4 Certainty

SUMMARY

This chapter deals with the requirement of certainty in contractual formation, considering problem areas such as agreements to agree, agreements to negotiate in good faith, and lock out agreements.

4.1 Often parties do not agree on all aspects of their arrangement or set out all parts of their agreement in a clear manner. This causes two problems. First, their failure to do so may indicate that they do not intend to be bound unless and until agreement is reached on the remaining issues or the agreement is set out clearly. We have dealt with this issue already in Chapters 2 and 3, where we noted that unless the parties intend to be legally bound, there will be no contract, so we will only mention this issue in passing at relevant points in this chapter. The second problem is that the parties have left gaps in their agreement, that is, matters on which they have not reached agreement, or they have expressed parts of the agreement in a vague or ambiguous manner. This begs the question of when the courts will be willing to try to fill in the gaps or resolve the ambiguities in the agreement. The courts often have the tools to fill in such holes, for example, by implying terms into the agreement (see Chapter 8), but when should they use these tools to hazard a guess at what the parties intended or would have intended had they thought about the matter in question? In other words, when will an agreement be sufficiently '*certain*' to be a contract? This is the issue we shall focus on in this chapter.

4.2 These two problems are not entirely distinct. The latter may bear upon the former: for example, the fact that the parties have not agreed on all matters may indicate that they did not intend to be legally bound at that point (as was held to be the case in *British Steel Corpn v Cleveland Bridge & Engineering Co Ltd* (1984), for example, on which see Chapter 5). Two recent examples of the same point are *Dhanani v Crasnianski* (2011) and *Barbudev v Eurocom Cable Management Bulgaria EOOD* (2011). As Teare J put it in *Dhanani*, cited with approval in *Barbudev*:

> *the circumstance that an agreement is no more than [an] agreement to negotiate and agree may show objectively that the parties to it cannot objectively have intended it*

> *to be legally binding, notwithstanding that it had certain characteristics which otherwise might have evinced an intention to agree, for example, that it was signed by each party.*

Similarly, the former may influence the latter: if the court decides that the parties did not intend to be bound, it will not attempt to fill in the gaps in their agreement (as in *Baird Textile Holdings Ltd v Marks & Spencer plc* (2002), for example). Often a party will allege that an agreement fails on both counts (as in *Hillas & Co Ltd v Arcos Ltd* (1932)). On the other hand, if the parties clearly intend to create a legal obligation, the court will try to give it legal effect and only hold it to be void for uncertainty if it is legally or practically impossible to give the agreement any sensible content (*Scammell v Dicker* (2005)).

4.3 Returning to the second issue, when a court has to decide whether an agreement is sufficiently certain to be enforced, it is faced with two competing policy considerations, as Lord Wright famously explained in *Hillas v Arcos*:

> *Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects. That…, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law.*

On the one hand, the courts want to uphold the expectations of the parties as far as possible, so if the parties intend to be legally bound, the court should do all it can to fill in the holes and resolve ambiguities. On the other, there will come a point where the agreement is so vague or incomplete that the court would be making a contract for the parties, rather than trying to give effect to the parties' intentions.

4.4 The problem is that it is extremely hard to tell where the line should be drawn, and the courts have found great difficulty in deciding cases near the borderline. Often, they have taken a rather narrow view of contract and held that there is no contract in such situations. It is suggested that, as advocated in the next chapter (and at the start of Chapter 2) a broader notion of contract should be adopted, so the courts should be more willing in these borderline cases to hold that there is a contract. Two reasons can be given in support of this proposal. First, as we shall see in the next chapter, to say that there is no contract at all where one party has at least partly performed his side of the agreement causes large problems, because the non-contractual doctrines that the courts have to apply to determine whether the party should be paid for his performance are less than satisfactory. It is better to extend the notion of contract to cover such cases than to use a different doctrine to deal with such cases. Second, the narrower notion of contract often fails to give proper effect to the shared expectations of the parties. Often they have a number of expectations in common, so to say

that there is no contract in such circumstances overlooks these. As the New Zealand Court of Appeal commented in *Fletcher Challenge Energy Ltd v Electricity Corpn of New Zealand Ltd* (2002), where the parties intend to be legally bound, the court should strive to find a way to give effect to that intention by filling the gaps in the agreement or resolving ambiguities.

