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I. Introduction

The UK chapter of the European Commission study on damages for breach of EC competition law is necessarily somewhat speculative. However, UK Courts have to a certain extent lead the field in the context of remedies for breach of EC law. In particular, it has been generally accepted by UK courts, lawyers and academics that damages should be available in principle as a remedy for breach of EC competition law since the landmark *Garden Cottage* case of 20 years ago. Two major developments in UK law on damages for breach of EC competition law have arisen recently in the *Crehan* case. First, the Article 234 reference by the High Court established for the first time with any clarity that the European Court of Justice recognises that damages should be available as a remedy for infringement of EC competition law where that is necessary for the effective enforcement of individual rights. Second, on 21 May 2004, the Court of Appeal became the first UK court to award damages for breach of Article 81 EC. It overturned the first instance judgment of Park J, allowing the appeal by Mr Crehan on liability and awarding damages of £131,336 (plus interest and subject to the incidence, if any, of tax payable on the damages to be decided, if not agreed).

The difficulties confronting a national court in the context of claims for damages are well demonstrated by the different approach to the measure, or method of assessment of the quantum, of damages taken by the Court of Appeal and the High Court in the *Crehan* case. Although the High Court ruled that there was no substantive infringement of Article 81, Park J. went to great lengths to consider the questions of causation and quantum of damages on a fail-safe basis, as can be seen from the case note summary in the Annex to this chapter. The High Court held that the damages should be assessed at the date of judgment, not at the date of loss which was accepted as the normal rule. Park J considered that interest on damages calculated at the date of loss was not an appropriate way to assess Mr Crehan's loss. The Court of Appeal has overturned that approach reducing Park J's damages figure of £1,311,500 (including interest) to £131,336 (with interest and the incidence of tax still to be assessed). There was no dispute in the Court of Appeal about the High Court's measure of the losses actually suffered (lost profits) during the period when Mr Crehan operated the two public house premises until the surrender of the leases. The dispute concerned the assessment of loss of future profits from that date and the value of the businesses free of the beer – tie restriction at the same date. As the Court of Appeal has granted permission to appeal to the House of Lords, the issues of liability and assessment of damages remain uncertain.

The only other two reported cases of note where claims for damages have been discussed are the *Arkin* and *Provimi and Trouw* cases. In *Arkin*, the alleged breach of Article 82 EC was not upheld, but in the alternative, the High Court found that even if there had been an infringement no damage had been caused by the alleged abuse of dominant position. The *Provimi and Trouw* case was settled. To this extent, the latter case is one of a long line of cases understood to have been threatened or commenced in UK Courts which have been settled over the last 20 years or so. Anecdotal evidence suggests that damages equivalent to many millions of euros have on occasions been paid to settle cases.

The United Kingdom of Great Britain and Northern Ireland is a complex jurisdiction because of the historical development of the constitutional relationships between Scotland and England/Wales as well as that between Northern Ireland and Great Britain. In general, UK competition law applies uniformly throughout the United Kingdom. In

particular, the Competition Act 1998 (as amended by the Enterprise Act 2002) applies in Scotland and Northern Ireland as well as in England and Wales. However, history has left Scotland and Northern Ireland with their own legal systems and law courts. Where there are obvious relevant differences a comment is made in the text. Generally, however, the law and practice is described by reference to the Courts of England and Wales. For further details of the constitution and Court systems in Scotland and Northern Ireland reference may be made to the admirable study by Mr August J. Braakman for the European Commission Competition Directorate General entitled "The application of Articles 85 and 86 of the EC Treaty by National Courts in the Member States" Brussels, July 1997, Section 1A and Annex 1 (Section VIII, pages 29 – 30) – see Annex 1 of this Chapter.

One of the key developments in United Kingdom competition law in the context of civil remedies before a Court has been the creation of the Competition Appeal Tribunal by the Competition Act 1998. Following the amendments to the 1998 Act by the Enterprise Act 2002, that tribunal has jurisdiction to award damages following the adoption of infringement decisions by the Office of Fair Trading and/or European Commission. The Competition Appeal Tribunal has jurisdiction throughout the United Kingdom and the substantive law and procedure laid down by the Competition Act 1998 equally applies throughout the three separate jurisdictions. It is not surprising, therefore, that the first claims for damages following on from a European Commission infringement decision have been started in the Competition Appeal Tribunal. But the two cases are at too early a stage to provide answers to the many questions likely to arise there, as decisions on service out of the jurisdiction and case management rulings regarding the time for filing defences have been made only recently (see *BCL Old and others –v- Aventis SA, Rhodia Limited, F Hoffman – La Roche AG and Roche Products Limited, case 1028/5/7/04*; and *Deans Foods Limited –v- Roche Products Limited, F Hoffman – La Roche AG and Aventis SA, case 1029/5/7/04*).

II. Actions for damages - status quo

A. What is the legal basis for bringing an action for damages?

(i) Is there an explicit statutory basis, is this different from other actions for damages and is there is a distinction between EC and national law in this regard?

Articles 81 and 82

- In UK law, the cause of action, for damages for infringement of EC competition law is characterised as the tort of breach of statutory duty (*Garden Cottage Foods Ltd v Milk Marketing Board*¹) applied in *Crehan v Courage (CA)*². This stems from section 2(1) European Communities Act 1972 ("ECA") which provides a statutory basis for the recognition of directly effective rights and duties in the English legal system.

The statutory duty breached is that created by section 2(1) of the ECA which provides:

"All such rights, powers, liabilities, obligations and restrictions from time to time created or arising by or under the Treaties, and all such remedies and procedures from time to time provided for by or under the Treaties, as in accordance with the Treaties are without further enactment to be given legal effect or used in the United Kingdom shall be recognised and available in law, and be enforced, allowed and followed accordingly; and the expression "enforceable Community right" and similar expressions shall be read as referring to one to which this subsection applies".

The principles of English law applicable to the tort of breach of statutory duty will also apply to a claim for breach of Articles 81(1) and 82 provided that those rules do not conflict with the Community law principles that require national law not to

1 *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] 1 AC 130; [1983] 2 A11 ER 770, HL.

