

1980/4

ROYAL COURT (INFERIOR NUMBER)

Before: Sir Frank Breaud, Bailiff.  
Jurat H. Perree.  
Jurat Lucas.

Between  
Grunhalle Lager International Limited      Plaintiff  
and  
Tascan Trading Limited      Defendant  
(By original action and counter-claim)

AND  
Between  
Tascan Trading Limited      Plaintiff  
and  
Jackfrost France S.A.R.L.      Defendant  
and  
Grunhalle Lager International Limited      Third Party  
(By original action and counter-claim)

- Advocate G.R. Boxall for Grunhalle Lager International Limited.
- Advocate J.A. Clyde-Smith for Tascan Trading Limited.
- Advocate R. Vibert for Jackfrost France S.A.R.L.

In 1976 and 1977 the Royal Court heard evidence in the above case. The issues in the case are summarised as follows.

In 1973, Grunhalle Lager International Limited (hereinafter called "Grunhalle") brewed a special lager for export, known as Grunhalle Export Lager (hereinafter called "the lager") at Randall's Brewery, Clare Street, St. Helier. In May, 1973, Grunhalle appointed Mr. A. Ash as its sole concessionaire for Europe in respect of its products, including the lager. It was agreed by Grunhalle that that concession would be operated by a limited liability company which Mr. Ash was then forming; that company was called Tascan Trading Limited (hereinafter referred to as "Tascan"). Subsequently, Tascan appointed Jackfrost France, S.A.R.L. (hereinafter called "Jackfrost") as sole distributor in France of the lager. Mr. G. Origlia was the beneficial owner of Jackfrost.

Between March and July, 1974, Grunhalle supplied to the order of Tascan quantities of the lager which Tascan in turn invoiced to Jackfrost for sale in France. Jackfrost was dissatisfied with the quality of some of the lager supplied to it as aforesaid. It also complained that the lager was not in accordance with samples which had previously been distributed to potential customers. Jackfrost therefore sought assurances through Tascan that the lager would be of a consistent quality in the future.

Moreover, although Tascan had appointed Jackfrost sole distributor in France, Grunhalle purported to veto that appointment on the ground that Tascan was not empowered under the terms of its appointment as sole concessionaire to make such an appointment. Jackfrost was not prepared to continue to sell the lager unless the issue of the appointment of Jackfrost as sole distributor in France was resolved. Assurances to that effect were therefore sought through Tascan.

Having failed to secure such assurances from Grunhalle, Tascan by letter dated 10th July, 1974, informed Jackfrost that Grunhalle would not agree to the appointment of Jackfrost as sole distributor, that if Jackfrost wished to continue selling the lager it must conform to rules laid down by Grunhalle, and that Grunhalle reserved the right to change the brew every week. On receipt of that information, Jackfrost decided to cease selling the lager.

Grunhalle had not been paid for any of the lager supplied to Tascan for re-sale to Jackfrost, and therefore submitted its account for £2,479.52 to Tascan, who in turn submitted its account to Jackfrost for £2,810.32, being its account for the said lager (including its profit). Neither account was paid, with the result that this action came before the Court.

Grunhalle actioned Tascan for the amount of its account; namely £2,479.52, and Tascan in turn actioned Jackfrost for the amount of its account, namely, £2,810.32.

Jackfrost /

Jackfrost denied liability on the ground that the lager was not in accordance with the samples supplied and some of it was of an inferior quality, with the result that customers refused to place further orders and some refused to accept delivery.

Jackfrost also counter-claimed against Tascan on the ground that, by writing the aforesaid letter of 10th July, 1974, Tascan was in breach of two essential terms of the agreement between the two companies, namely, that the quality and specification of the lager to be supplied would remain constant, and that Jackfrost would be appointed the sole distributor for France. Jackfrost stated that by reason of that breach it had no alternative but to cease dealing in the lager and claimed damages in respect of the costs it incurred in establishing its business in France and of the profits which it would have made if the agreement had been honoured.

In reply, Tascan agreed that in the light of its letter of 10th July, 1974, which was the result of a meeting between Mr. Ash and Mr. P.F. Clubb, Managing Director of Grunhalle, Jackfrost had no alternative but to cease dealing in the lager, but claimed that it had throughout acted in good faith and had taken all possible steps to fulfil its obligations, and that therefore Jackfrost's counter-claim should more properly lie against Grunhalle, but in the alternative if the counter-claim properly lay against Tascan then Tascan was entitled to be indemnified by Grunhalle. At the request of Tascan, Grunhalle was convened as a Third Party to the counter-claim against Tascan.

In Answer to the action against it by Grunhalle, Tascan pleaded that the lager supplied to it by Grunhalle for resale to Jackfrost was inferior to the sample originally provided. Furthermore, Grunhalle purported to refuse to consent to Tascan's appointment of Jackfrost as sole distributor in France and refused to supply Tascan with saleable beer for distribution in France, as a result of which Jackfrost was

unable / ...

unable to order further supplies of the lager. In consequence Tascan denied being liable in the sum claimed or in any sum. It further counter-claimed for general and special damages in respect of actual and potential losses which it incurred as a consequence of the breaches of warranty and breach of contract by Grunhalle.

In Reply to the counter-claims both of Tascan and Jackfrost, Grunhalle stated that it had no contract with Mr. Origlia or Jackfrost, and that therefore, if there were any contract or agreement concluded between either of them and Tascan, the remedy for any breach thereof did not lie against Grunhalle. It further stated that Tascan had no authority to appoint either Mr. Origlia or Jackfrost as sole distributor of the lager in France. It therefore maintained its claim.

The two actions were consolidated and were heard together.

The Court delivered a written judgment on 8th March, 1978. By consent, that judgment was confined to the issue of liability, the issue of the quantum of damages (if applicable) being left over for further argument.

