for a party to proceed with litigation in the face of an enforceable agreement to follow a dispute resolution procedure, may be an instance of abuse of process in accordance with the principle stated by MacKinnon LJ in *Racecourse Betting Control Board v Secretary for Air* [1944] Ch 114 at 126, having reference to an exclusive jurisdiction clause:

> " ... the court makes people abide by their contracts, and, therefore, will restrain a plaintiff from bringing an action which he is doing in breach of his agreement with the defendant that any dispute between them will be otherwise determined."

29 This same approach was adopted by Rogers CJ in *AWA Ltd v Daniels* (unreported, Supreme Court, NSW, Rogers CJ, 24 February 1992) and, at least in principle, by Master Horton in *Allco (Steel) Queensland Pty Ltd v Torres Strait Pty Ltd* (unreported, Supreme Court, Qld, Full Court, 12 March 1990).

30 It is noteworthy that a different approach was taken in *Townsend v Coyne* (1995) 6 BPR 13,935. In that case, Young J concluded that in the absence of the applicability of the *Commercial Arbitration Act* 1984 (NSW), the Court is unlikely to grant a stay unless there is an instance of abuse of process. With reasoning similar to that of Master Horton in *Allco Steel*, who emphasised the overriding concern of the paramount jurisdiction of the Court to determine proceedings, Young J refused the application for a stay, on the basis that he doubted whether it would constitute an abuse of process to commence proceedings without a prior attempt to mediate.

31 The particular facts of *Townsend* concerned an application for the removal of a caveat. Clearly, where urgent interlocutory relief is sought by one party, it is unlikely that the court will allow another party to shelter behind a dispute resolution process so as to frustrate the party obtaining that urgent relief. Such

considerations will inform the court's exercise of it's discretion to grant a stay or adjournment as appropriate.

Construction of the clause

32 The plaintiff's first submission is that on the proper construction of the contracts, the provisions of cl 28.1 of the commercial terms (Rev 4 dated 21 January 1997) are not expressed to be mandatory before commencement of any legal action. They point to the absence of the words ''shall be compulsory'', which are found in cl 28.2, submitting that for cl 28.1 to be treated as mandatory, those words in cl 28.2 would need to be treated as otiose, which is contrary to the presumption against ''mere surplusage'': per Sommerville LJ in *SA Maritime et Commerciale of Geneva v Anglo-Iranian Oil Co Ltd* [1954] 1 WLR 492 at 494-495); [1954] 1 All ER 529 at 530-531.

33 Secondly, the plaintiff submits that having regard to the definition of ''Dispute'' in cl 1.1(s) of the commercial terms, cl 28 of the contracts has no application to certain of Aiton's claims, namely, the claim for quantum meruit and the claims for damages for negligence or breaches of the *Trade Practices Act* and the *Fair Trading Act*.

34 The plaintiff's third submission is that in any event, the requirement of ''good faith'' imposed by cl 28 of the contracts, is not such as to ''require of the parties participation in the process by conduct of sufficient certainty for legal recognition of the agreement'': *Hooper Bailie* (at 209). This is because (the plaintiff asserts) the concept of ''good faith'' is too imprecise to give rise to an enforceable obligation.

35 To my mind, the plaintiff's first submission is without substance. It is not open to the parties to elect to comply or to fail to comply with the dispute resolution procedure. Upon the proper construction of cl 28, the staged set of procedures stipulated for in the clause require to be strictly observed as necessary pre-conditions to the right to commence proceedings. Clause 28.1 requires that the parties ''shall'' make good faith efforts to comply with the first stage procedure for dispute resolution ''before'' either party commences mediation, legal action or expert resolution. Failing that process, cl 28.2 provides for mediation as the second stage of the dispute resolution procedure. Likewise, cl 28.2 uses the mandatory language of ''shall''. In addition, the second stage is expressly stated to be a ''compulsory'' pre-condition to the right to proceed with legal action or the expert resolution process.

36 As to the plaintiff's second submission, I am mindful that the tender representations relied upon by the plaintiff are said to have induced the plaintiff to enter into the contracts. They are, therefore, so closely connected with the terms of the contracts that they ''arise with respect to the terms and conditions of this contract'': see the definition of dispute in cl 1.1; see generally the manner in which Clarke JA dealt in *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 483 with the ambit of the words ''arising out of'' and ''related to this agreement'' — ''It is not only claims arising out of the agreement or any breaches of it which are covered but also those related to the agreement and any breaches of it. The phrases 'in relation to' or 'related to' are of the widest import and should not, in the absence of compelling reasons to the contrary, be read down.'' The words ''arise with respect to the terms and conditions of this contract'' by parity of reasoning, are of wide import not to be read down without compelling reasons. The

negligence count is based entirely upon the same representations. The plaintiff's quantum meruit case is based on additional works performed at the request or direction of the defendant, its representatives or agents. The quantum meruit claim is inextricably linked with the plaintiff's contractual claims (summons, issues likely to arise, par 15) and so ought be treated together. The plaintiff's second submission is rejected.

37 It is the plaintiff's third submission, as to the certainty of the concept of "good faith", which commands greater substance.

38 Clause 28.1 expresses a requirement of "good faith" in:

> "The Purchaser and Supplier shall make *diligent and good faith efforts* to resolve all Disputes in accordance with the provisions of this Section 28.1 [General] before either party commences mediation, legal action or the expert Resolution Process, as the case may be (1st paragraph).
>
> The Designated Officers shall meet in person and each shall afford sufficient time for such meeting (or daily consecutive meetings) as will provide a *good faith, thorough exploration and attempt to resolve the issues*. If the Dispute remains unresolved 5 Business Days following such last meeting, the Designated Officers shall meet at least once again within 5 Business Days thereafter in a further *good faith attempt* to resolve the Dispute (2nd paragraph, 4th line)."

39 Clause 28.2:

> "(h) The Parties agree to use *all reasonable endeavours in good faith* to expeditiously resolve the Dispute by mediation." ([Emphasis added.)

40 It appears that cl 28.1 amounts to an agreement to negotiate disputes in good faith, as distinct from an agreement to conciliate disputes in good faith.

41 The issue of whether the requirement of "good faith" in dispute resolution clauses creates obligations which are enforceable in law is examined below. It is convenient to turn first to dispute resolution clauses generally.

ADR clauses as a pre-condition to litigation generally

42 There is no legislative basis for enforcing dispute resolution clauses otherwise than those which provide for arbitration: *Commercial Arbitration Act*. However, it is clear that if parties have entered into an agreement to conciliate or mediate their dispute, the Court may, in principle, make orders achieving the enforcement of that agreement as a pre-condition to commencement of proceedings in relation to the dispute: *Hooper Bailie*.

43 To achieve enforcement of such an agreement it is essential that the agreement is in the *Scott v Avery* (1856) 10 ER 1121 form — that is, expressed as a condition precedent. Such a clause was seen not to offend the general tenet of law that it is not possible to oust the jurisdiction of the Court as it acted, in effect, as a postponement of a party's right to commence legal proceedings until the arbitration was concluded, not as a prohibition against a party having such recourse: *Scott v Avery*. Further, as mentioned previously, the agreement is enforced, not by ordering the parties to comply with the dispute resolution procedures, but by forbidding them from using other procedures from which they have agreed to abstain until the end of the dispute resolution process.

44 The Court will not adjourn or stay proceedings pending alternative dispute resolution procedures being followed, if the procedures are not sufficiently

detailed to be meaningfully enforced: *Elizabeth Bay Developments Pty Ltd v Boral Building Services Pty Ltd* (1995) 36 NSWLR 709.

45 In *Hooper Bailie*, Giles J framed the test for enforcement in the following terms (at 209):

> "An agreement to conciliate or mediate is *not* to be likened ... to an agreement to agree. Nor is it an agreement to negotiate, or negotiate in good faith, perhaps necessarily lacking certainty and obliging a party to act contrary to its interests. Depending upon its express terms and any terms to be implied, it may require of the parties *participation in the process by conduct of sufficient certainty for legal recognition* of the agreement." (Emphasis added.)

46 In that case, the Court dealt with a summons seeking to prevent the defendant from continuing with an arbitration between the parties. The suit was brought on the basis that the defendant had agreed by exchange of letters that the arbitration would not continue until a process of conciliation had concluded and the process had not concluded.

47 Giles J held that the parties had agreed to conciliation in respect of the issues identified in the exchange of letters and had agreed that the arbitration would not resume until such conciliation was concluded. After reviewing Australian authorities and having reference to United States' and English authorities, Giles J concluded that the procedure was sufficiently certain to render the agreement enforceable as a solicitor's letter set out the procedure to be followed. Accordingly, his Honour ordered that the arbitration be stayed pending conclusion of the conciliation process.

48 In contradistinction, in *Elizabeth Bay*, a case where Giles J again considered the enforceability of a dispute resolution agreement, being an agreement to mediate, his Honour held that there were two compelling reasons why the agreement was not sufficiently certain to be enforced in the circumstances. The first, related to the inconsistency between the mediation agreement and the guidelines setting out procedure. The second, relevantly to the issue now before me, related to the requirement (cl 11) that parties attempt to negotiate their disputes in good faith.

