



Neutral citation: [2004] CAT 14

**IN THE COMPETITION APPEAL
TRIBUNAL**

Case No. 1017/2/1/03

Victoria House,
Bloomsbury Place,
London WC1A 2EB

22nd July, 2004

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

Sitting as a Tribunal in England and Wales

BETWEEN:

PERNOD-RICARD SA & CAMPBELL DISTILLERS LIMITED

Applicants

- v. -

OFFICE OF FAIR TRADING

Respondent

supported by

BACARDI-MARTINI LIMITED

Intervener

Mr. Aidan Robertson (instructed by DLA LLP) appeared for the Applicants

Mr. Jon Turner and Miss Kassie Smith (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Respondents.

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

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JUDGMENT

THE PRESIDENT:

1. The Tribunal gave Judgment in this matter on 10th June 2004 (see[2004] CAT 10).
2. In paragraph 255 of that Judgment the Tribunal asked for further submissions from the parties with a view to deciding what relief (if any) be granted at this stage, and/or what is the most just and economical way of dealing with the remaining issues in these proceedings.
3. We have today been discussing what is the best way of proceeding with the remainder of this case in the light of the submissions that the parties have made to the Tribunal.
4. Pernod submit that there are three remaining issues in the case, namely:
 - a) the matters raised in paras. 4.31- 4.39 of the existing Notice of Appeal, which relate to the adequacy of the assurances which the OFT accepted from Bacardi,
 - b) the allegation in para. 4.43 of the Notice of Appeal that the OFT unlawfully fettered its discretion; and
 - c) the allegation in paras. 4.16 to 4.29 of the Notice of Appeal concerning the adequacy of the OFT's reasons.
5. It appears to us that by far and away the most important of those three issues is the first one, namely the alleged inadequacy of the undertakings which the OFT accepted from Bacardi.
6. Pernod's preferred course, we are told, is for the Tribunal to proceed to a hearing to pronounce on the textual adequacy of the assurances. Pernod's preference is that the Tribunal should do that without entering into (at least in any detail) the background evidence that may throw light on the adequacy or otherwise of the assurances. Having, so Pernod hopes, persuaded the Tribunal to pronounce the undertakings as textually inadequate, Pernod would then invite the Tribunal to remit the matter to the OFT. At that stage, we understand, Pernod would then present further evidence to the OFT to show that

- there has been conduct in the market place post the assurances amounting to abuse which, it is hoped, will demonstrate that further assurances are needed, or that some other solution ought to be found to this case.
7. The OFT's position as to the disposal of this case is that it should at this stage simply serve a defence, supported by a witness statement and perhaps documents, in support of the assurances given, and explaining very fully why those assurances were accepted in the circumstances prevailing at the time in January 2003. According to the OFT the Tribunal should not embark on a purely textual analysis of the undertakings because some evidence as to the background circumstances is necessary and desirable.
 8. Bacardi has a similar position. Bacardi submits first that none of the matters to which objection is taken regarding the drafting of the assurances in fact raises a practical problem, since in Bacardi's submission Bacardi has gone over and above the assurances, has complied with both the letter and with the spirit of the assurances given and has, indeed, extended them in particular to other Rums. If there was an infelicity or gap, or glaring hole, in the assurances then Bacardi's position is that it would wish to look seriously at closing any such gap because it does not see that there is in fact any practical problem on the ground.
 9. Bacardi also submits that the Tribunal should not go into this matter on a purely textual basis because evidence of the factual background, of the kind already set out in Bacardi's Statement of Intervention, would be necessary for the Tribunal to understand the purport and effectiveness of the assurances.
 10. Our view at the moment is that it is not appropriate for this Tribunal to seek to determine any issue as to the adequacy of the assurances on a purely textual basis without some knowledge of the background evidence and the surrounding circumstances in which the assurances were given. On the other hand, at the stage this matter has now reached it is difficult for the Tribunal to go into wholly new matters which have not been previously raised in the appeal, nor so far raised before the OFT.
 11. It also appears to us (at least provisionally) to be a somewhat sterile exercise to examine the adequacy of the text of the undertakings if Bacardi is, as we are told, ready to consider

revising the undertakings and to deal with any lacunae that there may be. It would seem somewhat unnecessary to hold a full scale hearing on the issue of adequacy if the issue of adequacy can in fact be addressed by other practical means.

12. Rules 19 and 20 of the Tribunal Rules gives this Tribunal a very wide set of powers to resolve issues, to facilitate the disposal of cases and to arrive at practical solutions to tangled problems. This certainly appears to be a tangle to which the Tribunal should seek to find a pragmatic solution.

13. What we propose, subject to any overriding difficulty that may be drawn to our attention by the parties in a moment, is as follows:

- a) We propose to make no order today, but to adjourn this case management conference to the first open date after 1st October 2004.
- b) We would invite Pernod to place any evidence that it has of further abusive behaviour in the market place before the OFT with a view to persuading the OFT to take such action as the OFT may be advised, whether by way of seeking revised undertakings or otherwise. (As an indicative timetable we would suggest that Pernod should place any such evidence before the OFT within 28 days).
- c) We would thereafter invite the OFT and Bacardi, in the light of any further evidence submitted by Pernod, in the light of the Tribunal's observations today and in the light of paras. 4.31- 4.39 of the Notice of Appeal, to consider whether there are any revised assurances that it may be appropriate to put forward in the light of developments, or any other action to be taken and, if so, to give Pernod the possibility of commenting on any further assurances or possible action.
- d) We would expect each of the principal parties to report back to the Tribunal by 1st October next, in writing, explaining what has transpired in the meantime, with a view to enabling the Tribunal at that stage to determine what is the just and economical course to follow for the further conduct of these proceedings.

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

Discussion following Judgment

THE PRESIDENT: Mr. Turner? I think that would imply that the time for serving the defence is just extended generally.

MR. TURNER: Sir, I am grateful for that. There is one point of clarification. Presumably, as a result of those directions, the new information that Pernod may supply to the Office will be information directed to the question of the adequacy of these assurances, and in the framework, as it were, of the Competition concerns for this case. Obviously if there were new matters entirely that would therefore fall outside the scope of this case and be a separate matter, but we are assuming that the new evidence concerned will be matters directly to the framework of this case.

THE PRESIDENT: I do not think it is really for us to make any directions what Pernod should submit to the OFT.

MR. TURNER: Not at all.

THE PRESIDENT: The issue with which the Tribunal is at present seized is the adequacy of the assurances. If whatever Pernod submits amounts to a fresh complaint, or new behaviour, or something, then I think events must be left to unfold. We will see what the position is if and when you get the new material.

MR. TURNER: I am obliged, Sir.

THE PRESIDENT: Yes, Mr. Flynn?

MR. FLYNN: That is a very sensible solution, Sir – nothing to say.

THE PRESIDENT: We reserve the costs of the main proceedings and all other issues that we may need to deal with at some point. Thank you all very much indeed.