



[2005] CAT 9

**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 Piper Rudnick Gray Cary UK LLP) 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 Messrs Simmons & Simmons) appeared for the Intervener.

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RULING

THE PRESIDENT:

- 1 The matters we are considering today relate to various questions that arise in relation to the final disposal of these proceedings. The brief background is that the Tribunal gave a Judgment in this matter on 10 June 2004 (see [2004] CAT 10), in which the Tribunal held essentially that there was an appealable Decision which gave the Tribunal jurisdiction to hear the Appeal (see [194] of that Judgment) and that it had been unfair of the OFT to close its file in the case without giving Pernod a chance to be consulted beforehand (see [239]).
- 2 The Tribunal, however, left open the question of what consequential relief (if any) should be granted and what was the most just and economical way of dealing with the remaining issues in the proceedings (see [255]). The principal issue in the proceedings at that stage related to the adequacy or otherwise of various assurances that Bacardi had given to the OFT on the basis of which the OFT had decided to close the file. What then occurred was that there was a Case Management Conference on 22 July 2004 and, as a result of that, the Tribunal adjourned the Case Management Conference having given indications according to the recital in that order that:

“(1) Pernod should provide to the OFT such evidence as it may be advised to submit within 28 days; (2) the OFT shall, in the light of that evidence, consider what action to take, including whether appropriate amendments to the text of the assurances given by Bacardi can be agreed to meet any competition concerns; and (3) Pernod should be given an opportunity to make any observations on any action proposed by the OFT, or on any proposed amendments to the assurances before they are accepted.”

- 3 Following that order, on 27 August 2004 Pernod submitted various witness statements to the OFT making various allegations of anti-competitive conduct by Bacardi to support its contention that the assurances were inadequate and/or that Bacardi was in breach of those assurances. The OFT then conducted an investigation and in a progress report that the OFT lodged at the Tribunal’s request on 31 March 2005, the OFT came to the conclusion in para.60 as follows:

“Pernod’s new allegations do not go to the adequacy of the assurances. Pernod’s allegations can properly be divided into new allegations of anti-competitive conduct and allegations that the assurances are being breached. The OFT, nevertheless, has

examined all these allegations of anti-competitive conduct by Bacardi and has not found any significant evidence to warrant further investigation by the OFT.”

- 4 There was then a meeting that took place on 15 March 2005 at the OFT with representatives of Pernod in which the matter was discussed. Pernod, in the course of that meeting, seems to have made it clear that they had encountered difficulties in obtaining evidence. It is said in the course of the meeting that “the industry is a trifle sensitive” regarding matters concerning the OFT, but at the end of that meeting it was said on behalf of Pernod by a representative of Pernod’s solicitors (DLA):

“The OFT had shown that it was prepared to investigate Pernod’s concerns, and took the policing of the assurances seriously. Pernod still wanted the CAT to consider the text of the assurances (although it was unlikely to happen). If the textual analysis route could not be pursued he did not see much point in Pernod pushing on with the appeal. On the basis of what the OFT had found, it seemed that Bacardi was being co-operative by taking the assurances seriously and Pernod was comforted by the OFT’s openness to investigating the breaches or new allegations. However, Pernod would need to discuss this with Counsel.”

When asked whether Pernod wished to make any further comments on that report, Pernod’s representative replied that he had nothing to add

“He added that Pernod had seen value in the proceedings before the CAT as Bacardi had to take the assurances seriously. However, it was not possible to keep the proceedings running for ever and exit strategies could be discussed. Pernod would contact the OFT after it had discussed matters with Counsel.”

- 5 On 29 March 2005 Bacardi voluntarily proffered a revised version of the assurances that it had originally given to the OFT in January 2003. That new version of the assurances is now satisfactory to Pernod in the sense that, in the light of that voluntary offer by Bacardi, Pernod does not now wish to pursue these proceedings. The assurances are also acceptable to the OFT, but both the OFT and Bacardi stress that they have never in fact accepted that the original assurances were defective in any way. However, the OFT sees no reason not to accept the new assurances proffered by Bacardi. The text of those assurances is annexed to a letter

sent by Bacardi to the OFT on 29 March 2005. I will not take time to set them out here, but in due course they will be annexed to this Judgment when it goes on the Tribunal website.

