CA on appeal from an order of Mr Justice Colman before Kenney LJ; Potter LJ; Sir John Balcombe. 10th October, 1996

LORD JUSTICE KENNEDY:

1. INTRODUCTION

1. This is an expedited appeal from the decision of Mr. Justice Colman whereby he granted a declaration in the terms sought by the plaintiffs/respondents in an originating summons dated 29th March 1996.

2. The three respondents (whom I shall call "the seller") hold production licences in relation to certain Continental Shelf Blocks in the United Kingdom sector of the North Sea known collectively as "J - Block". Each entered into a Gas Sales Agreement with the defendant/appellant ("the buyer") dated 26th March 1993 and in substantially the same form ("the GSA"), under which the seller sold and the buyer purchased the entire entitlement of each respondent to natural gas extracted from J Block during a period expiring in 2011.

3. Article 2.2 of the GSA, to which I shall turn in detail shortly, dealt with the sequence and time range in which the seller´s facilities would be completed and deliveries of Natural Gas ("Gas") under the GSA would start. The date for commencement of deliveries of gas to the buyer was referred to as the "Commissioning Date", which clause 2 anticipated would be the subject of agreement between the parties, in default of which 25th September 1996 was nominated as the Commissioning Date.

4. The declaration granted by the Order of Mr. Justice Colman was in the following terms:

"That it is or would be a breach of Articles 2.2, 2.4 and 2.6 of the Gas Sales Agreements made between each of the Plaintiffs and Defendant .. for the Defendant to refuse or fail to agree a Commissioning Date (as defined in the Gas Sales Agreement):

(a) because it perceives it to be in its own financial interest to defer the First Delivery Date .. by reason of the market price of gas being lower than the price payable after the First Delivery Date under the Gas Sales Agreements; or

(b) for any reason other than one which is based entirely upon the technical or operational practicality of the proposed Commissioning Date."

2. SCHEME OF THE GSA AND ARTICLE 2.

5. The GSA is a complicated contract which deals with a wide-ranging and complex subject-matter. It seeks to regulate the parties´ conduct over a number of phases and over the course of some 18 years in relation to what is in effect a cooperative enterprise for the exploitation of the J Block field. It requires the parties to act with a degree of cooperation.

6. The seller is obliged to construct the facilities necessary to extract the J Block gas and to transport it to a 250-mile long pipeline in the North Sea known as the CATS pipeline through which the gas is to be transported to the mainland. The buyer on the other hand is obliged to construct the necessary facilities to receive the gas at the Delivery Point on the mainland at Teesside. The seller and buyer are to commission their respective facilities jointly. Once gas is available and commissioning complete, the buyer´s obligations are those characterised as "Take or Pay", that is to say the buyer is obliged either to take the gas and pay for it, or to postpone delivery but to pay immediately. The seller is obliged to sell its total output exclusively to the buyer until the year 2011, by which time it is anticipated that the J Block reservoirs will largely be depleted.

7. The GSA contains express provisions dealing with the co-ordination of construction schedules, the commissioning of the facilities and the carrying out of a Run-In Test to prove the capacity of both facilities prior to the First Delivery Date, when the normal delivery and Take or Pay provisions come fully into effect.

8. Article 2 of the GSA is concerned with the stage leading up to the commencement of gas deliveries. It is directed to the parties´ obligations connected with the co-ordination of construction, commissioning and testing of the extraction and delivery facilities prior to the First Delivery Date.

9. Article 2 provides as follows:

"Period of Agreement; Commissioning; Run-In

2.1 This Agreement shall come into force on the date on which it is executed and shall continue until the end of the Contract Period unless extended or earlier terminated in accordance with the terms of this Agreement.

2.2 The Seller (together with the Other Sellers) shall notify the Buyer of its good faith estimate of the time range within which the Sellers Facilities will be completed and the Seller will be capable of commencing deliveries of Natural Gas to the Delivery Point in accordance with the following notice periods:

By notice not later than: Time range not exceeding:

(i) twenty-four (24) months six (6) months before the start of the time range to be nominated;

(ii) nine (9) months before three (3) months the start of the time range to be notified;

(iii) four (4) months before one (1) month the start of the time range to be nominated.

The time range in subparagraph (i) above shall fall within the period commencing on 1 October 1995 and ending on 27 September 1996, and the time ranges in subparagraphs (ii) and (iii) above shall fall within the time ranges previously notified. Promptly following each of such Seller's notices, the Buyer shall notify the Seller of its good faith estimate of the date within the time range specified or earlier upon which construction of the Buyer's Facilities will be completed and the Buyer will be capable of accepting deliveries of Natural Gas at the Delivery Point. In addition, each Party shall keep the other Party informed at intervals of not more that ninety (90) Days, and, after the month in which the notice referred to in Clause 2.2(ii) is sent, at intervals of not more than thirty (30) Days, of

the progress of the design, construction and installation of (as appropriate) the Sellers Facilities and the Buyers Facilities. The Seller and the Buyer shall use reasonable endeavours to coordinate the construction of their respective facilities so that completion of construction occurs at approximately the same time, and each Party shall cooperate with the other to develop such written procedures as may be operationally necessary in connection therewith. The Buyer and the Seller shall use reasonable endeavours to agree, as much in advance as possible but in any case not less than thirty (30) days in advance, the date on which the Seller (and the other Sellers) will commence deliveries of Natural Gas to the Buyer (herein referred to as the 'Commissioning Date'), the date of the Run-In Test (as hereinafter defined), and the quantities of Natural Gas which the Buyer will use reasonable endeavours to nominate and take from the Seller and which the Seller will use reasonable endeavours to deliver during the Run-In Period (as hereinafter defined). If the Seller and the Buyer are unable to agree, prior to 25 August 1996, as to the Commissioning Date or the dates of the Run-In Test, then the Commissioning Date shall be 25 September 1996 and the Run-In Test shall be conducted from 25 to 28 September 1996. The Seller shall use all reasonable endeavours to cause the construction of the Sellers Facilities (except for any necessary commissioning) to be completed by the Commissioning Date. The Buyer shall, use all reasonable endeavours to cause the construction of the Buyers Facilities (except for any necessary commissioning) to be completed by the Commissioning Date.

