affairs'.[30] This is so particularly when it is considered that the English Jockey Club, a body which is very similar in constitution and powers to the National Greyhound Racing Association, does itself allow legal representation before its stewards in practice.

WHERE TO NOW?

Neither decision is binding in Australia, nor is of particularly high authority—the Court of Appeal's decision, for instance, being on an interlocutory injunction only. However, due to a dearth of decisions on the same or similar issues in Australia, it is disturbing to note the lack of uniformity in the courts' approach to the requirements of natural justice in *exactly* the same factual and legal circumstances. For the plaintiff, it is surely unsatisfactory (and expensive) to be the victim of what, in the end, amounts to a straight-out difference of opinion.

M. E. STOCKWELL

As an ironical postscript, it should be noticed that on December 2nd 1969, the plaintiff appealed again, this time from the decision of Lyell J. to the Court of Appeal (Harman, Edmund Davies, and Widgery L.JJ.). However:

> At the hearing of the appeal, the Court of Appeal was informed by counsel that the Rules of Racing had been revised and that the proposed inquiry would now be held under the new Rules of Racing, which permitted the plaintiff to be legally represented at the inquiry.[31]

Agreement as to costs had been reached, and by consent the appeal was therefore dismissed.

M.E.S.

KING'S MOTORS (OXFORD) LTD. v. LAX[1]

Is an "agreement to agree" unenforceable?

The decision of Burgess, V.-C. in *King's Motors (Oxford) Ltd. v. Lax*[1] is neither startling in its result nor is it the result of an extensive analysis of the law but it is a useful starting point from which to

30 [1969] 2 All E.R. 221, 229.
31 [1970] 2 W.L.R. 256.
1 [1969] 3 All E.R. 665.

re-examine this area of the law of contract. In that case the lessee under a seven-year lease sued the lessors for a declaration that a notice to terminate given by the lessors was void. The lease contained an option for renewal for a further term of seven years subject to the same terms as the existing lease (with the exception of the clause for renewal) 'at such rental as may be agreed upon between the parties'. Burgess V.-C. held the clause unenforceable, in that it was only an agreement to agree in the future and left the main provision of the new lease—the rental—to be decided later. Burgess V.-C. could find no specific English authority on this point and applied a decision of the British Columbia Court of Appeal—*Young v. Van Beneen.*[2] Although he felt that his decision was unjust, he held that he was unable to apply the decision of the English Court of Appeal in *Foley* v. *Classique Coaches, Ltd.*[3] and imply a term that, in the absence of agreement as to rental, a reasonable rental should be payable. He distinguished *Foley's* case on the basis that there was a general arbitration clause in the agreement in issue in that case, but there was no such clause in the agreement before him.[4] This point will be discussed later.

It is submitted that the decision of Burgess V.-C. is undoubtedly correct as far as it went although, as I hope to show, he did not deal with the enforcement of the renewal clause as adequately as he could have. A virtually identical clause was held to be unenforceable in *Randazzo v. Goulding*[5] on the same basis—that there was no agreement which the court could enforce, as the parties had not yet concluded an agreement. It is interesting to note, however, that there are a number of cases in the United States holding that a renewal clause in a lease leaving the rental to be agreed on by the parties can be enforced by implying a term that the rental shall be a reasonable sum.[6] The basis of these decisions appears to be the assumption that a renewal clause is inserted in a lease for the benefit of the lessee, and thus should not be interpreted against him.[7] The court also regards the certainty of the other terms as important and will be more

2 [1953] 3 D.L.R. 702.
3 [1934] 2 K.B. 1.
4 [1969] 3 All E.R. 665, 666.
5 [1968] Qd.R. 433 (F.C.).
6 Rainwater v. Hobeika, (1946) 166 A.L.R. 1228 (S. Carolina S.C.); Moss v. Olson, (1947) 76 N.E. 2d. 875 (Ohio S.C.); Annotation, *Validity and Enforcement of Provision for Renewal of Lease at Rental Not Determined,* (1944) 166 A.L.R. 1237.
7 See Moss v. Olson, (1947) 76 N.E. 2d. 875, 881.

