[2009] UKPC Case Ref 45
Privy Council Appeal No 0020 of 2009

JUDGMENT

Pell Frischmann Engineering Limited
v
(1) Bow Valley Iran Limited
(2) Bow Valley Energy Limited
(3) P T Bakrie Interinvestindo
(4) Bow Valley International (Jersey) Limited

From the Court of Appeal of Jersey

before

Lord Phillips
Lord Rodger
Lord Walker
Lord Mance
Lord Clarke

JUDGMENT DELIVERED BY
LORD WALKER

ON

26 November 2009

Heard on 13 and 14 July 2009

Appellant
Sir Sydney Kentridge QC
Ian Geering QC
Anthony de Garr
Robinson QC

(Instructed by Olephant)

Respondents
Adrian Beltrami QC
Matthew Parker

(Instructed by Butcher Burns)
(Bow Valley Iran Limited (1))

Respondent
Adrian Beltrami QC
Matthew Parker

(Instructed by Butcher Burns)
(Bow Valley Energy Limited (2))

Respondent
(Not represented)
(P.T. Bakrie Interinvestindo (3))

Respondent
Adrian Beltrami (QC)
Matthew Parker

(Instructed by Bow Valley International (Jersey) Limited)

LORD WALKER:

Introduction

1. This appeal is concerned with the unfortunate outcome of a plan for a joint venture between the parties to the action. They hoped to conclude a profitable contract with the National Iranian Oil Company ("NIOC") for the development of an offshore oilfield known as the Balal field. The inception of the plan was marked by the signature of confidentiality agreements in November and December 1996. It ended, in acrimonious and disputed circumstances, in July 1997. However this litigation was not commenced in the Royal Court of Jersey until 5 January 2004.

2. The claimant in the litigation was Pell Frischmann Engineering Limited ("PFE"), an English company. Its head office was in Manchester Square, London. Its chairman was Dr Willem Frischmann, who came to England as a refugee after the Second World War. He was described by the Royal Court as "a man of huge energy, exceptional engineering talent and considerable entrepreneurial flair." However the Royal Court was also quite severely critical of his judgment in the course of the negotiations for the joint venture.

3. There were four defendants, three of them companies in a Canadian group engaged in the oil industry and based in Calgary: Bow Valley Iran Limited (a Jersey company), Bow Valley Energy Limited (an Alberta company—"BVE") and Bow Valley International (Jersey) Limited (a Jersey company). They were the first, second and fourth defendants and are the only active respondents to this appeal. The third defendant and third respondent, which has not taken any active part in the litigation, was an Indonesian company called P T Bakrie Interinvestindo ("Bakrie"). Mr Bakrie was its Chairman and Mr Atalas was its CEO. At the inception of the plan for a joint venture Bakrie was seen as the principal source of finance.

4. PFE's claim alleging conspiracy, deceit, inducing breach of contract and breach of confidence was heard in the Royal Court over 35 days (between March and July 2006) by Mr H W B Page QC sitting as a Commissioner with Jurats Le Breton and Morgan. They gave judgment on 31 May 2007. It was a very long judgment, running to 445 paragraphs. The Royal Court rejected entirely PFE's allegation of a dishonest conspiracy between the defendants to deprive PFE of the benefit of all the time, trouble and expense which it had occurred in pre-qualifying for the Balal contract and securing an exclusive position of preferred bidder. It rejected the claims for breach of contract on the strength of its finding at an implied term limiting the duration of the defendants' obligations. But it found that BVE and Bakrie were liable to PFE for breach of confidence, and awarded £500,000 damages (for which all the defendants were jointly and severally liable).

5. PFE appealed to the Court of Appeal and BVE cross-appealed as to quantum and interest. The Court of Appeal (the Honourable Michael Beloff QC, Mr P D Smith QC and Mr G C Vos QC) heard the appeal between 31 March and 2 April 2008 and gave judgment on 3 September 2008. On the appeal the Court of Appeal differed from the Royal Court as to the construction of the confidentiality agreements, finding that the defendants were in breach of their express terms, (as well as being in breach of an equitable obligation of confidence), but held that the award of £500,000 damages was still appropriate. This sum was awarded as "*Wrotham Park* damages" (see *Wrotham Park Estate Co. Ltd v Parkside Homes Ltd* [1974] 1 WLR 798). The Court of Appeal rejected PFE's appeal on the allegations of conspiracy, deceit and inducing breach of contract. It dismissed the cross-appeal as to interest. The result of the appeal was therefore broadly neutral, and this was reflected in the Court of Appeal's costs order.

6. PFE's further appeal to the Board is concerned primarily with the quantum of the *Wrotham Park* damages, although it also seeks to challenge the lower courts' dismissal of the claims for conspiracy and inducing breach of contract. It is therefore necessary to go into the facts in some detail, even though their Lordships have not been asked to depart from any of the concurrent findings of primary fact made by the courts below.

7. The troubled course of the negotiations can be summarised in five stages.

(1) July 1995 to October 1996: PFE invested time and money (with no involvement of BVE or Bakrie) in establishing good relations with NIOC and obtaining recognition as prequalified to bid for the Balal project.

(2) November 1996 to March 1997: BVE and Bakrie both entered into confidentiality agreements with PFE as prospective members of a consortium to undertake the Balal project; PFE submitted its final proposal (19 December 1996) and its final bid (12 March 1997) with some input of expertise from BVE and others; PFE entered into a conditional contract with NIOC, but with some unwelcome last-minute terms (19 March 1997).

(3) April to mid-June 1997: PFE could not comply with the condition (as to a $5m bond) imposed by NIOC; there were discussions as to buy-outs between the prospective consortium members; BVE and Bakrie had direct contact with NIOC at Kuala Lumpur (5 June 1997) and PFE alleged breaches of the confidentiality agreements.

(4) Mid- to end-June 1997: Mr Mirhadi of NIOC was in Calgary; NIOC sent an ultimatum (the "15-day letter") to PFE (16 June 1997); PFE and Monument Oil and Gas had unsuccessful meetings with NIOC in Teheran (22 June 1997).

