Neutral Citation No. [2006] NICh 2 | *Ref:* **CAMC5538**

Judgment: approved by the Court for handing down | *Delivered:* **12/06/2006**

(subject to editorial corrections)

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

CHANCERY DIVISION

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BETWEEN:

SEYMOUR SWEENEY

Plaintiff;

and

LAGAN DEVELOPMENTS LIMITED
SEAMUS McCLOY
JOHN WALKER
THOMAS WILSON

Defendants.

_____

CAMPBELL LJ

[1] The summons before the court contains four questions for determination concerning a document dated 5 May 2004 and entitled "Consortium Agreement". The questions are:

a) Does the document constitute a legally binding agreement?

b) Is the Consortium Agreement void for uncertainty and/or incomplete?

c) Is the validity of the Consortium Agreement affected by the fact that John Walker, the third named defendant, did not sign or execute it?

d) Is the validity of the Consortium Agreement affected by the fact that Thomas Wilson, the fourth named defendant, has purported to withdraw from the consortium?

The background

[2] In February 1970 a large area of land at Ballee in County Antrim was acquired compulsorily for a road improvement scheme. Later 96 acres of this land became superfluous and in 2003 the Department of Social Development

placed it on the market for sale by way of public auction. John Walker, the third defendant, and Seymour Sweeney, the plaintiff in these proceedings, decided to form a consortium with others to purchase this land.

[3] During November 2003 Mr Walker and Mr Sweeney entered into contracts with a number of the former owners of the land who claimed to be entitled to a right of pre-emption. These contracts were intended to provide support for the pre-owners in establishing this right and in return they were to exercise their rights and sell the land to Messrs Walker and Sweeney for the consideration they had agreed with the Department plus 10%. In addition Messrs Walker and Sweeney agreed to pay all reasonable costs incurred by the former owners in relation to the transaction. An application for judicial review was brought before the High Court in which Mr Sweeney and Mr Walker sought to assist to enforce the previous owners' claim to a right of pre-emption.

[4] According to Mr Walker as a result of his efforts four other developers indicated that they were prepared to join Mr Sweeney and himself in the consortium. He claims that agreement was reached verbally between all of the members of the consortium and that solicitors were then instructed to record in writing the terms of their agreement. Mr Sweeney claims that the solicitors were instructed to draw up a draft agreement for consideration by those who were intending to form the consortium. At the end of April 2004 the agreement had not been executed by all the parties and a deadline was set for noon on 5 May 2004. The four signatories to the agreement were;

(a) Lagan Developments Limited (" Lagan"),
(b) Seamus Mc Cloy,
(c) Seymour Sweeney,
(d) Thomas Wilson,

Two others who had shown interest in the consortium had not signed and they were Mr B.J. Eastwood who decided later not to become a member and Mr John Walker.

[5] On the instructions of Mr Sweeney the solicitors to the consortium wrote to Mr Walker on 16 September 2004 informing him that as he had failed to sign the agreement he could not be considered to be a member of the consortium. The other members of the consortium did not in agree with this statement and on 27 September 2004 the solicitors withdrew their letter of 16 September.

[6] By a letter of 17 December 2004 solicitors acting for Mr Thomas Wilson questioned "the existence or validity of the Consortium Agreement" and went on to say that as their client had become disillusioned generally by the

disputes that had arisen they were giving notice of their client's withdrawal from the consortium (to the extent that it could be said to exist).

[7] At this stage the solicitors to the consortium advised that there were three possible courses now open;

(i) To treat the letter as effective and to continue the consortium, amending the participation levels as had been done when Mr Eastwood decided not to become a member.

(ii) To disband the consortium,

(iii) To refuse to accept Mr Wilson's resignation and inform him that he was still a member of the consortium.

[8] The solicitors explained that option (i) required agreement from each of the remaining members and as there was no mechanism for a member's departure the agreement would have to be varied, as previously, with the consent of each member. Option (ii) only required an arrangement for disengagement. As the consortium document was never intended to be a final document and elements of it formed no more that an agreement to agree it would be unenforceable so option (iii) was not available.