General principles

4.5 In deciding whether it would be proper to attempt to fill in the gaps or resolve ambiguities in the parties' agreement, the courts seem to be influenced by a number of factors. A helpful (albeit necessarily non-exhaustive) list of these factors can be found in the judgment of Rix LJ in *Mamidoil Jetoil Greek Petroleum Co SA v Okta Crude Oil Refinery AD* (2001).

Partly performed agreements

4.6 Where the agreement has been at least partly performed by at least one party, the court will be more willing to find that the contract is sufficiently certain (*G Percy Trentham Ltd v Archital Luxfer Ltd* (1993) per Steyn LJ). Three reasons can be given to justify this stance. First, the fact that at least one of the parties has acted on the agreement by beginning to perform makes it easier to infer that the parties intended to be legally bound by it. Second, as Steyn LJ notes, it makes it easier to fill in the gaps in their agreement by implying terms because the performance will shed light on the intentions of the parties in respect of the matters that they did not deal with expressly in their agreement. Third, as we shall see in the next chapter, to find that there is no contract in such a situation makes it difficult to decide what rights and obligations should be given to or placed upon the parties, and in particular whether the part performance should be paid for. If there is no contract to answer this question, it is hard for the courts to decide what doctrine should take its place. This type of analysis was recently endorsed by the Supreme Court in *RTS Flexible Systems Ltd v Molkerei Alois Muller GmbH & Co KG* (2010).

4.7 However, it should not be thought that the part or even full performance of an agreement has *always* been enough to persuade the courts that the contract is sufficiently certain. For example, in *British Steel Corpn v Cleveland Bridge & Engineering Co Ltd* (1984) (recently applied by the Court of Appeal in *Whittle Movers Ltd v Hollywood Express Ltd* (2009) but distinguished in the *RTS* case), the fact that an agreement to manufacture and deliver steel nodes had been fully performed was insufficient to persuade Goff J that a contract had been formed, because the lack of agreement on a number of matters persuaded him that the parties did not intend to be legally bound (see further Chapter 5).

Previous dealings between the parties

4.8 If the parties have had similar agreements in the past, the gaps in the current arrangement may be filled by looking at the terms agreed in the past. For example, in *Hillas & Co Ltd v Arcos Ltd* (1932), the claimant contracted to buy a certain quantity of 'softwood goods of fair specification' in 1930, with the option of entering into a contract to buy a certain amount more for delivery in 1931. One of the defendant's arguments was that the words of the option were insufficiently certain. The House of Lords rejected this argument: it was held that the shipping conditions for the 1930 shipment (which had been expressly agreed) could be used to fill in that gap in the 1931 option, and that the goods referred to the option were the same as those expressly described in relation to the 1930 shipment, namely softwood goods of fair specification.

Standard types of agreement

4.9 If the agreement is of a standard type, such as a contract for the sale of goods, the court will find it easier to fill in the gaps or resolve ambiguities because it will be more familiar with the terms that ordinarily govern such agreements. For example, in *Hillas*, by looking at the custom of the timber trade, the court was able to give the phrase 'fair specification' a sufficiently certain meaning. Indeed, in the sale of goods context, the Sale of Goods Act 1979 will often imply various terms into the agreement, which help to fill any gaps left. For example, if the parties say nothing about what the price should be, a reasonable price will be implied (s 8(2)). If they lay down criteria for calculating the price, this will be perfectly acceptable (s 8(1)). If they agree that the price should be fixed by a third party but the third party is preventing from doing so by the fault of one party, the other can sue for damages (s 9(2)).

4.10 The flip side of this is that if the agreement is unusual or novel in some way, it will be harder for the courts to cure uncertainties in it. For example, in *Scammell & Nephew Ltd v Ouston* (1941), the House of Lords held that the phrase 'on hire purchase terms' was insufficiently certain, so there was no contract. One of the main problems was 'that the hire-purchase agreement was still fairly novel at the time, so as Viscount Maugham commented, 'there was no evidence to suggest that there are any well known "usual terms" in such a contract'.

Long-term contracts

4.11 The longer the period over which the agreement is intended to operate, the more likely it is that the parties will need, or desire, to leave certain matters to be adjusted as the contract goes along. The courts will assist the parties to do so wherever possible.

