

# ARTICLES

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## UNCERTAINTY OF CONTRACT: SOME RECENT DEVELOPMENTS

A court having to deal with an agreement the parties to which have deferred stipulation of an "essential" term—as, for instance, the price in a sale—is likely to be confronted with either of two supposed principles of law cognate in nature and nuisance value. They are the so-called rules in *Milnes v. Gery*<sup>1</sup> and *May & Butcher v. The King*<sup>2</sup> respectively. Both these principles seek in effect to prohibit a certain kind of contractual obligation. According to *Milnes*, if two parties enter into an agreement to buy and sell at a price to be fixed by a third party, either may withdraw from it before the price is actually fixed, even if he does so in the teeth of an express promise to the contrary<sup>3</sup>. "Upon the principle, that a fixed price was an essential ingredient in a contract of sale, the ancient Roman lawyers doubted, whether an agreement, that did not settle the price, was at all binding. Justinian's Institutes and the Code state that doubt; and resolve it by declaring, that such an agreement should be valid and complete, when and if the party to whom it was referred, should fix the price: otherwise it should be totally inoperative: 'quasi nullo Pretio Statuto'; and such clearly is the law of England"<sup>4</sup>.

An analogous dogma is said to attach to those situations in which the parties have left the price, or another essential term<sup>5</sup>, not to third-party stipulation, but to their own prospective agreement. Such "agreements to agree" are, according to *May*, similarly devoid of legal effect until the deferred term is actually articulated.

It must surely come as a surprise to many lawyers to be told that all this is the law<sup>6</sup>. Why should it be, after all? There are no doubt some, or perhaps even many, cases in which parties who defer agreement on the price, or refer it to an arbiter, mean thereby to make manifest that no binding agreement is to come into existence until the price is fixed—just as parties who stipulate

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1. (1807) 33 E.R. 574.
2. [1934] 2 K.B. 17n (H.L.).
3. See, for example, *Vickers v. Vickers* (1867) 4 Eq. 529. The qualification exists in cases of the sale of realty, that where only the price of "subordinate appendages", that is, inessential fixtures, has been left over for third-party stipulation, this is no obstacle to instant obligation: *Jackson v. Jackson* (1853) 65 E.R. 80.
4. *per* Sir William Grant M.R., (1807) 33 E.R. at pp.577-8.
5. No doubt the *Milnes* doctrine, too, extends in theory beyond price to other "essential" terms. The vast majority of cases involving it are, however, concerned with price-stipulation, so that the principle might as well be thought of as confined in practice to those situations. But see *Brown v. Gould* [1971] 2 All E.R. 1505, discussed in the text below.
6. I see that Mr. F. Graham Glover (New Law Journal, July 29, 1971, p.657) expresses no surprise; but since he commits himself to the view that the "cases in which the essentials of certainty have been considered are relatively easy to harmonise", his sanguineness is probably exceptional.

that their agreement is "subject to contract", or the like, mean usually thereby to indicate that there is to be no obligation until a formal contract is in fact executed. But so far as the latter sort of case is concerned, the courts have recognized that the employment of a formula like "subject to contract" does not necessarily have the effect of postponing obligation, and that the question is one of interpretation of all the relevant facts in each case<sup>7</sup>. Why should not the same approach be valid in cases of the former sort?

I have argued elsewhere, on the basis of a detailed examination of the authorities, that neither *Milnes* nor *May* in fact represents the present state of the law<sup>8</sup>. Two recent cases, one English, one Australian, seem to me to confirm this view. Neither, however, attacks *Milnes* or *May* directly; their challenge to these authorities is in need of exposition. I propose to do that job here.

Something may first be said, however, of the assumption, implicit in these pages, that agreements of the kind found in *Milnes* or *May* form a species properly examinable as such. The general area in which we find ourselves located is that of "uncertainty" or "indefiniteness". Is it useful, it might reasonably be asked, to look only at situations in which the parties have deliberately left terms to future stipulation, as distinct from those in which uncertainty is the result of carelessness or forgetfulness?