(5) July 1997: PFE, BVE and Bakrie resumed buy-out negotiations while the 15-day period (slightly extended) ran out; the negotiations came to nothing (8 July 1997); NIOC entered into an agreement with BVE and Bakrie (28 July 1997).

The facts: *(1) July 1995 to October 1996*

8. In July 1995 NIOC published a notice inviting pre-qualification for tenders for a number of oilfield projects, including Balal and Soroosh (another field in which PFE was interested). At that time the United States of America was imposing sanctions against Iran and negotiations with NIOC involved political as well as financial risks. The financial risks arose from the structure of the commercial arrangement. The successful contractor was to construct an oil well and bring it into production, with ownership of the well being vested in NIOC. The capital cost was to be paid by the contractor and reimbursed (with interest) over three years but only up to a stipulated maximum, and only after "first production" (production averaging 16,000 barrels of crude oil a day) had been achieved. The contractor was also to receive a remuneration fee (a percentage of the capped cost) after achieving "further additional production". (In this opinion all references to $ are to United States dollars).

9. PFE successfully went through the pre-qualification procedure. It went to a lot of trouble, and incurred substantial expenditure, in doing so and in formulating first-stage proposals for the project (submitted to NIOC on 26 June 1996). PFE had a great deal of engineering expertise but did not have expertise in drilling oil wells. It needed a partner with that sort of expertise. BVE appeared to be a suitable partner. It was a new venture set up by Mr Daryl ("Doc") Seaman, described by the Royal Court as "something of a legendary figure in the Calgary-based oil industry." BVE had plenty of expertise in oil drilling but limited financial resources. At a meeting in London on 11 October 1996 PFE and BVE decided to work towards a joint venture in developing the Balal field (and another field, Soroosh, which dropped out of the narrative at an early stage).

(2) November 1996 to March 1997

10. A confidentiality agreement between PFE and BVE was signed on 1 November 1996. It was quite short and can be set out in full:

> "WHEREAS:
>
> 1. PFE 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. PFE has received certain data from NIOC regarding the Soroosh and Balal fields which NIOC regard as confidential and PFE 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 PFE by NIOC and subsequently sent to BVE, as confidential and BVE will enter into the same agreement with PFE as PFE with NIOC.

3. BVE will work on the Soroosh and Balal project exclusively with PFE and undertakes not to carry out any work on its own or with other parties.

4. BVE undertakes that all information received from PFE will be kept strictly confidential and will not divulge same to any third party without the express written consent of PFE.

5. BVE will not use PFE advisors in Iran without the permission of PFE.

6. BVE undertakes not to approach NIOC directly on these projects without the express written consent of PFE.

7. It is the intention of PFE and BVE to enter into a joint venture agreement in the near future which will define the relationship of PFE, BVE and other participating parties, including Fallingbrook Commodities Limited."

11. Fallingbrook Commodities Limited was a company which Dr Frischmann had originally seen as a source of finance. PFE had entered into a confidentiality agreement with it in April 1996. But it dropped out of the picture and was in effect replaced by Bakrie (a company with which BVE had previously done business) following a meeting in London. On 2 December 1996 PFE and Bakrie entered into a confidentiality agreement in the same terms as that between PFE and BVE, but with the omission of clause 7.

12. Negotiations with NIOC continued. PFE and BVE met its task force committee in London on 23 January 1997. On 10 March Bakrie indicated its willingness to participate and arrange a loan of $50m. On 12 March PFE submitted to NIOC its revised final bid. The Royal Court found that BVE (and also a Spanish company called Dragados, whose work was paid for by BVE) made a considerable contribution to the revised final bid. On 19 March PFE signed a service contract with NIOC, which initialled it but was understood not to be unconditionally agreeing to it. The agreement was a complicated commercial agreement on the general lines already indicated.

13. NIOC had in January 1997 raised issues as to making reductions in the cost cap and the remuneration fee. These issues arose again when Dr Pendered of PFE was in

Tehran to sign the formal service contract on 19 March 1997. There were (in the words of the Royal Court),

> "Two last minute developments in Tehran [which] were to have a lasting impact on the future of the consortium's involvement with the project. The first was a request, at a meeting with the Iranian authorities on 19 March, for a reduction in both the capital cost and the remuneration fee. This was relayed to Dr. Frischmann in London who then engaged in negotiations by telephone with Mr. Jalilian of NIOC and eventually, the same day, agreed to reduce the capital cost from US$176m to US$172m and the remuneration fee from 52% to 49%."

In return PFE was offered some (imprecisely defined) concessions.

> "Secondly, when the parties met again on 20 March, Dr. Pendered was faced with a requirement by NIOC for what was, in effect, a performance bond from [PFE] in an amount of US$5m. With little opportunity to take further instructions from London, Dr. Pendered signed the service contract [on behalf of PFE] adding in manuscript 'the contractor shall submit "bank guarantee" for the amount of US$5m in favour of NIOC.'"

The requirement for a bond of this character was understandably regarded as onerous. Dr. Frischmann described it as a "suicide bond". In the event, despite vigorous efforts PFE was unable to provide a bond from a bank of sufficient standing to be acceptable to NIOC.

(3) April to mid-June 1997

14. From about the last week of March 1997 there were increasingly active discussions, sometimes tripartite and sometimes bilateral, between PFE, BVE and Bakrie. Because the parties to the proposed joint venture were spread around the globe, much of the discussion is documented by faxed letters and emails, and is fully recorded in the Royal Court's judgment. After a detailed account of the communications during this period the Royal Court commented:

> "We mention these two bilateral sets of communication with Bakrie, because both [PFE] and [BVE] accuse one another in these proceedings of bad faith and deceitfulness in conducting these private discussions with Bakrie; in truth, neither side was alone in having such discussions."

15. This varied pattern of communication was understandable. For all three parties it was a period of considerable uncertainty. NIOC was adopting a robust negotiating stance towards PFE, which was the only one of the consortium directly involved in the negotiations with NIOC. All parties were aware of the threat of US sanctions. PFE was having difficulty in satisfying NIOC as to the soundness of its financial backing.

