ORDER OF THE COURT (Third Chamber)
10 December 2003 *

In Case C-204/02 P,

Colin Joynson, residing in Manchester (United Kingdom), represented by S. Ferdinand, Solicitor,

appellant,

APPEAL against the judgment of the Court of First Instance of the European Communities (Third Chamber) of 21 March 2002 in Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085, seeking to have that judgment set aside,

the other parties to the proceedings being:

Commission of the European Communities, represented by K. Wiedner, acting as Agent, and N. Khan, Barrister, with an address for service in Luxembourg,

defendant at first instance,

* Language of the case: English.

Six Continents plc, formerly Bass plc, established in London, represented by J. Block and J. Baxter, Solicitors, with an address for service in Luxembourg,

intervener at first instance,

THE COURT (Third Chamber),

composed of: C. Gulmann (Rapporteur), acting for the President of the Third Chamber, J.N. Cunha Rodrigues and J.-P. Puissochet, Judges,

Advocate General: L.A. Geelhoed,
Registrar: R. Grass,

after hearing the views of the Advocate General,

makes the following

Order

1 By a statement of appeal lodged at the Court Registry on 30 May 2002, Mr Joynson, pursuant to Article 49 of the EC Statute of the Court of Justice, brought an appeal against the judgment of the Court of First Instance of 21 March

2002 in Case T-231/99 *Joynson* v *Commission* [2002] ECR II-2085 ('the judgment under appeal'), by which that Court dismissed an application for annulment of Commission Decision 1999/473/EC of 16 June 1999 relating to a proceeding pursuant to Article 81 of the EC Treaty (Case IV/36.081/F3 — Bass) (OJ 1999 L 186, p. 1) ('the contested decision') granting an individual exemption for a specified period for standard leases applied by Six Continents plc, formerly Bass plc, ('Bass') to tenants of its public houses and for the exclusive purchasing obligation and non-competition obligation ('beer tie') contained in such leases.

Facts of the dispute

2 The facts underlying the dispute are set out as follows in paragraphs 1 to 13 of the judgment under appeal:

'1 Bass PLC ("Bass") is a company quoted on the London Stock Exchange. The Bass group is an international group operating in the field of hotels, leisure and the manufacture of drinks, especially beer, in Europe, the United States and other countries.

2 In June 1996 the Bass group owned some 4 182 public houses in the United Kingdom, of which 2 736 were managed by an employee of the group and 1 446 leased....

3 During 1998 the Bass group progressively sold a large part of its leased estate, retaining only about 20 pubs.

4 The contractual relations between the Bass group and most of its tied lessees were governed by a standard lease, under which one of the companies in the Bass group made a licensed house available to the lessee, with the fixtures and fittings needed to operate it, in return for the payment of rent and an undertaking to buy the beers specified in the lease from Bass or a supplier designated by Bass.

5 The standard lease thus contained an exclusive purchasing obligation and a non-competition obligation.

6 The exclusive purchasing obligation required the tied tenant to buy exclusively from the other party to the agreement or a person designated by it the beers specified in the agreement, although with the possibility of purchasing beer from another brewery under the national provision generally known as the guest beer provision.

7 The non-competition obligation prohibited the tied tenant from selling or offering for sale in his establishment or bringing into the establishment for the purpose of sale any beer of the same type as a specified beer but not supplied by the other party to the contract or a person designated by it, except for a beer packaged in bottles, cans or other small containers or a draught beer if that beer was customarily sold in draught form or was necessary to satisfy a sufficient demand from the pub's customers.

...

8 In February 1995 the Office of Fair Trading (OFT) opened an inquiry, at the request of the Commission, into the wholesale pricing policies of the United Kingdom breweries. Following that inquiry, which related to Bass among

others, the OFT in May 1995 adopted a report "Inquiry into breweries' wholesale pricing policy in the United Kingdom" and issued a press release on that report on 16 May 1995.

