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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:

(1) PERNOD-RICARD SA

(2) 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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CASE MANAGEMENT CONFERENCE

1 THE PRESIDENT: We are lacking Respondents. Are they here?

2 MR. ROBERTSON: They are here, they are just getting themselves ready. I should say that we
3 have had the opportunity outside of discussing draft directions that were circulated this
4 morning by the OFT and I think there is almost – almost – complete agreement between the
5 parties as to the directions I will be inviting the Tribunal to make. It is the OFT proposals.

6 THE PRESIDENT: Yes, well I think we had just better wait for them to come and then we will
7 may be extract it. Here they are.

8 MR. TURNER: I am sorry, Sir.

9 THE PRESIDENT: Mr. Robertson had started to tell us, Mr. Turner, that there were some draft
10 directions that were practically agreed between the parties.

11 MR. TURNER: Yes, Sir. Those were the ones that were sent to the Tribunal earlier on today.
12 Essentially, Sir, as Mr. Robertson says, there has been an outbreak of reasonableness on all
13 sides.

14 THE PRESIDENT: Wonderful. If I may just say, from the Tribunal's point of view, there are
15 three matters that we would like to discuss in general terms this afternoon, quite apart from
16 the detailed question of what happens next.

17 The first is, in general terms, what really is left in this case in terms of the issues that
18 remain to be decided. Secondly, given that at an earlier stage Bacardi in particular was
19 prepared to act in a way that resulted in a settlement, is this the sort of case that really
20 should be litigated further, or are there ways and means in which it could be satisfactorily
21 resolved, to the satisfaction of all parties.

22 The third question, I think is hinted at at least in one part of the papers we have seen,
23 is what now is the relationship between the situation we have in this case, in certain
24 eventualities, and the coming into force of the new EC Regime, and the Binding
25 Commitments Regime, with effect from 1st May? It is true that all the facts of this case
26 relate to a period before 1st May. On the other hand, it is probably a case where at least,
27 prima facie, one can say there was an effect on trade in Member States, because we are
28 dealing with parties of different Member States and it is a case in which there may be at
29 least an EC context – put it that way. If that context is to be dealt with after 1st May, even
30 though the matters arose before 1st May, what is the legal framework that is an appropriate
31 legal framework to follow? That is one question that we had in our mind – I am not
32 necessarily asking for answers to that last question today, but it is just a question that has
33 been in our mind.

1 MR. TURNER: Sir, may I take those in that order, before addressing the terms of the draft
2 directions?

3 THE PRESIDENT: Yes.

4 MR. TURNER: As we understand matters, we understand there are six main arguments which
5 are live and which are in the Notice of Appeal. Does the Tribunal have copies of the bundle
6 prepared for this hearing?

7 THE PRESIDENT: Yes, we do.

8 MR. TURNER: If you will turn in that to tab 2, and go to p.27, that is the relevant part of the
9 Notice of Appeal. It falls under the heading “The Assurances Do Not Adequately Address
10 the Competition Problem”. In essence the arguments boil down to six propositions, and
11 those propositions are first, essentially the question of the meaning of “promotional support
12 arrangements.” That is 4.32. Bacardi says that the assurances on their proper construction
13 are too narrow to meet the Pernod’s concern which arose from the known facts.

14 Secondly, at para. 4.33 to 4.36 there is an allegation that an exception written into the
15 assurances renders them essentially valueless and there is an explanation as to why the
16 exception can be circumvented. That is the second issue.

17 The third issue is at 4.37, and this relates to a part of the assurances to the effect that
18 Bacardi is entitled to discuss particular solus deals with the Office of Fair Trading. The
19 complaint is that this may be indeterminate and may lead to such solus deals being allowed
20 where they are, in fact, an abuse of dominance.

21 Fourthly, 4.38, very shortly put, the assurances did not require Bacardi to terminate
22 existing exclusivity deals. That relates to certain categories only – solus pouring and solus
23 optic agreements.

24 The fifth issue, 4.39, inadequate monitoring; and lastly 4.40, the assurances are given
25 only by an entity which does not control another potentially relevant entity, Westbay
26 Distributors. Those are, at the moment the arguments, and if you now turn to the proposed
27 directions.

28 THE PRESIDENT: Yes.

29 MR. TURNER: You will see at para. 1 the proposal that has been accepted by Pernod, that they
30 will state by close of play tomorrow which of these arguments are pursued – that is in 1(a).
31 1(b) is clarification as to whether the separate argument, that there was an unlawful fettering
32 of discretion is pursued, and 1(c) relating to the question of the OFT’s reasoning, whether
33 that was adequate, whether that is pursued.

