

JERSEY / JUDGMENT

Pell Frischmann v Bow Valley

[2008] JCA 146 (03 September 2008)

[2008] JCA 146

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

COURT OF APPEAL 3rd September 2008 Before : The Hon. Michael Beloff, Q. C., President; P. D. Smith, Esq., C. B. E. Q. C., and; G. C. Vos, Esq., Q. C.. Between Pell Frischmann Plaintiff/
APPELLANT And

- (1) Bow Valley Iran Limited (Formerly known as Balal Development Company Limited)
Defendants/ RESPONDENTS
- (2) Bow Valley Energy Limited
- (3) P T Bakrie Interinvestindo
- (4) Bow Valley International (Jersey) Limited Advocate J. P. Speck for the Appellant. Advocate N. M. Santos-Costa for the First, Second and Fourth Respondents. The Third Respondent was not represented. Index Section title Paragraph numbers A. Introduction B. The parties 2-4 C. Overview 5-8 D. The history 9-97 E. The findings of the Royal Court 98-102 F. The appeal and cross-appeal 103-104 G. The approach of the Court of Appeal 105-110 H. The witnesses 111-115 I. Bias 116-124 J. Why Pell Frischmann lost the contract 125-138 K. The obligations of the parties L. The Confidentiality Agreements 140-141 M. The Royal Court's approach to the contractual claims 142-144 N. Our approach to the contractual claims
- (1) Were the Confidentiality Agreements superseded or 146-154 amended by a bipartite or tripartite agreement in December 1996 or March 1997 or at any other time?
- (2) The true construction of the Confidentiality Agreements 155-161
- (3) Did Pell Frischmann have any implied obligations 162-168 under the Confidentiality Agreements?
- (4) Did implied terms of the Confidentiality Agreements 169-176 limit the operation of clauses 3 and 6?
- (5) Were the Confidentiality Agreements in restraint 177-182 of trade?
- (6) Repudiation of the suggested tripartite agreement 183-186
- (7) The events of the 7 th and 8 th July 1998 187-217

- (8) Did Bow Valley breach clauses 3 and 6 of the 218-221 Confidentiality Agreements?
- (9) Did Bow Valley breach clause 4 of the 222-223 Confidentiality Agreements and/or act in breach of confidence?
- (10) Was loss caused to Pell Frischmann as a result 224-230 of BV's breaches of clauses 3 and 6 of the Confidentiality Agreements?
- (11) Was loss caused to Pell Frischmann as a result of 231-232 BV's breaches of clause 4 of the Confidentiality Agreements?
- (12) Is Pell Frischmann entitled to Wrotham Park damages 233-246 as well as or instead of compensatory damages?
- (13) What is the quantum of Pell Frischmann's 247-257 recoverable loss? O. Tort claims 258-260 P. Conspiracy to injure 261-264 Q. Wrongful or unlawful interference 265-267 R. Procuring breach of contract 268-269 S. Deceit 270-272 T. Injurious falsehood 273-278 U. Conclusion on the tort claims 279-283 V. Overall conclusion 284-286

judgment

Beloff JA: This is a judgment of the Court to which all its members have contributed. A. Introduction 1. This case was tried by Commissioner H. W. B. Page and Jurats Le Breton and Morgan (the "Royal Court") over the course of a 32-day trial between the 6 th March 2006 and the 26 th July 2006. A detailed judgment comprising some 445 paragraphs was delivered on 31 st May 2007, and a further judgment on costs was delivered on 26 th July 2007. We had a full transcript of the proceedings before the Royal Court and many bundles of documents. We were assisted on the appeal by comprehensive written submissions both before and after the hearing which took place between 31 st March and 2 nd April 2008, and by the skilled oral presentation by the advocates for each party. B. The parties 2. Pell Frischmann Engineering Limited ("Pell Frischmann") is an English engineering company, set up in 1926 and with, by 1996, substantial assets, staff and expertise in oil field development studies. The factual witnesses who appeared for Pell Frischmann were Dr Willem Frischmann CBE, the Chairman of the Pell Frischmann Group, ("Dr Frischmann"), Dr John Pendered, managing director of Pell Frischmann, Mr William Fraser, a Chartered Engineer who assisted Pell Frischmann with the project, Dr Richard Lamb, who prepared some of the conceptual drawings for Pell Frischmann, Mr Michael Sarch, a self-employed Chartered Surveyor who assisted in raising finance for the project for Pell Frishmann. Expert witnesses for Pell Frischmann included Mr John Ellison, a forensic accountant, and Dr John R. Lacey, an oil industry expert. 3. Bow Valley is a Canadian oil and gas operating company, which was re-founded in July 1996, the group having been sold out in 1994, with the name being retained:- (1) Bow Valley Energy Limited ("Bow Valley"), the second Defendant, is an Alberta Corporation, and was the operating company for the events pertinent to this litigation.

- (2) The contract of 28 th July 1997 with the National Iranian Oil Company ("NIOC"), entered into by Bow Valley, which lies at the commercial core of the dispute, was assigned to Bow Valley Iran Limited, the first Defendant ("BVIL"), after it was entered into.
- (3) Bow Valley International (Jersey) Limited, ("BVIJL") the fourth Defendant, was the company through which the project finances for the control were routed. The witnesses who appeared for Bow Valley were Mr Walter DeBoni, a director, Mr Rod Blair, a consultant to Bow Valley, Mr Jim Cummings, counsel to Bow Valley, Mr David Fleming, General Manager of the Balal Project for Bow Valley, Mr Howard Keith, a technical manager with Premier Oil, who gave evidence about the Balal drawings, Mr Robert Bryngelson, an engineering consultant to Bow Valley. Expert witnesses for Bow Valley included Mr Anthony Mulcare, who gave evidence about oil industry practice, and Mr Carey Mamer, a forensic accountant.
4. P T Bakrie Interinvestindo ("Bakrie"), the third Defendant, is an Indonesian company working in the oil and gas field. It was outside the jurisdiction, and chose to play no part in the proceedings. There were, therefore, no Bakrie witnesses.
- C. Overview
5. We can set the scene by adopting gratefully, and with only minor adaptations, the Royal Court's summary of the dispute and of the rival contentions.
6. The dispute concerns an off-shore oil field in Iran, known as Balal, and the circumstances in which the NIOC came to award the contract for its development to Bow Valley and Bakrie in late July 1997. Pell Frischmann alleges that these two companies, between them, contrived to "steal" the contract from Pell Frischmann and claims damages on various bases, and also compensation for the use of technical and cost-related information generated by Pell Frischmann. Bow Valley denies wrong-doing of any kind.
7. Pell Frischmann's case can be summarised as follows. In 1996, it pre-qualified as a prospective bidder for the contract to develop Balal and another oil-field, Soroosh. In the course of so doing it had been invited by NIOC to sign, and co-sign a confidentiality agreement covering information provided by NIOC. In October 1996, Pell Frischmann was introduced to Bow Valley as a potential source of funding, and, in November 1996, at Pell Frischmann's request, Bow Valley in turn signed a confidentiality agreement (the "Bow Valley Confidentiality Agreement" or "BVCA") designed, among other things, to protect information supplied to Bow Valley by Pell Frischmann for the purposes of their discussions pending signature of a joint venture agreement and to prevent Bow Valley making any independent approach to NIOC. A little later, a similar agreement was signed by Bakrie (the "Bakrie Confidentiality Agreement" or "BCA"). In the event, despite negotiations over the course of the next six months or so involving Pell Frischmann on the one hand and Bow Valley, and at a later stage Bakrie, on the other, no joint venture agreement was ever concluded. In March 1997, Pell Frischmann was invited to sign, and did sign, a Service Contract with NIOC for development of the Balal Field, Soroosh having by then fallen out of the picture. In April 1997, Bow Valley introduced Bakrie as a potential source of funding and, shortly thereafter, these two embarked on a plan to obtain control of the project for themselves to the exclusion, or substantial exclusion, of Pell Frischmann. Towards the end of May 1997, having engineered a situation in which there was still no concluded joint venture agreement and in which negotiations over an offer by Pell Frischmann to sell its

interest in the project to them had failed, Bow Valley and Bakrie approached NIOC direct, in breach of their respective Confidentiality Agreements, and in due course wrongfully secured the award of the Balal Contract for themselves without Pell Frischmann. 8. Bow Valley's case, can be summarised as follows. The idea that there was some conspiratorial intention to steal the Balal contract from Pell Frischmann is a fantasy, and nothing of the kind occurred. Bow Valley's repeated, bona fide, endeavours to reach agreement with Pell Frischmann on the terms of either a joint venture basis or a buy-out of Pell Frischmann interest, were defeated by unrealistic demands on the part of Pell Frischmann. Those efforts included a joint venture proposal under which Bakrie would fund the entire costs of the project, which was rejected by Pell Frischmann. The impact of U. S. sanctions against Iran during this period had the effect of severely limiting the sources of potential finance for projects in that country. Despite repeated efforts by Pell Frischmann to find alternative partners for the development of Balal (another oil company partner in place of Bow Valley and another source of funding in place of Bakrie) it was never able to do so. NIOC, eventually became disillusioned with Pell Frischmann, revoked the exclusive status that it had originally conferred on Pell Frischmann as its preferred bidder, and offered the contract to Bow Valley and Bakrie. There was, by that stage, nothing to stop them from lawfully taking up that offer. Nor, Bow Valley contends, was there anything improper in the use that it made of technical and cost-related material originally generated by Pell Frischmann. D. The history 9. The main events in this tangled tale were as follows. 10. In June 1995, NIOC, the state agency responsible for managing oil and gas resources on behalf of the Islamic Republic of Iran, published an invitation to tender for the development of certain gas and oil-related projects including the Balal and Soroosh large off-shore fields. It was envisaged that the project would require a consortium including an oil company (which Pell Frischmann was not) and an outside source of finance. The contractor needed to finance the development of the field until full production was achieved. 11. On 21 st December 1995, Pell Frischmann completed a questionnaire for NIOC which spoke of Pell Frischmann's intention "to form a consortium of suitable international and Iranian Oil companies when the exact scope of work is established in implementation and financing of three projects, Soroosh, Balal and another". Upon completion the finished installations were to be handed over to NIOC. 12. On 15 th March 1996, Pell Frischmann signed a confidentiality agreement with NIOC. 13. By April 1996 Dr Frischmann had been introduced to a potential source of funding in the form of Fallingbrook Commodities Limited ("Fallingbrook"). 14. On 2 nd April 1996, Pell Frischmann and Fallingbrook signed a confidentiality agreement, and Pell Frischmann wrote to NIOC saying that it proposed to bid for the Balal and Soroosh projects "in a joint venture consortium headed principally by [Pell Frischmann] and [Fallingbrook] in order to assure the necessary finance for the projects". 15. On 26 th June 1996, Pell Frischmann wrote again to NIOC enclosing a proposal for development of the Balal field, saying: "Our proposal is submitted jointly by ourselves, Fallingbrook Commodities Ltd and the Industrial Progress and Development Company of Iran Ltd ["IPDCIL"] acting as a Consortium to undertake the proposed Project." The Chairman and Manager of IPDCIL was Mr Manoochehr Mohandes ("Mr Mohandes"). 16. In September 2006, NIOC and Pell Frischmann held a series of

meetings in Teheran. Other competitors were making bids. Pell Frischmann accepted that its bid was not particularly impressive. 17. On 11 th October 1996, Bow Valley first met Pell Frischmann at Pell Frischmann's offices in London. There followed an exchange of correspondence expressing mutual interest. Bakrie was told about the project by Bow Valley shortly after Bow Valley had first been approached by Pell Frischmann. 18. On 6 th November 1996, the Bow Valley Confidentiality Agreement was entered into between Pell Frischmann and Bow Valley. Over the entire course of their nine month relationship, the BVCA was the only formal agreement ever signed between these parties relating to data received by Pell Frischmann regarding the two oil fields from NIOC. We shall consider the text, meaning and implications of the BVCA in due course. 19. On 2 nd December 1996, the Bakrie Confidentiality Agreement was entered into between Pell Frischmann and Bakrie after further meetings between Pell Frischmann and Bow Valley. The only difference between the BCA and BVCA was that the BCA did not include any equivalent of the clause 7 of the BVCA, which provided, inter alia, that Pell Frischmann and Bow Valley intended to enter into a joint venture agreement in the near future. 20. On 19 th December 1996, a joint bid was despatched to NIOC by Pell Frischmann just before an NIOC deadline of 22 nd December 1996. Fallingbrook was, to all intents and purposes, dismissed from the scene. Mr. Mohandes's company, IPDCIL, was still named as one of the participants in the bid. 21. The bid included a "Technical Proposal" and a "Commercial Proposal". The former consisted, among other things, of a section headed "Composition of Consortium", reading as follows:- "It is proposed that the Development of the Balal Field will be undertaken by a Consortium comprising of Pell Frischmann Engineering Ltd working in association with Bow Valley Energy Ltd, Industrial Progress and Development Company of Iran and other Iranian consultants and contractors. Particulars of Pell Frischmann and Industrial Progress and Development Company of Iran were provided in our previous proposal and in earlier pre-qualification submissions, and we have not therefore resubmitted such material in the present proposal. In our previous proposal, we indicated that we intended to involve an oil company within the Consortium to provide necessary expertise and experience in reservoir management and oilfield operations. Since our initial proposal we have therefore enlarged our Consortium by bringing in Bow Valley Energy Ltd of Canada to considerably strengthen our capability for successfully executing the Project". 22. This was followed by a "Corporate Summary" of Bow Valley, the final paragraph of which referred to the fact that Bow Valley had entered into "an Agreement of Association with a large Indonesian conglomerate to jointly evaluate exploration and development opportunities in Indonesia, North Africa and the Middle East". The conglomerate was Bakrie. 23. This description of the Consortium was, in turn, followed by a section headed "Master Development Plan". The invitation to tender had required the contractor to produce such a plan, based on information provided by NIOC relating to the reservoir, geology of the field and the existing facilities, and on concepts for the project drawn up by NIOC. The Master Development Plan prepared and submitted with the December 1996 Bid consisted of some thirty-five pages of text divided into ten sections together with a number of "Conceptual Drawings" and equipment lists prepared by Pell Frischmann relating to the wellhead and production platforms, respectively. The

"Introduction" described the Master Development Plan as having been prepared by Pell Frischmann, Bow Valley and others. As regards the Commercial Proposal, which consisted of some dozen pages of text and various attachments, Section 2.0 provided as follows:- "Since the submission of our original proposal we have entered into negotiations with a number of major international banks and contractors with respect to establishing a commitment to provide the required funding for the project. Following efforts we are now confident that the Pell Frischmann Consortium can secure the finance required. In this connection we are pleased to attach a letter of support from The Sumitomo Bank Limited, dated 12 Dec 1996 confirming that it will be in a position to source the required debt finance. In addition, Bow Valley Energy plans to finance a portion of the capital required for this project in the Canadian and European equity markets. Accordingly, we are pleased to also include in this respect two letters, one from a financial institution in Canada and one from a Canadian institution operating in the United Kingdom". 24. On 31 st December 1996, Mr Rahimi of NIOC had written to Dr Frischmann requesting, by 19 th January 1997, "necessary supporting documentation to indicate your company's ability to finance [the Soroosh and Balal projects]" and "a list of all your partners in the above projects". 25. On 8 th January 1997, Dr Frischmann replied to Mr Rahimi summarising the position as regards funding as follows:- "Since the submission of our original proposal, and the discussion of this with NIOC, Pell Frischmann have entered into negotiations with a number of major international banks and contractors with respect to establishing a commitment to provide the required funding for the project. Following these efforts we are now confident that Pell Frischmann and Bow Valley can secure the finance required. Letters in support of this position were included within our Commercial Proposal, and we are pleased to attach these also to this letter. In particular, we draw your attention to the attached letter of support from The Sumitomo Bank Limited, dated 12 December 1996, confirming that it will be in a position to source the required debt finance. In addition to this debt finance, Bow Valley Energy Ltd plans to finance a portion of the capital required for this project in the Canadian and European equity markets. Accordingly, we also attach two further letters, one from a financial institution in Canada and one from a Canadian financial institution operating in the United Kingdom, both of which confirm this matter. We have also discussed these projects with Bank Melli Iran in both Tehran and London, and based on these discussions, we are pleased to attach a letter from Bank Melli Iran confirming their willingness to support the financing of the Iranian portion of the work". 26. On 8 th January 1997, in response to NIOC's request for more information about the composition of the consortium, Dr Frischmann said that the intention was that the projects would be undertaken by Pell Frischmann "working in association with" Bow Valley and IPDCIL, but that the consortium would also include "representation from our major supporting bank". Particular emphasis was placed on the fact that, since the time of Pell Frischmann's original proposal, its capabilities had been considerably strengthened by the introduction of an oil company in the form of Bow Valley with the necessary expertise and experience in reservoir management and oilfield development that Pell Frischmann's earlier proposal lacked. 27. In January and February 1997, further meetings and correspondence between Pell Frischmann

and NIOC took place. Over the same period, correspondence also took place about the financial package for the project between Pell Frischmann, Bow Valley and Bakrie. 28. On 11 th March 2007, Bakrie wrote directly to Pell Frischmann saying:- "We are pleased to join the Balal Project. We herewith confirm that we are in a position to arrange US\$50 million loan and to put the equity as required for propositional share of the project" [sic]. 29. On 12 th March 1997, Pell Frischmann in turn wrote to NIOC as follows:- "Bow Valley, our proposed partners for the Balal Offshore Development, are working with one of the largest group of companies, Bakrie Inter Investindo Co Ltd in Indonesia on oil and gas projects. Bakrie have expressed great interest in joining us as a partner/investor if we are successful in obtaining the contract for the Balal Field. We would like to inform NIOC that at a Board Meeting yesterday, it was agreed that we would formally invite Bakrie to join us. In our view having Bakrie as a partner/investor will strengthen our team for the Balal Field and will enable us to seek further opportunities for projects in the oil and gas sector in Iran". The Service Contract and the Performance Bond 30. On 12 th March 1997, the consortium's revised bid was duly submitted as requested by NIOC. 31. On 19 th March 1997, Pell Frischmann signed a service contract (the "Service Contract") in its own name only with NIOC. It included substantial price reductions in capital cost and in the Remuneration Fee. NIOC did not sign it. The commencement of Development Operations was to be within 3 months of the "Effective Date" of the Contract, the latter being defined as the date on which the Contract "after being duly signed by both N. I. O. C. and the Contractor, is approved by the Board of Directors of N. I. O. C.". Approval by the NIOC Board was expected before the end of the month. 32. The Service Contract also obliged Pell Frischmann to produce a US \$5 million on demand performance bond in favour of NIOC: "The Contractor i.e. Pell Frischmann shall submit Bank Guarantee for the amount of ... US\$5,000,000 in favour of NIOC..." The operative part of the "Bank Guarantee" required by NIOC as appended to the Service Contract was in these terms:- "Now the condition of this guarantee is such that in the event that [NIOC] notifies our Bank in writing that Pell Frischmann Engineering Ltd has failed to commence Development Operations within 3 months of the Effective Date of the Agreement as per Clause 3.2 of the Contract we undertake to honour our guarantee for (.....) forthwith upon receipt of the aforesaid written request and pay the above mentioned sum to [NIOC] without the necessity of any proceedings whether judicial, administrative or otherwise to be instituted by [NIOC]". 33. On 24 th March 2007, Dr Frischmann wrote to Mr DeBoni and Mr Blair of Bow Valley, confirming discussions held the previous day. After making a number of specific comments on Bow Valley's draft letter agreement of th January 2007 draft, Dr. Frischmann continued: "In addition to the above, could you please explain urgently, how and when your equity would be available. It is likely that we would need to demonstrate to banks, subcontractors with possible export credit arrangements, that the company has been capitalised. In addition, we have the most urgent matter of raising the \$5 million Bond, which we may need to send to Iran in the next 10 days. If you could demonstrate to insurance companies and Banks that the company is capitalised, the obtaining of the Bond will be simplified. I am conscious of the fact that we have made promises to Bakrie, but in my view we should try to agree our arrangement first. We could then invite Bakrie to visit us in London later this

