SUPREME COURT OF SOUTH AUSTRALIA

(Civil: Application)

ALSTOM POWER LTD v YOKOGAWA AUSTRALIA P/L & ORS (NO 4)

[2006] SASC 298

Judgment of The Honourable Justice Debelle

27 September 2006

CONTRACTS - BUILDING, ENGINEERING AND RELATED CONTRACTS - REMUNERATION - RECOVERY

Performance bonds - subcontractor provides contractor with irrevocable bank guarantees as performance bonds - contractor had not drawn on the guarantees - bank guarantees had expired - contractual obligation on subcontractor to replace the expired guarantees - guarantees not replaced - whether contractual obligation to replace is subject to s 51AA of Trade Practices Act.

Trade Practices Act 1974 (Cth) s 51AA, s 52, s 87(2), referred to.
Wood Hall Ltd v The Pipeline Authority (1979) 141 CLR 443 ; *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyds Rep 146, applied.
Olex Focas Pty Ltd v Skodaexport Co Ltd [1998] 3 VR 380, discussed.
Alstom Power Ltd v Yokogawa Australia Pty Ltd (No 3) [2006] SASC 256; *Bachmann Pty Ltd v BHP Power New Zealand Ltd* [1999] 1 VR 420; *Bateman Project Engineering Pty Ltd Project Engineering Pty Ltd v Resolute Ltd* (2000) 23 WAR 493; *BI (Aust) Pty Ltd v Cigna Insurance Australia Ltd* (1990) 11 BCL 64; *Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd* (2003) ATPR 41-953; *Burleigh Forest Estate Management Pty Ltd v Cigna Insurance Australia Ltd* [1992] 2 Qd R 54 ; *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159; *Fletcher Construction Australia Ltd v Varnstorf Pty Ltd* [1998] 3 VR 812; *GKN Contractors Ltd v Lloyds Bank* (1985) 30 BLR 48; *Hortico (Aust) Pty Ltd v Engineering Equipment Co (Aust) Pty Ltd* (1985) 1 NSWLR 545; *Malaysia Hotel (Aust) Pty Ltd v Sabemo Pty Ltd* (1993) 11 BCL 50; *Matthew Hall Mechanical Electrical & Engineers Pty Ltd v Baulderstone Pty Ltd* (1991) 10 BCL 50;

Plaintiff: ALSTOM POWER LTD Counsel: DR G GRIFFITH QC WITH MR M FRAYNE - Solicitor: COSOFF CUDMORE KNOX
First Defendant: YOKOGAWA AUSTRALIA PTY LTD Counsel: MR W J N WELLS QC WITH MR H M HEUZENRODER - Solicitor: CRIDLANDS
Second Defendant: YOKOGAWA ELECTRIC CORPORATION Counsel: MR W J N WELLS QC WITH MR H M HEUZENRODER - Solicitor: CRIDLANDS
Third Defendant: DOWNER ENGINEERING POWER PTY LTD Counsel: MR W J N WELLS QC WITH MR H M HEUZENRODER - Solicitor: CRIDLANDS
Fourth Defendant: DOWNER EDI LIMITED Counsel: MR W J N WELLS QC WITH MR H M HEUZENRODER - Solicitor: CRIDLANDS
Hearing Date/s: 19/09/2006
File No/s: SCCIV-05-1315
A

Pearson Bridge (NSW) Pty Ltd v The State Railway Authority of New South Wales [1982] 1 ACLR 81, considered.

ALSTOM POWER LTD v YOKOGAWA AUSTRALIA P/L & ORS (NO 4) [2006] SASC 298

Civil

1 **DEBELLE J:** The question in this matter is whether a contractor is able summarily to enforce the contractual obligation of a subcontractor to replace performance bonds which have expired.

2 In 2002 the plaintiff Alstom Power Limited ("Alstom") entered into an agreement to perform refurbishment works on the power station at Port Augusta known as Playford B Power Station. That agreement was made with the operators of the power station.

