

JERSEY / JUDGMENT

Pell Frischmann v Bow Valley

[2008] JCA 172 (26 September 2008)

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COURT OF APPEAL 26 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 Determination on interest and costs. Advocate B. Lincoln for the Appellant. Advocate D. James for the First, Second and Fourth Respondents. The Third Respondent was not represented.

JUDGMENT

VOS JA: 1. This is the judgment of the Court.

Introduction

2. We have today handed down judgment in this appeal and cross-appeal. We concluded that judgment by summarising the outcome as follows:- "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 BVCA, in the sum of £500,000". 3. We have received detailed written submissions from the parties since handing down a draft judgment, and have this morning heard oral submissions on costs and on Bow Valley's cross appeal on interest, and on the quantum of interest, and connected matters. 4. The Royal Court ordered that Pell Frischmann should receive interest on the principal sum of £500,000 from 28 th July 1997, which it determined to be the date on which Bow Valley and Bakrie first enjoyed the benefit of the confidential information. It determined a rate of interest at Base plus 1%, reducing the normal rate from Base plus 2% on account of Pell Frischmann's 6 year delay in commencing proceedings. 5. The main Orders made by the Royal Court as to costs were, in outline, as follows:- (i) The Bow Valley Defendants were to pay 100% of Pell

Frischmann's costs of the Iranian Law/ double actionability issue on the standard basis. (ii) All the Defendants were to pay 20% of the remainder of Pell Frischmann's costs of the action on the standard basis. (iii) Pell Frischmann were to pay 80% of the Bow Valley Defendants' costs (a) on the standard basis up to the end of February 2006, and (b) on the indemnity basis thereafter. Issues raised 6. The issues raised by the parties on this hearing are as follows:- (i) Should the Royal Court have awarded compound interest, instead of simple interest on the damages? (ii) Should the Royal Court have postponed the interest award so that it only commenced from 6 th January 2004 (when proceedings were issued)? (iii) Has Pell Frischmann obtained less than Bow Valley's ' without prejudice save as to costs ' offer of \$1.25 million on 20 th October 2005, and if so what are the costs consequences? (iv) If Pell Frischmann has obtained more than Bow Valley's offer, should the costs orders made by the Royal Court be varied in one or more of the following ways:- (a) Should the 20/80% split of costs be varied so as to require Pell Frischmann to pay less of the costs awarded? (b) Should the award of indemnity costs in Bow Valley's favour after February 2006 be left in place? (v) What order for costs should be made on Pell Frischmann's appeal? (vi) What order for costs should be made on Bow Valley's cross-appeal as to interest? (vii) What order for costs should be made on Bow Valley's cross-appeal as to quantum? (viii) Should Pell Frischmann be granted leave to appeal to the Privy Council and on what terms? Issue 1: Should the Royal Court have awarded compound interest, instead of simple interest on the damages? 7. Pell Frischmann argues that the Royal Court should have awarded compound interest on the breach of confidence damages it awarded, and that we should now order compound interest on the Wrotham Park damages we have awarded. Pell Frischmann did not contend for such an award before the Royal Court (see paragraph 4 of the judgment on interest in the Court below), though it reserved its right to do so on appeal. 8. Pell Frischmann now submits that the award we have made is a restitutionary one, and that the Court has jurisdiction to order compound interest where such an award of damages is made. Mr Lincoln has addressed an interesting argument based on the differing approaches to the issue in the speeches of their Lordships in *Sempra Metals v. Inland Revenue Commissioners*

[2008] 1 AC 561 . Mr Lincoln does not, however, suggest that the jurisdiction on which he relies makes it more than discretionary at this stage in the proceedings for the Court to award compound interest. 9. The majority in *Sempra* (Lords Hope, Nicholls and Scott) suggested that there should be a common law right to receive compound interest by way of full restitution (as part of the remedy) to achieve the just result, subject to an abatement for 'subjective devaluation'. But Lords Scott and Mance thought that such a recovery would require proof that interest had been earned by the Defendant. The minority in *Sempra* (Lords Walker and Mance) suggested that compound interest should be available in equity as part of restitutionary awards as a matter of the court's discretion. We would refer in particular to paragraphs 99, 111-112 and 130 in Lord Nicholls' speech, paragraph 150-3 in Lord Scott's speech, paragraphs 185-187 of Lord Walker's speech (on which Mr Lincoln particularly relies), and paragraph 240 in Lord Mance's speech. As Lord Nicholls made clear in paragraph 111, the award of compound interest, like the restitutionary award

