UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PASHA S. ANWAR, *et al.*, Plaintiffs, v. FAIRFIELD GREENWICH LIMITED, *et al.*, Defendant. This Document Relates To: All Actions	Master File No. 09-cv-118 (VM)

AFFIDAVIT OF ROBERT MILES, Q.C.

Exhibit 12

BRITISH COMPANY LAW CASES

Volume 4

1988

CCH EDITIONS LIMITED
TAX, BUSINESS AND LAW PUBLISHERS
TELFORD ROAD, BICESTER
OXFORDSHIRE OX6 0XD
Phone: Bicester (0869) 253300
London (01) 491 1322
Facsimile No.: Bicester (0869) 245814
DX: 40162 Bicester

Dawson International plc v. Coats Patons plc & Ors.
Court of Session (Outer House). Judgment delivered 4 March 1988.

Take-over — Breach of contract — Reimbursement of loss and expense — One public company sued another for costs incurred preparatory to abortive take-over bid — Defenders applied for action to be dismissed — Whether pursuers had good claim against company for breach of contract — Whether company could bind itself to recommend particular take-over offer — Whether pursuers had good claim against company and directors for reimbursement of loss incurred on faith of unwarrantable and reckless representations

This was an action in which one public company sued another public company and two of its directors for costs incurred preparatory to a take-over bid which lapsed when the target company agreed to be taken over by a third company whose subsidiary it became. On procedure roll the defenders moved to have the action dismissed.

The pursuers' action was based on two distinct grounds. First, the pursuers claimed against the first defenders, the target company, for breach of contract, averring that at meetings between representatives of the pursuers and of the first defenders in January 1986, the pursuers and first defenders had agreed that the pursuers would offer to buy the entire share capital of the first defenders at the price stated in a joint press announcement of 27 January 1986; that by that date the first defenders had contracted to recommend the pursuers' offer to their shareholders, not to solicit a competing offer and not to encourage or co-operate with any unsolicited approach; in breach of contract the first defenders did encourage and co-operate with the (ultimately successful) approach from the third company and did not recommend the pursuers' offer.

Secondly, the pursuers claimed against all three defenders for reimbursement, averring that the defenders represented to the pursuers that they were committed to supporting the pursuers' offer and that there had been no other approach, leading the pursuers to believe that the defenders would not encourage or co-operate with another offeror; the first defenders did co-operate with the approach made by the third company; accordingly, the representations made by or on behalf of the defenders, on the faith of which the pursuers were, to the defenders' knowledge, incurring substantial expense, were made unwarrantably and recklessly.

The first defenders argued that they could not have entered into a contract in the terms indicated by the pursuers' averments. First, it was not within the power of a company to bind itself to recommend a particular offer and not to encourage or co-operate with a competing approach (such a contract could only be made with the directors). Secondly, such a contract would conflict with directors' fiduciary duties to act in the best interests of shareholders, by fettering their freedom to act. For the same reason if there had been such a contract it would have been understood to be conditional on the pursuers' bid remaining the best bid from the point of view of the first defenders' shareholders. The first defenders also submitted that the pursuers' averments as to the alleged contract and its breach were inadequate.

In reply, the pursuers submitted that it was within the power of a limited company to enter into such a contract as was alleged and that such a contract would not necessarily be contrary to directors' duties: the fiduciary duty of directors was owed to the company, although its exercise involved consideration of members' interests.

The pursuers' case for reimbursement presupposed that no contract was in fact made. The pursuers submitted that where one person had indicated to another an intention to enter into a contract (but no such intention had been truly formed) and led the other to incur expense in reliance on the expressed intention, there had been an actionable wrong entitling the person misled to recover. A claim for reimbursement arose where representations or inducements which occasioned substantial loss were recklessly and unwarrantably held out as to a state of affairs, which was not limited to the existence of a contract and could include a statement as to future intentions.

The defenders argued that on the authorities the remedy of reimbursement was only available where a party admitted or had alleged against him a contract from which he had resiled, being entitled to do so by reason of the absence of signed writing, having been given possession of heritage which could only be explained by reference to the alleged or admitted contract.