1 THE PRESIDENT: I think for our part one of the questions we would have for Pernod today – in
2 a moment, Mr. Robertson, when Mr. Turner has finished – is how far you can enlighten us
3 today rather than waiting for tomorrow, as to what is pursued and what is not. Yes, Mr.
4 Turner?

5 MR. TURNER: The second question – is this the sort of case that should be litigated is a point on
6 which the OFT does have views. We feel that the essential background does need to be
7 born in mind by all parties. This is a case of informal assurances that were given to the
8 office. If there are issues of concern on the ground that Pernod can show us with colourable
9 evidence then the Office has indicated that it is open to reviewing those and taking action if
10 there is a reasonable suspicion of infringement. The fact is that Pernod's appeal, and we
11 have just run through the six matters, is essentially (a) backward looking; and (b) a textual
12 challenge on these six points. What it does not do, as the Tribunal will have seen is to bring
13 forward evidence itself of a problem that has been ignored and to rely on it to show why it
14 has not been taken into account. We do not see evidence of exclusionary conduct which has
15 been brought to the party by Pernod. For that reason, we also are concerned that this case
16 should not be a textual exercise.

17 It has been stated on numerous occasions that the primary purpose of competition law
18 is to safeguard the real interests of consumers. Of course, one source for that is Advocate
19 General Jacobs in the *Bronner* case. For our part we would regret it if litigation were to be
20 used as a forum for companies to settle disputes at the public's expense. We do hope,
21 therefore, that thought may be given by Pernod as to whether this case may be pursued in
22 other ways if there is colourable evidence of a competition concern. Sir, I think that is all
23 the Office has to say about the second matter.

24 So far as the third matter is concerned, the impact of modernisation and the Binding
25 Commitments Regime, again we point to the fact that these assurances are essentially what
26 the OFT accepted, based on the evidence available at the time. They were accepted in the
27 beginning of January 2003. We are now in July 2004. For that reason we say that even if
28 this case were to proceed to a conclusion that on a textual analysis of this set of assurances
29 they were, at the time, insufficient, that would not be grounds for in itself remission for the
30 OFT to deal with the matter now under current market conditions, still less to enter into the
31 Binding Commitments Regime which one finds under the Act as amended. For that reason
32 also, therefore, we do doubt for our part the continued utility of these proceedings.

1 THE PRESIDENT: If the assurances were textually inadequate, and I think it is probably fair to
2 say that there is at least a question mark over the wording of at least one of the paragraphs,
3 what in your submission would then happen? What would the consequence be of the
4 Tribunal taking the view that the wording was, in some way, inadequate?

5 MR. TURNER: Assume, for the sake of argument, that the wording allowed ----

6 THE PRESIDENT: Purely for the sake of argument.

7 MR. TURNER: -- the possibility of circumvention by Bacardi. Were that to be the case, the
8 Office would need to consider, again in the light of current conditions, whether there was a
9 need to plug that gap. Bacardi says for its part, even more strongly than the Office, certain
10 circumstances have changed. It says that it no longer has agreements of many relevant kinds
11 in force. Were that to be the case, were there to be an indication that there were a gap to be
12 filled then, in our submission, the correct route would be for the Office and Bacardi to deal
13 with that in the first instance informally. If that were to fail then the matter may have to be
14 dealt with formally.

15 THE PRESIDENT: That is one of the things I think in the back of our mind about the second
16 question we asked about the possibility of resolving the case, which is an objective that the
17 Tribunal has always to bear in mind under its Rules. Bacardi is saying that there is no
18 prospect of any conduct likely to infringe Chapter II prohibition in the relevant respect. It
19 would be rather hard to see why it is not possible to write that down in some way that plugs
20 any gap that there may be, if there is one.

21 MR. TURNER: Yes, Sir. For our part I think we would respectfully agree with that.

22 THE PRESIDENT: Rather than spend a great deal of money fighting.

23 MR. TURNER: Yes.

24 THE PRESIDENT: Yes, all right. I am simply exploring – if you do not mind me doing so –
25 without prejudice in any way to what shape this case eventually takes and, as it were,
26 thinking aloud really.

27 MR. TURNER: Sir, we welcome that.

28 THE PRESIDENT: Very well. I think it is probably Mr. Robertson next. First, I think we have
29 two questions in particular, Mr Robertson. Can you help us as to what arguments you really
30 are pursuing and, secondly, whether you intend to file any evidence to suggest that since the
31 undertakings were given, Bacardi's allegedly abusive behaviour has in some way continued,
32 or that there are, for some reason or other, continuing concerns from your client's side?

