Neutral citation: [2003] CAT 19

IN THE COMPETITION APPEAL TRIBUNAL
New Court,
Carey Street,
London WC2A 2JT

Case No. 1017/2/1/03

Thursday, 11th September 2003

Before:

THE PRESIDENT, SIR CHRISTOPHER BELLAMY (Chairman)
PROFESSOR PAUL STONEMAN
MR DAVID SUMMERS

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PERNOD-RICARD SA — First Appellant

and

CAMPBELL DISTILLERS LIMITED — Second Appellant

v.

THE OFFICE OF FAIR TRADING — Respondent

supported by

BACARDI MARTINI LIMITED — Intervener

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Mr Nicholas Green QC appeared for the First and Second Appellants, Pernod-Ricard SA and Campbell Distillers Limited.
Ms Kassie Smith and Ms Karmen Gordon appeared for the Office of Fair Trading.
Mr James Flynn QC and Mr Tony Woodgate appeared for the Intervener, Bacardi Martini Limited.

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JUDGMENT (Pleading to the merits)

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1 THE PRESIDENT: The Bacardi Group is a well-known supplier of
2 rum, in particular light rum. The Pernod-Ricard Group,
3 through its distributor Campbell Distillers, distributes a
4 light rum known as Havana Club. According to the figures
5 before the Tribunal, Bacardi has a very substantial market
6 share in both the "on-sales" market and the "off-sales"
7 market.
8 In June 2000 Bacardi was apparently the subject of an
9 investigation commenced by the OFT into various selling
10 practices of Bacardi under Chapter II of the Competition
11 Act 1998 which prohibits an abuse of the dominant position.
12 In September 2000 the second appellants in this case,
13 Campbell Distillers, lodged a complaint to the OFT in which
14 it was alleged that Bacardi had been abusing its dominant
15 position by various practices designed to obtain
16 exclusivity for Bacardi rum on licensed premises and to
17 exclude Havana Club from the market.
18 The OFT proceedings continued and on 28th June 2002
19 the OFT issued a Rule 14 notice under Rule 14 of the
20 Director's Rules SI 2000 No. 293. According to the OFT's
21 press release of that date, the OFT at that stage proposed
22 to find that Bacardi had infringed the Chapter II
23 prohibition of the Competition Act by entering into a
24 number of agreements requiring pubs and bars, among other
25 things, to sell only white rum produced by Bacardi.
26 At that point Campbell Distillers asked for a non
27 confidential version of the Rule 14 notice but the OFT
28 declined to give them a copy of that notice. We note in
29 passing that that procedure does not appear to be entirely
30 consistent with the practice of the European Commission
31 under Articles 7 and 8 of Regulation no. 2842/98.
32 It is apparently the case that, by November 2002,
33 Bacardi had replied to the Rule 14 notice and we infer that
34 Bacardi had raised various issues in its reply tending to
35 show to the OFT that the matter was perhaps more
36 complicated than had first been thought. It seems that
37 thereafter, in December 2002, the OFT issued a request for
38 information under Section 26 of the 1998 Act. Indeed, at
39 that stage the appellants themselves made certain
40 submissions to the OFT about the question of the relevant

market and, in particular, whether vodka was to be included in the same market as rum.

What then occurred is that on 28th January 2003 Bacardi gave the OFT certain assurances on exclusivity which are again set out in an OFT press release of 30th January 2003. In the light of those assurances the OFT decided to close the file, the Director-General of Fair Trading (as he then was), saying: "The assurances remove the competition problem that prompted the investigation and should widen competition opportunities in the market. It would not be appropriate, in the circumstances of this case, to devote more resources to it."

By a letter of the same date to the appellants the OFT said much the same thing: "We believe that the assurances remove the competition problem that gave rise to the alleged breach of Chapter II of the Competition Act 1998. Accordingly, we have closed our investigation into Bacardi."

On 28th February 2003 Pernod-Ricard, the parent company of Campbell Distillers, applied under Section 47(1) of the Act to the Director to withdraw or vary a decision which they maintain had been taken by the Director to the effect that Bacardi was not infringing the Chapter II prohibition. They contended that there was an appealable decision as a result of the combined effect of Section 46(3)(b) and Section 47 of the Act.