The point of this distinction—I have elsewhere used the phrases "advertent indefiniteness" and "inadvertent indefiniteness" to characterize it<sup>9</sup>—lies in the difference of approach to the two categories which the cases display. Only in cases of advertent indefiniteness do we come across dogmatic assertions such as those made in *Milnes* and *May*. If the situation is seen as one of indefiniteness caused, not by deliberate deferment of terms, but by inadvertent vagueness of articulation, the courts have always been willing to deal with it *on the facts*, along the line of the "subject-to-contract" cases already referred to. A very good recent illustration is afforded by *Brown v. Gould*<sup>10</sup>. A lease contained a clause providing for renewal of the term at the tenant's option "at a rent to be fixed having regard to the market value of the premises at the time of exercising this option taking into account to the advantage of the Tenant any increased value of such premises attributable to structural improvements made by the Tenant during the currency of this present lease". Counsel for the defendant reversioners argued, on originating summons taken out by the plaintiff lessee, that this clause was void for uncertainty, relying on *Milnes*<sup>11</sup>. Megarry J. adopted as his own the distinction, taken in *Milnes* itself, between

7. *Branca v. Cabarra* [1947] K.B. 854; *Masters v. Cameron* (1954) 91 C.L.R. 353. See generally, Lucke, "Arrangements preliminary to formal contracts" (1967) 3 Adel. L. Rev. 46.

8. See Ellinghaus "Agreements which defer 'essential' terms" (1971) 45 A.L.J. 4 (Part I), 72 (Part II). Since the publication of this piece I have come across a valuable American essay on *Milnes*: Note, "The Specific Performance of Appraisal Contracts—A Further Repudiation of *Milnes v. Gery*" (1947) 33 Va. L. Rev.

9. *Ibid.*, at p.5.

10. [1971] 2 All E.R. 1505.

11. It is not clear why he did not rely on *May* in the alternative; that decision being, on the face of it, quite as relevant as *Milnes*. But if he had, Megarry J's response would no doubt have been along the same lines, *mutatis mutandis*.

cases where "the parties have agreed upon a particular mode of ascertaining the price" and those where "no particular means of ascertaining the value are pointed out", as where the agreement is to sell "at a fair valuation"<sup>12</sup>. The case before him fell, so His Honour held, into the latter category, and the *Milnes* principle, which seeks to proscribe interference by the court only in those belonging to the former one, was not therefore applicable to it<sup>13</sup>. Instead, the question was simply "whether the language of the clause provides a proper formula or whether it is too uncertain to be valid"<sup>14</sup>. As to this, the bias of the court was against holding void for uncertainty any provision "intended to have business efficacy", which this was conceded to be<sup>15</sup>. "The question is not, I think, whether the clause is proof against wilful misinterpretation, but whether someone genuinely seeking to discover its meaning is able to do so. To that question I would answer Yes"<sup>16</sup>.

It will be seen that the distinction made in *Milnes*, and approved by Megarry J., corresponds in its essentials to that earlier referred to between advertent and inadvertent indefiniteness. If the parties have provided for a mode of ascertaining the missing term, either by subsequent agreement between themselves or by third-party stipulation, they have clearly deliberately postponed its determination. If, on the other hand, they have used a formula like "at a fair valuation", they will normally<sup>17</sup> think of themselves as having agreed on an objectively ascertainable quantum, leaving over only the mechanics of computation, the task of articulation of that which is already sufficiently explicit. To the extent to which the court refuses to apply the formula provided by the parties on the ground of "uncertainty", they stand convicted of inadvertence. But, as *Brown v. Gould* shows, the court will in the ordinary way be reluctant to arrive at such a judgment by what must, after all, often be an exercise in lawyer's hindsight<sup>18</sup>.

In the area of advertent indefiniteness, however, *Milnes* and *May* represent, as has been said, a less scrupulous attitude of mind, one which is not content to take each case on its facts, to exercise "reasonable goodwill"<sup>19</sup>, but which

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12. *Per* Sir William Grant M.R. (1807) 33 E.R. at p.577. Megarry J. suspected that the distinction was "not as clearly bottomed on binding decisions as it might be": [1971] 2 All E.R. at p.1510. It is true that the courts have rarely struck it so explicitly; nonetheless, their approach to problems of inadvertent indefiniteness has consistently been in terms of the facts of each case, as has been said. See, for instance, the cases cited in (1971) 45 A.L.J. at p.6, n.13.
  13. It is not clear whether His Honour is by implication to be taken as approving the *Milnes* principle when applied in the "correct" context. If so, this view would, of course, be *obiter*. Probably, however, it is not to be attributed to him: at p.1509 he speaks of the cognate *May* principle as being only "prima facie" applicable to options for renewal of a lease such as that at issue in *Lax*.
  14. *Per* Megarry J. [1971] 2 All E.R. at p.1510.
  15. *Ibid.*, at p.1507.
  16. *Ibid.*, at p.1511.
  17. It might well be, of course, that in some cases the formula adopted by the parties was not intended to serve as an objective referent, but was meant rather as a shorthand reference to third-party stipulation (or even perhaps to subsequent agreement between themselves). In *Donaldson v. Puddey* (1923) 36 W.A.R. 34, for example, the agreement was to sell stock and fittings "at valuation". The court held that this phrase meant, according to the usage of the trade, that the price was in fact to be determined by third-party valuers.
  18. *Cf.* *Greater London Council v. Connolly* [1970] 2 Q.B. 100.
  19. *Per* Megarry J. [1971] 2 All E.R. at p.1511.