- 6 The issues that then have been canvassed in this Case Management Conference are effectively four in number. First, whether the assurances are acceptable to all parties, and we are assured that they are, so this is a matter that can effectively proceed by agreement. Secondly, we have had during the course of argument some discussion about the effect of the new powers of the Office of Fair Trading under sections 31A and following of the Competition Act 1998 (as amended) to accept binding commitments. The assurances that we have been discussing in this case so far are voluntary assurances, not binding commitments of the kind envisaged under those new statutory provisions.
- 7 Since the voluntary assurances given in this case originally pre-date the amendment to the Act I have just mentioned, whether these newly amended assurances offered by Bacardi could (or should) be converted to binding commitments is a somewhat complicated question given the particular background to these proceedings. We think it best in the circumstances not to enter into any further discussion of that point, particularly since Pernod has not pressed for these new assurances to be converted into binding commitments. We would simply say, as neutrally as possible, as far as the future is concerned that from the point of view of the effectiveness of the United Kingdom competition regime, binding commitments have advantages from the point of view of enforcement over voluntary assurances, and may well prove to be a weapon in the OFT's armoury that needs further development. We have not, of course, addressed the problem of whether there remains scope for accepting voluntary commitments after the introduction of section 31A – that is also a matter that we leave open.
- 8 That being the case, the two remaining issues in this Appeal are first the technical issue of how the Appeal should actually be disposed of; and secondly the question of costs. Pernod does not wish technically to withdraw the appeal as Bacardi and the OFT suggest it should, and we have had some discussion as to whether the appeal should be disposed of by consent within the meaning of Rule 57 of the Tribunal's Rules, which provides for a consent order but contains a somewhat complicated procedure which requires a consent order impact statement on which the Tribunal has already made some provisional comments in the first Judgment the Tribunal gave in the *Napp* case ([2001] CAT 1) at[58]-[60] of that Judgment.

- 9 It does seem to us provisionally that the consent order route under Rule 57 is directed to a different kind of situation from the one that we have here. In the absence of any voluntary withdrawal by Pernod it does not seem to us that Rule 12 provides a very satisfactory solution either. In those circumstances it seems to us that the practical course is for the Tribunal simply to draw an order that says that the Tribunal will make no further order in this case and that the Tribunal's file is therefore closed. There is apparently no objection on Pernod's part to such an order containing recitals which set out the parties' respective positions on the circumstances in which the Tribunal has made that order. It is not, of course, for the Tribunal to try to capture what the parties themselves think is the position.
- 10 We would invite the parties to provide the Tribunal with the recitals that each party wishes to see reflecting its own position in the order, and the Tribunal will then make an order along the lines that I have just indicated.
- 11 That takes us to the final question in this case which is the question of the costs of these proceedings. Essentially, Pernod says that it should have the costs of the proceedings because it was successful in the Judgment that the Tribunal gave. The OFT resists that suggestion. In the alternative, the OFT suggests that if Pernod were to be allowed its costs on the issue of admissibility canvassed in the Tribunal's Judgment of 12 June 2004, it should have only half of those costs. That submission is based on the contention notably that following the Tribunal's order of 22 July 2004 Pernod submitted witness statements and other material to the OFT. The OFT then incurred an enormous amount of time and expense in investigating those allegations but, as appears from its progress report, came to the conclusion that there was nothing in them. Since that investigation was, according to the OFT, fruitless and was done under the aegis of an order by the Tribunal, it would be right to take that into account in making an order for costs and to reduce Pernod's entitlement to costs accordingly.
- 12 Bacardi, for its part, also asks that Pernod should pay at least a proportion of Bacardi's costs on the basis that despite, as it were, a technical victory by Pernod, Bacardi's position has always been that there is little or no point in these proceedings – that there never was any substance in the case brought by Bacardi – and in those circumstances Bacardi should have at least some of its costs.
- 13 Our view on the costs issues is broadly as follows: the Appellant, Pernod, succeeded on the admissibility issue before the Tribunal, and consistently with the Tribunal's Judgments in