week". 34. On 24 th March 1997, at the same time as writing to Bow Valley, Pell Frischmann dispatched copies of the bond wording to a number of third parties who, it was hoped, might help. These included Griffiths & Armour, Lewis and Peat Holdings Limited and one General de Vire. 35. Also on 24 th March 1997, Griffiths & Armour, Pell Frischmann's insurance brokers, pointed out in a fax to Pell Frischmann that the bond wording "is, in fact, on demand, and whilst we can suggest changes it is, in our opinion, extremely unlikely that the National Iranian Oil Company will accept these". They explained that, before the matter could be taken further with insurers, a variety of information would be required, including the most recent Pell Frischmann accounts. At that stage, the brokers could do no more than suggest that the premium might be of the order of 5 to 15% of the total bond value: in other words, between US\$250,000 and US\$750,000. 36. On 2 nd April 1997, Griffiths & Armour reported that their inquiries in the market had resulted in advice that the alternative of a conditional bond was highly unlikely to be acceptable to the Iranians; that the placing of a bond of this kind would entail "a parent company guarantee"; and that the premium would be likely to be at least 10% of the bond value. 37. On 2 nd April 1997, notwithstanding this advice, Pell Frischmann immediately faxed to Tehran, for NIOC's consideration, a less uncompromisingly-worded draft, providing for the bond to become payable only after written notice of default coupled with failure on the part of Pell Frischmann to remedy the situation within 30 days and exclusion of any claim on the guarantee in the event of failure as a result of force majeure . This, as predicted by Griffiths & Armour, was unacceptable to NIOC. 38. After further negotiations over the ensuing two weeks in April 2007, Pell Frischmann was eventually obliged to accept wording substantially in the terms originally required by NIOC (though with an amendment adding a further limit to the duration of the guarantee). 39. In short, the required bond remained an unconditional one, automatically payable on demand by NIOC in the event of development operations not starting on time, and continuing until satisfactory completion of 10% of the work or commitment by Pell Frischmann of 10% of the capital cost. Negotiations concerning a joint venture agreement 40. In March and April 1997, both Pell Frischmann and Bow Valley had bilateral communications with Bakrie. 41. On 3 rd April 1997, Fladgate Fielder, the solicitors for Pell Frischmann, sent a draft Framework Agreement to Bow Valley, to which only Pell Frischmann and Bakrie were parties. All reference to Bow Valley, as such, had been expunged, although the draft referred at one point to the possibility of each party transferring an equal proportion of its holding to "a third party shareholder" so as to give that party 5% of the issued share capital. 42. On or about 4 th April 1997, the Bow Valley board met and discussed, according to the minutes, a collateral agreement between Bow Valley and Bakrie, whereby Bakrie would provide financing to Bow Valley, or in the alternative purchase a partial interest from Bow Valley on the basis of a \$5 million note. 43. On 9 th April 1997, all 3 parties met in Jakarta, and Pell Frischmann, whose solicitors were, by then, Norton Rose, rejected the Bow Valley/Bakrie proposal that there should be control by a majority of the three, on the basis that Bow Valley and Bakrie were to assume the bulk of the financial risk. Instead, Pell Frischmann insisted that decision making within the proposed joint venture should be by unanimity. 44. On 10 th April 1997, consistently with

what Mr DeBoni of Bow Valley had written to Pell Frischmann on 14 April 1997, Bow Valley and Bakrie rejected unanimously. 45. On 15 April 1997, Mr Burns of Bakrie sent Pell Frischmann a detailed counter-proposal for the proposed joint venture agreement. Mr Burns had previously that day sent a draft to Mr DeBoni, saying that there was an old saying about the nose of the camel "which appears very true in this instance". No little time was spent trying to discern the significance of this delphic reference. But, in our view, its meaning depends upon an identification of the camel which was never established. We are, therefore, despite Advocate Speck's detailed submissions, unable to draw any meaningful (let alone adverse) inferences from this communication between Messrs Burns and de Boni. 46. The essential elements of Mr Burns' 15 April 1997 counter-proposal were as follows:- (i) Bakrie would finance the entire project without the need for any capital contributions by either Pell Frischmann or Bow Valley, in return for a one-third share in the Remuneration Fee. (ii) Pell Frischmann would be treated as having earned a one-third "carried" interest in the project. (iii) Bow Valley would be solely responsible for the management/ development of the project. (iv) No management or financing fees or pre-investment costs of any kind would be chargeable to the project by any participant. (v) Any cost over-run would come out of Bow Valley's one-third share of the Remuneration Fee, and, in the event of that being exhausted, out of Pell Frischmann's one-third share of that fee. (vi) All revenue (after meeting operating costs and expenses) would be used first to pay all Bakrie loans, and then by distribution to the three shareholders. 47. On 20 April 1997, Pell Frischmann sent a 19-point counter-proposal including the following: It proposed that each of the three parties should provide equity capital of US\$3 million, but in the case of Pell Frischmann its expenditure to date was to count as its contribution. Pell Frischmann was to be appointed "for design and engineering" and was to be paid for this at normal commercial rates. All decisions were to be "by unanimous agreement, except as provided for in the shareholders agreement to be negotiated". "Any overrun or savings of the budget will be entirely a matter of agreement between BMP [Bakrie] and Bow Valley, since the management will be entirely assigned to Bow Valley, Pell Frischmann will not be responsible for such overruns. Pell Frischmann will receive a minimum profit of one third of the remuneration fee, as defined in the Service Contract". Bakrie was to produce a draft form of Bank Guarantee in the form required by NIOC in their letter dated 15 April 1997 and make such guarantee available "as soon as possible but not later than Sunday 27th April". It was to be "Pell Frischmann's responsibility to inform BMP and BVE of arrangements made with Iranian advisors etc and it will be BMP, BVE and Newco responsibility to deal with such appointments. In the shareholders agreement Newco, BVE and BMP will indemnify [Pell Frischmann] against all claims against Pell Frischmann under such arrangement". The profit from oil trading arrangements would be split as to 45% to Pell Frischmann and the rest between Bakrie and Bow Valley. 48. On 22 April 1997, after a further rapid interchange of correspondence, Bakrie wrote to Pell Frischmann withdrawing from the project, in the following terms:- "Thank you for your letters concerning Bakrie participation in the proposed Balal project in Iran. Unfortunately, since you have not accepted the conditions under which Bakrie would be prepared to finance the project, we must decline to participate. We appreciate that Bakrie

was considered as a possible partner for this project. As such, Bakrie has attempted, in good faith, to define our participation in terms of financing the project and reach agreement with you on these terms. I regret that this was not possible to do. We wish you every success on the Balal project". The provision of the Performance Bond 49. On 1 st May 1997, Pell Frischmann produced to NIOC a performance bond from Panamerican Finance Bank Corporation of Barcelona ("Panamerican"), but, on 5 th May 2007, Pell Frischmann requested Panamerican not to pay it 50. On 7 th May 1997, in a letter addressed to Dr Frischmann, NIOC informed him that it had not been able "to locate the existence of the Panamerican Finance Bank Corporation" ; stating that, unless and until verification of its status was received or a fresh guarantee was obtained from an approved bank, the Service Contract could not be considered operative. 51. On 9 th May 1997, Mr Mohandes communicated to Pell Frischmann NIOC's annoyance at the type of bond produced, and their concerns about the very existence of Panamerican. 52. On 10 th May 1997, Dr Frischmann wrote again to NIOC saying that, at long last, Panamerican had provided some information concerning the dealings that it had had with NIOC in 1972 in connection with a letter of credit. He suggested that NIOC would be able to look up the transaction in their files and continued:- "We are having discussions with a number of Banks on the NIOC approved list but difficulties are arising as they are not willing to accept the wording requested by NIOC. Can I ask you once again to please accept our Bond No 010211 in the form it was sent to you to save us embarrassment, time and further expense". 53. On 14 th May 1997, NIOC replied, to Dr Frischmann's fax rejecting his further request:- "In reply to your letter dated 10 May 1997, we kindly, once again refer you to our last letter dated May 8, 1997 in which we clearly advised you the NIOC's policy as regards to your instance. Therefore, we are not in a position to accept your L. O. G. No. 010211 as it is. Your immediate action as per our letter dated May 8, 1997, is necessarily required". The buy-out discussions and BV's dealings with NIOC 54. On 15 th May 1997, Pell Frischmann wrote to Bow Valley asking it to buy Pell Frischmann out, saying that the bi-party agreement between Bakrie and Bow Valley "seems much easier to arrange". Negotiations duly commenced for such a buy out. 55. Between 12 th March and 27 th May 2007, there were no telephone calls made or faxes sent to Iran by Bow Valley. 56. On 27 th May 1997, Mr Mohandes wrote to Pell Frischmann asking it to name its new partner, and expressing great concern about the bond and other matters. 57. Also on 27 th May 1997, Mr DeBonis wrote to Dr Hosseini of NIOC in the following terms:- "Re: Balal Buy-Back Project I am writing to inform you of the status of our Company's position relative to the Balal buy-back project. As you may be aware, Bow Valley Energy Ltd in good faith worked with Pell Frischmann Engineering Ltd to submit a bid to NIOC for development of the Balal field. Bow Valley also introduced Bakrie Interinvestindo Co. Ltd to Pell Frischmann for the purpose of assisting with project financing. Since our Company is associated with Bakrie (part of a large Indonesian conglomerate) in investigating oil and gas opportunities in other countries, Pell Frischmann agreed that having them as a partner would strengthen our bid. Pell Frischmann therefore advised you by letter dated March 12, 1997 that Bakrie would be joining our consortium. Recently we have read press reports that a contract for the Balal project may be awarded by NIOC to Pell Frischmann and Bow Valley subject to that

consortium being able to raise financing. In addition, numerous reports have circulated that we may be subject to U. S. sanctions upon such an award. We wish to provide clarification of our position on both of these issues. Firstly, Bow Valley and Bakrie are together able to provide the expertise needed to optimally develop the Balal offshore oilfield along with all of the financing required. Secondly, both Bow Valley and Bakrie stand prepared to undertake such a project in the face of U. S. sanctions. Unfortunately, Bow Valley and Bakrie have been unable to reach an agreement with Pell Frischmann that would, in our judgement, allow for the project to proceed in accordance with international petroleum industry practice. We trust you will appreciate that we cannot continue to invest our shareholders' funds on Balal under these circumstances. At the same time, we wish to guard against the possibility of our actions being negatively construed against the Islamic Republic of Iran. Please be assured that Bow Valley and Bakrie remain ready and able to undertake an oil and gas development project in Iran. We had sincerely hoped that the Balal project would provide the first step toward establishing a long term investment and business relationship with NIOC and your Government. Representatives from our Company and the Bakrie group could be available on short notice to travel to Tehran to discuss any of the foregoing and to explore other business opportunities with you. We would be most pleased to hear from you in this regard". 58. Also on 27 th May 1997, Mr DeBoni acknowledged to the Canadian embassy in Teheran that Bow Valley could not go it alone without Pell Frischmann due to its confidentiality obligations. Bow Valley sought the embassy's help in fixing a meeting with NIOC in the following terms:- "As I have indicated to several media people that have called us on the Balal project, "the news of the award of the Balal contract is greatly exaggerated." The contract has not been signed yet and we continue discussions with Pell Frischmann. Bow Valley was instrumental in identifying financing for the entire project but we are still attempting to make an appropriate joint venture agreement with Pell Frischmann before proceeding. It is possible that such an arrangement will not be made and that either Pell Frischmann or ourselves will proceed without the other party or the project will be awarded to another company. The issue should be settled within the next day or two. We have been in contact with Foreign Affairs in Ottawa and have fully apprized them of the situation and we will continue to do so. In the event that our arrangements with Pell Frischmann do not materialize, we will in any event wish to pursue other projects in Iran and would plan on speaking with NIOC. We would contact the embassy before proceeding along this line". 59. On 28 th May 1997, a copy of Mr DeBoni's letter of 27 th May to Dr Hosseinian was sent to Mr. Kamarianakis in the Canadian Embassy in Tehran under cover of the following fax from Mr DeBoni: "We have not made any progress with Pell Frischmann in trying to reach an appropriate agreement and we need to move forward without them. Together with our Indonesian partners, Bakrie, we would like to pursue other opportunities in Iran as soon as possible. We cannot consider at this time attempting to undertake the Balal projects without Pell Frischmann due to confidentiality and exclusivity provisions between our companies. We would appreciate it if the Canadian Embassy can assist in securing an invitation for Bow Valley and Bakrie to meet with NIOC to further these goals. Please let us know if there is anything else we should do to promote this meeting". 60. On 28 th May 1997, Mr Blair wrote to Mr Alatas of Bakrie

suggesting they were working together to approach NIOC. 61. On 29 th May 1997, Mr Mirhadi of NIOC invited Bow Valley to meet Mr Hosseinan of NIOC in Kuala Lumpur ("KL") on 5 th and 6 th June 1997. 62. Between 28 th and 30 th May 1997, Mr Blair had 3 telephone conversations or messages with Mr Ahmadi of NIOC. 63. On 29 th May 1997, Mr Mohandes twice faxed Pell Frischmann saying that he had heard that Bow Valley had offered NIOC to go it alone, and saying also that Pell Frischmann had annoyed NIOC. 64. On 31 st May 1997, Bow Valley wrote to Pell Frischmann saying it was proceeding with an IPO in the Canadian markets, and asked for confirmation that all agreements between them had been terminated:- "Bow Valley is proceeding to conclude the documentation for its initial public offering in the Canadian markets which I anticipate should be announced shortly. We would appreciate your confirmation that there are no debts or other obligations outstanding between our companies and that any agreements between us have terminated. If you would like to be included on the President's list for the IPO, please advise as soon as possible and we will send you the appropriate documents when they are available. We would be pleased to extend the same offer to senior members of your team who have worked with us on the Iranian project". 65. On 1 st June 1997, Mr Kamarianakis wrote from the Canadian Embassy in Tehran thanking Mr DeBoni for his recent faxes "keeping us apprised [sic] of the situation": "I have arranged to meet with Mr Mirhadi (Mr Nejad Hosseinian's deputy) tomorrow to discuss these issues further and will provide you with a report following this meeting. For your information, Mr Mirhadi who will also be in Kuala Lumpur with Mr Nejad Hosseinian, was the former head of Kala Naft's Calgary (Kala Naft is the procurement arm of NIOC office and is very familiar with the Calgary oil scene)". 66. On the 3 rd June 2007, Mr Kamarianakis wrote again to Mr De Boni:- "Had a meeting with Mr Mirhadi yesterday in his offices at NIOC. We discussed the Balal contract and he stated that preliminary contract assignment has been given to Pell Frischmann. He stated that this limits their ability to discuss the awarding of Balal to other parties. NIOC must continue to work with Pell Frischmann unless and until they drop out in which case, they would most likely revert to the number 2 candidate. However, depending on the legal aspect of your [Bow Valley/Bakrie] relationship with Pell Frischmann, there may be room to manoeuvre [sic]. As background, when the buy-back agreements were first tendered there were two tracks which bidders followed: the technical bid - which was evaluated by the technical committee; and the commercial bid - which was evaluated by the financial committee. These processes were/are mutually exclusive until the point when the committees ranked the bids and they were sent to senior management for a decision. Future bids will most likely follow a similar path. NIOC through Mr. Nejad Hosseinian and Mr. Mirhadi (his deputy) have primary responsibility for buy-back projects. As well, Mr. Jallilian (head of NIOC Offshore) is also a key player with these projects and is definitively worth cultivating. Assuming Balal is no longer available, there exists other potential buy-back projects in Iran. In particular, there are offshore development projects available on the Iranian portion of the Straits of Hormuz. Mr Mirhadi had very little knowledge of your firm and asked me pointed questions about your experiences, expertise, etc. I answered that I was unfortunately unaware of all of your previous experiences but recommended you as a bona fide, reputable, Canadian oil

company with top-notch senior management and technical experts. I also mentioned some of the background which you and Mr Peltier provided me during our meeting in Calgary 6 weeks ago. I can tell you to expect questions concerning previous experience, projects, etc. They are also very interested in the reasons behind the change between yourselves and Pell Frischmann . Please let me know whether there is anything else which you require and I look forward to hearing from you soon or perhaps meeting with you in the near future"(emphasis added). 67. Meanwhile, the negotiations between Pell Frischmann and Bow Valley concerning the buy-out had continued until 2 nd June 1997, when Pell Frischmann rejected Bow Valley's and Bakrie's proposal. Pell Frischmann simultaneously reminded Bow Valley of its obligations under the BVCA. 68. On 2 nd June 1997, Pell Frischmann wrote to NIOC saying it was having difficulties finalising its arrangements with Bow Valley, and that it was having detailed discussions with Monument Oil & Gas plc ("Monument"), and that it would visit Teheran the following week. 69. On 3 rd June 1997, the Canadian embassy reported to Bow Valley that NIOC was still committed to Pell Frischmann, "unless and until they drop out". 70. On 5 th June 1997, senior principals of NIOC (Dr Hosseinian and Mr Mirhadi), Bow Valley (Messrs DeBoni and Blair) and Bakrie (Messrs Bakrie, Setiano, Alatas and Burns) met in (KL). As a result of that meeting, NIOC said that it would give a 15-day ultimatum to Pell Frischmann, asking it to provide evidence of a bank guarantee from a recognised bank, and a copy of a joint venture agreement between Pell Frischmann and the consortium parties which had been introduced to NIOC by Pell Frischmann. 71. On 10 th June 1997, Mr Blair told Pell Frischmann that Bow Valley did not intend to pursue the Balal contract on its own, but that it had met NIOC on 5 th June 1997 at NIOC's invitation. 72. On 12 th June 1997, Pell Frischmann protested to Bow Valley about its direct contact with NIOC, alleging a breach of, at least, clause 6 of the BVCA, which required Bow Valley not to approach NIOC directly without Pell Frischmann's consent. 73. On 16 th June 1997, Pell Frischmann protested in turn to Bakrie about its direct contact with NIOC, alleging a breach of clause 6 of the BCA. 74. On 16 th June 1997, NIOC wrote to Pell Frischmann, copied to Bow Valley, giving Bow Valley 15 days to provide a letter of guarantee in the form required by NIOC, a final financing agreement, and a final joint venture agreement. 75. On 17 th June 1997, Bow Valley rejected Pell Frischmann's allegations of breach of the BVCA, and said that it would only proceed alone if agreement were reached to that effect with Pell Frischmann. 76. On 18 th June 1997, Pell Frischmann wrote to NIOC about its good progress with Monument, and Monument tried to arrange a trip to Teheran, which began on 21 st June 1997. 77. On 24 th June 1997, Pell Frischmann and Monument met NIOC, and Dr Hosseinian told Pell Frischmann that Pell Frischmann was only an engineering company and that the NIOC had made a mistake in not insisting on contracting with an operating company. He said that Monument could bid alone, and that Bow Valley had confirmed that it would be prepared to take the contract. The meeting nonetheless resulted in NIOC extending Pell Frischmann's 15-day deadline from 1 st to 4 th July 1997. 78. Between 13 th June and 11 th July 1997, Mr Mirhadi of NIOC visited Calgary to see his daughter. 79. On 25 th June 1997, as a result of the 24 th June meeting with NIOC, Pell Frischmann contacted Mr DeBoni again. 80. On 26 th June 1997, Bow Valley and Bakrie made a revised offer to buy