insists instead on dealing in terms of iron-clad principle. The reason for this is given in *Milnes* itself:

The Court, declaring, that the one shall take, and the other shall give, a price, fixed in any other manner, does not execute any agreement of their's; but makes an agreement for them; upon a notion that it may be as advantageous as that, which they made for themselves. How can a man be forced to transfer to a stranger that confidence, which upon a subject, materially interesting to him, he has reposed in an individual of his own selection<sup>20</sup>?

Similar language is to be found in *May*<sup>21</sup>, where the "individual of his own selection" is, of course, each party himself.

I have elsewhere dealt with this argument<sup>22</sup>, and will confine myself here to the observation that justice may require enforcement of such agreements even at the cost of allowing judicial interference, for otherwise the reasonable expectation of a party may be defeated unnecessarily.

The *May* principle, to take it first, has since its enunciation sustained a series of body-blows severe enough to make one marvel why it continues to be invoked as though it were undoubted law. The clear tendency in subsequent cases has been to regard *May* as being no more than a decision that *on the facts* there before the House no concluded contract could be shown to exist. The case cannot, on that interpretation, be seen as laying down formally that there can *never* be a binding contract where an "essential" term has been left to the future agreement of the parties. In contract law the issue of formation must always be tackled and resolved in terms of fact and not of dogma; it is not the business of the courts to circumscribe the scope or variety of contractual obligation (where questions of illegality or public policy are not involved)<sup>23</sup>.

In *Kings' Motors (Oxford) Ltd. v. Lax*<sup>24</sup> the court proved to be unacquainted with this point of view. The action concerned a lease containing an option to renew for a further specified term "at such a rental as may be agreed upon between the parties hereto". Burgess V.-C. held that the clause was void for uncertainty as being "no more than a contract to enter into a contract which is always given as the classic example of an agreement which is

20. *Per* Sir William Grant M.R. (1807) 33 F.R. at p.577.

21. Especially *per* Lord Warrington of Clyffe, [1934] 2 K.B. at p.22.

22. Ellinghaus, *supra* n.8, especially at pp.7-8, 81. The argument has also been made that an undue inclination on the part of the court to "make a contract for the parties" will lead to a decline in the standards of legal draftsmanship: Adams, "Whither 'Voidness for Uncertainty'?" (1971) Law Society's Gazette 484 (Part I), 529 (Part II), at pp. 486, 531. The etiology of sloppiness, in drafting or anything else, is surely more complex than this. And, in any case, is the denial of justice to litigants the proper means for the upgrading of professional competence? Should the surgeon let the patient die in order to demonstrate the diagnostician's fallibility?

23. See *Hillas v. Arcos* (1932) 147 L.T. 503, at p.516; *Foley v. Classique Coaches* [1934] 2 K.B. 1; *British Bank for Foreign Trade Ltd. v. Novinex Ltd.* [1949] 1 K.B. 623; *F. G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.* [1967] 1 Ll.L.R. 53; in accord are the Australian cases, *Rudd v. Commissioner of Stamp Duties* [1937] 37 S.R. (N.S.W.) 366; *South Australia v. The Commonwealth* (1962) 108 C.L.R. 130.

unenforceable"<sup>24</sup>. He expressed considerable regret at having to come to such a conclusion.

