High Court of Justice
Queen's Bench Division
Administrative Court

Case Numbers
CO/2322/2015
CO/2323/2015
CO/2352/2015
CO/2601/2015
CO/2706/2015

Claimants:

BRITISH AMERICAN TOBACCO UK LIMITED
BRITISH AMERICAN TOBACCO (BRANDS) INC.
BRITISH AMERICAN TOBACCO (INVESTMENTS) LIMITED

PHILIP MORRIS LIMITED
PHILIP MORRIS BRANDS SARL
PHILIP MORRIS PRODUCTS S.A.

JT INTERNATIONAL SA
GALLAHER LIMITED

IMPERIAL TOBACCO LIMITED

TANN UK LIMITED
TANNPAPIER GMBH
BENKERT UK LIMITED
DEUTSCHE BENKERT GMBH & CO KG

Defendant:

SECRETARY OF STATE FOR HEALTH

Intervener:

ACTION ON SMOKING AND HEALTH (ASH)
ASH is very grateful to Peter Oliver and Ligia Osepciu of Monckton Chambers, and to Sean Humber of Leigh Day, who provided their legal services pro bono.

Summary of Judgement: Please note this summary is provided by ASH for research and media purposes only, and is not to be relied on as a legal document. Key extracts from the judgement are listed from page 3 of this document onwards, they are all direct quotes from the judgement, with page and paragraph numbers.

The full judgement in the case can be read at: https://www.judiciary.gov.uk/wp-content/uploads/2016/05/bat-v-doh.judgment.pdf

ASH Comment

There were many thousands of pages of written evidence submitted before the oral submissions began, with more following as the parties reacted to issues raised during the hearing. The total cost of all the lawyers and papers is not known but will certainly run into millions, and will rise further if there are appeals.

This is what is meant by the ***"chilling effect"*** of tobacco industry litigation. The UK Government is well-resourced and generally committed to tobacco control as a public health objective. But other Governments in less wealthy countries may be put off regulatory action by the financial and human resource costs of defending such claims. **NB** Uruguay is being sued through the International Centre for Settlement of Investment Disputes by Philip Morris, using Switzerland as its base for bringing the case, because Switzerland and Uruguay have a bilateral trade agreement. **Also**: The case against Australia brought by Philip Morris as an investor-state dispute failed on Friday 18th December 2015. Further information is available here here.

Key Issues in the case

The judge identified 17 distinct grounds of claim by the industry, all of which were rejected:

Ground 1: the regulations are unlawful constituting the implementation of an unlawful power under article 24(2) of the EU revised Tobacco Products Directive
Ground 2: the "limited" weight attached to the claimants' evidence
Ground 3: proportionality – the regulations are inappropriate
Ground 4: the regulations fail the necessity test of proportionality because other equally effective but less restrictive measures exist which have been ignored
Ground 5: proportionality strictu sensu: the regulations fail to strike a fair balance between the competing interests
Ground 6: Non-expropriation of property without compensation: article 1 of the first protocol of the European Convention on Human Rights ("A1P1")
Ground 7: Article 17 of the Charter of Fundamental Rights of the European Union (right to property)
Ground 8: Legislative intent and the common law right to property
Ground 9: Article 16 of the Charter of Fundamental Rights of the European Union (freedom to conduct a business)
Ground 10. Do the regulations violate the unitary character of trademarks in the Community Trademarks Regulations?
Ground 11: Misdirection in law – failure to apply the test in article 24(2) of the Tobacco Products Directive (which allows Member States to go beyond the TPD on packaging rules)
Ground 12: Parliament had no competence (jurisdiction) to adopt the Regulations
Ground 13: Alleged unlawful consultation process
Ground 14: The Regulations infringe article 34 of the Treaty on the Functioning of the EU
Ground 15: The failure to await the outcome of the reference (to the European Court of Justice) in *Philip Morris*
Ground 16: Tipping paper challenge: Regulation 5 (appearance of individual cigarettes) is *ultra vires*
Ground 17: Regulation 5 is disproportionate

Key extracts from the judgement

All extracts are direct quotes from the judgement, with paragraph and page numbers. The full judgement can be read here. Additions in square brackets are explanatory comments from ASH, and emphases in bold are added by ASH.