willing to make the implication of a reasonable term if most of the terms of the old lease are to continue under the new lease.[8] These decisions cannot be regarded as necessarily applicable to English and Australian law which has always drawn a clear distinction between a contract under which the parties have reached final agreement but expressed their agreement vaguely, and a contract wherein the parties agree to decide some essential term or terms at a later date;[9] a distinction the American cases referred to do not always make. It is only in the former case that English and Australian courts are prepared to imply a reasonable term.[10]

The policy of the law is to enforce bargains wherever possible,[11] but the court will only enforce the bargain made by the parties and will not create a contract for the parties.[12]

It is desirable, in this area, to distinguish six main contractual situations.[13]

1. The parties may make a complete contract but provide that a formal contract embodying the terms of the former contract be entered into. The parties in such a situation intend to be bound by the informal contract until such time as the formal contract, usually prepared by their solicitors, has been executed.[14] In such a situation there are two separate contracts, but upon its execution the formal contract supersedes the informal one unless the parties intend otherwise.[15]

The informal contract, it is important to note, usually contains two types of contract:

(a) the contract setting out the agreement between the parties, which is to be embodied in the formal contract;

(b) the contract to settle and execute the formal contract.[16]

The contract in (b) need not be an express one—it can be implied[17] —but it is important to note that there is no reason why both

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8 Id. at 877.

9 Hillas v. Arcos, (1932) 147 L.T. 503; [1932] All E.R. Rep. 494 (H.L.).

10 Compare May & Butcher Ltd. v. The King, (1929), [1934] 2 K.B. 17n (H.L.) with Hillas v. Arcos, (1932) 147 L.T. 503; [1932] All E.R. Rep. 494.

11 See Sir Frederick Pollock in (1932) 48 L.Q.R. 141; Placer Development Ltd. v. The Commonwealth, (1969) 43 A.L.J.R. 265, 273.

12 Placer Development Ltd. v. The Commonwealth, (1969) 43 A.L.J.R. 265.

13 See the discussion by Bray C.J. in Powell and Berry v. Jones, [1968] S.A.S.R. as yet unreported (judgment delivered 26th July, 1968: No. 74).

14 See Masters v. Cameron, (1954) 91 C.L.R. 353, 360.

15 See Horst K. Lücke, *Arrangements Preliminary to Formal Contracts,* (1967) 3 ADELAIDE L. REV. 46 at 53, 67.

16 See Masters v. Cameron, (1945) 91 C.L.R. 353, 360.

17 Niesmann v. Collingridge, (1921) 29 C.L.R. 177.

contracts referred to above should not be enforced. The extent to which the contract in (b) can be enforced will be discussed below when the sixth contractual situation is discussed.

2. If the parties simply contract to make a contract the terms of which are specified, or at least, capable of being made certain, such contract is enforceable[18] and equity in granting a decree of specific performance applies the maxim 'equity regards as done that which ought to be done'[19] and holds that as the parties were bound to enter into a specific contract, they must be deemed to have done so. As Lord Wright succinctly expressed it in *Hillas v. Arcos*: 'A contract *de praesenti* to enter into what, in law, is an enforceable contract, is simply that enforceable contract, and no more and no less'.[20]

3. The parties may enter into a contract which they regard as final but which omits some terms or expresses them in vague language or which uses terms such as 'fair rent', 'reasonable price' or similar terms. The courts' approach to these contracts is that the parties intended the contract to be final—they did not leave any terms for future agreement—and the courts' policy should be to uphold, if possible, bargains entered into by contracting parties. Sir Frederick Pollock maintained that the courts may find it necessary 'to be ingenious and even to strain a point of form if effect can thereby be given to men's reasonable intentions and expectations'.[21] The courts now lean over backwards to enforce such contracts and imply reasonable terms wherever possible.[22] The only limitation is that the essential terms—the skeleton—of the contract should be clear,[23] otherwise the court would make the parties' contract for them. What are "essential terms" will depend on the particular contract; Fullagar J. held that in a contract for the sale of land, for instance, the parties, subject-matter