49 His Honour stated (at 716):

> "... by cl 11 the parties also confirmed that they 'enter[ed] into this mediation with a commitment to attempt in good faith to negotiate towards achieving a settlement of the dispute'. What did this mean?
>
> On one view it was merely declaratory, a statement of the parties' states of mind. It is difficult to regard the parties as having undertaken in 1993 to declare at a future time that they had (at the future time) a commitment to good faith negotiations: first, other than being a laudable emotion the declaration itself would not advance the process of mediation, and secondly by the future time one or other of the parties may well not have had that commitment. It is more likely that, as one of a number of paragraphs expressing rights and obligations in a formal legal agreement, cl 11 was intended to impose an obligation to attempt to negotiate in good faith.' The obscurity in cl 11 is to be regretted, since it brought to the mediation agreement either a legally peripheral declaration likely to be disproved at the very time cl 11 was invoked or a purported obligation the recognition of which involved formidable legal difficulty: the cumulative

uncertainty of 'commitment', 'attempt', 'negotiate' and 'in good faith' is forbidding.

I do not think it matters which view is taken of cl 11. *It is not easy to take a course requiring a party to assert a state of mind which it may well not have, and even less easy to take a course which compels a party to commit itself to the vagueness of attempting in good faith to negotiate with the other party to the dispute.* The latter difficulty lies not so much in the ascertainment of the presence or absence of good faith, or even in the uncertainty of attempting, but rather *in the necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith*: see *Hooper Bailie* (at 209); *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 26-27; *Walford v Miles* [1992] 2 AC 128 at 138." (Emphasis added.)

50 The plaintiff submits that the decisions of Giles J in *Hooper Bailie* and *Elizabeth Bay*, mandate a holding that cl 28.1 is unenforceable not only because it is merely an agreement to negotiate, as opposed to an agreement to conciliate and/or to mediate, but also because it contains a good faith requirement. Likewise, that cl 28.2 also containing the good faith requirement, is unenforceable.

51 Giles J did not have before him, in either case, an agreement to negotiate. In *Hooper Bailie*, his Honour drew a distinction between an agreement to conciliate or mediate and an agreement to negotiate in good faith, upholding the former in principle and expressing doubt as to the necessary certainty of the latter. However, his Honour's reasoning centred upon an agreement to conciliate — the question of enforceability of an agreement to negotiate as part of the dispute resolution mechanism, not being an immediate concern.

52 The status of agreements to negotiate in good faith was considered by Hayne J who wrote the leading judgment in *Con Kallergis Pty Ltd v Calshonie Pty Ltd* (1998) 14 BCL 201. In that case, a question arose as to whether an agreement for valuation of variations was uncertain or incomplete on the grounds that the agreement provided that the price of the work was to be negotiated by one party to the contract with a third party. The argument proceeded on the assumption that the contracting party's obligation to negotiate, may properly be seen as an obligation to negotiate in good faith or to do so honestly and reasonably (at 211).

53 Although Hayne J was not prepared to countenance the argument of uncertainty for the first time on appeal, his Honour made the following remarks in obiter (at 211-212):

> "It was submitted ... that even if the obligation undertaken ... was to negotiate in good faith ..., the obligation was still too uncertain to admit enforcement .... *Although there may be difficult questions of fact and degree about whether evidence of particular conduct reveals a lack of good faith or lack of honesty or reasonableness, the obligation to act in good faith or honestly or reasonably is an obligation that is certain* ... : see, eg, *Meehan v Jones* (at 589) per Mason J. As his Honour there said:
>
> > 'The limitation that the purchaser must act honestly, or honestly and reasonably, takes the case out of the principle that:
> >
> > > "... where words which by themselves constitute a promise are accompanied by words which show that the promisor is to have

> a *discretion or option as to whether he will carry out that which purports to be the promise*, the result is that there is no contract on which an action can be brought. . . .''
>
> Some of the writing in this area seeks to suggest that there can be only one answer to the general question whether an agreement to negotiate is enforceable. The discussion by the members of the courts who decided Coal Cliff and Trawl Industries, as well as the discussion by Giles J of the problems he had to consider in Hooper Bailie and in Elizabeth Bay show that the question may be more complex than the simple statement of it may suggest and that the answer to the problem may vary according to the precise terms of the agreement. They suggest that it is only when all of the circumstances are known that it can be seen whether the obligations of the parties (described as 'to negotiate') can be identified with certainty. And that is why it is now too late to raise the point. Norris has been deprived of the opportunity to lead evidence about those matters.
>
> Where, as I assume may be the case here, B and C must negotiate (B because it is bound to A to do so and C because it is bound to B to do so) and there is a process for resolving any disagreement between B and C, I consider that the obligation ''to negotiate'' the price is certain.'
>
> The contract considered in *Walford v Miles* was held to be uncertain because either party could break off negotiations at any time and for any reason. It was held that the implication of an obligation to negotiate in good faith did not cure the difficulty because a negotiator, acting in good faith, might nevertheless always break off negotiations. *But unlike the kind of contract considered in Walford v Miles, a contract of the kind now under consideration (in which I assume there is provision for resolution of disputes between the negotiators) does provide for an end to the negotiation other than the parties to it retreating to their offices to nurse their pride and their rejected bargaining position. If one party withdraws from the negotiations, whether in the hope that the opposite party will re-open them with an improved offer or for any other reason, the impasse between the parties can be resolved by one or other setting in train arbitration of the dispute or whatever other process of dispute resolution has been agreed. The matter will not stop with the breaking off of negotiations.*'' (Emphasis added.)

54 Hayne J did not address the nature or content of an obligation to negotiate in ''good faith''.

55 Notwithstanding that Hayne J does leave this question unanswered, his Honour's comments are instructive as they highlight the difference between, on the one hand, an ''agreement to agree'', which was described by Lord Wensleydale in *Ridgway v Wharton* (1857) 10 ER 1287 at 1313 as ''a contradiction in terms'': ''It is absurd to say that a man enters into an agreement till the terms of that agreement are settled'', and on the other hand, an ''agreement to negotiate'', where it constitutes part of a broader dispute resolution process.

56 This point is clearly made by D Cremean in the following passage:

> ''No justification exists for starting from the premise that an agreement to negotiate in good faith is like an agreement to agree. *The two are quite*

> *different*. To adopt the analogy of an agreement to conciliate or mediate, an agreement to negotiate should be viewed as obliging the parties to participate in a negotiating process. A negotiating process, where offers and counter-offers are made, may or may not lead to agreement. But agreement is not necessarily the outcome of the process. *Agreement in consequence of agreement is not guaranteed.* An agreement to agree, on the other hand, obliges no participation in a negotiating process because, in theory, agreement has already been reached. Agreement in consequence of agreement is guaranteed.'' (Emphasis added.)

D Cremean, ''Agreements to negotiate in Good Faith'' (1996) 3 *Commercial Dispute Resolution Journal* 61 at 63.

57 It is important not to collapse the distinction by confusing what are referred to here, as an ''agreement to negotiate'' (agreement to negotiate as part of a process), with what are really, ''agreements to agree'' (agreement to negotiate to achieve agreement). An example where phraseology alone may confuse the issue, is found in *Courtney and Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* [1975] 1 WLR 297; [1975] 1 All ER 716, where Lord Denning (with whom Lord Diplock agreed), in considering an agreement ''to negotiate fair and reasonable contract sums'', stated: (at 301; 719-720):

> ''If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognise a contract to negotiate. The reason is because it is too uncertain to have any binding force. No court could estimate the damages because no one could tell whether the negotiations would be successful or would fall through: or if successful what the result would be. 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.''

58 One commentator has suggested that the decision in *Con Kallergis* turns on its particular facts. P Mead, ''ADR Agreements: Good Faith and Enforceability'' (1999) 10 *Australian Dispute Resolution Journal* 40 at 43 suggests that there is a distance between an agreement on the one hand, which purports to compel one party to that agreement to attempt to negotiate with a third party, failing which an alternative procedure somewhat removed is expressly prescribed, and on the other hand, an agreement to negotiate which itself forms part of the dispute resolution mechanism.

59 To my mind, this is a false distinction. As discussed below, the focus ought properly be on the *process* provided by the dispute resolution procedure. Provided that no stage of the dispute resolution mechanism is itself an ''agreement to agree'' and therefore void for uncertainty, there is no reason why, in principle, an agreement to attempt to negotiate a dispute may not itself constitute a stage in the process.

Procedure to be certain

60 In *Hooper Bailie*, Giles J stated (at 206):

> ''What is enforced is not co-operation and consent but *participation in a process* from which consent might come.'' (Emphasis added.)

61 It is for this reason that that the process from which consent might come must be sufficiently certain.

62 This is not to suggest that the process need be overly structured. Certainly, if specificity beyond essential certainty were required, the dispute resolution

procedure may be counter-productive as it may begin to look much like litigation itself.

