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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1017/2/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

8th April 2005

Before:
SIR CHRISTOPHER BELLAMY
(The President)
PROFESSOR PAUL STONEMAN
DAVID SUMMERS

Sitting as a Tribunal in England and Wales

BETWEEN:

PERNOD-RICARD SA
& CAMPBELL DISTILLERS LIMITED

Appellants

and

OFFICE OF FAIR TRADING

Respondent

supported by

BACARDI-MARTINI LIMITED

Intervener

Mr. Nicholas Green QC (instructed by DLA) appeared for the Appellant.

Mr. Jon Turner and Miss Kassie Smith (instructed by the Solicitor to the Office of Fair Trading) appeared for the Respondent

Mr. James Flynn QC (instructed by Simmons & Simmons) appeared for the Intervener.

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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: Good morning ladies and gentlemen. The Tribunal is provisionally of the view
2 that there are four matters that we would like to discuss today:

- 3 1. Whether the proposed revised assurances are in fact agreed as to the terms of
4 those assurances being voluntarily offered by Bacardi.
- 5 2. Whether and to what extent the new regime relating to binding commitments is
6 relevant to the situation that presents itself in this case.
- 7 3. The formal mechanism of disposing of the Appeal, if that is what we decide to do;
- 8 4. The question of costs.

9 I do not know whether those issues are sufficient for a working agenda or whether anyone has
10 any further points they want to add to that. If not, perhaps we can just make sure first of all
11 that the assurances that have now been offered by Bacardi, and on which Pernod has had the
12 opportunity to comment are essentially acceptable to the three parties and form a basis upon
13 which the Appeal need proceed no further. Mr. Green, what is the position on that so far as
14 your clients are concerned?

15 MR. GREEN: I have taken instructions, they are acceptable.

16 THE PRESIDENT: And that, I imagine, is true of you too, Mr. Turner, is it?

17 MR. TURNER: That is the Office's position.

18 THE PRESIDENT: And since Bacardi has proffered them, presumably they are acceptable to
19 Bacardi?

20 MR. FLYNN: Naturally Bacardi thinks they are satisfactory as a means of resolving the proceedings
21 and for that purpose.

22 THE PRESIDENT: Yes, thank you. I think that takes us on, if I may turn to you, Mr. Turner, to a
23 question that has been raised by Pernod, which we would just like to explore for a moment,
24 which is whether these commitments should take the form of binding commitments under what
25 is now s.31A of the Act – which I happen to have in front of me. As I understood it, the OFT's
26 position is that that question does not arise because the investigation that the OFT had begun
27 was closed, and that therefore we are not in a situation where the OFT has begun an
28 investigation within the meaning of s.31A(1). As to that, two points perhaps occur. First of
29 all, strictly speaking – and literally speaking – the OFT had begun an investigation in this case
30 and had not made a Decision within the meaning of s.31(2), that is to say an infringement
31 Decision. So that is the first point that arises on that subsection.

32 The second point is that although the OFT purported to close the investigation that it
33 had begun, the effect of the Tribunal's Judgment was that there were (according to us)
34 procedural errors in that course having been taken without first consulting Pernod, and we left
35 open at para.255 of the Judgment the question of what relief, if any, should be granted, so that

1 formally speaking it would seem to us – at least provisionally – that we could say that the
2 closure of the investigation was set aside, which would mean that the investigation is still on
3 foot, which would mean that the s.31A(1) conditions are met. So we would like to invite any
4 comments the OFT has either on that point or more generally on the use of these new powers
5 to accept binding commitments in a case like this.

6 MR. TURNER: May I give four reactions to that? First – and I will be corrected if I am wrong about
7 this – our impression is that the request for commitments, at least on the correspondence, is not
8 persisted in by Pernod – for commitments to be the mechanism for bringing this to an end.
9 The flavour of the correspondence is that this can be arrived at by agreement in the Tribunal
10 today through the making of an appropriate order. That, we understand from the
11 correspondence, to be Pernod’s position.

12 Secondly, the point you make about s.31(2) is well taken. On the other hand, it is the
13 Office’s position that there is no administration investigation afoot for the purpose of the
14 commitments’ regime. The Office had closed the file. While it is true that the Tribunal has
15 found that the case is admissible, and that the decision to accept assurances was an appealable
16 decision, that is a different matter from saying that the investigation is still afoot. We do not
17 consider that it is the case that when the Tribunal entertains an appeal in a file closure case –
18 let alone all non-infringement cases – that the result of that is that the administrative
19 investigation is to be deemed to be afoot.

20 Thirdly, one of the components for the acceptance of commitments is the
21 identification of a competition problem and of the framing of commitments designed to fit that
22 competition problem. In this case that is very important, because the position of certainly
23 Bacardi as we understand it, and of the Office of Fair Trading is that no competition problem
24 has been demonstrated by Pernod, or otherwise appears.

25 THE PRESIDENT: In your original press release you said that the original undertaking solved the
26 competition problem.

27 MR. TURNER: Yes, the original undertaking solved the competition problem as then appeared and
28 that was the conclusion of the investigation at that stage. What we are talking about now, as I
29 understand it, is a change to the assurances because of Pernod’s case that there are some
30 lacunae, flaw or problem with the existing assurances so that they do not meet the competition
31 problem. The position so far as we are concerned, and I believe Bacardi as well, is that that is
32 not the case, there is no flaw, there are no lacunae. What has been proposed is a device to try
33 to break the deadlock and bring these proceedings to a close. I am not even sure that if
34 commitments are required in a case of this kind that Bacardi would be prepared to continue
35 with its proposal, but Mr. Flynn can speak to that.

1 The fourth point is that we are in a rather interesting position where the decision to
2 accept assurances was made in 2003 prior to the introduction of commitments regime, and the
3 Tribunal is therefore in the transitional position, as it were, straddling the introduction of the
4 new regime. It is our submission that in these circumstances in making an order which we
5 would invite the Tribunal to do today, the Tribunal is looking backwards to the Decision that
6 the Office made and, assuming the Office got it wrong, what the Office should have done at
7 that stage, prior to the introduction of the commitments' regime.

8 Those, in my submission, are four points which lead to the conclusion that there is no
9 need for the parties to engage in the procedures required under the new commitments' regime
10 in the circumstances of this case.

11 Sir, I can deal with the remaining two issues that you canvassed in opening.

12 THE PRESIDENT: Just before you do that, Mr. Turner, and it may be you do not have any
13 instructions on the point, but is there any general policy by the Office as to the circumstances it
14 will go down the binding commitments' regime, and the circumstances in which it will, as it
15 were, accept more informal assurances, now that the binding commitments' regime exists and
16 is there?

17 MR. TURNER: I am aware of the Office's internal consideration of that issue. I will take
18 instructions but I am not sure that we have arrived at a final position on that point. Shall I take
19 instructions for a moment on that?

20 THE PRESIDENT: I think it would be of some interest, yes, thank you.

21 MR. TURNER: (After a pause): It is a point that the Office has considered – I am aware of that,
22 and the position we are at is that the legal view is about to be put to the Office's Board, and we
23 would prefer if we may ----

24 THE PRESIDENT: To reserve.

25 MR. TURNER: -- to reserve that point.

26 THE PRESIDENT: Thank you.

27 MR. TURNER: Because there is an issue, Sir, as you say, as to the scope for accepting informal
28 assurances, in view of the new regime, and that is the issue which is yet to be finally resolved.

29 THE PRESIDENT: Yes, it also has various ramifications for the procedural remedies that follow if
30 it is a situation of binding commitments, or it is not, both from the point of view of the
31 enforceability of the commitments, and from the point of view of any review by the Tribunal if
32 that becomes inappropriate.

33 MR. TURNER: The Office is well aware of that and intends to define its position shortly.

34 THE PRESIDENT: Yes, thank you. You were going to deal with the two other issues.

1 MR. TURNER: The two other issues are the form of the appropriate order and costs. I will develop
2 these submissions only briefly for present purposes.

