JUDGMENT : HIS HONOUR JUDGE HUMPHREY LLOYD QC : TCC. 24th March 2000

1. In this action the claimant, Mr Abballe, makes two claims. The first is for payment of US $300,000 which he claims is due pursuant to an agreement in the form of a letter dated 20 January 1997 but made when it was counter-signed by the defendant, Alstom on 20 February 1997. The letter although addressed to Alstom was drafted by it. Under this agreement (the terms of which are annexed to this judgment) Mr Abballe and Alstom entered into a joint venture for a potential Build Operate Transfer (BOT) project based on the construction of a power station at El Salto, Guadalajara, in the State of Jalisco in Mexico. The project envisaged the building of a 1100 MW co-generation electricity plant fired by natural gas. The second claim is for damages for Alstom's failure to carry forward that project. Mr Abballe says that Alstom was obliged to do so under the agreement. The action was started in February 1999. The defence was served in May 1999. At a case management conference held in July 1999 a trial was fixed for June 2000.

2. On 14 December 1999, Alstom made an application for an order that Mr Abballe's claim for damages *"for repudiatory breech of contract as contained in particular in paragraphs 43 to 50 of the statement of claim... be struck out pursuant to CPR Part 3, Rule 3(4) because the statement of case... and the replies to the requests as to the statement of claim and reply pursuant to CPR Part 18... disclose no reasonable ground for bringing such claim and/or are embarrassing."*

3. On the hearing of the application Mr Jeffery Onions QC submitted that Rule 3.4(2) of the CPR should be applied in a manner equivalent to that in which the Court of Appeal has said that Part 24 should be applied, namely that this application should succeed if it should be established that the claimant *"has no real prospects of succeeding"*, as set out in Rule 24.2. He relied upon **Swain v. Hillman,** 4 November 1999, unreported, in which Lord Woolf MR had said that:-

   3. "the words no real prospect of succeeding it" did not need any amplification, they spoke for themselves. The word "real" directed the court to the need to see whether there was a realistic, as opposed to a fanciful, prospect of success."

4. Mr Anthony Speaight QC for Mr Abballe maintained that the principle continued to be that which had applied under RSC Order 18, Rule 19. He referred to **Barrett v. Enfield London Borough Council** [1999] WLR 79 at pages 83B - 86A in which Lord Browne-Wilkinson reiterated what he had said in **X v. Bedfordshire County Council** [1995] 2 AC 633 at page 740:-

   4. "It is... necessary to proceed on the basis that the facts alleged in the various statements of claim are true... . Actions can only be struck out under RSC Order 18, Rule 19 where it is clear and obvious that in law that the claim cannot succeed... ."

5. In the course of argument there was therefore some discussion about the relationship between CPR 3.4 and Part 24. In order to avoid any misunderstanding I shall at the outset of this judgment set out the approach which I intend to adopt to this application. Rule 3.4(2) states:-

   5. "The court may strike out a statement of case if it appears to the court -

   6. (a) That the statement of case disclosed no reasonable grounds for bringing or defending the claim;

   7. (b) That the statement of case is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings; ... ."

6. The practice direction for this Rule starts by referring to Rule 1.4(2)(c) which provides that the court's powers of case management include the summary disposal of issues which do not need a full investigation at trial. It goes on to point out that there are two distinct powers: under Rule 3.4 and under Rule 24.2. Paragraph 1.7 of the practice direction then states:-

   8. "A party may believe he can show without a trial that an opponents case has no real prospect of success on the facts, or that the case is bound to succeed or fail, as the case maybe, because of a point of law (including the construction of a document), is bound to fail. In such a case the party concerned may make an application under Rule 3.4 or Part 24 (or both) as he thinks appropriate."

