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THE HIGH COURT

1988/8388p

BETWEEN:

PERNOD RICARD
COMRIE plc

PLAINTIFFS

AND

F.I.I. (FYFFES) plc

DEFENDANT

Judgment of Mr. Justice Costello delivered the 21st day of October 1988.

I

The present takeover battle for the shares in Irish Distillers Group plc began at the beginning of September of this year. These proceedings have resulted from an important engagment in that battle. The contestants in the main struggle are an Irish-based company now called G.C. and C. Brands plc on the one hand and a French-based company called Pernod Ricard on the other. The protagonists in the dispute before me are Pernod Ricard (and its Irish subsidiary, Comrie, plc.) as plaintiffs, and an Irish company called F.I.I. (Fyffes) plc., defendant, Pernod Ricard claiming that an enforceable agreement exists by which the defendant agreed to sell to its subsidiary its twenty per cent share-holding in Irish Distillers. Partly as background information but more importantly to establish the circumstances in which the parties negotiated and to explain their attitudes to the negotiations, I propose to begin this judgment with a brief description of the companies involved in the present controversies and an outline of certain of the developments which had occurred before the negotiations began.

Irish Distillers Group plc is an Irish company whose main business and that of its subsidiaries is the distilling and marketing of Irish whiskey, which it sells under such well-known brand names as "Jamesons", "Power's", "Paddy", "Bushmills", as well as gin and vodka. By Irish standards it and its subsidiaries comprise a substantial group, employing over 1,000 people in Ireland and enjoying

in the year just ended an estimated pre-tax profit of IR £18m. On the 30th May of this year G.C. and C. Brand Ltd mounted a bid to acquire all the shares in Irish Distillers, making its formal offer on 27th June. This company had been recently established and was jointly owned by two Irish companies, Gilbey's of Ireland Group Ltd and Cantrell and Cochrane Group Ltd, two companies who were themselves subsidiaries of two very large English companies, in the case of Gilbey's the ultimate parent company being Grand Metropolitan plc, and in the case of Cantrell and Cochrane, Allied Lyons plc. It is accepted that in reality G.C. and C. Brands Ltd was being used as a vehicle for a bid for Irish Distillers which was being made by a consortium comprising Grand Metropolitan, Allied Lyons and Guinness plc. Its offer was a cash one namely IR 315p for each of Irish Distillers' 25p shares. It was strongly opposed by the Board of Irish Distillers who argued that it undervalued the group's assets, that its acceptance would result in the sale of some of its brands and real assets (including the Old Bushmills Distillery) and that its acceptance was not in the interests of either the group's shareholders or its employees. In addition to advising its rejection the Board complained to the Commission of the EEC that it infringed Community Law. In a Statement of Objections the Commission expressed a provisional view that there had been an infringement of the Community's competition rules and following negotiations and the granting of certain undertakings to the Commission the panel of Take-Overs and Mergers in London gave a formal ruling that the offer of 27th June had lapsed. This cleared the way to a new offer being made by a reorganised

G.C. and C. G.C. and C. Brands Ltd became G.C. and C. Brands plc and a wholly owned subsidiary of Gilbeys and on the 22nd August it (this time on behalf of Grand Metropolitan alone) made a new bid. Entitled "New and Increased and Final Offer for Irish Distillers" the offer document increased its previous offer from IR 315p to IR 400p per share. There are two points about the offer document to be noted; firstly, it was no longer solely a cash offer - Irish Distillers' shareholders could now elect to accept cash or what was termed "an alternative investment in the form of Guaranteed Notes"; and secondly it contained an undertaking that

> "application will be made to the Irish Revenue Commissioners for their agreement that the exchange of Irish Distillers shares for Guaranteed Loan Notes under the Loan Note Alternative will be effected for bona-fide commercial reasons and would not, within the meaning of section 63 of the Finance Act, 1982, form part of any arrangement or scheme of which the main purpose or one of the main purposes is avoidance of liability to tax" (p. 10).

It is relevant to observe the extremely limited contractual obligation undertaken by G.C. and C. in this offer document; it merely undertakes to apply to the Revenue Commissioners for the agreement stated in the paragraph; failure to obtain it would not in any way affect the parties' obligations resulting from acceptance of the offer document.

This alternative method for effecting a transfer of Irish Distillers' shares brings me to an important aspect of this case, namely the possible tax liability which F.I.I. might have to face on a diposal of shares. It had recently purchased them, it was being offered a price which would result in a substantial capital gain, and it was faced with a possible liability to pay capital gains tax at

the rate of 60% under the provisions of the Capital Gains Tax Act, 1975. But there was a way by which this liability could with perfect propriety be postponed and diminished, namely if it could avail of the relief afforded by paragraph 4 of Schedule 2 of the Act. By virtue of this section immediate liability would not arise when a company seeking to acquire shares in another company issues debentures in exchange for those shares as a result of a general offer made to the members of the company, the offer having been made on a condition which, if it were satisfied, would result in control of the company passing to the offeror. So, if F.I.I exchanged its shares in Irish Distillers for debentures in G.C. and C. it could claim relief (in the recondite language used in the world of mergers and take-overs called "roll-over" relief) under the 2nd Schedule as the exchange would have been as a result of the sort of general offer referred to in paragraph 4. Thus it could postpone liability to pay tax until it realised the debentures and could reduce its over-all liability because it would be taxed at a lower rate, depending on the length it held the Loan Notes. It had tried to obtain an offer from G.C. and C. earlier in the year on these terms and had failed. F.I.I. was acutely conscious of the benefit to it of disposing of its shares so as to comply with Schedule 2, which meant that to be attractive to it any rival offer would have to

(a) involve an exchange of debentures for shares and

(b) be part of the type of general offer referred to in paragraph 4.