3 THE PRESIDENT: Yes, thank you.

4 MR. TURNER: So far as the form of the order is concerned, there is an issue whether it should be a
5 withdrawal under rule 12 of the Rules, or in the form of a consent order under rule 57 of the
6 Tribunal's Rules. We say this, Pernod was content to withdraw the Appeal as the Tribunal
7 may have seen in a letter that it wrote on 6th April. It then withdrew from that position later
8 yesterday afternoon.

9 THE PRESIDENT: Just a moment, let me catch up with the correspondence.

10 MR. TURNER: If you have the bundle which was supplied for the hearing.

11 THE PRESIDENT: Yes.

12 MR. TURNER: At tab 18 of that you will find a letter from DLA, first point out that the discussion
13 about commitments, s.31A was noted, and it was said that that would be addressed in due
14 course. The Tribunal will have seen that DLA since then put in a long letter the following day
15 which did not touch on that point. There is then a proposal and you will see that under the
16 recitals in italics the Tribunal gives permission for the Appeal to be withdrawn, so that was
17 what was being canvassed at that stage.

18 Then late yesterday afternoon, at about 10 past 4, we received a letter saying that they
19 had reflected and did not consider it appropriate for them to withdraw the Appeal after all. I do
20 not know if the Tribunal has a copy of that?

21 THE PRESIDENT: Yes, we have it.

22 MR. TURNER: So this we take to be the up to date position now, and you will see from the middle
23 paragraph that Pernod are now saying that they do not, on reflection, believe that they can
24 withdraw the Appeal. The reason that they give is that a large part of the Appeal has already
25 been dealt with in the Tribunal's Judgment on admissibility and procedural fairness, that is 10th
26 June Judgment last year and, as such, we do not believe it would be an appropriate step for the
27 Appellants to withdraw the Appeal. Then what they say is they are therefore leaving it for the
28 Tribunal to decide on the correct procedural mechanism.

29 THE PRESIDENT: Yes, so they do not withdraw it, on the other hand they do not wish to prosecute
30 it?

31 MR. TURNER: Yes. They say also in the last sentence, and this is the explanation for what I was
32 saying about commitments: "This proposal is made on the basis that provided it is agreed
33 between the parties that the assurances will be amended as agreed ..." and those are the
34 voluntary assurances, "...we fully agree that the proceedings should now be brought to an
35 end."

1 We say about that that we note Pernod's reservation in the letter. We feel that it is
2 misguided because withdrawal of the Appeal is certainly an option. It affects matters going
3 forward not going back. It is a way for them to end the Appeal at their instance at this stage,
4 and it does not upset in any way the Judgment that has already been given.

5 Further, we consider strongly that withdrawal is the natural course to be taken in this
6 case. Not only did Pernod accept that apparently in its letter of 6th April, but it said as long ago
7 as 15th March that exit strategies could be discussed, and I would ask the Tribunal just to pick
8 up the agreed note of the meeting that was held with the Office on that date, and you should
9 have that in a small file submitted to the Tribunal as the Office's progress report on 31st March.

10 THE PRESIDENT: Yes.

11 MR. TURNER: It is paginated, there is an agreed note of the meeting beginning on p.85, from
12 which you can see who the attendees were. The material parts are right at the end on pages 88
13 and 89 of the bundle. Just at the bottom of that page you have this:

14 "CK (Miss Kent, OFT) asked how Pernod saw the appeal going forward.

15 "MP (Solicitor, DLA) said that the OFT had shown that it was prepared to investigate
16 Pernod's concerns and took the policing of the assurances seriously. Pernod still
17 wanted the CAT to consider the text of assurances (although it was unlikely to
18 happen). If the textual analysis route could not be pursued he did not see much point
19 in Pernod pushing on with the Appeal."

20 THE PRESIDENT: Is this an open meeting, Mr. Turner?

21 MR. TURNER: It has been agreed, and it is not a "without prejudice" offer of compromise.

22 "On the basis of what the OFT had found it seems that Bacardi was being co-
23 operative by taking the assurances seriously [the existing assurances] and Pernod was
24 comforted by the OFT's openness to investigating breaches or new allegations.

25 However [fair reservation] Pernod would need to discuss this with counsel."

26 Then if you turn over the page you have AA [Mr. Ageletakis, OFT] asking whether there were
27 any specific comments that Pernod wished to make on our report. That was the Office's report
28 dismissing effectively a raft of allegations that had been made by Pernod about a competition
29 problem current in the market.

30 "MP said that he had nothing to add. He added that Pernod had seen value in the
31 proceedings before the CAT as Bacardi had had to take the assurances seriously.
32 However, it was not possible to keep the proceedings running for ever and exit
33 strategies could be discussed. Pernod would contact the OFT after it had discussed
34 matters with counsel."

1 It was an open and agreed note. That was some two weeks before the Bacardi offer landed,
2 unexpectedly for both Bacardi and the Office I should say, so I say straight away that there is o
3 linkage between Pernod's readiness to end these proceedings and the subsequent Bacardi offer.
4 Pernod has made clear that it has achieved what it wanted because Bacardi has taken the
5 assurances seriously and the OFT has shown its willingness to be muscular. Pernod was
6 considering an exit strategy. It is for those reasons that we say withdrawal is the more natural
7 route.

8 Thirdly, and finally, withdrawal is also straight forward. The consent order route has
9 certain problems and these were in a sense identified when the Tribunal drew to our attention
10 the provisions of Rule 57 of the Tribunal's Rules.

11 THE PRESIDENT: It is a bit complicated, is it not?

12 MR. TURNER: They appear primarily to envisage a consent order in an infringement case, or at any
13 rate a case where there has been some significant movement affecting the state of regulation.

14 THE PRESIDENT: Did we not have to look at this in the very first *Napp* Judgment – the very first
15 Judgment the Tribunal gave?

16 MR. TURNER: Yes. We may well have done, and I confess that I have forgotten – Mr. Green was
17 in that as well. I do not know if he remembers what happened.

18 THE PRESIDENT: I do not think any of us can remember now what it was we considered. I seem to
19 remember we looked at it briefly.

20 MR. TURNER: There are two points to make. First, that under rule 57(1) the pre-condition is that
21 the parties agree the terms on which to settle all or any part of the proceedings. Costs, I
22 apprehend, will be a term that is not agreed. Secondly, and perhaps of more significance, there
23 needs to be an agreed consent order impact statement. That is a problem here because there is
24 no agreement about impact. Bacardi and the Office say that the impact on competition of the
25 Bacardi offer in practice is nil. Pernod, I apprehend, has a different perspective. So that is the
26 route and all I have to say about that.

27 In terms of the content of the order there is then perhaps an issue that we do not need
28 to spend very much time about, between the parties, about the content of the recitals – what an
29 order should look like. The Office's position, which we believe to be agreed by Bacardi, is
30 that the recitals should make clear the parties' respective position in relation to Bacardi's offer,
31 and that the operative paragraph of an order should record simply that the Tribunal gives
32 permission for the Appeal to be withdrawn.

33 Pernod has produced a proposal, a counter proposal, which you can find in their
34 submissions at tab 1 of the big bundle, p.8 and, if you have that open, you will find a copy of
35 the Office's proposal at tab 18B of your bundle.

1 THE PRESIDENT: Yes.

2 MR. TURNER: Looking first at the Office's proposal, the first two recitals are making clear that the
3 Intervener and the Office (the Respondent) maintain the position that there is no need to amend
4 the original assurances in order for them to be effective, although they are proposing and
5 expressing their willingness to accept certain amendments. Then you will see that Pernod's
6 proposal removes those qualifications and is framed in terms of Pernod itself also agreeing the
7 amendments. Without wanting to spend too much time over what I hope are not too trivial
8 points, the problem that the Office certainly has with Pernod's proposals are, first, that they do
9 not record the parties' positions and that gives a false message about the significance of the
10 changes, and it does not reflect in our submission the outcome of these proceedings, nor the
11 attitude of ----

12 THE PRESIDENT: So we do not have an agreed consent order, in other words?

13 MR. TURNER: Not yet, no. Secondly, Pernod's proposal refers to Pernod agreeing the
14 amendments whereas in our submission Pernod does not have locus to agree, as opposed to
15 being consulted on any changes to these assurances. So that is all there is to say about the
16 order. We do not have an agreed form of words. I do not know whether there is going to be an
17 issue about the route, whether withdrawal or consent order will be a matter of dispute.

