Neutral Citation Number: [2009] EWHC 2140 (Comm)

Case No: 2009 FOLIO 992

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18/08/2009

Before:

MR JUSTICE CHRISTOPHER CLARKE

- - - - - - - - - - - - - - - - - - - -

Between:

SABMILLER AFRICA B.V.	
- and -	
TANZANIA BREWERIES LIMITED	**Applicants**
- and -	
EAST AFRICAN BREWERIES LIMITED	**Respondents**

- - - - - - - - - - - - - - - - - - - -

- - - - - - - - - - - - - - - - - - - -

Alain Choo-Choy QC & **Nicholas Sloboda** (instructed by Lovells) for the Applicants
David Oliver QC & **Alec Haydon** (instructed by Addleshaw Goddard) for the Respondents

Hearing dates: 4th, 5th & 6th August 2009

- - - - - - - - - - - - - - - - - - - -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

C.S.C.S. Clarke

....

MR JUSTICE CHRISTOPHER CLARKE

MR JUSTICE CHRISTOPHER CLARKE:

1. This is an application for injunctive relief pending further order of the Court or of the arbitration tribunal, which at the time of the hearing was yet to be appointed in order to determine the disputes between the parties.

2. The case concerns the production and distribution of beer in Tanzania. The battle is between very sizeable players. The applicants are Sabmiller Africa BV ("Sabma") and its subsidiary Tanzania Breweries Ltd ("TBL"). Sabma, previously named South African Breweries International (Africa) B.V., is a subsidiary of SABMiller Plc. In 2002, as now, TBL was the market leader in the brewing market in Tanzania. It currently holds an 80-85% market share. Another major player in that market was and is Serengeti Breweries Ltd ("SBL"), TBL's most significant competitor. Kibo Breweries Ltd ("Kibo") was another brewer in Tanzania. It had a brewery at Moshi. Kibo had only a minority share of the market and was unprofitable. Kibo was owned by East African Breweries Ltd ("EABL"), the respondent, a company in the group of companies headed by Diageo Plc. The SABMiller Plc and Diageo groups are two of the world's leading producers of alcoholic drinks.

3. In Kenya the positions were reversed. EABL owned Kenya Breweries Ltd ("KBL"). KBL was the market leader. Sabma owned Castle Brewing Kenya Ltd ("CBK"), which had a minority share of the market and a brewery at Thika. It, also, was unprofitable.

4. In 2002 Sabma and EABL decided to reorder their positions. In both Tanzania and Kenya the shares in the minority brewer (Kibo or CBK) were to be sold to TBL or EABL. In return TBL and KBL would issue 20% of their shares to the vendor of the minority brewer (EABL or Sabma). There would then be a brewing and distribution agreement whereby, in each country, the products of the group of which the vendor was part would be brewed and distributed under licence by the market leader. Each group would thereby cease their loss-making business and gain a reciprocal 20% share in the larger and more profitable former competitor in each territory.

5. This arrangement was effected, in each country, by three different agreements:

   (i) a share purchase agreement ("SPA");

   (ii) a brewing and distribution agreement ("BDA"); and

   (iii) a shareholders agreement ("SHA").

   All were dated 14th May 2002.

6. Thus, in respect of Tanzania, under what I will call the "TBL SPA" EABL sold to TBL 100% of Kibo and TBL allotted 20% of its shares to EABL. Under what I will call the "TBL BDA" EABL appointed TBL to brew and distribute its products. An SHA between Sabma and EABL (the "TBL SHA") governed the relationship between them as shareholders of TBL. Sabma owned 52.9% of the shares, EABL 20% and the Tanzanian Government and the public 27.1%.

7. Similar arrangements, mutatis mutandis, applied in Kenya, although the Company under the BDA in respect of which KBL was to be the Brewer was South African Breweries International (Finance) B.V.

The TBL BDA

8. By clause 3.1 of the TBL BDA the Company, i.e. EABL, granted to the Brewer, i.e. TBL, the sole and exclusive right during the Term to brew and/or handle the Products in the Territory. The Products were Pilsner lager, Pilsner Extra lager and Pilsner Ice lager, Tusker lager, Guinness Foreign Extra, Stout, Kibo Gold lager, and Malta Guinness, a non alcoholic beverage. The most significant of those is Tusker, a popular mainstream lager of medium strength. Pilsner is a strong mainstream lager.

9. TBL brews a considerable number of beers of its own in Tanzania including Kilimanjaro and Safari which are mainstream lagers, Castle Lager, and Castle Milk Stout ("CMS") together with Eagle, an economy lager, and Ndovu Special Malt, a premium pale lager. Serengeti is another popular mainstream lager.

10. Under clause 5 TBL was to pay a royalty of 5% of the net value of the Products sold.

11. Clause 17 dealt with Duration and Termination. By clause 17.1 the agreement was to last for an initial period of five years from the effective date which I take to have been the date of the agreement or close thereto. That period came to an end in May 2007. Clause 17.1. provided for the agreement to be extended for a further period of five years in certain circumstances which have not occurred.

12. Clause 17.2. provided that the agreement should continue after the initial period of five years until either party gave at least 12 months written notice to the other.

13. Clause 17.3. provided for termination for fundamental breach in these terms :

> *"17.3. Notwithstanding clause 17.1.*
>
> *a party (the "Innocent Party") may terminate [the BDA] on written notice to the other (the "Defaulting Party") <u>if</u>:*
>
> *17.3.1.2 the Defaulting Party commits a fundamental breach of its obligations under [the BDA] ... <u>and</u>, if the breach is capable of remedy, fails to remedy it within sixty days, following receipt of written notice from the Innocent Party specifying the breach and requiring its remedy.*
>
> *The notice contemplated in clause 17.3.1.2 shall be given within sixty days after the expiry of the sixty day period referred to in cause 17.3.1.2…"*
>
> [Underlining added]

14. The effect of these provisions is that, in the case of a breach which is capable of remedy, the innocent party may terminate if:

    (a) the defaulting party has committed a fundamental breach;

(b) the defaulting party has received from the innocent party a written notice specifying the breach and requiring its remedy;

(c) the defaulting party has failed to remedy the breach within 60 days; and

(d) the innocent party gives notice of termination within 60 days of the expiry of the former period.

Clause 17.4, to which I shall revert, provides for certain events to be deemed to be fundamental breaches.

15. The TBL BDA contained significant restrictions on EABL in the event that it came to an end. Clause 4.6 provides as follows:

> *"Save as permitted in terms of this agreement and subject to clauses 4.5 and 4.8, the Company undertakes that, until the later of:*
>
> *4.6.1 the date on which … [the BDA] terminates; and*
>
> *4.6.2 the expiry of the period of 180 days following the date ("Restraint Date") on which EABL…. ceases:*
>
> *4.6.2.1. to have the right to appoint a director of … [TBL] in terms of the TBL Shareholders Agreement; and*
>
> *4.6.2.2 to be entitled to the minority protections contained in the TBL Shareholders Agreement,*
>
> *for any reason (including, but without limitation, by reason of EABL exercising its right to waive such rights in terms of Clause 17 of the TBL Shareholders' Agreement) it will not, and will procure that no company forming part of the EABL group or Diageo group will, and it will use its best endeavours to procure that no director, officer or employee of … [EABL] or any other company forming part of the EABL group or Diageo group will:*
>
> *4.6.2.3 whether as principal, agent, partner, representative, Controlling Shareholder, consultant or adviser or in any other similar capacity, be directly or indirectly interested in or engaged in any company, corporation, firm, business undertaking, trust, partnership, concern or other entity or association of any nature which directly or indirectly carries on the business of brewing and/or handling and/or importing any Specified Beverages[1] (including the Products and Discontinued Products) in the Territory; or*

[1] Defined in clause 1.1. as clear beer, stout, cider, alcoholic fruit beverages and ready to drink pre-mixed alcoholic beverages.

> 4.6.2.4 *knowingly distribute or sell any Specified Beverages to anyone outside the Territory where it has reasonable cause to believe that such Specified Beverages will be distributed or sold directly or indirectly in the Territory. If any such distributions or sales come to … [EABL's]… attention, it will use all reasonable endeavours, and will use all reasonable endeavours to procure that other companies forming part of the Diageo group use all reasonable endeavours, to enforce any rights or remedies it or they may have to prevent such distributions or sales."*

I call these "the Restraints", a term which also covers the almost identical restrictions contained in the TBL SHA: see para 25 below. By clause 4.9 EABL acknowledged that the Restraints were "*fair and reasonable as to the subject matter, area and duration and are reasonably necessary to protect the proprietary interests of [TBL] and [Sabma] and to maintain the goodwill of [TBL]*".

Clauses 4.13 and 4.14 provide that:

> *"4.13. A breach of any of the restraints stipulated in clauses 4.6 or 4.7 shall entitle [TBL] or (Sabma), without prejudice to any other rights available to either of them in law and notwithstanding any other provision of this agreement, to apply to any court of competent jurisdiction for an interdict or injunction.*
>
> 4.*14 Subject to clause [4.8] the provisos of clauses 4.6 and 4.7 shall remain of full force and effect notwithstanding the termination of this agreement."*

16. It is apparent from these provisions that the Restraints do not cease because the agreement terminates. On the contrary they remain in effect until after the date of termination or, if longer, the expiry of the period of 180 days following the date on which EABL ceases to have the rights and entitlement specified in 4.6.2.1 and 4.6.2.2 ("the minority rights"). These are rights given to EABL under clauses 4.1 and 6.1 of the TBL SHA for so long as EABL is the beneficial and legal owner of not less than 10% of TBL' s equity capital. By clause 17 of the TBL SHA those rights may be waived by EABL on written notice to Sabma. Such a waiver becomes effective upon the later of (a) the date of receipt of the notice and (b) the date upon which termination or cancellation of the TBL licence and brewing agreements (which include the TBL BDA) becomes effective.

17. Clause 4.8 provided a means by which EABL could escape from the Restraints. That clause provides as follows:

> *"[EABL] shall not be bound by the restraint undertaking contained in clause 4.6 if EABL…. ceases to have the rights referred to in clauses 4.6.2.1 and 4.6.2.2 as a result of and following the exercise by EABL of its option to require [SABMA] to purchase all EABL's shares in and all claims by way of loan account against [TBL] in circumstances where:*

………………..

4.8.2 [EABL] has terminated this Agreement in terms of clauses 17.3.1.1 or 17.3.1.2…"

18. As is apparent, this clause cannot apply, so far as presently relevant, unless EABL has terminated the agreement for fundamental breach pursuant to clause 17.3.1.2. It is also necessary that EABL should have ceased to have the minority rights "*as a result of and following the exercise by EABL of its option"* to require Sabma to purchase EABL's shares in TBL.

19. That option – the "*put option*" - was contained in the TBL SHA which, by clause 16.1.1.4.2, defined "*put event*" so as to include the lawful termination of the TBL BDA by EABL pursuant to clause 17.3.1.2. (termination for breach). Clause 16.3 then provided:

> *"16.3.1. If a put event occurs, then without prejudice to any other rights which EABL may have in terms of law or this agreement, EABL shall have the irrevocable right and option ("put option") to sell to SABI Africa, which shall then be obliged to purchase from EABL all (but not part) of EABL's shares in TBL ("put option shares") and all (but not part only) of EABL's claims on shareholders loan account against TBL, if any (collectively referred to hereinafter in this clause 16.3 as the "put option equity") upon the following terms and conditions-*
>
> *16.3.1.1. the put option shall be exercisable at any time within the 30 day period commencing on the date upon which [Sabma] and EABL reach agreement in respect of the purchase price of the put option equity (which purchase price shall be determined in accordance with clause 16.3.2) or, failing such agreement, the date upon which EABL receives written notification from TBL's auditors of their determination of the purchase price of the put option equity (which purchase price shall also be determined in accordance with clause 16.3.2). If a put option is not exercised within such 30 day period, it shall automatically lapse upon expiry thereof;*
>
> *16.3.1.2 the put option shall be exercised by EABL giving written notice of such exercise to SABI Africa at its domicilium referred to in clause 23;"*

20. By clause 16.3.2.the option price of the shares was to be that percentage of the fair market value of the whole of the shares "*before any adjustment to take account of the effect of the fundamental breach*" which constituted EABL's percentage holding in TBL.

21. Mr Alain Choo Choy, QC, on behalf of the applicants submits that the effect of these provisions is that upon the happening of a put event EABL acquires without more and *ipso facto* a right to sell its shares in TBL. But that right is only exercisable within 30 days of the date of the parties' agreement in respect of the purchase price or the written notification from TBL's auditors of the purchase price. Knowledge of the price would be highly material to any decision to exercise the option. Until such agreement or notification there is a right but it is not yet

exercisable. So EABL will not be within clause 4.8. of the BDA until such time as it is in a position to exercise its option. Even then it will not cease to enjoy its minority rights by virtue of the put option until the actual transfer of the put option shares which cannot take effect until regulatory approval has been obtained: see clause 27 of the TBL SHA. The condition of EABL's release from the Restraints will not arise until then because it is only then that it will cease to have the minority rights both as a result of and following the exercise of the put option.

22. EABL submits that the parties cannot have intended the operation of clause 4.8 to be delayed pending agreement as to, or determination of, the purchase price of, the put option equity. Each of these events could be long delayed, including by Sabma's deliberate inaction. The conditions set out in clause 4.8 should be regarded as satisfied by the combination of termination for fundamental breach and notice of EABL's wish to exercise the put option. If the position is otherwise the Restraints are to be regarded as in unreasonable restraint of trade.

23. TBL for its part submits that this construction involves ignoring the wording of the agreement and, in particular, the definition of the option period in clause 16.3.1.1. It accepts that Sabma could not frustrate the option mechanism by refusing in good faith either to agree the price or instruct the auditors. Clause 29 of the TBL SHA imposes on the parties an express duty of utmost good faith. But there is no question of bad faith here. There is a bona fide dispute as to whether a put event has ever occurred.

24. As it seems to me TBL has a very tenable argument that clause 4.8 will not operate to relieve EABL of the Restraints prior to (at the earliest) the agreement or determination of the put option equity. For interlocutory purposes I propose to proceed on that assumption.

The TBL SHA

25. The TBL SHA contains restraints on EABL which are very similar to clauses 4.6 – 4.8 of the TBL BDA in paras 18.4.2.4 – 18.4.2.6. It also contains, in para 18.6, a provision similar to para 4.8.

