

Case No: HT-02-238

Neutral Citation No: [2004] EWHC 695 (TCC)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
TECHNOLOGY AND CONSTRUCTION COURT

St. Dunstan's House,
133-137, Fetter Lane,
London, EC4A 1HD

Date: 21 April 2004

B e f o r e :

HIS HONOUR JUDGE RICHARD SEYMOUR Q.C.

FILOBAKE LIMITED

- and -

(1) RONDO LIMITED

(2) FRAMPTON INTERNATIONAL LIMITED

Simon Williams (instructed by Pittalis & Co. for the Claimant)

Bruce Gardiner (instructed by Carter Bells for the First Defendant)

Michael Roberts (instructed by Hegarty & Co. for the Second Defendant)

Cl

Defendants

JUDGMENT

H.H. Judge Richard Seymour Q. C. :

Introduction

1.

The Claimant company, Filobake Ltd. ("Filobake"), was incorporated on 10 July 1998. The business of Filobake is the manufacture of pastry products. The pastry which Filobake produces is not comestible pastry items but rather pastry in a prepared form, such that it is ready for baking by a customer once it has been made into some sort of case and filled.

2.

A type of pastry in the production of which Filobake specialises is filo pastry. Filo pastry is a type of pastry used especially in Greek and Lebanese cuisine. A characteristic of filo pastry is that it is very thin and used in layers. Greek filo, as I understand it, is thinner than Lebanese, that being the principal, perhaps the only, distinction between the two. A type of pastry which has some similarities with filo pastry, although it is thicker, and which is particularly used in Arab and Indian cuisine is samosa pastry. As the name suggests, samosa pastry is used for the making of samosas. As is well-known, samosas are triangular pastry parcels filled with vegetables or meat. From the time it

commenced business Filobake produced some samosa pastry. However, from about the summer of 1999 Filobake was interested in expanding its capacity to produce prepared samosa pastry.

3.

Apparently as a means of seeking to attract customers for samosa pastry Filobake prepared a specification of samosa pastry which it was able to produce. That specification identified the ingredients and proportions of the pastry as 76% flour, type unspecified, 20% water, 1.4% sunflower oil, 1% wheat starch, 1% salt and 0.6% potassium sorbate. The moisture content of the pastry was said to be 26% +/- 0.5%. The specification indicated that the pastry could be supplied refrigerated or frozen. When precisely the specification was produced and to whom it was circulated did not emerge in evidence.

4.

In a sense Filobake is a joint venture between members of the Charilaou family and members of the Pittalis family. In terms of shareholdings in the company the Pittalis family is now, effectively, by far and away the dominant partner in the venture. Mr. Harry Charilaou and his brother, Mr. Kypros Charilaou, known as Mr. Gibb Charilaou, each currently hold 18,750 of the issued £1 shares in the company. A company called Venture Promotions Ltd. ("Venture") holds 50,000 of the issued £1 shares in the capital of Filobake, while a company called Jomaro (UK) Ltd. ("Jomaro") holds 113,500 of the issued shares, and is thus the controlling shareholder. The directors of Filobake are, and have been at all times since the company was incorporated, Mr. Kyriacos John Pittalis, Mr. Marios Robert Pittalis, Mr. Harry Charilaou and Mr. Kypros Charilaou. Mr. Kyriacos Pittalis is the largest single, and controlling, shareholder in Jomaro and a director of that company. Mr. Marios Pittalis is also a director of, and a shareholder in, Jomaro. The other shareholders in Jomaro are all members of the Pittalis family. They are, respectively, Mr. Erato Pittalis, Mr. Roger Royiros Pittalis and Mr. John Kyriacos Pittalis. Mr. Kyriacos Pittalis and Mr. Marios Pittalis are also directors of Venture. Mr. Marios Pittalis and Mr. John Pittalis are sons of Mr. Kyriacos Pittalis.

5.

Mr. Harry Charilaou and Mr. Kypros Charilaou are sons of Mr. George Charilaou. As I understand it, Mr. George Charilaou was born in Cyprus and was there involved in the manufacture of pastry products. He told me that he was a master baker and experienced not only in the production of bread, but also cakes. Mr. George Charilaou came to the United Kingdom in 1955. In about 1980 he set up a business producing filo pastry by hand. Mr. Harry Charilaou and Mr. Kypros Charilaou became involved in that business. Latterly, at any rate, the family business had been carried on through the medium of a company called Sunchase Ltd. ("Sunchase") from premises in Kentish Town in London.

6.

In about May 1998 Mr. Harry Charilaou became involved in negotiations on behalf of Sunchase for the acquisition of the assets of the business of a company called Pittas Filo Products Ltd. ("Pittas"). Those assets included a pastry production line ("the Existing Line"). Pittas was the tenant of premises known as and situate at Units B, C and G, 17, Queensway, Enfield, Middlesex ("the Original Premises"). The freehold owner of the Original Premises was a company called Qlodge Ltd. ("Qlodge"). Mr. Kyriacos Pittalis and Mr. Marios Pittalis are, and were at all times material to this action, directors of Qlodge. It was in the context of discussions concerning a possible assignment of the lease of Pittas of the Original Premises that Mr. Harry Charilaou came into contact with Mr. Kyriacos Pittalis, although Mr. George Charilaou and Mr. Kyriacos Pittalis had been acquainted for many years. Out of the initial contact between Mr. Harry Charilaou and Mr. Kyriacos Pittalis

developed the idea of the Charilaou and Pittalis families co-operating in the establishment and operation of Filobake.

7.

Although he is the controlling shareholder, and a director, of a number of companies, Mr. Kyriacos Pittalis is by profession an accountant. From 1957 he has practised as such under the style K.J. Pittalis & Co. Mr. John Pittalis, as well as being a shareholder in Jomaro, is a chartered accountant and, now, the sole principal in the firm of K.J. Pittalis & Co. Mr. Kyriacos Pittalis is now a consultant to the firm, having retired as a partner. The firm of K.J. Pittalis & Co. is the accountant to, and auditor of, Filobake.

8.

Mr. Marios Pittalis is a solicitor. He and Mr. Roger Pittalis, who is also a solicitor, are the partners in the firm of Pittalis & Co. The firm of Pittalis & Co. acted as solicitor to Filobake both in this action and in connection with the matters which have given rise to this action.

9.

The day to day running of Filobake was initially undertaken by the Charilaou family. However, in August 1999 Mr. Stelios Tsangarides, who is an accountant by profession, was engaged as a part-time office manager. As I understand it, the members of the Charilaou family, in particular, Mr. Harry Charilaou and Mr. Kypros Charilaou, continued to look after the production side of the business. Mr. Kypros Charilaou no longer works on a day to day basis for Filobake, having diversified into painting and decorating. In about April 2001 Mr. Vasos Pittalis, who is a brother of Mr. Kyriacos Pittalis, became production manager of Filobake. The background of Mr. Vasos Pittalis is in the clothing industry and prior to taking up his appointment with Filobake he had no experience of the pastry business. Consequently even after his appointment the pastry-making expertise provided at management level within Filobake continued to come from Mr. Harry Charilaou and his brother.

10.

Filobake commenced trading in October 1998. It traded under the name "Apollo" . In the period up to 30 June 1999, the date to which its initial accounts were made up, Filobake's turnover was some £96,189, producing a gross profit of £41,080 and a loss on ordinary activities before taxation of £13,958. However, there was confidence in the future, not least because Mr. Harry Charilaou had identified expanding the company's capacity to produce prepared samosa pastry as a development opportunity. It was against this background that the question arose of how best to seek to exploit that perceived opportunity.

11.

Seewer AG ("Seewer") is a Swiss company which specialises in the production of pastry and dough processing equipment. The equipment in question includes various elements which can be assembled into a production line. In particular, it includes dough or pastry extruders, that is to say, machines by means of which dough or pastry inserted in the top can, as a result of passing through rollers, be produced at the bottom as a continuous sheet of a given width and thickness. In addition, Seewer produces machines which can fold sheets of dough or pastry on top of one another, a process called laminating, as well as machines to cut dough or pastry, laterally or longitudinally, and machines in which prepared dough or pastry can be packaged. It also produces conveyor belts which can link the various stages in the process of converting the raw dough inserted into an extruder into packaged prepared dough or pastry. As I understand it, Seewer, which has been in existence for some fifty years or so, for many years used the brand name "Rondo" for its products. In about 1983 Seewer

established an English subsidiary, Rondo Ltd. ("Rondo"), to sell, supply and instal its products in the United Kingdom and elsewhere. Rondo is the first defendant in this action.

12.

In about 1997 Seewer took over an Italian company, Doge Food Processing Machinery s.r.l. ("Doge"), which was in a similar line of business. After the take-over machines produced by Doge seem to have been marketed under the brand name "Rondo Doge" .

13.

It appears that in the course of producing prepared pastry or dough for sale to final users it is sometimes necessary to heat the pastry or dough to set the pastry structure and reduce the moisture content. This heat treatment is not baking, although it seems that it is sometimes, inaccurately, described as cooking. Typically the heat treatment stage, if it occurs, lasts a matter of a few seconds. For the purpose of heat treatment an oven can be incorporated into a production line with elements of the types manufactured by Seewer. Seewer does not, however, manufacture such ovens, and Rondo does not supply them. It may be necessary, in a case in which pastry or dough has been heat treated on a production line in an oven, thereafter to cool it again before it passes down the line to the packing station. For this purpose coolers can be installed in a production line including elements produced by Seewer, but again Seewer does not manufacture such coolers and Rondo does not supply them. The reason for cooling heat-treated pastry or dough is simply to enable it to be handled comfortably at the packing station. Thus the degree of cooling required is simply to a temperature in the region of the ambient temperature of the packing station, and what are described as coolers are in fact simply fans, appropriately mounted to perform their desired function.

14.

A company which does manufacture and sell both ovens for the heat treatment of dough or pastry, and coolers, is Frampton International Ltd. ("Frampton"). Frampton is the second defendant in this action.

15.

As I shall explain, Filobake purchased from Rondo various elements, in particular a pastry extruder, a laminating machine, various cutters, and a number of conveyor belts, which were intended to be assembled, together with an oven and a cooler supplied by Frampton, to form a production line ("the New Line") for the production of samosa pastry. Filobake's case in this action was, shortly, that it could not produce samosa pastry, or at any rate acceptable samosa pastry, using the New Line. That situation was said to be as a result of breaches on the part of Rondo and Frampton of their respective contracts with Filobake. So far as Rondo was concerned, it was also said to amount to a breach of duties of care which it was contended Rondo owed to Filobake. Filobake asserted that it had rejected both the equipment supplied by Rondo and that supplied by Frampton. It claimed damages in respect of its alleged losses, as well as return of the prices paid for the equipment supplied by Rondo and that supplied by Frampton.

16.

The case of both Rondo and Frampton in answer to that of Filobake was, essentially, that the equipment supplied by each was perfectly satisfactory and that any difficulty in using the New Line was the result of Filobake failing to use the equipment, and in particular the oven, properly, and/or failing to devise and to put into use a proper recipe for samosa pastry.

The negotiations leading to the contracts for the purchase of equipment from Rondo and Frampton

17.

In about February 1999 Rondo supplied to a customer in Saudi Arabia most of the component elements for a production line ("the Saudi Line") for the production of samosa pastry. The Saudi Line included an oven and coolers, but they were supplied by a Swedish company, Teflon Cooker Sweden AB ("Teflon").

18.

Mr. Terance Tredget is employed by Rondo as a salesman. In that capacity he had first met Mr. Harry Charilaou while the latter was based in Kentish Town. In about June 1999 Mr. Charilaou met Mr. Tredget when Mr. Tredget was visiting a neighbour of Filobake. Mr. Charilaou told Mr. Tredget of his interest in producing more samosa pastry. Mr. Tredget told Mr. Charilaou about the Saudi Line. From that point rather desultory discussions began as to the possibility of Filobake purchasing from Rondo elements for the New Line.

19.

The next significant step was the production by Rondo of a quotation, described as "Doge Thin Pastry Line Quotation to Dwg. F1717/9" dated 7 September 1999 ("the Original Quotation"). In the Original Quotation the equipment to which it related ("the Rondo Equipment") was set out as follows:-

" 1.

Conveyor belt made of polyurethane resin FDA approved. Working width 1.200mm. Electronic control with motor HP1. Stainless steel and aluminium structure. Other parts made of aluminium and plastic material. Conveyor equipped with internal and external scrapers with collecting containers.

2.

Conveyor belt with shaped listels crosswise to feed the extruder hopper. Complete with sensor for dough level control in the extruder hopper.

3.

Flour duster for dough bottom. Adjustable quantity and spraying width. Electrical operation with motor HP 0,50. Hopper capacity 15 dm³ approx. Parts containing product to be made of stainless steel or non toxic material. Stainless steel and aluminium structure.

4.

6 roller dough extruder. Working width 1.000mm.

The unit completed with:

-

Dough stocking hopper with capacity of about 100 lt, completed with 2 hexagonal feeding rollers in stainless steel.

-

2 laminating rollers in stainless steel AISI 304 diameter 200 mm.

-

2 laminating rollers in stainless steel AISI 304 diameter 140 mm.

-

2 laminating rollers with similar features as above.

The pair of rollers can be singularly adjusted through proper handwheel.

Independent operating with 4 varispeeds electronically controlled.

Structure in stainless steel and aluminium and chromed parts.

5.

Flour duster for dough top. As item no.3.

6.

Longitudinal laminating unit (Sheeter). Working width 1.200 mm.

Diameter of the two laminating rollers to be 220 mm made of stainless steel (solid rollers). Read-out electronic tachymetric control with motor HP2. Manual raising of the roller with reading on comparator. Aluminium structure, connecting parts made of chromed steel. Unit completes with dough infeed device and electric eye for automatic survey of the dough tension.

7.

Conveyor belt made of polyurethane resin, FDA approved. Working width 1.200 mm.

Other features as item no. 1.

8.

Shaft with 2 longitudinal cutting disc.

9.

Conveyor belt made of polyurethane resin, FDA approved. Working width 1.200 mm.

Other features as item no. 1.

10.

Linear cutters.

11.

Conveyor belt made of polyurethane resin, FDA approved, with reverse motion for folding. Working width 1.200 mm. Other features as item no. 1.

12.

Guillotine with electropneumatical operation. Length of cut to be programmed on the control panel and to be electronically controlled. Structure in aluminium and chromed steel. Stainless steel coverings.

13.

Conveyor belt made of polyurethane resin, FDA approved. Working width 1.200 mm. Other features as item no. 1.

14.

Guillotine with electropneumatical operation. Length of cut to be programmed on the control panel and to be electronically controlled. Structure in aluminium and chromed steel. Stainless steel coverings.

15.

Conveyor belt made of polyurethane resin, FDA approved. Working width 1.200 mm. Other features as item no. 1. "

Beneath the listing of the Rondo Equipment were a number of "Technical Features" . The only one which it is material to note was:-

" Production capacity: 15mt/min with thickness approx. 0,5 mm. "

The price quoted for the Rondo Equipment was £181,238 excluding Value Added Tax.

20.

A visit to the Doge factory in Italy was arranged in early October 1999 so that Mr. George Charialou and Mr. Kypros Charilaou could see equipment such as that included within the Rondo Equipment in operation. Mr. Tredget went with them. Although it was unclear exactly who made the note, there was put in evidence a note prepared within Filobake entitled "Trip to Italy" . The note included:-

" TEST MACHINE FOR

1. Filo

2. Lebanese

3. Samosa

We must mix our own dough to our own recipe. "

21.

Following the visit Mr. Tsangarides made a file note of a discussion which he had had with the Messrs. Charilaou about what had happened. A copy of that note was put in evidence. Save that he made the point that the samosa pastry ingredients were supplied by Doge, I do not think that Mr. Tredget was unhappy with the contents of the note. What it said was:-

" The ingredients used for the tests were taken from England by terry [sic] in his car and were the same ingredients used for our normal production.

The machine seen was about ten years old. Only the first part of the complete machine was seen i.e. the filo was produced but not cooked. The quality of the filo was generally good and up to our standards.

The machine speed was 15 meters per minute but according to Terry the machine in Saudi was running at 23 meters per minute.

SAMOSAS

The filo produced was 440 kilos pr hour. (based on first stage of process).

Basis of calculation.

32 kg flour + 14 kg water + 1 kg salt 1 kg oil (no cornflower for samosa) = 48 kg less 8 kg for offcuts and loss of weight in cooking = 40 kg net.

This process took 5.5 minutes.

The machine is capable of producing filo but it was not possible to ascertain the speed as an extra set of rollers was needed to do this. It was not possible to see whether the machine would be able to fold the filo after it was produced.

The width of the roller can be increase [sic] by about 10% so that production will be increased by the same amount according to the engineer.

In order to keep up with the machine we will need an additional mixer. "

22.

Rondo then prepared a presentation document entitled "Presentation to Apollo Fillobake [sic] on Samosa's [sic] " dated 22 October 1999 which was sent to Filobake. The presentation essentially comprised photographs of the Saudi Line with explanatory text, a drawing and a section entitled "Samosa Setting & Recipe" . The recipe ("Recipe 1") set out as the ingredients 75 kg of flour, type unspecified, 25 kg of water, 1 kg of salt, 1 kg of potassium sorbate, 11 grams of beta powder and 6 kg of palm oil. There were then set out mixing times for a spiral mixer and for an upright mixer, but not times for any other sort of mixer. It was indicated that 10 kg of trimmings were added in the mixer for the last two minutes of the mixing. Thereafter the dough was left to rest for 30 minutes. A water temperature of 15 degrees C was recorded, as well as a flour temperature of 36 degrees C, with the same temperature for the dough. Average dough moisture content was said to be 31.78%, and "After Cooking" 25.8%. Oven temperatures were then set out, with cooker (that is to say, oven) speed, cooking time, and various details concerning dimensions. It seems to me that it is fairly obvious that the details given in the "Samosa Setting & Recipe" section of the presentation related to what actually happened on the Saudi Line rather than to some theoretical condition.

23.

At this point Mr. Harry Charilaou decided to involve Mr. Kyriacos Pittalis in the consideration of the Rondo Equipment. It was common ground that a meeting was arranged for 26 November 1999. That meeting was attended by Mr. Kyriacos Pittalis, Mr. Harry Charilaou and Mr. Tsangarides for Filobake, and by Mr. Michael Johnson, General Manager of Rondo, and Mr. Tredget for Rondo. At that meeting a further "Presentation on Samosa's [sic] " dated 26 November 1999 was handed over. Again it comprised annotated photographs - in fact it seems the same ones as in the previous presentation - of the Saudi Line. It included the same "Samosa Setting & Recipe" section as the earlier presentation. What was new was that it included, or was accompanied by, "Doge Thin Pastry Line Quotation to Dwg. F1717/9A" . In the light of the course matters in the event took, I need not dwell on that quotation. It was a quotation for only 13 of the 15 items comprised in the Rondo Equipment. It contained a note that, "The line with this configuration is for Samosa only" . That note did not appear on the earlier quotation and its significance seems to be that the Line with all 15 items of the Rondo Equipment was considered suitable for production of filo pastry as well as samosa pastry.

24.

It was common ground that Mr. Kyriacos Pittalis made notes during the meeting on 26 November 1999. A copy of those notes was put in evidence. They included:-

" Extra machinery needed

Oven Either operated by Gas or electric.

15 mtrs per minute production - suggest oven to cover for 20 mtrs.

Mixer - for 3 bags

Silo

Water Meter

Flow rub [sic - it was common ground that "wrap" was meant] machine with gas flash - cost between £80 - £100k

Stainless steel Tables

General matters

1. Space to accommodate m/c & other equipment

Length of machine - 19.2 metres per quotation

Extra length for additional filo element - 2.0 metres

Length for oven - 10.00 metres approx

Overall metres - 31.2 approx. "

It was common ground that the advice as to the speed of the oven came from Mr. Johnson or Mr. Tredget. A flow wrap machine is a packaging machine. Prepared pastry, unless it is to be utilised more or less immediately, needs to be treated in some way to prolong its useful life. Freezing is one form of such treatment. Another is gas flash. Gas flash is essentially a process by means of which air is removed from packaging. Although the relevant Filobake witnesses were rather vague about it, it seems to me to be clear from the terms of Mr. Kyriacos Pittalis's note that, as at the date of the meeting on 26 November 1999, the means of preserving the life of pastry produced on any equipment Rondo might supply which Filobake had in mind was gas flash. The length of the oven recorded in Mr. Pittalis's note was that of the combined oven and cooler in the Saudi Line.

25.

Matters did not progress quickly. Mr. Harry Charilaou seems to have been interested in showing samples of samosa pastry to possible customers to gauge their reactions. He appears to have thought that if they liked the pastry orders would inevitably follow, but, as I shall explain later in this judgment, there does not seem to have been any serious effort made to assess the likely demand for quantities of samosa pastry in excess of those which Filobake was able to produce on the Existing Line. In order to assist Mr. Charilaou's activities Mr. Tredget made available samples of samosa pastry produced on Rondo machinery at its premises in Chessington, Surrey. Mr. Harry Charilaou made a report to Mr. Tredget about how he was getting on in a facsimile transmission sent on 27 March 2000. He said, so far as is presently material:-

" ...this is the score, I have approached the to [sic] big boys and they are both very happy with the pastry. Terry we have now come to the stage that I have proved to my uncle [which Mr. Charilaou explained in his evidence was a reference to Mr. Kyriacos Pittalis, to whom he is not in fact related] that the customers are there, the situation this time is that the two big boys are seeking just a couple

of samples, Terry I know it is a pain in the neck, but I believe this is the last stop. Terry please find the following.

