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Judgment: approved by the Court for handing down | *Delivered:* **16/02/2007**
(subject to editorial corrections)

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

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ON APPEAL FROM THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

_____

CHANCERY DIVISION

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IN THE MATTER OF A DOCUMENT ENTITLED CONSORTIUM AGREEMENT DATED 5th MAY 2005

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BETWEEN:

SEYMOUR SWEENEY

Plaintiff/Appellant;

And

LAGAN DEVELOPMENTS LIMITED
SEAMUS McCLOY
JOHN WALKER
THOMAS WILSON

Defendants/Respondents

Before Kerr LCJ, Higgins LJ and Girvan LJ

GIRVAN LJ

Introduction

[1] By an originating summons issued on 24 June 2005 the plaintiff appellant ("the appellant") sought the determination by the court of four questions relating to a document called a Consortium Agreement dated 5 May 2004 ("the Consortium Agreement") made between the appellant and

the defendant respondents ("the respondents"). In this appeal the appellant challenges the decision of Campbell LJ in relation to the answers which he gave to two of the four questions. The two related questions which arise in the appeal are whether the consortium agreement constituted a legally binding agreement or whether it was void for uncertainty and/or incomplete. Campbell LJ concluded that the agreement was a legally binding agreement in part and was not void or incomplete in respect of that part which he considered was binding.

Background

[2] In February 1970 a substantial area of land near Ballymena, County Antrim known as Ballee was compulsorily acquired by the then Ministry of Development pursuant to the provisions of the New Towns Act (Northern Ireland) 1965 for the creation of Ballymena New Town. Some 96 acres of that vested land subsequently became superfluous to requirements and in 2003 the Department of Social Development ("the Department") as the successor in title to the Ministry of Development placed the lands on the market for sale by public auction. A number of the previous owners and their successors in title sought to challenge the Department's decision to sell the land by public auction and asserted that they had a statutory right of pre-emption in relation to some of the lands which the Department considered surplus to requirements. There are pending and as yet incomplete judicial review proceedings brought by some of the previous owners.

[3] During November 2003 the appellant and the defendant, John Walker ("Mr Walker"), entered into separate arrangements with a number of the former owners of parts of the 96 acres who claimed to be entitled to exercise a right of pre-emption. Under these arrangements the appellant and Mr Walker agreed to financially support each relevant former owner in establishing his claimed right of pre-emption. The arrangement provided that if the Department confirmed that the lands were to be offered to the former owner or owners they in turn would sell such land to the appellant and Mr Walker if the figure fixed by the Valuation and Lands Agency in respect of the lands was acceptable to them. The price to be paid to the former owners by the appellant and Mr Walker was to be the Department's valuation with an uplift of 10%.

[4] In or around the time that the appellant and Mr Walker were negotiating with the former owners they agreed to seek to recruit other developers to form a consortium to acquire and develop the land to the point where it could be disposed of with valid planning permission. According to the affidavit of Mr Walker it was he who was successful in identifying other individuals who would be prepared to participate in the consortium. When the agreements with the former owners were completed it was agreed that the appellants' solicitors should be instructed to draw up a written contract to

record what had been agreed between the proposed members of the consortium. The members of the consortium were to comprise the appellant and the respondents together with Mr B J Eastwood who subsequently decided not to participate. The solicitors produced a document which was sent to the parties at the end of April 2004, the solicitors stressing that there would be no further amendments to it. It was to be signed by noon on 5 May 2004. Four parties signed the agreement namely the appellant, Lagan Developments Limited, Seamus McCloy and Thomas Wilson. Although Mr Walker did not sign the document Campbell LJ at first instance concluded that it would still open to him to complete the formality of executing a counterpart of the agreement since his participation in it had been acknowledged from the outset. He held that the validity of the agreement was not affected by the fact that Mr Walker had not signed or executed it. No appeal has been brought in respect of that part of the decision.

[5] Under the Consortium Agreement paragraph 2.1 records that the participants had formed a consortium "to negotiate and purchase or bid for and pre-develop the Property". The "Property" was defined as being the property as agreed to be transferred to the appellant and Mr Walker by the former owners under the pre-owner contracts. Alternatively if the rights of pre-emption were not established the full 96 acres would be on the market and in that event if the consortium was successful in its bid to acquire all these lands the Property was defined as the full 96 acres. The agreement envisaged that if the rights of pre-emption were established and exercised then the consortium would acquire and pre-develop the land covered by the right of pre-emption although the totality of the lands owned by the former owners who are parties to the pre-owner contracts does not amount to the full 96 acres. The project envisaged by the consortium "was the purchase and pre-development of the Property to the point of obtaining viable planning permission". The parties defined themselves as a consortium with "the parties hereto acting in joint venture (not in partnership) for the purposes of the consortium agreement" a point reinforced in clause 15.