9 On 11 June 1996, Bass Holdings Ltd and Bass Lease Company Ltd, wholly-owned subsidiaries of Bass, notified pursuant to Article 4 of Regulation No 17 of the Council of 6 February 1962, First Regulation implementing Articles [81] and [82] of the Treaty (OJ, English Special Edition 1959-1962, p. 87), the standard lease for a public house with an on-licence in England and Wales. They sought negative clearance or, failing that, confirmation by the Commission that the agreements could benefit from the application of Commission Regulation (EEC) No 1984/83 of 22 June 1983 on the application of Article [81(3)] of the Treaty to categories of exclusive purchasing agreements (OJ 1983 L 173, p. 5), as amended by Commission Regulation (EC) No 1582/97 of 30 July 1997 (OJ 1997 L 214, p. 27), or from an individual exemption under Article 81(3) EC, with retroactive effect from the date of conclusion of the agreements. Regulation No 1984/83 contains in Title II special provisions relating to beer supply agreements.

10 ...

11 ...

12 ... the Commission adopted... [the contested decision]. It decided that the standard lease notified fell within Article 81(1) EC, but declared that provision inapplicable on the basis of Article 81(3) EC, with effect from 1 March 1991 to 31 December 2002.

13 Mr Joynson operated a public house in Bolton (United Kingdom) belonging to Bass Holdings from July 1992 under a standard lease. The agreement ended when Bass Holdings sold the pub in February 1998....'

The judgment under appeal

3 By application lodged at the Registry of the Court of First Instance on 12 October 1999, Mr Joynson requested that Court to annul the contested decision.

4 In the judgment under appeal, the Court of First Instance dismissed that application for annulment.

5 It first pointed out that review by the Community judicature of the complex economic appraisals made by the Commission when it exercises the discretion conferred on it by Article 81(3) EC, with regard to each of the four conditions laid down in that provision, must be limited to verifying whether the rules on procedure and on the giving of reasons have been complied with, whether the facts have been accurately stated, and whether there has been any manifest error of assessment or misuse of powers.

6 The Court of First Instance took the view that the Commission had in no respect made a manifest error of assessment in regard to the appraisal of the profitability of Bass tied houses and the evaluation of the price differential, rent subsidy and countervailing benefits.

7 It found in particular that it had not been established that the Commission had erred in law in analysing the issue of the profitability of Bass tied houses in relation to the effects of possible discrimination by the prices imposed by Bass and in relation to the benefits which might offset such discrimination.

8 Likewise, according to the Court of First Instance, the Commission had not been shown to have committed a manifest error of appraisal by not assessing the difference between the average price at which beer was available on the open market generally and the price at which beer was sold by Bass to its tied lessees, or by excluding from the reference group chosen for the assessment of this price differential establishments other than individual free houses.

9 The Court of First Instance also took the view that the Commission's assessment of the rent subsidy and its appraisal of the evidence submitted by the present appellant were not vitiated by manifest errors and that the same also held true for the manner in which the Commission had evaluated the countervailing benefits.

The appeal

10 In his appeal, in support of which he submits eight grounds of appeal, Mr Joynson asks the Court to set aside the judgment under appeal and to grant the relief which he sought at first instance. In the alternative, he submits that the Court should remit the case to the Court of First Instance, and, in any event, requests it to order the Commission to pay the costs.

11 The Commission submits that the Court should dismiss the appeal and order Mr Joynson to pay the costs.

12 Bass requests the Court to dismiss the appeal, make an appropriate declaration to the effect that the use of the tie by type in a lease is compatible with Regulation No 1984/83, and order Mr Joynson to pay the costs.

13 It should be noted at the outset that, under Article 119 of its Rules of Procedure, where an appeal is clearly inadmissible or clearly unfounded, the Court may at any time dismiss the appeal by way of reasoned order.

The first ground of appeal

14 By his first ground of appeal, Mr Joynson argues that the Court of First Instance erred in law in rejecting his argument that, in order to determine whether the system of tied leases contributed to an improvement in distribution within the meaning of Article 81(3) EC, the Commission ought to have examined whether that system resulted in tied lessees being less profitable than their competitors, irrespective of the negative effects of the price differential on the supply of beer resulting from the prices charged by Bass to its tied lessees in comparison with the conditions of supply of those competitors.

15 With regard to the relevance of the question raised by the appellant concerning the influence which the system of Bass standard leases had on the profitability of the public houses tied to that brewer, it does not appear that the Court of First Instance erred in law in upholding the Commission's assessment in that regard.

16 The first ground of appeal must therefore be rejected as being manifestly unfounded.

The second ground of appeal

17 By his second ground of appeal, Mr Joynson argues essentially that, in paragraph 58 of the judgment under appeal, the Court of First Instance erred in ruling that, having regard to the particular features of the United Kingdom on-trade beer market, the fact that the non-competition clause related to types of beer and not to brands or names did not preclude the granting to the agreements in question of an exemption on the basis of the same kind of considerations as those which were applied to the beer supply agreements benefiting from exemption under Regulation No 1984/83.