Insofar as it purports to expound a general principle of contract law, this decision must, with respect, be regarded as misconceived. It so happens, however, that it is perfectly defensible as a decision relating specifically to renewal agreements of the kind before the court. There is reason for treating such agreements as constituting a category *sui generis*, exempt from general principle: a category to which (perhaps alone) the so-called rule in *May* may in fact be appropriate. In the absence of evidence to the contrary, an option of renewal runs with the land and is exercisable by an assignee of the lease<sup>25</sup>. The lessor might therefore find himself faced—if options to renew on terms to be agreed were thought enforceable—with the necessity of bargaining with a stranger. There appear to have been no previous English cases dealing with the *May* issue in the context of a lessee's option to renew, but there is Australian authority in support of the *Lax* decision<sup>26</sup>.

The recent decision in *Smith v. Morgan*<sup>27</sup> resumes the anti-*May* trend, but has about it a disturbing and unnecessary evasiveness of approach. The case really deserves a more extended analysis than is appropriate here. The plaintiff, (on originating summons) had sold land, a house, and part of a barn, to the defendant. At the same time she covenanted that she would not, for a period of five years, sell the rest of the barn, or certain other adjoining land; and that, if thereafter she should want to sell, she would give the defendant a first right to buy "at a figure to be agreed upon". The plaintiff now argued that this clause was ineffective as a mere agreement to agree under the *May* principle. The simple answer should have been that *May*, insofar as it purports to lay down an inflexible rule, is wrong in law and not in accordance with later authority, and that the question whether such an agreement is binding or not is one of fact in each case (here the intention to make a binding agreement could hardly, in view of the formality of the document and the likelihood of substantial reliance, have been seriously questioned).

Brightman J., however, preferred a less direct approach. He held that *May* was irrelevant because the clause before him was not an agreement to agree at all: "What the conveyance purports to impose is an obligation on the

24. [1969] 3 All E.R. 665.

25. *Buckland v. Papillon* (1886) 2 Ch. App. 67.

26. *Eudunda Farmers Co-operative Society v. Mattiske* [1920] S.A.L.R. 309; *Beattie v. Fine* [1925] V.L.R. 363; *Randazzo v. Goulding* [1968] Qd. R. 433; *contra, Re Nicholas and Grant's Lease* (1923) 44 A.L.T. 169. In *Lax Burgess V-C* drew on a Canadian precedent, *Young v. Van Bienen* [1953] 3 D.L.R. 702, as "a case very similar to the present one". Whether great similarity can in fact be shown to exist may, however, be doubted; in *Young* it was not only the rent which had been left over for future determination: "It is to be observed that here the option clause does not provide for renewal of the lease. The lessee is thereby given 'the first option to rent the building for an additional three-year period'. No reference is there made to the terms of the new lease, other than its duration; nor is it made to appear with any degree of certainty, that the terms of the old lease were to apply to the new." (*Per Bird J.A.*, at p.704.)

27. [1971] 2 All E.R. 1500, [1971] 1 W.L.R. 803. Australian lawyers will note that this decision, whatever its intrinsic shortcomings, as discussed in the text, constitutes the latest English refutation of the unsatisfactory principle of *Hall v. Busst* (1960) 104 C.L.R. 206.

vendor alone, that is to say, an obligation to make to the purchaser an offer for sale should the vendor wish to sell, such offer for sale to remain open for three months"<sup>28</sup>. Accordingly, the plaintiff was bound, if she wished to sell, "to make an offer to the purchaser at the price and at no more than the price at which she is, as a matter of fact, willing to sell . . . The plaintiff must, of course, act *bona fide* in defining the price to be included in the offer"<sup>29</sup>.

The decision surely went the right way, but its method of approach is hardly comprehensive enough. Suppose a different and not improbable situation involving the same sort of clause. The plaintiff wishes to sell; she has several offers. She approaches the defendant and asks whether he is minded to exercise his right of pre-emption; they need not now concern themselves with the price, which after all has been left "to be agreed upon"; she wishes only to have his firm answer whether he wants the land or no. The defendant indicates unequivocally that he intends to be the purchaser, whereupon the plaintiff turns down the other offers. And now suppose that the defendant reneges: he will not talk about price and wants to have nothing more to do with the deal. If the vendor can show loss (because, say, the market has fallen), can it be supposed that she would under such circumstances be without remedy? And yet this consequence would seem to follow if Brightman J's view be accepted that the clause imposes an obligation on the vendor alone<sup>30</sup>.

The proper interpretation of such a clause must surely be (the issue of *formation* having once been decided) that it constitutes a binding agreement to agree on a price subject to a condition precedent, namely that the purchaser, on learning of the vendor's wish to sell, exercises his right of pre-emption. Once he does he is as much bound to carry on with the bargain as is the vendor.