2 *Case C-453/99, Courage Ltd v Crehan* [2001] ECR I – 6297; *Crehan v Innpreneur Pub Company* [2003] EWHC 1510 (Chancery Division); [2003] ALL ER (D) 354 (Jun); *CA, [2004] EWCA Civ 637, 21 May 2004*.

discriminate between similar claims under national and EC law and not to prevent the availability of an effective remedy for breach of EC law.

As a matter of EC law, Articles 81(1) and 82 EC have direct effect in UK law and therefore create rights in respect of the individuals concerned which national courts must protect.³

The preliminary ruling of the ECJ in *Courage Ltd v Crehan*⁴ is authority for the proposition that, in UK law, Article 81 can be relied on by anyone (even if the claimant is himself a party to the anti-competitive, and therefore unlawful, agreement). Accordingly, a breach of the duty imposed by Article 81 gives rise to a cause of action in English law for which English law must provide an effective remedy.

It is generally recognised that anyone who suffers loss as a result of an infringement of Articles 81 and 82 EC and who makes a claim in the UK for breach of statutory duty can recover damages for such breach. The authority for this is the case of *Garden Cottage Foods Limited -v- Milk Marketing Board*⁵ (an abuse of dominant position case) where the leading judgment is that of Lord Diplock. This approach has now been applied in *Crehan v Courage (CA)*⁶

The duty was described by Lord Diplock as being one imposed not only for the purpose of promoting the general economic prosperity of the common market but also for the benefit of private individuals to whom loss or damage is caused by a breach of that duty:

"A breach of the duty imposed by [Art 82 EC] not to abuse a dominant position in the Common Market or a substantial part of it can thus be categorised in English law as a breach of statutory duty that is imposed not only for the purpose of promoting the general economic prosperity of the Common Market but also for the benefit of private individuals in whom loss or damage is caused by a breach of that duty."

Prior to this case there was some uncertainty as to whether it was necessary to "invent" new causes of action in UK law to deal with breaches of directly effective articles of the EC Treaty.

The underlying premise is that EC rules which have direct effect create directly enforceable rights in private law which national courts must protect and therefore there must be a cause of action available which provides an effective remedy including compensation in the form of damages.

In the cases where damages have been in issue, and/or discussed, in the period following the *Garden Cottage Foods case*, UK courts have proceeded on the assumption that damages were an available remedy⁷ In the recent decision of the English High Court in *Arkin*⁸, it was common ground between the parties that a person who suffered loss caused by breach of Articles 81 or 82 could bring an action for damages by way of analogy to a claim for breach of statutory duty. This was also the case in *Crehan* where the main issue of EC law concerned the availability of damages to a co-contractor who as a matter of English law might

3 Case 127/73, *BRT v Sabam* [1974] ECR 51.

4 See, note 2.

5 *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] 1 AC 130; [1983] 2 A11 ER 770, HL.

6 See, note 2.

7 See eg *An Bord Bainne Co-operative Ltd v Milk Marketing Board* [1984] 1 CMLR 519, affd [1984] 2 CMLR 584 CA; *Bourgoin S A v Minister of Agriculture Fisheries and Food* [1985] 1 CMLR 528; on appeal [1986] 1 CMLR 267, CA (this case was concerned with whether damages could be recovered from a Member State that had acted in breach of Article 28 of the Treaty, but the judgments in the Court of Appeal deal also with actions under the competition rules: the case was settled after the Court of Appeal's judgment, the claimant recovering substantial damages, and before an appeal to the House of Lords had been heard: see [1987] 1 CMLR 169); *Plessey v GEC* [1990] EEC 384, para 37 (injunction refused *inter alia* on grounds that damages at the trial would be an adequate remedy); *Norbain SD Ltd v Dedicated Micros Ltd* [1998] Eu LR 266 (QBD: interlocutory injunction refused *inter alia* since this would complicate rather than simplify the calculation of damages); as cited in Whish, *Competition Law* (fifth edition), p301, footnote 119.

8 *Arkin v Borchard Lines Ltd* [2001] Eu LR 232, QBD (preliminary issues); judgment [2003] EWHC 687 (Comm), [2003] ALL ER (D) 173.

be said to be "*in pari delicto*" (the English law principle which precludes a claim for damages relying on the claimant's own illegality).

Notwithstanding the longevity of this right, until the Court of Appeal decision in the *Crehan* case on 21 May 2004, there has been no reported case in which damages have been awarded in the UK in relation to a breach of either Article 81 or Article 82 EC, or the CA1998 prohibitions. There are a number of explanations for this negative statistic: all claims for damages have been settled, some for significant sums, because of the cost, complexity and delay involved in UK Court proceedings until the recent Woolf reforms of court procedure; UK judges have not been trained (or otherwise gained experience) of competition law; although there was a statutory right to damages under the Restrictive Trade Practices Act 1976, the predecessor to CA1998, there were no decided cases where damages were awarded; since the CA1998 came into force on 1 March 2000, there have been no reported cases in which an award of damages has been made in relation to the Chapter I and Chapter II prohibitions. The first case has been started in the CAT under the new Section 47A CA 1998 introduced by S18 EA 2002 but is still at the initial stage of the procedure.⁹

UK Competition Law

Damages have been available for injured parties under the CA1998 since the entry into force of the two prohibitions on 1 March 2000. The cause of action also is a breach of statutory duty, namely a breach of S2 and/or S18 CA1998. S58(1) CA1998 provides that a finding of fact by the OFT (previously the Director General of Fair Trading) in certain decisions refusing exemption or made in the course of an investigation into infringement of the Chapter I or Chapter II prohibitions, is binding on the parties, if relevant to an issue in other proceedings under the Act, once the time for appealing has expired. Following the entry into force on 20 June 2003 of S20 Enterprise Act (EA) 2002 inserting a new S58A CA 1998 after S58, the ordinary civil courts are bound by decisions of the OFT (and the CAT on appeal) regarding infringement of the Chapter I and Chapter II prohibitions as well as of Articles 81 and 82, once the time for any appeal has expired, or if made any appeal has been unsuccessful. S58A does not apply in relation to decisions made before the commencement of S20 EA2002 (20 June 2003).