Held, allowing enquiry on the pursuers' case of breach of contract, but ruling the pursuers' case for reimbursement irrelevant:

1. It could not be accepted as a general proposition that a company could have no interest in the change of identity of its shareholders upon a take-over. There would be cases in which its agents, the directors, would see the take-over of its shares by a particular bidder as beneficial to the company and others where the directors would see a particular bid as not in the best interests of the company. Accordingly, it could not be accepted that, by reason of lack of any interest in the matter, a company could not enter into a contract of the nature alleged by the pursuers.

2. Directors owed fiduciary duties to the company. In discharging their duty to the company they had to consider the interests of shareholders, but that did not mean that the directors were under a fiduciary duty to shareholders in regard to the disposal of shares on a take-over and accordingly obliged to act in such a way as to further their best interests. What was in the interests of current shareholders as sellers of their shares might not coincide with what was in the interests of the company. Thus directors might on behalf of a company agree to recommend a bid and not to encourage or co-operate with an approach from another would-be bidder without being in breach of a fiduciary duty to current shareholders.

3. If directors took it upon themselves to give advice to shareholders in a bid, the authorities showed clearly that they had a duty to advise in good faith and not fraudulently, and not to mislead whether deliberately or carelessly. If they failed in that duty, affected shareholders might have a remedy. However, that did not demonstrate a so-called secondary fiduciary duty to shareholders, merely a potential liability, arising out of the directors' words or actions, based on ordinary principles of law.

4. The submission that if there had been a contract it would have been conditional upon the pursuers' bid remaining the best bid from the point of view of shareholders, did not make the pursuers' averments irrelevant. Whether such a condition was implied in any such contract was a matter for the defenders to aver and prove.

5. There was force in a number of the first defenders' criticisms of the pursuers' factual averments, but they fell short of demonstrating that in point of relevancy or specification the pursuers had failed to aver sufficient to justify enquiry.

6. There was no authority for reimbursement of expenditure incurred by one party occasioned by the representations of another, beyond the case where the former acted in reliance on the implied assurance by the latter that there was a binding contract between them when in fact there was no more than an agreement which fell short of being a binding contract. In such circumstances while the latter was within his rights in failing to implement his part without good reason, it was unconscionable that he should deny reimbursement of what had been expended by the former in implement of his. The alleged representations in the present case were that the first defenders were committed to supporting the pursuers' offer and that there had been no approach by another bidder, neither of which fell within the scope of the remedy: accordingly the pursuers' case for reimbursement was irrelevant.

The following cases were referred to in the opinion:

Allan & Anor. v. Gilchrist (1875) 2 R. 587.
Bell v. Bell (1841) 3 D. 1201.
Buchanan v. Baird & Ors. (1773) M. 8478.
Clark v. Workman [1920] 1 I R. 107.
Company No 008699 of 1985, Re a (1986) 2 BCC 99,024.
Crowther (John) Group plc v. Carpets International plc (unreported, 4 October 1985).

Dobie v. Lauder's Trustees (1873) 11 M. 749
Dunford & Elliott Ltd. v. Johnson & Firth Brown Ltd [1977] 1 Ll. Rep. 505
Fowlie v McLean (1868) 6 M. 255.
Gething & Ors v. Kilner & Ors. [1972] 1 W.L.R. 337
Gilchrist & Anor. v. Whyte 1907 S.C. 984.
Gowans' Trustees v. Carstairs (1862) 24 D. 1382.
Grahame & Anor. v. Burn (1685) M. 8472.
Gray v. Johnston 1928 S.C. 659
Greenhalgh v. Arderne Cinemas Ltd. & Ors [1951] Ch. 286
Harmer (H.R.) Ltd., Re [1959] 1 W.L.R. 62
Heddle v Baikie (1846) 8 D. 376
Heron International Ltd. & Ors. v. Lord Grade & Ors. [1983] B.C.L.C. 244.
Hinchcliffe v. Crabtree [1972] A.C. 707
Lawson v. Auchinleck (1699) M. 8402.
Microwave Systems (Scotland) Ltd v. Electro-Physiological Instruments Ltd. 1971 S.C. 140
Morgan v. Tate & Lyle Ltd. [1955] A.C. 21
Northern Counties Securities Ltd. v. Jackson & Steeple Ltd [1974] 1 W.L.R. 1133
Parke v. Daily News Ltd. [1962] Ch. 927
Percival v Wright [1902] 2 Ch. 421.
Prudential Assurance Co. Ltd. v Newman Industries Ltd. & Ors (No 2) [1982] Ch. 204.
R. v. Panel on Take-overs and Mergers, ex parte Datafin plc & Anor. [1987] Q.B. 815; (1987) 3 BCC 10
Rackham v. Vavasseur (unreported, 6 April 1977).
Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation & Ors. [1986] Ch. 246; (1984) 1 BCC 99,158.
Shirlaw v. Southern Foundries (1926) Ltd. [1939] 2 K.B. 206
Stirling v Maitland & Anor. (1864) 5 B. & S. 840; 122 E.R. 1043
Walker v Milne (1823) 2 S. 379 (2nd Ed. 338)