2.3 The period commencing on the Commissioning Date and ending on the First Delivery Date (as hereinafter defined) is herein referred to as the 'Run-In Period'. The Buyer shall notify the Seller (and the Other Sellers) not later than 10.00 a.m. on the Wednesday immediately prior to the start of each Week during the Run-In Period of the quantities of Natural Gas which the Buyer reasonably anticipates nominating on each Day of such Week for the purposes of such commissioning and testing. Unless otherwise agreed by the Parties pursuant to Clause 2.2., the Buyer shall use reasonable endeavours to nominate, for delivery by the Seller, the Sellers proportion of the maximum quantities of Natural Gas which the Buyer (acting as a Reasonable and Prudent Operator) can accept delivery of through the Buyers Facilities and utilize as fuel or otherwise dispose of during such period; provided, however, that the quantities of Natural Gas which the Buyer nominates for delivery by the Seller for each Day during such period shall not exceed one hundred fifteen percent (115%) of the Sellers Proportion of the Maximum TDCQ. During the Run-In Period the Seller (together with the Other Sellers) shall use reasonable endeavours to deliver to the Buyer the quantities of Natural Gas so nominated.

2.4. On the dates agreed upon or fixed pursuant to Clause 2.2, the Seller (together with the Other Sellers) and the Buyer shall conduct a three (3) Day test (the 'Run-In Test') of the Seller's capability of delivering and the Buyer's capability of receiving one hundred fifteen percent (115%) of the Sellers Proportion of the Maximum TDCQ. The Run-In Test shall be completed when such capabilities have been established on three (3) consecutive Days and the Seller believes, acting as a Reasonable and Prudent Operator, that it will be capable of delivering Natural Gas to the Buyer at the rate of one hundred fifteen (115%) of the Sellers Proportion of the Maximum TDCQ throughout the Base Plateau Period. If the Seller makes one hundred fifteen percent (115%) of the Sellers Proportion of the Maximum TDCQ available for delivery throughout each of such three (3) consecutive Days but the Run-In Test is not completed because the Buyer is unable to accept delivery of such quantities, then the Seller (together with the Other Sellers), acting as Reasonable and Prudent Operators, shall have the right on one (1) occasion during the period of thirty (30) Days after the last Day of such test by notice to the Buyer to deem the Run-In Test to have been completed at a rate for the Seller equal to one hundred fifteen percent (115%) of the Seller's Proportion of the Maximum TDCQ. If the Run-In Test is not completed due to technical disruption by third parties, the Run-In Test may be stopped by the Seller (together with the Other Sellers) or the Buyer and repeated on a Day reasonably acceptable to the Parties. Neither Party shall unreasonably delay or extend the Run-In Period or prevent the Run-In Test from being expeditiously completed. If the Run-In Test is completed or deemed completed pursuant to this Clause 2.4, then the Plateau TDCQ, which shall be effective from and including the First Delivery Date, shall be a quantity of Gigajoules equal to the Maximum TDCQ.

2.5. All Natural Gas taken by the Buyer during the Run-In Period shall be paid for at the Run-In Price and the take-or-pay provisions in Clause 14 shall not apply to the Run-In Period. The Seller shall have no liability to the Buyer for failure to deliver the quantities of Natural Gas nominated by the Buyer during the Run-In Period except where the Seller has not used its reasonable endeavours to deliver such quantities, and the Buyer shall have no liability to the Seller for failure to take such quantities except where the Buyer has not used its reasonable endeavours to take such quantities. Except as set forth above in this Clause 2, all the other terms and conditions of this Agreement shall apply to Natural Gas purchased by the Buyer during the Run-In Period.

2.6. The First Delivery Date shall be the first to occur of: (i) the First Day of the Month at least forty-eight (48) hours next following the completion or deemed completion of the Run-In Test, or (ii) six (6) o'clock a.m. on 1 October 1996. Except as otherwise provided in this Article 2, the Seller's delivery obligations under this Agreement and the Buyer's take-or-pay obligations under Clause 14 hereof shall begin on the First Delivery Date. The Parties shall each use their reasonable endeavours to procure that the First Delivery date occurs prior to 1 October 1996.

The scheme and sequence of events in Article 2 is therefore as follows:

(1) Each party will use reasonable endeavours to co-ordinate the construction of its respective facilities so that completion of construction occurs at approximately the same time.

(2) Each party will give various notices to the other relating to the progress of the construction of the facilities, leading to a narrowing period to be agreed for the date of delivery.

In particular the seller gives the buyer three "good faith" estimates of the time range within which the seller´s facilities will be completed and the buyer will be capable of commencing deliveries. The first (24 months)

notice is to specify a range of 6 months falling within the period 1st October 1995 -27th September 1996; the second (9 months) notice is to narrow the 6 months range to three months within the same period; the third (4 months) notice is to specify the final 1 month range within that period.

(3) Upon receipt of each of the successive seller´s notices, the buyer reciprocates with a good faith estimate of the date (falling no later than the range specified in the seller´s notice) by which the buyer´s facilities will be completed and they will be capable of accepting delivery of gas.

(4) In parallel, each party will keep the other party informed at not more than 90 day (narrowing to 30 day) intervals of the progress of the design, construction and installation of each party´s facilities.

(5) The parties must use reasonable endeavours to agree, not less than 30 days in advance, the date on which deliveries commence, i.e. the Commissioning Date, and the date of a 3-day test (the "Run-In Test") of the parties capability to deliver and receive oil. In the absence of earlier agreement, the "long stop" dates provided for are 25th September 1996 for the Commissioning Date and 25th - 28th September 1996 for the Run-In test.

(6) Once the Run-In test has been successfully completed, there follows, after a defined interval (see 2.6), the "First Delivery Date", at which date the parties´ full sale and purchase obligations are brought into effect.

3. THE IMMEDIATE DISPUTE.

10. The notices required under Article 2.2 were duly given as follows:

(i) On 16th December 1993 the seller gave 24 months notice specifying a 6 months time range from 16th December 1995 - 16th June 1996. On 31st January 1994 the buyer responded specifying 16th December 1995.

(ii) On 15th March 1995 the seller gave a 9 month notice specifying a 3 month time range between 16th December 1995 - 15th March 1996. On 10th April 1995 the buyer responded specifying 20th January 1996.

(iii) On 3rd August 1995 the seller gave 4 months notice specifying a 1 month time range of 16th December 1995 - 15th January 1996. On 4th September 1995 the buyer responded specifying 1st January 1996.

11. That being so, the next step was for the parties to agree the Commissioning Date and the date of the Run-In test. As set out above, Article 2.2 provided an obligation for each to use reasonable endeavours to agree that date and that: *"If the Seller and the Buyer are unable to agree, prior to 25th August 1996 ... then the Commissioning Date shall be 25th September 1996 and the Run-In test shall be conducted from 25th to 28th September 1996".*

12. However, despite the seller having pressed to agree a commissioning date with the buyer, the buyer has declined to reach agreement against the background of a severe fall in the short term market price of gas, to the extent that the contract price payable by the buyer under the GSA would, if currently payable, exceed the market resale price of gas, causing very substantial loss to the buyer.

