Neutral Citation Number: [2004] EWCA 637

Case No: A3/2003/1725

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL (CIVIL DIVISION)

ON APPEAL FROM THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

Park J.

CH1998C801

Royal Courts of Justice

Strand, London, WC2A 2LL

Date: 21/05/2004

Before :

LORD JUSTICE PETER GIBSON

LORD JUSTICE TUCKEY
and

SIR MARTIN NOURSE

- -

Between :

BERNARD CREHAN	**Appellant**
- and -	
INNTREPRENEUR PUB COMPANY CPC	**Respondent**

- -

- -

Mr. David Vaughan CBE Q.C., Mr. Mark Brealey Q.C. and Ms. Marie-Eleni Demetriou (instructed by **Messrs Maitland Walker of Minehead**) for the **Appellant**

Mr. Iain Milligan Q.C., Mr. Nicholas Green Q.C., Mr. James Flynn Q.C. and Mr. Martin Rodger (instructed by **Messrs Sprecher Grier Halbertstam of Clerkenwell**) for the **Respondent**

Hearing dates : 23 – 31 March 2004

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Judgment Approved by the court
for handing down
(subject to editorial corrections)

Lord Justice Peter Gibson:

1. This is the judgment of the court to which all of its members have contributed.

2. We have before us an appeal by the Claimant, Bernard Crehan, against the order made by Park J. on 26 June 2003. The judge dismissed Mr. Crehan's claim against the First Defendant, Inntrepreneur Pub Company (CPC) ("Inntrepreneur"), for damages for breach of Art. 81 of the EC Treaty. The appeal is brought with the permission of the judge. By a Respondent's Notice, Inntrepreneur advances additional grounds for upholding the judge's order relating to points which the judge decided or on which he expressed a view adverse to Inntrepreneur or which he found it unnecessary to decide. In the result we have heard argument on virtually all the points in issue before the judge.

Art. 81

3. It is convenient at the outset to set out the relevant provisions of Art. 81 (formerly Art. 85) and of the Regulations which govern the obtaining of exemptions from Art. 81.

4. Art. 81 provides:

"(1) The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the common market, and in particular those which:

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

….

(2) Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

(3) The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;

….

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

5. The European Court of Justice ("the ECJ") has given definitive guidance on the conditions to be satisfied if a beer supply agreement is prohibited by Art. 81 (1) (see Delimitis v Henninger Bräu AG [1991] ECR I – 935). There are two cumulative conditions, to which, like the judge, we will refer as Delimitis conditions 1 and 2. The first, which goes to what is called the foreclosure of the market, is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the

agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in question must make a significant contribution to the sealing off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement.

6. The exemptions provided by Art. 81 (3) might be block exemptions or individual exemptions.

7. By Council Regulation 1984/83 ("the Block Exemption") an exemption was given for "beer supply agreements", viz. long term exclusive purchasing agreements entered into for the resale of beer in premises used for the sale and consumption of beer. The relevant provisions are contained in Art. 6 of that Regulation:

"(1) Pursuant to Article 85(3) of the Treaty, and subject to Articles 7 to 9 of this Regulation, it is hereby declared that Article 85(1) of the Treaty shall not apply to agreements to which only two undertakings are party and whereby one party, the reseller, agrees with the other, the supplier, in consideration for according special commercial or financial advantages, to purchase only from the supplier, an undertaking connected with the supplier or another undertaking entrusted by the supplier with the distribution of his goods, certain beers, or certain beers and certain other drinks, specified in the agreement for resale in premises used for the sale and consumption of drinks and designated in the agreement.

(2) The declaration in paragraph 1 shall also apply where exclusive purchasing obligations of the kind described in paragraph 1 are imposed on the reseller in favour of the supplier by another undertaking which is itself not a supplier."

8. Art. 7 of the Block Exemption provides:

"(1) apart from the obligation referred to in Article 6, no restriction on competition shall be imposed on the reseller other than:

(a) the obligation not to sell beers and other drinks which are supplied by other undertakings and which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement.

….

(2) Beers or other drinks of the same type are those which are not clearly distinguishable in view of their composition, appearance and taste."

9. Individual exemptions were provided for in Council Regulation 17/62/EEC ("Reg. 17"). By Art. 4 of Reg. 17 agreements in respect of which an exemption under Art. 81 (3) is sought must be notified to the Commission. By Art. 9 (1) the power to grant individual exemptions was given to the Commission alone subject to review of the Commission's decision by the Court of First Instance ("the CFI"). Art. 19 (3) provided for the publication of what are known as advance notices when the Commission intends to take a decision on various matters, including whether to grant individual exemptions. The Commission was required to publish a summary of the application or notification and invite all interested third parties to submit observations.

10. Also in Reg. 17 is Art. 2 by which the Commission is empowered to give what is known as a negative clearance, that is to say a certificate that on the basis of the facts in its possession there are no grounds under Art. 81 (1) for action on the part of the Commission in respect of an agreement, decision or practice. The Commission can grant a negative clearance if the undertakings concerned apply for it. A more informal procedure for disposing of an application is frequently adopted by the Commission, which may issue a "comfort letter". Such letter is published in the Official Journal so as to bring it to the attention of

interested third parties.

11. Art. 3 of Reg. 17 empowers the Commission, when it finds that there is an infringement of Art. 81, to require the undertakings concerned to bring such infringement to an end.

The facts

12. The judge's full and careful judgment is now reported at [2003] EuLR 663. We propose only to refer to the salient facts.

13. In the 1980s each of Grand Metropolitan plc ("GM") and Courage Ltd. ("Courage"), then owned by the Australian company Elders IXL, had major interests in the United Kingdom brewing and pub businesses. Each owned a large number of pubs. Some pubs were not let but were managed by employees as part of the managed estate of each. Other pubs were let to tenants under tenancy agreements which almost invariably contained beer ties. Such ties obliged the tenant to buy all or most of the beer sold in the pub from the brewery which owned the pub. Before 1991 pub tenancies were for short terms generally not exceeding 5 years, but the tenancies were usually renewed on expiry. The tenancies were not assignable. Other publicans borrowed money from a brewery, a term of the loan commonly being that the borrower would buy some proportion of his beer from the brewery. Such loan ties therefore had an effect similar to beer ties.

14. In August 1986 the Director General of Fair Trading instructed the Monopolies and Mergers Commission ("the MMC") to investigate and report on the existence, or possible existence, of a monopoly situation in relation to the supply of beer within the United Kingdom for retail sale on licensed premises. In February 1989 the MMC reported. It found that a complex monopoly situation existed in favour of the brewers with tied estates and loan ties. The Government responded by making two statutory instruments (known as the Beer Orders) under the Fair Trading Act 1973. By one, the Supply of Beer (Tied Estates) Order 1989 ("the TEO"), a brewery or brewery group owning over 2,000 pubs was required to reduce by 31 October 1992 the number of outlets comprised in their tied and managed estates to 2,000 plus one half of the excess over 2,000 owned since July 1989. The TEO also restricted the permitted scope of beer ties in pub leases, requiring that all tenants be permitted to purchase one cask-conditioned ale (but not lager) from a supplier of their own choosing, although the supplier could be their own landlord, and to purchase low alcohol beers and non-beer drinks free of any tie. The tenant was free to negotiate the price for the one cask-conditioned ale ("the guest ale). By the other statutory instrument, the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989 ("the LTO"), all agreements for loans by a brewery or brewery group had to be terminable by the borrower on not more than 3 months' notice.

15. On 28 March 1991 GM and Courage agreed a major reorganisation of their respective brewery and pub interests. By a "pubs for breweries swap" GM transferred its breweries and brewery interests to Courage. GM and Courage incorporated a holding company owned by them in equal shares. That company wholly owned three operating subsidiaries, one of which is Inntrepreneur. It is a leading example of a new type of company which emerged about this time as a result of the changes in the beer industry and which is referred to as a PubCo, viz. a company owning pubs but not having any brewing activities and not being a member of a brewery group. To Inntrepreneur were transferred the pubs in GM's and Courage's tied estates. Inntrepreneur entered into a new form of lease, being for 20 years, with rent reviews every five years. The rents were higher than under the old types of tenancy. The tenant was responsible for repairs. The leases were assignable after two years. All the leases contained beer ties, requiring the lessees to purchase their supplies of beer (subject to the same exceptions as were provided by the TEO) from Inntrepreneur or a supplier to be nominated by Inntrepreneur at the full list price of the nominated supplier. Courage was nominated by Inntrepreneur as the supplier under an agreement known as the Beer Procurement Agreement. This required Courage to make available a wide range of high quality beers in line with consumer demand and in a competitive manner, but also provided that Courage's prices were to be generally competitive with the prices which tied tenants of brewers other than Courage charged for similar beers. Courage's price list included beers

from suppliers other than Courage.

16. For that reorganisation GM and Courage obtained approval from the European Commission ("the Commission") and from the Office of Fair Trading ("the OFT"). But a condition of approval from the OFT was that GM and Courage gave undertakings ("the Undertakings") to the Secretary of State for Trade and Industry. Although the TEO did not apply to Inntrepreneur as it was not a brewery or a member of a brewery group, the Undertakings imposed on Inntrepreneur through its shareholders obligations which were similar to or more severe than those which the TEO would have imposed. Inntrepreneur in March 1991 owned about 8,450 pubs. By reason of the Undertakings, from 31 October 1992 Inntrepreneur could have only a maximum of 4,350 pubs leased on tied leases. Inntrepreneur sold some pubs and on 31 October 1992 it released from tie 2,098 pubs. The Undertakings also required Inntrepreneur (which after the sales and releases owned 4,331 tied pubs) to release all its pubs from tie on or before 28 March 1998. The leases contained provisions for Inntrepreneur, on the release of the beer tie, to require an immediate rent review. Although the Government had announced its intention to review the Beer Orders after a few years, in fact the Government changed its mind and announced that there would be no such review. In February 1997 the Government agreed to release Inntrepreneur and its shareholders from the Undertakings. In practice Inntrepreneur did release a number of lessees from the tie on 28 March 1998, but many of its pubs continued to be tied.

17. Mr Crehan was born in Ireland in 1947 but has lived in England since 1967. He worked in various pubs in the south of England over the years, starting as a barman and progressing to being an employed manager of a succession of managed houses. He did not become the owner or tenant of a pub until 1991. Inntrepreneur had two pubs to let in Staines, The Phoenix, and, diagonally across a quiet crossroad, The Cock Inn. Mr. Crehan knew The Phoenix and applied for the lease of it. He was told by Inntrepreneur that if he was offered a lease, he would have to take a lease of The Cock Inn as well. He was told by Inntrepreneur that both pubs had weekly takings of about £4,000 a week. He provided to Inntrepreneur a business plan for The Phoenix, which showed an estimated profit (before rents) of £65,480.11. He obtained financial advice from an accountant, Mr. Neal of Freeman & Co., who provided a more detailed profit and loss account of the two pubs. Based on a turnover of £4,000 a week for each pub and after annual rents of £36,000 for The Phoenix and £35,000 for The Cock Inn, Mr. Neal projected annual net profits of £18,906 at The Phoenix and of £20,506 at The Cock Inn.

18. Mr. Crehan was offered a lease of each of the two pubs at rents of £36,000 for The Phoenix and £35,000 for The Cock Inn. In the negotiations about rent he offered £26,000 for The Phoenix (the judge had no evidence of what rent Mr. Crehan offered for The Cock Inn), but Inntrepreneur refused to agree to any reduction, save that the combined rents of £71,000 would be reduced to £35,000 in the first year to reflect the cost of repairs to both pubs which Mr. Crehan undertook to carry out as a condition of obtaining the leases. Inntrepreneur told him that the repairs would cost about £60,000, but a surveyor consulted by Mr. Crehan estimated that the cost would approach £120,000. Mr. Crehan expected that the cost to him would be manageable because his wife’s brother, Mr. Carroll, was a builder and would do the work more economically.

19. Mr. Carroll was the source of the funding which Mr. Crehan needed for the new business venture. Mr. Carroll had won IR£250,000 on the Irish lottery and provided IR£50,000 to Mrs. Crehan, half by way of gift and half by buying out her interest in their late father’s house. In addition Mr. Carroll agreed to contribute a further IR£50,000 to the business, but not, the judge found, so as to become a partner in the business even though Mr. Carroll was named as the lessee with Mr. Crehan in the tenancy agreements, and although the judge made no specific finding as to what the status of the contribution was, it appears to have been provided by way of loan to Mr. Crehan.

20. Mr. Crehan agreed to the negotiated terms for the two leases and the tenancy agreements were exchanged on 11 July 1991. Mr. Crehan occupied the two pubs on that date. It was agreed that each lease was only to be granted upon Mr. Crehan completing the works of repair to the pub, and until such completion his occupation of the pub was said to be as

licensee only subject to compliance with the covenants and obligations contained in the lease as if it had been granted. In the event the leases were never granted because Mr. Crehan did not complete the works of repair.

21. The form of lease intended to be granted was in the standard Inntrepreneur lease form: a 20-year term, 5-year rent reviews, repairing, maintenance and insurance covenants on the part of the lessee, assignability of the lease after the first two years (except to a brewer or a brewer's associated company) and a beer tie. The beer tie required Mr. Crehan to purchase from Inntrepreneur or its "Nominees" and from no other person all such "Specified Beers" as he required for sale in the pub. The term "Nominees" was defined to mean "the person firm or company (if any) specified in the Particulars and/or such person firm or company as [Inntrepreneur] may from time to time specify to the Lessee". Courage was specified in the Particulars. Specified Beers were beers of the types listed in Part A of the Appendix to the lease and 13 types were so listed. Brands were not specified, but such beers were said to be represented by the brands or denominations of beer stated in Inntrepreneur's or its nominee's price list. The price list was that of Courage and contained a large range of beers which Courage brewed, some under licence, but also included beers not brewed by Courage. The brands on the price list could be changed by Inntrepreneur or its nominee, but a new type of beer could not be added to the Specified Beers. Mr. Crehan could purchase one guest ale (in fact he chose to purchase his guest ale from Courage). There was a minimum purchase obligation by which Mr. Crehan was bound to purchase a specified minimum quantity of beer, failure to comply with which gave rise to an obligation to pay compensation. In practice the latter obligation was hardly ever enforced and was not sought to be enforced against Mr. Crehan.

22. Mr. Crehan intended to attract a younger clientele to The Phoenix in the evenings by providing some entertainment there. He intended The Cock Inn to appeal more to older pub-goers. Food was provided, prepared by Mrs. Crehan. Mr. Crehan charged prices for drinks based on advice from Mr. Neal. Sales were far below expectations. Mr. Crehan increased the entertainment at The Phoenix to attract custom, thereby incurring greater costs. He did not think that he could afford to reduce prices for drinks.

23. The first trading year was described by the judge as a disaster. The accounts prepared by Mr. Neal for the first 12 months to 10 July 1992 showed net losses of £1,157 at The Phoenix and of £13,810 at The Cock Inn. Further, of over £90,000 of capital introduced into the two pubs less than £20,000 remained. The net cash balance for the two pubs was only £2,377. £47,000 had been paid for glassware, furniture and other items needed for starting up. Some cash had been spent on some of the repairs and other works carried out by Mr. Carroll. Some had gone on funding the losses and some had gone on drawings to meet living expenses. At neither pub had the turnover come anywhere near to what had been expected. At The Cock Inn the beer barrelage achieved for the first year was 197 or 201 barrels, compared with 335 in the previous year. At The Phoenix the barrelage was 271, which while the same as that in 1990, was much lower than in previous years where 400 or more had been achieved. Inntrepreneur's and Courage's valuers had valued The Phoenix for mortgage purposes in 1991 with a barrelage of 420 and Inntrepreneur's expert witness at the trial assumed the same barrelage when assessing the market rent in 1991.

24. Mr. Crehan was unable to effect a major improvement in the trading position in the second year. Further, at The Cock Inn he had not carried out all the required works of repair. On 4 March 1993 Inntrepreneur agreed to accept a surrender by Mr. Crehan of his tenancy agreement of The Cock Inn. Mr. Main, Mr. Crehan's expert accountancy witness, has calculated a small profit of £2,849 for the period from 11 July 1992 to 4 March 1993, leaving an overall loss of £10,961 for the 20 months' trading at The Cock Inn.