There was a second aspect of the capital gains tax code of which F.I.I. was also aware, namely that arising

from the provisions of section 63 of the Finance Act, 1982 to obtain the benefit from Schedule 2 the exchange of debentures for shares was required to be effected for bona fide commercial reasons and further the exchange could not form part of an arrangement or scheme of which the main purpose or one of the main purposes was the avoidance of tax. This was an entirely different point; it had been dealt with in the G.C. and C.'s Final Offer document in the way I have already indicated, namely by an undertaking to seek the Revenue's agreement that the transaction was a bona fide one and one made without the prohibited purpose specified in section 63.

The tax problem had an important bearing on the negotiations in this case for the following reasons. The manner by which one company goes about acquiring shares in another is likely to vary from case to case, but one of the common ways is for the offeror to attempt to acquire by private negotiations sale commitments from as large a percentage of shareholders in the offeree company as possible before making a public and general bid. Such commitments are made in contracts with individual shareholders by which the shareholder agrees in advance to accept a general offer if and when it is made on terms which have been approved in principle. These contracts take the form of irrevocable undertakings to accept the contemplated general offer and were familiarly referred to throughout the negotiations and in these proceedings as "irrevocables". In connection with G.C. and C.'s first bid F.I.I. had signed an "irrevocable" before a general offer had been made. When it came to negotiate with Pernod Ricard it was anxious to contract by means of an

"irrevocable" because it was satisfied that if it exchanged its shares for debentures pursuant to the terms of an "irrevocable" there would be compliance with the Second Schedule of the 1975 Act.

There is one other aspect of the pre-negotiation developments to which I should refer before turning to the plaintiff herein, that is the role of the Take-Over Panel in London in the situation which existed after G.C. and C.'s "Final Offer" of the 22nd August. The evidence establishes that both parties entered into the negotiations on the understanding that G.C. and C. could not make a further bid for Irish Distillers without the permission of the Take- Over Panel and that that permission would only be given if and when another general offer to all Irish Distillers' shareholders was made by another rival bidder. This put the plaintiff in a strong negotiating position because the defendant could not hope for an over-bid from G.C. and C. unless and until a general offer had been made and the plaintiff made clear to the defendant that it would not consider making a general offer unless it at least had got a binding agreement for the sale of the defendant's holding.

The first-named plaintiff in these proceedings, the Pernod Ricard Group, was formed following a merger in 1975 of two very substantial French companies, Pernod and Ricard, as a result of which the group has become the world's largest wine and spirits concern by sales volume. Its involvement in its present attempt to acquire Irish Distillers followed an approach made by the Board of Irish Distillers, seeking its assistance to ward off the take-over by the Grand Metropolitan, Allied Lyons, Guinness

consortium. Various tentative proposals were considered but these were overtaken by events and by the Final Offer of 22nd August. The Board of Irish Distillers was as opposed to the second bid from G.C. and C. as it had been to the first, believing that it was "inadequate" and "as ill-conceived as the previous one", as it informed its shareholders. On 28th August the Board of Pernod Ricard decided that an offer for all Irish Disillers' shares would be made provided

(1) it had financing guaranteed by its bankers,

(2) that it had the support of Irish Distillers and

(3) that it had a good chance of success

and it authorised M. Thiery Jacquillat its president and managing director to negotiate on its behalf. No difficulty in relation to (1) and (2) arose. M. Jacquillat decided to carry out the third condition in a manner which he made perfectly clear to F.I.I. F.I.I., owned 20 per cent of the shares in Irish Distillers and Irish Life Assurance Co Ltd 10 per cent and M. Jacquillat from the very commencement of the negotiations stated that unless he first had agreement that F.I.I. would sell its shares to Pernod Ricard and then Irish Life he would make no bid for the company.

The two major issues that arose in the negotiations which followed were (a) price and (b) method of acquisition. Before he left Paris for Dublin M. Jacquillat had had a meeting with one of the plaintiff's bankers, Messrs Shroder Wagg and Co Ltd, and as a result a decision was taken on the form of agreement he would propose to F.I.I. It was proposed that it should be asked to agree to sell its shares to Pernod Ricard when (and if) a general

offer to all shareholders was made. The distinction between that method of acquisition and an irrevocable undertaking should be noted. If F.I.I. was to accept the form of agreement the plaintiff proposed it would enter into a binding obligation to sell in the event of a general offer being made, so that irrespective of the fate of the general offer it was obliged to transfer its shares. On the other hand if it signed an irrevocable undertaking to accept the terms of a general offer when one was made no transfer of its shares would take place if for any reason the general offer lapsed or was declared invalid. This distinction between "a conditional purchase agreement" (as it came to be called) and an "irrevocable" was one which the parties fully understood and it loomed large in their discussions for F.I.I apprehended that a conditional purchase might not afford it Schedule 2 relief whereas if the transaction were to proceed by way of an irrevocable undertaking roll-over relief under the Schedule was available.