4.12 The recent Court of Appeal decision in *Durham Tees Valley Airport Ltd v Bmibaby Ltd* (2010) highlights how far the courts are willing to go in this regard, where it is clear that the parties intend their agreement to be binding (para **4.2**). Bmibaby agreed to 'operate' two aircraft from the airport for ten years. The airport would generate money from each flight, but the contract did not set out expressly how many flights it would run. In fact Bmibaby only operated one aircraft for a certain period of time, and then announced a few years into the contract that it would no longer operate any from the airport. When the airport sued for damages, Bmibaby claimed that the contract was void for uncertainty, on the basis that Bmibaby could not know in advance how many flights it had to operate in order to comply with its contractual obligation. The Court of Appeal rejected this argument. Interestingly, it held that the test was not whether the court could determine in advance what the minimum number of flights was for the rest of the contract, something that it thought was not possible on the facts, because strikes, pandemic, weather conditions, terrorism and so forth might well affect what that minimum turned out to be. Instead, the question was whether the court would be able to determine on a set of facts which had occurred whether Bmibaby had breached the contract, and it felt that it was able to do that, because the relevant conditions that would affect what that minimum level was would, by definition, have happened and therefore the court would be able to take them into account. It is suggested that this decision pragmatically recognises that the standard of performance required in a long-term contract is likely to be affected by the conditions that prevail from time to time, and therefore that it is important that these features should not prevent such an agreement having contractual force.

Machinery/criteria laid down in the agreement

4.13 As we shall see, if there are criteria or machinery laid down in the agreement for determining those matters which have not been dealt with completely, this will often allow the court to uphold the agreement. For example, the agreement may not lay down a price but say that it is to be calculated in a particular way. Similarly, if the parties include an arbitration or other type of dispute-resolution clause, this may assist the court in finding the agreement to be sufficiently certain because it provides a mechanism by which disputes over the meaning of particular terms can be resolved.

Some thorny issues

4.14 There are a number of situations in which the courts have found particular difficulty in deciding whether the agreement possesses the requisite certainty. As will become apparent, it is arguable that they have often been too reluctant to give effect to agreements which the parties intended to be binding.

An agreement to agree

4.15 Sometimes the parties will reach agreement on some matters, but expressly say that other matters, such as the price for example, are to be agreed at a later date. Often, they will not reach agreement on these latter issues, which causes two problems. The first is that the parties may not intend the agreement to bind them legally until agreement is reached on these outstanding matters. However, as noted at the start of the chapter, this is not a certainty problem; it is a problem relating to the intention to be legally bound. More important for present purposes is that it is often difficult to work out what agreement the parties would have reached on these matters, so it is difficult to fill in the gaps. The Sale of Goods Act 1979 cannot be used to imply a term that the buyer must pay a reasonable price, because this provision of the Act (s 8(2)) does not apply where, as here, the contract provides that the price is to be agreed by the parties themselves.

4.16 In *May & Butcher Ltd v The King* (1934), the agreement provided for the price to be agreed but the parties were unable to do so. The House of Lords held that this meant that no contract was formed, Lord Buckmaster holding that 'it is not open to them to agree that they will in the future agree upon a matter which is vital to the arrangement between them and has not yet been determined'. However, it is submitted that *May & Butcher* goes too far in suggesting that expressly leaving an important matter to be agreed by the parties at a later date will *always* make an agreement uncertain, because sometimes there may be ways in which the courts can work out or make an educated guess at what the parties would have agreed.

4.17 For this reason, various exceptions have developed to the general rule:

- The agreement may contain criteria for determining the unresolved matters. In *Hillas v Arcos*, the option did not expressly state the price to be paid but provided that it was to be calculated in a particular way by reference to an official price list.

- The agreement may contain a procedure for determining the unresolved matters. For example, it may provide that a particular matter is to be determined by one party, or is to be referred to arbitration (*Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* (1989)). If this machinery fails to work, this may not be fatal because the court may be willing to imply a term (for example, that the price will be a reasonable one: *Sudbrook Trading Estate Ltd v Eggleton* (1983)), particularly where this failure is caused by the fault of the defendant. However, they will not do this where the parties regarded it as essential that the matter would be resolved using the machinery laid down by them, and the parties have not attempted to use the machinery (*Gillatt v Sky Television Ltd* (2000)).