The precise nature of the obligations assumed by the parties under such an arrangement, that is, its content, on the articulation of which depends the resolution of the issues of *breach* and *remedy*, must vary with the circumstances. There are, I suggest, two possibilities. It may be that the parties have agreed in effect to conduct negotiations in good faith: any obligation on the part of the vendor to make a *bona fide* offer is then seen as integral to the negotiation process to which the parties stand committed. Or it may be that the parties have bound themselves to sell and buy at a "reasonable price". In terms of *remedy*, where there has been breach of a contract to negotiate, specific performance is probably inappropriate; but there seems to be no reason why damages cannot be awarded. True, since there cannot have been, in the nature of the case, any certainty that even good-faith negotiations would have resulted in agreement, the case for awarding expectation damages is seriously weakened. There is, however, no difficulty in granting reliance damages to the

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28. [1971] 1 W.L.R. at p.807.

29. *Ibid.*, at p.808.

30. It might be objected that, in the hypothetical case given, the parties have by a new process of offer and acceptance made an agreement quite independent of any covenant in the original conveyance. But such an agreement would, of course, itself be confronted with the *May* principle. And it might in any case be attacked on the ground of mistake or the like. The logical focus for attention is, therefore, the original covenant. The decision is also criticized (on other grounds, notably for making the unrealistic assumption "that the would-be seller starts off the bargaining process with some fixed and immutable selling price") by Adams, *supra* n.22, at p.485.

injured party where he can be shown to have incurred loss of that kind. If the contract is seen as involving not simply a duty to negotiate, but an obligation to agree to reasonable terms, either damages or (in otherwise suitable cases) specific performance may be awarded on the basis of a judicially determined standard of reasonability. These notions, which perhaps sound at first dangerously glib and innovatory, have been discussed and documented in some detail elsewhere<sup>31</sup>.

An essentially analogous approach is (again, contrary to received opinion) warranted in cases of the *Milnes* type, where the deferred term has been left not to the postponed agreement of the parties themselves, but to third-party stipulation in some form or other. I must refer again to previous work of my own<sup>32</sup>; no more than a summary of its conclusions is appropriate here, adhering to the three-fold categorization of issues—formation, breach, remedy—already alluded to<sup>33</sup>:

1. *Formation*. Whether an agreement leaving the price to third-party stipulation is binding *ab initio* or not is a question of fact to be decided in terms of the parties' intentions in each case.
2. *Breach*. If an agreement is found to be binding *ab initio*, questions of duty and breach may be resolved in any of the following three ways, depending on the facts:
  - (a) The parties are bound to the extent that neither may withdraw until it becomes clear that the arbiter cannot or will not act in the stipulated way; thereafter they are discharged.
  - (b) The parties are bound, on failure of the arbiter to act, to resume negotiations which must be conducted in good faith.
  - (c) The parties are bound absolutely, whether or not the arbiter acts.
3. *Remedy*. Questions of remedy may be resolved as follows:
  - (i) In case of breach of an agreement construed as belonging either to category 2 (a) or 2 (c) above, the appropriate remedies are those ordinarily applicable to a breach of contract; specific performance (where available), rescission and/or damages. Specific performance will have to be decreed, or damages awarded, in terms of a "reasonable price" fixed by the court.
  - (ii) In cases of agreements falling into category 2 (b) above, that is, in cases of refusal to negotiate in good faith, specific performance is probably inappropriate, but reliance damages may be awarded.

How are these principles to be applied to a species of agreement peculiarly modern and widely-used, that of the continuing-supply contract<sup>34</sup>—a context

31. Ellinghaus, *supra* n.8 at pp.17-20.

32. *Ibid.*, at pp.78-82.

33. Much of the confusion manifested by courts and commentators can be attributed to a failure to keep these three issues separate from each other. See Ellinghaus, *supra* n.8 at p.5.