Pernod Ricard established a wholly owned subsidiary in Ireland, Comrie plc., the second-named plaintiff for the purpose of acquiring shares in Irish Distillers and on 31st August Mr. Dermot Desmond, the managing director of National City Brokers Group was instructed to commence buying Irish Distillers' shares on the stock exchange on Pernod Ricard's behalf. By the afternoon of 2nd September he had acquired a holding of between 4.5 and 5 per cent. On Thursday 1st September M. Jacquillat came to Dublin. He had a meeting with the Board of Irish Distillers on that day whose full support was forthcoming and a preliminary meeting with Mr. Haslam of Irish Life. A meeting with

F.I.I. was fixed for the following day. But before it took place M. Jacquillat and his advisers were aware of certain aspects of the position that F.I.I. might be expected to adopt and in particular with its apprehended tax problem. On 19th August Mr. Hooper of the Investment Bank of Ireland, who were acting as financial advisers to Irish Distillers, had 'phoned Mr. Flavin, one of the directors of F.I.I., to inquire whether F.I.I. was still bound by its irrevocable undertaking to G.C. and C. and was informed that it was not. He was also informed that before F.I.I. entered into an irrevocable commitment with anyone else it would require a "significant cash inducement", that it had a considerable tax problem in relation to the acquisition of its shares, that anyone making a bid would have to make it as part of a general offer, and it would have to be a "paper offer", that is the consideration should not be cash but loan stock. The availability of F.I.I. to negotiate a sale of its shares was again confirmed on 31st August to Mr. Hooper.

M. Jacquillat had throughout the negotiations as his professional advisers Mr. Desmond of National City Brokers, Mr. Swallen of Shroder Wagg and Co, and his English and Irish solicitor. Mr. Desmond, before the negotiations began, was aware that his clients wanted to acquire by means of a conditional purchase agreement and not by means of an irrevocable undertaking and that F.I.I. wanted to be able to defer its tax liability under Schedule 2. On the evening of the 1st September he had in consultation with solicitor and counsel worked on the form of an agreement which he believed could achieve both objectives. He 'phoned Mr. Carl McCann on Thursday 1st

September, ascertained that F.I.I. shares were available and that F.I.I. was interested in long loan stock in exchange for its shares. A meeting was arranged for 10 a.m. the following morning. It was attended by M. Jacquillat on behalf of the plaintiffs and his advisers, Mr. Desmond, Mr. Swallen of Shroder, and M. Sorrell of Société Général Merchant Bank plc (the second firm of merchant bankers acting for Pernod Ricard). It was attended on the defendant's behalf by Mr. Carl McCann (its deputy chairman), Mr. Flavin a member of its Board, Mr. Anthony Canning Jones of Merril Lynch and Mr. Bergin, the company's solicitor. Mr. Flavin was there in a dual capacity because not only was he a non-executive director of F.I.I. but he was also chief executive of a very large investment company which was acting as financial adviser to F.I.I. He acted as principal spokesman for F.I.I. in all the negotiations which followed, except on one occasion.

Because of counsel's animadversions on the veracity of two of the plaintiff's witnesses there is general remark which I think I should make before I consider the progress of the negotiations. It is true that this action has been heard within a few weeks after they had taken place. It is equally true that there is considerable conflict of evidence on some crucial aspects of them. But I am satisfied that all the witnesses before me did the best they could to remember what was said and done, and that the infirmity in recollection where it exists is caused by human fallibility and not malign intent. Quite obviously some witnesses had clearer recollections than others, and where I prefer the evidence of one over that of another I do not intend to impugn the honesty of the witness whose

testimony I reject.

II

It is unnecessary for me to review here all the testimony by the participants to the negotiations which took place on the morning of Friday 2nd September and it will suffice if I give my conclusions in summary form as to the effect of what was said. M. Jacquillat offered to buy F.I.I.'s shares in Irish Distillers at 430p per share, he was prepared to give loan stock in Comrie plc in exchange for them instead of cash, he was prepared to have the stock guaranteed by Société Général, and that the stock could be for 8 or 9 years as required by F.I.I. He made it perfectly clear that he would make no general bid for the shares in Irish Distillers unless he had the prior agreement from F.I.I. as well as Irish Life that they would sell their shares. No agreement as to price was reached at this meeting but it was indiated that F.I.I. was looking for a price in the region of 470 to 480 per share. There was very considerable discussion on the method of acquisition. This was in the main dealt with on the plaintiffs side by Mr. Desmond who explained that it was proposed to acquire the F.I.I. shares by means of a share purchase agreement and not by the execution of an irrevocable undertaking, that he was aware of the tax problem involved, that a scheme had been evolved which would get over them and which that very morning was being discussed between a fellow director and counsel and his colleague was arranging to see the chairman of the Revenue Commissioners that day to obtain his confirmation that the