1 MR. ROBERTSON: To deal with each of those in turn. On the first point, what matters still
2 remain alive? I will come to what stages we might go to in a moment, but at this stage the
3 position is that the issues listed in subparagraph 1 of the OFT's proposed directions do all
4 remain alive with one or two exceptions, and we would propose to write by close of
5 business tomorrow to clarify that. But the obvious one, for example, is Westbay, which has
6 been clarified and that no longer is a live issue.

7 THE PRESIDENT: When you say "the issues", are we talking about 4.30 to 4.41 of the Notice?

8 MR. ROBERTSON: We are talking about the issues that Mr. Turner listed, the one that is no
9 longer alive is that at para. 4.40.

10 THE PRESIDENT: What about 1(b) and 1(c)?

11 MR. ROBERTSON: Those do remain alive, they would still be grounds of challenge. But if I
12 could put this in context of the way in which Pernod would prefer the case to proceed. As
13 we have set out in correspondence, our problem with the assurances is that they are
14 textually inadequate. Our objective is to have this remitted to the OFT so that we can
15 present our case as to why they are inadequate to the OFT, and to supply evidence of how
16 they are being circumvented in the market place.

17 We appreciate that we have first to convince the Tribunal that the assurances are
18 indeed textually inadequate, so our primary goal would be to have a hearing on the textual
19 adequacy of the assurances and, for that reason, if we go down that route – it is the first of
20 our two preferred options – there is no need to get into a detailed examination of evidence.

21 THE PRESIDENT: But if, for some reason, the assurances were textually inadequate or weak
22 but, in fact, they had, as it were, achieved their object in stopping the abusive behaviour
23 what would then be the legal position? What position would the Tribunal be in? Fine, they
24 may be textually inadequate, but if there is in fact no continuing conduct it might be a bit
25 difficult for the Tribunal to make an appropriate order.

26 MR. ROBERTSON: The Tribunal is faced with a choice of what is the most just and economical
27 way of dealing with these proceedings. For the Tribunal to make an assessment of the
28 adequacy of the assurances, in fact, one has to go into quite detailed factual investigation of
29 how the market is operating, what effect the assurances have had, what is Bacardi's conduct
30 on the market post assurances. That is going to involve consideration of quite an amount of
31 evidence.

32 THE PRESIDENT: If there is any evidence. But if there is no evidence then it is less difficult.

1 MR. ROBERTSON: We are not litigating this for fun. We are litigating this because there is a
2 real problem in the market place.

3 THE PRESIDENT: Post assurances?

4 MR. ROBERTSON: Yes. We are here because we are still facing problems in the market place,
5 because of Bacardi's ----

6 THE PRESIDENT: Are you proposing to give the Tribunal any evidence about that?

7 MR. ROBERTSON: It depends on the route the Tribunal prefers to take. If the Tribunal goes
8 down our preferred route of looking at the adequacy of the wording of the assurances,
9 essentially as a forensic exercise and, if it comes to the conclusion that in the light of the
10 competition problem that seems to have been identified by the OFT, the assurances are not
11 worded sufficiently effectively to deal with those issues then we say the matter then at that
12 point should be remitted back to the OFT and it is for the OFT to consider our evidence, and
13 it is back within the OFT's discretion – the ball is back in the OFT's court. We make our
14 case to the OFT and the OFT then decides whether the assurances need redrafting,
15 strengthening, gaps need plugging. We say that is classically a matter for the OFT. That is
16 where we want this case to go.

17 THE PRESIDENT: If there was a problem in the market one question that would arise is whether
18 it was a problem that was to do with the wording of the assurances, or whether it was to do
19 with the fact that the assurances are not binding or in some other way incomplete that
20 nobody has thought of so far, or were simply being disregarded.

21 MR. ROBERTSON: That is a detailed factual inquiry and that is something that, if this were
22 back in the OFT, one would expect them to contact not only the suppliers here of Bacardi
23 and Havana Club Rums, but those actually engaged in the market. Those people who run
24 bars, run chains of pubs.

25 THE PRESIDENT: I think the question for us would be – one possible question for us, and again
26 I am still thinking aloud – is whether there is at least prima facie evidence that there is a
27 problem, to give you a launch pad for your argument that there is a problem rather than
28 simply relying on a rather dry textual argument.

29 MR. ROBERTSON: That would then take us down the second of the two routes that has been
30 explored in correspondence, which is for the Tribunal itself to go into an exploration of the
31 facts.