63 In *Elizabeth Bay*, Giles J noted (at 714) that apart from the express agreement in cl 11 to enter into negotiation in good faith, the agreement to mediate did not lay down a procedure for the mediation process other than the parties' presence or representation, the mediators discretion to hold private sessions with any party to the mediation and the stipulation that, unless otherwise agreed, the parties would within 14 days of the agreement provide to each other and to the mediator, a short statement of issues outlining the nature of the dispute and the various matters in issue. His Honour concluded that the agreement to mediate being so open-ended, was unworkable, as the "process to which the parties had committed themselves would come to an early stop when, prior to the mediation, it was asked what the parties had to sign and the question could not be answered" (at 715).

64 In a similar vein, the plaintiff submits that beyond the alleged uncertainty of the "good faith" requirement, the process of mediation set out in cl 28.2 lacks sufficient certainty to be given legal effect in that:

> "(1) there are no provisions dealing with the remuneration to be paid to a mediator, if agreed or appointed pursuant to paragraph (c) of clause 28.2;
>
> (2) there are no provisions dealing with what is to happen if one or both of the parties do not agree with the fees proposed by any such mediator, or what is to happen if the nominated (or agreed) mediator declines appointment for this or any other reason."

65 The mediation agreement is indeed silent about the remuneration to be paid to the mediator and the effect of a declined appointment.

66 To my mind, of particular difficulty is the lack of a provision in the clause setting out a mechanism for apportionment of the mediator's costs. Whilst it may be arguable that a term should be implied to the effect that the parties would jointly share the reasonable remuneration of the mediator, in my view that term may not be implied. The well-known conditions necessary to ground the implication of a term are as follows:

(1) it must be reasonable and equitable;

(2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;

(3) it must be so obvious that "it goes without saying";

(4) it must be capable of clear expression;

(5) it must not contradict any express term of the contract.

(*Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 347 per Mason J applying *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266 at 281-283.)

67 To my mind, the suggested implied term does not satisfy the third of these conditions. There is a strong argument that the parties may have intended that the same regime as that stipulated in cl 28.3(h) apropos the costs, upon the invocation of cl 28.3 of an expert, was to apply in respect of the costs of a mediator. One can easily imagine that the parties may have intended that the mediator be given power to determine costs. Equally, the parties may have intended that they be obliged to share the mediators costs. Hence the suggested implied term is not so obvious that "it goes without saying".

68 A further question going to certainty relates to the method of determining the mediator's remuneration. In this regard, whilst it would have been preferable to

stipulate the procedure to be followed to achieve such determination, I do not see the matter as affecting the enforceability of the agreement.

69 I note that in view of decided Australian case law, commentators such as L Boulle and R Angyal have noted that, for a mediation clause to be enforceable, it must satisfy the following minimum requirements (I interpolate to note that in my opinion, these minimum requirements ought be seen as applying to any stage in a dispute resolution clause as the case may be, not just to mediation):

> ''*It must be in the form described in *Scott v Avery*. That is, it should operate to make completion of the mediation a condition precedent to commencement of court proceedings.
>
> *The process established by the clause must be certain. There cannot be stages in the process where agreement is needed on some course of action before the process can proceed because if the parties cannot agree, the clause will amount to an agreement to agree and will not be enforceable due to this inherent uncertainty.
>
> **The administrative processes for* selecting a mediator and in *determining the mediator's remuneration should be included in the clause* and, in the event that the parties do not reach agreement, a mechanism for a third party to make the selection will be necessary.
>
> *The clause should also set out in detail the process of mediation to be followed — or incorporate these rules by reference. These rules will also need to state with particularity the mediation model that will be used.''(Emphasis added.)

(See Australian Law Reform Commission, *Review of the Adversarial System of Litigation*, Issues Paper 25, June 1998, Chapter 6, par 6.20.)

70 It follows that the subject mediation clause is unenforceable.

71 To my mind, the mediation clause is not severable from the negotiation clause. The two are intended to walk together as a staged procedure, constituting the dispute resolution process as agreed between the parties. As such, the agreement to negotiate must also be unenforceable.

72 In deference, however, to the detailed submissions advanced on other aspects of the matter, and against the possibility that my view of the inability to imply the above term be incorrect, I propose to deal with the other issues raised.

73 As to the plaintiff's submission relating to the absence of provisions dealing with what is to happen if the nominated (or agreed) mediator declines appointment for any reason, it is to be noted that cl 28.2 provides a clear mechanism for the appointment of a mediator and in the event of disagreement as to his or her identity, then the mediator is to be appointed by the president for the time being of the New South Wales Bar Association. If a nominated mediator declined appointment on some basis then presumably, the nomination process would merely be reactivated. The plaintiff's submission on this issue is without substance.

74 To my mind, where parties agree to follow a dispute resolution procedure as a condition precedent to either party commencing proceedings, it is important that the parties be able to determine when that procedure has come to an end. Clearly, conclusion of the procedure is not to be equated with resolution of the issues in dispute: see *Hooper Bailie* (at 203).

75 While this question might be thought to be academic, ability to determine the conclusion of the process and thus, the point at which the parties may be free to

pursue litigation or expert resolution, must be a telling indicium of the *certainty* and thus enforceability of the agreement. This is because conclusion of the procedure must surely be determined by the terms of the agreement itself: see R Angyal, "The Enforceability of Agreements to Mediate" (1995) 12 *Australian Bar Review* 1 at 10.

76 I read the words "exchange of the pertinent information" in cl 28.1 as requiring to be exchanged within the 15-day period between submission of the first and second dispute notices.

77 Clause 28 clearly stipulates time frames within which the staged procedures for attempting dispute resolution are to be followed in the absence of agreement to the contrary. As such, it cannot be said that in the absence of agreement, the parties would not know when the condition precedent is satisfied and when they thus have the option of instituting proceedings.

78 But for the matter identified above in relation to the allocation of the mediator's costs, I am satisfied that the remainder of the procedure provided for in the subject contracts (disregarding the good faith requirement for the moment) would be sufficiently certain to be enforced. My finding that the remainder of the procedure is in fact sufficiently certain, is in part informed by what I see to be the parties' ability to determine when the procedure provided for in cl 28 has concluded.

"Good faith" as a requirement of an ADR clause

79 Clearly, the purpose of the good faith requirement in cl 28 is to require the parties to have a commitment to the dispute resolution process in advance of any dispute arising.

80 It has been said that an "agreement to negotiate a dispute in good faith" is unenforceable for the same reasons why an "agreement to agree" is unenforceable. This position is made clear by Lord Ackner in *Walford v Miles* (at 138), with whom Lord Keith, Lord Goff, Lord Jauncey and Lord Browne-Wilkinson agreed:

> "The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, *subjectively*, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However *the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations*. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it is appropriate, to threaten to withdraw from further negotiations or to withdraw in fact, in the hope that the opposite party may seek to re-open negotiations by offering him improved terms. Mr Naughton, of course accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question — how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement?' A duty to

> negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from those negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly a bare agreement to negotiate has no legal content.'' (Emphasis added.)

81 A similar position was adopted by Giles J in *Elizabeth Bay* (at 716) who emphasised the ''necessary tension between negotiation, in which a party is free to, and may be expected to, have regard to self-interest rather than the interests of the other party, and the maintenance of good faith''. For Giles J, it was this tension, rather than the difficulty inherent in attempting to ascertain the presence or absence of good faith, which was determinative of the ''forbidding'' ''vagueness'' of cl 11.

82 With great respect, I disagree — such tension ought not be the linchpin in an argument that a good faith requirement in negotiation is too vague and uncertain to be meaningfully enforced.

83 It is clear that a tension may exist between negotiation from a position of self-interest and the maintenance of good faith in attempting to settle disputes. However, maintenance of good faith in a negotiating process is not inconsistent with having regard to self-interest: see D Cremean, ''Agreements to Negotiate in Good Faith'' (1996) 3 *Commercial Dispute Resolution Journal* 61 at 64. As Cremean points out (at 65): ''... good faith is not co-extensive with selflessness.'' It does not require a party to make concession upon concession. Clearly, good faith negotiation is not the equivalent of agreement, is not a synonym for settlement, and does not require any particular outcome: see C McPheeters, ''Leading Horses to Water: May Courts which have the Power to Order Attendance at Mediation also Require Good-Faith Negotiation?'' (1992) 2 *Journal of Dispute Resolution* 377 at 391.

84 To further take up the point raised by Lord Ackner in *Walford*, nor should good faith prevent a party from withdrawing from negotiations if appropriate.

85 I turn now to the related argument, that the concept of ''good faith'' is too vague and uncertain to be enforceable. This argument was forcefully put by Handley JA in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 41-42, where his Honour stated that there were no identifiable criteria by which the content of the obligation to negotiate in good faith could be determined. Handley JA pointed out that:

> ''Negotiations are conducted at the discretion of the parties. They may withdraw or continue; accept, counter offer or reject; compromise or refuse, trade-off concessions on one matter for gains on another and be as unwilling, willing or anxious and as fast or slow as they think fit''

86 Accordingly, his Honour concluded that ''these considerations demonstrate that a promise to negotiate in good faith is illusory and therefore cannot be binding''.