   9. Paragraph 5 states:-

10. *"5.1 Attention is drawn to Part 23 (general rules about applications) and to the practice direction that supplements it. The practice direction requires all applications to be made as soon as possible and before allocation if possible.*

11. *5.2 While many applications under Rule 3.4(2) can be made without evidence and support, the applicant should consider whether the facts need to be proved and, if so, whether evidence and support should be filed and served."*

7. As a preliminary point I do not accept that this application was made late since it relies in part upon Mr Abballe's answers to a request for information which were not delivered until the end of October 1999. The application was therefore made within a reasonable time of receipt of them. Alstom's position had already been set out in its defence (see for example paragraph 6). Since all cases in this court are immediately allocated upon commencement and since it is not always possible even by the time of the first case management conference to decide whether a claim or defence (if it then exists) should be made the subject of an application under Rule 3.4(2), I do not consider that it necessarily follows that in this court an application such as this cannot be made at such a stage even though it is quite close to the date of trial.

8. It is clear from the paragraph 5 of the practice direction that an application under Rule 3.4 may be supported by evidence. Alstom did not however file any evidence. Mr Onions said that he intended to follow the previous practice and to assume that all the relevant facts relied upon by Mr Abballe in the statement of claim would be established by him at the trial but to contend that, on that assumption and on the correct interpretation of the agreement of January 1997, Mr Abballe could not succeed as a matter of law in his second claim for damages. Mr Speaight maintained that on that basis the claim should not be struck out. I intend therefore only to consider this application on that basis.

9. In my judgment it is also clear where the facts are assumed in favour of the respondent, that the test to be applied under Rule 3.4(2) is whether the case is bound to succeed or fail in law: see paragraph 1.7. Rule 3.4, like all other rules, is to be both interpreted and applied in accordance with the over-riding objective: see Rule 1.2. The over-riding objective requires a court, amongst other things, in dealing with a case justly, to ensure that expense is saved and that it is dealt with expeditiously and fairly. Both these aspects of the over-riding objective may be attained by deciding whether an issue can be disposed of summarily without full investigation and trial: Rule 1.4(2)(c). Where the only question is one of law such as the interpretation of a contract and if on the application the point is argued fully, it is generally possible to arrive at the same conclusion that would have been reached on a trial (as has happened here). In my judgment the previous approach under Order 18 Rule 19 was, to an extent, influenced by the practice that applications to strike out were supposed to be dealt with quickly and summarily. Nevertheless, as the cases show, many such applications were argued at length, some all the way up to the House of Lords, and, in so doing established new law. In my judgment, where, as here, the application is heard for the best part of a day there is no reason, just as a matter of interpretation of Rule 3.4(2), why the court should be bound only to accede or to reject the application if the applicant has or has not established its case on a "clear and obvious" basis if otherwise the claim is bound to fail or to succeed. If in procedural terms the dismissal of the application is not a decision that the case is sound in law there is nothing to prevent the court, when giving judgment, from informing the parties that it intends to operate its case management powers under Rule 1.4(2)(c) by giving notice under Rule 3.3(3) of its intention to make an order under Part 24.3(1) subject, of course, to hearing the parties. Secondly, I see no reason why in the application of Rule 3.4(2) and in the circumstances that I have described, the court need to adopt a test such as "plain and obvious" if when all that is needed is whether the Rule has been satisfied and whether the claim is bound to succeed or fail. To that extent I do not accept Mr Onions' submission that the test is as described in Rule 24.2 although in practical terms there is likely to be no material difference between the two. Both have to be governed and tested by the over-riding objective: would it be just to strike out the claim or not?

10. I now turn to the substance of the application. I annexe to the judgment the relevant paragraphs of the statement of claim (but not the amplifications contained in the answers to the request for information). In essence Alstom's case turns on the meaning of clause 2(b) of the agreement:-

12. 2. Stage 2 - Implementation Phase

13. Subject to both parties:-

14. (a) being satisfied with conclusions set out in the Investment Appraisal Report; and

15. (b) entering into (alone or together with other prospective investors in the Project) a definitive consortium agreement which shall determine in detail the relationship between the parties during the Implementation Phase (the "Consortium Agreement").