34. This somewhat clumsy term is intended to encompass not only "requirement contracts" (of the kind in issue in the *Nudgee Bakery* case) and "output contracts"

in which, in fact, the *Milnes* principle has not so far been in issue? This question, which is surely of great commercial significance, was raised in the recent Australian case *Re Nudgee Bakery Pty. Ltd.'s Agreement*<sup>35</sup>. The facts were these. An agreement was drawn up in June 1966 by the applicant, the Nudgee Bakery Pty. Ltd., and the respondent, the Queensland Co-operative Milling Association Ltd. The Nudgee Bakery undertook that it and an associated company would, for a period of five years, buy all their requirements of flour and wheatmeal<sup>36</sup> exclusively from the respondent. The prices payable were to be "the maximum prices fixed and declared for the time being" in respect of these commodities "pursuant to the 'The Profiteering Prevention Acts 1948 to 1959' or any amendment thereof or any other Act passed in substitution therefor". In June 1966, flour and wheatmeal were "declared goods" under the legislation referred to; that is, specified maximum prices were then in operation. This continued to be the case until January 1967, when flour and wheatmeal ceased to be "declared goods". The parties nevertheless continued with their agreement; in the absence of a statutory price-structure, they accepted prices fixed from time to time by the Queensland Flour Millers' Association, that having apparently become the custom of the industry. In March 1970, however, the applicant claimed to be no longer bound to buy exclusively from the respondent, and began in fact to buy flour and wheatmeal from other sources. The applicant now sought by originating summons determination of the status of the 1966 agreement.

The precise nature of the respondent's argument on these facts does not emerge very clearly from the report. He seems to have contended, on the one hand, that the original agreement of 1966 had been effectively varied by resort to "trade practice" after 1967; on the other hand, he argued also that the 1966 agreement should in fact be understood as providing not so much for price-stipulation by a third party, but rather for the payment of "fair and reasonable prices"<sup>37</sup> and that, since prices fixed by the Queensland Flour Millers' Association after 1967 were characterizable as "fair and reasonable prices", the applicant's obligations continued unchanged.

Matthews J. in the Supreme Court rejected both contentions refusing to admit any evidence of trade practice. The agreement of June 1966 provided expressly for price determination by a third party<sup>38</sup> for which agreed-on mode

(an obviously cognate category), but any contract whatsoever under which one party has undertaken to supply the other with a commodity or services on a continuing basis over a period of time.

35. [1971] Qd. R. 24.

36. The agreement embraced other commodities as well, but these were treated as comprehended in the formula "flour and wheatmeal".

37. This somewhat tortuous argument seems to have rested on the contention that prices fixed under the Profiteering Prevention Acts were in fact "fair and reasonable prices": so much was shown, it was claimed, by the fact that simultaneously with the agreement in issue the applicant had given to the respondent, in respect of debts then owing to it, security by way of a mortgage debenture deed also containing an undertaking by Nudgee and its associate to purchase exclusively from the respondent (during the continuance of the security): *this* covenant stipulated for payment "at fair and reasonable prices".

38. Matthews J. did not *expressly* characterize the agreement in this way. That this was, however, his view of it is shown clearly by his quotation of s.12 of the Sale of Goods Act 1896 (Qd.), which deals with agreements "to sell goods on terms that



another might not be substituted. So long as this mode was defunct, that is, for as long as flour and wheatmeal continued to be exempted from the operation of the Profiteering Prevention legislation, the agreement remained "suspended and not enforceable at the suit of either party"<sup>39</sup>.

How is this decision to be regarded in terms of the suggestions concerning formation, breach, and remedy, made above?

*Formation.* At the outset it is necessary to ask: precisely in what sense was this an agreement providing for third-party stipulation at all? It will be remembered that at the time when it was made, flour and wheatmeal were already "declared goods", that is, subject to maximum prices then in a state of proclamation. The agreement was therefore one for a price *to be* stipulated only insofar as the third party in question, that is, the authority administering the Profiteering Prevention Acts, might from time to time *change* the applicable prices. As a matter of formation it could hardly be argued in these circumstances that the parties intended to postpone binding obligation until a price was fixed; the *Milnes* requirement stood satisfied and the doctrine of that case therefore had no further relevance.

Matthews J. did not, however, decide the issue in this way. In fact, neither *Milnes* nor any of its progeny had apparently been cited to the court at all (the case seems to have been somewhat perfunctorily argued). Instead, the applicant had relied on the cognate *May* principle. Matthews J. quite properly thought *that* principle to be only "indirectly" relevant<sup>40</sup>:

Because the agreement with which I am concerned itself provides for a method of fixing prices by the parties, the matters arising upon the summons involves [*sic*] but indirectly the familiar and oft [*sic*] difficult question whether the parties have a completed agreement . . . Here there was a concluded agreement . . . The case is distinguishable from those in which the price (or method of its ascertainment) is not determined by the parties<sup>41</sup> . . .