[9] As appears from the ensuing correspondence Mr Sweeney was of the view that the consortium did not exist legally and he made it clear that if it did exist he did not consent to the redistribution of Mr Wilson's shares. Messrs McCloy, Lagan and Walker were prepared to agree to a pro rata redistribution of the shares, as had happened when Mr Eastwood withdrew. A meeting took place on 7 March 2005 when it was confirmed that Mr Wilson had irrevocably departed from any consortium. Because of the disagreement between Mr Sweeney and the other parties present at the meeting as to: the status of the agreement, the membership of any consortium, and assuming that there was a legally binding agreement, how the shares of Mr Wilson should be redistributed, it was decided to seek a determination by the court.

[10] Mr Walker and the other defendants wished the Court to consider the nature of the entire relationship between the parties including any pre-existing oral agreement. They applied to the Chancery Judge to have the summons converted into an action and he decided that there was sufficient to allow the summons to proceed to a hearing but left open the possibility of a trial with oral evidence if this proves necessary. It was accepted by the defendants through counsel that the terms of the oral agreement on which they relied were reflected in the Consortium Agreement.

The Consortium Agreement

[11] As this agreement is at the centre of the application it is necessary to set out the substance of it.

> "2. **BACKGROUND**
>
> 2.1 The Parties hereto have formed a consortium to negotiate and purchase or bid for and pre-develop the Property.
>
> 2.2 The Parties wish to record their agreement to work together on the terms set out in the Consortium Agreement.
>
> 3. **DEFINITIONS**
>
> 3.1 In this Consortium Agreement unless the context otherwise requires the following expressions shall have the following meanings:
>
> 'Agreed Proportions" the respective proportions of the issued ordinary shares to be held by the Parties in the Company as set out in clause 7.4:
>
> "Application" shall mean the application under the "Crichel Downs" principle for the right of the Pre-Owners to sell the Property;
>
> | | |
> |---|---|
> | "the Auction" | the auction at which the Bid is to be made; |
> | "the Auction Contract" | shall mean the contact to be entered into between the Company and the Department of Social Development for the purchase of the Property if the Bid is successful; |
> | "Auction Vendor" | means the Department of Social Development the vendor of the Property if the Bid is successful |
> | "the Bid" | The Bid for the Property at the Auction |

"the Company"	Sarcon (No [ ]) Limited
"the Consortium"	the Parties hereto acting in joint venture (not in partnership) for the purpose of this Consortium Agreement;
"Covenantors"	means each of B J Eastwood, Kevin Lagan, Seamus McCloy, Seymour H Sweeney, R John Walker Snr and Thomas Wilson;
Nominated Bidder"	means such person as is agreed between the Consortium members;
"Parties"	means the parties set out at clause 1 above;
"Pre- Owners"	means the former owners (or descendants thereof) being the persons entitled to make the "Crichel Downs" application in respect of the Property namely John Mairs, Mary Wilson, Irene Wilson, Doreen A Smyrell, William McQuitty and Messrs George J, Alan and Robert Eagleson;
"the Pre-Owners Contracts"	shall mean the contracts to be entered into between Sweeney and Walker and the Pre-Owners for the purchase of the Property if the Application is successful;
"the Pre-Owners DSD"	shall mean the contracts to be entered into between the Pre-Owners and the Department of Social Development for the purchase of the Property if the Application is successful;
"the Property"	if the Bid is successful 96 acres of land at Ballee Road East Ballymena or if the Application is

	successful such property as is agreed to be transferred in the Pre –Owners Contracts.
"Project"	the purchase and pre-development of the Property to the point of obtaining viable planning permission for the Property;
"the Project Manager"	Sweeney or, if so nominated by Sweeney, Seaport Investments, Limited;
"Shareholders Agreement "	shall mean the agreement to be entered into between the Parties hereto regulating their relationship as Shareholders in the Company and including without limitation the matters contained in clauses 9,10 and 11 herein

Any reference to a person being an **"Associate"** of another shall be interpreted in accordance with Article 4 of the Insolvency (Northern Ireland) Order 1989, and, in addition, without limiting the generality of the foregoing, a person shall be regarded as "associated "with any person who is an associate of his and with any company of which any director is an associate of his.