The Subcontract

3 On 4 April 2002, Alstom entered into a pre-contract agreement with a joint venture to perform aspects of the refurbishment works concerned with electrical and control and instrumentation work ("the EC&I Works"). The joint venture was known as YDRML Augusta Joint Venture. There were two parties to the joint venture. They were the first defendant Yokogawa Australia Pty Ltd and the fourth defendant Downer EDI Ltd. The second defendant Yokogawa Electric Corporation is the parent company of Yokogawa Australia Pty Ltd. The third defendant Downer Engineering Power Pty Ltd is the parent company of Downer EDI Ltd. The pre-contract agreement was made pending completion of negotiations concerning a contract for the EC&I Works. In about December 2002, Alstom and the joint venture entered into a contract for the performance of the EC&I Works ("the EC&I subcontract"). The contract price for the works was $33,877,559.50 as adjusted under the EC&I subcontract.

The Obligation to Provide Performance Bonds

4 The EC&I subcontract contained a number of articles which dealt with the provision of guarantees. For present purposes, it is necessary to notice only two sets of guarantees which in the EC&I subcontract were called the "Performance Security" and the "Retainage Security". It was a condition precedent to the EC&I subcontract that the joint venture parties provide the Performance Security and the Retainage Security to Alstom: see Article 1.1 of the EC&I subcontract. I will refer collectively to the Performance Security and the Retainage Security as "the securities".

5 Article 5 of the EC&I subcontract provided, among other things, for the terms in which the securities should be provided and the rights of Alstom in relation to them. It also provided for progress payments and their certification as well as a régime for determining the final amount due to the parties. I set out the

relevant provisions of Article 5. In those provisions, references to "the Contractor" are references to Alstom and references to "the Subcontractor" are references to the joint venture.

5.1 Performance Security and Retainage Security

5.1.1 The Performance Security to be provided by Subcontractor to Contractor under Article 1.1:

(a) will be in an amount equal to ten percent (10%) of the Contract Price (excluding the GST component of the Contract Price) and from a lender acceptable to Contractor; and

(b) is provided as security for the proper and due performance by Subcontractor of all of its obligations under this Contract.

5.1.2 The Retainage Security to be provided by Subcontractor to Contractor under Article 1.1:

(a) will be in an amount equal to ten percent (10% of the Contract Price (excluding the GST component of the Contract Price) and from a lender acceptable to Contractor; and

(b) is provided as security for the proper and due performance by Subcontractor of all of its obligations under this Contract.

5.1.3 The Performance Security and Retainage Security shall remain in force until the date for return under Article 5.4 or 9.6(l) and shall secure all of Subcontractor's obligations under the Contract, including the Performance Guarantees.

5.1.4 Without limiting the unconditional nature of the Performance Security or the Retainage Security, Subcontractor acknowledges that Contractor shall be entitled to draw on the Performance Security or Retainage Security for any amount which the Contractor claims is due or payable to Contractor under this Contract or otherwise in connection with the Electrical and C & I Works, including Liquidated Damages and Performance Guarantee Payments.

5.1.5 Subcontractor covenants with Contractor that it will not institute any proceedings whatsoever or exercise any rights or take any steps to restrain or injunct the lender that issued the Performance Security or Retainage Security, or Contractor or Lender from exercising its rights under the Performance Security or Retainage Security, even where Subcontractor disputes Contractor's claim (including where a Dispute has been commenced under Article 14).

5.1.6 Contractor has unfettered discretion as to which Security it may seek to draw upon.

Articles 5.2 and 5.3 set out a procedure for the making of claims for progress payments, their certification and payment.

6 Article 5.4 provided for final payments for the works as well as for the parties' rights in respect of the securities. The régime provided by Article 5.4 was that, after the acceptance date for Stage 1 or Stage 2 of the EC&I Works, the joint venture would submit a Final Payment Statement summarising and

reconciling all previous invoices and payments. In addition, the Final Payment Statement was to include all claims for money which the joint venture considered to be due to it by Alstom for the EC&I Works. Within 35 days after receipt of the Final Payment Statement, Alstom was to pay the joint venture the amount due to the joint venture subject to any amounts due to Alstom under the EC&I subcontract including the securities. Article 5.4 concludes with the following provisions:

