LORD DENNING : Court of Appeal

The question in this case is whether two letters give rise to a concluded contract. Mr Tolaini wanted to develop a site in Hertfordshire. It was The Thatched Barn Hotel together with five acres of land. He got in touch with a property developer, a Mr Countney. It appears that Mr Courtney was well placed to obtain finance for building development. He was also a building contractor himself. The two met and discussed ways and means at the office of Mr Sacks, an architect. The proposal was that Mr Courtney should introduce someone to provide the money and lend it to Mr Tolaini. Mr Tolaini was to develop the site by building a motel and other things. But he was to employ Mr Courtney or his company to do the construction work. After the meeting, on 10 April 1969, Mr Courtney wrote to Mr Tolaini this letter:

'Re: Thatched Barn Hotel

'… I am now in a position to introduce you to those who: (a) are interested in your proposals, (b) have access to the necessary finance …

'I think I should mention, at this point, that my commercial interest in this matter is that of a Building Contractor. I am interested in it due to the fact that Mr Sacks, whom I have known for some years, is aware that I work for a number of large investing and development concerns, and thought it possible that I might be in a position to be of service to you.

*'You will understand, therefore, that in addition to making myself useful to you, my objective is to build the three projects mentioned, namely, the Motel, the Filling Station, and the future Hotel, or other development, on the "Green Belt" area of your site. [*Then follow these important words*:] Accordingly I would be very happy to know that, if my discussions and arrangements with interested parties lead to an introductory meeting, which in turn leads to a financial arrangement acceptable to both parties yo will be prepared to instruct your Quantity Surveyor to negotiate fair and reasonable contract sums in respect of each of the three projects as they arise. (These would, incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5%) which, I am sure you will agree, is indeed reasonable.'*

On 21 April 1969 there was a meeting between the parties at the Thatched Barn Hotel. Mr Courtney said he wanted to have something in writing from Mr Tolaini before he went further. Accordingly Mr Tolaini did write a letter on 28 April 1969, in the terms:

'In reply to your letter of the 10th April, I agree to the terms specified therein, and I look forward to meeting the interested party regarding finance.'

Those are the two letters on which the issue depends. But I will tell the subsequent events quite shortly. Mr Courtney did his best. He found a person interested who provided finance of £200,000 or more for the projects. Mr Tolaini on his side appointed his quantity surveyor with a view to negotiating with Mr Courtney the price for the construction work. But there were differences of opinion about the price. And nothing was agreed. In the end Mr Tolaini did not employ Mr Courtney or his company to do the construction work. Mr Tolaini instructed other contractors and they completed the motel and other works. But then Mr Tolaini took advantage of the finance which Mr Courtney had made possible, but he did not employ Mr Courtney's company to do the work. Naturally enough, Mr Courtney was very upset. He has brought this action in which he says that there was a contract by which his company were to be employed as builders for the work, and it was a breach of contract by Mr Tolaini or his company to go elsewhere and employ somebody else. Mr Courtney's company claimed the loss of profits which they would have made if they had been employed as builders for this motel. At the trial the parties agreed to proceed only in the following question: *'Whether there was concluded any enforceable agreement in law between the Plaintiff and the Defendants or one of them, and if yes, who were the parties to the agreement and what were its terms'.*

Shaw J heard the evidence on the point, both as to the initial interview and as to the circumstances in which Mr Courtney's company were not employed to do the work. He held that there was an enforceable agreement. He found that the parties were Mr Courtney's company and Mr Tolaini's company; and that the terms were, inter alia, contained in the letters of 10th and 28 April 1967 which I have read. He said in his judgment that the letters- *'gave rise to a binding and enforceable contract whereby the Defendants undertook to employ the Plaintiffs … to carry out the work referred to in [Mr **Courtney's** letter of 10th April 1969] at a price to be calculated by the addition of 5% per cent to the fair and reasonable cost of the work and the general overheads relating thereto.'*

I am afraid that I have come to a different view from the judge. The reason is because I can find no agreement on the price or on any method by which the price was to be calculated. The agreement was only an agreement to 'negotiate' fair and reasonable contract sums. The words of the letter are 'your Quantity Surveyor to *negotiate* fair and reasonable contract sums in respect of each of the three projects as they arise.' Then there are words which show that estimates had not yet been agreed, but were yet to be agreed. The words are: *'These [the contract sums] would, incidentally be based upon agreed estimates of the net cost of work and general overheads with a margin for profit of 5%.'* Those words show that there were no estimates agreed and no contract sums agreed. All was left to be agreed in the future. It was to be agreed between the parties themselves. If they had left the price to be agreed by a third person such as an arbitrator, it would have been different. But here it was to be agreed between the parties themselves.

Now the price in a building contract is of fundamental importance. It is so essential a term that there is no contract unless the price is agreed or there is an agreed method of ascertaining it, not dependent on the negotiations of the two parties themselves. In a building contract both parties must know at the outset, before the word is started, what the price is to be, or, at all events, what agreed estimates are. No builder and no employer would ever dream of entering into a building contract for over £200,000 without there being an estimate of the cost and an agreed means of ascertaining the price.

In the ordinary course of things the architects and the quantity surveyors get out the specification and the bills of quantities. They are submitted to the contractors. They work out the figures and tender for the work at a named price; and there is a specified means of altering it up or down for extras or omissions and so forth, usually by means of an architect's certificate. In the absence of some such machinery, the only contract which you might find is a contract to do the work for a reasonable sum or for a sum to be fixed by a third party. But here there is no such contract at all. There is no machinery for ascertaining the price except by negotiation. In other words, the price is still to be agreed. Seeing that there is no agreement on so fundamental a matter as the price, there is no contract.

But then this point was raised. Even if there was not a contract actually to build, was not there a contract to negotiate? In this case Mr Tolaini did instruct his quantity surveyor to negotiate, but the negotiations broke down. It may be suggested that the quantity surveyor was to blame for the failure of the negotiations. But does that give rise to a cause of action? There is very little guidance in the book about a contract to negotiate. It was touched on by Lord Wright in ***Hillas & Co Ltd v Arcos Ltd*** ([1932] All ER Rep 494 at 505, 147 LT 503 at 515) where he said: *'There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing.'* Then he went on ([1932] All ER Rep 494 at 505, 147 LT 503 at 515): *'… yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate, though in the event of repudiation by one party the damages may be nominal, unless a jury think that the opportunity to negotiate was of some appreciable value to the injured party.'*

That tentative opinion by Lord Wright does not seem to me to be well founded. 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. We were referred to the recent decision of Brightman J about an option, ***Mountford v Scott***; but that does not seem to me to touch this point. 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. So I would hold that there was not any enforceable agreement in the letters between the plaintiff and the defendants. I would allow the appeal accordingly.

LORD DIPLOCK.

I agree and would only add my agreement that the dictum—for it is no more—of Lord Wright in ***Hillas & Co Ltd v Arcos Ltd*** ([1932] All ER Rep 494 at 505, 147 LT 503 at 515) to which Lord Denning MR has referred, though an attractive theory, should in my view be regarded as bad law.

LAWTON LJ.

I agree with both the judgments which have been delivered.

Appeal allowed. Action dismissed.