One of the big boys requires uncut pastry of the same spec' the nearest you can to 30x49 cm sheets, I believe this should be straight forward, and this must be done, now these I will put down on fax please try your best to get as many of these as possible. OK here it is as follows.

1) Size to remain as last sample, but if you could make one with reduced salt, but to put the balance back with lemon or citric acid, and a higher moist level about 0.1 more than the last sample, and one to be the same as the last, but again if you could higher the moist [sic] , Terry I can not stress how close we are now, and especially as soon as these samples can get to us we will know as well once and for all if and when we going [sic] to order the machine, at that I personally promise you, Terry thanks for everything mate and I believe this time we would have cracked it, cheers mate. "

Mr. Charilaou was unable in cross-examination to recall precisely who were the two "big boys" referred to in the facsimile transmission, but he thought they were probably Motu Ghosh Foods Ltd. ("Motu Ghosh") and UPB Products Ltd. ("UPB"). Motu Ghosh was an existing customer of Filobake for samosa pastry, but UPB was not.

26.

Mr. Harry Charilaou told me in cross-examination, and it seemed to be common ground, that there is no single recipe for samosa pastry which must be followed in all circumstances if the result is to be samosa pastry. Rather the position is that there are any number of different recipes. Which recipe a particular baker chooses to follow is a matter of personal taste and consumer demand. One well-established difference between samosa pastry types is that some produce a smooth surface on frying the finished samosa prior to eating, while others produce a bubbled surface. Whether the surface is smooth or bubbled after frying depends on the water content of the pastry. It appears from the terms of Mr. Charilaou's facsimile transmission of 27 March 2000 that an aspect of seeking to secure approval of samosa pastry samples offered was making pastry to a recipe which potential customers found attractive.

27.

As part of the continuing process of negotiations Rondo produced two further quotations, each dated 16 May 2000. The first was essentially the Original Quotation with a revised price, £209,500 plus Value Added Tax. The only difference in the description set out of the Rondo Equipment was that there were added to the description of item 9 the words, "with two flour duster for top and bottom dusting of thin pastry" . The second was essentially the quotation dated 26 November 1999 with a revised price, £173,790 plus Value Added Tax.

28.

The recollection of Mr. Johnson and Mr. Tredget was that the two quotations dated 16 May 2000 were handed over at a meeting on 26 May 2000. Whether that is so or not is not important, for it was not suggested that anything of significance to any issue which I have to decide was discussed at that meeting. In contrast there was an important meeting prior to the production by Rondo of a "Doge Thin Pastry Line Revised Quotation to Dwg. F1717/9" dated 30 June 2000 ("the Final Quotation") which led directly to the preparation of that document. Mr. Johnson and Mr. Tredget put the date of that meeting as 16 June 2000. Although it was common ground that there had been a meeting, and no real dispute about what was discussed at it, none of the relevant witnesses called on behalf of Filobake ascribed a date to it. The meeting was attended by Mr. Kyriacos Pittalis, Mr. Harry Charilaou and Mr. Stelios Tsangarides on behalf of Filobake, and Mr. Johnson and Mr. Tredget on behalf of Rondo. At the

meeting the principal issues discussed were the requirements of Filobake, articulated by Mr. Kyriacos Pittalis, for a reduction in the quoted price of the total package of the Rondo Equipment, a guarantee of performance and a firm delivery date. The Final Quotation described the Rondo Equipment exactly as in the Original Quotation, save that the words added to the description of item 9 in the quotation of 16 May 2000 again appeared. The stated production capacity remained as stated in the Original Quotation. Apart from a reduction in the price of the Rondo Equipment to a total of £195,000 plus Value Added Tax, the principal changes as between the Final Quotation and its immediate predecessor were the addition of a section entitled "Performance" and the inclusion of what were called "Samosa Recipe" and "Filo Recipe" .

29.

In the "Performance" section of the Final Quotation appeared this:-

" Samosa

The equipment detailed in this specification will be able to produce Samosa to the attached recipe as follows:-

Width 1000 mm

Speed 15 metres per minute

Thickness 0.5 mm

Capacity 440 kg per hour

Sheet Size 300 x 490 mm

Sheet Weight 90 grms "

The "Samosa Recipe" which was set out was simply this:-

"

10.000 kg	Flour (11.2 - 11.5 protein)
1.500 kg	Oil
0.200 kg	Salt
3.000 kg	Water Approx. depends on flour

For best results a dough relaxer should be added at ½% flour weight

(For ones used in Saudi was an American company called Beta Tab) "

In this judgment I shall call the recipe set out above "Recipe 2" .

30.

At the end of July 2000 – Mr. Tsangarides put the date as 20th , while Mr. Tredget put it as 27th , but the exact date does not matter – Mr. Tsangarides and Mr. George Charilaou visited the premises of Rondo in Chessington and observed a demonstration of a small production line which incorporated a small oven produced by Frampton. It seems that up to this point it had been envisaged that Filobake

would wish to incorporate both an oven and a cooler in the New Line, but that little, if anything beyond general discussion about those requirements, had occurred. Mr. Malcolm Fleming, Managing Director of Frampton, was also present. The demonstration was treated by the Filobake representatives as producing satisfactory pastry. Mr. Fleming told me in cross-examination, and I accept, that he noted the speed of the conveyor through the demonstration oven and the temperature which heat-treated the pastry which was declared by Mr. George Charilaou to be satisfactory. Mr. Fleming told me that he was then asked by Mr. Harry Charilaou to produce a quotation for an oven with a speed of up to 20 metre per minute and a cooler. Such quotation was sent by Mr. Fleming to Mr. Harry Charilaou under cover of a facsimile transmission dated 7 August 2000. The quotation ("the Frampton Quotation") began with a descriptive section. There followed a table of dimensions (the oven having an overall length of 3700 millimetres and a chamber length of 2500 millimetres), a statement of prices, and indications of terms, delivery and warranty. For present purposes what are material are the descriptive section, the prices, terms, provisions as to delivery and the warranty. Those parts of the Frampton Quotation were to this effect:-

" I would suggest an oven model C-1-8-P/S.

The grill would have a 1000 mm wide close mesh stainless steel belt passing through a 2500 mm long cooking chamber. Frampton patented slab elements would be mounted above and below the belt. The upper and lower elements would have independent temperature control. The oven would be wired to give three independent zones along its length. This would enable sections to be turned off if a lower production rate were required. For example, if the production rate required was only 14 m/minute, then 1/3 of the heaters could be turned off.

A geared three-phase motor, the speed of which would be controlled by an inverter linked up to Rondo's control panel would drive the belt. This would mean that the speed of the oven and cooler would match that of the rest of the line and changing the speed of the Rondo line would change the speed of the oven and cooler. The oven and cooler would be capable of drying and cooling your product at up to 20 m/minute.

The cooler would comprise a stainless steel chamber 2000 mm in length through which would pass a 1000 mm wide wire mesh belt. A number of cooling fans mounted at one end of the cooler would draw air into the chamber through filters, blow it over the surface of the product and exhaust the air at the exit end. The conveyor would be linked to the oven conveyor to ensure that both conveyors travel at the same speed.

...

PRICING

The ex works price for the oven model C-1-8-P/S would be £24,800 exc VAT.

The price for the cooler model FC-1-6-P/S would be £6,800 exc VAT.

Delivery, installation and commissioning would be £1,050 exc VAT.

TERMS

35% deposit with order, 55% on delivery and the 10% retention to be paid within 14 days of satisfactory performance trials.

DELIVERY

Delivery would be 8-10 weeks from receipt of order and deposit.

WARRANTY

The oven and cooler would carry a two-year or 4000 hour (whichever is reached first) parts and labour warranty. ”

31.

It appears that Filobake was in fact interested in seeking to fund the purchase of the component elements of the New Line, and, indeed other equipment which it was contemplating acquiring, through HSBC Equipment Finance (UK) Ltd. (“HSBC”). To that end Mr. John Pittalis prepared a business report (“the Business Report”) which he sent to Mr. Paul Meredith of HSBC under cover of a letter dated 15 September 2000. The Business Report included both a cashflow forecast and a projected profit and loss account for Filobake for the year ended 31 March 2002. The projected profit and loss account anticipated sales of £536,000, gross profit of £309,040 and a net profit of £181,480. The latest accounts of Filobake available as at the date of Mr. Pittalis’s letter were those for the year ended 30 June 2000. A copy of the balance sheet of Filobake as at 30 June 2000 was included with the material sent to Mr. Meredith. The profit and loss account for the year ended 30 June 2000 was not sent, but that in fact showed a turnover of £245,601 for the year, yielding a gross profit of £104,943 and an operating profit of £14,410. Great things were therefore anticipated as likely to follow from the introduction of the New Line.

32.

The letter dated 15 September 2000 included the following:-

“ 1. Our business report concerning the acquisition of the new production machine is attached for your attention.

This includes a cash flow forecast together with a projected profit and loss account for twelve months following the installation of the machine together with associated notes.

We have only projected additional sales doubling the current production to 10,000 kilos per week whereas the machine is capable on just a normal shift of producing 18,000 kilos per week.

I have discussed in detail with the sales team at the company and they believe that additional sales of 18,000 kilos will be reached. They have had numerous enquiries from existing and potential customers but are being cautious as the existing machine does not have the capability.

The additional 5,000 kilos have a projected average selling price of £1 per kilo compared to the current average of £1.20....

7. Various numerous third parties have expressed an interest in the products, mainly based on verbal discussions between the working directors and potential customers. Based on our recent visit to the premises and listening to such discussions there appears to be a tremendous interest particularly once the new machine and its capabilities are proven. Interest has been received from Dalepak, Booker, Bake a Paste Limited, various manufacturers of samosas and from existing customers. ”

Mr. John Pittalis told me in cross-examination that the persons described in his letter as “the sales team at the company” were in fact Mr. Harry Charilaou and Mr. Tsangarides, especially Mr. Charilaou. Notwithstanding the references to interest from Dalepak, Booker and Bake a Paste Ltd., notes to the cash flow forecast sent under cover of the letter made clear that the anticipated increase in sales of 5000 kilograms per week was expected to come from existing customers.

33.

Mr. Meredith replied positively to Filobake's approach for funds with an offer enclosed under cover of a letter dated 28 September 2000. In the meantime, without waiting to learn the outcome of the approach to HSBC, on 21 September 2000 Mr. Kyriacos Pittalis had accepted the offer contained in the Final Quotation on behalf of Filobake by appending his signature to that document.

34.

At the time Mr. Kyriacos Pittalis signed the Final Quotation no definite arrangement had been made for the acquisition of an oven or a cooler. That matter does not seem to have been pursued with any particular urgency. A question arose as to whether there was sufficient space in the New Line as proposed to be installed in the Original Premises for an oven of the dimensions proposed in the Frampton Quotation. That led to Frampton producing a further quotation, dated 20 December 2000, for a rather shorter oven, but a slightly longer cooler. Whether or not it was the production of that further quotation that prompted him, Mr. Harry Charilaou at length dealt with the matter of an oven and a cooler in a facsimile transmission dated 4 January 2001 to Mr. Fleming in which he said:-

“ This is to confirm our order for an oven and cooler as pre [sic] your quotation of 7 August 2000 and subsequent drawings and faxes to us and Rondo for a price of £32650 plus vat to include delivery, installation and commissioning.

Delivery to be at the same time as the Rondo machine which is expected to be delivered mid March but please liaise with Terry on this. ”

35.

In this judgment I shall call the oven ordered by Filobake from Frampton “the Oven” and the cooler ordered “the Cooler” . The Oven as delivered was in fact of the dimensions set out in the quotation dated 20 December 2000, namely 3250 millimetres long, but the chamber was still 2500 millimetres long.

Delivery and events thereafter until 11 September 2001

36.

The Rondo Equipment, the Oven and the Cooler were all delivered on 17 March 2001. In order to facilitate the installation of the New Line Filobake took a lease of additional accommodation adjacent to the Original Premises. That accommodation was Unit A, 17, Queensway, Enfield (“Unit A”). Unit A was, it seems, let at the beginning of 2001, but the tenant, Mr. Vasos Pittalis, was persuaded, by a payment by Filobake of a sum of £22,000 and his employment thenceforth as production manager of Filobake, to vacate. Unit A was then demised to Filobake by a lease dated 2 April 2001 for a term commencing on 25 March 2001 and expiring on 23 June 2013. The initial rent reserved was £12,000 per annum. It appears that the Rondo Equipment, the Oven and the Cooler were installed without any real difficulty in the space available.

37.

Prior to the installation of the New Line, on about 23 February 2001, Mr. George Charilaou and Mr. Vasos Pittalis had been to the Doge factory in Italy to inspect the Rondo Equipment after manufacture. They saw it operating, but not with the Oven or the Cooler. They pronounced themselves very happy with the performance of the Rondo Equipment.

38.

It seems that it was during and immediately after commissioning of the New Line and its component elements that problems were encountered. Mr. Harry Charilaou and Mr. Tsangarides both told me that the Rondo Equipment seemed to function satisfactorily, but that there were problems with the Oven and the Cooler. At one point during commissioning by Rondo personnel a shaft became detached within the Oven, but it was possible to put it back fairly easily. Thereafter, while Mr. Johnson of Rondo was testing the New Line, banging was heard coming from the Oven. He sent a facsimile transmission to Mr. Fleming about that on 18 April 2001:-

“ We appear to be in some trouble with the Oven at this customers’ [sic]

After refitting the shaft, I mentioned in our telephone conversation, we completed the Samosa run. However, when we started up for the thin pastry trials we had a number of banging noises from the oven and it was switched off.

Filobakes problem is that they have an important customer audit on Monday 23rd April and it is therefore imperative that the plant runs smoothly that day.

Could you please contact Harry and let him know what can be done in the time available. ”

39.

Mr. Harry Charilaou himself sent a facsimile transmission dated 18 April 2001 to Mr. Fleming. The material part of that communication was in these terms:-

“ At the moment we need you here as soon a [sic] possible. We can not carrying [sic] on with our trails [sic] . There are some minor and major problems with the oven. The major one at this moment is that the oven drive roller falls out and is now making a huge banging noise and stops the oven belt from turning. We need to be in production by Monday, we have used this week to learn the plant, because Monday 23rd April we have our audit from one of our customers and we are suppose [sic] to be in operation by the Monday 23rd April. Now there are also a few more major and minor problems that we must mention.

1) The cooling system is not enough, to cool pastry to room temperature and we can not pack pastry on flow wrap as a continual line, we need extra cooling fans after the cooling system.

2) The oven belt and cooling belt must have independent speed control, (same one you told me you done for Kim’s line).

3) The flaps have to be removed at oven end to get to in side cooling system to remove cooling filters, plus these flaps are not safe on either ends and are very dangerous.

4) The alarms run for 30 or so minutes at the end of the day until oven cools down, if an independent control switch can be added.

5) When resetting Rondo machine it sets oven off again to start running the boys from Rondo mentioned this to us but ourselves do not know if this is a real concern.

My dear friend Malcolm please does [sic] not see this information as a complaint but rather as an approach to finding away [sic] to rectify –make adjustments to oven. ”

40.

The continuing perception on the part of Mr. Harry Charilaou of problems with the Oven prompted him to send a further facsimile transmission to Mr. Fleming on 3 May 2001. He wrote:-

“ We have come to the stage where we can no longer go into production.

As far as the Rondo machine is concerned it is ok for samosa pastry to be produced, unfortunately the oven is what is holding us back.

We are losing customers and major production, as far as the oven belts are concerned we can co-operate with you, however the bottom line Malcolm is for you or someone from your company to come A.S.A.P, (EVEN WEEKENDS) to rectify all oven problems, so we can start production straight away and also if you can liase with Rondo A.S.A.P.

On Thursday 26 April 2001 when you were here with John Harper from Rondo, you requested that on the following week Wednesday or Thursday that you would be coming to fix the fans to the cooling system and that you wanted a baker from Rondo to be present so that the whole line could be tested properly. On Monday 2 May Stelios telephoned you and reminded you of the appointment for Wednesday 4 May 2001. On Wednesday the man from Rondo was here but neither you nor any one else from your company turned up.

I phoned your office and was told that you had not booked the appointment in your diary and that you were feeling ill. Rob from Rondo then phoned Mike Johnson who was in Switzerland who was extremely upset, because they keep sending there [sic] people to us and there [sic] machine can not fully operate properly because the oven/cooler has not been rectified.

However we have found a company who will assist you concerning an alternative solution to the oven belt, we ourselves have seen samples of the belt and are extremely happy with it. Of course you have to discuss other technical situations that are concerned with fixing oven belt on, I can say that the price of the belt is extremely cheap, I believe no more then [sic] £500. We have also noticed the existing oven belt fraying.

Malcolm as mentioned please rectify the situation regarding the oven A.S.A.P. thank you. ”

41.

Frampton sought to address the apparent problem that the Cooler did not produce a sufficient reduction in heat after pastry had been through the Oven by fitting additional fans. That was done on 10 May 2001. That did not seem to achieve the desired result and two more fans were fitted on 30 July 2001.

42.

On about 1 June 2001 Filobake paid the final instalment of the price of the Rondo Equipment. The final instalment of the price of the Oven and the Cooler was paid on about the same date.

43.

By an agreement in writing (“the Mortgage”) called a “Chattels Mortgage” made between Filobake and HSBC it was provided, in clause 3, that:-

“ The Chargor [defined as meaning Filobake] declares that it is the unencumbered owner of the Equipment and HEREBY ASSIGNS with full title guarantee to the Company [defined as HSBC and an associated company of HSBC] ALL AND SINGULAR the Equipment as security for the Indebtedness [defined as all monies owed by Filobake to the Company] and all monies covenanted to be paid by the Chargor (whether the same shall have become due or not) or otherwise stated to be secured or charged on the Equipment hereunder Provided Always that if the Chargor or its successors in title shall on demand pay to the Company all and every the sum or sums of money secured hereby then the

Company shall at any time after such payment have been so made upon request and at the cost of the Chargor duly discharge this security ”

The expression “the Equipment” was defined as including the Rondo Equipment, the Oven and the Cooler. The Mortgage was signed but undated. However, an instruction to pay sums due under it given to Filobake’s bankers was dated 6 July 2001, and it was not in dispute that the Mortgage was executed on about that date.

44.

On 31 July 2001 Rondo replaced the scrapers on the pastry extruder on the New Line. The scrapers as originally fitted were in fact pieces of plastic the function of which was to force pastry off the lowest roller of the extruder if the pastry did not slip off naturally. One advantage of the inclusion of a relatively high oil content in samosa pastry produced on Rondo equipment is that it acts as a sort of releasing agent and helps pastry to slide off the roller unaided. The scrapers were replaced again on 6 August 2001, apparently because the ones previously fitted were faulty. On 31 July 2001 the Rondo engineer who attended Filobake’s premises was Mr. Robert Childs. Mr. Childs is a qualified baker, although he is now employed by Rondo as a demonstrator. On the occasion of his visit on 31 July 2001 Mr. Childs observed some trials of the New Line conducted with a variety of different dough mixes. He noted that satisfactory pastry was not being produced, but his view was that this was because insufficient oil was being added to the mixes. He recorded that view in a report which he made at the time. He told me in evidence that he was told by Filobake representatives that oil cost 97 pence per litre and it would throw out Filobake’s costings for production of samosa pastry if the sort of quantities of oil which Mr. Childs recommended were to be added to dough mixes. Mr. Harry Charilaou disputed in his evidence that Mr. Childs had been told what Mr. Childs said he had about oil, or that what Mr. Childs said was the fact. However, I accept the evidence of Mr. Childs on this point.

45.

Mr. Tsangarides told me that he made notes of the visits made by representatives of Rondo or Frampton between May and August 2001. Copies of those notes were put in evidence. They revealed that the outcome of the matters which prompted the facsimile transmission sent by Mr. Harry Charilaou to Mr. Fleming on 3 May 2001 was that someone from Frampton eventually came on 10 May 2001. Thereafter there seems to have been a problem on 25 May 2001 when the Oven stopped working, but that was fixed by someone from Frampton the next day. There appear to have been no further problems warranting anyone at Filobake to call either Rondo or Frampton until the middle of July, when Mr. Fleming came to assess the requirement for additional cooling prior to the fitting of additional fans on 30 July 2001. Mr. Tsangarides recorded a visit of Mr. John Harper of Rondo on 19 July 2001 for an unspecified purpose, but no further visits until 31 July 2001 when Mr. Childs, in fact together with Mr. Harper, visited and the trials of different types of dough to which I have already referred took place. Mr. Tsangarides noted that on 1 August 2001 Mr. Johnson of Rondo advised increasing the quantities of oil included in the dough. He also recorded the visit of Rondo representatives on 6 August 2001 to fit new scrapers to the extrusion machine. He made just two further entries, respectively for 10 August and 14 August 2001. The entry for 10 August 2001 was in these terms:-

“ Harry, Rush, Mohammed, Ugin & Sonny experimented on machine from 11.30 to 3 p.m.