S18 EA2002 introduced a new Section 47A CA1998 providing that the Competition Appeal Tribunal (CAT) is bound by any infringement decision under the Chapter I or Chapter II prohibitions by the OFT or under Articles 81 or 82 EC by the OFT or European Commission once the time for appealing has expired, or if made any appeal has been unsuccessful. S47A CA1998 applies to claims arising before the commencement of Section 18 EA2002 on 20 June 2003 as it applies to claims arising after that time (S18 (2) EA2002). S47A CA1998 provides a statutory procedure (not a new cause of action) for claims for damages or any other claim for a sum of money before the CAT. It does not affect the right to bring any other proceedings in respect of the same claim, for example, for an injunction in the ordinary civil courts where the conditions for the grant of an interlocutory injunction are satisfied.

Actions for Damages

Breach of statutory duty is a specific cause of action in English tort law which differs from the other actions for damages e.g. breach of contract.

Distinctions

Articles 81 and 82 EC are subject to equivalent treatment to UK competition law in damages claims before the CAT. The S47A CA1998 express statutory procedure for bringing monetary claims before the CAT applies equally to OFT and EC Commission decisions under CA1998 and/or Articles 81 and 82. Both

⁹ *BCL Old and Others v Aventis SA, Rhodia Limited, F. Hoffman-La Roche AG and Roche Products Limited*, Case 1028/5/7/04; and *Deans Foods Limited v Roche Products Limited, F. Hoffman-La Roche AG and Aventis SA*, Case 1029/5/7/04.

categories of decisions are binding on the CAT. On the other hand, S58A CA1998 only renders OFT/CAT decisions binding on an ordinary court (as opposed to the CAT) dealing with a claim for damages and not EC Commission decisions. However, the *Masterfoods* case law would have a similar effect by virtue of Section 60 CA1998 (and S2 ECA 1972) which require the relevant Community law principles to be applied by the ordinary English courts. This would include the doctrines of direct effect and supremacy of Community law. Article 16(1) of Regulation 1/2003 effectively incorporates the *Master Foods caselaw* obligations requiring national courts not to adopt decisions which conflict with prior or contemplated Commission decisions and laying down the procedural options for the national courts in these circumstances. The 2004 Commission Notice on Co-operation with national courts explains in further detail how the *Master Foods* and *Delimitis* case law should be followed (see, paragraphs 11-14).

B. Which courts are competent to hear an action for damages?

(i) Which courts are competent?

Until January 2004, there were no special rules for allocation of EC competition cases in the UK civil courts. (Both the county courts and High Courts in England and Wales had jurisdiction to hear competition law cases. The county court has jurisdiction in proceedings where the value of the claim is £50,000 or less. In view of the complexity of the legal issues, competition law proceedings normally were brought in the High Court.) However, in January 2004, the Civil Procedure Rules applicable only in England and Wales were amended to provide that all EC competition cases should be brought, or transferred to, the Chancery Division of the High Court (CPR, Part 30.8). At the same time a Practice Direction was published covering the question of allocation/ transfer to the Chancery Division and co-operation between the Commission/NCA's and national courts under Regulation 1/2003 from 1 May 2004: *Practice Direction – Competition Law – Claims Relating to the Application of Articles 81 and 82 of the EC Treaty* (Civil Procedure Rules, January 2004, PRACTICE DIRECTION, EU Competition Law; see, <http://www.dca.gov.uk/civil/>).

In addition, the Competition Appeal Tribunal (CAT) has been given competence to hear "monetary claims" under S47A CA1998 from 20 June 2003 over and above its appellate and review jurisdiction under the CA1998 and EA 2002. "Monetary claims" will cover claims in any part of the UK for damages or restitution and potentially for orders for an account of profits unlawfully obtained.

(ii) Are there specialised courts for bringing competition-based damages actions as opposed to other actions for damages?

Under S47A CA1998, parties who have suffered damage caused by an infringement of Articles 81 and/or 82 may bring a claim for damages ("a monetary claim") before the CAT. The CAT will be bound by any prior decision of the Office of Fair Trading (OFT) and/or the European Commission provided any appeal has been dismissed or the time for appeal has expired even if the relevant decision was adopted before 20 June 2003, the date when the Enterprise Act 2002 (EA 2002) introduced S47A to the CA1998. S47A CA1998 provides that any claim for damages, or any other claim for a sum of money, which a person who has suffered loss or damage as a result of the infringement of a relevant prohibition may make in civil proceedings brought in any part of the United Kingdom, may be brought before the CAT.

The CAT will have jurisdiction where there is an infringement of any of the following prohibitions:

- (a) the Chapter I prohibition;
- (b) the Chapter II prohibition;
- (c) the prohibition in Article 81(1) of the EC Treaty;
- (d) the prohibition in Article 82 of the EC Treaty;
- (e) the prohibition in Article 65(1) of the Treaty establishing the European Coal and Steel Community (ECSC);

- (f) the prohibition in Article 66(7) of that Treaty (S47A(2)).

The ordinary limitation rules that would apply to the claim are to be disregarded (S47A(3)) but no claim may be made before the CAT until a decision of the OFT or European Commission listed in S47A (6) has established that the relevant prohibition in question has been infringed; and otherwise than with the permission of the Tribunal, during any period during which an appeal may be brought against a decision of the OFT in the CAT or against a decision of the European Commission in the CFI or any period of further appeal against the CAT or CFI decisions (S47A(7) and (8)).

The decisions which may be relied on for the purposes of proceedings under S47A are:

- (a) a decision of the OFT that the Chapter I prohibition or the Chapter II prohibition has been infringed;
- (b) a decision of the OFT that the prohibition in Article 81(1) or Article 82 of the EC Treaty has been infringed;
- (c) a decision of the CAT (on an appeal from a decision of the OFT) that the Chapter I prohibition, the Chapter II prohibition or the prohibition in Article 81(1) or Article 82 of the EC Treaty has been infringed;
- (d) a decision of the European Commission that the prohibition in Article 81(1) or Article 82 of the EC Treaty has been infringed; or
- (e) a decision of the European Commission that the prohibition in Article 65(1) of the ECSC Treaty has been infringed, or a finding made by the European Commission under Article 66(7) of that Treaty(S47A(6)).