For the reasons set out in its judgment on liability, the Court held -

- (1) that Jackfrost was liable to Tascan for the account for the second delivery, and that Tascan was in turn liable to Grunhalle therefor;
- (2) that as regards the third delivery, Jackfrost should account to Tascan and that Tascan should in turn account to Grunhalle, for the amount only of the lager which was sold and for any returnable bottles or crates pertaining to the lager which was sold;
- (3) that Tascan did, and was entitled to, appoint Jackfrost as sole distributor in France;
- (4) that the letter dated 10th July, 1974, from Tascan to Jackfrost entitled Jackfrost to repudiate its contract with Tascan and to bring an action for damages for breach of contract against Tascan by way of counter-claim;

(5) that Tascan was in turn entitled to be indemnified by Grunhalle in respect of that counter-claim of Jackfrost;

(6) that Tascan was also entitled to recover damages in its own right against Grunhalle by reason of the wrongful conduct of Grunhalle which led to the ending of the contract between Tascan and Jackfrost.

Grunhalle appealed against those decisions of the Court mentioned in paragraphs (3) to (6) above, but that appeal was dismissed by the Court of Appeal.

Following that dismissal, the Royal Court has now heard evidence and arguments on the issue of damages claimed by Jackfrost against Tascan and Tascan against Grunhalle, and this judgment relates to that issue.

The Court therefore has to assess the proper award of damages under the following heads:

As regards Jackfrost against Tascan:

1. The expenses incurred in setting up its business of selling the lager in France, which proved abortive by reason of Grunhalle's wrongful conduct and caused Tascan to be in breach of contract to Jackfrost, and certain ancillary expenses;
2. Compensation equivalent to the future profits (if any) which it would have made in respect of that business if there had been no breach of contract by Tascan arising out of Grunhalle's wrongful conduct.

As regards Tascan, compensation equivalent to the future profits (if any) which it would have made in respect of the business of selling the lager to Jackfrost if there had been no breach of contract by Grunhalle.

We are not asked to assess the expenses claimed by Tascan in setting up its business of selling lager to Jackfrost, because the parties hope to agree the amount of special damages, but if they cannot they will come back to Court.

For the avoidance of doubt, we wish to emphasise that, by consent, this action and therefore this judgment is not concerned with any claim which Tascan may have against Grunhalle in respect of its operations as sole concessionaire in any country in Europe other than France.

We begin with the claim of Jackfrost for expenses. That claim is in four parts.

First, there is the claim for expenses incurred in setting up the business in 1974. The details of the expenses were calculated by M. Salliou, a French accountant engaged by Jackfrost. He first detailed all the expenses of Jackfrost, and then apportioned the amount which in his opinion was properly attributable to the business of selling the lager. Deducting a gross trading profit of 11,000 francs for that year, the balance claimed by Jackfrost under this head amounts to 67,037.00 francs. We are satisfied as to the accuracy of this figure.

We were asked to award simple interest on this figure, and we agree. We have decided that interest at the rate of ten per cent should run from 30th September, 1974, until 21st September, 1980. The total amount of interest is 40,050.31 francs.

Secondly, we were asked to award a sum of 13,673.00 francs under the heading of "Patentes" (local taxes payable by Jackfrost) for 1974. Counsel for Grunhalle queried whether, because Jackfrost was trading before it commenced the business of selling lager, all the expenses claimed under this head were attributable to that business. We are satisfied that they are. We award interest at the rate of ten per cent for the same period as above, amounting to 8,168.74 francs.

Thirdly, because Jackfrost remained in being as a Company until 1980, although it was not trading, it was required to pay an "impôt" of 1,000 francs in each of the years 1974, 1976 and 1977, and of 3,000 francs in each of the years 1978, 1979 and 1980. Counsel for Grunhalle queried whether the whole of these amounts were attributable to the lager business, because Jackfrost traded both before and after that business. We are satisfied that the figures are correct, and that it was necessary for the Company to remain in existence afterwards pending these legal proceedings. We therefore award the sum of 12,000.00 francs under this head, and simple interest at ten per cent for the same period as above, amounting to 3,400.00 francs.

Fourthly / ...

Fourthly and lastly, we were asked to award a sum of 13,670.00 francs, being the "honoraires" of M. Salliou for the years 1976 to 1980 inclusive. We agree.

The amount of expenses thus awarded totals 157,999.05 francs, and because the expenses were incurred by a French company in France we make our award in French francs.

For convenience, we attach a detailed calculation of our award.

We next turn to the claim for general damages by Jackfrost against Tascan.

Because the Court had found in its previous judgment that Tascan was in turn entitled to be indemnified by Grunhalle in respect of the counter-claim of Jackfrost, the claim for general damages by Jackfrost is in effect a claim against Grunhalle. Moreover, during the hearing Tascan supported the claim of Jackfrost because the success of its own claim against Grunhalle is dependent entirely upon the outcome of the claim of Jackfrost.

It was agreed by all the parties that the measure of damages due to Jackfrost and to Tascan was the loss of profits (if any) which they would have made from selling the lager if there had been no breach of contract. As McGregor on Damages (14th Edition) states at paragraph 134 on page 127 -

"The starting point in resolving a problem as to the measure of damages for breach of contract is the rule that the plaintiff is entitled to be placed, so far as money can do it, in the same position as he would have been in had the contract been performed."

In this case that involves an estimate by the Court as to what profits would have been made.

That rule is limited by the consideration of what was in the contemplation of the parties. That limitation was stated and explained in the leading case of Hadley -v- Baxendale (1854) 9

Ex.341, and re-stated with modifications by the Court of Appeal in Victoria Laundry -v- Newman (1949) 2 K.B. 528. In the light of the conclusions to which we have come on the evidence, we do not consider it necessary to examine further in this judgment the principles stated and re-stated in those authorities, except to express the view without hesitation that at the time of the formation of the contracts between Grunhalle and Tascan and between Tascan and Jackfrost respectively, both Grunhalle, in the former case, and Tascan, in the latter case, anticipated that considerable profits were likely to be made eventually. It therefore follows that had we been satisfied that very substantial profits would in fact have been made but for the breach, then we would have awarded general damages accordingly.