25. Mr. Crehan carried on trading at The Phoenix until 7 September 1993. On 31 October 1992 he was released from the beer tie at that pub, but Mr. Main estimated a loss for the period from 11 July 1992 until 7 September 1993, when Mr. Crehan surrendered his tenancy agreement, of £33,369, making a loss of £34,526 for the 26 months' trading at The Phoenix. He owed arrears of rent to Inntrepreneur and unpaid debts to Courage for beer supplies. He could not pay either of them.

26. In addition he owed money to Bampton Finance Ltd. ("Bampton") with whom he had entered into a financing transaction in March 1993 by way of a sale and lease-back of the furniture and fittings of The Phoenix. Mr. Crehan had agreed with a builder, Innplan Contracts Ltd. ("Innplan"), for Innplan to do some works which Mr. Carroll had been unable to do, the £18,000 raised from Bampton going to Innplan. Innplan did less than £7,000 of the work and then became insolvent.

The Commission's involvement

27. We now turn to the involvement of the Commission in the dispute between Inntrepreneur and its tenants. An unexpectedly high number of tenants under Inntrepreneur's leases found themselves in financial difficulty. The judge found that there was a financial squeeze on Inntrepreneur tenants, squeezed between the higher rents under their leases than the previous pub tenancies and the beer tie provision, binding the tenants to purchase most of their beer supplies from Courage at the full prices in Courage's price lists. Inntrepreneur and Courage found themselves involved in more litigation than other pub lessors with large tied estates. Some cases arose when tenants fell into arrears with their rents. Many tenants advanced the argument that the beer ties contravened Art. 81.

28. Inntrepreneur decided to apply to the Commission, notifying the terms of the Inntrepreneur leases to the Commission on 17 July 1992 with a view to obtaining a decision (1) that the Inntrepreneur leases did not offend Art. 81 (1); alternatively (2) that they were taken out of it by the Block Exemption; in the further alternative (3) that the Commission would grant an individual exemption under Art. 81 (3).

29. On 19 November 1992 there was a first meeting between representatives for Inntrepreneur and Courage, headed by Mr. Richard Fleck of their solicitors, Herbert Smith & Co., and representatives of the Commission, headed by Mr. Mensching, a senior official of the Commission. The position adopted by the Commission at that meeting and in all subsequent exchanges was that the conditions of Art. 81 (1) applied and that Inntrepreneur could not bring itself within the Block Exemption. Inntrepreneur's attitude generally was not to concede that the Commission was right on those two points but not to argue the points. Instead Inntrepreneur's and Courage's representatives concentrated their efforts on getting an individual exemption, as that would have overcome their problems with Inntrepreneur tenants at that time. In the present litigation, by which Mr. Crehan claims damages, the question whether an individual exemption should have been granted is irrelevant, given that the power to grant such an exemption is vested in the Commission alone.

30. At the first two meetings with the Commission and in subsequent correspondence the Commission indicated that it provisionally took a favourable view of Inntrepreneur's request for an individual exemption, on the footing that even if tied tenants paid more for their supplies of beer than tenants free of any tie, they received countervailing advantages (such as lower rents) to justify such exemption. Accordingly on 30 July 1993 the Commission issued an advance notice under Art. 19 (3) of Reg. 17. By implication it is clear from the notice that the Commission's view was that Art. 81 (1) applied and that the Block Exemption did not apply.

31. By November 1993 some 190 lessees or their associations had responded to the Art. 19 (3) notice, criticising Inntrepreneur's case and saying that rents under Inntrepreneur's leases were too high. The National Association of Inntrepreneur Lessees, established by dissatisfied tenants, applied to the Commission under Art. 3 of Reg. 17. In May 1994 another application under Art. 3 was made to the Commission, this time by the solicitors, Charles Russell & Co., on behalf of 48 current or former Inntrepreneur tenants, including Mr. Crehan and Martin Bayliss. Mr. Bayliss was another of the tenants involved in litigation against Inntrepreneur and Courage.

32. The opposition to the grant of the individual exemption appears to have caused the Commission to think again. In December 1994 the Commission by letter to Inntrepreneur, GM

and Courage effectively withdrew the Art. 19 (3) notice. The Commission's concern was the differential pricing system, which operated in the United Kingdom for supplies of beer to pubs, and tied Inntrepreneur tenants to having to purchase their beer supplies at Courage's full list prices, whereas those without such ties could obtain large discounts for their purchases. This led the Commission in early 1995 to request the OFT to investigate whether the tied house system placed tied tenants at a competitive disadvantage. In May 1995 the OFT produced a report which was favourable to Inntrepreneur. However, the Commission was not, it seems, convinced and exchanges between it and Inntrepreneur continued.

33. On 29 November 1996 at a meeting between Mr. Fleck and other representatives of Inntrepreneur on the one hand and Mr. Mensching and other representatives of the Commission on the other, the Commission indicated that it was close to a formal refusal of Inntrepreneur's request for an exemption; further, such refusal would have been accompanied by a decision that Art. 81 (1) applied and that the Block Exemption did not. Mr. Mensching also said that preparations were in hand for the issue of a Statement of Objections. That would have been a procedural precursor to the Commission taking action under Art. 3 of Reg. 17.

34. At that meeting Mr. Fleck informed the Commission of a system called RetailLink the introduction of which Inntrepreneur was at that time contemplating as a means of repairing its relations with its tenants. Under RetailLink Inntrepreneur itself paid discounts to those of its tenants who agreed to participate in the system by reference to their purchases. This was seen by the Commission as satisfactory. RetailLink commenced on 25 February 1997, operating retrospectively from 1 January 1997, and ran until 28 March 1998, and helped in persuading the Department of Trade and Industry to release Inntrepreneur from the Undertakings.

35. On 26 March 1997 Inntrepreneur formally gave notification of the new system to the Commission. It applied first for a negative clearance, referring to the conditions laid down in Delimitis and submitting that "changes in conditions of the UK market mean that there is no longer sufficient foreclosure for the first limb of this test to be satisfied". It also submitted that Delimitis condition 2 was not satisfied. Second, it applied for exemption under the Block Exemption. Third, it sought an individual exemption. An Art. 19 (3) notice was issued by the Commission on 10 December 1997, stating the Commission's intention to grant an individual exemption. On 24 January 2000 a comfort letter was issued by the Commission, relating to the period from 1 January 1997:

"On the basis of the information provided on notification of the agreement as well as that contained in documents subsequently received the Commission's Directorate-General for Competition has now completed the examination of this case.

The result of this examination is that for the period from the introduction of the standard leases up to and including 28 March 1998, the agreement appears to contain restrictions of competition falling under the prohibition in Article 81(1) of the EC Treaty, namely the non-compete and exclusive purchase obligations contained in the requirement that all specified beers are bought exclusively from Inntrepreneur or its nominee with the exception of one guest beer from the date of introduction of the notified leases until 28 March 1998.

However, the Directorate-General for Competition takes the view that you have provided sufficient justification for finding that the conditions laid down by Article 81(3) are fulfilled.

A Notice pursuant to Article 19(3) of Council Regulation No 17 was published in the Official Journal of the European Communities, No. 374 p.11 of 10 December 1997 inviting all interested parties to submit their observations.

You have agreed that the notification under consideration may be dealt with by means of an administrative letter closing the file.

The Directorate-General for Competition, therefore, considers that it is not necessary to conclude the procedure by proposing that the Commission should adopt a decision granting an exemption under Article 81(3), as laid down in Article 6 of Council Regulation No 17.

However, the case could be reconsidered if the factual or legal situation changes as regards any essential aspect of the agreement which affects the view which should be taken of it."

36. On 28 March 1998 the SupplyLine system replaced RetailLink and this too was notified to the Commission. On 29 June 2000 the Commission issued a negative clearance to the effect that Art. 81 (1) did not apply to it at all.

37. The acceptability to the Commission of RetailLink and SupplyLine for the period from 1 January 1997 has no direct relevance to the period during which Mr. Crehan was an Inntrepreneur tenant, though the implication for the earlier period of the refusal by the Commission to give a negative clearance for the later period and of the refusal of the application for the application of a Block exemption is a matter to which we will return later. The favourable view of RetailLink taken by the Commission was indirectly relevant to the withdrawal on 14 October 1997 by Inntrepreneur and Courage of the notification given in 1992. Inntrepreneur reserved the right to renotify the arrangements if the Commission did not issue favourable Art. 19 (3) notices in respect of RetailLink and SupplyLine. The suggestion that the notification should be withdrawn originally came from Mr. Mensching.

38. That left outstanding the application made by the 48 dissatisfied Inntrepreneur tenants under Art. 3 of Reg. 17. On 24 November 1997 the Commission wrote to Charles Russell & Co., saying that it did not propose to deal with the application, and that the factual situation had changed once Inntrepreneur had withdrawn its notification. The Commission said that there was no longer a Community interest for the Commission to deal with the case and that the only remaining question with regard to the application of Community competition law to the Inntrepreneur lease prior to the introduction of RetailLink was whether or not Art. 81 (1) was applicable. The Commission continued:

"This is a question which the national court is in a position to decide. It can be added that the national court can take into account some factual and legal elements which the Commission has made public on earlier occasions. With regard to a general market description, reference can be made to the earlier mentioned 19(3) notice and to similar such notices in the Bass and Whitbread cases. As to the legal point of the applicability of Article 85(1), legal guidance can be taken from the Commission's intention indicated in the earlier mentioned Inntrepreneur 19(3) notice to grant an exemption to the Lease.

Furthermore, in the event that the national judge finds that Article 85(1) is applicable, he is in a position to determine the civil law effects following from the prohibition set out in Article 85(2).

….

The judge can also award compensation for loss suffered as a result of an infringement of Article 85."

The proceedings

39. The proceedings with which we are concerned had their origin in a claim brought in the Queen's Bench Division by Courage on 9 June 1993 against Mr. Crehan for £15,266 owed by him for purchases of beer and other goods. Mr. Crehan served a defence and counterclaim, joining Inntrepreneur and another Courage company as defendants to the counterclaim. In the counterclaim Mr. Crehan alleged that the terms of the Inntrepreneur leases and in particular the beer tie were in breach of Art. 81. He claimed damages and a set off of the damages against any sums owed by him to Courage. Courage and Inntrepreneur served a reply and a defence to the counterclaim.

40. On 7 January 1994 Courage applied for summary judgment under RSC O.14 on its claim for unpaid beer and other goods, and Courage and Inntrepreneur applied under RSC O. 14A for the determination of a question of law, viz. whether Mr. Crehan was entitled to counterclaim

for damages for breach of Art. 81. These applications were never heard and for more than 3 years nothing of significance happened in the litigation. As the judge found, an understanding appears to have been reached between the solicitors for Mr. Crehan and the solicitors for Inntrepreneur that it was not appropriate for the court proceedings to be pursued actively while the matter was still being considered by the Commission. There was also an understanding that when the Community law issues raised by the tenants did go to trial Mr. Crehan's case would be the lead case.

41. On 7 October 1997, even before Inntrepreneur and Courage formally withdrew the 1992 notification to the Commission, Mr. Crehan served notice of his intention to proceed. On 29 January 1998 the proceedings were transferred to the Chancery Division.

42. On 20 March 1998 Master Moncaster directed that certain questions be tried as preliminary issues. The question was raised whether, if Art. 81 was infringed by the leases and beer ties, Mr. Crehan could sue for damages and, if so, against whom.

43. Carnwath J. decided those preliminary issues adversely to Mr. Crehan. That judge gave Courage judgment for its claim for unpaid invoices and dismissed Mr. Crehan's counterclaim for damages for breach of Art. 81. Mr. Crehan appealed to this court (Morritt, Schiemann and Mance L.JJ.). This court noted that by reason of an earlier decision of this court (Gibbs Mew plc v Gemmell [1998] EuLR 588) based on the decision of the House of Lords in Tinsley v Milligan [1994] 1 AC 340 a tenant, participating in an illegal contract, is precluded from claiming damages when the claim is based on that illegality. This court said (Courage v Crehan [1999] EuLR 834 at p. 853):

"30 We are minded to refer to the European Court of Justice the question whether, assuming that a party to a prohibited agreement may be someone who is given rights against the other party by virtue of Article 85 which are protected under Community Law, and assuming that such a party has been damaged by actions taken under the agreement by the other party, the national court is obliged as a matter of Community law to award damages to the injured party."

44. This court referred to the ECJ the following questions:

(1) Is Art. 81 to be interpreted as meaning that a party to a prohibited tied house agreement may rely on that article to seek relief from the courts from the other contracting party?

(2) If the answer to question (1) is 'yes', is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the agreement which is prohibited under Art. 81?

(3) Should a rule of national law which provides that courts should not allow a person to plead and/or rely on his own illegal actions as a necessary step to recovery of damages be allowed as consistent with Community law?

(4) If the answer to question 3 is that in some circumstances such a rule may be inconsistent with Community law, what circumstances should the national court take into consideration?

45. In the opinion of Advocate-General Mischo (Courage Ltd. v Crehan [2002] QB 507 at p. 511 para. 12), he noted the two assumptions in the passage cited in para. 43 above and continued in para. 13:

"It follows that this court must rule in the abstract on a situation where a breach of article 81 EC has caused loss to one of the parties to the agreement. The question whether this abstract situation corresponds to the facts in the case is a question to be decided later by the referring court and does not concern this court."

46. In the judgment of the ECJ at p. 520 para. 17 the ECJ noted the basis on which the questions were raised. It stated that the national courts, whose task was to apply the provisions of Community law in areas within their jurisdiction, must ensure that the rules of Community law take full effect and must protect the rights which those rules confer on individuals.

47. The ECJ continued at p. 522:

"26 The full effectiveness of article 85 of the Treaty and, in particular, the practical effect of the prohibition laid down in article 85(1) would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.

….

29 However, in the absence of Community rules governing the matter, it is for the domestic legal system of each member state to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)."

48. The ECJ then said that a litigant should not profit from his own unlawful conduct but added at p. 523:

"32. In that regard, the matters to be taken into account by the competent national court include the economic and legal context in which the parties find themselves and, as the United Kingdom Government rightly points out, the respective bargaining power and conduct of the two parties to the contract.

33. In particular, it is for the national court to ascertain whether the party who claims to have suffered loss through concluding a contract that is liable to restrict or distort competition found himself in a markedly weaker position than the other party, such as seriously to compromise or even eliminate his freedom to negotiate the terms of the contract and his capacity to avoid the loss or reduce its extent, in particular by availing himself in good time of all the legal remedies available to him.

34. Referring to *SA Brasserie de Haecht v Wilkin* (Case 23/67) [1967] ECR 407 and *Delimitis v Henninger Bräu AG* (Case C-234/89) [1991] ECR I-935, 984-987, paras 14-26, the Commission and the United Kingdom Government also rightly point out that a contract might prove to be contrary to article 85(1) of the Treaty for the sole reason that it is part of a network of similar contracts which have a cumulative effect on competition. In such a case, the party contracting with the person controlling the network cannot bear significant responsibility for the breach of article 85, particularly where in practice the terms of the contract were imposed on him by the party controlling the network."

49. The ECJ concluded at p. 523 para. 36:

"Having regard to all the foregoing considerations, the questions referred are to be answered as follows. A party to a contract liable to restrict or distort competition within the meaning of article 85 of the Treaty can rely on the breach of that article to obtain relief from the other contracting party. Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract. Community law does not preclude a rule of national law barring a party to a contract liable to restrict or distort competition from relying on his own unlawful actions to obtain damages where it is established that that party bears significant responsibility for the distortion of competition."