18 THE PRESIDENT: Can I just raise two other possibilities, Mr. Turner? One is that the Appeal
19 should be simply dismissed on terms, perhaps. The other is that we should simply make no
20 order, we should simply say, as the Court of First Instance would say, there is no need for the
21 Tribunal to make any further ruling in these proceedings, and we close our file.

22 MR. TURNER: Yes, it sounds as though one is achieving the same result.

23 THE PRESIDENT: It is true that the matter is not specifically dealt with under the Rules, but the
24 Rules are fairly widely drawn.

25 MR. TURNER: The Office would have no objection to either of those proposals. Our only concern
26 is to find an efficient way of bringing these proceedings to an end, and we do not want to be
27 technical. If Pernod are happy with that and if Bacardi are, then there could be no objection.

28 THE PRESIDENT: Yes, the consent order impact statement is discussed in the very first *Napp* case,
29 that is to say the application to suspend the original *Napp* Decision, very briefly at paras. 60
30 and 61, where the Tribunal, which in that case was the President sitting alone, said:

31 "61. I take the view that, if such a consent order impact statement is necessary for the
32 purpose of disposing of interim applications such as the present, the statements made
33 by the parties, in this case in writing and orally, explaining the circumstances of the
34 consent order and its anticipated consequences for competition, suffice in an interim

1 context to comply with the requirements as to consent order impact statements under
2 [the then] Rule 28(2)(b) and (3).”

3 I am not sure that the consent impact statement would be a particular problem here. You could
4 simply say that the consent order arises as a result of changes to the assurances, that they arose
5 in the light of the proceedings before the Tribunal and that the anticipated effect on
6 competition is either neutral or to reinforce or clarify the assurances originally given so they
7 are to the same effect as to the original assurances. That is all you need to say.

8 MR. TURNER: That would certainly satisfy us. Whether Pernod would live with such a
9 formulation is the problem.

10 THE PRESIDENT: It is not quite clear whose impact statement it is under the Rules. It is a bit of a
11 dog's breakfast this rule, actually.

12 MR. TURNER: It appears to envisage that there is an agreed position on it. Frankly, the
13 circumstances on which there will be an agreed position on the impact on competition ----

14 THE PRESIDENT: No, I think the rule is probably envisaging a much more complicated situation
15 than the one we have here, where the OFT and the infringer have come to terms in quite a
16 complicated case, and the OFT wishes to settle, and the infringer and the OFT between them
17 agree that that can be done. Then it is a question of, if necessary, going out to third parties to
18 make sure that everything has been taken into account. I think that it is not really envisaging
19 the procedural situation we have here, where there is a third party Appellant and the Office and
20 the alleged infringer are, as it were, on the same side. That is not the situation that is envisaged
21 by this rule at all I do not think.

22 MR. TURNER: No, we are quite firmly of the view that the primary situation is a non-infringement.

23 THE PRESIDENT: So we could perhaps say we do not think this rule is in point in this situation.

24 MR. TURNER: That would also satisfy the Office as a general matter, if the Tribunal were to
25 express that view.

26 THE PRESIDENT: Yes.

27 MR. TURNER: The final issue is costs. The position can be simply stated. Pernod desires all its
28 legal costs, as we understand it, up to today. The Office says that the just order is that costs lie
29 where they fall; alternatively, a reduced contribution to Pernod's costs of contesting the
30 admissibility issue, and we have contended for slicing half off at the least.

31 THE PRESIDENT: You mean half the total?

32 MR. TURNER: Half of their total costs, reasonable costs of contesting the admissibility issue.

33 THE PRESIDENT: Sorry, what are you saying? That they should have half their total costs or they
34 should have half the costs of contesting the admissibility issue?

35 MR. TURNER: The latter.

1 THE PRESIDENT: Half the costs of contesting the admissibility.

2 MR. GREEN: I wonder if I might help? We are only seeking costs up to the date of the Judgment
3 on the preliminary issues. We take the view that the order of the court in July of last year was
4 effectively a direction that the matter be attempted to be resolved informally by administrative
5 procedure, not in proceedings before the Tribunal, so we are only seeking costs up to
6 effectively June/July 04.

7 THE PRESIDENT: Yes, I think it is 10th June.

8 MR. TURNER: That is helpful. Bacardi's position as expressed in its submissions ----

9 THE PRESIDENT: And just on the admissibility issue, what is the argument for saying they should
10 only have half their costs of that issue?

11 MR. TURNER: It is to reflect events since the admissibility issue was contested, and the impact of
12 those should be taken into account in deciding the amount of costs that they should be entitled
13 to recover.

14 THE PRESIDENT: What events are you referring to? What events do you mean?

15 MR. TURNER: I am just going to develop that.

16 THE PRESIDENT: I am sorry.

17 MR. TURNER: Essentially there are two aspects. First, that subsequent events have shown that the
18 substantive basis of their Appeal has been thin or absent, and more particularly that the way
19 they have conducted the Appeal has put the Office to a considerable amount of unnecessary
20 expense over a long period. I will develop that in a moment, but Mr. Green, as you have just
21 heard, says that that is all irrelevant in a way because it all forms part of an administrative
22 investigation and is outside the jurisdiction of the Tribunal.

23 Finally, Bacardi's position is that they want Pernod to pay a proportion of their costs,
24 and Mr. Flynn will develop that.

25 THE PRESIDENT: Yes.

26 MR. TURNER: The Office's position can be developed in this way. First, we say that unreasonable
27 conduct should normally be penalised by making some adjustment to a costs' order so that an
28 appropriate deterrent message should be given, and we believe that that principle must be
29 uncontroversial. Secondly, that that principle should apply all the more strongly where the
30 unreasonable conduct is at the instance of a very large, well resourced and expertly advised
31 corporation such as Pernod, and where the conduct concerned has led, on our case, to a
32 substantial diversion of public resources and, quite frankly, a waste of public money.

33 In the present case the admissibility judgment was handed down 10 months ago in
34 June of last year, and since that time what has happened is that Pernod has, in our submission,
35 behaved unreasonably in the conduct of this Appeal, not in some administrative investigation

1 beyond the Tribunal's purview. As I say, it has similarly become clear that the merits of its
2 Appeal, as opposed to admissibility and procedural considerations, did lack substance. If I
3 may, it might be convenient for me simply to develop that and then it is done, rather than come
4 back to these points.

5 First, if you have a small bundle of correspondence that accompanied the main bundle
6 for the hearing, it was correspondence I believe accompanying Pernod's submissions of
7 yesterday. In it, and I am afraid my copy is not paginated but it is in chronological order, there
8 is a letter of 13th July 2004, which was just before the Case Management Conference on 22nd
9 July.

10 THE PRESIDENT: Yes, we have it in front of us, thank you.

11 MR. TURNER: The first point was that at the end of its admissibility Judgment the Tribunal had
12 requested the parties, as you will remember, to get together on what the issues were going to be
13 going forward now that that admissibility issue had been decided, and this letter was written in
14 that context. In the first full paragraph (the second paragraph of the letter) Pernod's solicitors
15 said:

16 "The principal live issue now remaining in this appeal for consideration at the next
17 hearing is the first of those referred to by the Tribunal, namely, that the assurances do
18 not adequately address the Competition law problem."

19 Then there is reference to the second of the live issues which was fettering of discretion by the
20 Office, and the position was that was essentially an aspect of the principal live issue, and
21 Pernod would not propose to argue it as a separate issue. Then as to the third issue referred to
22 by the Tribunal of the OFT's reasons – the adequacy of reasoning:

23 "This would no longer arise for consideration if the matter is remitted for
24 consideration by the OFT."

25 So the first point was that there seemed to be agreement at that stage that there was only one
26 live issue, which was the adequacy of the assurances, and that the other aspects of the Appeal
27 were not the main focus for the Appeal proceedings. However, you will also recall, and we
28 can go there if need be that Pernod retrenched its position at the hearing on 22nd July through
29 counsel, and said that all of these issues were still in play. That is reflected in the Ruling, but
30 the reference in the transcript (tab 24) is p.4.