What is for our purposes important here is the implicit recognition of the view that agreements for third-party stipulation of the price are *as such* capable of binding *ab initio*. On this point the *Nudgee Bakery* case therefore figures as the most recent refutation of the *Milnes* dogma<sup>42</sup>.

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the price is to be fixed by the valuation of a third party". It is, of course, perfectly correct to classify the agreement in this way; "maximum prices fixed . . . pursuant to 'The Profiteering Prevention Acts'" might be paraphrased "maximum prices as fixed by the authority administering" that legislation.

39. [1971] Qd. R. at p.29.

40. The headnote of the report is therefore quite misleading in stating that *May* was "applied": at p.25. It compounds this error by asserting in the same breath that *Foley v. Clasique Coaches Ltd.* [1934] 2 K.B. 1, was also "applied". *Foley* and *May*, whilst both concerned with "agreements to agree", are utterly opposed in tendency.

41. [1971] Qd. R. at p.28.

42. There is, however, this worrying aspect of Matthew J's approach: it seeks to distinguish the *Milnes* type of agreement *as such* from that of *May*. Any distinction along these lines must be resisted; in both situations the question "was there obligation from the start?" ought to be dealt with pragmatically and not dogmatically.

*Breach.* Granted that the 1966 agreement was from the start a binding one, what was its precise content? What were the duties of the parties in the event (which occurred) of failure of the price-fixing process? Matthews J. held, in effect, that each party was bound to act in accordance with his undertaking so long as wheat and flour continued to be "declared goods", that is, so long as the arbiter continued to act. On his ceasing to act, however, the agreement became "suspended": neither party was any longer bound, though obligation might (by implication) revive if wheat and flour became once more "declared goods".

On the face of it, this seems a congruous solution. The categories of duty which were suggested earlier by way of giving content to agreements providing for third-party stipulation were, of course, drawn up with reference to those fact situations in which the *Milnes* principle has hitherto been in issue: that is, agreements to sell specific property transferable on a once-for-all-time basis, in which the price-fixing process was therefore to be on that basis also. The *Nudgee Bakery* case involves quite a different transaction-type, that of the continuing-supply contract. In such cases price-stipulation is prerequisite not to a single *act* of transfer, but is rather the basis of an ongoing *process* of transfer. This makes possible the notion of a "suspension" of the parties' duties as adopted by Matthews J. To take account of it, category 2(a) above might be amplified as follows:

The parties are bound to the extent that neither may withdraw until it becomes clear that the arbiter cannot or will not act in the stipulated way; thereafter they are discharged. Provided that in the case of a continuing-supply contract, where there is a possibility that the arbiter's failure to act is only temporary, the parties' duties may be regarded either as discharged or as suspended until such time as the arbiter resumes his function.

It will be noted that, so far as continuing-supply contracts are concerned, discharge is retained as an alternative to suspension in all cases<sup>43</sup>. Matthews J. should not, it is submitted, be taken to have put forward "suspension" as the *only solution in such cases*. His decision should be understood as an interpretation of the particular facts before him, and of the parties' intentions as disclosed by those facts.

This leaves open as well the possibility that categories 2(b) and 2(c) above may also be applied to continuing-supply contracts where the situation warrants it. In fact, it might very plausibly be argued that these two categories, by *preventing* the immediate cessation or suspension of obligation on failure of the price-fixing process, are more in tune with the realities of the continuing-supply context. To take them in reverse order:

A. 2(c) The parties are bound absolutely, whether or not the arbiter acts.

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43. The various Goods Acts seem to provide *only* for discharge: if the "third party cannot or does not make such valuation the agreement is *avoided*" (my emphasis). They are, however, best thought of as not addressing themselves to the continuing-supply situation at all, but as confined rather to the one-time transfer of specific chattels. That, at any rate, must have been Matthew J's view, since he decided on "suspension" after demonstrating his awareness of s.12 of the Queensland act by quoting it.