13. The present position appears to be that the facilities have, since the beginning of 1996 been effectively completed, but, until they are commissioned and tested, the provisions for the sale and delivery of the gas cannot become operative.

14. The buyer maintains that the agreement provision in relation to the Commissioning and Run-In test dates is no more than a contract to negotiate or an "*agreement to agree*" and thus, creates no legally enforceable obligation on the appellant to commission or deliver, or agree to commission or deliver, before the long-stop dates provided for, and has in any event proposed for agreement a Commissioning Date which is the same as the long stop date provided for. The buyer contends in any event that it is entitled to take its own financial position into account when seeking to agree a Commissioning and Run-in test date.

15. The seller on the other hand contends that each party is under an obligation to use its best endeavours to reach agreement on the Commissioning and Run-in test dates having regard only to criteria of technical and operational practicality. It acknowledges that no such criteria are expressly confirmed or referred to in the GSA but contends that, in the context of the overall agreement and the pattern of coordination provided for in it, the "best endeavours" clause represents an enforceable duty on each of the parties to cooperate in the performance of the contract by reaching agreement on a Commissioning Date as soon as it is technically and operationally practical for them to do so. The seller contends that, the facilities of both parties being effectively complete and ready for final Commissioning and Run-In, it is a breach of contract for the buyer to refuse to agree to the Commissioning and Run-In test dates for selfish and commercial motives as opposed to reasons of technical or operational practicality.

4. EVIDENCE.

16. On the 2nd April 1996, Mr. Paulson, the seller´s manager of Capital Projects, swore a substantial affidavit in support of the summons in which he asserted that *"as the stage has now been reached where there are no technical or operational reasons for not completing the final commissioning works which require gas to be delivered to Enron, it is a breach of Articles 2.2, 2.4 and 2.6 of the GSA for Enron now to refuse or fail to agree to cooperate in the carrying out of such works"*. On the 12th April 1996 the buyer responded with a summons to dismiss the action as frivolous, vexatious and an abuse of the process of the Court, and on the 19th April 1996 Waller J. made orders which led to the hearing before Colman J. It was pursuant to one of the orders made by Waller J. that the seller formulated a statement of the assumed states of fact alleged by the seller to constitute a breach of the Gas Sale Agreement. That formulation reads:-

1. "Notwithstanding that the construction of the Seller´s Facilities and the Buyer´s Facilities (as defined in the Gas Sales Agreements) was completed on or about 15th February 1996, the (buyer) has refused or failed to agree

the proposed Commissioning Date (as defined in the Gas Sale Agreements) because it perceives it to be in its own financial interests to defer the First Delivery Date (as defined in the Gas Sale Agreements) by reason of the short term market price of gas being lower than the price payable after the First Delivery Date under the Gas Sale Agreements. Further or alternatively:

2. *Notwithstanding that the construction of the Sellers Facilities and the Buyers Facilities ... was completed on or about 15th February 1996 and that there are no technical or operational reasons for refusing or failing to agree the proposed Commissioning Date, the (buyer) has refused or failed to agree a Commissioning Date."*

17. The borrower chose not to serve evidence on affidavit, but by a solicitor´s letter of 22nd April 1996 accepted that for the purpose of determining the construction issue the factual matrix should be as set out in paragraphs 2, 3, 6 and 7 of Mr. Paulson´s affidavit (which paragraphs add nothing to the assumed states of fact), and exhibits 2 and 3 to that affidavit. Exhibit 2 is a map of the North Sea showing the J Block field, and exhibit 3 is the Agreement of 26th March 1993. The letter goes on to make it clear that the buyer does not accept the remainder of Mr. Paulson´s affidavit, and contends that it is irrevelant to, or inadmissible in relation to, the issue of construction. So, although Mr. Pollock QC, for the seller, invited our attention to a number of paragraphs in Mr. Paulson´s affidavit other than those identified in the letter of 22nd April 1996, and went as far as to summarise in a written note what he contended to be the relevant parts of Mr. Paulson´s affidavit, I would not for the purpose of these proceedings be prepared to extend the factual matrix into disputed territory. However, it is obvious that the seller suffers financially and to a considerable degree if the gas does not start to flow as soon as possible after the seller has made the investment required of the seller to make the flow possible.

5. THE JUDGMENT OF MR. JUSTICE COLMAN.

18. Mr. Justice Colman, in a long and careful judgment, found against the appellant on the following basis.

19. He accepted that: *"As a general principle an agreement to negotiate a contract is not enforceable in English law because it lacks the necessary certainty. A Court cannot decide by reference to any objective consideration or criteria whether subjectively a proper reason exists for the termination of negotiations; see* ***Walford -v- Miles*** *[1992] AC 128, per Lord Ackner at p. 138. A provision requiring a party to use its best endeavours to agree will in general equally be unenforceable, for that is just as incapable of enforcement by reference to objective criteria as an agreement to agree: see* ***Little -v- Courage Limited*** *[1994] 70 P & CR 469 per Millett LJ at p.476.*

20. Where that which is to be agreed is something which has to be done in the course of an on-going contract the same underlying principle will apply. If the contract contains no indication of the objective criteria by reference to which the matter must be agreed, the provision cannot be enforced because it is insufficiently certain: see ***Malozzi -v- Carapelli*** [1976] 1 Lloyd´s Rep. 407".

21. However, in reliance upon other authority, in particular ***Didymi Corporation -v- Atlantic Lines & Navigation Co, Inc*** [1968] 2 Lloyd´s Rep. 108 and the approach of the House of Lords in ***Sudbrook Trading Estate Limited -v- Eggleton*** [1983] 1 AC 444, he held that, where the contract contains sufficient indication of objective criteria to enable that which has to be agreed or calculated to be arrived at by the parties or, if they are unable to agree, by a court or arbitrator, the provision may be treated as enforceable. Whilst recognising that the relevant provision was itself entirely silent on what criteria (if any) were applicable, he nonetheless held that such criteria were inherent in, and to be applied on the basis of, the machinery and mutual obligations provided for in Article 2 as a whole. The key passages in his judgment read as follows: *"The issue of construction falls within an extremely narrow compass. Have the parties reserved to themselves an unfettered entitlement to refuse to agree, as contended by the buyers, or have the parties agreed to criteria which are sufficiently identifiable to give certainty and therefore legal enforceability to the provision? Mr. Gordon Pollock QC on behalf of the sellers, submits that, by implication, each part undertook to use reasonable endeavours to agree those dates for the Commissioning Date and the commencement of the Run-In Test which were the earliest dates upon which it was reasonable for the relevant operations to commence in the light of technical and operational feasibility."*

