JUDICIARY OF
ENGLAND AND WALES

British American Tobacco & others -v- Department of Health

Summary of judgment by Mr Justice Green

Queen's Bench Division of the High Court

Administrative Court

19th May 2016

The note below summarises the judgment handed down in this case. It forms no part of the judgment which should be read in full for a complete understanding of the reasons for the decision.

Introduction

1. Tomorrow, 20th May 2016, Regulations adopted by Parliament are due to come into force. These will restrict the ability of the tobacco industry to use their valuable brands, trademarks and designs upon tobacco packaging and upon tobacco products. In promulgating the Regulations Parliament took into account a substantial body of evidence and research about the effect of branding and advertising on packaging and on tobacco products.

2. That research found that the designs and branding upon cigarette packaging and upon the tobacco products themselves exerted a causal effect upon consumer behaviour and encouraged smoking.

3. In the United Kingdom alone 600 children every day are initiated into smoking. These are the future customers of the tobacco industry. Smoking generates a vast financial burden for the State in terms of medical and care costs and it imposes, for those who succumb to tobacco related illness, pain and suffering. The formal cost benefit analysis carried out by the Government in its impact assessment shows that the net benefit to the State of introducing these measures, in both monetary and societal health and happiness terms, is enormous.

4. In introducing the Regulations Parliament was implementing a Convention drafted by the World Health Organisation (the WHO) on tobacco control measures. This Convention is one of the most widely adhered to treaties in the history of the UN and at present about 180 countries worldwide have signed up to it. The Convention and the WHO Guidelines which accompany it describe tobacco as creating a world health epidemic and they accuse the tobacco industry of seeking to subvert national health policies.

5. The contracting states have agreed to introduce a series of restrictive measures which include for instance increased health warnings and bans of flavoured tobacco products. The Convention also urges the contracting states to introduce further control measures. One such measure has become known as "*standardised packaging*". This occurs when substantially all of the branding which is presently on cigarette boxes and packaging and upon the product's themselves, such as colour or brand names or other signs and marks, is prohibited. In their place all that will be allowed is a uniform set of what the tobacco companies consider to be "*drab*" homogenous markings which the tobacco companies say in effect destroys the value of their trade marks and their ability to differentiate themselves in the market place.

6. In the present litigation the tobacco claimants have sought to launch a full scale attack on the Regulations. In the judgment these challenges are grouped under seventeen different grounds. The judgment is very long and comprises 1000 paragraphs and extends to over 380 pages.

The issues in a nutshell

7. In this litigation the tobacco companies have challenged the Regulations upon the basis of international trade mark and health law, EU law, the European Charter of Fundamental Rights, the European Convention of Human Rights, and the domestic common law. They attack not only the Regulations themselves but also the process by which Parliament came to adopt the legislation.

8. I shall now, in a nutshell, summarise my conclusions on the principal grounds of challenge.

9. First, the tobacco companies claim that the process by which the evidence was collected which led the Secretary State for Health to lay draft Regulation before Parliament was biased and unfair. In particular they object that the Minister, on the advice of civil servants, placed only "*limited*" weight on the voluminous evidence submitted by the tobacco industry. This led to a major battle between the tobacco companies and the Government over the intrinsic quality of the evidence submitted by the tobacco sector. In the litigation the Secretary of State challenged the quality and integrity of the evidence submitted by the tobacco industry. It was argued: that it was not independent but partisan, that it lacked peer-review; that it failed properly to grapple with the substantial worldwide independent literature and research base which was contrary to it; that it was also inconsistent with the internal research of the tobacco companies themselves which was hidden from view; and that it was in any event unverifiable. In short the Secretary of State argued that the entire body of evidence tendered by the tobacco industry fell significantly short of internationally accepted best practice standards for research and evidence. As such it did not deserve to be accorded the great weight that the tobacco companies demanded that it be given.

