Findings from the Tobacco Industry's legal challenge to Standardised ('Plain') Packaging Regulations in the U.K.

In March 2015, the United Kingdom (UK) adopted the Standardised Packaging of Tobacco Products Regulations 2015 (the Regulations)[1], becoming the second country in the world, after Australia, to fully adopt plain packaging laws. All four multinational tobacco corporations - British American Tobacco, Philip Morris Brands, Imperial Tobacco and Japan Tobacco International – quickly commenced legal challenges in the High Court seeking to overturn the Regulations. These challenges were heard in December 2015 and the presiding judge, Mr Justice Green, gave his ruling[2] on May 19, 2016, the day before the Regulations came into force.

There were 17 grounds of legal challenge but for this document, these can be summarized into four main issues. The tobacco companies claimed that the Regulations:

1. were adopted without due process having been followed;
2. expropriated or deprived the tobacco companies of the property in their trademarks and so should be compensated;
3. were incompatible with EU law including trade rules and the EU Community Trade Mark Regulation; and
4. were not allowed under the EU Tobacco Products Directive.

Many of these grounds involved an analysis of the tobacco companies' position that the Regulations were disproportionate and unnecessary because the evidence did not support that they would be effective to meet the public health objectives.

THE COURT'S FINDINGS

Mr Justice Green gave a 1000 paragraph long judgment dismissing all the grounds of claim. In doing so he gave particular attention to issues of international relevance including – the importance of the WHO Framework Convention on Tobacco Control (FCTC); the public health justification for standardized or plain packaging laws; the issue of whether there is a right to use trademarks; and a detailed analysis of the evidence that supported the policy and the tobacco companies' evidence submitted to oppose the policy.

The judge's analysis of the evidence from both sides of the dispute is particularly significant because the same evidence is likely to be considered by any government taking forward plain packaging and this is the first judgment that provides a careful scrutiny of it, to see if it meets the legal tests.

The "substantial legal significance"[3] of the WHO FCTC

The judge highlighted the recent Court of Justice of the European Union decision on the TPD where the court "attached very great probative weight to the FCTC and to the WHO Guidelines which were intended to assist the contracting parties '…in implementing the binding provisions of that convention'… They were, whilst being non-binding, capable of exerting 'decisive influence'". Mr Justice Green agreed that the FCTC and its guidelines "are important and relevant as guides to interpretation of the EU Tobacco Products Directive (TPD) and as to the powers and rights of the Member States to adopt tobacco control measures, including but not limited to standardised packaging measures." [4]

Expropriation of property and the claim for compensation

The judge accepted that trade marks were property capable of being expropriated by government regulation. But he stated that under the standardised packaging Regulations "title to the rights in issue remains in the hands of the tobacco companies; the *Regulations curtail the use that can be made of those rights but they are not expropriated*."[5]

Secondly, the word marks of the brands can still perform their essential functions of preventing unauthorized use and as an identifier of origin. Thirdly, the restrictions on use of the trademarks does not result in the tobacco companies being unable to conduct their business. And fourthly, the *interference was unequivocally in the public interest*.[6]

He stated that "There are no cases where compensation has been paid for the curtailment of an activity which is unequivocally contrary to the public interest. In my judgment *the facts of the case are exceptional such that even if this were a case of absolute expropriation no compensation would be payable*." [7]

WTO Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement

The judge put the tobacco companies' case starkly: "On the Claimant's construction however TRIPS does hinder the adoption of public health measures and should be construed so as to preclude such health measures".[8] He pointed out that the DOHA declaration 2001[9] specifically states that "*the TRIPS Agreement does not and should not"* prevent Contracting States from taking measures to protect public health and that the tobacco companies' arguments are clearly inconsistent with the DOHA declaration principles.

The judge also stated that, "The Claimants submit that TRIPS takes precedence over the FCTC. In my view they must be read consistently one with the other and this is done by rejecting the Claimants' construction which otherwise effectively emasculates the FCTC."[10] "TRIPS and the FCTC can be read together without any risk of them colliding or being mutually inconsistent".[11]

Tobacco companies' rights to *use* their trademarks

The tobacco companies contend that trademark owners cannot be prevented from using a trade mark at all even when it facilitates a health epidemic. The judge stated that "In my judgment the law is very clear: It is *no* part of international, EU or domestic common law on intellectual property that the legitimate function of a trade mark (i.e. its essence or substance) should be defined to *include* a right to *use* the mark to harm public health."[12]

The UK government's evidence in support of plain packaging

"In my judgment the qualitative evidence relied upon by the [Government] *is cogent, substantial and overwhelmingly one-directional in its conclusion*, which is that various types of advertising and branding [on packaging] are effective in influencing consumer reactions … The research has been generated over a number of decades by psychologists, social scientists and others in relevant disciplines ... it is the totality of the research and the consistency of its conclusions over time that is important"[13]

The Tobacco Companies' expert evidence as a whole, lacks credibility

Mr Justice Green applied "the sorts of **methodological standards that in my judgment are world-wide norms**". He then found that:

"the Claimants' evidence *is* largely: *not peer reviewed*; frequently *not tendered with a statement of truth* or declaration that complies with the [Civil Procedure Rules]; almost universally *prepared without any reference to the internal documentation* or data of the tobacco companies themselves; either ignores or airily *dismisses the worldwide research* and literature base which contradicts evidence tendered by the tobacco industry; and, is *frequently unverifiable*." [14]

"In this case the evidence submitted by the Claimants' experts is not capable of being verified nor its underlying assumptions tested."[15]

"On the basis of my own review of the methodologies adopted by the Claimants experts … I conclude that that body of expert evidence does not accord with internationally recognised best practice."[16]

Tobacco companies' failure to provide access to any internal research or documentation.

