THE HIGH COURT

[1998 No. 6687 P.]

BETWEEN

THE COMPETITION AUTHORITY

PLAINTIFF

AND

THE LICENSED VINTNERS ASSOCIATION, LORCAN LYNCH, FRANK TOWEY, EDWARD BYRNE AND VINCENT MURPHY

DEFENDANTS

JUDGMENT of Mr. Justice William M. McKechnie delivered on the 24th day of July 2009

1. The Competition Authority is a statutory body established by legislation, having as part of its functions, the power to enforce the provisions of the Competition Act 2002 ("the 2002 Act"). Under s. 14(2) of that Act, the Authority has a right of action in respect of, *inter alia*, any agreement, decision or concerted practice prohibited by s. 4 of the Act or by Article 81 of the Treaty establishing the European Community (the "EC Treaty").

2. The Licensed Vintners Association is a trade association and representative body for the publicans of the greater Dublin area. It has approximately 700 members, and represents over 90% of publicans in that area. Its sister association, the Vintners Federation of Ireland, is the equivalent body for publicans, trading in the rest of the

Country and has approximately 5000 members nationwide. Both are associations of undertakings for the purposes of s. 4 of the 2002 Act and Article 81 of the EC Treaty.

3. By way of Notice of Motion dated the 31st March 2009, the Competition Authority seeks an order of attachment against the Chief Executive Officer of the first named defendant ("LVA"), and an order for the sequestration of the assets of that defendant. In parallel proceedings between the Competition Authority and the Vintners Federation of Ireland ("VFI") and others, similar orders are sought against the Chief Executive of that organisation and against the organisation itself. Notwithstanding the terms of these notices, however, no relief as a matter of fact is being sought against any personal defendant, with such persons being named solely because of the proceedings next mentioned. The actual relief which is sought on this application is, in essence, a declaration that both associations are in contempt of court, in the circumstances hereinafter described. As these issues were ventilated in the LVA motion, it is in that case in which judgment is given. As no distinction of materiality exists between either case, the decision applies equally and without distinction to the second set of proceedings involving the VFI.

4. On the 1st June 1998, the Competition Authority instituted proceedings against both the LVA and certain of its officers and against the VFI and certain of its officers. Therein the Authority alleged that certain recommendations made, certain practices engaged in and certain activities carried on, by these associations, their servants or agents, were anti-competitive in a variety of ways and accordingly breached s. 4 of the Competition Acts 1991 to 1996. A full defence was filed by both associations. On the matter coming on for hearing, the parties compromised the disputed issues by

entering into a settlement, the terms of which were received and filed in court pursuant to an order made on the 18th December 2003 (erroneously dated 27th June 2003). There were no admissions offered or acknowledgments of responsibility given and, save for the limited order made, the proceedings were struck out with no further order as to costs or otherwise.

5. The terms of settlement so agreed included three undertakings given, *inter alia*, by the LVA. That organisation undertook:-

> "(i) ….not to recommend to [their members] the prices, margins, increases in prices and increases in margins earned on the sale to the public of alcoholic beverages for consumption on licensed premises owned, managed or controlled by [their members]. ["Undertaking No. 1"]
>
> (ii) …not to breach the provisions of s. 4 of the Competition Act 2002, in relation to the sale of and the price at which alcoholic beverages are sold to the public for consumption on licensed premises owned, managed or controlled by [their members]. ["Undertaking No. 2"]
>
> (iii) …to inform [their members] of the settlement of these proceedings and the undertakings provided herein…" ["Undertaking No. 3"]

It is alleged in the instant application that by reason of the press release hereinafter mentioned, the LVA has breached the aforesaid undertakings and accordingly is guilty of contempt of court.

6. On the 1st December 2008, the LVA and the VFI published a joint press statement which stated, *inter alia*, that:-

"The two representative bodies for Irish publicans have announced a one year price freeze in drink prices in pubs with immediate effect. The unique joint announcement was made on behalf of over 5,500 publicans by the Licensed Vintners Association which represents publicans in Dublin and the Vintners Federation of Ireland representing publicans in the rest of the country.