18 Shepard v. Carpenter, (1893) 55 N.W. 906 (Minn. S.C.); May & Butcher Ltd. v. The King, (1929), [1934] 2 K.B. 17n, 20; Hillas Ltd. v. Arcos, (1932) 147 L.T. 503, 515; Parkway Inc. v. U.S. Fire Insurance Co., (1944) 58 N.E. 2d. 646 (Mass. S.J.C.); Navin v. New Colonial Hotel, Inc., (1950) 90 N.E. 2d. 128 (Ind. S.C.); Bosaid v. Andry, [1963] V.R. 465, 477. See also Sir Frederick Pollock, (1932) 48 L.Q.R. 141; G.L.W., (1942) 6 M.L.R. 81.

19 See Walsh v. Lonsdale, (1882) 21 Ch.D. 9 (C.A.).

20 (1932) 147 L.T. 503, 515.

21 (1932) 48 L.Q.R. 141.

22 Hillas v. Arcos, (1932) 147 L.T. 503; Jubal v. McHenry, [1958] V.R. 406; W. L. Witt (W.A.) Pty. Ltd. v. Metters Ltd. and General Industries Ltd., [1967] W.A.R. 15.

23 May & Butcher Ltd. v. The King, (1929), [1934] 2 K.B. 17n, 21 per Viscount Dunedin; G. Scammell and Nephew Ltd. v. H. C. and J. G. Ouston, [1941] A.C. 251. See also Mercantile Credits Ltd. v. Harry, [1969] N.S.W.R. 248, 250.

and price must be specified,[24] though Kitto and Windeyer JJ. were not prepared to hold uncertain a term for the payment of a 'reasonable price'.[25] Before they are prepared to imply a reasonable term the courts insist that the parties must have reached final agreement. The distinction, referred to earlier, between a final contract with uncertain terms and a contract providing for future agreement, is fundamental. The question is always one of the intention of the parties. A contract which omits a number of terms or makes some vague provision in regard to them may, in a particular case, be enforced, while a contract, even if it provides that only one term shall be agreed later, may be held unenforceable if the parties are held to have intended that the latter contract shall be implemented only when all its terms are settled. The first contract, if it cannot be enforced, fails because of uncertainty; the second fails because there never was a contract to be enforced.[26] The failure to distinguish between these two grounds of unenforceability is responsible, I submit, for much of the confusion in this area of contract law. We find the error even in the headnote to the report of *King's Motors (Oxford) Ltd. v. Lax* which says that the option for renewal was held 'void for uncertainty'. This is incorrect. The option failed because there never was a concluded option-agreement. To say that it failed for uncertainty incorrectly implies that there was a concluded option-agreement which was capable of being too uncertain.

It is, moreover, important to notice that the language in which the parties express the contract—while obviously important—is not conclusive. The outstanding case here is *Foley v. Classique Coaches Ltd.*,[27] a decision which has been approved on a number of occasions.[28] The plaintiff and the defendant agreed to sell and purchase respectively land for use in the defendant's business as a motor coach proprietor. The sale was subject to the defendant entering into a second agreement with the plaintiff whereby he was bound to purchase from the plaintiff all petrol needed for the business 'at a price to be agreed by the parties in writing from time to time'. The Court of Appeal held, unanimously, that the second contract was a concluded and binding contract, not a mere contract to enter into a contract,

24 Hall v. Busst, (1960) 104 C.L.R. 206, 222.

25 Hall v. Busst, (1960) 104 C.L.R. 206; Note, (1969) 43 A.L.J. 586.

26 See G. Scammell and Nephew Ltd. v. H. C. and J. G. Ouston, [1941] A.C. 251 per Lord Wright at 268-269.

27 [1934] 2 K.B. 1.