They made samosa but the problems were as follows.

(1) Oven belt needs replacing because it makes black marks on pastry.

(2) Oven takes too long to cool.

(3) Oven not consistent. Too much pastry is wasted and it varies with different doughs.

(4) The pastry that was made was good and it was not cooled properly. The oven can cook thinner doughs but not thicker ones.

Malcolm [Fleming] is waiting to hear on Monday 13/8 about the problems and try and solve them. "

46.

Continuing problems with the Oven and with cooling led to a meeting on 14 August 2001 between Mr. Harry Charilaou and Mr. Tsangarides on behalf of Filobake, and Mr. Fleming. On that occasion Mr. Fleming suggested that consideration be given to substituting a box cooler for the Cooler. Mr. Tsangarides's note of the meeting was to this effect:-

" (1) Replace belt with Teflon belt & it should do the trick.

(2) To adjust oven to shut down very quickly when turned off. This is easily done (Disconnect alarm).

(3) Remove tray under cooler to assist with cooling of pastry.

(4) Where there is a build up of pastry resulting in the pastry catching fire [which in fact only happened twice, soon after the delivery of the Oven] Malcolm can make adjustment to cut pastry when it built up too high.

(5) Box Cooler -

Malcolm tested the pastry and found that the whole of the top layer was dry and the layers underneath were moist. He suggested that we should probably have a box cooler to dry the pastry. He was going to ring Rondo to find out if the Saudis had this system and they confirmed that is exactly what they had but they had not told him. "

47.

The day after the meeting between Mr. Harry Charilaou, Mr. Tsangarides and Mr. Fleming on 14 August 2001 Mr. John Pittalis wrote a letter, in the name of his father and signed by him, to Mr. Johnson which was copied to Mr. Fleming. What Mr. Pittalis wrote was:-

" DOGE THIN PASTRY LINE

We refer to the agreement dated 30 June 2000 regarding the above production line.

As you are no doubt aware, since the installation of the machine in March, consistent problems have been encountered with the production capabilities of the machine, to the extent that no pastry of acceptable quality has since been produced in satisfactory quantities.

Engineers have visited both from yourselves and Frampton International Limited to try and rectify the problem.

We have been extremely patient in this matter and as both you and Frampton are aware, full payment has been made for the equipment despite the non-performance.

Yesterday, Malcolm Fleming of Frampton International Limited visited the premises and some of his recommendations included a new Teflon belt for the oven and he suggested a cooling box which

apparently is similar to the one used in the Saudi Arabian factory rather than the current system employed.

Frankly, it appears that we are being used as some sort of guinea pigs in this process.

Apart from the considerable amount of time that has been wasted and lost by ourselves in this matter, the following are relevant:

1. We have been unable to send out samples which have been continuously requested by prospective customers and the excuses on our part are becoming more and more thin and is a major detriment to relations with existing and potential customers.
2. A considerable amount of wastage has been incurred due to the numerous attempts to try and produce pastry to an acceptable standard.
3. Increased wage and labour costs have been incurred in the constant testing of the new production line.
4. Potential orders have been lost due to the fact that we have been unable to provide the product or been able to accept orders as we have not had the production capabilities.
5. There has been a substantial increase in overheads to accommodate the new machine, including the purchase of the adjoining leasehold premises, to create larger premises to incorporate the length of the machine.
6. The total cost of the production line, ancillary equipment and alterations to the premises has been in the region of £300,000 and still no product has been delivered.

We suggest that if you had purchased a car for a tenth of the cost that you would have returned it by now.

Our patience has been extended to its limit and we look to your company, either to rectify the problems immediately and to satisfy the performance guarantee included in the contract or to replace the machine immediately with full reimbursement of the costs and other associated costs incurred by ourselves.

Given our adherence to the agreement, we suggest that you give this matter your immediate attention as losses are continuing to accrue by our company due to the non-performance by yourselves and/or Frampton International Limited.

We trust it will not be necessary to take this matter further. Rest assured, if specific performance is not provided within the next 14 days then our solicitors will be instructed. "

48.

Rather curiously, given the terms of the letter dated 15 August 2001, on about 21 August 2001, and again on about 27 August 2001, Mr. Johnson wished, and was permitted, to demonstrate the New Line to a potential South African customer, called Ali Baba Foods International ("Ali Baba"). On the first occasion there was apparently some problem with the Oven, but on the second occasion the demonstration was to Mr. Johnson's satisfaction. There was a discussion on one of these occasions between Mr. Johnson, Mr. Harry Charilaou, Mr. Tsangarides and Mr. Kyriacos Pittalis about the alleged deficiencies in the New Line. Mr. Johnson indicated that Rondo's position was that it was not responsible for the final pastry product, only for the performance of the Rondo Equipment. He also

seems to have expressed the view that any problem rested with the Oven. Mr. Pittalis made plain that the Filobake position was that any problems were for Rondo and Frampton to sort out between them.

49.

Mr. Fleming was involved in further trials of the New Line at the end of August 2001. Following those trials he wrote a letter dated 4 September 2001 to Mr. Harry Charilaou. That letter was in the following terms:-

“ The trials that we carried out last week have confirmed the thoughts that I have had regarding the cooking of your product.

There are two areas of concern. One is the marking on the underside of the product, the other is the sticking of the product when stacked and left.

The lines on the underside of the product disappear completely when the belt is at a temperature of 160-180 °C. The oven was designed to run continuously but if the oven is left empty for long periods of time for example when only small batches are run through, then the belt absorbs energy from the upper elements and rises in temperature. Once the line is running continuously, this will not be a problem. This was shown during our trials last week when longer runs were carried out. If it is the case that you may not run continuously, then an air knife could be fitted at the end of the oven to cool the belt and prevent its [sic] temperature rising. This would be controlled automatically by the lower element temperature controllers.

The cooling was designed to cool the product to a temperature approaching ambient. Unfortunately the ambient temperature in the area adjacent to the oven is 30 °C or more and so it has not been possible to cool the product to below 35-40 °C. If stacked at these temperatures the layers then stick to each other.

There are two solutions to this. One is to run the upper element temperatures higher than we have up to now, which will reduce the water content of the product. The other is to change the cooler to a multi level cooler which will give a forced cooling time of 25-30 seconds.

The first option is probably not possible as we have had to rewire the elements to give a lower loading due to insufficient incoming mains supply.

The cost of changing the cooler to a multi deck cooler would be £5,650 exc vat. We would require 7 days to make the necessary parts and would need a full day on site.

I do not feel that there would be any benefit in fitting a PTFE belt in place of the woven belt as we have proved that we can produce product without line when running at the correct temperatures. In addition the manufacturers cannot guarantee that the belt would not be damaged if the machine were to be left running for extended periods of time without product in it. Also, as I have explained, with the lower elements running at the temperatures that we now have found to be best, the machine can just be switched off and left after production is finished. If a PTFE belt were to be fitted the belt could not be turned off until the oven had cooled right down. As you know, this takes a considerable time and means that operators would have to remain on site during this period.

As you are aware we have spent considerable time and incurred great expense in assisting you and wish like yourselves to resolve your problems and get you into full production. ”

50.

What in fact then happened was that Filobake instructed its solicitors, Messrs. Pittalis & Co., to write both to Rondo and to Frampton. The letter to Rondo, dated 11 September 2001, said this:-

“ We are instructed on behalf of Filobake Limited.

On 21st September 2000 our Clients entered into an agreement with you pursuant to your quotation dated 30th June 2000. Your quotation included a performance clause that the equipment would be able to produce Samosas.

You also arranged for the oven and cooler to be supplied by Frampton International Limited and liased with them as to the interaction between the two sets of equipment which was fundamental to the equipment working properly.

Our Clients paid to you the amount of £195,000.00 plus VAT and to Frampton International Limited the amount of £32,650.00 plus VAT.

Since the equipment was delivered in the week beginning 17th March 2001, there has been a consistent problem with the production capabilities of the equipment to the extent that the equipment has been idle, as it does not work.

We refer to our Clients’ letter to you dated 15th August 2001 which was copied to Frampton International Limited. Despite the 14 days deadline the equipment still does not work. It is now apparent to our Clients that after 5 months the problems to the equipment are so extensive that they cannot be rectified in order to work properly. In the meantime our Clients have incurred substantial losses and in particular have lost existing and potential customers.

Our Clients therefore reject the equipment and demand that you remove the equipment and both you and Frampton International Limited reimburse our Clients in an amount to be notified.

If Frampton International Limited and yourselves do not agree to the above within seven days, then our Clients will issue Court proceedings. ”

51.

A copy of the letter dated 11 September 2001 to Rondo was sent by Messrs. Pittalis & Co to Frampton under cover of a short letter also dated 11 September 2001, which simply stated that:-

“ We are instructed on behalf of Filobake Limited.

We enclose our letter to Rondo Limited dated today’s date. You will note the contents of that letter, our Clients’ claim against Rondo Limited and yourselves and the seven day deadline provided. ”

52.

Each of Rondo and Frampton instructed solicitors to respond to the letters dated 11 September 2001 written by Messrs. Pittalis & Co. In summary each indicated that its client’s position was that the equipment which each had provided was satisfactory and ready for use. After further inconclusive correspondence this action was commenced by a Claim Form issued on 20 June 2002.

53.

In fact the Rondo Equipment, the Oven and the Cooler have not been removed from the premises occupied by Filobake and they remained there at the date of the trial. Not only that, but until at least June 2003 Filobake had continued to use the Rondo Equipment, the Oven and the Cooler to produce quantities of samosa pastry for a customer, Gazebo Fine Foods (“Gazebo”). I shall return to the evidence concerning use of the New Line to produce samosa pastry for Gazebo.

Filobake's pleaded claims

54.

The primary claim made against each of Rondo and Frampton in this action was for damages for alleged breach of the contract between the relevant party and Filobake. I shall come to indicate precisely what were said to have been the relevant terms of each of those contracts and in what respects it was contended that each of the contracts had been broken. Before doing so it is material to record that, in addition to the claims in contract against Rondo, it was contended that Rondo had owed to Filobake a duty of care in tort in relation to the performance of the Oven and the Cooler, and also a duty of care to advise Filobake as to the compatibility of the component elements of the New Line with Filobake's existing equipment and procedures. Again I shall return to the matters which it was contended were relevant to the question whether either duty of care asserted should be imposed upon Rondo.

55.

The claim for damages for breach of contract pleaded against Rondo in the Amended Particulars of Claim was based upon alleged breach of one express term and four implied terms. The express term contended for was pleaded at paragraph 13 of the Amended Particulars of Claim in this way:-

" that the Line [defined in paragraph 5 as meaning for the purposes of the Amended Particulars of Claim what I have called the Rondo Equipment - that is to say, not including the Oven and the Cooler] would be able to produce 15 metres of samosa pastry 0.5 millimetres thick per minute to the recipe included in the quotation dated the 30th June 2000. "

The implied terms alleged were pleaded at paragraph 15 of the Amended Particulars of Claim as terms respectively that:-

" a) the First Defendant would ensure that the Oven and the Cooker were of satisfactory quality and fit for their purpose, namely the cooking and cooling of the pastry passing through them, and that they were compatible with the Line;

b) the Line would be of satisfactory quality;

c) the Line would be fit for its purpose, namely the manufacture of samosa pastry to the specifications and the recipe set out in the quotation dated the 30th June 2000;

d) the First Defendant would advise the Claimant as to the compatibility or otherwise with the Line of its existing equipment and procedures such as its horizontal mixers and its packaging and freezing techniques. "

56.

The matters relied upon as giving rise to the duties of care in tort for which Filobake contended were set out in paragraphs 8 to 12 inclusive of the Amended Particulars of Claim, and the duties of care themselves were pleaded at paragraphs 14 and 14a. What was said was:-

" 8. In the early summer of 2000 George Charilaou, the father of Harry Charilaou, and Stelios Tsangarides attended a demonstration of the operation of the Line at the First Defendant's premises in Chessington, Surrey.

9. At the demonstration he was introduced by Mr. Johnson and Mr. Tredget of the First Defendant to a Malcolm Fleming, the managing director of the Second Defendant.

10. The Second Defendant was said by Mr. Johnson and Mr. Tredget to be a reputable supplier of ovens and coolers with whom the First Defendant had worked in the past and whose ovens and coolers were compatible with products supplied by the First Defendant.

11. Following the demonstration the Claimant was supplied by the First Defendant with a further quotation for the Line dated the 30th June 2000 in the sum of £195,000 plus VAT and also by the Second Defendant with a quotation dated the 7th August 2000 for a C-1-8-P/S oven ("the Oven") and an FC-1-6-P/S cooler ("the Cooler") in the total sum of £32,650 plus VAT.

12. In reliance on:

a) the representations made by Mr. Johnson and Mr. Tredget at the demonstration as set out in paragraph 10 above;

b) those in the document dated the 26th November 1999; and

c) the performance guarantee in the quotation dated the 30th June 2000,

on the 21st September 2000 the Claimant entered into an agreement with the First Defendant for the supply of the Line as described in the quotation dated the 30th June 2000 and on the 4th January 2001 with the Second Defendant for the supply of the Oven and the Cooler as described in the quotation dated the 7th August 2000. ...

14. Further, the Claimant will say that, in the premises set out in paragraphs 8-12 above, there arose a duty of care, owed by the First Defendant to the Claimant, to ensure that the Oven and the Cooler were of satisfactory quality and fit for their purpose, namely the cooking and cooling of the pastry passing through them, and that they were compatible with the Line.

14a. The Claimant will say further that, in view of the First Defendant's representations as to its expertise in the field, as evidenced for example by the information contained in the presentation dated the 26th November 1999, and the Claimant's reliance upon the same, there arose a further duty of care, owed by the First Defendant to the Claimant, to advise the Claimant as to the compatibility or otherwise of the Line with the Claimant's existing equipment and procedures such as its horizontal mixers and its packaging and freezing techniques. "

57.

Aside from the references in paragraphs 12 b) and 14a of the Amended Particulars of Claim to the presentation on 26 November 1999, all that was expressly pleaded concerning it in the Amended Particulars of Claim was the allegation in paragraph 7 that:-

" On the 26th November 1999 the First Defendant supplied the Claimant with a document entitled "Presentation on Samosas" which included photographs and a drawing of the Line, a samosa pastry recipe, a list of oven temperatures and settings and a quotation in the sum of £162,850.00 plus VAT. "

58.

There was a Request for Further Information on behalf of Rondo in relation to the allegation that Filobake relied upon representations contained in the presentation on 26 November 1999. The relevant requests and responses were these:-

" Requests

1. Specify each and every representation in the documents dated 26th November 1999 that the Claimant relied upon in deciding to enter the agreement.

2. State the relevance of all the representations referred to in paragraph 12 of the Particulars of Claim to the Claimant's causes of action.

Replies

1. The Claimant relied on the photographs and drawings showing the oven/cooker as an integral part of the Line and also the technical information suggesting that the Line would run at 15 metres per minute.

2. The Claimant's case in tort is that the First Defendant assumed responsibility for the provision of the Oven and the Cooler and that the Claimant relied upon, amongst others, the representations set out in paragraph 12 of the Particulars of Claim in entering the Agreement, thereby giving rise to the duty of care on the part of the First Defendant set out in paragraph 14 of the Particulars of Claim. "

59.

After paragraph 14a was added to the Particulars of Claim by amendment there was a further Request for Further Information made informally by letter dated 3 November 2003 by Messrs. Carter Bells, solicitors acting on behalf of Rondo, to Messrs. Pittalis & Co. So far as paragraph 14a was concerned the relevant requests were:-

" 1. In paragraph 14a, please set out all representations made by the First Defendant as to its expertise relied upon by the Claimant to support the existence of the alleged duty of care. Please provide sufficient details of all such representations including (with regard to any oral representations) the maker and the recipient of the representation, the date and place at which the representation was made, and provide the gist of the representation; (with regard to any written representation) please identify the document in which the representation was contained.

2. Please clarify that the Claimant restricts its case under paragraphs 14a and 15(d) to the compatibility of the Line with the Claimant's horizontal mixers and its packaging and freezing techniques. "

The answers given, in a letter dated 17 November 2003, were:-

" 1. The Claimant refers to the First Defendant's presentation documents dated the 22nd October 1999 and the 26th November 1999 as well as the First Defendant's presentation video.

2. Yes. "

60.

The formal Request for Further Information raised on behalf of Rondo also sought clarification of the express term pleaded in paragraph 13 of the Amended Particulars of Claim. The responses indicated that the term upon which reliance was placed was that set out in the Final Quotation under the heading "Performance" , the material text of which I have already quoted, but that it was said, contrary to a literal reading of the Amended Particulars of Claim, that the express term applied to the whole of the New Line, in the sense in which I have used that term in this judgment, including the Oven and the Cooler,

" Because it is impossible to produce the samosa pastry described in the quotation without cooking and cooling it. An oven/cooker and a cooler were necessarily part of the equipment needed to produce samosa pastry. "

61.

In addition, the formal Request for Further Information sought elucidation as to the basis upon which the term pleaded at paragraph 15 a) of the Amended Particulars of Claim that Rondo would ensure that the Oven and the Cooler were of satisfactory quality and fit for their purpose fell to be implied into the contract between Rondo and Filobake. The answer given was:-

“ It was the clear intention of the Claimant and the First Defendant that the First Defendant would ensure that the Oven and the Cooler were of satisfactory quality and fit for their purpose and that they would be compatible with the Line. ”

62.

The claim for damages for alleged breach on the part of Frampton of the contract between Filobake and Frampton was simply based upon alleged breach of implied terms of the contract that the Oven and the Cooler would be of satisfactory quality and fit for the purpose of cooking and cooling pastry passing through them.

63.

Although Filobake proceeded in this action against two separate defendants in respect of alleged breaches of two separate contracts the alleged material terms of which were not identical, there was a single paragraph of the Amended Particulars of Claim, paragraph 18, in which the breaches of the two contracts upon which reliance was placed were set out. That paragraph was in these terms:-

“ 18. In breach of the agreements the Line could not produce samosa pastry to the agreed specification and/or recipe, nor was it, the Oven or the Cooler of satisfactory quality or fit for its intended purpose.

Particulars

- a) The Line could not produce samosa pastry 0.5 millimetres thick at 15 metres per minute to a commercially acceptable standard;
- b) When the Line was run in accordance with the First Defendant's specification in the quotation dated the 30th June 2000 the finished product displayed markings resembling the construction of the Oven belt and the pastry surface was tacky - it retained heat after cooling which was released following folding in packs which caused the sheets to stick;
- c) The Oven belt frayed to the extent that it was dangerous and likely to cause injury;
- d) The Line required new scrapers and a new sheeting head;
- e) Several fires occurred in the Oven due to a build up of pastry because there was no means of safely cleaning it;
- f) The feed and delivery ends of the Oven conveyor did not allow automatic transfer to and from adjacent machines;
- g) The electric heating controls of the Oven did not control its temperature to within commercial set limits and there was no means of controlling the heat which built up in the conveyor belt;
- h) The edges of the belt were damaged by the guide rollers and were dangerous;
- (i) The recipe, with its water and oil to flour ratio of 45%, would not produce a dough which could be extruded to produce a samosa sheet;

(j) When however the dough had the right amount of moisture to produce an extrudable product the Oven and the Cooler were unable to remove enough of it without a corresponding increase in temperature to a point where belt marks appeared on the pastry and cooling was adversely affected;

(k) The Line produced samosa sheets of unacceptable sheet strength in the longitudinal direction in that they cracked when folded. "

64.

The focus of the pleaded particulars of the alleged breaches of the two contracts set out in paragraph 18 of the Amended Particulars of Claim seemed to be alleged deficiencies in the Oven. That impression was rather confirmed by responses to the formal Request for Further Information made on behalf of Rondo to the effect that the only deficiencies complained of in the Rondo Equipment were that new scrapers and a new sheeting head, or extruder, were necessary.

65.

Further allegations of breach of duty and breach of contract as against Rondo were set out in paragraphs 19 and 19a of the Amended Particulars of Claim as follows:-

" 19. Furthermore, having regard to the particulars set out in paragraph 18 above, the First Defendant was in breach of the duty of care owed by it to the Claimant

Particulars

a) It failed to ensure that the Oven and the Cooler were of satisfactory quality;

b) It failed to ensure that the Oven and the Cooler were fit for their intended purpose, the cooking and cooling of samosa pastry; and

c) It failed to ensure that the Oven and the Cooler were compatible with the Line.

19a. The First Defendant was further in breach of agreement and/or duty in that it failed to advise the Claimant that a better product could be achieved on the Line by the use of spiral mixers and failed to advise the Claimant as to improvements which the Claimant might make to its packaging and freezing techniques. "

66.