"Speaking at a Special Press Conference in Dublin today, the two organisations said that the commitment was being made in light of the deteriorating economic situation and the growing pressure on consumer spending; 'In financial terms, 2009 is going to be a difficult and challenging year for everyone and we recognise that people are going to be under real pressure to tighten their belts. This commitment reflects our members' concerns that the pub trade should do its bit in terms of keeping costs down and providing value for money.'

"The leaders of the two organisations … said that the initiative for the price freeze had come from members themselves; 'This initiative is very much member driven. In both organisations, publicans across the country have contacted us to express their concerns at the worsening economic conditions and their wish to do something to respond to the situation. Both organisations then considered the matter at Council level, engaged in widespread consultation and came to this decision. We believe the freeze will be honoured by the vast bulk of our members across the country.'

"The two organisations also called on the drinks suppliers and manufacturers to support this initiative by not exceeding current price structures over the coming year …

"Given that Ireland has the highest alcohol taxes in Europe, we very much welcome recent comments by the Minster for Finance that there will not be a mini-Budget in 2009. This provided much-needed certainty and facilitated our decision to pursue this initiative.

"The two organisation said that they had had to consult with their lawyers to confirm that it was in order for them to make this commitment; 'We're not advocating that our members sell at any particular price points and we fully appreciate that it is a matter for each and every publican to decide upon their own respective resale prices. We're simply saying that our two organisations are committing our members to not exceeding the current price levels which they apply to drinks products over the next twelve months. Should individual members wish to compete at prices below those they charge today, they are of course entirely free to do so.

"'We are confident that this initiative will be warmly welcomed by our customers. We thank them for their custom and look forward to their ongoing support.'" (Emphasis added)

7. This press release was forwarded to the Competition Authority on the same day and a meeting subsequently took place between the parties on the 9th December 2008. On the 13th January 2009, the Authority made its position known by indicating that in its opinion the publication was in breach of s. 4 of the Competition Act 2002. In particular, the Authority noted that:

"It is inherent within both section 4 of the Act and Article 81 EC that each undertaking must determine independently the policy which that undertaking intends to adopt on the market… The fact that the announcement purports

simply to freeze, as opposed to raise, prices does not exclude it in competition law terms. Any agreement or concerted practice among competitors or decision of a trade association which sets the price to be charged for a product has the potential to distort competition in the market to the detriment of customers. Section 4(1) of the Act and Article 81(1) EC prohibit any price-setting activity among competitors or by an association of undertakings to predict with a reasonable degree of certainty what the pricing policy pursued by their competitors will be… Even though the announcement is stated to be non-binding in nature, by removing the element of uncertainty in relation to prices, the price freeze removes a vital element of the competitive process, leading to less vigorous competition, and potentially, higher prices than could have been achieved on the market under normal competitive conditions."

8. On the 26th January 2009, Mason Hayes & Curran, Solicitors, replied on behalf of the VFI, and on the 23rd March 2009, Messrs. Arthur Cox, Solicitors responded on behalf of the LVA. Both firms spoke in trenchant terms. The former stated that:

"Our client considered the arguments set out in your letter and remains firmly of the view that there has been no breach of Section 4(1) or Article 81(1), and that even if prima facie there was such a breach (which they do not consider is the case), then the conditions for exemption under Section 4(5) and Article 81(3) would apply to the proposed measures."

Disputing the Authority's categorisation of the price freeze announcement as an agreement between competitors to "fix" prices, the letter continues:

"The price freeze constitutes a commitment (with immediate effect) to consumers by each participating member, using the VFI and LVA as conduits, not to raise prices above the level currently being charged by that member, for a period of one year. This is fundamentally different to an agreement between competitors to fix prices and, it is submitted, it is not appropriate to apply the case law and economics of price fixing in analysing this measure. Importantly, participating members would be free to lower their prices at any time. In this regard the term 'price freeze' was at all times intended to refer to not raising prices above their current levels, and our client considers that this was understood by consumers… For the avoidance of doubt, there is no (nor could there be any) proposal for members to coordinate their prices prior to or during the price freeze. The price freeze related to the prices which each member was charging at the date of the announcement which could, and would, in many instances, be different."