We were addressed by counsel for Jackfrost on the issue of certainty and referred to the leading case of Chaplin -v- Hicks (1911) 2 K.B. 786. He submitted that although the Court in this case was faced with a difficult task because of the many uncertainties and contingencies, they were not such as to relieve the Court of the duty of assessing the proper damages. Counsel for Grunhalle conceded this, and we agree, difficult though our task is.

We next briefly summarise the relevant background. Prior to 1972 Grunhalle acquired a Bavarian recipe for a lager with a view to brewing it in Jersey and exporting it to France. Grunhalle thought that its distinctive flavour would appeal to the French consumer, and had high hopes of success. In 1972 Grunhalle exported it direct to a Mr. Thebault, a wholesaler in the Dinard area and proprietor of the Brasserie de la Rance. Sales were negligible as there was apparently only one outlet, the Hotel des Bains at Dinard. Nevertheless, Grunhalle remained very optimistic as to future sales, both in France and in Europe, and in May, 1973, appointed Mr. Ash as its sole

concessionnaire / ...



concessionnaire in Europe for the lager.

As we have stated, Mr. Ash in turn arranged for the concession to be operated by Tascan, a Company which he formed for the purpose. He re-appointed Mr. Thebault and appointed a further wholesaler in the Dinard area, a Mr. Blanchard, and arranged other openings. He sold only £2,000 worth of the lager during 1973 (he was limited to a period of some two to three months because of matters beyond his control), but because of the favourable way in which the lager was received he (as well as Grunhalle) was confident that the prospects were excellent, so much so that he decided, having met Mr. Origlia, to appoint Mr. Origlia's existing French Company, Jackfrost, as sole distributor for France so as to enable him to concentrate on the rest of Europe. The appointment was subject to Jackfrost ordering its first trailer load.

Mr. Origlia, having obtained certain assurances at a meeting at the offices of Grunhalle on 4th February, 1974, and having satisfied himself as to the quality and price of the lager and the prospects of its success, conducted a preliminary marketing operation at the Jersey Chamber of Commerce Stand at the Foire de Rennes in April, 1974. For that purpose he ordered thirty cases of the lager which he gave away at the stand. He was delighted with the favourable response and on or about 24th April Jackfrost ordered twelve hundred cases from Tascan, thereby bringing into operation the confirmation of its appointment by Tascan as sole distributor for France.

That first delivery arrived in a generally broken condition and had to be returned and replaced by a second delivery. Jackfrost sent a further order shortly afterwards, and this, which we call the third delivery, was despatched on 3rd June. Unfortunately, as Grunhalle admitted, the lager in this delivery was immature, and led to complaints from customers. As a result, some of it was never sold. Jackfrost complained to Tascan and to Grunhalle, but sent a further

order on 4th July, asking for prompt delivery "because it is now the holiday season and we are in great demand." A further order was sent on 8th July. Neither of those orders was ever executed because Grunhalle had not been paid by Tascan, and Tascan in turn had not been paid by Jackfrost, for the previous deliveries. On 10th July, as we have already stated, the contract was brought to an end by the wrongful conduct of Grunhalle.

Between April and July, 1974, Jackfrost sold or gave away between 2,000 or 3,000 cases of the lager. It received from sales ,000 francs (or, say, £2,842.11) and made a gross trading profit of about 11,000 francs. Mr. Origlia claimed, however, that taking into account the expenses of setting up the new business Jackfrost made a substantial loss, and we accept this.

We have summarised this background because it underlines one of the main difficulties in this case. The breach of contract occurred at such an early stage in the enterprise of Jackfrost that there was not time for a clear pattern of trading to emerge to assist in showing whether the enterprise was likely to be profitable. Counsel for Jackfrost and for Tascan submitted that all the signs indicated that the enterprise would have been extremely successful, whereas counsel for Grunhalle submitted that it would have continued to make a loss. In the absence of any clear trading pattern emerging before the breach of contract, we have to be guided by the other evidence which was put before us.

Before we consider this, however, we must refer to the anticipated duration of the contract, because that affects the quantum of damages. It appears that the duration of the sole concession granted to Tascan, and of the sole distributorship granted to Jackfrost, was not specifically discussed before entering into the contracts.

Nevertheless /

Nevertheless, the parties agreed at the hearing that we should for our purposes assume a period of five years, that is to say, 1974 to 1978 inclusive. We do so, with, however, this qualification, which we think is reasonable, that if, contrary to the high expectations of the parties at the time, the enterprise of Jackfrost had not turned out successfully, then it would have terminated before the end of the five year period, because we do not believe that Jackfrost would or could have continued to trade at a loss.

We come now to the evidence which was put before us, and we start with Jackfrost's own assessment of the profits which it would have made. Early in 1974 Mr. Origlia asked Mr. Salliou, the French accountant of Jackfrost, to prepare an "Etude" or forecast of the net profits which Jackfrost could expect to receive from the sale of the lager in France. Mr. Salliou, who had had no experience of marketing beer, prepared his Etude for the five years 1974 to 1978 on the basis of the number of cases (containing 24 bottles each) which Mr. Origlia forecast that Jackfrost would be able to sell in each of those years. That forecast was as follows

1974 Sector Brittany-Normandy	1,000,000 cases
1975 Sector Brittany-Normandy	300,000 cases
with extension to the Paris Sector	200,000 cases
a total of 500,000 cases.	
1976 With extension to the Lyon Sector	750,000 cases
1977 With extension to the Provence, Cote d'Azur Sectors	1,000,000 cases
1978	1,200,000 cases.