Dispute resolution

26. Clause 23 of the TBL BDA provides a mediation process and, if that fails, for all unsettled disputes to be referred to arbitration by three arbitrators under the ICC rules. Clause 23.7 provides:

> *"The parties shall continue to perform their respective obligations under this agreement to the extent possible notwithstanding commencement of any proceedings in accordance with the rules. Such proceedings shall be conducted so as to cause the minimum inconvenience to the performance by the parties of such obligations."*

Clause 23.15 provides:

> *"The provisions of this Agreement shall not prevent or delay either party from seeking an urgent order for specific performance or interim or final injunctive relief or any other relief of a similar nature from any court having jurisdiction*

on a "without notice" basis or otherwise and none of the foregoing provisions of this clause 23, shall apply to any circumstances where any such remedies are sought. "

27. At the time of the hearing the arbitrators had not yet been appointed. But TBL had indicated that it would nominate its arbitrator within the week.

28. The TBL SHA contains in clause 19 dispute resolution provisions similar to those in the TBL BDA, including an identical provision to that contained in clause 23.7.

The history

29. By July 2009 EABL was close to reaching an agreement to purchase an interest in SBL. TBL got wind of this.

15th July

30. On 15th July 2009 TBL wrote to EABL seeking confirmation that it was not seeking to purchase an interest in any competitor of TBL. It asked for confirmation by 5.00 pm Tanzanian time on 16th July that, if EABL was engaged in such discussions, it would desist. On 16th July EABL replied saying that it would be unable to provide a substantive response by 5.00 pm but anticipated being in a position to respond the following morning. Given that EABL had been in negotiations to acquire a shareholding in Serengeti Breweries Limited ("SBL") for months and was about to conclude the agreements referred to in the following paragraphs, this response was disingenuous.

16th July

31. On 16th July EABL entered into an agreement with a number of vendors to purchase – eventually – a 51% shareholding in SBL ("the SBL SPA"). It also entered into a Loan Facility Agreement ("the SBL LFA") pursuant to which EABL agreed to make a loan to SBL. The precise amount is unknown because the relevant figures have been redacted.

17th July

32. On 17th July the events set out in the next three paragraphs occurred.

33. EABL in a 14 page letter to TBL and Sabma gave notice of termination of the TBL BDA with immediate effect on the grounds of fundamental breach. Without prejudice to that notice it also gave notice under clause 17.2 of the TBL BDA terminating it in 12 months time. On the same day, by separate letter, it gave notice to Sabma that it wished to exercise the put option. In the same letter it gave notice pursuant to clause 17 of the TBL SHA that it waived all its minority rights.

34. At 10.40 a.m. East African Time EABL entered into a brewing and distribution agreement ("the SBL BDA") with SBL.

35. The applicants applied to Gross J for relief. EABL was represented. TBL had by then learnt of the SBL SPA and SBL BDA but not of the SBL LFA. The upshot of the hearing was that EABL was required to undertake until further order of the

court not to proceed with or procure completion of the SBL SPA or the SBL BDA and to continue to act as if it were bound by the Restraints.

36. TBL contends that each of the three transactions entered into on 16th and 17th July are offending transactions i.e. transactions which EABL are precluded from entering into by reason of the Restraints or the provisions of the TBL BDA.

The offending transactions

The Loan Facility Agreement

37. Under the SBL LFA EABL agreed to make available to SBL two facilities (Facilities A and B). The facilities were to be used for certain purposes which have been redacted in the copy of the document before me. There is reference to a Permitted Project. The facilities are on demand facilities (clause 6.1), although there is provision for repayment to take place, in any event, on the "Pre-Completion Date" as defined in the SBL SHA, which is the last Business Day of the month prior to the month in which the Completion Date falls. The Completion Date is 30th July 2010, although that date may be changed by EABL or a different date may be agreed by the parties, and is also subject to fulfilment of the conditions precedent specified in clause 4.1 of the SBL SHA (see para 38 below). The loan is secured by pledges by the Sellers (whose names have been redacted) of shares in SBL: clause 11.8. These are to be released if certain Transaction Security documents are executed and registered including a debenture over SBL's assets and two mortgages: clause 15.

The SBL Sale & Purchase Agreement

38. Under this agreement certain identified sellers agreed to sell to EABL shares amounting to 51% of SBL's issued share capital. Clause 4.1. provided:

> *"Conditions Precedent*
>
> 4.1. *Completion of this Agreement in accordance with clause 9 and schedule 4 is conditional on the following conditions being fulfilled or waived in accordance with clause 4.5 before 28th February 2011 (or such later date as the Parties may agree in writing) (Long Stop Date*)
>
> *(c) the contractual relationships between the Buyer and both Tanzania Breweries Ltd and SABMiller plc (and its relevant Affiliates) in the Territory having been terminated in all respects and the Buyer not being restricted or prohibited by or as a consequence of those relationships (whether by court order or otherwise) from performing any of its duties or obligations or asserting any of its rights under this Agreement (or any other Transaction Document).*

Clause 4.5 provided*:*

> *"4.5. The Buyer [EABL] may any time by notice in writing to the other Parties waive any of the Conditions in whole or in part"*

39. Clause 8.5 (b) provided that Sabma and EABL should execute the SBL BDA after EABL had served notice of termination of the TBL BDA.

The SBL BDA.

40. By clause 2.1 of this agreement EABL appointed SBL to brew, package distribute, sell and market the Products in Tanzania. The provisions of clause 2.2. made the appointment exclusive. The Products are Tusker, Guinness Foreign Extra, Pilsner, Allsops and Malta Guinness. All of these products with the exception of Allsops are covered by the TBL BDA. Allsops is not a Product, although it is a Specified Beverage. The agreement was to begin on the date of the SBL SPA i.e. 16th July.

The issues

41. It is convenient to set out the issues as they appear at this stage.

42. The applicants contend:

(a) that each of the offending transactions is a breach of EABL's obligations towards TBL and Sabma;

(b) that TBL has not been in breach, fundamental or otherwise, of the TBL BDA;

(c) that, even if it has, any such breach was capable of remedy. TBL has never served any written notice requiring any breach to be remedied; accordingly EABL never had a right to terminate the TBL BDA;

(d) even if it had had such a right, its termination was ineffective to free it from the Restraints because the Restraints survive termination. Clause 4.8. does not apply unless EABL ceased to have the minority rights as a result of and following the exercise of the put option, which has never been exercised. Even if that option had been exercised EABL would not cease to have the minority rights as a result of and following the option unless and until the shares were transferred to it in consequence (see paras 19 - 24 above);

(e) that there is a serious issue to be tried in respect of all the above propositions; TBL has a good arguable case, indeed more than that, on all of them;

(f) that none of these propositions can or should be determined by a judge on an interlocutory application; but should be left for the arbitral panel to decide in accordance with the dispute resolution procedure agreed by the parties;

(g) that orders should be made restraining EABL from (i) completing the SBL SPA; (ii) implementing the SBL BDA; (iii) implementing the SBL LFA; (iv) breaching the Restraints; or (v) seeking to terminate the TBL BDA until further order of the arbitral tribunal. That is the appropriate body to determine not only the substantive issues between the parties but also what interim measures should be taken or continued and what steps should be taken expeditiously to resolve the disputes between the parties.

43. EABL contends: '

(a) that TBL has been in fundamental breach of its obligations under the TBL BDA;

(b) that those breaches were irremediable and, accordingly no notice to remedy was called for; and the TBL BDA has been validly terminated;

(c) that it has waived its minority rights and, accordingly, the longest that the agreement can subsist for is 180 days from the date of termination i.e. until about 17th January 2010;

(d) but in fact clause 4.8 applies because it has declared its wish to exercise the put option;

(e) that neither the SBL LFA nor the SBL BDA is caught by the Restraints;

(f) that in any event the balance of convenience is strongly against continuing any injunctive relief.

44. On another level the dispute may be characterised thus. EABL says that it became increasingly disillusioned with TBL's performance in failing to promote its products, in making price changes to its detriment and in cutting promotional expenditure. These are the breaches it finally relied on to terminate the BDA. It waited to see how things panned out before doing so. When it became apparent that its concerns were not going to be allayed it terminated the TBL BDA, exercised the put option, and then entered into the SBL BDA. It had been in negotiation to purchase an interest in SBL, so as to have alternative arrangements in hand if the relationship with TBL broke down, as it did; but it needed to tread carefully so as not to be in a position where it had no BDA with TBL and no substitute arrangement either. For that reason everything came together on 16th and 17th July.

45. TBL contends that the allegations of breach are nothing but a smokescreen. If there was any real substance in EABL's complaints it would have been vociferous in making them earlier and would have served notices to remedy. What EABL in fact did was to negotiate with SBL, TBL's closest rival, and shareholders in SBL to link up with SBL in order to acquire a new competitive position which involved excluding TBL from any part in distributing EABL's products. To that end it was necessary (a) to enter into secret negotiations with SBL, which began, at least preliminarily, following the expiry of the initial period of the BDA in May 2007 and culminated in the very lengthy agreements entered into on 16th/17th July; (b) not to give TBL any inkling of what EABL was doing (lest TBL try to stop it); and (c) not to seek any remediation of breach (lest any cause for complaint be remedied thus removing the ability to terminate). EABL then put forward a series of weak claims of fundamental breach in order purportedly to justify termination and, so it hoped, to rid itself of the Restraints.

46. As it happens Sabma Plc has itself had discussions with SBL with a view to acquiring its beer business, On 3rd July 2009 it entered into an Exclusivity Agreement with SBL, acting through Mr Vimal Mehta, in the short interlude between one such agreement between EABL and Mr Mehta as a shareholder in SBL and a later extension of the same agreement. Whether that acquisition was ever a realistic possibility is doubtful given that TBL and SBL combined would completely dominate the Tanzanian beer market.

The Court's approach

47. Both sides have filed a very considerable amount of evidence and very extensive skeleton arguments. It is not possible, on an interlocutory application such as this, to resolve conflicts of evidence on issues of fact on which the outcome of the case may depend. The general approach of the court in the exercise of its powers to grant an injunction under section 37 (1) of the *Supreme Court Act 1981 i*s well known. If the court is satisfied that there is a serious question to be tried, it must go on to consider whether the claimant would be adequately compensated in damages and whether the defendant would be in a financial position to pay them. If the answer to both of those questions is in the affirmative, no injunction should normally be granted. If not the court must consider whether the defendant would be adequately compensated under the claimants undertaking as to damages in the event of his succeeding at trial. If the answer to that question is "yes" the fact that the defendant may succeed at trial is no bar to the grant of an injunction. Where there is doubt as to the adequacy of damages for both parties the court must determine where the balance of convenience lies. If matters are evenly balanced it may be wise to take such measures as are calculated to preserve the status quo.

48. These guidelines – derived from the speech of Lord Diplock in *American Cyanamid Co. Ltd v Ethicon [1975] AC 396* – are just that. They are not a fetter on the Court's jurisdiction under section 37 to grant an injunction where it is just to do so: see Lord Goff in *Reg. v. Secretary of State for Transport ex p. Factortame Ltd* [1991] 1 A.C. 603 at 671E-674A; and Mance, LJ (as he then was) in *Bath and North East Somerset District Council v Mowlem Plc* [2004] BLR 153, at para 12. A fundamental principle is that the court should take whatever course appears to carry the lower risk of injustice if it should turn out to have been the "wrong" course - in the sense that the court either grants an injunction which should have been refused or refuses to grant an injunction that should have been granted: *Factorrtame* p 683, approving Hoffman J in *Films Review Ltd v Cannon Film Sales Ltd* [1987] 1 WLR 670,680.

49. Further, the question whether damages are an adequate remedy is to be asked in the context of the underlying purpose of the jurisdiction, namely that of doing what is just. As Sachs LJ (with whom Edmund Davies and Cairns LJJ agreed) said in *Evans Marshall & Co. v. Bertola S.A.* [1973] 1 W.L.R. 349, at 379H:

> "*The standard question in relation to the grant of an injunction, "Are damages an adequate remedy?", might perhaps, in the light of the authorities of recent years, be rewritten: "Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?*"

50. Three further guidelines are potentially relevant. Firstly, the court has, on an interlocutory application, a greater reluctance to grant mandatory as opposed to prohibitive injunctions, or injunctions which would carry the same risk of injustice as mandatory injunctions. Generally speaking the Court requires a much higher degree of assurance that the applicant will ultimately be successful on the merits: *Shepherd Homes v Sandham* [1971] Ch 340 (for mandatory injunctions the case must be "*unusually strong*"); *Zockoll Group Ltd v Mercury Communications Ltd* [1998] FSR 354. Secondly, a court will not, generally, make an order (whether in positive or negative form) the effect of which would be to compel the person enjoined either to remain idle or to perform the positive covenants of an agreement for personal services: *Page One Records Ltd v Britton* [1968] 1 WLR 157. That is not, however, an absolute rule. Much depends on the nature of the services. Thirdly, if in practice it would not be possible to hold a trial before the time at which the relevant restrictions expire, the court will not confine itself to considering whether there is a serious issue to be tried: see *Lansing Linde Ltd v. Kerr* [1991] 1 WLR 251 (CA), per Staughton LJ, at 258:

> *"If it will not be possible to hold a trial before the period for which the plaintiff claims to be entitled to an injunction has expired, or substantially expired, it seems to me that justice requires some consideration whether the plaintiff would be likely to succeed at a trial. In those circumstances it is not enough to decide merely that there is a serious issue to be tried. The assertion of such an issue should not operate as a lettre de cachet, by which the defendant is prevented from doing that which, as it later turns out, he has a perfect right to do, for the whole or substantially the whole of the period in question."*

51. The present application is made under section 44 of the Arbitration Act 1996 which provides:

> *"1) Unless otherwise agreed by the parties, the court has for the purposes of and in relation to arbitral proceedings the same power of making orders about the matters listed below as it has for the purposes of and in relation to legal proceedings.*
>
> *(2) Those matters are–*
>
> ………
>
> *(e) the granting of an interim injunction or the appointment of a receiver.*
>
> *(3) If the case is one of urgency, the court may, on the application of a party or proposed party to the arbitral proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets.*
>
> *(4) If the case is not one of urgency, the court shall act only on the application of a party to the arbitral proceedings (upon notice to the other parties and to the tribunal) made with the permission of the tribunal or the agreement in writing of the other parties.*
>
> *(5) In any case the court shall act only if or to the extent that the arbitral tribunal, and any arbitral or other institution or person vested by the*

> *parties with power in that regard, has no power or is unable for the time being to act effectively.*
>
> *(6) If the court so orders, an order made by it under this section shall cease to have effect in whole or in part on the order of the tribunal or of any such arbitral or other institution or person having power to act in relation to the subject-matter of the order.*

52. The power to make an order for the purpose of preserving evidence or assets includes the preservation of contractual rights: *Cetelem SA v Roust Holdings* [2005] 2 Lloyd's Rep 494.

53. Subject to one qualification, it is common ground that the Court will exercise its discretion under section 44 to grant interim injunctive relief in broadly the same way as it does in exercise of its power to grant injunctions under section 37 (1) of SCA 1981: *Lauritzencool A.B. v Lady Navigation Inc* [2005] 1 Lloyd's Rep 260., at para 30 [2]; *Permasteelisa Japan KK v Bouyguesstroi* [2007] EWHC 3508 in which Ramsey, J applied the principles developed in respect of calls on performance guarantees pending the determination of the arbitral tribunal.