out Pell Frischmann. The offer was expressed to be open only until 30 th June 1997. 81. On 27 th June 1997, Pell Frischmann made a counter-offer of buy-out terms to Bow Valley and Bakrie. Negotiations continued for the following week. 82. In early July 1997, Pell Frischmann told Mr Blair that Bow Valley was in a horse race with other companies to partner Pell Frischmann in the Balal contract. 83. On 2 nd July 1997, Monument and Pell Frischmann ended negotiations, and Pell Frischmann sought to hold Monument to the terms of their Confidentiality Agreement. 84. On 3 rd July 1997, Pell Frischmann and Bow Valley made concerted efforts to agree a buy-out deal, and Bow Valley wrote to NIOC saying that Bow Valley and Bakrie "believe we are very close to bringing this matter to a positive conclusion". 85. On 4 th July 1997, Bakrie wrote to NIOC in similar terms. 86. On 4 th July 1997, Pell Frischmann wrote to NIOC. The terms in which it wrote were quite different (a) from the terms in which Bow Valley and Bakrie had written, and (b) from the terms of a draft Pell Frischmann had sent Mr DeBoni the day before. Pell Frischmann's letter sought to keep the door open for other deals, and asked for more time in which to find banker partners, contrary to what seems to have been understood with Bow Valley and Bakrie. The Royal Court held that this letter sealed Pell Frischmann's fate as far as NIOC was concerned. 87. Also on Friday 4 July 1997, NIOC's extended 15-day deadline to Pell Frischmann expired. 88. On Monday 7 th July 1997, NIOC notified Pell Frischmann by fax that, as Pell Frischmann had failed to secure the necessary financing, NIOC was no longer under any obligation to award the contract for the Balal project to Pell Frischmann, and that NIOC was negotiating with other interested parties (the "7 th July Fax"). The 7 th July Fax would have been received in Pell Frischmann's offices in London either just before midday or at about 12.26 p.m. 89. Meanwhile on the same day, 7 th July 1997:- (i) Norton Rose, Pell Frischmann's solicitors, wrote to Mr. DeBoni with the latest draft of the proposed buy-out agreement saying that Pell Frischmann was keen to sign the agreement the same day. (ii) Mr. DeBoni replied pointing out that the latest draft failed to take account of a number of points previously discussed, explaining that no funds would be released until the agreement had been finalised, and stating that Bow Valley understood that Pell Frischmann had received a letter from NIOC within the last day regarding its status in the Balal contract and requesting a copy of it. (iii) Mr. Blair prepared a briefing memorandum for a meeting of the Bow Valley board that was to take place on the following morning (8 th July 1997), referring to continuing efforts on the part of Bow Valley to conclude a buy-out agreement with Pell Frischmann. 90. On Tuesday 8 th July 1987, NIOC informed Bow Valley and Bakrie by fax that it was willing to award the contract to a joint venture of Bow Valley and Bakrie provided they accepted the terms of Pell Frischmann's contract (the "8 th July Fax"). NIOC asked Bow Valley and Bakrie to submit the US\$5 million bank guarantee from an acceptable bank and the Bow Valley/ Bakrie joint venture agreement within 10 days. The 8 th July Fax would have been available in Bow Valley's office in Calgary at the beginning of the working day. 91. At 9.30 a.m. on 8 th July 1997, Bow Valley's board meeting took place in Calgary. The receipt of the 8 th July Fax was reported to the board, and the board authorised the conclusion of the buy-out agreement with Pell Frischmann on terms acceptable to Bow Valley. Mr DeBoni's fax of that afternoon to Mr Rahimi of NIOC confirmed they were close to a Pell Frischmann deal. 92. At 6.21 p.m.

London time on 8 th July 1997, Norton Rose faxed a letter to Mr DeBonis annexing to it what they described as "the agreement in the final form" , and stating that Pell Frischmann required it and the associated escrow letter to be signed, and "the funds" (US\$3 million) provided for in the draft agreement to be transmitted that day. 93. Shortly after 9.00 p.m. London time (ie just after 2.00 p.m. in Calgary) on 8 th July 1997, a copy of the 7 th July Fax was sent by Pell Frischmann to Bow Valley. The fax was accompanied by a letter from Pell Frischmann to Mr DeBonis saying that Pell Frischmann was still in the running for the Balal contract but without exclusivity. 94. At 1 p.m. on 8 th July 1997 at the Rodeo in Calgary, Mr Mirhadi gave Mr Blair to understand that NIOC was fed up with Pell Frischmann, and that it no longer felt under any obligation to Pell Frischmann. Mr Mirhadi gave Mr Blair the impression that there would be no obstacle to Bow Valley and Bakrie proceeding without Pell Frischmann. 95. On 11 th July 1997, Mr DeBonis wrote complaining to Pell Frischmann about it not having disclosed the fact that NIOC no longer had an exclusive right to contract with NIOC. 96. On 16 th July 1997, Pell Frischmann wrote complaining to Mr DeBonis about Bow Valley's alleged misconstruction of the facts, and urging Bow Valley and Bakrie to join with Pell Frischmann so as to secure the contract with NIOC. 97. On 28 th July 1997, NIOC signed a contract with Bow Valley and Bakrie. E. The findings of the Royal Court 98. The Royal Court found in paragraphs 307-318 that Pell Frischmann's allegations of conspiracy, deceit, malicious falsehood and wrongful interference, arising out of the matters we have described in the previous section of this judgment, were groundless. 99. The Royal Court specifically held in paragraph 308 that: "The evidence in the present case simply does not support the existence of any conspiratorial intent to deprive Pell Frischmann of anything that was rightly theirs". 100. Particular findings which supported this overall conclusion included:- (i) that: "... in relation to the 24th June 1997 meeting between Pell Frischmann, Monument and NIOC that Dr Hosseinan's uncompromising stance was the result not Bow Valley's fault but of Pell Frischmann's own fault: entering service agreement without JV terms agreed, failure to provide a proper bond and producing an unprepared Monument at the last moment". (ii) that : "Bow Valley and Bakrie were not in bad faith in the buy-out negotiations, and did not deliberately delay to try to exclude Pell Frischmann; rather Pell Frischmann deliberately delayed. Bow Valley wanted to reach a deal with Pell Frischmann so as not to lose the contract altogether". (iii) that: "Pell Frischmann's letter of 8th July was disingenuous, and that, by 7th July 1997, NIOC were as they had said, no longer interested in dealing with Pell Frischmann". (iv) that: "Until the Rodeo, Bow Valley and Bakrie had genuinely intended to contract with Pell Frischmann for a buy-out agreement". 101. The Royal Court further concluded that:- (i) Bow Valley 's actions, even if in breach of the BVCA, caused Pell Frischmann no loss. (ii) There was a tripartite contract between Pell Frischmann, Bow Valley and Bakrie created on 19 th March 1997, the date of the Service Contract between Pell Frischmann and NIOC, whereby they each owed the other reciprocal obligations not to pursue the project alone. (iii) Pell Frischmann repudiated this tripartite contract when it attempted to contract with Monument. (iv) Bow Valley accepted that repudiation in Bow Valley's letter of 11 th July 1997, thereby ending Bow Valley's restraint on contracting with NIOC alone. (v) This acceptance of Pell Frischmann's repudiation

exonerated Bow Valley from compliance with clauses 3 and 6 (not to work on its own and not to approach NIOC) of the BVCA, but did not exonerate Bow Valley from compliance with clause 4 (not to use confidential information) of the BVCA. (vi) In any event, as a matter of construction of clauses 3 and 6 of the BVCA, the clauses were not applicable after Pell Frischmann had destroyed the opportunity to contract with NIOC. (vii) There were breaches of clause 4 of the BVCA (specifically in relation to the material contributed by Pell Frischmann to the Master Development Plan). (viii) Pell Frischmann's loss should be assessed at £500,000 for breach of confidence. 102. We deal in more detail with the way in which the Royal Court approached the contractual claims below. All other claims by Pell Frischmann were, as we have indicated, dismissed by the Royal Court. F. The appeal and cross-appeal 103. Pell Frischmann now appeals against the Royal Court's decisions. It seeks judgment against the Bow Valley defendants for breach of the BVCA, for inducing breach of contract, for unlawful interference, deceit and conspiracy. It argues that the damages awarded to Pell Frischmann should be increased from £500,000 to US\$10 million, and that there should be an award of compound interest. In addition, Pell Frischmann appeals the Royal Court's detailed costs orders. 104. The Bow Valley defendants have served a Respondents' notice asking that the award of £500,000 damages be reduced to zero, and that simple interest should only be awarded from 6 th January 2004. G. The approach of the Court of Appeal 105. In a case where the parties interpretation of events are so diametrically opposed, but when the Court of first instance has aligned itself so firmly with one side, it is salutary to remind ourselves both of the reach and the limits of this Court's powers on appeal. 106. The basic position is set out in Rules 12(1)-(3) of the Court of Appeal (Civil) Rules 1964 :- "12 General powers of the Court

- (1) The Court shall have full discretionary power to receive further evidence on questions of fact, either by oral examination in court, by affidavit, or by deposition taken before the Viscount or on commission: Provided that in the case of an appeal from a judgment after hearing of any cause or matter on the merits, no such further evidence (other than evidence as to matters which have occurred after the date of the trial or hearing) shall be admitted except on special grounds.
- (2) The Court shall have power to draw inferences of fact and to give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require.
- (3) The Court may make any order, on such terms as the Court thinks just, to ensure the determination on the merits of the real question in controversy between the parties". 107. It is well established that in a case where findings are made dependant on the view that the Royal Court has formed of the various witnesses, the circumstances in which the Court of Appeal can interfere with a judgment of the Royal Court are circumscribed. There is indeed a consistent line of authority in this Court to that effect: *Hyams v. English*

[1981] at page 89, *Taylor v. Fitzpatrick*

- [1979] 1 CA at page 9, *Shalia v. Granite*
- [1971] 1 CA at pages 758-760, *Davis v. Stirling*
- [1983] 1 CA at pages 79-80. This line of authority adopts the approach of the English Courts under the pre-CPR regime. The position may also be compared with the present position in England, epitomized in *Assicurazioni Generali SpA. v. Arab Insurance Group*
- [2003] 1 WLR 577 per Clarke LJ at paragraphs 14-17. 108. In the House of Lords, Lord Sumner put the matter in the following way in *The Hontestroom*
- [1927] A. C. 37, at pages 47-48 (approved in *Whitehouse v. Jordan*)
- [1981] 1 WLR 246 by Lord Wilberforce at page 249, and by Lord Fraser at page 263):- "not to have seen the witnesses puts appellate Judges in a permanent position of disadvantage as against the trial Judge, and, unless it can be shown that he has failed to use or has palpably misused his advantage, the higher Court ought not to take the responsibility of reversing conclusions so arrived at, merely on the result of their own comparisons and criticisms of the witnesses and of their own view of the probabilities of the case. The course of the trial and the whole substance of the Judgment must be looked at, and the matter does not depend on the question whether a witness has been cross-examined to credit or has been pronounced by the Judge in terms to be unworthy of it. If his estimate of the man forms any substantial part of his reasons for his Judgment the trial Judge's conclusions of fact should, as I understand the decisions, be let alone. In *The Julia* (1860) 144 Moo. P. C. 210, 235, Lord Kingsdown says: 'They, who require this Board, under such circumstances, to reverse a decision of the Court below upon a point of this description, undertake a task of great and almost insuperable difficulty ... We must, in order to reverse, not merely entertain doubts whether the decision below is right, but be convinced that it is wrong.' Wood L. J., in *The Alice* (1868) L. R. 2 P. C. 245, 248, says: 'The principle established by the decision in *The Julia* is most singularly applicable We should require evidence that would be overpowering in its effect on our Judgment with reference to the incredibility of the statements made.' James L. J. thus laid down the practice in *The Sir Robert Peel* (1880) 4 Asp. M. L.C. 321, 322: 'The Court will not depart from the rule it has laid down that it will not overrule the decision of the Court below on a question of fact in which the Judge has had "the advantage of seeing the witnesses and observing their demeanour, unless they find some governing fact which in relation to others has created a wrong impression."' 109. In the case of *Jones, Jones and Bedell Cristin Trustees Limited v. Plane*
- [2006] JLR 438, the Court of Appeal at paragraph 29 approved another classic passage from the speech of Lord Wright in *Powell v. Streatham Manor Nursing Home*
- [1953] A. C. 243 at pages 265-266 couched in the following terms:- "Two principles are beyond controversy. First it is clear that in an appeal of this character, that is from the decision of trial judge based on his opinion of the trustworthiness of witnesses whom he has seen, the Court of Appeal, 'must, in order to reverse, not merely entertain doubts whether the

decision below is right, but be convinced that it is wrong' ... And secondly the Court of Appeal has no right to ignore what facts the judge has found on his impression of the credibility of the witnesses and proceed to try the case on paper on its own view of the probabilities as if there had been no oral hearing". The Court of Appeal in Jones at paragraph 30 of its own Judgment went on to say as follows: "The application of these principles is ... particularly important in this jurisdiction where, as in this case, the facts are found by the Jurats rather than a judge". 110. This latter dictum is, in our judgment, a recognition of the jurats' distinctive (and historic) role as fact finders. in contrast with that of the Judge who has a dual role in deciding both law and fact. H. The witnesses 111. Of the Bow Valley witnesses, the Royal Court found at paragraph 417 that Mr DeBoni of Bow Valley was "for the most part an honest and straightforward witness, though occasionally somewhat defensive". The Royal Court also found at paragraph 418 that: "We had little doubt [Mr Blair of Bow Valley] was truthful to the best of his recollection and we accept his evidence on the core issues of Pell Frischmann's case of alleged conspiracy". 112. While the Royal Court was less than wholeheartedly enthusiastic about Mr Cummings, Bow Valley's lawyer, (and, at one time, Bakrie's lawyer), in the end the Court was satisfied at paragraph 419 "that his evidence was substantially truthful on all key aspects of the conspiracy case". 113. Given that, to summarise the respective view points of the parties still more succinctly, the issue was whether Bow Valley and Bakrie always or, at any rate, for some latter part of the period between November 1996 and July 2007, were intent on obtaining a contract from NIOC for themselves to the exclusion of Pell Frischmann, or whether Bow Valley and Bakrie were merely intent on preserving their participation in that contract if, for any reason, Pell Frischmann was no longer regarded by NIOC as an acceptable counterparty, this judgment about the Bow Valley witnesses and their credibility was likely to be of great importance in determining which version was correct. 114. By contrast the Royal Court was critical at paragraph 412 of the behaviour of Dr Frischmann, the moving spirit behind Pell Frischmann, in the witness box which rendered "much of [his] evidence of doubtful value". The Royal Court was also critical in paragraph 415 of Mr Sarch, whom it described as "an important witness" but "largely - and worryingly - inscrutable and unconvincing". Mr Fraser was said at paragraph 414 "not [to be] a witness of any great significance". Dr Lamb while "an important witness" was concerned only with technical matters (paragraph 416) and Dr Pendered while "honest and straightforward" was "a little guarded", particularly in relation to the period (which was obviously crucial) between March 1997 and July 1997 (paragraph 413). 115. Mr Speck strenuously contended that the Royal Court's assessment of Pell Frischmann's witnesses was coloured by their erroneous understanding of both the existence and the extent of their respective obligations. We do not accept that such an error did feed into the Royal Court's assessment which, as we read the Judgment, had an independent source. But even if it did, it could not have affected their assessment of Bow Valley's witnesses, which was crucial to their dismissal of the various tortious claims. I. Bias 116. Mr Speck did not merely assert that the Royal Court's conclusions as to the credibility of Bow Valley's witnesses was inconsistent with the objective facts and the contemporary documentation;

he suggested that the Royal Court was biased in its approach. 117. Whilst we accept that, if bias is considered to be demonstrated by a Court of first instance, it is Counsel's right, indeed duty, to draw it to the attention of the Court of Appeal, it is an accusation not lightly to be made. In our view, Mr Speck essentially reasoned in reverse: i.e. he started from the fact that the majority of the findings were adverse to Pell Frischmann, to conclude that it followed that the Royal Court was biased. He could supply no pre-existing reason why such bias should exist. 118. If Pell Frischmann had not, for any reason, had a fair trial, then the appropriate relief by this Court would have been an order for a retrial. This Court cannot, in a case where there was oral evidence deployed over a period of more than 30 days do justice to either party without hearing those witnesses, and, although this Court formally conducts a rehearing, the label can be misleading. It is not a replication of a trial at first instance. 119. Ultimately, we assessed Mr Speck's submissions on this issue as forensic hyperbole, and see (with a sense of relief) no reason to require a re-hearing of the issues ventilated in these proceedings. We rejected as unsubstantiated the allegations of bias or unfairness made against the Royal Court, which conducted the proceedings, as appears from the transcript, with conspicuous care and courtesy. A court can be wrong without being biased. The real issue is whether the Royal Court was right or wrong in its conclusions. 120. We accept, of course, that we should not abdicate our function as an appellate court by uncritical acceptance of the Royal Courts' findings. If its conclusions are inconsistent with the probabilities or contemporary documentation, then it may be open to us to conclude that the Royal Courts' had failed to take proper advantage of seeing and hearing the witnesses. See, for example, *Yaquooob v. Royal Insurance (UK) Limited*

[2006] EWCA Civ 885 per Chadwick LJ. 121. But when the Royal Court has made clear findings as to the relative credibility of the parties and their witnesses, which, in turn, informed their overall findings on the issues before them, it is in our view necessary for an Appellant to establish such inconsistency with the probabilities and documentation. It is not enough for an Appellant to assert that a different conclusion as to the credibility of the parties and their witnesses would have led to a different view of the documentation. This would again be to reason in reverse. Nor can the Court of Appeal be compelled to start from the position that the Royal Court may not have taken full advantage of its role as a trial court rather than the position that presumptively it had. Otherwise the possibility of an exception would be allowed to undermine the probability of such a presumption by procedural distortion. 122. We do not accept that the Royal Court gave inadequate weight to the documents. Mr Speck cites as "a particularly stark example" of a failure to appreciate their significance, the documents which illustrated that Bow Valley was prepared to take the Balal contract without Pell Frischmann (see his final Written Submission at paragraphs 37 and 57(2)). But this failed to recognise that there was a difference between Bow Valley indicating its preparedness to be partners of NIOC if Pell Frischmann was unable to satisfy NIOC as to its own suitability for such role, and Bow Valley seeking to exclude Pell Frischmann from participation in the contract, even if Pell Frischmann would so satisfy NIOC. Here, as elsewhere, Pell Frischmann appeared to

assume that which it was necessary for it to prove. 123. Although we have differed on the conclusions reached by the Royal Court as to the meaning and duration of the BVCA (as to which see below) we do not accept that a person's, in particular a non-legal person's, erroneous view of complex legal documents, is an indication of ill-motive (any more that such a person's correct view is an indication of overall credibility). 124. Moreover we cannot accept that the Royal Court's conclusions were inconsistent with the probabilities. It is not inherently more probable than not that Bow Valley and Bakrie trespassed beyond the boundaries of acceptable commercial behaviour than that they kept within them. Indeed, if anything, the probabilities are the other way. It is clear that the quality of evidence required to establish reprehensible behaviour may be greater than that required to establish, for example, a breach of contract: See *Secretary of State for the Home Department v. Rehman*