[6] The key provisions of the Consortium Agreement (after amendment following the withdrawal of Mr Eastwood) are set out below. Since the role of the company to be formed by the members of the consortium under the terms of the agreement is of central importance the references to the role of the company are italicised in the following text, though not in the original agreement.

> "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;

	%
(b) Lagan	20
(c) McCloy	20
(d) Sweeney	20
(e) Walker	20
(f) Wilson	20
Total	100

7.4.2. If the Application is successful;

	%
(b) Lagan/McCloy	25
(c) Sweeney	25
(d) Walker	25
(e) Wilson	25
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."

The Dispute

[7] Subsequent to the making of the agreement differences of views between the parties emerged in relation to the enforceability of the agreement and in particular the appellant formed the view that the agreement was not legally binding. In due course this led on to the issue of the originating summons proceedings in which the appellant contended that the agreement was unenforceable and uncertain. Originally the respondents wanted the court to consider the nature of the entire relationship between the parties including any pre-existing oral agreement. An attempt was made to convert the originating summons into a plenary action but the Chancery Judge decided that the originating summons should proceed to a hearing but left open the possibility at trial of permitting oral evidence if necessary. It appears that before Campbell LJ it was accepted that the terms of the oral agreement on which the respondents relied were reflected in the Consortium Agreement. The argument before this court proceeded on the same basis. This approach accords with the parole rule of evidence applicable to written contracts and instruments. In a complex commercial situation it will often happen that the

written document will not fully realize the hopes and aspirations of the parties but that does not make the contact any less binding. Evidence of the party's negotiations before the contract is excluded as is evidence of the parties' post-contractual behaviour. Such evidence is not admissible in law to show their intentions.

[8] In his judgment Campbell LJ identified two separate routes whereby the consortium members might acquire the land to be held for the purposes of the consortium's joint venture namely by what can be called the "auction route" or alternatively by what can be called the "pre-emption route".

[9] If the former owners fail in their attempt to establish a right of pre-emption the land would have to be acquired by a successful auction bid. The appellant and respondents accepted as correct Campbell LJ's conclusion that in relation to the auction route there was no enforceable obligation on any of the parties to agree the amount that the nominated bidder was to be authorized to bid on behalf of the company which the consortium members envisaged would be set up. In the absence of unanimous agreement it would be impossible for the court to supply the figure for the authorised bid.

[10] The pre-emption route, on the other hand, would arise if the former owners were successful in establishing a right of pre-emption. In that event the lands could be acquired by the appellant and Mr Walker and would pass to the consortium in accordance with the procedures laid down by the agreement. Campbell LJ concluded that in the event of the pre-emption rights being established and the land being acquired in that way the agreement was sufficiently certain to be made workable.

[11] Mr Hanna QC for the appellant argued that this conclusion was erroneous. He contended that the purpose and intention of the agreement was to enable the consortium to carry out a particular project as a joint venture. The key elements of the project included the formation of a limited liability company as the vehicle for executing the project. The form, structure and financing of that company required agreement on the part of the members. The pre-development of the land was to the point of obtaining viable planning permission. The financing of the acquisition and the pre-development of the land would be funded by substantial borrowing. There had to be agreement on all the elements of the project to make the agreement workable. This agreement was in large measure an agreement to agree on matters of fundamental importance in relation to the acquisition of the lands. Under the pre-emption route the agreement failed for uncertainty for a number of reasons. Firstly, it depended on full agreement about the price to be paid to the former owners and there was no agreed mechanism for resolving any dispute. Secondly, some but not all of the former owners might be successful in the pre-emption applications and there was no provision as to how the project might proceed if this happened. The appellant and Mr Walker might disagree about

the acceptability of the Department's figure and there was no provision as to how the project might proceed in that eventuality. A major area of uncertainty was in the definition of the project itself. "Pre-development" was undefined as was "viable planning permission." Mr. Hanna recognized that clause 17.2 provides that if any provision of the agreement is found to be invalid or unenforceable but would be valid and enforceable if some part of the provisions were deleted the provision in question could be applied with such modification as may be necessary to make it valid. He argued, however, that the deletion of provisions could not supply the level of certainty required. What remained would be unworkable and would render the essential purpose of the joint venture incapable of being achieved. In order to introduce the necessary level of certainty the agreement would require to be rewritten and substantially modified.