87 In *Asia Pacific Resources Pty Ltd v Forestry Tasmania* (unreported, Supreme Court, Tas, Full Court, FCA 6 of 1997, 4 September 1997), the Full Court considered ''good faith'' in the context of an implied term to negotiate in good faith. Wright J, in rejecting the implication of such a term at law, stated (at 12):

> ''The novel 'good faith' concept, ... whilst capable of statement with beguiling simplicity can never be a pure question of law ... because even

its most ardent proponents appear to recognise that 'good faith' is incapable of abstract definition and can only be assessed as being present or absent if the relevant facts are known or are capable of being known — a little like proximity in the law of negligence.''

88 While there may be a vagueness about a ''good faith'' obligation, it is to be noted that there is a vagueness about many commercial contracts: see D Cremean, ''Agreements to Negotiate in Good Faith'' (1996) 3 *Commercial Dispute Resolution Journal* 61 at 64. The author draws attention to the statement of Ormiston J in *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 67:

> ''... the courts should strive to give effect to the expressed agreements and expectations of those engaged in business, notwithstanding that there are areas of uncertainty and notwithstanding that particular terms have been omitted or not fully worked out.''

89 Further, it is worthwhile remembering the observation of Barwick CJ (with whom McTiernan, Kitto and Windeyer JJ agreed) in *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429 at 436-437:

> ''But a contract of which there can be more than one possible meaning or which when construed can produce in its application more than one result is not therefore void for uncertainty. As long as it is capable of a meaning, it will ultimately bear that meaning which the courts, or in an appropriate case, an arbitrator, decides on its proper construction: and the court or arbitrator will decide its application. The question becomes one of construction, of ascertaining the intention of the parties, and of applying it ... *so long as the language used by the parties*, to use Lord Wright's words in *Scammell (G) and Nephew Ltd v Ouston* [1941] AC 251 *is not 'so obscure and so incapable of any definite or precise meaning that the Court is unable to attribute to the parties any particular contractual intention', the contract cannot be held to be void or uncertain or meaningless*. In the search for that intention, no narrow or pedantic approach is warranted, particularly in the case of commercial arrangements. Thus will uncertainty of meaning, as distinct from absence of meaning or of intention, be resolved.'' (Emphasis added.)

90 I note that one submission made by Mr Rudge SC for the defendant is that the good faith requirements in cl 28 are satisfied by a party merely attending the stages of the dispute resolution procedure.

91 I do not think this can be correct.

92 The very nature of the words ''good faith'' must go toward the *conduct* of the parties involved in the agreed dispute resolution, as inclusion of those words connotes something more than mere attendance in the process.

93 I turn now to examine whether the words ''good faith'' in cl 28 have meaning of sufficient certainty to be enforceable.

94 In *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (1992) 26 NSWLR 234, Priestley JA (at 263-268) closely examined the notions of good faith drawing extensively from developments in the United States, Canada, Australia and New Zealand. The analysis in its detail, context and conclusions draws together the several strands which argue strongly for the recognition in Australia of the implied obligation of good faith in the performance and enforcement of contracts as is clearly recognised in the United

States. Priestley JA (at 263-264) remarked as follows in considering an implied obligation of good faith in contract:

> "The kind of reasonableness I have been discussing seems to me to have much in common with the notions of good faith which are regarded in many of the civil law systems of Europe and in all States in the United States as necessarily implied in many kinds of contract. Although this implication has not yet been accepted to the same extent in Australia as part of judge-made Australian contract law, there are many indications that the time may be fast approaching when the idea, long recognised as implicit in many of the orthodox techniques of solving contractual disputes, will gain explicit recognition in the same way as it has in Europe and in the United States."

95 His Honour continued (at 265) that:

> "There is a close association of ideas between the terms unreasonableness, lack of good faith and unconscionability. Although they may not always be co-extensive in their connotations, partly as a result of varying senses in which each expression is used in different contexts, there can be no doubt that in many of their uses there is a great deal of overlap in their content."

96 An extract from the conclusions in the judgment of Priestley JA in *Renard* was referred to by Finn J in *Hughes Aircraft Systems International v Air Services* (1997) 76 FCR 151 at 191-193, who indicated that his own view inclined to that of Priestley JA. Finn J, when dealing with a suggested general implied duty of good faith and fair dealing, said:

> "(a) Good faith and fair dealing
>
> The applicant's submission is that the proposed term is a manifestation of a general implied duty of good faith and fair dealing. I have, in consequence, been invited to embrace the conclusion of Priestley JA in *Renard Constructions (ME) Pty Ltd v Minister for Public Works* (at 268) that:
>
> > '... people generally, including judges and other lawyers, from all strands of the community, have grown used to the courts applying standards of fairness to contract which are wholly consistent with the existence in all contracts of a duty upon the parties of good faith and fair dealing in its performance. In my view this is in these days the expected standard, and anything less is contrary to prevailing community expectations.'
>
> The primary basis upon which I was asked to make this implication was unrelated specifically to pre-award contracts in procurement cases. Rather as suggested in the *Restatement of Contracts*, Second, art 205, the implied duty existed in 'every contract'. I make this particular observation because, as later discussed, a duty to act fairly in some form appears to have been accepted in other Commonwealth jurisdictions in pre-award contract contexts: see *Pratt Contractors Ltd v Palmerston North City Council* [1995] 1 NZLR 469 at 478 and 483; *Martselos Services Ltd v Arctic College* (1994) 111 DLR (4th) 65; and see generally, N Seddon, *Government Contracts: Federal, State and Local* (1995) at 235ff.
>
> The respondent in contrast has pressed upon me the judgment of Gummow J, then of this Court, in *Service Station Association Ltd v Berg Bennett & Associates Pty Ltd* (1993) 45 FCR 84; After considering North

American jurisprudence's acceptance of an implied duty of good faith and fair dealing, his Honour observed (at 96):

> 'Anglo-Australian contract law as to the implication of terms has heretofore developed differently, with greater emphasis upon specifics, rather than the identification of a genus expressed in wide terms. Equity has intervened in matters of contractual formation by the remedy of rescission, upon the grounds mentioned earlier. It has restrained freedom of contract by inventing and protecting the equity of redemption, and by relieving against forfeitures and penalties. To some extent equity has regulated the quality of contractual performance by the various defences available to suits for specific performance and for injunctive relief. In some, but not all, of this, notions of good conscience play a part. *But it requires a leap of faith to translate these well established doctrines and remedies into a new term as to the quality of contractual performance, implied by law.*' (Emphasis added.)

Needless to say I have been asked to remain in Gummow J's company and not take that leap.

Other Australian authority on this duty is indecisive. Notably, in the Full Court of this Court in *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410 at 511, it was found unnecessary to consider whether such a duty should be implied in that case. The court did not enter upon the question of whether our law recognised such an implication as a matter of law.

If the matter stood merely as one of choice between two conflicting views, I would, as a matter of comity, adhere to that of Gummow J: see *Bank of Western Australia Ltd v Commissioner of Taxation (Cth)* (1994) 55 FCR 233 at 255 on 'comity' and the cases referred to therein. This is an arena in which opinions, judicial and scholarly, differ often sharply: see, for example, I Renard, ''Fair Dealing and Good Faith'' in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996). And it is difficult to disagree with Gummow J's characterisation both of the methodology of Australian contract law while it remained subject to direct English control and of the role assumed by equity in regulating contract formation and performance.

Having said this, it is also appropriate to indicate that my own view inclines to that of Priestley JA. Of that inclination I would say only this. Fair dealing is a major (if not openly articulated) organising idea in Australian law. It is unnecessary to enlarge upon that here. More germane to the present question, the implied duty is, as is well-known, an accepted idea in the contract law of the United States and, probably, of Canada: see E A Farnsworth, ''Good Faith in Contract Performance'' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (1995); for a convenient collection of some of the voluminous literature in the United States debating the meaning of the implied duty; see *Farnsworth on Contracts* (1990) vol 2, par 7.17a; for an English view, see for example, Right Honourable Lord Justice Staughton, ''Good Faith and Fairness in Commercial Contract Law'' (1994) 7 *Journal of Contract Law* 193; and see *Livingstone v Roskilly* [1992] 3 NZLR 230 at 237-238. Its status in civil law is well recognised: see, eg, H K Lücke, ''Good Faith and

Contractual Performance'' in P D Finn (ed), *Essays on Contract* (1987); J F O'Connor, *Good Faith in English Law* (1990) Chapter 8. It has been propounded as a fundamental principle to be honoured in international commercial contracts: see, eg, Unidroit, *Principles of International Commercial Contracts*, International Institute for the Unification of Private Law, Rome (1994) art 1.7. Its more open recognition in our own contract law is now warranted: cf Sir Anthony Mason, ''Contract and Its Relationship with Equitable Standards and the Doctrine of Good Faith'', *The Cambridge Lectures* (8 July 1993); notwithstanding the significant adjustments this would occasion to some of contract law's apparent orthodoxies: see, eg, Lücke (at 177ff).