28 National Coal Board v. Galley, [1958] 1 W.L.R. 16, 24; King's Motors (Oxford) Ltd. v. Lax, [1969] 3 All E.R. 665, 666.

and thus a reasonable term as to price was implied. Scrutton L.J. and Greer L.J. based their decision on the fact that the parties believed they had concluded a final and binding agreement and had acted on this belief for three years.[29] Their Honours laid emphasis on the presence of a general arbitration clause in the agreement, presumably as it eliminated the court's problems in trying to fix a reasonable price, as the arbitrator could do so. Maugham L.J. based his decision on the same ground, though he stated, more specifically, that three main factors induced him to hold that the parties did not intend the contract to be a mere "agreement to agree":

(a) the second contract was intended to be a binding agreement;
(b) it formed part of the inducement for the execution of the first contract;
(c) unlike the informal letter in *May & Butcher Ltd. v. The King,*[30] the second contract was stamped and bore all the signs of a contract intended to be legally binding.[31]

Foley v. Classique Coaches Ltd.[32] demonstrates, therefore, that, even though a contract contains words which may appear to amount to an "agreement to agree", the intention of the parties may enable the court to hold otherwise. It may have been similar reasoning which enabled the American courts to imply a reasonable rental in the cases referred to previously, though the courts did not purport to decide the cases on this ground.

4. The parties may provide in their contract that a term is to be decided by a third party, for example an arbitrator. It is well established that such a contract is enforceable.[33] The reason why it is enforceable and not held to be too uncertain is not altogether clear. It is obvious that in such a situation the parties have reached final agreement on the terms to be fixed *by them*[34] and no further reference to the parties is necessary. But is it not a misuse of the word "certain" to say that such a contract is certain—that its terms are certain? We cannot say, at the time of its execution, what its terms will be. If the third party fails to decide the term or terms left to his decision, the term or terms

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29 [1934] 2 K.B. 1 at 10, 11 respectively.
30 [1934] 2 K.B. 17n (H.L.).
31 [1934] 2 K.B. 1, 13.
32 [1934] 2 K.B. 1.
33 Foster v. Wheeler, (1888) 38 Ch.D. 130 (C.A.); May & Butcher Ltd. v. The King, (1929), [1934] 2 K.B. 17n, 21 per Viscount Dunedin; Hall v. Busst, (1960) 104 C.L.R. 206, 222.
34 May & Butcher Ltd. v. The King, (1929), [1934] 2 K.B. 17n, 21 per Viscount Dunedin.

will be left undecided and the contract will then probably be too uncertain to be enforced.[35] It is strange that the potentiality of certainty is enough to satisfy the courts. It is only for reasons of practical convenience that courts have held such contracts certain enough to be enforced; indeed the same could be said for the contracts discussed under heading 3 above. Certainty of contract is obviously a question of degree only. Lord Buckmaster was, I submit, attempting to express this lack of real certainty of contract when he said, in *May & Butcher Ltd. v. The King*: 'I find myself quite unable to understand the distinction between an agreement to permit the price to be fixed by a third party and an agreement to permit the price to be fixed in the future by the two parties to the contract themselves. In principle it appears to me that they are one and the same thing'.[36] With all respect, however, this statement by Lord Buckmaster demonstrates the result of the failure to make the distinction to which I referred earlier. His Lordship failed to distinguish uncertainty of contract on the one hand and failure to conclude a contract on the other as a ground for the unenforceability of a contract. It is only when the parties intend that their contract is complete without future agreement that the problem of certainty of the terms of the contract can arise; until that time there is no concluded contract which deals with the terms which the parties intend to regulate in their future contract.

5. The parties may agree to leave to one of themselves the task of deciding a term or terms of the contract. The problem here is not one of deciding whether the parties have concluded a final agreement (because they have concluded such an agreement and do not intend further reference to be made to *both* parties) nor is it a question of certainty of contract. The problem here is whether the contract is illusory in that it leaves one party, practically speaking, the option of refusing to continue with the contract by not deciding the term or terms left for his decision. It is well established that if a contract gives such an option to one of the parties, that party provides no consideration (as his observance of the contract is purely voluntary) and the contract is void.[37] Thus, in *Beattie v. Fine*[38] the option of renewal in a lease provided for a further five year lease 'at a rental to be agreed upon by the lessor'. It was held that this gave the lessor

