

1978/1

ROYAL COURT (INFERIOR NUMBER)

Before: Sir Frank Ereaut, Bailiff,
Jurat H.H. Le Quesne,
Jurat The Hon. J.A.G. Coutanche

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

AND

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

Advocate W.R. Stone for Grunhalle Lager International Limited

Advocate J.A. Clyde-Smith for Tascan Trading Limited

Advocate V. Vibert for Jackfrost France S.A.R.L.

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

/Subsequently.

Subsequently, Tascan appointed Jackfrost France, S.A.R.L. (hereinafte called "Jackfrost") as sole distributor in France of the lager.

Mr. G. Origliawas the beneficial owner of Jackfrost.

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

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

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

Grunhalle had not been paid for any of the lager supplied to Tascan for re-sale to Jackfrost, and therefore submitted its account for £2479.52 to Tascan, who in turn submitted its account to Jackfrost for £2810.32, being its account for the said lager (including its profit). Neither account was paid, with the result that this action now comes before the Court.

/Grunhalle

Grunhalle actions Tascan for the amount of its account; namely £2479.52, and Tascan in turn actions Jackfrost for the amount of its account, namely, £2810.32.

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

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

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

In Answer to the action against it by Grunhalle, Tascan pleads that the lager supplied to it by Grunhalle for resale to Jackfrost was inferior to the sample originally provided. Furthermore, Grunhalle purported to refuse to consent to Tascan's appointment of Jackfrost as sole distributor in France and refused to supply Tascan with saleable beer for distribution in France, as a result of which Jackfrost was unable to order further supplies of the lager. In consequence Tascan denies being liable in the sum claimed or in any sum. It further counter-claims for general and special damages in respect of actual and potential losses which it incurred as a consequence of the breaches of warranty and breach of contract by Grunhalle.

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

The two actions were consolidated and were heard together.

By consent, this judgment is confined to the issue of liability.

We deal first with the claim by Grunhalle against Tascan for payment of its account for lager supplied between March and July, 1974, and with the claim in turn by Tascan against Jackfrost for payment for the same lager plus profit. It is not disputed that the lager which is the subject of the claims was supplied to Tascan and in turn by Tascan to Jackfrost in France and that none was returned to Grunhalle, but, as we have stated, Jackfrost denies liability to Tascan on the ground that the lager supplied was not in

accordance with the original samples and that some of the lager was in any event of inferior quality. Tascan associates itself with that defence in respect of the claim against it by Grunhalle.

In May, 1973, Grunhalle had appointed Mr. Ash sole concessionaire in Europe for its products, including the lager. With the consent of Grunhalle, the grant of sole concessionaire was transferred to Tascan, of which Mr. Ash was the beneficial owner. Subsequently, in order that Tascan should be able to concentrate on the other countries covered by the concession, Mr. Ash decided that Tascan should appoint a sole distributor for the lager in France, believing that Tascan had the right to do so. In January, 1974, he met Mr. Origlia and after discussions verbally agreed to appoint Jackfrost, a Company of which Mr. Origlia was the beneficial owner, sole distributor for the lager in France, such appointment not to take effect, however, until Jackfrost had shown that it could sell the lager in France. Both Mr. Ash and Mr. Origlia interpreted that as meaning that Jackfrost would become the sole distributor in France as soon as Jackfrost had ordered from Tascan its first full trailer load of the lager.

In April, 1974, the Jersey Chamber of Commerce took an area at the Foire de Rennes to publicise Jersey products. The Chamber contacted Grunhalle who decided to take a stand to publicise its name. Mr. Ash, as representing Tascan, the sole concessionaire in France, was invited to man it, together with a representative of Grunhalle.

At that date Jackfrost had not yet given its first order, but it was agreed between Mr. Ash and Mr. Origlia that as Jackfrost was to be appointed sole distributor as soon as that event occurred Mr. Origlia should also be on the stand to promote the lager. From evidence which was not very clearly given, it would seem that

/Grunhalle

Grunhalle knew that Mr. Origlia was to be invited to be on the stand, but were not happy about it.

Grunhalle supplied samples of the lager to be given away to customers, and they were very well received. Although Mr. Ash had agreed with Mr. Clubb in February and had notified Mr. Origlia in March, that the lager to be supplied for the French market would in future be of a gravity of 1050 degrees, the samples were of 1055 degrees. They were the last of some old stock and had matured for some three to four months. Neither Mr. Ash nor Mr. Origlia knew that these samples were 1055 degrees, although they tasted them, because neither was an expert on beer; their expertise lay in selling. They both regarded the exercise at the Foire de Rennes as promotional and they assumed that the samples were of the same gravity as the lager which Grunhalle would in future be supplying to Tascan for sale by Jackfrost, name 1050 degrees, because it never occurred to them that Grunhalle would supply samples of a different gravity from that which would later be supplied for sale.

In addition to the samples provided free by Grunhalle, Mr. Origlia bought from Grunhalle thirty cases of the lager to give away at the Foire, and which he did give away. We were unable to ascertain from the evidence what was the gravity of that lager.

Following the success of the promotional exercise at the Foire de Rennes, on or about 24th April, Mr. Origlia, through Jackfrost, ordered twelve hundred cases of the lager from Tascan, who in turn placed an order for that quantity with Grunhalle. That order was met and despatched to Jackfrost, and we call it the first delivery. Many of the bottles arrived broken, and had to be returned. A fresh order was despatched, and we call that the second delivery. Following that order, Tascan confirmed the appointment of Jackfrost as sole distributor in France.