For ease of use, we have organised extracts from the judgement as follows:

1. **Background**
2. **Regulatory Process and Tobacco Expert Evidence**
   - "Unfair" treatment of tobacco industry evidence
   - Industry use of expert evidence
   - Tobacco industry did not disclose internal documents
   - Tobacco industry use of Government internal documents
   - Other objections to the process leading to the Regulations
   - Comments on individual experts giving evidence for the tobacco industry
3. **Tobacco industry "rights"**
   - Intellectual property
   - Demand for compensation
4. **Proportionality**
   - Decision made by Parliament
   - Regulations subject to review
   - Tobacco industry challenge to Article 24(2) of the Tobacco Products Directive
5. **Conclusions**

Background

The decision by Parliament to introduce the Regulations was in large measure in furtherance of the policy laid down by the World Health Organisation (WHO) in a singular treaty of 2004, the Framework Convention on Tobacco Control (FCTC). This is one of the most widely endorsed treaties in the history of the UN. [Para 2, page 13]

The view taken by Parliament was that the evidence available to it indicated that the measure would be effective and that there was a real risk to public health and welfare if there was a delay in promulgation pending some subsequent full-blown analysis of the Australian experience for purposes of comparison. [Para 5, page 14]

The Claimants submit the TPD is itself illegal. A reference was made by the High Court to the [European] Court of Justice of a series of questions raising challenges to the legality of the TPD in *Philip Morris*. On 4th May 2016 the Court of Justice handed down its judgment emphatically rejecting these challenges. The parasitic domestic law challenge thus necessarily fails. [Para 9, page 15]

The Government relied upon the fact that in the FCTC contracting States were under obligations to meet the treaty objective to reduce continually and substantially the prevalence of tobacco use and exposure to tobacco smoke through the implementation of "*comprehensive tobacco control strategies*". [Para 146, page 68]

An important, and indeed singular, provision of the [Framework] Convention [on Tobacco Control] which is relevant to issues arising in this case is Article 5(3). This is a remarkable provision which operates upon the express premise that government is the victim of attempts to undermine it by the tobacco industry. It requires contracting states to "*protect*" their health policies from the "*vested interests of the tobacco industry*" [Para 168, page 80]

Regulations Process and Expert Evidence

- **"Unfair" treatment of tobacco industry evidence**

The first [reason given for legal challenge of the process: ASH comment] is the general complaint that it was unlawful to give only "limited" weight to the tobacco industry evidence since this unfairly discounted the probative value or worth of that evidence; the second and narrower but essentially similar argument was advanced by BAT alone and was that the specific evidence adduced by BAT had been singled out for adverse and unlawful treatment. BAT contended that its position was different to that of the other tobacco companies who participated during the consultation process because of the sheer volume and quality of the BAT evidence. The tobacco companies not only challenge the approach adopted by the Secretary of State but they also retaliate and attack the impartiality of the experts called to give responsive evidence on the side of the Secretary of State accusing them of being biased in favour of "*tobacco control*". They also attack the "best practice" standards which the Secretary of State relied upon to evaluate evidence. The issue is of very real significance. It is not only at the heart of the limited issue concerning the approach of the Secretary of State to the evidence of the Claimants during the consultation; but it is also relevant to all of the other grounds of challenge where the tobacco companies have adduced evidence though experts. [Para 10, page 15]

A remarkable feature of the WHO Convention (FCTC) is that it marks out the **tobacco companies as entities which have deliberately sought to undermine national health polices** and it translates this considered position into a strong recommendation to the contracting states that, in effect, they apply great circumspection when assessing evidence submitted to them by tobacco interests. The FCTC position is said to be "*evidence based*", a claim that the tobacco companies submit is "*manifestly*" absurd. The FCTC contains at its heart two propositions of real significance for the present case. The first is that tobacco use is an "*epidemic*" of global proportions which exerts a catastrophic impact upon health. The tobacco companies do not dispute or seek to undermine the universal medical consensus as to the profound harm caused by smoking. The second, and most controversial in the context of the present proceedings, is that **the tobacco companies have over multiple decades set out, deliberately and knowingly, to subvert attempts by government around the world to curb tobacco use and promote public health.** [Para 18, page 17]

The second proposition is based upon the experience of the US courts in litigation involving the tobacco companies in the course of which the tobacco companies were, after protracted interlocutory disputes about discovery and privilege, required to divulge truly stupendous quantities of internal documentation (exceeding 50 million pages). This material has now been placed in the public domain and is searchable on-line. The WHO has produced its own practical guide to searching the material. The analysis conducted of these documents by bodies such as WHO, and by the US courts, has led to some stark and, from the perspective of public health, unpalatable conclusions: in particular that the outward facing public statements of the tobacco companies are contradicted by their own inward facing private deliberations and analyses. **One instance of this concerns the claim by the tobacco companies that they do not market their products towards children. This**

proposition (repeated in this litigation) has been rejected in the US courts and by the WHO upon the basis, *inter alia*, of internal tobacco company documents. [Para 19, page 17]

Put bluntly the Government says that the intrinsic quality of the tobacco company's evidence is inferior as not being in compliance with accepted methodological best practice accepted worldwide by the scientific and technical research communities. These include such matters as: the importance of peer review of research results; the independence of researchers and experts from vested interests; the cross-referability of the reports of experts instructed by the tobacco companies against the internal documents of the tobacco companies themselves; the qualifications and competence of tobacco company experts to opine upon particular topics; and, the practice of the tobacco company experts of ignoring or dismissing the pre-existing and adverse literature. [Para 20, pages 17-18]