54. He observed:

> *"46 Should the court therefore apply the principles developed in respect of calls on performance guarantees or should it apply a different test seeking to preserve the position pending the determination by the arbitral tribunal. In my judgment, the court should be wary of adopting a different test to that customarily applied to cases which come before the court. To do otherwise would add uncertainty to the approach to be adopted. In particular, in this case, it would add uncertainty where there are common forms of security given by way of bonds in relation to obligations which, particularly in the context of construction contracts, are often the subject of arbitration.*
>
> *47 In addition, if the court were to approach the question of whether to grant an injunction by taking into account the prospects of success in obtaining relief from the arbitral tribunal, the court would face difficult questions on the jurisdiction of the arbitral tribunal to grant relief and on foreign law which I consider should be avoided at all interim stage. I also consider that there would be difficulties if the court were to take account of the approach of the arbitral tribunal.*
>
> *48 In such circumstances, the court should generally act as it would if the same dispute were before it in court, rather than attempting to adopt a different test so as to hold the position pending a future application to the arbitral tribunal."*

55. I had at one stage thought it to be being submitted that the court was bound to adopt a purely holding role, maintaining the status quo until the arbitration tribunal was constituted such that the court should make the orders sought unless irreparable damage would ensue before the arbitrators could convene - on the

[2] In *Cetelem SA v Roust Holdings Ltd* [2005] 2 Lloyd's Law Reports 494 and *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] 2 Lloyd's Rep 591 no suggestion of any different approach was made.

footing that the tribunal would then decide the question of interim relief. Mr Choo Choy made clear that that was not his submission. What, however, he does submit is that, when considering the *Lansing* point, I should take account of the fact that the arbitration tribunal will be soon be constituted; and that it will be able to take whatever measures it thinks fit for the speedy resolution of the issues. It could for instance order a preliminary and expedited hearing, on ampler evidence than it has been possible to assemble in the limited time available, as to whether or not the TBL BDA has been validly terminated or as to the validity and effect of the Restraints. The Court should not, in those circumstances, assume that any order it may make will, because of the timescales, have final effect.

56. Against that background I turn to consider:

(a) the strength of TBL's case on:

(i) whether the TBL BDA has been validly terminated for fundamental breach; and

(ii) whether implementation of the offending agreements would be a breach of EABL's obligations;

(b) whether it would be just to confine either side to a remedy in damages;

(c) the so-called balance of convenience.

Fundamental breach

57. EABL rely on three matters as constituting fundamental breach: (a) the unilateral implementation of price changes by TBL; (b) a failure on TBL's part to use its best endeavours to develop sales of EABL's products; (c) TBL's failure to spend the requisite amount on advertising and promoting EABL's products.

Unauthorised price increases

58. Clause 12.11 of the TBL BDA provides as follows:

"12.11 The Brewer [TBL] may propose changes to the pricing plan set out in the Business Plan for consideration by the Company [EABL]... Any such proposed change shall comply with clause 12.2 and shall be accompanied by a full analysis of the impact of such change in a format set out in Annex G and including a proposed implementation date, which shall be no earlier than thirty days (or immediately, where the change arises due to an increase in duties or taxes improved by any government or government authority in the Territory) from the date of receipt by [EABL] of the proposal and accompanying analysis. No such change may be implemented without the prior written approval of [EABL] (which approval shall not be unreasonably withheld or delayed, provided [TBL] complies with the procedure set out in this clause 12.11)."

59. Annex G included the following provisions:

"2. The proposal submitted to [EABL] for changes in prices of the Products must include the following:

2.1 of current prices for all of the Products at all points in the value chain (ex brewery, distributor price, wholesaler price, retailer price.)

2.2 Confirmation of the current level of price premium of the Products compared to the mainstream lager beer and premium lager beer, stout, cider, AFBs and/or RTDs[3] as appropriate ("comparable product")

2.3 Details of the proposed changes to current prices and current price premium as in 2.1. and 2.2 above

2.4 Justification of proposed changes. This must include:

2.4.1. Comparison of the proposed level of price change to the prevailing rate of consumer price inflation in the Territory

2.4.2. Details of tax and duty changes included in the price change

2.4.3. Details of production costs and effect of proposed change on ex brewery gross margin on the Products compared to other brewery products

2.5 Details of new price premium over Products as in 2.2 above

Price Premium of the Products

Price Premium is defined as the difference between the actual consumer price per litre or the appropriate measurement for the Product in question (confirmed by audit of AG Nielsen) and the actual consumer price per litre or other appropriate measurement of a mainstream comparable product.

Proposals for price changes to the Products which have the effect of increasing the level of price premium relative to mainstream comparable products will not be acceptable to the Company other than in sectional circumstances."

60. Clause 17.4 provides for a fundamental breach to be deemed to have occurred in the event of:

17.4.1.3 [TBL] implementing a material change to the pricing plan set out in the Business Plan without the prior written approval of [EABL] in terms of clause 12.11, unless [EABL] withholds or delays such approval unreasonably."

61. Certain matters are common ground. Firstly, there was a threatened price increase in March 2008 which was not in fact implemented. Secondly, there were price increases in November 2008 and February 2009. Thirdly, TBL did not follow the procedure laid down in clause 12.11. It did not provide a full analysis of the impact of the change in the form specified in Appendix G; nor did it propose

[3] Alcohol Fruit Beverages and Ready to Drink premixed alcoholic beverages.

implementation dates no earlier than 30 days from receipt by EABL of the proposal. The changes were not implemented with EABL's written approval. TBL contends that the procedure laid down by clause 12.11 was never followed (either in Tanzania or Kenya) and that a convention developed that it would not be. EABL disputes that and submits that that is in any event irrelevant.

History

The threatened price increases in March 2008

62. In March 2008 TBL proposed to increase the price of EABL's Tusker and Guinness. EABL objected. In respect of Guinness the objection was that the 16% proposed increase for Guinness was a big step change which would move it from parity with CMS, TBL's product. In respect of Tusker the increase would move it from a mainstream to a semi-premium beer, when its position in the former category (the same category as TBL's Kilimanjaro beer) was the basis of EABL's plans, and when Tusker consumers benchmarked Tusker to Kilimanjaro. Gerald Mahinda, EABL's then managing director, observed in an e-mail of 20th March 2008 to Craig McDougall, TBL's then managing director:

> *".......I don't believe that this is a tenable pricing strategy even in the short term because we all know that once you lose consumers, you have to work hard to get them back if at all. This strategy is a sure way to temper not enhance the current Tusker growth trajectory.*
>
> *This is exactly what happened when we took pilsner price up in 2004 and the brand never recovered from it 6% market share to its current 0.6% share"*

In the event the proposed price increases did not go ahead after Mr Mahinda had spoken to Mr Kirby, the finance director of Sabma. The asserted rationale had been to increase the Tusker price so as to force Serengeti to decide whether to try and compete with Kilimanjaro and face increased margin pressure or increase the price to Tusker levels which would benefit Kilimanjaro.

63. On 11th August 2008 TBL increased prices for Safari, Pilsner, Balimi and Bigwa. Of those only Pilsner was an EABL brand.

64. 22nd August Mr Lyaruu, an EABL representative seconded to TBL, reported to Mr Mahinda that:

> *"TBL has been undermining the sales of Tusker during this month of August. Monthly to date sales of Tusker is 33% below last year. And this is evenly distributed among the regions … When I ask questions I get contradicting answers. However it was confirmed to me by very reliable sources that there is a deliberate plan behind this movement and this behaviour is somehow directly related or rather caused by the expired contract as TBL is not sure of which way we are going to tilt and as such they have adopted the worst scenario case of what if the contract is not renewed …*"

65. He then related the news that TBL had signed that week for Kilimanjaro Lager to sponsor two soccer teams when two years ago TBL had shot down EABL's

proposal to sponsor one of them saying that it was not the company's policy to sponsor soccer teams.

Stocking and distribution problems

66. By the autumn of 2008 there were serious stocking and distribution problems with Tusker and Guinness particularly in the North West region. On 6th October Mr Kilonzo, another EABL secondee, complained to TBL of 4 weeks insufficient supply or distribution of Guinness to the south and said that "this *brand will die at the hands of supply and distribution unless the situation is arrested*". He reported that there was no Guinness in the trade. On 13 October he reported that there were no stocks of Guinness in the whole country save for Musoma and no stocks of bottles or 330ml cans of Tusker in Mbeya and only about a week's stock available across the country. He complained that distribution still continued to stifle the growth of Pilsner; and that market share had weakened further week on week on the back of stock unavailability. On 24th March 2009 Mr Lyaruu reported that he had recently had an opportunity to do a trade visit to 4 towns; that the areas in question had gone without Tusker 500ml one for quite a long time; and:

> *"Guess who is laughing all the way to the Bank. None other than Serengeti because most of these Tusker consumers switch to Serengeti when Tusker is not available."*

A & P (Advertising and promotion) costs

67. On 29th September 2008 Mr Maganga of TBL informed Mr Kilonzo, that a total of Tshs 110.6 million had to be cut from the total budget from October 08 to March 09 for EABL brands. This was part of a wider series of TBL spending cuts in the light of the current economic climate. 11% of the total cuts is said to have been borne by EABL products.

The November 2008 price increases

68. On Friday 7th November 2008 TBL proposed to increase the price of Tusker and Guinness on Monday 9th November. According to EABL this was notified in a telephone conversation in the early evening between Mr McDougall and Mr Kilonzo. On Saturday 8th November Ms Ithau of EABL e-mailed Mr McDougall:

> *"Our mutual terms of agreement are we need to discuss this before implementation. My concern as per the last increase is that you are pitching Tusker to Ndovu. Tusker is mainstream and should always be parity to Kilimanjaro. The same applies to Guinness which is parity to CMS. We need to discuss this intended increase before you implement….*

69. On the same day Mr Mahinda e-mailed Mr McDougall asking him to hold the price increases which were scheduled for Monday 10th and asking that David Minja, TBL's marketing director should get in touch with Ms Ithau of EABL to discuss the reasons why the price was being increased on EABL's brands and not on the other TBL brands. He said that they should also agree on the Tusker A & P spend for the Tusker Challenge Cup.

70. On 10th November 2008 Mr McDougall informed Mr Mahinda by e-mail that in October TBL was $ 450,000 below budgeted operating profit although volumes

were on target, and that it would attempt to maximise the revenue from 4 brands in the short term - CMS, Ndovu, Tusker and Guinness - by taking a price increase on 11th November saying:

> *"These brands are ideally placed to "help us out" and we will review the situation on an ongoing basis. The major financial constraint is the exchange rate and the continuing creep in imported raw materials*
>
> *This course of action is in the best interest of TBL"*.

He also said that the funds allocated to the Tusker Challenge Cup were adequate. Mr Mahinda replied saying that EABL was not against price increases but did not agree an increase in the price for Tusker on its own which would reposition EABL's brands against TBL in terms of price segments. If the objective was to cover the costs and revenue gap there should be an increase in price on all brands i.e. Kilimanjaro and Safari together with Tusker.

71. On the same day a meeting took place attended by Mr Kilonzo for EABL, Mr McDougall and Mr Minja of TBL, together with the finance director of TBL. According to Mr Kilonzo's e-mail report of the meeting TBL said that the business was *"in the hole*" for about $ 450,000 because of the rising cost of raw materials and the impact of devaluation. TBL felt that Guinness typically retailed at significantly higher prices than lagers in other markets and that Tusker had the premium perception in the trade and was able to take a price hike. Mr Kilonzo said that EABL would not oppose a price increase as long as the whole competitive set was involved and specifically Kilimanjaro and Safari lager. TBL said that CMS was not in the same league as Guinness and that the management would make decisions on brands in the best interests of the total business. The price change was to happen the following day.

72. Mr Kilonzo's e-mail records:

> *"It was also explained that their [sic] is no agreement in force but guidelines [sic] hence the engagement. The agreement process I believe is called Thunderbird has stalled so far with no concrete discussion going on. The business therefore will make decision in the interest of the business without reference to the alliance agreement terms that have more or less lapsed and are not being actively pursued."*

73. On 11th November TBL announced an increase in the price of Ndovu, CMS, Guinness and Tusker. Mr Mahinda e-mailed Mr McDougall on the same day to point out that, although they were in negotiation for a new agreement, the BDA still governed and that Annex G provided a format for price changes in Products under clause 12.11. It was plain that EABL objected to the increases. Also on this day Mr Chitgopkar of SBL sent an SMS message to a senior TBL Sales Manager asking why Ndovu and Tusker prices were being increased and whether the increase would apply to other products. According to his evidence he received a response the same day:

> *"No only eabl brands we want to shrink"*.

The February 2009 price increases

74. On 6th February 2009 TBL again increased prices by a weighted average of 11.6%. This appears to have been done without any prior notice at all. On 11th February Mr Mahinda complained to Mr Robin Goetzsche, the new managing director of TBL, that this was contrary to the provisions of the contract.

75. Later in February there was e-mail correspondence between Ms Ithau and Mr Minja in which she complained that the agreed A & P budget for Tusker had not been released. Mr Minja pointed out that the budgets for the 2008/9 year were in the system and that TBL had insisted on a reduction in the planned activities relating to Tusker and nothing could be spent on marketing above what had been approved. She pointed out that the overrun was the result of the amount that had been deducted from the brand budgets without consulting the brand team.

Negotiations for renewal

76. Meanwhile negotiations relating to the possible renewal of the TBL BDA had been continuing. On 11th March 2009 Mr Brecher of EABL e-mailed Mr Kirby asking, inter alia, for his views on:

> *" (a) Unconstrained brand growth: We believe our brands, and particularly Tusker, have the potential to double their current share in the Tanzania market - at our last discussion, you mentioned you'd only be willing to consider investing further behind our brands if you could get greater assurances built into the agreement - we would like to get your view on what specific form these greater assurances might take?"*

77. On 10th June Mr Nick Blazquez, a director and vice-chairman of EABL, e-mailed Mr Mark Bowman, the managing director of Sabma referring to a discussion they had had the previous Friday. He expressed concern that TBL had increased the price of Tusker without appropriate consultation with EABL. He also said that he had been advised that TBL had limited the distribution of Tusker in Tanzania. In April EABL's analysis suggested that Tusker declined year-on-year by 12% in a market which showed strong growth. He referred to EABL being told by TBL that the approach to Tusker was in part being driven by the absence of a long-term agreement and that TBL required a "*perpetual*" right to EABL's brands in Tanzania. (This suggestion of a contract "*in perpetuity*" had, indeed, been made by Mr Goetzsche in an e-mail to Mr Mahinda of 6th May 2009). He expressed the view that TBL was obliged to comply with the TBL BDA and said that EABL was looking at contractual remedies in relation to the price increases. He added:

> *"Secondly, I understand your change in policy in relation to the need for a long-term license for third-party brands, but want to emphasise that this is not the basis upon which we entered into the original agreement. I also feel that TBL's actions, in continuing to restrict our brands' growth contrary to the distribution agreement while at the same time insisting on a long-term renewal, does not allow for a constructive dialogue and leaves us with few options. It is also fair to say that given the relative economics, (as I mentioned we pay a net c £2m pa) and the way in which TBL are currently managing our brands, this does not provide us with a great deal of encouragement. Under the circumstances and as a matter of commercial*

policy, I cannot support the renewal of our existing terms on a long-term basis."

