

COURT OF JUSTICE

AUG 03 '84

S. E. V.

THE THIRD SECTION OF THE COURT OF JUSTICE RENDERED THE FOLLOWING ORDER:

P/B Barclay

Considering the petition of June 16, 1983,
considering the facts of the case and the documents submitted,
considering the preparatory order of March 30, 1984,
considering the parties' conclusions,
whereas the following facts in particular result therefrom:

A. By petition for provisional measures dated June 16, 1983, based on the Law on unlawful competition (LCD), the Court is asked to prohibit the sale and promotion, and to order the attachment of the material destined for the sale and promotion of the cigarette "Barclay" the package of which bears the following indications: "Condensate 1 mg, nicotine 0,2 mg, determined according to standard methods".

B. The cigarette "Barclay", put on the Swiss market by B.A.T. (Suisse) SA since 1982, is characterized by a filter called "Actron". Four little ventilated channels disposed around the filter create a dilution of the smoke in the mouth because of the air so induced; this action creates a turbulence and excites the gustatory papilla which made the producer qualify this cigarette as "ultra-light with a pronounced taste".

C. According to the claimants, the indications on the cigarette package are misleading; by their nature, they mislead the consumer, because of the fact that the indication "determined according to standard methods" gives no complementary explicit information considering

the inadequacy of the fumage machine to test the "Actron" filter as this machine does not take into account the variations of air intake and consequently the dilution.

D. The interested parties were invited to give further explanations as during these proceedings different new elements were brought to the attention of the Court.

In fact, by circular-letter dated January 31, 1984, the Federal Office for Public Health published an "advance information of a method in the Swiss manual of food products (chapter 38 : tobacco and tobacco articles)".

Thus, the former practice was formally adopted (Coresta norms, method ISO 3308).

Without being inserted in the said manual, it was provided that the tests for ventilated cigarettes must contain the following two phases:

1. fumage and determination of nicotine and tars with unmodified cigarette-samples;

2. fumage and determination of nicotine and tars with cigarette-samples the air-inlets of which were obstructed (e.g. by means of a glue-tape).

The indication of the nicotine and tar contents could be the following:

- either the average of all the results of the tests,

- or the indication of the two extreme values (on one side the average of the values obtained with the ventilation active and on the other side the average of the values obtained with the ventilation obstructed).

This information did not exclude the future adoption of more perfect methods of analysis and evaluation.

The Swiss Federation of Cigarette Producers (ASFC) absolutely opposed to the method called of "double fumage".

E. The Court ordered the bringing in of an administrative proceeding of the Canton of Vaud concerning the decision of the Cantonal Laboratory of Survey of Food Articles dated May 13, 1983, informing BAT of the results of the "Barclay" cigarette scientific test performed by Dr Aubort, chemist of the Canton of Vaud, the results of which are as follows:

"The indications on the package of the cigarette Barclay "condensate 1 mg. - nicotine 0,2 mg." are misleading for the consumer. The indication "determined according to standard method" gives no explicit complementary information. The dispositions of art. 15 par. 1 and 18 of the Ordinance of May 26, 1936 concerning food articles are not observed. Consequently, the package of the Barclay cigarette is disputed."

Dr Aubort pointed out that the modification of the Barclay cigarette - a little tube extended for one millimeter from the filter's extremity -, requested by the Vaud and Jura cantonal chemists would result in characteristics similar to those of a cigarette ventilated in a conventional manner and could be maintained on the market in its actual presentation.

The administrative proceedings of the Canton of Vaud which should have been continued by a second expert appraisal was suspended, "the situation being too confused to consider this second expert appraisal as well as to permit the withdrawal of the challenge". This decision was taken by State Councillor Cl. Perey who considered that the circular letter of the federal office rejected the evaluation method of ventilated cigarettes by the "fumage machine" as employed in the past. The double fumage represented a fundamental modification of the evaluation of ventilated cigarettes and the contents of this circular letter caused the immediate challenge to the cigarette Barclay as well as other ventilated cigarettes on the Swiss market for the incorrect indications on the package. Mr. Perey expressed prudent reserves concerning this cigarette (letter dated February 16, 1984).