itself is based on justice. 10. Mr Lincoln submits that the Jersey Courts should adopt the position of the minority in *Sempre*, and hold that the power to award compound interests in restitutionary claims is an equitable one, which is, therefore, discretionary. But even if compound interest were available as of right on the damages we have awarded (about which we express no opinion), in this case we think that Pell Frischmann is too late to argue for an award of compound interest as part of the award we have already made. Pell Frischmann mentioned its claim for compound interest in its Notice of Appeal and in its written submissions, but did not argue at the oral hearing before us, when the assessment of Wrotham Park damages was argued in detail, that it wanted compound interest as part of its award. Moreover, Pell Frischmann never sought to prove what Bow Valley earned on the benefit it achieved. 11. In these circumstances, at this stage of the proceedings, Pell Frischmann cannot have an award of compensatory damages as part of an award we have already made. Furthermore, even if Pell Frischmann is now entitled to compound interest on the award we have made (on which we make no jurisdictional decision), it could only be entitled to compound interest as a matter of the Court's discretion. 12. On any basis, therefore, if there were now any jurisdiction to order compound interest, it would only be as a matter of discretion. It is true, as Mr Lincoln submits, that the damages we have awarded are not compensatory, but reflect the gain that Bow Valley made, as opposed to the loss that Pell Frischmann sustained. And, therefore, notionally it might be seen to be just to award compound interest to prevent Bow Valley keeping any of its ill-gotten gains. But in our judgment, there are important countervailing features which must affect our discretion. First, there is the severe delay in bringing these proceedings, to which we shall return later in this judgment. Secondly, there are the comments of the Royal Court as to Pell Frischmann's conduct of these proceedings, which conduct has caused further delay since the inception of the action. 13. In the circumstances, we think it is unnecessary to resolve the interesting questions Mr Lincoln has raised, because we have reached the clear view, that, even if compound interest could have been awarded in this case (whether at the main hearing of the appeal or after the award), it would have been and would be inappropriate to do so as a matter of discretion. We will, therefore, leave over for future determination in this jurisdiction both the juridical nature of the damages we have awarded, and the questions of (a) the juridical nature of the claim for compound interest as part of a restitutionary award, and (b) whether there is a discretionary jurisdiction to award compound interest on such an award after the award has been made. Issue 2: Should the Royal Court have postponed the interest award so that it only commenced from 6 th January 2004 (when proceedings were issued)? 14. It is common ground that the award of interest is discretionary. Both parties cite the dictum of Stuart-Smith LJ in *Roache v. News Group Newspapers Limited*

[1998] EMLR 161 172, where he said:- "Before the Court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the Court is forced to the conclusion that he has not balanced the

various factors fairly in the scale". 15. The grounds on which Bow Valley allege that the Royal Court erred in the ways suggested by Stuart-Smith LJ were (a) that it wrongly took into account the fact that legal action of some kind was recognised by Bow Valley in July 1997, (b) it failed to take sufficient account of Pell Frischmann's deliberate delay in starting proceedings, and (c) that the proceedings were conducted unreasonably. 16. We do not think any of these grounds are established so as to vitiate the Royal Court's exercise of discretion. Bow Valley did indeed envisage the possibility of proceedings, and that can be one factor, amongst many, in the discretionary balance. Moreover, The Royal Court expressly took account of delay by reducing the interest rate ordered. In addition, the alleged unreasonable conduct was expressly mentioned by the Commissioner at paragraph 7 of the judgment on interest. It may be that other Courts would have allocated more weight to these factors, but it seems to us that no error of principle was made, and it is therefore not open to this Court to intervene. 17. We reject Bow Valley's attack on the period for which interest was awarded. Issue 3: Has Pell Frischmann obtained less than Bow Valley's 'without prejudice save as to costs' offer of \$1.25 million on 20 th October 2005, and if so what are the costs consequences? 18. It is accepted by Bow Valley that Pell Frischmann will only be awarded less than the \$1.25m including costs offered on 20 th October 2005 if Bow Valley's appeal on interest is successful. It has not been, and therefore it is clear that Pell Frischmann will recover more than it was offered by Bow Valley. The offers may still be of relevance in the costs exercise (as appears below), but costs cannot be considered on the basis that Pell Frischmann was ever offered more than it eventually recovered. Issue 4: If Pell Frischmann has obtained more than Bow Valley's offer, should the costs orders made by the Royal Court be varied in one or more of the following ways:

- (a) Should the 20/80% split of costs be varied so as to require Pell Frischmann to pay less of the costs awarded? (b) Should the award of indemnity costs in Bow Valley's favour after February 2006 be left in place? 19. This issue is perhaps the most significant before the Court on these applications. The competing positions are that Bow Valley says that the Royal Court's orders should be left intact, and Pell Frischmann contends (a) that the costs should be split in the way suggested by the Royal Court, but that the proportions should be 70/30 instead of 20/80 (i.e. Pell Frischmann says that it should recover 70% of its costs below), and
- (b) that the award of indemnity costs against it after the end of February 2006 should be overturned. 20. The Royal Court's enunciation of the relevant applicable principles in paragraphs 3-9 (as to costs generally) and in paragraphs 20-28 (as to the award of indemnity costs) is not seriously disputed by either party, and we shall not repeat what the Royal Court has said. What is in issue is the application of those principles. 21. It seems to us that we are obliged to reconsider the costs awarded below in the light of the outcome of the appeal. Though we did not disturb the Royal Court's rejection of Pell Frischmann's tort claims, we did find in favour of Pell Frischmann on the contract claims, even if not in respect of the quantum of the overall recovery. Pell Frischmann is justified, it seems to us, in saying that it made significant advances before this Court, if one is considering the matter issue by issue, as we do. 22. Dealing first with the proportions, Pell Frischmann contends that it "has now

succeeded on the vast majority of issues, both factual and legal, canvassed at trial". We think this an exaggeration, not because, making a headcount, it may not be accurate - we have not conducted such an exercise - but because it does not meet the main point made against Pell Frischmann by the Royal Court, namely that absent the conspiracy charges, the case could have been tried in something not far off 5 days (see paragraph 13 of the Costs Judgment). 23. In our judgment, even taking account of the parts of the appeal on which Pell Frischmann succeeded, it was responsible for a large part of the costs of the proceedings. We can enumerate a few of the more important factors. First, Pell Frischmann treated the matter like a fraud trial, and refused to exchange witness statements or open its case fully in writing. As the Royal Court indicated, this caused many extra days of trial. Secondly, leaving hyperbole aside, Pell Frischmann conducted its case with no holds barred. It exercised no restraint in the allegations it made, and most of the allegations underlying the tort claims have been found to be unjustified. There may be, as Pell Frischmann argues strongly, some forensic fault to be laid at the door of Bow Valley, and there may have been many legal submissions on the contractual issues, but none of that affects the Royal Court's assessment of the disproportionate way in which the litigation was conducted. The fact that Pell Frischmann is said to have run up £4 million worth of costs up to trial by itself makes this point good. Thirdly, Pell Frischmann refused to negotiate on a level playing field, and (as the Royal Court pointed out) but for the exaggerated nature of the way the claims were advanced, the proceedings might well have been settled. 24. We have considered carefully the transcripts and the competing positions, and we think that the proportions should be adjusted to 40/60 from 20/80 to reflect Pell Frischmann's limited success on the appeal. This will mean that Pell Frischmann will pay 60% of Bow Valley's taxed costs, and Bow Valley will pay 40% of Pell Frischmann's taxed costs. We considered making a more broad brush order involving a net payment from one party to another, but concluded that it would be inappropriate to interfere with the Royal Court's basic approach to the costs issue at this stage. 25. In relation to the award of indemnity costs, however, we must differ from the Royal Court. We do not find the Royal Court's reasoning in paragraphs 30-35 sufficiently convincing. An award of indemnity costs is, as the Commissioner said at paragraph 26, out of the ordinary. Unreasonableness, at least, is required. Whilst the pursuit of 'no holds barred' litigation may seem unreasonable to some, it has not been suggested that this litigation was undertaken in bad faith. It was disproportionate, but that is not the same thing as unreasonableness, and for that disproportionate conduct, Pell Frischmann will be paying the larger part of the costs. 26. In addition, we are not persuaded that there is a sensible line to be drawn at the end of February 2006. It is true that the documents were by then disclosed, but Pell Frischmann was entitled to cross-examine the witnesses if the claim was brought in good faith. In our judgment, the award of indemnity costs was inappropriate, and is the more so now that Pell Frischmann has been vindicated on the principle of its contract claims. 27. There is one further issue raised by Pell Frischmann in paragraph 41 of its submissions. It complains that the costs of and occasioned by Bow Valley's amendment to allege a joint venture to bid were reserved by Order of 6 th January 2006, and were never dealt with again by the Royal Court. We agree that, now that the point has been lost, these