- Where the parties clearly intend the agreement to legally bind them and have acted upon it, the courts may be willing to say that the certainty test is satisfied. In *Foley v Classique Coaches Ltd* (1934), the claimant agreed to sell his petrol station to the defendant on condition that the defendant entered into an agreement to buy petrol exclusively from him, at 'a price to be agreed by the parties from time to time'. The Court of Appeal

held that this petrol agreement was sufficiently certain, and that a term should be implied requiring a reasonable price to be paid if the parties failed to agree on the price. There were a number of reasons why the court felt able to distinguish *May & Butcher*. The parties clearly intended the agreement to bind them: it was contained in a stamped document, had been acted upon without problems for three years, and was a condition of the sale of the petrol station. Moreover, there was an arbitration clause to resolve any disputes as to the price. It is suggested that the decision is a sensible one: the prices which the defendant had paid the claimant for the petrol over the three years would allow an arbitrator to make an educated guess at what a reasonable price might be.

- However, the Court of Appeal subsequently reiterated the existence of the general rule in *Willis Management (Isle of Man) Ltd v Cable & Wireless plc* (2005) (although see, too, its comments in *Scammell v Dicker* (2005) that the legal status of an agreement to agree 'cannot be simply stated').

An agreement to negotiate

4.18 The parties may agree to negotiate with a view to agreeing a contract. This agreement to negotiate causes a certainty problem, but of a different kind from that previously discussed. It is not a problem in working out what the parties would have agreed; instead it is a problem in judging whether the parties have tried hard enough to reach agreement (see Cohen (1995)). In other words, it is difficult to determine whether a party has made a genuine attempt to negotiate an agreement.

4.19 In *Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd* (1975), the Court of Appeal held that an agreement to negotiate was too uncertain to be enforced. Lord Denning MR reasoned as follows:

> *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 can 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… I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.*

4.20 *Courtney* was approved by the House of Lords in *Walford v Miles* (1992). However, there are a number of problems with the reasoning used by the Court of Appeal and the conclusion that it reaches:

- The analogy drawn with agreements to agree is a dubious one: as explained. First, these two types of agreement throw up different problems. Moreover, as we have already seen, exceptions had developed to the general rule that an agreement to agree was too

uncertain, so it was incorrect to lay down an *absolute* rule that agreements to negotiate should not be enforced. There will be situations where there are criteria (either in the contract or from the surrounding circumstances) that can be used to define more precisely the content of the duty to negotiate. As we shall see, the courts have begun to realise this in the context of particular types of contract to negotiate, namely agreements to use reasonable endeavours to conclude a contract (see also the reasoning in *Cable & Wireless* at para **4.21**).

- The argument that it would be impossible to assess damages is unconvincing: the claimant has lost the chance to agree a contract and it was established long before 1974 that a court can award damages for loss of a chance by estimating how profitable the resultant contract would have been and discounting this amount to take account of the fact that agreement might not have been reached even if both sides had negotiated properly (see *Chaplin v Hicks* (1911), for example, discussed in para **17.9**).

4.21 Indeed, there is a hint that the courts may be increasingly willing to distinguish *Courtney*. In *Cable & Wireless plc v IBM* (2002), a clause in the contract which provided that in the event of a dispute, the parties should attempt to resolve the dispute through negotiation using an alternative dispute resolution ('ADR') procedure recommended by the Centre for Dispute Resolution, was held to be sufficiently certain. The identification of a procedure by which they would negotiate meant that there were sufficient criteria 'for a court to readily ascertain whether [the obligations to negotiate] have been complied with'.

An agreement to negotiate in good faith

4.22 Such an agreement is just a particular type of agreement to negotiate. Therefore, the House of Lords in *Walford v Miles* (1992) applied *Courtney* and held that such an agreement was too uncertain to be enforced.