50. The matter then came back to this court to consider the further conduct of the proceedings. Inntrepreneur sought an order for the trial of two further preliminary issues, one relating to the Block Exemption, the other whether the loss claimed by Mr. Crehan was caused by the wrong of which he complained. This court on 12 November 2001 gave short shrift to that application, saying that the first issue should have been raised far earlier and that the second would involve substantial issues of fact and so was inappropriate to be tried as a preliminary issue. This court then, acting on the ECJ's ruling, allowed the appeal from Carnwath J.'s order dismissing Mr. Crehan's counterclaim and remitted the case to a designated Chancery judge. Park J. was so designated. Very detailed Particulars of Claim were filed on behalf of Mr. Crehan in June 2002. This provoked a further preliminary skirmish, Inntrepreneur applying to strike out 5 paragraphs in those Particulars by which it was pleaded that it would be an abuse of process were Inntrepreneur to contend that there was no infringement of Art. 81 or that the Block Exemption applied. We understand that the judge refused to deal with that application at that stage and that it was not renewed at the trial.

The trial

51. The trial commenced in February 2003 and lasted 29 days. The principal issues before the judge relevant to this appeal were the following:

(1) Is Delimitis condition 1 satisfied?

(2) Is Delimitis condition 2 satisfied?

(3) Does the Block Exemption apply?

(4) Is it an abuse of process for Inntrepreneur to contend that there was no infringement of Art. 81 and that the Block Exemption applies?

(5) Does Mr. Crehan share responsibility with Inntrepreneur to such an extent that Mr. Crehan's claim could not succeed?

(6) Are the damages claimed by Mr. Crehan in respect of a type of loss against which he is protected by Art. 81?

(7) Did the beer ties cause Mr. Crehan's business failure at The Phoenix and The Cock Inn?

(8) What is the appropriate quantum of damages, and at what date should the damages be measured?

52. A very large number of witnesses gave evidence before the judge. Mr. Crehan and 18 other witnesses of fact gave evidence for him, that evidence being primarily directed to issues (7) and (8). For Inntrepreneur 14 witnesses of fact were called. They included Mr. Fleck (on the discussions and exchanges with the Commission) and representatives of other brewing concerns (on the ease of entry into the United Kingdom beer distribution market and on the ease of expansion of business in that market). Among those representatives was Mr. Dinesen, the former chief executive in the United Kingdom of the Danish brewery, Carlsberg.

53. 8 experts also gave evidence. There were two economists: for Mr. Crehan, Dr. Veljanovski, and, for Inntrepreneur, Professor Yarrow, who spoke to a report prepared by him and two other economists from an organisation known as NERA (National Economic Research Associates). There were two valuers: for Mr. Crehan, Mr. Day FRICS, and, for Inntrepreneur, Mr. Butters FRICS. There were two accountants: for Mr. Crehan, Mr. Main FACCA, and, for Inntrepreneur, Mr. Haberman FCA. Inntrepreneur also called Mr. Spicer, an investment analyst who has specialised in the brewing industry, and Mr. Willis FRICS, a surveyor whose firm has a particular specialisation in licensed premises and who gave general evidence about the brewing and licensed premises business from the late 1980s onwards.

54. Mr. Crehan called no factual evidence in relation to issues (1) and (2), but relied on

decisions of and documents produced by the Commission and on other documentary material such as reports of the MMC and OFT. To some extent Inntrepreneur also relied on similar documentary material and, very sensibly, Inntrepreneur's solicitors by letter dated 14 January 2003 suggested that neither party would take any point on the absence of notices under the Civil Evidence Act 1995 and CPR r. 33.2(3) when making submissions as to the weight to be given to hearsay statements and that each party would be free to rely on the failure of the other to call a witness to give oral evidence and to be available for cross-examination as a reason why less weight should be given to that evidence.

55. The judge in his overview of the case (paras. 2 and 3 of his judgment) identified two questions of overriding importance: (1) whether in 1991 and in subsequent years the structure of the beer distribution industry in the United Kingdom was such that the beer ties in Inntrepreneur leases infringed Art. 81 and (2) if it was, whether the failure of Mr. Crehan's business was caused by the beer ties in his leases. The judge answered the first question in the negative and the second question in the affirmative. He dealt with the 8 issues, which we have identified, in the following manner:

(1) Delimitis condition 1 was not satisfied (paras. 148-198 of the judgment).

(2) On Delimitis condition 2 the judge left unresolved what he would have decided about it if he had decided the issue of Delimitis condition 1 in favour of Mr. Crehan (paras. 199-205).

(3) The Block Exemption would not have applied (paras. 206-223).

(4) It was not an abuse of process for Inntrepreneur to contend that Art. 81 was not infringed and that the Block Exemption applied (paras. 145-147).

(5) Mr. Crehan did not share responsibility with Inntrepreneur for any infringement of Art. 81 (paras. 224-225).

(6) The damages claimed by Mr. Crehan were of a type which allowed him to obtain damages for any breach of Art. 81 (paras. 226-228).

(7) The beer ties caused Mr. Crehan's failure (paras. 230-263).

(8) The damages should be measured at the date of judgment and comprised (i) the losses actually suffered (including lost profits) during the periods from 11 July 1991 until the surrender of the leases on 4 March 1993 and 27 September 1993 respectively, (ii) the profits which Mr. Crehan would have made between 1993 and 2003 if free of tie, and (iii) the value as at 2003 of the leases he would have owned if free of tie throughout (paras. 266-291).

The answers to issues (3) and (5) – (8) were all obiter.

56. In respect of issue (8) the judge would have awarded £57,121 in respect of item (i), £1,045,944, reduced for unidentified contingencies by 15%, to £889,052 in respect of item (ii) (but he would have rounded up the aggregate of items (i) and (ii) to £950,000), and £361,500 in respect of item (iii). Thus the judge's total award, if he was wrong on Delimitis condition 1, would have been £1,311,500. We are told that there are about 600 dissatisfied Inntrepreneur tenants. Whilst the value of their claims will depend on the particular facts of their cases, it is apparent that the outcome of this appeal may have very significant financial consequences for Mr. Crehan and for Inntrepreneur.

The appeal

57. On this appeal we have had the benefit of knowledgeable and skilful argument from counsel on both sides. Sensibly Mr. David Vaughan Q.C. and Mr. Mark Brealey Q.C. have divided between them the presentation of the arguments for Mr. Crehan on the appeal and the reply to Inntrepreneur's Respondent's Notice, whilst Mr. Iain Milligan Q.C. and Mr. Nicholas Green Q.C. have similarly shared the burden of addressing us on behalf of Inntrepreneur in

responding to Mr. Crehan's appeal and in presenting the arguments on the Respondent's Notice. We are grateful to them for their considerable assistance and expedition which enabled us to conclude the hearing within the estimate of seven days.

58. We will now go through the relevant issues in turn. We should record that although a number of the issues raise points of Community law, neither side requested us to make a reference to the ECJ under Art. 234 of the Treaty and we have not found it necessary to do so.

(1) <u>Delimitis condition 1</u>

59. In <u>Delimitis</u> the ECJ set out in para. 10 of its judgment the benefits to the reseller, typically the tenant, of a beer supply agreement which generally affords to the tenant benefits such as the grant of loans on favourable terms, the letting of a pub and the provision of equipment for its operation, in return for which the tenant generally undertakes for a pre-determined period to obtain supplies of the products covered by the agreement only from the seller and not to sell competing products. In para. 11 the ECJ noted the advantages to the supplier of guaranteed outlets and cooperation with the tenant, allowing the supplier to plan his sales over the duration of the agreement and to organise production and distribution effectively. Further advantages for the tenant were stated in para. 12, viz. that the agreement enables the tenant to gain access under favourable conditions and with the guarantee of supplies to the beer distribution market, and that the tenant, by virtue of his shared interest with the supplier in promoting sales of the goods covered by the contract, has the supplier's assistance in guaranteeing product quality and customer service.

60. The ECJ went on to say that if such agreements do not have the object of restricting competition, their effects have to be assessed in the context in which they occur and where they might combine with others to have a cumulative effect on competition. It said in para. 15:

"Consequently, in the present case it is necessary to analyse the effects of a beer supply agreement, taken together with other contracts of the same type, on the opportunities of national competitors or those from other Member States, to gain access to the market for beer consumption or to increase their market share and, accordingly, the effects on the range of products offered to consumers."

61. The ECJ then set out the various matters to be determined in making that analysis. First, the relevant market has to be determined. It said that the reference market is that for the distribution of beer in premises for the sale and consumption of drinks (para. 17), that it is delimited geographically and that account has to be taken of the national market for beer distribution in such premises (para. 18). It said in para. 19 that to assess whether the existence of several beer supply agreements impedes access to the market, the nature and extent of the agreements needs to be examined, adding that the effect of the networks of contracts on access to the market depends specifically on a comparison between the number of outlets tied to national producers and those not so tied, the duration of the commitments and the quantities of beer to which the commitments related and the proportion between those quantities and the quantities sold by those not tied.

62. The ECJ said (in para. 20) that the other factors to be taken into account are those also relating to opportunities for access, but explained (in para. 21) that in that connection "it is necessary to examine whether there are real concrete possibilities for a new competitor to penetrate the bundle of contracts by acquiring a brewery already established on the market together with its network of sales outlets, or to circumvent the bundle of contracts by opening new public houses". It also referred to the presence of beer wholesalers not tied to producers active on the market as being a factor capable of facilitating a new producer's access to that market as he could make use of the wholesalers' sales networks to distribute his own beer. It further said that competitive conditions operating on the relevant market must be taken into account and that for this it was necessary to know not only the number and the size of producers present on the market but also the degree of saturation of that market and customer fidelity to existing brands (para. 22).

63. The ECJ expressed its conclusion on Delimitis condition 1 in this way (para. 23):

"If an examination of all similar contracts entered into on the relevant market and the other factors relevant to the economic and legal context in which the contract must be examined shows that those agreements do not have the cumulative effect of denying access to that market to new national and foreign competitors, the individual agreements comprising the bundle of agreements cannot be held to restrict competition within the meaning of Article 85(1) of the Treaty. They do not, therefore, fall under the prohibition laid down in that provision."

64. For completeness we add that, as indicated in para. 5 above, the ECJ, when answering the question referred to them by the national court, made mention not only of new competitors being denied access to the relevant market, but also referred to it being "difficult for competitors who could enter the market or increase their market share to gain access to the national market" (para. 27).

65. As a result of a series of notifications under Art. 4 of Reg. 17 and applications under Art. 2 of Reg. 17 for negative clearance and exemptions under Art. 81 (3), the Commission conducted an investigation into the United Kingdom beer market. It has throughout expressed the view that during the period with which we are concerned the relevant market was foreclosed so that Art. 81 (1) applied. Mr. Crehan relies in particular on three decisions of the Commission in 1999 in the cases of Whitbread, Bass and Scottish and Newcastle, each of which was at the relevant time a major landlord of pubs in the United Kingdom. Although three separate decisions, on relevant matters they are expressed in virtually the same terms. At the trial the judge rightly found it sufficient to concentrate on the Whitbread decision delivered on 24 February 1999.

66. That decision was given in response to the notification by Whitbread in 1994 of three standard forms of leases of pubs each with a beer tie. Whitbread requested a negative clearance, alternatively confirmation that the Block Exemption applied, alternatively that it be granted a retrospective individual exemption. The period covered was from the beginning of 1990, when a standard 20-year lease was introduced. On 27 September 1997 the Commission published an Art. 19 (3) notice, indicating its intention to grant a retroactive individual exemption. The decision in 1998 contains a review of the United Kingdom market, and demonstrates an awareness of the facts of the market and the changes brought about by the Beer Orders consequent on the MMC report in 1989

67. The Commission considered the demand factors followed by the supply factors (brewing, wholesaling and retailing). It found that there were 6 relevant retail channels, and relying on figures in the 1989 MMC report and on data provided by the Brewers and Licensed Retailers Association ("the BLRA") (of which Inntrepreneur and Courage are members) for the years 1994-1997, the Commission estimated the volume of beer supplied through (a) the brewers' tied estate, (b) the brewers' managed estate, (c) the tied estate of PubCos (of which Inntrepreneur and Allied Domecq had the largest estates), (d) the managed estate of PubCos, (e) loan-tied premises and (f) premises free of ties. It compared the consumption of beer in the period 1985 – 1989 via each of those channels with that in 1997. It examined the competition between the brewers, market entry at the brewing level and at retail level and the changes in the arrangements between pub tenants and their landlords.

68. In a section headed "Legal Assessment" the Commission examined the relevant product market and the relevant geographical market. It considered the restrictive effect on competition of the principal restrictions and in paras. (108) – (118) it looked at the cumulative effect of several similar networks. It took into account the vertical integration in the form of managed houses and tied houses, and the inclusion in the network of agreements with retail outlets via loan ties or, on the wholesale level, of agreements containing obligations such as exclusive or minimum purchasing obligations with wholesalers, including brewers performing a wholesale function and PubCos. It referred specifically to Inntrepreneur and its associated company, Spring Estates Ltd., and Allied Domecq as having

to buy in 1997 almost all the beer requirements of their estate from one national brewer. It concluded that "the bundle of tying agreements of UK brewers has since 1990 had considerable effect on the opportunities for gaining independent access to the UK on-trade beer market" (para. (118)). It examined other factors governing opportunities for access (acquisition of pubs, takeovers of brewers, the relatively small role of traditional wholesalers and the licensing by foreign brewers of a major national brewer), but noted, in para. (124), "In such circumstances, the UK brewer will have a strong influence on the positioning and the marketing (advertising) of the foreign brewer's brand". It referred to competitive forces in the market. It concluded on Delimitis condition 1 (para. 127):

"It can thus be concluded that an examination of all tying agreements, including but not limited to beer-supply agreements entered into, and the other factors relevant to the economic and legal context of the UK on-trade market shows that the brewers' tying agreements had in 1990 and still have today, on the basis of the most recent available information, the cumulative effect of considerably hindering independent access to that market, for new national and foreign competitors."

69. The Commission then considered Whitbread's tied estate for the purpose of Delimitis condition 2 and concluded in para. (138):

"It is therefore concluded that Whitbread's tied sales, of which the notified agreements are a part, contribute significantly to the foreclosure of the UK on-trade market. The exclusive purchasing obligation and the non-competition obligation in the Leases therefore have a restrictive effect on competition."

70. The judge recognised in para. 136 of his judgment that since the Inntrepreneur tied estate was slightly larger than the Whitbread tied estate, the Commission would have come to the same conclusion as regards the Inntrepreneur tied estate.

71. The Commission found that the Whitbread leases affected trade between member states and that the restrictive effect of the cumulative networks and other factors contributing to the foreclosure of the United Kingdom on-trade beer market and the significant contribution made by Whitbread's network to that effect meant that such trade was affected to an appreciable extent. It therefore found that the exclusive purchasing and non-competition obligations of the leases fell foul of Art. 81 (1). It refused a negative clearance. It then considered but rejected Whitbread's claim that the Block Exemption applied, but found that Whitbread's leases, by reason of their terms and the countervailing benefits they conferred during the recession in the 1990s, justified a retroactive individual exemption.

72. The part of the Whitbread decision whereby the Commission granted an individual exemption was challenged by two tied tenants before the CFI (Shaw v Commission) [2002] ECR II-2023). Whitbread did not challenge the Commission's decisions that the Delimitis conditions were satisfied and that the Block Exemption did not apply, but intervened to support the Commission's decision to grant an individual exemption. The CFI, which has jurisdiction under Art. 230 of the EC Treaty to review the legality of a decision taken by the Commission, upheld it.

73. What the judge recognised to be logically the first argument of Mr. Crehan related to the attitude to be adopted by the national court to the question of the foreclosure of the relevant market: should the court accept the view of the Commission that there was such foreclosure in the relevant period or should the court arrive at its own view on the evidence and argument put before it? The judge held that he should decide that question for himself. He gave several reasons for that decision.