[2003] 1 AC 153 per Lord Hoffmann at paragraph 55, and *In re H (Minors) (Sexual Abuse: Standard of Proof)*

[1996] AC 563 , per Lord Nicholls at paragraph 586, and *Re Doherty*

[2008] UKHL 33 , per Lord Carswell at paragraphs 23-28. J. Why Pell Frischmann lost the contract 125. We shall start by considering why it was that Pell Frischmann lost the contract since if, as the Royal Court held, Pell Frischmann was the author of its own misfortune, then the case that Bow Valley or Bakrie contrived it, is depreciated, if not wholly extinguished, and, for this purpose, we start with the significance of Pell Frischmann's position vis a vis the required performance bond. 126. As appears from our previous recitation of the history, although Pell Frischmann had accepted the obligation to submit such a bond on 19 th March 1997, it was not until 1 st May 1997 that Pell Frischmann proposed a bond, and then only one from Panamerican of Barcelona, Spain. NIOC rejected it, because it had never heard of Panamerican, and attempts to establish its credentials ended in failure. Indeed, we are bound to say that Panamerican's existence was barely, if at all, established in evidence. NIOC required a bond from a bank on its approved list or verification of the status of Panamerican or that the Panamerican bond be confirmed by one of the banks on the NIOC list. None of these requirements was ever met by Pell Frischmann. We do not doubt that the requirement was reasonable, but what is material is not whether the requirement was reasonable, but that this was NIOC's requirement. 127. Pell Frischmann's case is that, before the meeting in KL on 5 th June 1997, NIOC had agreed to dilute the terms of the bond from an on demand guarantee to one more akin to a performance bond, that Panamerican furnished such a bond on 5 th June 1997, and that, had the Panamerican bond been confirmed by an approved bank, NIOC would have accepted it. Pell Frischmann contends that, as a result of the KL meeting, prompted by Bow Valley and Bakrie, NIOC "suddenly took a very hard and uncompromising position" , and would not confirm its agreement to dilute the terms. 128. The first issue is whether such agreement to dilute was even made. A letter of 9 th June 1997 from Mr Mohandes to Pell Frischmann is said to constitute evidence of it. However, there does not appear to be any other

evidence to support what Mr Mohandes seems, in our view, to have over optimistically reported. 129. Furthermore, even if NIOC would have accepted a suitably worded bond from Panamerican confirmed by an acceptable bank (NIOC's letter to Pell Frischmann of 8 th May 1997), Pell Frischmann does not allege (still less establish) that even the version of the Panamerican bond obtained on 5 th June 1997 was ever confirmed by such a bank. 130. Indeed, on 16 th June 1997, NIOC despatched the 15-day letter to Pell Frischmann which stated that "... unless we receive the following documents from your end within 15 days from the date hereof, NIOC shall be left with no alternative but to take the appropriate action which might be deemed necessary . A

- letter of guarantee as per NIOC's instructions based on the exact proposed text and issuing bank. B - your final financing agreement. C - your final JV agreement with the consortium partners previously introduced to NIOC." 131. We accept that the sending of a letter couched in these terms may well have been at the suggestion of Bow Valley and Bakrie at the KL meeting. However, leaving the contractual provisions aside, we find nothing sinister in that. It did not by itself indicate that either Bow Valley or Bakrie was seeking to steal the contract from Pell Frischmann, but only that they were anxious that they should not be denied participation in it because of procrastination of their putative partner. 132. Eventually, NIOC sent the 7 th July Fax to Pell Frischmann. It provided, in part, as follows:- "Considering that you have failed to secure the financing requirements of Balal project within the respite [sic - presumably "respite"] allowed and extension thereof by NIOC, we are hereby informing you that NIOC is no longer under any obligation to award the contract to Pell Frischmann Engineering for Balal project". 133. We note that the 7 th July Fax refers only to Pell Frischmann having "failed to secure the financing requirements of Balal project" , which seems to be a reference to requirement B in the 15-day letter. This may reflect what Dr Hosseinian is recorded as having told representatives of Pell Frischmann and Monument on 24 th June 1997 to the effect that "... issue of the bond alone would not be sufficient and he would require to be satisfied on all three points of the letter, ie the bond the JV agreement and a firm indication of finance availability". 134. NIOC's 8 th July Fax to Bow Valley states that "... since the time for [Pell Frischmann] to submit the required guarantee has expired. Therefore, NIOC is under no obligation to award the contract for the development of Balal field to the said company". Therefore, we interpret the reference to "financing requirements" in the 7 th July Fax to be a short hand for both requirements A and B of the 15-day letter. But whether this be so or not. there is, no doubt that NIOC wanted a bond in proper form, and that Pell Frischmann had failed to provide it. 135. This issue about the proffering of an acceptable bond is barely mentioned in Pell Frischmann's "Cardinal Errors of Fact" document, which runs to nearly 200 pages and comprises 521 paragraphs, much of it in the form of quotations from documents. In our view, however, the bond issue presents an insurmountable problem as far as Pell Frischmann's appeal is concerned. 136. In short, first, the evidence that NIOC had agreed to the wording change is of very poor quality and the absence of corroboration suggests that NIOC was never prepared to agree to such change. Secondly, there is no evidence to show that an acceptable bank would ever

have been prepared to confirm a bond from Panamerican, whatever its terms. Thirdly, Pell Frischmann has failed to establish that, whatever may or may not have been said at the KL meeting, this was the result of a strategy by Bow Valley and Bakrie to exclude Pell Frischmann from the contract: such a finding would, we record, be at odds with the Royal Court's assessment of the Bow Valley witnesses. 137. We note that this is not the approach taken, at any rate expressly, by the Royal Court, whose reasoning on the issue is set out at paragraph 314 of the Judgment, where there is no explicit reference to the bond, as compared with Pell Frischmann's inability or unwillingness to make an adequate financial contribution. The reason for this may again be the absence of explicit reference to the bond in NIOC's 7 th July Fax terminating Pell Frischmann's exclusivity, on which we have already commented above. But we are ad idem with the Royal Court in concluding that it was Pell Frischmann's own fault that it lost its exclusivity, and any hope of obtaining the Balal contract. 138. This conclusion is consistent not only with the objective facts, but with the Royal Court's views of Dr Frischmann, with which we have no reason to disagree. K. The obligations of the parties 139. We shall next consider the contractual relationship between the parties as a precursor to determining what obligations were owed to each party. L. The Confidentiality Agreements 140. The Bow Valley Confidentiality Agreement dated th November 1996 between Pell Frischmann and Bow Valley provided as follows:- "WHEREAS: 1. Pell Frischmann Engineering has acquired the right to tender for the buy back contracts with NIOC for the Soroosh and Balal fields in the Persian Gulf and BVE is actively seeking oil and gas production interests worldwide. IT IS HEREBY AGREED 1. Pell Frischmann Engineering has received certain data from NIOC regarding the Soroosh and Balal fields which NIOC regard as confidential and Pell Frischmann Engineering have entered into a confidentiality agreement with NIOC in respect of such data. A copy of the confidentiality agreement is attached and will form part of this agreement and should be signed by BVE. 2. BVE undertakes to treat all data provided to Pell Frischmann Engineering by NIOC and subsequently sent to BVE, as confidential and BVE will enter into the same agreement with Pell Frischmann Engineering as Pell Frischmann Engineering with NIOC. 3. BVE will work on the Soroosh and Balal project exclusively with Pell Frischmann Engineering and undertakes not to carry out any work on its own or with other parties. 4. BVE undertakes that all information received from Pell Frischmann will be kept strictly confidential and will not divulge same to any third party without the express written consent of Pell Frischmann. 5. BVE will not use Pell Frischmann advisors in Iran without the permission of Pell Frischmann. 6. BVE undertakes not to approach NIOC directly on these projects without the express written consent of Pell Frischmann. 7. It is the intention of Pell Frischmann and BVE to enter into a joint venture agreement in the near future which will define the relationship of Pell Frischmann, BVE and other participating parties, including Fallingbrook Commodities Limited." 141. The Bakrie Confidentiality Agreement dated 2 nd December 1996 contained the same terms as the BVCA, save that (a) references to Bow Valley were replaced by references to Bakrie throughout, (b) clause 7 was omitted, and (c) Bakrie was not required to sign a copy of Pell Frischmann's confidentiality agreement with NIOC. M. The Royal Court's approach to the contractual claims 142. The Royal Court dealt with Pell

Frischmann's contractual claims on a somewhat attenuated basis. We have taken a somewhat different view of the validity of these claims. We will start, however, by explaining briefly the Royal Court's decision. 143. In the broadest outline the Royal Court held that :- (i) Pell Frischmann had a good claim against Bow Valley, even absent the Confidentiality Agreements, for damages for breach of confidence, because Bow Valley used Pell Frischmann's confidential information in relation to the contract with NIOC on 28 th July 1997 (paragraph 321 and Part 13). (ii) Bow Valley 's alleged breach of the confidentiality obligations in clause 4 of the Bow Valley Confidentiality Agreement was, therefore, academic, since Pell Frischmann was adequately compensated by the award of £500,000 for breach of confidence (paragraphs 321 and 339) (iii) Bow Valley 's alleged breaches of clauses 3 and 6 were also academic, because the alleged breaches were not causative of any loss to Pell Frischmann:- (a) before 8 th July 1997, because Pell Frischmann's loss of exclusivity was entirely attributable to its own conduct, and was not due to anything that Bow Valley did in approaching or treating directly with NIOC (paragraph 328-9); (b) after 8 th July 1997, because Pell Frischmann had nothing left of any value, and had not the slightest chance of itself concluding a deal with NIOC (paragraphs 330 and 333); (c) in respect of wasted expenditure, because that was caused by Pell Frischmann having destroyed its own prospects of obtaining an interest in the Balal contract (paragraph 340). (iv) Bow Valley's alleged breaches of clauses 3 and 6 of the Confidentiality Agreements gave rise to no claim to "Wrotham Park" damages (pursuant to the principle adumbrated in *Wrotham Park Estates Co Ltd. v Parkside Homes Ltd.*

[1974] 1WLR 798) assessed by reference to what Bow Valley had gained or what Bow Valley would have had to pay for what it had used, rather than by reference to what Pell Frischmann had lost, because the circumstances were not exceptional, and by 7 th July 1997, the agreement had become devoid of meaning (paragraphs 333 and 339). 144. The remainder of the Royal Court's conclusions were provisional in the sense that they were put on the basis of what they "would have been had it been necessary to decide the point[s]" (paragraph 341). These provisional conclusions were as follows:- (i) The true construction of clauses 3 and 6 of the Confidentiality Agreements meant that these clauses did not apply in the circumstances that pertained in practice. Paragraphs 353 and 354 of the Royal Court's judgment are unclear as to precisely when as a matter of construction these clauses lapsed, and as to which of the several suggested unforeseen events covered in these paragraphs triggered such a conclusion. (ii) In the light of the Royal Court's conclusion as to the proper construction of the Confidentiality Agreements, it was not necessary to imply any terms into them. (iii) Bow Valley 's contention that a joint venture to bid contract came into being on 19 th December 1996 between Pell Frischmann and Bow Valley did not succeed, because the matters were at a relatively early stage at that time (paragraphs 358-9). (iv) From the moment that the Service Contract was awarded to Pell Frischmann on 19 th March 1997, however, Pell Frischmann, Bow Valley and Bakrie were each bound to pursue the contract exclusively with one another, unless and until otherwise agreed (paragraph 359). This is what we shall call the "tripartite contract". (v) Pell Frischmann repudiated the

tripartite contract by attempting to contract with Monument in May and June 1997, and that repudiation was accepted by Bow Valley and Bakrie, by BV's 'without prejudice' letter dated 11 th July 1997, terminating any restraint on Bow Valley and Bakrie from contracting with (or presumably approaching) NIOC without Pell Frischmann (paragraph 359). N. Our approach to the contractual claims 145. We intend to deal with the various issues in the following order:- (i) Were the Confidentiality Agreements superseded or amended by a bipartite or tripartite agreement in December 1996 or March 1997 or at any other time? (ii) The true construction of the Confidentiality Agreements. (iii) Did Pell Frischmann have any implied obligations under the Confidentiality Agreements? (iv) Did implied terms of the Confidentiality Agreements limit the operation of clauses 3 and 6? (v) Were the Confidentiality Agreements in restraint of trade? (vi) Repudiation of the suggested tripartite agreement. (vii) The events of the 7 th and 8 th July 1998 (viii) Did Bow Valley breach clauses 3 and 6 of the Confidentiality Agreements? (ix) Did Bow Valley breach clause 4 of the Confidentiality Agreements and/or act in breach of confidence? (x) Was loss caused to Pell Frischmann as a result of BV's breaches of clauses 3 and 6 of the Confidentiality Agreements? (xi) Was loss caused to Pell Frischmann as a result of BV's breaches of clause 4 of the Confidentiality Agreements? (xii) Is Pell Frischmann entitled to Wrotham Park damages as well as or instead of compensatory damages? (xiii) What is the quantum of Pell Frischmann's recoverable loss? (i). Were the Confidentiality Agreements superseded or amended by a bipartite or tripartite agreement in December 1996 or March 1997 or at any other time? 146. In paragraph 359 of its judgment, the Royal Court expressed the view that the better view was probably that from the moment that the Balal Service Contract was entered into between Pell Frischmann and NIOC on 19 th March 1997, Pell Frischmann on the one hand, and Bow Valley and Bakrie on the other hand were each bound to pursue the project exclusively with one another. This view has been supported before us by Advocate Costa for Bow Valley, although he no longer contended (either in the alternative or at all), as he had at trial, that a bipartite agreement came into being between Pell Frischmann and Bow Valley as a 'joint venture to bid' on 19 th December 1996, when the joint bid was despatched by Pell Frischmann to NIOC 147. The Technical section of the 19 th December 1996 joint bid included, as we have already mentioned, the following:- (i) Under the heading "Composition of Consortium", there was a provision saying that "It is proposed that the Development of the Balal Field will be undertaken by a Consortium comprising of Pell Frischmann working in association with Bow Valley , Industrial Progress and Development Company of Iran and other Iranian consultants and partners. ... Since our initial proposal we have therefore enlarged our Consortium by bringing in Bow Valley of Canada to considerably strengthen our capability for successfully executing the Project" (emphasis added). (ii) Under the Heading "Corporate Summary" of Bow Valley, it was recorded that Bow Valley had entered into " an Agreement of Association with a large Indonesian conglomerate to jointly evaluate exploration and development opportunities in Indonesia, North Africa and the Middle East" (the emphasised words were held by the Royal Court to be describing Bakrie). 148. In the part of the joint bid headed "Commercial Proposal", there was reference to Bow Valley planning

to finance a portion of the capital required for the project in the Canadian and European equity markets. 149. It seems to us that, whilst Bow Valley and Bakrie must have permitted Pell Frischmann to put forward this bid including references to them, the bid itself provides no evidence of any concluded joint venture or other agreement between Pell Frischmann and Bow Valley, let alone between Pell Frischmann, Bow Valley and Bakrie. We, therefore, consider that Mr Costa's decision not to reinstate his 'joint venture to bid' submission before us, was a sound one. 150. On 19 th March 1997, Pell Frischmann entered into the Service Contract with NIOC without seeking or obtaining the consent of Bow Valley or Bakrie to its final terms. The Service Contract contained an obligation on Pell Frischmann to provide a US\$5 million bank guarantee in favour of NIOC. This obligation had not been agreed with Bow Valley or Bakrie (or indeed Dr Frischmann). 151. In these circumstances, in our judgment, the Service Contract could not evidence the conclusion of any contract between Pell Frischmann and Bow Valley, or between Pell Frischmann, Bow Valley and Bakrie, whether to the effect that each was bound to pursue the project exclusively with one another, or at all. 152. The Royal Court, however, seems to have relied upon the conduct of the parties in expressing views as to reciprocal obligations that they might have between March and June 1997 (paragraph 356). We have looked carefully at the contemporaneous documents, and confess that we are unable to find any support in them for the proposition that the parties (whether Bow Valley and Pell Frischmann or Bow Valley, Bakrie and Pell Frischmann) were ad idem as to any reciprocal obligations, or indeed any obligations at all beyond the Confidentiality Agreements. 153. It is common ground between the parties that a contract can only be implied between the parties from their conduct if it is necessary to do so. The principles are, as is again common ground, set out in *Baird Textile Holdings Limited v. Marks & Spencer plc*

[2001] EWCA Civ 274 at paragraphs 17-21 of the judgment of Morritt V-C, and at paragraphs 59-64 of the judgment of Mance LJ. 154. In our judgment, there was no basis, in application of these principles, to identify any implied contract in this case. After 19 th March 1997, negotiations for the conclusion of a joint venture agreement between Pell Frischmann, Bow Valley and Bakrie continued, but no agreement was ever reached. That meant that the Confidentiality Agreements were of as much utility after 19 th March 1997 as they had been before. As we have said, no agreement, express or implied, between Pell Frischmann, Bow Valley and Bakrie can possibly be spelled out of Pell Frischmann's unilateral action in concluding the Service Contract with NIOC on terms that were not even approved by Bow Valley or Bakrie. Moreover, we can see no basis for implying a contract beyond the Confidentiality Agreements from the parties' conduct or correspondence. Of course, we accept that there was, in one sense, a de facto 'consortium' negotiating for the Balal contract pursuant to the Service Contract. But the terms on which that consortium was operating were simply never agreed, and there can be no necessity requiring an implied contract to come into being, when at the very same time, such a contract is in the course of active negotiation. (ii) The true construction of the Confidentiality Agreements 155. It was submitted by Mr Costa that the Confidentiality

