

Competition update

The Jerry Maguire principle seems to be ever more important in competition law. In the eponymous film, Jerry Maguire was the sports agent who got a conscience and ended up with only one client, Rod Tidwell. And though Rod liked Jerry, there was one overriding slogan he wanted Jerry to remember at all times: 'show me the money'. And while it is not the only criterion which governs when companies turn to competition law, it is becoming a more and more significant consideration.

Crehan: damages for victims of anti-competitive behaviour

If your company has suffered because of the actions of a cartel or because a monopolist has been abusing a dominant position, what can you do?

You can turn to the public authorities to help you. You can complain to the Office of Fair Trading (OFT) that there has been a breach of the Competition Act 1998 (CA 1998). Or, if the infringements have a Community dimension, you can approach the EC Commission in Brussels. If there is an element of urgency and irreparable harm may be done if the infringements are not stopped, you may ask for interim relief. But the final outcome of the process – at its most favourable – will be an infringement decision and a large fine.

While these public sanctions may be effective general deterrents, they do not give you any real compensation if you have lost profits or market share. To put it another way: *schadenfreude* does not show up on the balance sheet.

So if you cannot get satisfaction for losses suffered by the public enforcement route, what about heading straight to court?

In contrast to the US, where treble damages claims play a key part in the enforcement of US anti-trust rules, there is no specific provision in the CA 1998 that gives a right to damages. The EC competition provisions (Arts 81 and 82), on which the UK prohibitions are modelled, are also silent.

However, the European Court of Justice's (ECJ) judgment in *Courage Ltd v Cre-*

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by Daniel Beard

han (C453/99) [2002] QB 507 confirmed that damages are available.

Crehan (C) was a pub tenant who considered that the terms of the agreement he had concluded with his brewery landlord were too onerous and tied him into buying expensive beer. But he did not just want to say the agreement was void. He wanted some money.

The European Court concluded that domestic courts must protect an individual's rights derived from Community competition law. Where a person has suffered loss due to a competition law infringement, he is entitled to vindicate his rights by way of compensation. The ECJ also emphasised the importance of private actions in enforcing competition law. Making damages available to those harmed by anti-competitive behaviour gives incentives for them to take steps to stop the infringements; victims become private policemen for the market.

Because s 60 CA 1998 requires UK courts and authorities to follow ECJ decisions, the European approach to damages should apply in purely domestic cases under the CA 1998 too. And we are now beginning to see claims for damages for breach of both EC and domestic competition law being brought in the UK courts. However, some of the initial attempts have been none too successful.

Arkin
In *Arkin v Borchard Lines* (no 4) [2003]

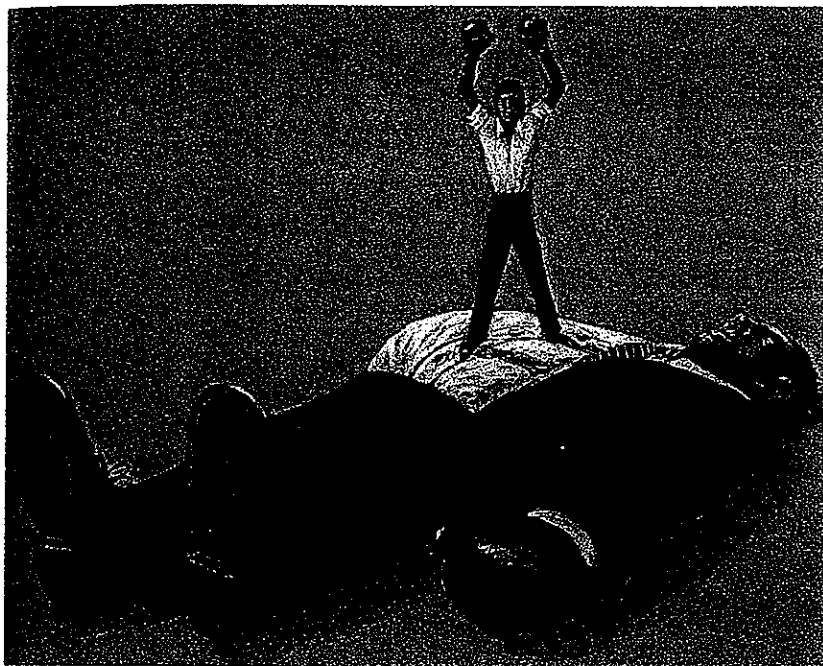
EWHC 687 (Comm) a shipping company alleged that it had been driven out of business by a cartel and had suffered catastrophic losses.

In principle, actions of a cartel in setting prices or otherwise taking action to foreclose the market to competitors can give rise to damages claims. But the fact damages may be available in principle does not obviate the need to make out the basic ingredients of your claim. A competition damages claim is brought as an action for breach of statutory duty and, in particular, it is necessary to make out causation of loss. The judge in the case decided the claimant had failed to show it was the unlawful action of the alleged cartel which had resulted in the losses suffered. Ordinary principles of tort were the downfall of the claim, not obscure competition law doctrines.

