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Crehan v Inntrepreneur: A long road to the UK's first damages award from a competition law breach

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Damages

Crehan v Inntrepreneur: A long road to the UK's first damages award from a competition law breach

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On 21 May 2004, the English Court of Appeal overturned the previous judgment of the High Court and made an award of £131,336 in damages to Mr Bernard Crehan, a former pub lessee, who suffered damage as a consequence of a beer tie imposed on him by the Inntrepreneur Pub Company in breach of article 81 of the EC Treaty.

This is the first award of damages made by an English court for a breach of either the EC or the UK competition rules. The case is of particular importance in a number of respects:

- its rulings on the regard that must be given to prior decisions of the European Commission
- its approach to causation of loss and a claimant's entitlement to damages
- its approach to the quantification of damages, and
- as a forerunner for the treatment of damages cases in the UK, particularly in light of the changes introduced by the modernisation regulation *(Reg. 1/2003)* and the Enterprise Act 2002

Background to Mr Crehan's claim and the case to date

Mr Crehan entered into agreements with Inntrepreneur in 1991 to take the leases of two pubs. The leases included a beer tie, which required Mr Crehan to buy certain "specified beers" from Inntrepreneur or its nominee. Mr Crehan's experience in trading at the two pubs was disastrous. By September 1993 he had ceased trading altogether.

The form of lease that Mr Crehan entered into was notified to the European Commission in 1992. By 1994, it had become apparent that the Commission's view was that this form of lease contained restrictions that fell within article 81(1), that the lease did not have the benefit of the block exemption for beer supply agreements *(Regulation 1984/83)*, and that it did not believe Inntrepreneur's arrangements qualified for individual exemption.

In the event, the Commission did not reach a formal decision with regard to Inntrepreneur's notification as, by 1997, Inntrepreneur had introduced an alternative distribution system, which it notified in place of the previous form of lease – the one to which Mr Crehan had been subject.

However, the Commission did issue a series of decisions in relation to leases notified by Whitbread, Bass and Scottish & Newcastle, in each case concluding that the beer tie agreements foreclosed the relevant market, in breach of article 81(1), and that the block exemption did not apply, but granting retrospective individual exemption to the agreements in question.

The litigation between Mr Crehan and Inntrepreneur began in June 1993 as a debt claim by Courage (Inntrepreneur's nominee for the purposes of the beer tie) for money owed by Mr Crehan for purchases of beer and other goods.

Mr Crehan's defence and counterclaim alleged that the Inntrepreneur lease, which obliged him to buy beer from Courage, was in breach of article 81. He therefore claimed damages.

The parties did not actively pursue the litigation while the notification of the Inntrepreneur leases was still under consideration by the European Commission, but resumed the case in earnest in 1998.

Before the substantive question of the damages claim could be heard, the High Court made a reference to the European Court of Justice, essentially to establish whether a person in Mr Crehan's position, who may be party to a contract that is illegal under article 81, could be entitled to damages despite the normal rule under English law that precludes parties to an illegal contract claiming damages based on that illegality. In essence, the European Court of Justice confirmed that there should be no absolute bar on a party in Mr Crehan's position from recovering damages.

Mr Crehan's substantive claim was tried over 29 days in the High Court in early 2003. The High Court found that the Inntrepreneur lease did not restrict competition under article 81(1) and that therefore the damages claim failed. Nevertheless, the High Court went on to consider whether, hypothetically, Mr Crehan would have been entitled to damages and the amount of those damages, so that its views were on record in the event that it was overturned on its finding of infringement. It is this judgment of the High Court that the Court of Appeal was considering.

The Court of Appeal's judgment

The key aspects of the Court of Appeal's assessment, which are considered further below are:

- did the Inntrepreneur leases infringe article 81, and how was the assessment under article 81 to be made?
- was the kind of loss suffered by Mr Crehan one for which he was entitled to claim damages?
- what was the appropriate quantum of damages to which Mr Crehan was entitled?

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Did the Inntrepreneur leases infringe article 81? How was that to be decided?

The facts of the *Crehan* case predate the coming into force of the modernisation regulation, which abolished the notification system and now allows national courts to decide on the application of article 81(3). In this case, it was therefore common ground that, as the agreements had never received individual exemption, the Inntrepreneur leases would infringe article 81 if it could be shown that they fell within article 81(1) and that they did not benefit from the block exemption.