"I am satisfied, because it is common sense, that the Claimant tobacco companies will have conducted some analysis, internally, of the economic and financial implications for each of them of the introduction of the Regulations."[17]

"It has been a striking feature of the evidence adduced by the tobacco companies during the consultation process (and replicated in the court proceedings) that it is virtually devoid of any reference to the internal documents of the tobacco companies themselves."[18]

"My concern lies … with what has the appearance of being an industry wide practice not to adduce internal documents or to allow their experts to see and review and then rely upon internal documents."[19]

"[The Civil Procedure rules provide that] 'Experts should consider all material facts, including those which might detract from their opinions'. How can an expert consider all material facts including those that are inculpatory to their client if they do not ask for and/or receive relevant internal documentation?"[20]

Specific experts tendered by the Tobacco Companies

The following extracts provide some of the judge's views on specific experts relied on by the Claimants, in addition to the general comments on that evidence set out above.

- Professor Timothy Devinney: The judge noted that Professor Devinney ignored the extensive evidence available on the tobacco companies' marketing and research and dismissed more than 90 peer reviewed studies and empirical reports on plain packaging as not relevant or reliable. The judge agreed with the Secretary of State's criticism that his analysis represented a "…highly unusual framework for evaluating the quality of the literature and provide[s] little or no insight as to the merit of the empirical evidence base".[21]
- Professor Jonathan Klick: "although Professor Klick was expressly retained to offer his opinion on the literature regarding the effect of plain packaging on smoking rates in the UK the report

does no such thing. In fact it cites remarkably few pieces of actual literature relating to the issue in question." "I would have found this analytical approach more attractive if Professor Klick had any experience in the specific field of smoking or had undertaken his own research or had conducted detailed analysis of the actual literature instead of airily dismissing it in its entirety."[22]

- Professor Neil McKeganey: "What I find unacceptable is the preparation of a report which by its total refusal to engage with any of this contra-material simply conveys the impression that it does not exist and that the best way to refute it is to ignore it."[23]
- Professor Gregory Mitchell: "Nowhere does he address the very substantial body of evidence which fundamentally contradicts his conclusions. In short, I found this evidence unsatisfactory at almost every level."[24]
- Professor Casey Mulligan: "Professor Mulligan employs an unforgiving approach which never admits of even the possibility of error on his part whilst simultaneously taking the view that any and all opposing experts' reports are flawed."[25]
- Professor Kip Viscusi: The main criticism is that professor Viscusi was highly selective in the evidence he relied on. His report challenged "the existing research base at a high level of abstraction."[26]
- Professor Ronald J. Faber: "Unfortunately, Faber has not provided any analysis specific to changes in the tobacco market or any citations to comprehensive reviews of the effect of marketing restrictions for tobacco products. These reviews conclude that comprehensive advertising restrictions are indeed responsible for reductions in primary demand". "Professor Faber is neither an expert in this particular area nor, to plug any gap in expertise, has he reviewed the relevant literature". "[his] opinion on the effects of standardised packaging amounts to speculation without empirical justification."[27]
- Mr Weston Anson: "Mr Anson's conclusion, widely recycled by the tobacco companies, that the loss caused by the Regulations would be "billions" is completely untenable and unverified."[28]
- Mr Mark Bezant: "For this reason it is highly probable that the loss he identifies as attributable to the Regulations is *very substantially overstated* … even if Mr Bezant's analysis were correct it would still mean that the cost/benefit analysis contained in the 2014 Impact Assessment came squarely down on the side of favouring the public over the private interest, such is the vast gulf between the costs imposed upon the state and the loss of value to the tobacco companies."[29]

Tobacco Company assertions - Mr Justice Green's views

Each of the tobacco company assertions listed below were addressed in some detail in the judgment but the passage or passages from the judgment that reflect the judge's views have been copied here.

Claim – there are equally effective, less restrictive measures available: The tobacco companies argued that the UK could have introduced less restrictive measures such as an increase in tobacco taxes, increasing the minimum age for buying tobacco and educational campaigns. The judge stated that, in respect of all these submissions, no supporting evidence was adduced and that "The Claimants' argument amounts to mere assertion."[30]

Claim – plain packaging will increase illicit trade: In their submissions to the UK consultations and in the media campaigns opposing the introduction of plain packaging, the tobacco companies relied heavily on allegations that the policy would lead to an increase in illicit tobacco. Conversely, in the legal challenge the risk of the Regulations increasing "illicit trade was not at the oral hearing seriously pursued by the Claimants"[31], was advanced by way of mere assertion and no expert evidence, data or analysis was submitted to the court in support of that contention[32].