22. He went on to find that: *"The whole structure and content of Article 2 is directed to the co-ordination of operational capability and the minimising of delay in bringing the respective facilities to the point of the First Delivery Date. The GSA is concerned with the physical capability of the facilities only as a means of bringing into operation the normal delivery and take or pay provisions of the agreement. It is to that objective that the various qualified obligations to use reasonable endeavours are directed. If the scope of the contractual choice under the agreement provision included an unfettered entitlement to withhold agreement for commercial considerations, that would be entirely inconsistent with the purpose to which those qualified obligations were directed. The unfettered power to delay the commencement of the normal regime under the GSA would appear to be highly improbable alongside the other terms of the contract".*

6. THE CRITICAL WORDS AND THE ISSUE.

23. The contractual words at the heart of the dispute are those in Article 2.2 *"The Buyer and Seller shall use reasonable endeavours to agree ... If the seller and the buyer are unable to agree prior to 25th April 1996 ... then the Commissioning Date shall be 25th September 1996 and the Run-In test shall be conducted from 25th to 28th September 1996".*

24. A number of points seem to me to be of some importance:-

(1) The buyer and seller do not commit themselves to agree; they only commit themselves to use reasonable endeavours to agree, so the wording is such as to contemplate the possibility of disagreement, and, in the last sentence quoted, express provision is made to deal with that eventuality.

(2) There are three matters to be agreed, namely -
(a) the Commissioning Date
(b) the date of the Run-In test:
(c) the quantities of natural gas which the buyer will use reasonable endeavours to nominate and take from the seller, and which the seller will use reasonable endeavours to deliver during the Run-In Period.

(3) The last sentence quoted sets out precisely what is to happen if the Commissioning Date or the date of the Run-In Test are not agreed prior to 25th August 1996, and Article 2.3 sets out what is to happen if there is no agreement pursuant to Article 2.2 as to the quantities of gas for the Run-In period.

(4) Nowhere in this passage, or elsewhere in the contract, is any guidance offered as to the circumstances in which either party might be found not be using reasonable endeavours to agree. For example, the contract does not say that a party to the contract will not be regarded as making reasonable efforts to agree if its failure to agree to a Commissioning Date is attributable solely to its own financial interest, or is for any reason other than the technical or operational practicality of the proposed Commissioning Date.

25. If the implication is to be found that the parties could only have regard to criteria of technical and operational feasibility, it can only be found, as the Judge found it, by analysing Article 2 as a whole, and then re-reading the critical words in context.

26. However it is, I believe, worth noting in passing that in order to set aside the declaration made by Colman J., the buyer does not (as the passages quoted from his judgment might suggest) have to go so far as establish an unfettered entitlement to refuse to agree. In the context of the present case it would be sufficient for the buyer to show that, when the critical words of Article 2.2 are properly understood, they do not require the buyer to disregard his own financial position when endeavouring to agree a Commissioning Date.

7. AUTHORITIES AND PROPOSITIONS OF LAW

27. The basic submission made to us by Mr Kentridge QC for the buyer was that the critical words in Article 2.2 are no more than an agreement to agree, which has long be recognised to be legally unenforceable - see for example ***May & Butcher -v- R*** (1934) 2 KB 17 in which an agreement for the sale of tentage which provided that the price, dates of payment and manner of delivery should be agreed from time to time was held by the House of Lords to be incomplete and therefore unenforceable because it left vital matters to be settled. Similarly in ***Courtney & Fairbairn Ltd -v- Tolaini Bros Ltd*** (1975) 1 WLR 297 Lord Denning M.R. said at page 301 H:- *"If the law does not recognise the contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me that it cannot recognise the contract to negotiate. The reason is because it is too uncertain to have any binding force. No Court could estimate the damages, because no one can tell whether the negotiations would be successful or would fall through: or if successful, what the result would be. It seems to me that a contract to negotiate, like a contract to enter into a contract is not a contract known to the law."*

28. In ***Mallozzi -v- Carapelli*** (1976) 1 LL. R. 407 the provision with which the Court was concerned appeared, as in the present case, in a contract otherwise binding, but that was held not to effect the principle.

29. In ***Liverpool City Council -v- Irwin*** (1977) AC 239 the House of Lords was concerned with the landlords' obligations to repair in relation to a contract which Lord Wilberforce at page 235 D found to be partly but not wholly stated in writing. He went on to consider some of the situations in which a court would supply what is not expressed, saying at page 253 G:- *"Where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work - this is the case, if not of the* ***Moorcock*** *(1889) 14 PD 64 itself on its facts, at least of the doctrine of the Moorcock as usually applied."*

30. Mr Kentridge submits that here we are dealing with an apparently complete bargain which patently will work without the addition of any term because the critical words in Article 2.2 include a fall-back provision to enable it to do so, but Mr Pollock submits that this is another type of case envisaged by Lord Wilberforce, at page 254 A, where the Court *"is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the Court is searching for what must be implied."* If there does have to be any implication, what is to be implied must be not only necessary to give business efficacy to the contract, it must also, as Lord Salmon accepted, be precise in its terms. At page 262 H he cited with approval the words of Lord Goddard C.J. in ***R. -v- Paddington & St. Marylebone Rent Tribunal ex part Bedrock Investments Ltd*** (1947) KB 984 at 990:- *"No covenant ought ever to be implied unless there is such a necessary implication that the Court can have no doubt what covenant or undertaking they ought to write into the Agreement."*

31. Here, Mr Kentridge submits, the seller cannot say with sufficient precision what covenant or undertaking ought to be written in.

32. In ***Sudbrook Trading Estates Ltd -v- Eggleton*** (1983) AC 444 the lessees of industrial premises were granted an option to purchase the reversion at a price to be agreed by two valuers, one nominated by each side, and in default of agreement by an umpire appointed by the valuers. When the lessees exercised their option, the lessor refused to appoint a valuer, and contended that there was no effective formula for ascertaining the price, merely an agreement to agree, so no enforceable contract existed, but the House of Lords held that the provisions as to the appointment of valuers clearly indicated that there should be a sale at an objectively ascertainable fair and reasonable price. In the ***Didymi*** (1988) 2 LL.R. 108 the Court of Appeal adopted the same approach where a charter provided that if the owners representations as to the speed and fuel consumption of a vessel proved inaccurate the hire should be *"equitably decreased by an amount to be mutually agreed between the owners and the*

charterers." The trial judge, whose decision was upheld by the Court of Appeal, found that the words *"to be mutually agreed"* where directory or mechanical and did not represent the substance of the provision, and that the use of the word *"equitably"* gave the clause sufficient certainty for it to have legal effect. As Bingham L.J. said at page 115:- *"In this context the expression* ***"equitably"*** *in my judgment means* ***"fair and reasonably".*** *I am unpersuaded that there is any uncertainty as to the meaning of the word."*