In my judgment the Government *was* entitled to conclude that the tobacco company's evidence *did* fall below acceptable standards during the consultation. The conclusions which have arisen from the US courts about the sharp discord between what the tobacco companies think inside their own four walls and what they then say to the outside world (especially through experts), are so damning and the evidence of the discord so compelling and far reaching that it is not at all surprising that the WHO concluded that there was an *evidence base* upon which to found their recommendations to contracting states to apply vigilance and demand accountability and transparency in their dealing with the tobacco companies. [Para 21, page 18]

As a generality, the Claimants' evidence *is* largely: not peer reviewed; frequently not tendered with a statement of truth or declaration that complies with the CPR [Court Procedural Rules for England and Wales]**; almost universally prepared without any reference to the internal documentation or data of the tobacco companies themselves; either ignores of airily dismisses the worldwide research and literature base which contradicts evidence tendered by the tobacco industry; and, is frequently unverifiable**. [Para 23, page 18]

The Claimants … submit that the fact that their evidence is exposed in litigation and subject to judicial review is a superior process to peer review. I fundamentally disagree.
[Para 288, page 143]

- **Tobacco industry use of expert evidence**

In this case the evidence submitted by the Claimants' experts is not capable of being verified nor its underlying assumptions tested. [Para 26, page 19]

Experts owe their primary duty to the Court. Detailed rules governing the conditions under which experts give evidence in this jurisdiction are set out in CPR 35. 35PD2.1 provides that expert evidence should be the independent product of the expert uninfluenced by the pressures of litigation. 35PD 2.3 states: ***"Experts should consider all material facts, including those which might detract from their opinions".*** **How can an expert consider all material facts including those that are inculpatory to their client if they do not ask for and/or receive relevant internal documentation?** [Para 316, page 158]

My concern lies not just with the position of a single Claimant company but, rather, with **what has the appearance of being an industry wide practice not to adduce internal documents or to allow their experts to see and review and then rely upon internal documents.** [Para 319, page 158]

Adherence to best practice is … at a premium in a case such as this where the Claimants have already been found wanting at the level of international governmental opinion and in proceedings before the US courts. [Para 370, page 180]

On the basis of my <u>own</u> review of the methodologies adopted by the Claimants experts in the light of the Secretary of State's evidence on this issue I conclude that that body of expert evidence does <u>not</u> accord with internationally recognised best practice. This is most striking in the context of the evidence submitted during the consultation; but it applies also to a considerable portion of deal of the evidence placed before the Court in relation to other grounds of challenge.
[Para 374, page 180]

The four most significant ways in which evidence submitted during the consultation generally fell below best practice are **(i) the fact that it was not peer reviewed <u>or</u> based upon peer reviewed material; (ii) the fact that it was not benchmarked against internal documents; (iii) the fact that the underlying worldwide literature base was largely ignored; and (iv) the fact that it was not verifiable** [Para 375, page 181]

I would find it hard to believe that internally the tobacco companies have not given consideration to the impact of downtrading on pricing strategy and profit recoupment policies. Yet their policy of not disclosing internal document means that this is an issue they have not addressed in these proceedings and their internal thought processes are not transparent to this Court. This means that their instructed experts can hypothesise about price movements without the risk of their theories and opinions being undermined by internal "real life" thinking. [Para 607, 401]

There has been no ability to cross check any of the assumptions underpinning the Claimants' expert reports against internal documents. **It is argued by the Claimants that there were no such documents which are of relevance to the quantitative analyses. This submission however is not based upon any of the lawyers having conduct of this case having undertaken a full disclosure exercise with their clients. It is not a submission I can accept.** The experience in the US shows that there are likely to be a multiplicity of relevant documents, and that they might well <u>not</u> be supportive of the Claimants' case. [Para 625, page 265]

The impact of standardised packaging in Australia simply must have involved the tobacco companies in predicting future sales. Their marketing men would have been failing in their elementary duties if they had not done this. If all of this *internal* analysis was held up and put side by side with *external* experts reports it would put them into context. If the external experts had been seized of all of the internal projections of their clients when they prepared their reports this would have forced them to address that internal material, to modify their own views or at least to explain in a credible way why the internal analysis was wrong or unreliable. And if that internal material corroborated the expert's conclusion that would enhance the reliability of those reports before the court. **In my judgment I am bound to be cautious of analysis created entirely by experts prepared in blissful ignorance of the clients' internal analysis and research.** [Para 627, page 266]

In conclusion, I am of the clear view that if and insofar as only "*limited*" weight was attached to the Claimants' evidence then this was reasonable, justified and proper. In any event, even if the Claimants' evidence was wrongly accorded "limited" weight there is no actual evidence that this conclusion affected the views of Parliament. [Para 376, page 262]

