

## House of Lords Reverses Court of Appeal Judgment in *Inntrepreneur v Crehan*

July 2006

### ***Inntrepreneur Pub Company and others v Crehan*** **[2006] UKHL 38**

On 19 July 2006, the House of Lords brought thirteen years of litigation to an end when it overruled the Court of Appeal's judgment in the case of *Inntrepreneur Pub Company* ("Inntrepreneur") and *Crehan*. The Court of Appeal had made the first award of damages by a UK court for a breach of the competition rules. The House of Lords reversed the Court of Appeal's ruling on the effect, in domestic proceedings, of findings of fact in EC Commission decisions concerning different agreements and parties from those before the court. As a result, the UK is yet to have its first successful damages claim for losses suffered as a result of an infringement of UK or EC competition law.

#### **FACTUAL BACKGROUND**

Mr Crehan entered into agreements to take leases of two pubs in Staines from *Inntrepreneur*. Those leases contained standard "beer ties" which required Mr Crehan to buy his beer from *Courage Ltd* at list prices. When Mr Crehan's businesses failed, *Courage* sued Mr Crehan for an amount outstanding on his beer account and Mr Crehan counter-claimed against *Courage* and *Inntrepreneur* for damages, alleging that his losses flowed from the beer tie which infringed the prohibition in Article 81 of the EC Treaty on agreements which restrict competition.

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## JUDGMENT OF THE HIGH COURT

In order to establish that the beer tie agreement infringed Article 81, Mr Crehan needed to show that the test formulated by the European Court of Justice in Case C-234/89 *Delimitis v Henninger Bräu AG* [1991] ECR I 935 was satisfied on the facts. The two limbed *Delimitis* test provides that a beer supply agreement will infringe Article 81 where:

- i) the agreement is one of a number of similar agreements which together have a cumulative effect on competition rendering access to the market difficult (i.e. the market is “foreclosed”); and
- ii) the agreement in question makes a significant contribution to that sealing off effect.

In arguing that *Delimitis* condition 1 was satisfied, Mr Crehan sought to rely on the Commission’s finding, in a series of decisions concerning similar agreements between the brewers Whitbread, Bass and Scottish & Newcastle and their respective pub tenants, that the UK on-trade beer market was foreclosed in the early 1990s.

Mr Crehan therefore argued that the High Court need not decide the issue of foreclosure for itself but should simply rely on the conclusions expressed by the Commission. Park J rejected that approach preferring to take his own view on the basis of the extensive economic evidence which the parties put before him. The judge concluded that access to the UK market was not hindered for the purposes of *Delimitis* condition 1 so that Mr Crehan’s claim failed. Park J did, however, go on to consider the other aspects of Mr Crehan’s case, concluding that, but for his conclusion on *Delimitis* condition 1, he would have awarded damages in excess of a million pounds.

## JUDGMENT OF THE COURT OF APPEAL

The Court of Appeal disagreed with the judge’s approach in respect of the Commission’s assessment of the market. The judgment concluded that, although the other decisions of the Commission did not “formally bind” *Inntrepreneur*, it was not open to Park J to depart from the Commission’s findings on foreclosure. Those findings were capable of challenge only before the European Community Courts. In the Court of Appeal’s view, the judge should have neither received evidence nor heard submissions on the question of foreclosure since to do so was to “second-guess” the Commission.

Consequently, the Court of Appeal found that Park J’s judgment offended against the EC principle of legal certainty and breached the “duty of sincere co-operation” in Art 10 of the EC Treaty, which obliges institutions of Member States to ensure fulfilment of Community law obligations. Having found in Mr Crehan’s favour on other points raised in the appeal, the Court of Appeal awarded him damages, albeit for the smaller sum of £131,336.

## THE HOUSE OF LORDS OPINION

Reversing the Court of Appeal’s judgment, the House of Lords found that Park J was right not to unquestioningly follow the Commission’s assessment of the market but to decide the matter for himself. The House of Lords therefore restored Park J’s ruling that the market was not foreclosed in the early 1990s and Mr Crehan’s claim consequently failed.

In his leading Opinion, Lord Hoffman accepted that EC law places the national judge under a duty not to take decisions which ‘conflict’ with decisions of Community institutions. However, the risk of conflict arises only where conflicting decisions are taken in respect of the same subject matter as illustrated by Case C-344/98 *Masterfoods v HB Ice Cream Ltd* [2000] ECR I-11369. In that case, the ECJ held that the continuing of an injunction granted by the Irish High Court, (restraining Masterfoods from inducing retailers to store their ice cream in freezers owned by Unilever) which enforced Unilever’s arrangements with retailers governing the use of its freezers, would conflict with

a decision by the Commission, in respect of the same period of time, that Unilever's arrangements infringed Article 81 and were therefore unlawful.

Lord Hoffman therefore concluded that the duty to avoid conflicting decisions did not arise on the facts of this case given that a decision of the Commission that the Whitbread agreements infringed Article 81 (and therefore required individual exemption under Article 81(3)) did not conflict with a decision of the national court that the Inntrepreneur agreements did not. Lord Hoffman observed that this rule is now enshrined in Article 16 of the Modernisation Regulation (Council Regulation (EC) No 1/2003) which provides that national courts cannot take decisions "running counter" to a decision adopted by the Commission.

Lord Hoffman also drew attention to the inherent unfairness of the Court of Appeal's decision that Inntrepreneur's defence (that the market was not foreclosed) could be shut out by a decision of the Commission in which it took no part.

Finally, Lord Hoffman rejected the notion that an English court need show "deference" to Commission decisions in cases where the duty to avoid conflicting decisions does not arise. In those circumstances, the English court exercises jurisdiction to apply Article 81(1) concurrently with the Commission so that a relevant Commission decision should be treated as evidence properly admissible before the English court, albeit evidence which, given the Commission's expertise, may be considered to be highly persuasive.

Lord Bingham ruled, in the same vein, that the duty to avoid conflicting decisions does not require national courts to accept the factual basis of a decision reached by a Community institution when considering an issue arising between different parties in respect of a different subject matter. Thus, simple acceptance by Park J of the Commission's assessment would have been an abdication of the judicial function.

## COMMENTS

The House of Lords Opinion is to be welcomed as it adopts a principled approach to the scope of the duty on the national court not to arrive at decisions which conflict with those of the EC Commission. In particular, Lord Hoffman correctly takes account of the fact that Inntrepreneur would not have had *locus standi* to challenge the Commission's decisions in respect of the Whitbread and other agreements. In order to challenge a Commission decision before the European courts, a party must be able to show that the decision is of "direct and individual concern" to him. As Inntrepreneur had not participated in the Commission's investigations into the agreements concluded by the other brewers, it would not have had standing to challenge those decisions. Thus, as Lord Hoffman points out, the effect of the Court of Appeal's ruling was that Inntrepreneur was adversely bound by a finding which it had no opportunity to challenge.

*Monckton barristers Sir Jeremy Lever QC, Jon Turner and Ronit Kreisberger represented the Office of Fair Trading which intervened in the House of Lords proceedings.*

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