Agreements may have lapsed after the bid on 19 th December 1996 or the Service Contract on 19 th March 1997. This submission seems to us to be much akin to the holdings of the Royal Court in paragraphs 353-4 as to the proper construction of clauses 3 and 6 of the Confidentiality Agreements. The nub of the Royal Court's view was that "It can never, as we see it, have been the intention of the parties that the restrictions imposed by clauses 3 and 6 should extend to a situation of a kind as far removed from the circumstances contemplated at the time when the agreements were signed in late 1996 as that which actually occurred" (the last sentence in paragraph 353). 156. The Royal Court seems to have relied in particular on the provisions of clause 7 of the BVCA (a clause that was not present in the BCA) to the effect that Pell Frischmann and Bow Valley intended to enter into a joint venture agreement 'in the near future' . This seems to us to be incapable of being interpreted as a provision that the positive obligations expressly agreed will lapse in the event that such an agreement is never concluded at some unspecified point. 157. In our view, the Royal Court was not justified in construing the Confidentiality Agreements as having a general cut-off, if circumstances changed, or if no joint venture terms were agreed. The Confidentiality Agreements contain no express wording giving any credence to such a view and, commercially, such a construction would make their provisions unworkable. How would the parties know when the obligations terminated? There could, in our judgment, be no certainty for the parties if that were the true construction, and there is no warrant for such a view to be found in the words the parties used. The lack of certainty as to when such a lapse would occur is by itself fatal to the Royal Court's analysis. 158. Likewise, it seems to us that neither of the events on 19 th December 1996 or the th March 1997 can possibly have had the effect of terminating the Confidentiality Agreements. The parties were, as we have said, still actively negotiating a joint venture (as Clause 7 of the BVCA expressly envisaged), and the confidentiality and non-compete obligations of the Confidentiality Agreements were precisely the protection that Pell Frischmann required to prevent Bow Valley or Bakrie using their preferential position to enter into a contract with NIOC excluding Pell Frischmann. 159. In addition, it seems to us that the Confidentiality Agreements themselves contemplated that Pell Frischmann might negotiate with others at the same time as with Bow Valley or Bakrie. The very fact that there were separate Confidentiality Agreements with each of Bow Valley and Bakrie makes this point clear. Clause 7 of the BVCA expressly contemplates a joint venture, and therefore discussions, with "other parties". 160. The more difficult question in our view is whether the obligations in clauses 3 and 6 would come to an end if Pell Frischmann decided not to pursue the project any further and in consequence abandoned it. Even this circumstance cannot, in our judgment, be held to have limited the term of operation of clauses 3 and 6 as a matter of construction, because there is no warrant for such a construction on the face of the Confidentiality Agreements. There seems to us, however, to be a better case for an implied term along these lines. 161. Before considering implied terms of this character, we consider whether Pell Frischmann had any implied obligations under the Confidentiality Agreements. (iii) Did Pell Frischmann have any implied obligations under the Confidentiality Agreements? 162. There was much debate at the hearing of the appeal

about whether Pell Frischmann had any positive obligations under the Confidentiality Agreements. Pell Frischmann submitted that it had none, except that Bow Valley's and Bakrie's obligations would only be activated if it (Pell Frischmann) chose to provide them with confidential information in the first place. Thus, Pell Frischmann effectively submits that the Confidentiality Agreements were unilateral contracts that it was open to Pell Frischmann to operate or to walk away from without responsibility to Bow Valley or Bakrie. 163. This unilateral character does not, however, answer the question of whether or not Pell Frischmann had any implied obligation under the Confidentiality Agreements. It might be that, once the agreements were activated, Pell Frischmann could acquire some obligation to use its best endeavours to secure the contract with NIOC alongside Bow Valley or Bakrie. 164. Bow Valley argued for certain specific implied terms at the trial, including that Pell Frischmann would act in good faith and for the mutual benefit of it and Bow Valley (see paragraph 346 of the Royal Court's judgment). 165. In our judgment, however, the touchstone of necessity for the implication of such terms is not met. The Confidentiality Agreements are entirely workable without such an implication. The express wording of the Confidentiality Agreements makes it clear that there was no such obligation on Pell Frischmann, and indeed no similar obligation, contemplated. Nothing in the Confidentiality Agreements even suggests that Pell Frischmann's ultimate goal of a contract with NIOC would involve Bow Valley or Bakrie:- (i) The Recitals makes it clear that it is Pell Frischmann that has acquired the right to tender. (ii) Clause 1 provides that Pell Frischmann has received confidential data from NIOC. (iii) Clause 2 provides Bow Valley's and Bakrie's agreement to treat anything provided to them by NIOC as confidential. (iv) Clause 3 provides that Bow Valley/Bakrie will work on the projects exclusively with Pell Frischmann, and that they will not carry out any other work on their own or with others. (v) Clause 4 provides Bow Valley's and Bakrie's agreement to keep anything provided to them by Pell Frischmann confidential. (vi) Clause 5 provides that Bow Valley/Bakrie will not use Pell Frischmann's advisors in Iran without Pell Frischmann's permission. (vii) Clause 6 provides that Bow Valley/Bakrie should not approach NIOC directly without Pell Frischmann's consent. (viii) Clause 7 of the BVCA (alone) provided that Pell Frischmann and Bow Valley intended to enter into a joint venture agreement in the near future defining the relationship between Pell Frischmann, Bow Valley and other parties. 166. The only reference to Bow Valley being involved in a contract is clause 7, but that refers to an intended contract between Pell Frischmann and Bow Valley, not between NIOC, Pell Frischmann and Bow Valley. 167. It is also impossible to see how there can have been even a lesser obligation on Pell Frischmann not to treat with others. The very fact that it entered into broadly the same Confidentiality Agreements with Bow Valley and with Bakrie demonstrates that it was intending to bring in more than one potential suitor and was not guaranteeing success to any of them. This kind of confidentiality agreement is common in industry, and is accepted by those outside the loop of the contractual opportunity in question, because otherwise, they would have no chance of any involvement whatever. In other words, Pell Frischmann took advantage of a strong bargaining position in November and December 1996, and was entitled to do so.

168. We have looked in detail at the expert evidence given by Mr Anthony Mulcare for Pell Frischmann and by Dr John Lacey for Bow Valley, but we cannot see that they gave any evidence as to market practice in relation to confidentiality agreements in the oil industry generally, which has a bearing on this aspect of our judgment. (iv) Did implied terms of the Confidentiality Agreements limit the operation of clauses 3 and 6? 169. Mr Costa sought to maintain the implications of the terms for which he had contended at trial (as set out at paragraph 346 of the Judgment of the Royal Court). The suggested implications seek to bring all BV's obligations to an end at various points in time: (a) when the tender was unsuccessful, or (b) if the tender were successful, when Pell Frischmann lost the contract thereafter, or (c) if Pell Frischmann lost the contract by its own default. 170. It is, we repeat, axiomatic that, to be implied, terms have to be necessary, not just desirable. In our judgment, such terms were not necessary and cannot be implied. We ask rhetorically "why should the confidentiality obligation in clause 4 should fall away at any stage?" Surely, that obligation at least must have been intended to prevent use of that confidential information even after any bid had failed or lapsed. 171. The suggested implied terms (which could only possibly apply to clauses 3 and 6), seem to us incapable of identification. Any such terms cannot be so convoluted and complex that they could never possibly have represented the parties intention at the time the Confidentiality Agreements were made. 172. In our judgment, therefore, assessed by such standards, terms as to what might happen (a) when tenders succeeded or failed, or (b) if Pell Frischmann acted inappropriately, cannot be regarded either as necessary, or as required to give business efficacy to the contract. The position is rather the reverse. Such implied terms would make the Confidentiality Agreements impossibly cumbersome and uncertain. 173. The question remains as to whether there was, nevertheless, some more limited implied termination point for the obligations in clauses 3 and 6 of the Confidentiality Agreements. At one point in the argument, Mr Speck seemed minded to concede at least that if Pell Frischmann walked away from the deal altogether, the obligations on Bow Valley and Bakrie might lapse. 174. On the facts of this case, of course, Pell Frischmann never walked away from the NIOC deal. They lost their favoured position as exclusive bidder on the 7 th July 1997, but that did not mean that they no longer wished to obtain the contract with NIOC. Nonetheless in our view, as we shall explain, an implied term that brought clauses 3 and 6 to an end if Pell Frischmann decided not to pursue the project any further and walked away from it, could be regarded as both necessary, and as required for business efficacy purposes. 175. The expectation of the parties was that the Confidentiality Agreements would lapse when replaced by some kind of joint venture agreement. But the parties must have realised the possibility that no joint venture would be entered into. It seems to us that, so long as Pell Frischmann continued its interest in obtaining the Balal contract, the purpose of the Confidentiality Agreements continued in being - namely to protect Pell Frischmann from direct competition from its own team. But if Pell Frischmann walked away, the situation would be different. At that stage, Pell Frischmann would be adequately protected by clause 4, and could not possibly have expected that it could prevent Bow Valley and Bakrie from dealing with NIOC directly if that seemed useful to them. Pell

Frischmann would still be able to protect its confidential information in that position. 176. As a matter of record, no such implied term was pleaded, and the existence of such an implied term would not affect the outcome in this case, since (as we have already intimated), when Bow Valley and Bakrie signed up to their contract with NIOC on 28 th July 1997, Pell Frischmann had not walked away, but still maintained their interest in obtaining the Balal contract, however unlikely it might have been at that stage that they could actually succeed in doing so.

- (v) Were the Confidentiality Agreements in restraint of trade? 177. The Royal Court did not decide that Clauses 3 and 6 of the Confidentiality Agreements should be construed in a limited way because they were clauses in unreasonable restraint of trade. And Bow Valley did not plead or argue, as we understood it, that these clauses were wholly unenforceable as a result of the restraint of trade doctrine. Bow Valley has, however, argued that this is a reason why this Court should uphold the decision of the Royal Court as to construction. 178. The principles are clear, namely that an agreement is in restraint of trade if one party agrees with another party to restrict his liberty in the future to carry on trade with other persons not parties to the contract in such manner as he chooses (Chitty on Contracts , th edition, 2004 at paragraph 16-078). The Confidentiality Agreements are, therefore, plainly contracts in restraint of trade, and are only enforceable if they are reasonable with reference to the interests of the parties and the public (Chitty, paragraph 16-075 and 16-091). 179. Bow Valley 's point in this area was that the authorities show that contracts in restraint of trade can and should be construed restrictively so as to prevent them falling foul of the rules that we have stated. 180. In our judgment, this aspect of the case takes Bow Valley no further, because we have already held that there is an implied term limiting the temporal operation of clauses 3 and 6. It may be that the factors mentioned in the judgments of Lindley MR in Haynes

v. Doman

- [1899] 2 Ch 13 at 25-27 would also lead to the limitation that we have held is achieved by the implied term. But we do not believe that the restraint of trade doctrine can lead to any further limitation on clauses 3 and 6 - for example so as to limit their operation to a time prior to the making of a joint bid. As we have said, neither application of the necessity principle nor anything in the text of the Confidentiality Agreements leads to that conclusion. 181. It seems to us that clauses 3 and 6, subject to the implied term that we have mentioned (limiting their operation to a time when Pell Frischmann remains interested in contracting for the Balal project), would be entirely reasonable because (a) this is a one-off contract, and (b) Bow Valley and Bakrie would not have been involved at all were it not for Pell Frischmann (c) Clauses 3 and 6 were required to protect Pell Frischmann from competition from companies it had chosen as possible co-contractors; and (d) this reasonable objective ceased to be operative once Pell Frischmann walked away from the project and unequivocally decided no longer to be involved with it. Pell Frischmann would be adequately protected at that stage by clause 4. 182. If, of course, clauses 3 and 6, properly construed and with any implied terms that are properly to be

read into the Confidentiality Agreements, provided more protection to Pell Frischmann than was reasonable, the clauses would be entirely unenforceable, since the blue pencil rule could not be applied to limit them, bearing in mind that they were drafted without any limitation whatever: Chitty op cit paragraphs 16-188ff. But this situation was neither argued for, nor, in the way we have decided matters, could it have arisen. (vi) Repudiation of the suggested tripartite agreement 183. In the light of our findings thus far, it is not strictly necessary for us to say anything about the Royal Court's further holdings at paragraph 359 that:- (i) Pell Frischmann's attempts to contract with Monument in May and June 1997 constituted a repudiation of the tripartite agreement between Pell Frischmann, Bow Valley and Bakrie concluded on 19 th March 1997; and (ii) Mr De Boni's 'without prejudice' letter to Pell Frischmann dated 11 th July 1997 constituted an acceptance of Pell Frischmann's repudiation of that tripartite agreement. 184. Nevertheless we are of the view that, there are, in any event, insurmountable problems with each of these holdings. 185. First, a repudiation must be a clear and unequivocal expression of an intention not to perform the contract. As Lord Wilberforce put the matter in *Woodar Investment Development Limited v. Wimpey*

[1980] 1 WLR 277 at page 280F: "My Lords, I have used the words "in the circumstances" to indicate, as I think both sides accept, that in considering whether there has been a repudiation by one party, it is necessary to look at his conduct as a whole. Does this indicate an intention to abandon and to refuse performance of the contract?", and at page 283E: "Repudiation is a drastic conclusion which should only be held to arise in clear cases of a refusal, in a matter going to the root of the contract, to perform contractual obligations". It is true that, if there had been a contract under which each party agreed only to pursue the project exclusively with one another, Pell Frischmann's discussions with Monument might have constituted conduct expressing unequivocally its intention not to be bound by that obligation. But since we have held that the Confidentiality Agreements remained in being, discussions with Monument could not possibly amount to a repudiation of any agreement, when they were precisely what the BVCA itself contemplated. 186. Secondly, we cannot see how a letter headed 'without prejudice' can constitute an acceptance of a repudiation. But even if it could, the letter itself simply informs Pell Frischmann that Bow Valley and Bakrie had decided to cease any further efforts to reach an accommodation with Pell Frischmann relative to the Balal project. It did not say, one way or the other, whether Bow Valley and Bakrie were content to treat Pell Frischmann's conduct in treating with Monument as bring the tripartite contract to an end. Indeed, the letter was silent as to Bow Valley and Bakrie's views on whether tripartite obligations to pursue the project only with one another had ever existed, let alone whether they were treating them as at an end. It is also noteworthy, that Bow Valley's letter of 11 th July 1997 does not purport (at least expressly) to have been written on behalf of Bakrie. (vii) The Events of 7 th and 8 th July 1997 187. Before we deal with the alleged breaches of the BVCA, we need to address Pell Frischmann's factual arguments as to the events of the 7 th and 8 th July 1997. 188. Pell Frischmann deployed a number of arguments in relation to

the events of these two days. The main ones were as follows: (i) The Royal Court's conclusion that Pell Frischmann "almost certainly deliberately delayed" in providing Bow Valley and Norton Rose, its own solicitors, with a copy of the 7th July Fax, while urging Bow Valley and Bakrie to sign the buy-out agreement, amounted to findings of bad faith on the part of Pell Frischmann, and were wrong (the "Delay Allegation"). (ii) The Royal Court's finding that the evidence of Mr. Cummings of Bow Valley as to the meaning of the 8th July Fax was plausible, was wrong and perverse (the "Cummings' Allegation"). (iii) The Royal court was wrong in holding that exclusivity was at the heart of the proposed buy-out of Pell Frischmann by Bow Valley and Bakrie (the "Exclusivity Allegation"). (iv) The Royal Court was wrong in its finding that, up until the events of 8th July 1997, there had not seemed to have been any likelihood of Bow Valley and Bakrie alone being offered the Balal contract (the "8th July Watershed Allegation"). 189. We deal with the Exclusivity Allegation first as this finding is of crucial importance not only to the Delay and the Cummings' Allegations, but also to the issue of damages. The Exclusivity allegation 190. According to Pell Frischmann, it was not exclusivity (which according to the Royal Court meant that NIOC was still holding the Service Contract open for Pell Frischmann alone) but the release of Bow Valley and Bakrie from their obligations under the Confidentiality Agreements which lay at the heart of the proposed buy-out agreement. 191. The Royal Court considered that the commercial materiality to the buy-out agreement of whether or not Pell Frischmann did or did not have exclusivity was self evident. In support of that conclusion, the Royal Court pointed to subsequent correspondence between Pell Frischmann and Monument indicating that exclusivity was a vital consideration as far as that company was concerned if it was to join with Pell Frischmann in pursuing the contract to develop the Balal field. 192. The Royal Court's view is, in our judgment, confirmed by the draft agreement sent by Norton Rose to Bow Valley on 8th July 1997. If its function was simply to remove the restrictions on Bow Valley and Bakrie comprised in their respective Confidentiality Agreements, we would have expected it to have been worded in that way. Instead, the main thrust of the draft was to provide for the substitution of Bow Valley and Bakrie for Pell Frischmann as parties to the Service Contract or, alternatively, if this was not possible, for the novation or assignment of PF's rights under the Service Contract in favour of Bow Valley and Bakrie. 193. Indisputably, the message in 7th July Fax was that Pell Frischmann had lost the Service Contract. To adopt the language of the Royal Court, it is self evident that at that point in time there was no longer a Service Contract in existence and that no substitution, assignment or novation was then possible. The whole substratum of the buy-out had gone. In our view, the release of the Obligations of Bow Valley and Bakrie under their respective Confidentiality Agreements was nothing more than an inevitable and necessary concomitant. 194. We also record that the Royal Court's conclusion on this point was the result of what seems to us to have been a very careful analysis of the evidence on the issue, particularly that of Dr Frischmann. Mr Speck drew our attention to numerous points of detail which, he argued, tended to show that the Royal Court's conclusion was wrong, but we do not consider that taken either individually or cumulatively they amount to sufficient grounds for us to upset

the Royal Court's finding. Inevitably in a long and closely contested case there are points to be made one way or the other on disputed issues. Not every point has to be addressed in the judgment of the court of first instance. In our view the Royal Court properly examined this important issue and we cannot fault its conclusion on it, which we endorse. The Delay Allegation 195. Bow Valley contended that Pell Frischmann delayed forwarding the 7 th July Fax in the hope that Bow Valley and Bakrie would commit to the buy-out agreement without realising that Pell Frischmann had lost exclusivity and, therefore, had nothing to assign to Bow Valley and Bakrie. The Royal Court's conclusion that there was deliberate delay turned on its assessment of the evidence of Mr Sarch, who alleged that, on 7 th July 2007, he had been told by Dr Frischmann to send the 7 th July Fax to Bow Valley. In fact, as Mr Sarch conceded in his affidavit, he did not immediately send the 7 th July Fax to Bow Valley. According to him, he telephoned Bow Valley about 4.00 p.m. London time (9.00 a.m. in Calgary, and before the Bow Valley board meeting) and read the 7 th July Fax to someone. By the date of his affidavit (April 2006), he could not remember who he had spoken to. In fact, it appears that Mr Sarch spoke to Mr Blair at about that time, but Mr Blair said that he had no recollection of being told about the 7 th July Fax at that time. Eventually, as we have said, a copy of the fax of the 7 th July Fax was faxed by Pell Frischmann to Bow Valley at 9.00 p.m. London time on 8 th July 1997. This was some hours after Norton Rose had sent the draft buy-out agreement " in the final form " to Bow Valley. 196. All of these events took place against the background that:- (i) In a letter faxed to Pell Frischmann at 3.33 p.m. on 7 th July 1997, Mr DeBoni stated that Bow Valley understood that Pell Frischmann had received a letter from NIOC " within the past day regarding your status in the Balal contract " and requested a copy of it; and (ii) According to Mr Cummings, counsel for Bow Valley, he had requested a copy of the 7 th July Fax in the course of a telephone conversation with Mr Sarch on that day. 197. In the course of cross-examination, Mr Sarch rejected the suggestion that Pell Frischmann's loss of exclusivity was of any importance in relation to the proposed buy-out deal. He implied that the delay in copying the th July Fax to Bow Valley was really a matter of no consequence. We reiterate our endorsement of the Royal Court's conclusion to the contrary. 198. We have referred, above, to the Royal Court's assessment of Mr Sarch. It went on in its judgment to state explicitly that "we are unable to accept, as credible, his explanation of the delay in forwarding NIO's fax of 7th July 1997 to Bow Valley" (paragraph 415). 199. In our view, there is no basis in which we could interfere with the Royal Court's conclusions that:- (i) Pell Frischmann, in the form of Mr Sarch, deliberately delayed providing Bow Valley with a copy of the 7 th July Fax; (ii) It was to be implied that this was done in the hope that Bow Valley and Bakrie would sign the draft agreement and remit the US\$3 million to Norton Rose in ignorance of its contents. 200. As to the delay in copying the 7 th July Fax to Norton Rose, Pell Frischmann complained that, as the issue was not properly raised at the trial, it should not have been considered or relied upon by the Royal Court. Moreover, although the Royal Court found that a copy of the 7 th July Fax was sent to Norton Rose shortly after that firm despatched its letter to Bow Valley enclosing "the agreement in final form" at 6.21 p.m. London time on 8 th July 1997, Pell Frischmann