32 THE PRESIDENT: We may not want to go into a full explanation of the facts, but we may need
33 something more to go on than Pernod's mere assertion that there is a problem of some sort.

1 MR. ROBERTSON: That is right.

2 THE PRESIDENT: I just do not know.

3 MR. ROBERTSON: Backed up by the fact that Pernod is unlikely to be litigating this case unless
4 it had a real interest.

5 THE PRESIDENT: There are all sorts of reasons why people litigate cases, but we try to go on
6 evidence where we can.

7 MR. ROBERTSON: If we are going to go down the evidence route then we need to consider
8 whether we are dealing with the position as at the date the assurances were accepted or, as
9 I think the Tribunal has it in mind, the position now in the market place. That latter step
10 involves the Tribunal engaging in a fact finding exercise that may raise questions as to
11 whether the Tribunal was then exercising an appellate jurisdiction or is stepping out of the
12 line of its being Tribunal of First Instance and I just raise that, we have no concluded views
13 on that, it does seem to raise that issue. That is why our third option was for this to go to
14 the OFT because that is the fact finding Body, it is the Body that can contact everyone that
15 is involved in the trade and ask them how Bacardi's practices are affecting essentially their
16 stocking choices. At the moment this Tribunal has only got two suppliers and the OFT in
17 front of it.

18 THE PRESIDENT: I do not think we would be trying to make any kind of factual finding.
19 We simply want something to go on to show that there may be some sort of problem.
20 Bacardi tells us that there is no problem and everything has been observed and there is no
21 risk of any restarting of the alleged conduct and so forth and so on.

22 MR. ROBERTSON: One of the things that we have not explored yet in correspondence, but
23 I think this is what the Tribunal has in mind, the Tribunal seems to be contemplating the
24 possibility of a witness statement being served on behalf of Pernod.

25 THE PRESIDENT: It is very much up to you, I think, Mr. Robertson, it is your appeal, and you
26 have to decide what you want to do. I am simply pointing out a possible difficulty, that if
27 there is no evidence before us of any problem that may have some bearing on whether the
28 assurances are adequate to solve the competition problem.

29 MR. ROBERTSON: What we had contemplated, and this is reflected in the draft directions we
30 had agreed, is that the next stage would be for the OFT to serve its defence, as it were,
31 setting out why it regards the assurances as being satisfactory having regard to the evidence
32 that was before it.

33 THE PRESIDENT: It has more or less done that, has it not?

1 MR. ROBERTSON: The OFT want another four weeks in which to revise that defence. It has
2 not set out that much by way of supporting documents and that, I think, is the main issue for
3 the OFT as I understand it. What I think they have in contemplation is that they would
4 serve a witness statement along with the defence, setting out the principal documents upon
5 which they rely. I said to Mr. Turner that was serving a witness statement “à la *Claymore*”
6 and he said it would be very much not “à la *Claymore*” in that it would be full and it would
7 not raise the necessity for repeated applications for disclosure following that. What we had
8 in mind was, in consideration of that defence, that there would be a further case
9 management conference and there would be submission of witness statements –
10 undoubtedly we would want to put in a witness statement setting out the position as we saw
11 it. So that is how we saw the procedure going.

12 THE PRESIDENT: When you say a witness statement setting out the position as you saw it, you
13 mean setting out the position in the market place as you see it.

14 MR. ROBERTSON: That is correct.

15 THE PRESIDENT: So we are going to have witness statements on the market situation anyway?

16 MR. ROBERTSON: Exactly.

17 THE PRESIDENT: As a prelude, or part of the background to an argument about the textual
18 adequacy of the assurances?

19 MR. ROBERTSON: If we go down that route it will be about the adequacy of the assurances in
20 fact, it will not be a purely textual argument. It will be the Tribunal engaging in a fact
21 finding exercise.

22 THE PRESIDENT: What route do you suggest we go down? We cannot stop the OFT putting in
23 whatever it wants in its defence at the moment.

24 MR. ROBERTSON: There are two alternative routes. The first is, as we set out in
25 correspondence, not to go down an evidenced based route, to restrict the next hearing to a
26 consideration of the textual adequacy of the assurances and, if the Tribunal were to find
27 that, on the face of them, they did not appear to be textually adequate to address the
28 competition problem that they sought to address, then the matter should be remitted to the
29 OFT. That is the first of the two alternatives we have proposed.