18 This ground effectively brings into question the Commission's economic appraisal of the facts as set out in paragraph 171 of the contested decision and confirmed by the Court of First Instance. Under Article 225 EC and Article 58, first paragraph, of the Statute of the Court of Justice, an appeal is limited to points of law and must be based on grounds relating to lack of jurisdiction of the Court of First Instance, breach of procedure before the Court of First Instance adversely affecting the appellant's interests or infringement of Community law by that Court. The Court of First Instance alone has jurisdiction to make findings of fact, except where it is clear from the documents before it that it has made a material error in so doing, and to assess the facts.

19 The second ground of appeal must accordingly be rejected as being manifestly inadmissible.

The third ground of appeal

20 By his third ground of appeal, Mr Joynson submits that the Court of First Instance erred in law in paragraph 62 of the judgment under appeal in

interpreting Regulation No 1984/83 as allowing the presumption that exclusive beer purchasing agreements which do not meet all of that regulation's conditions do not have the effect of reducing the profitability of tied houses to the point of jeopardising the improvement in distribution which could result therefrom.

21 This ground is no more than a development of the first ground of appeal and must therefore be rejected as manifestly unfounded for the same reason as that set out in paragraph 15 of the present order.

The fourth ground of appeal

22 By his fourth ground of appeal, Mr Joynson argues that the Court of First Instance committed a further error of law. Contrary to what follows from paragraphs 59 and 61 of the judgment under appeal, an examination of the possibility of granting an individual exemption to a beer supply agreement under Article 81(3) EC cannot be limited to the application of the framework of analysis provided by Regulation No 1984/83.

23 It does, however, appear that the Court of First Instance did not simply examine whether the Commission had applied the framework of analysis provided by Regulation No 1984/83. In paragraphs 63 to 66 of the judgment under appeal, it found that the Commission had also analysed the factors specific to the United Kingdom on-trade beer market and approved the Commission's analysis.

24 The fourth ground of appeal thus has no basis in fact and is for that reason manifestly unfounded.

The fifth ground of appeal

25 Mr Joynson submits that the Court of First Instance also erred in law in paragraphs 74, 75 and 78 to 80 of the judgment under appeal in failing to reject the interpretation of Article 14(c)(2) of Regulation No 1984/83 applied by the Commission to the facts put before it. The condition in Article 81(3) EC of contributing to the improvement of distribution could not, he argues, be satisfied if, for structural reasons, an exclusive beer supply agreement were to impair significantly the ability of a reseller tied to a brewer to compete on a level playing field with his competitors at the same level of distribution. In the present case, the price differential and the reference group used to measure that differential cannot be the only factors to be taken into consideration.

26 This ground is in substance the same as the first ground of appeal and must accordingly, for the same reason as that set out in paragraph 15 of the present order, be rejected as manifestly unfounded.

The sixth ground of appeal

27 By his sixth ground of appeal, the appellant submits that the Court of First Instance was wrong, in paragraphs 98, 103 and 146 of the judgment under appeal, to uphold the Commission in its use of the turnover method for the purpose of assessing the rent subsidy.

28 In the first part of this ground, the appellant argues that the conclusion reached by the Court of First Instance in regard to the turnover method is wrong in law and manifestly at variance with the provisions of Regulation No 1984/83, in

particular Article 6(1) thereof, under which an exclusive purchasing obligation can be exempted only if it is incurred in consideration for special commercial or financial advantages. The appellant considers to be mistaken the Court of First Instance's reasoning set out in paragraph 98 of the judgment under appeal with regard to profitability, namely that there were 'no sufficient reasons... for assessing the only question which might have been relevant, but was different, namely whether the system of Bass standard leases reduced the profitability of Bass tied houses so much that their capacity for distributing beer was seriously affected'. This reasoning is, moreover, inconsistent with paragraph 146 of the judgment under appeal. If the principles derived from Regulation No 1984/83 were applied, the issue of profitability would first of all be one of at least equal, if not greater, profitability, and would at the very least involve a method of ensuring, for example, that a tenant made a reasonable living or did not fall below the minimum wage having regard to the maximum working week regulations, which the profits method would show and the turnover method would not.