16. On 7 and 8 April there were tripartite meetings in Jakarta, and also some bilateral discussions to which BVE was not a party. The Royal Court rejected PFE's complaint that at a meeting on 10 April it was "ambushed" on the issue of decision-making in the proposed joint venture (BVE and Bakrie wanted decisions to be taken by a majority, without requiring unanimity).

17. At this stage there was the first mention of a possible buyout as between the prospective consortium members. On 15 April Mr. Burns of BVE wrote to Dr. Frischmann suggesting that Bakrie would finance the whole project in return for one-third of the remuneration fee; PFE would be a sleeping partner with a one-third interest; BVE would be solely responsible for management of the project, and would have any cost overrun debited to its one-third share. Dr. Frischmann rejected this proposal (in an amended form), a decision which the Royal Court termed "nothing short of perverse". The Royal Court also commented (para 101):

> "A constant theme of [PFE's] case was that from an early stage [BVE] and Bakrie had affected, in their dealings with [PFE] to be at arm's length, when in fact they were secretly working in association with one another, with a view to stealing [PFE's] contract. As we make plain elsewhere, the suggestion that they had such intent is unfounded. But quite apart from that, it is hard to accept that Dr. Frischmann was really unaware that [BVE] and Bakrie were more closely associated with one another than [PFE] was with either of them or was ever likely to be."

18. By the beginning of May 1997 BVE was (as appears from the minutes of a Board Meeting held on 9 May) pessimistic about the project. Dr. Frischmann continued to search for other sources of finance. In mid-May the Canadian press reported, wrongly, that the Balal contract had been awarded to a consortium of BVE and PFE. The US authorities became interested in possible sanctions-breaking. On 9 May Mr. Mohandes, an Iranian consultant advising PFE, informed it that NIOC was "very upset" about the failure to provide a satisfactory bond and indicating that this was PFE's "last chance". Dr. Frischmann tried again but on 14 May NIOC maintained its hard line.

19. On 15 May Dr. Frischmann invited BVE to make an offer to buy out PFE's interest. Mr. Blair of BVE

> "felt Frischmann would want an inflated value and that NIOC would not take too kindly to someone obtaining a contract and then flipping it to make a profit."

On 20 May Mr. Bakrie and Mr. Atalas of Bakrie came to Calgary. Over the next few days BVE and Bakrie engaged in vigorous negotiations with Dr. Frischmann, mainly by fax. On 22 May Dr Frischmann (completing a proforma supplied by BVE) asked for US$18m together with various contingent payments. On 23 May BVE faxed a counter-offer providing for staged payments, contingent on the project proceeding

successfully, up to a maximum total of US$11.825m. BVE also offered to sell its interest on the same terms.

20. BVE's offers lapsed on 27 May. On 28 May Mr De Boni of BVE approached the Canadian Embassy in Tehran asking for help "in securing an invitation for [BVE] and Bakrie to meet with NIOC." Mr De Boni also wrote to Dr Hosseinian of NIOC informing him that BVE and Bakrie had been unable to reach agreement with PFE but remained interested in the project. The Royal Court did not accept that BVE had made a similar approach to NIOC at an earlier date. These steps led to a meeting in Kuala Lumpur on 5 June attended by Dr Hosseinian and Mr Mirhadi of NIOC, Mr. De Boni and Mr Blair of BVE and Mr. Bakrie, Mr. Setiano and Mr. Atalas of Bakrie.

21. The period while the Kuala Lumpur meeting was being arranged coincided with NIOC coming close to the end of its patience with Dr. Frischmann. Mr. Mohandes faxed Dr. Frischmann on 29 May:

> "I waited for you to contact me all day yesterday . . . NIOC has been very annoyed with continuous delays and the fax from Spain [about a bond offered by a bank which proved unacceptable to NIOC] annoyed them further".

On 31 May Mr De Boni wrote to Dr. Frischmann asking (perhaps disingenuously) for confirmation "that there are no debts or other obligations outstanding between our companies and that any agreements between us have terminated." Dr Frischmann replied on 2 June indicating that he was willing to keep negotiating, and insisting that the confidentiality obligations were still in force.

22. The meeting at Kuala Lumpur was central to the serious allegations of treachery and deceit made by PFE against BVE and Bakrie. It was put to BVE's witnesses that its minutes of the meeting were "sanitised" and misleading. The Royal Court did not accept this (para 164):

> "Mr Blair accepted that he had prepared his summary minutes sometime after the meeting itself from rough contemporary manuscript notes; as he said in evidence, it is not easy to take a full note when you, yourself are actively engaged in the discussion. He denied the suggestion that they were not a genuine and fair record. The fact that the original manuscript version was no longer available appears to us to be unremarkable, given that it may well have been discarded once the typed version had been completed. And the idea that the final notes were deliberately "sanitised", stripped of anything vaguely incriminating, is wholly at odds with [PFE's] innumerable complaints that the notes reveal statements which, they say, represent half-truths, falsehoods, remarks made to NIOC which were derogatory of [PFE] and breaches of confidentiality by [BVE], little or none of which would be expected to have been there if the document had been prepared for the purpose suggested by [PFE]. To examine, seriatim,

> the numerous points at which, according to [PFE], the informed reader can detect signs of deliberate falsification would not be justified; overall we consider the thesis wholly improbable and unpersuasive."

23. The minutes show that NIOC was told again of the difficulties that the consortium members were having in coming to terms, especially as to voting rights and responsibility for cost overruns. Dr Hosseinian suggested that he should write to PFE asking for production within 15 days of a bank guarantee from a recognised bank, and a copy of a joint venture agreement between PFE, BVE and Bakrie. The Royal Court found (para 172),

> "On a fair reading of the summary minutes as a whole, however, is it impossible to detect any concerted attempt by [BVE] and Bakrie to use the occasion of this meeting to denigrate [PFE] and thereby try to encourage NIOC to abandon any further attempt to contract with them."