30 THE PRESIDENT: What would that involve so far as the OFT’s defence is concerned?

31 MR. ROBERTSON: That is obviously a matter for the OFT.

32 THE PRESIDENT: Yes.

1 MR. ROBERTSON: But we would not be inviting the Tribunal to engage in a fact finding
2 exercise. The second of the alternatives which will undoubtedly be lengthier and costlier
3 for all concerned, but if that is the preference of the Tribunal and the other parties we are
4 happy to go down it, is to go essentially down the route of the OFT's proposed directions
5 circulated this morning, with one or two tweaks, but essentially to go down the course that
6 the parties have assumed we are going down – the OFT puts in its defence, there is a further
7 case management conference to consider timetable for service of witness statements – we
8 would undoubtedly put in a witness statement in response to that defence and then proceed
9 to a full hearing. Bacardi no doubt would also be putting in evidence. There would be
10 issues then as to possible examination of witnesses, depending on the contents of the
11 witness statements, but that would involve the Tribunal engaging in fact finding as to
12 whether the assurances were in fact adequate, not just they appear to be textually adequate.

13 THE PRESIDENT: Would that latter route involve, as the OFT appears to fear, some lengthy
14 argument about discovery of further documents from the OFT?

15 MR. ROBERTSON: We would hope not, and in our discussions Mr. Turner assured me that they
16 will put in the necessary documents for an understanding of their decision. We would ask
17 that they also serve with that a schedule of the documents that is on the OFT's file. That is
18 just a print out of essentially the index of the file, redacted as necessary for reasons of
19 confidentiality, just so we can see the extent to which disclosure reflects what is on the
20 OFT's file. We would hope that we would not have the situation that appears to have taken
21 place in *Claymore* where there are repeated applications for disclosure.

22 THE PRESIDENT: Yes, I see. Thank you. Yes, Mr. Flynn?

23 MR. FLYNN: Members of the Tribunal, I hardly know where to start. It seems now that
24 Mr. Robertson puts a wholly new case.

25 THE PRESIDENT: Well why do we not start with the two questions we asked at the beginning.

26 MR. FLYNN: That is probably a good place to start.

27 THE PRESIDENT: The first question I asked, and I think we would like your views first and
28 then anything you would like to say in response to what has been said.

29 MR. FLYNN: Your first question is what really is left?

30 THE PRESIDENT: What really is left, and is there a prospect of a sensible settlement?

31 MR. FLYNN: As to what is really left, we obviously assumed that by today, in fact, well in
32 advance of today and so the parties could discuss and agree them, we would know which

1 issues in the application were being pursued. We now know that probably most of them,
2 but not all of them are. That is something that could have been sorted out a little while ago.

3 As far as whether this should be litigated further obviously an answer to that question
4 really depended on knowing what was still in issue. These assurances were put forward by
5 Bacardi on a voluntary basis, as the Tribunal is well aware, to put an end to this
6 investigation, and it is not any part of Bacardi's case that it goes that far and no further.
7 These are voluntary assurances which are intended to make everyone happy so far as that
8 can be done.

9 THE PRESIDENT: Your client's desire is to resolve the matter?

10 MR. FLYNN: That was the whole purpose of it. You have seen our draft statement of
11 intervention which says that we take them extremely seriously, have complied with them,
12 not only to the letter but well beyond the letter and fully in spirit.

13 THE PRESIDENT: You say you have complied with the letter and the spirit?

14 MR. FLYNN: And the spirit, and beyond. We apply this to all Rums, for example.

15 THE PRESIDENT: All Rums?

16 MR. FLYNN: Yes, and the case only ever concerned white Rum.

17 THE PRESIDENT: Yes.

18 MR. FLYNN: So there it is, it is all set out in Bacardi company policy.

19 THE PRESIDENT: It is very telling Mr Robertson, even today, has not given the Tribunal
20 a single example of any continuing problem, and you have also heard Mr. Turner today
21 saying that the OFT has always made it clear that if there is any continuing problem that
22 anyone wants to bring to its attention that is precisely what they should do, and yet we have
23 Pernod today in correspondence saying that they did not wish to take up the option of the
24 matter being remitted to the OFT at this stage, which is one of the options which the
25 Tribunal trailed, although without obvious enthusiasm, at the end of the Judgment.
26 Now I understand that he wishes to achieve that but after going through these fairly
27 unnecessary proceedings first.

28 It really seems to us that if Pernod have a real case, a real problem in the market it is
29 something they should be raising with the OFT for the OFT to consider. It is not, in our
30 view, a matter which should be put forward at this stage in these proceedings when the
31 whole of their case is put on the basis that you have seen it in the application.