A further order from Jackfrost quickly followed to ensure continuity of supplies for sale, and was despatched by Grunhalle on about 3rd June. We call that the third delivery. On 3rd June Mr. Ash wrote to Mr. Clubb to express concern that the lager in that order was immature (it had been brewed on 6th or 7th May, pumped on 22nd May and kegged on 31st May), whereas Grunhall's Export beer had achieved its name for quality because it was stored for a minimum of three months. On 17th June Mr. Origlia wrote to Mr. Ash to say that customers were complaining, that the lager supplied was not of the same quality as the samples at the Foire de Rennes, that he was having some of the lager analysed and requesting guarantees as to future quality. He also complained direct to Mr. Clubb. On 21st June Mr. Clubb told Mr. Ash that there was nothing wrong with the lager. On the same day he wrote to Jackfrost to say that "he was more than satisfied" with the third delivery, and ended his letter with the words -

" We shall quite understand, therefore, if you would prefer to discontinue with the sales of our beer. "

He conveyed that same sentiment to Mr. Ash. On 29th June Jackfrost replied to Mr. Clubb saying that it was awaiting the analysis results, that in view of the expenses already incurred it had no intention of discontinuing sales, that in a few days it would be ordering further supplies and that it required only that Grunhalle should supply lager equal to that which had been originally agreed.

On 4th July, Jackfrost sent a further order for the lager, and asked for prompt delivery "because it is now the holiday season and we are in great demand". On 8th July, Jackfrost sent a further order for the lager. Neither of those orders was immediately executed because although the accounts for lager

/supplied

supplied were to be paid monthly neither the second nor third deliveries had been paid for. Tascan had not paid because it had not been paid by Jackfrost. Those orders were never in fact executed because, for reasons which are not relevant to this question, Jackfrost ceased to deal in the lager.

As we have said, Jackfrost sent samples of the lager to be analysed at laboratories at Lille and at Nantes. It is not clear to us from which deliveries the lager was taken or indeed whether the sample ^{sent to Nantes} came from the Grunhalle product at all, but that is of little consequence for the following reasons. Dr. Woodward, a specialist in brewing, interpreted the Lille analysis as showing a gravity of 1051.2, and the Nantes analysis as showing a gravity of 1049.3, the latter being so little below 1050 as to be of no consequence to the customer. He further stated that such analysis could give no indication of the quality of the beer in terms of flavour, taste or aroma.

Dr. Woodward was asked his opinion of the difference in taste between lager which had been stored for three months and that which had been stored for only two weeks, as was the case with the third delivery. He explained that lager improves rapidly during its first two weeks of storage, and much more slowly during the rest of its storage time. Nevertheless, the extra storage period would produce a noticeably superior taste, especially in a lager designed for three months storage.

With regard to the lager supplied in the second delivery, we heard no evidence that it had not been matured for the correct period. We were shown a letter dated 30th May, 1974, from Brasserie de la Rance to Jackfrost, to the effect that a hotel customer had complained that the Grunhalle lager he had ordered from the Brasserie was "infecte" and that therefore he would not be
/ordering.

ordering further supplies. Having regard to the date of that letter, the complaint must have referred to the second delivery. However, that letter is merely evidence that Jackfrost received a complaint; it is not evidence that the complaint was justified. Apart from that letter, the only evidence of a complaint about the second delivery was the evidence of Mr. Origlia himself, who said that he received numerous complaints in relation to both the second and third deliveries. We do not consider that that is sufficient to satisfy us that the second delivery was unsaleable, particularly since none of it was returned for inspection and replacement.

That leaves, as regards the second delivery, only the point that it was not of the same gravity as the samples at Rennes, being five degrees less. As we understood the evidence, lager with a gravity of 1050 is a very good beer, provided that it has been properly brewed and matured in all other respects. Mr. Ash was constantly sampling the lager, which must have been the 1050, at Cannon Street and he always found it excellent. Mr. Clubb said that at a meeting on 4th February, 1974, at the brewery, which Mr. Origlia attended, Mr. Origlia tasted 1050 lager and thought it very satisfactory. Mr. Ash agreed to the reduction in the gravity from 1055 to 1050 on Mr. Clubb suggesting that the 1055 was a little sweet. From this and other evidence we conclude that 1050 lager was an excellent product, and not necessarily less acceptable to the customer than 1055 lager.

It follows that the objection to the lager of the second delivery can only be on a psychological basis, that is to say, that customers who ordered it on the basis of the samples provided at Rennes received a product which was to some extent different but not necessarily worse. We can accept that in principle it is not desirable, when promoting sales by sample, to supply subsequently a

/product

product which is not in all respects the same as the sample, even if it is just as good a product. That may be particularly true of beer, which we understand to be very much a substance of varying personal taste. But does the fact that the lager later supplied was five degrees less in gravity than the samples justify Tascan, and in turn Jackfrost, in not paying for the second delivery?

The facts surrounding the giving away of the samples were in dispute and far from clear. Mr. Ash and Mr. Origlia regarded it as a promotional exercise and argued that Grunhalle which supplied the samples should have realised that and should therefore have supplied samples of 1050 lager. The Hon. E.G. Greenall, Chairman of Grunhalle, and Mr. Clubb told us that the object of the exercise at the Foire de Rennes was to say thank you to customers, and that Mr. Origlia had no right even to be on the stand, which was the property of the brewery. As to the latter claim, we do not accept it. The brewery knew that Mr. Origlia, or Jackfrost, was to be a distributor appointed by Tascan, the sole concessionaire, and since Mr. Ash had been asked to man the stand because Tascan was the sole concessionaire, we do not consider that the brewery was entitled to forbid Mr. Origlia's presence on the stand. As to the former claim, we accept that the giving away of the samples provided by Grunhalle was partly a thank you for past custom, but inevitably it was also a promotional exercise to the advantage of Tascan, its distributors, and Grunhalle itself.

Having said that, however, we do not think that the fact that the samples were 1055 instead of 1050 now entitles either Tascan or Jackfrost to refuse to pay for the second delivery, for the following reasons.