4. **EXCLUSIVITY**

4.1. In recognition of the investment of resources and funds which the Covenantors and the Company will be required to make, the commitment necessary from the Covenantors in respect of the Bid and the Application for the benefit of each of the Covenantors and the Company and the confidential nature of the information regarding the making of the Bid and the Application, each of the Covenantors hereby agrees and undertakes that neither he nor any of his Associates shall either alone or jointly with others in any way participate in or be associated with or support any consortium or other entity pursuing the

purchase of the Property, or the realisation of the Project and each of the Covenantors further agrees that this clause shall take effect and be binding upon each of them whether or not the Bid or the Application is successful.

4.2. It is agreed that this clause 4 shall survive termination of this Agreement for whatever reason.

5. **BID**

5.1. The Parties shall agree the details and formulation of the Bid prior to same being made and shall authorise the Nominated Bidder to implement same on their behalf. The Parties agree that the Nominated Bidder shall have authority to make the Bid on behalf of the Company up to such amount as is agreed between the Consortium members acting unanimously.

5.2. In the event of the Bid being successful Walker will pay the deposit on behalf of the Company in consideration of the remaining Parties paying sufficient funds to the Company to enable the Company to reimburse Walker 83.3% of the deposit, in the event that finance is not available from a third party funder within 14 days of the payment of the deposit.

6. **APPLICATION**

6.1. Each Party hereby undertakes and agrees to contribute to the Company in the Agreed Proportions (by way of subscription for equity or loan) such amount as is necessary to reimburse the Pre-Owners for the costs of the Application and the Company agrees to pay the costs of the Application to the Pre-Owners on production of such evidence as to the amount of same as the Company in its absolute discretion deems to be reasonable. For the avoidance of doubt it is agreed that such costs shall be payable whether or not the Application is successful.

6.2. If the Application is successful Sweeney and Walker shall, subject to the Pre-Owners DSD Contracts being completed nominate the Company as the Purchaser in each of the Pre-Owners Contracts.

7. CAPITAL, FUNDING AND DISTRIBUTION

7.1. It being the intention that the, Company shall borrow 80% of the purchase price for the Property from a third party funder each Party hereby undertakes and agrees to contribute to the Company in the Agreed Proportions (by way of subscription for equity or loan) such amount as is necessary to complete the purchase of the Property being not less than 20% of the purchase price.

7.2. Subject to clause 7.1 it is the intention of the Parties that the Company should be self-financing and should obtain additional funds from third parties without recourse to its shareholders.

7.3 Subject to clause 7.2, in the event that such third party funding is not available each Party undertakes to provide sufficient funds to the Company to enable the Company:

7.3.1. to meet all costs incurred by the Company, including but not limited to costs in respect of the Bid and the Application, the negotiation of the Auction Contract and the Pre-Owners Contracts and the realization of the Project (for the avoidance of doubt to include all fees due to the Project Manager)

7.3.2. to meet the costs (including interest and bank fees) of servicing the borrowing

necessary to purchase the Property;

all such funds to be contributed in the Agreed Proportions.

7.4. The equity of the Company shall be held as follows.

7.4.1. If the Bid is successful;

	%
(a) Eastwood	16.66
(b) Lagan	16.66
(c) McCloy	16.66
(d) Sweeney	16.66
(e) Walker	16.66
(f) Wilson	16.66
Total	100

7.4.2. If the Application is successful;

	%
(a) Eastwood	20
(b) Lagan/McCloy	20
(c) Sweeney	20
(d) Walker	20
(e) Wilson	20
Total	100

7.5. It has been agreed by the Parties that any profits of the Company shall be divided in the Agreed Proportions following payment of expenses (for the avoidance of doubt including, but not limited to, the payment of fees and expenses to the Project Manager in respect of the management of the Project).

7.6. The Parties shall be jointly and severally liable for the fees incurred by or on behalf of the Company, the consortium (or any of the Parties) payable to Millar McCall & Wylie and/or Carson McDowell. For the avoidance of doubt it is agreed that such fees shall be payable whether or not the Bid or the Application is successful. As between themselves the Parties shall bear the

aggregate amount of any such costs, incurred by them pursuant to this clause 11 in the Agreed Proportions and each Party shall indemnify the others accordingly.

8. ACTIVITIES OF THE CONSORTIUM

8.1. During the term of this Consortium Agreement the business of the Consortium shall be the Bid and/or the Application the preparation and negotiation of the terms of the Auction Contract or the Pre-Owners Contracts and the realisation of the Project.