I should add that, unlike Gummow J, I consider a virtue of the implied duty to be that it expresses in a generalisation of universal application, the standard of conduct to which all contracting parties are to be expected to adhere throughout the lives of their contracts. It may well be that, on analysis, that standard would be found to advance little the standard that presently may be exacted from contracting parties by other means: cf the standard applied in *Conoco v Inman Oil Co* 774 F2d 895 (1985) at 908. But setting the appropriate standard of fair dealing is, in my view, another matter altogether from acceptance of the duty itself.''

97 In *Alcatel Australia Ltd v Scarcella* (1998) 44 NSWLR 349, Sheller JA (with whom Powell and Beazley JJA agreed), stated (at 369) as follows:

> ''The decisions in Renard Constructions and Hughes Bros mean that in New South Wales *a duty of good faith, both in performing obligations and exercising rights*, may by implication be imposed upon parties as part of a contract.'' (Emphasis added.)

98 It appears to be commonsense that as an obligation to act in ''good faith'' may, in principle, be legally recognised as an implied or imputed obligation, there is no reason why it should be struck down as uncertain in cases where there is an express contractual term, as in the present case.

99 In *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* the majority of the Court of Appeal considered that a preliminary contract to negotiate in good faith was possible, although it was not made out on the facts (Mason P with whom Waddell A-JA agreed, Handley JA disagreeing on this point). Special leave to appeal was refused by the High Court: *Sijehama Pty Ltd v Coal Cliff Collieries Pty Ltd* (1992) 4 Leg Rep SL 2.

100 The law in this area can not, however, be regarded as settled, as while the reasoning of Handley JA found support in the House of Lords' decision in *Walford v Miles*, the New South Wales Court of Appeal found it unnecessary to deal with the matter in *Australis Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104: see *Healey v Commonwealth Bank of Australia* [1988] NSWSC 678 per Giles JA.

101 In *Tobias v QDL Ltd* (unreported, Supreme Court, NSW, Simes J, No 1995 of 1996, 12 September 1997) the Court considered whether an alleged obligation to ''review and negotiate in good faith'' the terms of repayment of an amount outstanding under a mortgage *to the satisfaction of both parties*, gave rise to a binding legal obligation.

102 Simos J, who relied upon the reasoning of Handley JA in *Coal Cliff*, held that it did not, being of the opinion that ''at least in the circumstances of the

present case, the alleged obligation is illusory [being no more than an agreement to agree] and, accordingly did not relevantly exist''.

103 To my mind, notwithstanding the unsettled status of law in this area, *Tobias*, like *Coal Cliff*, can be distinguished from the question presently before me. Both cases concern a clause requiring the negotiation in good faith of a substitute *agreement*. In the circumstances of each case, such a clause was said to be illusory (though the majority in *Coal Cliff* was prepared to countenance such an agreement in appropriate circumstances). In cl 28, however, the parties have made their agreement to follow a *process* of dispute resolution as a pre-condition to litigation — the obligation of good faith relates to *performance* of the agreement, and is, therefore, quite different.

104 To my mind, the following comments of Simos J are instructive on this distinction:

> ''... in my opinion, there is significant difference between an obligation to 'act' in good faith, compliance with which obligation may, in certain circumstances, be capable of being assessed by reference to some appropriate legal and/or factual standard, on the one hand, and on the other hand, an alleged obligation to 'negotiate' in good faith to achieve an outcome 'satisfactory' to both parties, which, in my opinion, as I have said, is no more than an agreement to agree giving rise to no legally binding obligation.''

105 There is clearly a difference between the obligations of good faith contained in cl 28 and the alleged obligation considered in *Tobias*. The former, being *an obligation to ''negotiate'' in good faith in an endeavour to reach agreement, is not to be equated with the latter, being ''an obligation to 'negotiate' in good faith to achieve an outcome satisfactory to both parties*''. The former is only an obligation to participate in a negotiating process which may, *but not must*, achieve an outcome, which if achieved, may, *but not must*, be viewed as satisfactory to both parties. The outcome may indeed be viewed as unsatisfactory by either or both parties, but as an outcome which, for whatever reason, both sides accept as resolving the dispute.

106 It is interesting to note how the words ''good faith'' have been treated in academic writings.

107 In Brownsword, Hird and Howells (eds), *Good Faith in Contract — Concept and Context: Concept and Context* (1999), ''good faith'' is described (at 3) as an elusive idea, taking on different meanings and emphases in different contexts.

108 A question arises as to whether the law surrounding the notion of ''good faith'' as it relates to a general duty of good faith in the performance of a contract, can be imported to give content to the good faith requirement in cl 28.

109 The meaning of ''good faith'', as it relates to performance of contractual obligations, was comprehensively explored in a paper by Justice Cole: T R H Cole, ''Law — All in good faith'' (1994) 10 *Building and Construction Law* 18. His Honour noted (at 19) that there is ''no shortage of possible definitions for the term 'good faith' but there does not appear to be one universally accepted definition''. In his overview of academic analysis on the subject, Cole J drew attention to the myriad of possible definitions for the phrase. Similarly, P D Finn in comments that the ''good faith issue'' is both controversial and complex. It does not admit a simple (single) answer:

''Commerce, the Common Law and Morality'' (1989) 17 *Melbourne University Law Review* 87.

110 Notwithstanding the difficulties inherent in defining the concept, Cole J concludes that the experience overseas suggests that good faith is a concept that has independent meaning and substance (at 20).

111 Interestingly, many commentators, rather than attempting to affirmatively define good faith, approach the issue by highlighting what does not constitute good faith. For instance, in G Shalev, ''Negotiating in Good Faith'' in S Goldstein (ed), *Equity and Contemporary Legal Developments*, papers presented at the 1st International Conference on Equity, The Hebrew University of Jerusalem, Jerusalem (1992), the author states:

> ''The concept of good faith cannot be independently defined or reduced to rigid rules; it acquires substance from the particular events that take place and to which it is applied. The difficulty of defining the good faith principles results also from the fact that it is not intended to dictate certain modes of behaviour. It is hard to say when good faith exists in a factual setting; it is much easier, and more common, to point to its absence.''

112 In K Kovach, ''Good Faith in Mediation — Requested, Recommended, or Required? A New Ethic'' (1997) *South Texas Law Review* 575 at 612, the author includes the following as signs that a party is negotiating in bad faith: ''... unexpected delays in answering correspondence; postponement of meetings; sending negotiators without authority to settle; repudiating commitments made during bargaining; shifting positions; interjecting new demands; insisting on a verbatim transcript of the negotiation; refusal to sign a written agreement; unilateral action; and withholding valuable information.''

113 In Canada, it has been judicially observed that ''good faith'' cannot be defined except by providing modern examples of bad faith behaviour: *Gateway Realty Ltd v Arton Holdings Ltd (No 3)* (1991) 106 NSR (2d) 180 at 197; affirmed (1992) 112 NSR (2d) 180.

114 This approach is evident in Australian courts. For instance, it has been held that failure to co-operate at a mediation conference or adopting an obstructive attitude in regard to an attempt to narrow issues, may constitute a lack of good faith. Accordingly, this may lead to adverse costs orders being made against the unco-operative or obstructive party in later court proceedings: *Capolingua v Phylum Pty Ltd* (1991) 5 WAR 137. In *Capolingua v Phylum*, Ipp J held that where it was later shown that issues would otherwise have been narrowed, this was a relevant factor in awarding costs in respect of a later trial that had been unnecessarily extended.

115 To my mind, however, reference to what good faith is not, does not adequately give content to the obligation at any particular stage. In saying this, I recall the comments of Handley JA in *Coal Cliff* (at 43). With respect I do not, however, agree with Handley JA to the extent that his Honour remarks that determination of bad faith does not ''even provide guidance'' as to the ''content of the obligation at any particular stage''.

116 The following observations of Brownsword, Hird and Howells (at 4) go towards on an affirmative understanding of the good faith concept:

> ''It is commonplace that good faith can be read as having both a subjective sense (requiring honesty in fact) and an objective sense (requiring compliance with standards of fair dealing). [I interpolate to note the footnote reference to the UNIDROIT principles of International

Commercial Contracts, Article 1.106(1) which provides that each party, in 'exercising his rights and performing his duties ... must act in accordance with good faith and fair dealing'. The authors point out that the Commission takes 'good faith' to mean 'honesty and fairness in mind, which are subjective concepts', and 'fair dealing' to mean 'observance of fairness in fact which is an objective test'.] It is also commonplace that the most troublesome aspects of good faith relate to its objective dimension. In particular, if good faith is understood as prescribing standards of fair dealing, who are the good-faith standard setters, by what authority do they set such standards, and what are the standards that they so set?''

117 In this context, it is instructive to examine the impact lexicon plays in our understanding of the notion of good faith.

118 In light of the interest generated by international instruments such as the UNIDROIT *Principles of International Commercial Contracts* prepared by the International Institute for the Unification of Private Law (Rome: UNIDROIT, (1994)), which specifically refer to a requirement of ''good faith'' in contracts, the Quebec Research Centre of Private and Comparative Law at McGill University set about preparing partner dictionaries, in French and English, which set out the fundamental vocabulary of Quebec private law.