10. For their part the tobacco industry argued that the experts instructed to act for the Government were biased in favour of "tobacco control". They also argued that the

standards relied upon by the Secretary of State as best practice were not in fact sensible best practices at all; they were inappropriate in an industry where views were polarised and that in any event a court process was the very best place to test the cogency and integrity of their evidence.

11. In the judgment I have addressed this issue at considerable length. I have concluded that the evidence submitted by the tobacco industry did fall significantly below internationally accepted best practice. I have also found that use of such research standards is very important and valuable for any court seeking to assess and weigh competing evidence of this sort. I have concluded also that on the facts of this case the Government was correct to attach "*limited*" weight to the tobacco industry evidence.

12. In this regard I note that the conclusion that I have arrived at is also the view of the US Courts and of the Australian Government and of the World Health Organisation. I have taken these views into account but the conclusions I have arrived at are my own having examined very carefully all of the evidence in the case and measured it against what I consider to be normal standards of evidence preparation.

13. The tobacco companies have also challenged the proportionality of the Regulations upon the basis that they are unsuitable and will in fact be counter-productive and harmful to health. They also argue that the Regulations are not necessary because other less intrusive measures would have been equally effective. And finally they argue that in any event when viewed in the round the balance struck between their own private law rights to use their trade marks and other intellectual property, on the one hand, and public health interests on the other hand, is unfair. These grounds were raised under EU law and under the European Convention on Human Rights. I have rejected all of these submissions. I have found that on the evidence there was and is cogent and substantial evidence supporting the proportionality of the Regulations. They are suitable and appropriate to achieve an important public health objective. There are no other equally effective measures which could have been adopted. I have also concluded that when a balance is struck between the fundamental public health rights reflected in the Regulations and the private predominately financial interest of the tobacco industry that balance comes down overwhelmingly in favour of the Regulations.

14. Next the tobacco companies argued that the Regulations violated their fundamental right to respect for property (for instance their trade marks, copyright and goodwill). They argued that the Regulations amounted, in substance, to an unlawful expropriation of their property rights without fair compensation. They raised this challenge under the European Convention on Human Rights, under the Fundamental Charter in EU law, and under the common law relying upon literature and learning from the 18th century onwards. I have also rejected these challenges. The Regulations do not take away from the tobacco industry their rights. I accept that the Regulations do substantially limit and restrict the use of those rights but they do so for entirely proper and legitimate reasons and they do so striking a fair balance between the right to property and opposing public health interests and rights. I have in this regard rejected the contention that the tobacco companies should entitled to any compensation at all. I cannot see any logical or rational basis for imposing upon the State a duty to pay compensation to the tobacco companies for ceasing to engage in an activity which facilitates a health epidemic and imposes vast costs upon the state.

15. Finally, on 4th May 2016, just two weeks ago, the European Court of Justice rejected a challenge by the tobacco industry to the EU legislation which seeks to implement the Convention in the EU. In that litigation the tobacco companies advanced a lengthy series of technical challenges to the EU legislation. In the present case the tobacco companies have also advanced a lengthy series of technical challenges but this time to the legality of the Regulations. These challenges were under international law, under EU law and under domestic law. I have analysed each ground separately and in detail and have rejected them all. I have found that under international and EU law the Regulations are perfectly valid and pursue important pubic health objectives which are fully recognised and acknowledged in international health and trade law (for instance under the WTO) and in equivalent EU law.

16. When one stands back from the immense detail of these challenges, as the Secretary of State submitted during the hearings, the essence of the case is about whether it is lawful for States to prevent the tobacco industry from continuing to make profits by using their trade marks and other rights to further what the World Health Organisation describes as a health crisis of epidemic proportions and which imposes an immense clean-up cost on the public purse.

17. In my judgment the Regulations are valid and lawful in all respects. There is no basis upon which I could or should strike down the Regulations or prevent them coming into effect tomorrow.

18. I therefore reject all of the applications for judicial review.