33. Similarly, at page 118, Nourse L.J. said:- *"I would certainly accept that, if there had been a simple agreement for a decrease in the hire to be agreed between the owners and the charterers themselves, then the prescribed mode of agreement would have been essential and the agreement would have failed. But that is not the agreement which the parties have made. A purely objective standard has been prescribed. The parties can only agree upon an equitable decrease."*

34. The same approach was adopted by the Privy Council in ***Queensland Electricity Generating Board -v- New Hope Collieries Pty Ptd*** (1989) 1 LL.R. 205 but in ***Walford -v- Miles*** (1992) 2 AC 128 the House of Lords confirmed that an open-ended agreement by a seller to deal only with one potential purchaser lacked certainty and was therefore unenforceable. At page 138 F Lord Ackner said that Counsel seeking to enforce the agreement:- *"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 the 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 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."*

35. Mr Kentridge submits that those observations apply to the critical words of Article 2.2 in the present case, but Mr Pollock contends that here the buyer was obliged to negotiate within a prescribed framework which did not entitle him to have regard to extraneous matters such as his own financial position.

36. In ***P & O Property Holdings Ltd -v- Norwich Union*** (1994) 68 P & CR 261 a developer and head lessor had each contracted to use *"reasonable endeavours to obtain"* lettings of units in a shopping centre. The head lessor contended that in the circumstances the developer should have been prepared to pay to a tenant a reverse premium if a hypothetical reasonable landlord would regard such a premium as good estate management in current conditions, but the House of Lords, upholding the decision of the Court of Appeal, rejected that contention. In the Court of Appeal Steyn L.J. said at page 16 A of the transcript:- *"The concepts of (a)* ***"reasonable endeavours"*** *obligation placed on both parties, and (b) the judgment of the "reasonable landlord" are inherently in tension. As a matter of ordinary commonsense they convey different ideas. The* ***"reasonable endeavours"*** *obligation necessarily imports the idea that the endeavours of the parties may fail to result in a letting, but neither is necessarily in breach. The judgment and approach of the parties may be at odds, but measured against a yardstick of reasonableness neither may be in breach of the* ***"reasonable endeavours"*** *obligation. The reality is that the position of each party may be reasonably defendable. On the other hand, the standard of the* ***"reasonable landlord"*** *results in a single vindicated position."*

37. Similarly, in the House of Lords Lord Browne-Wilkinson trenchantly rejected the submission that by agreeing to use reasonable endeavours the parties intended to impose an objective standard as to what terms it would be reasonable to agree to obtain a letting. Mr Kentridge submits that precisely the same line of reasoning can be applied to the case with which we are concerned.

38. In ***Little -v- Courage Ltd*** (1995) 70 P & CR 469 an option to renew the lease of a public house had a condition precedent involving agreement on a new business plan. The tenant contended, amongst other things, that there was therefore an implied term that the landlord would use its best endeavours to reach agreement on a business plan, and as to that Millett L.J. said at page 476:- *"An undertaking to use one's best endeavours to obtain planning permission or an export licence is sufficiently certain and is capable of being enforced. An undertaking to use one's best endeavours to agree, however, is no different from an undertaking to agree, to try to agree, or to negotiate with a view to reaching agreement; all are equally uncertain and incapable of giving rise to an enforceable legal obligation."*

39. In ***Arbuthnott -v- Fagan*** (1995) CLC 1396 Sir Thomas Bingham MR at page 1400D described the task we have to perform in these words:- *"Courts will never construe words in a vacuum. To a greater or lesser extent, depending on the subject matter, they will wish to be informed of what may variously be described as the context, the background, the factual matrix or the mischief. To seek to construe any instrument in ignorance or disregard of the circumstances which gave rise to it or the situation in which it is expected to take effect is in my view pedantic, sterile and productive of error. But that is not to say that an initial judgment of what an instrument was or should reasonably have been intended to achieve should be permitted to override the clear language of the instrument, since what an author says is usually the surest guide of what he means. To my mind construction is a composite exercise, neither uncompromisingly literal nor unswervingly purposive: the instrument must speak for itself, but it must do so in situ and not be transported to the laboratory for microscopic analysis."*

40. We were also invited to consider a passage in the speech of Lord Mustill In ***Charter Re-Insurance Co. Ltd. -v- Fagan*** (1996) 3 All E.R. 46 at page 54 to similar effect.

41. It is, of course, helpful to look at the authorities so as to be reminded of the parameters within which this case falls to be decided, but following that perusal the problem remains as to whether, properly considered in their contractual setting, the critical words in Article 2.2 prevented the buyer from refusing or failing to agree a Commissioning Date for financial reasons, or indeed for any reason other than one based entirely upon technical or operational practicality.

8. CONTRACTUAL SETTING

42. Mr Kentridge submits that Article 2, and in particular Article 2.2, deals with commissioning and running-in sequentially. The steps are set out in chronological order, and broadly speaking that seems to me to be right. On three occasions, over a two year period, with increasing accuracy, the seller has to notify the buyer of the period when he will be ready to commence deliveries, and the buyer has to respond with notification as to when, within the seller's timescale, he will be able to accept deliveries. As time goes by each side has to report to the other at regular intervals as to the progress of the design, construction and installation of their respective facilities, and at line 33 Article 2.2 provides:- *"The seller and the buyer shall use reasonable endeavours to co-ordinate the construction of their respective facilities so that completion of construction occurs at approximately the same time."*

43. Mr Pollock submits that the thinking behind these provisions is clear. Both sides were making substantial investments so it was to their mutual advantage to keep in step, to invest neither too early nor too late, and for the same reason they must have envisaged that as soon as the equipment on both sides was ready the gas would flow. But the fact remains that the critical words, that is to say the words requiring both parties to use *"reasonable endeavours"* to fix a Commissioning Date do not even suggest when, in relation to the programme of work, the *"reasonable endeavours"* should commence, or how the Commissioning Date should be triggered other than by agreement on both sides or by the operation of the fall-back provision, and, as it seems to me, the omissions may well have been deliberate. Certainly it was envisaged that the Commissioning Date might be agreed before construction was complete because in Line 53, immediately after the critical words, Article 2.2 provided for both sides to use "all reasonable endeavours" to complete construction of their facilities by the Commissioning Date. And, as Mr Kentridge has pointed out, there were matters other than the completion of construction which the parties might reasonably have wished to take into consideration when fixing the Commissioning Date. Quite apart from considerations directly linked to the prevailing price of gas the buyer would, at the very least, want to be able to handle the gas, to pay for it, and to dispose of it when it began to flow, so he would need to have in position appropriate staff, appropriate finance, and appropriate contracts for re-sale. Yet, if the arguments now put forward by the sellers are correct it would seem to follow that at no stage, even if the work of construction was still far from complete, could the buyer object to a proposed Commissioning Date on the basis that, for example, the buyer had yet to complete the negotiation of a contract for re-sale.