35 Ibid.; Hall v. Busst, (1960) 104 C.L.R. 206, 222.
36 [1934] 2 K.B. 17n, 20.
37 See British Empire Films Pty. Ltd. v. Oxford Theatres Pty. Ltd., [1943] V.L.R. 163.
38 [1925] V.L.R. 363.

the right to refuse to agree upon any rental as a result of which there was no contract. The contract entered into by the parties in the renewal clause was illusory. Likewise, in *Placer Development Ltd. v. The Commonwealth*[39] where the Commonwealth agreed with a timber company to pay it a subsidy (if it had to pay customs duties on the importation of its products into Australia from Papua and New Guinea) 'of an amount or at a rate determined by the Commonwealth from time to time', the majority of the full High Court held that the Commonwealth was not obliged to determine or pay any subsidy and, therefore, there was no contract between the parties.[40]

On the other hand, Bray C.J. in *Powell and Berry v. Jones*[41] held valid and enforceable an agreement for a tenancy for five years the offer for which stated that it was 'to be in terms and to contain such special clauses as the Landlord may require'. His Honour held that the landlord was bound to carry out this agreement and, probably, to act reasonably in fixing its terms. His Honour thus held that the landlord did not have an option whether or not to proceed with the contract and, therefore, it was not an illusory contract. Bray C.J. referred to *Christison v. Warren*[42] and continued: 'Indeed in that case the learned Judge held that the extra terms to be included in the formal document must be reasonable as well and this may well be so at least in the sense that the courts would refuse in any decree of specific performance to compel the other party to execute a formal document containing unreasonable terms'. A little further on Bray C.J. observed that if the lessor had refused to allow any agreement to be drawn up or to name any terms, the court would regard him as having waived the provision in the agreement giving him the right to specify the terms.

The circumstances in which the court will hold the party who has been given the right to specify terms bound to do so are well canvassed in the judgments of Menzies J. and Windeyer J.—the dissenting judges —in *Placer Development Ltd. v. The Commonwealth.*[43] Their Honours both regarded it as fundamental that not only did the parties intend the agreement as a whole to be legally binding but that also there was clear evidence that the parties intended the relevant clause

39 (1969) 43 A.L.J.R. 265.
40 Id. at 266, 268 per Kitto, Taylor and Owen JJ.
41 [1968] S.A.S.R. as yet unreported (judgment delivered on 26th July, 1968: No. 74).
42 [1903] St.R.Qd. 186; see especially per Chubb J. at 189.
43 (1969) 43 A.L.J.R. 265.

to be legally binding.[44] Their Honours held that each case must depend on the interpretation of the relevant contract and that in this case, the Commonwealth had undertaken to do two things:

(a) to determine the amount of subsidy payable;

(b) to pay the amount so determined[45] (subject to Parliamentary appropriation of funds).

Windeyer J. was prepared, I submit, to go further than Menzies J. and to hold that the Commonwealth was bound to pay a *reasonable* subsidy. I submit that he held that, if the basis for determining the amount of the subsidy had been specified or if there were some objective basis for determining it, the court could have determined the amount of a reasonable subsidy payable. His Honour said: 'When an agreement produces a liability to pay some sum of money, and the amount is not determined by the agreement, there is ordinarily no obstacle to saying that a reasonable sum was intended: and, if what is a reasonable sum can be determined by a court, a judgment for that amount can be given'.[46] His Honour held that the subsidy must not be merely nominal and suggested that it must be reasonable: 'The contractual obligation of the Commonwealth to the plaintiff was to decide what sum in its discretion it considered, having regard to all considerations which weighed with it, commercial and political, it would be *reasonable* to pay the timber company by way of subsidy; and, having decided it, to pay it'.[47] Although Windeyer J. was a dissentient in this case, his judgment cannot be ignored.

If the term which is held to provide one of the parties with an option whether or not to fulfil it is an "essential" one it is clear that the contract is illusory and is void for failure of consideration. On the other hand, if the relevant term is a minor one, the court may be prepared to imply a reasonable term, though it is unlikely to do so because the parties have expressed their intention clearly; they have not provided for a *reasonable* term but have left the term for one party to decide.[48]

6. I now revert to the problem with which I began. The parties may provide that one or more terms shall be the subject of a future agreement between them. Such a contract represents what I have, throughout this paper, called an "agreement to agree". It has, occasionally,

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[44] Id. at 268, 270-273.