C's agreement not anti-competitive. C was similarly unsuccessful. Having had his case go all the way to Luxembourg and result in an important new judgment which allowed damages claims, he must have thought it was, literally, the home straight when the case came back before the High Court. No such luck. In *Crehan v Innentrepreneur* [2003] EWHC 1510, Park J concluded that, in the context of the market in which he was operating, C's agreement with the brewery was not anti-competitive.

While the outcome of the *Crehan* saga might be thought surprising by some, it does not, perhaps, tell us much about the prospects for the generality of competition damages claims. It was, after all, a claim by a co-contractor to an agreement which was alleged to be unlawful and void. Many (if not the vast majority) of potential damages claims will be by third parties who were not party to the infringing behaviour. Furthermore, C's beer tie arrangement could only be contrary to competition law if, because it was the same as numerous other such ties, all of the ties taken together foreclosed the market. In many cases where damages could be sought, no such 'cumulative effect' will need to be shown.

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Piggyback claims

The fact these recent cases have not resulted in compensation does not mean private enforcement of competition law in the UK courts is a dead letter. Far from it. An important element of the Enterprise Act 2002 which came into force in June this year is to enable 'piggyback' claims. These are claims brought for compensation after the public authorities have carried out an investigation and have concluded there has been an infringement.

The Enterprise Act has introduced into the CA 1998 a new s 58A which means that where the OFT has made a finding of infringement under the Chapter I or Chapter II prohibitions because there has been an anti-competitive agreement or an abuse of dominance, that finding can be relied upon in any damages claims before the civil courts. Of course, if any appeal against such an infringement decision has been lodged, the claimant cannot rely upon it until after that appeals process is complete.

Although a claimant may have to wait a little while, it will make life much easier since it will not be necessary to produce evidence to satisfy the court that there has been an infringement. As *Arkin* illustrates, there may still be difficult issues as to causation and quantification of loss which need to be dealt with, but the claimant is in a much better position than before. An important advantage may be that following an infringement decision a negotiated settlement on damages may

be proportionately more likely, given the binding nature of the adverse finding.

Competition Appeals Tribunal

In addition to the possibility of 'piggyback' claims, the Government has also introduced further changes by way of the Enterprise Act which may assist those bringing damages claims. It has long been a fear of potential claimants that since the courts were unfamiliar with competition claims, there was a much greater risk in proceeding before them, compared with expert bodies who knew their way round the legislation and had some acquaintance with relevant economic concepts.

Ferris J, after hearing a session of economic evidence from an expert during one of the last cases which came before the Restrictive Practices Court, famously said: "I am of the school which says 'This all too difficult, we had better give up'." While he may well have been expressing the unspoken views of those who have sat through long periods of technical evidence, it was not the sort of quote that instilled greater confidence in potential applicants.

However, we now have a specialist competition court in the UK, the Competition Appeals Tribunal (CAT). The CAT's president is Sir Christopher Bellamy who sat for many years in the Court of First Instance in Luxembourg and is very familiar with competition law concepts and issues. The Enterprise Act has expanded the jurisdiction of the CAT, so it not only hears complaints against the

decisions of the domestic regulators, but it can now also hear damages claims following on from adverse decisions.

Indeed, s 47A CA 1998 (which was introduced by the Enterprise Act) not only allows the CAT to hear damages claims following domestic infringement decisions (which will be 'piggyback' claims) but also to hear claims following findings of infringements of EC competition law by the EC Commission. While the existence of the 'piggyback' procedure might mean claimants will be more confident about bringing their claims in the ordinary civil courts, the possibility of bringing the claim in a specialist competition court may be of even greater comfort, particularly if it was the court which upheld any appeal on the lawfulness of the OFT decision in question.

Provimi

One further development which might encourage people to bring damages claims in the UK courts (including the CAT) is the recent case of *Provimi Ltd v Aventis Animal Nutrition SA* [2003] EWHC 961 (Comm).

In November 2001 the EC Commission found a number of undertakings had operated a cartel in the market for certain vitamins. A UK company which had bought vitamins from UK subsidiaries of the cartel members claimed damages from the companies it had bought from. In particular, since the term 'undertaking' can cover all members of a group of companies, the claims were brought not just against the subsidiaries but against them and members of their respective groups. A German company which had bought vitamins, not from the UK subsidiaries but from other group members, also sued.

On an interlocutory application the court held the claimants had a reasonable prospect of success and should be entitled to proceed. That conclusion covered not only the UK companies suing UK companies (and members of the same group) but also the German company joining in the litigation. It may, therefore, be a further reason for parties wanting to make damages claims following cartel infringement decisions to bring all claims in the UK where they can be consolidated and dealt with efficiently.

So, while claimants are not yet doing Rod Tidwell's victorious 'show me the money' dance, the steps are getting progressively clearer.