In the context of the beer industry, the European Court of Justice in *Delimitis* had given definitive guidance on when article 81(1) applies to a beer supply agreement.

The application of the *Delimitis* principles to the UK market had clearly been closely considered by the European Commission in its review of Inntrepreneur's notifications, and also in reaching its decisions in the *Whitbread, Bass* and *Scottish & Newcastle* cases. Its consistent conclusion had been that the *Delimitis* conditions were fulfilled and that beer ties in the UK market during the 1990s restricted competition and so fell within article 81(1).

The High Court judge accepted that the Commission would have come to the same conclusion with respect to the Inntrepreneur ties. Nevertheless, in the High Court, the trial judge invited evidence on the application of article 81(1) and made his own assessment of the facts, coming to the opposite conclusion.

The Court of Appeal expressed itself profoundly uneasy with the judge's approach to the evidence. In particular, it emphasised that a High Court judge would inevitably be conducting his review on material less comprehensive and contemporaneous than that available to the Commission in carrying out its own exhaustive investigation.

Having reviewed the member states' duty – and that of their courts – of sincere cooperation with the Community institutions as derived from article 10 of the EC Treaty, the Commission's Notice on cooperation between national courts and the Commission, and subsequent case law, in particular, *Masterfoods*, the Court of Appeal concluded:

> In our judgment it was inappropriate for the judge to adopt the approach that he should receive such evidence and hear such submissions, as the effect of the judge second-guessing the Commission and concluding the Commission was wrong has been to create an irreconcilable inconsistency in the application of the Community's competition policy to the relevant market. We do not say that the Commission is infallible; far from it. We do say that, if the Commission is to be shown wrong in its decisions on the applicability of Art. 81(1), that has to be decided not by the national court but by the ECJ or CFI. In our opinion the judge failed to comply with the duty of sincere cooperation and thereby erred in law *(para 98)*.

In the light of this, and on the Court of Appeal upholding the finding that the block exemption did not apply, the Court of Appeal found an infringement under article 81.

Comment: The Court of Appeal's judgment in this respect is an encouraging one for the English courts' approach in future. Since the *Crehan* case was decided in the High Court, the modernisation regulation has come into effect, allowing national courts to apply article 81 in its entirety and therefore requiring even greater cooperation from national courts to ensure consistency in the application of Community law.

In this judgment, the Court of Appeal has firmly indicated that it takes its obligation to avoid inconsistency very seriously indeed, and that it will allow itself to be guided by the European Commission even in cases where the particular case before the English court is not itself the subject of a prior Commission decision.

The Court of Appeal's attitude also suggests that the English courts may find themselves encouraged to invite and give proper regard to *amicus* briefs from the Commission, or alternatively to make use of article 234 references in order to protect against inconsistency.

In practice, it is likely that the views of Commission will be given particular weight where it has an intimate knowledge of the market under consideration. It is less clear what weight an English court would give to a legal analysis by the Commission in the abstract, for example, in a case where it submits an *amicus* brief but where it had not previously reviewed the issues before the court.

For the future, it will be interesting to see whether the English courts accord the same deference to decisions of the national competition authorities. In some respects, the same factors apply – the national authority will have conducted an in-depth investigation and will be best placed to reach a decision, and the correct forum for reassessing the decision of the national authority is, in the UK at least, *via* an appeal to the specialist Competition Appeal Tribunal, rather than the generalist High Court.

By way of comparison, the current practice of the Competition Appeal Tribunal where there are factual gaps in the Office of Fair Trading's analysis is to remit the case back to the national authority *(e.g. Aberdeen Journals v DGFT [2002] CAT 4, Argos and Littlewoods v DGFT [2003] CAT 24),* rather than invite the parties to present extensive fresh evidence before it, implicitly acknowledging that the best placed body to assemble the factual evidence for a competition case is the national competition authority, rather than a court.

This is not a procedural course open to the High Court, but the regular use the Competition Appeal Tribunal makes of this device itself highlights the fact that a court must proceed with extreme caution in attempting a review of evidence for a competition law infringement.