16. the parties shall proceed to develop the Project on a non-recourse or limited recourse basis by reference to a detailed programme of activities."

17. That provision was in part reproduced in paragraph 20 of the statement of claim:

18. "It was a term of the joint venture agreement that after the conclusion of the said period the parties would proceed to develop the project; [that they would negotiate in good faith the outstanding details of a consortium agreement, the essential details of which had already been agreed; and that after such details had been negotiated], they would enter into a consortium agreement generally in the form of the Defendant's model consortium agreement embodying both the already-agreed essential terms and the negotiated details."

(I have inserted square brackets to denote the part which Mr Speaight said was a matter of inference or implication; the remainder was express on a proper interpretation of the agreement.) Clause 4(viii) also provided:-

19. "Any of the parties may, with the exception of confidentiality provisions, withdraw from the participation of the development of the Project if such party concludes after completing Phase 1 that the Project is not economically viable."

11. In paragraphs 43 onwards of the statement of claim Mr Abballe recounts that in a letter of 27 October 1997 Alstom purported to notify Mr Abballe that it no longer considered the project to be economically viable and that it was accordingly withdrawing pursuant to clause 4(viii). I n paragraph 44 Mr Abballe maintains that Alstom had not in fact reached that conclusion and accordingly was not entitled to operate clause 4(viii). In paragraph 45 Mr Abballe pleads that, in the alternative, for the same reasons set out in paragraph 44, the letter was not written in good faith and that its withdrawal was unreasonable. In paragraph 46 it is said the letter was not a valid exercise of clause 4(viii) for various reasons. It was not necessary to summarise paragraphs 47 or 48 for the conclusion in paragraph 49 is that there was a repudiation by Alstom. In paragraph 50 Mr Abballe sets out his case for loss and damage.

12. Alstom submits that its obligation to proceed under the provisions of clause 2 was subject to two contingent conditions precedent neither of which were satisfied. Mr Speaight accepted that clause 2, if taken by itself, was subject to such conditions. First, the parties had to be satisfied with the conclusions set out in the Investment Appraisal Report. This expression is not defined in the agreement but it must be the results contemplated by clause 1(ii) and (iii) of the agreement, since in clause 1(iii)(k) the Report is the last task listed. Although Mr Onions gave a number of reasons why that condition had not been met, he accepted that it was not necessary and probably not possible for that issue now to be determined and that the damages claim was not to be struck out solely on the basis that the first contingent condition was not satisfied. Secondly, however, Alstom submits that its obligation to proceed was subject to the parties entering into a definitive consortium agreement which determined in detail the relationship between the parties during stage 2. It is common ground that no such agreement was entered into and accordingly Alstom's primary submission was that it was thus under no obligation to proceed. The second main submission made was that any obligation to proceed with the project was unenforceable because of the uncertainty as to the nature of the project and because the matters that needed to be determined to enable the project to succeed had not been established. However I could not strike out the case on that basis alone.

13. Accordingly the case turns on what was described as the second contingent condition i.e. whether there was an obligation to proceed to make the definitive consortium agreement. Alstom contended that if it was under no obligation to conclude a definitive consortium agreement Mr Abballe could not

claim damages on the basis that he had lost what he might have obtained had such an agreement been entered into. For Mr Abballe Mr Speaight submitted that if the agreement had that meaning it would allow either party to refuse to enter into a consortium agreement with impunity. Clause 4(viii) suggested that the only ground for withdrawal was that the project was not economically viable. That clause would be redundant if there were no obligation to proceed. The contract would effectively be limited to Stage 1 and not to Stage 2. Mr Speaight placed considerable reliance on the factual matrix set out in paragraph 18 of the statement of claim and in particular sub-paragraph 3, 5 and 6 of paragraph 18 of the statement of claim. He submitted that the factual matrix showed that by the time the agreement had been entered into the parties had already reached the stage of agreeing the essential terms of a consortium agreement. Clause 2 should therefore be seen as if as if it were an option to enter into such an agreement and should be given effect to as such. However Mr Speaight made it clear that Mr Abballe's case was not that all the terms of the Consortium Agreement had been settled before the letter agreement.