/Firstly

Firstly, we do not consider that this was a true case of sale by sample. It is correct that Mr. Origlia would not have involved himself in the operation unless he had first satisfied himself that Jackfrost would be selling a good saleable product, but he did satisfy himself of that at the meeting at the brewery offices on 4th February, and we believe that the product he tasted there was 1050 gravity. It was that which led him to set up his sales organisation. He apparently saw no difference between the 1050 lager which he tasted then and the 1055 which he tasted later; nor did Mr. Ash. We think that that was unfortunate, and we also think it was unfortunate that Grunhalle sent a 1055 lager for the purpose of samples. But we are satisfied that it never occurred to Grunhalle that they were supplying these samples as the basis upon which Jackfrost, and therefore Tascan, would place orders; in other words, we do not think, so far at least as Grunhalle were concerned, that it was a term of the contract of sale of the second delivery that the lager should answer the description of the samples provided for the Foire de Rennes.

Secondly, even if the second delivery was a sale by sample (the sample being that provided at the Foire de Rennes), Jackfrost has not made out its case. If it was a sale by sample, then Jackfrost had ample opportunity to sample the second delivery upon receipt and complain at the time. We assume that Mr. Origlia or some other Company representative must have sampled the consignment, but no complaint was made at the time, and a large part, if not all, of the second delivery was sold. It is too late to complain afterwards that it was not up to sample, and we do not consider that it is a valid excuse for Mr. Origlia to say that because he was not an expert he could not tell the difference between the second delivery and the Rennes sample.

/Thirdly

Thirdly, we have to say that there is no evidence that customers rejected or complained about the second delivery, on the ground that it was not up to the Rennes sample, except the evidence of Mr. Origlia himself. In this context that is hearsay evidence and unsatisfactory. We are entitled to assume that not every customer bought lager from the second delivery on the strength of samples given away at Rennes. The evidence shows that both Mr. Ash and Mr. Origlia thought the 1050 lager was a good product. The complaint from the Brasserie de la Rance was that the lager was "infecte", not that it differed from the sample. There is insufficient evidence to show that it was rejected because it was not up to sample.

Our conclusion therefore is that Jackfrost is liable to Tascan for the account for the second delivery, and Tascan is in turn liable to Grunhalle.

We deal now with the third delivery, which is quite a different matter to the second. The lager from that delivery was too immature, and we are satisfied that its taste must have been noticeably inferior to the second delivery and to the samples at Rennes. Mr. Ash told us that this was particularly disturbing because at Rennes he had emphasised the maturity factor. Despite the somewhat militant and complacent tone of Mr. Clubb's letters at the time, and to which we have referred, Mr. Clubb ^{agreed} with us that the lager comprising the third delivery was a mistake. Although we heard no direct evidence of complaints from French customers about the third delivery, Mr. Origlia told us that he received many, and although that is hearsay as to the truth of the complaints we are satisfied from the other evidence on this matter that the third delivery lager was sufficiently different from, and inferior to, the second delivery as to justify the conclusion that a number of

/complaints

complaints were received in circumstances which would have entitled Jackfrost to require the replacement of the consignment. The fact that Jackfrost was ordering more supplies in early July does not alter our opinion. A distributor of beer must maintain supplies to his customers, especially at the height of the summer, and some complaints about a previous delivery will not come in until after further orders have been placed. Moreover, Jackfrost clearly showed in their letters that they anticipated, and indeed required assurances, that the next supplies would be satisfactory.

Mr. Clubb claimed that he made it clear at the time that he was prepared to replace the consignment, although that does not appear in his letters to Jackfrost. What is certain is that Mr. Ash wrote to Jackfrost on 4th July offering to accept the return of any unsold stocks which were not acceptable to its French customer Mr. Origlia told us that he knew that he could return unsatisfactory stocks. The difficulty in this case is that Jackfrost did not do so, and we therefore have to consider why it did not.

In giving evidence Mr. Origlia gave three explanations. The first was that there was no point in sending the unsatisfactory lager back until his position had been cleared; by this he meant, as we understood it, his growing concern about the apparent variable quality of the lager and the apparent difficulties over the appointment of Jackfrost as sole distributor in France, culminating in the letter (already referred to) of 10th July, 1974, from Tascan to Jackfrost which led that company to cease all dealings in the lager. Whatever relevance these matters may have as to the counter-claim, they do not in themselves justify the failure to return the unsatisfactory lager to Tascan, the vendor.

The second explanation was that Jackfrost made no profit on the sale of the lager. The figures given to us were that it sold lager from both deliveries to the gross amount of 22,113 francs, /which

which at the then current rate of exchange was just under £2000. Out of that it had to pay £562 Customs duties, £423 Value Added Tax and £900 for handling charges at the docks and for delivery. In addition it had to pay for the cost of collecting unwanted products. Jackfrost therefore made no profit, and was in fact out of pocket.

The third explanation was that it would have been expensive to return the unsatisfactory lager, the duty on the buyer of defective goods was only to make them available, not to return them, and a list of locations and unsold quantities had been made available to Tascan and to Grunhalle.

Our decision as to payment for the third delivery is based on Grunhalle's admission, and our independent conclusion, that the lager was in all the circumstances not a satisfactory product for the purpose for which it was consigned. Jackfrost was entitled to reject the whole consignment, but, perhaps unwisely, it accepted part of the delivery by making some sales to its customers; when, however, it received complaints from those customers it rejected the unsold remainder of the delivery.

We consider that the equitable solution now is as follows, and we order Jackfrost should account to Tascan, and Tascan to Grunhalle, for the amount only of the lager which was sold. The quantity of lager not sold need not be paid for, notwithstanding that it has not been returned.

Other matters may arise from that decision. There may be returnable bottles and presumably there will be returnable crates still in France for which Grunhalle has charged in its account for the third delivery. If so, then we consider that the cost of returning them should be borne by Jackfrost and Tascan, in the case of the quantity of lager sold, and by Grunhalle in the case of the quantity of lager not sold. If there is any other matter arising of which agreement cannot be reached, our further order will have to be sought.

/We

We now deal with the respective counter-claims of Jackfrost against Tascan and Tascan against Grunhalle. They can conveniently be considered together because they are based on the same grounds.