The industry funded reports by KPMG which suggest that there has been a rise in use of illicit tobacco in Australia post implementation of plain packaging (and which have been the subject of significant criticism for the methodology used), were not submitted to the Court as evidence.

The conclusion can be drawn that while the tobacco companies continue to claim in public that plain packaging will lead to an increase in illicit trade, they do not consider there is any sufficiently plausible evidence to support this contention in legal proceedings.

Claim - the tobacco companies do not market to children: as with other legal challenges, the tobacco companies contend that they do not target children through their advertising and promotion. The judge relied on the extensive conclusions of Judge Kessler in *US v Philip Morris*[33] case of 2006, and on the WHO review of internal tobacco industry documentation[34]. He noted that the "after a 9 month trial, the US Federal Court, in the US Judgment, found as a fact that the tobacco companies' advertising and promotional activities, including branding, did materially influence consumer behaviour, including that of children… That ruling was based on all of the evidence, including internal documents."[35]

Claim - packaging is not advertising: "In 2006, a spokesman for Gallaher (now part of JTI) noted that "marketing restrictions make the pack the hero". Branded packaging has been described as the "silent salesman" and the manufacturers' "billboard" … The importance of the present case is that the packaging and the product itself constitute virtually the last opportunity for tobacco companies to promote their product."[36]

Claim – even slave owners were compensated when slavery was abolished: An extraordinary assertion was made in court by the tobacco companies to support their claim for compensation as a result of the use of their trademarks being curtailed. The tobacco companies resorted to comparing their trade mark rights to slave ownership in order to justify their claim for compensation. They stated that the UK Parliament had legislated for the payment of compensation to colonial slave owners upon the abolition of slavery in 1833 because it was just in a case where property rights had been curtailed. Mr Justice Green stated that "what was "just and expedient" in the eyes of MPs in 1833 [many of whom were slave owners] is not an indication of what would be so in 2016. It is inconceivable that anyone would be compensated for the manumission of a slave in a modern Western state."[37]

Use of this summary document:

This document is intended to provide a short summary of some of the key issues that may arise in other jurisdictions considering plain packaging and to signpost the key parts of the long judgment that could be looked at in more detail if required. By highlighting key quotes this is intended to be an advocacy tool rather than a legal analysis. It is not intended to provide a comprehensive summary of the Judgment of Mr Justice Green as many of the legal grounds dealt with issues specific to EU law or domestic UK law. The judgment itself contains a useful 46 page summary at its start.

References

[1] http://www.legislation.gov.uk/ukdsi/2015/9780111129876
[2] R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin). https://www.judiciary.gov.uk/wp-content/uploads/2016/05/bat-v-doh.judgment.pdf
[3] Ibid paragraph 901
[4] Ibid paragraph 260
[5] Ibid paragraph 38 (emphasis added)
[6] Ibid paragraphs 785 to 788 (emphasis added)
[7] Ibid paragraph 811 (emphasis added)
[8] Ibid paragraph 916(iv)
[9] A summary of the declaration on TRIPS and public health can be found here - https://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm
[10] R (British American Tobacco & Ors) v Secretary of State for Health [2016] EWHC 1169 (Admin) paragraph 916(vi)
[11] Ibid paragraph 186
[12] Ibid paragraph 40
[13] Ibid paragraphs 592-594 (emphasis added)
[14] Ibid paragraph 23 (emphasis added)
[15] Ibid paragraph 26
[16] Ibid paragraph 374
[17] Ibid paragraph 698
[18] Ibid paragraph 292
[19] Ibid paragraph 319
[20] Ibid paragraph 316
[21] Ibid paragraph 391
[22] Ibid paragraphs 392 -395
[23] Ibid paragraph 314
[24] Ibid paragraph 568
[25] Ibid paragraph 554
[26] Ibid paragraph 561
[27] Ibid paragraphs 401 and 402. Mr Justice Green was setting out the views of the defendant expert Professor Hammond with whom he expressed agreement.
[28] Ibid paragraph 704
[29] Ibid paragraph 705-706 (emphasis added)
[30] Ibid paragraph 668
[31] Ibid paragraph 609
[32] Ibid paragraph 669 and 996
[33] *United States of America (and Tobacco-Free Kids Action Fund et Ors, Intervening) v Philip Morris USA Inc et al*, US District Court for the District Court of Columbia (Civil Action No. 99-2496 (GK), 17th August 2006 (per Judge Gladys Kessler).
[34] "The Documents: What they are; what they tell us: and how to search them – A practical Manual" http://www.who.int/tobacco/communications/TI_manual_content.pdf
[35] BAT v SoS for Health [2016] paragraph 567
[36] Ibid paragraph 71
[37] Ibid paragraph 855