transaction would not attract immediate liability to tax. There was strong opposition from the F.I.I. side to the proposed method of acquisition because of its apprehended tax implications, and on at least three occasions it was strongly urged that acquisition should take place by means of an irrevocable undertaking to be given by F.I.I. F.I.I. clearly left the plaintiff's representatives with the impression that if this method was adopted it would have no concern about the tax situation. The plaintiff's representatives insisted that the acquisition be carried out in the way they suggested and so F.I.I. insisted that it should get a "tax clearance certificate" or "tax clearance letter" from the Revenue Commissioners. Because the question of tax clearance has featured prominently in the case I should say a word about it. As a matter of practice, but not because of any statutory requirement, an inspector of taxes may be prepared to consider a proposed transaction and to express an opinion that if the transaction is carried out in the contemplated way it would not attract tax or it would come within some of the relieving provisions of the tax code. Such opinions have no legally binding force, but they do give comfort because provided the transaction is carried out as contemplated they are honoured in practice. F.I.I. made it clear that it wanted an opinion (which was described somewhat inaccurately as a tax clearance certificate) that the proposed purchase agreement would qualify for relief under Schedule 2 of the 1975 Act and that this would not be negated by s. 63 of the 1982 Act. Mr. Desmond expressed considerable confidence that it could be obtained and on behalf of Pernod Ricard it was agreed that one would be

obtained. But this was in the context of a conditional purchase agreement and it was implied by what the defendant's representatives said that one would not be required if instead an irrevocable undertaking was given.

Pernod Ricard also agreed to produce a written agreement the next day and counsel's opinion to the effect that the conditional purchase agreement would qualify for Schedule 2 relief. The precise term of the agreement on this part of the negotiation is important. It has been suggested that Mr. Flavin stated that F.I.I. would require the production of a written agreement and that F.I.I. would not be bound until it was signed. That is not so. What Mr. Flavin said was that their discussions would be meaningless unless F.I.I. had a piece of paper in front of them, by which he meant that there could be no agreement until they had seen the proposed purchase agreement in written form - a perfectly reasonable and sensible requirement. But he did not specify at that meeting that F.I.I. would be under no contractual obligation until it had signed a written agreement. There are three further comments on this meeting which I should make. Firstly, I think it is unlikely that Mr. Carl McCann stated with any degree of force that F.I.I would have to clear in advance any offer which was made with the Commission of the EEC; in any event it was not a point taken up by F.I.I.'s principal negotiator Mr. Flavin and if the statement was made it was never conveyed to the plaintiff's representative that no agreement would be entered into until it had been approved by the Commission. The matter was not referred to again and the point was forgotten. Secondly, I do not think that Mr. Canning-Jones stated that any agreement entered into

would be subject to a condition that no transfer would occur if a higher offer was made. Any reference Mr. Canning-Jones may have made to the possibility of a higher offer being forthcoming did not convey to the Pernod Ricard's representative that such a term should be included in any contract for sale that might be negotiated. Thirdly, there was certainly a discussion about the amount of irrecovable undertakings which Pernod Ricard would require prior to a general offer being made so as to be confident of its success, but there was no agreement that the transfer of F.I.I.'s shares was conditional on any stated amount of irrevocable offers having been obtained prior to the general offer, or that the execution by Irish Life of an irrevocable undertaking in respect of its shares was a pre-condition of the defendant's obligation. The meeting ended by an arrangement for a further meeting the next morning and an agreement on the plaintiff's part to bring to it a draft contract, and counsel's opinion on the draft.

The following morning the parties' representatives and their advisers met again. M. Jacquillat again represented the plaintiffs and he had with him as advisers Mr. Desmond, Mr. Swallen and Mr. Sorrell as on the previous day and in addition his English solicitor, Mr. Chaine and his Irish solicitor, Mr. Collins. The defendant was represented by Mr. Flavin and Mr. Carl McCann, as before who were joined by Mr. Niall McCann, the company's chairman, the Financial director, Mr. McNamee, and the company secretary, Mr. Guernon. Its advisers present were Mr. Bergin (who had a colleague Mr. Meghan with him), and a tax adviser Mr. Mooney. The plaintiff's representatives

had three documents with them, namely a draft contract of sale, counsel's opinion on whether the contract would qualify for relief under Schedule 2 of the 1975 Act, and a draft press announcement which incorporated a draft of the principal clauses of the proposed general offer. When these were distributed the general meeting adjourned. The defendant's legal advisers and tax consultant met separately together and then gave the Board of F.I.I. their advice; a second general meeting then took place; it adjourned for a second time. M. Jacquillat and Mr. Niall McCann met and negotiated. There then followed a meeting of the Board, and after it a second small group comprising M. Jacquillat and Mr. Desmond, on Pernod Ricard's side and Mr. Niall McCann, Mr. Carl McCann and Mr. Flavin on F.I.I.'s side which negotiated further. This was followed by a general discussion between the advisers, Mr. Niall McCann having by this time left for Belfast and M. Jacquillat for his Dublin hotel. It is the plaintiff's case that from the discussions at the second general meeting (which took place after the perusal and approval of the plaintiffs documents) and at the two smaller meetings there emerged an oral concluded agreement for the sale of the defendant's shares.