costs should be paid in any event by Bow Valley, but we have taken this into account in the general proportional order we are making, as Mr Lincoln has submitted we should. 28. We will, therefore, leave in place the order as to Pell Frischmann's costs of the Iranian law and double actionability issues, and substitute the following orders in relation to the costs of the first instance proceedings:- (i) All the Defendants pay 40% of the remainder of Pell Frischmann's costs (apart from its costs of the Iranian law and double actionability issues) of the action on the standard basis. (ii) Pell Frischmann pay 60% of the Bow Valley Defendants' costs on the standard basis. Issue 5: What order for costs should be made on Pell Frischmann's appeal? 29. It is true, as Pell Frischmann contends, that much of the argument on the appeal was taken up with the contractual case. But that was because the Court indicated early on in the hearing that that was where its interest lay. The written materials were voluminous and dedicated on Pell Frischmann's side at least, to the rehabilitation of its grand conspiracy case. Again, we have no hesitation in saying that the scale of the written argument was disproportionate. 30. In a case of this kind, the overall outcome is particularly important. Of course, the individual issues make up that outcome, but Pell Frischmann would obviously not have been likely to have pursued a vast appeal just for the pleasure of winning the bulk of its contractual arguments, had it known that the financial outcome would be unchanged. 31. We take the view that whether one adopts an issue based approach or an overall view, the result is broadly the same, Pell Frischmann lost at least 50% of the substantive arguments it put forward (evaluated on the basis of the time and writing they occupied). We agree also with Bow Valley's submission that the allegation of bias made against the Royal Court was, at best, unreasonable. Pell Frischmann did indeed win a number of legal points, but they availed it nothing. 32. In these circumstances, we believe that the just outcome is for there to be no order as to the costs of Pell Frischmann's appeal. Issue 6: What order for costs should be made on Bow Valley's cross-appeal as to interest? 33. Bow Valley failed on its cross-appeal as to interest, and it must, therefore, pay Pell Frischmann's costs of it. Issue 7: What order for costs should be made on Bow Valley's cross-appeal as to quantum? 34. The outcome of this cross-appeal is not quite so straightforward. Bow Valley succeeded in one sense, because the £500,000 award for the abuse of confidential information was reduced, but the fact that it failed on part of Pell Frischmann's appeal meant that, overall, it was no better off. 35. In our judgment, this part of the cross-appeal is best regarded as an integral part of the main appeal, and the costs order should be the same, namely no order as to costs. Issue 8: Should Pell Frischmann be granted leave to appeal to the Privy Council, and on what terms? 36. Pell Frischmann is entitled to permission to appeal as of right, having regard to the value of its claim, and we, therefore, duly grant them the leave they seek, on condition that Pell Frischmann deposits £100,000 by way of security for costs. We do not think it right to make this order conditional on payment of the judgment sum. Conclusions 37. We hope that the parties' counsel will be able to agree an order to reflect these determinations. 38. We will make no special order as to the costs of this hearing, which will simply form part of our overall order as to the costs of this appeal. Authorities Pell Frischmann v Bow Valley

[2008] JCA 146 . Wrotham Park Estate Company Limited

v. Parkside Homes Limited [1974] 1 WLR 798. Sempra Metals v. Inland Revenue Commissioners

[2008] 1 AC 561 . Roache v. News Group Newspapers Limited [1998] EMLR 161 172. Page Last Updated: 22 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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