74. The first was that Inntrepreneur was not a party to the proceedings which resulted in the 1999 decisions in Whitbread, Bass and Scottish & Newcastle, and it had no input into the materials which the Commission considered. It is not in dispute that those decisions did not formally bind anyone not addressed by those decisions. However, the decisions related to the same market as that in which Inntrepreneur was engaged and it can hardly be said that

Inntrepreneur had no opportunity to make submissions to the Commission (or to the national competition authorities such as the MMC and the OFT to whose reports the Commission referred) on the question of the foreclosure of the United Kingdom market. Inntrepreneur had made submissions to the Commission when notifying it of its standard leases in 1992 and seeking a decision that Art. 81 (1) did not apply to them and also when responding on 1 July 1994 to the application of the 48 Inntrepreneur tenants, the response including a submission by economists on how the national beer market should be assessed. It knew what the Commission's view on foreclosure was, but in its direct dealings with the Commission chose not to make submissions about it. For the purpose of the Whitbread decision, Inntrepreneur's trade association, the BLRA, had provided the Commission with information.

75. The second was that the Whitbread decision had been subjected to "lengthy and vigorous criticism" by counsel for Inntrepreneur, by the NERA report and by Dr. Yarrow in his evidence, and that Dr. Veljanovski had the opportunity to justify criticised passages, but had not always been able to do so. We were taken by Mr. Green (who argued the Community law aspects of Inntrepreneur's case) to several passages in the cross-examination of Dr. Veljanovski which demonstrated the limits of his evidence insofar as it was intended as a justification of the Commission's decision. He accepted that he could not reconcile some of the passages in the Whitbread decision. The judge said that he had received a large body of evidence on the basis of which he felt that he did have enough material on which to come to a conclusion. That conclusion was that in 1991 and subsequently the relevant United Kingdom market was not foreclosed to the extent that it would have had to be for Delimitis condition 1 to be satisfied, and that the decision which the Commission reached about this in the Whitbread case was wrong. The judge referred with approval to several of the witnesses of fact called by Inntrepreneur and to the evidence of the experts. He commented adversely on the fact that, for example, no one from the giant American corporation, Anheuser Busch, which brews Budweiser beer, had given evidence before him although Dr. Veljanovski had relied on what Anheuser Busch is reported in a report of January 2001 to have said to the Competition Commission (the successor to the MMC). Similarly, the judge appeared to give greater weight to what Mr. Dinesen had said in his oral evidence than what his company, Carlsberg, had said to the MMC.

76. We are left profoundly uneasy by the judge's approach to the evidence. It is apparent from what the ECJ said in Delimitis that a comprehensive investigation and evaluation of a complex economic situation needs to be conducted before it can be determined whether or not Delimitis condition 1 is or is not satisfied. The judge rightly acknowledged (in para. 159) that he could not possibly embark on a detailed research investigation himself and that to do so would be inconsistent with the role of a judge in civil litigation in this jurisdiction. That is why such investigations have been entrusted to bodies such as the Commission, the MMC or Competition Commission and the OFT. The conclusions reached by such bodies involve assessments of matters on which experts can reasonably differ. For an English judge trained in the adversarial system, the impression made by a good witness is very likely to outweigh the evidence contained in a document to which no witness before the judge can speak with direct knowledge. Dr. Veljanovsky, for example, could not speak for the Commission in respect of the Whitbread decision: he was never a party to the Commission's reasoning nor aware of the full range of the material which it had, apart from what was revealed in the decision. Much material which it receives is commercially sensitive and confidential. It is apparent that Mr. Crehan was frustrated in the attempts which he made to obtain evidence by the issue of witness summonses. The result is that a judge, embarking on the exercise which Park J. did, perforce makes his assessment on the evidence which the parties choose or are able to put before him, and inevitably does so on material less comprehensive and contemporaneous than that which was available to the Commission carrying out its own exhaustive investigation years earlier. We will come shortly to how far such an exercise conforms with Community law.

77. The third reason given by the judge was that the Commission by its letter of 24 November 1997 had said that the English court could determine whether Art. 81 (1) applied, and that came after the notice under Art. 19 (3) of Reg. 17 in the Whitbread case which was given

on the footing that Art. 81 (1) applied and Delimitis condition 1 was satisfied. However, the judge did not refer to the comments which the Commission made in the letter (cited in para. 38 above) on what the English court could take into account and "the legal guidance" as to the applicability of Art. 81 (1). It is clear to us that the Commission expected the English court to follow its view, implicit in the Art. 19 (3) notices, that Art. 81 (1) applied. Moreover, by the time the judge gave his decision, Inntrepreneur had failed to persuade the Commission on the RetailLink notification that Art. 81 (1) was inapplicable. Whilst the comfort letter of 24 January 2000 only related to the period from 1 January 1997, Inntrepreneur was informed in it of the Commission's view that for that period Art. 81 (1) did apply, and it has not been suggested to us that if the market was foreclosed on 1 January 1997 it was not foreclosed in 1991.

78. It is a striking feature of this case that, as Inntrepreneur very properly accepts, if the judge were right, the Commission has been consistently wrong for many years in its view of the foreclosure of the United Kingdom market. That view had been expressed not only in the decisions and Art. 19 (3) notices and comfort letter to which we have referred but in other cases as well. The Commission in its XXIX[th] Report on Competition Policy 1999 described its decisions in Whitbread, Bass and Scottish & Newcastle as taken after "an exhaustive examination by the Commission departments".

79. By Art. 10 of the EC Treaty:

"Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.

They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

This is the foundation of what is known as the principle of sincere cooperation, being a principle involving obligations and duties of mutual assistance both for the member states and their national courts and for the Community institutions such as the Commission.

80. An objective of the Treaty is the implementation of Art. 3(1)(g) providing for the establishment of a system ensuring that competition in the common market is not distorted.

81. In a Commission Notice on cooperation between national courts and the Commission in applying Arts. 81 and 82 (OJ 1993 C39/6), the Commission described its functions and those of the national courts respectively in this way:

"4. The Commission is the administrative authority responsible for the implementation and for the thrust of competition policy in the Community and for this purpose how to act in the public interest. National courts, on the other hand, have the task of safeguarding the subjective rights of private individuals in their relations with one another."

82. In paras. 17-19 of the Commission Notice the Commission referred to the fact that Arts. 81 (1) and 82 have direct effect and that thereby national courts have power to determine whether Art. 81 (1) applies, but it referred to what the ECJ said in Delimitis about the risk of inconsistency between decisions of the national courts and of the Commission ([1991] ECR I – 935 para. 47:

"Such conflicting decisions would be contrary to the principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission."

We would add the comment that a fortiori conflict between decisions of the national courts and a decision already given by the Commission must be avoided.

83. In para. 20 of the Commission Notice the Commission said that before the national court answers the question whether Art. 81 (1) applies, it should ascertain whether the relevant agreement has already been the subject of a decision, opinion or other official statement issued by the Commission. It continued:

"Such statements provide national courts with significant information for reaching a judgment, even if they are not formally bound by them."

It further said in para. 21 that if the Commission has not reached an agreement, the national courts can always be guided, in interpreting the Community law in question, by the case-law of the ECJ and the existing decisions of the Commission.

84. It is not open to a national court to find that a decision of the Commission is invalid. That can only be done by the Community courts (Foto-Frost v Hauptzollamt Lübeck-Ort [1987] ECR 4199).

85. The English courts have duly recognised the importance of according due deference to Commission decisions.

86. In Hasselblad (GB) Ltd. v Orbinson [1985] 1 QB 475 Sir John Donaldson M.R. said at p. 504:

"it cannot be right that the national courts and Community institutions shall both independently weigh the force of particular evidence with the possibility of inconsistent results."

87. In MTV Europe v BMG Records (UK) Ltd. [1997] EuLR 100 at p. 105 Sir Thomas Bingham M.R. referred to "the extreme undesirability of inconsistent decisions as between the Commission, on one side, and national courts on the other", adding "It is not hard to understand the undesirability of such inconsistency which undermines legal authority, leaving parties in doubt as to where they stand, and infringes the integrity of the Community legal order."

88. Similarly, in Iberian UK Ltd. v BPB Industries plc [1997] EuLR 1 Laddie J. (at p. 16) said:

"The necessity of avoiding conflicting decisions between the Commission and national courts is a theme which runs through a number of European and English domestic cases, as I will set out below. It is an objective which makes obvious sense. The European Union is intended to be a cohesive economic unit. It would interfere with that cohesiveness if a finding by the specialist competition authority of the Community that there had been an abuse of dominant position was undermined by decisions of national courts, some of which came to the same conclusion and others of which came to the opposite conclusion."

89. An example of the ECJ's attitude to the duty of sincere cooperation and of its insistence on the primacy of the Commission's role is provided by the ECJ's decision in Masterfoods Ltd. v HB Ice Cream [2001] 4 CMLR 14. This was a reference by the Irish Supreme Court to which Masterfoods had appealed against the decisions in 1992 of the Irish High Court. The High Court had dismissed a claim by Masterfoods that HB, by agreements with the retailers of ice cream in Ireland whereby HB provided freezers free of charge but subject to an exclusivity clause, infringed Arts. 81 and 82. The High Court, on a separate claim by HB, had also granted HB a permanent injunction restraining Masterfoods from inducing retailers to break the exclusivity clause. In 1991 Masterfoods lodged a complaint with the Commission. The Commission in 1993 in a Statement of Objections stated that HB's distribution system infringed Arts. 81 and 82, but, following notification by HB of proposed alterations of that system, which were implemented in 1995, the Commission issued an Art. 19 (3) notice in 1995 that it intended to grant an exemption under Art. 81 (3). However, in 1998 the Commission issued a decision that Arts. 81 and 82 were contravened and rejected the request for an exemption. HB sought the annulment of that decision before the CFI. Pending the CFI's decision, the Supreme Court referred questions to the ECJ as to what the duty of sincere cooperation required of it in the circumstances. Despite the fact that the Irish proceedings were concerned with HB's distribution arrangements prior to 1992 whereas the

Commission's decision was concerned with the altered distribution arrangements, the ECJ held that the duty of sincere cooperation required the Supreme Court to stay its own proceedings pending final judgment in the action for annulment (unless it considered a reference on the validity of the Commission decision was warranted).

90. It was argued by Mr. Vaughan that a clear analogy may be drawn between Masterfoods and Mr. Crehan's case. He relied in particular on the comfort letter of 24 January 2000 and the statement in it that the lease contained restrictions of competition falling within the prohibition contained in Art. 81 (1) for the period from 1 January 1997 to 28 March 1998, with its implication that the same applied in the period prior to that period.

91. Mr. Green however pointed out that Masterfoods was a case where there were the same parties, the same agreement under scrutiny and concurrent proceedings in the Irish courts and in Luxembourg, whereas in Mr. Crehan's case there are no proceedings before the Commission or the CFI or the ECJ and the Commission and the ECJ have expressly left it to the English court to determine whether Art. 81 (1) was contravened. Mr. Green submitted that there was therefore no conflict between Park J.'s decision and the decision of the Commission, and that the principle of Masterfoods had no application here.

92. We accept that Masterfoods can be distinguished on its facts. Nevertheless, it is a useful illustration of the application of the principle of sincere cooperation to circumstances where what the Irish courts were considering and what the Commission and the CFI were considering were not identical. Further, as Mr. Green conceded, what Park J. decided was inconsistent with what the Commission decided.

93. On a reference to the ECJ in H. J. Banks & Co. Ltd. v British Coal Corp. [1994] 5 CMLR 30 Advocate-General Van Gerven considered the relevance for the national court of a decision taken by the Commission in a similar competition matter. Although dealing with a competition matter arising under the European Coal and Steel Community Treaty he assimilated the principles applicable under that Treaty with those applicable under Art. 81 and 82. He referred to what had been said in Delimitis about the role of the Commission as responsible for the implementation and orientation of Community competition policy and the need for national courts to avoid decisions conflicting with those taken by the Commission. Under the heading "To what extent are findings of fact and/or of law in a Commission declaration binding on the national court?" the Advocate-General said of notices given in an administrative letter or even through formal negative clearance that they do not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with Art. 81, from reaching a different finding as regards the agreements concerned on the basis of the information available to them. However the opinion expressed in such notices constituted a factor which the national courts may take into account. The Advocate-General said that where by decision the Commission established a breach of Art. 81, whilst the decision is binding only on those to whom it is addressed, it carried greater significance than those notices. He referred to the principle established in Foto-Frost and said that the duty of sincere cooperation imposed the obligation on the national court to mitigate as far as possible in the interests of the Community the risk of a conflicting ruling. He said (at p. 88):

"60 …. As a body which supervises compliance with the Community rules of competition and has specialised departments for that purpose, the Commission has many years of experience with the result that its findings carry a degree of authority, although such authority is not binding. However, it is self-evident that no obstacles may be placed in the path of third parties seeking to challenge before the national court findings which the Commission has arrived at in a decision of that kind.

61 If, on the basis of the parties' arguments, the national court comes to the conclusion that the issues of fact and/or law decided by the Commission are incorrect or insufficient, or if at any rate it has serious doubts in that regard, then in the light of the Delimitis judgment it must take the following course of action: in the case of findings which carried no weight in the final decision and do not therefore underlie the reasoning of the Commission, the national court is at liberty to adopt a different interpretation: in those circumstances the

risk of conflicting decisions and the resultant impairment of the principle of legal certainty is extremely small. On the other hand, in the case of findings which have an influence on the final decision arrived at by the Commission, the national court is well advised, in accordance with the provisions of its national procedural law, to suspend the proceedings in the case and to seek the necessary information from the Commission or make a direct reference to the court for a preliminary ruling concerning the validity of the decision in question or the interpretation of the relevant Community competition rules."

94. The ECJ did not comment on the Advocate-General's observations.

95. It is not in dispute that the judge was bound to take account of the various decisions of the Commission relevant to the question whether Art. 81 (1) applied in Mr. Crehan's case and give great weight to the Commission's conclusions. The question is whether the judge was wrong not to have gone further.

96. Mr. Vaughan submitted that there are three possible degrees of deference which should be accorded by the national court to the Commission under the duty of sincere cooperation. The first is absolute deference, in circumstances where the national court is under an obligation to ensure that its judgment is totally consistent with the relevant Commission decision, subject only to the option to refer the question of the validity of the decision to the ECJ under Art. 234 of the Treaty. The second, he said, is very great deference, in circumstances where the duty of sincere cooperation requires the court to defer entirely to findings of the Commission which apply to the agreement before the court, again subject to the possibility of a reference, but where a party can properly adduce evidence to distinguish the facts of his case from those found by the Commission. However, in such a case, Mr. Vaughan said, the national court should not examine whether the Commission's determination was wrong. Mr. Vaughan's third category was where the national court must only accord deference to the Commission, in circumstances where a Commission decision is only indirectly relevant to the issue before the national court or where the view of the Commission is expressed only informally.

97. We do not need to discuss whether or not such degrees of deference are correctly categorised and defined. In our judgment, in the present case the English court was obliged under the duty of sincere cooperation to give to the Commission much greater deference than that which the judge, with all respect to him, was prepared to give. We accept that the Commission and the ECJ left it to the English court to determine whether the application, made by this court on making the reference, that the beer tie in the Inntrepreneur lease contravened Art. 81 (1) was correct. However, it is apparent from what the Commission said in the letter of 24 November 1997 to Charles Russell & Co., that it expected the English court to take into account its earlier conclusions not only in respect of Inntrepreneur but also in cases such as Whitbread, even though not final decisions. The fact that it was considered unnecessary and therefore undesirable for the Commission itself formally to give the decision as to whether Art. 81 (1) applied when the English court was in a position to give the decision and to award compensation (which the Commission could not do) did not leave the judge free to reconsider the Commission's earlier conclusions afresh. Still less was the judge free so to do in 2003, by which time the Whitbread, Bass and Scottish & Newcastle decisions with its conclusions, central to those decisions, on the foreclosure of the relevant market had been published and the comfort letter of 24 January 2000 relating to RetailLink had been issued. We accept that it is a ready inference from that letter that in the Commission's view Art. 81 (1) applied to the Inntrepreneur leases throughout the period relevant to Mr. Crehan's case.

98. Inntrepreneur in its evidence and submissions to the judge did not attempt to distinguish the present case from Whitbread and the other decisions of the Commission going to the applicability of Art. 81 (1) to the relevant market. Instead it attacked those decisions as "fundamentally flawed". 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 that 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 to be 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. The judge's decision offended against the principle of legal certainty in the Community. In our opinion the judge failed to comply with the duty of sincere cooperation and thereby erred in law.