32 As far as what is in the application is concerned, we would say that some of this is
33 quibbles with the wording – again, we hope to have addressed that in our Statement of

1 Intervention, and the OFT has also addressed it in the defence. We do not think the
2 assurances are meant to be read in the way that Pernod reads them. That is not to say if
3 someone identifies an infelicity, a gap, or even a glowing hole in the assurances, Bacardi
4 would not consider rewriting, offering some different assurances. What we have yet to see
5 is the shadow, or hint, of a real problem.

6 In terms of how this case could go forward if these arguments are maintained,
7 we would submit that the way it has been presented by Mr. Robertson puts before the
8 Tribunal a false dichotomy. He says either no evidence or, I think, the kitchen sink – the
9 Tribunal has to do a complete fact finding exercise and make itself the first review body to
10 decide how the market works and so forth. I do not think either of those are correct. I do
11 not think it is possible to deal with the arguments, and Mr. Turner has already run the
12 Tribunal through them, purely as a matter of wording. If we take the first one – “What is a
13 promotional support agreement?” The problem Pernod raises with that is, well what about
14 all other sorts of agreements that Bacardi could enter into with retailers?

15 To answer that question, if you do it purely textually well of course you could re-label
16 any agreement, any words you liked and would that take it outside the assurances? I do not
17 think so. But actually in fact to deal with that you need a certain amount of evidence. You
18 need the facts that we have set out in our statement of intervention and this wording covers
19 the relationship we have with retailers, bearing in mind that we do not supply retailers.
20 The relationship we have with retailers is one in which we encourage them to push the
21 Bacardi brand. That is what these promotional support agreements are. We are not selling
22 them the Rum, they can actually get it from anyone they like. We cannot withhold supply
23 from them, these arrangements are for promotional support. They are to advantage the
24 Bacardi brand. To understand that you have to understand the things that we have set out in
25 our statement of intervention – those are evidenced.

26 THE PRESIDENT: I may have mis-remembered it, because it is some time since we have looked
27 in detail now, but the original argument was that promotional support arrangements were
28 not wide enough to cover naked exclusivity, as it were. That was the original argument.

29 MR. FLYNN: Yes, and how can you have naked exclusivity if you are not supplying.

30 THE PRESIDENT: If you are not in contractual relations?

31 MR. FLYNN: Yes.

32 THE PRESIDENT: So you are in contractual relations with some, I think, are you not?

1 MR. FLYNN: We have given up – to the extent we ever had it – we have given up naked
2 exclusivity with retailers. That is what these assurances do, but to understand that you have
3 to see what we say about it. To an extent that is matters of evidence. Our proposal as to
4 that, which attracted I would say unreasoned scorn of DLA, our suggestion to deal with it
5 was that our Statement of Intervention should stand as evidence of the matters set out there.
6 That should be taken to be Bacardi’s evidence. We can put in a witness statement to say
7 these things, there is no problem about that. We can elaborate on them as necessary before
8 the Tribunal, but we cannot see a basis for deciding the points that are raised by Pernod with
9 no evidence at all – some of them are technical quibbles, but some of them do require a bit
10 of evidence, but it does not require the kitchen sink. The Tribunal does not require the
11 whole of the OFT’s files to deal with the points that have been raised.

12 THE PRESIDENT: No.

13 MR. FLYNN: That is the thrust of our proposal as to how this should go forward. I reiterate that
14 we certainly are opposed to the idea that a new case can be put forward based on some
15 evidence and new argument that Pernod would wish to put in. If they have problems in the
16 market place that they have not told us about up to now, and they have not been able to tell
17 the Tribunal about today, that is a matter they should raise with the OFT. What the
18 Tribunal should be concerned with are the points in the application which Pernod wish to
19 pursue, and we will deal with those in the most economical and efficacious way possible.
20 If it really is a matter of wording, and we do note that there are passages in the wording
21 which we would say are misapprehensions as to the purpose of the assurances, but they find
22 their way into the Judgment, if the Tribunal is concerned about those there is nothing to say
23 that Bacardi would not consider rewording these assurances.

24 THE PRESIDENT: I suppose on that point, Mr. Flynn, if one was beginning to go into the
25 wording of the assurances against the background you outline one would still be looking for
26 some kind of further explanation of the exception that is set out in para. 6, and possibly the
27 semi-exception that is set out in para.2. Those are the sort of textual and substantive points
28 that, I suppose, spring to mind.