119 ''Good faith'' as it relates to contracts, was chosen by the editorial committee as the first term to be presented as a sample in a paper published in advance of the release of the dictionary. The editorial committee stated as follows:

> ''... the concept of good faith may now be thought of as one of the cannons of international contract law. Since the notion of good faith is seen as fundamental to understanding all aspects of the law of contract, civilians generally express surprise at how little place 'good faith' occupies as a formal construct in the common law tradition. This is not to say 'good faith' is absent in the common law — on the contrary — but its *mode of expression is such that it may be buried in the cases of that tradition rather than expressed formally as an abstract principle*. This is especially problematic when it comes to articulating 'good faith' in English, the language most commonly associated with common law parlance, in a document such as the UNIDROIT Principles. In this respect, the usage of good faith in English civilian parlance in Quebec is of particular interest.
>
> It is often said that in civil law, 'good faith' is not only understood in a subjective manner but also objectively, whereas common lawyers tend to measure 'good faith' on a subjective basis corresponding essentially to a given actor's state of mind. In order to ensure the notions of 'good faith' and 'bonne foi' be taken as equivalents, the expression 'good faith and fair dealings' was chosen to underline the objective aspect of 'good faith' in the EUROPEAN Principles and the UNIDROIT Principles. In this choice of terms, there is a lingering sense that law's expression in French corresponds naturally to the civil law and that English and common law are also more natural partners. Yet, the English language may certainly be thought of as sufficiently elastic to express the civilian notion of good faith. English-speaking civilians in Quebec do not feel any need to add the expression 'fair dealings' in order to make the scope of the notion of good faith clearer.

GOOD FAITH Loyalty, honesty, in the exercise of civil rights.'' (Emphasis added.)

120 Turning specifically to the proposition that the mode of expression of good faith is buried in the common law tradition: it may be that Australian courts have already developed a concept akin to the notion of good faith.

121 In *United States Surgical Corporation v Hospital Products International Pty Ltd* [1982] 2 NSWLR 766 at 800, McLelland J observed that the duty of good faith performance in contract law of New York/Connecticut was not materially different from the implied business efficacy principle. That is, where in a written contract it appears that both parties have agreed that something will be done, a court will imply a term that ''each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect'': *Mackay v Dick* (1881) 6 App Cas 251 at 263 per Lord Blackburn approved by the High Court in *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596.

122 In *Secured Income* Mason J (at 607-608) made clear that this rule of construction does more than oblige contracting parties to co-operate so that each may perform their obligations under the contract, rather, it ensures that contracting parties do all that is necessary to carry out the contract.

123 Further, parties are subject to a universal duty to act honestly: *Meehan v Jones* (at 580-581) per Gibbs CJ; per Mason J (at 589-590); per Wilson J (at 597-598).

124 To my mind, a notion of good faith is implicit in any alternative dispute resolution procedure, as without it there is no chance of reaching a mutually satisfactory conclusion. Indeed, literature on alternative dispute resolution frequently includes an explicit comment that good faith is part of the process: K Kovach, ''Good Faith in Mediation — Requested, Recommended, or Required? A New Ethic'' (1997) *South Texas Law Review* 575.

125 Certainly, in *Allco Steel*, Master Horton appears to have taken as a given that the dispute resolution clause, cl 4.5.6 of the contract, contained an implied term that any attempt to conciliate disputes pursuant to that clause, be made ''bona fide''.

126 Certain comments made by Rogers CJ Comm D in *AWA Ltd v Daniels* suggest that his Honour reached this same conclusion. For instance, Rogers J observed, in answer to submissions that a court order for mediation would be futile in view of the reluctance of party participation, that successful mediation may be achieved if ''the parties enter into in *good faith*, as they said they would, the skill of the mediator will be given full play to bring about consensus'' (at 1) (emphasis added). Further, Rogers J cited the following passage from *Haertl Wolff Parker Inc v Howard S Wright Construction Co* (unreported, United States Dist Lexis 14756) a decision made, albeit at first instance, in the United States District Court in Oregon:

> ''A contract providing for alternative dispute resolution should be enforced, and one party should not be allowed to evade the contract and resort prematurely to the courts: *Southland Corporation v Keating* 465 US 1 (1984) at 7. *The success of an alternative dispute resolution procedure will always depend on the good faith efforts of the parties*, particularly where, as here, the outcome of the procedure is not binding.
>
> In this case, the disputes were referred to Oseran as required by the Partnership Agreement, but HWP abandoned the effort when practical

> difficulties arose. Oseran remains ready to consider the disputes. Therefore, the courts cannot say that it would be futile to refer the deadlocked issues to him.'' (Emphasis added.)

127 To my mind, it is telling that Rogers J did not recoil from the parties' concession that they would enter into mediation in ''good faith'' if required by the court to do so. Indeed, ''good faith'' was seen as a necessary concomitant of any attempt to mediate a dispute.

128 To my mind, the matter should be approached as a question of principle, it being undesirable to attempt to formulate a list of factual indicia suggesting compliance or non-compliance with the obligation to mediate in good faith per contra — K Kovach, ''Good Faith in Mediation — Requested, Recommended, or Required? A New Ethic'' (1997) *South Texas Law Review* 575 at 615.

129 The good faith concept acquires substance from the particular events that take place and to which it is applied. As such, the standard must be fact-intensive and is best determined on a case-by-case basis using the broad discretion of the trial court.

130 In the realm of insurance law it is common to find an exclusion clause providing that a policy of insurance does not indemnify the assured ''in respect of any liability brought about by the dishonest or fraudulent act or omission of the assured''. There are numerous authorities seeking to define the word ''dishonest'', which do not make entirely clear what is the ambit of conduct which will be dishonest. In *McMillan v Joseph* (1987) 4 ANZ Insurance Cases 75,051, Casey J stated (at 75,056).

> ''I accept the appellant's submissions that 'dishonest' is used in the sense of deliberate conduct carrying out it's ordinary meanings (amongst others) of 'not straightforward' and 'underhand'. Like fraud, the term is of wide application in the almost infinite variety of human activity and whilst the general concepts it embodies are well understood, attempts to analyse or define them narrowly are fruitless. In any given case a decision on whether conduct is dishonest is best left to the commonsense and experience of the judge or jury after consideration of all the relevant circumstances.''

131 To my mind, the comments in relation to fraud and dishonesty in the second and third sentences of the above extract, apply equally to the notion of good faith.

132 This is not to suggest, however, that there may not be general, overarching ''core'' principles of ''good faith'' which may provide a framework for the ''commonsense and experience of the judge or jury after consideration of all the relevant circumstances''.

133 This topic is dealt with by J Stapleton as follows in relation to ''good faith'' in performance of contract:

> ''Within the fashionable debate about good faith there is surprisingly little agreement about or even interest in what the 'core' principle of good faith might be. Even among radical advocates of good faith keen to establish its viability as an independent doctrine, the question of what is its core principle often seems swamped by an eagerness to advance a normative agenda. This agenda focuses on, what are allegedly and generally accepted to be, applications of the principle, typically in the fashionable context of contract: a new duty to disclose here; a new duty to co-operate there.
>
> But this eclipse of the good faith principle by a variety of alleged

applications of it is doubly regrettable. By focusing on the range of standards which might be generated by a good faith principle it can give the impression that the underlying principle is itself indefinite or contradictory; while at the same time deflecting attention from the search for a formulation of that core principle. But as I hope to show, it is possible to state a coherent structured principle for good faith. . . .

Two major caveats should be noted before we examine the core principle of good faith.

First, we must free ourselves from the current focus on specific applications of good faith. . . .

It does not make sense to focus only on those scattered applications of good faith which excite current interest, particularly since these tend to excite interest because they are located in the interstices of current rules. What if many of those rules could themselves plausibly be expressed in terms of a concern with 'good faith' as that term has traditionally been understood in connection with phrases such as the bona fide purchaser for value without notice? For example, whatever the precise formulation we use, intuitively it would seem possible to express in good faith terms specific rules such as the tort of deceit and large areas of well-settled equitable obligation. Indeed Professor (now Justice) Paul Finn describes all eight equitable obligations imposed on fiduciaries as 'duties of good faith'. It would not be sensible for us to ignore these areas in formulating the good faith principle, which should operate at such a level of generality that it is capable of capturing all the instances where we might deploy that term . . . .

The second caveat in the search for a formulation of the core principle of good faith is that we should be alert to the fact that a principle might be described as a 'general principle' but only be recognised in law as giving rise to entitlements in selected situations. The negligence principle is a well-known example. . . .

Across all the contexts in which the good faith idea is deployed I believe we can identify and enunciate a conceptual common denominator and it is one that fuses the notions of the advertent pursuit of self-interest and unconscionability. The principle of good faith restrains the deliberate pursuit of self-interest where this is judged unconscionable for certain specific reasons and these reasons can themselves be enunciated within the formulation of good faith. To be more precise:

> The good faith doctrine comprises standards/ obligations/considerations that seek to temper the deliberate pursuit of self-interest in situations where the conscience is bound.
>
> Such unconscionable conduct may be constituted either by:
>
> (a) the person being dishonest;
>
> (b) the person conducting himself contrary to his word/undertaking in the sense of contradict; or
>
> (c) the person exploiting a position of dominance or power over a person who is vulnerable relative to him.