It was not disputed on behalf of Rondo that a contract in terms incorporating the Final Quotation had been concluded on 21 September 2000 between it and Filobake for the supply by Rondo to Filobake of the Rondo Equipment. Equally there was no dispute that the Final Quotation included the section entitled "Performance" the material parts of which I have already quoted. However, about that section it was pleaded at paragraph 6(f) of the Amended Defence of the First Defendant that:-

" It is denied that the First Defendant thereby warranted the performance of any oven or cooler to be supplied to the Claimant in due course by a third party. Insofar as this is alleged in paragraph 13 of the Amended Particulars of Claim, this is denied. The guarantee was limited to the performance of the equipment detailed in the specification. On true construction, and based on industry practice, the recipe attached to the quotation was merely indicative of a typical samosa recipe and did not form a contractual term. "

67.

Rondo's case in relation to the duties of care contended for in the Amended Particulars of Claim and the alleged implied terms of the admitted contract was set out in the Amended Defence of the First Defendant as follows:-

" 7. It is denied that the First Defendant owed the Claimant any duty in tort that was wider than [sic] the duty owed under the Agreement. In any event, it is denied that the matters set out at paragraphs 8-12 satisfy the necessary requirements for the existence of such a duty. Accordingly, paragraph 14 of the Amended Particulars of Claim is denied.

7A. It is further denied that the First Defendant owed a duty to advise the Claimant as to the compatibility of the Line with the Claimant's existing equipment and procedures such as its horizontal mixers and its packaging and freezing techniques. The Claimant neither sought such advice nor was such advice offered by the First Defendant. Indeed, the First Defendant was never informed that the Claimant planned to freeze the pastry, nor of the type of mixer that the Claimant intended to use. Accordingly, the First Defendant did not assume any responsibility to provide such advice. For these reasons paragraph 14A of the Amended Particulars of Claim is denied.

8. As to paragraph 15 of the Amended Particulars of Claim:

(a) It is denied that there was an implied term in the terms alleged at paragraph 15(a), given that the First Defendant did not supply the Oven or the Cooler to the Claimant. Such term is not implied by statute; nor a usual incident of a contract of this type; nor was it necessary to give the contract business efficacy. By 21st September 2000, the Claimant had yet to conclude an agreement with any oven supplier. The First Defendant cannot be taken to have warranted that any oven which would in due course be purchased by the Claimant would be compatible with the Line;

(b) The implied term alleged at sub-paragraph (b) is admitted. Such term did not include the Oven or the Cooler;

(c) The implied term alleged at sub-paragraph (c) is denied. The implied term was that the component parts supplied by the First Defendant would be reasonably fit for the purpose of making samosa pastry to the specifications set out in the performance guarantee. There was no implied term that the recipe attached to this document must be used in order to achieve these specifications. Such a term would be contrary to industry custom and practice. There was no term that the whole production process (including an oven and cooler supplied by the Second Defendant) would produce pastry to a particular specification.

(d) There was no implied term that the First Defendant would advise the Claimant as to the compatibility or otherwise with the Line of its existing equipment and procedures such as its horizontal mixers and its packaging and freezing techniques. Such an implied term is not required by the officious bystander test, nor in order to give the agreement business efficacy, nor by industry custom and practice. "

68.

The response on behalf of Rondo to the allegations of breach of contract pleaded at paragraph 18 of the Amended Particulars of Claim was set out at paragraph 11 of the Amended Defence of the First Defendant:-

" As to paragraph 18 of the Amended Particulars of Claim:

(a) It is accepted that, following installation, the Line, the Oven and the Cooler together were not capable of producing samosa pastry 0.5 millimetres thick at 15 metres per minute. This was due to problems with the Oven and the Cooler and not due to the Line. The Line itself was always capable of producing samosa pastry which complied with the contractual specifications set out in the performance guarantee. The experts agree that the Line fitted with the Oven will produce such pastry (joint statement paragraph 1). Insofar as it is the Claimant's case that a commercially acceptable standard is, or is reflected in the Finished Product Specification which is Appendix 3 to the Froebel Report dated 20th June 2003, it is denied that that specification was ever part of the pre-contract discussions or negotiations with the First Defendant. As the Froebel Report acknowledges, the "Finished Product Specification" is a unilateral creation by the Claimant and its expert and there was in fact no detailed pastry specification agreed or provided beyond the performance specification.

(b) In relation to the allegation of negligence at (d), the Line came with plastic scrapers which needed a period of use to develop a sharp angle. This was to be expected, and was not as a result of any breach of contract on the First Defendant's part. However, in order to assist the Claimant, and on the recommendation of the First Defendant's engineer, these scrapers were changed to a phosphorous bronze cutter with a finer edge to avoid the need for "bedding in" time. These were however removed by the Claimant and replaced with the present steel scrapers.

To the best of the First Defendant's knowledge, the Line does not require a new sheeting head and the original sheeting head has not been replaced

(bA) The First Defendant cannot admit or deny whether the recipe attached to the quotation was capable of producing a dough which could be extruded [sic - presumably "extruded" was meant] to produce a samosa sheet. This recipe has not been tested by the parties' respective experts.

(bB) If the Line had been used with a spiral mixer and or sufficient oil had been used in the recipe the samosa sheets would not have had an unacceptable sheet strength in the longitudinal direction and would not have cracked when folded. Accordingly, this failing was not caused by the Line but by the Claimant's decision to use a horizontal mixer to mix the dough before it entered the Line and or insufficient oil in the recipe.

(c) The remainder of the particulars of negligence relate to the operation of the Oven which was not the First Defendant's responsibility ...

(d) Accordingly, the Line was of satisfactory quality and fit for its purpose, and the First Defendant was not in breach of the agreement as alleged or at all. "

69.

There was no dispute as to how the contract between Filobake and Frampton had been made. Frampton's response to the allegation that the terms of that contract included the terms which it was alleged on behalf of Filobake were to be implied into it was set out at paragraph 14 of the Amended Defence of the Second Defendant:-

" As to paragraph 16 :

(1) it is admitted that it was a term of the contract between the Claimant and the Second Defendant that the Oven and Cooler would be of satisfactory quality;

(2) it is admitted that there was also a term that the Oven and Cooler would be fit for their purpose;

(3) the relevant purpose was the cooking and cooling of the type of pastry used at the demonstration on 27 July 2000 and prepared in the same way as on that occasion, as approved by the Claimant at the time; ”

Frampton’s case as to what had happened at the demonstration referred to was set out at paragraph 6 of the Amended Defence of the Second Defendant:-

“ (1) the demonstration took place on 27th July 2000 and was attended by Mr. Malcolm Fleming for the Second Defendant;

(2) the oven used for the demonstration was a scaled-down production oven which had previously been used for trial on Chinese pancakes;

(3) the First Defendant produced some samosa pastry and samples were passed through the oven;

(4) after making a number of trials using different temperatures and bake times, a product was produced which Mr. George Charilaou of the Claimant agreed was acceptable;

(5) the settings used to produce the acceptable product (being a temperature of 400 degrees C and a bake time of 9-10 seconds) were noted down and used by the Second Defendant as the basis of the specification later supplied to the Claimant. ”

70.

Frampton’s case was that the Oven and the Cooler were both of satisfactory quality and fit for their intended purpose. A lengthy response to the particulars pleaded at paragraph 18 of the Amended Particulars of Claim was set out in the Amended Defence of the Second Defendant:-

“ 20. No admissions are made as to particular (a) and in any event non-compliance with the alleged term would not amount to a breach of contract on the part of the Second Defendant. Insofar as it is the Claimant’s case that a “commercially acceptable standard” is, or is reflected in the “Finished Product Specification” which is Appendix 3 to the Froebel Report dated 20th June 2003, it is denied that the specification was ever part of the pre-contract discussions or negotiations. As the Froebel Report acknowledges, the “Finished Product Specification” is a unilateral creation by the Claimant and its expert and there was in fact no detailed specification agreed or provided in pre-contract discussions and negotiations.

21. As to particular (b):

(1) It was not a term of the contract between the Claimant and the Second Defendant that the Oven and/or Cooler would perform in accordance with the First Defendant’s specification for the Line.

(2) If, which is not admitted, the finished produce displayed markings corresponding to the Oven belt, this was because the belt was too hot. Once switched on, the Oven requires a certain amount of time to reach its set operating temperature. Once this temperature is reached, the belt will be too hot as a result of passing through the Oven with no product on it to absorb the heat. It is normal commercial practice, as the Second Defendant informed the claimant on the commissioning of the Oven, for the operator to pass dough through the Oven to enable the belt to reach its correct temperature, that dough then having to be thrown away.

(3) The Oven is also designed to be run continuously, but if it is left empty for periods of time then the belt will absorb energy from the upper heating elements and rise in temperature, which may lead to marking of the pastry in the way alleged.

(4) Further, the Oven is designed for runs at high speed and marks may appear if the Line is run too slowly.

(5) Trialling carried out at the Claimant's premises at the end of August 2001 showed that no lines appeared on the underside of the pastry when the belt was at a temperature of 160 to 180 degrees C.

(6) If, which is not admitted, the surface of the pastry was tacky after cooking, this was the result of the ambient temperature in the Claimant's factor [y] being too high. The Second Defendant refers to Paragraph 17 above and in particular to the Claimant's decision not to instal air conditioning in its factory.

22. As to particular (c), it is admitted that a section of the belt (but not the whole belt) was frayed. No admissions are made as to whether this was dangerous, and replacement of a frayed belt is in any event a simple matter. It was agreed between the Claimant and the Second Defendant that the frayed section would be replaced once the Line was up and running. However, the Claimant purported to reject the equipment before the Second Defendant had a chance to do so.

23. As to particular (d), this is a complaint directed against the First Defendant and the Second Defendant does not plead to it.

24. As to particular (e), if (which is not admitted) fires occurred in the Oven, this was a result either of (1) pastry being allowed to go back into the Oven after cooking instead of being unloaded as it ought to have been, or (2) inadequate recipe or (3) inadequate extrusion. It is denied that fires started because the oven could not be safely cleaned, i.e. because it was unclean and un-removed pastry stuck to the line caught fire. Manual cleaning of the line did have the effect of removing pastry from the line.

25. As to particular (f), this is admitted. It was never a term of the contract between the Claimant and the Second Defendant that the feed and delivery ends of the belt would allow automatic transfer to adjacent machines.

26. Particular (g) is denied. The temperature control permits control within 3% of the set point. It is therefore denied that heat cannot be controlled. Heat only builds up when there is no product on the line and/or the line is not running continuously - as to which see Paragraph 18 of the Amended Defence above.

27. As to Particular (h), the Second Defendant repeats Paragraph 22 above.

27A. As to Particular (i), whether or not the assertion/observation therein is correct, this relates to the claim against the First Defendant and the Second Defendant does not plead to it.

27B. As to Particular (j), insofar as it is at all meaningful, (which is denied given that, according to its Part 18 Replies by letter dated 17th November 2003 the Claimant cannot specify the temperature it relies on, "because there are too many variables involved"), the allegation therein is denied. On a sustained i.e. continuous running of the Oven, which the Oven is designed to do, the marking will cease and disappear after marking during the initial running - as to which see Paragraph 18 of the Amended Defence above.

27C. Since, apparently, (according to its Part 18 Replies by letter dated 17th November 2003), this is not an allegation made against the Second Defendant, the Second Defendant does not plead to Particular (k). "

Samosa pastry

71.

As I have already remarked, the evidence was that there is no single recipe which must be followed exactly if samosa pastry is to be produced. Rather, it appears that the particular characteristics required of a samosa pastry depend upon the desires of the baker or consumer concerning taste and texture. The basic ingredients of the pastry are always flour, water, oil and salt, but those ingredients can, within limits, be combined in different proportions. There are different types of flour, having different protein compositions, as well as other differing characteristics. There also different types of oil, for example, palm oil, olive oil, rapeseed oil and sunflower oil, which may affect the taste of the finished pastry. Other variables in the production of a samosa pastry, apart from different proportions of the basic ingredients, are the possible addition of flavourings or decorative markings in the form, for example, of poppy seeds or cumin, the method of mixing the ingredients, the time for which the ingredients are mixed, the temperature of the ingredients at the time of mixing and the period, if any, for which dough once mixed is allowed to rest before any further processing takes place. In particular, it was common ground, at least between the independent experts who gave evidence at the trial, that better results are obtained if the ingredients are mixed in a spiral mixer than in a horizontal mixer. This is because of the folding action of a spiral mixer upon the dough entraps air and allows the flour protein more readily to relax, thereby improving elasticity or extensibility. A horizontal mixer, in contrast, operates by application of force to the ingredients to combine them together. Although what I have recorded concerning mixers was common ground between the independent experts, Mr. George Charilaou told me that he considered that a mixer was a mixer and that it did not make any difference what sort one used to make samosa pastry. I do not accept that his view is accurate, but the fact that he held it may be of some significance. Up to a point a better result is obtained the longer the mixing of the ingredients continues. It was also, I think, common ground that a better result is obtained if the water used in the dough is, at the moment of mixing, tepid, rather than cold.

72.

As I understand it, there is no single moisture content which a samosa pastry must have. Up to a point, again the moisture content desired is a matter of individual preference. However, an essential feature of a samosa pastry is that it should be capable of being folded without cracking so as to make the pastry parcel in which the filling is placed. Another essential feature is that the pastry should be capable of being rolled thin so that the walls of the pastry parcel are not too thick. The ability of a pastry to be rolled thin and to be formed into a parcel shape depend upon the elasticity, or extensibility, of the pastry.

Construction of the performance obligation accepted by Rondo

73.

Filobake's case was that the effect of the section of the Final Quotation entitled "Performance" was that Rondo warranted that the New Line would produce samosa pastry in accordance with Recipe 2 amongst other things at a rate of 15 metres per minute and to a thickness of 0.5 millimetres. That case involved the proposition that Recipe 2 was a recipe for samosa pastry which, if followed, and the resulting dough put through the New Line, would produce a satisfactory result at the end of the New Line. What was important about that way of putting the case was that it was contended by Mr. Simon Williams, who appeared on behalf of Filobake, that the acid test of whether or not there had been a breach of warranty was simply whether, if Recipe 2 was followed and the resultant dough passed along the New Line through the different processes incorporated in the New Line, the result at the far end of the New Line was a satisfactory samosa pastry. In his written closing skeleton argument Mr.

Williams identified as the critical issues in relation to the construction of the express term upon which Filobake relied "(1) what is meant by "Samosa" and (2) by "to the attached recipe"". His submissions in relation to those issues were:-

" As to (1) C says that since samosa pastry is invariably folded to make a parcel, "Samosa" must mean pastry which can be folded (without cracking). As to (2) C says that the clear intention is that the Line will produce pastry which can be folded when the attached recipe is used. "

Mr. Williams recognised in his written skeleton argument that there was an issue as to whether "the attached recipe" was in truth a recipe, in the traditional culinary sense of a list of ingredients and quantities and a series of instructions as to what to do with them which, if followed, produced a particular result. However, as to that he submitted that Recipe 2 had in fact been followed, not least at tests on 23 February 2004 to which I shall come.

74.

Mr. Bruce Gardiner, who appeared on behalf of Rondo, set out Rondo's response to the case which I have summarised in the preceding paragraph in his written skeleton argument as follows:-

" 8. D1 accepts that it was thereby warranting the dimensions, speed and capacity of the machine, and the dimensions and weight of the finished pastry. However, D1 denies that on its true construction, the contract contained a "contractual recipe" so that D1 would be in breach of contract if the stated specifications could not be achieved with what was described as "Samosa Recipe". This interpretation is in accordance with the proper approach to the interpretation of contracts summarised by Lord Hoffmann in *Investors Compensation v. West Bromwich Building Society* [1998] 1 WLR 896.

9. D1 makes the following observations on the wording of the quotation:

a. The "Samosa Recipe" does not form part of the specifications listed, but is a means to achieve those specifications;

b. The "Samosa Recipe" is really no more than an incomplete and insufficiently detailed list of ingredients. Mr. Froebel agreed that it was lacking in essential details ... It is unclear what type of flour, oil or dough relaxer to use. The recipe does not specify the water temperature or the flour temperature. The water content is stated to be approximate depending on the flour. There are no detailed instructions as to how the ingredients should be processed in terms of mixing speed, mixing time, resting time, cooking time or cooking temperature. The inadequacies are patently obvious when compared with an earlier "recipe" provided by D1 eight months earlier in the Samosa Presentation [this is a reference to Recipe 1]The proportions of ingredients in that document are obviously different to those found in the document attached to the quotation. ...

c. The wording underneath "for best results ..." suggests the inclusion of this recipe is an attempt to be helpful rather than a contractual warranty.

d. A "recipe" for filo pastry was also included, although this did not form any part of the specification - again this suggests that the recipes were included in an attempt to be helpful.

e. Mr. Froebel accepts that it is unusual for there to be a contractual recipe ..., and this is not industry practice unless the recipe is integral to the machine (supplementary statement). If a recipe was "integral" to the machine, he would expect it to contain all necessary information.

10. If determining the correct samosa recipe is a matter of baking expertise, and is often determined by customer preferences and requirements, then the parties are unlikely to have regarded this particular “recipe”, such as it was, and chosen by D1 (rather than C or one of C’s customers), as a contractual term. This is the conclusion that best fits with “business common sense” ...

11. The Court can and should look to background evidence to determine the status of the recipe referred to in the quotation. The document prepared for the first visit to Italy clearly states “we must mix our own dough to our own recipe” In view of this unequivocal statement contrary to C’s case in C’s own documentation it is perhaps not surprising that none of C’s witnesses acknowledged that they were the document’s author. C’s evidence about the 27th July 2000 demonstration confirms this intention - C brought its own ingredients Furthermore, C’s costings for the HSBC Business Plan, prepared before the contract was signed were clearly not based on the amount of oil specified in the “contractual recipe” ... Finally, Mr. Harry Charilaou accepted in evidence that the plan was always to use their own recipe on the new machine ..., and indeed D had supplied him with samples made to different recipes before the contract was signed. ”

75.

Mr. Gardiner also submitted that, whatever precisely the effect of the section of the Final Quotation entitled “Performance” , it only applied to the Rondo Equipment, and not to the New Line including the Oven and the Cooler. He further submitted in his written closing submissions that:-

“15. Even if the “recipe” did form a contractual term, then full significance must be given to each word used. The word “approx” clearly indicated that there would need to be adjustment of the water level. Mr. Froebel agreed that there is a variability built into the recipe in that there could be more or less Mr. Harry Charilaou accepted in cross examination that he would read the recipe as allowing a variation of 1kg of water either side of 3kg ...”

76.

The passage from the speech of Lord Hoffmann in *Investors Compensation Scheme v. West Bromwich Building Society* to which Mr. Gardiner referred is the well-known passage at pages 912H to 913F. Mr. Williams agreed that that passage set out the approach which should be adopted to the questions of construction in the present case. Although the passage is very well-known it is convenient to set it out in this judgment:-

“ The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the “matrix of fact”, but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) The law excludes from the admissible background the previous negotiations of the parties and their declarations of subjective intent. They are admissible only in an action for rectification. The law makes this distinction for reasons of practical policy and, in this respect only, legal interpretation

differs from the way we would interpret utterances in ordinary life. The boundaries of this exception are in some respects unclear. But this is not the occasion on which to explore them.

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars: the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see *Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd.* [1997] AC 749.

(5) The “rule” that words should be given their “natural and ordinary meaning” reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in *Antaios Compania Naviera SA v. Salen Rederierna AB* [1985] AC 191,201: “if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business commonsense, it must be made to yield to business commonsense.”

77.

I accept the submission of Mr. Gardiner that the section of the Final Quotation entitled “Performance” related only to the Rondo Equipment and not to the New Line including the Oven and the Cooler. After all, before setting out details of width, speed and so forth the relevant section did in terms say, “The equipment detailed in this specification will be able to produce Samosa to the attached recipe as follows” . It follows from that that the section of the Final Quotation in question was not concerned with whether the end result of mixing the ingredients in Recipe 2 in the proportions there set out and passing the dough thereby produced down the New Line would be a pastry which could successfully be used to create samosas, but rather with whether the end result would be a pastry 1000 millimetres wide, 0.5 millimetres thick passing along the Rondo Equipment at 15 metres per minute, and so forth. As much of the machinery included in the Rondo Equipment, seven out of fifteen items, comprised conveyor belts, four more were cutters or guillotines, and two were flour dusters, in practical terms, apart from the question of line speed, the focus of interest was thus whether pastry having the composition and proportions set out in Recipe 2 could successfully be extruded through the extruder and then successfully be folded on the laminating unit.

78.