In determining a claim under S47A, the CAT is bound by any decision listed in S47A (6) which establishes that the prohibition in question has been infringed (S47A(9)).

The right to make a claim to which this section applies in proceedings before the Tribunal does not affect the right to bring any other proceedings in respect of the claim, such as an application for an interlocutory injunction in the Chancery Division of the High Court (S47A(10)).

C. Who can bring an action for damages?

- (i) Which limitations are there to the standing of natural or legal persons, including those from other jurisdictions? What connecting factor(s) are required with the jurisdiction in order for an action to be admissible?**

The ordinary law of tort applicable to breaches of statutory duty will apply to standing i.e. the claimant must fall within the class of persons intended to be protected by the Act in question. In *Garden Cottage*, Lord Diplock described a breach of duty imposed by Article 82 as being for the benefit of private individuals to whom loss or damage is caused by a breach of that duty.¹⁰ The same would apply to the class of persons protected by Article 81. However this has been tentatively extended by Aikens J. in the *Provimi* case¹¹ in the context of defendants who are part of the same corporate group. In this situation, the judge ruled it was arguable that a non-UK claimant who has never directly done business with a defendant within the English jurisdiction qualifies if that claimant has purchased products, or would have purchased products if they were not subject to Cartel prices, from any member of that group. The judge then allowed the non-UK claimant to sue other non-UK co-defendants under the Civil Jurisdiction Regulation 44/2001 (Article 6) which allows a claimant to bring an action against non-UK defendants when the "claim" is closely connected to that against the defendant domiciled in England and Wales.

"A person domiciled in a Member State may be sued, where he is one of a number of defendants, in the courts where any one of them is domiciled provided that the claims are so closely connected that it is expedient to hear and determine them

10 [1984] 1 AC 130, at page 141C-E.

11 *Provimi and Trouw v Aventis and Roche* [2003] EWHC 1211 (Comm); [2003] ALL ER (D) 59 (Jun).

together to avoid risk of irreconcilable judgments resulting from separate proceedings."

The ordinary rules on jurisdiction apply including the Brussels Civil Jurisdiction Regulation 44/2001 and the Lugano Conventions. A defendant is normally to be sued in his place of domicile (Article 2) subject to the exception rules applicable to tort (Article 5(3)) or breach of contract (Article 5(1)) and subject to rules on jurisdiction of co-defendants (Article 6) and express agreement on jurisdiction (Article 23) provided for in Regulation 44/2001 and discussed in the *Provimi* case¹².

(ii) Is there a possibility of collective claims, class actions, actions by representative bodies or any other form of public interest litigation?

Apart from joinder of parties with the same claim (CPR Part 19, Rule 19.1), it is possible to bring a representative action when more than one party has the "same interest" in a claim (CPR Part 19, Rule 19.6(1)) or more commonly a group action when there are multiple claimants and common issues of law or related fact under a Group Litigation Order (CPR Part 19, Rule 19.11).

Representative actions may only be brought where the relief sought is by its nature beneficial to all whom the claimant seeks to represent. They are comparatively rare.

GLOs

Group litigation orders (or GLOs) are subject to strict supervision by the court under CPR Part 19, Rules 10, 11 and 12. There are no precedents in competition damages cases to date.

Where a number of claims give rise to common or related issues of fact or law, the Court may make a group litigation order (GLO). A GLO may only be made with the consent of a senior judge (Practice Direction 19B, para 3.3). A typical example of the circumstances in which a GLO is likely to be made is where a number of claims are made against a manufacturer with a common cause of action e.g. claims arising out of the side effects of a drug.

A GLO will have the following features:

- directions on maintaining a group register of the claims governed by the GLO;
- specification of the issues to be dealt with under the GLO and identification of the claims which can be managed under it;
- nomination of the Court that will manage the group litigation.

Further directions made under a GLO include directing that:

- group claims must be transferred to the management Court;
- certain details must be included in the particulars of claim to show that the criteria for entry of the claim on that group register had been met;
- future claims raising GLO issues must be commenced in the management Court;
- one or more of the claims should proceed as test cases and that the others should be delayed until further order.

Documents disclosed are treated as disclosed to all the parties on the group register (CPR), Rule 19.12(4), unless the Court otherwise orders. Any judgment or order made in a claim on the group register is binding on the parties to all the other claims, unless the Court otherwise orders (Rule 19.12(1)(a)). The Court may give directions as to the extent that an order or judgment should bind the parties to claims added to the group register after the order or judgment was made or given (Rule 19.12(1)(b)).

12 See note 10.

Specified bodies: s47B CA 1998

Under Section 47B CA1998 representative bodies may bring actions on behalf of individual consumers if appointed by Order, e.g. Consumers' Association.

S47B CA 1998 provides that a "specified" body may (subject to the provisions of the CA 1998 and CAT rules) bring proceedings before the CAT which comprise "consumer claims" made or continued on behalf of at least two individuals (s47B(1)) with the consent of the individual concerned (s47B(3)).

"Specified" means a body such as the Consumers Association specified in an order made by the Secretary of State, in accordance with criteria published by the Secretary of State for the purposes of this section (s49B(9)).

"Consumer claim" means a claim to which section 47A applies which an individual has in respect of an infringement affecting (directly or indirectly) goods or services to which s49B(7) applies (s49B(2)).

S47B applies to goods or services which:

- (a) the individual received, or sought to receive, otherwise than in the course of a business carried on by him (notwithstanding that he received or sought to receive them with a view to carrying on a business); and
- (b) were, or would have been, supplied to the individual (in the case of goods whether by way of sale or otherwise) in the course of a business carried on by the person who supplied or would have supplied them.

A business includes:

- (a) a professional practice;
- (b) any other undertaking carried on for gain or reward;
- (c) any undertaking in the course of which goods or services are supplied otherwise than free of charge (s47B(4) and (5)).