78. On 8th June a telephone conference took place between Mr Mahinda and Mr Goetzsche in which many of the existing bones of contention were chewed over. On 19th June Mr Goetzsche e-mailed Mr Mahinda a message which included the following

> *"2. Pricing of Tusker at Mainstream - as per your request we are happy to move Tusker back to the mainstream pricing, but suggest that we do so at our next price increase as to do so sooner would no doubt " leave money in the channel" as the price point has already been established in retail.*
>
> *3. Our production issues seem to be generally addressed now and hence availability should improve on all of our brands. Interestingly, I was down in the south of Tanzania this week and I can assure you that every outlet visited -including deep rural – had Tusker available.*
>
> *4 With respect to A & P we will make sure that the specific programmes are adequately funded and I can assure you that your brands have a disproportionate level of funding versus the TBL brands."*

79. On the same day Mr Bowman e-mailed Mr Blazquez informing him that local Tanzanian management believed that appropriate consultation did in fact take place in respect of pricing:

> *"Nevertheless, clearly your view is different, and it is important that we are aligned around the development of our respective brands in the two markets. I have asked local management to arrange to meet with EABL management to ensure we quickly resolve the concerns you have expressed.*
>
> *Similarly, and if you believe it is necessary, I am available to meet with you at your convenience to ensure that we can maintain a positive working relationship we have, and indeed look for further opportunities."*

80. On 6th July Mr Blazquez e-mailed Mr Bowman expressing the view that the recent negative impact on EABL's brands had resulted directly from the actions of TBL's management on increased pricing and restricted distribution, which was borne out by falling sales of Guinness and Tusker relative to the rest of TBL's portfolio. He complained that the price increases in November 2008 and February 2009 were primarily responsible for the decline in the Tusker brand sales over recent months. He also said that he had been made aware that distribution of Tusker particularly in the south was being actively curtailed.

81. On 10th July Mr Goetzsche e-mailed Mr Adetu, the new managing director, of EABL. He expressed the view that the process which TBL had followed in relation to price increases was:

> *"completely consistent with custom and practice adopted between us over many years, so to be honest I was confused about his [i.e. Mr Mahinda's] concern at the time. Since then, I had assumed this concern had gone away, as we've all been proceeding on the basis of the current prices for some time (and had agreed to revisit the pricing levels at the time of the next*

price review) - so I was a bit surprised to learn that the issue had been mentioned again at high level...

As a result of this we will drop the price with immediate effect..."

This relates to the price of Tusker & Guinness. It is not wholly clear to me what exactly was the drop in price but Mr Goetzsche's evidence is that it was reduced as requested by EABL.

82. On 16th July Mr Bowman e-mailed Mr Blazquez indicating that Sabma was keen to find a way to maintain and develop the relationship with EABL. In the event what happened in mid July is as described in paras 30-34 above.

Discussion

83. It is apparent from the history referred to above that any contention that EABL elected to affirm the contract notwithstanding any breach thereof constituted by the November 2008 and February 2009 price increases is likely to fail . As *Tele 2 International v Post Office Ltd* [2009] EWCA Civ 9 makes clear, any election not to exercise a right of termination only occurs if the party entitled to terminate "*has so communicated [its] election to the other party in clear and unequivocal terms"*; per Lord Goff in *The "Kanchenjunga"* [1990] 1 Lloyd's Rep 391. In *Tele 2* the Respondent continued to perform the relevant agreement for about 11 months after the breach without either protest or reservation of rights and was, therefore, held to have abandoned its right to terminate. Here the breaches were followed (and in the case of the November 2008 breach, preceded) by strong protests and reference to the invocation of contractual rights.

84. Further, if and insofar as reliance is place on some conventional understanding between the parties (which EABL disputes) TBL faces the problem of clause 24.4 of the TBL BDA which provides that:

> *"The failure of either party at any time to enforce any provision of this Agreement will not be a waiver of that provision or of the right of that party to enforce it subsequently. Notwithstanding the foregoing, in the event that any term, covenant or condition contained in this Agreement should be breached by either party and thereafter waived by the other party, such waiver shall be limited to the particular breach so waived and shall not be deemed to waive any other breach."*

85. Accordingly, I approach the matter upon the footing that TBL is unlikely to establish that EABL was not entitled to treat the November 2008 and February 2009 price increases as breaches, either because it had previously disabled itself from relying on clause 12.11 or because after the breaches it elected to affirm the contract, them notwithstanding. In those circumstances both sets of price increases constituted breaches of clause 12.11.

86. In order for EABL to rely upon the price increases as deemed fundamental breaches it is necessary that the breaches should have been incapable of remedy. If they were capable of remedy, it was necessary for EABL, if it sought to rely on them as fundamental breaches, to serve written notice specifying the breach and requiring its remedy. No such notice was ever served. If such a notice had been served it would have been necessary for EABL to have waited for 60 days to see if

it was remedied and then serve a notice of termination within 60 days thereafter, if it was not.

87. EABL's approach, as characterised by it, was to wait and see what the effect of the various breaches was and whether it could resolve the problems with TBL (see Mahinda para 145), although it is said to have taken the view that the announcement and implementation of the price increases were not remediable. In the event TBL indicated in July that it would drop the price of Tusker and Guinness with immediate effect.

88. Mr David Oliver QC on behalf of EABL submits that it is too simplistic to suggest that TBL could remedy the breach constituted by any price increase simply by reversing it. The effect of a price increase may be to cause a substantial body of consumers to switch their allegiance so that it is impossible or, at any rate, very difficult to regain their custom. Once a price increase has taken effect and distributors and retailers have got used to it, a reduction of the price may further damage the brand because such yo-yoing over a short period can have a confusing effect. Further the reduction of the price may not feed into the price charged to the consumer. The retailer may see the decrease as an opportunity for increased margin.

89. EABL further contends that it may not always be possible to know what will be the impact of a price increase until you see how it is digested by the market. That may be so. A price increase, which was thought to be potentially destructive of market share, may turn out to have no such effect; an increase expected to have no effect may possibly be catastrophic. EABL, Mr Oliver submits, as the innocent party was entitled to a reasonable time to see what was the effect of the price increases before being required to decide what to do about them. Whether or not a breach is remediable must be determined as at the date when, acting reasonably, EABL made its decision.

90. To remedy a breach does not require the guilty party to perform the impossible by producing the same condition of affairs as if the breach had never occurred. The question is whether matters can be set right for the future. In some cases that may be achieved simply by the cessation of the breach (whether it consists of action or omission). In others the question whether a breach is capable of remedy may depends on what has been its effect. However, whether or not a breach is capable of remedy must, as it seems to me, be considered at the time at which the breach occurs, at any rate if the breach is known. Some breaches may be clearly capable of remedy; some clearly not. In some cases it may not be possible to say.

91. What it is not, as it seems to me, open to EABL to do is to forbear, after breach, from serving a notice to remedy a remediable breach, of which it is aware, and then, when, absent such a notice, the breach has with the passage of time become irremediable, to contend that events have shown that no notice was needed. The fact that an unremedied breach may over time become irremediable cannot determine whether, if action had been taken earlier, it could have been remedied.

92. At any rate there are serious questions to be determined as to (i) whether or not that analysis is correct; and (ii) whether the offending price increases were capable of remedy when, or shortly after, they were announced or intimated. As to that I do not find it easy to accept that, if the November 2008 and February 2009 price

increases had been the subject of a written notice when the changes were made and had then been cancelled (as opposed to being dropped in July), the effect of their temporary existence would have been irremediable, although I note that Mr Goetzsche told Mr Mahinda in February that the best way forward was to review the increase at a later stage as "*decreasing it at that point would cause confusion in the market place*" . In those circumstances TBL has a well arguable, indeed, as it seems to me, a strong case, that EABL was not entitled to terminate on this ground.

93. The next matter to be considered, which I can do briefly in the light of my conclusion in the previous paragraph, is the effect of the provision in clause 12.11 that:

> *"No such change may be implemented without the prior written approval of [EABL] (which approval shall not be unreasonably withheld or delayed, provided [TBL] complies with the procedure set out in this clause 12.11.)"*

94. TBL contends that EABL unreasonably withheld its consent. This would not, however, preclude the price increases from being a breach because TBL did not comply with the procedure set out in clause 2.11. But, Mr Choo Choy submits, the deemed fundamental breach for which clause 17.4.1.3 provides does not arise if EABL has unreasonably refused its consent, whether or not that procedure has been complied with, since 17.4.1.3 provides for a deemed breach in the event of:

> *"[TBL] implementing a material change to the pricing plan set out in the Business Plan without the prior written approval of the Company in terms of clause 12.11, unless [EABL] withholds or delays such approval unreasonably."*

95. This contention seems to me arguable. The exception to the deeming of breach (*"unless….."*) is not conditional on compliance with the procedure.

96. So far as the supposed reasonableness of the price increases are concerned the nature of the dispute is as follows. EABL submits that the question of unreasonableness must be looked at from its perspective, since it is its consent which is in issue. It had good reason to object to the increases. The November 2008 increase put Tusker into a different price category; and produced a 16% increase for Guinness. The February 2009 increase took effect in respect of already inflated prices and, in the case of Guinness was 38%. There is no evidential basis for saying that EABL's refusal was unreasonable.

97. As to the consequence both parties have placed reliance, but for different purposes, on a spreadsheet of historical volumes of sales (4/240), comparing each month with the same month in the previous year. EABL relies on these figures for the following:

  (a) Of TBL's beers only two (Safari and Miller draught) were showing negative growth in June. EABL's key brands – Tusker, Guinness and Pilsner were all negative; TBL points out that Safari's sales were down 18.82% compared to Tusker's 17.05% and in the same month EABL's Malta was up 50.54% - a situation scarcely indicative of adverse discrimination against EABL brands;

(b) Eagle, SBL's cheapest beer, had shown major growth from August 2008. That impacted on Safari, which had 5 months of deterioration between August 2008 and June 2009. But EABL had no equivalent to Eagle and so could not afford the contraction of Tusker. TBL points out that it is not its fault that EABL has no equivalent to Eagle;

(c) In respect of Tusker, in all of the 19 months down to and including October 2008 there had been growth year on year; in six of the 8 succeeding months there had been contraction;

(d) By contrast sales of Castle, a TBL brand, competing with Tusker, had shown negative growth in 16 out of the 19 months down to October 2008 and positive growth in all the months after that;

(e) Kilimanjaro, TBL's products also competed with Tusker and since February 2009 has done markedly better. TBL points out that Kilimanjaro experienced decreases in four of the months from and including November 2008;

(f) The Guinness figures for June 2009 showed "negative growth" of – 73.85% and similar or worse figures for the 3 preceding months. For 14 of the 19 months down to October 2008 Guinness had shown increases year on year. From November 2008 onwards the figures had been uniformly negative and progressively so.

(g) A comparison of the total sales figures (see 4/113-116] revealed substantially greater increases of sales of TBL rather than EABL's products compared with the same month in the previous year in December 2008, and January and April 2009 .In February May and June 2009 TBL figures were flat when EABL's declined. TBL says that this comparison is misleading because the TBL figures include Eagle which, in the period relied on, was not as susceptible to falling sales and for which EABL has no comparable product.

(h) According to the graph reproduced at para 83 of Mr Mahinda's statement, which shows year to date growth in percentage terms, whilst TBL and EABL products have followed a similar trajectory (a point on which TBL strongly relies) TBL's overall figures have always been positive whilst those of EABL have been negative, and the figures for Guinness disastrous.

98. These figures, EABL contends, show how right and reasonable it was to object to the increases both in November 2008 and February 2009.

99. TBL contends that the question of reasonableness is to be looked at from the point of view of TBL as a whole, of which EABL was a 20% shareholder. When the price increases are examined it can be seen that there was good reason for them.

There was an estimated $ 450,000 budgetary shortfall which had to be funded. There has been a devaluation of the Tanzanian shilling at the beginning of 2008/9 and a marked decline in its value against the euro in December 2008; and significant inflation in global energy, food and raw material prices. TBL wished to put pressure on SBL by moving Ndovu and Tusker into a semi-premium brand bracket and thought that Tusker, which was well established and had been intentionally (and with EABL's assent) moved into a long necked bottle, a hallmark of a semi-premium brand, could withstand a price increase without damaging its market share. Safari, CMS and Ndovu had already had price increases in August 2008. Safari's price was increased by 10%. Guinness ' price margins were being eaten up by the increasing cost of the concentrate which had to be purchased in euros. There was nothing exceptionable about the February 2009 increases, which applied to Safari, Kilimanjaro, Castle and CMS as well. The increases were similar in percentage terms across all the brands increased save that there was a large increase (38%) in respect of Guinness which was attributable to the particular problems associated with that product.

100. The price increases in November 2008 and February 2009 were as in the following table. If account is taken of the Safari increase in August the total percentage change is 29% i.e. the same as Tusker:

Product	**% Change Nov**	**% Change Feb**	**Total % Change**
Safari and Pilsner 500 ml RB	0	19	19
Kilimanjaro 501 ml Rb LN	0	20	20
Tusker 501 ml RB LN 330 ml Can	 10 9	 18 27	 29 39
Castle 501 ml RB LN 330 ml Can	` 0 0	 18 27	 18 27
Castle Milk Stout 501ml RB LN	9	15	26
Guinness 500 ml RB	16	38	60

.

101. TBL also points to the latest figures which show better growth in respect of EABL products than TBL ones:

	JULY 17TH -31ST 2008		**JULY 17TH -31ST 2009***		
	VOLUME	% CONTRIBUTION	VOLUME	% CONTRIBUTION	%GROWTH
TBL PRODUCTS	107,448	84%	99,693	82%	-7%
EABL PRODUCTS	20,834	16%	21,404	18%	3%
TOTAL	128,282	100%	121,097	100%	-6%

102. It is not possible on an interlocutory application such as this to determine the validity of the rival contentions as to reasonableness. Insofar as the reasonableness of the increases is concerned I regard each side as having a reasonably arguable case, although I do not enjoy any high degree of assurance of the validity of TBL's case insofar as the November 2008 increases placed Tusker into a different price category. Further the February increases were made with no advance notification such that it may be difficult to say that consent was either withheld or delayed.