9. Having taken issue with the conclusions reached by the Authority, Mason Hayes and Curran, then outlined the problems facing publicans at this time:

"Publicans are facing increasing charges, largely due to increased supply prices. Suppliers tend to be mainly multinational companies and it is very difficult for publicans to resist those price increases… [T]he current situation is rapidly leading to the closure of pubs across the country. The elimination of competitors from the market, if allowed to continue, would in fact allow remaining publicans to maintain higher prices. Moreover, rates on our client's members [sic.] premises will increase this year and our client's members are also faced with increased employment costs… [T]he aim of the

proposed price freeze would be for publicans to resist upward pressure on prices by not raising their prices above current levels. The price freeze does not have the object or effect of restricting competition and accordingly there is no breach of Section 4(1) or Article 81(1)."

Although it is unnecessary to quote further from this letter of 26th January 2009, it should be noted that the Solicitors engaged in further argument as to the applicability of s. 4(1) and Article 81(1), in particular arguing that the actions of their client were in fact caught by the saver contained in s. 4(5) of the 2002 Act and Article 81(3) of the EC Treaty.

10. Messrs Arthur Cox, on behalf of the LVA, argued with equal vigour and in similar terms, in their letter dated 22nd March 2009, noting in particular that:

"The LVA would not have begun the price freeze initiative nor would the LVA continue with the price freeze initiative if it shared the Competition Authority's view. Furthermore our client only proceeded with the price freeze initiative following careful consideration and the receipt of legal advices from this firm. That is why, to date, our client has not indicated a willingness to accept the terms of the cease and desist request from the Competition Authority…"

11. Further correspondence followed but no agreement could be reached as to whether the press announcement constituted a breach of competition law, or breached the undertakings above given. In March 2009, the Authority produced a draft Enforcement Decision which it intended to publish on its website setting out its

position on this controversy. It subsequently decided not to so do. It did, however, by letters dated the 27th February 2009 and the 5th March 2009, call upon the LVA:-

> *"- to cease with immediate effect the implementation of the price freeze announced on the 1st December, 2008:*
>
> *- to notify the LVA's members of the change in policy and of the Competition Authority's view that horizontal coordination of this nature is prohibited by s. 4 of the Competition Act 2002, and Article 81 E.C.:*
>
> *- to instruct the LVA's members to remove from public view any posters advertising the price freeze currently on display in their premises:*
>
> *- to desist from discussing, arranging or adopting on behalf of its members a coordinated pricing policy of this nature in the future: and*
>
> *- to provide the Competition Authority by the 20th March, 2009, with details of the steps taken by the LVA to comply with this request."*

As the association felt unable or unwilling to take the steps as requested, the within Notice of Motion issued on the 31st March 2009.

12. During the course of the hearing both parties agreed that this Court should, before embarking on the issues regarding Undertaking No. 2, determine whether or not the association was in breach of the first recited undertaking. Accordingly, this judgment is in respect of Undertaking No. 1 only, with all other matters standing adjourned pending a determination thereon. Incidentally, nothing turns on Undertaking No. 3, which has long since been complied with.

13. Resulting from this arrangement it will become immediately apparent that a resolution of Undertaking No. 1 does not involve, as such, matters which might

ordinarily be regarded as coming within competition law principles. Issues such as whether the press release restricts or distorts competition, in any of the ways alleged by the Competition Authority, do not fall for consideration. Questions, like whether the release amounts to co-ordinated conduct or to horizontal co-operation thereby reducing the risks of market uncertainty, do not fall for decision. Nor does what defences might be available by reason of the pro-competitive consequences (if any) of the announcement in question. Accordingly, it must be appreciated that this Court is offering no view or opinion, whatsoever, on whether the price freeze is pro or anti-competitive, whether consumer benefits resulting therefrom (if any) could be achieved or even enhanced in its absence, *etc*. This court is simply dealing with the proper construction of an undertaking in the context of its alleged breach. The fact that this issue arises in competition law proceedings is purely incidental to its solution. It is only if and when the parties engage on Undertaking No.2 that true issues of competition principles arise. Curiously enough in such circumstances, it might be noted that the vast proportion of the written submissions deal with the latter undertaking and not the undertaking the subject matter of this decision.