31 In the same letter Pernod announced its aim of conducting what it called a textual
32 Appeal, in which there would be no evidence about the practical effects of the assurances on
33 the market, about how they work in practice or about the possibilities in the real world for
34 circumvention, given the drafting. You see that beginning at the bottom of that letter:

1 “In our view there are advantages in the Tribunal deciding this issue without hearing
2 evidence. The hearing would need then only be short and would focus on the cogency
3 of the assurances.”

4 and so on. If you turn the page you will see the (to us quite startling) proposition:

5 “One consequence of the Tribunal determining the case without evidence is that it
6 would not be open to the OFT or the Bacardi to contend that the assurances were, in
7 fact, adequate, contrary to the impression given by the languages of the assurance,
8 because of some factual matter. If the appeal is determined without evidence then the
9 appeal is, of necessity, a more limited exercise.”

10 Well, it is quite true that the Appeal would be a more limited exercise, but for the very reason
11 given in that paragraph it would also be a sterile exercise, namely, that there would be no way
12 in which the Tribunal could determine whether the assurances were, in practice, adequate.

13 The Tribunal will recall that what then happened was that Pernod’s counsel asserted
14 that Pernod was litigating the case in truth because there was a real problem in the market
15 place and that it did have evidence to show the inadequacy of the assurances, in line with what
16 it said in the Notice of Appeal. The Ruling made by the Tribunal was that it should then
17 produce evidence in support of its Appeal ----

18 THE PRESIDENT: Was this 22nd?

19 MR. TURNER: Yes, this was the Ruling of 22nd July at that Case Management Conference – it
20 should produce evidence show it to the Office of Fair Trading and see what could be done,
21 because there may be a practical and efficient way of resolving this Appeal.

22 Now, unfortunately between then and now a lot of what has happened has been
23 invisible to the Tribunal, but we have engaged in a very considerable amount of work. I
24 should just pause for a moment to say that Pernod, of course, characterise what happened as
25 effectively a remission to the Office of Fair Trading, and that is the hook for Mr. Green’s
26 submission that this then fell into the administrative ambit rather than being part of the judicial
27 hearing. We say that it was not. The Tribunal’s Ruling and what then happened was squarely
28 within the ambit of these Appeal proceedings. You gave Pernod an opportunity to show the
29 colour of its case, and that is important given what Mr. Green says you must disregard for cost
30 purposes. The reference to remission – I hear Mr. Green muttering – is in the DLA’s
31 submissions of 5th April, tab 1, at para.3.19.

32 THE PRESIDENT: I do not think we have formally remitted anything to the OFT.

33 MR. TURNER: You did not remit anything.

34 THE PRESIDENT: Let us see – on you go, Mr. Turner.

1 MR. TURNER: The evidence to flesh out the assertions in the Notice of Appeal then arrived a
2 month later on 27th August.

3 THE PRESIDENT: I think we were copied ----

4 MR. TURNER: You were copied in.

5 THE PRESIDENT: -- with various representations and witness statements, but we have not had
6 occasion to consider them as far as we know.

7 MR. TURNER: Absolutely, but the Office has, and the gist of our case on costs really boils down to
8 all of the work that has gone in to looking into this and the outcome, because it was looked into
9 in very great detail by the Office, and that included attention from the legal team to try to
10 discern what in it was of relevance of weight in Pernod's claim for the purpose of this Appeal.

11 THE PRESIDENT: Relevant to the assurances, or relevant to something else.

12 MR. TURNER: Relevant to the assurances, the question of the adequacy of the assurances and the
13 points made in the Notice of Appeal, specific points listed about the possibilities of
14 circumvention. We understood that the evidence was going to back up the claims made in the
15 Notice of Appeal. If I may ask the Tribunal to pick up the Office's progress report bundle?
16 What you may not have had occasion to look at is the report that the Office produced after it
17 had finished its work and which was the subject of the meeting on 15th March, the meeting
18 note which we have already looked at.

19 THE PRESIDENT: Yes.

20 MR. TURNER: You should have three tabs, and in the final tab ----

21 THE PRESIDENT: "Report on Pernod's submission, 27th August."

22 MR. TURNER: Yes, that is the confidential version; I believe that there is a non-confidential
23 version in the previous tab. So just so the Tribunal is aware of the identity of particular
24 retailers is a matter of confidentiality.

25 THE PRESIDENT: Yes.

26 MR. TURNER: What you see when you read through this ----

27 THE PRESIDENT: So who has had the confidential version? Bacardi has not had the confidential
28 version?

29 MR. TURNER: Bacardi has not had the confidential version. They had the prior version, but the
30 confidential version is what was discussed with Pernod. To cut a long story short, we went
31 through each and every claim and we found nothing in it. In some cases when we approached
32 retailers and asked them who had been named by Pernod and asked them what had happened,
33 we were told we simply did not understand what had been said and that it was not right. In no
34 case was there anything of any substance, and nor did any of the claims relate to the questions
35 of circumvention that had been highlighted in the Notice of Appeal. They related either to

1 extraneous matters, introduced for the first time, or to allegations that the assurances had been
2 broken by Bacardi in various ways, which we had always said we would look into straight
3 away.

4 I will take you to just a few of these points. If you turn to para.13 – I am not going to
5 go through each and every one of these – an allegation there that Bacardi has a solus house
6 pouring agreement with a particular Style Bar. That was an allegation therefore that there was,
7 contrary to the assurances, a solus pouring agreement of a certain kind. In para.13 you will see
8 what was set out in the witness statement submitted by Pernod that they were told by the owner
9 of Style Bar B that Bacardi has a solus house pour arrangement with them, and Pernod said
10 that the Havana Club was refused any kind of listing.

11 If you turn to para. 15 over the page, you will see there we contacted Style Bar B and
12 spoke to the owner. The owner stated that Style Bar B does not have any kind of exclusive
13 agreement with Bacardi. When asked about having refused Havana Club listing, he stated that
14 Pernod must be mistaken as Style Bar B considers Havana Club a valuable premium brand and
15 stocks three types of Havana Club rum.

16 Then the next allegation that there was an exclusive cocktail list agreement with Style
17 Bar B, you will see in para.16 an allegation that Bacardi paid an inflated sum of money and
18 that in return they require there to be no other competing brands in the cocktail list.

19 Paragraph 18, we contacted the Style Bar B, spoke to the owner – if you read through
20 you will see the gist of that is that there was nothing in the allegation.

21 If you go to para.24, this is also helpful in demonstrating the diffuse nature of the
22 allegations that were made. There is an allegation that Pernod was refused inclusion in a Salsa
23 night promotion poster with Style Bar B, and para.24 recites what the witness evidence
24 submitted was, namely, information that Pernod sought to include the Havana Club brand on a
25 poster advertising a Salsa night, and that it was rejected because it was said that they would
26 lose too much money paid by Bacardi.

27 At para.26 we have gone to the owner and he explained that the bar decides on
28 promotions and then goes to suppliers for sponsorship to help with the cost. He thought it
29 would be strange to allow another supplier to take part in a salsa night promotion for which
30 sponsorship had already been paid, and so on. In the final sentence he said that he would have
31 no hesitation in hosting a similar night sponsored by Pernod if he thought it would generate
32 interest and revenue.

33 Paragraph 28 was a rather larger allegation; we call it the “fat bottles” argument.
34 You will see from para.28 it was an allegation that Bacardi had requested almost total
35 distribution of 1.5 litre white rum bottles, instead of the usual 70 cl. bottles in the estate outlets

1 of a particular retailer, together with optic status. You will see at the bottom of that paragraph
2 the effect of that was meant to be that it excluded, it squeezed out the display of a competing
3 brand on the back bar.

4 At para.29 there is a meeting with Pernod subsequently, and Pernod explained that
5 there is a general trend in bars to upscale to 1.5 litre bottles of spirits; it is generally thought to
6 be a more efficient way of dispensing spirits, especially as people are buying larger measures.

7 “Pernod elaborated further on the allegation during the same meeting by explaining
8 that it believed that a 1.5 litre bottle takes up the optic space of two 70 cl. bottles.