4.23 In *Walford*, the claimants wished to buy the defendants' business. It was agreed that in return for the claimants providing a letter of comfort from their bankers, the defendants would not negotiate with anyone else. The claimants duly provided the letter but the defendants pulled out of negotiations with the claimants and sold to someone else. The claimants' principal claim was for breach of contract. They alleged two breaches of contract, the first of which was a breach of the agreement not to deal with third parties (the 'lock out' agreement). This issue is discussed in a later section (para **4.32**). What is important for present purposes is that the claimants also alleged that a term should be implied requiring the defendants to 'negotiate in good faith' with the claimants. The House of Lords rejected both claims for breach of contract. The principal reason for rejecting the implied term was that such a term would be too uncertain. Lord Ackner (who gave the only speech) reasoned as follows:

> *the Court of Appeal appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavours and*

> *as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. 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… How can a court be expected to decide whether,* subjectively, *a proper reason existed for the termination of negotiations?…[T]he 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.*

4.24 While *Walford* was perhaps not the best case in which to suggest that a duty to negotiate in good faith was sufficiently certain, because there were few criteria in the agreement or otherwise to help the court to define what such a duty would mean in practice, Lord Ackner's remarks go too far in suggesting that an obligation to negotiate in good faith should *never* be upheld:

- It fails to give effect to the parties' expectations: if the parties intend to create a binding agreement to negotiate, why should the court stand in their way?

- Lord Ackner's argument that giving effect to a duty to negotiate faith is 'inherently repugnant to the adversarial position of the parties when involved in negotiations' is, with respect, a dubious one. It is true that the law should be reluctant to impose duties on a party to take the other party's interests into account, such as a duty to negotiate in good faith, because parties should generally be free to act in their own interests. However, as noted by Mason (2000), this does not mean that there should be any objection to the *parties* imposing such duties on themselves by agreement.

- Lord Ackner's argument that each party can walk away from negotiations without incurring liability (unless they make a misrepresentation) goes too far. As we shall see, the law will sometimes uphold the parties' agreement to use reasonable endeavours to reach agreement, which places limits on the parties' ability to break off negotiations without incurring liability.

4.25 At the very least, it is suggested that where there are criteria, whether laid down in the agreement or apparent from the surrounding circumstances, that allow the court to flesh out the content of a duty to negotiate in good faith by specifying what such a duty does and does not require of a party, then the agreement should be enforceable. In such a situation, Lord Ackner's argument that such a duty would be unworkable seems to lose its force. As Lord Steyn pointed out extra-judicially (Steyn (1997)), in some circumstances such a duty will be entirely practical and workable, so the enforcement of such a duty should not be dismissed out of hand. Indeed, as we shall see, this approach is taken in the context of an agreement to use reasonable endeavours: if the circumstances allow the court to define the content of the duty, the agreement will be enforced. In light of the comment, it is heartening that the Court of Appeal have distinguished *Walford* in a situation where one of the sub-clauses in a complex contract contained an express duty to negotiate (*Petromec Inc v Petroleo Brasileiro SA Petrobas*

(2005)). Longmore LJ commented that, unlike *Walford*, where the claimants were seeking to *imply* an obligation to negotiate in good faith and the alleged contract was simply a contract to negotiate (a 'bare agreement to negotiate' in the words of Lord Ackner), here there was an 'express obligation which is part of a complex agreement drafted by City of London solicitors… It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered… To decide that it has "no legal content"… would be for the law deliberately to defeat the reasonable expectations of honest men.'

More generally, he suggested that while it might sometimes be difficult to tell whether negotiations had been brought to an end in bad faith or not, 'the difficulty of a problem should not be an excuse for the court to withhold relevant assistance from the parties by declaring a blanket unenforceability of the obligation'.

4.26 Similarly, in *CPC Group Ltd v Qatari Real Estate Investment Co* (2010) (the Chelsea Barracks case), Vos J felt able to uphold a clause in a development agreement that required 'utmost good faith' during performance of the contract, as Morgan J had done a few years earlier in *Berkeley Community Villages Ltd v Pullen* (2007). Vos J held that the term required the party to adhere to the spirit of the contract, which was to seek planning consent for the maximum area in the shortest possible time, to observe reasonable commercial standards of fair dealing, to be faithful to the agreed common purpose and to act consistently with the justified expectations of the parties.

4.27 However, in *Barbudev v Eurocom Cable Management Bulgaria EOOD* (2011), the court held that an obligation in a side-letter to negotiate in good faith over the share that Mr Barbudev would have in the business acquired by the first defendant, and the terms on which he would acquire it, was an invalid agreement.