(4) Mid-June to end-June 1997

24. Mr Mirhadi of NIOC flew to Calgary on 13 June and remained there at least until 11 July. At trial PFE attacked his extended stay as very suspicious, and evidence of BVE and Bakrie trying to conspire to misappropriate PFE's favoured position in relation to the Balal project. The Royal Court found that Mr Mirhadi did have several meetings with Mr Blair of BVE, but that he had other reasons to be in Calgary. Mr Mirhadi's married daughter lived there, and he had a wider interest in fostering relations with Canadian companies at a time when US sanctions against Iran were a constant preoccupation. In addition, Mr. Mirhadi and Mr Blair had some interests in common and enjoyed each other's company.

25. Meanwhile Dr Frischmann was negotiating with a new potential partner, Monument Oil and Gas ("Monument"). NIOC asked him through Mr Mohandes for information about Monument. In a postscript marked "private" Mr Mohandes commented that he did not know "what game you were playing". In a second message on the same day he wrote;

> "I have run out of excuses, please let us know what your problem is."

This was two days before the fax (already mentioned) about NIOC's being annoyed at PFE.

26. Dr Frischmann continued to have discussions with Monument, and informed NIOC of this. It was arranged that a team from Monument would visit Tehran on 14 June. On 7 June Dr Frischmann left London for his family home in Majorca where he stayed for a fortnight. On 10 June Mr. Blair of BVE responded to Dr Frischmann's letter of 2 June, referring to his letter of 23 May to Dr Hosseinian and to

the Kuala Lumpur meeting. He indicated willingness to resume negotiations but no particular enthusiasm for doing so:

> "From your letter (and our earlier discussion by telephone) it is evident that the parties involved have significantly different perceptions of value relative to the Balal contract. I also note from your letter, however, that you retain some optimism that a resolution might be reached between our companies. While I too hold out hope that an accommodation may be possible, support for the project amongst our directors has been eroded by the lack of an agreement and the requirement to finalise disclosure documentation for our initial public offering."

PFE wrote two letters in answer, both dated 12 June. One simply repeated PFE's offer of 22 May. The other, longer letter, complained of breaches by BVE of the confidentiality agreement. On 16 June Dr Frischmann sent a similar letter to Bakrie.

27. PFE's negotiations with Monument were slow and the visit to Tehran was postponed. Then on 16 June NIOC sent to PFE what the Royal Court called the "15-day letter":

> "We…..write to inform you 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 instruction 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.
> D – regarding your request for 75% of early production of oil produced up to the completion of development plan, there is no objection and it can be allocated."

28. On 17 June BVE wrote to PFE rejecting the accusation of breach of the confidentiality agreement. BVE stated that it had told NIOC that it would proceed with the Balal project only by agreement with PFE. As to other oil fields in Iran, BVE was free to proceed without reference to PFE. The letter concluded,

> "if [PFE] wishes to salvage the Balal project we remain willing to conclude an arrangement with you but certainly not under the terms you have proposed. If you do not wish to proceed, your unequivocal and forthright advice to that effect is in order and would be appreciated."

On 18 June Dr Frischmann wrote to NIOC saying that he was making good progress with Monument. The following day Monument wrote to NIOC about a meeting. The Royal Court commented (para 208):

> "But much of the letter was devoted to emphasising Monument's current activities in Iran and Turkmenistan, future co-operation with NIOC generally, and oil swap arrangements in particular. The strong impression given by the letter is that Monument saw the forthcoming visit as a valuable opportunity to discuss future relations with NIOC at least as much as a chance to secure participation in the Balal project. Mr Mohandes evidently felt much the same way."

At about the same time ANZ Investment Company, which had been in discussions with PFE about providing finance, made clear that it did not regard itself as committed to the project.

29. The visit to Tehran by teams from PFE and Monument took place on 21 June, with three days of meetings and discussions. They did not go well for PFE. NIOC had become increasingly frustrated by the delays over finance. Mr Dorr of PFE made a minute:

> "JP [Dr Pendered of PFE] apologised for the delays incurred so far and Monument presented their corporate background and intentions for Iran. Mr Hosseinian advised, in a pointed manner, 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. He also mentioned that he considered it now to be a mistake that a contract had been signed with PFE; he blamed his team for this and said they should have signed with the JV or preferably with an oil company.
>
> He addressed AB [Mr Andris Blankenburgs of Monument] directly and told him that, as far as he was concerned, Monument was acceptable and they could approach NIOC directly if they so wish, either with or without PFE. He also said that he did not consider it was essential to use PFE as their capabilities were available from a large number of consultants and contractors. According to him there are a number of companies lined up ready to sign, with finance arranged, including [BVE]. He felt he had been misled by PFE with promises that had not been honoured (he did not specifically mention the bond issued)."

All PFE achieved from the Tehran visit was an extension of the 15-day period from 1 July to 4 July 1997.

30. The Royal Court summarised the position at this critical stage (para 222):

> "[PFE] claims that Dr Hosseinian's uncompromising stance at the meeting on 24 June reflected the "chilling" effect of [BVE's] success in sabotaging [PFE's] reputation at their own meeting with the minister in Kuala Lumur earlier in the month. But this is wholly implausible. Dr Hosseinian had every good reason to have been disenchanted with [PFE] by the time of the meeting on 24 June: reasons that had nothing whatever to do with [BVE] or Bakrie. [PFE] had bid for, and been awarded, the service contract as part of a consortium without, as it turned out, having agreed terms with its partners; it had given the impression that the necessary finance was available when it was not; it had repeatedly pressed NIOC to accept a performance bond from a 'bank' which was not among those on the NIOC-approved list and which was so private that no one could readily establish its credentials; it had dropped [BVE] as their prospective oil company partner in favour of Monument and asked for NIOC's formal approval of this substitution."

The judgment went on to record PFE's discomfiture at the meeting in Teheran.

(5) July 1997

31. The final chapter before the breakdown of relations within the consortium was a fortnight of active negotiations for a buy-out by BVE of PFE's interest in the project. The negotiations were conducted mainly by the parties, not their lawyer (though there was a draft contract which provided, not merely for the release of obligations under the confidentiality agreements, but also for the assignment, if possible, or otherwise the novation of PFE's interest under the contract with NIOC). These negotiations took place under the shadow (from PFE's point of view) of the approaching deadline of 4 July, which NIOC could not be expected to extend further (though in the event it was extended by a few more days).