- **Tobacco industry did not disclose internal documents**

It has been a striking feature of the evidence adduced by the tobacco companies during the consultation process (and replicated in the court proceedings) that it is virtually devoid of any reference to the internal documents of the tobacco companies themselves.
[Para 292, page 145]

In a sector and market where there is a systemic concern about the reliability of data and research submitted by the tobacco industry if those companies and parties do not *ensure*, when *they* place research before a decision maker, that *their* research is *fully* verifiable including, where necessary, disclosure of underlying internal documents (for and against), then this is a factor that the decision maker is entitled to take account of when weighing and evaluating that evidence.
Para 293, page 208]

JTI stated that it had not conducted research on whether the introduction of standardised packaging in the UK would or would likely discourage children in the UK from taking up smoking. It stated also that this was in conformity with its "global position". I set out verbatim JTI's position to the Court:
"(a) JTI does not market its products to minors;
(b) JTI does not market its products in order to encourage anyone to take up smoking or to discourage anyone from quitting;
(c) JTI does not conduct market research involving or in relation to minors;
(d) JTI has no interest in information about minor's consumption of tobacco products; and
(e) JTI does not seek, collect or accept marketing data about minors, or analyse general data to learn about minors".

I find this statement remarkable. The evidence from the Secretary of State (which is not disputed by the Claimants and indeed was reflected in the evidence of JTI's own experts) is that the vast majority of smokers take up smoking before they are in their early 20's and most before they are 18 years of age. Youth smoking is critical to the future of the tobacco companies. 600 children per day between the ages of 11 and 15 start smoking in the United Kingdom. Children can quickly become addicted. These children become the long term customers of the future and then replenish the customer base depleted by adult quitters. **Yet, JTI states as a component part of its global strategy and as a specific reason for not generating internal documents: *"JTI has no interest in information about minors' consumption of tobacco products"*. How, rhetorically one asks, can JTI have "*no interest*" in information about consumption of tobacco by children? Growth in sales depends upon the advent of youth smoking which is an enormous social and future health problem. And what sort of Nelsonian knowledge is reflected in the global strategy of a company that is not only disinterested but also refuses to even "*accept*" (see paragraph (e) of the JTI position (*supra*)) marketing data about children and which has no interest in even *learning* about children?**
[Paras 295 and 296, pages 145 - 146]

PMI objects elsewhere to the Regulations because they amount to an "*… unprecedented and radical curtailment of [PMI's] intellectual property rights (and the billions of pounds of damage that will ensue*)" – yet they say that they do not "*generally*" (again – whatever that term means) conduct <u>any</u> internal assessment of this unprecedented and radical threat to the business? **It is hard to conceive of any international company turning quite so deliberately away from analysing this sort of fundamental threat, unless there was a compelling strategic justification, namely the fear that**

such internal analysis and evaluation might, in due course, in regulatory or judicial proceedings, be exposed to critical scrutiny. [Para 299, page 147]

The Claimants submitted in these proceedings that internal documents were not relevant to the tasks the experts were instructed to perform. I do not agree. For instance the Claimant's experts addressed and were profoundly damning of the pre-existing literature and research base which indicated that branding and advertising were causative of changes in consumer behaviour and, it could logically be inferred therefore, that restrictions upon such branding and promotion would equally also affect consumer behaviour (i.e. away from smoking). **The internal disclosed documents** [released under the US Master Settlement with the tobacco industry] **suggest that the tobacco companies engage in extensive marketing and research into this very issue and that these documents support the Secretary of State's position. Yet, the Claimant's external experts who addressed this issue ignore this source of evidence.** [Para 313, page 156]

… Chantler [Sir Cyril Chantler: the paediatrician who conducted an independent review of the public health evidence for standardised packaging] recorded in his report (paragraph 48) that the tobacco companies have chosen not to "*…present the undoubtedly extensive results of its own internal market research for example focus group research exploring brand switching*…". Chantler suspected, on the basis of the US litigation, that this internal material would contradict the tobacco companies' public utterances. And, moreover, in the US Judgment Judge Kessler expressly rejected the equivalent argument advanced there by the tobacco companies and she found, upon the basis of comprehensive evidence which included internal documents, that the tobacco companies were well aware of the strong causal nexus between advertising and consumer reaction. I therefore reject the Claimants' challenge to the qualitative evidence relied upon by the Secretary of State. [Para 594, page 250]

I am satisfied, because it is common sense, that the Claimant tobacco companies will have conducted some analysis, internally, of the economic and financial implications for each of them of the introduction of the Regulations. None of that analysis is before the Court or has been (apparently) seen by the experts instructed by the tobacco companies. [Para 698, page 284]

- **Tobacco industry use of Government internal documents**

I note that the tobacco companies have themselves in the past adopted an aggressive approach towards the internal documents of Government officials. The following illustrates their approach to one such document that they considered to be relevant and probative. In the witness statement of Ms Laura Oates, Head of Government Relations at Gallagher Limited, the witness explained that in August 2011 as a result of a FOIA request made by another tobacco manufacturer, JTI obtained an email dated 10th May 2011 sent by a civil servant working for the Defendant to the Australian Department of Health and Ageing which stated:

"As I'm sure you're aware, one of the difficulties regarding [the introduction of plain packaging for tobacco products] is that nobody has done this and therefore, there isn't any hard evidence to show that it works".