9 Finally they clarified that optics which are intended for 1.5 litre bottles cannot be used
10 for 70 cl. bottles, and that most retailers decide the mix of optics themselves which
11 usually includes a set number of small and large optics.”

12 THE PRESIDENT: Mr. Turner, I think all we need for present purposes is the conclusion of this
13 report.

14 MR. TURNER: The conclusion was that there was nothing in it. I am simply seeking to ----

15 THE PRESIDENT: You had investigated it.

16 MR. TURNER: -- drive home that there was really quite a lot to do, that the Office treated it very
17 seriously and engaged in an awful lot of work. The cash value of this, because I apprehend
18 that Pernod will say, “Look, it was too difficult to look into, no one could really get to the
19 bottom of it for one reason or another” is this: Pernod itself did not contend that the Office’s
20 examination of this had been superficial or flawed at the time. I have shown you the meeting
21 note which was agreed, and they accepted the Office’s work. Indeed, they said that there was
22 no problem with the manner of the Office’s examination and that they were satisfied with what
23 it had shown. That was the same passage in which Pernod said they wanted an exit strategy
24 from the Appeal. That was pages 88 and 89 of this bundle.

25 THE PRESIDENT: Meeting of 15th March?

26 MR. TURNER: Yes, and we rely on that.

27 THE PRESIDENT: Yes.

28 MR. TURNER: Obviously the Tribunal cannot form a view about these bits and pieces itself, but
29 what they can see is what Pernod said when we met with them and asked them for their
30 comments on this report – they did not have any. At the top of p.89:

31 “AA asked specifically whether there were any specific comments that Pernod wished
32 to make on our report. There was nothing”.

33 They had nothing to say. They wanted an exit strategy for the Appeal and that is the basis of
34 our strongly felt submission that Pernod has run an essentially hollow case. It has put the

1 respondent to this appeal to very great and unnecessary expense spanning many months. The
2 nub of what I say is that that should be reflected in the final costs award.

3 THE PRESIDENT: Yes.

4 MR. TURNER: Against this, as I understand it, there are two arguments made. First, that Bacardi's
5 offer itself demonstrates that there was some substance in Pernod's case and also that the
6 Office has essentially sold the pass by admitting that the assurances would be strengthened or
7 clarified – it is true those were the words used by the Office. That is, in my submission, quite
8 wrong. There has never been any need to amend these assurances in practice. Statements
9 made by Pernod at that meeting show the Tribunal that they were happy that Bacardi was
10 taking the existing assurances seriously.

11 Secondly, and perhaps if I may refer only to one paragraph in the report which we
12 have not looked at, para.58, which is on the last page, you will see beginning at para.55 on the
13 preceding page, that there were allegations about so-called “cloaking” arrangements. What
14 was said was that actually Bacardi has direct agreements with retailers and that it was wrong to
15 think that there were mere promotional arrangements of the kind envisaged by the existing
16 assurances. If you turn to para.58 you will see the conclusion:

17 “The Office asked Pernod during the meeting 22nd September 2004 for any example
18 (other than certain alleged rebate schemes discussed above) of promotional activity
19 which would not be covered by the assurances as a result of a cloaking agreement
20 which was their contention. Pernod has not provided any specific evidence of such
21 examples or even any hypothetical scenario which might give rise to this.”

22 and they make no comment about that subsequently. So we are not saying that existing
23 assurances were flawed, we are not conceding that, we are recognising merely that Bacardi's
24 offer gives more than was previously there, that is obvious to anybody, and so certainly why
25 not take it? Bacardi's offer and the Office's willingness to accept it does not prove that there
26 was substance in Pernod's case. Although Pernod also says that the Bacardi offer meets its
27 concerns, and says there you are, it has met our concerns, we are now happy to close this
28 Appeal off, it would be interesting if, even with Mr. Green's inventiveness, he would be able
29 to find how Bacardi's offer meets any of the points raised in the material that Pernod submitted
30 on 27th August – certainly we can find no coverage there.

31 The other point is that Mr. Green says the Office was at fault in not having sent
32 Pernod the proposed amendments from Bacardi as soon as they arrived, and I assume that the
33 point is that this should be taken into account by the Tribunal when weighing up conduct.

34 THE PRESIDENT: They arrived on 29th March ----

1 MR. TURNER: Last Tuesday, 29th March. The position is that Pernod had already indicated two
2 weeks previously in that meeting that they had no comments on the Office's findings rejecting
3 their evidence, and that Pernod was happy that the existing assurances were being taken
4 seriously and that they wanted an exit strategy. The offer arrived in the afternoon of 29th
5 March, that is true. Pernod was notified of the offer and was sent Bacardi's letter, although it
6 is true by an oversight without the attachment after only a gap of one working day. There was
7 no question on of any error on the part of the Office – certainly anything that counterbalances
8 the material that I have shown you about what has transpired over a period of many months. In
9 substance our conclusion is that the costs of contesting admissibility proceedings, such as they
10 were, effectively in January 2004 when the hearing concluded, but for well over a year we
11 have been engaged in a lot of work which has turned out to be fruitless, and which Pernod has
12 not even seen fit to defend, and that is why we say the just order to make is for costs to lie
13 where they fall at the end of the day. If the Tribunal nevertheless considers that there should
14 be a costs' award in Pernod's favour, in respect of the admissibility issue dispute, and we can
15 understand in normal circumstances there should be some reflection of that, then there should
16 be a reduction to mark what has happened for over a year since that point was reached. There
17 is one further point that I should just flag up. Mr. Flynn's submissions have reminded me of
18 something of which I was unaware, and Miss Smith has also reminded me of the same point,
19 that even in relation to the admissibility issue part of the area of dispute at that stage was that it
20 was being alleged that a decision had been made as to the past – a non-infringement decision
21 effectively – rather than as to the future, but that was simply abandoned. Nevertheless, both
22 the Office and Bacardi ran up costs preparing to meet that issue – we did so in our draft
23 Defence and in our skeleton argument. In case I have not made it clear, our point is not
24 simply that it is only behaviour since July, it is what the events since July have demonstrated in
25 terms of the absence of merit in the case being brought from the start.

26 Sir, those are the Office's submissions.

27 THE PRESIDENT: Thank you. It will be easier, I think, to have Mr. Flynn first and then let you
28 finish, Mr. Green.

29 MR. FLYNN: Sir, members of the Tribunal, I can probably be fairly brief, Mr. Turner having gone
30 over the matters pretty thoroughly and Bacardi being I think more or less in entire agreement
31 with that. Perhaps it would be helpful if I just explained how we got to where we think we are
32 today? The Tribunal's Judgment on admissibility obviously said that there was an admissible
33 Appeal here. The Tribunal decided against remitting the matter to the OFT for consultation on
34 the Rule 14 Notice as it was in those days, or on the draft Decision, and the Tribunal indicated
35 then, and has subsequently indicated most clearly that it is not interested in a debate purely on

1 the textual adequacy of the assurances if it cannot be persuaded that there is some actual
2 competition problem in the market, such a debate would be sterile as Mr. Turner has explained.

3 THE PRESIDENT: Where did we say that, Mr. Flynn.

4 MR. FLYNN: You said that at the case management conference back in July, Sir. You made it quite
5 clear to Pernod's counsel that you were not at that stage interested in a debate on the text and
6 without evidence of there being some problem in the market; and in the letter convening this
7 Case Management Conference the Tribunal has also indicated that it is not currently minded –
8 I am not quoting the letter – the indication was the Tribunal did not currently see the point in
9 such a debate. So in our submission it was left to Pernod at that time (in July) to supply
10 evidence to the Office of what it had said to the Tribunal were actual competition problems in
11 the market. That evidence was provided, or rather representations were provided with witness
12 statements, with some extensive redactions for confidentiality, so to this day Bacardi does not
13 actually know who these retailers are. The Office has examined it extremely thoroughly over a
14 lengthy period. The bottom line is, as Mr. Turner has said, that there is nothing in it. Pernod is
15 running on empty, it has nothing to gripe about and not a shred of evidence that Bacardi is
16 either breaching the assurances or doing anything else which causes at least the Office to have
17 any concerns. It was when that position was reached, which was only a couple of weeks ago –
18 in other words, after the meeting to which Mr. Turner has referred to – it was only at the stage
19 when the OFT had examined the matter and concluded that there was no competition problem,
20 and that it saw no need for any amendment to the assurances to resolve any such competition
21 problem, only at that stage did Bacardi offer these voluntary amendments to the assurances. It
22 did so principally to allay any concerns that the Tribunal might have because of the provisional
23 and tentative indications which were made at the Case Management Conference back in July.
24 This was intended to assist the Tribunal in bringing the proceedings to a close, whether that be
25 by withdrawal of what in our submission has turned out to be a sterile and empty appeal or, as
26 you have suggested might be a possibility earlier today, by dismissing it. If it could be simply
27 dismissed, or that the Tribunal makes no order on it, which of those courses is taken is a matter
28 of indifference to Bacardi – I do not mean that in any disrespectful way – any of those would
29 do. We think the appropriate course would be to withdraw it because it has been shown to be
30 empty, but if Pernod are not prepared to take that step then in our submission it should be
31 dismissed.