32. On 25 June Dr Frischmann phoned Mr De Boni (who was in Calgary) to reactivate negotiations. The next day BVE responded with an offer of $3m down and 12.5 % of the remuneration fee (net of cost overruns). Mr De Boni wrote in explanation of his offer:

> "Our offer reflects the reality that recent pressures related to the US sanctions have made it more difficult and more costly for us to secure project financing. In addition, our Iran advisers point out that the large reductions which were renegotiated in the remuneration fee and capital cost have significantly compromised the value of the contract. Should you find our offer acceptable, we would be prepared to move forward immediately to finalise documentation with you and provide the requisite bank guarantee to NIOC."

33. PFE responded with a counter-offer of $12m ($3m down and $9m deferred). Vigorous negotiations, with almost daily counter-offers, produced the position at 1 July that BVE's offer had risen to $7.5m ($3m down and $4.5m linked to production) together with a further $2.5m if the project was extended to include a submarine pipeline; while PFE had come down to $8m ($4m down and $4.5m linked to production) and a further $2.5m if the pipeline was included in the project.

34. The Royal Court roundly rejected (as "a nonsense") PFE's case at trial that BVE was deliberately spinning out the negotiations in order to obtain an unfair advantage. Its judgment analysed the evidence in detail and concluded (para 242):

> "There was every good reason why [BVE] and Bakrie should want to reach an agreement with Dr Frischmann. The contract was in [PFE's] name. If [BVE] and Bakrie had ever harboured any idea of trying to persuade NIOC to revoke its award to [PFE] (and, while there may have been some hard-liners in either camp who would have like to do that, we find no evidence of any considered decision, or attempt, to do so), it can only have been very short-lived. By the beginning of June, NIOC had made it abundantly clear that they would continue to work with [PFE] unless and until it dropped out . . . the imposition by NIOC of a time-limit for conclusion of an agreement was going to, and did, operate as a spur to both parties to sort out their differences or face the risk of both losing the Balal contract altogether."

35. Dr Frischmann was in the meantime continuing discussions with Monument (whose representatives attended a meeting at Manchester Square on 2 July). Having asked BVE to inform NIOC that the consortium was very close to agreement (a request that BVE complied with) Dr Frischmann wrote a letter in quite different terms, referring to different prospective partners. The Royal Court commented (paras 262-263):

> "It is also very difficult to imagine how Dr Frischmann could have thought that a letter in these terms would produce anything other than an unfavourable reaction from NIOC, let alone how he could have brought himself to send it knowing that [BVE] would or might be writing to NIOC with news of a completely different kind: as regards the latter point, we can only assume that Dr Frischmann had not expected [BVE] to write so quickly.
>
> At all events, we have little doubt that this letter must have sealed [PFE's] fate as regards Balal. Looking at the matter from NIOC's perspective, on opening their offices on Saturday 5 July . . . they – or at least Mr Rahimi and Mr Jalilian – would have found two wholly inconsistent faxes: one from [BVE] telling them that they were on the verge of an agreement with [PFE] and one from [PFE] making no reference to any such negotiations

and asking for substantially more time in which to find a banker-partner for the project."

36. The events of 5, 6, 7 and 8 July saw the final collapse of the proposed consortium. These sometimes dramatic events (which led to accusations by PFE of conspiracy by BVE and Bakrie, and by BVE of PFE having suppressed the news that it had lost exclusivity) are covered in great detail in the Royal Court's judgment. Its findings of fact were generally unfavourable to PFE and Dr Frischmann. But the essential points are that no buy-out agreement was concluded; PFE was no longer acceptable to NIOC, and on 28 July 1997 BVE and Bakrie entered into a contract with NIOC on essentially the same terms as those of the conditional contract of 19 March 1997, with essentially the same master development plan annexed to it. However the contract ultimately proved much less profitable than BVE and Bakrie hoped when they entered into it.

Exclusivity

37. In the courts below there was a good deal of discussion about the "exclusivity" which PFE claims to have enjoyed in its commercial relations with NIOC, and about the implications of its loss of exclusivity in July 1997. But it is not always clear from the judgment below whether exclusivity was being treated as a matter of legal right, or commercial expectation. In their Lordships' view it can only have been a matter of expectation, not right.

38. The contract document signed by PFE on 19 March 1997 was expressed (clause 31) to be governed by the laws of the Islamic Republic of Iran, but neither side seems to have pleaded or adduced evidence as to the effect of Iranian law. By clause 3.3 the contract was not to take effect until it had been signed by NIOC and (subsequently) approved by NIOC's board of directors. PFE did not assert that NIOC was ever contractually bound by it. Its pleaded case (in paragraph 10 of the amended order of the justice) was that NIOC decided to award the development contract to PFE and that terms were agreed, but (paras 12 and 13) subject to the condition of PFE procuring a $5m bond from a bank.

39. Nevertheless NIOC seems to have proceeded for some time in the belief that PFE was able and willing to procure the requisite bond, and that the contract would come into effect in the near future. On 10 April 1997 NIOC provided a draft bond but accepted some amendments to its wording proposed by PFE. But by 1 May, NIOC was openly sceptical about accepting a bond issued by the shadowy Panamerican Finance Bank Corporation, as proposed by Dr Frischmann, and by 9 May it was (according to Mr Mohandes) "very upset". This reaction had hardened further by 14 May (as recorded in paras 121 to 130 of the judgment of the Royal Court).

40. Nevertheless NIOC waited a further month (during which the Kuala Lumpur meetings took place) before sending the 15-day letter (and NIOC subsequently granted two short extensions of this period). NIOC's apparent indulgence towards

PFE was no doubt largely a matter of self-interest; it had devoted a lot of time and effort to examining PFE's proposals, and US sanctions were having the effect of reducing the number of companies interested in bidding for the contract if PFE fell out. The practical effect was that PFE was still the preferred bidder, although with NIOC increasingly impatient, until about the end of May. Then PFE's position seems to have deteriorated very rapidly (on 29 May Mr Mohandes stated in a fax to Dr Frischmann, "So today and tomorrow are your last in this game.") Its position was not retrieved by the meetings in Tehran between 22 and 24 June 1997. Their Lordships have already quoted (in para 30 above) the Royal Court's assessment of the position as at the latter date.