The consumer claims included in proceedings under this section must all relate to the same infringement (s47B(4)).

The provisions of section 47A(5) to (10), as to the type of decision binding on the CAT following expiry of the periods for appeal, apply to a consumer claim included in proceedings under s47B as they apply to a claim made in proceedings under s47A (s47B(5)).

Any damages or other sum (not being costs or expenses) awarded in respect of a consumer claim must be awarded to the individual concerned; but the Tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body acting on behalf of the individual (s47B(6)).

An application by a body to be specified in an order under this section is to be made in a form approved by the Secretary of State for the purpose (s47B(10)). [So far, the Consumers Association has been so specified.]

No other procedure exists of this nature under UK law as it differs from a representative action or group litigation order or joinder of actions since a representative body which has no other interest may have standing under s47B CA 1998 to claim damages. There is no possibility for any other public body or ombudsman to bring an action for damages. Relator actions that used to be brought by the Attorney General to enforce public rights or duties no longer have any express procedure provided for since the reform of the civil procedure rules in 1999.

D. What are the procedural and substantive conditions to obtain damages?

(i) What forms of compensation are available?

In summary, the current position in relation to remedies is as follows: `

(a) Injunctive relief

Infringement of Articles 81 and 82 can be subject to applications for injunctive relief at the suit of an injured party before the courts but not the CAT. The onus is on that party to satisfy the basic conditions which need to be satisfied if a court is to exercise this discretionary remedy, see *American Cyanamid Co v Ethicon Ltd [1975] AC 396*.

There is no reason in principle why any distinction should be drawn in the context of the availability of injunctive relief between Articles 81 and 82.

(b) Damages

The ECJ preliminary ruling in the *Crehan* case has confirmed the general, but never definitively established prior view of the UK courts, that a remedy in damages is available to a party who can establish that he has suffered loss as a result of a breach of Article 81 or 82. In the *Garden Cottage* case, the House of Lords expressed the view that if the contravention of Article 82 gave rise to a cause of action in English law, that cause of action entitled the claimant to a remedy in damages for breach of statutory duty. The Court of Appeal in its judgment of 21 May 2004 in the *Crehan* case has confirmed that the English law tort of breach of statutory duty is the cause of action in the UK.

However, until the *Crehan* Article 234 EC ruling, the English Court of Appeal held that a party to a contract may not claim damages against the other party on the basis that the contract infringes Article 81. That legal ruling of the English Court of Appeal has now to be set aside or, at best, qualified in light of the allocation of responsibility and degree of bargaining power enjoyed by the parties to a contract, following the *Crehan* case.

In English tort law, restitution is a potential alternative remedy to damages and when both are pleaded, the claimant will have to elect which to pursue at trial. Similarly an account of profits may be an available remedy. Loss of a chance and non-material loss (moral damages) are not recoverable. However, there is no English case law on remedies other than damages. In the only example of an award of damages, the Court of Appeal on 21 May 2004 assessed damages under the two heads of loss of profits during the time the loss was directly suffered, and an estimate of the loss of value of the business at that date.

(ii) Other forms of civil liability (e.g. disqualification of directors)?

S204 EA 2002 introduced a new sanction against company directors by adding new sections to the Company Directors Disqualification Act 1986 (CDDA 1986). Directors may be disqualified from office for a period of up to 15 years where they know, or ought to have known, that their company was guilty of an infringement of EC or UK competition law (see CDDA 1986, S9A(4)).

(iii) Does the infringement have to imply fault? If so, is fault based on objective criteria? Is bad faith (intent) required? Can negligence be taken into account?

Under English case law, the basis for action under Articles 81 and 82 is that their breach constitutes a breach of statutory duty. It is necessary for a claimant mounting a claim on the basis of either Article to satisfy the usual requirements for establishing a breach of duty under English law.

For example, because a statutory duty is imposed to prevent some particular form of harm, it is usually necessary for the claimant to establish that the loss which he suffered falls within the scope of injury contemplated.¹³ In the *Crehan Case*, the Court of Appeal accepted this principle as a matter of English law. It found that the test was not established on the facts which the Court said consisted of an infringement whereby the market was foreclosed to competing beers at the distribution level when the damage suffered was at a different level and, therefore, not contemplated. However, the Court disapplied the English law principle in order to ensure that there was an effective remedy in accordance with EC law as interpreted by the ECJ in the *Crehan* Article 234EC preliminary ruling.

There is no requirement of fault in the case law; simply a breach of a directly effective provision of EC law covered by ECA 1972, s2(b). Accordingly, strict liability under the first category of *X v Bedfordshire County Council*¹⁴ applies as demonstrated in the *Crehan Case* where the Court of Appeal awarded damages for the first time.

Proof of Liability for Breach of Statutory Duty

To establish liability for breach of Article 81(1) it may be necessary to prove:

- (a) a breach of statutory duty owed to the relevant class of persons but subject to European Court case law on the interpretation of Article 81(1). For example, the *Crehan*¹⁵ case establishes that Article 81 imposes duties not to breach its terms and suggests that those duties create directly effective rights which may be enforced by all individuals since the duty is owed to all individuals;
- (b) the breach of statutory duty caused the claimant loss and damage, in order to satisfy the requirement that there must be an economic or personal interest before an individual claiming breach of a directly effective right can bring a claim for damages. It follows that the English law on causation should be applied. Evidence must be adduced to establish the causal link between the breach and the damage and normally the claimant need only show that the breach materially contributed to the harm. The claimant should not be denied relief simply because the breach is not the sole or even the main cause of the harm under English tort principles. Further, the usual tortious defences (for example, limitation) will be available subject to the two overriding Community law principles that limit the procedural autonomy of Member states (non-discrimination and effective protection). Further details are given in Section E(c), E(d), F and H(i) respectively. The *Crehan* case, for example, has established that the "in pari delicto" defence (no damages if claimant relies on their own illegality) is not available in all circumstances. The Court of Appeal has also disapplied an English principle normally applied to breach of statutory duty to ensure effective protection of Mr Crehan's rights under Article 81 EC illustrating the impossible position enjoyed by litigants in the absence of harmonisation of national law on procedure and remedies.