It is relevant to refer briefly to the three documents given to F.I.I. The draft contract was a very short and quite simple one. It provided that the defendant would sell its shares to the plaintiffs for a consideration left blank provided a general offer for Irish Distillers' shares was made by the plaintiffs; that the plaintiffs would procure that a general offer be made provided they had before 9 a.m. on 12th September received an irrevocable

undertaking to acccept the offer from shareholders holding 32 million shares or such lesser number as the plaintiffs might decide; that the defendant would transfer its shares within three days of the making of the general offer against Loan Notes representing the consideration for the shares. Counsel's opinion was a very brief one. It pointed out that under the proposed agreement the obligation created on the part of F.I.I. to sell its shares would arise from the making of a general offer, that until it was made no obligation to sell existed, that when it arose it would be as a result of the general offer and that accordingly the proposed agreement was within the ambit of subparagraph (2) of paragraph 4 of the Second Schedule to the 1975 Act. The third document was a much longer one. It contained the draft of the terms of an announcement of the principal terms of a general offer. But it was in a form with which F.I.I. would have been perfectly familiar. It contained nothing of a controversial nature; and once price had been agreed the blanks left in the form could have been filled in without difficulty. I am not at all surprised that F.I.I.'s professional advisers readily expressed agreement with Counsel's opinion that the draft contract was within the terms of Schedule 2 of the 1975 Act. But Mr. Mooney, the defendant's tax consultant, was aware of the provisions of s. 63 of the 1982 Act and he had with him the offer document issued by G.C. and C. which contained the provision relating to it to which I have referred and it was his view that a tax clearance certificate should cover both the 1975 Act point and the 1982 Act point.

Again, I do not propose to rehearse here all the

evidence adduced from both sides on what took place that Saturday morning; I propose to give my conclusions on the effect of what was said and the legal consequences of what was said.

Before the F.I.I. representatives returned to the meeting Mr. Flavin had called Mr. Desmond out for a private conversation and said to him that the price of 430 was not good enough and that Pernod would have to do much better. He left Mr. Desmond with the impression, as he had made no mention of the tax problem, that F.I.I. was accepting the plaintiffs views on the tax situation. When the full teams met Mr. Desmond's assessment of the situation proved correct. Mr. Flavin acted as the defendant's spokesman. He indicated that they were satisfied with the documents. He informed the plaintiff's representatives that his tax advisers thought the opinion of counsel was a good one, that the proposed method of implementing the transaction was satisfactory to the defendant, but that notwithstanding this view the defendant still required a tax clearance certificate. Whilst indicating the defendant's acceptance of a sale transfer by means of the purchase agreement he stated "I can't understand why you are not going the irrevocable route" and implied, as had been done the previous day, that the "irrevocable route" would have obviated the defendant's tax problems. Turning to the question of price he stated that it was the view of the defendant that it was prepared to sell for 470p to 480p. There was not much discussion immediately following this statement. M. Jacquillat inquired whether what he was told about price was a Board decision and when he was informed that it was he asked the Board's chairman to join him in a

private conversation.

Mr. Flavin had called on Mr. Mooney to speak during the course of his remarks and Mr. Mooney had indicated that he thought counsel's opinion was a correct one but that a tax clearance certificate was nonetheless required on both the 1975 Act and 1982 Act points. A question has arisen as to whether he added that a certificate would be required for whatever route was taken. Whilst I think it is unlikely he said this as the defendant had accepted that the sale be completed in the manner proposed by the plaintiff and furthermore none of the defendant's witnesses recalled him saying so, the point was not taken up by Mr. Flavin and it was not made clear to the plaintiff's representatives that the defendant wanted a tax certificate should the agreement be changed and an irrevocable undertaking executed instead.

Negotiations on price then began. M. Jacquillat and the chairman of F.I.I. met together and alone. M. Jacquillat told him that the plaintiff would not offer 470 or 480, but after a short discussion he made a new offer of 440p. Mr. McCann then left the room and met his Board to consider this new offer. There was then convened a meeting of M. Jacquillat and Mr. Desmond on the one side and Mr. Flavin and Mr. Niall McCann and Mr. Carl McCann on the other. Before leaving this meeting for Belfast Mr. Niall McCann stated that he was prepared to sell at 450p. M. Jacquillat then made a 'phone call to Paris and returned to the meeting. He announced that the Board of Pernod Ricard was prepared to accept the offer of sale at 450p per share. There was a spontaneous shaking of hands and Mr. Flavin said "we are partners now" and he offered on

behalf of F.I.I. to give the plaintiffs help in getting additional "irrevocables" before the public bid was made. M. Jacquillat wanted to know when they could sign the agreement and Mr. Flavin said that there was a difficulty because their legal adviser had to go to a wedding and that they could sign the following day. He said to M. Jacquillat not to worry about it; "we will arrange all that, we are all together now". M. Jacquillat then 'phoned Mr. Niall McCann in his car and told him that he had accepted the offer of sale at 450p. Mr. McCann expressed satisfaction and congratulated M. Jacquillat. Having made an arrangement to meet the following day M. Jacquillat also left the premises. The evidence satisfies me that the parties had reached a concluded agreement whose terms I will indicate later. Mr. Flavin returned to the room where the parties' advisers had been waiting and he again repeated that they were now "partners" or that they were now "together" and indicated the readiness of the defendant to use its influence with the institutional shareholders in Irish Distillers to obtain support for Pernod Ricard's bid. A point was raised by Mr. Flavin about the possibility of the general offer being higher than the figure they had agreed, which was dealt with. There was some discussions between the parties' legal representatives about making contact the following day if required. All left the building on the understanding that there would be another meeting the following afternoon at 5 p.m.