41. The Royal Court also made a finding as to NIOC's position during the first week of July (para 306):

> "In the course of that weekend [5-6 July 1997] NIOC decided that they were no longer prepared to deal with Pell Frischmann on an exclusive basis – or, in all probability, at all; they did not include them in the list of selected contractors who were going to be invited to re-bid; and they required Pell Frischmann to collect the performance bond previously lodged with them."

The Court of Appeal concurred in this (para 137):

> "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."

In reaching this conclusion the Court of Appeal had to deal with a new issue as to whether the NIOC had agreed (at some time before 5 June 1997) to make the terms of the bond less stringent: the Court concluded that the evidence for this was "of very poor quality".

42. The Court of Appeal also dealt separately (paras 190-194) with the issue of exclusivity ("which according to the Royal Court meant that NIOC was still holding the service contract open for Pell Frischmann alone)". The Royal Court considered it self-evident that exclusivity (in that sense) was commercially material to the buy-out agreement that was being negotiated during the first week of July 1997. The Court of Appeal concurred in that view, relying on the draft agreement prepared by PFE's solicitors, and concluding (para 193):

> "Indisputably, the message in the 7 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 sub-stratum of the buy-out had gone. In our view, the release of the obligations of [BVE] and Bakrie under their respective confidentiality agreements was nothing more than an inevitable and necessary concomitant."

That passage seems to refer primarily to paras 329 and 330 of the Royal Court's judgment (para 329 refers to "the fact that the fundamental premise of the buy-out agreement had disappeared by 7 July (if not before)"). As will appear, their Lordships are unable to agree with the conclusion in the last sentence of the passage.

Damages: some common ground

43. Before discussing some more general issues relating to damages their Lordships note that there are two potentially controversial issues as to damages on which PFE does not challenge the Court of Appeal's approach. One is the time at which damages should be assessed; the other is whether damages should be separately assessed for breaches of clauses 3 and 6 of the confidentiality agreements (obligation to work exclusively with PFE, and not to approach NIOC without PFE's consent), on the one hand, and breaches of clause 4 (confidential information) on the other hand.

44. On the basis of concurrent findings below (but disregarding the Royal Court's finding of a new tripartite agreement) BVE and Bakrie committed breaches of their obligations under the confidentiality agreements on various dates between 27 May 1997 (when Mr De Boni of BVE wrote to Dr Hosseinian of NIOC) down to 28 July 1997 (when BVE and Bakrie entered into a service contract with NIOC). There may have been further theoretical breaches as well, but for practical purposes no one argued for assessment at a date after 28 July 1997.

45. The Royal Court (concerned with damages for breach of confidence only) took 28 July 1997 as the appropriate date (para 404). The Court of Appeal took the same view (para 243):

> "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 July 1997 and possibly beyond. It would be illogical to assess them at an artificial mid-point in the factual sequence."

PFE might have been expected to have argued for part at least of the damages to be assessed before exclusivity had been lost, on the basis that its bargaining position was stronger. But the appellant's written case (paras 85 to 87) opts for 28 July 1997 as "the natural point on which to assume a negotiation", adding (para 87),

> "that Pell Frischmann had lost exclusivity by then would not have mattered."

Wrotham Park Damages

46. In their written and oral submissions to the Board both sides (following the lead given by the courts below) made frequent references to "*Wrotham Park* damages" (see *Wrotham Park Estate Co Ltd v Parkside Homes Ltd* [1974] 1 WLR 798 – "*Wrotham Park*"). That may be a convenient shorthand expression, but it can become misleading if it is not made clear (as it was not always made clear in the courts below) whether it refers to

(1) every type of compensatory damages which exceed the actual financial loss caused to the claimant by an actionable breach of duty; or
(2) damages awarded (in lieu of specific performance or an injunction) under the jurisdiction created by section 2 of the Chancery Amendment Act 1858 ("Lord Cairns's Act"); or
(3) Damages awarded under Lord Cairns's Act in respect of a non-proprietary breach of contract (that is, a breach of contract not involving the invasion of a property right).

The expression is probably most helpful as a description of the second, intermediate category, which includes but is not limited to the third, narrow category into which this appeal falls. Both courts below seem to have assumed without argument that the jurisdiction conferred by Lord Cairns's Act is exercisable (presumably by analogy) by the Royal Court of Jersey. That view is given some slight support by the decision in *Benest v Langlois* [1993] JLR 117, in which numerous English authorities on breach of confidence were cited and followed (but the decision was concerned only with liability, not
remedy).

47. The topic of *Wrotham Park* damages has been discussed in a number of important judgments, some quite recent, of which the most illuminating (apart from the judgment of Brightman J in *Wrotham Park* itself) are those of Nourse LJ and Nicholls LJ in *Stoke on Trent City Council v W & J Wass Ltd* [1988] 1 WLR 1406 ("*Stoke*"); Sir Thomas Bingham MR and Millett LJ in *Jaggard v Sawyer* [1995] 1 WLR 269 ("*Jaggard*"); Lord Nicholls in *Attorney-General v Blake* [2001] 1 AC 268 ("*Blake*"); Mance LJ (and the short concurring judgment of Peter Gibson LJ) in *Experience Hendrix Plc v PPX Enterprises* [2003] FSR 853 ("*Experience Hendrix*"); Neuberger LJ in *Lunn Poly Ltd v Liverpool & Lancashire Properties Ltd* (2006) 25 EG 210 ("*Lunn Poly")* Warren J in *Field Common Ltd v Elmbridge Borough Council* [2007] EWHC
2079 (Ch); and Arden LJ in *Devenish Nutrition v Sanofi-Aventis* [2009] 3 All ER 27.

48. These instructive judgments are not completely consistent among themselves (especially as to the circumstances in which the court will award an account of profits, *alias* restitutionary damages, which is not an issue in the present appeal). But they establish the following general principles (much more fully developed in the judgments themselves):

(1) Damages (often termed "user damage") are readily awarded at common law for the invasion of rights to tangible moveable or immoveable property (by detinue, conversion or trespass): *Stoke* at pp1410-1412; *Experience Hendrix at* paras 18 and 26.