99. We would add that in any event we are not persuaded that the Commission did make the egregious errors which Inntrepreneur persuaded the judge that the Commission made in its Whitbread decision. We intend no disrespect to the careful and detailed rival arguments of Mr. Brealey and Mr. Green when we confine ourselves to one example of an error found by the judge to be of particular importance.

100. That example relates to the restrictive effect of loan ties. The Commission in its Whitbread decision had attempted faithfully to follow the guidance in Delimitis, step by step. It sought to ascertain whether it was difficult for competitors to gain access to the national market, and examined that question in the economic and legal context of the relevant beer tie. It considered the cumulative effect of similar agreements to the relevant agreement containing the beer tie and whether the network of agreements impeded access to the market. It took into account loan ties in this context in concluding that the bundle of tying agreements of the United Kingdom brewers had since 1990 had a considerable restrictive effect on the opportunities for gaining access to the on-trade beer market.

101. That was a conclusion similar to that reached by the MMC in its 1989 report on "The Supply of Beer", the MMC referring (in para. 2.6.3 of its report) to the existence of loan ties creating "a degree of stickiness in the market". It recognised that loan ties were not in general as restrictive as a beer tie in a tenancy agreement, but said that they did have the effect for the period they existed of restricting the ability of the outlet to purchase types of beer except from the brewer making the loan. It concluded in para. 12.81 that the extent of the supply of beer under loan ties distorted the entry of new suppliers and restricted and prevented smaller established brewers from expanding their free trade sales and that prevention and restriction of competition was against the public interest.

102. Similarly in another 1989 report on the proposed merger between Elders and Scottish & Newcastle the MMC reported that many outlets, not managed or leased (with beer ties) by brewers were tied by loan ties which restricted the ability of third parties to supply the outlets. It recognised that competing brewers might win previously loan-tied business from others, but said (in para. 2.32 of its report) that the loan tie did, for its duration, restrict the ability of other brewers or wholesalers to supply an outlet.

103. The MMC's recommendation that loan ties be abolished was not adopted by the Government, which, as we have noted in para. 14 above, provided by the LTO that loan ties should be terminable on 3 months' notice. However, the Government recognised that loan ties continued to have a restrictive effect because by Art. 7 of the TEO large brewers were required to give a party to a loan tie, otherwise precluded from purchasing beer from whomsoever he chose, the right to obtain a guest beer.

104. Despite the Beer Orders, the effect of loan ties on competition continued to trouble the MMC. In October 1990 in its report on the "pubs for breweries swap" (see para. 15 above) the MMC concluded that the LTO would make little practical difference to the trade in loan ties and to the brewers' competitive position. In July 1992 the MMC in its report on the proposed merger between Allied-Lyons and Carlsberg noted that despite the release from tie of some 12,000 pubs, the national brewers continued to have substantial purchases tied to them through loan ties, which were increasing, and the development of long-term supply contracts with pub chains. The MMC referred to the effect of the ability to terminate a loan tie on 3 months' notice and said that long-term ties had increased so that in 1991 they represented 27% of the national brewers' sales to the on-trade compared with 24% in 1989. It pointed out that national brewers, with their greater financial strength and portfolios of strong brands, were much better placed to compete for loan tie business. It referred to Carlsberg's evidence to the MMC that because of the narrowness of its portfolio it could not

economically bid for loan tied business and that this was one reason why it was unable to increase its sales to the free on-trade. It said that the existence of loan tie arrangements on a substantial on-going scale still represented a restriction on the ability of smaller brewers and wholesalers to compete in the free on-trade. It concluded (in para. 8.77 of its report) that loan ties and long-term supply arrangements had anti-competitive features in that, at least in the short term, they foreclosed or sharply reduced the availability of the particular outlets business to competing suppliers.

105. Finally, in June 1997 in its report on the proposed merger between Bass and Carlsberg, the MMC rejected the argument of Bass (advised by Professor Yarrow) that loan ties had no restrictive effect because of the 3-months termination provision. It acknowledged that, since the Beer Orders, untying did increase the overall level of competition at the wholesale level but not by as much as initially was thought because of the effect of loan ties and long-term supply agreements.

106. The Commission's view of loan ties, as expressed in the Whitbread decision, accorded with that of the MMC. Its investigation had involved an examination of loan ties and their economic effect in relation to beer sales. It specifically considered loan ties in paras. 110-115 of that decision and had regard to the argument that since the Beer Orders such ties, being terminable on three months' notice, should no longer be regarded as hindering any opportunities for access. It accepted that independent access to the loan tied outlets was not always excluded, but it said that the possibility for other brewers to reach the final consumer directly in competitive conditions was limited. It also accepted that the average duration of four years indicated that the contractual relationship was not temporary and that a new competitor needed to offer the tied retailer the finance to pay the existing loan, probably by a new loan tie. It also said that such entry into loan tie premises only makes sense for a brewer offering all or most types of beer typically offered by a pub retailer to the public.

107. We can well understand the attraction to the judge of Professor Yarrow's view that any agreement with a three months termination clause with no redemption penalty could not be thought in economic terms to have any foreclosing effect. To put it at its lowest, that is a tenable view. However, we cannot accept that that entitled the judge to reject as wrong the contrary view of the Commission, supported as it was by the MMC. That accords no deference at all to the Commission which had considered loan ties, as required by Delimitis, in their economic and legal context in concluding that they made it more difficult for a competitor to enter the market or increase his market share. The Commission's findings on loan ties did have an important influence on its decision in the Whitbread case.

108. The judge also was of the opinion that the Commission's view in the Whitbread decision that loan ties which were terminable at three months' notice could have foreclosing effects could not stand with the decision of the ECJ in Neste Markkinointi Oy v Yötuuli Ky [2001] 4 CMLR 993.

109. In Neste the ECJ considered a reference from a Finnish court concerning a petrol station agreement under which the operator of the station agreed to take fuel from a single supplier. The agreement was for 10 years and thereafter the operator could terminate the agreement by giving a year's notice. Neste acquired the supplier and after the 10-year period had expired the operator stopped purchasing fuel from Neste without giving the one-year notice. Neste recovered possession of the station and sought compensation. The operator contended that the exclusive purchasing obligation was void. The Finnish court sought a ruling from the ECJ as to whether the agreement was void on the basis of Delimitis condition 2. The Finnish court proceeded on the assumption that the whole network of Neste's exclusive purchasing agreements together with other similar networks foreclosed the Finnish market. However, although Neste had agreements covering about a third of the stations in Finland, only 27 (or less than 5%) of Neste's agreements contained a provision for a one-year notice of termination. The ECJ noted (in para. 21) that an exclusive purchasing agreement for fuel differs from an exclusive purchasing agreement for other products such as beer or ice cream in that only one brand of fuel is sold in a petrol station and said (in para. 22) that consequently duration rather than the exclusivity clause was the

decisive factor in the market-sealing affect. It also noted (in para. 34) another feature pertaining to petrol station agreements and which supported a notice period of a year as reasonably protecting the interests of both parties and limiting the restrictive effect of the contract on competition in the relevant market. It held (para. 36) that in those circumstances, when the contracts which might be terminated on one year's notice represented only a very small proportion of all the exclusive purchasing agreements entered into by a supplier, they made no significant contribution to the cumulative effect and so were not within Art. 81 (1).

110. Mr. Green drew our attention to the remarks of Advocate-General Fennelly at para. 34 of his opinion in Neste:

"A relatively short notice period in certain retail markets, like those for ice cream and beer where there is far greater product differentiation than in the retail petroleum-fuels supply market, could still contribute to a not insignificant degree to an overall tying-in effect flowing from a major supplier's network of agreements. However, if, at the time a dispute arises, the agreements in question give resellers a virtually unrestricted opportunity, without being subject to penalties on existing loans or any other disguised termination disincentives, to switch suppliers, it is difficult to conceive of any adverse effect on competition on the relevant market flowing from them."

111. However the Advocate-General was not examining an exclusive purchasing agreement relating to ice-cream or beer in its proper economic context. We have difficulty in seeing why so fact-specific a decision relating to the particular circumstances of exclusive purchasing agreements between a petrol station operator and a supplier must be taken to overrule the decision of the Commission in Whitbread. Each agreement's effects must be assessed in the economic and legal context in which the agreement occurs, as the ECJ said in para. 25, and the difference between the agreement in Neste and an exclusive purchasing agreement for beer was expressly noted. The fact that duration (in terms of the notice period for termination of the agreement) was the decisive factor in Neste cannot make it the decisive factor in every other case, as that would be inconsistent with the guidance in Delimitis. Further, in other cases involving exclusive purchasing agreements (of ice cream) a short notice period for termination has been held not to prevent the restriction of competition nor to constitute the relevant duration which must be considered pursuant to Delimitis. In Langnese-Iglo v Commission [1995] ECR II - 1533, in which the agreements could be terminated on 6 months' notice, the CFI held that, having regard to the economic and legal context and "the effective duration of the contractual agreements, which is around 2 ½ years", the agreements fell within Art. 81 (1). So too in Masterfoods Advocate-General Cosmas did not agree with the argument that because retailers could terminate the agreements at will, the agreements fell outside Art. 81 (1). He said (in para. 82) that one should look at the actual duration of the agreements.

112. We conclude, in respectful disagreement with the judge, that he was wrong to say that the Commission's view in Whitbread on the effect of the termination provision could not stand with Neste. For the reasons we have given we hold that Delimitis condition 1 is satisfied.

(2) Delimitis condition 2

113. In Delimitis the ECJ said (in para. 24 of the judgment) that if the first condition is satisfied, it is necessary to assess the extent to which the relevant agreement contributed to the cumulative effect produced by the totality of the similar contracts found on that market. As the judge rightly stated in para. 199 of his judgment, the second condition has to be applied, not by reference to one individual agreement, but by reference to the particular network of tying agreements to which the individual agreement belongs.

114. The judge gave two indications of tentative views pointing in different directions. One was that having regard to a notice, commonly referred to as a de minimis notice, published by the Commission in December 2001, he would have thought that the Inntrepreneur tied sales from November 1992 onwards were not large enough to make a significant contribution to such level of market foreclosure as may have existed (para. 204). The other was that if all

the tied networks collectively did foreclose the market to a sufficient degree to satisfy Delimitis condition 1, it would be curious, though not impossible, if the Inntrepreneur tied estate, being the largest in the country both before and after 1992, did not make a significant contribution to that effect.

115. The de minimis notice published on 22 December 2001 had been preceded by notices published on 3 September 1986 and 9 December 1997. In the 1986 notice the Commission indicated that it held the view that agreements between undertakings engaged in the production or distribution of goods "generally" did not fall under the prohibition of Art. 81 (1) if the goods the subject of the agreements did not represent more than 5% of the total market for such goods. In the 1997 notice the guideline figure for vertical agreements (between undertakings operating at different economic levels) was 10%, but in the 2001 notice a market share not exceeding 5% was "in general" not considered to contribute significantly to a cumulative foreclosure.

116. In our judgment the judge was wrong insofar as he indicated that Delimitis condition 2 would not be satisfied. Again, in our judgment, the judge did not give due deference to Commission decisions. In the Whitbread, Bass and Scottish & Newcastle decisions the Commission had found that smaller tied estates had made a significant contribution to the foreclosure. A fortiori the Inntrepreneur tied estate must have satisfied that test.

117. Further, the de minimis notices provide only general guidelines for all economic activities and do not prevent the Commission from taking the view that in a particular sector of the economy a share smaller than the guideline figure will be sufficient to satisfy Delimitis condition 2 provided that the other matters which Delimitis requires to be taken into consideration support that view. In Delimitis, the ECJ stated in para. 26 of the judgment:

"A brewery with a relatively small market share which ties its sales outlets for many years may make as significant a contribution to a sealing-off of the market as a brewery in a relatively strong market position which regularly releases sales outlets at shorter intervals."

118. Further, as Mr. Brealey pointed out, the market shares by volume and by number of tied pubs, were consistently around the 5% mark and in 1991 were higher. In 1991 Inntrepreneur had 7,355 tied pubs. In July 1993 Inntrepreneur had 4,331 tied pubs representing about 4% of the total outlets in the United Kingdom and 5% of the total market for beer through such outlets. But if the tied houses and beer sales of GM, as the joint owner of Inntrepreneur, are taken into account (see para. 25 of the ECJ's judgment in Delimitis), those figures are increased by a further 2%. On 31 December 1993 Inntrepreneur had 4,652 tied pubs, and in January 1995 it had 4,326 on-licenced premises representing 5% of such outlets in the United Kingdom and 5% of the beer sold through such outlets.

119. In our judgment therefore Delimitis condition 2 was satisfied.

(3) Does the Block Exemption apply?

120. As we have decided that the judge should have held that Inntrepreneur's beer tie fell foul of Art. 81 (1), his decision that it could not bring itself within the Block Exemption becomes crucial. By its Respondent's Notice Inntrepreneur says that the judge was wrong: the exclusive purchasing and non-competition obligations imposed upon Mr Crehan fell within the exemption and so Art. 81 (3) made Art. 81 (1) inapplicable.

121. We have set out Arts. 6 and 7 of the Block Exemption in paras. 7 and 8 and summarised the obligations assumed by Mr Crehan in para. 21. More specifically the exclusive purchasing obligation required him to:

"purchase from the Company or its Nominees and from no other person, firm or company all such Specified Beers as he shall require for sale in the premises…." (1st Schedule Clause 2 (1)).

The "Company" was Inntrepreneur and "Nominees" were defined as Courage "and/or such person, firm or company as the Company may from time to time specify to the lessee". "Specified Beers" were defined as:

"beers of the types set out in Part A of the Appendix hereto… which are represented by the brands or denominations of beer stated in the Company's Price List last issued before the date of the agreement…"

Part A was headed "Types of beer specified in this lease" and did indeed refer to beer by type (e.g. light, pale or bitter ale) rather than by brand. By Clause 2 (2) the Company or its Nominees could add to, substitute or delete any brand or denomination representing the types of beer set out in Part A. The non-competition obligation required Mr. Crehan not to bring on to the premises for any purpose "any Specified beer which is not supplied by the Company or its Nominees".

122. As we have already said, the Commission maintained from the outset that Inntrepreneur could not bring itself within the Block Exemption. This was because it believed that Art. 6 only applied to ties by brand and not to ties by type. In its Whitbread decision it explained:

"The standard leases provide for a specification of the beer tied by type which allows Whitbread to add to, delete or substitute the brands of beer that it supplies to the lessees by amending the contents of its price list from time to time for specified beers. The specification of the beer tied by type thus allowed Whitbread unilaterally to extend the scope of the exclusive purchasing obligation and therefore does not fulfil the conditions of Article 6, which require a specification by brand or denomination." (Para. 148)

The judge however was faced with conflicting European and English Court of Appeal decisions on this point to which we must now refer.

123. First the point arose in Delimitis itself. In that case, as the questions for the court show (B(1)), the drinks subject to the exclusive purchasing obligation were not listed in the agreement which simply said that they would be "as set out in the brewery's price list as amended from time to time". Of this the ECJ said:

"36 It is clear from Article 6 (1) … that the exclusive purchasing obligation on the part of the re-seller relates solely to certain beers or to certain beers and drinks specified in the agreement. The purpose of requiring that they be so specified is to prevent the supplier from unilaterally extending the scope of the exclusive purchasing obligations. A beer supply agreement which refers, as regards the products covered by the exclusive purchasing agreement, to a list of products which may be unilaterally altered by the supplier does not satisfy that requirement and thus does not enjoy the protection of Article 6 (1)."

The judge said he had some difficulty in understanding why Delimitis was not determinative of this case. He assumed it was not because the Court of Appeal had not suggested and neither party had contended that it was. We think it was not determinative for the simple reason that the agreement in that case made no attempt to specify the beer to which the tie related. The products could be varied by the brewer at will without the lessee's consent. In this case Part A of the Appendix could only be varied by agreement with the lessee.