Ms Oates then explained how JTI sought to capitalise upon this internal document. On 8th April 2013 it reproduced it, in full, in a press advertisement published in national newspapers and magazines. The advertisement was subject to investigation by the Advertising Standards Authority who, on 18th July 2014, held that the advert misleadingly: "*…implied that no real evidence existed to support the*

introduction of plain packaging at the time the ad appeared". JTI then referred that decision to the Independent Reviewer of ASA Adjudications, Sir Hayden Phillips, upon the basis that it was unreasonable, illogical and unsustainable. JTI submitted that there remained no hard evidence at the time the advertisement appeared in 2013 that plain packaging worked. On 30th October 2014 Sir Hayden Phillips notified JTI that he was minded to conclude that the ASA had misinterpreted the natural meaning of the advertisement. However, on 7th January 2015 the ASA decided to stand by its original determination. [Footnote, page 181]

- **Other objections to the process leading to the Regulations**

BAT challenged, in a variety of ways, the consultative process which led up to the Secretary of State laying draft regulations before Parliament for its consideration and promulgation. There is nothing in these objections. [Para 42, page 24]

At the outset of this litigation in its written submission BAT submitted that the consultation exercise conducted by the secretary of State was a "*sham*", that it smacked of predetermination, and that the Government had a "*crusade*" against the tobacco companies. In oral submissions this was toned down and three particular and narrow issues only were advanced for determination. [Para 920, page 366]

… **The submissions made for BAT were at a high level of generality and appeared to assume that the Secretary of State was the actual decision maker. They took no account of the fact that Parliament took its <u>own</u> independent decision after full debate.** The submissions did not explain how any individual failings on the part of civil servants or Ministers could have exerted any tainting impact upon the decision subsequently made by Parliament. There is, on the evidence, simply no arguable causal nexus or connection identified and any such failing would in any event be *de minimis* and immaterial. [Para 43, page 24]

I have found that the Secretary of State has adduced ample evidence to support the suitability and appropriateness of the Regulations. [Para 35, page 21]

- **Comments on individual experts' evidence for the claimants**

<u>Professor Timothy Devinney</u> (Pro-Dean for Research and Innovation and Leadership Chair in International Business – University of Leeds

Professor Devinney is a vigorous critic of peer review. Professor Devinney says this:

"Finally, it is my view that the Chantler Report places undue weight on the fact that the studies have been peer-reviewed, or that the Systematic Reviews ascribed to standards of the Cochrane Collaboration.

… there are also known biases in the peer-review process that tend to generate more positive outcomes than negative outcomes…and also concerns that hot topics and those for which there is financial, personal and political investment or are likely to be published with erroneous findings".

Professor Hammond [expert witness for the Government] responded, with an unconcealed air of incredulity:

"Devinney proceeds to argue that journals in his field are far more stringent than public health and medical journals, and provides a number of outdated and outright incorrect statistics on journal acceptance rates and times to publications. Regardless of Devinney's personal opinion, peer-review

remains the basis for scientific standards, along with comprehensive independent reviews of the evidence base, such as those included in the US Surgeon General's Report".

He also highlighted the observation by Professor Devinney that:

"The hotter a scientific field (with more scientists involved), the less likely the research findings are to be true".

He describes this as "*…a puzzling and irrelevant factor with which to criticise a research literature*". His overall conclusion about the approach of Professor Devinney is that his analysis represented a "*…highly unusual framework for evaluating the quality of the literature and provides little or no insight as to the merits of the empirical evidence base*". Professor Hammond devoted 75 paragraphs to a methodological critique of Professor Devinney's report. [Paras 388 – 391, pages 185 - 186]

Professor Jonathan Klick (Professor of Law: University of Pennsylvania)

I turn now to Professor Klick. He was retained by BAT to offer an opinion upon the literature regarding the effects of plain packaging on smoking rates. Professor Klick is a professor of law at the University of Pennsylvania; he is also the Erasmus Chair of Empirical Legal Studies at Erasmus University Rotterdam. I was invited by Counsel for BAT to pay *especial* attention to this report: I have. Before turning to the observations of Professor Hammond I therefore offer a number of my own conclusions about this evidence which I confess to finding unsatisfactory in multiple respects. First, **although Professor Klick was expressly retained to offer his opinion on the literature regarding the effect of plain packaging on smoking rates in the UK the report does no such thing. In fact it cites remarkably few pieces of actual literature relating to the issue in question. The preponderant part of his opinion seeks to rebut the proposition that peer-review literature produced by independent authors provides a reliable basis upon which to found *any* conclusion.**

Secondly, there is a remarkable symmetry between the ultimate conclusion arrived at by Professor Klick and the methodological approach adopted by the Claimants generally, which is that it is not possible, using qualitative or quantitative research results pre-dating the Australian experience, to evaluate the impact of a standardised packaging policy in practice. The thrust of his attack, therefore, is to undermine the relevance and weight to be attached to *all* prior literature.