14. Mr Onions contended that the effect of the claimant's argument was that clause 2 was no more than an agreement to agree which was unenforceable in English law. The agreement was expressly subject to English law and accordingly whatever the nationality of the claimant, the location of the works and the international character of the project, the obligations of the parties could only be those which were enforceable under English law. Mr Onions maintained that in **Walford v. Miles** [1982] 2 AC 128 the position in English law had been clearly set out by Lord Ackner at page 138:-

20. *"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. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question: how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these 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."*

21. *He referred also to **Little v Courage** (1994) 70 P & CR 469. In that case the tenant of a pub had an option to renew his lease subject to agreeing with the brewer a business plan and agreement. The tenant duly notified the landlord that he wished to renew but the landlord after expressing a willingness to do so did not present the tenant with any business plan and agreement and then declined to grant a new lease on the grounds that no new plan or agreement had been entered into. The Court of Appeal held that the lease should read as making the plan and agreement a condition only if so required by the brewer so the landlord was not entitled to refuse to renew the lease. However in the course of its judgment the Court followed and applied **Walford v Miles** in rejecting the tenant's case that the lease was subject to a variety of implied terms (see page 475).*

15. Mr Speaight relied on the discussion of that case in **Chitty on Contracts,** 28th edition, at paragraph 2 - 127 and in the last paragraph of that section which states that **Walford v. Miles** does not exclude the possibility that a different conclusion may be reached where the parties have reached agreement on all essential points so as to show that they do intend to be legally bound by the agreement, but have left other points open. The court may then imply a term that they are to negotiate in good faith so as to settle outstanding details which are to be incorporated in the formal document which would set out

the full terms of the contract between them. Hence paragraph 20 of the statement of claim had been framed to combine the effect of clause 2 and the proposition in Chitty contained in the last sentence of paragraph 2- 147.

16. To support that proposition the editors rely on **Donwin Productions Limited v. EMI Films Limited,** 9 March 1984, unreported. In that case Pain J came to the conclusion that the parties had reached an agreement on the terms set out in a letter which recorded all the matters regarded as essential to a contract other than one (the length of the licence) but since that had already been agreed at an earlier date it had not been necessary to repeat it. He therefore came to the conclusion that the terms formed a contract:-

22. *"It is true that it would be rather a rough and ready contract, which would require to be filled out by a written agreement in due course. But to my mind it constituted a perfectly good contract by which the parties could work pending the written agreement. I think it would by necessary implication be a term of such a contract that the parties would negotiate in good faith about the further terms to be inserted in the written agreement. While this term was not expressed it is plain from the conduct of negotiations that it was the intention of the parties that this should be done. I am not overlooking the decision in* ***Courtney Limited v. Tolaini Bros*** *[1975] 1 All ER 716, that the law does not recognise a contract to negotiate. But I do not think that decision prevents the implication of such a term as I have suggested once a firm agreement has been made any further fuller agreement is in contemplation".*