An agreement to use reasonable endeavours to reach agreement

4.28 This is just a type of agreement to negotiate, but one that courts have been willing to uphold where they feel able to formulate criteria to judge whether the duty to use reasonable endeavours has been complied with. In *Queensland Electricity Generating Board v New Hope Collieries Pty Ltd* (1989), the defendant agreed to supply coal to the claimant for 15 years. For the first five-year period, the agreement contained detailed provisions for calculating the price payable. It was provided that for purchases after this period, the provisions for working out the price were to be agreed by the parties. The claimant sought a declaration that this amounted to an agreement to agree and was insufficiently certain. The Privy Council refused to grant the declaration. It held that the parties were under an implied obligation to use reasonable endeavours to agree on the price provisions beyond the initial five-year period. It felt able to give effect to an agreement to make reasonable endeavours to agree because it was clear that the parties intended the agreement to have binding effect and perhaps most importantly, it felt able to formulate guidelines to judge whether such a duty had been breached:

> *The statements of basic intention in the recitals and in cl. 9.1, together with the detailed pricing provisions for the first five years,… lay down broad guidelines as to the object to be achieved; and how the system has worked during the first five years is likely to provide the arbitrator with much help in determining what is fair and reasonable for later periods.*

4.29 However, it is important to be aware of the limits of *Queensland Electricity*: the court only felt able to uphold the agreement because of the factors listed in the passage quoted. By contrast, in *Phillips Petroleum Co UK Ltd v Enron Europe Ltd* (1997), both Kennedy and Potter LJJ held that the agreement left the parties at liberty to take into account their own financial positions. While neither went so far as to expressly say that the agreement was unenforceable, both felt great unease about allowing the agreement to impose any meaningful duties upon the parties when the court could find no criteria by which to judge if the agreement could be breached. Potter LJ felt that the agreement in question 'utterly fails to reveal any express or implied criteria to be applied'.

An agreement to use best endeavours to reach agreement

4.30 In *Walford*, Lord Ackner suggested *obiter* that such agreements were enforceable (quoted at para **4.23**). However, his comment was explained by the Court of Appeal in *Little v Courage Ltd* (1994), where it was held that '[a]n undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced: an undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation' (Millett LJ). Millett LJ's reasoning was applied by the Court of Appeal in *London & Regional Investments Ltd v TBI plc* (2002).

4.31 It is suggested that this blanket refusal ever to enforce an obligation to use best endeavours to reach agreement is unjustified. As seen, in the extremely similar context of an agreement to use reasonable endeavours, where criteria can be formulated (from the agreement or otherwise) to judge whether such a duty has been breached, there should be no objection to giving effect to the agreement. It is hard to justify treating agreements to use reasonable endeavours so differently from agreements to use best endeavours.

Lock out agreements

4.32 A lock out agreement is an agreement that one party (normally the seller) will not negotiate with anyone else. In principle, there would seem no reason *not* to enforce such agreements, because there is little difficulty in telling if the party in question has breached the agreement. However, the current state of the law is that such an agreement will only be valid if it specifies how long the party is not to negotiate with others, but not otherwise (contrast *Walford* and *Pitt v PHH Asset Management Ltd* (1993)).

4.33 As we have seen in our earlier discussion of *Walford*, one of the claims advanced was that the defendants had broken a lock out agreement. The House of Lords held that the fact that the lock out agreement had no express time limit meant it was unenforceable even if a term could be implied that the agreement would last for a reasonable period of time, because 'such a duty, if it existed, would indirectly impose upon the [defendants] a duty to negotiate in good faith [with the claimants]'. There are three problems with this reasoning:

- It is hard to see how a negative obligation, namely not to negotiate with others, indirectly imposes a positive obligation, namely to negotiate with the claimants (O'Neill (1992)).
- The result reached fails to give effect to the parties' intention: if they intend the seller to be bound by the lock out agreement, why should he not be, particularly if there is no difficulty in defining the content of this duty?
- It is unclear what the objection is to implying a term that the agreement last for a reasonable time. Indeed, as Buckley (1993) points out, it was far from impossible to work out what should have constituted a reasonable time on the facts of *Walford*.

OVERVIEW

1 Often parties do not agree on all matters or set out all of their agreement in a clear manner. This causes two problems:
   - Their failure to do so may indicate that they do not intend to be bound unless agreement is reached on the remaining issues or the agreement is set out clearly.
   - The parties have left gaps and ambiguities in their agreement. Unless the courts are able to fill in these gaps by implying terms and resolving any ambiguous provisions, they will hold that the agreement is too uncertain to be enforced. This is the doctrine of 'certainty'.