The next point which seems to me to be material in construing the section of the Final Quotation entitled “Performance” and the reference therein to Recipe 2 is that Recipe 2 was not a recipe in the traditional culinary sense of a list of ingredients and quantities and a series of instructions which, if followed, would produce a particular result. The bakery expert called on behalf of Filobake, Mr. Roland Froebel accepted, as Mr. Gardiner submitted that he did, that one could not make samosa dough to Recipe 2 without supplying essential missing details. Recipe 2 was simply a list of ingredients, generically described, and an indication of the proportions in which those ingredients should be mixed. No information was given as to any precise type of flour to be used or as to any precise type of oil. Even if one left those points on one side on the basis that the type of flour and the type of oil were immaterial, there was no information as to the means to be adopted to mix the

ingredients or as to the mixing time, those being, as I have explained, important matters in the successful production of samosa pastry. No information was given as to the temperature at which the ingredients should be added to the mix, again an important matter, especially so far as the water was concerned. There was no indication whether, after mixing, the dough should be left to rest before undergoing further processing. If the issue was whether the result of putting down the New Line a dough made to Recipe 2 would be a satisfactory samosa pastry one would also need to know for how long and at what temperature the dough would need to be heat-treated and to what temperature it would need to be cooled before packing.

79.

In the result it seems to me that it was misleading of Mr. Williams to refer to Recipe 2 as “the contractual recipe” in the sense in which he did, namely as a recipe which could be followed and would result in a pastry satisfactory to be used to make samosas. The sole significance of Recipe 2, in my judgment, was as a statement of the ingredients and proportions of ingredients which, if mixed in an appropriate fashion, at appropriate temperatures and for an appropriate period of time (as to all of which matters Recipe 2 itself was silent), could then be passed through the Rondo Equipment so as to produce pastry 1000 millimetres wide, 0.5 millimetres thick and so forth, at a rate of 15 metres per minute. Whether the end result was tasty or not, whether it could be folded further once off the New Line and what its moisture content might be do not seem to me to be matters with which the Final Quotation, on proper construction, dealt. It seems to me that Mr. Gardiner went too far in submitting that Recipe 2 was an attempt to be helpful, rather than a contractual warranty, but in my judgment the significance of the warranty was limited.

80.

It follows that the term pleaded at paragraph 13 of the Amended Particulars of Claim was not, in my judgment, upon proper construction of the contract made between Filobake and Rondo, a term of that agreement.

The other contractual obligations of Rondo

81.

Apart from the alleged express term of the agreement between Filobake and Rondo pleaded at paragraph 13 of the Amended Particulars of Claim, all of the other terms upon which reliance was placed on behalf of Filobake were said to be implied terms. Of those, Rondo accepted only that there were implied terms that the Rondo Equipment would be of satisfactory quality and that it should be reasonably fit for its intended purpose, while disputing that that purpose was what was contended on behalf of Filobake, namely the manufacture of samosa pastry to the specifications and recipe set out in the Final Quotation. The ground upon which it was asserted on behalf of Rondo that the terms for which Filobake contended were not to be implied into the contract between the parties was that it was not necessary or appropriate to do so, applying the usual tests for the implication of terms in a contract.

82.

A formulation of the test to be applied in considering whether it is necessary or appropriate to imply terms in a contract was set out by Lord Pearson in *Trollope & Colls Ltd. v. North West Metropolitan Regional Hospital Board* [1973] 1 WLR 601 at page 609A-D:-

“ Faced with the conflict of judicial opinion in this case, I prefer the views of Donaldson J and Cairns LJ as being more orthodox and in conformity with the basic principle that the court does not make a contract for the parties. The court will not even improve the contract which the parties have made for

themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term which went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, formed part of the contract which the parties made for themselves. "

83.

As I understood the case of Filobake, it was contended that the terms sought to be implied into the contract which were contested on behalf of Rondo did represent the actual, but unexpressed, intention of the parties.

84.

In my judgment none of the terms which it was asserted on behalf of Filobake, but disputed on behalf of Rondo, were to be implied into the agreement between them in fact represented the actual, but unexpressed, intention of both parties or otherwise met the requirements in law for the implication of terms into a contract. The structure of the contractual arrangements for the establishment of the New Line was that the Rondo Equipment was procured by Filobake separately from the Oven and the Cooler. That was obvious, but it was accepted in cross-examination by those factual witnesses called on behalf of Filobake who were asked about it, specifically Mr. Harry Charilaou, Mr. Tsangarides and Mr. Kyriacos Pittalis. It was obviously theoretically possible for Filobake to have placed a single order with one party for the supply of not only the Rondo Equipment, but also the Oven and the Cooler, but that was not done. Moreover, at the date at which the contract for the acquisition of the Rondo Equipment was made between Filobake and Rondo, so far as the evidence went, no decision had been made on behalf of Filobake to purchase an oven or a cooler, still less the Oven and the Cooler, from anyone. The contract for the purchase of the Oven and the Cooler was not made until over three months after the contract for the purchase of the Rondo Equipment. It would be unusual for a vendor of equipment under one contract to warrant the quality or fitness for their intended purpose of equipment to be supplied by a different vendor under another contract, not least because one would expect the terms of the second contract to deal, expressly or by implication of the terms for which [Sale of Goods Act 1979](#) provides, with those very issues. There is no justification in the circumstances of the present case, as it seems to me, to imply into the contract between Filobake and Rondo any term relating to the quality or fitness for any purpose of the Oven or the Cooler.

85.

I accept the submission of Mr. Gardiner that the purpose for which the Rondo Equipment had to be fit was of delivering the performance set out in the section of the Final Quotation entitled "Performance" , and not some further or wider purpose, and in particular not of producing, in conjunction with the Oven and the Cooler, satisfactory samosa pastry.

86.

There was no evidence that anyone on behalf of Filobake ever sought advice from anyone on behalf of Rondo concerning the compatibility of any of the Rondo Equipment with equipment other than the Oven and the Cooler, whether equipment already, at the date of the contract between Filobake and Rondo, owned by Filobake, or equipment to be acquired thereafter. All of the Filobake witnesses who dealt with this matter accepted in cross-examination that no advice had been sought and that none

had been given. The position was the same in relation to procedures as it was in relation to equipment. If no advice was sought or given, it is plain, as it seems to me, that no term should be implied into the contract between Filobake and Rondo that Rondo should give advice concerning the compatibility of the New Line or the Rondo Equipment with other equipment or the existing procedures of Filobake for producing pastry. The significance of the implied term contended for seemed to be to attribute blame to Rondo in respect of the fact, which was common ground at the trial between the relevant experts, that use of a spiral mixer produced better samosa pastry than use of a horizontal mixer, and in respect of the difficulties, if such there were (which was disputed), created by freezing and then unfreezing samosa pastry in relation to its use after unfreezing in making samosas.

Duties of care owed by Rondo to Filobake

87.

Two separate types of duty of care were said to have been owed by Rondo to Filobake. The first was a duty which mirrored the alleged contractual obligations of Rondo in respect of the Oven and the Cooler. It was said that Rondo owed a duty of care to Filobake to ensure that the Oven and the Cooler were of satisfactory quality, fit for the purpose of "cooking and cooling samosa pastry", and compatible with the Rondo Equipment. The second type of duty alleged was a positive duty to give advice as to two matters. The first of these matters was "that a better product could be achieved on the Line by the use of spiral mixers", while the second was "as to improvements which the Claimant might make to its packaging and freezing techniques".

88.

In support of his submission that Rondo owed Filobake the duties of care for which Filobake contended, Mr. Williams drew to my attention the passage in Clerk & Lindsell on Torts, 18th edition, paragraphs 7-84 to 7-116 inclusive, which is concerned with the circumstances in which a party owes a duty of care to another party not to cause the second party what is generally described as "pure economic loss". At paragraph 16 of his written opening statement Mr. Williams summarised Filobake's case as to the existence of the duty of care of the first type contended for in this way:-

"C also says that D1 assumed responsibility for the provision of the Oven and Cooler which were an integral part of the pastry making process and were in breach of the duty thereby owed to the extent that the failure of the Oven and Cooler contributed to the failure of the equipment as a whole to produce samosa pastry of an acceptable standard."

Mr. Williams did not deal separately in his written opening statement with the second type of duty of care upon which Filobake sought to rely. In his written closing skeleton argument he submitted that both types of duty of care contended for arose under the principle in *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] AC 465. In relation to a duty of care to advise specifically as to the advantages of using a spiral mixer Mr. Williams submitted:-

"Mixing - in paragraph 28 of his witness statement .. Michael Johnson makes it clear that he knew that a spiral mixer was preferable. Terry Tredget was aware that C was intending to use its existing horizontal mixer and acquire an additional one to cope with the increased capacity of the Line - see meeting 26.11.99 Yet never once was C advised that this could contribute to problems with the quality of the pastry. Horizontal mixer in Saudi in video. D1 even carried out tests on the Line from March to August 2001 using the horizontal mixers. It was only when Mr. Ives became involved in March 2003 that the adequacy of C's mixers was first raised."

89.

A number of tests have been formulated in the House of Lords over the last fifteen years or so by reference to which it has been suggested that the question whether a duty of care was owed by A to B should be answered. That upon which Mr. Williams relied in particular seemed to be the assumption of responsibility test of Lord Goff of Chieveley expounded in *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145 at pages 180C-181D. He also reminded me of what Lord Steyn had said in *Williams v. Natural Life Health Foods Ltd.* [1998] 1 WLR 830 at page 835F, of the comments of Lord Browne-Wilkinson in *White v. Jones* [1995] 2 AC 207 at page 273H, of the passage in the judgment of Neill LJ in *James McNaughton Paper Group Ltd. v. Hicks Anderson & Co.* [1991] 2 QB 113 at page 124E-H and of the part of the speech of Lord Goff of Chieveley in *Spring v. Guardian Assurance Plc* [1995] 2 AC 296 which appears at page 318G-H of the report.

90.

Insofar as Mr. Williams sought to rely upon duties of care which were said to mirror alleged contractual obligations of Rondo to Filobake it seems to me important to remind oneself of the observations of Lord Hoffmann in *South Australia Asset Management Corporation v. York Montague Ltd.* [1997] AC 191 at page 211 that:-

“ Because the valuer will appreciate that his valuation, though not the only consideration which would influence the lender, is likely to be a very important one, the law implies into the contract a term that the valuer will exercise reasonable care and skill. The relationship between the parties also gives rise to a concurrent duty in tort: see *Henderson v. Merrett Syndicates Ltd.* [1995] 2 AC 145. But the scope of the duty in tort is the same as in contract.”

In other words, if there is a contractual obligation to do something with reasonable skill and care, a duty of care to the same effect will be owed, but any duty of care is no more than co-extensive with the contractual obligation - it is not more onerous.

91.

The first type of duty of care for which Mr. Williams contended was, in effect, not a duty on Rondo to take care to do anything, but rather a duty to ensure that equipment supplied by another, Frampton, met certain standards of quality and suitability. That is not a duty inherently of the nature of a traditional duty of care, but rather an obligation in the nature of a guarantee of the equipment supplied by the third party. Moreover, for the reasons which I have explained, it seems to me that the obligations contended for did not exist as contractual obligations on the part of Rondo. In those circumstances I reject the submission of Mr. Williams that Rondo owed to Filobake any duty of care concerning the Oven and the Cooler.

92.

A duty of care the proper performance of which involves the need to give positive advice can arise if a party has assumed an obligation in respect of the giving of advice - see *Henderson v. Merrett Syndicates Ltd.*, supra. Such a duty of care will most easily be found to have arisen in a case in which a professional person has agreed to give advice concerning a particular matter. The performance of the obligation may well involve not merely responding to specific requests for advice, but volunteering it. The duty of care in relation to advice for which Mr. Williams contended did involve the need for Rondo to volunteer advice, but in circumstances in which it had not specifically been asked to give any advice other than as to the identity of a manufacturer of ovens and coolers compatible with its own products, and it had not done so. The advice which it was contended Rondo should have given did not relate to Rondo's own products, but to general bakery techniques, so far as concerned the use of a spiral mixer to produce samosa pastry, and to packaging and freezing the product resulting from a

successful use of the New Line. Rondo had no specialist expertise in respect of either of those matters. Mr. Williams's submission that Mr. Johnson in his witness statement made clear that he knew that a spiral mixer was preferable was based, as it seems to me, upon a misreading of a single throwaway comment at the very end of his statement. I reject the submission of Mr. Williams that Rondo owed Filobake a duty of care to volunteer any advice.

Conclusion as to obligations of Rondo

93.

In the result, in my judgment the sole material obligations of Rondo to Filobake were to supply as component parts of the New Line the items listed in the Final Quotation which were of satisfactory quality, and which were, individually and collectively, capable of enabling pastry containing the ingredients listed in Recipe 2, mixed in the proportions set out in that recipe at appropriate temperatures, for an appropriate period of time on an appropriate mixer and left to rest for an appropriate period of time, to be extruded 0.5 millimetres thick and passed down the New Line at a speed of 15 metres per minute. The latter obligation is in fact a distillation of the implied obligation to supply equipment which was reasonably fit for its intended purpose and the express obligation as to the performance of the Rondo Equipment.

Did the Rondo Equipment, the Oven and the Cooler meet the contractual standard?

94.

The Rondo Equipment, the Oven and the Cooler were each purportedly rejected by Filobake by the letter dated 11 September 2001 written by Messrs. Pittalis & Co. to Rondo. The express ground of rejection was that satisfactory samosa pastry could not be made on the New Line. In the light of my consideration of the obligations of Rondo and Frampton, respectively, the express ground of rejection was not a permissible ground of rejection in law. However, the questions remain whether the Rondo Equipment, the Oven and the Cooler were each of satisfactory quality and reasonably fit of the purposes for which they were each intended. There was a certain amount of factual evidence, to which I have referred, as to difficulties encountered after delivery of the Rondo Equipment, the Oven and the Cooler and before the purported rejection in getting the Rondo Equipment, and particularly the Oven and the Cooler, to work satisfactorily. However, it would be fair to say that Mr. Harry Charilaou accepted in cross-examination that so far as he was concerned all of the apparent deficiencies in the New Line were capable, as at about the end of August 2001, of being overcome. Whether any of the Rondo Equipment, the Oven or the Cooler were, as at 11 September 2001, not of the quality required by the relevant contract or not delivering the performance necessary if contractual obligations were to be performed were matters as to which expert evidence was led at the trial, and to that evidence I must now turn.

95.

The expert evidence material to issues of liability in the present action has been assembled in a rather unusual fashion. Before any proceedings were commenced Mr. Maurice Leeke, whose professional disciplines are mechanical and electrical engineering, was commissioned on behalf of Filobake to prepare a report dealing with the matters set out in paragraph 1.2 of his report dated 30 January 2002 ("the First Leeke Report") as follows:-

" 1. The reason why the machinery is not working, in particular the oven and cooler.

2. Whether it is possible to resolve the problem, in particular to repair the oven and cooler. If so, the cost of repair.

3. If the problem lies with the oven and cooler, whether it is possible to replace the oven and cooler, and the costings of such replacement.

4. Comment on the relationship between Rondo and Frampton. In particular if Rondo's contract to supply a samosa machine, are they responsible for the oven and cooler even though it is supplied by somebody else, given that the cooking of the pastry was an integral part of the process. "

The last of these matters was, as it seems to me, entirely a matter of law and thus outside the professional expertise which Mr. Leeke possessed.

96.

In the First Leeke Report Mr. Leeke expressed criticisms of the designs of both the Oven and the Cooler. He indicated that his opinion, after conducting various trials, was that "the main problems with the production line are developing from the oven and cooler section" (paragraph 5.4.1 of his report). He rather reserved judgment on the Rondo Equipment, saying, at paragraph 5.2.3 of his report:-

" The Rondo plant cannot be deemed satisfactory until full production trials are carried out by Rondo over a period of one day with the complete production line in operation and producing pastry offered to and acceptable to Filobake. "

The First Leeke Report was disclosed to each of Rondo and Frampton before proceedings were issued on behalf of Filobake.

97.

After the action had been commenced, and in an effort to carry forward an assessment of technical issues, on 17 January 2003 H.H. Judge Anthony Thornton Q.C. directed that Mr. Donald Ives, who has qualifications as a mechanical engineer and is also a Fellow of the Institute of Food Science and Technology, be appointed as a single joint expert "to ascertain that the line, oven and cooler were of satisfactory quality and fit for their intended purpose. The manufacture, cooking and cooling of samosa pastry." In response to those instructions Mr. Ives undertook a variety of tests and prepared a report ("the Ives Report") dated 27 March 2003 which was put before me.

98.

For the purposes of his report Mr. Ives visited the premises of a company called Spurway Foods Ltd. ("Spurway") at Greenford, Middlesex. The reason for the visit to Spurway was that there was installed in its premises a line ("the Spurway Line") similar to the New Line, but delivered later. The Spurway Line included not only elements similar to the Rondo Equipment, but also an oven manufactured and supplied by Frampton of the same type as the Oven. There was no cooler, and the Spurway Line was narrower than the New Line, but that was not considered a material difference between the two lines. The business of Spurway included the manufacture of samosas and the Spurway Line was used to produce pastry to a thickness of 1.1 millimetres destined to be utilised in that manufacture. Having discussed the Spurway Line with Mr. Sayeed Hassain, a director of Spurway, and having observed the Spurway Line in operation, Mr. Ives concluded, at paragraph 4.58 of the Ives Report, that:-

" From my observations I can confirm that Spurway Foods:-

1. Successfully manufacture samosa pastry 62 cm wide by 1.1 mm thick automatically cutting the pastry into sections 20 cm long by 9.5 cm wide on a Rondo line and Frampton oven.

2. I observed the line operating successfully at 8 metres per minute and was advised that the line would operate satisfactorily at 12 metres per minute and 15 metres per minute.

3. The samosa pastry is used by Spurway for the manufacture of samosas. It is a fresh pastry and is not packaged, frozen and thawed before use. ”

99.

Mr. Ives stated his conclusions in section 11 of the Ives Report. So far as is presently material those conclusions were:-

“ 11.01 From my observations of the Filobake process, my visit to Spurway Foods and testing at Filobake of the Rondo line and Frampton oven with coolers it is my opinion that:-

1. The Rondo line with Frampton oven and coolers will manufacture samosa pastry at one metre wide by 0.6mm thick at 15 metres per minute.

2. The effective use of the Rondo line and Frampton equipment is dependent upon the recipe ingredients and the preparation of those ingredients into a dough.

3. A vertical mixer, as listed within the Rondo presentation, and as used by Spurway Foods is in my opinion superior to the horizontal mixer installed and in use by Filobake.

4. If Filobake used an alternative flour to that of filo flour, accurately prepared the recipe batch using warm water and prepared the dough using a vertical mixer, allowing resting of the dough to relax the protein structure then the line will produce samosa pastry at 15 metres per minute.

5. The Frampton oven when correctly set will effectively heat treat the pastry without marking the pastry surface.

6. The cooling fans installed as part of the Frampton installation are not required other than when operating at 15 metres per minute or when a high ambient temperature exists. From the tests, two fans placed close to the entry of the layering conveyor will effectively reduce the temperature of the finished pastry for immediate packaging.

7. The requirement to immediately cool after the pastry exit from the oven, in my opinion, will reduce the water evaporation from the heated pastry resulting in a finished product of higher moisture content and possible risk of deterioration.

8. From the test completed and from my observations at Spurway Foods the difficulty of embrittlement has not occurred.

9. The sheets of pastry as produced for samosa rapidly evaporate their moisture content when exposed to ambient temperatures. The loss of water is further accelerated under refrigerated storage conditions. This will quickly cause embrittlement of the pastry.

It is my opinion that embrittlement occurs due to the ineffective packaging which is then placed into a deep freeze store. Whilst further detailed evaluation is necessary, it is a well known problem within the food industry that refrigerated conditions and storage of unprotected food products results in significant water loss and subsequent weight loss.

12. It is confirmed that the top first pass roll of the Rondo extruder has been damaged. This damage does not disfigure the extruded product on discharge from the third pass rolls.

13. It is my opinion that the steel scraper strips fitted by Filobake which rub the polished steel rolls of the extruder should be replaced with phosphor bronze scrapers as brought to the test programme by Rondo.

The metallurgical lubricant between steel and polished steel rollers is poor and there is a possibility of roller damage.

14. The Frampton oven conveyor belt requires replacement or repair to eliminate the damaged sides of the conveyor belt structure.

The Frampton oven automatic belt tensioning device is ineffective when wide temperature variations occur and should be reconsidered. ...

11.03 The function of the Rondo line and Frampton oven are considered satisfactory for the production of samosa subject to the equipment being correctly set up and monitored. ... ”

The significance of the references to embrittlement in Mr. Ives's statement of his conclusions was that there had been complaints on behalf of Filobake that samosa pastry produced using the New Line had been found to be brittle, and thus not to fold without breaking, after it had been first frozen and then thawed.

100.

In section 12 of the Ives Report Mr. Ives considered specifically the particulars of alleged breach of contract in paragraph 18 of the Particulars of Claim. Those particulars were amended subsequent to the preparation of the Ives Report, and so Mr. Ives did not consider all of the allegations which were pursued before me. However, his views in relation to the matters which he did consider were:-

“ 12.01 It is my opinion that the Rondo line is of sound design and good manufacturing quality.

12.02 It is my opinion that the Rondo line as installed at Filobake is satisfactory for the purpose of manufacturing samosa pastry at 15 metres per minute, one metre wide and 0.5mm to 0.7mm thick.

12.03 It is my opinion that the Frampton oven will effectively heat treat samosa pastry and have adequate temperature control as installed within the Rondo process line.