44. Article 2.3 deals only with the Run-In Period, that is to say the period between the Commissioning Date and the First Delivery Date, and to my mind it contains nothing which throws light on the critical issue in this case, but Article 2.4 is more significant. It provides for a three day Run-In Test to be carried out or deemed to be carried out during the Run-In Period. Colman J. found in the deeming provisions which work in favour of a seller willing and able to supply gas to a buyer unable to receive it - *"A further indication that it was the mutual intention of the parties that once the seller's part of the system was physically completed and physically capable of delivering the requisite quantity of gas, the commencement of the ordinary delivery regime under the GSA should not be held up by matters relating to the physical inadequacy or capability of the buyer's facilities."*

45. To my mind the deeming provisions should not be made to carry more weight than they can bear. I accept that once the Commissioning Date has been fixed by agreement, or by the operation of the fall-back provision, in Article 2.2, the deeming provisions in Article 2.4 prevent the buyer from dragging his feet by prolonging the Run-In Test, but that seems to me to be of no assistance in deciding the matters to which the buyer was entitled to have regard when deciding whether or not to agree to an early Commissioning Date. The same observation applies to this sentence in Article 2.4 which the Judge found to be of some significance:- *"Neither party shall unreasonably delay or extend the Run-In Period or prevent the Run-In Test from being expeditiously completed"*.

46. I accept that, since the Run-In Period begins with the Commissioning Date any unreasonable lack of readiness to agree the Commissioning Date would seem to be a breach of this express contractual obligation. As has been pointed out, to confine the obligation to difficulties experienced after the Run-In Period has commenced would give no proper weight to the use of the word *"delay"*, but the question remains of whether and at what point the lack of readiness to agree should be branded as unreasonable, which is simply another way of formulating the issue raised by Article 2.2.

47. Article 2.5 is for present purposes of no assistance, so I come to Article 2.6. It provides that the First Delivery Date shall be the first day of the month at least 48 hours following the completion or deemed completion of the Run-In Test or 6am on 1st October 1996. The Contractual significance of the First Delivery Date is that it triggers not only the Seller's delivery obligations, but also the take or pay obligations of the buyer, and Article 2.6 concludes:- *"The parties shall each use their reasonable endeavours to procure that the First Delivery Date occurs prior to 1st October 1996."*

48. Here again, as it seems to me, there is nothing to indicate that a buyer is not using reasonable endeavours to procure an earlier First Delivery Date if he genuinely and for good reason believes that it would be financially imprudent for him to do so.

49. During the course of submissions our attention was also drawn to Article 2.7 and 2.8, but for present purposes I am unable to derive assistance from either.

9. CONCLUSION

50. When the critical words in Article 2.2 are read in their contractual setting, and with regard to the ensuing fall-back provision, I find it impossible to say that they impose on the buyer a contractual obligation to disregard the financial effect on him, and indeed everything else other than technical or operational practicality, when deciding how to discharge his obligation to use reasonable endeavours to agree to a Commissioning Date prior to 25th September 1996. If the obligation were to be strait-jacketed in that way, that is something which to my mind would have been expressly stated, and, as Mr Pollock's argument really conceded, this is not a situation in which it would be appropriate for the Court to imply a term, not least because it is unnecessary to do so for purposes of business efficiency. The fall-back provision expressly states what is to happen if no early Commissioning Date is agreed.

51. For those reasons I would allow this appeal and set aside the declarations made in the Court below.

LORD JUSTICE POTTER:

52. I agree. I would merely add some comments of my own.

53. In the course of a powerful argument, Mr. Pollock QC placed much emphasis upon what he submitted were the plain expectations of the parties as revealed by the GSA, which he equated with the "reasonable expectation of honest men" referred to by Steyn LJ in ***First Energy -v- HIB*** [1993] 2 Lloyd's LR 194 at 196. The GSA was an agreement drawn up between international energy companies intended to regulate their trading and financial relationship over a period of at least 15 years and involving hundreds of millions of pounds worth of business. They were plainly the product of much arm´s length negotiation and careful legal drafting, which appears to have been calculated to provide sequentially for every contractual eventuality which might occur at the various stages of the development and operation of the supply contract. That being so, I see no reason to suppose that it was the expectation, let alone the obligation, of the parties that, in any area of activity in which room was left for manoeuvre or further negotiation, they were not at liberty to take into account their own financial position and act in the manner most beneficial to them, short of bad faith or breach of an express term of the contract.

54. It has also been argued that, as a matter of drafting, if the parties had not intended to impose a binding legal obligation by providing for the use of reasonable endeavours to agree a Commissioning Date earlier than the long-stop date, having regard only to technical or operational practicality, it would have been easy for them simply to agree that the Commissioning Date would be 25th August *1996 "or such earlier date as the parties might agree"*. I find that argument unpersuasive. It is not unknown in contracts of this kind for the parties to adopt a *"best endeavours"* or *"reasonable endeavours"* clause for the very reason that they wish to make clear a future co-operative intention without providing for an enforceable legal obligation which in negotiation one or other may have refused to agree.

55. As I have already indicated, the pattern of drafting each GSA has been to provide specifically for all eventualities. This is particularly so in respect of matters which affect the date at which the parties' obligations to take and supply product are concerned. In accordance with the overall *"take or pay"* structure, a pattern of notional (long-stop) dates for events such as Commissioning/Run-In are set to trigger such obligations regardless of the actual state of play or of relative blame or "*foot dragging"* by one side or the other in the event of delay. It would be strange in that context if the parties had been content to leave the availability of an action for breach of contract in respect of some earlier (unspecified) Commissioning Date dependent upon the interpretation of a *"reasonable endeavours"* clause by reference to unwritten criteria, now stated to represent the obvious intention of the parties despite the close perusal and prolonged exercise in interpretation necessary to ascertain such putative intention. Rather might they have been expected to provide that, in the event of failure to agree, an aggrieved party might serve reasonable notice upon the other calling for agreement and fixing a date in default. Instead, however, the parties provided for a long-stop Commissioning Date of 25th September 1996.