The following, which refers to the experts reviewed by the Stirling reviewers, characterises Professors Klick's rhetorical approach:

"Apparently there is a belief that experts have some magical insight into an issue in which there is no real evidence, spinning the straw into flawed and inapt policy gold. Although the world would be a better place if such predictions were possible, the record on the accuracy of expert predictions is not good, even in fields where the underlying research is of substantially higher quality than exists on the issue of plain packaging".

In relation to the numbers contained in the 2014 Impact Assessments he says that since these were prepared by individuals who are not impartial the result is that they can fill in "*whatever numbers they want*" **i.e. suggesting that the data has been fabricated**. In fact he treats anyone who has worked for Government or indeed anyone who has produced research literature which is consistent with the Defendants pro-standardised packaging proposals as driven through with "*confirmation bias*" i.e. the subconscious desire to prove one's personal predisposition. He says that this is "*egregious*".

I would have found this analytical approach more attractive if Professor Klick had any experience in the specific field of smoking or had undertaken his own research or had conducted detailed analysis of the *actual* literature instead of airily dismissing it in its entirety. [Paras 392 – 395, pages 186 - 187]

The opinion of Professor Klick was prepared in June 2012. It has not been updated. It has not since then been subjected to peer-review. It has however been tendered in the course of this litigation as relevant to the Claimants' proportionality challenges without even a statement of truth being attached to it. It is not CPR complaint. I could have declared it inadmissible. Yet I was invited to accord it real weight in the context of issues arising in this litigation. Had it been peer reviewed then it could well have received a barrage of (critical) comment and had this occurred it is questionable whether it would have been tendered as evidence in this case at all; or if it had it would then have been capable of being benchmarked against such peer review commentary. [Para 399, page 188]

Professor Neil McKeganey, Professor of Sociology, University of Glasgow and Director of the Centre for Drug Misuse Research

Once again I repeat the criticism that I make of so many of the Claimants experts, his conclusions contradict a very great deal of research by independent peer reviewed researchers, and also the internal research of the tobacco industry, and his conclusions contradict the findings of Judge Kessler who, after a comprehensive nine month trial, found the opposite, and he ignores the adverse conclusions of WHO upon analysis of the tobacco companies internal documentation. **What I find unacceptable is the preparation of a report which by its total refusal to engage with any of this contra-material simply conveys the impression that it does not exist and that the best way to refute it is to ignore it.** [Para 314, page 157]

Professor Gregory Mitchell, Professor of Law, University of Virginia

He is a professor of law with an interest and (from his CV) some limited professional experience in psychology. His report is dated 30th July 2014. It was tendered in the course of this litigation without an expert declaration or any acknowledgement that the report is intended to be consistent with the CPR. [Para 562, page 241]

Notwithstanding that Dr Mitchell is so critical of the "*facile*" acceptance by Chantler of the existing literature base, nowhere does Dr Mitchell specifically engage with the nuts and bolts of that existing literature. As I have already set out that the literature is substantial and overwhelmingly one directional; the preponderant portion of researchers worldwide have found that consumers, whether youth or adult, do respond to precisely the sorts of marketing, branding and advertising signals that the tobacco companies actively use wherever they can.

I also find the failure to address the question of the tobacco companies' internal documents unsatisfactory. [Paras 565 and 566, pages 241 - 242]

In relation to adolescent initiation Dr Mitchell's central thesis is that adolescents are generally aware of the health risks associated with smoking and do not believe that they are immune to the negative consequences thereof, including youth in the United Kingdom. He opines that even younger smokers perceive higher risks of their experiencing smoking-related negative outcomes than their non-smoking peers, at times overestimating their objective risk of disease and early mortality. Dr Mitchell continues with this theme for a relatively small portion of his overall report. **Nowhere does he**

address the very substantial body of evidence which fundamentally contradicts his conclusions. In short, I found this evidence unsatisfactory at almost every level. [Para 568, page 243]

Professor Casey Mulligan, Professor in Economics, University of Chicago

Professor Mulligan employs an unforgiving approach which never admits of even the possibility of error on his part whilst simultaneously taking the view that any and all opposing expert's reports are flawed. [Para 554, page 238]