32 Sir, I do not know if you want me to address you on the s.31A point?

33 THE PRESIDENT: I think at this stage probably not, Mr. Flynn.

34 MR. FLYNN: It is not being sought by way of statutory commitments by Pernod.

1 THE PRESIDENT: It does not seem as though it is being pressed, and the overall situation is a bit
2 complex.

3 MR. FLYNN: I will come back to that should it raise its head, but on the basis that these are
4 voluntary amendments to voluntary assurances offered by Bacardi and not sought by the Office
5 and, indeed, offered of course at a time when s.31A was not in force, then perhaps I do not
6 need to say more about it than that. In relation to the form of the order ----

7 THE PRESIDENT: Just in case you want to comment, it may well be that the Tribunal may think it
8 appropriate to say something about the desirability of s.31A being made use of (now that it is
9 there) in cases that arise after it has come into force but I am not that we want to pursue the
10 issue in relation to ----

11 MR. FLYNN: If it is not in relation to Bacardi, Sir, then I will ----

12 THE PRESIDENT: -- this particular case which, as it were, straddles the change of regime and has a
13 complicated procedural background.

14 MR. FLYNN: Yes, I do not think Bacardi, as Bacardi, has a position on how s.31A should be used
15 in the future. It would certainly have a position as to how it should be used in this case which
16 is that it should not.

17 In relation to costs I think Mr. Turner has essentially told you what our position is on
18 that. While Pernod succeeded on the admissibility they did so on a narrow basis, which was
19 definitely the minor and secondary argument in their application, having abandoned without
20 notice and at the hearing, the major plank of their admissibility case as set out in the Notice of
21 Appeal.

22 THE PRESIDENT: The major plank being that there was a Decision as to the past?

23 MR. FLYNN: That there was a Decision as to the past that Bacardi had not infringed prior to giving
24 the assurances, and that case was simply abandoned in a rather jaunty way by Mr. Green – said
25 to be irrelevant – at the hearing. So although they succeeded on admissibility plainly costs, and
26 unnecessary costs, were racked up there. Subsequently, and for the reasons given by Mr.
27 Turner, as we see it – I think you have already stated, Sir – the Tribunal did not remit this
28 matter to the OFT , it did not submit the subject matter of the original complaint to the OFT. It
29 called on Pernod, should it wish to do so, to provide evidence of continuing problems in the
30 market, going to the live points in its Notice of Appeal. So in our submission this plainly was
31 a matter connected with the proceedings before the Tribunal – it is effectively a Tribunal
32 supervised procedure. I know that the Tribunal has not seen every bit of paper, and it should
33 be grateful for that, but it has seen the essentials and it has called for progress reports, and here
34 we are at a Case Management Conference for that progress to be assessed. From the Bacardi
35 point of view that has necessarily involved considerable resource of the legal team – myself

1 and Simmons & Simmons have, of necessity been very closely involved in this extremely
2 thorough investigation. In our submission, for all the reasons Mr. Turner has given you orally,
3 and which are set out in more detail in their report, which summarises the contents of these two
4 large files that exercise has been shown to be a waste of time in which Pernod has made quite
5 wide ranging allegations that it has simply been unable to support, and some fairly trivial
6 allegations that have also been shown to be entirely baseless. In our submission that should be
7 reflected in a contribution from Pernod towards Bacardi's costs of intervening in this Appeal,
8 which it was inevitable that it would have to do given the consequences of the relief that
9 Pernod has continued to seek.

10 If I may just add, they continue to slur Bacardi by suggesting that Bacardi is beaching
11 the assurances, even if they cannot prove it – that is said in recent correspondence and you will
12 have seen the course of events over the last two or three weeks when there have been radical
13 changes of position as to whether they are prepared to withdraw the Appeal or not, they simply
14 cannot make their minds up and of course there is an immense amount of expense which we
15 would like to see reflected in a costs' order.

16 Those are my submissions.

17 THE PRESIDENT: Thank you, Mr. Flynn. Yes, Mr. Green?

18 MR. GREEN: First, so far as s.31(2) is concerned, as you have seen, Pernod requested clarification
19 on the basis on which the OFT was to accept the new assurances. It does not feel strongly
20 about the issue either way.

21 THE PRESIDENT: So you are not pressing that?

22 MR. GREEN: We made the request, the Tribunal has asked for clarification, we are happy to see the
23 assurances given, and we have accepted them on the basis that they were given. So if you wish
24 me to address it I will, but not otherwise.

25 THE PRESIDENT: No, I do not think we do, thank you, Mr. Green. There are two issues then
26 remaining. One is next steps, how the matter is brought to a conclusion and otherwise costs,
27 and I will deal with them in that order.

28 First, what should now happen? There are, in fact, four alternative ways of bringing
29 these proceedings to a close. All the parties are agreed that the proceedings before the
30 Tribunal can and should be brought to a close, and I think there are two aspects to this. First,
31 how technically this should be done and, secondly, what should be recorded in any order. As
32 to the technical aspects, there are a number of provisional points to bear in mind. The first is
33 that there has already been order and heard preliminary issues arising out of some of the issues
34 in the Notice of Appeal, in particular relating to admissibility, and Pernod's right to be
35 consulted, and Judgment was given of course last year in June.

1 Secondly, since the Judgment on the preliminary issues was handed down on 12th
2 June, the parties have followed the Tribunal’s indication set out in the order of 22nd July, and if
3 you just look at that – I think it is important – tab 25 of the main bundle. This is also relevant
4 to the question of costs, and what is meant by “proceedings before the Tribunal”. It is correct
5 to say the Tribunal did not remit the matter to the OFT. The Tribunal, as was made clear in its
6 Judgment of the same date, was anxious to find an informal route for the matter, if possible, to
7 be resolved, and the Tribunal simply indicated – in other words, it did not even make an order
8 – in the third recital:

9 “... with regard to the further progress of this case that (1) Pernod should provide to
10 the OFT such evidence as it may be advised to submit within 28 days; (2) the OFT
11 shall, in the light of that evidence, consider what action to take, including whether
12 appropriate amendments to the text of the assurances given by Bacardi can be agreed
13 to meet any competition concerns ...”

14 So you were contemplating that there be an agreement between the parties to meet any
15 concerns which the parties debated; and

16 “(3) Pernod should be given an opportunity to make any observations on any action
17 proposed by the OFT, or on any proposed amendments to the assurances before they
18 are accepted.”

19 So the Tribunal, as was made clear in its Judgment of the same date and if you go back a
20 couple of tabs – you should just see the order, you simply ordered adjournment of the case
21 management conference, that was the order. So there was no order that anybody do anything,
22 there was simply an indication that that is how matters should stand. You made clear in your
23 Judgment, in the previous tab, on 22nd July at para.14 – p.4 of the Judgment – you stated:

24 “14. We note, as the discussion today has indicated, that there are possible
25 difficulties with the drafting of at least one part of the proposed undertaking, but that
26 it seems to us is a matter that could well be resolved between the parties without the
27 Tribunal needing formally to have a necessarily costly hearing to determine it.
28 However, we have endeavoured to establish the framework in which this matter can
29 be taken forward respecting the position of all the parties and with a view to seeing
30 whether it can sensibly be dealt with at the minimum of cost and expense and, in
31 particular, dealt with at the appropriate level.”