On those projected sales figures, Mr. Salliou estimated that Jackfrost would make a net profit (after tax) as follows

1974	53,000 francs
1975	350,000 francs
1976	750,000 francs
1977	1,100,000 francs
1978	1,350,000 francs

, total net profit (after tax) over five years was therefore forecast at 3,603,000 francs.

Counsel for Jackfrost conceded that there were so many uncertainties that it would be unrealistic to ask the Court to award that total sum by way of damages. He therefore proposed that that sum (which counsel estimated to be the equivalent of about £380,000 at the rate of exchange ruling at the date of the hearing) should be discounted by some sixty per cent, giving a figure of, say, £150,000. Because each year's profits would have been banked at the time, it was reasonable to add one-third of that sum by way of interest, making a total of £200,000, which he asked us to award.

He calculated the sum of £150,000 by estimating 1974's net profits at £5,000, and then doubling the profits each year, with a slight reduction for 1978, as follows:

1974	£5,000
1975	£10,000
1976	£20,000
1977	£40,000
1978	<u>£75,000</u>
	<u>£150,000</u>

Counsel for Jackfrost asked us to take the Etude seriously as basis for our award, and we have considered it at some length. The Etude relies wholly on Mr. Origlia's forecast of projected sales. The only statistics given in the Etude to assist in that forecast are those supplied to Mr. Salliou by the French Chamber of Commerce for the consumption of beer (of all types) throughout France. The figures (in hecto-litres) are for beer consumed in 1970 - 1973 (and subsequent years to 1978 were later added). In 1973, the figure was 21,938,000, it gradually increased to a peak of 25,715,000 in 1976 (which was a year of extensive drought) and then fell back to 23,696,000 in 1978.

Mr. Origlia informed us that, apart from these statistics, the only other matters which he took into account in making his forecast

of sales were: first, he obtained some figures for beer consumption in Brittany and Normandy (but not for any other region); secondly, he was personally impressed by the taste and quality of the lager; and thirdly, the samples which he gave away were well received.

Finally, it was pointed out to us that the volume forecast, although large on the face of it, envisaged the lager taking only a very small share of the beer market in France, as follows: In 1974 one in every 2,300 bottles consumed would be the lager, in 1975 one in every 700, in 1976 one in every 460, in 1977 one in every 350, and in 1978 one in every 290.

We feel bound to say that we can find very little realistic foundation for Mr. Origlia's forecast. As we shall consider later, the French market for lager on the evidence given to us is extremely competitive and very difficult to break into, as Mr. Origlia conceded. He himself had had no experience of marketing lager (or other beer), either in France or elsewhere. We would have expected anyone contemplating entering such a competitive field to make many further enquiries.

In particular, we would have expected Mr. Origlia to have researched the figures for the export of British lager to France. If he had done so, we think that he would have been much less optimistic. We have been given such figures obtained from the Brewers' Society in London. They show that in 1974 the total of British lager exported to France was 1901 barrels or 3110 hecto-litres. By 1978 that figure had risen to 2,640 barrels or 4320 hecto-litres, which is .01823% of the total beer consumption in France in that year. Mr. Origlia's forecast of his sales for 1978 was 1,200,000 cases or 81,816 hecto-litres, some nineteen times greater than the total of British lager exported to France in that year, and .34527% of the total beer consumption in France for that year. We shall consider that figure later, but for the present we limit ourselves to saying that we can find no realistic basis for Mr. Origlia's forecast of sales; it appears to us to have been largely uninformed speculation.

We heard considerable evidence about the difficulties of launching British lager in the French market, and because this evidence is very relevant to the issue before us, we now summarise it.

In May or June 1974 Jackfrost appointed Mr. C. Mahé, a representative in Brittany and Normandy for wines, spirits and beers as one of its representatives in those areas to sell the lager on commission. He was given samples to distribute, and these were well received. He then went on to sell a quantity of the lager in June and July to wholesalers, cafes and bars (he could not sell to supermarkets, as they obtained their supplies from a central wholesaler). He considered that his sales were adversely affected by the fact that his subsequent supplies of the lager were not up to the samples (a reference to the delivery which was immature).

He spoke of the French market for beer. Nine-tenths of the beer drunk was lager ("biere blonde"). British lager was good, but it was not widely known in France. It faced strong competition from the large well-established brands, such as Heinecken, Kronenbourg, Carlsberg, La Meuse and Stella Artois, and was therefore difficult to sell. Moreover, the launching of a new lager required a great deal of advertising; the established firms had to keep advertising to maintain their place in the market. Jackfrost's publicity consisted in giving one bottle free in each ten sold. Another aspect of the competition was that many outlets borrowed money from the lager suppliers, which obliged them to take the lager from the supplier in question, although that did not prevent them from buying other brands also.

Mr. Mahé expressed the view that despite the stiff competition and the fact that a large part of the market was already taken by established brands, British lager should be able to find a place and he had expected a "reasonable addition" to his sales.

After the breach of contract in July 1974, the lager ceased to be sold in France until in 1977 Grunhalla decided to try exporting

t again to France, and engaged two representatives with very considerable experience of selling lager in France. They were Mr. M.E. Pomerand and Mr. A.M. Villain. Their efforts lasted for two years. Total sales were 73,000 francs (or £7,000) which resulted in a loss. Grunhalle therefore largely abandoned the attempt in 1979, having concluded that the French market was too difficult to break into, and that the lager was not generally popular in France.

Mr. Pomerand is a British subject but spent his youth in France, and has worked in the retail trade in England and France for many years. He found a partner for Courages in France and opened a chain of public houses for Whitbread in Holland, Belgium, France, Italy and Switzerland. He therefore claimed to have many close contacts in the beer trade in France, and an intimate knowledge of the beer market there.