showed us another copy of the fax that had been sent by Pell Frischmann to Norton Rose at the earlier time of 5.58 p.m. 201. Bow Valley countered by arguing that, as the allegation was not one of fraud, it did not need to be raised in the manner contended for by Pell Frischmann, and objected to Pell Frischmann's attempt to introduce fresh evidence, the copy of the 7 th July 1997 sent at 5.58 p.m. not having been before the Royal Court. As to the earlier transmission of the 7 th July Fax, we were referred to a rather ambiguous passage in Mr Sarch's evidence, which is open to the interpretation that the documents despatched to Bow Valley by Norton Rose at 6.21 p.m. would have been drafted before Norton Rose would have received the copy of the 7 th July Fax at 5.58 p.m. 202. Our reading of the Royal Court's conclusion on this point, appearing as it does in brackets in the course of a sentence in the judgment asserting that Pell Frischmann had almost certainly deliberately delayed in providing Bow Valley with a copy of the 7 th July Fax, is that it was included for completeness. No specific significance was attached to the finding and, in our opinion, it does not really add anything to the finding of deliberate delay in the provision of the 7 th July Fax to Pell Frischmann. The gravamen of this finding (although not explicitly spelt out) was that Pell Frischmann sought to deceive Bow Valley by concealing Pell Frischmann's change of status in relation to the Balal contract. It does not seem to us to make very much difference if this deceit was practised by holding back the 7 th July Fax from Bow Valley and Norton Rose, or from Bow Valley alone. The Cummings Allegation 203. Pell Frishmann contended, as we have said, that the Royal Court's finding that Mr Cummings's evidence as to the meaning of the 8 th July Fax was plausible, was wrong and perverse. 204. The background to this argument is the Royal Court's finding that the 8 th July Fax would have been seen by either Mr DeBoni or Mr Blair before the Bow Valley board meeting that morning, and that its receipt would have been reported to the board at that meeting. According to Pell Frischmann, the significance of this is that the Bow Valley board authorised the conclusion of the buy-out agreement on terms acceptable to Bow Valley notwithstanding that it was clear from the 8 th July Fax that Pell Frischmann had lost exclusivity. If this contention were correct it would, at the very least, lend powerful weight to Pell Frischmann's argument that it should be awarded damages equivalent to the sums it would have received had the buy-out agreement gone ahead. 205. In dealing with this issue, the Royal Court relied heavily on the evidence of Mr Cummings, who was company secretary of Bow Valley and acted as legal counsel, but was not a member of the board. Mr. Cummings's evidence was to the effect that, when he saw the th July 1997, he was initially pleased, as he believed it to be confirmation of NIOC's readiness to approve the proposed buy-out agreement. Later, he said, he saw the 7 th July Fax, which removed the essence of what Bow Valley was trying to buy from Pell Frischmann. The faxes, he said, were inconsistent. Mr DeBoni and Mr Blair, who attended the board meeting, also gave evidence as to their reactions to the 8 th July Fax. 206. The Royal Court concluded that there was " at least an element of ambiguity " in the 8 th July Fax, which could have led it to being read in the way that Mr Cummings had said that he took it, and that it was understandable, faced with the 8 th July and 7 th July Faxes (the order in which they were received) Bow Valley and Bakrie might have been uncertain at first as to NIOC's

precise intentions. The implication of this conclusion is that the Royal Court thought that the facts that (a) Bow Valley had seen the 8 th July Fax, and (b) it still authorised the buy-out, did not mean that Bow Valley thought that Pell Frischmann's loss of exclusivity was irrelevant to the buy-out. 207. Pell Frischmann attacked the reasons the Royal Court gave for its conclusion that Mr Cummings's evidence was plausible. 208. The first reason was that the 8 th July Fax opened with a specific reference to a letter of 3 rd July 1997 from Bow Valley to NIOC, which indicated that Bow Valley and Bakrie were close to reaching an agreement with Pell Frischmann. Pell Frischmann asserted that this was "far too slender a foundation for such an important finding". We disagree. In our view, it is a cogent reason. 209. The second reason was that the way the Bow Valley board conducted itself on the morning of 8 th July 1997 appeared to be consistent with Mr. Cummings's initial interpretation. If one accepts, as the Royal Court did, and we have endorsed, that exclusivity lay at the heart of the buy-out agreement, then the conduct of the board was indeed entirely consistent with that interpretation. 210. The third reason was that Pell Frischmann had claimed in its pleaded case that NIOC's offer of the Balal contract in the 8 th July Fax met the very objective of the proposed buy-out agreement. Once again, against the background of the significance of exclusivity to which we have referred, we regard this reason as sound. 211. Besides attacking the Royal Court's reasons, Pell Frischmann went on to list a series of criticisms of the Royal Court's acceptance of Mr. Cummings's evidence which we list, with our observations, as follows: (i) Pell Frischmann contended that the 7 th July Fax included the words: " NIOC is no longer under any obligation to award the contract to [Pell Frischmann] for the Balal project ", and the 8 th July Fax included the words " NIOC is under no obligation to award the contract for the development of the Balal field to [Pell Frischmann] ". If the words quoted from the 7 th July Fax were accepted by Bow Valley as meaning that Pell Frischmann's exclusivity had been removed, it must follow that the very similar words of the 8 th July Fax could only have been interpreted as having the same meaning. We reject this submission. It ignores the fact that the remainder of the respective faxes were different. The words relied on by Pell Frischmann have to be read in context. When this is done, it can readily be seen that the faxes could have been interpreted differently and, in particular, the 8 th July Fax interpreted as Mr Cummings contended. (ii) Pell Frischmann contended that both Mr Blair and Mr DeBoni interpreted the 8 th July Fax as meaning that Pell Frischmann had lost exclusivity. We have looked at the transcript of the evidence of these witnesses, and we do not accept that this is an accurate reflection of what was said. We note that the Royal Court reached no such conclusion in either case. (iii) Pell Frischmann relied on the description of the 8 th July Fax in the list of documents prepared on behalf of Bow Valley to the effect that the fax indicated that the exclusivity of Pell Frischmann had been terminated. This is clearly the case. However, it does not invalidate Mr. Cummings's evidence - or the Royal Court's ruling on it - that this was not how it was interpreted at the time that it was received. (iv) The same applies to the statement in Bow Valley's Re-Re-Amended Answer in which the meaning of the 8 th July Fax is accurately described. Pell Frischmann asserted that this was " a defence that Mr. Cummings himself had been instrumental in preparing ". In our

opinion, the portion of the transcript relied on does not support this statement. (v) Pell Frischmann contended that the Royal Court did not address the fact that the parties knew and expected Pell Frischmann to lose exclusivity after the deadline of 4 th July 1997 expired. This ignores the fact that what the 15-day letter said was that unless the documents identified were received, " NIOC shall be left with no alternative but to take the appropriate action which might be deemed necessary ", so that until " the appropriate action " was taken, Pell Frischmann's exclusivity would remain intact. (vi) Pell Frischmann contended that Mr Blair and Mr DeBoni had discussions with Mr Mohandes during the weekend of 5 th and 6 th July 1997 (i.e. after the deadline of 4 th July 1997 had expired), in which he told them that a letter was about to be sent to Pell Frischmann, dealing with its position, which Pell Frischmann said could only have meant loss of exclusivity. We reiterate the point made above. Until Bow Valley knew the terms of the 7 th July Fax, and accepting Mr. Cummings's interpretation of the 8 th July Fax, it was entitled to assume that Pell Frischmann's exclusivity remained intact. (vii) Pell Frischmann contended that the Royal Court disregarded a telephone message for Mr. Blair from Mr. Mohandes left at 12.00 noon on 7 th July 1997 to the effect that the letter to Pell Frischmann did not take it out of the bidding process but that " since he can't deliver " others will be invited in too. Mr. Mohandes did not give evidence at the trial, and what he reported from time to time was not always accurate. The message was, in any event, unclear, particularly in relation to the timing of the invitations to others, and as to who those others might be. (viii) Pell Frischmann contended that, by the time the th July Fax was sent to Pell Frischmann, Bow Valley must have known that Pell Frischmann was going to receive a letter from NIOC withdrawing exclusivity. It is clear from the Royal Court's judgment that it did not accept that Bow Valley knew this and, in our opinion, this is a finding it was entitled to make on the evidence it heard. The Royal Court clearly had in mind that Bow Valley may have suspected that what did happen might have happened, but given the continuing negotiations on the buy-out agreement and the fact that it was predicated (as the Royal Court found) on Pell Frischmann's exclusivity, this suspicion cannot, in our view, be converted into a finding of knowledge. (ix) Pell Frischmann contended that Mr Mirhadi of NIOC was in Calgary from 13 th June 1997 onwards and had frequent contact with Bow Valley personnel. It must be inferred, it argued, that he knew about the expiry of the deadline, the 7 th and 8 th July Faxes, and what they contained, and over the weekend of 5 th and th July 1997, he must have conveyed this information to Bow Valley. The judgment of the Royal Court indicates that it considered the evidence relating to Mr Mirhadi's visit in detail and with great care. It is clear that the question of Mr Mirhadi " somehow conveying information illicitly to Bow Valley " was in the Court's mind as it quotes those words from the evidence of Mr Blair, yet it was not prepared to draw the inference contended for by Pell Frischmann. We can see no basis on which we could take a different view. (x) Pell Frischmann contended that the Royal Court preferred the evidence of Mr Cummings, who did not appear to be someone it could confidently rely on all of the time, and whose evidence it felt obliged to approach with a degree of caution, in contrast to that of Messrs. DeBoni, Blair and Fleming. We do not accept the premise that there was significant

divergence in the evidence of these witnesses. Furthermore, it is a task of courts at first instance to decide whose evidence to accept or reject on any particular point. The fact that a witness may be regarded as unreliable on one point does not mean that his evidence on another may not be accepted. The Royal Court patently approached Mr. Cummings's evidence with an appropriate degree of caution, and we accept the material conclusion that it reached on it. The 8 th July Watershed Allegation 212. Pell Frischmann argued that the Royal Court was incorrect in its finding that, up until the events of 8 th July 1997, there did not seem to have been any likelihood of Bow Valley and Bakrie alone being offered the Balal contract. 213. This argument turned on the assumption that the finding was linked to the Royal Court's conclusion, to which we have already referred, namely that there was no improper contact with Mr Mirhadi of NIOC during the time he spent in Calgary between 13 th June and 16 th July 1997. 214. Pell Frischmann's submissions on this point comprised an elaborate analysis of Bow Valley's contact with Mr Mirhadi during this period, and a series of admonitions as to the methods of analysis the Royal Court ought to have adopted in testing various aspects of the evidence. 215. It is noteworthy that Pell Frischmann relied on the Royal Court's findings that Mr. Blair was "truthful to the best of his recollection" and Mr. DeBoni was "honest and straightforward" in its attack on the Royal Court's acceptance Mr Cummings's evidence to which we have referred. Despite this approach, Pell Frischmann did not hesitate in accusing Mr Blair, in the course of its contentions on this issue, of lying as to the nature of his discussion with Mr Mirhadi on 8 th July 1997, and argued that in other respects Messrs. Blair and DeBoni were not telling the truth. 216. Apart from the fact that, as we have said, the Royal Court considered the evidence relating to Mr Mirhadi's visit in detail and with great care, we observe that Pell Frischmann in its elaborate contentions in support of this argument was unable to point to any aspect of any testimony as supporting its argument. The whole of the argument as to improper contact with Mr Mirhadi was based on inferences from circumstances and documents which the Royal Court declined to draw. 217. We do not consider it to be necessary or appropriate to deal in detail with every point made by Pell Frischmann in support of this argument. Suffice it to say that we have concluded that the Royal Court's reasoning on this issue is unimpeachable, based as it was on the evidence of witnesses that it saw and heard. (viii) Did Bow Valley breach clauses 3 and 6 of the Confidentiality Agreements? 218. Pell Frischmann has alleged that Bow Valley and Bakrie breached clause 3 and 6 of the Confidentiality Agreements during May and June 1997 by carrying out work on their own in relation to the Balal project, and by approaching NIOC directly without Pell Frischmann's consent. 219. It seems to us to be an inescapable conclusion that Bow Valley and Bakrie did breach clauses 3 and 6 of the Confidentiality Agreements, both:- (i) In the period up to 7 th July 1997, when they carried out work on the Balal project together and with NIOC, and without Pell Frischmann's involvement, and when they approached NIOC directly in relation to the Balal project without Pell Frischmann's express written consent. (ii) In the period after the 7 th July 1997, when they moved towards entering into an agreement with NIOC. 220. The reason for drawing a line at the 7 th July 2008 is that Pell Frischmann was in a very different position before and after that date, on which Pell

Frischmann lost exclusivity. The Royal Court, it will be recalled, held that, by 7 th July 1997, there was no longer the " slightest chance " that Pell Frischmann would obtain the contract for itself (paragraph 333). 221. We have described the steps that Bow Valley and Bakrie took in dealing directly with NIOC prior to 8 th July 1997 in the early sections of this judgment. (ix) Did Bow Valley breach clause 4 of the Confidentiality Agreements and/or act in breach of confidence? 222. The Royal Court held that Bow Valley had used Pell Frischmann's confidential information in its dealings with NIOC. Though it dealt with these allegations as a breach of confidence in equity, it made it clear that the position would have been no different had it been treated as a breach of clause 4 of the Confidentiality Agreements. 223. Bow Valley has not appealed the findings that it acted in breach of confidence, and we will, therefore, proceed on the basis that the Royal Court's findings are now common ground.

- (x) Was loss caused to Pell Frischmann as a result of Bow Valley's breaches of clauses 3 and 6 of the Confidentiality Agreements? 224. The Royal Court effectively divided this question into two asking:- (i) Was any loss sustained by Pell Frischmann as a result of the pre-8 th July 1997 breaches of the Confidentiality Agreements? (ii) Was any loss sustained by Pell Frischmann as a result of the post-8 th July 1997 breaches of the Confidentiality Agreements? 225. In our judgment, although it is important to look at the position both before and after 8 th July 1997, the Court must also look at the breaches of the BVCA in the round, across the entire period. 226. If we start by dividing the periods up: (i) Before the 8 th July 1997, Pell Frischmann had failed to secure the financing requirements of the project to NIOC's satisfaction, as we have already found above. NIOC's actions in sending the 15-day letter and terminating Pell Frischmann's exclusivity, again as we have found above, was entirely Pell Frischmann's responsibility and fault. We do not accept Pell Frischmann's conspiracy theory that, in some way, Bow Valley's and Bakrie's meeting in KL with NIOC can have persuaded NIOC to take a different or harsher approach to Pell Frischmann than they would otherwise have done. Thus, when, on 8 th July 1997, Bow Valley came to know that NIOC had terminated Pell Frischmann's exclusivity, Pell Frischmann may have had a claim for nominal damages against Bow Valley and Bakrie, but it had no claim for substantial damages. (ii) After the 8 th July 1997, Bow Valley's breaches plainly caused Pell Frischmann some loss, quite apart from the use of Pell Frischmann's valuable confidential information. Pell Frischmann had a contractual expectation that it would be able to bid for the Balal contract without competition from Bow Valley or Bakrie, and that expectation had been defeated. What it had lost was the chance that it might have secured the contract, had Bow Valley and Bakrie not been in the running. 227. It was entitled, therefore, to be put in the position it would have been in had the Confidentiality Agreements been performed. Had they been performed, Bow Valley and Bakrie would not have bid and Pell Frischmann might have obtained the contract with NIOC. It seems to us, however, that that possibility was as insignificant as the Royal Court thought it was. Accordingly, the loss of Pell Frischmann's chance to contract with NIOC was, after 8 th July 1997 valueless. 228. But the question of whether Pell Frischmann should be compensated for the loss of the opportunity to sell a

release from the Confidentiality Agreements to Bow Valley and Bakrie still arises. In our judgment, such a contract would have been concluded, had Pell Frischmann's exclusivity not been terminated, on the 8 th July 1997, and Pell Frischmann would have been entitled to something between US\$7.5 million and US\$10 million under that contract. It cannot be right, however, for Pell Frischmann's loss to be considered at an arbitrary point in time, whilst the breaches are continuing, and when their ultimate effect has yet to eventuate. Losses cannot be assessed in a vacuum without regard to what happened before and afterwards. 229. After Pell Frischmann lost exclusivity, Bow Valley continued to breach each of clauses 3, 4, and 6 of the BVCA. Had the breaches both before and after 8 th July 1997 not occurred, we consider doing the best we can, the following would have been the position:- (i) No buy-out contract between Pell Frischmann, Bow Valley, and Bakrie would have been concluded by 8 th July 1997. As we know no such contract was in fact concluded, and it would have been even less likely to have been, had there been no pre-8 th July 1997 breaches. (ii) Pell Frischmann, Bow Valley and Bakrie would have negotiated for a buy out after 8 th July 1997, but bearing in mind Pell Frischmann's loss of exclusivity, and the parties widely differing views about their respective bargaining positions, such a buy-out contract would have been equally unlikely to have been concluded. Pell Frischmann would have been unlikely to accept less than it had intended to contract for before 8 th July 1997, and Bow Valley would have been unlikely to want to pay more than a nominal sum, since it believed that Pell Frischmann had nothing valuable left to sell. We will need to consider the rights and wrongs of these competing positions when we come to consider quantum. 230. Our conclusion, therefore, is that, overall, Pell Frischmann is entitled to be placed into the position that it would have been in, had the BVCA been performed. In that event, Pell Frischmann would have obtained nothing, because negotiations would have come to nought. (xi) Was loss caused to Pell Frischmann as a result of BV's breaches of clause 4 of the Confidentiality Agreements? 231. This question cannot sensibly be considered separately from the other breaches of the BVCA. 232. But we agree with the Royal Court that Pell Frischmann is entitled to be compensated for the breach of clause 4 and for use of Pell Frischmann's confidential information. Looked at alone, that would require the valuation of the confidential information used, which is the subject of the cross-appeal, and to which we will turn under the heading of quantum. (xii) Is Pell Frischmann entitled to Wrotham Park damages as well as or instead of compensatory damages? 233. Thus, we come to the question of whether Pell Frischmann should be compensated for the use by Bow Valley (and Bakrie) of Pell Frischmann's opportunity, even though Pell Frischmann could have made nothing of it, and would not, in all probability, have been able to sell it to Bow Valley. These are what the parties have described as Wrotham Park damages (see *Wrotham Park Estate Company Limited v. Parkside Homes Limited*