56. Finally, the unwillingness of the Courts to give binding force to an obligation to use "reasonable endeavours" to agree seems to me to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is to be regarded as reasonable or unreasonable in an area where the parties may legitimately have differing views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of dispute. In the face of such difficulty, the Court does not give a remedy to a party who may with justification assert, "well, whatever the criteria are, there must have been a breach in this case". It denies the remedy altogether on the basis of the unenforceability in principle of an obligation which may fall to be applied across a wide spectrum of arguable circumstances. This case seems to me to afford a good example of the wisdom of that approach.

57. Even if I were satisfied (which I am not) on the basis of the facts agreed for the purposes of the issue that, by acting solely in its financial interests, the buyer has not made reasonable endeavours to agree a Commissioning Date prior to 25th September, the requirement of *"reasonableness*" would nonetheless present acute difficulties to any Court asked to decide from what date the buyer was in fact in breach and ought to be held liable in damages. For that purpose it might well be necessary to investigate at length, and form judgments upon, the availability of key personnel, designers or other specialists, the state and progress of the works, the stage at which the works might legitimately be regarded as ready from a practical and technical point of view including

testing, the commitment of resources towards completion and finalisation of the facility, the completion of onsale arrangements and a variety of other considerations arguably reasonable to be taken into account before proposing and/or agreeing a Commissioning Date.

58. In all those respects, the GSA utterly fails to reveal any express or implied criteria to be applied. Colman J. appears to have found assistance on the question of principle from the cases of ***Sudbrook Trading Estates Limited -v- Eggleton*** and the ***Didymi.*** Neither in my view affords real assistance to the seller´s arguments in this case. The criteria in respect of the price and rate of hire to be agreed were respectively those of fairness and reasonableness in the first case and an equitable (which the Court said meant *"fair and reasonable"*) decrease from a fixed rate in the second. The difference in nature and effect between prescription by the parties of an objective standard readily to be applied and a *"mere agreement to agree without machinery to resolve any failure to agree"* is succinctly dealt with in the judgments of Nourse LJ. and Dillon LJ in the ***Didymi*** at pp.118 - 119. The standard of fairness and reasonableness is an objective criterion to which the Court is frequently willing to resort when determining a price or other sum not specifically agreed but readily assessable by reference to market rates and prices in the relevant sphere. No such straightforward or well-established exercise arises in a *"one-off"* case of this kind, in which no criteria have been specified and there are a variety of considerations which may legitimately operate in the minds of the parties in relation to their ability or willingness to agree upon a specific date.

59. I too would allow the appeal.

SIR JOHN BALCOMBE:

60. Each Gas Sales Agreement ("GSA") of 26 March 1993, whose construction is the subject-matter of this appeal, is a long term contract for the sale and purchase of the output of a North Sea gas field. The contracts oblige the respondent sellers and the appellant buyers to construct certain facilities which are necessary for the performance of the contracts. After the First Delivery Date until the end of the contract period in 2011, the buyers must make regular and substantial payments to the sellers, whether the buyers physically take delivery of gas pursuant to the contracts or not. (Hence the description of the contracts as "*Take or Pay*" contracts.) In return for these payments, the sellers are precluded from delivering gas from the contract field to anyone other than the buyers and must stand ready to deliver from the field in response to nominations for gas made by the buyers. Each GSA is a document which, even without its attendant 10 schedules, runs to over 200 pages of print and bears all the hallmarks of having been the subject of extensive negotiation and prepared by skilled lawyers.

61. The relevant provisions of Article 2 of the GSA are set out verbatim in the judgment of Colman J. and themselves run to 4 1/2 pages of print. The article is in essence arranged chronologically so as to cover the steps leading up to the First Delivery Date in order:

(1) In article 2.2 the parties agree to exchange a series of notices setting forth their respective good faith estimates of the dates of completion of their respective facilities. The notices are delivered within continually narrowing time frames.

(2) Article 2.2 then provides: " *The Buyer and the Seller shall use reasonable endeavours to agree, as much in advance as possible but in any case not less than thirty (30) Days in advance, the date on which the Seller (and the other Sellers) will commence deliveries of Natural Gas to the Buyer (herein referred to as the "Commissioning Date")*....." The clause continues and, in the same sentence, extends the same language to using reasonable endeavours to agree the date of the Run-In Test and the quantities of Natural Gas to be nominated, delivered and taken during the Run-In Period.

(3) Article 2.2 also expressly provides: "*If the Seller and the Buyer are unable to agree, prior to 25 August 1996, as to the Commissioning Date or the dates of the Run-In Test, then the Commissioning Date shall be 25 September 1996 and the Run-In Test shall be conducted from 25 to 28 September 1996.*"

(4) Article 2.2 also imposes the following additional obligations on the parties:

a) The parties must use reasonable endeavours to coordinate the construction of their respective facilities so that completion of construction occurs at approximately the same time, and the parties must cooperate to develop "*such written procedures as may be operationally necessary in connection therewith.*"

b) The Seller must use reasonable endeavours to cause the construction of the Sellers Facilities to be completed by the Commissioning Date.

c) The Buyer shall also use reasonable endeavours to cause the construction of the Buyers Facilities to be completed by the Commissioning Date.

(5) By article 2.3 (first sentence) the Commissioning Date marks the start of the Run-In Period which is the period of time during which the parties commission their respective facilities. The Run-In Period culminates in a 3 day Run-In Test (article 2.4) which establishes the ability of the parties' facilities to deliver and take gas at a certain rate for an uninterrupted 3 day period. Article 2.4 provides: "*Neither Party shall unreasonably delay the Run-In Period or prevent the Run-In Test from being expeditiously completed.*"

(6) The First Delivery Date is defined in article 2.6 as being the first to occur of (i) the first day of the month at least 48 hours next following the completion or the deemed completion of the Run-In Test or (ii) 6 a.m. on 1 October 1996. The First Delivery Date marks the start of the sellers' delivery obligations and the buyers' "Take or Pay" payment obligations. Article 2.6 concludes by providing that: "*The Parties shall use their reasonable endeavours to procure that the First Delivery Date occurs prior to 1 October 1996.*"

(7) If the Run-In Test has not been completed by 1 October 1996, the First Delivery Date occurs as provided by article 2.6, but the provisions of article 2.7 and (possibly) article 2.8 become relevant and provide for the operation of the contract on an interim basis pending completion of the Run-In Test.