[12] Mr Shaw QC on behalf of the respondents contended that the learned trial judge correctly and properly applied the relevant principles of law. Although the document might have contemplated that the preferred vehicle for the acquisition of the lands would be a new company such a company was not an essential element to the agreement. The entire agreement was predicated on the concurrence of the members of the consortium to act in concert in relation to the purchase of the land on an agreed share of profits and expenses. The company was merely a vehicle to implement the agreement but was not fundamental to its fulfillment as the parties could decide to operate under a different guise. In relation to financing the acquisition it was a private matter for each member of the consortium to decide the source of the funding requisite to make the necessary contribution to the acquisition. The members of the consortium would be the joint owners of the property and they might find it sufficient simply to own the property in conjunction with one another. In the absence of agreement on the disposal of the land the parties would have remedies under the Partition Acts. If they did not agree to the parameters of the planning permission application to be sought in respect of the lands they could individually make their own planning applications since it is possible to apply for planning permission in respect of the land in the ownership of another.

The Court's Conclusions

[13] Clause 3 of the Consortium Agreement makes clear that what the parties were setting out to establish was a joint venture. The term "joint venture" does not have a precise legal significance not being a legal term of art. As Hewitt's "Joint Ventures" 3rd Ed at para 1.11 makes clear it refers to a range of collaborative business arrangements, the fundamental characteristic of a joint venture being collaboration between the participants involving a significant degree of integration between the joint venturers. The key element to be considered and agreed by the joint venturers is the degree and nature of that collaboration. Joint ventures may take the form of a contractual alliance, a

partnership or a corporate joint venture. As is pointed out in Lindley and Banks on Partnership 18th Ed at paragraph 5.07 although partnerships and joint ventures have a number of common characteristics, in some instances the two expressions appear to be used interchangeably whilst in others the joint venture is recognised as a relationship quite separate and distinct from partnership. Whilst ii can probably be said that all partnerships involve a joint venture the converse proposition does not hold good. In Spree Engineering and Testing Limited v. O'Rourke Civil and Structural Engineering Limited 18th May 1999 (NLC 299069302) the court concluded that the particular arrangement between two companies in a joint venture did not involve a partnership because they specifically agreed provisions which avoided the degree of integration necessary to found a partnership. The companies carried out their own part of the work independently. The court concluded that:-

> "An integrated joint venture generally satisfies (the partnership) test of "the relation which subsists between persons carrying on business in common with a view to profit." On the other hand a non-integrated joint venture generally falls to be treated simply as an unincorporated association since the participants generally share no more than gross payments received."

[14] It is clear that joint venturers must be in agreement as to the model of the joint venture if they are to reach a consensus necessary for a contract since very different legal and financial consequences flow from the model adopted. There are clear legal differences between running a joint venture as a company and running it as a loose contractual alliance. These include the management framework, the decision making arrangements, the funding arrangements and the financial powers of the entity (a company, for example, having powers to raise money by way of floating charges). Clearly there will be different exit strategies and issues relating to the division of profits.

[15] What is clear from the Consortium Agreement is that the participants did reach some form of understanding that the model which they would adopt for the joint venture was of the corporate joint venture nature. Clause 4.1 binds the participant to the terms of the agreement in recognition of the resources and funds which the participants *and the company* will be required to make and the agreement was entered into in recognition of the commitment necessary from the consortium members in respect of the bid and the pre-emption application for the benefit of the consortium members *and the company.* Under clauses 5 and 6 both in relation to the bid and the pre-emption application the parties agreed to contribute to the company the necessary funding. Clause 7 details the capital, funding and distribution arrangements in respect of the

company. The agreement makes clear throughout the centrality of the company in the joint venture. Under clause 9 on the bid being accepted by the Department or in the event of the application for pre-emption rights being successful the parties should enter into negotiations in good faith and with due diligence to enable a shareholders agreement to be executed *conditional on the transfer of the property to the company.*