32 In other words, at the informal administrative level in front of the OFT.

33 “So that is the course we propose to take as far as today is concerned.”

1 You will see that in the discussion following the Judgment, when Mr. Turner asked for an
2 indication that Pernod should be limited as to the matters it put before the OFT the President is
3 recorded (half way down) as saying:

4 "I do not think it is really for us to make any direction what Pernod should submit to
5 the OFT."

6 And that tracks the debate which was held at the CMC, and in particular a recognition – and it
7 must, of course, I think have been a provisional recognition that in the Tribunal's view there
8 were at least some inadequacies in the text of the assurances (p.3 of the transcript of the CMC,
9 tab.24, lines 1-4). So the procedure which was adopted and which is really the pre-cursor to
10 my submissions about next steps, was that as of July 2004 the matter should endeavour to be
11 resolved informally, away from the Tribunal as a matter of administrative procedure and it
12 was not even ordered that the matter be so dealt with, it was simply indicated. That is the
13 basis of my submission when I come to costs, that costs are relevant but only up until the date
14 of the CMC and cannot, because they do not fall within rule 55, encompass whatever
15 happened thereafter, which I will address later.

16 The third relevant matter, and I have given you the background to it already, is that in
17 the Judgment I have shown you the Tribunal did identify – at least provisionally – what might
18 well have been viewed as inadequacies in the assurances, and as to that it is significant that the
19 Tribunal had so indicated, and it is plainly significant that Bacardi on 29th March offered to
20 amend the assurances in two material respects which, as my client has indicated, meet its
21 concerns – not entirely but sufficient for my client to say there should be an end to the
22 proceedings now.

23 In this context a number of conclusions can be drawn which we submit are relevant to
24 the way forward. First, concerning withdrawal of the Notice of Appeal it simply seemed to us
25 to be inappropriate to withdraw the entirety of the Notice of Appeal when the Tribunal has
26 ruled upon certain aspects of the Notice of Appeal.

27 THE PRESIDENT: It is discontinuing, I think, rather than withdrawing.

28 MR. GREEN: Applying to withdraw it, or applying to discontinue.

29 THE PRESIDENT: Yes.

30 MR. GREEN: But it requires us to make an application. On the other hand, and it may be there is a
31 measure of common ground here, two of the other three alternatives may well be satisfactory.
32 We certainly have no objection to saying that we do not pursue the residue of our Notice of
33 Appeal on the basis of certain statements which would be recorded in an order, and we have
34 no difficulty with either Bacardi or with the OFT recording such matters as they think it
35 appropriate to record. Pernod would wish to record that Bacardi had offered the amendments

1 to the assurances, that the OFT had agreed to the same, and that they had had an opportunity to
2 comment upon them and did not demur from them.

3 THE PRESIDENT: That is quite close to the wording the OFT proposes, is it not?

4 MR. GREEN: Yes, there is not much difference between the OFT's wording, save that we would
5 then add at the end of that that the Tribunal simply makes no further order, not that on that
6 basis we withdraw. We, likewise, recognise the OFT would wish to record its agreement to
7 the assurances without prejudice to its contention as to their necessity and so on, and for
8 Bacardi that it had offered the assurances – again without prejudice to its contentions that it
9 was not dominant, or it was not engaged in abuse and so on and so forth. Those indeed may
10 be relevant and I can see the public interest in the parties recording their respective positions
11 because any interested third party who wished to look at the website to see why the
12 proceedings had been closed would then learn what the parties' respective positions were. So
13 there is not a great deal of difference between the parties. We believe that the respective
14 positions should be recorded.

15 We submit that the proper way is for the Tribunal simply to say that in those
16 circumstances that no further order is required or needed, or no further utility in the
17 proceedings going ahead. That is, we submit, a sensible way forward in these circumstances,
18 but we do not think it is proper for us to apply to discontinue, given that the Tribunal has
19 already ruled upon a portion of the Notice of Appeal. We are happy to say we do not press
20 our further arguments in those circumstances, and the Tribunal simply makes no further order.

21 So far as dismissing the Appeal is concerned, we would submit that this is quite
22 inappropriate, because the Tribunal has not heard argument from the parties on the pros and
23 cons, and rights and wrongs of the various positions adopted by the parties subsequent to the
24 preliminary issues having been heard, and there are undoubtedly some complex issues. You
25 have not had argument on the material that Pernod submitted to the OFT, there were witness
26 statements, representations. You have heard a very selective number of comments from Mr.
27 Turner on his side of the affair, but what my client said to the OFT, and which is evident in the
28 documents and portions you have not seen, is that we had difficulty in getting statements from
29 retailers. They were reluctant to show us documents and contracts they had with Bacardi. We
30 did get some statements, and there are discrepancies between the statements they made to us
31 and the statements they made to the OFT. If you are going to get to the bottom of all that there
32 is a great deal to be heard and argued about and, with respect, you should not assume
33 following the meeting with the OFT – which was not a “without prejudice” meeting, it was an
34 open meeting – that if Bacardi had not made its offer of amended assurances we would be here

1 saying “we are throwing our hand in”, and agreeing to discontinue the proceedings, there
2 would have been issues we were seriously considering.

3 The reality is that it is not sensible for the Tribunal to get engaged in that sort of
4 collateral or satellite litigation ----

5 THE PRESIDENT: Anyway, you do not want to withdraw, and you do not think it should be
6 dismissed, but you are happy with an order that the Tribunal makes no order?

7 MR. GREEN: Absolutely.

8 THE PRESIDENT: Whatever recitals the parties, within reason, each of the parties want to include.

9 MR. GREEN: We think that is an appropriate way and interested third parties will see the reasons
10 why it has come to the position it has come to.

11 So far as costs are concerned, these are governed by Rule 55. Plainly, the Tribunal
12 has a discretion, but that discretion is, however, bounded by the provisions of Rule 55 and
13 costs can be awarded in relation to the proceedings before the Tribunal. We believe there is an
14 issue as to the meaning of the words “before the Tribunal”.

15 As we understand the policy behind those words in Rule 55 ----

16 THE PRESIDENT: Just a moment.

17 “(2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the
18 proceedings make any order it thinks fit in relation to the payment of costs by one
19 party to another in respect of the whole or part of the proceedings...”

20 I do not think the words “before the Tribunal” quite ----

21 MR. GREEN: They come in, they are ----

22 THE PRESIDENT: We have to take into account the conduct of all parties in relation to “the
23 proceedings”.

24 MR. GREEN: No, the words “before the Tribunal”

25 THE PRESIDENT: (After a pause) I am not sure it is there – just in relation to “the proceedings”.

26 You can say by implication “the proceedings” means the proceedings before the Tribunal but
27 not the administrative proceedings.

28 MR. GREEN: I am sorry, yes, the answer to that is in the definition of “proceedings”, and the
29 definition of “proceedings” is “proceedings before the Tribunal”.

30 THE PRESIDENT: Where is the definition of “proceedings”?

31 MR. GREEN: We set that out in our note to you – I am sorry, I had forgotten that point for the
32 moment.

33 THE PRESIDENT: Oh yes.

34 MR. GREEN: Rule 3(a).

35 THE PRESIDENT: “All proceedings before the Tribunal”.

1 MR. GREEN: And Parts 1 and 5, and Part 5 include the provisions on costs.

2 THE PRESIDENT: So it has to be proceedings before the Tribunal, thank you.

3 MR. GREEN: So far as proceedings before the Tribunal are concerned, we understand the policy
4 behind this to be quite an important one and in this respect I am somewhat surprised by Mr.
5 Turner's submissions, because in the context of the Tribunal one is dealing with a case where
6 the Tribunal is governing the conduct of a Regulator, today the OFT – it could be another
7 Regulator, such as Ofcom – and in many instances the Tribunal quashes and remits the matter
8 back to the Regulator, for example that happened in *Littlewoods* and in *Freeserve*, and there
9 are then administrative proceedings. When parties implement an order of the Tribunal, and
10 this involves conduct before the Administrator, these are not proceedings before the Tribunal;
11 they are now back before the Administrator. In the present case we do not even have a
12 remission, we have an indication they should happen pursuant to your previous order, and it is
13 one level down. I have always understood this to be part of a policy which indeed protects the
14 decision maker from paying the costs of a person before it subject to a remission, because
15 otherwise when it came to costs, on Mr. Turner's analysis in another case, the Tribunal may
16 find itself engaged in satellite litigation determining who said what to whom, and who was
17 reasonable in the course of the administrative proceedings at the end of the case to determine
18 costs. That is why "before the Tribunal" has a limiting effect to the judicial part or parts of an
19 ongoing process, which involves the decision maker and the supervisory Tribunal.