62. The parties failed to agree a Commissioning Date earlier than 25 September 1996, the fall-back date provided by article 2.2 of the GSA. For the purposes of the preliminary issue which came before Colman J. he was (and we are) required to assume that this failure occurred because the buyer perceived it to be in its own financial interests to defer the First Delivery Date by reason of the short term market price of gas being lower than the price payable after the First Delivery Date. So the issue - which is purely one of the construction of the GSA and in particular article 2.2 - is whether the buyer is constrained only to withhold agreement to a proposed Commissioning Date on the basis of the technical or operational practicality of the proposed date, or whether the buyer is entitled to have regard to its own financial interests in deciding whether or not to agree a proposed Commissioning Date. Colman J decided this question in favour of the sellers, i.e in the first sense set out in the previous sentence.

63. The arguments before the judge, as before us, centred on the submission that the lack of objective criteria by which the process of using reasonable endeavours to agree a Commissioning Date can be judged means that the obligation is too uncertain to be enforceable; on that interpretation the obligation would be no more than an agreement to agree and therefore unenforceable. Mr. Kentridge, Q.C., counsel for the appellant buyer, accepted in the course of argument that if his submissions (in favour of unenforceability) were correct, the effect of article 2.2 could be condensed into a single sentence: "*The Commissioning Date shall be 25 August 1996 or such earlier date as the parties may agree*". I would be surprised if the lawyers, who obviously spent much time and effort in drafting and negotiating the elaborate provisions of article 2.2, had really intended to achieve no more than this, but if the proper application of the principles of construction required me to reach such an unattractive conclusion, I would reluctantly do so. Fortunately I do not feel so constrained.

64. In my judgment the approach and conclusion of Colman J. can not be faulted. After referring to (1) the general principle that an agreement to negotiate a contract is not enforceable in English law because it lacks the necessary certainty, (2) the application of that principle to something which has to be done in the course of an ongoing contract, and (3) the authorities from which that principle and its application are to be drawn, he continued: "*Where, however, the contract contains sufficient indication of objective criteria to enable that which has to be agreed or calculated to be arrived at by the parties, or if they were unable to agree by the court or arbitrator, the provision will be treated as an enforceable obligation: see* ***Didymi Corporation v. Atlantic Lines and Navigation Co. Inc.*** *[1968] 2 Lloyd's Rep 108 .....Accordingly, in determining whether the agreement provision in Article 2.2 is an enforceable obligation, it is necessary to ascertain whether on its proper construction, within its contractual setting, the agreement provided for is one to be arrived at by reference to identifiable objective criteria or by reference to the unfettered subjective considerations of each of the parties.*" He then conducted a careful analysis of the relationship of the agreement provision in article 2.2 to the rest of the GSA and in particular its contractual function and reached the following conclusions:

"*The whole structure and content of Article 2 is directed to the co-ordination of operational capability and the minimising of delay in bringing the respective facilities to the point of the First Delivery Date. The GSA is concerned with the physical capability of the facilities only as a means of bringing into operation the normal delivery and take or pay provisions of the agreement. It is to that objective that the various qualified obligations to use reasonable endeavours are directed. If the scope of the contractual choice under the agreement provision included an unfettered entitlement to withhold agreement for commercial considerations, that would be entirely inconsistent with the purpose to which those qualified obligations were directed...*"

"*the agreement provision in lines 39 to 49 [of article 2.2] has the contractual function of facilitating the identification of the first point of time when the parties' facilities will be physically ready to be put into operation and subsequently tested. It provides for a [mutual] process of co-ordination of availability which would otherwise be lacking. The agreement provision is therefore ancillary to the process of completion of physical construction and the commissioning of the facilities. ...Given that the agreement provision has this ancillary purpose, the subjective commercial interest of either party must be an entirely irrelevant and therefore impermissible consideration.*"

65. I agree with both those conclusions.

66. Since I believe that the applicable principles of law are not substantially in contention, but the question turns on the construction of the GSA - which, like most questions of construction depends on the impression made on the reader by the detailed provisions of the contract - I do not propose to refer to many of the cases which were cited to us during the course of argument. However, there are a number of specific matters which I should mention.

1) In my judgment, when approaching a question of the kind with which we are here faced, we should have well in mind the words of Steyn L.J. in ***First Energy v. HIB*** [1993] 2 Ll. R. 194 when he said (at p.196): "*A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a principle of law. It is the objective which has been and still is the principal moulding force of our law of contract. It affords no licence to a Judge to depart from binding precedent. On the other hand, if the prima facie solution to a problem runs counter to the reasonable expectation of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness.*" The application of this criterion should lead the court away from a construction of Article 2.2 of the

GSA which I do not believe can ever have been within the contemplation of the parties at the time they entered into the contract and which would produce a result so unfair to the seller.

2) Mr. Kentridge submitted that the construction favoured by the judge (which I support) requires the implication of a term in the contract, that such a term must be capable of clear formulation, and that no-one has yet suggested what that term should be. I do not accept that the judge's construction requires the implication of a single specific term. As Lord Wilberforce said in ***Liverpool C.C. v. Irwin*** [1977] A.C.239, 253: "*..there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms:.....In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work.....There is a third variety of implication.....and that is the implication of reasonable terms. .....The present case, in my opinion, represents a fourth category, or I would rather say a fourth shade in a continuous spectrum. The court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied.*" In my judgment the present case comes within Lord Wilberforce's fourth category or shade. The court has rightly found that it is implicit in Article 2.2 of the GSA that, in using reasonable endeavours to agree a Commissioning Date, the parties may have regard only to technical and operational criteria, and may not in this context take into account their subjective commercial interests.

3) The appellants' skeleton argument includes a submission that the position would have been different had the GSA contained an arbitration clause; it would then have been possible to imply a term as the parties could be taken to have intended that the arbitrator should be in a position to arrive at what the parties were unable to agree. This submission shows a misconception as to the effect of an arbitration clause. A similar submission was rejected by Goff L.J. in ***Beer v. Bowden*** [1981] 1 W.L.R.522, 526: "*...Mr.Jaques ...says..that one could only make an implication of that character* [a fair rent] *if assisted by the presence of an arbitration clause. Where you have got an arbitration clause, then if you imply a term that there shall be a reasonable price...or a fair rent...., any dispute as to what is reasonable or fair falls within the arbitration clause; and, if you have not got one, it falls to be resolved by the court.* ***But, in my judgment, the presence or absence of an arbitration clause does not matter.*** [my emphasis] ..... *So...one implies a term on general principles, and then only turns to the arbitration clause to resolve any dispute arising upon the implied term.*"

67. In my judgment the learned judge reached the right conclusion for the right reasons. I would dismiss this appeal.

Order: Appeal allowed. Orders below discharged. Leave to appeal was refused.

MR S KENTRIDGE QC (Instructed by Messrs Norton Rose of London) appeared on behalf of the Appellant.
MR G POLLOCK QC (Instructed by Messrs Freshfields of London) appeared on behalf of the Respondent.