Mr. W.A. Nimmo Smith Q.C. and Mr S.N. Brailsford (instructed by Dundas & Wilson) for the pursuers.

Mr. P.H. Brodie Q.C. and Mr J. Murray Q.C. (instructed by Maclay Murray & Spens) for the defenders.

Before: Lord Cullen

Lord Cullen: This case came before me on procedure roll when the defenders moved me to sustain their first and second pleas-in-law and dismiss the action.

The action arises out of an abortive take-over bid by the pursuers to acquire the shares of the first defenders. The second and third defenders are, and at all material times have been, directors of the first defenders. The pursuers sue for payment of the sum of £8,383,404, which represents the costs of underwriting, printing and professional services in connection with the bid and the tax chargeable on recovery of these costs.

According to the pursuers' averments there were a number of meetings between representatives of the pursuers and the first defenders. At a meeting on 15 January 1986 it was provisionally agreed that the pursuers acquire the shares of the first defenders in exchange for new shares in the pursuers. There was some discussion of the price at which the shares should be valued for this purpose. The pursuers' representatives made it clear that they were not interested in becoming involved in a contested take-over situation and that any proposal should be so devised as to prevent, so far as practicable, any other bidder intervening. The representatives of the first defenders, including the second and third defenders, indicated that, in order to achieve a "lock-out", the offer would require to include a cash alternative of not more than ten per cent below the valuation of the shares. The directors of the first defenders represented that, if agreement could be reached on the

valuation and other terms of the offer, including the cash alternative, the merger would proceed as an agreed merger recommended by the board of the first defenders with the object of achieving a "lock-out", in which it was understood that the board would not encourage or co-operate with any competing offeror The second and third defenders indicated that a "lock-out" would be likely to be achieved at a price of £2.50 per share. At a further meeting on 16 January 1986 there was discussion of the valuation of the shares, the proposed management structure, the name of the merged company, and the cash alternative It was agreed that the pursuers' offer should proceed and be formally made as soon as practicable, subject to final approval by both boards and to agreement on the price of the shares Thereafter the pursuers' chairman had a number of conversations with the second defender, including one on 22 January 1986 in which he informed him that the pursuers would pay a price representing £2.50 per share on the basis that this would be a "lock-out" price and on condition that the pursuers would have a majority on the board of the merged company and that its name would be Dawson Coats Patons. The pursuers next aver that at the request of the first defenders the pursuers' chairman attended a meeting with them in London on 23 January 1986 where he reiterated the offer of £2 50 and further offered to meet the costs of underwriting the cash alternative providing that his other conditions were accepted and there was to be an agreed merger between the pursuers and the first defenders. This offer was accepted by the first defenders. On the evening of that date representatives of Morgan Grenfell & Co. Ltd and Samuel Montagu & Co. Ltd , the financial advisers instructed for the first defenders and the pursuers respectively, met to discuss the proposed merger. It was again confirmed at that meeting that the basis of the offer was to be one of full recommendation and that a counter-bidder should not be encouraged On 26 January 1986 a meeting was held between the pursuers and the first defenders to finalise details of the press release to be made when the pursuers' offer was made public. On 27 January 1986 a joint press announcement was made in terms approved by both boards and their financial advisers. This announced that terms had been agreed for a merger and set out the full terms of the offer along with information as to the proposed organisation of the merged company. It included the statement that "the board of Coats Patons will recommend Coats Patons shareholders to accept the ordinary offer". It was agreed that the formal offer documents would be issued to the shareholders of the first defenders on 3 February, later postponed to 10 February, 1986. On 7 February 1986 the pursuers instructed the printing of the offer documents after each board had met separately on that date and finalised the contents.

