TO REASONABLY AGREE OR TO REASONABLY NOT AGREE?

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English law holds that an agreement to agree is no agreement at all. That said, in reality the question of whether a provision is in fact an agreement to agree (and thus unenforceable) is much less clear cut.

As a result the courts are often called upon to distinguish between situations where they can intervene to determine what the parties should have agreed under a contract, and those where they cannot do so.

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In its 2013 decision in *MRI Trading AG v Erdenet Mining Corporation LLC1*, in which WFW acted for the successful party, the Court of Appeal gave helpful guidance on the outer limits of when the courts will intervene to complete a bargain in the absence of agreement by the parties.

However, in *Morris v Swanton Care & Community Limited2,* in which WFW again acted for the successful party, the Court of Appeal has now robustly reiterated that, despite the principles set out in *MRI*, the fundamental position is that an agreement to agree will not be enforced by the courts. The decision suggests a reluctance to further expand the circumstances in which the courts will intervene where the parties cannot agree themselves.

THE CASE

In *Morris v Swanton Care*, the claimant, Mr Morris, sought damages for additional "earn-out consideration" he claimed he was entitled to under the terms of an agreement (the "SPA") under which he had sold his company, Glenpath Holdings, to the defendant. The SPA entitled the claimant to additional consideration for providing consultancy services to the defendant following the completion of the sale. Specifically, it provided that:

"Mr Morris shall have the option for a period of 4 years from Completion and following such period such further period as shall reasonably be agreed between Mr Morris and the buyer to provide the [consultancy] services…"

The defendant paid the claimant for the consultancy services for the initial four year period but declined to agree a further period. The claimant therefore brought proceedings, arguing that he was entitled to, and the defendant was obliged to agree, a reasonable further period for the provision of the consultancy services. In response the defendant argued that the words ”following such period such further period as shall reasonably be agreed” amounted to a mere agreement to agree any further period, and was therefore unenforceable.

The judge at first instance agreed with the defendant, dismissing Mr Morris’ claim entirely. The claimant appealed.

THE APPEAL

In her final judgment in the Court of Appeal, Lady Justice Gloster rejected all of the claimant’s grounds of appeal, saying:

“I have no doubt that, on their true construction, the relevant provisions… amount to an agreement to agree in relation to the further period after the agreed 4 years and are consequently unenforceable.”

"Lady Justice Gloster rejected the claimant's attempts to argue that the court could (and should) intervene in the absence of agreement between the parties in this case."

In doing so, Lady Justice Gloster rejected the claimant’s attempts to argue that the court could (and should) intervene in the absence of agreement between the parties in this case. In particular, she forcefully rejected the submission that the phrase “such further period as shall reasonably be agreed” imposed both an obligation to reach agreement reasonably and to agree a reasonable period. Lady Justice Gloster held that:

“…any period of extension could be agreed, with the words “shall reasonably” applying to the agreeing and not to the further period itself. The claimant’s argument seeks to transfer the “reasonable” requirement to the period itself… but that is wrong…”

Lady Justice Gloster rejected the claimant’s argument in this regard primarily on the basis that it simply was not what the provision in question said. However, she added that:

“…the proposition is that, on the assumption that there was such a thing as an objectively reasonable period, that is what the parties acting reasonably should have agreed. The difficulty with this, apart from the actual terms of the clause, is that it presupposes that there is such a thing as a reasonable period which everyone could equally recognise as being reasonable…”

This suggests that, even if the contract had provided that the parties were obliged to agree a “reasonable further period”, the provision would still have been held to be unenforceable, and appears to be a rejection of the well-rehearsed argument that an obligation to reach a “reasonable” agreement on an issue will be sufficiently certain to allow the court to intervene and determine what should have been agreed.

Finally, Lady Justice Gloster was also unpersuaded that an obligation to reasonably agree (i.e. to agree in a reasonable manner) amounted to an enforceable obligation in this case. Citing a line of authorities on obligations to use reasonable endeavours to agree, she held that:

"…the law is clear that, in such a case, there is no obligation on the parties to negotiate in good faith about the matter which remains to be agreed between them… the fact that the relevant provision requires the parties "reasonably" to agree did not turn an unenforceable provision into an enforceable agreement."

"An obligation to agree reasonably is not an obligation to agree something reasonable and does not impose on a party an obligation to agree something that is counter to its own commercial interests"

CONCLUSION

Morris v Swanton Care gives helpful and clear guidance on the limits of the English courts' ability and willingness to intervene and determine what parties should have agreed where they have failed to do so themselves.

In particular, it emphasises that an obligation to agree reasonably is not an obligation to agree something reasonable and does not impose on a party an obligation to agree something that is counter to its own commercial interests.

Further, it strongly rebuts the argument that an obligation to agree a "reasonable" outcome is sufficiently certain to allow the court to intervene in the absence of such agreement.

These findings are a firm reassertion of the long held principle that an agreement to agree is not enforceable, and an important counterweight to the line of authorities that have expanded the scope of what agreements the courts can and will enforce.

Thomas Ross, a former partner, and Nick Payne, a former senior associate, both in our London office, jointly authored this article.