12.04 It is my opinion that the oven requires repairs to the edges of the conveyor belt and reconsideration of the belt tensioning device. Damage to the belt occurred due to loss of belt tracking. The oven is of a reasonable standard of construction and suitable for use in the food industry.

12.05 It is my opinion that the Frampton fan cooling system as installed and extended is effective in cooling samosa pastry but is not required for cooling unless the line is operating at 15 metres per minute. The cooling effect of the fans is dependent upon the ambient temperature within the production hall and in hot conditions may require refrigerated air cooling.

12.06 It is my opinion that the method of fan cooling directly to the surface of the pastry as currently used can cause mechanical damage to the pastry when the fan speeds are set high causing the pastry to move on the transfer conveyors.

12.07 It is my opinion that the rapid chilling of the pastry surface does not permit the natural dissipation of moisture from the pastry after exit from the oven. Restricting this will result in degraded pastry product with possible stickiness and mould growth.

12.08 It is my opinion that the plastic scrapers as originally fitted by Rondo were adequate for cleaning the extruder rolls provided they were correctly bedded in to the extruder roll surface.

The steel scrapers fitted by Filobake should be replaced before damage occurs with the polished steel extruder rollers.

12.09 I assume that a new sheeting head set out in Paragraph D of the particulars of claim refer to the damaged top roller occurring when a bolt fell into the extruder. This does not have any effect on the quality of the pastry produced.

12.10 Item twelve under Paragraph 18 appears incorrect. I understand that scrapers were replaced by Filobake with an inappropriate material.

....The need for a new sheeting head claimed under paragraph thirteen of the particulars of claim is not confirmed within the evidence that I have. ...

12.11 It is my opinion that the scrapers and the need for gear changing on the top roll were not defects but modifications carried out by Rondo to accommodate the dough prepared and processed by Filobake.

12.12 I cannot comment on the dough produced to the recipe specified in the quotation dated the 30th June 2000 which also includes a recipe for filo pastry. I have not evaluated the flour specified at 11.2 to 11.5 protein nor have I evaluated the use of a dough relaxer.

The successful results I have achieved are based upon the recipe I have observed at Spurway and used during the tests at Filobake. To advise on this matter would require a further series of tests and dough preparation with specific ingredient temperatures.

12.13 It is my opinion that the correct setting of the oven and effective flour dusting of the pastry will eliminate all pastry tackiness.

12.14 It is my opinion that the oven belt will not mark the pastry when correct temperature settings are stabilised relative to the pastry speed and thickness of production.

12.15 It is my opinion that the only reason for a fire occurring in the oven was due to ineffective hygiene practices by Filobake.

12.16 From my observation of the tests, the start-up of the line requires that pastry is fed through onto the oven conveyor and from the oven conveyor to the cooler manually. Thereafter no further manual adjustments are necessary the automatic transfer of pastry from one conveyor to the other continues.

12.17 The electrical heating controls of the oven are satisfactory for the production of pastry as verified within the tests. Commercial set limits are not defined nor do I consider alternative controls for the oven necessary. "

101.

It is apparent from the terms of the Ives Report, the material parts of which I have quoted, that Mr. Ives took the view after his tests and observations that the Rondo Equipment was of satisfactory quality and able to produce samosa pastry one metre wide and 0.5 millimetres thick at a rate of 15 metres per minute, subject to two matters. The first was that the upper roller of the extruder had been damaged by a bolt, but that did not affect the quality of the pastry produced and in any event the dropping of the bolt was a matter for which Filobake was responsible. The second was that the

scrapers fitted to the extruder at the time of Mr. Ives's inspection were unsuitable, being steel, but they were not the original scrapers, those having been replaced by Filobake. The original scrapers Mr. Ives considered had been satisfactory. In summary, therefore, Mr. Ives's view was that the Rondo Equipment as supplied by Rondo was of satisfactory quality, met the requirements set out in the "Performance" section of the Final Quotation in relation to a samosa pastry, if not that described in Recipe 2, and was reasonably fit for the purpose of producing a samosa pastry one metre wide and 0.5 millimetres thick at a rate of 15 metres per minute.

102.

So far as the Oven and the Cooler were concerned, Mr. Ives's view as expressed in the Ives Report was that the Oven was of satisfactory quality at the time of his inspection of it, save in one respect, and would effectively heat-treat samosa pastry. The respect in which Mr. Ives considered that the Oven was not of satisfactory quality at the time of his inspection was that part of the conveyor belt through the Oven was frayed as a result of loss of belt tracking, which required reconsideration of the belt tensioning device. The fraying of the belt did not, however, have any effect upon the heating performance of the Oven. Mr. Ives considered that the Cooler was effective in cooling samosa pastry, but was in fact unnecessary unless the New Line was running at 15 metres per minute. In essence, therefore, Mr. Ives's conclusions were that the Oven and the Cooler at the time of delivery and installation were of satisfactory quality and reasonably fit for their respective intended purposes.

103.

It is, and was at the time Mr. Ives produced the Ives Report, obvious that if his conclusions are correct, that is the end of this action, unless Mr. Ives had misunderstood the contractual obligations of Rondo or Frampton. No doubt recognising the realities of the position, Filobake, through Messrs. Pittalis & Co., went back to Mr. Leeke to seek his views on Mr. Ives's conclusions in respect of engineering matters. Filobake also instructed Mr. Froebel, who has a degree in food technology and is a Member of the Institute of Food Science and Technology, to advise in relation to the bakery aspects of Mr. Ives's conclusions.

104.

Mr. Leeke and Mr. Froebel co-operated from the differing perspectives of their respective professional disciplines in carrying the instructions which they had each received from Messrs. Pittalis & Co. A matter which soon became apparent to Mr. Froebel, as he told me in cross-examination, was that it was necessary, if he was to be able to make an assessment of the performance of the New Line from a bakery perspective, to take a view as to what the New Line was supposed to produce, that is to say, to identify not only the characteristics of the dough which was supposed to be processed by the New Line, but also a finished product specification. Mr. Froebel was made aware of Recipe 2 as attached to the Final Quotation. About that he said in his report dated 20 June 2003 ("the Froebel Report") in section 4:-

" 1) The contracted recipe is very basic in its detail and specifically for the flour only a protein range is given. I would have expected to have seen a specification for the flour detailing as a minimum : water absorption, level of gluten addition (if any), starch damage, and extensibility / resistance levels. As these were not given a decision was taken based on agreement with Mr. Leeke and representatives from Filobake Ltd. to use ADM's "Sovereign" flour as the "contractual" flour. It has the closest match to the specified protein levels and possess [sic] other characteristics that are well suited for the manufacture of Samosa pastry. The specification with relevant extensibility curves are attached under Appendix 2. "

Appendix 2 to the Froebel Report in fact was not an expanded version of Recipe 2, but a specification of "Sovereign" flour. In his cross-examination Mr. Froebel agreed that in order to seek to follow Recipe 2 one would need, in addition to knowing the sort of details of the flour which he specifically mentioned in the Froebel Report, to know what type of oil was to be used, the temperature of the water to be added, the mixing speed, the mixing time, the resting time for the dough, the heating time and the heating temperature. On the evidence as a whole that is not an exhaustive list of necessary information, which would include the temperature of all the ingredients to be mixed and the type of mixer to be used, but the matters which I have mentioned were those specifically put to Mr. Froebel and with which he agreed.

105.

Mr. Froebel told me in cross-examination (Transcript Day 4 p.87 lines 10 - 13) that:-

" ... within any form of discussion the finished product, moisture is absolutely essential in understanding the specification for the machinery that is being put forward. It is absolutely inherent within it. "

It is apparent that he approached the giving of the advice sought from him on the basis that what Rondo and Frampton agreed between them to provide to Filobake was a production line which produced a samosa pastry with given characteristics, central among which was a specific moisture content after passing through the heat-treatment stage. In order to seek to address what he considered to be the relevant question it was logically necessary, as he told me, to have a specification for the finished product against which what was produced by the New Line could be judged. No such finished product specification had ever been produced by Filobake, so Mr. Froebel prepared his own, which was attached as Appendix 3 to the Froebel Report. Most of the constituents of that finished product specification were to a degree subjective, such as, "Smell Characteristic bland flour aroma with no "off odours" detected". That sort of requirement is not particularly material to any issue in this action. What is material is that a target moisture content of the finished pastry of 26% and an acceptable range of moisture of 26% +/- 2% were specified. When he was asked in cross-examination where those figures came from Mr. Froebel said (Transcript Day 4 p. 87 lines 18 - 22):-

" That came from Filobake. It was an indicated customer requirement which I have not necessarily challenged. It seems a reasonable moisture, it is one that I would not find outrageous. It is not too low, it is not too high and it seemed a quite realistic moisture target. "

106.

The answer of Mr. Froebel which I have quoted at the end of the last paragraph created a bit of a mystery. Mr. Harry Charilaou was asked about his approach to producing pastry and he frankly said that he did not worry too much about analysis of contents, although that was sometimes done for customers who required it. He judged the quality of any pastry by touch. He was plainly not interested in some percentage moisture in finished pastry as a sort of magic number. He relied on his experience. The other person with pastry production experience who gave evidence on behalf of Filobake was Mr. George Charilaou. His experience, he told me, was entirely in producing pastry by hand. Neither of the Messrs. Charilaou gave evidence of ever having told Mr. Froebel that Filobake, or some customer of Filobake, had a requirement for a moisture content of finished samosa pastry of 26%. The question then is where did the figure come from? In all of the material put before me a figure of the order of 26% moisture for finished samosa pastry only appeared, prior to surfacing in Appendix 3 to the Froebel Report in two places, the specification to which I have referred at paragraph 3 of this judgment, where it was rendered as 26% +/- 0.5%, and in Recipe 1, if one rounds

up the recorded after cooking moisture content of 25.8%. Neither of these references is to 26% +/- 2%. It may be that, when Mr. Froebel asked someone at Filobake what was the desired moisture content of finished samosa pastry, the response was based on the only figure apparently readily to hand, that derived either from the specification mentioned at paragraph 3 of this judgment or from Recipe 1. However that may be, I am satisfied that actually Filobake had no specific requirement for a moisture content of finished samosa pastry. Its requirement was simply for a samosa pastry saleable commercially as such.

107.

However, rather unfortunately, once the supposed requirement for a moisture content of finished samosa pastry of 26% had been identified, it assumed a crucial importance in the further evaluations of the New Line made by Mr. Froebel and Mr. Leeke. In essence the tests and observations in which each of them participated indicated that in order to achieve a dough which was capable of satisfactory extrusion on the Rondo extruder it was necessary to make the water content of the dough something of the order of 35% by weight of the weight of the flour, compared with the 30% "approx. depends on flour" in Recipe 2, but, if that was done, a moisture content of 26% in the finished samosa pastry could not be achieved because the Oven only removed about 4% of the overall moisture content of the dough. In the Conclusions section of the Froebel Report Mr. Froebel set out his relevant opinions in this way:-

" 1) The contractual recipe indicating a water level of 30% by weight of flour (approx dependent upon flour used) would not produce a developed dough that could be extruded to produce a Samosa sheet.

2) The water level in the contractual recipe had to be increased to 36.5% by weight of flour to produce a developed /workable dough. This is a significant increase for any flour given an initial indicated level of only 30%.

3) All trials that managed to be extruded produced Samosa sheets exhibiting unacceptable sheet strength in a longitudinal direction. This factor alone makes the product unsaleable.

4) The theory that by increasing water levels to assist in developing dough and protein structure in order to produce a more extensible Samosa sheet has not been borne out and it must be concluded that the horizontal mixer is contributing to this situation by not imparting sufficient energy into the dough /unit time. Infact [sic] , the situation is further compounded in that as water levels are increased the characteristics of the dough change to such an extent that the dough can not be extruded satisfactorily. This proves that there is quite a "tight" window of acceptability for dough consistency.

5) Running at 8 m / min trial 2 indicated that with an input moisture of 35.1% the oven was able to reduce the moisture to 30.7%. A reduction of 4.4% and not in line with specification requirements of 26 +/- 2%. This immediately puts into question the ability of the oven to remove the necessary moisture when running at the contractual speed of 15 m / min. In my opinion the oven can not provide sufficient residence time in which to remove the necessary moisture at temperatures that will not produce unwanted quality characteristics such as band marks and scorching.

6) From the trials it can be concluded that each of the flours used could produce doughs that are extrudeable once the optimum water absorption level has been found. All flours could be used to produce a Samosa sheet albeit non [sic] exhibited the necessary longitudinal strength and therefore not commercially saleable. "

108.

It is apparent from Mr. Froebel's conclusions quoted in the preceding paragraph that the problems which he identified were, first, that the moisture content of samosa dough which was capable of being extruded could not be reduced to the level of 26% at the finished pastry stage, although it could be reduced to a level of 30.7%, and, second, that the finished samosa pastry produced on the New Line lacked the necessary longitudinal strength to be satisfactory as samosa pastry. The first supposed problem was, of course, entirely the result of the introduction of a moisture requirement in the finished pastry of 26%. There was no suggestion in the evidence that 26% moisture content was an essential attribute of samosa pastry, or even a usual attribute. On the contrary, Mr. Froebel accepted (Transcript Day 4 p.80 lines 19 - 21) that, "there are a whole number of different recipes for making samosas" . The second problem did not affect as such the ability of the Rondo Equipment to extrude pastry and to pass it down the New Line, or the ability of the Oven to heat-treat it, or the ability of the Cooler to cool it. It therefore threw sharply into focus the issue of what exactly it was that the Rondo Equipment needed to be capable of doing if the contract between Filobake and Rondo was to be performed, and what exactly it was that the Oven and the Cooler needed to be capable of doing if the contract between Filobake and Frampton was to be performed.

109.

Ultimately, as it seemed to me, Mr. Ives, Mr. Leeke and Mr. Froebel were in agreement as to what the Rondo Equipment, the Oven and the Cooler could and could not do which is relevant to the matters which I have to decide. In an agreement dated 8 December 2003 prepared for the purposes of [CPR Part 35.12\(3\)](#) they indicated their agreement, so far as is material, as follows:-

" 1. The Rondo line, fitted with the oven, will produce, stack and cut pastry at a speed of fifteen metres per minute, one metre wide and 0.5mm thick with constant thickness across the pastry sheet. The product does not meet the Filobake specification as detailed in Mr. Froebel's report <aped 3>. The target moisture of 26% can not be attained and the longitudinal strength is unacceptable.

2. From the tests conducted by Mr. Froebel and Mr. Leeke it is concluded that the prepared dough required approximately 35% water content and produced a samosa pastry of a water content higher than the Filobake specification.

3. Under the test conditions listed by Mr. Froebel, the length of the oven, when operating at fifteen metres per minute pastry speed, will extract approximately 4% of moisture from the prepared pastry.

4. A spiral mixer is integral to the production of an acceptable finished pastry. The Filobake single speed horizontal mixer is unsuitable for producing an acceptable finished product.

5. If the finished samosa product is to meet the Filobake specification of 26% moisture, as listed in Mr. Froebel's report, Appendix 3, when using a dough of 35% water content, it will be necessary to redesign and lengthen the oven/cooling system. "

110.

It seems to be implicit in that agreement, in particular in paragraph 4, that it was accepted by all experts that it was possible to produce a samosa pastry of acceptable commercial quality using the New Line, but that the tests conducted by Mr. Froebel and Mr. Leeke had not resulted in that happening. Certainly the evidence of Mr. Ives that Spurway was able to produce a samosa pastry suitable for its need to use it in the production of samosas was not challenged, and I accept it. I was impressed by Mr. Ives. He seemed to me to be thoroughly independent and fair-minded, and to have performed his instructions as a single joint expert conscientiously and comprehensively. I thought that

Mr. Froebel, who had not given expert evidence before, was also doing his best to help me, although, as I have explained, I think that he was diverted somewhat from the real issues by his understandable desire to establish a finished product specification by reference to which he could reach a conclusion on the matters which he understood he was required to address. Mr. Leeke, I felt, on a number of issues expressed both in his reports - he made two - and in his oral evidence opinions which were not able to withstand critical analysis under cross-examination, particularly by Mr. Michael Roberts on behalf of Frampton. So far as may be necessary I prefer the evidence of Mr. Ives to that of Mr. Leeke and that of Mr. Froebel, but as I have indicated, on the central technical issues it did not seem to me that there was any significant disagreement between them. Where they did diverge substantially was in their respective views of what the Rondo Equipment, the Oven and the Cooler should have been able to do. That, in my judgment, was entirely a matter of law, depending upon proper construction of the relevant contracts.

111.

As the action progressed towards trial a matter which came to loom large was whether a dough prepared to Recipe 2 could be satisfactorily extruded through the Rondo Equipment. Rather surprisingly it was not until the day before the commencement of the trial that any tests were conducted on the New Line to see whether that was possible or not. A further joint statement of Mr. Ives, Mr. Leeke and Mr. Froebel was produced dealing with the results of those tests. Mr. Ives explained in oral evidence that for the purposes of the tests decisions had to be taken as to the temperature of the various ingredients at the time of mixing, the type of flour to be used (it was "Sovereign"), the type of oil to be used (rapeseed), the type of mixer to be used (spiral), the mixing times at slow and fast speeds (mixing commenced with a period at slow speed, followed by a period at high speed), and the resting time for the dough. Once those decisions had been made and implemented - some of them, in particular mixing times and resting times were altered between tests - five tests were conducted. Broadly the results were that to get an extrudable dough it was necessary to add a quantity of water equal to 35% by weight of the weight of the flour. Once that was done a good extruded pastry could be produced on the Rondo Equipment at a speed of 17 metres per minute.

112.

Mr. Williams submitted that the fact that the Rondo Equipment was unable to extrude dough composed of the ingredients and in the proportions set out in Recipe 2, in particular with a water content of 30% by weight of the flour content by weight, meant that the Rondo Equipment did not meet the requirements of the term entitled "Performance" in the Final Quotation. He further submitted that the same circumstance meant that the Rondo Equipment was not of satisfactory quality and not reasonably fit for its intended purpose. Mr. Gardiner, in contrast, submitted that the fact that the proportion of water to flour, measured by weight, necessary to produce an extrudable dough had to be increased from 30% to 35% did not mean that the Rondo Equipment was not able to meet the stated performance specification because Recipe 2 stated that the stated proportion of water was, "approx. depends on flour" , and 35% was approximately 30% in the context of a recipe of this type. The question, then, could be presented as how approximate is approximate? In addressing that question in the context of the present case the first thing to note, on my findings of fact, is that the Rondo Equipment was capable of processing a samosa dough - in fact to the recipe used by Spurway - so as to produce a satisfactory prepared samosa pastry. The next relevant factor, as it seems to me, is that the ingredient the proportion of which was variable was cheap and readily obtainable. Third, as Mr. Froebel said in cross-examination (Transcript Day 4 p. 83 lines 1 - 7):-

“ A. One would expect a degree of variability of water because even through seasonality you can get changes from one year to the next.

Q. Therefore, one would expect that one has to do trial and error with a number of different quantities of water to see what works?

A. Yes, that is what my report has basically been about. ”

Fourth, Mr. Harry Charilaou did indeed say in cross-examination (Transcript Day 1 p. 31 lines 4-19), as Mr. Gardiner submitted that he had, that he would have interpreted the water content in Recipe 2 of 3 kilograms “approx” of water as involving the need to try out a number of different water combinations anywhere between 2 and 4 kilograms.

113.

As it seems clear that questions of judgment and “feel” are important in assessing the sufficiency of a dough, and it is recognised that the expertise of the baker is involved in considering whether a particular dough is adequate or requires the addition of some more of some ingredient or other, specifically water, it seems to me that the submission of Mr. Gardiner that a water content of 35% by weight of the weight of the flour is “approx. depends on flour” 30% is well-founded and I accept it. It follows that in my judgment the Rondo Equipment met the performance specification in the contract between Filobake and Rondo. However, even if technically that were wrong, it is plain on the evidence that the Rondo Equipment was capable of processing a samosa dough so as to produce finished samosa pastry of a commercially acceptable quality, as happened in the case of Spurway. It was thus reasonably fit for that purpose and of satisfactory quality. In those circumstances any technical breach of contract resulting from a need to add water in order to achieve that consequence caused no loss to Filobake and therefore would only attract an award of nominal damages.

114.

So far as the two specific pleaded criticisms of the Rondo Equipment was concerned, Mr. Leeke accepted in cross-examination that he had no criticism of the sheeting head on the extruder. The only evidence of any defect in the extruder was of damage caused to the top roller by someone dropping a bolt onto it. It was accepted that had not been done by anyone at Rondo and that it had no effect on the production of pastry. Mr. Leeke seemed to accept that phosphor bronze scrapers, as fitted by Rondo on 6 August 2001, would have been appropriate, but in any event he said in cross-examination that he had not seen those scrapers and could not comment upon them. Mr. Ives’s view was that the plastic scrapers originally fitted were satisfactory. On that state of the evidence I find that there was no substance in the pleaded criticism of either the sheeting head of the extruder or the scrapers as originally fitted or as subsequently replaced by Rondo.

115.