As we have already said, in its pleadings Jackfrost claims that Tascan, by its letter of 10th July, 1974, was in breach of two essential terms of the agreement between the two companies, namely, that the quality and specification of the lager to be supplied would remain constant, and that Jackfrost would be appointed the sole distributor for the lager in France, and that by reason of that breach it had no alternative but to cease trading in the lager. Tascan agrees that in the light of that letter Jackfrost had no alternative but to cease trading in the lager.

It is necessary to make this comment at this stage. Although it is true that, at one point in his evidence, Mr. Origlia stated that even if he had received an assurance about the sole distributorship he would nevertheless have ceased trading because of the lack of assurance about the future constant quality of the lager, nevertheless at other points in his evidence he stated that he ceased trading for the two reasons given in the pleadings. We believe that his actions were motivated by both reasons, and we consider this case on that basis.

We must first examine the matter relevant to the appointment by Tascan of Jackfrost as sole distributor of the lager in France.

Prior to May, 1973, Mr. Ash had sold the lager in France as Grunhalle's representative. Being satisfied with his sales efforts, Grunhalle decided to appoint a Company to be formed by Mr. Ash, which was Tascan, to be the sole concessionaire for its products in Europe. The letter of appointment, dated 3rd May, 1973, from Mr. Clubb to Mr. Ash, was in the following terms

" In reply to your letter dated the 24th April we agree that as from the 1st June you are Concessionaire for Grunhalle Lager International Limited in Europe.

I have noted that you will be forming a Company in Jersey and that this Company will receive not less than 10% of the total cost of the purchasing Merchant by way of commission.

I am enclosing a cheque for expenses incurred by yourself up to today's date and confirm with you that all future expenses will be borne by your Concessionaire Company.

I look forward to a happy and prosperous relationship between our two Companies. "

It was not in dispute that the appointment was as "sole" concessionaire. There were no other written terms, and no other relevant letters on the subject at that time.

There were at that date several distributors in the Brittany area of France to whom Tascan, as sole concessionaire, proceeded to sell direct. Later, Mr. Ash decided, in the exercise of his right as sole concessionaire in Europe, to appoint a sole distributor in France to leave him free to concentrate, through Tascan, on other countries. As already stated, he met Mr. Origlia in January, 1974, and agreed to appoint him, or one of his companies, sole distributor provided that he could demonstrate his ability to sell the lager; subsequently, after the promotional exercise at the Faire de Rennes, Jackfrost gave its first full order to Tascan on or about 24th April and Tascan then appointed Jackfrost sole distributor for the lager for France.

In respect of the sole distributorship, the first contention of Grunhalle was that Tascan never did in fact appoint Jackfrost as sole distributor. Although the evidence of Mr. Ash tended at times to be vague and even inconsistent, we have no doubt at all that Tascan did in law make such an appointment on or about 24th April, 1974. It was verbal and was to be rendered into a written

/agreement

agreement which would have included important conditions. Nevertheless it was effective as from that date, and the fact that Jackfrost ceased trading before the appointment could be put into writing did not invalidate the appointment.

The second contention of Grunhalle was that if Tascan did appoint Jackfrost as sole distributor, that appointment was, firstly, in breach of the implied conditions attaching to the appointment of Tascan as sole concessionaire, and secondly, contrary to the express terms of the agreement on the matter between Grunhalle and Tascan.

We begin with the first limb of Grunhalle's argument, which was that the grant of a concession is a personal appointment to a selected person. It is a privilege which must be performed personally. It cannot be delegated nor vicariously performed, except with the grantor's consent. It therefore followed that Tascan could appoint neither a sole distributor nor indeed any distributor without the consent of Grunhalle, which consent was never given.

It is difficult to find a legal definition of the word "concession", but in "Words and Phrases Legally Defined" (2nd Edition) Vol.2, we find a definition of a similar term, namely, "franchise" in the Australian case of Comr. of Taxes v. Ford Motor Company of Australia Pty. Ltd. (1941) St.R.Qd. 233 -

" What ... the respondent bought was in substance the sole selling rights throughout Australia of Ford products and parts and the right to be supplied with such products and parts. Such rights as these are known in the motor trade as a 'franchise'. "

That definition is helpful, because in the present case Tascan was granted the sole selling rights throughout Europe of the lager, and the right to be supplied with the lager. The true relationship between Grunhalle and Tascan was not one of agency, that is to say, it was not one of principal and agent, but of vendor and purchaser.

/Tascan

Tascan could not operate its sole concession except through one or more distributors, and therefore the power to appoint one or more distributors was implicit in the appointment of Tascan as sole concessionaire, as otherwise the grant was of no effect and worthless. If we were to accept the contention of Grunhalle, therefore, we would be saying that Grunhalle had granted to Tascan a right which Tascan could not exercise without Grunhalle's consent. This appears to us to be a wholly untenable proposition, and we therefore cannot accept that there was any such implied condition attached to the grant of the sole concession as is alleged.

The second argument of Grunhalle is that even if there were no implied condition that Tascan could not appoint a sole distributor, it was made clear to Mr. Ash, and therefore to Tascan, before its appointment of Jackfrost, that it had no such right.

Mr. Clubb agreed that it was lax of him not to have made it clear in his letter of appointment of 3rd May, 1973, that Mr. Ash, or Tascan, had no right to appoint a sole distributor for any country, nor even to appoint a distributor for any region without the consent of Grunhalle. He admitted that he had given little or no thought to the legal consequences of the appointment, but claimed that if he had gone into the details he would have included a clause prohibiting the appointment of a sole distributor. Mr. Greenall said that the letter was written only to show the good faith of Grunhalle, and that the details were to be put into writing and would have included a condition prohibiting the appointment of a sole distributor.