In 1977 Mr. Pomerand was working for Greenall Whitley, a United Kingdom brewery commercially associated with Grunhalle, and was partly engaged in promoting sales of that Company's product, Chester Brown (a barley wine), in France. Mr. Greenall therefore asked Mr. Pomerand to try to promote sales of the lager. Mr. Pomerand said that it would be difficult, but that he would try. He worked on a yearly fee of £2,300, not commission. After discussion with the Commercial Attaché at the British Embassy in Paris, he began by temporarily establishing a public house in Le Printemps, a large store in Paris, as part of a British Month which was opened by the British Ambassador. He invited a number of distributors in the beer trade to come and sample the lager in draught. They liked it, but expressed the view that there were already too many lagers on the market. No orders were given.

Mr. Pomerand invited the President of the Distributors Association in Paris to visit Jersey to discuss the lager. He spent three days in the Island, but no orders resulted.

Mr. Pomerand /

Mr. Pomerand next visited distributors along the Normandy and Brittany coast, in collaboration with Mr. Villain, who was the representative for Chester Brown in an area from the Loire to Cherbourg. He visited many retail outlets, and Mr. Villain visited his contacts among the small distributors. Their sales were very small, and in 1978 Mr. Pomerand persuaded Grunhalle to change the label on their bottles to "La Blonde de Jersey", because he gained the impression that customers were suspicious of a lager with a German-sounding name but brewed in Jersey, and thought the product could not be genuine.

He experienced difficulty in persuading Mr. Thebault to resume selling the lager. Mr. Thebault's reluctance stemmed from unhappy experiences in 1974. The price of the lager then had not been constant. Also, he remembered with annoyance that another wholesaler in the same area, Mr. Blanchard, had been appointed in competition with himself. That was contrary to the code of the trade. Mr. Thebault did not refer to the immaturity of the lager in 1974. Mr. Pomerand eventually managed to persuade Mr. Thebault to resume selling the lager after having his young daughter to stay in England and after entertaining the whole of his sales staff in Jersey.

Finally, in some desperation and not without some sense of embarrassment, Mr. Pomerand used his position as the President of the Croix de Guerre and Medaille Militaire Association in the United Kingdom to ask the National President of the Association in France to write to local Association Presidents to urge them to promote the lager by asking for it in their local outlets, in the hope that this would have a snowball effect.

In 1979 Mr. Pomerand had to tell Grunhalle that despite all his efforts, and those of Mr. Villain, he could make no headway and he advised Grunhalle to abandon the promotion of the lager in France.

Mr. Pomerand expressed certain general views about the beer

market / ...



market in France. Firstly, France was not primarily a beer drinking country. Secondly, British lager had come late into a market where several large companies were already well established. He did not think it was exportable. Thirdly, a newcomer needed to spend large sums of money to break into the market. Most outlets were tied to breweries by substantial loans. Although, with the consent of the breweries, the licensees could sell other brands, they promoted primarily the brand of the brewery to which they were tied. There were several very well-known brands, French, Belgian, Dutch, German and Danish, and in the face of such competition it was extremely difficult to offer a sufficient inducement to persuade a retailer to take a new beer. To penetrate the market one needed a specialised product, such as Guinness, and even then promotion expenses were very high.

Mr. Villain, who is a representative of several breweries and has been selling beer since 1954, was asked by Mr. Pomerand in 1977 to collaborate with him in selling the lager in lower Normandy, and Ille-et-Vilaine, and he endeavoured to do so for three years. As he conceded, his efforts were a failure. In 1978, his best year for sales of the lager, he sold 180 hecto-litres as compared with 42,000 hecto-litres of other lagers.

He explained that it was difficult for British lagers to break into a very competitive market, because they had come late into the field. Most cafes were tied to breweries by loans, and promotions and gifts. To break into the market a newcomer needed to spend millions of francs. He felt that British lagers were not generally to the taste of the French consumer, and that they compared unfavourably in price.

He admitted that the sale of the lager was not "une vente sérieuse" but only "une vente accessoire". He had been able to sell it only at those outlets where he was making sales of other lagers. He had tried selling it at outlets where he was not making other sales, but had

had / ...

had no success because most outlets were already tied to breweries and were subject to promotions of other lagers, of which there were many. Moreover, French lagers, which he mostly sold, were cheaper in price.

We have now summarised the main evidence on which we have to base our judgment. As we have said, Jackfrost and Tascan asked us to find that the enterprise would have greatly prospered, whereas Grunhalle submitted that it would have been a financial failure. Our conclusion, after a lengthy examination of the evidence and after

drawing all such inferences as we properly can in this difficult case, is that the enterprise would probably have failed. We have to concede that there was a small chance that it might have had some success, but if it had we feel certain that the profits would have been modest, because we do not believe that the enterprise would ever have achieved the large resources required to penetrate beyond the Normandy/Brittany region.

In reaching our conclusion we have been much influenced by the evidence we heard from Mr. Pomerand, Mr. Villain and Mr. Mahé about the difficulty of breaking into the French lager market, evidence which we think is corroborated by the figures of total exports of British lager to France to which we have referred. Those figures constituted a minute proportion of total lager consumption in France, and showed little advance over the five years. We have no hesitation in accepting that the French lager market is highly competitive and protectionist and that penetration of that market by a new product is extremely difficult and requires very substantial financial promotion and a close knowledge of the market. Mr. Origlia and Jackfrost had few financial resources and, we think, little appreciation of the difficulties of the market which they were trying to penetrate.