[45] Id. at 269-270, 272-273.

[46] Id. at 272.

[47] Id. at 273. (Emphasis added.)

[48] Beattie v. Fine, [1925] V.L.R. 363.

been said that an "agreement to agree" is void.[49] Sir Frederick Pollock, for example, said: 'A bare contract to make a contract is naught in any possible system of law, because the promise lacks any certain contents'.[50] Likewise in *Foley v. Classique Coaches Ltd.*, Maugham L.J. said that 'An agreement to agree in the future is not a contract'.[51] With all respect, these statements—pronounced as they are, with nothing further added—are incorrect. If two parties can agree to work for each other, or to do some future act, or to enter into a contract with specified terms, why should they not be able to agree to make a contract the terms of which will be decided when they come to make that contract? The more usual statement made by the courts is that 'an agreement to agree is unenforceable'.[52] This is misleading. If the statement means that the contract into which the parties are to enter in the future is unenforceable, it is merely a statement of the obvious. How could one enforce a contract which has not yet been made? If the statement means that the contract whereby the parties contract to enter into a future agreement is unenforceable it is, I submit, incorrect. Too often, I respectfully suggest, the courts simply recite that 'an agreement to agree is unenforceable' without considering the second interpretation to which I have referred. Thus Lord Wensleydale, for example, says: 'An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled'.[53] If Lord Wensleydale had considered the second interpretation to which I have referred, he would have realised that the terms of the 'agreement to enter into an agreement' *are* settled: they are that the parties shall negotiate with a view to entering into an agreement.

It is true that the parties do not agree to negotiate but simply agree to enter into a contract. I submit that an agreement to enter into a contract necessarily implies an agreement to enter discussions leading to such contract. Thus in *Hillas v. Arcos*, Lord Wright said: 'There is then no bargain except to negotiate, and negotiations may be fruitless

49 Horst K. Lücke, *Arrangements Preliminary to Formal Contracts*, (1967) 3 ADELAIDE L. REV. 46, 51.

50 (1932) 48 L.Q.R. 141.

51 [1934] 2 K.B. 1, 13.

52 Foster v. Wheeler, (1887) 36 Ch.D. 695, 698; Loftus v. Roberts, (1902) 18 T.L.R. 532 (C.A.); May & Butcher Ltd. v. The King, (1929), [1934] 2 K.B. 17n., 20 (H.L.); Cummins v. Cummins, [1934] 2 D.L.R. 228 (Man.C.A.); Willesden v. Webb, [1937] Q.W.N. 8; Karpa v. O'Shea, (1969) 3 D.L.R. 3d. 572 (Alta.S.C.).

53 Ridgway v. Wharton, (1857) 6 H.L.C. 238, 305; 10 E.R. 1287, 1313.

and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate'.[54] Likewise in *Re Apps,* Barry J. said: 'For the sake of completeness, I should say that the clause may amount to a contract to enter into negotiations for the purpose of agreeing on the terms upon which the purchase price of £4000 should be paid, and if there be a breach of that contract . . . the lessee may be entitled at least to nominal damages'.[55] It is this contract—the contract whereby the parties contract to enter into negotiations—which I propose to discuss. The common law has not been opposed to the enforcement of such a contract; it has, generally speaking, not noticed it.[56]

The parties who enter into such an "agreement to agree" often regard themselves as legally bound to negotiate the terms of the future contract. It is, of course, necessary that they should so intend, as intention to create legal relations is a prerequisite of an enforceable contract. Professor Knapp summed this up by saying that the parties contract to negotiate because they have a common commitment to the deal but wish to reserve points not yet settled and recognize that these points are 'potential deal-upsetters'. Should the parties fail to reach agreement after bona fide negotiations, it is intended that the whole deal shall be cancelled.[57] I submit that this was probably the intention of the parties in *King's Motors (Oxford) Ltd. v. Lax*[58] thus causing Burgess V.-C. to feel most unhappy about the decision he felt bound to make. His Honour pointed out that '[h]ere there is an agreement intended to be binding and it includes the option'.[59] Recognition of the contract to negotiate would, I submit, have enabled His Honour to give effect to the parties' intention.