Failure to develop sales

103. The relevant contractual provisions are as follows:

"12 SALES AND MARKETING

12.1. [TBL] will, at its own expense, use its best endeavours to develop and maximise sales of the Products in the Territory and to satisfy demand for the Products and generally to expand the production and distribution of the Products in the Territory. Within three months after date of signature of this Agreement, the Company and the Brewer will agree the Business Plan for the period from the Effective Date until 31 March 2003("First Year") which will include the following … (there then follows a long list of matters including)

12.1.4. A pricing plan (including customer incentivisation and discount pricing policies and the value chain appropriate to the market) for sales of the Products by [TBL] in the Territory on a month by month basis;

12.1 The pricing plan referred to in 12.1.4 shall take into account the following:

12.1.1 the market positioning of the Products in relation to competitor brands as set out in the Business Plan; and

12.1.2 [EABL]'s recommended prices for each Product for [TBL], distributors and retailers

………..

12.4. The Business Plan, containing each of the items referred to in clause 12. 1 and any Volume Targets which the parties have allocated to a Product (if applicable) for each Year of this Agreement following the First Year shall be agreed between [TBL] and [EABL] by no later than 31 December of the immediately preceding Year. If the parties fail to reach agreement on -

12.4.1 the Business Plan by 31 December of the immediately preceding Year, the Business Plan for the immediately preceding Year shall continue to apply;

104. Clause 17.4 provide for a fundamental breach to be deemed to have occurred in the event of:

"*17.4.1.2 a material breach of:*

- ...
    - *the obligation of the Brewer to use its best endeavours to develop and maximise the sales of the Products in the Territory and to satisfy demand for the Products and generally to expand the production and distribution of the Products in terms of clause 12.1*

105. EABL contends that TBL has failed to" *use its best endeavours to develop and maximise the sales of the Products in the Territory and to satisfy demand for the Products and generally to expand the production and distribution of the Products"* in accordance with clause 12.1.

106. The evidence relied upon in support of this contention consists largely of :

(a) evidence of serious supply problems (see the complaints referred to in paras 62ff);

(b) evidence of the collapse of sales of Pilsner;

(c) individual pieces of evidence which indicate that TBL was not intending to put in the contractually required effort, in part because of a belief that, after the initial five years, the TBL BDA no longer governed; and

(d) the deteriorating fortunes of Tusker, Guinness (and Pilsner) which, EABL contends, are attributable both to the price increases and a lack of support for EABL products. What has happened, it suggests, is that there has been a deliberate skewing of the market in favour of TBL and an active attempt to decrease the market share of EABL products. .

107. As to the supply problems, the evidence adduced by TBL is to the effect that there were indeed problems but that they were the result of factors beyond their control (a circumstance which by clause 24.5 of the BDA is an excuse for non performance) and cannot be attributed to a failure to exercise best endeavours.

These factors included a high level of salinity in the water supply in Dar-es-Salaam caused by drought; the supply of poor quality bottles for Tusker by TBL's suppliers (one of them an EABL subsidiary) which had a tendency to crack at the neck; and an infection in the yeast used for Tusker production in June 2008 which significantly affected Tusker production in July and August.

108. As to Pilsner TBL contends that its production became uneconomic and "*the brand just faded away"*. EABL says that the brand was withdrawn by TBL because of (a) its recategorisation by TBL as a premium product in 2004, (b) a TBL decision in mid-2007 to withdraw support for development and promotion of the brand and (c) TBL's discontinuance of production of it in November 2008;

109. As to (c) Mr Blazquez's evidence is that in October 2008 at a meeting in Nairobi Mr Bowman threatened to "*trash*" EABL's brands in Tanzania if EABL sought to exit the TBL BDA and said:

> "*that, unless a new long term agreement with a minimum notice period of three years was concluded TBL/Samba would so damage EABL's brands in Tanzania that there would be little for EABL to take up if we terminated the agreement*".

Mr Bowman says (i) that he had no meeting with Mr Blazquez in Nairobi in October, as opposed to May, 2008; (ii) that he never said any such thing at any meeting; and (ii) that, if he had, he would have expected an immediate request for a full explanation in writing (and for the conversation to be referred to in Mr Mahinda's witness statement).

110. What Mr Mahinda does say in his witness statement is that in April 2009 Mr Kirby stated to Mr Brecher and Mr Upadhyaya (both of EABL) that TBL was taking steps to constrain the growth of Tusker and would continue to do so until a long term agreement was reached between the parties. Mr Kirby's evidence is to the effect that a discussion with EABL took place in the context of an unrealistic suggestion by EADL of a target market share for Tusker of more than 22% (more than 5 times the 4% target for Tusker under Annex C to the BDA and considerably more than the current 14%) and that his comment was that it would not be in TBL's interest to promote so large a market share for Tusker (which would require investment beyond that contemplated by the BDA at the inevitable expense of TBL's brands) when EABL had refused to agree a long term extension to the BDA.

111. There is also a dispute between the parties as to the significance of a section in the Budget Presentation for 2009/2010 under the heading "*Thunderbird Response*" which was not provided to EABL's directors. The section omitted outlines what appears to be a proposal to grant sales incentives only on TBL brand volumes; and to launch competing brands ("*Proposal to launch like-like as Club*" /"*Club" response to Tusker ABV% of 4,2 and taste profile*.." and ""*Bottom drawer" Malta ready*"). It also speaks of EABL's planned "growth" as minus 14%. EABL says that this shows that TBL was proposing to reduce EABL's sales by taking steps to compete with its products. Mr Goetzsche's evidence is that the documentation in question was an internal Sabma/TBL document which was never approved for presentation to the Board and was based on a scenario in which EABL left the joint venture. The sales incentives referred to were those planned as part of a

renovation strategy for Kilimanjaro, Safari and Ndovu which was planned whether EABL left or not and did not mean that if EABL stayed TBL would not promote its brands. A launch was proposed of a brand similar to Club which would be different from Tusker – without sugar and from a different yeast. It was not intended to replace Tusker. As to the last item, there was nothing to prevent TBL competing with an alternative to EABL's Malta Guinness. The minus 14% figure reflected the fact that brand rejuvenation plans might impact on Tusker. EABL's own plans for Tusker might mean that it was wrong.

112. As to (d) TBL points out that under Clause 12.1 of the BDA TBL also has to meet contractually agreed Market Share Targets both individually, for each brand, and cumulatively, for all brands. These are provided for under Clause 12 and (initially) under Annex C of the BDA. If TBL fails to meet such targets then Clause 12.6.2 provides for liquidated damages to be paid by TBL to EABL. TBL has met its overall volume target in each year of the agreement. It also points to the *overall* growth of EABL and TBL's brands in Tanzania and Kenya over the life of the Agreements:

Growth 2003 – 2009		
Tanzania	EABL Brands TBL Own Brands	+ 94.6% + 33.8%
Kenya	TBL Brands EABL Own Brands	- 75% + 54%

113. In addition if regard is had to the performance month by month between November 2008 and June 2009 expressed as a percentage of the preceding month (see para 36 of Bowman 1) the TBL and EABL portfolios march broadly in step.

114. I cannot determine on an interlocutory basis whether TBL has been in breach of its obligation to use best endeavours. EABL has some grounds for alleging that there has been such a breach. But TBL has a very realistic prospect of showing that that is not so. EABL has not offered any response to TBL's explanations of the reason for supply problems; the complaint in relation to Pilsner is somewhat dated; there is a dispute about what was said at the conversations relied on; the credibility of Mr Goetzscher's explanations[4] and the significance of the missing section of the presentation cannot be determined without further inquiry, production of documentation and cross-examination. Some of the figures present a different picture from that sought to be painted. .

115. TBL contends that, if and insofar as there was any failure to exercise best endeavours on its part, it was remediable. No notice to remedy has been served and, accordingly there is no right to terminate on the grounds of fundamental breach. Again it seems to me that TBL has strong grounds for contending that that is so. Such a failure can often be set right for the future by the guilty party exerting itself in a way that it has not done before.

Marketing Budget

[4] The explanation that TBL was planning for a scenario in which it would no longer be selling EABL products does not seem to fit with a document that talks about reduced EABL growth.

116. Clause 12 14 of the TBL BDA provides:

> *"12.14 [TBL] will, during each Year, spend on marketing and advertising support the amount approved by the parties as part of the Business Plan which amount shall not be less than 5% (five per cent) of the total Sales Value of all the Products in the Territory in the previous Year. If [TBL] fails to spend such amount [EABL] shall be entitled (but not obliged) to spend an amount equal to such shortfall over such period as it reasonably considers appropriate and [TBL] shall reimburse such expenditure within 14 days of [EABL] delivering evidence of the expenditure …*

117. Another deemed fundamental breach arises in the event that :

> *17.4.1.5 [TBL] fails, in respect of his obligations under clause 12.14 to spend the agreed amount in respect of the marketing and advertising support in respect of any two consecutive years"*

118. In respect of the year 2008/9, (1st April – 31st March) as is common ground, TBL failed to spend the specified 5%. It has never done so [see document 4/237]. Every TBL budget contained a marketing plan. Brand plans put together by EABL embedded employees were used to create the marketing budget. All budgets prior to the budget for the year 2009/10 were approved by the board, including the EABL director. None of them provided for a 5% spend. In 2008/9 TBL spent 3.62% of the previous year's total sales value of all the Products. EABL has never availed itself of its right to spend an amount equal to the shortfall and charge the expenditure to TBL.

119. EABL does not rely on a failure to spend the 5% in respect of two consecutive years i.e. a deemed fundamental breach. It contends that there has been an actual failure in respect of 2008/9 and an anticipatory breach in respect of 2009/10 for which TBL's budget provided for a spend of less than the agreed amount.. Since the threatened breach was a threat of that which, if carried into effect, would have been a fundamental breach, it amounted to a repudiation which EABL claims to have accepted.

120. The threat is said to have arisen in the following way. In March 2009 TBL circulated a Resolution for budget approval for 2009/10. On 25th March Mr Kierini, EABL's Chairman asked for clarification in relation to the EABL brands in relation to F 10 (i.e. the year 2009/10) and the EABL brands in terms of portfolio leverage and pricing strategy. On March 27th 2009 Ms Ithau of EABL e-mailed David Minja of TBL to complain that the A & P Budget for the following year totalled, as it did, 3% of the 2008/9 Actual Net Sales Value. On March 30th Mr Goetzsche of TBL replied to Mr Kierini advising him that the F10 Budget would include Tusker, Guinness and Malta, Pilsner being suspended until a decision on its future could be made and stating that all brands would continue to be priced at current levels. He added:

> *"Obviously the contract between EABL and TBL has lapsed and we are awaiting confirmation of the continuation of this agreement".*

121. On 4th May 2009 Mr Mahinda wrote to Mr Goetzsche declining to sign the proposed F10 Budget. TBL did not change its stance in relation to the expenditure at any time prior to July 2009.

122. There are problems with regarding TBL as in repudiatory breach. Firstly the Business Plan for 2008/9 was agreed. Clause 12.4. provides that if the parties fail to reach agreement on a Business Plan for the following year the Business Plan for the preceding year should continue to apply. The question then arises as to whether, in those circumstances, TBL became obliged to spend in 2009/10 5% of the Total Net Sales Value of all Products in 2008/9 when that is not the "*amount approved by the parties as part of the Business Plan*" and when the only amount that can be said to fall within that description, albeit by default, is the amount in the 2008/9 plan. A similar problem arises in relation to 2008/9 itself where there was an actual as opposed to a default business plan with an agreed amount which was less than the specified 5%. I find it very difficult to accept that, if the parties have agreed a spend of less than 5%, it is a breach of contract on TBL's part not to spend that proportion.

123. Secondly, in circumstances where on 17th July 2009 only about 3.5 months of the 2009/10 year had elapsed it is well arguable that TBL's stance, by way of expression of view, that the contract did not oblige it to pay the unagreed 5% is arguably not repudiatory: *Woodar v Wimpey Ltd* [1980] 1 WLR 277. TBL has now confirmed, in para 145 of Mr Goetzsche's second witness statement of 29th July, that if EABL really wants to spend 5% for 2009/10 TBL will work on that basis, although it will reduce the profits available for distribution.

124. There is more scope for argument that the reduction to the budget which was made in September 2008 was a breach of clause 12.14 but, even if it was, that was not a breach which covered two years.

125. In those circumstances TBL has solid grounds for contending that there was no fundamental or repudiatory breach.

Conclusions on the validity of termination

126. In short, for the reasons set out in the preceding paragraphs I conclude that there is a serious question as to whether TBL was in fundamental breach and whether EABL was justified in terminating the TBL BDA. I go further than that. It seems to me that TBL has a strong case for saying that any price increase and want of best endeavours breaches should have been the subject of a notice to remedy and that there was no repudiatory breach in respect of the advertising expenditure. That being so it is necessary to examine whether or not either the Restraints or clause 3.1 of the BDA preclude the implementation of the offending agreements

To what extent do the Restraints preclude the implementation of the offending agreements?

The SBL SPA

127. It was not seriously disputed that the implementation of the SBL SPA would constitute a breach by EABL of the Restraints contained in the TBL SHA since it would involve EABL as principal being directly interested in a company (SBL) which carries on the "*business of brewing and/or handling and/or importing any*

Specified Beverages (including the Products and Discontinued Products) in the Territory".

The SBL LFA

128. So far as the SBL LFA is concerned Mr Oliver submitted that its implementation would not constitute a breach of the Restraints since that would not involve EABL:

> " *whether as principal, agent, partner, representative, Controlling Shareholder, consultant or adviser or in any other similar capacity,[being] directly or indirectly interested in or engaged in any company, corporation, firm, business"*

engaged in brewing in Tanzania. As he submits, the words of the provision, which, being restrictive of trade must be interpreted strictly, indicate that the interest concerned is a proprietary one. The SBL LFA, by contrast, is no different from a loan, such as might be made by a bank or other financial institution, which would be surprised, he suggests, to find that it had become interested in SBL.

129. Mr Choo Choy submits that the wording is wide enough to embrace a financial interest or engagement. He points out that the loan is part of a trio of arrangements which involved EABL taking a 51% interest in SBL, lending it what is presumably a large sum, and appointing it as its brewer and distributor for EABL products. The loan is given for certain specific purposes, the nature of which is hidden by the redactions. It is to be secured initially by a pledge of shares by the Sellers (identity redacted) and then by mortgages and a debenture, which would give EABL rights in respect of SBL property. Clause 10 of the LFA imposes certain undertakings on the Borrower, ten of which have been completely redacted. The others require the Borrower not to merge (10.8), not to make any substantial change in its business (10.9), nor acquire any company or any shares of a business (10,10); to preserve its assets (10.11), not to create any Security over any of its assets or finance indebtedness or the acquisition of any asset by a sale of its receivables or the application of its funds (10.12), not to dispose of assets save in the ordinary course of business or in exchange for assets of comparable or superior type value and quality (10.13), not to enter into any transaction save on arm's length terms (10.14); not to become a creditor in respect of any financial indebtedness, save for arrangements already in place and Shareholder Loans (10.15); not to give guarantees (10.16), declare any dividend or redeem any of its share capital (10.17); nor incur any further financial indebtedness (10.18); nor to issue any shares (10.19). It also contains positive obligations to maintain insurance (10.20) and preserve the value of intellectual property. (10.21). Under clause 10.5. EABL is bound to comply with all the obligations imposed on it by the SBL SHA.