A running complaint throughout Professor Mulligan's analysis is that he has not had access to the underlying data so he has not been able to verify his conclusions. **There is thus in this regard a striking difference between the entirely logical desire of Professor Mulligan to keep "working the data" and the rooted objection to transparent peer review which the Claimants have throughout in this litigation advanced as a reason not to reject that part of *their* evidence which is not peer reviewed and to give precedence to the worldwide research base which has been peer reviewed and upon which the Secretary of State relies.** [Para 560, page 240]

Tobacco Industry "Rights"

The submission of the tobacco companies was that there was nothing exceptional about tobacco which was a lawfully marketed product. The companies had a powerful private interest in their property rights (mainly trademarks) which trumped the public interest arising. Counsel for the Secretary of State reformulated the argument as a claim that the tobacco companies had the right to maximise their profits for the benefit of shareholders by promoting a product that shortened lives and caused a health epidemic of colossal proportions and which imposed upon the state a vast financial cost. [Para 36, pages 21 -22]

The Claimants contend that under A1P1 … under the Fundamental Charter [of the European Union] **and under domestic common law they have a property right (their intellectual property and goodwill) which has been unlawfully expropriated from them by the Regulations without compensation.** I accept that their trademarks and other relevant intellectual property amount to "*possessions*" or "*property*" which in principle are capable of falling with the protective principles involved. I also accept that in principle certain types of goodwill can also amount to a protectable interest (though on the facts of the case it is not possible to form a concluded view as to the extent to which there are goodwill related rights arising**). I reject the submission however that the rights have been expropriated. Title to the rights in issue remains in the hands of the tobacco companies; the Regulations curtail the *use* that can be made of those rights but they are not expropriated.** [Para 38, page 22]

There is no breach of A1P1 [Protocol 1 Article 1, European Convention on Human Rights: Right to peaceful enjoyment of property: ASH comment] **if compensation is not paid due to (a) the undeniable and all pervasive harm caused by the product; (b) the fact that the trademarks are used *causally* to further that harm by promoting the product to consumers; and (c) the fact that they thereby impose on the State clear up and remedial costs of a staggeringly large scale.** [Para 802, page 320]

- **Intellectual Property**

At base Parliament, both under international law relating to health (WHO) and intellectual property (e.g. in TRIPS) and under EU law, has a broad discretion to adopt on a precautionary and

prospective basis measures designed to protect against health problems. And that is what the Regulations do. [Para 40, page 34]

Article 7 [of the TRIPS agreement] makes the important point that intellectual property must serve but not subvert the public interest. In particular usage must be reconciled with "*social and economic welfare"* and *"a balance of rights and obligations*". [Para 178, page 84]

The WTO Ministerial Conference has adopted a declaration which elaborates upon the importance of public health as a proper reason to derogate from intellectual property rights. [Para 180, page 123]

TRIPS and the FCTC can be read together without any risk of them colliding or being mutually inconsistent. [Para 186, page 128]

First, the trademarks (of whatever description) remain unequivocally the property of the Claimants; the state has not expropriated or taken away the rights for itself or to be handed to some third party… In substance the Regulations impose substantial restrictions on the freedom of the tobacco companies to use their property rights, and in particular their trademarks. However, the restrictions are far from being total and the Claimants remain entitled to market themselves though the affixing of a brand name and their own manufacturers name…

Second, when measured against the function attributed to trademarks in EU law they (and especially the word marks) can still perform this role both in terms of a right to prevent unauthorised use and, more broadly, as an identifier of origin. Once again they do not do so in the way the Claimants would wish but they have not lost those core functions altogether and they remain important attributes.

Third, the curtailment of the use of the trademarks does not result in the Claimants being unable to conduct their business.

Fourth, **the interference was unequivocally in the public interest and there is no challenge to the legitimacy of the objective pursued by Parliament in promulgating the Regulations.**
[Paras 785 to 788, page 316]

- **Demand for Compensation**

It is "fair" not to compensate the tobacco companies for requiring them to cease using their property rights to facilitate a health epidemic. In my judgment it would not be right to expect the State to pay <u>any</u> compensation for the restrictions imposed upon the use of the rights in question.
[Para 39, page 23]

The Regulations bear the same characteristics as other regulatory measures designed to further the public interest which, in so doing, impose burdens and costs on the regulated community. Public policy evolves. Political thinking evolves. **No individual or company can have an expectation that if it produces and supplies a product that is, or become recognised as, contrary to the public interest that it will be entitled to continue to produce and sell that product, or that if the State comes to prescribe or curtail the product in issue that it will be entitled to compensation.**
[Para 798, page 319]

There are no cases where compensation has been paid for the curtailment of an activity which is unequivocally contrary to the public interest**. In my judgment the facts of the case are exceptional**

such that even if this were a case of absolute expropriation no compensation would be payable. [Para 811, page 324]