17. I do not consider that that decision assists me for Pain J found that there was a complete agreement which would have stood and would have been sufficient for the needs of the parties. The issue was whether there was some obligation to build on that rudimentary but legally enforceable agreement. Mr Speaight however argued that there were parallels: either the agreement dated 20 January 1997 constituted the equivalent of the rudimentary agreement or the essential terms of the consortium agreement referred to in paragraph 18.6 of the statement of claim were its match. I do not consider that this is an answer. First, it is accepted that proceeding to stage 2 of the project was by clause 2 subject to the relevant condition precedent so that the creation of a definitive Consortium Agreement cannot be an "outstanding detail". That Agreement was vital; it replaced the letter Agreement of January 1997 - see clause 4(vii)(a). Secondly, Mr Abballe's case as pleaded is that the terms that were agreed were still "subject to contract", "subject to the outcome of more detailed investigations over the next 6 months" etc. Mr Speaight said that the words "subject to contract" were his (as the pleader) and had not been used by the parties and that they were intended to represent that the parties had not in their discussions bound themselves, for example, to set up a limited liability company in Mexico. I shall read them in that sense. The factual matrix thus manifestly describes an agreement that was not only incomplete in material or potentially material respects but also an agreement which would be regarded as legally unenforceable even if its terms had not been subject to specific reservations and even if the parities had regarded it as enforceable. There were evidently arrangements which could not be carried forward into the letter of agreement either because they had yet to be finalised to the satisfaction of a party or because neither party wished them to form part of the agreement that was made. Clause 1(iii)(h) expressly recognises that "a definitive consortium agreement setting out the terms of the full scale joint development of the Project" has yet to be produced which it is only natural given all the matters that had to be carried out in Stage 1, not least " an outline risk allocation analysis (cl 1(iii) (g)), a "timetable/program" for Stage 2 (cl 1(iii)(i), and a budget (cl 1(iii)(j), all of which could have affected what the parties had agreed and had previously thought was settled. Although Mr Abballe relied on the existence of the model consortium agreement and the agreement of the essential terms of that agreement as set out in paragraph 18 of the statement of claim, I do not consider that it is sufficient merely to assert that certain the essential terms had as a matter of fact been agreed as the real question is whether they produced an enforceable agreement. In these circumstances to give the factual matrix a status of or comparable to a legally binding agreement would not accord with the express intentions of the parties which was that, first, the agreement in the letter set out all that the parties regarded as sufficiently agreed to be binding and potentially enforceable, and secondly, that in stage 1 it was necessary to establish a definitive consortium agreement (which had not been done by

its conclusion). In their context words such as "subject to contract" either mean that the agreement was not intended to create legal relations or that it was itself merely an approximate agreement.

18. Furthermore **Donwin** cannot in my judgment stand with **Walford v. Miles** and the dicta in **Little v Courage** unless the agreement is seen as the performance of an existing agreement rather than an agreement to make by negotiation the effective agreement. The ratio of **Walford v. Miles** appears to me to be that an agreement to negotiate requires a party to consider its own best interests and if it were enforceable it would necessarily require a party to forego those best interests. It is to be contrasted with an agreement to use best endeavours to do something. Giving that term its customary meaning (see for example **IBM v Rockware Glass** [1980] FSR 335 which was not cited to me but is referred to in **Little v Courage**) a party is thereby obliged to take those steps which a prudent person in the position of that party would take acting in its own interests. If there is a dispute about what steps should be or should have been taken then if necessary a court or arbitrator will have to decide what a prudent person should do or should have done. Moreover the Court of Appeal said in **Little** (at page 476):

    23. *"An undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, or to try to agree, or to negotiate with a view to reaching an agreement; all are equally uncertain and incapable of giving rise to a legally enforceable obligation".*

    24. *A party is not required to abandon or to subordinate its interests to those of the other party which would be the case if an agreement to negotiate were enforceable. In the case of an otherwise complete agreement to use one's best endeavours to perform something the party has to accept that a court or other tribunal may determine what is in its own best interests and to that extent some of the objective criteria would be applied to what will otherwise be regarded as purely selfish or subjective.*

19. Alstom's application in essence raises a point of interpretation. The agreement has plainly to be read for what it was - an outline agreement but one which was considered to be sufficient by the parties for its immediate purposes, not least the retention of Mr Abballe and the payment to him of significant amounts. Mr Speaight accepted that it is not easy to interpret and that its drafting was in places muddled. It is however typical of agreements which the court should try to uphold rather to destroy. It must be read in its entirety and in its context. Mr Abballe's statement of claim has been carefully constructed to ensure that the agreement can be read against its background.