On March 21, 1984, ASFC noted Dr Siegwart's (head

of the Survey Division of food articles) statement according to which the circular letter of the Federal Office for Public Health of January 31, 1984 was somehow set to one side and would have no effect, at least as long as the conclusions to be reached by the commission suggested by him are not accepted.

F. The technical problem arising in the present dispute was the object of a thorough examination before several courts in the United States of America which considered that the advertised quality according to which Barclay is a cigarette with "1 mg of tars" is misleading.

Thus, on October 25, 1983, the US District Court for the District of Columbia ruled that it is permanently prohibited to Brown & Williamson Tobacco Corporation to indicate in its advertising, including on the packages and labels, a specific ratio of tar or a specific content of tars as being characteristic for any kind of Barclay cigarettes, and including the indication of 1 mg. for the cigarette Barclay, unless this value is accepted by the Federal Trade Commission or obtained by a method of analysis approved by the commission for testing the cigarette Barclay. Indeed, this Court concluded that the ventilation tests created strong presumptions that the cigarette Barclay was incorrectly evaluated by the fumage machine FTC to 1 mg. (see "Memorandum" of October 14, 1983).

A petition to suspend the execution until the decision of the Court of Appeals was dismissed by the Court of Appeals, according to its decision of November 7, 1983.

G. BAT opposed the petition considering the official character of the method Coresta ISO 3308.

Further, the defendant never opposed the principle of the double fumage rejected by ASFC.

Consequently, BAT considers that the cigarette "Barclay" corresponds to the requirements of the Swiss manual of food articles in the field of cigarette analysis and that this product is in conformity with art. 420 c ODA (ordinance on food articles). The

defendant claims that the result of the analysis corresponds to the legislation and that mentioning the characteristics of a product cannot be considered misleading.

According to the defendant, the claimants were totally incapable of presenting even a hint of verisimilitude of the damage difficult to repair which they were supposed to have suffered and which only the provisional measures required could have determined.

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1. A provisional order according to art. 9 LCD may be required by a party who demonstrates the likelihood of the following cumulative conditions:

- a) an act of unfair competition by the defendant,
- b) the threat of a damage difficult to repair,
- c) the existence of a damage which cannot be prevented otherwise than by the requested provisional measures.

2. According to the claimants, it is at least doubtful, considering the manner of its elaboration, i.e. without observing the procedure provided for in the decrees of the Federal Council of December 14, 1964 concerning the manual (RS 817.021.1) and of September 29, 1944 (RS 817.021.2), that the norm ISO 3308 forms a regular part of the Swiss manual of food articles.

In the evaluation of this dispute, this Court follows the opinion, expressed on March 13, 1984, by Dr Y. Siegwart, assistant manager of the Federal Office for Public Health, according to whom the fumage method based on the norm ISO 3308 has an official character. In return, according to the same Dr Y. Siegwart, the instructions for the interpretation of the values contained in the circular-letter do not refer to the Swiss manual of food articles.

Nevertheless, they should contribute to permit an objective interpretation of the results, until a method

is elaborated reproducing the real absorption by the smoker or any other appropriate system of evaluation.

Furthermore, it seems (see Me Junod's letter to the Federal Office for Public Health of April 9, 1984) that in spite of the suspension of the application of the circular letter of January 31, 1984 BAT could comply with the requirement of art. 420 c par. 2 ODA by applying the instructions, i.e. indicating a content of tars (and, consequently, of nicotine) corresponding to the average of the two values given by the "double fumage" (with and without ventilation).

3. In their pleadings of April 13, 1984, the claimants demonstrated with good reason that the strict application of administrative prescriptions concerning techniques to measure tar-content do not absolutely prevent the violation of rules prohibiting unfair competition.