29 I am looking at the assurances now, and para.6 would appear to make an exception
30 and it is the sort of paragraph that, from the Tribunal’s point of view – bearing in mind, as
31 Mr. Turner reminded us, we are not concerned with the parties but with the general public
32 interest and the ultimate consumer – would possibly raise some questions as to whether that

1 was workable, satisfactory, policeable, or what? You may say you are never going to do it,
2 in which case well that puts another light on things.

3 MR. FLYNN: Well you have seen what we do say in the Statement of Intervention, it just simply
4 has not arisen.

5 THE PRESIDENT: If it is not going to arise, there would not be any particular reason for
6 maintaining it.

7 MR. FLYNN: That might well be said. I think some confusion has arisen over the word
8 “including” in those assurances, because it is not meant to say that promotional support
9 arrangements including by way of example solus pouring or solus optic status, it means
10 promotional support arrangements which include solus pouring or solus optic status, if that
11 makes it any clearer. It is not a wider exception.

12 THE PRESIDENT: Yes, I do not think that was particularly in our minds. What is on one’s mind
13 is that the thrust of para.6 appears to be that if the retailer invites tenders on some
14 promotional basis that includes solus pouring or solus optic status then that is a situation in
15 which Bacardi can tender on that basis if not to do so would risk Bacardi being excluded
16 from the premises altogether.

17 MR. FLYNN: Bacardi would be wholly shut out, yes.

18 THE PRESIDENT: That is how I have understood it, at least.

19 MR. FLYNN: Yes.

20 THE PRESIDENT: But if that is not likely to arise then query – stop there.

21 MR. FLYNN: It has not arisen in the last 18 months, it may not be a big problem. I do not think
22 it is a real problem.

23 THE PRESIDENT: We are being somewhat unrealistic it seems to me off the top of my head for
24 all the parties to spend time and effort trawling over the technicalities of the wording of
25 these assurances if the situations to which they are addressed are not really practical
26 situations anyway.

27 MR. FLYNN: I take the point both ways, and I think there is no practical problem.

28 THE PRESIDENT: Which is why we started this discussion by asking ourselves what is left of
29 this case and is there any scope for arriving at some solution to it. It may well be that if this
30 case can be resolved there may come a stage where Pernod wishes to make a fresh or
31 different complaint to the OFT, perhaps – I just do not know.

1 MR. ROBERTSON: Sir, I hesitate to interrupt, but Pernod will be putting in evidence at the
2 appropriate point exactly the type of tender that Mr. Flynn says does not exist. It is a point
3 of factual dispute as between the parties.

4 THE PRESIDENT: Well we will come back to you in a moment, Mr. Robertson, just let me
5 finish with Mr. Flynn.

6 MR. FLYNN: If I can just say that has not arisen as a factual dispute between the parties up to
7 now. It is nice of Mr. Robertson to pop up just now and say that but it is getting a little late
8 in these proceedings for points like that to be coming in. In our submission that would have
9 been a new case.

10 Sir, that is probably more than enough on your first two questions.

11 THE PRESIDENT: Yes.

12 MR. FLYNN: In respect of the third issue, that is probably a bridge across if one got to it, from
13 Bacardi's position. It is really a matter for the Office if its decision to accept these
14 assurances were in some way struck down by the Tribunal and put in question, what it did
15 next would be for it to consider. Probably Bacardi's views at this stage are by the by.

16 THE PRESIDENT: Yes, thank you.

17 MR. FLYNN: If we perhaps come back to the details or directions I may have other things to say.

18 THE PRESIDENT: Yes. Mr. Robertson, I am struggling a bit I must say with the idea that we
19 can look at these assurances and discuss their adequacy without having any background
20 evidence about it. We have at the moment evidence from Bacardi to the effect that there is
21 no problem. You tell us that there is, or maybe a problem but we have no evidence from
22 you to support that at the moment – so query, where do we go from there?

23 MR. ROBERTSON: Sir, that argues – if that is the route the Tribunal prefers to take ----

24 THE PRESIDENT: No, it is not a question of the route the Tribunal prefers, it is a question of
25 how you are putting your appeal, I think.

26 MR. ROBERTSON: In that case, we would put our appeal on the basis that the assurances are,
27 as a matter of fact, inadequate to address the competition problems for the reasons set out in
28 the Notice of Appeal, and we would be putting evidence before the Tribunal to that effect.
29 The question is do we do that before the OFT serves its final defence, or do we proceed on
30 some sort of different timetable to that discussed between the parties whereby we put in
31 evidence within the next month, for example.