The arguments of Jackfrost and Tascan for asking us to find that the lager would have been a success were, firstly, that the Bavarian recipe had been specially acquired by Mr. Greenall and Mr. Clubb, both experienced and successful brewers, for the export market because

they thought that it would appeal to the Continental taste; secondly, that these two experienced brewers believed in 1972 to 1974 that it would be a great success and in a local newspaper article spoke of sales having exceeded "our greatest expectations"; and thirdly, that it was very well received at the Foire de Rennes; and fourthly, that in the opinion of Mr. Ash, Mr. Origlia, Mr. Greenall and Mr. Clubb it was an extremely good beer.

As to the first argument, Mr. Greenall told us that the failure of Mr. Pomerand and Mr. Villain to make any impact had convinced him that he and Mr. Clubb were wrong, and that the taste, which was special, obviously did not appeal to French consumers. As to the second argument, he agreed that he and Mr. Clubb had been very enthusiastic and optimistic at first, but after the experiences of Mr. Pomerand and Mr. Villain, he now realised that they had not sufficiently investigated and understood the ramifications and difficulties of the French market. As to the third argument, we think that the enthusiastic reception of free samples does not afford a very reliable guide to commercial success in a very resistant and competitive market; in this respect, the experience of Mr. Pomerand is, we think, very revealing. As to the fourth argument, we accept that it was an extremely good lager to those to whom it appealed, but commercial success depends on many other factors.

As we have already shown, the record of sales in France by Grunhalle and later by Mr. Ash, did not, in our view, give any solid reason for optimism, but Mr. Origlia hoped, by setting up a sales and distribution organisation in France through Jackfrost, to make real headway. We can only say that the way in which he approached his difficult task has not inspired in us any confidence at all that he would have succeeded. He told us that when he met Mr. Ash he thought he had "hit the jackpot". We accept that and we think that goes far to explain why he failed to appreciate the harsh realities of the task:

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efore him. He had had no experience of selling beer in France, but that apparently did not deter him at all. For the Etude he conjured up figures of future sales with very little research or realistic basis. He appears to have had little or none of the large financial resources needed to promote the sales he envisaged, especially those projected beyond the Normandy/Brittany region.

We were urged to reject the evidence of Mr. Pomerand and Mr. Villain as being irrelevant and misleading, for the following reasons.

First, that the conditions in 1977 to 1979 could well have been different from those existing in 1974; the product and the market conditions might have changed, thus providing no reliable indicator. We do not accept that argument. The evidence was that the lager was still made from the same recipe. As to market conditions, our clear conclusion from the evidence of Mr. Pomerand, Mr. Villain and indeed Mr. Mahé is that the difficulties of marketing a new lager in 1974 were as great as now.

Secondly, that Mr. Pomerand and Mr. Villain were part-time salesmen, as opposed to Jackfrost's full-time salesman, that they did not really try hard because the sale of the lager was not "une vente serieuse" for them, and that because from the start they had little faith in the ability of British lager to penetrate the French market their efforts were doomed from the beginning. We have considered that argument carefully, but we cannot accept it. These two men were extremely experienced in the French market, and Mr. Villain had a close knowledge of the Normandy/Brittany region. We think that they were just the men to have succeeded, if success were possible. Mr. Pomerand, in particular, went, we believe, to very great lengths indeed to promote the lager. The fact that he achieved such a poor response has persuaded us that Jackfrost is very unlikely to have done any better.

Thirdly, that Grunhalls, by the timing of its decision to try to resume penetration of the French market, had shown that its sole purpose in that resumption was to be able to bring evidence which would

give a false picture to the Court. We do not accept that argument. We believe that the engagement of Mr. Pomerand was a genuine attempt to try to resume sales in France.

We have considered several other arguments put to us by the parties, including the allegation, which had some basis, that the lager was over-priced by comparison with other similar lagers, but they do not affect the main reasons which we have mentioned and which have led us to our conclusion.

For all the reasons we have given, we have come to the conclusion in this difficult case that Jackfrost would probably not have made any net profits in 1974, and that therefore the enterprise would have been terminated at the end of 1974. Alternatively, if it had not been and had continued into 1975; we think that Jackfrost would probably not have made any net profits in 1975 either, and that the enterprise would in such case have definitely terminated at or before the end of 1975.

However, although that is our firm conclusion as to what would probably have occurred, we realise that in a case such as this where there are so many uncertainties we cannot say positively that Jackfrost would not have made some net profits in the Normandy/Brittany area. We are certain that its enterprise would not have extended beyond that region and that its profits would not in any year have been substantial, but we have to accept that there was a small chance that Jackfrost would have made modest net profits, and, if it had, that it might have continued to do so throughout the five year period. We accept, therefore, that our award must reflect that small chance.

We have considered anxiously and at length how we should translate that chance into monetary terms. Bearing in mind that this judgment includes an award of damages to Tascan, whose claim is based on a percentage of the estimated volume of the lager which would have been sold to Jackfrost, we had at first hoped that it might have been possible for us to estimate the number of cases which Jackfrost might have been expected to sell, and to base our award to Jackfrost strictly on that volume of business. Unfortunately, although we could have made an estimate of the number of cases which Jackfrost might have sold in each year, none of the many figures supplied to us would have assisted us to translate that volume of sales into net profits. No doubt we might have adjourned the case for an accounting exercise to be done, but that would have considerably prolonged matters, which we consider to be undesirable,

and in any event we are not sure that such an exercise would necessarily have produced any meaningful figures. We have therefore decided to do the best we can on the information which we have.

We have come to the conclusion that as regards Jackfrost we should award a lump sum to compensate for the possible loss of the limited net profits which it had a small chance of making in each of the five years. It follows that we have concluded that it is impossible to relate the two awards, that to Jackfrost and that to Tascan, with any degree of precision, because the former depends on many factors, such, for example, as efficiency of operation, whilst the latter depends entirely upon volume of sales. Ultimately, however, as we have said, Tascan depended on the success of Jackfrost. That conclusion in fact reflects the way in which the claim of each of those two parties was put to us; Jackfrost asked for a lump sum which discounted the total net profits as shown in the Etude by some sixty per cent, whilst Tascan relied wholly on the total volume of purchases by Jackfrost as also shown in the Etude.