By letter of 15th May 2003 the OFT rejected that application. I do not at this stage, I think, need to set out that letter of 15th May in any detail, save to note that at paragraph 7 it is said that the Director took the view that, for the purposes of the future but only for the purposes of the future, the assurances "removed the competition problem that had prompted the investigation. In other words, while Bacardi adhered to the assurances, and in the absence of new information, the Director would not have reasonable grounds to suspect an infringement from the date the assurances were given. However, there continued to be reasonable grounds for suspecting an infringement up to the date that the assurances were given."

Campbell Distillers then appealed to the Tribunal by a notice of appeal dated 15th July 2003. That notice alleges that Bacardi is in a dominant position in the United Kingdom market for on-sales of white rum, that they have abused their dominant position through various practices designed to give them exclusivity in the on market trade and that the Director has taken an appealable decision that there has been no infringement of the Chapter II prohibition. It is further said that the Director has not given adequate reasons for his decision, that the assurances that he accepted are not adequate to deal with the competition problem and that Campbell Distillers should have been consulted before those assurances were accepted.

The OFT at this stage has contended that there has been no appealable decision and that therefore the Tribunal has no jurisdiction to determine the case. That submission is supported by Bacardi who has already been admitted as an intervener.

The stage the case has reached is that the OFT's defence is due on 25th September. At the case management conference today we have been considering the procedural circumstances of the case and, in particular, the issue of whether the question of whether there is an appealable decision should be taken as a preliminary issue and the associated question of whether the pleadings at this stage by the OFT and the intervener should be limited to the question of admissibility only.

This kind of issue has arisen in a number of previous cases before the Tribunal, namely *Bettercare* [2002] CAT 6, *Freeserve.com* [2002] CAT 8, *Claymore* [2003] CAT 3 and *Aquavitae* [2003] CAT 17. In all those cases the question of admissibility was taken as a preliminary issue and those cases set out the Tribunal's case law on the test to be applied, particularly as summarised in paragraphs [172]-[175] of *Aquavitae* referring back to *Claymore*.

The OFT invites us to adhere to our previous practice and submits that it will save time and costs in the end if we do so. Bacardi supports those submissions and emphasises in particular that this is a question which goes to jurisdiction which should be decided at an early stage

as the Tribunal said in *Bettercare*.

There are two aspects to this problem. The first aspect is whether there should be a preliminary issue on the question of admissibility and the second aspect is when exactly that preliminary issue, if any, should be argued, having regard to the state of the pleadings.

In the light of the particular circumstances of this case the Tribunal is not attracted to the idea of limiting the pleadings at this stage to the question of the preliminary issue, thus committing the Tribunal today to decide that issue as a preliminary issue. Our thinking is as follows.

Whether to take an issue as a preliminary issue is a case management issue. In deciding an issue like that we should be guided by Rule 19 of the Tribunal's Rules SI 2003 No. 1372 which refers to the need to decide cases justly, expeditiously and economically or, to put it more precisely, to give such directions "as it thinks fit to secure the just, expeditious and economical conduct of the proceedings." We should also, in our view, take account of what is known as the overriding objective in civil proceedings, which is that cases should be decided justly and, in particular, in ways that put the parties on an equal footing, save expense, deal with cases proportionately, expeditiously and fairly, and allot an appropriate share of the Tribunal's resources.

Those sorts of considerations involve certain balancing exercises. It is true that, if we limit the pleadings at this stage, that may ultimately save time and costs later if we hold that there is no appealable decision. *Aquavitae* is a case of that kind. On the other hand, experience suggests that, if the Tribunal finds there *is* an appealable decision, a preliminary point on admissibility has the tendency to delay the case for between six months and a year and may in the end add costs because of the need for further hearings. *Bettercare*, *Freeserve* and *Claymore* are examples of that.