However, in the meantime, on 28 January 1986 the second defender contacted the pursuers' chairman and informed him that a "fly had been cast" by another party but that he had told the party that no co-operation would be given to any alternative bid. On the same date a representative of the pursuers' financial advisers was telephoned by a representative of the first defenders' financial advisers and also informed that a "fly had been cast" and that this approach had been rebuffed. On 9 February 1986 the Sunday Telegraph newspaper reported rumours of an agreed take-over bid for the first defenders by Vantona Viyella plc. On 10 February 1986 the first defenders publicly announced an agreed take-over by that company It is also averred that:

> "The pursuers have since ascertained that an approach was made to the first defenders on behalf of Vantona Viyella plc on 28 January and that the first defenders agreed to enter into discussions with Vantona Viyella plc on the basis that the discussion should not be disclosed to the pursuers and that those discussions proceeded, the first named defenders co-operating fully with Vantona Viyella plc throughout the period from 28 January to 10 February. As aforesaid, the pursuers are a smaller company than the first named defenders and could not afford to become involved in a contested take-over/merger without the support of the first named defenders' board to resist such a counter-offer. In the

circumstances
allowed to laps
I was given to un
this last avermen
board had withh
dispatch to their
from the chairma
recommended the
part of the propos
circumstances the
sent to the shareh
In support of th
tabled two distin
claim which I
consideration is
although it is give
pursuers' pleadin
first defenders alc
the condescenden
of the discussion:
"*Separatim* an
sustained the l
art 8 hereof as
breach of con
joint meeting
by the joint
January 1986
pursuers had
would offer to
of the first def
the press
defenders had
that they wou
to their share
nor anyone or
competing tak
and that in th
made an unso
the first def
would not en
such an appro
contracted to
offer to the
defenders bet
February 19
operate with
Viyella plc. I
pursuers' off
these circums
in material t
with the purs

circumstances the pursuers' offer has been allowed to lapse."

I was given to understand, in explanation of this last averment, that the first defenders' board had withheld their consent to the dispatch to their shareholders of the letter from the chairman of the board in which he recommended the pursuers' offer. This formed part of the proposed offer document. In these circumstances the offer document was not sent to the shareholders of the first defenders.

In support of their claim the pursuers have tabled two distinct grounds. The ground of claim which logically arises first for consideration is that of breach of contract although it is given a secondary place in the pursuers' pleadings. It is directed against the first defenders alone. It is averred in art. 9 of the condescendence as amended in the course of the discussion:

> "*Separatim* and in any event the pursuers sustained the losses condescended upon in art. 8 hereof as a reult of the first defenders' breach of contract. By at latest the said joint meeting of 26 January 1986 followed by the joint press announcement of 27 January 1986 the first defenders and the pursuers had agreed that the pursuers would offer to buy the entire share capital of the first defenders at the price stated in the press announcement. The first defenders had by the same date contracted that they would recommend the said offer to their shareholders and that neither they, nor anyone on their behalf, would solicit a competing take-over bid from a third party, and that in the event that any third party made an unsolicited approach to take over the first defenders, the first defenders would not encourage or co-operate with such an approach. The first defenders had contracted to recommend the pursuers' offer to their shareholders. The first defenders between 26 January 1986 and 10 February 1986 did encourage and co-operate with an approach from Vantona Viyella plc. They did not recommend the pursuers' offer to their shareholders. In these circumstances the first defenders are in material breach of their said contract with the pursuers. As a result the pursuers have incurred loss as hereinbefore condescended upon . . ."

For the first defenders it was argued that they could not have entered into a contract in the terms indicated by the pursuers' averments. In the first place it was not within the power of a company to bind itself to recommend a particular offer and not to encourage or co-operate with a competing approach. Such a contract could only be made with the board of directors. A company was indifferent to the change in identity of its shareholders, such as upon a take-over. Reference was made to *Morgan v. Tate & Lyle Ltd.* [1955] A.C. 21 and in particular Lord *Reid* at p. 55, where, referring to the nationalisation of the shares of a company he said:

> "But by the latter form the company's position is unchanged; it retains its assets and continues to carry on its business. All that happens is that the new shareholders can alter its policy; but a change of shareholders does not interest the company as a trader, and expenditure to prevent a change of shareholders can hardly be expenditure for the purposes of the trade."