It is, however, quite clear that if no limitation is placed on a party's freedom of contract the contract will be illusory as either party will have the option to refuse to negotiate. Some judges have, indeed, held that no limitation can be placed on a party's freedom of contract. Thus in *Murphy v. McSorley*[60] a years option to purchase was given 'at a price of $45,000 with a cash payment of $15,000 and balance to

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54 (1932) 147 L.T. 503, 515.

55 [1949] V.L.R. 7, 12. See also Lord Campbell C.J. in Hall v. Conder, (1857) 2 C.B. (N.S.) 22, 53; 140 E.R. 318, 331 (Exchequer Chamber.).

56 See Charles L. Knapp, *Enforcing the Contract to Bargain,* (1969) 44 N.Y.U. L. Rev. 673, 686.

57 Id. at 681, 728.

58 [1969] 3 All E.R. 665.

59 Id. at 666.

60 [1929] S.C.R. 542; 4 D.L.R. 247.

be arranged'. The parties made mutual offers without result. The Supreme Court of Canada refused to enforce the agreement, Mignault J. for the majority saying: 'It is no answer to say that McSorley's attitude was not "fair" or "reasonable" '.[61] Likewise in *Stocks and Holdings (Constructions) Pty. Ltd. v. Arrowsmith*[62] the High Court held unenforceable a contract of sale of land which based the purchase price on the number of lots into which the property was to be subdivided and provided that 'any subdivision shall be subject to the approval of the vendor'. Barwick C.J. said: '[the vendor] was not obliged to accept any plan of subdivision or any plan which others might think ought reasonably to have been accepted'.[63]

There are, however, judicial statements to the contrary effect. In the High Court case just referred to McTiernan J. (dissenting) said: 'I do not think that these words mean that the vendor is entitled to apply subjective tests in considering whether or not to approve of a plan of subdivision tendered by the purchaser. The purchaser can require the vendor to approve of a plan unless the vendor has grounds for refusing which a Court would find are reasonable'.[64] A similar view was expressed by Lord Campbell C.J. in *Hall v. Conder*.[65] It was held in that case that the plaintiff could sue the defendant for £2,500 on a contract whereby the defendant agreed to pay the plaintiff '£2,500 in such manner as shall ultimately be agreed upon' but then refused to pay after a reasonable time had elapsed during which the defendant had refused to negotiate. The Court held that the defendant's conduct amounted to a repudiation of the contract for which the plaintiff was entitled to recover. This decision was followed by the Ontario Court of Appeal in *De Laval v. Bloomfield*,[66] a decision since criticized.[67]

On the basis of these authorities and cases previously discussed in the fifth category above, I submit that the parties are bound, under a contract to negotiate, to enter into bona fide negotiations. Although it is futile to discuss bona fides or mala fides in the absence of specific contract situations, one case that stands out as a good example of

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[61] Id. at 546, 250 respectively.
[62] (1964) 112 C.L.R. 646.
[63] Id. at 652.
[64] Id. at 654.
[65] (1857) 2 C.B. (N.S.) 22, 53. There is a most inadequate discussion of this case by D. M. Gordon in (1939) 17 CAN. BAR REV. 205.
[66] [1938] 3 D.L.R. 405.
[67] Jackson v. Macaulay, Nicholls, Maitland & Co., [1942] D.L.R. 609, 612 (B.C.C.A.); Cherewick v. Moore and Dean, [1955] 2 D.L.R. 492, 501 (B.C.S.C.).

lack of bona fides is *Roberts v. Adams*.[68] An option for the purchase of realty provided that the purchase price of $85,000 was to be 'payable as mutually agreed by both parties'. The lessee offered to pay the full sum in cash but the lessor had decided not to sell to him and refused to enter into an agreement. The plaintiff sued the defendant and lost. The court held that the contract was an "agreement to agree" and was, thus, unenforceable. If the court had realized that there was also a legal obligation to enter into genuine negotiations, a more just result could, perhaps, have been obtained.