20. First, I do not consider that either clause 4(vii) or clause 4(viii) precludes either party from withdrawing without the consent of the other or for a reason other than lack of economic viability. Reliance on clause 4(vii)(a) begs the question since the commitments which it mentions have to be identified: in so far as they are contained in clause 2 they may not truly be commitments. Mr Abballe's case was that the reason for limiting the right to withdraw to lack of economic viability appeared from the factual matrix to the agreement. The entry point was in the opening words of the agreement: "we refer to the development work which has already taken place." It was clear that the parties had agreed on everything that might otherwise have justified withdrawal. Although said to be part of the *"General Provisions for Stage 1"* clause 4(viii) clearly applies to stage 2 (like other parts of clause 4) as the object of stage 1 was to prove the economic viability of the scheme and clause 4(viii) applies *"after completing Phase 1"*. Clause 4(viii) must therefore be concerned with changes which one party considers vitiate that conclusion and make it no longer tenable. I do not consider that it can be used only at the end of Stage 1 if, as Mr Speaight suggested, the work done did not establish economic viability since in those circumstances there would be no reason to proceed and so there would be nothing to withdraw from. If Stage 1 did not demonstrate viability that was the end. In addition clause 4(viii) is not expressed as limiting the right of withdrawal to lack of economic viability and I see no reason so to limit it. Prior to the commencement of stage 2 other events may occur which might cause either party to wish to withdraw before the Consortium Agreement was made: a party might no longer to able to deliver its proposed contribution; a party might have fallen out of favour; outside circumstances might mean that it was no longer in the interests of a party to continue; the project whilst remaining objectively "economically viable" might no longer produce the returns originally contemplated in the time scale originally envisaged. I leave aside the effect of the interests of third parties which could be influential

on the interests of the parties themselves. Once the intrinsic viability of such a project has been established it is normally not impossible to find a replacement for a prospective member of the consortium who has to drop out. Accordingly I do not consider that clause 4(viii) is to be read as confining the right to withdraw. The consortium agreement would deal with the right to withdraw from the implementation of Stage 2.

21. Secondly, in my judgment clause 2 does not create an obligation to proceed which is enforceable in English law. The next stage was the making of the Consortium Agreement. Mr Speaight submitted that clauses 2 and 4(viii) would be pointless if there were no obligation to proceed. That may well be so but, if so, it shows only that the parties did not appreciate the effect in law of clause 2. Many commercial agreements contain well-intentioned provisions which, even when given the most favourable interpretation possible, prove on examination to be fatally flawed and unenforceable in law. The second condition precedent requires the parties first to agree on *"a definitive consortium agreement"*. I have already said that I do not consider that it is sufficient merely to assert that all the essential terms had a matter of fact been agreed as the real question is whether, even leaving aside the fact that they had been *"subject to contract"* (in the sense intended by Mr Speaight), they added up to an enforceable agreement. Clause 1(h) of the agreement, upon which Mr Speaight relied, did of course provide that the work in Stage 1 should include the *"production of a definitive consortium agreement setting out the terms of the full scale joint development of the Project"*. However the factual matrix does not include much more than Alstom's model Agreement and *"essential terms"*. Clause 1(h) was not apparently met. The definitive agreement was to "determine in detail the relationship between the parties during the Implementation Phase". To use a common expression "the devil is in the detail". Parties do not always appreciate the full extent of participation until it is spelled out. No assumptions can be made that they will always be overcome by negotiation. It is at these moments that the parties' real interests surface and prove to create sticking points. It cannot be assumed that altruism and unselfishness will prevail. In English law **Walford v Miles** and the dicta in **Little v Courage** make it clear, in my judgment, that an apparent obligation to agree a contract such as that called for by clause 2 is unforceable.

22. In addition clause 2 also refers to a *"detailed programme of activities"*, which may be more than the *"timetable/program"* mentioned in clause 1(i). The pleaded factual matrix does not in my judgment establish that clause 1(i) was met (like clause 1(h)). I am sure that this means a programme which will form an integral part of the Consortium Agreement but even if it was not to do so such a programme was not a matter of detail but by the reference was considered to be essential to the implementation of the project. Thus not all the essential terms had been agreed. Furthermore given the nature of the project the agreement of such a programme in my view has to be treated as if it were an agreement to agree: neither party was bound to forego its own interests and thus the agreement was unforceable in law. (Such a programme is not of course comparable to a programme of activities that has to fit previously defined parameters such as where dates or periods are already fixed.) For these reasons Mr Abballe's case on damages to the extent that it assumes that under clause 2 Alstom was under a legally binding obligation to proceed is in my judgment bound to fail.