To act in good faith requires that you do not act dishonestly, do not deliberately contradict yourself (these two limbs might loosely be termed the 'sincerity' dimension of good faith), or deliberately exploit a position of dominance over another.

> The inter-relationship of and difference between good faith and reasonableness is subtle but of great importance. A requirement to satisfy a standard of reasonable behaviour is more demanding than the requirement of good faith. . . .
>
> This distinction becomes vital when we confront judicial statements that 'effect must be given to the reasonable expectations of honest people'. Left unqualified this statement is ambiguous. People have different types of expectations, among which are expectations of good faith (that is, honesty, sincerity and no deliberate exploitation) as well as expectations of objectively reasonable and 'fair' conduct. These two types of expectations are different from each other. It is for this reason that we cannot use phrases such as 'expectations of honest people' or 'expectations of reasonable conduct' as a surrogate by which covertly to introduce good faith concerns into the law. Because the ambiguity of such phrases allows them to reach beyond expectations of good faith to expectations of objectively reasonable conduct, they introduce a different and potentially much more demanding standard than intended.''

(J Stapleton, ''Good Faith in Private Law'' (1999) *Current Legal Problems* 1 at 5-7.)

134 To my mind, this commentary is valuable in endeavouring to reach for an overarching framework in which to apply the good faith notion. In relation to the present case which of course deals with good faith in terms only of obligations to negotiate or mediate, it is not necessary for the Court to explicitly accept or reject the author's views. As the caselaw unfolds, that may become necessary.

135 Of particular note is Stapleton's acknowledgment that ''good faith'' is not synonymous with ''reasonable behaviour''. (This sits well with Priestley J's observations in *Renard*, as his Honour points out that while there is overlap in their content, reasonableness and good faith are not co-extensive in their connotations.)

136 Returning to the reservations as to the certainty of ''good faith'' expressed both by Giles J in *Elizabeth Bay* and Handley JA in *Coal Cliff*, I note that their Honours place significance on the ability of the parties to negotiate from a position of self-interest. Their Honours suggest that negotiation from a position of self-interest, in the face of the interests of the other party, is necessarily at odds with an obligation to maintain good faith in negotiation.

137 To my mind, the distance between the concepts of good faith and reasonableness accommodates the tension referred to by their Honours. The precise order, content or timing of offers and counter-offers that would ordinarily arise in the course of negotiation or mediation are unlikely to give rise to a situation where (to use Stapleton's language), a party's ''conscience'' is bound. In other words, such matters are unlikely to inform the Court in any decisive way as to the presence or absence of good faith.

138 Beyond the authorities referred to above, I have had regard to those dealing with certain statutory requirements of good faith where such requirements relate to the conduct of parties participating in a process.

Statutory requirements of ''good faith''

139 Section 31(1)(b) of the *Native Title Act* 1993 (Cth) requires that negotiating parties ''must'' negotiate in good faith with a view to obtaining agreement of

each of the native title parties. That obligation, to ''negotiate in good faith'', has been interpreted to be mandatory prior to the possible doing of a future act: *Walley v Western Australia and Western Mining Corporation Ltd* (1996) 67 FCR 366 at 381-382 per Carr J, applied in *Western Australia v Taylor (Njamal People)* (1996) 134 FLR 211 at 215.

140 There is no specific reference in the Act as to the meaning of the phrase ''negotiate in good faith'' other than what is stated in s 31 and in the preamble. The content of the obligation has, therefore, been approached on the basis that whatever might be regarded as the normal meaning of the expression, the meaning to be given to it must depend upon the context provided by the statute: *Njamal People* case per Member Sumner applying *Re Director-General of Health (Cth); Ex parte Thomson* (1976) 51 ALJR 180 at 181-182; *Cooper Brookes (Wollongong) Pty Ltd v Commissioner of Taxation (Cth)* (1981) 147 CLR 297 at 319-320 per Mason and Wilson JJ.

141 The key point in the preamble is that future acts of this kind can only be done if ''every reasonable effort has been made to secure the agreement of the native title owners through a special right to negotiate''. The phrase ''every reasonable effort'' has thus been imported into the good faith requirement in s 31(1)(b): see *Njamal People* case (at 219).

142 In the *Njamal People* case, Member Sumner considered what was encompassed by the phrase ''negotiate in good faith''. His Honour looked to the ordinary meaning of the words ''good faith''.

143 In the first place, Member Sumner extracted dictionary definitions:

> ''Good Faith''
>
> *New Shorter Oxford English Dictionary on Historical Principles* (1993) ed at 908: ''honesty of intention; sincerity''.
>
> *Macquarie Dictionary*, 2nd ed (1991) at 754:
>
> > ''1. honesty of purpose or sincerity of declaration: to act in good faith;
> >
> > 2. expectation of such qualities in others: to take a job in good faith.''

144 His Honour concluded (at 219) that:

> ''It is clear that if negotiations were being approached in a dishonest way or with a fraudulent intention then there would not be a negotiation in good faith. The more difficult question is whether more than sincere intentions on the part of those involved in the negotiation process is required. It is here that it becomes important to look at the words in the phrase as a whole taking account of the purposes to be achieved by the [*Native Title Act*]. In my view subjective honesty of purpose or intention and sincerity are essential, but not necessarily sufficient, ingredients of good faith negotiations. It is necessary to consider whether what is done is reasonable in the circumstances.''

145 To further this inquiry, his Honour then turned to examine case law arising with respect to s 170QK(2) of the *Industrial Relations Act* 1988 (Cth) — the ''only Australian statutory provision in relation to negotiating in good faith which has been judicially considered''.

146 His Honour noted the following comments of the Full Bench of the Industrial Commission in *Public Sector Professional Scientific Research, Technical, Communications, Aviation and Broadcasting Union v Australian Broadcasting Commission (ABC* case) AILR, vol 36, No 21 at 374:

> ''However, the determination of whether or not a negotiating party is 'negotiating in good faith' may depend on the conduct of the party when considered as a whole. For example if a party is only participating in negotiations in a formal sense, but not bargaining as such then they may not be 'negotiating in good faith'. Negotiating in good faith would generally involve approaching negotiations with an open mind and a desire to reach an agreement as opposed to simply adopting a rigid, pre-determined position and not demonstrating any preparedness to shift.''

147 From the academic writings cited by his Honour, it would appear that the *ABC* case is in line with United States cases and commentary on the *National Labour Relations Act* 1935 (US). For instance, in *National Labor Relations Board v Reed & Prince Manufacturing* 118 F.2d 874,885 (1st Cir), cert denied, 313 US 595 (1941) at 885. It was held that the employer was required by statute to ''*negotiate sincerely ... with an open mind and a sincere desire to reach an agreement in a spirit of amity and co-operation*''. Further, in *National Labor Relations Board v Boss Mfg Co* 7 Cir, 118 F2d 187,189 it was stated that ''mere pretended bargaining will not suffice''. Such conduct renders the requirement futile. ''The concept of 'good faith' was brought into the law of collective bargaining as a solution to this problem. One who merely went through the motions knowing that they were a sham could be said to lack good faith.''

148 Sumner CJ cited Jeff Shaw QC MLC reproduced in 1996 ALLR (CCH) at 50, who sets out as follows, the principles discernible in the United States cases on ''negotiation in good faith'' in the labour relations context:

> ''1. Good faith is an obligation of the parties to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. A party will be *bargaining in good faith if it has an open mind and a sincere desire to reach an agreement.*
>
> 2. *The duty to bargain in good faith does not require that either party must enter an agreement.*
>
> 3. One test as to whether a party is acting in good faith depends upon how a reasonable person might be expected to react to the bargaining attitude shown by those participating.''

149 Sumner CJ relevantly summarised points 4-6 as follows:

> ''4. While point 3 is an objective test the American courts have placed some emphasis upon the 'state of mind of the parties' relying upon inferences drawn from the conduct of the parties as a whole.
>
> 5. The taking of unilateral actions by one party at the expense of the bargaining process may be seen as an indicator of that party's bad faith.
>
> 6. The failure to answer a reasonable request for relevant information from another party may be seen as an indicator of bad faith on the part of the party failing to supply the information.''

150 Similarly, s 11 of the *Farm Debt Mediation Act* 1994 (NSW) requires that for a period after a creditor has given notice of enforcement action to a mortgagor, the creditor attempt to mediate in good faith.

151 That section was considered by Badgery-Parker J in *State Bank of New South Wales v Freeman* (unreported, Supreme Court, NSW, Badgery-Parker J, No CL 12670 of 1995, 31 January 1996) who (at 7), made plain that the *Farm Mediation Act* does not deal with the substantive rights of the parties. Rather,

''what it does is to interpose, between default of a mortgagor and enforcement action by a mortgagee, a barrier which is, however, limited in duration''.

152 To my mind, the following observations of Badgery-Parker J (at 11) are particularly pertinent to the matter before me:

> ''An undertaking to mediate in good faith no doubt connotes a willingness on the part of a party to consider such options for resolution of a dispute as are propounded by the mediator or the opposing party; but *it does not appear to me than an inference of lack of good faith can be drawn from the adoption of a strong position at the outset and a reluctance to move very far in the direction of compromise, without more.*'' (Emphasis added.)