14. The following general principles regarding execution, by way of attachment and sequestration, are not in dispute:

(1) That Undertaking No. 1 may be enforced by way of attachment or committal against the officers, servants and agents of the LVA; such persons are specifically referred to in the undertaking: Order 42, rule 7.

(2) That Undertaking No. 1 may be enforced against the LVA by way of sequestration against its corporate property: Order 42, rule 32.

(3) That Undertaking No. 1 may be enforced against the LVA by way of attachment against its directors or officers or by way of sequestration against their property: Order 42, rule 32.

(4) That the Order of the 18th December 2003, together with the appropriate penal endorsement, has been properly served on the defendants: Order 41, rule 8.

(5) That no distinction should be made between "disobeyance" *simpliciter* and "wilful disobeyance" for the purposes of determining breach: Order 42, rule 32; and,

(6) That acting *bona fide* and on foot of legal advice is not relevant in determining the breach; (*Re Mileage Conference Group of the Tyre Manufacture's Conference Limited's Agreement* [1966] IWLR 1137: para. 3.239 of Arlidge, Eady & Smith *"On Contempt (2nd Ed.)"*)

15. As stated above, this application is concerned with an alleged breach of an undertaking, albeit an undertaking that has been received and made a rule of court. For the purpose of enforcement no distinction arises between an undertaking, an injunction and a court order: all can be treated as equal for attachment and sequestration purposes. In *Hussain v. Hussain* [1986] 1 All ER 961 at 963 Sir John Donaldson MR said:

> *"Let it be stated in the clearest possible terms that an undertaking to the court is as solemn, binding and effective as an order of the court in like terms…"*

As far back as 1835 Sir Charles Pepys MR held that an undertaking is equivalent to an injunction: *London & Birmingham Railway v. Grand Junction Canal Co.* (1835) 1 Ry. CA 224. Arlidge, Eady & Smith *"On Contempt (2nd Ed.)"* at 12.170-172 says in this regard that:

> *"The law has generally regarded the breach of an undertaking given to the court by or on behalf of a party to civil proceedings as tantamount to a breach of an injunction."*

See also *"Contempt of Court – Consultation Paper by the Law Reform Commission"* (1991).

16. A party who is the subject matter of an undertaking must strictly comply with its terms. The lack of intent, the absence of motive or the want of negligence will not exempt a party who otherwise breaches an undertaking. In *Stancomb v. Trowbridge UDC* [1910] 2 Ch. 190, Warrington J., gave the following statement of law at p. 194, which has been cited in many subsequent cases:-

> *"…if a person or corporation is retrained by injunction from doing a particular act, that person or corporation commits a breach of the injunction, and is liable for process for contempt, if he or it in fact does the act, and it is no answer to say that act was not contumacious in the sense that, in doing it, there was no direct intention to disobey the order."*

This interpretation was approved by the House of Lords in *Heatons Transport (St. Helens) Limited v. Transport and General Workers Union* [1973] 1 AC 15, Roskill L.J. stating that not only had such an interpretation been followed in a number of cases, but:

> *"It is also the reasonable view, because the party in whose favour an order has been made is entitled to have it enforced, and also the effective administration of justice normally requires some penalty for disobedience to an order of a court if the disobedience is more than casual or accidental and unintentional"*.

That reference by Roskill L.J. to *"… casual or accidental and unintentional …"* was also an endorsement of Warrington J.'s interpretation of the term "wilful", in the *Stancomb* case.

17. That this remains good law is evident from the House of Lords decision in *Re Supply of Readymix Concrete (No.2)* [1995] 1 A.C. 456, a case of corporate contempt. Without their employer's knowledge or authority, local managers entered into price fixing agreements in breach of an undertaking previously given by their employers not to do so. The House of Lords held that this breach by the employees constituted a contempt of court on the part of the employer. Lord Nolan, at p. 481 of the report, said:-

> *"Given that liability for contempt does not require any direct intention on the part of the employer to disobey the order, there is nothing to prevent an employing company from being found to have disobeyed an order 'by' its servant as a result of a deliberate act by the servant on its behalf. In my judgment the decision in Stancomb's case is good law, and should be followed in the present case. The employees of the respondents have, by their deliberate conduct, made their employers liable for disobeying the orders… The respondents are therefore guilty of contempt of court."*

None of the above principles are in dispute between the parties. However, there is disagreement, at a relatively important level, with regards to the relevant standard of proof which should be applied.