23. Paragraphs 20 and 21 also put the case on a slightly different basis, namely that there was an obligation to *"negotiate in good faith"* so as to settle the outstanding terms of the consortium agreement. Mr Speaight accepted that if paragraph 20 could not be sustained then paragraph 21 also could not be supported. In my judgment to present the case on the basis of breach of an implied obligation of good faith is equally unsupportable. Obligations to interpret or to perform a contract in good faith are recognised by other legal systems whose laws also derive in part from Roman law (but not I believe an obligation to negotiate in good faith to the extent of subordinating one's interests). Historically English law has achieved the same objectives by the use, for example, of ameliorating techniques such as implying terms, construing provisions as subject to the requirement of "*reasonableness"*, taking a pragmatic view of contractual terms, and perhaps above all, in the application of the principle set out in **Mackay v Dick.** There have been indications recently that English law might in certain circumstances recognise an obligation to perform a contract in good faith (see the dicta of Sir Thomas Bingham MR in **Philips Electronique Grand Public SA v British Sky Broadcasting Ltd** 19 October

1994, CA, unreported but which was not cited to me). There is so far as I am aware nothing to displace **Walford v Miles** in which it was held that *"a duty to negotiate in good faith was unworkable in practice"*. Lord Ackner also said:

> *25. The agreement alleged in para 5 of the unamended statement of claim contains the essential characteristics of a basic valid lock-out agreement, save one. It does not specify for how long it is to last. Bingham LJ sought to cure this deficiency by holding that the obligation upon the respondents not to deal with other parties should continue to bind them 'for such time as is reasonable, in all the circumstances'. He said:*
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> *26. '¼ the time would end once the parties, acting in good faith, had found themselves unable to come to mutually acceptable terms ¼ The defendants could not ¼ bring the reasonable time to an end by procuring a bogus impasse, since that would involve a breach of the duty of reasonable good faith which parties such as these must, I think, be taken to owe to each other.'*
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> *27. However, as Bingham LJ recognised, such a duty, if it existed, would indirectly impose upon the respondents a duty to negotiate in good faith. Such a duty, for the reasons which I have given above, cannot be imposed. That it should have been thought necessary to assert such a duty helps to explain the reason behind the amendment to para 5 and the insistence of Mr Naughton that without the implied term the agreement, as originally pleaded, was unworkable—unworkable because there was no way of determining for how long the respondents were locked out from negotiating with any third party.*
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> *28. Thus, even if, despite the way in which the Walford's case was pleaded and argued, the severance favoured by Bingham LJ was permissible, the resultant agreement suffered from the same defect (although for different reasons) as the agreement contended for in the amended statement of claim, namely that it too lacked the necessary certainty, and was thus unenforceable."*
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> *29. I therefore consider that the term suggested in paragraph 20 is unsupportable. For these reasons paragraphs 43-50 of the statement of claim should be struck out as they are premised on a case that in law is bound to fail.*

24. Alstom also contended that the project was too uncertain: the statement of claim mingles what for present purposes had to be taken to be agreed with what Mr Abballe envisaged the plan to be: see paragraph 39 of the statement of claim which describes the project comprising two stages with the second stage (for increasing the size of the power station by 400/ 450 MW) *"commencing after some 8 years"*. Whilst I see the force of Alstom's case I agree that it would not be appropriate to use Rule 3.4 to strike out Mr Abballe's claim on this ground. If, contrary to the conclusions that I have reached, the agreement imposed an obligation to proceed or was subject to the obligations of good faith it would be necessary to investigate the facts to see whether the difficulties suggested by Alstom would have made it impossible to proceed so that its withdrawal could not be said to deprived Mr Abballe of anything tangible or even the loss of a chance.