Nevertheless, both Mr. Clubb and Mr. Greenall claimed that Mr. Ash was well aware that this was Company policy and that both Mr. Greenall and Mr. Clubb had told him on several occasions that he had no right to appoint a sole distributor for any one country

or even for a large region. This Company policy was based on good commercial reasons. Firstly, a sole distributorship for an area the size of France would not work. A distributor in the South of France would not buy from a sole distributor based in the North; and even if he did, such a system would put up the price of the product because you would then have two middlemen, the sole concessionaire and the sole distributor. Secondly, Mr. Ash, and therefore Tascan, was inexperienced and needed Grunhalle's help. The idea was that Tascan as sole concessionaire would set up a network of distributors, but would seek the advice of Grunhalle before making any appointment, and Grunhalle could veto any appointment if it appeared that it would be harmful to the interests of Grunhalle in promoting the sales of lager. Mr. Clubb agreed that this appeared to make Mr. Ash and Tascan more like employees, but Mr. Ash did not object and always kept Grunhalle informed of all his activities.

There were two specific occasions where it was claimed by Grunhalle that it was made clear to Mr. Ash that Tascan could not appoint a sole distributor. The first was a meeting in September, 1973, with a Mr. Thebault, a distributor of the lager in Brittany, attended by Mr. Clubb and Mr. Ash. According to Mr. Clubb Mr. Thebault asked to be appointed sole distributor and Mr. Clubb told him that that would not be possible as it was against Grunhalle's policy. That was said in the presence of Mr. Ash. Mr. Ash agreed that a meeting with Mr. Thebault did take place, but he denied the account given by Mr. Clubb. He told us that Mr. Thebault wanted to be the main distributor for Brittany, but he refused him because there was another distributor in Brittany who would, in the event of such an appointment, have had to order through Mr. Thebault. He added that Mr. Clubb was present only to answer technical questions

/and

and did not state that it was the policy of Grunhalle not to grant sole distributorships.

The other occasion relates to an important meeting on 4th February, 1974, at Grunhalle's offices at Cannon Street attended by Mr. Origlia, Mr. Ash, Mr. Clubb and Mr. Greenall. The evidence of the four witnesses as to what took place was conflicting.

Mr. Origlia told us that he asked Mr. Ash to arrange the meeting because if he were to become the sole distributor for the lager in France he would have to incur considerable expense and he therefore wanted some assurances from Grunhalle beforehand. At the meeting he said that he would be incurring considerable expense in marketing a new beer and he therefore required assurances on three matters. First, the lager to be supplied must be consistent with the sample (that was a reference to the lager which he sampled at the brewery before the meeting and which, according to Mr. Clubb, was 1050 gravity). Second, orders must be executed promptly. Third, payment to be made monthly. He was given those assurances. He then said that he wanted to be sole distributor for France. According to Mr. Origlia, Mr. Clubb replied in some such words as: "We can give you our word as English gentlemen. We will play our part But the sole distributorship is a matter for Mr. Ash." Mr. Origlia was satisfied with the meeting, and he, Mr. Ash and Mr. Clubb then lunched together. Mr. Origlia took on extra staff and prepared his sales organisation in order to qualify for the appointment of Jackfrost as sole distributor.

Mr. Ash's account of the meeting is a little different. As we understood him, the purpose of the meeting was partly to introduce a potential sole distributor to Grunhalle, so as to keep them informed of what he was doing, and partly to enable Mr. Origlia to obtain certain assurances as to continuity of quality, delivery, back-up

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advertising material and sufficient security to justify his expenditure. Mr. Ash kept a diary in which he wrote up accounts of important meetings immediately after the event. His entry for 4th February reads:

"Saw Chairman and Paul Clubb with Jack Frost 12.30. Chairman and Paul C. confirmed that I was the European concessionaire to Grunhalle and they'd only deal with me and Tascan. Paul Clubb said unless I was prepared to scrap my arrangement and have a fresh deal with brewery, with a new company with Jack Frost and me. I said I was not prepared to do this. The Chairman said 'I do not blame you; neither would I'. Jack Frost raised question of effect if Randalls or Grunhalle opened or dealt with a brewery in France. Paul C. said they would still have to deal through Tascan. The directors of Grunhalle were English gentlemen and, having given Tascan an assurance, they would not try to go back on their word. Jack took me to lunch at La Paix. "

Mr. Ash told us that at that meeting he looked upon Mr. Origlia as a potential sole distributor and he thought that Mr. Clubb knew this. His evidence as to whether he said this at the meeting was, however, conflicting and vague, and he could not really remember. He did not think that Grunhalle had given any clear undertaking to Mr. Origlia at that meeting, but he remained of the opinion after the meeting that he had the support of Grunhalle to his proposed appointment of Jackfrost as sole distributor.

Mr. Clubb told us that the meeting was held to enable Mr. Ash to introduce Mr. Origlia as a possible distributor for the lager in St. Brieuc. Mr. Origlia did ask for the sole distributorship in France but Mr. Clubb rejected that request, and thought that he might have added that it was not Company policy to permit such appointments. Mr. Origlia asked for price security, and Mr. Clubb undertook to give a fair notice before making any alteration. Mr. Origlia asked about quality, and Mr. Clubb indicated the 1050 lager which Mr. Origlia was drinking. Mr. Clubb agreed to us that he had used the expression

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"the word of an English gentleman", but that was a reference to Grunhalle not going behind Tascan's back; it was not used with reference to the appointment of Jackfrost as sole distributor.

Mr. Greenall told us that Mr. Origlia was introduced because he could make good sales of the lager. At the meeting Mr. Origlia said that it would cost him a lot to launch his sales and he wanted a degree of exclusivity. He told Mr. Origlia he would consider it, intending to tell Mr. Ash later not to appoint Mr. Origlia because he had not liked what he had heard from Mr. Origlia about his business methods, and he feared he might damage the good name of Grunhalle and prejudice the Company's good relations with its existing distributors in Brittany. Furthermore, he suspected that Mr. Origlia might be seeking to "muscle in" on Tascan's concession. Mr. Greenall said that he did tell Mr. Ash this within the next two days.