Pure economic loss is not normally recoverable under the English law of tort outside the area of economic torts such as interference with contract. This is especially true of future economic loss which is considered speculative (or too remote) from a causation perspective. The approach of the High Court and the Court of Appeal in the *Crehan Case* demonstrates the potential for totally different approaches to the

13 *Gorris v Scott (1874) LR 9 Exch 125*

14 [1995] 2 AC 633 it was held that there are four categories of breach of statutory duty. These are (i) breach simpliciter irrespective of carelessness (strict liability); (ii) careless performance of statutory duty in the absence of any other common law right of action; (iii) common law duty of care arising from imposition of statutory duty; and (iv) misfeasance in public office. It was held that for breach simpliciter a private law cause of action only arises if the duty is imposed to protect that particular class of claimant and if the statute was intended to provide a private remedy. The weight of academic authority suggests that a breach of statutory duty arising from an infringement of Community competition law imposes this type of strict liability.

15 *Courage Ltd v Crehan C-453/99*, see note 2 above.

assessment of damage. Park J in the interests of what might be said to be the EC law preference for "full compensation" of losses proved to have been caused by the infringement, as favoured by the ECJ in the *Factortame* damages case¹⁶ and by AG Van Gerven in the *Banks* Case¹⁷, assessed damages at the date of judgment not at the date of loss. The Court of Appeal reversed the position since Park J had chosen not to follow the normal English law approach to damages which requires damage to be assessed at the time of loss and the period that the claimant is kept out of his money to be covered by interest. It will be interesting to see if the House of Lords (to which the Court of Appeal has granted permission to appeal) refers this issue to the ECJ for an overdue EC law clarification of the unsatisfactory position of competition law procedure and remedies which are subject to continuing legal uncertainty as a result of the need to apply national law subject to such EC law as is relevant.

- (c) the damage claimed must meet the requirements of the English law on remoteness of damage in the context of tort claims. (See, section E(d) on causation)

In *Arkin*, the court found that there was no causation.¹⁸ On the other hand, there was a finding of causation (but not an infringement) at first instance in the *Crehan* case.¹⁹ On appeal, the Court of Appeal found an infringement of Article 81 EC overruling the High Court on substance. The Court of Appeal also overturned the High Court findings on the two heads of future economic loss: the loss of profits after the date that Mr Crehan gave up his pub leases and the reduced sale value of the leases. The Primary ground for the different assessment of damages by the Court of Appeal was the speculative nature of future losses (foreseeability issue) which overlaps with causation to the extent that English law will not recognise as recoverable losses damage too speculative to be proved to have been caused by the tort. Causation requires a causal link between the tort and the damage and that such damage is not too remote because it is not reasonably foreseeable or speculative e.g. future economic loss. The "but for" test is a rule of thumb used to establish whether the damage has been directly caused by the tort rather than by some other cause.

- (d) As a golden rule, one of the most distinctive procedural aspects of the UK law system of causes of action are the rules on pleadings.

Claims for damages in UK courts therefore must comply with the rules on written pleadings, in particular the necessary degree of particularisation, to avoid a strike out application for failure to disclose a cause of action. To date the case law has been concerned largely with the particularising of the alleged breach of Articles 81 and 82: particulars must be pleaded of the agreement, significant effect on competition and significant effect on trade (Article 81) and the existence of a dominant position (in the Common Market or a substantial part), the abuse(s) alleged, and the effect on trade (Article 82).

In the specific context of damages, it is essential to plead the causal link between the infringement alleged and the damage directly flowing from any loss so caused (or other relief) and any interest claimed. It is not normally required to claim costs in a claim for damages.

16 Joined Cases C-46/93, *Brasserie du Pecheur and Factortame* [1996] ECR I-1029.

17 Case C-128/92, *Banks v British Coal Corporation* [1994] ECR I-1209.

18 *Arkin v Borchard Lines Ltd* [2003] EWHC 687 (Com Ct) paras 489-570, Colman J.

19 *Courage Ltd v Crehan* [2001] ECR I-6297, [2001] 5 CMLR 1058; *Crehan v Intrepeneur Pub Company* [2003] EWHC 1510 paras 230-263 (Chancery Division) Park J.

E. Rules of evidence

(a) General

(i) Burden of proof and identity of the party on which it rests (covering issues such as rebuttable presumptions and shifting of burden to other party etc.)

The burden of proving that the agreement or conduct in question is in breach of Article 81 or 82 lies on the party claiming that to be the case.²⁰ However, Section 47A provides that OFT/EC Commission decisions are binding on the CAT (including decisions prior to 20 June 2003, the date when the EA 2002 entered into force); and OFT decisions are binding on ordinary courts under Section 58A CA1998, in both cases provided that all relevant time limits for appeal have expired or that any appeal has been completed.

(ii) Standard of proof NB any technical expressions that exist in national law such as for example "beyond reasonable doubt" must be clearly explained.

In *Shearson Lehman Hutton Inc v Watson Co Ltd*²² Webster J in the English High Court was of the view that, as an infringement of Article 81 carries a liability to penalties, he should apply the standard of "a high degree of probability": this is a higher standard than in civil proceedings generally ("balance of probabilities" i.e. on the basis that the finding is more likely than not) but lower than the requirement in a criminal case i.e. "beyond reasonable doubt" (normally stated in jury trials as a test whereby the jury can be "sure" of guilt or innocence.)

In *Masterfoods Ltd v HB Ice Cream Ltd*²², however, Kean J in the Irish Court (to which UK judges often look for an analogous common law approach) decided to apply the standard of proof normally applicable in civil proceedings, namely the proof on the balance of probabilities; the same (high court) standard was applied by the English High Court in *Arkin v Borchard Lines Ltd*²³ but a "high" balance of probabilities test. The civil standard requires the court to be satisfied on a "balance of probabilities" or on the basis that the finding is more likely than not even if the court is not "sure". In civil damages claims based on Articles 81 and 82 EC, it follows that the normal civil standard of proof: balance of probabilities, will be applied.