In the second place such a contract would be in conflict with the fiduciary duty of directors. They had to deal on the one hand with the property of the company, as to which they were trustees owing duties to it: see *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation & Ors.* [1986] Ch. 246; (1984) 1 BCC 99,158, per *Slade* L.J. at p. 298; at p. 99,195. Even in that context shareholders were entitled to appeal to sec. 459 of the *Companies Act* 1985 in the event of their being unfairly prejudiced in the conduct of the company's affairs. On the other hand, directors might be concerned with the property of individual shareholders, namely their shares where a take-over was proposed. Here they owed duties to the shareholders, although they might also owe duties to the company. Section 432(2)(d) of the 1985 Act implied that shareholders were entitled to reasonably adequate information as to the affairs of a company. They were also entitled to expect that the directors acted in accordance with the constitution of the company (see *Re H.R. Harmer Ltd.* [1959] 1 W.L.R. 62, per

Romer L J at p 87) Directors had also a duty in advising shareholders to support a resolution to approve the acquisition of assets by a company, to give such advice in good faith and not fraudulently. If they failed to do so they could be made liable to shareholders for personal loss sustained by them, as distinct from loss sustained by the company itself (see *Prudential Assurance Co. Ltd. v. Newman Industries Ltd & Ors. (No 2)* [1982] Ch. 204, at p. 222). In giving advice to shareholders upon a proposal to acquire their shares it was recognised that directors had duties towards them, including a duty to be honest and a duty not to mislead (see *Gething & Ors. v. Kilner & Ors.* [1972] 1 W.L.R 337, per *Brightman* J. at p. 341) Thus when directors were concerned with the shares of shareholders they owed a fiduciary duty to them and so were obliged to act in their best interests. The alleged contract upon which the pursuers relied would plainly be contrary to that fiduciary duty. In particular it involved the directors fettering their freedom to act in their best interests Reference was made to *Clark v. Workman* [1920] 1 I.R 107. If so, the contract was invalid, under reference to sec. 35 of the 1985 Act This submission was supported by various statements made in the then current *City Code on Take-overs and Mergers* This contained guidance as to good commercial practice in regard to take-overs. The background to the code could be seen from *R v. Panel on Take-overs and Mergers, ex parte Datafin plc. & Anor* [1987] Q.B 815; (1987) 3 BCC 10 The code had been relied upon in a number of decisions in England such as *Dunford & Elliott Ltd. v. Johnson & Firth Brown Ltd* [1977] 1 Ll. Rep. 505, per Lord *Denning* M.R. at p 510 and *Hinchcliffe v. Crabtree* [1972] A.C. 707, per Lord *Reid* at p 730 and Viscount *Dilhorne* at p. 740 The duties of directors and the terms of the code could be taken to be well known to officials of the pursuers and the first defenders, which were large quoted companies, and to their merchant bank advisers

The first defenders then went on to submit that if there had been such a contract it would have been understood to be conditional on the pursuers' bid remaining the best bid from the point of view of the shareholders of the first defenders. This too should be taken to be known to commercial men without need for averment. Accordingly the pursuers' averments should be read as conditional in this sense. Where shareholders were being asked to vote on a resolution that their company should acquire or dispose of an asset the directors had a duty to advise them as to what in the light of changing circumstances was in the best interests of the company. Reference was made to a decision of *Templeman* J. in *Rackham v. Vavasseur* (unreported, 6 April 1977) in which an agreement for the acquisition of certain shares by a company had been made subject to the approval of its shareholders However, in the light of the collapse of the property market the shares had become virtually worthless when the resolution fell to be passed *Templeman* J held that in these circumstances the directors of the company were bound so to advise the shareholders and to use their influence and their powers to ensure that the acquisition was not approved Another example was provided by the decision of *Vinelott* J in *John Crowther Group plc v. Carpets International plc* (unreported, 4 October 1985) In that case the approval of shareholders was required for the disposal of shares owned by the company. The directors had undertaken on behalf of the company to use all reasonable endeavours to procure the passing of the required resolution However, a higher bid had been made by a rival *Vinelott* J. rejected the view that the directors were bound by their undertaking, whether or not they thought that it was in the interests of the company that the resolution be passed He said,