This case is a case that has apparently already been running for three years and we think we should attempt to manage this case in a way that does not unduly prolong

1 these proceedings. The principles to be applied in
2 deciding whether there is an appealable decision now emerge
3 reasonably clearly from the Tribunal's previous case law.
4 Although we have no doubt that in due course the OFT will
5 seek to persuade us that either our previous case law leads
6 us to the conclusion that there is no appealable decision,
7 or that our previous decisions are distinguishable, at
8 least at the moment and without hearing further argument on
9 the point, it is not, in our view, beyond doubt that there
10 is no appealable decision in this case. In other words,
11 there are issues on that matter which, in our judgment, do
12 need to be explored.
13 The question is what is the best context in which
14 those issues should be explored and what information should
15 the Tribunal have before it when it comes to decide the
16 question of jurisdiction.
17 It seems to us first of all that this case has certain
18 wider ramifications for the procedures to be followed under
19 the 1998 Act in circumstances such as these, particularly
20 as regards the position of complainants. The position of
21 complainants in relation to Rule 14 notices, in relation to
22 the acceptance of undertakings, in relation to the legal
23 effect of any undertakings and in relation to whether there
24 is any and, if so, what obligation to consult complainants
25 seem to us to be quite important procedural issues. It
26 also seems to us, at least provisionally, in the light of
27 the further harmonisation that is likely to take place from
28 1st May next year of national and EC competition law, that
29 it is likely to be relevant to explore some of those issues
30 against a wider canvas.
31 It also seems to us that there are or may be certain
32 links between what can be broadly described as the
33 substance of the case and the admissibility issue. One
34 obvious example is the argument raised by the appellants to
35 the effect that the undertakings are inadequate to deal
36 with the competition problem and the OFT's indication, as
37 we understand it, that the circumstances and reasons for
38 accepting the undertakings will be matters that they will
39 be telling the Tribunal about in due course.
40 In all those circumstances the Tribunal does not feel

1 wholly comfortable in deciding the question of whether or
2 not there is an appealable decision in this case without
3 having the wider context of the appeal.
4 As indicated in argument, and we are particularly
5 grateful for the helpful submissions we have received, what
6 we are proposing is in effect a middle course. Rather than
7 limit the draft defence to the preliminary issue of
8 admissibility in the strict sense, what we propose to
9 invite the Director to do is to set out in the draft
10 defence a statement of his position on the case as a whole;
11 in other words, not simply the question of admissibility
12 but the other points that are made in so far as those
13 points affect the substance.
14 What we mean by that is as follows. We do not expect
15 the Director to follow what is required by Rule 12(4) in
16 particular, which requires the defence to include copies of
17 all documents that the respondent considers could be
18 relevant, all arguments on fact, any expert evidence and so
19 forth. What we would be seeking or what we would find most
20 helpful is a relatively short statement of position by the
21 Director on the various other issues raised in the defence.
22 We are not seeking detail but we are seeking, as I say, an
23 indication of the Director's position. It may very well be
24 that on some issues the Director has no position, in which
25 case it will be perfectly acceptable for the Director to
26 explain that. If at some stage we need to go into further
27 detail, we can do so later. What we are looking for is a
28 sufficient defence to place this case in its overall
29 context.
30 Similarly, as far as Bacardi's potential statement in
31 intervention is concerned, the Tribunal would find it
32 helpful if Bacardi could, as it were, paint for us a
33 picture so that we can understand from Bacardi's point of
34 view what the course of events was, what its position is on
35 the allegations that are being made and what in particular
36 its position is on the undertakings that have been given.
37 When we have that context, as it were, we can then, in
38 our judgment, take a more informed decision on whether
39 there should be a separate hearing on the question of
40 admissibility, whether there should be a hearing on

1 admissibility and some other points at the same time, or
2 what course this case should then take.
3 What we would therefore propose now, in discussion
4 with the parties, is to fix a timetable for the delivery of
5 the further pleadings that I have indicated on the lines
6 that I have indicated and then to set aside a further day
7 for a hearing by the Tribunal, the subject matter of which
8 has yet to be decided. When we have the pleadings, we will
9 decide what it is we want to hear on the next occasion and
10 give the parties notice in due time of the subject matter
11 of any further hearing that is to take place.
12 There will also of course be a general liberty to
13 apply so that, if the parties are unclear on any point as
14 to what the Tribunal is looking for, the necessary
15 application can be made.
16 I think that explains the Tribunal's thinking and what
17 we need to do now is to have a slightly more detailed
18 discussion about the timetable and the timing of these
19 various events.
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