Our award to Jackfrost is therefore as follows:-

1974	Loss of net profits	£2,000
1975	" " " "	3,000
1976	" " " "	4,000
1977	" " " "	3,000
1978	" " " "	<u>3,000</u>
	Total:	<u>£15,000</u>

By way of explanation of our award, we wish to say that -

1. We have allowed higher profits for 1975 than for 1974 because it might have been expected that profits would be somewhat higher in the second year of the enterprise.

2. 1976 was a year of drought and therefore, if the enterprise were still in being, larger sales than normal could have been expected, as the figures of both the French Chamber of Commerce and the Brewers' Society show.

3. As both those figures also show, total sales of beer and lager dropped back in 1977. We do not think that Jackfrost would have increased its sales by further penetration of the market, and so we have reduced estimated profits to £3,000 for 1977, and maintained that figure for 1978.

To the total sum of £15,000, we add interest of one-third, as requested by counsel for Jackfrost, making a total award of £20,000 by way of general damages due to Jackfrost by Tascan.

In accordance with the previous judgment of the Court already referred to, but subject to what we have to say in the next paragraph, we order Grunhalle to indemnify Tascan in respect of the two awards which we have made in favour of Jackfrost against Tascan for expenses incurred (special damages) and for loss of profits (general damages) respectively.

Those two awards under those respective heads raise a question which was not canvassed before us, but which we think should have been. It appears to us that Jackfrost may well not be entitled to claim both its expenses in connexion with the business and loss of net profits for the wrongful termination of that business. If there had been no breach of contract Jackfrost would have continued to trade, at least for a time, and its expenses would have been deducted from its gross profits. It seems to us, therefore, that Jackfrost is now in the position of having to elect between its claim for expenses and its claim for loss of profits. We refer to the cases of *Cullinane -v- British "Rema" Manufacturing Company* (1953) 2 All E.R. 1257, and *Anglia Television Company Limited -v- Reid* (1979) 3 All E.R. 690.

Because this matter was not raised by either party at the hearing, it will be necessary, if the parties cannot agree, to argue, if necessary, the question before us, and, if the principle is



correct, to consider whether any part of the expenses should be excluded from the application of that principle in this case.

We turn now to the claim by Tascan against Grunhalle for general damages for loss of profits.

We wish first to comment on the submission by Grunhalle that in assessing the general damages due to Tascan we should take into account the failure of Tascan properly to mitigate the damage caused to it by the breach of contract. The submission was that although the letter of 10th July, 1974, from Grunhalle to Tascan had been found to justify Jackfrost in ceasing its operation, there was no reason why Tascan should not have continued to sell the lager to other distributors in France. Tascan should have realised that the letter was motivated by hostility to Jackfrost and not to Tascan, and that therefore, having itself received assurances as to future standards and supplies and having also contacts with lager distributors in France, it could have continued to trade.

We accept that a person damaged by a breach of contract has a duty to mitigate that damage, but we do not consider that Tascan could have been expected to continue trading in the lager in the light of the letter to which we have referred and of the very difficult circumstances which then faced Mr. Ash. As the previous judgment found, Grunhalle not only wrongly objected to Jackfrost, which Tascan had perfectly properly appointed as its sole distributor in France, but purported also to derogate wrongly from its appointment of Tascan as sole concessionnaire by informing Tascan that it could not appoint a sole distributor or indeed any distributor without its approval. It may be that if Mr. Ash had persevered there might have been a future for Tascan in selling the lager, but we think that the damage done by the wrongful actions of Grunhalle was psychological as well as material, and we cannot find that Mr. Ash, and therefore Tascan, behaved unreasonably in ceasing all its operations. Mr. Ash's award is therefore not liable to be reduced by a failure to mitigate the damage.

As we have already said, the success of the claim by Tascan against Grunhalle is substantially dependent on the outcome of the claim by Jackfrost against Tascan. The reason is that Tascan, as the middle-man, took orders for the lager from Jackfrost and then ordered the necessary supplies from Grunhalle. The lager was invoiced to Tascan who then invoiced Jackfrost, adding ten per cent to the price charged by Grunhalle to cover its expenses and profit. Tascan estimated its profit at half that margin of ten per cent, and therefore now claims by way of general damages five per cent of the cost to Jackfrost of the lager which Jackfrost would have ordered during the five year period but for the breach of contract by Grunhalle. It follows that the greater volume of the lager which Tascan can show that Jackfrost would have ordered, the greater the damages to which it is now entitled.

Unlike Jackfrost, Tascan claimed that the Etude was a valid forecast of the volume of the lager which Jackfrost would have ordered, and accordingly based its claim on that volume as shown by the figures given under the heading "Prix d'achat de la bière" for each year. Those figures total 65,326,000 francs, of which five per cent is 3,266,300 francs, and that is the amount now claimed by Tascan by way of general damages.

We have already expressed our conclusion that Jackfrost would probably have made no net profit at all in 1974, and that had it nevertheless continued to trade in 1975 it would probably have again made a loss and would in such case have stopped trading. It is not necessary for us to repeat the reasons which we have already given for reaching that conclusion. As we have already said, however, we must accept, in the alternative, that there was a small chance that Jackfrost would have made modest net profits from sales in Brittany and Normandy (we are certain that they would not in any year have been substantial), and that if it had it might have continued to do so throughout the five year period. In other words, we must accept

- that there was a small chance that Jackfrost would have continued to trade throughout the five year period and would, therefore, have continued to order limited supplies from Tascan throughout that period. Our award to Tascan must reflect that chance, bearing in mind that, as we have already said, it is impossible for us to relate the two awards, to Jackfrost and to Tascan, with any precision.