124. The other two European decisions were judgments of the CFI published on 21 March 2002. Both cases were decided by the same court and raised much the same issues. In the first case, Shaw v Commission, two Whitbread lessees applied to annul the Commission's Whitbread decision. In that decision one of the Commission's reasons for granting an individual exemption was that, although the Whitbread leases did not fall within the Block Exemption, a tie by type was a more practical way of operating exclusive beer arrangements than a tie by brand. The lessee said that this was wrong and that the tie by type greatly enhanced foreclosure. In rejecting these arguments the court said that Art. 6:

"… relates solely to certain beers or to certain beers and drinks specified in the agreement… It thus does not relate to beers of the same type, but only to brands of beer other than those specified in the agreement. It is thus conceivable that a tied lessee may obtain beers of the same type as the brands specified in the agreement from third party undertakings, who may thus have access to the market via tied lessees. That possibility is purely theoretical, however. Article 7 (1) (a) expressly permits the supplier to impose on the re-seller the obligation not to sell beers and other drinks supplied by other undertakings which are of the same type as the beers or other drinks supplied under the agreement in the premises designated in the agreement." (para.48)

125. In the second case, Joynson v Commission [2002] ECR II - 2085 the lessee applied to annul the Commission's decision to grant individual exemption to Bass. His grounds for doing so were much the same as those in the Shaw case. Again the court said that the Bass leases did not fall within the Block Exemption because the exclusive purchasing obligation was by type, not by brand. However such a clause constituted a more effective way of implementing the exclusive purchasing arrangements for beer in the United Kingdom and made it possible to preserve access to the market better than the tie by brand. The court said:

"58 The principal ground for excluding beer supply agreements containing a specification of the purchasing obligation by type of beer from benefiting from the Block Exemption thus required, in the present case, recourse to that clause. It follows that the Bass standard leases fail to comply with the conditions of [the Block Exemption] solely because of a purely technical matter which does not, however, prevent those agreements from complying with the spirit of that regulation.

59 In those circumstances the Commission was right to refer, in the context of the examination of the possibility of granting an individual exemption, to the framework of analysis provided by the regulation."

Mr. Joynson appealed the CFI's decision to the ECJ. On 10 December 2003 his appeal was dismissed on the grounds that it was manifestly inadmissible or unfounded, but the decision does not deal specifically with the tie by type issue.

126. The first Court of Appeal decision is Greenalls Management Ltd. v Canavan [1998] EuLR 507. The lease in that case contained a term by which in effect the parties purported to agree that the Block Exemption applied. The claimants sought to enforce its beer tie which was by type. The lessee contended among other things that the tie was not within the exemption. The appeal against the judge's grant of an injunction was dismissed. Millett L.J., with whom Judge L.J. agreed, said that it was not necessary to decide whether the tie was within the exemption because the defendant had not alleged a breach of Art. 81. He went on however to express a provisional view because the argument had been outlined to the court and the point might arise in other cases. He said (at p. 514):

"[A] close analysis of Arts 6, 7 and 8 … shows that it is only the type of beer or other drink which must be specified in the contract, and that these articles do not require the brand or trade mark to be so specified, so that the supplier is at liberty to add or vary the brands or trademarks to which the tie extends by amending his price list from time to time, although he may not extend the scope of the tie by adding further types of drinks. That is the submission which is made to us on behalf of the plaintiff, and I, for my part, find it convincing."

Staughton L.J. had reservations about this saying (at p. 515):

"I am not yet convinced that a supplier can unilaterally extend a list of commodities as to which the tenant is bound by the tie."

127. The next case is Gibbs Mew plc v Gemmell. Here the brewery claimed possession of a tied house. The tie was by type. The lessee claimed damages for breach of Art. 81 and a declaration that the Block Exemption was inapplicable to his lease. His appeal from the judge's order in favour of the brewery was dismissed. Peter Gibson L.J., with whom Mantell L.J. agreed, said that he agreed with the majority in Greenalls. At [1998] EuLR at p. 602 he

said:

"There is no express requirement in [the Block Exemption] that the specification required must be by brand or denomination. Article 7 (1) (a) refers to beers supplied under the agreement as of a type; the tenant may be precluded from selling beers of that type supplied by other undertakings. Thus, the comparison between the agreement beers and those which he may not sell is by reference to the type of beer. The same comparison is apparent in Article 7 (1) (b), and there appears to be an assumption that the agreement will identify beers by type. Article 7 (2) defining drinks of the same type by reference to "their composition appearance and taste", is consistent with the interpretation of *Gibbs Mew.* Article 8 (2) (b) requires the tenant to have the right to obtain from other undertakings non-beer drinks "of the same type" as those supplied under the agreement but which bear different trademarks. "Type" there cannot mean brand or denomination. The regulation, in short, does not point to the specification having to be by brand or denomination but is consistent with it having to be by type.

The present case differs from *Delimitis* in that in the lease itself are specified the types of beer and other drinks. The landlord cannot unilaterally enlarge the scope of the tie beyond those types. The landlord can change the brands or denominations on the price list, but unless it has freedom to do that, no brand or denomination could be added to or removed from the price list without a variation of the lease itself, requiring the tenants consent. That consideration seems to me to add practical force to the considerations based on the language of [the Block Exemption] which persuaded the majority in the *Greenalls* case."

Schiemann L.J. at p. 608 said he preferred to express no opinion on the Block Exemption.

128. The last Court of Appeal decision on this point was made on 27 May 1999 when questions in this case were referred to the ECJ (see paras. 43 and 44 above). In Byrne v Inntrepreneur, which was heard at the same time, the issue again arose as to whether the tie in an earlier Courage lease fell within the Block Exemption. At this time the court had only the Commission's decision in Whitbread to consider. It found some inconsistency in that decision, but said that it was bound by the previous decisions of this court in Greenalls and Gibbs Mew. Nothing in the Commission's decision altered this doctrine of precedent. Arts. 6, 7 and 8 appeared to represent a coherent whole and did not support the Commission's suggested requirement for the tie to be by brand or denomination (paras. 151 and 152).

129. So these were the authorities with which the judge was faced. He said they did not leave the matter in a satisfactory state. However he expressed his conclusion as follows:

"217 My understanding of section 3 of the European Communities Act 1972 (as amended) is that questions as to the meaning of any community instrument (like the Block Exemption) are questions of law and are to determined as such in accordance with the principles laid down by any relevant decision of the ECJ or the CFI. In my view I am obliged by the statute to apply the law as declared by the CFI in the two cases to which I have referred. That obligation overrides my normal duty to regard myself as bound by decisions of the Court of Appeal. Therefore, if Inntrepreneur needed the protection of the Block Exemption, my decision would be that it did not qualify for it because the Inntrepreneur beer ties were ties by type, and the meaning of the Block Exemption (as definitively determined by the Court of First Instance) is that such ties cannot come within the terms of the exemption."

130. Mr. Crehan had advanced two further reasons why the Block Exemption did not apply. Firstly he said that Art. 6.2 did not apply to the tripartite arrangement created by his agreement because the purchase obligation permitted Inntrepreneur and other brewers as well as Courage to be the supplier and was therefore not exclusive. The judge "narrowly" accepted this argument because the obligation was "too flexible and variable" to come within Art. 6.2.

131. Mr. Crehan's other point was that he had not in fact been accorded any special commercial or financial advantages in consideration for the tie. The judge rejected this point saying:

"221 …. I find it difficult to believe, that, in so far as the reference to special commercial and financial advantages requires a factual examination at all, the examination can be expected to be performed, not merely with hindsight, but also individually on a tenant by tenant basis. Taking the Inntrepreneur case as a whole and looking at it at the time when the leases, including the beer ties were being negotiated and entered into, the theory was that, although the lessees were tied, they would get something in return in the form of lower rents than they would have had to pay if they had not been tied. I am inclined to think that that would be sufficient to refute this particular ground on which Mr. Crehan seeks to argue that Inntrepreneur cannot bring itself within the Block Exemption, even though Mr. Crehan himself was an exception to the norm and did not pay lower rents than would have been charged to an untied tenant."

132. Mr. Green contends that the judge was wrong to follow the CFI decisions on the tie by type issue. They were only concerned with the challenge to the individual exemptions granted to Whitbread and Bass and did not directly involve any issue about the Block Exemption. No question of conflict therefore arises. Insofar as they expressed a view about the Block Exemption that view should be no more or less persuasive than a judgment of the High Court. The judge was not bound by such a judgment but was bound (as we are) by the judgments of the Court of Appeal.

133. Section 3 (1) of the European Communities Act 1972 (as amended) says:

"For the purposes of all legal proceedings any question as to the …. meaning or effect of any Community instrument shall be treated as a question of law and, be for determination as such in accordance with the principles laid down by and any relevant decision of the [ECJ] or any court attached thereto."

134. The CFI is a court attached to the ECJ. It has considered the meaning and effect of the Block Exemption as we have explained. The court did not have to decide whether the Block Exemption applied, but its analysis of the meaning and effect of Arts. 6 and 7 played an important part in the decision which it did have to make. We do not therefore think that this analysis can be ignored. In the words of the 1972 Act we must now determine the tie by type issue in accordance with the CFI's decisions. This court's earlier decisions were made at a time when there were only Commission decisions. The position has now changed. We do not think the doctrine of precedent trumps the clear language of the Act.

135. The CFI's view of the tie by type issue is clearly expressed and for the reasons we have given we think we are bound to follow it. We have however heard full argument on this issue and on the assumption that we are not, or not fully, bound by the decisions of the CFI we think we should state our own conclusions having regard to those decisions.

136. The purpose of the Block Exemption is to define categories of agreements in which the conditions prescribed by Art. 81 (3) may be considered to be fulfilled. There is no need to give its provisions a wide meaning and some reason for not doing so because in any case of doubt individual exemption can be sought and this gives the Commission the opportunity to consider the agreement in question. Recital (9) says that exemption should be reserved for agreements "which it can be assumed with sufficient certainty" satisfy Art. 81 (3).

137. The previous decisions of this court have not apparently focused on the difference in language between Arts. 6 and 7 or the fact that they relate to different types of obligation. The exempted exclusive purchase obligation referred to in Art. 6 (1) must relate to "certain beers". The Commission and the CFI have interpreted this to mean beers specified by brand or denomination. This is a perfectly possible construction and one which is supported by the fact that where types of beer are intended to be referred to the Block Exemption says so. Art. 6 does not refer to certain types of beer. Art. 7 refers to types of beer but this article applies to non-competition obligations which are treated as a different kind of obligation by the Block Exemption. There is no reason therefore why the words "certain beers" in Art. 6 (1) should have the same meaning as the words "beers of the same type" in Art. 7 (1). Accordingly we think the CFI's construction can be justified.

138. This construction can also be justified as a matter of policy. From the perspective of Art. 81 (3) it might be thought that an exclusive purchase obligation by type went too far to qualify for automatic exemption, particularly where, as here, the supplier was unilaterally entitled to add, substitute or delete any brand of the types of beer specified. Obligations expressed in this way might be beneficial in Art. 81 (3) terms and more practical, as the Commission found in the case of the Whitbread and Bass beer ties, but that is a matter for individual exemption to be considered on a case by case basis. An obligation to purchase beers identified by brand or denomination is potentially less restrictive and more certain than a tie by type and that was as far as the framers of the Block Exemption were prepared to go.

139. Our conclusion on the tie by type issue makes it unnecessary to consider the other two Block Exemption issues to which we have referred, but in view of the fact that this case may go further we should express our conclusions on those issues also.

140. Mr. Green argues that the judge misunderstood Art. 6 (2). He submits that the supplier does not have to be identified in the agreement and it does not matter who the supplier is or whether more than one supplier is identified. The purpose of Art. 6 (2) was to introduce a degree of flexibility. In practice Inntrepreneur was not a supplier when Courage was; when Inntrepreneur was supplying Art. 6 (1) applied.

141. We do not accept these submissions. In short, Art. 6 applies to exclusive purchase obligations. An obligation to purchase from the supplier, another undertaking which is not itself a supplier and/or such other person, firm or company as may be specified to the lessee is not an exclusive purchasing obligation. This is the effect of the agreement in this case where Mr. Crehan was obliged to purchase from Inntrepreneur, Courage and/or anyone else who Inntrepreneur might specify. Art. 6(1) closely confines the exemption to agreements to which only two undertakings are party and the re-seller is required to purchase from the supplier, an undertaking connected with the supplier or his distributor. Art. 6 (2) extends this exemption to a tripartite arrangement which is imposed on the re-seller in favour of "the supplier by another undertaking which is not the supplier". Under this agreement the obligation is imposed in favour of more than one potential supplier and by Inntrepreneur who is itself a potential supplier. Whilst this may be said to be a technical point, as we have already said the exemption is obviously framed so as to sanction restrictions which can generally be justified, but no more. The fact that in practice there would only be one supplier at a time is irrelevant. The court’s task is to determine the essential character of the clause in question to see whether it falls within the Block Exemption. This is an exercise which has to be undertaken objectively (see Crehan v Courage [1999] EuLR at p. 889 para.138).

142. For these reasons we agree with the judge’s conclusion that Mr. Crehan’s agreement does not fall within Art. 6 (2) of the Block Exemption.

143. Mr. Crehan contends that the judge should also have held that the Block Exemption did not apply because he had not been accorded any special commercial or financial advantages. Mr. Brealey submits the judge was wrong to consider the matter on the basis that "the theory" was that lessees would get something in return for the tie. He should have considered what they actually got. Mr. Crehan, as the judge found, was required to pay a free of tie rent. The judge also found that Inntrepreneur tenants did not receive most of the special or financial advantages which Whitbread and Bass tenants received (para. 220). This was why Inntrepreneur failed to obtain individual exemption for the period before 1 January 1997. Mr. Brealey also relies on what Staughton L.J. said in Greenalls ([1998] EuLR at p. 515):

"[I]t seems to me that there could, in theory, come a time during the currency of the lease when no special commercial or financial advantage accrues to the tenant by reason of the tie. There could, in theory, be a time when a market rent for a public house without a tie was no different from the market rent of the public house with a tie. That may seem unlikely: but improbable things do happen."

144. We think the judge was right to say that the question of special commercial and financial advantage was not to be judged with hindsight or individually on a tenant by tenant basis. Exemption is only required if the agreement falls foul of Art. 81 (1). That will only be the case if the Delimitis condition 1 is satisfied. Is the market foreclosed by all agreements of this type? If it is, and Delimitis condition 2 is satisfied, the question then is whether in the Inntrepreneur agreements of this type the tie is given "in consideration for according special commercial or financial advantages". This makes it clear that the matter must be judged at the time when the agreement is entered into. With respect to Staughton L.J. we cannot accept the notion that agreements can drift in and out of exemption depending upon market conditions at the time. The recitals to the Block Exemption indicate the type of advantages which accrue to the re-seller from such agreements. Relevant to the Inntrepreneur agreement would be: requirements met on a regular basis for the duration of the agreement (5); equipping the lessee with premises for conducting his business (13); easier to establish, modernise, maintain and operate premises for the sale and consumption of drinks (15). A lower rent in exchange for the tie would of course be a financial advantage, but the absence of such an advantage cannot be determinative. The recitals do not refer to rent at all. In any event the judge accepted that it was Inntrepreneur's policy to agree lower rents in exchange for the tie.

145. For these reasons we think the judge reached the right conclusion on this issue.

146. It follows that we uphold each of the judge's decisions on this part of the case. The Block Exemption did not apply to Mr. Crehan's agreement. Art. 81 (1) was therefore applicable and breached.

(4) <u>Abuse of process</u>

147. Mr. Vaughan submitted to this court, as he had to the judge, that it is an abuse of the process of the English court for Inntrepreneur, which had pursued its case before the Commission for 5 years with the aim of putting an end to domestic litigation, and which had withdrawn from the Commission process after 5 years in order to avoid an adverse decision, to reopen the entire issue before the national court. He said that the judge should not have allowed Inntrepreneur to argue, as it did, that <u>Delimitis</u> conditions 1 and 2 were not satisfied and that the Block Exemption applied. As we have decided issues (1), (2) and (3) in Mr. Crehan's favour, this issue is now of little importance and we will deal with it only briefly.