[1974] 1 WLR 798). 234. The principles applicable to damages for the use made of another's property have been recently re-stated by Lord Nicholls in *AG v. Blake*

[2001] 1 AC 268 as follows at pages 282F-284A in the speech:- "In practice, these specific remedies [injunctions and specific performance] go a long way towards providing suitable protection for innocent parties who will suffer loss from breaches of contract which are not adequately remediable by an award of damages. But these remedies are not always available. For instance, confidential information may be published in breach of a non-disclosure agreement before the innocent party has time to apply to the court for urgent relief. Then the breach is irreversible. Further, these specific remedies are discretionary. Contractual obligations vary infinitely. So do the circumstances in which breaches occur, and the circumstances in which remedies are sought. The court may, for instance, decline to grant specific relief on the ground that this would be oppressive. An instance of this nature occurred in *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798. For social and economic reasons the court refused to make a mandatory order for the demolition of houses built on land burdened with a restrictive covenant. Instead, Brightman J made an award of damages under the jurisdiction which originated with Lord Cairns's Act. The existence of the new houses did not diminish the value of the benefited land by one farthing. The judge considered that if the plaintiffs were given a nominal sum, or no sum, justice would manifestly not have been done. He assessed the damages at 5% of the developer's anticipated profit, this being the amount of money which could reasonably have been demanded for a relaxation of the covenant ". In reaching his conclusion the judge applied by analogy the cases mentioned above concerning the assessment of damages when a defendant has invaded another's property rights but without diminishing the value of the property. I consider he was right to do so. Property rights are superior to contractual rights in that, unlike contractual rights, property rights may survive against an indefinite class of persons. However, it is not easy to see why, as between the parties to a contract, a violation of a party's contractual rights should attract a lesser degree of remedy than a violation of his property rights. As Lionel D Smith has pointed out in his article "Disgorgement of the profits of Breach of Contract: Property, Contract and 'Efficient Breach'" (1995) 24 Can BLJ 121, it is not clear why it should be any more permissible to expropriate personal rights than it is permissible to expropriate property rights. I turn to the decision of the Court of Appeal in *Surrey County Council v Bredero Homes Ltd*

[1993] 1 WLR 1361 . A local authority had sold surplus land to a developer and obtained a covenant that the developer would develop the land in accordance with an existing planning permission. The sole purpose of the local authority in imposing the covenant was to enable it to share in the planning gain if, as happened, planning permission was subsequently granted for the erection of a larger number of houses. The purpose was that the developer would have to apply and pay for a relaxation of the covenant if it wanted to build more houses. In breach of covenant the developer completed the development in accordance with the later planning permission, and the local authority brought a claim for damages. The erection of the larger number of houses had not caused any financial loss to the local authority. The judge awarded nominal damages of £2, and the Court of Appeal

dismissed the local authority's appeal. This is a difficult decision. It has attracted criticism from academic commentators and also in judgments of Sir Thomas Bingham MR and Millett LJ in *Jaggard v Sawyer*

[1995] 1 WLR 269 . I need not pursue the detailed criticisms. In the *Bredero* case Dillon LJ himself noted, at p 1364, that had the covenant been worded differently, there could have been provision for payment of an increased price if a further planning permission were forthcoming. That would have been enforceable. But, according to the *Bredero* decision, a covenant not to erect any further houses without permission, intended to achieve the same result, may be breached with impunity. That would be a sorry reflection on the law. Suffice to say, in so far as the *Bredero* decision is inconsistent with the approach adopted in the *Wrotham Park* case, the latter approach is to be preferred. The *Wrotham Park* case, therefore, still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss. In a suitable case damages for breach of contract may be measured by the benefit gained by the wrongdoer from the breach. The defendant must make a reasonable payment in respect of the benefit he has gained (emphasis added)". 235. Lord Nicholls then dealt with the question of whether an account of profits can be ordered in such a case. It is unnecessary to cite the entirety of these passages since Pell Frischmann have disavowed any claim to an account of profits in this case. But it will be seen from Lord Nicholls's conclusions in the following passages, on the issue of an account of profits, that the question of an account of profits is intimately intertwined with the question of whether non-compensatory damages will be awarded at all. 236. Lord Nicholls continued at pages 284H-286F:- "My conclusion is that there seems to be no reason, in principle, why the court must in all circumstances rule out an account of profits as a remedy for breach of contract. I prefer to avoid the unhappy expression "restitutionary damages". Remedies are the law's response to a wrong (or, more precisely, to a cause of action). When, exceptionally, a just response to a breach of contract so requires, the court should be able to grant the discretionary remedy of requiring a defendant to account to the plaintiff for the benefits he has received from his breach of contract . In the same way as a plaintiff's interest in performance of a contract may render it just and equitable for the court to make an order for specific performance or grant an injunction, so the plaintiff's interest in performance may make it just and equitable that the defendant should retain no benefit from his breach of contract . The state of the authorities encourages me to reach this conclusion, rather than the reverse. The law recognises that damages are not always a sufficient remedy for breach of contract. This is the foundation of the court's jurisdiction to grant the remedies of specific performance and injunction. Even when awarding damages, the law does not adhere slavishly to the concept of compensation for financially measurable loss. When the circumstances require, damages are measured by reference to the benefit obtained by the wrongdoer. This applies to interference with property rights. Recently, the like approach has been adapted to breach of contract further, in certain circumstances an account of profits is ordered in preference to an award of damages.

Sometimes the injured party is given the choice: either compensatory damages or an account of the wrongdoer's profits. Breach of confidence is an instance of this. If confidential information is wrongfully divulged in breach of a non-disclosure agreement, it would be nothing short of sophistry to say that an account of profits may be ordered in respect of the equitable wrong but not in respect of the breach of contract which governs the relationship between the parties. With the established authorities going thus far, I consider it would be only a modest step for the law to recognise openly that, exceptionally, an account of profits may be the most appropriate remedy for breach of contract. It is not as though this step would contradict some recognised principle applied consistently throughout the law to the grant or withholding of the remedy of an account of profits. No such principle is discernible. The main argument against the availability of an account of profits as a remedy for breach of contract is that the circumstances where this remedy may be granted will be uncertain. This will have an unsettling effect on commercial contracts where certainty is important. I do not think these fears are well founded. I see no reason why, in practice, the availability of the remedy of an account of profits need disturb settled expectations in the commercial or consumer world. An account of profits will be appropriate only in exceptional circumstances. Normally the remedies of damages, specific performance and injunction, coupled with the characterisation of some contractual obligations as fiduciary, will provide an adequate response to a breach of contract. It will be only in exceptional cases, where those remedies are inadequate, that any question of accounting for profits will arise. No fixed rules can be prescribed. The court will have regard to all the circumstances, including the subject matter of the contract, the purpose of the contractual provision which has been breached, the circumstances in which the breach occurred, the consequences of the breach and the circumstances in which relief is being sought. A useful general guide, although not exhaustive, is whether the plaintiff had a legitimate interest in preventing the defendant's profit-making activity and, hence, in depriving him of his profit. It would be difficult, and unwise, to attempt to be more specific. In the Court of Appeal

[1998] Ch 439 Lord Woolf MR suggested there are at least two situations in which justice requires the award of restitutionary damages where compensatory damages would be inadequate: see p 458. Lord Woolf MR was not there addressing the question of when an account of profits, in the conventional sense, should be available. But I should add that, so far as an account of profits is concerned, the suggested categorisation would not assist. The first suggested category was the case of "skimped" performance The second suggested category was where the defendant has obtained his profit by doing the very thing he contracted not to do. This category is defined too widely to assist. The category is apt to embrace all express negative obligations. But something more is required than mere breach of such an obligation before an account of profits will be the appropriate remedy. Lord Woolf MR

[1998] Ch 439 , 457, 458, also suggested three facts which should not be a sufficient ground for departing from the normal basis on which damages are awarded: the fact that the breach was cynical and deliberate; the fact that the breach enabled the defendant to enter into a more profitable contract elsewhere; and the fact that by entering into a new and more profitable contract the defendant put it out of his power to perform his contract with the plaintiff. I agree that none of these facts would be, by itself, a good reason for ordering an account of profits (emphasis added)". 237. We have cited extensively from Lord Nicholls's speech in *Blake* , because we believe that this represents the latest development in this area of the law - a view shared by McGregor on Damages , 17 th edition, 4 th supplement, paragraph 12-027D. Other more recent cases, in our judgment, simply seek further to distil the principles (but see the critique of *WWF Life Fund for Nature v. World Wrestling Federation Entertainment Inc* (2007 EWCA Civ 286) in McGregor op cit : paragraphs 12-027A - 12-027F) or to apply them in different factual contexts. 238. We can summarise our understanding of the principle confirmed by the line of authority which culminated in *Blake* as follows. An award based on what the Defendant has gained, rather than what the Plaintiff has lost, will be made where justice demands it. 239. It seems to us that it is very clear that in this case, on the facts as we see them (and indeed, although different, as the Royal Court found them), justice did indeed require that Bow Valley be required to pay damages to Pell Frischmann for having breached the BVCA, and for having done precisely what it contracted not to do. The fact that Pell Frischmann sustained no actual loss from it having done so, makes the need for an award of Wrotham Park damages more, not less, necessary. It was, as a result of the diametrically opposing views held by the two parties, that we have held that, had the contract been performed, Pell Frischmann would have received nothing for its confidential information or by way of buy-out of the covenants in clauses 3 and 6 of the BVCA. 240. But in our judgment, Pell Frischmann is nonetheless entitled to be compensated, just as the Plaintiff was in *Wrotham Park* itself, by reference to the amount of money which could reasonably have been demanded to buy-out the BVCA obligations. 241. We should mention that we have also had regard to dicta in recent cases concerning the need to take into account, not only the hypothetical negotiation that might have taken place, but also the actual benefit obtained by the wrongdoer, if that can be quantified at the date of trial: see the judgment of Anthony Mann QC (as he then was) in *Amec Development v. Jury's Hotel*

[2001] 1 EGLR 81 , and Mance LJ in *Experience Hendrix v. PPX*

[2003] FSR 853 at paragraph 45. It seems to us that the relevance of the actual profit made is that it is likely in many cases to be a useful reference point for the Court when seeking to fix a reasonable price for a hypothetical licence or buy-out (c.f. Potter LJ in *Severn Trent Water Ltd v. Barnes*

[2004] 2 EGLR 95). 242. It is not, of course, easy to assess the amount that Pell Frischmann could reasonably have demanded to permit Bow Valley to negotiate directly with NIOC using its confidential information. But certain parameters may be briefly stated. 243. First, we

believe that what could reasonably have been demanded must be assessed after, rather than before, Pell Frischmann lost exclusivity. The breaches of contract, for which these Wrotham Park damages are being claimed, continued through to 28 th July 1997 and possibly beyond. It would be illogical to assess them at an artificial mid-point in the factual sequence. 244. Secondly, the damages will, therefore, be on the basis that Pell Frischmann had lost exclusivity. This means that the buy-out price contained in the draft contract about to be signed on the 8 th July 1997, is of no relevance to the reasonable price that would have been paid. 245. Thirdly, we see no point in dividing the proper buy-out figure between the reasonable price of buying out clause 4 (use of Pell Frischmann's confidential information), and the reasonable price of buying out clauses 3 and 6 restricting contact with NIOC. The Court must do its best to assess the appropriate figure, having regard, of course, to the value of Pell Frischmann's confidential information as between willing buyer and willing seller, but without attempting to be too scientific about what would have been a simple commercial negotiation. 246. We deal with the assessment of this figure, according to these parameters, in the next section. (xiii) What is the quantum of Pell Frischmann's recoverable loss? 247. We remind ourselves that what needs to be established is the reasonable sum which Bow Valley would have had to pay to buy out all its BVCA obligations, including the right to use Pell Frischmann's confidential information. The Royal Court valued that confidential information alone at £500,000. 248. By way of cross-appeal, Bow Valley has challenged the Royal Court's assessment on the following grounds:- (i) Pell Frischmann never adduced any evidence as to the value of its confidential information, and since the burden of proof of loss was on Pell Frischmann, there should have been no award of damages. (ii) The confidential information had no value to Pell Frischmann, except to sell to Bow Valley. (iii) Bow Valley did not need the Master Development Plan, and could have developed an alternative in the time available, so that the value was limited to the price at which Bow Valley could have purchased the confidential information on the open market. (iv) The evidence showed that a conceptual design for the development of the Balal field could have been prepared for no more than US\$25,000. (v) The cost of the next stage in the design process, the Front End Engineering Design ("FEED"), was only anticipated to be US\$600,000, which suggests a far smaller value for the conceptual drawings. (vi) Pell Frischmann's total time costs for the entire project were £1,045,563, but excluding post April 1997 costs (after the confidential information had been prepared), and Dr Frishmann's own costs, they were only £179,192. The confidential information would, therefore, only have cost a small proportion of that sum to produce. (vii) There was no evidential basis for finding that the confidential information was worth more than the sum of its parts. (viii) The maximum that a competent third party consultant would have charged for supplying the confidential information was \$25,000. 249. Arguments 1, 4, 5, 6 and 8 start from the premise that the value of the confidential information will be the amount it cost to produce. The other arguments focus on Bow Valley's need for the information. In our judgment, all these factors are relevant, but none is determinative. What we are assessing is the objectively reasonable sum that Bow Valley would have had to pay Pell Frischmann to buy out the

BVCA obligations. This is not precisely the same exercise as assessing the value of confidential information as the English Court of Appeal was doing in the two *Seager v. Copydex* decisions reported at

[1967] 2 All ER 415 and [1969] 2 All ER 718, and in *Dowson & Mason Limited v. Potter*

[1986] 2 All ER 418. As the Royal Court recorded at paragraph 377(ii), the Court in *Seager* was assessing the fair value of the information to the offending party at the time the misuse occurred. Here, we are assessing the reasonable price which Bow Valley would have had to pay Pell Frischmann. The information may be of a lesser value to Bow Valley, than Bow Valley would have had, reasonably, to pay. The latter is the correct analysis because of the nature of Wrotham Park damages which compensate the Plaintiff for what the Defendant has made use of without permission. Thus, the Defendant cannot legitimately argue that the information was of no use to him, when he actually made use of it. The question is what Bow Valley would reasonably have had to pay, had it bought the information (or, more precisely, the release from the BVCA) rather than simply gone ahead without regard to the agreement it had made. 250. The fact, therefore, that Bow Valley was the only possible buyer for the information is not a reason for assessing the compensation at zero. But equally, it means that Pell Frischmann was not in the position of someone who could have sold the information on the open market, and cannot be compensated as if it were. 251. For these reasons, the starting point in this case can legitimately be taken as being the cost of producing the information. The Royal Court broke down its treatment under the following headings: (i) In relation to the Pell Frischmann drawings, it referred to Pell Frischmann's pleaded figure of £1,256,113 for wasted expenditure, but held that that figure had not been fully scrutinised or proved at trial. The Royal Court did not attempt a valuation of the drawings, but held that they "can only have been of significant value to Bow Valley" (paragraph 336). (ii) In relation to cost calculations, cash-flows and work programmes, the Royal Court reviewed the nature of the material for which Pell Frischmann claimed confidentiality, and rejected the suggestion that Pell Frischmann could claim for its various proposed sub-contractors' work. This left a claim for work done by Pell Frischmann's own staff, which the Royal Court explained in paragraphs 390-395, but did not specifically value. (iii) In relation to the US\$169 million cost recovery, the US\$78,585,000 Remuneration Fee, and the US\$5 million performance bond, the Royal Court did not attribute any great value to these items independent of the other materials. 252. The Royal Court kept in mind the fact that Bow Valley and Bakrie had themselves contributed to the confidential information it was valuing, and relied on the fact that the value of the whole was "probably significantly greater than the sum of its parts". It then assessed £500,000 as the "fair and proper value to put on the [Pell Frischmann] information in question" (paragraph 404). 253. Much of the Royal Court's detailed evaluation in paragraphs 380-404 has not been challenged by Bow Valley, and we see no reason to criticise it. But, in a sense, the exercise is not of great assistance, because we are, as we have pointed out, engaged in a slightly different exercise. 254. In assessing the just sum that Bow Valley should pay to Pell Frischmann by way of Wrotham Park damages, we

have taken the following matters into account:- (i) The facts that:- (a) Even on Pell Frischmann's case, its entire wasted expenditure was only £1,256,113; (b) Bow Valley contended that the wasted expenditure figure was, in fact, £1,045,563. (c) Bow Valley calculated that the true wasted expenditure figure, excluding both costs after the completion of the preparation of the confidential information, and Dr Frischmann's own costs, was only £179,192. (d) The actual cost of third parties producing the conceptual drawings and other materials, insofar as any reliable evidence was given, was relatively modest. (ii) Even on Pell Frischmann's case, the profit that Bow Valley actually made from the Balal project was between US\$1 and US\$1.8 million. The actual outcome serves to illustrate the risk of looking only at the huge forecasted profits, urged on us by Pell Frischmann. (iii) Bow Valley must pay a reasonable price for buying out clauses 3, 4 and 6 of the BVCA. Whether or not the confidential information should be valued at a greater figure than the sum of its parts, the just buy-out figure that Pell Frischmann could have reasonably demanded for the use of the confidential information and the release from clause 3 and 6, must be greater than the value of the confidential information alone. The question is how much greater. Pell Frischmann had the ability to charge some kind of ransom for the buy-out of the restrictions in clauses 3 and 6. Pell Frischmann could, on one analysis, have made any demand it chose for this buy-out - and we have found that it would probably have done so making an actual buy-out deal impossible. But we do not believe that Pell Frischmann could reasonably have demanded a very large additional price for the release from clauses 3 and 6. (iv) We have already explained that we do not think that the fact that Bow Valley was prepared to pay up to US\$10 million for a buy-out, whilst Pell Frischmann had exclusivity, is of any assistance to the assessment exercise we are engaged upon. 255. In these unusual circumstances, it is hard to reach a scientific assessment of what Pell Frischmann could reasonably have required as the price of the entire buy-out as a package (the confidential information, a licence to use it and the release of clauses 3 and 6). We bear in mind that we are awarding damages on the Wrotham Park basis because it is just to do so. The quantum of damages must also be just. 256. We have considered whether we should remit the question of assessment to the Royal Court, but we believe that we are in as good a position as the Royal Court to evaluate the just sum that should be awarded to Pell Frischmann. No exact assessment would have been possible, whatever evidence had been adduced at trial. In our judgment, taking all the matters we have mentioned into account, we have concluded that Pell Frischmann could reasonably have demanded a total sum of £500,000 for the use of its confidential information and a release from clause 3 and 6 of the BVCA. 257. In reaching this evaluation, we have obviously taken the view that the Royal Court somewhat over-valued the confidential information alone. Its reasoning did not explain how it reached its figure, and we believe that the marriage value of various pieces of information, which may have accounted for it, may have been allotted rather too great a prominence. We do think, however, that Pell Frischmann could reasonably have demanded as much as £500,000 for the buy-out from the agreement is, in essence, because the project was viewed as important by all parties, Bow Valley undoubtedly wanted the contract, and Pell