It is quite clear, of course, that before a contract to negotiate could be enforced there must be an intention to create legal relations. If the agreement is in writing this will be strong evidence that such intention is present.[69] There must also, of course, be consideration. The agreement is often contained in a clause in a lease or other agreement and the consideration for it is, therefore, included within the consideration given for the main agreement. If, however, the agreement exists separately, it is probably sufficient if there are mutual agreements to negotiate.[70] On general contract principles there is no reason why mutual promises to negotiate should not constitute adequate consideration.

If one party refuses to negotiate, or to negotiate genuinely, what remedy does the other party have? I submit that the courts would not decree specific performance as it would be impossible for the court to supervise the negotiations (which would probably be fruitless anyway) and damages would often be a sufficient remedy. The injured party would, I submit, be entitled to recover damages for the loss which flowed from the defendant's failure to negotiate.[71] It would normally be difficult to recover more than nominal damages as it would be practically impossible to prove a sufficiently proximate connection between the loss and the defendant's refusal to enter into what might well have been futile negotiations.[72] Nevertheless, if the plaintiff could prove that he had expressed an intention to agree to almost anything the defendant proposed, the connection with the loss caused by not entering into the contract may be more proximate; though here again proof of the proximity of damage is made more difficult by the fact that the plaintiff could hardly suffer loss on the

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68 (1958) 330 P. 2d. 900 (Calif. D.C. App.).
69 See Knapp, op. cit. note 56, at 720, 721.
70 Foley v. Classique Coaches Ltd., [1934] 2 K.B. 1, 12; Knapp, op. cit. note 56, at 691.
71 Hall v. Conder, (1857) 2 C.B. (N.S.) 22.
72 Hillas v. Arcos, (1932) 147 L.T. 503, 515; Re Apps, [1949] V.L.R. 7, 12.

basis of the expected contract if he would have agreed to anything the defendant may have proposed. It is sufficient, I submit, to say that the usual rules as to the recovery of damages for breach of conract apply; damages may be nominal or substantial depending on the plaintiff's ability to prove them.[73]

Finally, it must be noted that the particular circumstances of the relevant contract may take it out of the "agreement to agree" category. Thus, for example, the term left to be agreed on in the future may be relatively unimportant and severable, leaving the remainder of the contract enforceable.[74] Similarly, a contract leaving the parties a wide choice as to the manner of execution of the agreement does not necessarily prevent the agreement being concluded and enforceable.[75] If the parties provide for a sale to be on certain specified terms 'or terms to be mutually arranged', this will probably be interpreted as constituting a concluded contract for the sale on the specified terms, but with the addition of the truism that the parties may agree to vary those terms at a later date.[76]

Having now, I hope, made clear what is meant when we ask: Is an agreement to agree unenforceable?, I submit that the answer is: No.

GEORGE WINTERTON

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73 See Knapp, op. cit. note 56, at 723, 724.

74 Metropolitan Water District of Southern California v. Marquardt, (1963) 379 P. 2d. 28 (Calif. S.C.); Thorby v. Goldberg, (1965) 112 C.L.R. 597, 603; Prints for Pleasure v. Oswald-Sealy, (1968) 88 W.N. (Pt. 1) (N.S.W.) 375. See also CORBIN, CONTRACTS, (1963), Vol. 1, para. 29, pp. 89-94.

75 Thorby v. Goldberg, (1965) 112 C.L.R. 597, 605, 613; Powell and Berry v. Jones, [1968] S.A.S.R. as yet unreported (judgment delivered 26th July, 1968: No. 74).

76 Sidney Eastman Pty. Ltd. v. Southern, [1963] N.S.W.R. 815, 817. See also Re Harlou, [1950] V.L.R. 449, 450 and contrast Henning v. Toronto Railway Co., (1905) 11 O.L.R. 142 (Ont. C.A.).