148. The judge in para. 16 of his judgment gave his detailed reasons for rejecting the argument. We would not go along with all of the judge's reasoning. For example, the judge said that had the Commission proceeded to an adverse formal decision Inntrepreneur would have appealed to the CFI and would have presented full evidence in support of the arguments that the beer ties were not caught by Art. 81 (1) and that the Block Exemption applied. That appears to rest on a misunderstanding of the function of the CFI in an action for annulment of a decision of the Commission, limited as that function is to a review of the decision. However, we are in no doubt that the judge was right in his conclusion that there was no abuse of process in Inntrepreneur's conduct. It was with the full concurrence of Mr. Crehan's solicitors that the English proceedings were not actively pursued while the matter was under consideration by the Commission. The Commission was entirely content that the English court should give the formal decision on foreclosure and the Block Exemption. Whilst we have held that the judge was wrong not to have given greater deference to the decisions of the Commission because of the duty of sincere cooperation, we are not persuaded that the process of the English court has in any way been abused by Inntrepreneur accepting the Commission's suggestion to withdraw the notification in circumstances in which Inntrepreneur was to obtain an individual exemption for RetailLink, and in seeking to defend in the English proceedings Mr. Crehan's claim that Art. 81 (1) was infringed by Inntrepreneur's beer tie, when there had been no formal decision binding on the parties and governing the point.

(5) <u>Does Mr. Crehan share responsibility with Inntrepreneur to such an extent that his claim could not succeed?</u>

149. As we have said, the judge decided that Mr. Crehan did not share responsibility with Inntrepreneur for any infringement of Art. 81. By its Respondent's Notice Inntrepreneur challenges this part of the judgment. Again, in view of our conclusions on issues (1) to (4) this issue becomes crucial to Inntrepreneur's defence.

150. In paras. 42 to 49 we have set out how this issue arose. In resolving it the judge said:

"225 Counsel for Inntrepreneur argue that Mr. Crehan was a voluntary participant in the transaction. He did not have to enter into the agreements for leases if he did not want to. That is true, but in my judgment it does not approach the sort of situation which the ECJ had in mind …. the beer tie provisions were in the leases of The Cock Inn and The Phoenix because Inntrepreneur put them in its standard form of lease. Inntrepreneur at the time was not willing to take the provisions out of the leases, and it was not willing to consider any variations to them in negotiations with a prospective lessee or his advisers. There was no equality of bargaining power between Mr. Crehan and Inntrepreneur. Indeed the ECJ effectively recognised as much in a passage where it refers with approval to an observation which had been made to it both by the Commission and by the United Kingdom Government …."

The judge then referred to para. 34 of the ECJ's judgment (see para. 48 above).

151. Mr. Green submits that the judge misunderstood the ECJ's decision. The court had not said, as the judge thought, that essentially a tenant could not be barred from a claim. In para. 34 of its decision the court had not been referring to foreclosure attributable to the tied networks of multiple suppliers, but to a single network of one supplier. It was only in the latter case that a party contracting with "the person controlling the network" could not bear significant responsibility for the breach. Mr. Green also submits that the judge overlooked Mr. Crehan's bargaining power. Inntrepreneur owned only a small fraction of the licensed premises in the U.K. Mr. Crehan did not have to enter into a tied lease. He could have bought a pub, leased a pub from a small brewer or without tie or managed a pub. Although the terms of the tie were not negotiable, the main economic components of the agreement were; in particular the rent, contribution to initial repairs and the minimum purchasing requirement.

152. We do not think that the judge misunderstood what the ECJ said. The court held that Art. 81 precludes a rule of national law under which a party to a contract liable to restrict or distort competition is barred from claiming damages on the sole ground that the claimant is a party to that contract (para. 36). This was the illegality defence which Inntrepreneur was running and which the ECJ rejected. In para. 34 of its judgment the court refers to the paragraphs in Delimitis where the court was considering not only the contracts of one supplier but the totality of similar contracts. The reference to the person controlling the network must be to any person who controls a sufficiently significant part of the network to satisfy Delimitis condition 2. For the purpose of resolving this issue the judge had to assume that Inntrepreneur was such person.

153. But the question for the judge did not turn on any subtle point of construction of what the ECJ said. The broad question of fact which he had to decide was whether it had been established that Mr. Crehan bore significant responsibility for the distortion of competition. The answer to that question was self-evidently: no. He was not of course compelled to enter into any agreement with Inntrepreneur. To that extent he had bargaining power. But he was dealing with the single largest tied house landlord in the United Kingdom who made it clear that the offending tying terms in their agreement were not negotiable. There was no equality of bargaining power in any real sense. Mr. Crehan was in a markedly weaker position than Inntrepreneur: if he wanted to lease the pubs he had to agree to the tie. In practice Inntrepreneur imposed the tie on him. Looking at the way in which the ECJ analysed the position in paras. 32, 33 and 34 of its judgment there was, we think, only one answer to the question, which was the answer the judge gave.

(6) Are the damages claimed by Mr. Crehan in respect of a type of loss against which he is protected by Art. 81?

154. The remaining issues are those of causation and damages. As the judge pointed out (para. 230), because of his decision that Delimitis condition 1 was not satisfied these issues, though they have become decisive in this court, were not critical to the result below. However, recognising that the case might go further by way of appeal the judge fully considered them. Despite observations to the effect that he was not going into the detail which in other circumstances he might have adopted (paras. 272 and 273), we do not accept Inntrepreneur's suggestion that the judge's approach was somewhat tentative. On each of these issues he arrived at fully reasoned conclusions in favour of Mr. Crehan, the damages he would have awarded being set out in para. 56 above.

155. In this court Inntrepreneur's argument on the issues of causation and damages has been presented by Mr. Milligan, who did not appear below. On issue (6), and in the forefront of his argument, Mr. Milligan has submitted that the question posed ought to be answered in the negative.

156. The starting-point of Mr. Milligan's argument is para. 29 of the judgment of the ECJ in Courage Ltd. v Crehan [2002] QB 507, at p. 522 (see para. 47 above), which holds that, subject to the principles of equivalence and effectiveness, it is for the national law to lay down the rules governing actions for safeguarding rights which individuals derive directly from Community law. In that regard it is established that a breach of the duty imposed by provisions such as Arts. 81 and 82 is categorised in English law as a breach of statutory duty, actionable as such by a private individual to whom loss or damage is caused by a breach of that duty (see Garden Cottage Foods Ltd. v Milk Marketing Board [1984] AC 130 at p. 141 per Lord Diplock). Equally, it is established that an individual who sues for a breach of statutory duty in English law 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 (see South Australia Asset Management Corporation v York Montague Ltd. [1997] AC 191 at p. 211 per Lord Hoffmann; Gorris v Scott (1874) LR 9 Exch. 125). Mr. Milligan also relied on the decision of the US Supreme Court in Brunswick Corporation v Pueblo Bowl-O-Mat, Inc. (1977) 97 S.Ct. 690, a case concerning the interrelationship of the anti-merger and private damages action provisions of the Clayton Act. In delivering the judgment of the Court, Marshall J said, at p. 697:

"And it is quite clear that if respondents were injured, it was not 'by reason of anything forbidden in the antitrust laws': while respondents' loss occurred 'by reason of' the unlawful acquisitions, it did not occur 'by reason of" that which made the acquisitions unlawful.

We therefore hold that [for] the plaintiffs to recover treble damages … they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

157. Mr. Milligan submitted that, if the principle of those authorities is applied to the present case, Mr. Crehan can only claim damages for the type of loss against which he would be protected by Art. 81(1), that is to say for loss caused by distortion at the distribution level. He submitted, correctly, that Mr. Crehan has neither pleaded nor proved such a loss. This was recognised by Park J., who, at para. 144, said:

"Article 81 is about distortions of competition, but it is not about the particular kind of distortion which Mr. Crehan says affected him personally. Mr. Crehan says that the beer tie distorted competition between himself and other pubs which were free of tie, especially The Angel. It may have done that, but the distortion which Mr. Crehan needs to show as the first stage in his claim for damages under Art. 81 is distortion at a different place in the market altogether. He needs to show that the beer ties, taken together with other networks which also contained tying provisions, distorted competition between, on the one hand, aspiring entrants into the market for distributing beer to on-trade outlets and, on the other hand, incumbents already established in that market."

Up to that point Mr. Milligan accepted the judge's analysis. But he continued:

"Of course, if he can establish the initial proposition that the beer tie was illegal by reason of Art.81, the case moves to the next stage: did the illegality cause the loss for which Mr. Crehan seeks redress?"

That, said Mr. Milligan, was a fundamental error. Relying on the formulation adopted by the U.S. Supreme Court in the Brunswick Corporation case, he submitted that it was not enough for Mr. Crehan to prove that the loss he had suffered was causally linked to the illegal distortion at the distribution level. He must prove that the loss was of a type that Art.81(1) was intended to prevent; and that, self-evidently, he could not do. Causation, even established, did not entitle him to recover damages in respect of an irrecoverable loss.

158. As a matter of English law, we think that Mr. Milligan's statutory duty argument is correct. Indeed, it was hardly addressed by Mr. Brealey, and then only at the prompting of the court. We understand Mr. Brealey to have accepted its correctness as a matter of English law. It was not a new argument. At the trial, before the start of the oral evidence, the judge heard opening addresses by counsel for both Inntrepreneur and Mr. Crehan. Each was supported by a skeleton. The statutory duty argument was clearly raised in section I of Inntrepreneur's skeleton and it was fully developed by Mr. Lewison Q.C. in his opening address (transcript Day 5, pp.122–151). It was dealt with very briefly in the outline of the closing speech on behalf of Mr. Crehan. In the closing skeleton for Inntrepreneur there was the following:

"14.2 For the reasons explained in the Skeleton Opening [Inntrepreneur] submits that the loss claimed by Mr. Crehan is not a loss against which he is entitled to be protected.

14.3 Mr. Crehan did not address the heads of recoverable damages in his opening, and [Inntrepreneur] reserves the right to answer any submissions on this question which he may make in closing."

In his closing address (transcript Day 26, pp. 170–171) Mr. Lewison repeated that the case had not been opened against Inntrepreneur to explain why Mr. Crehan was entitled to recover for the particular heads of loss that he claimed, and the point was left there. In his closing address Mr. Brealey dealt with the point very briefly, submitting that Inntrepreneur's argument was a rerun of one it had already lost in the ECJ.

159. The judge did not refer to the statutory duty argument. However, in paras. 226 and 227 of his judgment he considered one of the suggested Community law defences to Mr. Crehan's claim: namely, that he was not an aspiring entrant to the market for the supply of beer to on-trade outlets. He recorded Inntrepreneur's argument to the effect that Art. 81 was intended to protect would-be entrants to a national market from being confronted with excessive difficulties of entry into the market by reason of agreements which restrict or distort competition; that Mr. Crehan was not such a person, since he did not want to make supplies of beer to pubs and other on-trade outlets; and that therefore he could not have a claim for damages for infringement of Art. 81. The judge said:

"In my opinion this argument by Inntrepreneur cannot stand with the CJEC's decision in Mr. Crehan's own case. It would make the whole decision pointless. The CJEC was specifically considering whether a publican lessee (not, for example, a brewer based in another member state) could have a claim for damages on the ground that his lessor's conduct infringed Art. 81. By giving the answer that he could, the Court must have taken it for granted that this particular defence being put forward by Inntrepreneur could not be maintained. Otherwise the Court would have been wasting its time, and would have known it."

160. In paras. 228 and 229 the judge referred to another suggested Community law defence: namely, that Mr. Crehan would not have purchased from suppliers in other member states even if he had been free of tie. He recorded Inntrepreneur's argument to the effect that Art. 81(1) prohibited agreements which might affect trade between member states in so far as they restricted or distorted competition within the common market; and that because Mr. Crehan did not himself wish to engage in trade between member states that he could have no claim for damages under Art. 81. The judge said:

"I do not agree with this. In my view it would put a gloss on the decision of the CJEC in Mr. Crehan's own case which would not have been intended by the Court and which would substantially emasculate the decision. The decision of the Court is that a person may have a claim for damages flowing from an agreement if two conditions are satisfied. The first condition is that the agreement is in breach of Art.81. The second condition is that the agreement causes damage to the particular claimant. It is true that the agreement will only be in breach of Art. 81 if it may affect trade between member states, but that is relevant to the first condition. I see no basis in the CJEC's decision for somehow interpolating the factor of affecting trade between member states into the second condition. That would be to read the Court's decision as if it said that a person who is harmed by an agreement which infringes Art. 81 has a claim for damages, but only if he himself wishes to engage in trade with other member states and is prevented from doing so by the agreement. That is not what the Court said, and in my opinion it is not what the Court meant either."

We return later to the views of the judge as expressed in these two passages.

161. In this court the statutory duty argument was adumbrated in Inntrepreneur's skeleton argument and, as we have described, it was fully developed by Mr. Milligan in his opening. In Mr. Crehan's skeleton argument it was again dealt with briefly, reliance being placed primarily on paras. 226–229 of the judge's judgment. It was said that the argument was flawed both in law and in fact. As to the law, reliance was placed on para. 26 of the judgment of the ECJ in Courage Ltd. v Crehan (see para. 47 above); again it was said that Inntrepreneur's argument was a rerun of the argument rejected by the ECJ. As to fact, it was said that Mr. Crehan's loss arose because he was unlawfully tied and could not buy from the person of his choosing at the price on offer in the market

162. 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 [2002] QB 507 at p. 522). With hindsight, it is perhaps unfortunate that the judge did not in terms refer either to the statutory duty argument or to the principle of effectiveness. However, it appears from paras. 226-229 of his judgment that his decision can only have been based on the latter principle. So, too, as we understood it, was Mr. Brealey's argument.

163. So the essential question we have to decide under issue (6) is the second question which was referred to the ECJ in 1999 (see para. 44 above), but as applied to the particular claim of Mr. Crehan. The second question proceeded on the footing that the first question would be answered (as indeed it was) in the sense that a party to a prohibited tied house agreement might rely on Art.81 to seek relief from the other contracting party. The second question asked:

"Is the party claiming relief entitled to recover damages alleged to arise as a result of his adherence to the clause in the [tied house] agreement which is prohibited under Art.81?"

A specific answer to that question was not given. Instead, it was elided with the third question (illegality) and the following composite answer given (see para. 49 above):

"Article 85 of the Treaty precludes a rule of national law under which a party to a contract liable to restrict or distort competition within the meaning of that provision is barred from claiming damages for loss caused by performance of that contract on the sole ground that the claimant is a party to that contract."

164. Shortly stated, Mr. Crehan's basic submission (we express it in our own words) is, first, that the ECJ effectively answered the second question in the affirmative and, secondly, that in giving that general answer it intended, or should be taken to have intended, that it should apply to the particular claim of Mr. Crehan. The first part of that submission is undoubtedly correct. The second part has been the subject of acute controversy in this court.

165. The starting-point for a consideration of the question whether the ECJ had, or should be taken to have had, the intention attributed to it by Mr. Crehan is the judgment of this court in Courage v Crehan [1999] EuLR 834 (see para. 43 above), pursuant to which the reference was made. At the conclusion of the argument before us, we gave leave for the written observations of the parties on the reference to the ECJ to be put in, which they subsequently were, together with short written submissions on behalf of Mr. Crehan and Inntrepreneur respectively. On behalf of Mr. Crehan it is submitted that these materials show that Courage's case to the ECJ was not restricted to the illegality issue and, further, that the statutory duty argument was advanced to and rejected by the ECJ. Mr. Crehan submits that the ECJ was well aware of the type of loss claimed by him, namely loss flowing from his inability as a result of the tie to "shop around for best buys", and that the ECJ ruled on that basis. On the other side, Inntrepreneur submits that Courage's case to the ECJ was restricted to the illegality issue and, further, that the statutory duty argument was neither advanced to nor considered by the ECJ.