20 THE PRESIDENT: If the boot were on the other foot you say you could have run up a huge sum in
21 legal costs during this grey area procedure ----

22 MR. GREEN: Yes.

23 THE PRESIDENT: -- which, on the OFT's argument you say, we could order ---

24 MR. GREEN: The OFT to pay.

25 THE PRESIDENT: -- to be paid.

26 MR. GREEN: The Tribunal has not had to grapple with it here, but for example, in *Freeserve* and
27 *Wanadoo* there may be aspects of the procedure before the Regulator which could have given
28 rise to a lot of costs, and one can think of other cases, *Littlewoods* where there was a remission
29 and *Aberdeen Journals* again. Dealing therefore with the issues concerned, when we came to
30 the preliminary issues, there were a limited number of matters. Admissibility accounted for
31 approximately – and this is a very rough approximation – adding up numbers of pages and so
32 on, 45 – 50 per cent. of the hearing and the written skeletons. The Office of Fair Trading said
33 that if you decided the case against them (para.28 of their skeleton) that you would be
34 "torturing the language of structure and purpose of the Act." Well, you did so torture it and
35 you found in my client's favour. The only point that is said against me in relation to

1 admissibility is that we ultimately won not on the basis of a decision as to the past but on a
2 more temporally limited basis, and that argument evolved in the course of argument – the
3 same arguments went to other temporal aspects of admissibility whether it was the past, or a
4 fractional period in the past, the Tribunal had to engage in and analyse in the Judgment. We
5 won on admissibility and the normal rule in relation to admissibility should be reflected in
6 costs. Bacardi agreed with the Office of Fair Trading, the OFT took a strong view against
7 admissibility on the basis that you would “torture the language, structure and purpose of the
8 Act” if they were to lose.

9 There was another issue which did not account for much of the time, which was in
10 relation to the Rule 14 and whether it should have been disclosed. This was an issue ordered
11 by the Tribunal, it was not a point specifically raised in the Notice of Appeal but you asked for
12 it to be addressed, and I can give you the references, but I shall not take you to them.

13 THE PRESIDENT: I do not think you need trouble us on that, Mr. Green.

14 MR. GREEN: I said in submission that the amount of time taken was miniscule, I calculate it is 5 to
15 10 per cent. of the total amount of time. The other issue was consultation. The OFT said
16 there was no duty to consult (skeleton, para.54) Bacardi agreed, we said there was. We
17 prevailed upon that point and approximately 40 per cent. of the time. Those are the very
18 rough percentages.

19 There was a fourth issue that you asked for observations of the parties in relation to
20 whether the OFT had a right to accept assurances at all. We accepted that they did. We did
21 not take the point which we could have taken because the law is not quite the same in the UK
22 as it is at the EC, but we said that they had an *Automec* type discretion based in ordinary
23 administrative law, we did not challenge the OFT’s position – we set that out in the skeleton
24 and in oral argument – and I believe we acted reasonably in that respect. So of the arguments
25 advanced we prevailed in all respects, and there is no reason why we should be deprived at
26 least a significant portion of our costs in that regard.

27 So far as any relevant exceptional circumstances are concerned, I have dealt with that
28 because it seems to us it is a question of the construction of Rule 55 – what is meant by
29 “proceedings before the Tribunal”, and the matters which Mr. Turner relies upon are outside
30 that ambit. But I should say in relation to that that you have not examined our evidence, the
31 representations made with the witness statements. As I explained, we had real problems
32 obtaining information from witnesses – we did get some, but this was retracted by some
33 retailers when the OFT went to them, and a real issue of evidence arises. We said to the OFT
34 that they should use their statutory powers, and they declined. We have issues as to the
35 process they used.

1 THE PRESIDENT: But you did apparently say, in the course of the meeting of 15th March, that you
2 had no comments to make on their report.

3 MR. GREEN: We made comments which are recorded in the previous five pages of that, “no further
4 comments”. We had made comments to the effect that we recognised there was a clash of
5 evidence. We recognised we were not going to be in a better position to go back to these
6 people and get better evidence, because they were not going to co-operate with us. It is
7 undoubtedly the case that this was a provisional view because they have not spoken to either
8 myself or Mr. Robertson as they made clear. It would not be fair to take that somewhat stray
9 comment out of proper context.

10 If the OFT is right then any procedure whereby any litigant goes back to the
11 administrator and then has a barney with the administrator, and the administrator disagrees
12 then is going to result simply because the administrator disagrees in that litigant having to pay
13 costs, even though the Tribunal has not had a chance properly to go into the detail of it. If you
14 really were going to take Mr. Turner’s submission seriously we would submit that you would
15 need to convene a hearing to go into that evidence in detail, and we submit that is plainly not
16 sensible – it is undesirable satellite litigation, but not justified in the light of Rule 55.

17 So far as Bacardi’s position is concerned, given (a) that the Tribunal had indicated
18 (albeit provisionally) that it perceived some difficulties with the textual analysis of the
19 assurances in July 04, it could be said against Bacardi that if they had really wanted to save
20 costs and time they could have made their offer in July, August or September instead of
21 waiting seven or eight months and there is every possibility that that would have brought the
22 proceedings to a close at a very much earlier stage, but they did not. We do not know why and
23 we have not had that explained. There is no reason why Bacardi should have any portion of
24 costs. So far as costs are concerned we simply submit that it is the costs up to the date of the
25 hearing and we should be entitled to our costs, to be assessed if not agreed.

26 Unless I can assist further, those are my submissions.

27 THE PRESIDENT: Thank you.

28 MR. TURNER: I think there is only one point I want to come back on.

29 THE PRESIDENT: Yes, very quickly, Mr. Turner.

30 MR. TURNER: It is the question of whether it all fell into the administrative area, or whether it was
31 proceedings before the Tribunal. As, Sir, you remarked at the conclusion of the hearing on
32 22nd July in the passage that Mr. Green took you to, the matter that the Tribunal was seized
33 with was the adequacy of the assurances. The purpose of the direction that was given at that
34 stage was this: it was a case management measure to enable Pernod to provide evidence to

1 support its case in the Appeal on the inadequacy of the assurances. That was not a remission
2 and the analogy with a remission is ill-founded.

3 So far as what occurred is concerned, it is not right to say that there needs to be a
4 hearing to go into the rights and wrongs of the evidence. The note of the meeting does not
5 only say that Pernod had no comments on the report, at the bottom of p.88 it says:

6 “On the basis of what the OFT had found it seemed that Bacardi was being co-
7 operative by taking the assurances seriously and Pernod was comforted by the OFT’s
8 openness to investigating breaches or new allegations.”

9 That was an agreed note. It was circulated to them, they thought about it and it came back, so
10 it cannot be referred to or dismissed simply as “stray comment”. It shows their attitude as to
11 the events that had taken place. We say it must be right that what has taken place should be
12 taken into account in the costs order, both in terms of what occurred and the expense to which
13 everybody was put, and it does fall as part of the proceedings; and, as to what it reflects about
14 the underlying merits of the case. On that issue we rely on what Pernod said in relation to the
15 meeting on 15th March – not just that they had no comments, but on the basis of what the OFT
16 had found, about which there was no complaint, Bacardi was being co-operative by taking the
17 assurances seriously. That was an end of the matter.

18 THE PRESIDENT: Thank you. The Tribunal will rise.

19 (The hearing adjourned at 12.05 p.m. and resumed at 12.10 p.m.)

20 (For Ruling see separate transcript)