Bettercare (1st August 2002) and *Freeserve (Costs)* ([2003] CAT 6) in our judgment Pernod should, in principle, have its costs on the admissibility issue. However, the admissibility issue as originally presented in the Notice of Appeal, did have two aspects. One was the contention that there was a finding of infringement as to the past, and the other was the contention that there was a finding of infringement as to the future. Pernod succeeded only on the latter allegation and not on the former. In those circumstances we think the correct order is that Pernod should have 75% of its costs on the admissibility issue.

- 14 Various other points were canvassed in the case, including whether Pernod should have had a copy of the Rule 14 Notice, and that was a point that was not in the end pursued by Pernod; and the question of whether Pernod should have been consulted on other matters before the OFT closed its file. On that latter point, Pernod's notice of Appeal was fairly scantily pleaded and it is a point upon which there was no clear guidance available at the time to the OFT on a point of general importance going beyond the scope of this particular case. Similarly, as regards the other issues in the Appeal they have not so far been issues on which the Tribunal has had to adjudicate and they have now been resolved effectively by agreement. So, with the exception of 75 per cent. of the costs of the admissibility issue, we think the right order is that as between Pernod and the OFT both sides should pay their own costs.
- 15 We have considered the argument advanced to us based on the time and expense that the OFT has incurred in investigating what it says are the fruitless allegations made by Pernod. We have some difficulty in accepting the submission advanced, essentially for two reasons. First, those matters took place in the context of a further administrative investigation by the OFT which the Tribunal indicated it thought it appropriate to have. It is not wholly clear to us at this stage, without finally deciding the point, whether that part of this matter can properly be described as "proceedings before the Tribunal" within the meaning of rule 3(a) and rule 55, to enable us either to award costs or to take that into account as a matter of costs. Secondly, we take the view that it is extremely difficult for the Tribunal to go into the rights and wrongs of the various contentions that were advanced by Pernod and the conclusions the OFT came to with a view to deciding whether (as the OFT submits) the whole exercise was a fruitless exercise or not. The OFT may well have come to that conclusion, but Pernod on the other hand may equally have considered that it was doing its very best to provide evidence and, at the end of the day, the relevant third parties were (for whatever reason) not supportive of what Pernod said the position was. That is a very difficult and complicated area from the Tribunal's point of view and it does not seem to us that it would be right to take it into account from the

point of view of costs. However, as I have already indicated, we have made a reduction in the costs of the admissibility issue, to which Pernod would be otherwise entitled, on the basis that it only partly succeeded on the arguments that it put forward on that issue.

- 16 That finally leaves the question of Bacardi's costs. Bacardi in this case did support the OFT on the admissibility and procedural issues in which the OFT and Bacardi were unsuccessful. The admissibility points and the procedural issues were of importance and the general effect of this case has been to cause the original assurances to be scrutinised and now revised, albeit voluntarily, and for further consideration to have been given to the matter. In view of the generally subsidiary role played by the Intervener in those considerations, in our view the Intervener's costs should lie where they fall, and we are not persuaded that are good grounds for ordering Pernod to make a contribution towards Bacardi's costs. So as regards Bacardi the order is that the Intervener should pay its own costs. I think that deals with the outstanding matters we have had to decide.

MR. TURNER: I am obliged, Sir. One supplementary point, under Rule 55(3) ----

THE PRESIDENT: Yes, a settlement or taxation.

MR. TURNER: Yes, if not agreed.

THE PRESIDENT: If not agreed I think they are to be summarily assessed by the Tribunal. Very well, thank you all very much indeed.