25. During the course of argument I raised the question of the references in the agreement to others participating in the project. Clause 4(viii) spoke of the parties *"entering into (alone or together with other prospective investors in the Project) a definitive consortium agreement"*; clause 2(iv) said:

> *30. "Both parties intend to invite further parties, in particular Banamex and Association des Industriels d'el Salto to participate in the development and/or equity investment in the Project. The basis of any such future participation shall be on such written terms as both parties may agree."*
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> *31. AIS was the local trade association representing the companies which had commercial and industrial premises in the El Salto industrial corridor (see paragraph 7 of the statement of claim.) Clause 3 referred specifically to "AIS & BANAMEX". In addition the factual matrix relied on by Mr Abballe included in paragraph 18.3 of the statement of claim:*
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> *32. 3. The Defendant had had discussions with a number of prospective sources of finance, and had secured agreements in principle of financial support.*
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> *33. In answer to a request for information of this part it was said:*
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> *34. "The Claimant's case is that the Defendant, through its appropriate department, contacted (i) the French government's Direction des Relations Exterieurs in connection with a grant from its engineering,*

procurement and construction fund; (ii) the British government's Department of Trade and Industry with reference to the Export Credit Guarantee scheme; and (iii) commercial banks, including Barclays and Credit Lyonnais. The Claimant cannot give any further details until after disclosure from the Defendant."

35. Paragraph 18.6 of the statement of claim included:

36. 5. The capital costs of the construction of the power station, other than those financed by French export credits, would be financed to the extent of 25% by equity and 75% by loans.

37. 6. Other persons would be invited to purchase equity in the company after the power station had been constructed.

38. 7. After a period of operation the company would sell the power station, wind up its activity and distribute the proceeds of sale to the shareholders. The length of this period would not be fixed by the consortium agreement: the parties envisaged a period of at least 12 years, and probably 20 years.

39. 8. The profits of the company would be distributed pro rata amongst shareholders."

26. It appeared therefore (as one might have expected) that this project would and could not have gone forward unless the necessary finance had been secured and backed by export credits. Others would almost certainly have joined in the Consortium Agreement and, or possibly, alternatively, their Agreement would have had to be obtained to other contracts, eg to take up the 25% equity, before the Consortium Agreement was made or became effective such as to commit Alstom to going ahead, (as for example expressed at the end of clause 4(iv)). Thus the reference in clause 2 to "other investors" is especially significant as indicating not merely areas of uncertainty which had to be resolved before Consortium Agreement could be concluded but also that the implementation of the project and of clause 2 was dependent on others being lined up to participate. When one considers what in practice this entails it is surprising that it could be suggested that clause 2 could impose an enforceable obligation to proceed, given that one of first issues posed by clause 2 would be whether, in the light of the work done in Stage 1, Alstom and Mr Abballe would go it alone or whether others would be brought into the consortium. It is also most unlikely that either would have entered into a Consortium Agreement for a project of this magnitude without having first secured an exit route, as contemplated by the factual matrix (see the extracts from the statement of claim set out above), even though the initial shareholders might or might nominally be the parties to this action.

27. Mr Speaight submitted that Mr Onions' skeleton argument (which had been put forward as setting out the grounds for Alstom's application) had not contained these factors. They were naturally adopted by Mr Onions. They are in my view no more than other reasons for interpreting the agreement as I have done. They stem from reading the factual matrix and the agreement (naturally informed by experience of arrangements such as the present one). Since however Mr Speaight found himself at a disadvantage and in view of the consequences to Mr Abballe of this application I should make it clear that they do not form part of my reasons for allowing it.

Order (in part): Application allowed.

Jeffery Onions QC appeared for the defendant, the applicant, instructed by Pinsent Curtis.
Anthony Speaight QC appeared for the claimant, instructed by Lock and Marlborough.