130. I consider that there is some force in Mr Oliver's submission. The Restraints were professionally drafted over what is said to be many months and formed part of a set of elaborate agreements. They are themselves obviously the product of much thought. It would have been easy to refer to loans or other financial assistance to competing businesses in terms. The restraints are to be construed in their context, but not generously, indeed the reverse. I note, although the cases were not cited to me, that in *Smith v Hancock* [1894] 2 Ch 377, 385 Lindley LJ referred to the case

of *Bird v Lake* 1 H & M 111 where it was held that to help a man to carry on business by lending him money without security was not a breach of a covenant "*not to carry on or be engaged in the business or any matter or thing whatsoever in anywise relating thereto*". Further in *Cory (William) & Sons Ltd v Harrison* [1906] AC 274, 276 Lord Halsbury observed that *"the mere fact of being a creditor of the firm is not being concerned or interested in it*". The fact that the covenant may be broken by EABL acting as agent for a competing business shows that a proprietorial interest is not an essential requirement in every case. But in circumstances where EABL is not acting as an agent and has, under the LFA no ownership interest in the company and no agency role, and has as its "interest" under that agreement the recovery of its loan, the repayment of which is not dependent on any degree of profit, there are difficulties in regarding the LFA as constituting a breach.

131. There seems to me, however, a realistic prospect of the tribunal legitimately coming to a different conclusion on the following basis. The LFA is part of the trio of agreements entered. The loans to be made under it provide funds for specified projects to a company of which EABL is to be the majority owner. The loan is to be secured by pledges of shares in SBL, which would give EABL at least a possessory interest, and by mortgages (which may be of SBL property) and a debenture. Whilst the form of the debenture is unknown, even if it consists only of a floating charge, "*each asset within the scope of the floating charge must be regarded as equitably assigned to the debenture holder by way of charge as soon as it comes into the ownership of the company*": *Halsbury's Laws, Companies* Vol 7 (2) para 1546. The loans are to be made under terms which are highly restrictive of the activities of SBL That would seem to be interest enough in SBL or its business within the meaning of the restraint I confess also to a sense of unease at reaching a decision adverse to the applicants in circumstances where the LFA has been subject to such heavy redaction.

The SBL BDA

132. If the TBL BDA has not come to an end, the implementation of the SBL BDA would be a breach of the provisions of clause 3 of the TBL BDA by which TBL is given the s*ole and exclusive right* during the Term to brew and/or handle the products in the Territory.

133. If it has terminated then, Mr Oliver submits, the Restraints do not preclude the implementation of the SBL BDA which neither involves EABL taking directly nor indirectly any proprietary interest in SBL or acting on SBL's behalf. I do not accept this. The SBL BDA provides for SBL to brew, package, distribute, sell and market EABL's products in return for which EABL is to be paid a royalty of 8% of the Net Sales Value of those products. That seems to me a sufficient pecuniary interest in part of SBL's business to come within the restraint. The agreement provides for a direct interest in the turnover of the business. That a pecuniary interest can come within a covenant not to be interested in a business is apparent from *Smith v Hancock* and *Gophir Diamond Co v Wood* [1902] 1 Ch 950 where Swinfen Eady J said of such a covenant, in that case in an employment contract:

> *"The covenant, fairly construed, prohibits the defendant from being interested, directly or indirectly, in a similar business in the sense that he*

must not have a proprietary or pecuniary interest in the success or failure thereof. If his remuneration in any way depended on the profits or gross returns, he would be interested in the business..."

Clause 4.2.

134. Mr Oliver submits that clause 4.2 of the TBL BDA permits EABL a continuing route to market for its products, even after the agreement has terminated. That clause provides:

"*Notwithstanding clauses 4.5 and 4.6:*

4.2.1 the Company and any of its Affiliates (and, in the case of sub-clauses 4.2.1.2 and 4.2.1.3 subject to [EABL] having given [TBL] at least 3 business days' written notice and consulted with [TBL] during such period).shall be entitled to:

...

4.2.1.2 in the event that any shortfall exists in the ability of the Brewer to meet market demand for such a Product in the Territory, import and sell such Product in order to meet such market demand. Sales by [TBL] and its affiliates in terms of this clause 4.2.1.2 will be made solely and exclusively to [TBL] provided that [TBL] promptly agrees to purchase the quantities required by [EABL] to make up the shortfall at the price and on the terms quoted by [EABL] or its Affiliates, failing which such imports may be sold to such other parties for sale in the Territory as [EABL] or its Affiliate(s) choose(s) and at the price(s) on the terms [EABL] or its Affiliates think[s] fit, provided that those terms are no more favourable to the purchaser than those quoted by [EABL] or its Affiliates to [TBL] ...

4.2.1.3 fulfil any order that the Brewer is unable to fulfil for such Products by the required delivery date from any source as the company shall think fit; and/or

4.2.2 where the targets in relation to distribution of the Product (as set out in the Business Plan) have not been achieved during any Quarter, the Company may appoint additional distributors in place or in addition to the Brewer's own or third party distributors for such period as is reasonably necessary to meet such targets and the Brewer shall sell to such distributors such quantity of such Product as the Company directs on the same terms as the Brewer sells such Products to the existing distributors."

135. Mr Oliver submitted that, if EABL withdrew from the TBL BDA, TBL could not meet the demand because the agreement could not work in its contemplated fashion. In that event EABL could take advantage of clause 4.2 1.2 to import Product, and of clause 4.2.2 to appoint additional distributors, and of clause 4.2.1.3 to appoint another Brewer – because of the power to fulfil any order which TBL is unable to fulfil "*from any source*" . However, it seems to me clear that clause 4.2 is intended to operate only during the currency of the contract.

There are several indicia in the clause to that effect. The bracketed words in clause 4.2.1 require notice to be given to TBL; it is difficult to see why that should be needed if there is no ongoing relationship. Clause 4.2.2 deals with an inability of TBL to meet the demand. It only has that (legal) ability during the term and the clause is addressing a situation where, whilst being entitled and bound to distribute product, it is practically unable to do so. The second sentence of clause 4.2.1.2 makes no sense in the post termination period, when there should be no reason for EABL having to sell to TBL. Clause 4.2.1.3 is dealing with orders that TBL cannot fulfil during the currency of its appointment. The targets referred to in clause 4.4.4 are targets for achievement whilst the agreement is in force; the clause is dealing with the possible appointment of additional distributors because the existing ones have not been able to meet the targets.

136. It does not seem to me that EABL can, consistently with its contention that the agreement has terminated, seek to avail itself of provisions only applicable during its currency, and I do not understand it to seek to do so. Even if it can, on the footing that TBL claims that the TBL BDA has not been terminated, it would be necessary for there to be a shortfall in the ability of TBL to meet the demand and EABL would have first to try and sell through TBL. It does not seem to me that the existence of these provisions should preclude the court from granting the relief sought.

Restraint of Trade

137. EBAL contends that the restrictions in clause 4.6 are in unreasonable restraint of trade insofar as they operate after termination, particularly a termination for fundamental breach. That is, it submits, particularly so if clause 4.8 operates in the manner suggested by TBL.

138. TBL's contention is that the TBL BDA will not terminate until July 2010. It seems to me that until that time no question arises of the unreasonableness of the Restraints.TBL could reasonably expect that, whilst it was acting as sole and exclusive Brewer for EABL and devoting itself to promoting EABL's products EABL would not acquire an interest in another brewer and appoint it to distribute its products as well.

139. In relation to the post termination period the position is potentially different. However, I am not persuaded that, at an interlocutory stage, I should regard the restraints as so unreasonable that any interlocutory relief based on them should be refused. They were the subject of extensive negotiation between two sizeable and sophisticated commercial concerns, each advised by well known lawyers. The parties took care to express their agreement as to the reasonableness of the restraints and the necessity for having them. The matching arrangements in relation to Tanzania and Kenya provided sizeable advantages to both sides, and included the passing over of confidential information and the potential loss of goodwill in relation to TBL's own products arising from its having agreed to act as brewer and distributor of EABL's products. Such interests could reasonably be said to deserve protection.

140. In addition the parties agreed by the dispute resolution provisions to:

> *"continue to perform their respective obligations under this agreement to the extent possible notwithstanding commencement of any proceedings in accordance with the rules."*

141. In *Transammonia AG v Kafka* [1999] ECC 176, the relevant contract was said to be unenforceable on the ground that it was in restraint of trade. Longmore, J, as he then was, regarded a similar provision to that set out above as a strong element in the balancing exercise which a court has to perform. I respectfully agree.

How long might the Restraints last?

142. It is material to consider over what period any injunction, whether made by the court or the arbitral tribunal, could properly last.

143. If TBL was in fundamental breach of the TBL BDA and EABL validly terminated it on that account (because no notice requiring remediation was necessary), the BDA would have terminated on 17th July. EABL, as a result of its waiver of the same date, would no longer be entitled to the minority rights so that the 180 day period prescribed by clause 4.6.1 would expire on about January 17th 2010. EABL would then be freed from the Restraints. The same would follow if there was, on 17th July, an accepted repudiatory breach.

144. If, however, there was no fundamental breach, or EABL was not entitled to terminate on account of it, and if there was no accepted repudiatory breach either, then the TBL BDA will not come to an end until July 2010. The Restraints will not cease until 180 days after that because the waiver under clause 17 of the SHA will not have become effective until the date upon which the termination of the BDA became effective i.e. July 2010. The period of 180 days does not begin until then. So the Restraints will last until January 2011.

Adequacy of damages

For the applicants

145. The applicants claim that it would not be just for them to be confined to a remedy in damages. If EABL is allowed to continue with the implementation of the SBL BDA the effect on TBL will be twofold. It will lose the profits which it would otherwise have made on the sale of (a) EABL's products; and (b) its own products. The combination of EABL and SBL will mean that SBL has increased backing and will strengthen the competition that TBL faces in the market. It will increase the range of beers offered by SBL and the popularity of both SBL and EABL products, to the detriment of TBL's brands. The calculation of TBL's damages will be problematic, particularly under the second head, and the result is likely to be that it suffers losses for which it is not compensated. SBL and TBL will be able to advance their plans to compete more than a year in advance. Even if TBL's loss is to be measured by SBL's sales of EABL products alone there are bound to be arguments about whether TBL would have done as well as SBL has done. Further, if an injunction is refused now, there will have been an alteration in the status quo such as to make it much more difficulty to obtain effective relief from the arbitration tribunal, whereas, if an injunction is granted, EABL will be in no worse position before the tribunal than it is now.

146. EABL contends that there is no real difficulty in assessing any loss of sales of EABL's products in the period of less than a year, at most, remaining under the TBL BDA. That can be done either by reference to historical data as to sales, and trends in sales, of EABL's product whilst in TBL's hands (supplemented by data as to the developments in the market over the relevant period) or by reference to sales actually made by SBL of EABL's Products over that period. The agreement contains no provision for any payment to TBL of a sum representing or related to any good will built up in respect of the sale of EABL products. So TBL can have no claim on that score. Clause 18.9 expressly provides:

> *"No sum will in any circumstances be paid by the terminating party or parties in compensation for their termination of this Agreement or the Registered User Agreement for loss of rights, loss of goodwill or a similar loss."*

TBL submits that the existence of that clause, which denies it any rights in respect of the trade in EABL products that it has built up over the years sounds in favour of an injunction. The goodwill built up in relation to EABL products will be accruing to their rival, SBL and it will enure to the benefit of all of SBL's products as well

147. EABL submits that the evidence is scant as to the likely effect on the sales of TBL's own products of SBL becoming the brewer/distributor for EABL's products. It is not self-evident that sales of TBL's products will reduce because SBL will be selling both SBL and EABL products. It would also be somewhat paradoxical to grant any relief on the basis that by combining with SBL EABL would increase the market share of its products to the detriment of sales of TBL's own products. If the contract continued TBL would be obliged to use its best endeavours to promote EABL's products. The assumption should be that in those circumstances TBL would have sold just as much EABL product as SBL sells. TBL cannot claim relief in respect of sales that should have been lost to it anyway.

148. TBL also relies on the evidence of Mr Goetzsche that future sales of EABL's products have been relied upon by TBL for the purpose of business plans, investment decisions (including expanding brewing facilities, treatment plants, desalination facilities et) marketing plans for EABL brands as well as sales forecasts, including in the formulation of the Business Plan for FY10 and the preparation of the Applicants' published accounts, all of which were made prior to EABL's attempt to terminate the BDA on 17 July 2009[5]. It would, it is said, be extremely difficult to quantify the amount of such reliance loss.

For EABL

149. It is also necessary to consider the adequacy of damages as compensation if it should turn out that EABL had wrongly been forced to continue with the TBL BDA. Obviously if the effect of the injunction was that EABL ceased to market beer in Tanzania, being unprepared to have TBL continue to brew and distribute it, EABL's damage would be very severe and difficult to quantify. I do not, however, regard it as appropriate to proceed on that hypothesis, since it will be

[5] Goetzsche 2 paras. 128-129 **[1/14]**

open to EABL to avoid a potentially catastrophic loss by continuing with the contract.

150. EABL contends that it would be difficult to quantify EABL's damages in that event. Such an inquiry would be likely to be made in circumstances in which EABL would be likely to allege that the sales of its products would have been improved by SBL. It would then be a question of trying to assess how much better off EABL would have been if its products had been made and distributed by SBL (who would have made no sales of EABL products at all and whose "sales" could, therefore, only be hypothetical) instead of TBL. TBL submits that there is no reason to suppose that SBL would be any more successful at brewing and distributing EABL's products than it is. Even if SBL has more ambitious targets for EABL brands than TBL (which is unknown but may appear from the redacted parts of the SBL – EABL contracts) it should be straightforward to calculate EABL's damages by reference to the difference between EABL's actual performance during the period and SBL's target levels.

Confidential information

151. TBL claims that it is at risk of suffering loss from the witting or unwitting use of information confidential to it. Under clause 21.2 of the TBL BDA each of the parties agreed in relation to the confidential information of each company forming part of the group of companies of which the other formed part that for as long as the BDA remained in force and effect it would only use that confidential information for the purpose of the BDA and keep such information confidential and disclose it only to those who needed to know it and who were aware of the obligations of confidence under the BDA and had been directed to keep the information confidential. Confidential information was widely defined (an indication, TBL submits of the recognition by the parties of the extent to which they would each learn confidential information of the other group) and clause 21 contained further provision for keeping such information safe.