> 5.4.15 Subject to Subcontractor complying with sub-article 5.4.5(b), if applicable, within twenty (20) days after the issue of a Certificate of Final Completion, Contractor shall release to Subcontractor any unused portion of the Retainage Security and Performance Security held by Contractor.
>
> 5.4.16 Subcontractor covenants with Contractor that it will, not less than one month prior to the expiry of any Security provided under this Contract, arrange for the issue to Contractor of a replacement letter of credit which is:
>
> (a) for a term of at least one year;
>
> (b) in the form of and in the amount of the Security that it is replacing; and
>
> (c) that otherwise satisfies the requirements of this Contract for the provision of the Security that it is replacing.
>
> 5.4.17 In addition to any other right that Contractor has to draw on any Security, Contractor may make a drawing on any Security which is to be replaced under sub-articular 5.4.16 if the obligation to provide that replacement Security is not satisfied by one month prior to the expiry of the Security which it is to be replaced, in which event Contractor may draw the full face value of the Security to be replaced.
>
> 5.4.18 At the settlement of the dispute the Contractor shall repay any monies drawn down in excess of the amounts agreed to be due to the Contractor.

Articles 5.5 to 5.10 deal with other unrelated issues as to payment.

The Securities Are Provided

7 The joint venture parties provided securities in accordance with the EC&I subcontract. For its part, Yokogawa Australia Ltd delivered two bank guarantees dated 3 October 2002. Each guarantee was an unconditional undertaking by a bank to pay the sum of $1,693,877.98 to Alstom within one day of a demand in writing from Alstom. It is common ground that the undertaking remained in force until 1 September 2004. Downer EDI Ltd also delivered two bank guarantees. Both were dated 2 October 2002. Each guarantee was an unconditional undertaking by a bank to pay $1,893,877.88 to Alstom within one day of a demand in writing from Alstom. It is common ground also that each undertaking remained in force until 1 September 2004. Thus, the four securities all expired on the same date. Each had an operation of some 23 months. The amount of the securities totalled $7,175,511.72.

The Securities Are Not Replaced

8 It will be recalled that Article 5.4.16 obliged each of the joint venture parties to replace the securities for a term of at least one year, the replacement security to be in the form and for the amount of the security it was replacing. Neither Yokogawa Australia Ltd nor Downer EDI Ltd complied with Article 5.4.16 and the securities were not replaced.

A Building Dispute

9 The works, the subject of the EC&I subcontract, have been completed. A substantial dispute exists between Alstom and the joint venture as to the amount properly due and owing to it for the works comprised in the EC&I subcontract. The parties entered into a mediation in an attempt to resolve their differences but without success.

10 Alstom has instituted an action in this court in which it seeks to enforce, among other things, the obligation of the joint venture parties to replace the securities. Alstom seeks, among other things, an order for specific performance or, in the alternative, a mandatory injunction requiring the joint venture parties to comply with their respective obligations in Article 5.4.16 of the EC&I subcontract.

11 The defendants have filed a defence and counterclaim. It is a substantial document. Shortly stated, the joint venture parties deny liability on the ground that Alstom has not acted in accordance with representations made in the pre-contract nor complied with the obligations in the pre-contract and in the EC&I subcontract. The joint venture parties assert that Alstom is not entitled to enforce the right to have the securities replaced.

12 The pleas of breaches of contract include allegations that Alstom caused delays to the joint venture by failing to allow the joint venture parties timely access to the site and by failing to complete in a timely manner the preparatory works for the EC&I works; that the delays caused Alstom to make significant alterations to the Schedule for the Works; that Alstom failed to allow claims for extension of time; that Alstom improperly deducted liquidated damages; that Alstom altered the Scope of the Works causing the joint venture to incur additional costs; that Alstom wrongfully failed to allow variations; and that Alstom failed to provide a work program. On these grounds, the joint venture parties claim damages by way of set off in an estimated $12 million.

13 In addition, the joint venture parties plead by way of set off claims for damages grounded on breaches of s 52 of the *Trade Practices Act 1974* (Cth) in respect of misrepresentations alleged to have been made in the course of the works. They allege that Alstom failed to adhere to what in the defence are called "the certification representation" and "the co-operation representation" and so engaged in misleading and deceptive conduct contrary to s 52. The certificate representation is alleged to be a representation that Alstom would perform its

certifying functions by procuring the services of an independent engineer. The co-operation representation is alleged to be a representation that Alstom would do nothing to prejudice the performance by the joint venture parties of the EC&I subcontract. The joint venture parties further allege that Alstom has been guilty of unconscionable conduct in breach of s 51AA of the *Trade Practices Act*. They then allege that they have completed all steps required for certification of the mechanical completion, practical completion and final completion of all stages of the EC&I subcontract. It is on those grounds that the joint venture parties have said that Alstom is not entitled to the relief it seeks in respect of the securities.