2 On one hand, the court must not be too eager to find that a contract is too uncertain because businessmen often record their agreements in a crude and summary fashion. However, a point will be reached where the agreement is so vague or incomplete that the court would be making a contract for the parties, rather than trying to give effect to their intentions.

3 It is arguable that in some cases the courts have been too willing to find that an agreement is insufficiently certain to be enforced. This is unfortunate, for it fails to give proper effect to the expectation of the parties that the agreement would be binding.

4 The courts seem to be influenced by the following considerations in deciding whether an agreement possesses the requisite degree of certainty. If at least one of these factors is present, the court will be reluctant to find that the agreement is unenforceable:
   - The agreement has been at least partly performed by at least one of the parties.

- The parties have concluded similar agreements in the past.
- The agreement is of a standard type.
- The agreement lays down criteria or machinery for determining those matters which have not been dealt with fully in the agreement.

5 In a number of situations the courts have found particular difficulty in deciding whether an agreement is sufficiently certain. It is arguable that in such cases, they have sometimes been too reluctant to find that it is.

6 The law is currently as follows:

- The general rule is that an agreement to agree will be insufficiently certain (because it is difficult to work out what the parties would have agreed) but a number of exceptions have developed in situations where the court feels able to determine what agreement the parties would have reached, such as where the agreement contains criteria or machinery for determining the unresolved matters or where the parties have acted upon the agreement.
- The general rule is that an agreement to negotiate is insufficiently certain. However, it is arguable that this rule is too absolute and that exceptions should be recognised where the agreement and surrounding circumstances allow criteria to be formulated that can be used to judge whether the parties have made sufficient efforts to negotiate.
- The general rule is that an agreement to negotiate in good faith is too uncertain to be enforced. The absolute nature of this rule and the reasoning behind it have been heavily criticised and is arguable that at the very least, exceptions should be recognised in the situations outlined in the previous paragraph.
- An agreement to use reasonable endeavours to reach agreement will be enforceable where the agreement and surrounding circumstances enable criteria to be formulated in order to judge whether the obligation has been broken.
- It is unclear whether an agreement to use best endeavours to reach agreement is sufficiently certain. The better view is that such agreements should be treated in the same way as agreements to use reasonable endeavours.

FURTHER READING

Mason 'Contract, Good Faith and Equitable Standards in Fair Dealing' (2000) 116 LQR 66

Mouzas and Furmston 'From Contract to Umbrella Agreement' [2008] CLJ 37

O'Neill 'A Key to Lock-Out Agreements' (1992) 108 LQR 405

Peel 'Agreements to Negotiate in Good Faith' Chapter 8 in *Contract Formation and Parties* (2010)

SELF-TEST QUESTIONS

1 What legal problems arise when parties fail to agree on all matters or set out all parts of their agreement in a clear manner?

2 Is English law too willing to hold that a contract is insufficiently certain to enforce?

3 What factors influence a court in deciding whether an agreement is sufficiently certain to be enforced?

4 Should an agreement to negotiate in good faith always be too uncertain to enforce? Are the reasons given in *Walford v Miles* (1992) convincing?

5 Amanda is offering a plot of land for sale for £1 million, which Bridie is interested in buying, but only if it is likely to obtain planning permission for redevelopment. While Bridie makes the necessary planning enquiries, she is keen to prevent other potential buyers purchasing the land, so Amanda and Bridie enter into a written agreement whereby, for an upfront payment of £25,000 by Bridie, Amanda agrees not to negotiate with any other purchaser for 'three months (assuming normal market conditions)'; in addition, in the event of 'a satisfactory response' from the planning authority, Amanda and Bridie agree to use 'reasonable endeavours to agree the sale of the plot for its then market value'. The planning authority takes longer than expected to respond to Bridie's enquiry, but after five months finally indicates that it would be willing to grant planning permission for redevelopment of the plot. Unfortunately, Bridie has now discovered that Amanda sold the plot two weeks after their agreement. Advise Bridie.

For hints on how to answer question 5, please see the Online Resource Centre at **www.oxfordtextbooks.co.uk/orc/osullivan5e/.**