Our award to Tascan must be based on the number of cases of the lager which we think that Tascan would have sold to Jackfrost.

Our conclusion is that those sales would have been as follows:-

1974	20,000 cases
1975	15,000 cases
1976	20,000 cases
1977	15,000 cases
1978	15,000 cases

We have already given our general reasons for our conclusion that the enterprise of Jackfrost would probably not have succeeded, and our estimate of the number of cases that would have been sold by Tascan to Jackfrost is based, as is our award to Jackfrost, on that general conclusion. It will be seen, however, that we have put the 1974 figure higher than the 1975, 1977 and 1978 figures, and as high as the 1976 figure. Our reasoning is as follows.

Even if, as we think probably would have been the case, the enterprise was destined never to make a net profit, it would have taken Jackfrost some time to come to that conclusion. Jackfrost would, therefore, have ordered quite a substantial number of cases in 1974 in order to try to build up its business. We know that up to the end of June it had ordered some 2,000 to 3,000 cases, and that two further orders were put in during the first two weeks of July (although never executed). We estimate that several further orders would have been given in 1974, and that total orders for that year would have amounted to 20,000 cases.

Different considerations apply to subsequent years, because, as we have said, we think that Jackfrost would probably have ceased business at the end of 1974, but we have accepted that there was a small chance that the business would have continued during 1975, and also a small chance that it would have continued beyond that date. If it had ceased at the end of 1974 no further orders would have been given. If, however, it had continued, there was a small chance that the business would have improved by comparison with 1974, and might have prospered even more in the drought year of 1976. Balancing those chances, we have reduced the 1975 figure as compared with the 1974 figure, but thereafter we have followed the general pattern which we have adopted in the case of Jackfrost. It follows from what we have said that our award to Tascan is based on the same estimated pattern of trade as we have adopted in the case of Jackfrost, except for 1974, which, as we have explained, gives rise to different considerations. Those considerations are that it is unlikely that Jackfrost would have made a profit in 1974, but that if it had continued in business there was a small chance that it would have made a profit (or a larger profit) in 1975; Tascan, however, was bound to make a profit in 1974, because its profits were based on the volume of orders received from Jackfrost and Jackfrost was endeavouring to build up its business in 1974 and so would have ordered some supplies (whether or not the business eventually made a loss). As time passed, Tascan's profits, depending as they did on orders received, would have been increasingly affected by the financial success or otherwise of the enterprise, as to which we have expressed our views.

Our award to Tascan is therefore based, firstly, on our estimate of the volume of sales to Jackfrost already given, and secondly, on Tascan's profit element (which we accept would have been 5%) on the cost to Jackfrost of those sales. The only evidence as to that cost

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which we have is the Etude, which forecast for each of the five years, under the item "Prix d'achat de la bière", the total estimated cost to Jackfrost of the volume of lager which, according to the forecast, it would buy from Tascan in that year. That figure, when taken with the estimated volume of sales forecast on page 1 of the Etude, enables us to calculate the forecast price per one thousand cases of the lager for each year. We have, of course, no means of knowing whether, if the contract had not been terminated, the lager would have been sold by Tascan to Jackfrost at the prices forecast, but Tascan, in its submissions to us, was content to rely on those figures, and we therefore do so too.

We therefore arrive at an award in francs calculated on the above basis, as follows:-

Year	<u>Cases</u>	<u>Invoice Cost</u>
1974	20,000	280,800.00
1975	15,000	207,920.79
1976	20,000	341,066.67
1977	15,000	275,986.20
1978	15,000	313,750.00
	Total:	<u>1,419,523.66</u>

Five per cent of that estimated total invoice cost for the five years amounts to 70,976.18 francs. To that sum we add, as requested by Tascan, interest at ten per cent for the period from 8th March, 1978, the date of the previous judgment to 21st September, 1980, which is 18,050.82, making, therefore a total award in francs of 89,027.00. We agree that our award should be in sterling, and therefore, subject to our next paragraph, we make a formal award in such sum in sterling as is equivalent to the above sum in francs at the rate of exchange (buying) ruling at the date of delivery of this judgment.

Although we have not been asked to assess the expenses claimed by Tascan, it appears to us that the question which we have raised as to whether Jackfrost can claim both expenses and loss of net profits or whether it should be obliged to elect between those two claims,

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equally applies to the two claims by Mascan for expenses and for loss of profits respectively.

CLAIM BY JACKFROST FOR EXPENSES

F.

SHEET 1 (B1)                      78,037 F - 11,000 F = 67,037.00

Interest on 67,037 F at 10%

1974 (3 months)	1,675.925		
1975	6,703.700		
1976	6,703.700		
1977	6,703.700		
1978	6,703.700		
1979	6,703.700		
1980 (to 21.9.1980)	<u>4,855.884</u>	=	40,050.31

SHEET 2 (B2) Patentes                      13,673 F                      =                      13,673.00

Interest on 13,673 F at 10%

1974 (3 months)	341.825		
1975	1,367.300		
1976	1,367.300		
1977	1,367.300		
1978	1,367.300		
1979	1,367.300		
1980 (to 21.9.1980)	<u>990.415</u>	=	8,168.74

Impôts                      12,000 F                      =                      12,000.00

Simple Interest on 12,000 F at 10%

	1000	1000	1000	3000	3000	3000	
1974	100	-	-	-	-	-	
1975	100	-	-	-	-	-	
1976	100	100	-	-	-	-	
1977	100	100	100	-	-	-	
1978	100	100	100	300	-	-	
1979	100	100	100	300	300	-	
1980	<u>100</u>	<u>100</u>	<u>100</u>	<u>300</u>	<u>300</u>	<u>300</u>	
	700	500	400	900	600	300	= 3,400

Honoraires                      13,670 F                      =                      13,670

157,999.05 F