166. Having carefully considered the earlier judgment of this court and the written observations of the parties on the reference to the ECJ, we are of the opinion that it cannot fairly be said that the statutory duty argument was advanced to or considered by the ECJ in any significant way. The whole point of the reference was to determine whether the rule of English law on illegality was a bar to the recovery of damages in Community law. Thus far we accept the submissions of Inntrepreneur. That, however, is not an end of the matter. It is still necessary to decide whether the decision of the ECJ is consistent only with the view that it intended, or should be taken to have intended, that its answer to the second question should apply to the particular claim of Mr. Crehan.

167. The ECJ's understanding of the nature of Mr. Crehan's claim was set out in para. 7 of the judgment in Courage Ltd. v Crehan [2002] QB 507 at p. 519:

"[Mr. Crehan] contended that [Courage] sold its beers to independent tenants of pubs at substantially lower prices than those in the price list imposed on [Inntrepreneur] tenants subject to a beer tie. He contended that that price difference reduced the profitability of tied tenants, driving them out of business."

It is submitted on behalf of Inntrepreneur that that was a misunderstanding of Mr. Crehan's claim. While it may be that the extent of the claim was not fully stated, we cannot accept that the ECJ was under any misunderstanding as to what Mr. Crehan's case was all about. Moreover, the ECJ was well aware that it was only distortion at the distribution level that constituted a breach of Art.81 and, further, that Mr. Crehan had neither claimed, nor could he have claimed, a loss at that level. Nevertheless, it gave, or effectively gave, an affirmative answer to two questions which specifically referred to the parties to "a prohibited tied house agreement". We think it must follow that the effect of the ECJ decision was to put 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. We are in general agreement with the views expressed on this question by Park J. in paras. 226-229 of his judgment.

168. We have already recorded (para. 58 above) that neither side has requested us to make a further reference to the ECJ under Art.234 of the Treaty. In regard to issue (6) Mr. Brealey forcefully submitted that no such reference should be made. He said that the ECJ would be "aghast" at receiving it. Mr. Milligan advanced no submission either way. Although the question is one of Community law alone, on which we entertain a natural diffidence as to the correctness of our view, we have not found it necessary to initiate a reference ourselves.

(7) Did the beer ties cause Mr. Crehan's business failure at The Phoenix and The Cock Inn?

169. The judge considered this issue in paras. 230-263 of his judgment. In para. 235, having stated that the arguments before him had tended to revolve around the question whether, if Mr. Crehan had been free of tie, he would have survived, the judge said:

"Inntrepreneur's answer, supported by expert evidence from Mr. Haberman, is that he would not. Mr. Crehan, on the other hand, is convinced that he would have survived, and expert evidence to that effect was given on his behalf by the accountancy expert, Mr. Main. My view (very much on the balance of probabilities, and not something on which I am confident that I am right) is that he would have survived – just, and with a struggle."

In para. 236 the judge added that it was tacitly accepted by both sides that the issue tended to revolve around whether Mr. Crehan would have got through the first three years or so. The judge stated his conclusion on this issue in para. 263:

"Reviewing all of the foregoing matters I come, on the balance of probabilities, to the conclusion, in agreement with the opinion of Mr. Main, that if Mr. Crehan had been free of tie throughout and had been paying a market rent for free-of-tie pubs, not an inflated rent for free-of-tie pubs, his business would have survived the first three critical years. He and his wife might have had to give up their house in Bedfont, and I think that survival of the business would have been a close-run thing. But I do think that Mr. Crehan would have survived – just – and, if I was in favour of him on the issue considered earlier of whether the beer ties in his leases infringed Art.81, I would conclude that the infringement of the article did cause the failure of the business and thus caused losses to Mr. Crehan."

170. The process of reasoning which led the judge to this conclusion was divided by Mr. Milligan into five stages, at each of which the judge made findings favourable to Mr. Crehan. First (para. 237), the judge found that the immediate cause of Mr. Crehan's business failure was that both pubs failed by large margins to achieve the levels of turnover which had been predicted for them. Secondly (paras. 238-254), the judge found that the dramatic falls in the turnovers of the pubs were caused by the high prices Mr. Crehan had to pay for his beer and the correspondingly high prices he considered he had to charge his customers, compared with the dramatically lower prices which competitors, especially The Angel, could pay to their suppliers and charge to their customers. Thirdly (paras. 257-258), the judge found that, if Mr. Crehan had been free of tie and had bought his supplies of beer at the large discounts available to free trade buyers, he would have reduced his prices to customers to the sort of levels which were contemplated in the second and third scenarios depicted by Mr. Crehan's accountancy expert, Mr. Main. Fourthly (para. 259), the judge found that, if Mr. Crehan had reduced his prices to that sort of level, turnover would have been increased to the extent contemplated in those scenarios. (We explain Mr. Main's third scenario below.) Fifthly (paras. 260-262), the judge made assumptions, first, (at least on Mr. Main's third scenario), that Mr. Crehan would have decided to spend less on entertainment at The Phoenix; secondly, that it was possible that Mr. and Mrs Crehan would have taken "the hard decision" to sell their house in Bedfont; and, thirdly, that if Mr. Crehan had been free of tie he would not have agreed to pay more by way of rent than he in fact paid.

171. Mr. Milligan submitted that there was insufficient evidence to support the judge's conclusion on this issue. He took us carefully through the judge's reasoning, criticising it at each of the second, third, fourth and fifth stages. We acknowledge the force of Mr. Milligan's submissions which might well have persuaded another trial judge to take a different view of the evidence and to make findings other than those the judge made. However, given the well known constraints on an appellate court in interfering with the findings of the trial judge, we are on balance satisfied that it is not open to us in this court to take any such view or to make any such findings. The judge was greatly impressed by the evidence of Mr. Main and agreed with Mr. Brealey's submission that he was a very reasonable, prudent and careful man. In para. 259 he said:

"On many matters on which there was a choice to be made between assumptions, Mr. Main consistently made the more prudent assumption, and I found his evidence both measured and helpful."

(8) <u>What is the appropriate quantum of damages, and at what date should the damages be measured?</u>

172. The sums the judge would have awarded to Mr. Crehan are set out in para. 56 above. The first of them, £57,121 in respect of the losses actually suffered (including lost profits) during the periods from 11 July 1991 until the surrender of the two premises on 4 March and 27 September 1993 respectively, was based on Mr. Main's third scenario, which assumed that Mr. Crehan, if free of tie, would have sold, at reduced prices, 330 barrels of beer per annum at The Cock Inn and 400 barrels at The Phoenix. Mr. Milligan did not suggest that that was a figure with which we could interfere. However, he submitted that the other two sums, £889,052 in respect of the profits which Mr. Crehan would have made between 1993 and 2003 if free of tie and £361,500 in respect of the value as at 2003 of the leases Mr. Crehan would have owned if free of tie throughout, would have been awarded on a wholly wrong basis and that we should reject those figures accordingly.

173. The judge, whilst accepting that the normal rule is that damages are assessed at the date of loss, not at the date of judgment, considered that in this case they should be assessed at the date of judgment (see paras. 267-268). Mr. Milligan submitted that that was a fundamental error and that the damages should be assessed at the two dates in 1993 when Mr. Crehan had to give up possession of the pubs. He said that the losses were suffered once and for all at those dates, the damages recoverable being the then equivalents of the values of free of tie businesses as going concerns.

174. Mr. Milligan relied primarily on the decision of His Honour Judge Raymond Jack QC (as he then was) in <u>UYB Ltd. v British Railways Board</u> (16 April 1999, unreported), the facts of which must be carefully considered. There two partners in a successful business decided to start up a separate business of a night-club in two arches under the approach road to Bristol Temple Meads railway station. In October 1991 they incorporated UYB as a vehicle for the new business. The arches were then the property of the British Railways Board. A conditional liquor licence having been obtained, on 24 July 1992 a tenancy agreement was entered into between the Board and UYB for a yearly tenancy at £16,310 per annum terminable on 6 months' notice expiring at any time. At that stage conversion work to the arches was in progress and the reconstruction of the roadway running above the arches was nearing its conclusion. Before that, in early June 1992, the ingress of water to the arches from the road above had first been observed. The water increased and at the beginning of 1993 it was said, in a report made by the Board, that the quantity of it then entering the arches was "quite unbelievable". Meanwhile, the conversion work had had to stop. It was never resumed and the night-club never opened. Judge Jack found that a meeting held between UYB and the Board on 11 November 1993 was in reality the end of the road, and that thereafter there was no prospect of the night-club project going ahead in the arches.

175. The Board accepted that it was liable to UYB for breach of contract and in tort, and in May 1998 judgment was entered for UYB with an order for damages to be assessed. UYB claimed £12.7m representing loss of profits and interest on lost profits. As Judge Jack, who conducted the assessment, said, that was a large sum in respect of a night-club in an untried venue which never opened. Because before the tenancy agreement was signed the Board had offered UYB a 25-year lease on the same terms, its claim for loss of profits was for those it alleged it would have made over a 25-year period, had the commencement of the business not been prevented by the Board's tort and breach of contract.

176. In dealing with the method of assessment of damages Judge Jack referred to the general principle stated by Lord Blackburn in <u>Livingstone v Rawyards Coal Co.</u> (1880) 5 App Cas 25 at p. 39 (see below). He also considered at some length the speech of Lord Wright in <u>The Liesbosch</u> [1933] AC 449. Having cited other authorities, including the decision of this court in <u>Allied Maples Group Ltd. v Simmons & Simmons</u> [1995] 1 WLR 1602, he stated that, so far as he was aware, there was no authority which considered the problem. He continued:

"The resolution is in my view to take a capital value for the hypothetical business at the time at which it became clear that it could not proceed, that is, when it was lost. That is the best reflection of what UYB….. [has] been deprived of. That value should be based on the value which the business would have fetched in the open market at that date. That figure will reflect the fact that the new purchaser would be running the business and taking the risks in place of UYB. It would reflect the market view of the value. It will carry appropriate interest commencing at the date of the valuation."

177. Accordingly, the judge held that the loss was to be measured, first, by an assessment of the profits lost between the date the premises would have opened in October 1992 had there been no water problem and 11 November 1993, secondly, by an assessment of the value of the hypothetical business in November 1993 and, thirdly, by the deduction from that value of such loss as should have been avoided by steps taken in mitigation. An appeal by UYB to this court was dismissed (in an unreported decision on 20 October 2000), Waller L.J., with whom Kennedy and Jonathan Parker L.JJ. agreed, saying that there was no legitimate basis on which UYB could complain as to the quantum of damages awarded. Mr. Milligan submitted that in regard to the first and second stages the assessment made in that case was on all fours with that which ought to be made in the present case. He accepted that, on the judge's findings, no deduction was to be made in respect of steps which could have been taken in mitigation.

178. Mr. Brealey submitted that there were important factual differences between UYB Ltd v British Railways Board and the present case, in particular that UYB's night-club business never got off the ground and would in any event have been of a speculative nature. While we fully accept that each case must be judged on its own facts, we do not think that these and other points made by Mr. Brealey are sufficient to justify a different approach from that adopted by Judge Jack. The approach adopted by Park J., on the other hand, is immediately suspect on one simple ground. He recognised (para. 281) that there must be some scaling down of Mr. Main's figure of £1,045,944 in order to take account of unidentified contingencies. However, we agree with Mr. Milligan that a reduction of only 15% was palpably insufficient to take account of all the uncertainties over a ten-year period. This confirmed, submitted Mr. Milligan, that the judge had approached the assessment of damages from the wrong end. We return to this point below.

179. We start with the general principle stated by Lord Blackburn in Livingstone v Rawyards Coal Co. (1880) 5 App Cas at p. 39, who said that the correct measure of damages is:

"that sum of money which will put the party who has been injured, or has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

The wrong sustained by Mr. Crehan was the loss of his businesses at The Cock Inn and The Phoenix. But, for the purpose of the measuring the damages recoverable, they were not actual businesses. They were hypothetical, in the sense that they had to be treated, contrary to the actuality, as having been free of tie. So they had to be treated, though for a different reason, in the same way as UYB's business. On Park J.'s approach that faces the court with the immediate difficulty that the measure of damages involves a hypothesis upon a hypothesis: the hypothetical profits of a hypothetical business.

180. In para. 281, having said that he would deduct a percentage for contingencies, the judge continued:

"I accept that Mr. Main has conscientiously taken account of developments between 1993 and 2003 in so far as he knows of them, and judges that they could have impacted on the businesses of The Cock and Inn and The Phoenix. For example, he has noted that part way through the period a new and large Wetherspoons pub opened quite close to The Cock Inn and The Phoenix (about the same distance away as The Angel), and he has considered what impact that might have had: by itself it might have had a downward effect on trade at The Cock Inn and The Phoenix. To the opposite effect he has observed that in 1997 a new shopping centre was opened near to The Cock Inn and The Phoenix: passing trade from that development could be expected to have a good effect on turnover. However, 10 years of trading is a long time, and there must be a real possibility that if Mr. Crehan had remained in the pubs for that period, something unforeseen could have gone wrong. I realise that a contingency provision is normally made in a forecast for the future, and that I am now looking back over ten years which have already elapsed. I nevertheless believe that it is appropriate to scale down Mr. Main's figure by 15 per cent for unidentified contingencies."

We have already expressed the view that a reduction of 15% was palpably insufficient to take account of all the uncertainties over the ten-year period. We would observe that although the judge took some account of local competition, The Cock Inn and The Phoenix were in an area containing numerous competitors. We respectfully suggest that, while the judge took account of actual developments during the period and made some allowance for something unforeseen going wrong, he did not attach anything like the necessary significance to the various possibilities which might falsify the assumption that Mr. and Mrs. Crehan would carry on business at The Cock Inn and The Phoenix for the full ten-year period, for example, ill health caused to Mr. and Mrs Crehan by the stress of carrying on the businesses for another 10 years or a simple decision by them to sell up and move elsewhere. The imponderables are so great that to adopt Park J.'s approach would be unduly speculative and thus unfair to Inntrepreneur. We propose to adopt Judge Jack's approach. It follows that we accept Mr. Milligan's submission that the damages should be assessed at the dates in 1993 when Mr. Crehan gave up possession of The Cock Inn and The Phoenix respectively.

181. It remains to consider the amount to be awarded to Mr. Crehan on that approach. This question has been made much easier of resolution by the stance adopted by Mr. Milligan on behalf of Inntrepreneur. He was prepared to accept Mr. Main's figures, based on the third scenario (the most favourable to Mr. Crehan), in regard to the projected net profits for the year ended 10 July 1993 in the case of The Cock Inn (£16,813) and the period of 60 weeks ended on 7 September 1993, in the case of The Phoenix (£9,661). He then referred to a joint statement of the valuation experts, Mr. Howard Day, FRICS, on behalf of Mr. Crehan and Mr. David Butters, FRICS, on behalf of Inntrepreneur. It is said in paragraph 3.3 of that statement:

"On the basis that a free of tie tenant had achieved the performances set out by Mr. Main, and could demonstrate that he had, it is agreed that the Leases could have been sold for a premium. Mr. Day states 2.5 Years Purchase on maintainable net profit after rent to include the value of the trade inventories. Mr. Butters believes the range could have been 1.5 to 2.5 Years Purchase in 1993. If the two leases had been sold together as a package then there could have been a premium attached to the sale to reflect the additional discounts available."

182. On that basis Mr. Milligan was prepared to multiply the aggregate of £16,813 and £8,373 (for 52 weeks) by 2.5, which produces a figure of £62,965. He was also prepared to agree that a figure of £4,500 should be taken in respect of the "marriage value"; that figure again being multiplied by 2.5 and producing a total of £11,250.

183. We understand that these figures would be acceptable to Mr. Brealey. However, they should be treated as provisional at this stage and available for discussion after judgment if appropriate. Subject to that, we would award Mr. Crehan damages of £57,121 plus £62,965, plus £11,250 making a grand total of £131, 336. That sum will bear interest. We will, if necessary, consider submissions in regard to dates and rate for the payment of interest. We believe that the only outstanding point is the incidence, if any, of tax payable on the damages. If that is not agreed, we will consider submissions on that point also.

Conclusion

184. We will allow the appeal on liability and award damages to Mr. Crehan in accordance with our answer to issue (8).