18. Put succinctly, both sides accept that given the criminal nature of contempt proceedings, the standard of proof in relation to facts is beyond reasonable doubt.

However, the Authority argues that once the facts have been established or otherwise admitted to that level, the follow-on question of whether, as a matter of law, there had been a contempt can be determined by reference to the civil standard – the balance of probabilities. On the other hand the defendants argue that before they can be found guilty of contempt, all matters before the Court, both facts and law, must be proven beyond reasonable doubt.

19. In support of it arguments on this point, the Authority cites the English High Court decision of *Chelsea Man Plc. v. Chelsea Girl Ltd.* [1988] FSR 217. This case involved proceedings for contempt of an Order made by the court restraining the defendants from passing off their goods or business as that of the plaintiff. Millett J. stated at pp. 224-225 of the report:

> *"Where it is alleged that the defendant has broken the terms of an injunction or undertaking to the court, this must be strictly proved according to the criminal standard of proof, but this requirement relates only to the allegation that the defendant has committed the acts complained of. It does not relate to the very different question of whether those acts, if proved to have been committed by the defendant, constitute a breach of the injunction or undertaking. That question is often, and in intellectual property cases almost invariably, one of degree and impression."*

20. As against that view there are several cases which make it quite clear that the relevant standard is beyond reasonable doubt, and that this applies to all matters at issue in the case, both factual and legal. For example, in *Dean v. Dean* [1987] 1 FLR 55 at 61, Neill L.J. stated:

> *"It is to be remembered that contempt of court, whether civil or criminal, is a common law misdemeanour. Furthermore, there are many authorities, of which the decision in Re Bramblevale Ltd [1970] Ch 128 is an authoritative example, to the effect that proceedings for contempt of court are criminal or quasi-criminal in nature and that the standard of proof to be applied is the criminal standard."*

Keane J., as he then was, in *National Irish Bank Ltd. v. Graham* [1994] 1 IR 215, and having considered *Re Bramblevale Ltd.* [1970] Ch 128, held at p. 220 that:

> *"It is clear that before the court takes the serious step of depriving a person of his liberty for failure to comply with an order of the court, it must be satisfied beyond reasonable doubt that he or she has in fact committed the alleged contempt."*

21. The authoritative text book on contempt, Alridge, Eady & Smith, *"On Contempt (3rd Ed.)"* (2005) offers criticism of Millett J.'s decision in *Chelsea Man Plc. v. Chelsea Girl Ltd.* At para. 15-53 they state:

> *"It is perhaps worthy of note that in this case neither Re Bramblevale nor Dean v. Dean appears to have been cited before the judge. Whether this would have made any difference to his conclusion is clearly a mater of conjecture, but in any event his approach seriously undermines the protection afforded to litigants by the closely related principles that proof is required beyond reasonable doubt and, correspondingly, that orders and undertakings that are enforceable by process of contempt should be carefully and clearly drafted. It is surely questionable whether a quasi-criminal liability should arise, with the*

> *possibility of loss of liberty or other penal sanctions, on the basis of 'degree and impression.'"*

It is suggested as an alternative to the views of Millett J., that the position adopted by Jenkins J. in *Redwing Ltd. v. Redwing Forest Products Ltd.* [1947] 64 RPC 67 is to be preferred; it being less likely to lead to arbitrariness and injustice. The view of Jenkins J., as stated at p. 71 of the report, was that:

> *"A Defendant cannot be committed for contempt on the ground that upon one of two possible constructions of an undertaking being given he has broken that undertaking. For the purpose of relief of this character I think the undertaking must be clear and the breach must be clear beyond all question."*

22. Apart from the above arguments in relation to the standard of proof, Counsel for the LVA also raised the issue of certainty as to the contents of the undertaking. Both sides accept that as the application is of a criminal nature, the undertaking must be construed in a narrow fashion, and where there is ambiguity the benefit of any doubt must be given to the defendants. However, there is a dispute as to what the Court should take into consideration when so construing the undertaking. The Authority argues that the Court should only look at the undertaking; being on its face clear and unambiguous as to its meaning. There is no room for the Court to read implied terms into the undertaking, although it admits that if there is any uncertainty it must be construed against them. The defendants, on the other hand argue that, in looking at the meaning which should be ascribed to the particular words, the Court should consider the pleadings in the original case.