8.2. The business of the Consortium as set out above shall be managed by the Project Manager who shall be paid a fee of £50,000 (paid annually for each year or part thereof) together with expenses (which expenses shall include fees of £25,000 (paid annually for each year or part thereof) for Mr John Walker junior as assistant project manager). The Fees of the Project Manager and the assistant project manager to be increased each year in line with inflation.

8.3. Save for the Project Manager in his capacity as Project Manager no Party shall act independently in relation to the Bid, the Application or the Project without first consulting the other Parties and in any and all dealings, in particular with the Auction Vendor and the Pre-Owners but not limited thereto, it shall first be made clear (in writing) to the party with whom dealings are taking place that for any agreement with the Company to be binding it shall require written consent of all the Parties hereto.

8.4. The preparation and negotiation of the Auction Contract or the Pro-Owners Contracts shall be under the control and direction of the Project Manager.

8.5. The Project Manager shall co-ordinate and administer the affairs of the Company in

relation to the Project subject to the overriding authority and control of the Parties.

8.6. The Parties shall meet at intervals to be agreed or when requested to do so in writing or by phone by any one of them.

8.7. The Parties agree that the Project Manager shall appoint appropriate professionals to enable the Company to obtain valid planning permission for the Property.

9. SUCCESSFUL BID OR APPLICATION

9.1. On the Bid being accepted by the Auction Vendor or the Application being successful the Parties shall (conditional on the Auction Contract being entered into or the Pre-Owners Contracts being completed in favour of the Company) enter into negotiations in good faith and with all due diligence to enable the following matters to be completed:-

9.1.1. execution of the Shareholders Agreement

9.1.2. the appropriate steps to be taken to ensure that the Company adopts Memorandum and Articles of Association in a form agreed by the Parties

9.1.3. the putting in place of the appropriate resources, both human and material, including, without limitation, the appointment of the Directors and Chairman of the Company (to be set out in the Shareholders Agreement,) to enable the Company to properly carry out its business

9.1.4. the putting in place, where appropriate by: execution, financing agreements, guarantees, bonds and insurances which are required and agreed by the parties under the Shareholders Agreement to enable the Company to meet its obligations, including but not limited to those incurred under the Auction Contract or the Pre-Owners Contracts

9.1.5. taking up and paying for all shares in the Company in accordance with the Shareholders Agreement and the Memorandum and Articles of Association and

9.1.6. paying into the Company by way of loan or otherwise all monies which are agreed under the Shareholders Agreement the Parties shall also pay

9.2. Each of the Parties undertakes that from the time at which the Bid is accepted or the Application is successful each Party shall with due diligence and good faith, notwithstanding any other terms in this Agreement, use its best endeavours to comply with its obligations under sub-clause 9.1.

9.3. Notwithstanding any other terms of this Agreement (but subject to the Terms of clause 13) if any Party is in breach of the undertaking set out in clause 9 hereof or in material breach of any other provision of this agreement ('the Defaulting Party") such Party shall (subject to clause 12) indemnify each of the other Parties against all loss and damage, including any costs and expenses

incidental thereto which shall arise out of any such breach

9.4. It is agreed between the Parties that, subject to the consent of the other Parties (not to be unreasonably withheld or delayed), each has the right to appoint or nominate a limited company to be the party to the Shareholders Agreement and undertake that Party's obligations hereunder and thereunder.

10. BOARD AND MANAGEMENT

10.1. Overall management and supervision of the Company shall be the responsibility of the Board of Directors of the Company Each party shall appoint one director to the board and each director shall have equal voting rights the chairman of the board will not have a casting vote. A quorum shall require at least one director appointed by each Party.

10.2. Appointments and removals of senior management shall be a matter for the Parties.

10.3. Certain key decisions affecting the Company shall be reserved for mutual agreement between the Parties as shareholders Final identification of these matters will be for the Shareholders Agreement but they are likely to include.