32 THE PRESIDENT: Have you put in any evidence to the OFT, yet?

33 MR. ROBERTSON: Not so far.

1 THE PRESIDENT: Is there any reason why not?

2 MR. ROBERTSON: I think we were just waiting to see where the Tribunal was minded to direct
3 the proceedings, how they were minded to continue. We had assumed that we would
4 proceed now to settling of defence, witness statements dealing with the points that are
5 identified as between the parties, and then going to a hearing to make findings of fact, and
6 go down that reasonably straightforward route. We had not contemplated abandoning the
7 proceedings. We thought this matter was now in front of the Tribunal and it was for the
8 Tribunal to deal with.

9 THE PRESIDENT: Yes. Thank you. Yes, Mr. Turner? I am not sure where all this is leading us
10 at the moment – we will see where we get to.

11 MR. TURNER: Sir, our position is as follows. The principle of the Tribunal conducting a pure
12 textual analysis without reference to the facts is wrong, and now that that has been
13 established as one of the hoped for ways forward an indication to the contrary really ought
14 to be given.

15 Secondly, insofar as Mr. Robertson said that the case does involve a problem in the
16 market place, albeit that there is no evidence yet in the case, but that it will be supplied,
17 there is a problem with the constitution of the appeal, because evidence in support of the
18 claim should have been supplied with the Notice of Appeal in accordance with the rules and
19 practice of the Tribunal, but it has not.

20 THE PRESIDENT: Well, it should have been, but there is a problem there, is there not? Because
21 the appeal was necessarily brought immediately after the assurances were given, probably at
22 a time when the problem would not yet have manifested itself in the market place – had
23 there been a problem. So we are probably in the situation (or we might be in the situation)
24 of facts that have come to light since the decision was taken. It might be different.

25 MR. TURNER: It might be different. On the other hand, the appeal was brought some time after
26 the assurances were accepted.

27 THE PRESIDENT: It is true that the appeal as such does not make any allegation that up to the
28 time the appeal was brought there was a problem in the market place, and we have not been
29 told I think so far in the course of the proceedings since then that there was a problem in the
30 market place.

31 MR. TURNER: Nor is the potentiality of any problem explained by reference to particular
32 market circumstances. It is put as a purely textual matter. But now that it has been
33 explained that there is a problem in the market place according to Pernod, our submission

1 would be that the correct route then to take would be to withdraw the appeal and to present
2 it to the Office of Fair Trading, because the Office has, as I have said, always made clear
3 that it will entertain such evidence of a problem in the market place. If that complaint is
4 then rejected that then will raise a new issue altogether, but it is not the issue which is
5 currently in the framework of these appeal proceedings.

6 Sir, I have only two other points, which are really points of detail compared to that
7 larger submission. First, in relation to the issue of a witness statement, I should just clarify
8 that our position was that a witness statement, if this appeal were to proceed, ought to be
9 produced so that matters can be explained in the true factual context. To pick up on an
10 example given by Mr. Flynn, there is complaint that the assurances relate to professional
11 support arrangements and that this is too narrow a term. My clients and Bacardi of course
12 understood the arrangements as extending to precisely the matters which were the subject of
13 concern that have been brought to the Office's attention, and we felt it necessary that a
14 responsible senior official from the Office should stand behind what is currently in the draft
15 defence to explain this sort of thing.

16 THE PRESIDENT: Explain that it in fact covers what they fear that it does not cover?

17 MR. TURNER: Yes, that it was understood on all sides that this was in fact the case, that there is
18 not a hole in that respect. That is the sort of matter that we were envisaging.

19 So far as listing the items on the file is concerned, I shall not go into that for the
20 moment, but just to say that it is not the simple exercise that Mr. Robertson has
21 foreshadowed. The access to the file was given, I think, in the Summer of 2002, at the time
22 of service of the Rule 14 Notice, the assurances some 6 months later than that, and there are
23 a very large number of documents in this case extending to some 70 files which will need to
24 be considered and looked at for such an exercise, and we would say that that is not
25 proportionate or necessary.

26 The essential point is the larger one. In view of what has come forth today we would
27 say that this appeal should now be withdrawn.

28 THE PRESIDENT: Yes. The Tribunal will retire to consider the position.

29 **(For Judgment see separate transcript)**

30 **LATER:**

31
32 THE PRESIDENT: Mr. Robertson?

33 MR. ROBERTSON: Pernod, for its part, is perfectly happy with that.

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

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

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

12 MR. TURNER: Not at all.

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

17 MR. TURNER: I am obliged, Sir.

18 THE PRESIDENT: Yes, Mr. Flynn?

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

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

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