Further, in the context of the Chapter I prohibition, the CAT has held that the civil standard of proof applies to the OFT even though the OFT proceedings are of a criminal nature for the purposes of Article 6 ECHR. In *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading*²⁴ the question arose whether proceedings under the Chapter I and Chapter II prohibitions were criminal proceedings for the purpose of the Human Rights Act 1998 ("HRA"). The CAT held that Competition Act 1998 proceedings are "criminal" under the HRA and that it followed from this that the undertaking concerned is entitled, amongst other things, to a fair and public hearing by an independent and impartial tribunal and to be presumed innocent: it is for the OFT to prove the infringements alleged. However, the CAT also concluded that the fact that penalty proceedings under the Competition Act 1998 are criminal for the purpose of the HRA does not mean that they should be subject to the same rules of evidence or procedures as ordinary criminal proceedings²⁵. In particular the CAT held that the HRA does not require that the criminal standard of proof "beyond reasonable doubt" (i.e. to be satisfied in the evidence so as to be "sure") should be applied: instead it concluded that the civil standard "balance of probabilities" was the appropriate standard, although, where a fine is imposed, this would require the OFT to provide "strong and

20 *Potato Marketing Board v Robertson* [1983] 1 CMLR 93 at para 98
21 [1989] 3 CMLR 429 at 570; see also *Application by Anley Maritime Agencies Ltd for Judicial Review* [1999] Eu LR 97
22 [1992] 3 CMLR 830 at 873
23 [2001] EU LR 232, QBD (preliminary issues); final judgement was given in *Arkin v Borchard Lines Ltd* [2003] EWHC 687 (Comm Ct)
24 Case No. 1000/1/1/02 [2002] CAT 1, [2002] CompAR 13; [2002] ECC 177, see also the interim judgment of the CAT in this appeal: Case No. 1001/1/1/01, [2001] CAT 3, [2001] CompAR 33, [2002] ECC 19, paras 69-70.
25 Case No. 1000/1/1/01 [2002] CAT 1, [2002] CompAR 13, para 101.

compelling evidence.... the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be"²⁶.

(iii) Limitations concerning form of evidence (e.g. does evidence have to be documentary to be admissible. Which witnesses can be called, e.g. the CEO of a company? Can evidence/witnesses from other jurisdictions be admitted/summoned?)

There are no limitations concerning the form of evidence or type of witnesses (within the terms of the question) in the ordinary UK civil courts;

Documentary evidence forms the subject of discovery which is subject to the CPR and privilege (see below). Otherwise evidence is provided by witnesses whose witness statements must be exchanged before trial. Witnesses called at trial will be subject to cross-examination on their witness statements and any oral evidence given in Court. The relevant CPR is rule 32.

If a witness is reluctant to attend trial, attendance can be compelled by issuing and serving a witness summons (CPR, rules 34.2 to 34.7). Issuing a witness summons is purely administrative, and the fee must be paid. Service must be effected personally and not less than 7 days before the witnesses are required to attend Court. Conduct money, namely a sum sufficient to cover the witness' expenses in travelling to and from Court and compensation for loss of time, must be tendered on service of the witness summons if the witness is to be liable to committal proceedings for failing to attend Court. There are two types of witness summons:

- (a) to attend court to give oral testimony;
- (b) to produce documents at Court. This enable the witness summons to operate in a manner similar to disclosure, but against a witness as opposed to a party. It is not intended to obtain disclosure against the party.

Witness summonses are issued to ensure that witnesses who are able to give relevant evidence are available in Court. The person who is served with a witness summons but is unable to give relevant evidence, may apply to have the witness summons set aside.

Witness Summonses are subject to the Court's discretion which may be exercised at the parties' request or exceptionally by the judge on his own initiative. Criminal sanctions for failure to appear are fines and imprisonment.

Oral evidence and cross-examination are minimised to issues defined by CAT which operates in a similar way to CFI with English rules of procedure and evidence (adapted to swift procedure).

The term "document" is construed very widely and includes all notes, records, tapes or anything on which evidence or information is recorded in an intelligible manner.

Where documents are protected by "privilege", they may neither be inspected nor produced as evidence in court. There are two categories of privilege relevant here:

- Legal professional privilege: "legal advice" privilege, and "litigation" privilege
- Privilege against self-incrimination

Legal Professional Privilege

Legal professional privilege is a fundamental right under the common law intended to safeguard the rights of the citizen to obtain skilled advice about the law without fear that what is discussed might be used against them at a later

26 [2002] CAT 1, [2002] CompAR 13, paras 105 and 109.

stage. It is supported by Article 8 of the European Convention on Human Rights and forms part of Community law: ²⁷ There are two classes of legal professional privilege:

- privilege applicable whether or not to litigation was contemplated or pending;
- privilege only applicable if litigation was contemplated or pending when the relevant communications were made or came into existence.

Legal advice privilege:

Communications between a party and solicitors are privileged from production provided that they are confidential and written to or by the solicitor in a professional capacity and for the purpose of getting legal advice or assistance. A recent Court of Appeal decision has clarified a number of issues relating to legal advice privilege, in a case concerning the collapse of Bank of Credit & Commerce International and the regulatory role of the Bank of England.²⁸ The Court of Appeal held that:

- documents prepared by Bank of England employees with the intention that they should be sent to their employer's law firm, Freshfields, for advice were not privileged. Legal advice privilege does not attach to documents obtained from third parties to be shown to a solicitor for advice, and an employee is to be treated as a third party for this purpose. It makes no difference that a corporation can only act through agents. Only communications between the client, the bank or a special unit of the bank dealing with a public inquiry known as the "Bingham Inquiry Unit", and the solicitor were privileged.
- documents, even if prepared with a dominant purpose of obtaining legal advice, which were not submitted to the solicitors, were not privileged.
- documents that were sent to the solicitors that had not been prepared for the dominant purpose of seeking legal advice were not privileged.
- ex-employees can be in no better position than current employees for the purpose of any claim to privilege.