There were criticisms, particularly by Mr. Leeke, of the effects upon the product of seeking to freeze and then to thaw samosa pastry produced on the New Line in terms of causing cracking and being unable to be folded so as to make samosas. I do not need to consider those criticisms because it was not a term of the contract between Rondo and Filobake that pastry produced on the Rondo Equipment should be capable of being frozen and then thawed without damage to the pastry.

116.

One of the principal early criticisms of the performance of the Oven related to the fact that toast-type markings appeared on the underside of pastry being put through it. That matter disappeared during the trial as a serious criticism as it was accepted that it only occurred at the commencement of a

production run for a couple of minutes until the temperature in the Oven had stabilised. In other words, it was a characteristic of the Oven that it needed to generate an appropriate internal atmosphere before useable pastry was produced. When the Oven was switched on the conveyor belt ran through it without pastry on the belt. That caused the belt to become hotter than was desirable for the production of pastry. However, as moist pastry began to run along the belt, the temperature of the belt adjusted and the markings disappeared. I find that there was no substance in this criticism. There was no evidence that in any other circumstances marks appeared on the pastry passing through the Oven, notwithstanding what was pleaded in particular (j) under paragraph 18 of the Amended Particulars of Claim.

117.

Another criticism of the Oven to which some importance was attributed at the beginning of the trial, but the significance of which declined as the trial progressed, concerned fires in the Oven. The evidence was that there were just two fires, both soon after the delivery of the Oven, which occurred when pastry adhered to the conveyor belt and went through the Oven more than once. The problem was dealt with easily and effectively. There was no recurrence. Filobake's pleaded case was that the fires occurred because there was no means of safely cleaning the Oven. It is a sufficient answer to that allegation that in fact there were no more fires after the initial two. It must have been possible, as was asserted on behalf of Frampton, safely and effectively to clean the Oven and the conveyor belt through it. How that was done, on the evidence, was by brushing that part of the belt which ran outside of the heat-treatment chamber to remove pastry while the belt was inched along. Mr. Harry Charilaou suggested that a member of the staff of Filobake was stationed permanently beside the Oven to watch out for problems with pastry sticking to the conveyor belt, but I do not accept that. Certainly there was no suggestion by Mr. Ives, Mr. Leeke or Mr. Froebel that that method of operation had been adopted during any of the tests which they had observed.

118.

It was not in dispute that there was no automatic transfer from the Rondo Equipment onto the conveyor belt which ran through the Oven and no automatic transfer from that conveyor belt once pastry had passed through the Oven and the Cooler. Once in production, a continuous sheet of pastry passed along the New Line, so the significance of whether there was automatic transfer was limited to the start of any particular production run. What had to happen at that time was that someone had to pick up the leading edge of the pastry as it approached the conveyor belt through the Oven and carry it onto that belt. That process was repeated at the other end of the belt. Although pleaded as a criticism of the Oven, in fact the lack of automatic transfer was simply a feature of the operation of the New Line.

119.

The pleaded complaints concerning the lack of effective heating controls on the Oven and lack of a means of controlling the heat build-up in the conveyor belt seemed to be related to the complaints about the marking of pastry. Certainly I do not consider that there was any substance in these complaints.

120.

The main complaints about the Oven centred on the alleged inability of the New Line to produce commercially acceptable samosa pastry. During the course of the trial those complaints came to focus in particular on the alleged inability of the Oven to reduce to 26% the moisture content of pastry with the initial proportion of water necessary to enable it to be extruded through the Rondo extruder, namely 35%. As there was no contractual obligation on Frampton to achieve that result regardless of

the moisture content of the original dough, there was no substance in that complaint. It was accepted that the Oven did enable the moisture content of samosa pastry put through it to be reduced by 4%, and there was no evidence that such a reduction in the moisture content of a dough capable of being extruded by the Rondo Equipment, that is to say, with an original moisture content of the order of 35% by weight of the weight of the flour, was insufficient to enable satisfactory finished samosa pastry to be produced. Such pastry was produced by Spurway.

121.

The remaining complaint about the Oven was the conveyor belt had frayed as a result of the belt tensioning device being inadequate to avoid the belt hitting the guide rollers and thereby being damaged. In my judgment the fact that in service the belt in the Oven did fray as a result of a problem with the belt tensioning device did mean that, in that respect alone, the Oven as delivered was not of satisfactory quality or reasonably fit for its intended purpose. In my judgment the Oven with the defect in the belt tensioning device which caused the conveyor belt to fray was not, in the words of [Sale of Goods Act 1979 s.14\(2A\)](#), of "the standard that a reasonable person would regard as satisfactory, taking account of any description of the goods, the price (if relevant) and all the other relevant circumstances". In his written closing submissions Mr. Williams, realistically, described the problems with the belt tensioning device and the consequent fraying of part of the conveyor belt as "minor defects". Mr. Roberts also categorised those problems as "a minor defect", but he submitted that they did not amount to a breach of contract at all. At paragraph 27 of his written closing submission he said:-

" The belt and tensioning device is a minor defect, but not one that renders the Oven and Cooler not of satisfactory quality. The belt would have been (easily) replaced a long time ago but having rejected the goods, the Claimant did not pursue this and continued to use the machine for tests and subsequently for products notwithstanding this issue with the inevitable result of further deterioration (which did not prevent pastry being made!). This was never something which prevented the Oven and Cooler from performing its job and was never the or a basis for rejection of the goods. It is a minor defect but not the sort of defect in the context of plant and equipment in relation to which D2 could be said to be in breach of contract. "

It seemed to me that in that submission Mr. Roberts rather conflated two separate issues, namely whether there was a breach of contract at all, and whether the breach of contract gave rise to a right in the purchaser to reject the goods. In my judgment, as I have indicated, there was a breach of the contract between Frampton and Filobake by reason of the defects in the belt tensioning device and the consequent fraying of the conveyor belt. However, that breach was so slight, as it appears to me, that it would have been unreasonable, within the meaning of [Sale of Goods Act 1979 s.15A\(1\)\(b\)](#), for Filobake to reject the Oven. That does not mean that Filobake was not in principle entitled to compensation for the breach.

122.

However, this action so far as Frampton is concerned has not been about the defects in the belt tensioning device and the consequent fraying of the belt. Mr. Fleming offered during his oral evidence to replace the belt and to adjust the tensioning device to avoid a recurrence. That offer was not accepted, but I have no doubt that if, in the light of this judgment, Filobake were to reconsider its position and seek to take Mr. Fleming up on it, he would do what he offered to do. However that may be, there was no claim for damages in respect of the cost of replacing the belt in the Oven or in respect of adjusting the belt tensioning device, and no evidence was led in respect of the cost of

replacing the belt or adjusting the belt tensioning device. Consequently, only nominal damages are recoverable in respect of the breach of contract which I have found proved against Frampton.

123.

No clear complaint about the Cooler ever really emerged. During the period after delivery and installation of the Cooler and before its purported rejection complaints were made that it produced insufficient cooling. However, I accept that the Cooler was only ever supposed to reduce the temperature of pastry emerging from the Oven to the ambient temperature in Filobake's premises. The Cooler was, after all, basically just a number of fans, with no means of producing cooling other than by agitation of the air. In the result I find that the Cooler was of satisfactory quality and reasonably fit for its intended purpose.

Conclusions as to liability

124.

In the result the claims of Filobake against Rondo fail. The claim of Filobake against Frampton succeeds insofar as the Oven was not of satisfactory quality or reasonably fit for its intended purpose by reason of having a defective belt tensioning device which in turn caused the belt in the Oven to fray, but those breaches only attract an award of nominal damages.

Loss of right of rejection

125.

In the light of the conclusions which I have already expressed there was no breach either of the contract between Rondo and Filobake or of the contract between Frampton and Filobake which entitled Filobake to reject any of the Rondo Equipment, the Oven or the Cooler. However, each of Mr. Gardiner and Mr. Roberts submitted in closing their respective clients' cases that if there had otherwise been a right of rejection in Filobake, that right had been lost.

126.

Mr. Gardiner in his written closing submissions said:-

" 43. Even if C became entitled to reject D1's equipment - that right was lost by reason of:

a. The representation made in C's letter dated 9th May 2001 [sic - the reference intended was to the facsimile transmission of 3 May 2001] ... Mr. Harry Charilaou agreed that given the wording he used, he could understand how Mr. Johnson could have read this as being a clean bill of health for the Rondo equipment

b. Paying the final 10% instalment of the price on 1st June 2001 after a reasonable opportunity of inspection ...

c. Delaying until September before rejecting the goods.

44. Because C has lost the right to reject the goods, C is restricted to claiming loss of profits. "

127.

Mr. Roberts, on the other hand, relied on some different matters as depriving Filobake of any right of rejection which it might otherwise have had. He said in his written closing submissions:-

" 38. This was simply too late in the day. Property and title had passed and [sic - the context suggests that "to" was meant] the Claimant on delivery and the Claimant subsequently dealt with and treating [sic] the equipment as his own in a manner which waived any residual right to reject. The Claimant

had paid in full for the goods and used them commercially in tests to achieve the pastry he wanted. In July the goods were mortgaged by the Claimant to HSBC as per the HSBC chattel mortgage under the covenants of which ... the Claimant had obligations which were wholly inconsistent with rejection of the goods. It is submitted that mortgaging the goods is wholly inconsistent with retaining any right to reject.

39. After refection [sic] , risk passes to the seller and the buyer cannot for example exercise lien for repayment of the price. He cannot deal wit [sic] them except with the express or implied authority of the seller. The problem for the Claimant here is that when he rejected them, the only rights in the goods that it retained was an equity of redemption and was in no position to deal thus with the goods. Furthermore the Claimants conduct thereafter - using the goods to manufacture, was inconsistent with rejection. At the time of purported rejection, there was, as this trial has shown, no breach of contract on the part of D2 and the Claimants have no [sic] demonstrated an entitlement to reject. "

128.

Mr. Williams's position on behalf of Filobake on the issue of rejection seemed in his closing submissions to be to a degree agnostic:-

" C says repudiatory breaches by D1 and D2; at time of rejection both D1 and D2 still trying to make equipment work - no production runs at 15m/m - Fleming agrees that the August demonstration for Ali Baba was at 8m/m; final instalment paid but at time when still expectation that it could be made to work. Await to hear D's case before making further submissions. If entitled to reject claim return of price plus wasted overheads and expenditure - paras 21(b), (c) and (d) of Particulars of Claim. Obligated to house and maintain equipment pending the litigation. Mr. Tinham agrees that substantial part of 21(d) is reasonable on this basis. "

Mr. Williams expounded upon that written submission orally. He contended that the decision to reject was in a sense conditional, its efficacy being dependent upon the judgment of the court. He submitted that in those circumstances Filobake was bound to house and to maintain the Rondo Equipment, the Oven and the Cooler, quite apart from being obliged to do so by the terms of the Mortgage. He asserted that the fact that the Rondo Equipment, the Oven and the Cooler had been made the subject of the Mortgage was no impediment to the rejection of those goods. He submitted that using the New Line after the purported rejection of the Rondo Equipment, the Oven and the Cooler was a step taken to mitigate Filobake's losses.

129.

By [Sale of Goods Act 1979 s. 35\(1\)](#) it is provided that:-

" The buyer is deemed to have accepted the goods, subject to subsection (2) below [not presently material] -

(a) when he intimates to the seller that he has accepted them, or

(b) when the goods have been delivered to him and he does any act in relation to them which is inconsistent with the ownership of the seller. "

By subsection (4) of the same section,

" The buyer is also deemed to have accepted the goods when after the lapse of a reasonable time he retains the goods without intimating to the seller that he has rejected them. "

130.

Under the terms of the contract between Frampton and Filobake the final instalment of the purchase price was not payable until after satisfactory performance trials. Payment of the final instalment was thus evidence of acceptance of the Oven and the Cooler. Payment of the final instalment of the purchase price of the Rondo Equipment was, as it seems to me, some evidence of the acceptance by Filobake of the Rondo Equipment, but possibly weightier evidence was Mr. Harry Charilaou's statement in his facsimile transmission to Mr. Fleming on 3 May 2001, copied to Mr. Johnson, that, "As far as the Rondo machine is concerned it is ok for samosa pastry to be produced". The mortgaging of the Rondo Equipment, the Oven and the Cooler was an act inconsistent with the continuing ownership of the Rondo Equipment by Rondo and of the Oven and the Cooler by Frampton. Had it been necessary I should therefore have held that Filobake had accepted both the Rondo Equipment and the Oven and the Cooler prior to 11 September 2001 when it purported to reject those goods. In any event, even if there had otherwise been an effective rejection, it seems to me that by using the New Line to produce samosa pastry for Gazebo for profit in 2002 and 2003 Filobake must be taken to have waived any right to treat the Rondo Equipment, the Oven and the Cooler as rejected. As Mr. Roberts submitted, an effect of rejection of goods is that property and risk revert to the seller, so that after rejection the buyer is no longer entitled to use the goods. If he does use them, in my judgment the effect in law is, as it were, to rescind the rejection.

Filobake's alleged losses

131.

In the light of my conclusions on liability it is strictly unnecessary to consider the losses allegedly sustained by Filobake. However, I heard quite a lot of evidence and argument concerning those alleged losses, so I think that I should indicate my conclusions on disputed items.

132.

There was a claim on behalf of Filobake for repayment of the purchase prices of the Rondo Equipment, the Oven and the Cooler. The amounts in question were not in dispute. It was accepted on behalf of Filobake that the entitlement to repayment only arose if it had been entitled to reject the relevant goods and had effectively done so.

133.

The damages claimed on behalf of Filobake against both Rondo and Frampton - no distinction was drawn between them in relation to the sums claimed - fell into five categories as pleaded in paragraph 21 of the Amended Particulars of Claim. Those were:-

" (a) Estimated loss of net profit before tax

01.07.01 to 30.06.03 £285,775.00

and continuing at the rate of £140,000 per annum, full particulars of which appear in paragraphs 51 and 57 of the report of Richard Donald Warman FCA dated the 8th August 2003

(b) Wasted cost of works to adapt premises to accommodate the Line, the Oven and the Cooler

£22,285.00

(c) Wasted fixtures and fittings necessitated by the Line, the Oven and the Cooler: £26,447.00

(d) Wasted machinery and installation costs necessitated by the Line, the Oven and the Cooler:

£20,758.00

being the total of the sums set out in the schedule annexed hereto

(e) Wasted overheads and operating costs allocated to the Line, the Oven and the Cooler

3 years to 30.06.03: £33,544.00

being the total of the sums set out in paragraph 38 of Mr. Warman's report less the sum of £81,336 for the costs of these proceedings, and continuing at a similar rate as set out in paragraph 56 of the report. "

It is convenient to refer to the alleged losses particularised at (a) as "the loss of profits claim", to the alleged losses particularised at (b) as "the premises claim", to the alleged losses particularised at (c) as "the wasted fixtures claim", to the alleged losses particularised at (d) as "the wasted machinery claim" and to the alleged losses particularised at (e) as "the wasted overheads claim".

134.

Mr. Williams made clear at the trial that the loss of profits claim was alternative to the combination of the premises claim, the wasted fixtures claim, the wasted machinery claim and the wasted overheads claim, plus the claim for repayment of the purchase prices, and was pursued only if it were found that Filobake had not been entitled to reject the Rondo Equipment, the Oven and the Cooler. All the other claims were pursued on the basis that it was found that Filobake had been entitled to, and had effectually, rejected the relevant components of the New Line.

135.

The premises claim was clarified in Further Information given in response to a Request dated 16 August 2002 made on behalf of Frampton. The clarification given was:-

" In fact this sum does not represent cost of works but represents premium/compensation to previous tenant of Unit A to vacate in order to secure additional space required to accommodate the new line and ancillary equipment at a costs [sic] of £22,000.00.

Stamp duty on new lease issued to Claimant for Unit A

£285.00 "

The claim for £22,000 paid to the previous tenant, Mr. Vasos Pitallis, was abandoned at the trial and I need say no more about it. The claim for £285 was proved by production of a stamped copy of the lease of Unit A granted to Filobake.

136.

The wasted fixtures claim and the wasted machinery claim were not really addressed in the evidence as prepared for trial. H.H. Judge Anthony Thornton Q.C. had directed on 22 November 2002, amongst other things, that:-

" By the 10th January 2003, the Claimant is to prepare paginated cross-reference bundles of all documents in support of the quantum of its claim with any explanatory commentary. "

A bundle of documents running to some 125 pages was prepared in purported compliance with that direction, but, with the exception of a copy of an invoice for a horizontal mixer costing £12,761.77 supplied by Konstadin Gatselakis, it did not deal at all with the wasted machinery claim. The other documents included in the bundle were not accompanied by any explanatory commentary, but there was an index to them and the index contained some headings in respect of collections of documents. The documents which were included in the bundle included a considerable number of petty cash

vouchers and invoices the significance of which was not apparent upon their faces. The witness statements prepared on behalf of the Claimant included almost nothing dealing with the wasted fixtures claim or the wasted machinery claim. The only relevant evidence was to be found in paragraph 19 of the statement of Mr. Tsangarides and in paragraph 29 of the statement of Mr. Harry Charilaou. Although not identically worded, those paragraphs were each to the same effect and that in Mr. Tsangarides's statement may be taken as representative of both:-

“ The machinery [that is, the Rondo Equipment, the Oven and the Cooler] was delivered on 17th March 2001. We ordered a new horizontal mixer and trolleys from Gatselakis in Greece for the price of £12,761.77 which arrived in April 2001... We also ordered a flow wrap machine for £17,990.00 exclusive of VAT which arrived in April 2001.... Other equipment purchased is detailed in the bundle of quantum documents dated 10th January 2003. ”

I accept that the new mixer costing £12,761.77 was purchased. It was necessary to acquire an additional mixer in order to produce sufficient dough to be able to service the New Line in full production. I also accept that a flow wrap machine costing, net of Value Added Tax, £17,990 was bought. There was no evidence what motivated the purchase of the flow wrap machine. However, there was no claim in respect of that machine, so that lack of evidence is not of any significance. The bundle of documents served on 10 January 2003 included a number of copy invoices in respect of what looked as if it was equipment of some sort, in particular invoices for a turntable, a platform truck and a wall ashtray, but there was no evidence what these items were intended to be used for or that they had any connection with the operation of the New Line. The function of a wall ashtray is perhaps obvious from its description, but its relationship, if any, to the New Line is not.

137.

In the result the only item in the wasted machinery claim which was proved as an item of expenditure was the new mixer, and none of the items in the wasted fixtures claim was proved.

138.

The loss of profit claim, was calculated on behalf of Filobake by Mr. Richard Warman, the expert accountant instructed on its behalf. He also dealt with the wasted overheads claim. The foundation upon which Mr. Warman based his evaluation of the loss of profit claim was the Business Plan. He told me that in his view the Business Plan appeared to have been properly prepared by a chartered accountant, Mr. John Pittalis, had been accepted by HSBC, a reputable bank, and was a sound basis for calculating the loss of profits claim. Mr. Warman himself was not really in a position to consider critically the Business Plan.

139.

Mr. John Pittalis, who prepared the Business Plan, was cross-examined by Mr. Gardiner on the contrast between the gross margin which he had included in the Business Plan and the gross margins shown in projections made by his father at the end of 1999 in the context of a possible sale of the business of Filobake. This exchange took place (Transcript Day 6 p. 103 lines 2 - 17):-

“ A. ...So, whether my figures are different to some other accountant, it happens a lot of the time. I can only say at that time, on that day, that was what I forecasted the GP [gross profit] . If I had done it a week later or a year later, it might be different because that is what forecasts are like. I can only do it to the best of my ability with the information at hand at that time.

Q. I think you accept then from that answer, Mr. Pittalis, that if you had done it a week later or a year later it could have been different?

A. You could have 10 different accountants and they will come back with 10 different figures. It happens. That is what accountants ...

Q. The figure could well be different from 58 per cent.

A. It could well be more; it could be or less. I am not going to disagree with you. "

That seems to me to be commendably frank on the part of Mr. John Pittalis, but it does not really inspire confidence in the Business Plan as a basis upon which to assess damages for loss of profit.

140.

I have already recorded that the Business Plan was sent to HSBC under cover of a letter dated 15 September 2000 written by Mr. John Pittalis. I have quoted from that letter the passage in which Mr. John Pittalis referred to "the sales team at the company" . I have no hesitation in accepting that he did speak to Mr. Tsangarides and Mr. Harry Charilaou and that they did tell him that they were confident that increased sales of the order of 5,000 kilograms per week could be generated. Probably the source of the projected sales figure was Mr. Charilaou rather than Mr. Tsangarides, because Mr. Charilaou dealt with sales, while Mr. Tsangarides was really the office manager.

141.