10.3.1 the Company engaging in any business whatsoever other than the Project or matters in relation thereto,

10.3.2 making or terminating any material contract,

10.3.3 major asset or business acquisitions/disposals,

10.3.4 appointment/removal of the chief executive and other senior management,

10.3.5 capital expenditure at a level to be agreed,

10.3.6 borrowing exceeding a level to be agreed,

10.3.7 approval of the annual budget,

10.3.8 material dealings between the Company and the Shareholders,

10.3.9 changes in dividend policy,

10.3.10 appointment/removal of the auditors

11. SHAREHOLDERS AGREEMENT

11.1 The Shareholders Agreement shall include appropriate provisions in respect of the following matters.

11.1.1 dividend policy (the Company shall, subject to applicable law and regulation, adopt a maximum distribution policy unless otherwise agreed by the Parties, however the Parties intend that the joint venture should have regard to its internal operation, cash-flow and funding requirement),

11.1.2 the auditors of the Company,

11.1. 3 the financial year of the Company,

11.1.4 monthly management accounts to be produced in respect of the operation of the Company and made available to the directors and the shareholders

(together with such additional financial information as they may from time to time require),

11.1.5 each party to have pre-emption rights if any other party wishes to transfer its shares in the Company (which, save for intra-group transfers, shall not be permitted for the initial period of 5 years, unless viable planning permission for the Property is obtained earlier or the Parties agree that the Property is commercially viable earlier),

11.1.6 appropriate undertakings to be given by the Parties not to compete with the business of the Company,

11.1. 7 dead-lock and dispute resolution

11.2 If any Party is in breach of the provisions of the Shareholders Agreement(the Defaulting Party') such Party shall forfeit its shares (which the remaining parties shall acquire pro-rata) and any rights to participate in any profits and indemnify each of the other Parties against all loss and damage, including any costs and expenses incidental thereto which shall arise out of any such breach

12. CONSEQUENTIAL LOSS

12.1 Save as specifically agreed in this Agreement, the Shareholders Agreement or as otherwise agreed in writing no Party shall be liable to the other Parties for any additional cost, expense or loss arising from any breach of this Agreement, howsoever caused other than for any additional cost, expense or loss directly resulting from such breach and which at the date hereof was reasonably foreseeable and not unlikely to occur in the ordinary course of events arising from such breach.

13. CONFIDENTIALITY AND ANNOUNCEMENTS

13.1 Each of the Parties shall keep confidential and shall not disclose to any other person and shall not use for any purpose except the purposes of the Consortium, any information obtained from any other Party as a result of negotiation entering into or implementing the business of the Consortium other than information which:

13.1.1 is required to be disclosed by operation of law or any binding judgment or order, or any requirement of a competent authority or any stock exchange regulations,

13.1.2 is reasonably required to be disclosed in confidence to a Party's professional adviser for use in connection with the business of the Consortium and/or matters contemplated herein

13.1.3 is or becomes information in the public domain (otherwise than through the default of a recipient Party)

13.2 No public announcement or press release in connection with the subject matter of this Consortium Agreement shall be made or issued without the prior written approval of each of the Parties, except such as may be required by law or by any stock exchange or by any governmental authority.

13.3 It is agreed that this clause 13 shall survive termination of this Agreement for whatever reason.

14. ASSIGNMENT OR TRANSFER

14.1 Each Party may assign or transfer its rights and obligation under this Consortium Agreement only with the unanimous prior written consent of the other Parties.

15. NATURE OF AGREEMENT

15.1 This Consortium Agreement relates only to the Bid the Application, and the Project and shall not constitute any Party to it as the agent of any other Party nor shall it constitute a partnership or an agreement to form a partnership or agency agreement between the Parties to it.

16. NOTICES

16.1 Any notice under this Agreement shall be in writing and signed by or on behalf of the Party giving it.

16.2 Any such notice may be served by leaving it or sending it by first class post at or to the address set out at clause 1 above,

16.3 Any notice so served by post shall (unless the contrary is proved) be deemed to have been served 48 hours from the time of posting and in proving such service it shall be sufficient to prove that the notice was properly addressed and was posted in accordance with sub-clause 16.2 above.

17. INVALIDITY AND SEVERANCE

17.1 If any provision of this agreement (and in particular any of clauses 9.1, 10 and 11 above which the Parties agree and acknowledge are not enforceable) shall be found by any court or administrative body of competent jurisdiction to be invalid or unenforceable, such invalidity or unenforceability shall not affect the other

provisions of this agreement which shall remain in full force and effect.

17.2 If any provision of this agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted, the provision in question shall apply with such modification(s) as may be necessary to make it valid.