152. Recital D of the TBL BDA provides that EABL and TBL:

> "*acknowledge that each of them has accepted the restrictions set out in clause 4 because they are necessary to produce the benefits to be achieved overall from the arrangements referred to in Recital B*"

namely, that EABL had decided that:

> "*the most efficient way to continue production and distribution of the Products in the Territory is to terminate the existing arrangements with Kibo [Breweries Ltd] and appoint …[TBL] to produce, distribute and sell the Products in the Territory on the terms and conditions of …[the BDA]*".

153. Paragraphs 18.2 and 18.3 of the TBL SHA provided:

> *"18.2 It is recorded that, by reason of its association and continued association with TBL, EABL and other companies in the Diageo group will acquire considerable knowledge and know-how relating to the group and its businesses.*

> *18.3 EABL acknowledges that, if the Diageo group is not restricted from competing with the TBL group as provided for herein, the TBL group will potentially suffer considerable economic prejudice, including loss of customer goodwill and, accordingly, [Sabma] will suffer considerable economic prejudice. Accordingly, it is essential in order to protect the interests of the TBL group and [Sabma] that EABL agrees to a restraint of trade undertaking in favour of TBL and [Sabma] to ensure that the Diageo group is precluded from carrying on certain activities which would be harmful to the business of the TBL group and [Sabma]."*

154. EABL has, TBL claims, had access during the seven years that the BDA has lasted to a substantial body of confidential information via the EABL embedded employees, the provision of information under the terms of the TBL BDA and SHA and the EABL nominee director on the TBL board. There is a clear risk of misuse of TBL's confidential information, which would be hard to prove and in respect of which the loss would be difficult to quantify. The Restraints which the parties freely entered into should be enforced.

155. TBL cites the following passages from Mr Lyaruu's witness statement as showing the extent of the confidential information to which EABL, at the very least, has access:

> "*a TBL budget for FY10 … [containing] details of the sales volumes, advertising and promotion ("A&P") spend and capital expenditure plans for the EABL and TBL brands for FY10 …"*
>
> *"the daily stock position and sales volumes of all [i.e. EABL and TBL] brands"*
>
> *"the A&P spend and budget for all brands"*
>
> *The "the annual meeting in around February where the whole TBL marketing team meet to discuss the brand promotions for the coming 12 months so that these are managed over the course of the year without any conflict between the brands"*
>
> *"we know the terms of contracts with suppliers of marketing and promotional activities because we tend to use those same suppliers for EABL brands"*
>
> *"We are able to walk through the [TBL] plant as it is a thoroughfare to access the various TBL offices on the same site"*
>
> *"We do know the identity of distributors … as TBL uses these distributors for EABL's products"*
>
> *"I do sit in an open plan office alongside Ms Munema [another EABL embedded employee] … in a small team of*

> *seven people (which includes us and five TBL marketing employees)"*
>
> *"we do know the names of most of the sales team and their targets"*
>
> *"we are able to assess for ourselves the performance of each of the brands [including TBL's brands]"*
>
> *"knowledge of future plans is derived from any sales and A&P and other forecasts that are made available to us via the TBL intranet, and these tend only to be for the coming financial year"*

156. The confidential information learnt over a seven year period is, TBL submits, likely to have been disseminated within EABL. In those circumstances, TBL submits, enforcement of the negative covenants is needed because loss would be extremely difficult to rove and quantify.

157. TBL also prays in aid the following observations of Lord Denning MR, as quoted in *Dyson Technology Ltd v. Strutt* [2005] EWHC 2814 at para. 60[6], elaborate on this aspect:-

> *"It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade but experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practicable solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period. …"*

The inadequacy of a confidentiality undertaking is illustrated, TBL submits, by the fact that swathes of the SBL documentation has been and remains redacted.

Loss of Trust and Confidence?

158. EABL accepts that TBL's undertaking in damages would be an adequate guarantee, if coupled with the guarantee from SABMiller Plc proffered by TBL. But it contends that, if an injunction is granted which prevents it from marketing its products through SBL the practical effect will be that it either has to continue to work with TBL in a relationship which depends on trust, when the relationship between them has irretrievably broken down, or stay out of the Tanzanian market completely. EABL will be locked in to doing business through a distributor in

6 The quotation is from Lord Denning MR's judgment in *Littlewoods Organisation Limited v. Harris* [1977] 1 W.L.R. 1472 at 1479.

whom it has lost all confidence and to the very considerable risk of catastrophic loss in respect of Guinness, whose sales have plummeted, and Tusker, where the position is also bad.

159. TBL submits that a court should not be dissuaded from granting injunctive relief which is likely to have the effect of causing EABL to continue to comply with the TBL BDA by reason of EABL's invocation of the mantra of trust and confidence. Trust of some kind is involved in almost every contract. The cases, it submits, in which the courts have declined to grant injunctive relief which may or will have the effect of making one party adhere to a contract from which he seeks to escape are where trust and confidence is the whole basis of the relationship as with a contract for the supply of personal services or one of agency or other fiduciary responsibility. Even then the court may decline to force the lady to sing but preclude her from performing elsewhere: *Lumley v Wagner* (1852) 1 De G.M & G 604.

160. Further the court cannot and should not assume that EABL's complaints about TBL's past performance are justified. One of the grounds upon which the Court of Appeal declined to set aside the injunction in *Regent Hotels (UK) Ltd v Pageguide Ltd* CA (Times 13 May 1985) was that the supposed breakdown in trust and confidence was in issue.

161. In *Lauritzencool* Cooke J made orders restraining the owners of two reefer vessels from withdrawing them from the service of the charterers to whom they had been chartered under a pooling arrangement. He held that an order restraining the defendant from employing the vessel in a manner inconsistent with the time charter did not in itself compel performance of the charter even though, in practice, if the defendant was restrained from other gainful employment for the vessel, it was likely that performance under the charter would continue. An order preventing the defendant from taking any steps preventing the performance of the time charter would be impermissible. But orders preventing them from employing the vessels in a manner inconsistent with the charter or fixing them with any third party for employment in respect of the remaining period of charters would be in accordance with the authorities. He also held that, although the charterers owed implied fiduciary duties to account to the owners in respect of the pool, the services in question were not "personal" in nature.

162. In the Court of Appeal Mance LJ held that there was no general principle that injunctive relief would not be given in respect of a contract for services if the practical effect would be to compel performance; that, even in relation to contracts for services which were more personal in nature than the present case, there was no inflexible principle precluding negative injunctive relief which prevented activity outside the contract contrary to its terms; and that the time charters in suit were not the type of contract for services involving very special personal skills and talent whose continued display was essential to the psychological, material, or physical, well being of the servant (to use the phraseology of Nourse, LJ, in *Warren v Mendy* [1989] 1 WLR 853] nor were they similar to other cases where the services were more personal in nature. Rather the case concerned commercial arrangements made between independent companies involving the employment of no named individuals and the services were not personal in nature, notwithstanding the fiduciary obligations owed by one commercial entity to

another. In the event of the granting of negative injunctive relief the parties could be expected to make their relationship work in their own interests.

163. In *Vertex Data Sciences Ltd v Powergen Retail Ltd* [2006] 2 Lloyd's Rep 591 Tomlinson J declined to restrain Powergen from acting on a notice of termination of a contract under which Vertex carried out a very wide range of customer service activities (opening and closing accounts, billing, collecting revenue, managing enquiries and complaints and other back office and administrative services) for Powergen under a Master Service Agreement. In that case the relationship between the two parties required "*close and continuing cooperation at an operational level on a daily basis*". He distinguished *Lauritzencoo*l on the footing that the relationship of time charterer and owner was a very impersonal one. It was not seriously in doubt that Powergen had lost confidence in Vertex, including at operational level. The agreement required extensive mutual cooperation if it was to work and there was scope for genuine disagreement as to what was the nature of the cooperation required from Powergen to enable Vertex properly to perform its obligations. In those circumstances it was inappropriate to grant the injunction sought. In addition, the terms of the contract were insufficiently precise to indicate to Powergen what was required of it if it was not to prevent or hinder Vertex from performing its functions.

164. In *Nissan (UK) Ltd v Nissan Motor Company Ltd*, CA, 31st July 1991 the plaintiff had been appointed the sole and exclusive distributor of Nissan cars. It was said to have committed repudiatory breaches of the agreement. The Court of Appeal upheld the refusal by the Vice-Chancellor of a mandatory injunction on the ground that the relationship between the parties involved continuous almost daily contact and that the relationship had broken down beyond repair, the top management of the parties even resorting to personal abuse at a high level. Bingham LJ (as he then was) said:

> *"I can see no justification for obliging NMC to supply its important United Kingdom market through a distributor who it believes, rightly or wrongly, to have worked against its interests instead of for them."*

165. In neither of the two previous cases was there an express negative covenant. Nor was there any provision such as clause 23.7. (See para 26 above).

166. In the light of these authorities it is necessary to consider the extent to which the performance of the TBL BDA either involves an element of personal service or is dependent upon the subsistence of a relationship of trust and confidence.

167. Under the TBL BDA the burden of performance rests principally on TBL. Under clause 3 it is to brew and /or handle the Products in the Territory. Under clause 5 it is required to do so in accordance with the Specifications, in conformity with applicable technical manuals and with directions given by EABL as to minimum acceptable quality standards. It has to act in full compliance with all applicable laws and regulations and under the supervision of a qualified brewer of a standard of training and ability acceptable to EABL. It has to brew in conformity with other requirements in respect of the Products regarding Trade Marks. It has to inform EABL if the Specifications or other EABL requirements in relation to the Products do not, or do not any longer, comply with the applicable laws and regulations and discuss the changes necessary to ensure that they do. TBL has a

number of obligations as to the use of ingredients, raw materials and packaging in accordance with the Specifications; as to annual production over regular intervals; production capacity to achieve Overall Market Share, and the provision of systems with the necessary capacity and performance; together with adequately trained staff.

168. Clause 6 provides that EABL may, but is not obliged to, locate a manager in TBL's office " *to liaise with [TBL] on the brewing and/or handling of the Products and to ensure that Products are being produced in accordance with the … Manuals and directions given by [EABL] to [TBL] from time to time*".. . In fact three members of EABL staff were seconded to TBL, including a country manager (Mr Lyaruu and, from October 2008 to January 2009, Mr Kilonso). Under clause 8 EABL and its authorised representatives had a right, on reasonable notice, to enter, inspect and review TBL's premises, processes, ingredients, materials and equipment. TBL was to send EABL samples of ingredients and raw materials and of bottles produced and of packaging in order to enable EABL to monitor TBL's compliance with the agreement. It was also to provide reports on brewing, fermentation and storage as required by EABL. There are provisions for record keeping and reporting of stocks, sales forecasts, production, marketing and advertising expenditure, net sales value of products sold, reconciliations of differences between yearly figures and earlier monthly or quarterly ones, and for reports on sales and promotional activities. Clause 12 provides for the agreement of Business Plans for each year. Under clause 13 EABL was to receive a royalty of 5% of the Net Sales Value of the Products sold in the Territory during the Term. By clause 16 EABL granted to TBL a non-exclusive license for the use of the Trade Marks and other Intellectual Property in connection with the Products. TBL was to package and label the Products only in exact conformity with the directions of EABL

169. The case thus differs from the facts considered in previous authorities. TBL's function is to carry on the business of brewing and distribution in accordance with contractually defined criteria, to achieve certain results, and to account for the agreed royalty. In so doing it can operate to a considerable degree on its own in similar manner to the owners in *Lauritzencool* who, subject to the orders of the charterers, were in control of their vessels, although the relationship of owner to time charterer is more impersonal. Unlike the position in the *Nissan* case TBL is both manufacturer and distributor. The brewing and distribution of EABL's beer does not call for the same degree of close cooperation at an operating level on a daily basis as in *Vertex*. In para 145 of his witness statement Mr Mahinda referred to the fact that :

> "*the other members of the EABL management team are remote from the operations and our involvement is more passive than is normal in a standard supply and purchase agreement*".

170. There is, however, more to the relationship than the production of beer to specified standards and in required amounts by TBL and the payment of royalty to EABL. In his witness statement Mr Blazquez expresses matters thus:

> "*13. The successful operation of the BDA relies on good co-operation and a high level of trust between the parties. This is because one party has*

granted the other control over extremely valuable brands that it has built up a considerable time and cost over many years. The recipient takes control over the price, the sales, manufacture, distribution, marketing and advertising and all of these things combined together being the "brand equity" of the products.

14 Although this relationship can be regulated through contractual rights and obligations it only works properly when the parties work together and co-operate over all of these factors. The owner of a brand can ask for regular information about how the other party is operating and how it is managing the brand, but the relationship will only work properly if both parties are committed to working together to promote the products. As soon as this co-operation and trust is lost then the relationship is doomed to fail. For example:

(a) the owner of the brand will specify the quality and specification of raw materials, ingredients and formula to be used to manufacture the products but relies on the other party to source most of the ingredients and to brew the product to the correct standard and quality and in the correct quantities;

(b) the price of the brand must be agreed between the parties based on the knowledge of the brand and its strategic proposition to consumers by one party and the knowledge of the local market and positioning within a portfolio of other brands by the other. Unless the parties co-operate to agree the correct price strategy and, as a result, the appropriate positioning as regards consumers, the sales and the brand equity of a product will be damaged

(c) the marketing and advertising must be agreed between the parties. The owner of the brand will provide suggestions and recommendations on how the product should be marketed, but relies on the co-operation of the other party to implement marketing campaigns and promotion;

(d) the owner of the brand will rely on the other party's sales force to go out into the market and sell the product. Again this relies on co-operation and trust between the parties about how best to sell a particular product, what are its strengths and characteristics and what does the local market and consumers look for;

(e) an effective distribution network is key to the sales & success of the product. The owner of the brand relies on the other party to have in place an effective distribution network and use this to distribute the products widely within efficient timescales so as to ensure quality and availability are not compromised;

(f) most importantly, the brand owner delegating the brewing and distribution of his products to a competitor must have faith that the brewer will act impartially and promote the brand owners

> *products as if it were his own, even if those of the brand owner prove to be more popular than the borrowers and retained brands. The natural tendency will be for the brewer to be tempted to promote his own products more than those he is merely licensed to produce because he will make more money from the sale of those than through the sale of those he brews for others who share in the profit. If the relationship of trust and confidence breaks down such that the brewer cannot be relied on to resist that temptation the agreement become unworkable."*

171. This seems to me a fair summary of the BDA relationship. It is material, however, to notice that the reliance referred to in several of the sub-paragraphs is reliance that TBL will perform its contract (e.g. to brew the product correctly, to implement marketing campaigns, to sell and distribute the product effectively and not to promote its own products at the expense of EABL's), rather than the particular trust and confidence which a principal places in his agent or a performer in his manager. The BDA is not a contract for the provision of the personal services of identified individuals, nor does it require a high degree of close cooperation for its day to day working. The contract specifies standards to be met and targets to be achieved. The manager who may be located in TBL's office is to provide advice and assistance but nothing he or any other seconded employees says is to absolve TBL from its liability to comply in every respect with the terms of the Agreement: clause 6.2. The Business Plan is to be agreed between the parties; but there are default provisions if it is not.