Prominently in its defence to this action is the defendant's plea that it was under no obligation to sell its shares to the plaintiff until a written contract was executed and that as none was executed no obligation has

arisen. I have already expressed my opinion that there was no express term to this effect insisted on by the defendant or accepted by the plaintiff. What happened on that Saturday morning was what frequently occurs in all sorts of negotiations - namely, a point was reached when the parties had made a bargain and agreed that a written document should be executed. When a dispute subsequently arises what the court has to decide is whether the preparation of a further document is a condition precedent to the creation of a contract or merely an incident in the performance of an already binding obligation. I have no doubt that the negotiations had in this case ripened into an agreement, that an obligation had been imposed on F.I.I. to sell its shares to Pernod Ricard if certain conditions were fulfilled by it, and that the preparation and execution of a written contract was merely an incident in the performance of the obligations the parties had undertaken to one another. I have reached this conclusion not only because of the view I have taken of the oral testimony in the case, but also because it is strongly supported by the conduct of the parties subsequent to the Saturday meeting to which I will later refer.

There were other grounds advanced by the defendant as to why it claimed that no obligation to sell existed. It was stated in evidence that it had been agreed that there were no less than six pre-conditions which would have to be satisfied before an obligation to sell could arise; one, the production of a tax clearance certificate; two, that Irish Life would agree to the plaintiff's offer; three, that the plaintiff would obtain shares or irrevocable undertakings to sell shares amounting to not

less than 40 per cent of Irish Distillers' shares; four, that a written contract would be entered into; five, that no higher bid would be received; and six, that EEC clearance would be given in advance. Of these six, only two were pleaded by way of defence, namely, the need for the execution of a written document with which I have already dealt, and the condition relating to tax clearance which I will turn to in a moment. As to the other four, I cannot acccept the defendant's evidence as to the existence of these four pre-conditions and none of them had become a term of the agreement reached when the negotiations had terminated on the morning of Saturday 3rd September. It is true that there were discussions as to the amount of shares which it would be necessary for the plaintiff to acquire to achieve success in its bid but the term in the draft contract which was approved in principle related to the number the plaintiff should acquire before an obligation was imposed on it to make a general offer and not one which operated in the defendant's favour.

As to the tax clearance certificate, I think that the plaintiff had agreed on the previous Friday when it was urging the share-purchase route as the method of completing the transaction that it would provide a tax clearance certificate and it impliedly, if not expressly, reiterated this agreement on the following morning. As to the form the certificate would take I think it was agreed that it would cover the two points which had been raised. But I do not think that the parties agreed that it must be in a form approved by the defendant nor do I think that it was agreed that no contractual obligation would arise until the tax clearance certificate was produced; on the basis of the

testimony in the case and the parties' conduct I conclude that the production of the tax clearance certificate was made a condition precedent in the contract and that by this contract the defendant had accepted an obligation to transfer its shares provided the certificate was available within three days of a general offer being made. This meant that the defendant was under an obligation to sign a contract on the following Sunday even if the tax certificate was not at that time available. It is relevant to point out that both parties were confident that a certificate could be obtained, a confidence partly arising from Mr. Desmond's assurances but also

(i) from the nature of the proposed contract document,

(ii) the advices both had received that it complied with the relevant 1975 Act provisions and

(iii) their own knowledge that the transaction was a bond-fide one and one which complied with the 1982 Act provisions.

The evidence relating to the negotiations established that a concluded agreement had been entered into by which the defendant had agreed to sell its shares at 450p per share and would receive debentures in Comrie plc in exchange, that this agreement was conditional (a) on the plaintiff making a general offer based on terms in the draft press notice and (b) on the production before the time fixed for completion of a tax clearance certificate, and that the transfer would be made within three days of the making of the general offer. The parties conduct supports the plaintiffs testimony. M. Jacquillat had made it perfectly clear that he would go back to Paris unless he obtained the defendant's agreement to sell. Experienced

negotiator as he was, it is unlikely that he would have moved to the second stage of his strategy (the acquisition of Irish Life's shares) unless he had successfully concluded the first. Nor would he have told Irish Life that he had the defendant's shares unless he had reasonable grounds for his belief that he had negotiated a concluded bargain. He, Mr. Desmond and Mr. Swallen met Mr. Haslam of Irish Life at 2.30 that afternoon. M. Jacquillat began the meeting by stating "Are you aware that we have a deal with F.I.I."? Mr. Haslam indicated that he was so aware (knowledge which he could only have acquired from the defendant) and also of the price which had been agreed but he asked M. Jacquillat to confirm the price, which M. Jacquillat did. He was insistent that Mr. Haslam would there and then obtain his Board's view on the offer and after leaving the meeting for about half-an-hour Mr. Haslam returned and on behalf of Irish Life accepted Pernod's offer of IR 450p per share and shook hands with M. Jacquillat. It was agreed that the transaction between them would be by means of irrevocable undertaking to accept an offer of 450p per share which would be made in a general offer, and no tax problem in relation to the transaction was raised by Mr. Haslam. It was further agreed that they would meet the following day to sign the undertaking.