18. **COUNTERPARTS**

18.1 This Agreement may be executed in one or more counterparts and when a counterpart has been executed by each Party hereto all such counterpart taken together shall for all purposes constitute one and the same Agreement binding on all of the Parties hereto.

19. **GOVERNING LAW**

19.1 This Consortium Agreement shall be governed by Northern Irish law and the Parties hereby submit to the jurisdiction of the Courts of Northern Ireland.

20. **NATURE OF AGREEMENT**

20.1 For the avoidance of doubt and in consideration of the mutual covenants and undertakings herein it is agreed that clauses 4, 5.2, 6, 7, 8, 10, and 12 to 19 (inclusive) are intended to be legally binding, and shall so bind the Parties."

[12] It will have been observed that in clause 17.1 the parties agree and acknowledge that clauses 9.1, 10 and 11 are not enforceable and in clause 20.1 it is agreed that clauses 4, 5.2, 6, 7, 10 and 12 to 19 (inclusive) are intended to be legally binding. The remainder of clause 9 is not referred to in clause 20.1 raising a question about the effect of clause 9 other than 9.1.

[13] Lord Dunedin in the well-known passage in *May v Butcher Limited v R* [1934] 2 KB. 17 said at page 21:

> "To be a good contract there must be a concluded bargain, and a concluded contract is one which settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. Of course it may leave something which still has to be determined, but then that determination must be a determination which does not depend on agreement between the parties."

[14] The court has to review what the parties said and did and from this infer whether the parties' objective intentions, as expressed to each other, were to enter into a binding contract.

[15] In certain circumstances the court may find it possible to supply what is lacking, for example what is a fair and reasonable specification with the assistance of an expert (*Hillas & Co Ltd. v Arcos Ltd.*(1932) 147 LT. 503) or a fair and reasonable price (*Foley v Classique Coaches Ltd* [1934] 2KB. 1).

[16] The law recognizes that there are situations in which the parties reach agreement without intending to enter into legal relations. In social and family matters this intention is readily implied while in business matters the opposite result would normally follow – *Rose and Frank Co v J R Crompton & Bros Ltd* [1923] 2 KB. at 288 per Scrutton LJ. If a declaration is made that an agreement is not intended to be binding in law, as with other unambiguous statements of intent, it will be accepted by the courts – *Jones v Vernon's Pools* [1938] 2 All. ER. 626

The issues

[17] *Is there a binding agreement?*

Mr Stephens QC submitted on behalf of Mr Sweeney that the two major objectives in paragraph 2.1 "to negotiate and purchase or bid for and pre-develop the Property" and the method by which they are to be achieved must be certain and clear otherwise the agreement is unenforceable. The entire agreement is predicated, he argued, on the existence of the company. The agreed proportions of the parties to the agreement are to take the form of ordinary shares in the company. It is the company that is to make the bid (clause 5.1) and to pay the costs of the application (clause 6.1) and if the application is successful it is the company which is to be nominated as the purchaser in each of the pre-owner contracts (clause 6.2). The auction contract or the pre-owners contracts are to be completed in favour of the company (clause 9.1) and the company is to borrow 80% of the purchase price of the property from a third party funder (clause 7.1). However, clauses 9.1, 10 and 11 which are stated in clause 17.1 to be not enforceable are essential to the

working of the agreement as they provide for the constitution and governance of the company which does not presently exist.

[18] Clause 5.1, Mr Stephens argued, is at the core of the venture and provides for the nominated bidder to make the bid on behalf of the company and to do so "up to such amount as is agreed between the Consortium members acting unanimously". This, he submitted, is nothing more than an agreement to agree.

[19] Mr Shaw QC contended on behalf of the defendants that the entire agreement is predicated not on the existence of the company as suggested, but on the agreement of the members of the consortium to act in concert in relation to the purchase of the lands on the basis of an agreed share of the profits and expenses. He submitted that the company should be regarded as no more than the vehicle for the implementation of the agreement and not fundamental to it as it remains open to the parties to implement the agreement in a different way.

[20] Secondly, Mr Shaw referred to clause 17.2 of the agreement which provides:

> "If any provision of this agreement is so found to be invalid or unenforceable but would be valid or enforceable if some part of the provision were deleted the provision in question shall apply with such modification as may be necessary to make it valid."