29 In the second part of this ground of appeal, the appellant contends that the Court of First Instance erred in law in accepting the turnover method and contravened reality inasmuch as the profits method is the method which is used in practice.

30 In the third part of the sixth ground of appeal, the appellant submits that the turnover method does nothing whatever to combat the evil of a trend of falling sales but upward-only rent review. Rent will increase proportionately because it is expressed as a percentage of turnover. In order to be acceptable, the turnover method must allow for rent reductions, something, however, which is at variance with the lease.

31 Mr Joynson's argument at first instance that the Commission ought to have applied the method which he advocated, and not that which was in fact used, for the purpose of assessing the rent subsidy was rejected by the Court of First

Instance in paragraphs 100 to 103 of the judgment under appeal on the ground that no evidence had been adduced to establish that the method which he advocated was more appropriate than that used by the Commission.

32 The sixth ground of appeal seeks in reality to challenge this appraisal by the Court of First Instance of the reliability of the method advocated by the appellant and thus relates to an appraisal of facts. For the reason set out in paragraph 18 of the present order, it must accordingly be rejected as being manifestly inadmissible.

The seventh ground of appeal

33 By his seventh ground of appeal, Mr Joynson submits that the lease model submitted to the Commission and the Court of First Instance featured an 'upwards-only rent review' clause. He argues that the existence of such a clause is in itself a ground for refusing an individual exemption.

34 It should be noted in this regard that the appellant did not raise this plea before the Court of First Instance.

35 Article 113(2) of the Court's Rules of Procedure precludes the introduction, in the appeal, of new pleas relating to the contested decision.

36 The seventh ground of appeal must for that reason be rejected as being manifestly inadmissible.

The eighth ground of appeal

37 By his eighth ground of appeal, Mr Joynson argues that the conclusion of the Court of First Instance in paragraph 150 of the judgment under appeal that the non-contractual benefits provided by Bass were able to offset the price differentials is patently at variance with the provisions of Regulation No 1984/83, in particular Article 6(1) thereof, under which an exclusive purchasing obligation may be the subject of exemption only if it is incurred in consideration for special commercial or financial advantages. The finding made in paragraph 150 of the judgment under appeal is also, the appellant submits, contrary to the Court of First Instance's earlier conclusion, in paragraph 56 of that judgment, that the Commission had been correct to base its decision on Regulation No 1984/83.

38 First, no objection can be raised that the conclusion of the Court of First Instance that the non-contractual benefits allegedly provided by Bass were able to offset the price differentials is contrary to the provisions of Regulation No 1984/83. As is clear from paragraph 57 of the judgment under appeal, the Bass standard leases could not benefit from the block exemption defined by Regulation No 1984/83 but were the subject of an individual exemption under Article 81(3) EC because, contrary to the conditions required by Article 6 of that regulation, they laid down a specification of the beer purchasing obligation by type of beer and not by brand or name.

39 Second, there is no contradiction between paragraphs 150 and 56 of the judgment under appeal. The Court of First Instance did not find, in paragraph 56 of the judgment under appeal, that the Commission had based the contested decision on Regulation No 1984/83. In the light of paragraphs 63 to 66 of the judgment under appeal, it appears that the Court of First Instance found simply that the Commission had *inter alia* taken into account, correctly in that Court's view, criteria similar to those of Regulation No 1984/83 but that it had also taken into account other factors for the purpose of assessing the profitability of Bass tied houses.

40 The eighth ground of appeal is for those reasons manifestly unfounded.

41 It follows from all of the foregoing that the grounds submitted by Mr Joynson in support of his appeal are either manifestly inadmissible or manifestly unfounded. The appeal must accordingly be dismissed pursuant to Article 119 of the Rules of Procedure.

Costs

42 Under Article 69(2) of the Court's Rules of Procedure, which is applicable to the appeal procedure by virtue of Article 118 of those Rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has applied for costs to be awarded against Mr Joynson and since the latter has been unsuccessful in his grounds of appeal, Mr Joynson must be ordered to pay the costs of the present proceedings.

On those grounds,

THE COURT (Third Chamber)

hereby orders:

1. The appeal is dismissed.

2. Mr Joynson shall pay the costs.

Luxembourg, 10 December 2003.

R. Grass
Registrar

V. Skouris
President