153 In my view, the authorities and academic writings referred to above demonstrate that while the content of any good faith requirement depends on context (statutory or otherwise) and the particular factual circumstances, it is possible to delineate an essential framework for the notion of ''good faith'' such that the requirement of ''good faith'' in cl 28 is sufficiently certain for legal recognition of the agreement.

Essential or core content of an obligation to negotiate or mediate in good faith

154 As already pointed out, the courts have always avoided hampering themselves by defining or laying down as a general proposition what shall be held to constitute fraud. Yet, however difficult it may be to define what fraud is in all cases, it is relatively easy to identify some of the elements which must necessarily exist.

155 In the same way the Court ought be wary in the extreme of hampering itself by defining in any exhaustive way or by laying down as a general proposition, the ambit of what will constitute a compliance with or failure to comply with an obligation to negotiate or mediate in good faith.

156 These are matters to be determined depending always on the precise circumstances of each individual case. But the ''certainty'' issue does require that the court spell out, even in non-exhaustive terms, the perceived essential or core content of an obligation to negotiate or mediate in good faith. To my mind, but without being exhaustive, the essential or core content of an obligation to negotiate or mediate in good faith may be expressed in the following terms:

(1) to undertake to subject oneself to the process of negotiation or mediation (which must be sufficiently precisely defined by the agreement to be certain and hence enforceable);

(2) to undertake in subjecting oneself to that process, to have an open mind in the sense of:

(a) a willingness to consider such options for the resolution of the dispute as may be propounded by the opposing party or by the mediator, as appropriate;

(b) a willingness to give consideration to putting forward options for the resolution of the dispute.

Subject only to these undertakings, the obligations of a party who contracts to negotiate or mediate in good faith, do not oblige nor require the party:

(a) to act for or on behalf of or in the interests of the other party;

(b) to act otherwise than by having regard to self-interest.

157 The fact that in the hope of achieving a better result, party A may pretend to

be entirely disinterested in considering options for resolution of the dispute propounded by party B or by the mediator, is of itself far from conclusive proof that party A has breached undertaking 2(a). At the same time as putting up such pretence, party A might be giving the closest constructive consideration to such options.

158 Again, the fact that in the hope of achieving a better result, party A may pretend to be entirely disinterested in putting forward any or any constructive options for resolving the dispute, is of itself far from conclusive proof that party A has breached undertaking 2(b). At the same time as putting up such pretence, party A might be awaiting a first offer from party B or giving close consideration to itself making an offer at what it perceives to be an appropriate time, as for example after some additional time has elapsed or after some further step is taken in the relevant discussions or communications.

159 That there are in certain situations clear and even grave difficulties in being able to prove the breach by a party of an obligation to negotiate or mediate in good faith, is not to be taken as meaning that those obligations lack necessary identifiable content and are therefore so uncertain as to be unenforceable in law. Certainty or uncertainty of contractual obligation is not to be measured by difficulties of proving breach of contractual obligations. The two fields of discourse ought not be collapsed.

Reasonable endeavours/diligent efforts

160 It appears that the concept of ''reasonable endeavours'' does not suffer from the same controversy in relation to agreements to negotiate as does ''good faith''. ''Reasonable endeavours'' is a term well-known to the law: *Graeme Webb Investments Pty Ltd v Soerpyk Pty Ltd* [1993] NSW ConvR 555-661; *Walford v Miles*. It is not imprecise or vague and would not render cl 28 unenforceable.

161 The wording of cl 28.2(h) of course requires the use of ''all *reasonable endeavours* in good faith to expeditiously resolve the dispute by mediation''.

162 There is, of course, a body of jurisprudence dealing with the content of an obligation to act reasonably in the performance of a contract. In the particular field of discourse with which the subject application is concerned, namely, the content of an obligation to negotiate or mediate in good faith, it does not seem to me that the addition of the words ''reasonable endeavours'' contributes at all to the otherwise content of the obligation absent the use of such words. In short, the Court would, in any event, in this particular type of contractual obligation, imply an obligation to act reasonably.

163 In the same way, the word ''diligent'', to be read with ''good faith efforts to resolve all disputes'' (cl 28.1) may not add anything to the otherwise content of the obligation, absent the use of such word.

Futility

164 I note the plaintiff's submission that even if the Court were otherwise minded to exercise its discretion in favour of a stay, such a stay would be futile. On the affidavit evidence of the plaintiff's witnesses, Mr Neil Price and Mr Keith Walker-Smith, there is no realistic prospect that the matters the subject of litigation would be resolved within the time limited by cl 28.2 of the commercial terms.

165 This is not a submission of substance. As stated previously, parties ought be

bound by their freely negotiated contracts. Further, as Giles J made clear in *Hooper Bailie*, "what is enforced is not co-operation and consent but participation in a process from which consent might come". Outside of a submission that the agreement had been frustrated (which was not advanced), it is not for the Court to assess whether matters falling within a dispute resolution clause are or are not likely to be resolved within the time frame stipulated by the clause.

Exercise of discretion

166 It is clear that a court order for stay of proceedings, having the effect of indirect enforcement of a dispute resolution clause, should not be made unless it can be done in accordance with fairness: see *AWA Ltd v Daniels* (at [5]) per Rogers CJ in Comm D citing Rogers and McEwan, *Mediation Law, Policy, Practice* (at 225ff).

167 In *Elizabeth Bay* Giles J appears to accept (at 715) the parties' submission that the party contesting the stay application bears the "practical burden of persuading the Court that it should not be held to an apparent agreement to endeavour to settle its dispute with [the other contracting party] by [the agreed dispute resolution process]".

168 The plaintiff submits that Transfield has waived any entitlement to rely upon cl 28 of the commercial terms by reason of its conduct in frustrating the plaintiff's early attempts to invoke the cl 28 procedures. Specifically, the plaintiff submits that as to the hourly rates site variations claims (labour rates claims), this waiver is evidenced by the facsimile dated 8 October 1998 (NEP49 to the affidavit of Mr Neil Price) and also by the manner in which it subsequently dealt with Aiton's claims: see pars 115-124 and exhibits NEP77 to NEP84 to the affidavit of Mr Neil Price.

169 The Transfield facsimile of 8 October 1998 was as follows:

> "With regard to your notice of dispute of 23 September 1998, would you please identify by reference to the attached 'register of Aiton Variation Claims' (site — 18 pages) the particular claims that are the subject of your said notification of dispute, and the specific reasons why you reject our settlement terms, and now seek to resolve those claims using the dispute resolution procedures of the contract. In many cases where there has been a reduction from an Aiton claim, Transfield has provided Aiton with the reasons for the reduction of the claim.
>
> As you know there are some 348 claims which make up Aiton's labour claims for site variations. *In addition to the procedures in the fifth paragraph of your letter not being acceptable to us, we do not think that they are realistic or practical.*" (Emphasis added.) (I note that the fifth paragraph referred to, outlined the cl 28.1 procedures.)

170 As mentioned above, in my view on the evidence, Transfield has not dealt with Aiton's early claims in a manner which could reasonably be expected of a party in its position, particularly given the reference to "good faith" in cl 28.1 in respect of negotiations between the parties under that clause. Indeed, Transfield on my findings has sought to frustrate Aiton's attempts, where made, to regularly invoke the provisions of cl 28.

171 Aiton has, however, failed to regularly invoke the dispute resolution process with respect to *all* the claims contained in the consolidated claim, later reflected in the summons.

172 Notwithstanding the extensive judicial and academic comment on the appropriateness of requiring parties to adhere to dispute resolution clauses as a pre-condition to litigation in the face of evident reluctance on the part of certain players, it seems to me that strict compliance with a dispute resolution procedure by a party invoking the process (Transfield) is, subject to one matter, an essential pre-condition to being entitled to relief by way of enforcing, albeit indirectly, the other party to comply with the procedure. The proviso is that where both parties have agreed that something shall be done which cannot effectively be done unless both concur in doing it, the contract is construed to oblige each party to do all that is necessary to be done on his or her part for the carrying out of that thing, although there were no express words to that effect: *Mackay v Dick* (at 263) per Lord Blackburn.

173 Had Aiton persevered and regularly invoked the dispute resolution procedures with respect to all claims it sought to subject to those procedures, then Transfield's conduct in endeavouring to frustrate the invocation of those procedures is likely to have been the dominant consideration in the Court refusing to exercise its discretion to order the stay of proceedings.

174 For the reasons earlier given, the mediation agreement is unenforceable by reason of its failure to spell out how responsibility for payment of the mediators' costs was to be dealt with. The mediation clause not being severable from the negotiation clause, the agreement to negotiate is also unenforceable. If the above holding be incorrect, the finding is that cl 28, including the obligations to negotiate and to mediate in good faith, is sufficiently certain to be enforceable.

175 In the result, the application for an order staying the proceedings is unsuccessful.

Notice of motion dismissed

Solicitors for the plaintiff: *Corrs Chambers Westgarth.*

Solicitors for the defendant: *Minter Ellison.*

JARROD WHITE