Was the kind of loss suffered by Mr Crehan one for which he was entitled to claim damages?

In English law, a breach of the duty imposed by articles 81 or 82 is categorised as a breach of statutory duty. This provides a right of action to private individuals who suffer loss or damage as a result of a breach of that duty. Further, it is a principle of English law that an individual who sues for a breach of statutory duty must show not only that a duty was owed to him, but also that it was a duty in respect of the kind of loss he has suffered.

Based on this principle, the Court of Appeal was impressed by the argument that Mr Crehan could only claim damages for

the type of loss against which article 81(1) was intended to protect in this context, i.e. loss caused by distortion at the distribution level. In this case, Mr Crehan was essentially claiming for losses at the retail level, given that the result of the tie was that Mr Crehan could not compete effectively against other pubs.

The Court of Appeal, commenting on this argument, concluded that:

> The statutory duty argument is without doubt a formidable one. If, as we think, it is correct, Mr Crehan's claim cannot succeed in English law alone. It can only succeed by an application of the principle of effectiveness; in other words, on the basis that the rule of English law would "render practically impossible" the exercise of a right to damages conferred on Mr Crehan by Community law *(see para 29 of the judgment of the ECJ in Courage Ltd v Crehan) (para 162)*.

In this case, there had already been a reference to the ECJ on the possibility of a damages award to Mr Crehan, albeit in connection with a different aspect of the claim. The ECJ effectively gave a positive answer to the question whether Mr Crehan could in principle be entitled to damages as a result of the beer tie in the knowledge of the type of claim he would bring.

The Court of Appeal read this as the ECJ putting its imprimatur on the particular claim of Mr Crehan, holding that a right to the type of damages he claimed was conferred on him by Community law. Therefore, as a matter of Community law, a claim of the type made by Mr Crehan (i.e. at a different level of the market from that at which the restriction of competition arose) was allowable.

Comment: The judgment is somewhat diffident on this point and it seems to be a question that will need development in future cases, and possibly further consideration from the ECJ. In economic terms, however, it would appear that the harm addressed by article 81(1) is not limited to the harm at the distribution level where the infringement occurred, but also the consequent harm to competition that occurs at other levels of the market.

Quantum of damages

Although Mr Crehan's claim for damages ultimately failed in the High Court, the judge nevertheless indicated the damages he would have awarded had he found there to be an infringement of article 81, coming to a total of £1,311,500:

- losses actually suffered by Mr Crehan during the period he still held the leases (£57,121)
- profits that Mr Crehan would have made between the time he surrendered the leases in 1993 until the date of the judgment in 2003, reduced by 15% for contingencies (£889,052), and
- the value of the leases on the pubs as at 2003, had Mr Crehan owned them free of tie (£361,500)

The Court of Appeal disagreed with the High Court's approach to damages, arguing that the measure of damages it sought to apply "involves a hypothesis upon a hypothesis: the hypothetical profits of a hypothetical business" *(para 179)*.

The alternative approach that it adopted was to assess a capital value for the hypothetical business (i.e. the pubs without a tie) at the time when it became clear that it could not proceed (i.e. when Mr Crehan surrendered the leases), together with an assessment of the losses actually suffered by Mr Crehan up to that point.

On this basis, the Court of Appeal awarded damages of £57,121 for lost profits plus £74,215 for the value of Mr Crehan's business at the time the leases were lost, making a total of £131,336.

Comment: The High Court judge had chosen to award damages on the basis of an assessment of the future profitability of the business as he was of the view that, if Mr Crehan were entitled to damages, an assessment of damages at the date the business failed would not be adequate compensation, as it was always likely that the earlier years of the business were going to be the most difficult ones.

The divergence of views between the High Court judge and the Court of Appeal as to what is fair *versus* what is speculative is likely to be a recurring problem in competition cases, where in many cases the claimant will argue that the infringing conduct led to it being denied access to an economic opportunity – something that itself may be uncertain, but is of value.

It will be interesting to see how the English courts adapt their approach where the infringement in question is a more blatant one, such as predatory behaviour by a dominant company – in particular whether the approach to the quantification of damages might be adjusted, or the problem of quantification be largely avoided, by relying on awards of punitive damages.