(2) Damages are also available on a similar basis for patent infringement and breaches of other intellectual property rights of a proprietary character: *Stoke* at p1412; *General Tire and Rubber Co v Firestone Tyre and Rubber Co Ltd* [1975] 1 WLR 819.

(3) Damages under Lord Cairns's Act are intended to provide compensation for the court's decision not to grant equitable relief in the form of an order for specific performance or an injunction in cases where the court has jurisdiction to entertain an application for such relief: Lord Nicholls in *Blake* at p281. Most of the recent cases are concerned with the invasion of property rights such as excessive user of a right of way (*Bracewell v Appleby* [1975] Ch 408, *Jaggard*). The breach of a restrictive covenant is also generally regarded as the invasion of a property right (Peter Gibson LJ in *Experience Hendrix* at para 56) since a restrictive covenant is akin to a negative easement. (It is therefore a little surprising that Lord Nicholls in *Blake*, at p283, referred to *Wrotham Park* as a "solitary beacon" concerned with breach of contract; that case was concerned with the breach of a restrictive covenant to which neither the plaintiff nor the defendant was a party; but the decision of the House of Lords in *Blake* decisively covers what their Lordships have referred to as a non-proprietary breach of contract.)

(4) Damages under this head (termed "negotiating damages" by Neuberger LJ in *Lunn Poly* at para 22) represent "such a sum of money as might reasonably have been demanded by [the claimant] from [the defendant] as a *quid pro quo* for [permitting the continuation of the breach of covenant or other invasion of right]" (*Lunn Poly* at para 25).

(5) Although damages under Lord Cairns's Act are awarded in lieu of an injunction it is not necessary that an injunction should actually have been claimed in the proceedings, or that there should have been any prospect, on the facts, of it being granted: Millett LJ in *Jaggard* at p285 (but cf at p291); Lord Nicholls in *Blake* at p282; Chadwick LJ in *World Wide Fund for Nature v World Wrestling Federation Entertainment Inc* [2008] 1 WLR 445, para 54. This point was not raised in argument in the appeal but is pertinent since there was such a long delay before PFE issued the order of justice commencing these proceedings.

49. Several of the recent cases have explored the nature of the hypothetical negotiation called for in the assessment of *Wrotham Park* damages. It is a negotiation between a willing buyer (the contract-breaker) and a willing seller (the party claiming damages) in which the subject-matter of the negotiation is the release of the relevant contractual obligation. Both parties are to be assumed to act reasonably. The fact that one or both parties would in practice have refused to make a deal is therefore to be ignored: *Wrotham Park* at p815, *Jaggard* at pp282-283. This point is material in

the present case since on the concurrent findings of the courts below Dr Frischmann, the directing mind of PFE, was a very determined (even a recklessly determined) negotiator (see especially the judgment of the Royal Court at paras 110-111 and 411-412).

50. Another issue is how far the court is entitled, in its assessment of *Wrotham Park* damages, to take account of events occurring after the time at which the hypothetical negotiation takes place (and in particular, to take account of how profitable the outcome has been for the contract-breaker). This issue sometimes tends to get confused with the wider issue of whether the court is awarding compensatory or restitutionary damages. Their Lordships consider that the right approach is that of the Court of Appeal in *Lunn Poly*, in which Neuberger LJ observed, after citing the judgment of Mr Anthony Mann QC in *AMEC Developments Ltd v Jury's Hotel Management (UK) Ltd* (2001) 82 P & C R 22, paras 11-13:

> "27 It is obviously unwise to try to lay down any firm general guidance as to the circumstances in which, and the degree to which, it is possible to take into account facts and events that have taken place after the date of the hypothetical negotiations, when deciding the figure at which those negotiations would arrive. Quite apart from anything else, it is almost inevitable that each case will turn on its own particular facts. Further, the point before us today was not before Brightman J or before Lord Nicholls in the cases referred to by Mr Mann.
>
> 28 Accordingly, although I see the force of what Mr Mann said in [13] of his judgment, it should not, in my opinion, be treated as being generally applicable to events after the date of breach where the court decides to award damages in lieu on a negotiating basis as at the date of breach. After all, once the court has decided on a particular valuation date for assessing negotiating damages, consistency, fairness, and principle can be said to suggest that a judge should be careful before agreeing that a factor that existed at that date should be ignored, or that a factor that occurred after that date should be taken into account, as affecting the negotiating stance of the parties when deciding the figure at which whey would arrive.
>
> 29 In my view, the proper analysis is as follows. Given that negotiating damages under the Act are meant to be compensatory, and are normally to be assessed or valued at the date of breach, principle and consistency indicate that post-valuation events are normally irrelevant. However, given the quasi-equitable nature of such damages, the judge may, where there are good reasons, direct a departure from the norm, either by selecting a different valuation date or by directing that a specific post-valuation-date event be taken into account."

51. In a case (such as *Wrotham Park* itself) where there has been nothing like an actual negotiation between the parties it is no doubt reasonable for the court to look at the eventual outcome and to consider whether or not that is a useful guide to what the parties would have thought at the time of their hypothetical bargain. But in this case

the parties clearly expected, as is apparent from their negotiations, that the contract with NIOC would be much more profitable than it turned out to be. For that reason, it is unnecessary to give a detailed account of the actual outcome. The Court of Appeal summarised the outcome (para 254 (ii)) by observing that even on PFE's case BVE's eventual profit was between $1m and $1.8m.

52. Instead, PFE has argued, the damages should reflect the actual negotiations which took place (and were very nearly brought to a conclusion) at the end of June 1997. BVE was, as already mentioned, willing to pay $3m on the conclusion of a service contract with NIOC and further sums of $2m, $2.5m and $2.5m linked to "early production" and "first production" as defined in the contract, the last payment also being conditional on the inclusion in the project of a submarine pipeline. BVE has argued that this offer ceased to have any relevance as soon as PFE lost exclusivity. PFE's position was that its loss of exclusivity was irrelevant, because the nearer BVE and Bakrie came to signing a deal with NIOC, the more valuable became PFE's power of veto (even if its value was by then only nuisance value).