It will be seen from these four accounts of what took place at the meeting that there is a direct conflict of evidence as to the question of a sole distributorship. Mr. Origlia, Mr. Clubb and Mr. Greenall all agree that it was raised (Mr. Greenall referred to it as "exclusivity", but we think that was the same thing). Mr. Ash could not remember. He was the only one of the four to keep a diary recording what took place at the meeting. His entry for that meeting does not record that the question was raised, and that might have been strong evidence for concluding that it was not, except that we find that neither does his entry record the assurances which Mr. Clubb and Mr. Greenall agree were given to Mr. Origlia. Considering that the meeting was arranged, as Mr. Ash agreed, to introduce Mr. Origlia and to enable him to seek such assurances, we find that omission surprising. When one examines the entry the answer would seem to be that Mr. Ash was concerned only to record those matters which related to Tascan and to himself personally. Our conclusion is, therefore, that Mr. Origlia

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did raise the question of sole distributorship.

That being so, what reply did Mr. Origlia receive? There are three positive versions. Mr. Origlia said that he was told that it was a matter for Mr. Ash, Mr. Clubb said he rejected the request, and Mr. Greenall told us that he said that he would think it over. Mr. Ash, of course, could not remember. In those circumstances, we look to see what in fact happened after the meeting. First, Mr. Origlia set up his selling organisation in France, and we believe that he would not have gone ahead and incurred considerable expense unless he had thought that he had received the assurances he required, including that relating to the sole distributorship. To be told that it was a matter for Mr. Ash would constitute such an assurance, since Mr. Ash had already promised him the sole distributorship on placing his first big order. Secondly, Mr. Clubb was aware that Tascan was proposing to use Jackfrost in a substantial way, for on 20th February, 1974, Mr. Ash wrote to him as follows:

" As you are aware, we are endeavouring to use the French organisation of Jack Frost in order that the French market may be considerably expanded ... "

It is true that the letter does not refer to sole distributorship, but it does confirm, in our view, that it was to the knowledge of Grunhalle that Jackfrost was something more than just another distributor. Thirdly, in early April there was a strong difference of opinion between Mr. Ash on the one hand, and Mr. Clubb and Mr. Greenall, on the other, about the role of Mr. Origlia at the Foire de Rennes, and at that time Mr. Clubb told Mr. Ash that Jackfrost was not to be appointed sole distributor. Mr. Ash maintained to Mr. Clubb that he had the right to make that appointment. Fourthly, Mr. Ash later confirmed the appointment of Jackfrost after the first order had been received. That appears from the letters of 8th April

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and 14th May from Jackfrost to Tascan, and from Tascan's reply of 22nd May (including in particular paragraph 5 of that letter), and of course from the evidence of Mr. Origlia and Mr. Ash.

Our conclusion is as follows. First, taking the period up to the meeting of 4th February, we do not think that Grunhalle ever made clear to Mr. Ash, either at the meeting in September, 1973, with Mr. Thebault, or at any other time that he could not appoint a sole distributor. The letter of appointment contained no such qualification, and there were no verbal reservations expressed at that time. If any subsequent reservations had been expressed on the matter we do not think that Mr. Ash would have given Mr. Origlia the qualified promise which he did in January, 1974.

Secondly, as to the meeting of 4th February, we think that Mr. Origlia is correct when he says that he was told that the question of a sole distributorship was a matter for Mr. Ash. In our view, it was a matter for Tascan as sole concessionaire, and it explains why Mr. Ash cannot remember Grunhalle giving any assurances in the matter; we think they passed Mr. Origlia over to Mr. Ash. As we have said, Mr. Origlia acted after the meeting as if he had received the assurance he wanted, and Mr. Ash acted similarly, because he did not seek to withdraw his promise to Mr. Origlia, but maintained it as the entitlement of Tascan under its appointment as sole concessionaire, and eventually implemented it. It is true that in April Mr. Clubb told Mr. Ash that Grunhalle was against the appointment of Jackfrost as a sole distributor, but that was after Tascan, through Mr. Ash, had confirmed its promise to Mr. Origlia and after it had become, in our view, legally bound to implement its part of the arrangement, because Mr. Origlia had committed himself to considerable expenditure on the strength of the promise,

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subject only to Mr. Origlia fulfilling his part of the arrangement by giving, through Jackfrost, his first full order. In other words, Grunhalle, in so far as they then sought to impose a condition in respect of their appointment of Tascan as sole concessionaire, were too late. We therefore find that Tascan did, and was entitled to, appoint Jackfrost as sole distributor in France.

We next turn to the events which led to Jackfrost ceasing to sell the lager in France. We have already described the immature quality of the third delivery, the complaints to which it gave rise and the correspondence concerning it which passed between Jackfrost, Tascan and Grunhalle. The attitude of Grunhalle, as revealed in the relevant letters, showed a hostility towards Mr. Origlia and Jackfrost which had first been noted by Mr. Ash in April. Mr. Origlia, for his part, was annoyed with Grunhalle, because he considered that the efforts of Jackfrost to sell the lager were being seriously hindered by the varying quality and gravity of the beer. He was concerned, not only by the immature quality of the third delivery, but also by what he considered to be a failure by Grunhalle to supply lager of the same gravity and quality as that offered as samples at the Foire de Rennes. As we have mentioned, that led him to send samples for analysis. In fact, the results of that analysis showed that the samples maintained a consistent gravity of around 1050, but Mr. Origlia did not read the analysis properly and gained the mistaken impression that there was a significant variation in gravity. Apart from that, there was undoubtedly a variation from the Rennes sample. All these matters led him to the conclusion that the lager being consigned to him was neither consistent nor reliable. Furthermore, he became aware that Grunhalle was objecting to the appointment of Jackfrost as sole distributor and although he considered that a verbal appointment had been made by Tascan no

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written agreement had yet been signed and he was concerned as to the future position of Jackfrost. In consequence, by letter dated 5th July, 1974, from Giarido Limited (another of his companies) Mr. Origlia wrote to Mr. Ash, of Tascan, complaining about the inconsistency of the lager supplied, stating that Jackfrost would not place further orders until the issue of the sole distributorship had been settled, and ending with the words:

" It is up to you to make arrangements with the Brewery and let us know what you intend to do in the future. "

Following the receipt of that letter, Mr. Ash saw Mr. Clubb on 9th July to discuss its contents with him. After the meeting Mr. Ash prepared a Note of what had been said. It clearly appears from the Note that Mr. Clubb was not satisfied with the sales of the lager in France, he blamed both Mr. Ash and Jackfrost, and he adopted what can only be described as a militant tone.