23. The reason why there is a debate on this issue is because of the meaning which the parties seek to credit to the phrase *"the prices"*. The Authority seeks to assign a wide meaning to this; namely that any recommendation made by the defendants which relates to the prices charged by publicans, is captured by the undertaking. On the other hand the defendants state that it is clear, when looking at the undertaking as a whole in the context of the pleadings in the original case, that the phrase is only meant to cover recommendations as to actual prices charged. This is a significantly narrower interpretation. They admit that had they recommended to their members a straight price freeze at current levels for 12 months this would be captured by the undertaking. However, they argue that this is not the situation here; in no way did they seek to affect the specific prices that publicans charge; they only recommended that the publicans should not increase their prices. This is not a price freeze, but a price ceiling. It has no affect on the actual price charged by the publicans.

24. Having considered the conflicting submissions, I am satisfied that it is unnecessary, and potentially ill-advised, especially in circumstances where the case was settled without prejudice, to reopen the pleadings in this case and to consider their contents as an aid to the interpretation of the undertaking in question. Often cases are settled on terms which may not reflect the pleadings and for reasons personal to the settling parties. In particular, in circumstances where no admissions are made or concessions given and no liability admitted, as in this case, the Court should be most reluctant to have regard to unproven allegations when interpreting the undertaking at issue. In addition, as the undertaking in this case is, in my view, clear on its face, the consideration which I have given to its meaning and application has been carried out without recourse to any extraneous material; but in the process with any benefit of the

doubt accruing to the defendants. This latter point means that if there are two interpretations reasonably open then that most favourable to the defendants should be applied.

25. There are thus two matters for further resolution. The first is in relation to the standard of proof, and the second is in relation to the interpretation of the undertaking and whether the defendants have breached it.

26. With regards to the standard of proof, it is not suggested that the appropriate principles should differ simply because of the competition context in which the application arises. Therefore the ordinary rules should apply. That being so, I respectfully agree with the position adopted by Keane J., as he then was, in *National Irish Bank Ltd. v. Graham* [1994] 1 IR 215. There is little doubt in my mind that in proceedings of a criminal or quasi-criminal nature the standard must be that of beyond reasonable doubt. Contempt, either civil or criminal, is a misdemeanour, and on a committal application, a person can be deprived of his liberty, in some situations for as long as it takes to achieve compliance. The imposition of a fine is an option as well as the forcible taking of possessions. In serious cases substantial penalties are available. Therefore it is of no surprise that the Courts view such matters with concern and insist upon the safeguard of the higher standard being met.

27. The overwhelming preponderance of case law is to this effect: *Re Bramblevale Ltd.* is a clear-cut example espousing the higher standard: *National Irish Bank Ltd.* is a clear-cut example of the application of this standard in practice; Keane J, as he then was, despite very strong circumstantial evidence of a breach, refused to attach as the

required matters had not been established beyond a reasonable doubt. The only contrary view of note is Millett J's decision in *Chelsea Man Plc.*, where the standard of *"degree and impression"* is suggested. If that view cannot be explained by reference to its own facts, and if the citation of *Bramblevale* and *Dean* to the court would have made no difference, then respectfully I would have to prefer the alternative view. I believe that the criticism offered of that decision by *Arlidge, Eady & Smith* is sound and accords with established practice. Moreover, I have to say that even if this area had not been touched by authority, I would have come to the same conclusion on first principles.

28. I therefore reject the arguments of Counsel for the Authority that this Court can sever issues of fact and law in the way suggested; so that a lower standard of proof applies to the latter as opposed to the former. The entirety of the claim as alleged must be proven beyond reasonable doubt.

29. Nonetheless, the Court must be clear as to what it is being asked to find beyond reasonable doubt. Each case must be carefully scrutinised so that the correct question is identified and answered to this standard.