> "I think I should say (and this is, of course, an interlocutory hearing) that I am not persuaded that this is a possible view. The terms of the agreement must clearly be read in the light of the facts known to all parties that directors owe a fiduciary duty to act in the interests of their company and to make full and honest disclosure to shareholders before they vote on such a resolution. It seems to me that it must have been understood by all that the undertaking to use reasonable endeavours to procure

the passing
necessarily
directors ha
fiduciary d
beyond ques
duty to
shareholder
in ignorance
If directors
seems to me
their honest
interests of t

Counsel subm
shareholders we
of their own sh
had no interes
similar duties
referred me to
Ors. v. Lord G
244, which was
take-over bid an
who owned a m
voting shares,
transfer of sha
p. 265 *Lawton* I
the Court of Ap

> "Where dire
> the interest
> company sh
> there are tw
> duty of the
> such as thos
> obtain the be
> not commit
> own voting s
> are satisfied
> price reason
> directors mu
> bidders, the
> be the interes
> The future o
> successful bi
> duty to the
> company af
> control of
> successful bi
> and the sha
> and remain
> their eyes op
> which the di
> price reason
> result of art

the passing of the resolution would be necessarily subject to anything which the directors had to do in pursuance of that fiduciary duty . . It seems to me plain beyond question that directors are under a duty to disclose the facts to the shareholders Indeed a resolution passed in ignorance of them would be worthless If directors must disclose the facts, then it seems to me that they must equally express their honest opinion as to what is in the interests of the company."

Counsel submitted that *a fortiori* when shareholders were concerned with the disposal of their own shares (as to which the company had no interest) the directors were under similar duties directly to them Counsel referred me to *Heron International Ltd. & Ors. v. Lord Grade & Ors.* [1983] B.C.L.C. 244, which was concerned with a contested take-over bid and the exercise by the directors, who owned a majority of the target company's voting shares, of a power to approve the transfer of shares to one of the bidders. At p. 265 *Lawton* L.J., delivering the opinion of the Court of Appeal said:

"Where directors have decided that it is in the interests of a company that the company should be taken over, and where there are two or more bidders, the only duty of the directors, who have powers such as those contained in art. 29, is to obtain the best price. The directors should not commit themselves to transfer their own voting shares to a bidder unless they are satisfied that he is offering the best price reasonably obtainable. Where the directors must only decide between rival bidders, the interests of the company must be the interests of the current shareholders The future of the company will lie with the successful bidder The directors owe no duty to the successful bidder or to the company after it has passed under the control of the successful bidder The successful bidder can look after himself, and the shareholders who reject the bid and remain as shareholders do so with their eyes open, having rejected that price which the directors consider to be the best price reasonably obtainable. Thus, as a result of art. 29, the directors owed a duty to the general body of shareholders who were shareholders on 13 January 1982 to obtain for the shareholders the opportunity to accept or reject the best bid reasonably obtainable."

The identification of the interests of a company with the interests of the current shareholders was supported by a consideration of the provisions of sec 314 and 315 of the 1985 Act as to the effect of non-compliance by the directors with their duty of disclosure in a take-over situation In regard to the shareholders representing the company in other contexts I was referred to *Greenhalgh v. Arderne Cinemas Ltd. & Ors* [1951] Ch. 286, per Lord *Evershed* M.R. at p 291, and *Parke v. Daily News Ltd.* [1962] Ch. 927, per *Plowman* J at p 963. It was of no significance how a second bid came about, such as by the directors entertaining an approach by the second would-be bidder. Further if the directors were free not to recommend the earlier bid, why should they not also be free to discuss a forthcoming bid with a second would-be bidder? (see *John Crowther plc v. Carpets International plc*).

The first defenders also submitted that the pursuers' averments as to the alleged contract and its breach were inadequate The averments were indistinct as to when the contract was made and whether it was entered into by or on behalf of the first defenders, and in the apparently unqualified terms implied by the averments of breach. The making of such a contract was inconsistent with the absence of any mention of it in the listing particulars dated 16 February 1986 and in the press announcement dated 27 January 1986, and with the pursuers' dealing in shares of the first defenders in January 1986. As regards the averments of breach all that was averred was that when approached by Vantona Viyella plc the first defenders agreed to and did enter into discussions with them, "co-operating fully" with them from 28 January to 10 February 1986 "Co-operating" was consistent with a neutral attitude on the part of the first defenders

In reply, the pursuers countered the argument that the first defenders could not have entered into the contract indicated by them In the first place it was submitted that it