Conclusions

172. I seek now to bring together the several considerations which bear upon the justice or otherwise of granting the applicants any of the relief sought. I have left doing so until last because this is a case which, perhaps more than most, requires the balancing of a number of factors in order to determine what is just.

173. There is a serious question as to whether EABL was entitled to terminate the TBL BDA. Success on the part of EABL on any one of the three asserted bases for termination would mean that the BDA terminated on July 17th 2009. The Restraints would then last until January 2010. But TBL has a strong case that the BDA will not terminate until July 2010 in which case the Restraints would last until January 2011.

The SBL SPA and SBL LFA

174. I regard it as just to restrain EABL from implementing the SBL SPA until January 2011 or further order of the court or the arbitral tribunal in the meantime, regardless of what order is made in relation to the other two agreements. Implementation of the SBL SPA would constitute a breach of clause 4.6.2.3 of the TBL BDA and clause 18.4.2.3 of the TBL SHA. These are negative covenants freely entered into by EABL. Restraining EABL from implementing the SBL SPA would give effect to the bargain made without any prejudice to EABL that would justify refusal of relief. EABL itself submitted that the relief was otiose because of the condition precedent. An injunction will secure that that contention is accurate. Similar considerations (save for the preceding sentence) apply to the SBL LFA.

175. Mr Oliver submitted that any injunction was unnecessary having regard to the condition precedent contained in clause 4.1 (c) of the SBL (see para 39 38 above). I do not accept this. Firstly, if no injunction is granted, there is nothing to stop EABL from contending that the condition precedent has been fulfilled on the ground that the contractual relationships between the parties have, indeed, been terminated (that being EABL's case). In any event the parties to the SBL SHA can waive the condition precedent.

The SBL BDA

176. So far as the SBL BDA is concerned, the position is as follows. If the TBL BDA is to be regarded as in force entry into and implementation of the SBL BDA conflicts with clause 3 of the TBL BDA. It would be a breach of clause 3 for such implementation to occur before July 2010. Thereafter it would be a breach of the Restraints (assuming them to be valid) for the implementation to occur before January 2011. If the TBL BDA was validly terminated in July 2009 implementation cannot occur, consistently with the Restraints, until January 2010.

177. No injunction should be granted which, by its terms, requires the performance by EABL of the TBL BDA. But that does not necessarily mean that the Court cannot preclude EABL from proceeding with the SBL BDA.

178. In my judgment damages would not be an adequate remedy for TBL.

179. Firstly it seems to me that the loss which it will suffer if EABL is allowed to proceed with the SBL BDA (together with the SBL SPA and the SBL LFA) is not limited to the royalties that it would have earned on the sales of EABL products that would have occurred if the TBL BDA had not been terminated. It is tolerably clear that the agreements which EABL and SBL seek to implement are designed to merge the interests of SBL and EABL, to enhance the position of SBL, of which EABL is to be the majority owner, and which is to be financed by the loans provided for by the SBL LFA, and to create a powerful new competitive force. The new enhanced SBL will no doubt seek, with its increased range of products and increased finance, to make a greater impact on the market than SBL has previously been able to do. It is inherently likely that the new SBL will succeed in attracting custom to the detriment of sales of TBL's products. The extent to which it does so will be very difficult to calculate but is likely to be real. If TBL/Sabma's contentions are right the new SBL will be able to start up 17 months earlier than the TBL BDA and SHA contemplate.

180. I note in this connection the evidence of Mr Goetzsch:

> *"we will lose all the custom and goodwill that we have successfully generated, at considerable expense to TBL, for EABL's brands over the last seven years. Such custom and goodwill will immediately accrue to our rival, SBL, who will immediately begin selling EABL Products. This will result in a surge in the popularity and goodwill associated with SBL's portfolio. Inevitably it will be very difficult to quantify the*

value and effect of such a wrongful transfer of custom and goodwill associated with TBL to SBL.”[7]

181. Even in respect of the loss of royalties from the sale of EABL products there will be difficulty in calculating damages. Insofar as TBL seeks to base its claim on the sales that SBL makes of EABL products there are likely to be arguments about whether TBL would have done as well as SBL. Insofar as reliance is placed on historic figures there will no doubt be arguments as to the extent to which historical figures are a reliable guide.

182. I do not attach much significance to difficulties that TBL may have in establishing reliance losses. TBL cannot both claim lost royalties and expenditure which it would have made in reliance on receipt of such royalties. It is not clear to me exactly what losses are contemplated under this head.

183. Secondly, the agreements between the parties explicitly recognise that EABL will be in receipt of information confidential to TBL over an extended period: see clause 21 of the TBL BDA and clause 18.2 of the TBL SHA; see. also, para 52 of Mr Goetzscher’s first witness statement. . Those who have received such information are not likely to be limited to the seconded employees and will include EABL’s director on the TBL board. Such information is likely to have been disseminated within EABL. The difficulties of establishing misuse of confidential information and the damage flowing therefrom is well known. That does not mean that contractual undertaking are invariably insufficient and that injunctive relief should usually be ordered where confidential information has been provided. But, in this case, it seems to me that TBL would not be adequately protected if it was left to rely on clause 21 of the TBL BDA.

184. In this connection I note that EABL has been assiduous in redacting substantial parts of the offending agreements. Whilst I cannot know and should not guess what exactly has been redacted, it extends to “*commercially confidential information as to the terms and basis on which [EABL] intends to operate with SBL in Tanzania*”: see Addleshaw Goddard’s letter of 21st July 2009. The fact that such redactions have been made seems to me illustrative of the significance and importance of confidentiality in this context, as also of the fact that whatever is planned for the new SBL is likely detrimentally to affect TBL.

185. I also regard it as relevant to take into account the fact that the parties have expressly acknowledged the need for the Restraints: see paras 152-3 above. Whilst that cannot be conclusive, it is an important factor in determining, on an interim basis, what is just.

186. I recognise that if an injunction is granted, and it turns out that it should not have been, there may be difficulties in EABL establishing how much better off it would have been if its products had been distributed by SBL instead of TBL. Such a difference would not necessarily be established by looking at what SBL’s plans were and seeing how far TBL’s activities fell short of achieving such a result. It is, not, however, clear that SBL would be able to do better than TBL and, if it can be established that they would, it ought not to be that difficult to establish the extent.

7 Goetzsche 2 para. 130 [1/14]

At best this point shows that to some extent damages are inadequate as a remedy on both sides.

187. It is also necessary to take into account the effect on EABL of preventing it from implementing the SBL BDA. It will in all probability have no choice but to have its products made and distributed by TBL. That will compel it to have its beer brewed and distributed through what may be, to use Bingham LJ's words:

> "*a distributor who it believes, rightly or wrongly, to have worked against its interests instead of for them.*"

188. TBL submits that events since 17th July 2009 have provided some further indication of the breakdown in the relationship between the parties. On 17th July Mr Lyaruu reported to Ms Ithau that TBL Sales and Distribution had been told that there were to be no more sales of Tusker until they were told otherwise. Mr Goetzsche says that this is untrue. It was, he says, made "*abundantly clear*" to everyone that business was to continue as usual.

189. On 20th July Mr Julius Kawacha of TBL reported to Diageo Ireland that TBL had stopped producing Malta Guinness and Guinness Stout and requested the suspension of all orders for the ingredients. Mr Goetzsche says that this was a mistake on the part of Mr Kawacha, a clerk, and the planning manager, in circumstances where there was over US 4 million of Guinness concentrate in stock. It was soon rectified by senior management.

190. On the same day, according to Mr Lyaruu TBL barred access by EABL's employees to the TBL intranet, to which they had previously had a certain level of permitted access. This precluded them from obtaining information to which EABL was entitled under clause 9 of the TBL BDA as to the daily stock position and sales volumes of all brands as well as the advertising and promotion spend. Mr Goeztsche says that this was because an upgrade was being performed affecting everyone although Mr Lyaruu's evidence is that the problem did not affect other employees.

191. According to the statement of Mr Lyaruu, on 22nd July 2009, as he was informed by an unidentified TBL Sales Representative. TBL employees were told that TBL would no longer be brewing Tusker (this is said by Mr Goetzsche to be *"entirely false*"); that TBL should continue to sell whatever stock they have available but only in small quantities and that the "Fridge Policy" should continue to be implemented. This was a policy of positioning Tusker and Guinness on the lower shelves of coolers at outlets.

192. Mr Chitgopkar, the director of sales and marketing at SBL, TBL's main competitor, has produced a statement exhibiting letters from retailers within Tanzania complaining about ongoing shortages of Tusker and absence of promotion of Tusker. TBL says that the authors of these statements claim not to have made them, nor to have agreed with their contents, or to have been bribed by SBL with free cases of Serengeti lager. In fact for the period April 2008 to June 2009 96.6% of EABL's forecast sales were produced.

193. Mr Bowman's evidence is that TBL had not stopped selling any of EABL's products and has not informed their employees to do any such thing but had

instructed them to treat EABL brands as a core part of TBL's portfolio; and that a system had been or was being put in place to allow EABL staff at TBL full access to the information they needed. The suspension of orders for ingredients was a reaction to EABL's purported termination of the TBL BDA.

194. It seems to me inherently likely that the news that EABL had purportedly terminated the TBL BDA on no notice would have impelled TBL personnel, in the immediate aftermath, to proceed on the assumption that the agreement was no longer binding. What is said to have happened has to be looked at in that context. Nor is it surprising that faced by the evidence from Mr Chitgopkar of SBL TBL took steps to examine its basis and validity.

195. That trust and confidence has irretrievably broken down does not seem to me to be something which is clearly established rather than something that is seriously in issue. More importantly I do not regard the contract in this case as requiring that degree of continual cooperation between the parties as to make it inappropriate to grant the relief sought in the light of what is said to be the relationship between the parties. It seems to me that, if relief is granted, the parties can be expected to make the contract work for its residual period in their own interests. Mr Oliver prayed in aid the shortness of the period of restriction left as a factor against granting relief. But that seems to me to cut both ways. The shorter the period of restraint the less prejudicial may be its consequences. The restraints are said by the applicants to last until January 2011, a period which cannot be dismissed as either negligible or so long as to make any restriction oppressive.

196. The prospect that the parties can be expected to make the contract work is enhanced by the fact that Mr Mahinda, the former Managing Director of EABL, left EABL on 1st July 2009 and has been replaced by someone how had no involvement in the events that will feature the arbitration. TBL will have every incentive to maximise the sales of EABL's products during the period of any injunction in order to minimise the risk of liability under the cross undertakings in damages, and to avoid liability to pay liquidated damages under BDA 12.6.2 and 12.7.

197. In this respect the words of Sachs LJ in *Evans Marshall & Co. v. Bertola S.A.* [1973] 1 W.L.R. 349, at 379 E-F seem to me pertinent:
"*Next I turn to the weight to be given to the nature of the relations between the parties which the judge likened to that of a joint venture where confidence and co-operation between the parties is required. I am not at all sure that the analogy is quite correct. This is a commercial agreement between trading companies that can be implemented to the profit of both parties, if each conforms with its express and implied terms. As in a great many commercial contracts consultation between the parties as to implementation is desirable: but that does not necessarily turn them into joint ventures. But in any event, the fact that some degree of mutual co-operation or confidence is needed does not preclude the court from granting negative injunctions designed to encourage the party in breach to perform his part.*

198. There are three further considerations of relevance. Firstly by clauses 23.7 of the TBL BDA and 19.7 of the TBL SHA the parties agreed to continue to work together pending the resolution of any disputes. That seems to me, as it did to

Longmore J in *Transammonia AG v Kafka* to be a powerful factor in favour of granting relief. .

199. Secondly, it seems to me appropriate to preserve the status quo

200. Thirdly, I take into account that the parties have agreed to have their disputes determined by arbitration. I do not regard that as a reason why the court should make an order if it would not have done so in the absence of an arbitration clause. But a case such as this is, in my view, one in which it is appropriate to grant interim relief on the footing that there should be a speedy determination, at least of the issues of liability. If there were no arbitration clause that would involve ordering a speedy trial. An ICC arbitral tribunal should be able, with the same and possibly greater facility than the court, to arrange for a speedy hearing. In view of the volume of evidence already produced the parties are well on the way so far as preparation for such a hearing is concerned. The appropriate course seems to me to grant interim relief which is subject to termination upon a further order of the arbitral tribunal. That will have the advantage that any further question as to the continuance of relief can come before the very tribunal which is to determine the merits; and should mean that the interim relief I am about to be order is not, in effect, final.

201. In short, in my judgment the greater risk of potentially irremediable injustice lies in refusing relief.

202. The order that I propose to make (subject to any further observations of Counsel as to its form) is an order restraining EBAL until further order of the arbitral tribunal, or of the court, or until 17th January 2011, whichever shall first occur, from any further implementation of (a) the SBL SPA; (b) the SBL BDA and (c) the SBL LFA and any related transaction by which advances made or to be made pursuant the latter are to be secured. That order should be upon the applicants and SABMiller Plc giving the usual undertaking in damages, and upon the applicants undertaking to apply to the tribunal as soon as reasonably possible for directions. I do not believe it to be appropriate for the latter undertaking to be more specific at this stage. My intention is that the arbitral tribunal should be invited to make appropriate directions for a speedy resolution of such of the issues as it is necessary finally to decide in order to determine whether or not the applicants are entitled to permanent relief; not that it should be invited to have a re-run of the current application. The order is to provide that it may be terminated by further order of the court so as to cater for the unlikely possibility that the arbitral tribunal is unable or refuses to act in the manner that I contemplate.

203. It will be seen that I do not propose to make an order that EABL must not seek to treat the TBL BDA as terminated since that appears to me to cross the line between making an order which may have the practical effect that EABL continues to perform the TBL BDA and ordering that it should.

The put option

204. I decline to make an order prohibiting EABL from exercising the Put option. It is debatable whether or not the right is presently exercisable. If it is not, any purported exercise of the option will be invalid. I cannot discern any damage which TBL will suffer on account of any purported exercise of the option that

turns out to be invalid. The transfer required by the exercise of the option cannot take place until the price has been agreed or determined, and possibly not even then. EABL will not, in practice, be able to secure payment of the price from TBL until the validity of its exercise of the option has been determined. There is time meanwhile for the arbitration tribunal to determine whether the option can be exercised before agreement or determination of the price and whether the TBL BDA has been validly terminated.