14 In their counterclaim the joint venture parties repeat the matters alleged in the defence. They also allege that, by reason of the breaches by Alstom of the EC&I subcontract, Alstom is liable to the joint venture in damages.

15 What is of particular relevance for present purposes is that the prayers for relief in the defence and counterclaim include a claim for an order pursuant to s 87(2)(ba) of the *Trade Practices Act* refusing to enforce Articles 1, 5.1 and 5.4 of the EC&I subcontract or an order pursuant to s 87(2)(b) of the *Trade Practices Act* declaring those articles to be void.

16 Although the claim by Alstom is in a relatively narrow compass, the issues raised by the joint venture parties in their defence and counterclaim are so wide ranging that it appears that the action will be a long and complex building dispute of an all too familiar kind.

Preliminary Questions

17 In an attempt to avoid the cost and delays of a long and complex building dispute, Alstom applied for an order pursuant to Rule 75 that certain questions be heard as preliminary questions. That application was heard on 17 August 2006. In the course of the hearing, counsel for Alstom reduced the ambit of the application so that the question was limited to the question whether Alstom was entitled to enforce the obligations of the joint venture parties under Article 5.4.16 of the EC&I subcontract. I made an order that the following questions be heard:

1. Are the allegations of the defendants in their respective defences and counterclaims that:

   (a) that the plaintiff has contravened the *Trade Practices Act 1974* (Cth) and seek an order declaring that the EC&I subcontract is void or unenforceable, or will not be enforced;

   (b) that the plaintiff has acted or will act in breach of the EC&I subcontract; and

   (c) that, in the exercise of its discretion, the Court should deny the relief on the grounds listed in paragraphs 95-101 of the defence of the first, third and fourth defendants (paragraphs 104-109 of the defence of the second defendant)

or any of them a sufficient answer to the relief that the plaintiff claims in paragraphs 1 and 2 of the prayers for relief in its statement of claim?

2. If the answer to question 1 is No, is the plaintiff entitled to the relief it claims in paragraphs 1 and 2 of the prayers for relief in its statement of claim?

The orders sought by Alstom in paragraphs 1 and 2 of the prayers for relief in its Statement of Claim were in these terms:

(1) An order for specific performance by YDRML of Article 5.4.16 of the EC&I subcontract.

(2) In the alternative to order 1, a mandatory injunction that YDRML be ordered to deliver to the plaintiff within 7 days for irrevocable bank guarantees each made in favour of the plaintiff in the amounts of AUD$1,693,877.98, AUD$1,693,877.98, AUD$1,893,877.98 and AUD$1,893,877.98 respectively and each current for a period of 12 months.

The reasons for the order made on 17 August 2006 are to be found in *Alstom Power Ltd v Yokogawa Australia Pty Ltd (No 3)* [2006] SASC 256.

18 The questions which Alstom seeks to agitate might be described as a plaintiff's demurrer. Alstom seeks to raise a question of law which, it says, is a complete answer to the defences on which the joint venture parties rely. The facts as pleaded in their defence must, therefore, be assumed to be true. The parties have proceeded on that footing.

The Nature of the Securities

19 Each of the four securities is an irrevocable undertaking granted by a bank to pay a sum of money on demand by Alstom and without reference by the bank to the joint venture party which had requested the bank to provide the undertaking. Each is an unconditional bond by the bank to pay money on demand up to a stated maximum amount and that sum is payable without reference to the joint venture party which had requested the bank to provide the bond. The conditional nature of the promise by the bank to pay cannot be qualified in any way by reference to the terms of the EC&I subcontract or by reference to the purposes of the contract: *Wood Hall Ltd v The Pipeline Authority* (1979) 141 CLR 443 per Barwick CJ at 445, Gibbs J at 451-452, Stephen J at 457-458, and Murphy J at 461. Guarantees and securities of this kind are commonly used in the building and construction industry as guarantees of performance or in replace of retention money. They represent an instrument which is quite readily, promptly and assuredly realisable: *Siporex Trade SA v Banque Indosuez* [1986] 2 Lloyds Rep 146 at 158. As Stephen J said in *Wood Hall* at 457:

> [N]one of the four guarantees is, by any process of implication or construction, to be deprived of the unqualified operation which its express words dictate. Not only does the clear, indeed empathic, language of these guarantees preclude the introduction of any such qualification: to introduce such a qualification would be to deprive them of the

> quality which gives them commercial currency. Once a document of this character ceases to be the equivalent of a cash payment, being instantly and unconditionally convertible to cash, it necessarily loses acceptability. Only so long as it is "as good as cash" can it fulfil its useful purpose of affording to those to whom it is issued the advantages of cash while involving for those who procure its issue neither the loss of use of an equivalent money sum nor the interest charges which would be incurred if such a sum were to be borrowed for the purpose. Being "as good as cash" in the eyes of those to whom it is issued is essential to its function.

They are on a similar footing to a letter of credit: *Edward Owen Engineering Ltd v Barclays Bank International Ltd* [1978] QB 159 per Lord Denning MR at 171. Thus, a court will not restrain a payment by a bank on an unconditional bond of this kind or a demand therefor. Thus, the beneficiary of a security of this kind is able to enforce the security notwithstanding that a genuine dispute might exist as to the entitlements of each party under the contract.

20 That principle is subject to two exceptions, a clear case of fraud or if the beneficiary of the bond has acted unconscionably in breach of s 51AA of the *Trade Practices Act*. The fraud exception has been examined in a number of cases which include *Hortico (Aust) Pty Ltd v Energy Equipment Co (Aust) Pty Ltd* (1985) 1 NSWLR 545; *GKN Contractors Ltd v Lloyds Bank* (1985) 30 BLR 48; *Halsbury Laws of Australia* Vol 3(2) para 65-1345 and the cases cited at note 2.

21 The exception in the case of unconscionable conduct within the meaning of s 51AA of the *Trade Practices Act* was identified by Batt J in *Olex Focas Pty Ltd v Skodaexport Co Ltd* [1998] 3 VR 380. In that case, Batt J restrained payment on a bond to guarantee payment of advances made to the donor of the bond because those advances had to a large extent been repaid. Batt J made the order notwithstanding the fact that, as he said (at 404), the effect of the *Trades Practices Act* was to work "a substantial inroad into the well-established common law autonomy of letters of credit and performance securities and other bank guarantees". Batt J was not prepared, however, to restrain payments of other securities which were in the form of the usual kind of performance securities.

22 The decision in Wood Hall has been followed and applied in Burleigh Forest Estate Management Pty Ltd v Cigna Insurance Australia Ltd [1992] 2 Qd R 54; Matthew Hall Mechanical Electrical & Engineers Pty Ltd v Baulderstone Pty Ltd (1991) 10 BCL 148; Malaysia Hotel (Aust) Pty Ltd v Sabemo Pty Ltd (1993) 11 BCL 50; BI (Aust) Pty Ltd v Cigna Insurance Australia Ltd (1990) 11 BCL 64; Olex Focas (supra); Fletcher Construction Australia Ltd v Varnstorf Pty Ltd [1998] 3 VR 812; Bateman Project Engineering Pty Ltd v Resolute Ltd (2000) 23 WAR 493; Boral Formwork & Scaffolding Pty Ltd v Action Makers Ltd (2003) ATPR 41-953; Hortico (Aust) Pty Ltd v Engineering Equipment Co (Aust) Pty Ltd (supra). These and other decisions in this context have been reviewed by Byrne J of the Supreme Court of Victoria in a piece of extra judicial writing, Rights of the Guarantor under a

Performance Bond (2001) 17 BCL 4. The commercial reliance on these bonds and relevant cases are noted in an article by Mr W Dixon, As Good as Cash? The Diminution of the Autonomy Principle (2004) 32 ABLR 391 and in Andrews and Millet, The Law of Guarantees (2005) Chapter 16. As the decisions in Pearson Bridge (NSW) Pty Ltd v The State Rail Authority of New South Wales [1982] 1 ACLR 81 and Bachmann Pty Ltd v BHP Power New Zealand Ltd [1999] 1 VR 420 demonstrate, it is always necessary to examine the terms in which the security is given to determine whether it constitutes an unconditional undertaking to pay the guaranteed sum without reference to the contractual position of the parties. Performance bonds of this kind plainly are important in the construction industry.

Should the Securities be Replaced?