From a long account of what was evidently a quite stormy meeting, we select four relevant extracts:

" Mr. Clubb said that Jackfrost must on no account be given a sole distribution for France and Tascan was in no position to grant this. In any event Ash should remember who held all the cards and would also be wise to heed the Chairman's wishes. Ash told Mr. Clubb that as Mr. Clubb well knew, Ash had promised Jackfrost an agreement for sole distribution rights in France after Tascan had received the first full order. A draft agreement was in fact submitted by Tascan to Jackfrost but consequently (sic) Ash was warned by Mr. Clubb not to give the sole distribution rights in France to Jackfrost. In order to defer to the Chairman's wishes and at the same time keep his word to Jackfrost, Tascan submitted another draft agreement to Jackfrost whereby Jackfrost would be appointed a distributor in France but Tascan would pay to Jackfrost fifty per cent of all net profits they made on beer sold in France other than through the distributorship of Jackfrost in France.

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Mr. Clubb repeated that Jackfrost was not to have the sole distributorship in France. If Jackfrost wanted to continue to sell the beer it would be as a distributor like Thebault or Blanchard if Jackfrost wanted to continue

"he would have to conform to the rules laid down by the Brewery and Ash could tell Jackfrost that as his expertise in salesmanship was so high the Brewery could change the brew every week if they so desired and this would be a test of the ability of Jackfrost.

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Mr. Clubb again said that sales were too slow. Ash pointed out that one had to be fair to Jackfrost France. They had employed a full time traveller to sell the beer together with other representatives and had involved themselves in considerable expense and Mr. Clubb should know the French mentality sufficiently well to know how difficult it was to persuade a customer to try a new beer but when the quality of the beer differed it was almost impossible. Mr. Clubb replied that this expense was purely Jackfrost's concern as a business risk and, in any event, the Brewery had not asked Jack Frost to sell the beer in the first place.

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The meeting closed with Mr. Clubb saying that if Jackfrost wanted to continue selling the beer he would have to abide by the rules laid down by the Brewery. The Brewery demanded complete and unconditional surrender by Jackfrost. Mr. Clubb said he admired Hitler because he had produced law and order by being ruthless. If Jackfrost conformed to the rules laid down in all obedience the Brewery would always be lenient and helpful. "

We should add, with reference to the first extract from

Mr. Ash's Note as given above, that Mr. Ash, although satisfied that he had the right to appoint Jackfrost as sole distributor, put forward a compromise scheme in the hope of preserving harmonious relations and in the belief that Jackfrost would not suffer financially. Mr. Origlia was not asked in evidence whether he knew of, or approved, that scheme, and in any event it came to nothing.

Following his meeting with Mr. Clubb on 9th July, Mr. Ash wrote to Mr. Origlia on 10th July, as follows:

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" re:- Grunhalle Products

At a meeting to-day between our Mr. Ash and Mr. Clubb of Grunhalle Lager International Ltd regarding your letter of the 5th inst., we were informed that you were not to be granted sole distribution rights in France and that, in any event, Mr. Clubb informed Mr. Ash that Tascan were not in a position to grant such rights.

If you wish to continue to sell the beer in France as a Distributor you will be required to conform to rules laid down by the Brewery, we are informed by Mr. and, furthermore Mr. Clubb has asked us to inform you that as your expertise and salesmanship are so good, the Brewery would be at liberty, if they so desire, to change the brew every week, and this would be a test of your salesmanship. "

We would point out that the reference to the meeting held "today" was clearly a reference to the meeting of 9th July.

Mr. Ash received no reply to that letter, and so on 19th July he wrote to Mr. Origlia to say that unless Tascan heard from Jackfrost within the next seven days it would assume that Jackfrost had decided not to continue to sell Grunhalle's products. Having still failed to receive a reply, Mr. Ash wrote again on 2nd August as follows:

" re:- GRUNHALLE PRODUCTS.

Further to our letter to you of the 19th July last as we have received no decision from you it would appear to us that it is now necessary for us to advise our French customers to send future orders to us.

You will appreciate that, although we are reluctant to take this step, in the present situation, in fairness to the Brewery, we have no alternative. "

Although Mr. Origlia did not reply to any of the above three letters to explain his reaction to them, we now know from his evidence what that reaction was. He had decided, on receiving the letter of 10th July that Jackfrost could no longer continue to sell the lager, and the reasons for that decision were, as we have earlier indicated, two-fold. First, that Tascan, by that letter from Mr Ash, was refusing to give any assurance as to the future quality and gravity of the lager, and secondly, that Tascan, by that letter, was repudiating its appointment of Jackfrost as sole distributor.

In its pleadings, Tascan agreed that on receipt of that letter Jackfrost had no alternative but to cease dealing in the lager, and Mr. Ash confirmed that view in his evidence. We understand why. Taking into account not only the letter of 10th July but also the two subsequent letters, Mr. Ash was clearly saying that he had accepted the directives of Grunhalle and its right to give them, and that he did not intend to take a stand against them, either then or in the future. As Mr. Ash admitted, that placed Jackfrost in an impossible position.