[16] It is clear that an agreement to agree is unenforceable and the law does not recognise a contract to enter into a contract where a fundamental term has yet to be agreed (see Courtney and Fairburn Limited v. Tolaini Brothers (Hotels) Limited [1975] 1 WLR 297, Little v. Courage Limited 70P & CR469 and Mallozzi v. Carapelli spa [1976] 1 Lloyds Reports 407.) If the existence of an agreed form of company is central to the nature of the joint venture agreed between the parties, until the form of the company is agreed there can be no enforceable agreement. In Pagnam SPA v. Feed Products [1987] 2 Lloyds Report 601 at 619 Lloyd J stated:-

> "(4) . . . 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 Stuart 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 contact as a whole unworkable or void for uncertainty.
>
> (6) It is sometimes said that the parties must agree in 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 contact 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 this 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 this statement is untrue. It is for the parties to decide whether they wish to be bound in 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 decisions. 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"".

[17] In paragraph 29 of his judgment Campbell LJ stated:-

> "I consider that the object and intention of the parties was to enter into a binding agreement and together to acquire the 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 J in Pagnam even if they failed to reach agreement on these outstanding matters it would only vitiate the contract if it made their contract 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".

[18] While it is true that the parties could purchase the property in their own names and hold it in the agreed proportions without a company being formed, the real question is whether on the true construction of the agreement the parties agreed to do so in the event of a failure to reach agreement on the structuring of a company which clause 9.1 makes clear is to be the appropriate body for the holding of the land. The duty of the court is to construe the agreement in order to give effect to the true contract of the parties, not to amend the agreement to fill a lacuna in the agreement to make it certain or workable when the parties have failed to reach a clear or certain consensus in relation to a point. The clear intention of the parties was, by means of a joint venture company to be formed, to acquire the property and to pre-develop it to the point of obtaining a viable planning permission. It was not simply to acquire the property. The means to the agreed end was by the creation of an integrated corporate entity wherein decisions would be made in accordance with the corporate nature of the enterprise and in accordance with a shareholder's agreement framework to be agreed by the parties. The entire wording of the agreement presupposed the coming into existence of such an entity which was to be the vehicle for the acquisition and pre-development of the property. In the absence of a company incorporated in an agreed form of the corporate entity it could not be implied or inferred that the parties were ad

idem as to how the members of the consortium could carry out in unincorporated form the agreed joint venture. The provision that the venture would proceed by the creation of a company is a clear contraindication of this. The nature of the corporate form of the joint venture points to a clear intention to have an integrated venture run on corporate lines. The agreement did exclude the creation of a partnership in clause 15 and the creation of an agency relationship between the parties. That was against the background of an intention to conduct the venture in corporate form. What the parties did not do was to address the question of what should happen if they failed to establish a corporate entity. Concluding that in the absence of an agreed company the parties must be taken to have agreed that the joint venture should be conducted as an non-integrated contractual association of tenants in common might fulfill a lacuna but it runs contrary to what the parties had agreed in respect of the nature of the joint venture. As we have said at para [14] clear practical and legal differences flow from a joint venture being in the form of a company or in the form of an unincorporated association.

[19] The provisions of clause 17.2 could not permit an exercise of rewriting the agreement by completely deleting all references to the role of the company in the joint venture in order to turn the agreement into an enforceable one. The consequent arrangement would not reflect the true consensus between the parties. Severance of a contractual provision may be permitted in certain circumstances but the predominant principle is that the court will not re-write the provisions as expressed by the parties. It will not add or alter words to effectively frame a promise that the promisors might have made but did not make where that would destroy the main purport and substance of what had been agreed (Cheshire, Fifoot and Furmston's Law of Contract 13th Ed at 436).

[20] Mr. Hanna argued that the concept of pre-development with a view to obtaining viable planning permission was itself so uncertain as to render the agreement unenforceable. The phraseology does give rise to a flexible concept which in a joint venture without common aims and structures could give rise to legitimate disputes and raise questions as to the proper policy to be followed to maximise the potential of the land. In a joint venture with an integrated management mechanism such as that envisaged by an agreed company there would exist a mechanism to achieve and follow a joint policy binding on all the joint venturers. The flexibility of the concept would not in itself in those circumstances render the agreement as a whole uncertain since the mechanisms would be designed to avoid dispute. In a joint venture without such mechanisms the concept is, however, uncertain since legitimately different views could be taken without a mechanism for imposing an agreed approach. This factor demonstrates the inevitability of the conclusion that the corporate nature of the venture was central to the concept of the agreed joint venture.

[21] Accordingly we conclude that the answer to the first question in the originating summons is No. In these circumstances the second question does not arise. We accordingly allow the appeal.