30. As appears from para. 5 *supra.*, Undertaking No. 1 given by the defendants was *"not to recommend to [its] members the prices, margins, increases in prices and increases in margins earned"* on the sale of alcohol for in-house consumption. It is accepted that the press statement was published, that, at the very least, it amounted to a recommendation, and that the same was related to the sale of alcohol for drinking whilst on licensed premises. It is also agreed that the communiqué did not relate to

price increase or margins. The net question therefore is: Did the defendants make a recommendation on "the prices… earned on the sale of" alcoholic drinks?

31. What is clear from the undertaking as a whole is that, in the context of prices, its terms capture more than an increase in prices: this is self-evident from the distinctive wording of the undertaking itself: see para. 30 *supra.* How therefore does one apply the relevant phrase to the press release?

32. I am not satisfied that either party was entirely correct in their characterisation of this expression. I am quite sure that it does not cover every communication where there is mention of the word "price" or "prices" or which only nominally relates to "price" or "prices". This interpretation would be far too broad, especially where the law requires that undertakings should be construed narrowly when they are sought to be relied upon in contempt proceedings. However, I am also not satisfied that the phrase only covers recommendations as to the actual price charged *i.e.* a price specified in Euros and cents. This would be too narrow and most probably would render the undertaking meaningless as, in accordance with the evidence, the price of the same product can vary from €3.00 to €6.00 (stout), and from €3.50 to €6.50 (lager). This view is virtually, or at least implicitly, acknowledged by the defendants in their acceptance of the proposition that if the recommendation amounted to an actual price freeze it would be covered by the undertaking as being one relating to *"the prices"*; this despite the fact that it did not actually dictate a given price.

33. In my opinion it is not possible to give to the press release its ordinary or natural meaning otherwise than to construe it as being a recommendation as to the

prices charges by publicans for the sale of alcohol on their premises. It speaks of a "… one year price freeze in drink prices…": of the initiative "for the price freeze" coming from members themselves: of its members commitment not to exceed "… the current price levels which they apply to drink prices over the next twelve months." What understanding would the ordinary man ascribe to these expressions? It is acknowledged that the release constituted a recommendation. If not about or on or relative to prices, then what is the recommendation speaking of? It addresses prices: it says prices shall not be increased: yes it is a ceiling, but a ceiling on prices. I cannot therefore, by any rule of construction which I know of, come to the conclusion that the object of the recommendation is anything other than pricing. Indeed this is confirmed by what the defendants say is a highly pro-competitive part of the release, which points out that members are free to decide on "their own respective resale prices". Prices, once again, are at the centre of the passage.

34. Once I came to the conclusion that the undertaking was not restricted to a recommendation on specific pricing, it seems to me that its terms are sufficiently clear to capture any recommendation that prices should be increased, or lowered, or held at their current levels, or so held subject to an individual publican's choice to charge less. The fact that these current levels were not mentioned and that these vary widely within the association's membership is not material. Nor is the fact that the recommendation is not binding. The entire thrust of the release was a communication to the public regarding prices: it could not be said that the reference to prices was incidental, secondary or subordinate to another topic. It was at the core of the communication. I therefore cannot see how it can avoid being captured by the undertaking. Indeed, although I do not find it necessary to rely upon it, the intention

of the defendants in making the recommendation bears out this interpretation. It was a recommendation intended to assure the public that there would be no increase in the price they would pay for drinks in licensed premises. A member of the public would certainly feel that the recommendation related to the price they would pay.

35. There is therefore no doubt in my mind but that this was a recommendation by the defendants to their members on the prices, on the sale to the public, of alcoholic beverages for consumption on licensed premises owned, managed or controlled by their members. I thus find that the defendants have breached their first undertaking and are guilty of contempt of court in that regard. I should emphasise that this finding is entirely based on an interpretation of Undertaking No. 1. In no way do I draw any conclusions as to the legality or otherwise of the recommendations under the Competition Act 2002.

36. Finally, I have been specifically requested by Counsel on behalf of the Competition Authority to defer even a consideration of what consequences might follow from such a finding. I gladly accede to such request, as I think it is entirely appropriate in the circumstances. I would hope that no further imposed order would be required from this Court in this regard.