53. In their Lordships' opinion neither of these extreme positions is correct. By the beginning of July 1997 PFE had not merely lost exclusivity but had irretrievably become *persona non grata* with NIOC; it had nothing to assign to BVE and Bakrie, either in terms of legal rights or in terms of commercial goodwill; its endorsement carried no weight with NIOC. It retained contractual rights to prevent BVE and Bakrie entering into direct negotiations with NIOC, and from using confidential information for that purpose, but those rights were of a negative nature. They did not reflect or enhance the value of PFE's interest in the project because PFE no longer had any such interest. A willing seller, acting reasonably, would have recognised that an excessively "dog in the manger" attitude would be counterproductive. At the same time BVE and Bakrie, as willing buyers acting reasonably, would have accepted that even negative rights must be bought out at a proper price, and that unless they were bought out, the project could not proceed at all.

54. A further factor to be considered is PFE's extraordinary and unexplained delay in bringing proceedings. The order of justice was not issued in the Royal Court until 5 January 2004, by which time its claim would have been statute-barred in most jurisdictions. The Royal Court attached great weight to this point in refusing any award of *Wrotham Park* damages (para 337). In their Lordships' opinion it was an error to treat the delay as decisive. In *Wrotham Park* Brightman J took account of the estate company's failure to act promptly in complaining about the breach of covenant. In this case PFE did complain promptly about breaches of the confidentiality agreement, and BVE's own documents show that it was conscious of the possibility of its liability for breach of contract. PFE's delay in commencing proceedings meant that it had no prospect at all of obtaining injunctive relief, but that is not fatal to an award of damages under Lord Cairns's Act, as already noted. Nevertheless the extraordinary delay is a reason for moderation in assessing damages of what Neuberger LJ called a "quasi-equitable nature."

Conclusions as to damages for breach of contract

55. Their Lordships see some force in PFE's submission that the Court of Appeal's assessment of *Wrotham Park* damages was rather confused and inconsistent. It started from three principles set out in paras 243 to 245 of its judgment: that the assessment should be made as at 28 July 1997; that it should be on the basis that PFE had lost exclusivity and that therefore the buy-out agreement that PFE and BVE were on the point of reaching was of no relevance; and that damages should be assessed as a single global figure. The first and third points, as already noted, are common ground (although PFE argues that the Court of Appeal did not follow its own direction as to global assessment). But the second point is, their Lordships consider, put too high. The negotiated buy-out figure was no longer conclusive, or anything like conclusive, but it was going too far to say that it was of no relevance. It was still relevant as contemporaneous evidence of BVE's and Bakrie's view of the likely profitability of the Balal project, and the amount that they were prepared to pay to participate in it.

56. The Court of Appeal then discussed (paras 249 and 250) the value of the confidential information on its own. This passage is, with respect, rather confused, as appears from the opening sentence of para 251, which their Lordships regard as a puzzling *non sequitur:*

> "For these reasons, the starting point in this case can legitimately be taken as being the cost of producing the information."

That was an error of principle. The critical point was that the confidentiality agreements gave PFE a power of veto which stood between its erstwhile collaborators and what they saw as a valuable opportunity. The Court of Appeal did not satisfactorily explain why it considered that the amount of the damages (£500,000) awarded by the Royal Court for breach of confidence (alone) was too high, or its own conclusion (paras 255-257) that £500,000 was the appropriate global figure for the entire damages.

57. These paragraphs suggest that the Court of Appeal saw the breaches of clauses 3 and 6 of the confidentiality agreements as adding something, but not anything very significant, to the total damages. This was perhaps reflective of the Court's view (para 193 of its judgment, quoted in para 42 above) that the release of the obligations was "nothing more than an inevitable and necessary concomitant" of the loss of exclusivity. That too was an error of principle. It brushed aside the continuing importance of those obligations, even though their value to PFE was a negative nuisance value. It significantly understated the commercial value of PFE's veto.

58. For these reasons their Lordships consider that the Court of Appeal, like the Royal Court, erred in principle in its approach to the assessment of damages, and that the sum of £500,000 awarded by each court is significantly too low. Their Lordships are reluctant to refer back the assessment of damages. These proceedings have already been protracted and costly enough. It is better for the Board to make its own

award, relying on the concurrent findings in the courts below. The award of damages is best made in United States dollars, the currency of the international oil trade in which all the negotiations between all parties were conducted. Taking into account all the factors already mentioned, their Lordships conclude that the appropriate figure is $2,500,000, with simple interest at the rate and from the date directed by the Royal Court. All the respondents to the appeal are to be jointly and severally liable for the damages and interest.

The tort claim

59. There have been concurrent findings dismissing PFE's claims alleging that BVE and Bakrie were parties to a dishonest conspiracy. PFE has nevertheless included in its grounds of appeal a claim based on "unlawful means" conspiracy, asserting that each of BVE and Bakrie induced or procured the other to commit a breach of contract (of one or other of the confidentiality agreements). The Royal Court peremptorily dismissed this part of the case (para 360):

> "Even if we are wrong in these conclusions and [BVE] and Bakrie were in breach of their respective confidentiality agreements, it would be wholly artificial to speak of each one having procured the breach of the other (another way in which [PFE] puts its many claims in tort). Each entity was well capable of making its own decision for itself and no doubt did."

The Court of Appeal endorsed this conclusion (para 269).

60. Their Lordships also endorse that conclusion as plainly correct. PFE's case on conspiracy failed completely, and it cannot be revived by that sort of artificial respiration. It is unnecessary to consider the further obstacles in the way of this ground of appeal, but there are several: that there was no intention on the part of BVE or Bakrie to cause loss (see especially Lord Hoffmann in *OBG Ltd v Allan* [2008] 1 AC 1, para 62); that actual loss (not merely compensation by way of *Wrotham Park* damages) would have had to be proved; and that any damages would merely duplicate the damages for simple breach of contract.

Conclusion

61. Their Lordships will therefore humbly advise Her Majesty that the appeal should be allowed, to the extent of substituting an award of $2,500,000 as damages for breach of contract, with interest and joint and several liability as already mentioned. The parties have 14 days in which to make written submissions as to costs.