If this clause is employed it is possible, he suggested, to excise the company from the agreement and to find a legally binding agreement between the plaintiff and the defendants. Lastly he submitted that to say that the agreement is nothing more than an agreement to agree flies in the face of the wording of clause 20.1.

[21] The document provides that the objective of the parties is to purchase the land which is identified and to bring it to stage where viable planning permission has been obtained. They have also agreed the shares that the remaining parties are to hold. Under clause 5.1 they are to agree the details and formulation of the bid which the nominated bidder is to make on behalf of the company and the bid is to be up to such amount as is agreed between the consortium members, acting unanimously. This latter requirement, in my view, presents a difficulty for the defendants.

[22] In *Little v Courage Limited* 70 P.& C.R. 469 Millett L.J. said at page;

> "Unlike some systems of law, English law refuses to recognise a pre-contractual duty to negotiate in good

> faith, and will neither enforce such a duty when it is expressly agreed nor imply it when it is not: See *Walford v Miles* [1992] 2 AC 128, 138 . The reason why such a term cannot be implied was explained by Lord Ackner :
>
> The reason why an agreement to negotiate, like an agreement to agree, is unenforceable, is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavours […] A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party […] While negotiations are in existence either party is free to withdraw from those negotiations at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a "proper reason" to withdraw. Accordingly a bare agreement to negotiate has no legal content."

[23] In *Courtney & Fairburn Ltd v Tolaini Brothers (Hotels) Ltd.* [1975] 1WLR 297 Lord Denning MR said at page 301-302:

> "If the law does not recognise a contract to enter into a contract (where 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 …It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law…I think we must apply the general principle that where there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract."

[24] *Mallozzi v Carapelli S.p.A* [1976] 1Lloyd's Rep. 407 is a case where a contract for the sale of grain contained a clause which provided:

> "C.i.f. free out one safe port west coast Italy – excluding Genoa. First or second port to be agreed between sellers and buyers on the ship passing the Straits of Gibraltar."

The Court of Appeal held that it was impossible to say that the provision in the contract was legally enforceable, or that there was any legally binding obligation to negotiate. At page 414 Roskill LJ said:

> "One has to look at this clause and see whether or not, on its true construction, in the context in which it appears in this contract, it is susceptible of being an enforceable provision a failure to comply with which will sound in damages, whether nominal or substantial. Looking at this clause, I do not think it is susceptible of legal enforcement, and for this reason: it simply provides that the parties *may* agree on first or second port. It does not provide that they *must*; and in the absence of agreement it is not legally enforceable."

[25] In the instant case there is no enforceable obligation on any of the parties to agree the amount that the nominated bidder is to be authorised to bid on behalf of the company. In the absence of a unanimous agreement it would be impossible for the court to supply the figure for the authorised bid. The fact that this clause is unenforceable does not, by virtue of clause 17, affect the other provisions of the agreement and they remain in full force and effect.

[26] The first objective of the agreement in clause 2(1) is to negotiate and purchase the land. If this method is enforceable and succeeds then there will be no requirement to achieve the objective by the alternative method of making a bid.

[27] In clause 17.1 it is stated that the parties agree and acknowledge that clause 9.1, 10 and 11 are not enforceable. As noted earlier clause 9.1 makes provision for the parties entering into negotiations in good faith and with all due diligence to take a number of steps that include agreeing the form of the memorandum and articles of association and other matters.

[28] The principles to be applied in deciding whether the agreement is incomplete because these matters require further agreement were summarized by Lloyd LJ in *Pagnan Spa v Feed Products* [1987] 2 Lloyd's Rep. 601 at 619 as follows:

> "(1) In order to determine whether a contract has been concluded in the course of correspondence, one must first look to the correspondence as a whole (see *Hussey v. Horne-Payne*).
>
> (2) Even if the parties have reached agreement on all the terms of the proposed contract, nevertheless they may intend that the contract shall not become binding until some further condition has been fulfilled. That is the ordinary "subject to contract" case.