As to the defendant's conduct; after the successful meeting with Irish Life Mr. Desmond and his colleagues in National City Brokers Group began a campaign to have as many shareholders as possible execute irrevocable undertakings before the following Monday. He contacted the Norwich Union (whose holding of 3% in the company made them the third largest shareholder) and because of a reluctance

which he encountered he decided to take Mr. Flavin up on the offer of support he had made at the conclusion of the morning meeting and rang him to ask him to contact the Norwich Union on Pernod's behalf. Mr. Flavin readily agreed to do so and added that he had been in touch with Standard Life (on his own initiative) and that they would sell. He rang back at about 7 p.m. to report his efforts to secure the support of the Norwich Union and indicated that they were being cautious and that he would contact them the following day. I think that the offer which Mr. Flavin had made on the defendant's behalf to help the plaintiff in its efforts to obtain undertakings from other shareholders to sell their shares to the plaintiff, the actual support which later in the day he gave it, are strongly suggestive that the F.I.I. representatives regarded a deal as having been concluded that Saturday morning.

III

The terms agreed on Saturday morning were varied by mutual agreement on Saturday evening. What happened was this. As a result of obtaining the defendant's agreement as to its 20% holding, Irish Life's agreement as to its 10% holding, the irrevocable undertakings obtained from the directors of Irish Distillers, the success of the campaign to have other shareholders execute irrevocable undertakings, M. Jacquillat realised that having regard to the holding acquired by Comrie it looked likely that he would have obtained more than 50% of the shares in Irish Distillers by Monday morning and that he was likely to win the battle with G.C. and C. So, the considerations which

prompted insistence on the sale by conditional purchase agreement no longer applied and he decided to authorise Mr. Desmond to approach Mr. Flavin and to agree to the defendant's reiterated preference that the transaction with it be undertaken by means of an irrevocable undertaking. It has been accepted by the defendant that a variation that evening was agreed on the terms negotiated that morning as to the method of effecting the transaction; controversy arises as to what was then said about tax clearance. On this part of the case a difference exists between Mr. Desmond and Mr. Swallen on the one part and Mr. Flavin on the other. I have found Mr. Desmond's and Mr. Swallen's recollection to be more accurate and also more consistent with the parties' subsequent conduct and the probabilities of the case and I accept their evidence.

When Mr. Flavin rang back at 7 p.m. he expressed confidence that the Norwich Union would sell the following morning and he then asked; "What about the tax clearance" to which Mr. Desmond replied; "You don't have to worry about that. We will take the easy option. We will go your suggested route". Mr. Flavin understood exactly what Mr. Desmond meant and willingly agreed on behalf of the defendant (and no suggestion has been made that he had no authority to do so) that the sale would be carried out in the way the defendant had all along wanted, namely by means of an irrevocable undertaking to accept in relation to its shares a general offer if made by the plaintiffs. He then went on to ask "What about roll-over relief". Mr. Desmond understood that Mr. Flavin wanted confirmation that the loan stock would be available for exchange for Irish Distillers' shares and that accordingly liability for

tax could be deferred under the 1975 Act. Mr. Desmond said that there would be no problem getting the relief through and that the best person to confirm this was Mr. Swallen. Mr. Swallen then 'phoned Mr. Flavin and a discussion took place about the roll-over relief and the proposed irrevocable undertaking. Mr. Swallen said that he was surprised with the query Mr. Flavin had raised as the position would be exactly the same as that which pertained in relation to the G.C. and C. offer and that he had been involved in the United Kingdom in many take-over transactions where roll-over relief was given when shares were exchanged for loan notes without difficulty. The following morning Mr. Swallen 'phoned Mr. Flavin to try to bring forward the five o'clock meeting because the plaintiffs wanted to announce the offer simultaneously in Paris, London and Dublin and translation problems made this difficult if the meeting was held at five. Mr. Flavin agreed to try to meet this request and said he would 'phone him back. He did so and it was agreed to hold the proposed meeting at 4 p.m. Mr. Flavin raised again the question of roll-over relief and the irrevocable undertaking and Mr. Swallen reiterated the points he had made the previous evening. The conversation ended by Mr. Flavin saying "Don't worry" and expressing the view that it would only take about half an hour to sign the documents at the afternoon meeting. It had been clearly implied in the course of the negotiations on Friday and Saturday morning that if the "irrevocable route" was taken the defendant would not require tax clearance and there was nothing said when the new term was agreed which altered that situation. I accept Mr. Desmond's evidence that he was not told on

Saturday evening that the defendant would require a letter of tax clearance in respect of the irrevocable undertaking, and Mr. Swallen's that he was not told the following morning that he was not to presume that they had a deal if tax clearance was not available. Had Mr. Swallen been told that the whole deal depended on the presentation that afternoon of the tax clearance certificate I think he would immediately have warned M. Jacquillat, but he did not do so. Had Mr. Desmond been told on Saturday evening that the defendant was still insisting on the production of a tax clearance certificate he would have busied himself on Sunday morning trying to get one; instead he played golf with M. Jacquillat. The fact that Mr. Flavin agreed to talk to Mr. Swallen (who was in no way concerned about getting the tax clearance) indicates that Mr. Flavin wanted to satisfy himself that the irrevocable undertaking would enable the payment of tax to be deferred under the relief provisions of the 1975 Act and was not discussing the acquisition of a certificate from the Revenue Commissioners. Furthermore, Mr. Flavin was aware of the manner in which the problem raised by the possible operation of the 1982 Act was dealt with in G.C. and C.'s offer document and as he was anxious to sell (believing as he did that the price offered was a good one) I think it is unlikely that he would have insisted on imposing a term on the plaintiffs which he did not require in a possible contract with G.C. and C.