Conclusion

In some respects, the problems that arose in the *Crehan* case have been addressed by the changes in legislation under the Enterprise Act 2002 and the modernisation regulation, both of which are intended to lower the hurdles to private enforcement of the competition rules.

For example, had the facts of the *Crehan* case arisen today, the courts would have been in a position to decide the application of article 81(3) themselves and so would not have been in the potentially uncomfortable position of having to consider an award of damages in respect of an agreement that might ultimately have been exemptable.

In other respects, this case shows that the recent changes will not solve every problem. Mr Crehan did not have a definitive Commission or national authority decision in his case that he could take to the courts and rely on. Even in the light of the legislative changes that make prior administrative decisions binding on the national courts, the debate in *Crehan* as to the extent a decision in a similar but distinct case could be binding will arise again.

The Court of Appeal's guidance in this respect is helpful. The willingness of the national courts to use the tools available to them to avoid inconsistency will become increasingly important.

The questions of entitlement to and quantification of damages are difficult ones and it is likely that the English case law will develop over time. In this case, the Court of Appeal adopted a relatively conservative approach, but it is not difficult to imagine cases where, in the interests of justice, there will be a pressing case for a more liberal approach to damages.

There are currently a number of pending damages cases by claimants alleging harm suffered as a result of the international Vitamins cartel, both before the English High Court and the Competition Appeal Tribunal, which now has jurisdiction to hear damages claims in certain cases. There is therefore every prospect of the principles set out in the Court of Appeal's judgment evolving further in the near future.

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Czech Competition Authority on petrol price fixing

A fine of CZK313m (€9.8m) has finally been confirmed for six oil companies. It was found that the Czech subsidiaries of Agip, Benzina, ConocoPhillips, Aral, OMV and Shell had agreed in 2001 to raise the price of Natural 95 petrol by a crown a litre at a time when prices were generally falling.

A sequence of three separate decisions followed the investigation. The first, in 2002, was struck down on appeal because the Office had refused to allow the companies to see evidence in the file on the ground that it was confidential to those who had provided it. This was a serious breach of the defendants' rights, so the case was remitted for a new decision.

The second decision in October 2003 reinstated the finding of an unlawful agreement and confirmed the fine. However, this was remitted because one of the companies, Aral, had been taken over by BP in the meantime.

The third decision, taking account of this change of legal personality, was made in March 2004. The appeal against this was rejected and the initial findings were confirmed by the President of the Competition Office on 31 May.

Antitrust emergency over Australian chicken

An unusual chain of events left Victoria's chicken meat industry exposed to liability under the Trade Practices Act. The ACCC stepped in with clearances in early June, but on an interim basis only.

With the imminent expiry of the authorisation for growers and processors to negotiate with each other collectively, a group of processors in Victoria was granted permission last year to continue doing so. The growers did not take part, but the permission was treated as extending to their collective action both by the ACCC and by a Federal Court judge.

On 5 August 2003, the full Federal Court bench struck down the ACCC's permission on the ground that it was given to the processors and did not authorise the growers to negotiate collectively. Their agreement among themselves would not be excused from the prohibition of restrictive agreements, even though it was for use in the same business transaction.

A final decision was delayed because the growers have added a request for clearance of a right of collective boycott. On 25 May, the ACCC granted Tasmania's chicken growers authorisation to negotiate collectively.

EU airlines' prices for online booking equalised

In less than six months, the European Commission has stopped 16 airlines from selling tickets on Internet at prices set according to where the buyer is resident.

Acting on complaints from many air passengers last year, it found that buyers in some EU countries were charged as much as three times more than buyers in other countries for the same ticket in terms of date of purchase, flexibility, etc.

Eighteen airlines were asked to explain themselves. Most were the regular flag carriers. Alitalia pleaded difficulties and Olympic did not reply at all.

The Commission said that the buyer's residence was identified by the details of the credit card offered in payment. This seems unlikely, since airline websites normally quote a price before credit card details are offered – few of us would make a firm order for a ticket without knowing how much it was going to cost. A more likely ploy is use of the website server's ability to detect the origin of the online connection from the IP address.

This inquiry did not touch on the practice of differential charging for tickets covering one leg of a longer journey *(see CLI July 2003, p.28)*.