It is further conceded by Tascan that Jackfrost is now entitled to be awarded damages by way of counter-claim for breach of contract. First, because it was a condition of the contract that the supplies of the lager to Jackfrost should not vary in gravity or quality except after due notice, and secondly, because it was a condition of the contract that Jackfrost should be the sole distributor in France, and had indeed already been so appointed. The letter of 10th July and the two subsequent letters constituted a breach of those conditions, for the reasons we have already given. When one party to the contract is informed by the other party in clear terms that he does not intend to honour an essential term of the contract, the aggrieved party is entitled to treat the contract as at an end and to bring an action for damages, and that is what Jackfrost did in this case. Tascan therefore concedes the breach of those two conditions and that Jackfrost is now entitled to damages.

We agree. We accept that a distributor of lager is placed in an impossible position if he is told that his supplier reserves the right to change the brew (which must mean the quality and gravity every week. We do not think that any distributor can be expected to carry on business on those terms. We further accept that Jackfrost had commenced operations on the basis of assurances that the lager

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would be of consistent quality. For that reason, and because Tascan was repudiating its appointment of Jackfrost as sole distributor, we agree that Jackfrost is entitled to damages against Tascan, in the light of the letter of 10th July.

However, Tascan contends that it was placed in the position of being unable to continue to fulfil its contract with Jackfrost because Grunhalle had made it impossible for Tascan to do so, and therefore Grunhalle is now liable both for the consequences of the breach of contract as between Tascan and Jackfrost, and also for the consequences of the breach of contract as between Grunhalle and Tascan.

We first have to ask ourselves whether the letter of 10th July correctly reflected what Mr. Clubb had said to Mr. Ash on 9th July. We think that it did. Mr. Clubb told us that he was angry at the meeting that Tascan should have appointed Jackfrost as sole distributor. He agreed that he had said, referring to the test of Mr. Origlia's salesmanship, that a brewery must always reserve the right to alter the gravity of its beer, and that he had said jokingly that a difference of 5% up or down would not make much difference to Mr. Origlia, but he never meant that to be passed on. With reference to the remark as to "who held all the cards", he denied that that was a veiled threat.

Mr. Ash sent a copy of his Note and of the letter to Grunhalle and no protest was made. Mr. Clubb said that when he received a copy of Mr. Ash's Note he was not pleased and did try to contact Mr. Ash but he was away. Mr. Greenall also saw copies of the Note and letter, but did not see any need to clarify the position, although he did think it wrong of Mr. Clubb to have said that Grunhalle could change the brew every week.

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We think that the letter of 10th July accurately reflected what Mr. Clubb said, but that leads to another question. In writing that letter, Mr. Ash was throwing in the sponge and accepting the directives and terms of Grunhalle. Should he not have stood his ground and protested to Grunhalle? Mr. Ash told us that after the meeting he felt that his position was hopeless because, as Mr. Clubb had said, Grunhalle seemed to hold all the cards. We think that Mr. Ash was a defeatist, but looking at the position as he saw it at the time we can understand why he acted, or failed to act, as he did. He had gone to the meeting to sort out the issues of the alleged unsatisfactory lager and the sole distributorship. Despite his protests at the meeting it was made clear to him, as we accept, that Grunhalle would not countenance the appointment of Jackfrost as sole distributor nor give guarantees about the future consistent quality of the lager. In the words of Mr. Ash in his Note, Grunhalle "demanded complete and unconditional surrender by Jackfrost". In all those circumstances, we cannot fault Mr. Ash, and therefore Tascan, for writing the letter of 10th July, nor can Grunhalle now complain of that letter.

As we have said and for the reasons given, that letter entitled Jackfrost to repudiate its contract with Tascan and to bring an action for damages by way of counter-claim. That action has been brought against Tascan, which has argued that it properly lies against Grunhalle. There was no contract between Jackfrost and Grunhalle and therefore we reject that submission. In the alternative, however, Tascan submits that it is entitled to be indemnified by Grunhalle in respect of that counter-claim. With that submission, we agree, for the following reasons.

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As regards the sole distributorship, Tascan was entitled, as we have found, to appoint Jackfrost sole distributor in France, and did so. Grunhalle wrongly refused to accept that Tascan was so entitled, and it is clear from the Note of the meeting of 9th July that Grunhalle was insisting that its future relationship with Tascan would be on the basis that Jackfrost should not be sole distributor.

As regards the consistent quality of future supplies, Tascan was entitled to assurances which it could pass on to Jackfrost, having regard to the fact that both Tascan and Jackfrost were dependent on Grunhalle's product, to the knowledge of Grunhalle. Far from such assurances being given, Grunhalle appeared to go out of its way to disclaim responsibility in advance for any future inconsistency.

It was suggested by both Tascan and Jackfrost that the conduct of Grunhalle was deliberately designed to bring the contract between Tascan and Jackfrost to an end. Grunhalle denied that, although it was agreed that the ending of that contract was not unwelcome to Grunhalle. However that may be, Grunhalle was aware of the legal relationship which Tascan and Jackfrost had contracted but in the knowledge of that relationship, and of the expenses which Jackfrost had incurred and of the assurances which Mr. Origlia had requested and received at the meeting of 4th February, Grunhalle made it impossible for Tascan to carry out its obligations to Jackfrost. Those obligations were contracted as a direct result of the concession granted by Grunhalle to Tascan, and in implementation of the obligations laid upon Tascan by that concession, namely, to promote the sales of the lager in France.

In all the above circumstances, we find that Grunhalle is liable to indemnify Tascan for the damages which it is liable to pay Jackfrost under the latter's counter claim.

As regards Tascan's counter-claim against Grunhalle, it follows from all that we have said that Grunhalle is liable to pay damages to Tascan for such loss and expenses as it has suffered in its own right by reason of the wrongful conduct of Grunhalle which led to the ending of the contract between Tascan and Jackfrost.

The quantum of such damages is, in the absence of agreement between the parties, a matter for argument.