This would seem in many continuing-supply situations to be the most appropriate interpretation. The very purpose of providing for the continuing supply of goods over a stated period of time will in most cases, after all, be that of stabilizing demand and supply so as to safeguard a substantial capital outlay. If the parties assume that the price-fixing process will be stable also, so that its cessation comes as an unexpected blow, there seems to be no good reason why the court should not step in and fix a "reasonable price", so as to prevent one party from taking advantage of a "windfall" by withdrawing from the agreement. That is what the Court of Appeal did, in a continuing-supply case involving the cognate *May* principle, *F. G. Sykes (Wessex) Ltd. v. Fine Fare Ltd.*<sup>44</sup>

Such an approach is particularly valid where the contract has been on foot for some time:

In a commercial agreement the further the parties have gone on with their contract the more ready are the Courts to imply any reasonable term so as to give effect to their intentions. When much has been done the Courts will do their best not to destroy the bargain. When nothing has been done, it is easier to say there is no agreement between the parties because the essential terms have not been agreed. But when an agreement has been acted upon and the parties . . . have been put to great expense in implementing it, we ought to imply all reasonable terms so as to avoid any uncertainties<sup>45</sup>.

- B. 2(b) The parties are bound, on failure of the arbiter to act, to resume negotiations which must be conducted in good faith.

It is difficult to see why such a duty to resume negotiations should not be regarded as minimal where the cessation of price-stipulation was not at the time of contracting foreseen by the parties. Of course, the "good faith" standard may in some instances cause real difficulty, but this has not prevented its application in the United States<sup>46</sup>.

Had the parties in the *Nudgee Bakery* case not in fact renegotiated their bargain? For over three years after the cessation of the price-stipulation process originally provided for they continued to trade, on the basis of prices supplied by a substituted agency, the Queensland Flour Millers' Association. The natural inference is that a new bargain had been struck, in substitution for or variation of the old<sup>47</sup>. The report of the case gives no real inkling as to why this view of the facts was not adopted by Matthews J.

To opt either for category 2(b) or for 2(c) is of course, apt to lead at once to the airing of a jurisprudential cliché of ancient lineage. It was voiced in the present case itself: "To do so, would be to compel (one party) to abide

44. [1967] 1 L.L.R. 53.

45. *Ibid.*, at pp.57-8.

46. Primarily in the field of labour relations: see Cox, "The duty to bargain in good faith" (1958) 71 Harv. L. Rev. 1401. A convincing attempt to apply the notion to all contracts generally is made by Knapp, "Enforcing the contract to bargain", (1969) 44 N.Y. Univ. L. Rev. 673.

47. *Cf. British Bank of Foreign Trade v. Novinex Ltd.*, [1949] 1 K.B. 623.

by terms to which it had not agreed"<sup>48</sup>. In a case, however, where the failure of the price-fixing process was not foreseen by the parties, no more pointless objection can be imagined. Since the event was unbargained for and not the subject of agreement at all, it might equally well be said that *not* to do so, but to hold that the agreement is discharged or suspended, is to subject the *other* party to terms to which it had not agreed. The truth is that in a case where the parties are confronted by events which neither foresaw and which were not, therefore, adverted to, the only possible method is to ask, either, "what would they have agreed on had they foreseen the event?", or, preferably (so as to avoid the heady aridities of such speculation), "what does justice require?"

*Remedy.* Two points relating specifically to the continuing-supply context may very briefly be made under this heading:

(a) Where specific performance is decreed (as it will not be, of course, in most cases of the sale of goods), on the basis of a reasonable price fixed by the court, provision might be made, where appropriate, for the review of that price from time to time.

(b) Where damages are awarded, the court will of course have to make a one-time estimate of the "reasonable price" as a basis for quantification. This may be difficult in situations where the contract was scheduled to run for a period of years and where fluctuations of price during that period were contemplated. Nonetheless the court should not on account of such difficulty refrain from the task. A wholly analogous one was accomplished in the *Sykes* case. There a contract for the continuing supply of chickens, in numbers to be agreed on from time to time, had been repudiated by the buyer after one and a half of the five years stipulated for had expired, and before he had built a processing factory as originally contemplated. The court awarded damages; Lord Denning said this as to the method of their computation:

In assessing the damages the arbitrator, or whoever has that task, has to ask himself this question: Suppose this agreement had been fulfilled and the factory had been built in accordance with the contemplated plans . . . and there had been no agreement as to the figures. In those circumstances what would be the reasonable number of unprocessed birds which would be required by Fine Fare, on the one hand, and supplied by Sykes . . . on the other hand? This question will have to be answered having regard to the probabilities<sup>49</sup>.

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48. [1971] Qd. R. at p.28. This is, of course, the argument put in *Milnes* and already referred to, text accompanying notes 20-22, *supra*.

49. [1967] 1 L.L.R. at p.58.