23 Dr Griffith QC, who appeared for Alstom, contended that, given the autonomy of performance securities of this kind and their commercial purpose, it was appropriate to make an order that the joint venture parties comply with the obligation under Article 5.4.16 to replace the securities. If such an order were not made, he submitted, parties bound to replace such securities could flaunt that obligation with impunity and in a manner wholly inconsistent with established commercial practice. The argument must fail.

24 The obligation which Alstom now seeks to enforce is an obligation altogether different from the strict undertaking attaching to a bond in the form of the securities by the joint venture parties. The terms in which those securities are expressed imposes an unconditional undertaking on the bank to pay. By contrast, the obligation of the joint venture parties to replace the securities is contractual. The bank acts upon its unconditional undertaking to pay. That is an entirely different kind of obligation from the contractual obligation of each of the joint venture parties to replace the bond. In other words, Alstom is seeking to enforce the contract. It is not enforcing the terms of a bond. Because Alstom seeks to enforce a contractual obligation, Alstom's claim is subject to any relevant defence available to answer a claim to enforce a contract. Those defences include s 51AA of the *Trade Practices Act* on which the joint venture parties rely. The relief which the joint venture parties seek attacks the footing on which rests the contractual right which Alstom seeks to enforce. If the joint venture parties are able to establish that Alstom has acted in an unconscionable manner within the meaning of s 51AA of the *Trade Practices Act*, that footing will be unsound. If the joint venture parties establish that defence, they will be entitled to an order pursuant to s 87(2)(ba) of the *Trade Practices Act* refusing to enforce Article 5.4.16, if not an order declaring that article void at some specified date pursuant to s 87(2)(b) of that Act.. If the provisions of s 51AA are applicable to a bond in the form of an unconditional undertaking to pay of the kind addressed in *Olex Focas*, those provisions will apply *a fortiori* in the case of a contractual obligation to replace securities which Alstom seeks to have replaced. As Alstom is seeking equitable remedies, its claim is liable to be met also by the equitable

defence of unconscionability. It is unnecessary to consider whether the other defences relied on will also prevail in this way.

25 The issues in this application are fundamentally different from those cases where the person providing a bond of this kind seeks to restrain the holder of the bond from demanding payment of the bond. Alstom seeks to create a new security to replace the one which has expired.

26 Dr Griffith submitted that each of the joint venture parties should be ordered to replace the securities, leaving to another day the issue whether they are entitled to an injunction restraining Alstom from enforcing the securities. The argument fails to acknowledge that each of the joint venture parties is entitled to a determination of the issue whether Alstom is prevented from enforcing the contractual obligations in Article 5.4.16 by reason of the defence as each has pleaded. The effect of Dr Griffith's contention is to elevate the contractual obligation to replace the guarantees to an unconditional undertaking on the part of the banks to pay pursuant to the replaced security. It is a bold but unpersuasive contention. The remedies under the *Trade Practices Act* are intended to provide a defence in an appropriate case. As Alstom seeks to enforce a contractual obligation, the joint venture parties are entitled to seek to rely on the remedies available under the *Trade Practices Act* in answer to Alstom's claim that they replace the security.

27 Dr Griffith's *cri de coeur* that, unless this contractual obligation is enforced, parties who are under an obligation to replace a bond or security of this kind will be able to ignore that obligation with impunity must be weighed against the terms of Article 5.4.17 of the EC&I subcontract. The effect of that article is to give Alstom an opportunity to draw on the securities if the joint venture parties have not replaced them. Alstom had ample opportunity to do so given the period of one month between the obligation to replace and the expiry of the securities. Had it done so, the commercial significance and advantage of these securities would have been preserved. Alstom has chosen not to exercise its rights pursuant to Article 5.4.17. It is not in my view entitled to seek to reinstate the position it forfeited by a summary determination that the joint venture parties must replace the securities given the defences which the joint venture parties have raised.

28 For these reasons, there is no ground on which it is proper to grant Alstom the summary relief it seeks. The question whether Alstom is entitled to have the securities replaced must be determined in the usual way. I would, therefore, answer the questions as follows:

1. The question whether the allegations are a sufficient answer to the relief which Alstom claims in paragraphs 1 and 2 of the prayers for relief in its Statement of Claim cannot be answered until the trial of the action.

2. Not until after the trial of the action.