Mr. Harry Charilaou told me in cross-examination that the capacity of the Existing Line at Filobake was of the order of 5,000 kilograms if operated on an 8-hour shift for 5 days a week. With two shifts production of perhaps 15,000 kilograms was possible, but in reality in a good week possibly 7,000 kilograms would be produced. The Business Plan recorded average sales as 5,000 kilograms per week, which on these figures would mean that the Existing Line was fully utilised on a single shift 5-day week basis. The Business Plan assumed additional production of only another 5,000 kilograms per week, a level of production which was within the capacity of the Existing Line if operated on a double shift basis. It was unclear on the evidence whether the original intention at the time of purchase of the New Line was that it should replace the Existing Line, or whether they would each continue in production in parallel. If the New Line could produce the same products as the Existing Line, but faster, it would seem sensible to have concentrated production on the New Line, not least because that would have meant the employees could be redeployed from the Existing Line to the New Line and thus that fewer, if any, additional employees would have been needed. However, what precisely was envisaged was not explored in evidence. What Mr. Harry Charilaou did say about the production of the Existing Line was that Filobake had only two customers for samosa pastry, a concern called Mariam's and Motu Ghosh. Mariam's took a very small amount, but in a good week Motu Ghosh took about 3,000 kilograms of samosa pastry. Mr. Tsangarides believed that Mr. Charilaou was confused about how much samosa pastry Motu Ghosh took each week. Mr. Tsangarides put the quantity at about 700 kilograms. I prefer the evidence of Mr. Tsangarides on this point. Mr. Charilaou's skills seemed to me to be very much practical, while Mr. Tsangarides had responsibility, amongst other things, for invoicing and thus a closer interest in what quantities were being sold to what customers. Each of Mariam's and Motu Ghosh had another supplier of samosa pastry, a company called St. James. Mr. Charilaou believed that Motu Ghosh obtained about half of its requirements of samosa pastry from St. James.

142.

While I have no doubt that Mr. John Pittalis did consult Mr. Harry Charilaou and Mr. Tsangarides about their thoughts as to sales levels if the New Line were brought into use, and while I accept that they told him that they were confident that sales could be increased by 5,000 kilograms per week, there seems, on the evidence, to have been no justification for the increase in sales which was anticipated. Mr. Tsangarides accepted in cross-examination that the projected increase could not have

come from the two existing customers for samosa pastry. It would have been necessary to obtain new customers. Mr. Tsangarides's attention was drawn to the note to the cashflow forecast included in the Business Plan that:-

" Indications from existing customers give expected minimum additional sales of 5000 kilos per week. This does not include interest from new customers and given the new machine's capacity of 18000 kilos per week the company expects sales to be at that level soon after the machine is required [sic] . However for the benefit of the forecast the increase in sales has been based on the minimum forecast. "

He said that he thought that that was a mistake on the part of Mr. John Pittalis. Certainly Mr. Tsangarides was not of the view that additional sales of 5,000 kilograms per week could have come from Motu Ghosh, the only significant existing customer for samosa pastry.

143.

Mr. Tsangarides prepared a note entitled "Potential Customers" at the point at which a decision to purchase the Rondo Equipment was being considered. Just four customers were identified in that note, two of them being Motu Ghosh and Mariam's. The other two were UPB and a Mr. Hanif. UPB were said in the note to "want to be our agents to distribute the pastry on an exclusive basis with suitable minimum volume guarantees." About Mr. Hanif the note said only:-

" He is based in Leeds and he imports 5000 kg a week of samosa pads from Saudi Arabia. He has tried the Rondo pastry and he was happy with it. He has said that he would be prepared to buy our pastry at £1 a kilo. "

It did not appear that as at the date of the Business Plan any other specific potential customer had been identified, still less its requirements assessed or any investigation undertaken as to the likelihood of obtaining its business. It is right to say that in June 1999 Mr. Harry Charilaou had been in contact with a company called Fabulous Foods and had received a facsimile transmission dated 4 June 1999 from Kim Kamiani of that company. That communication was mostly about organic filo pastry. However, it did conclude:-

" 6. Samosas & Value Added Pastry Products

I have had a very positive response from all the buyers regarding the concept of Organic Samosas and other frozen and chilled snacks. If the machine that you have targetted can produce in reasonable volume I can tell you that you will be busy seven days a week.

I can confirm that I have had positive interest from Tesco, J. Sainsbury, Asda, Safeway, Waitrose and many other customers. Please let me know when you will be ready to produce as most of my customers are looking to launch new snack lines from September onwards. "

The facsimile transmission was some 15 months before the Rondo Equipment was ordered and some 21 months before it was delivered. There was no evidence of any further contact between Filobake and Fabulous Foods after June 1999.

144.

At paragraph 48 of his witness statement Mr. Harry Charilaou dealt with his efforts to obtain customers for samosa pastry after the contract between Filobake and Rondo was made in September 2000. With the exception of contact with a Mr. Zaman of a concern called Raj in November 2000, all of those efforts were made after March 2001. There were included in the documents put before me a

number of facsimile transmissions created by Mr. Charilaou addressed to persons whom he obviously considered to be potential customers. Other than in the cases to which I have already referred, there was no indication of a positive response.

145.

The note entitled "Potential Customers" concluded with this comment about equipment from Rondo:-

" This means that whoever buys this machine first has the market for fillo [sic] to himself for a period of ?? with a 15% advantage in costings for raw materials, savings in staffing costs and the pastry cut to the customers requirements.

It has come to our attention that Rondo have approached at least one other fillo and samosa manufacturer.

The market for samosa pastry in the UK is enormous and growing every year. Samosas are the biggest single convenience food item sold today. "

In the end it seems that it was the conviction recorded at the end of the note "Potential Customers" rather than any real investigation of the market which led Filobake to consider that the levels of increased sales reflected in the Business Plan were achievable. In my judgment there was simply no credible evidence that the increased sales forecast in the Business Plan could have been made.

146.

It was plain from the evidence of Mr. Harry Charilaou that, notwithstanding the purported rejection of the Rondo Equipment, the Oven and the Cooler, he continued to seek customers for samosa pastry. In paragraph 48 of his witness statement he described sending samples of pastry to Mariam's and Motu Ghosh on 22 October 2001 and to The Samosa Company on 3 December 2001. Those efforts met with success to the extent that, as was demonstrated by copies of invoices rendered by Filobake to Gazebo, Gazebo did place regular orders for samosa pastry between at least October 2002 and June 2003. The orders were placed at roughly weekly intervals. How precisely Gazebo came into contact with Filobake did not emerge in evidence, but as it was not an existing customer it must have been solicited in some way. It did seem that, although the copy invoices produced in evidence only began in October 2002, trading between Filobake and Gazebo had actually begun some time before that. At all events a letter dated 1 March 2002 written by Mr. Cesar Bernal of Gazebo to Mr. Harry Charilaou was put in evidence which was in these terms:-

" As discussed on the telephone, we found that on your last delivery there were a number of boxes with layers of pastry with little or no starch on them, which made them very sticky and therefore difficult to separate.

These pastry layers tend to be towards the middle of the box and were significantly darker than the rest of the pastry sheets.

Could you please reply to me as to the reasons for this non-conformance and the measures to be taken to prevent this happening again. "

147.

Subsequently Mr. Bernal wrote a letter dated 5 August 2002 to Mr. Harry Charilaou. What Mr. Bernal wrote in that letter was:-

" As discussed on the telephone, the pastry delivered to us last Friday was extremely fragile.

This makes it very difficult for us to fill/form our products due to the pastry braking [sic] too easily.

As you know from previous conversations, the strength of your pastry is getting weaker and weaker, and as a result we are returning back to you the last consignment (except from a few boxes used for the bite size products).

In view of the new responsibilities Gazebo is acquiring with new customers it is extremely vital that the pastry you deliver to us performs as it did when we first purchased it.

Could you please carry out a full investigation into this issue and inform us as to the causes of this non-conformance and the corrective actions taken. Could you also advice [sic] us as to the time scales for this problem to be corrected. "

It appears from the terms of that letter that the quality of the pastry originally supplied was satisfactory, but had declined since, and that certainly up to August 2002 Gazebo had used Filobake pastry for products across the whole size range, not just for bite size products.

148.

Mr. Harry Charilaou told me that, in anticipation of the installation of the New Line it was necessary to undertake various building works at Filobake's premises, in particular to integrate Unit A into the Original Premises. Very properly, Motu Ghosh was told of what was intended. Motu Ghosh understandably indicated that it did not wish to continue receive samosa pastry produced during the period of the building works. In fact, having interrupted supplies in this way, Filobake lost Motu Ghosh as a customer. Motu Ghosh seems to have transferred procurement of all of its requirements of samosa pastry to St. James.

149.

The loss of Motu Ghosh as a customer meant that in fact after March 2001 the only significant customer of Filobake for samosa pastry was Gazebo. The only other customer at all seems to have been a company called Harry Mason Finger Foods Ltd., which took a small trial quantity, but did not place a repeat order. Mr. Harry Charilaou told me that Gazebo only took samosa pastry to be used for producing small size samosas, but from the terms of the letter dated 5 August 2002 written by Mr. Bernal that does not seem to have been the position originally at least. Mr. Charilaou also said that there were constant problems and complaints from Gazebo concerning what was produced by Filobake. However, the only written complaints were the two letters to which I have referred. From a facsimile transmission dated 29 October 2002 sent by Mr. Bernal to Mr. Charilaou it appears that Gazebo itself developed a recipe "in order to improve the pastry's strength" which it provided to Filobake. Copies of the invoices rendered by Filobake to Gazebo between October 2002 and June 2003 were put in evidence and they simply referred to the product supplied as "Catering Boxes - Samosa Pastry". The description did not indicate any particular size of sheet of pastry. The pastry was all supplied at a price of £1.20 per kilogram. In all 32 invoices were rendered, in respect of a total production of some 20,500 kilograms of pastry. Only one credit note was issued in respect of pastry supplied, dated 19 June 2003 in the sum of £115.20, in respect of 96 kilograms of pastry which was said to have been mouldy. According to Mr. Harry Charilaou, a dispute of some sort developed between Gazebo and Filobake in the summer of 2003 which resulted in the termination of the association between them. Exactly what was the nature of the dispute was unclear, but it apparently involved cross-allegations by each against the other. Certainly it was not simply a case, it appeared, of Gazebo deciding that the quality of the Filobake product was unsatisfactory.

150.

Shortly before relations between Gazebo and Filobake came to an end, it appears, Mr. Naruby and Mr. Bernal of Gazebo visited Filobake. A report of that visit, which in fact took place on 19 June 2003, was produced by Gazebo and a copy was provided to Filobake. The report began by listing the “visit objectives” :-

“ 1. To establish the reasons for frequent mould growth on the pastry within the stated shelf life (3 days at chilled temperatures).

2. To identify the steps in the manufacturing, delivery and further handling operations that have a negative effect on the peelability of the pastry (increased stickiness).

3. To modify/improve the current pastry’s recipe/manufacturing process to increase the pastry’s extensibility through various trials where recipe and mixing times will be modified. The ultimate aim is to achieve a pastry that is flexible enough to hold the filling in both medium and large samosas.

4. To discuss and analyse both the possibility and implications of providing ready cut pastry as per current dimension requirements including cocktail, medium and large products.

5. To assess the consistency of pastry making and quality/safety procedures at Filobake. ”

151.

Under the heading “Moulds Issue” the report referred to “the repetitive temperature abuse the pastry is currently being subjected to” and “temperature abuse during transport” . A section of the report entitled “Extensibility Issue” included this:-

“ The current lack of extensibility of the pastry is the main reason why we are using it only on cocktail size samosas.

Pastry extensibility depends on a number of process parameters (e.g. ingredients ratio, mixing time, final dough temperature, relaxing time, oven temperature, rolling and cutting direction) as well as on the types of flour used.

Process parameters must be established and controlled at Filobake. As mentioned earlier the process parameters should be established in accordance with the characteristics of the flour, which should be provided by the supplier with every batch by means of certificates of analysis. Once these parameters are established they have to be monitored and recorded for every batch produced to ensure consistency and to minimise stickiness, moulds and extensibility problems ... ”

152.

The final communication between Gazebo and Filobake which was put in evidence was a facsimile transmission dated 16 July 2003 from Mr. Bernal to Mr. Harry Charilaou and was in these terms:-

“ I have now run the trials with the pastry samples you have sent to me. The overall comments from these trials are:

1. The strength of all samples during forming was acceptable.

2. The pastry on sample 1 broke easily after frying.

3. Colour and texture were good after frying.

In order to be able to make a final decision on the appropriate recipe, I need to do a number of other tests on the cooked products, such shelf life, freeze and thawing.

Additionally I will have to ask you to send the same samples again but with small and middle sizes cut out.

The purpose will be to freeze and thaw the raw pastry and assess shelf life after that. Finally I will be assessing the consistency of the pastry samples before we go for a final order.

I am generally happy about your latest effort and suggest you keep up with it for the forthcoming trials, which I suggest should take place on the week starting 4th August (when I come back from holidays). ”

It thus appears that the written communications between Gazebo and Filobake, at any rate, concluded on a positive note. The only explanation for what went wrong was that provided by Mr. Harry Charilaou.

153.

On the totality of the evidence it seems to me that the only proper conclusion is that there was not the demand for samosa pastry which Filobake anticipated at the time the decisions to acquire the Rondo Equipment, the Oven and the Cooler were taken. No existing unsatisfied demand was identified at the time of the decisions, and attempts to generate custom in and after April 2001 were unsuccessful save in the case of Gazebo. If there had in truth been a demand, there is no obvious reason why that demand should not have been met to some extent, at least, by increasing production on the Existing Line. Gazebo became an established and loyal customer for a period of at least some months, and perhaps as many as eighteen, until a dispute unrelated to the Rondo Equipment, the Oven and the Cooler led to a breakdown in relations. Filobake had competitors in the marketplace, such as St. James, which did provide samosa pastry apparently serving whatever demand there was. Thus, had it been necessary to consider the loss of profits claim, I should have concluded that it had not been proved that the projections in the Business Plan were realistic or that any net profit had in fact been lost.

154.

The wasted overheads claim appeared, in principle at least, potentially to overlap the wasted fixtures claim and the wasted machinery claim insofar as it included items of cost said to have been wasted by reason of the alleged breaches of contract and duty on the part of Rondo and Frampton. However, in the light of the lack of evidence in support of virtually all of the items which it was sought to include within the wasted fixtures claim and the wasted machinery claim, this difficulty was theoretical rather than actual. The real problem with the wasted overheads claim was the approach which had been adopted to evaluating the worth of claims which, in principle, might well have been proper had liability been established. Mr. Warman told me in cross-examination that he had enlisted the aid of Mr. Kyriacos Pittalis in identifying the marginal or incremental costs to Filobake resulting from the acquisition and installation of the New Line. Mr. Kyriacos Pittalis plainly did quite a lot of work in analysing the accounts of Filobake for the years ended, respectively, 30 June 2001, 30 June 2002 and 30 June 2003, but unfortunately it was not with a view to identifying marginal or incremental costs, but so as to allocate a proportion of each and every item in the accounts as between the Existing Line, on the one hand, and the New Line, on the other. That was not, as it seemed to me, at all a useful exercise. By way of example of why it was not a useful exercise, the relevant accounts included an item in respect of rent and service charges. The amount shown for that item in the relevant accounts was the total of the rent and service charges referable both to the Original Premises and to Unit A. While the lease of Unit A was taken specifically so as to provide additional space required for the New Line, and thus the rent and service charges relating to Unit A were marginal costs of the New Line,

the rent and service charges relating to the Original Premises were unaffected by the acquisition or installation of the New Line. However, Mr. Pittalis in the exercise which he undertook allocated not only the whole of the rent and service charges relating to Unit A to the New Line, but also half of the rent and service charges relating to the Original Premises. With the exception of costs of sales, to which I shall return, Mr. Kyriacos Pittalis essentially allocated other costs shown in the accounts of Filobake, at least in the years ended 30 June 2002 and 30 June 2003 either in the same proportions as the rent and service charges, or equally. This approach had the consequence, amongst other things, that although there was no recorded production at all on the New Line in the year ended 30 June 2002 there was allocated to the New Line by Mr. Kyriacos Pittalis one half of the light, heat and power costs of Filobake in that year. Why no production on the New Line was recorded at a time when Filobake was apparently supplying Gazebo was not investigated, but an obvious explanation would be that the production for Gazebo at that time was undertaken on the Existing Line. Other allocations seemed to me to be similarly flawed as attempts to identify actual marginal costs. In a few instances, such as the rent referable to Unit A and plant maintenance for the year ended 30 June 2002, notes to Mr. Kyriacos Pittalis's allocations enabled one to identify amounts which seemed to be in fact marginal costs resulting from the decision to instal the New Line. However, by and large that was not possible.

155.

Mr. Kyriacos Pittalis's allocations of costs of sales to the New Line had the feature that significant allocations, especially of wages, were made to the New Line in each of the years ended 30 June 2001 and 30 June 2002 when there was in fact no recorded production on the New Line. The relevant figures were raw materials of £2,407, wages of £19,133 and packaging expenses of £996 in the year ended 30 June 2001 and raw materials of £4,337, wages of £38,386 and packaging costs of £7,002 in the year ended 30 June 2002. The only explanation offered by Mr. Kyriacos Pittalis of these figures was in Note 33 of his "Notes to trading results for the two years ended 30 June 2001 and 2002 per schedules A, B and C" :-

" The wastage costs on the new machine line are briefly explained as follows:

(a) raw materials wasted on trials and samples.

(b) production wages on new staff engaged, trained and kept on for the new machine line.

(c) packing expenses suffered for the production of the new machine line which became obsolete. "

Separate notes were produced by Mr. Kyriacos Pittalis to his allocations for the year ended 30 June 2003. From Note 2 of those notes it was clear that he had assumed an arbitrary 10% of the total cost of raw materials for the year as wastage on the New Line. He approached the allocation of costs of wages and packaging on the basis that production of a particular type of pastry resulted in a standard percentage of cost of sales for conventional filo pastry and a different standard percentage for other types of pastry. Having calculated the supposed costs of wages and packaging by application of the relevant percentages, the balance of actual expenditure on wages was allocated to the New Line as "Balance being wages for staff engaged and kept on for new machine being wasted and charged accordingly" , in the sum of £26,004, and the balance of actual expenditure on packaging was allocated to the New Line as "Balance being wastages on new line production/sales and trials" . Mr. Kyriacos Pittalis did not seek to support these treatments by reference to any underlying material which justified them on the facts of what happened in the year ended 30 June 2003, but rather by reliance upon the correctness of the percentages adopted in the initial part of the calculations, which he said were derived from the accounts of Filobake for the year ended 30 June 2000. While in principle that approach might have had merit, in the absence of information permitting a more

scientific identification of marginal costs of sales, in fact in this case it glossed over a material circumstance in relation to production wages. That was that, as I have already recorded, Mr. Vasos Pittalis was employed by Filobake as production manager as from April 2001. Mr. Roberts asked Mr. Kyriacos Pittalis why Mr. Vasos Pittalis had been employed by Filobake. The answer given (Transcript Day 7 p. 26 lines 6-14) was:-

“ What is the way to answer you? He is my brother. He lost his business. It closed down, to help us more or less expand, you see, this pastry business. As well as that, I had a duty to give him more or less an occupation to carry on, firstly. Secondly, the most important, he was my brother, he is my brother and he was at least going to look after, better than anybody else, my interests and the interests of the company and the shareholders. ”

A little later in his evidence Mr. Kyriacos Pittalis explained that his brother was always in the production area at the premises, was paid £1,500 per month by Filobake, and had been since April 2001. £1,500 per month is the equivalent of £18,000 per annum. If the figure was a net sum, rather than gross, as to which Mr. Kyriacos Pittalis was not asked, the annual employment cost of Mr. Vasos Pittalis would be considerably more than £18,000, but what did seem clear was that the vast bulk of the allegedly wasted production wages charged in Filobake’s annual accounts from about April 2001 was attributable to the sums paid to Mr. Vasos Pittalis. Certainly his salary was not included in either of the other two places in the accounts where wages and salaries appeared, respectively under administration costs and selling and distribution costs. Mr. Kyriacos Pittalis’s notes explained that salaries and wages under administration costs included only all of Mr. Tsangarides’s salary and 75% of the salary of Mr. Harry Charilaou. They also explained that salaries and wages under selling and distribution costs included 25% of the salary of Mr. Harry Charilaou plus an element of “other employees” . However, the latter was less than £6,120 in each relevant year, and thus not enough to cover the sum paid to Mr. Vasos Pittalis.

156.

On examination, therefore, it was plain that the allocations carried out by Mr. Kyriacos Pittalis were not intended to, and did not, save in the few cases to which I have referred, identify the marginal costs of the New Line, that is to say, the costs which would not have been incurred if the New Line had not been acquired and installed. The allocation exercise which was in fact performed was of no assistance in assessing any damages to which Filobake might have been entitled had I found that it was entitled to substantial damages from either Rondo or Frampton.

Conclusion

157.

For the reasons which I have set out the claim of Filobake against Rondo fails in its entirety. The claim of Filobake against Frampton succeeds only to the extent that I find that Filobake is entitled to nominal damages in respect of the breach of the implied term of the contract between the parties that the Oven should be of satisfactory quality which was constituted by the deficiency in the belt tensioning device and the consequent fraying of the Oven conveyor belt. I assess the nominal damages to which Filobake is entitled in respect of that breach in the traditional sum of £2.