Indeed, apart from the fact that it is formally set forth in a law, the general principle set out in the last par. of art. 1 LCD, namely the consecration of the principle of good faith in the field of commercial contractual relations, does not in any way presuppose the existence of a special administrative standard such as that in art. 420 c par. 2 ODA.

4. The elements presented by the claimants demonstrate that it is highly probable that the norm ISO 3308 is incapable measuring correctly the tar content of cigarettes equipped with a peripheral ventilation filter and one may even suppose that the specific structure of the "Actron" filter of the Barclay cigarette was developed in view of facilitating an objectively false analysis of the product.

It is therefore very probable the the Barclay cigarette contains tar and nicotine quantities higher than indicated on the package if smoked by a human being.

BAT commits an unfair act of competition by indicating the results given by the norm ISO 3308.

5. In this respect, it is not this Court's task to say how BAT should have indicated on the package of the Barclay its nicotine and tar content nor to suggest the adoption of the so-called "double fumage" method.

This Court, in its preparatory order of March 30, 1984, raised the question whether a simple prohibition to put different indications on the packages by BAT without enabling the defendant to know the requirements of the competent authorities would not lead to an arbitrary situation creating a definitive damage. On one side it appears that this situation can be avoided and on the other side this Court need not wait until the administrative authorities put an end to their hesitations in the research and promulgation of a definitive method of ventilated cigarette evaluation.

In this case, there exists indeed the threat of a damage difficult to repair, as the customers' habits influenced by the indications on the Barclay cigarette package risk to create an important damage to the claimants, who are BAT's competitors on the Swiss market.

The provisional measures must be ordered considering the urgency.

6. In accordance with art. 10 LCD, the defendants have to present guarantees which they do not contest.

In consideration of the importance of the present decision concerning the production by BAT of the Barclay cigarette, the security shall be of Fr. 500.000 and be in the form of a bank guarantee.

For these reasons

The Court:

Orders the provisional attachment in the defendant's hands of all the packages of cigarettes of the label "Barclay" with the indications "condensat 1 mg. - nicotine 0,2 mg. - déterminé selon méthodes standard".

Prohibits to the defendant to offer for sale, to sell and to put otherwise in circulation the cigarettes of the label "Barclay" in packages indicating a tar content of 1 mg. and a nicotine content of 0,2 mg.

Prohibits to the defendant to use in the advertising, promotion in the press, printing or in the moving-picture advertising any reference to tar content 1 mg and/or nicotine content 0,2 mg. in relation with the sale or distribution of "Barclay" cigarettes.

Orders the attachment in the defendant's hands of all advertising material (catalogues, prospectus, posters) concerning the "Barclay" cigarettes offered in packages indicating a tar content of 1 mg. and/or nicotine content of 0,2 mg.

All this subject to the penalties of art. 292 CPS (Swiss Penal Code), i.e. arrest or fine, in case of violation of the provisional attachment and/or of the prohibitions above.

Subordinates the execution of these measures to the presentation at the Court's chancery by the defendant of a bank guarantee of Fr. 500.000.

Fixes a period of 30 days for the claimants to act on the merits and this present measure shall remain in force until the case is finally judged or until the parties reach agreement.

Sentences the defendant to pay all the Court costs, as well as to pay an amount of Fr. 10.000 as contribution to the fees of the claimant's attorneys.

The Court's tax is fixed at Fr. 5.000 which must be reimbursed to the claimants by the defendant.

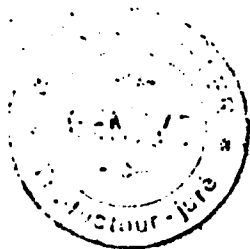
All other petitions of the defendant are rejected.

Done and ordered in Geneva, in Chambers, on June 29, 1984.

Sitting:

Messrs. Weber, President, Greber, Reymond, judges,
Mrs. Leemann, secretary.

2 signatures ill.



Certified true translation:
Geneva, July 25, 1984.

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