Frischmann might reasonably have made use of these factors in its negotiations, as the price of being prepared to grant the release Bow Valley sought. O. Tort Claims 258. The Royal Court's conclusions on conspiracy, the core of their allegations of tort, which embraced all the other torts, are summarised at paragraphs 308-313 which we quote:- "

308. In the first place, it is unnecessary to have resort to conspiracy theories in order to explain what happened. And while conspiracies are by their nature secretive and can often only be proved by a process of gleaning of evidence, pains-taking reconstruction of detail, and inference from circumstantial material, when all is said and done the evidence in the present case simply does not support the existence of any conspiratorial intent to deprive Pell Frischmann of anything that was rightly theirs.
309. Secondly, if Bow Valley and/or Bakrie ever harboured any thoughts of trying to persuade NIOC to let them have the contract in preference to Pell Frischmann, it can only have been very short lived: NIOC made it abundantly clear from Mr. Mirhadi's first conversation with Mr. Kamarianakis of the Canadian Embassy in Tehran that NIOC felt bound to continue to deal with Pell Frischmann unless they dropped out. Thirdly, NIOC did in fact honour that commitment right up until the expiry of its extended deadline on 4 th July. It was prepared to accept Monument as a partner to Pell Frischmann instead of Bow Valley; it made representatives available at the highest levels for discussion with a joint Pell Frischmann/ Monument delegation over a period of several days in June; and it made arrangements for Mr. Lindsay Kaye to examine the reservoir data that he wished to see. The only point on which it drew a line, for what appears to us to be very good reason, was in declining to extend the deadline beyond 4 th July for Pell Frischmann to lodge the specified performance bond, a joint venture agreement and evidence of funding.
310. Thirdly, for Pell Frischmann's conspiracy case to make sense, NIOC would have had to have been complicit in it. This was not something that was ever pleaded. It was specifically disavowed by Mr. Speck as being part of Pell Frischmann's case, and we can well understand why Pell Frischmann would be anxious not to make too much of any such allegation. Nonetheless, the point is inescapable. The case put by Pell Frischmann involved, among other things, the suggestion that the idea of the imposition of a dead-line was agreed between Bow Valley and Bakrie on the one hand and Dr. Hosseinian on the other at the meeting in Kuala Lumpur on 5 th June in order in order to put unfair pressure on Pell Frischmann, and the imputation of collusive goings-on with Mr. Mirhadi during his time in Calgary. But it is difficult, to say the least, to square these allegations with the continuing indulgence shown by NIOC towards Pell Frischmann over the course of the week following the meeting in Kuala Lumpur during which Pell Frischmann was trying to conclude an agreement with Monument and others. Other matters apart, eleven days elapsed after the Kuala Lumpur meeting before NIOC issued its 15-day notice. And, as Dr. Frischmann had pointed out to NIOC in his letter of nd June, Monument was a major oil and gas company with a London Stock Exchange listing and with capitalisation of £636 million. There is every reason, therefore, to suppose that NIOC would have been more than happy to allow Pell

Frischmann to substitute Monument for Bow Valley and Bakrie if Pell Frischmann could have reached an agreement with them. As will be evident from the foregoing review of the events during June 1997, NIOC made it clear that Monument were entirely acceptable as far as NIOC were concerned (not least, no doubt, because they had experience of Monument on other projects).

311. Then again, Pell Frischmann's case depended on the proposition that the imposition of the three conditions attached to NIOC's 15-day deadline mean that Bow Valley and Bakrie had Pell Frischmann "over a barrel", in that one of the conditions, the conclusion of a joint venture agreement, meant that Bow Valley and Bakrie were able to ensure that that condition was not fulfilled, simply by stalling negotiations with Pell Frischmann until time ran out. But that, too, is untenable given that it takes two to negotiate and give what actually happened:-
- (i) For a period of almost five weeks from 22 nd May until 26 th June, Dr. Frischmann plainly had little or no interest in any further negotiations with Bow Valley and Bakrie and was busy trying to negotiate a deal with Monument. (ii) His only gesture towards re-opening negotiations with Bow Valley and Bakrie prior to 26 th June was his cursory repetition on 12 th June of the offer contained in his letter of 22 nd May, an offer which he conceded in cross-examination was a deliberately inflated one. "Yes, I think it was inflated. It was the beginning. When you play chess, you put your pawns forward. Yes it was an inflated value, I accept it, I wanted to have their reaction." (iii) It was, moreover, an offer to which Bow Valley and Bakrie had already made a counter-proposal in their letter of 23 rd May. If Dr. Frischmann had been earnest about wanting to rekindle discussions with Bow Valley and Bakrie on 12 th June, the natural place to have started would have been a response to that last proposal from Bow Valley and Bakrie, not with the re-iteration, three weeks later, of an offer that he knew to be unrealistic and to which he had already had a response. (iv) By the time that Dr. Frischmann contacted Bow Valley again on Wednesday 25 th June, with a view to re-starting discussions about a possible buy-out, NIOC's deadline - which had just been extended the previous day from Tuesday 1 st to Friday 4 th July - was little over a week away.
 - (v) When he did make contact, it was still without any new quantified proposal on his part, so that it was left to Bow Valley and Bakrie to make a specific offer, which they did very promptly the following day. (vi) As already indicated there is no persuasive evidence that Bow Valley and Bakrie deliberately spun out the ensuing negotiations in order to ensure that the deadline of 4 th July expired with any agreement having been concluded. (vii) In any event, Bow Valley and Bakrie were in no position to control events. If Pell Frischmann had been more flexible in their negotiations with Monument, they might well have succeeded in satisfying NIOC's conditions within the requisite time-table: Dr. Frischmann/Monument delegation set off for Tehran on 21 st June. And there was no guarantee (as we find) that the contract would necessarily be offered to Bow Valley and Bakrie rather than to the original No. 2 bidder if the deadline were to expire before conditions were satisfied.

312. Nor are we in the least persuaded that Bow Valley and Bakrie deliberately set out to diminish Pell Frischmann's standing in the eyes of NIOC or that their conduct at any stage did in fact have that result. The particular passages in Mr. Blair's notes of the Kuala Lumpur meeting relied on by Pell Frischmann are minimal in the overall context of things and a slender peg on which to hang this serious allegation. It would, moreover, have been a risky strategy for Bow Valley and Bakrie to adopt, given that they were primarily concerned with their long-term relationship with NIOC, that NIOC might not take kindly to an attempt to disparage a potential co-venturer who had been selected by NIOC as their preferred bidder for development of the Balal Field, and that Pell Frischmann had been dealing with NIOC for some considerable time and had well-established lines of communication with them. (These almost certainly included established lines of communication with Mr. Jalilian. Faxes from Mr. Mohandes to Dr. Frischmann professed not to know the identity of those in question, the strong probability must be that this was a reference to Mr. Jalilian. And it was Dr. Frischmann's own evidence that he had had negotiations with Mr. Jalilian at the time of the final contract term negotiations in March.) It must also have been apparent to Bow Valley and Bakrie that it was unlikely that the Minister and other senior NIOC officers would be so unsophisticated as to be influenced by anything said by people whom they had not previously met and of whom they knew little.
313. In any event, it is plain that nothing that happened at the Kuala Lumpur meeting did in fact cause NIOC to cease to engage in a dialogue with Pell Frischmann as a prospective party to the Service Contract in a consortium with Monument. The so-called "chilling" effect that the Kuala Lumpur meeting is alleged (by Pell Frischmann) to have had on relations between NIOC and Pell Frischmann, is fanciful: as already discussed, Pell Frischmann had by then given NIOC considerable reason to be less than pleased with its conduct. But even then, NIOC remained willing to deal with Pell Frischmann, their only - and understandable - conditions being those spelt out in their fax of 1 st July". 259. In our judgment, the Royal Court's finding that there was no intention on the part of Bow Valley to injure Pell Frischmann is, unless impeachable, in reality dispositive of all the tort claims (see the Royal Court's summary at paragraphs 318 (i) and (v)). 260. We will, therefore, set out the law on the various torts alleged shortly. We draw on the 19 th edition of Clerk & Lindsell on Torts, save where superseded by the House of Lords' decision in *OBG v. Allen*
- [2008] 1 AC 1 , the new locus classicus on economic torts. P. Conspiracy to injure 261. The charge made by Pell Frischmann under this head is pungently described by Pell Frischmann in their final written submissions as " conspiracy to defraud ". It is said that Bow Valley conspired to defraud Pell Frischmann of the whole bundle of rights that Pell Frischmann had in relation to the project. It was a conspiracy to defraud Pell Frischmann of its interest in the Balal project. 262. The key to this tort turns on the distinction " between the case where the object is the legitimate benefit of the combiners and the case where the object is deliberate damage without any ... just cause ": see *Crofter Hand Woven Harris Tweed v. Veitch*

- [1942] AC 435 at page 469 per Lord Wright. 263. The Royal Court's findings place Bow Valley and Bakrie firmly on the right side of the dividing line. They had no object to damage Pell Frischmann. 264. In *OBG v. Allan*
- [2008] 1 AC 1, Lord Hoffmann spoke significantly of the "rarity of actions for conspiracy (in which a bad motive can, exceptionally, found liability)". Whilst we accept that fraud may be inferred, it is not easily to be inferred. Even if Dr Frischmann's belief that Pell Frischmann was the victim of a fraudulent conspiracy is genuinely held, that belief in itself is not proof that such a conspiracy existed. Q. Wrongful or Unlawful Interference 265. In *OBG v. Allen*, Lord Hoffman said at paragraph 47:- "The essence of the tort therefore appears to be (a) a wrongful inference with the actions, of a third party in which the Claimant has an economic interest and (b) an intention thereby to cause loss to the Claimant". See also Clerk & Lindsell *op.cit.*, paragraphs 25-88 relied on by Pell Frischmann in its final written submissions at paragraph 237. 266. Pell Frischmann accepted that "if the other aspects of Pell Frischmann's claim are made out, there can be no issue about Bow Valley's and Bakrie's intention to injure: they would not achieve their end of getting the Balal contract for nothing without damaging Pell Frischmann" (final written submissions at paragraph 242). The converse of that submission is, of course, that unless it is established that Bow Valley and Bakrie had an intention to achieve that end, the requisite intention is lacking. 267. The Royal Court found no intention in the part of Bow Valley or Bakrie to cause loss to Pell Frischmann (as distinct, again, from protecting their own positions, if Pell Frischmann fell out with NIOC). Therefore this claim too must fail. R. Procuring Breach of Contract 268. In *OBG v. Allen*, Lord Hoffmann analysed this tort at paragraphs 39-44. In summary a Plaintiff must establish: (i) a contract; (ii) a breach thereof; (iii) induced by the Defendant; and (iv) knowingly so induced. Pell Frischmann criticise the Royal Court's approach to this tort in paragraph 360 of its judgment (see footnote 12 in its final written submissions). But we can detect no legal error in what was not advanced as a comprehensive definition. Again, the Royal Court found no intention on the part of Bow Valley and Bakrie to induce a breach of contract between Pell Frischmann and NIOC. 269. Pell Frischmann's "essential case" is "that BVEL and Bakrie combined and conspired directly with each other to do acts which constituted breaches of their confidentiality agreements". We can do no better than adopt the Royal Courts conclusion: "even if Bow Valley and Bakrie were in breach of their respective confidentiality agreements, it would be wholly artificial to speak of one having procured the breach of the other ... Each entity was well capable of making its own decisions for itself and no doubt did" (paragraph 360 of the Royal Court's judgment). S. Deceit 270. Deceit is established "Where a defendant makes a false representation, knowing it to be untrue, or being reckless as to whether it is true, and intends that the Claimants should rely upon it, then insofar as the latter or does so and suffers loss, the defendant's liable for that loss" (see Clerk & Lindsell at paragraph 18-01). Pell Frischmann adopt the same definition in paragraphs 14 and 199 of its final written submissions. We can identify no such false representation knowingly made by Bow Valley or Bakrie on which they intended Pell

Frischmann should rely. 271. Pell Frischmann painstakingly unpick the letters from Mr Blair of Bow Valley of 10 th June 1997 and from Mr De Boni of Bow Valley of 17 th June 1997, which on their face reassure Pell Frischmann that Bow Valley had no intention of pursuing the Balal project on their own, and were compliant with the obligations owed to Pell Frischmann. Pell Frischmann contend that these letters were false and known to be false. 272. Again, as it seems to us, Bow Valley were not seeking to distract or delude Pell Frischmann from the true position which was, we repeat, that Bow Valley and Bakrie would pursue the Balal project with Pell Frischmann, if that were feasible, but did not wish to be excluded from it, if Pell Frischmann could not satisfy NIOC as to Pell Frischmann's own suitability. T. Injurious Falsehood 273. Paragraphs 24-09-18 of Clerk & Lindsell include the following:- "The essentials of this tort are that the defendant has published about the (Claimant) words which are false, that they were published deliberately and that special damage has followed as the direct and natural result of their publication". *Kaye v. Robertson*

[1991] FSR 62 at 67. See also *Ratcliffe v. Evans*

(1892) 2 QB 524 at page 527 274. We can identify no such words emanating from Bow Valley. 275. Pell Frischmann rely on Bow Valley's letter to NIOC of 27 th May 1997, and Mr Blair's note of 5 th June 1997 described - tellingly - as " the only evidence " that Pell Frischmann had to sustain its allegation on this issue. 276. We have quoted the letter in full at paragraph 57 above. Pell Frischmann is constrained to submit that it was clearly drafted with some care "no doubt with a view to helping Bow Valley defend its position should the letter ever see the light of day", which is tantamount to accepting that it does not have the stamp of malicious falsehood on its forehead. 277. Pell Frischmann therefore accepts that in order to make its case of malicious falsehood good, one has to read between the lines. In our view Pell Frischmann have to go further. Pell Frischmann has to persuade us to read into the letter meaning that its language does not, with one exception, convey. Certainly, nowhere does the letter impugn Pell Frischmann's good faith, and while it may imply Pell Frischmann wished to depart from international petroleum industry standards, there is no reason to doubt that this was Bow Valley's view, whether right or wrong. Mr De Boni's answer in cross-examination was as follows: "At this point we were trying to get the facts out in front of the Iranians so we could preserve our future prospects in the country" seems to us entirely plausible (Day 17 pages 148-9). 278. As to Mr Blair's meeting note of 5th June 1997, Pell Frischmann again have to contend that it means far more than it says: "It is a sanitised summary no doubt compiled with an eye on the possibility that it might have to be disclosed": Pell Frischmann's written submissions at 13.3 paragraph 75. Yet even with that defensive proviso, Pell Frischmann appears to detect within the comments recorded in those notes a deliberate effort falsely to suggest that Pell Frischmann had nothing to contribute to the project; that it was uncommitted to it; and that Pell Frischmann was wrongly seeking alternative partners; and (again) wished to flout industry standards. If even a sanitised note was so incriminating, we are compelled to wonder why then it was prepared, or, if prepared, retained. As to its 'sanitisation' one is compelled to

wonder how Bow Valley could have envisaged the inception of proceedings nearly a decade later in which it might fall to be disclosed. U. Conclusion on the tort claims 279. It follows from what we have said that, in order to substantiate any of their tort claims, Pell Frischmann must impugn Bow Valley's and Bakrie's motive and behaviour as in some way malign. 280. We have already pointed out the difficulties in the path of any appellant who seeks to overturn findings as to state of mind, by a Tribunal which had the advantage of seeing and hearing the witnesses and forming their conclusions upon that basis. These difficulties seem to us to be in this case insurmountable. 281. Furthermore, we have already determined that Pell Frischmann was the author of its own misfortune by failing to meet NIOC's requirements as to the bond. 282. It is also a peculiar feature of these proceedings that they were instituted only in January 2004 long after the events which gave rise to them. There seems little doubt that Dr Frischmann wanted to see whether and what he might have lost by its non-participation in the Balal project: and it is a reasonable inference that his view of Pell Frischmann as a victim, matured over the years. Time, far from lending perspective, detached him further from it. 283. Taking all these matters into consideration, we reject Pell Frischmann's appeal against the Royal Court's dismissal of the various tort claims. V. Overall conclusion 284. For the reasons we have given, we allow the appeal and the cross-appeal, but the outcome has the same overall effect as the judgment of the Royal Court. We make an award of Wrotham Park damages in favour of Pell Frischmann against Bow Valley, for breach of the Bow Valley Confidentiality Agreement, in the sum of £500,000. 285. The appeals in respect of Pell Frischmann's other claims are dismissed. 286. We have not determined the issues between the parties as to interest and costs, because we anticipate that submissions may need to be made in the light of our determinations. We, therefore, direct that the parties exchange and file at Court written submissions on interest and costs (incorporating any submissions that are relied upon from the written material submitted for the main appeal) by 19th September 2008. If necessary we will hear counsel on these issues on the morning of 26th September, 2008. Authorities Court of Appeal (Civil) Rules 1964. *Hyams v. English* [1981]. *Taylor v. Fitzpatrick* [1979] 1 CA. *Shalia v. Granite* [1971] 1 CA. *Davis*

v. *Stirling* [1983] 1 CA. *Assicurazioni Generali SpA. v. Arab Insurance Group*

[2003] 1 WLR 577 . *The Hontestroom* [1927] A. C. 3. *Whitehouse v. Jordan*

[1981] 1 WLR 246 . *Jones, Jones and Bedell Cristin Trustees Limited v Plane*

[2006] JLR 438 . *Powell v. Streatham Manor Nursing Home* [1953] A. C. 243. *Yaquooob v. Royal Insurance (UK) Limited*

[2006] EWCA Civ 885 . *Secretary of State for the Home Department v. Rehman*

[2003] 1 AC 153 . *In re H (Minors) (Sexual Abuse: Standard of Proof)*

[1996] AC 563 . *Re Doherty*

- [2008] UKHL 33 . Baird Textile Holdings Limited v. Marks & Spencer plc
- [2001] EWCA Civ 274 . Chitty on Contracts, 29th edition, 2004. Haynes v. Doman
- [1899] 2 Ch 13 . Woodar Investment Development Limited
- v. Wimpey
- [1980] 1 WLR 277 . Wrotham Park Estate Company Limited
- v. Parkside Homes Limited [1974] 1 WLR 798. AG v. Blake
- [2001] 1 AC 268 . McGregor on Damages, 17th edition, 4th supplement. Amec Development v. Jury's Hotel
- [2001] 1 EGLR 81 . Experience Hendrix v. PPX [2003] FSR 853. Severn Trent Water Ltd v. Barnes
- [2004] 2 EGLR 95 . Seager v. Copydex decisions reported at [1967] 2 All ER 415 and [1969] 2 All ER 718. Dowson & Mason Limited v. Potter
- [1986] 2 All ER 418. Crofter Hand Woven Harris Tweed v. Veitch
- [1942] AC 435 . OBG v. Allan
- [2008] 1 AC 1 . Clerk & Lindsell. Ratcliffe v. Evans
- (1892) 2 QB 524 . Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2008/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/pell-frischmann-v-bow-valley-2008-jca-146-03-september-2008>

Prepared on 24 October 2026 · Esheria