I conclude therefore that the parties had entered into an oral agreement by that Saturday evening by which the defendant had agreed to accept the terms of a general offer if made in accordance with the agreements reached on

Saturday morning and that there was no longer any condition precedent in the agreement relating to tax clearance.

It is true that no written form of irrevocable undertaking had been produced for the defendant's inspection at that time and that it was understood that one would be executed on Sunday afternoon. But the contract which the parties had entered into was not required by law to be in writing and the execution of a written document was not made a condition precedent to the defendant's liability under the agreement; it was merely a means of implementing a concluded bargain.

As arranged, the plaintiffs' representatives went to the meeting at 4 p.m. on Sunday afternoon. There was no-one there to meet them. Mr. Flavin came in alone after an appreciable interval and said "you have probably heard that G.C. and C. have made an offer of 525 and that it had received the authorisation of the Take-Over Panel to make it". This came as a considerable shock to the plaintiff's representatives who had not heard the news and did not think that a counter-offer could in the circumstances be made. M. Jacquillat said "we have an agreement and I want you to sign". Mr. Flavin did not deny the existence of an agreement but having reiterated a couple of times that "a new situation had been created" and having stated that "we have a very difficult situation" he left the room. He returned about ten minutes later and asked Mr. Desmond "Have you got the tax clearance". Mr. Desmond replied stating that the defendant did not need it as "you are going the irrevocable" and that Jim Kelleher (the plaintiff's tax consultant) was there and would confirm that there was no problem. Again, this statement by

Mr. Desmond was not challenged. Fifteen minutes later a meeting between M. Jacquillat and Mr. Desmond, Mr. Flavin, Mr. Niall McCann and Mr. Carl McCann was held. When Mr. Niall McCann started to speak about the previous day's discussions Mr. Flavin counselled him "as your financial adviser" not to say anything. Mr. Desmond pointed out that there would have been no new offer from G.C. and C. unless the plaintiff and the defendant had reached an agreement the day before and urged the defendant to sign it. At none of these discussions were the claims made on the plaintiff's behalf that an agreement existed denied, and at no time was it suggested that the defendant was not under any obligation to the plaintiffs because of the absence of a tax certificate or because no written document had been executed. The conduct of the parties on that Sunday afternoon lends support to the plaintiffs version of what had happened in their negotiations.

It is unnecessary to deal at any length with what subsequently transpired. An application to the High Court was made late on Sunday night and an interim injunction temporarily restraining the sale by the defendant of its shares otherwise than to the plaintiffs was obtained. The following evening just as Mr. Desmond was leaving to go to London for a hearing of the Take-Over Panel he received a call from Mr. Flavin and a request for what was called a "without prejudice" meeting. This took place. What was said and done thereafter was referred to during the course of the trial, the defendant submitting that the discussions were no longer confidential. When they met Mr. Flavin suggested that Mr. Desmond would now try to get a tax clearance letter indicating that if it could be obtained

this might result in a settlement but that he could not guarantee it. Mr. Desmond again stated there had been an agreement and that there was not any need for a tax clearance for "an irrevocable" but he agreed after discussion with M. Jacquillat to adopt Mr. Flavin's suggestion. The documents were assembled and a request made for an opinion from the appropriate Tax Inspector that on the basis of the proposed transaction relief under paragraph 4 of Schedule 2 of the 1975 Act would be available and that on the exchange of shares for debentures s.63 of the 1982 Act would not apply. The Inspector took the view that he should not give a letter because of the pending litigation, but he expressed the verbal opinion that there was no problem about tax clearance. Mr. Desmond telephoned Mr. Flavin to inform him of this and of the willingness of the Inspector verbally to repeat his view to him or Mr. Mooney. This offer was declined and the attempt to settle the case failed. By consent, terms of the interim injunction were continued until the trial of the action.

On 4th October Comrie plc issued a general offer for the entire issued share capital of Irish Distillers. It has not been suggested that this offer fails to conform to the draft submitted to the defendant on 3rd September. The defendant in my view cannot legally resile from the verbal contract it entered into and the plaintiffs are entitled to have it specifically enforced. I will order the defendant forthwith to accept the offer of all shares in Irish Distillers registered in its name or under its control, it being of course understood that it is at liberty to do so by electing to accept the debenture

alternative contained in the offer document. I will further order that the defendant be restrained from selling its shares in Irish Distillers other than to the plaintiffs but liberty to both parties to apply will be included in the order.

approved
DL
21.10.88