Proportionality

Smoking is a behaviour most commonly adopted in childhood or by young adolescents. Very few adults over the age of 25 start smoking. Evidence suggests that around 207,000 children aged between 11 and 15 years old start smoking every year in the United Kingdom, i.e. about 600 every day. Children whose parents or siblings smoke are 90% more likely to become smokers. Evidence suggests that if smoking is seen by young people as a normal part of life, they are much more likely to take up smoking. [Para 63, page 29]

In 2006, a spokesman for Gallaher (now part of JTI) noted that "*marketing restrictions make the pack the hero*". Branded packaging has been described as the *"silent salesman"* and the manufacturers' *"billboard"*. **Tobacco companies do not divulge their internal documents and they have not done so in this litigation. But in the course of litigation elsewhere, and especially in the United States, they have been compelled to provide discovery and there is thus a large body of indicative material that gives an insight into the internal thought processes within the manufacturers. This material suggests that a cat and mouse game is employed between the companies and Governments. As the scope for promotion shrinks through successive legislative interventions so the tobacco companies focus increasingly upon the territory that is left. The importance of the present case is that the packaging and the product itself constitute virtually the last opportunity for tobacco companies to promote their product.**

The market has also seen the introduction of innovative packaging intended to introduce a '*wow*' factor through, for example, 'GlideTec' packs (Imperial) which are designed to embrace the *"sociability of smoking"*. Slimmer packs are designed to appeal particularly to women, as fashion statements. Texture and lacquer are used on packs to provide a positive connection between the smoker and the packaging they handle frequently. [Paras 71 to 72, page 31]

The TPD is a direct response to the FCTC and the WHO Guidelines which represent a "*consensus*" between, *inter alia*, the Member States. Further, this is consistent with the principle in Article 114(3) TFEU that EU law shall accord health matters a "high level of protection" [Para 229, page 102]

- **Decision Made by Parliament**

It is important to remember that the ultimate decision maker was Parliament and that the process of promulgation was by affirmative resolution which thereby necessitated Parliament addressing itself specifically to the measures to be adopted. **It is abundantly clear from Hansard that Parliament engaged in depth with the merits and de-merits of the arguments; it cannot on any view be said that Parliament rubber stamped the legislation.** [Para 90, page 61]

Parliament has acted in accordance with a consensus formed at the broadest of international levels, i.e. amongst 180 states worldwide and in accordance with an EU directive giving formal legislative expression to that consensus. That consensus is that standardised packaging <u>will</u> contribute to enhanced public health. This area of health regulation is not a policy blank canvass. It is true that the FCTC did not mandate the adoption of standardised package and nor has the TPD; but the message conveyed by the Guidelines to the FCTC is clear: standardised packaging <u>is</u> a

positive step in the fight to reduce smoking. It is EU policy to reflect the FCTC and the Guidelines. [Para 464, page 209]

In my judgment, objectively, **Parliament acted reasonably in concluding that there was no equally effective less restrictive measure which met the aims and objectives of standardised packaging and that conclusion still holds true in these proceedings**. [Para 679, page 279]

- **Regulations Subject to Review**

It is a relevant consideration that the Regulations are not set in stone. If for instance at the end of five years' experience in the UK and in Australia pointed unequivocally to the conclusion that standardised packing was counterproductive to health then one would expect the relevant provisions TPD and/or Regulations to be reviewed and possibly revoked or at least modified.

In the present case, **the 2014 Impact Assessment indicated that there would be a review.** It pointed out that upon implementation monitoring could occur of the consequences and effects and that this on-going review would enable adjustments and other measures designed to mitigate any unintended consequences (such as impact on cross border trade or the size of the illicit market): See 2014 Impact Assessment at paragraph [38]. [Paras 455 to 456, page 207]

- **Industry ECJ challenge to Article 24(2) of the Tobacco Products Directive**

The following summarises the main points emerging from the judgment in *Philip Morris* which are relevant to the issues arising in this judgment:

- **The TPD and Article 24(2) thereof are valid**. The area of tobacco control is an issue relating to the internal market and public health and forms an area of shared competence between the EU and the Member States.
- **The FCTC and the recommendations in the WHO Guidelines are evidence based and reflect a wide international consensus**. The TPD is intended to implement the FCTC and in this regard the WHO Guidelines are, whilst not binding, nonetheless of very great probative value in interpreting the TPD.
- **Member States have a pre-existing right and competence to adopt legislation in the field of tobacco control.** They may exercise this jurisdiction subject to (i) general principles of EU law and (ii) ensuring that such national measures do not conflict with the harmonised measures in the area adopted by the EU. It follows that the Claimant's challenge to the Regulations based upon the alleged invalidity of the TPD fails. [Para 275, page 138]

Conclusions

For the reasons set out in this judgment all of the applications for judicial review fail. The Regulations were lawful when they were promulgated by Parliament and they are lawful now in the light of the most up to date evidence. [Para 46, page 25]