(3) Alternatively, they may intend that the contract shall not become binding until some further term or terms have been agreed; see *Love and Stewart v. Instone*, where the parties failed to agree the intended strike clause, and *Hussey v. Horne-Payne*, where Lord Selborne said at p. 323:

. . . The observation has often been made, that a contract established by letters may sometimes bind parties who, when they wrote those letters, did not imagine that they were finally settling the terms of the agreement by which they were to be bound; and it appears to me that no such contract ought to be held established, even by letters which would otherwise be sufficient for the purpose, if it is clear, upon the facts, that there were other conditions of the intended contract, beyond and besides those expressed in the letters, which were still in a state of negotiation only, and without the settlement of which the parties had no idea of concluding any agreement.

(4) Conversely, the parties may intend to be bound forthwith even though there are further terms still to be agreed or some further formality to be fulfilled (see *Love and Stewart v. Instone* per Lord Loreburn at p. 476).

(5) If the parties fail to reach agreement on such further terms, the existing contract is not invalidated unless the failure to reach agreement on such further terms renders the contract as a whole unworkable or void for uncertainty.

(6) It is sometimes said that the parties must agree on the essential terms and that it is only matters of detail which can be left over. This may be misleading, since the word "essential" in that context is ambiguous. If by "essential" one means a term without which the contract cannot be enforced then the statement is true: the law cannot enforce an incomplete contract. If by "essential" one means a term which the parties have agreed to be essential for the formation of a binding contract, then the statement is tautologous. If by "essential" one means only a term which the Court regards as important as opposed to a term which the

> Court regards as less important or a matter of detail, the statement is untrue. It is for the parties to decide whether they wish to be bound and, if so, by what terms, whether important or unimportant. It is the parties who are, in the memorable phrase coined by the Judge, "the masters of their contractual fate". Of course the more important the term is the less likely it is that the parties will have left it for future decision. But there is no legal obstacle which stands in the way of the parties agreeing to be bound now while deferring important matters to be agreed later. It happens every day when parties enter into so-called "heads of agreement".

It is also important to bear in mind the observation of Bingham LJ, whose decision at first instance was under consideration in *Pagnan*, that the task of the court is "to discern and give effect to the objective intentions of the parties".

[29] I consider that the objective intention of the parties was to enter into a binding agreement and together to acquire this property. Having agreed to do so they left the details concerning the formation of a company to hold the property and how it is to be controlled and funded, which are important, for further agreement between them. On the principles as set out by Lloyd LJ in *Pagnan* even if they failed to reach agreement on these outstanding matters it would only vitiate the contract if it made their agreement unworkable or void for uncertainty. I do not accept that it would do so. The parties could still purchase the property in their own names and hold it in the agreed proportions without a company being formed.

[30] I turn now to the third question, whether the validity of the consortium agreement is affected by the fact that Mr Walker did not sign or execute it. The form of the question assumes that Mr Walker did not sign although he claims that he signed a copy of the document. For the purpose of these proceedings, as currently constituted, I must proceed on the basis that he has not signed.

[31] Clause 18 refers to the execution of a counterpart by each party and that they taken together are to constitute one and the same agreement. It is submitted that in the absence of such a counterpart executed by Mr Walker the agreement is not binding. The solicitors to the consortium were able to confirm on 13 May 2004 that all members were participating with the exception of Mr Eastwood. This was after the date (5 May) on which they stated in their letter of 27 April 2004 that it would be assumed that a party no longer wished to be involved if they had not returned their signed copy of the Agreement. It was therefore known and accepted that Mr Walker was a

willing party to the agreement. By letter of 16 September 2004 Mr Sweeney, as project manager, attempted to make time of the essence for execution. As the other parties to the agreement had not authorised him to do so the letter had to be withdrawn. In the circumstances it is still open to Mr Walker to complete the formality of executing a counterpart of the agreement since his participation in it has been acknowledged from the outset.

[32] The fourth question concerns the effect of the resignation of Mr Tom Wilson. It is argued that the agreement is unenforceable since as a consequence of his resignation there is uncertainty in relation to the agreed proportions in clause s 3.1 and 4.7. The agreement does not make any provision for withdrawal from it and a party can only do so by agreement with the parties that remain. In the absence of such agreement Mr Wilson would be bound by it. Possibly it was in recognition of this that it was stated during the proceedings that he has withdrawn his resignation.

[33] The answers to the questions raised are;

(1) Yes, in part.

(2) No.

(3) No.

(4) No.