The Court of Appeal had said that legal advice privilege was in reality privilege in aid of litigation, because it concerned advice about rights and obligations that concern the subject matter of litigation. Accordingly, in the second case²⁹ Mr Justice Tomlinson held that even communications between the Bingham Inquiry Unit and Freshfields would not be privileged if they were directed not to advice about the bank's rights and obligations, but advice about how the bank's material might sensibly be presented to the Bingham Inquiry in a way least likely to attract criticism. This judgment was upheld on appeal.³⁰ These decisions clearly indicate that legal advice privilege is more restricted than litigation privilege.

Privilege also attaches to communications with the solicitor in the service of a party (e.g. a legal department of a company or government department) provided the communications relate to legal as opposed to administrative matters. Further, instructions and briefs to Counsel, and Counsel's opinions, drafts and notes are also privileged.

Litigation privilege:

Communications between the parties' solicitor and a third party are privileged when they come into existence after litigation is contemplated or commenced and are made with a view to such litigation, either for the purpose of obtaining or giving advice in regard to it, or obtaining or collecting evidence which may be used in it. However, the document in respect of which privilege is claimed must have come into existence at the time when litigation was contemplated or pending. It is not possible to attach privilege to enclosures to a letter to a solicitor simply because they were sent under cover of a letter which itself may be privileged.

27 *R (Morgan Grenfell & Co. Ltd) v Special Commissioner of Income Tax* [2002] 3 ALL ER 1.
28 *Three Rivers* (No. 5) [2003] QB 1556.
29 *Three Rivers* (No. 10) [2003] All ER (D) 40(Nov).
30 [2003] EWCA Civ 18.

Examples of privileged communications include witness statements and expert reports obtained by a solicitor for the purpose of a contemplated or current action.

Copies and translations of documents are privileged if the original was privileged but not if the originals were not privileged. However, a compilation of copies or translations of documents obtained from third parties may be protected by legal professional privilege if disclosing them may betray the trend of advice given by the solicitor to the client. But this will not apply where the original documents came from the client.³¹

Communications between the party personally and a third party will be privileged only if the dominant purpose for which the document was prepared was for submission to a legal advisor in view of contemplated or pending litigation.³²

The Court of Appeal has clarified that the test for establishing whether litigation privilege will apply requires the party claiming privilege to show that he was aware of circumstances that made litigation "a real likelihood rather than a mere possibility".³³ The case concerned an unprecedented application in the context of US tobacco litigation to question the lawyers acting for BAT. While many might have supposed in 1986 that litigation against the tobacco companies was a real likelihood, the Court of Appeal held litigation at that date to have been no more than a "mere possibility" since the last action against BAT had been in 1969. Litigation privilege was not available.

Privilege against self incrimination

The House of Lords held in the *Westinghouse Uranium Contract case*³⁴ that a party could claim privilege from discovery and disclosure of documents by invoking the Civil Evidence Act 1968, s14 on the grounds that to do so might incriminate him and make him vulnerable to the imposition of a fine by the European Commission for breach of Article 81 or 82. It is unclear whether the same approach would be adopted where the Commission or OFT have already adopted a decision finding an infringement and exercised their fining powers.

Confidentiality

The protection of business secrets or confidentiality does not normally arise in UK civil Courts where full disclosure is required but the use of disclosed documents is limited strictly to the purpose of the proceedings. However, a complex procedure applies in appeals against OFT decisions before the CAT. It is not clear how such issues, if relevant, will be dealt with under S47A or S47B CA 1998 in monetary claims before the CAT. However the CAT Rule 53 on requests for confidential treatment is applicable to claims for damages under Part IV of the Competition Appeal Tribunal Rules 2003 (S.I.2003 No. 1372).

(iv) Rules on (pre-trial or other) discovery within and outside the jurisdiction of the court vis-à-vis:

- **Defendants**
- **Third parties**
- **Competition authorities (national, foreign, Commission)**

The normal rules of discovery apply in the civil courts (CPR, Part 31) and are applied by the CAT in practice under the CAT Rules 2003 power to give directions under Rule 19(2)(k). In particular, the CAT may give directions for the disclosure between, or the production by, the parties of documents or classes of documents, under Rule 19(2)(k). The normal threshold is "standard disclosure". But the CAT disclosure is not automatic and is subject to directions under CAT Rule 19(2)(k). However, no issues have arisen in damages cases before the CAT as the first cases are only beginning.

31 *Sumitomo Corporation v Credit Lyonnais Rouse Ltd* [2002] 1 WLR 479

32 *Wagh v British Railways Board* [1980] AC 521.

33 *USA v Morris* [2004] EWCA Civ 330.

34 *Rio Tinto Zinc v Westinghouse Electric Corporation* [1978] AC 547, [1978] 1 All ER 434

Standard Disclosure

Disclosure is the process whereby a party to a claim is obliged to disclose to the other party the existence of all documents which are or have been in his or her control which are material to the issues and the proceedings. Initially, disclosure is given by an exchange of lists of documents and this should take place after allocation of the proceedings to one of three case management "tracks"³⁵. The other parties are then entitled to inspect and take copies of the documents disclosed, except any document which is privileged (CPR, Rule 31).

An order to give disclosure is an order to give standard disclosure unless the Court directs otherwise (CPR, Rule 31.5). The Court may dispense with or limit standard disclosure. The parties also may agree in writing to dispense with or limit it. The nature of the documents that must be disclosed under standard disclosure is described as follows (CPR, Rule 31.6):

"Standard disclosure requires a party to disclose only –

- (a) the documents on which he relies; and
- (b) the documents which –
 - (i) adversely affects his own case;
 - (ii) adversely affect another party's case; or
 - (iii) support another party's case;
- (c) the documents which he is required to disclose by a relevant practice direction."

Standard disclosure in accordance with CPR, Rule 31.6 is narrower than the pre-1999 test in that it no longer requires disclosure of documents which would fairly lead to a train of enquiry which might have either of the consequences" of the documents described in paragraph (b)(i) or (ii).

It is the duty of a solicitor to ensure that the client provides full disclosure as required by the rules. The duty is an active one. The client must be advised as to the requirements of disclosure and the solicitor must ensure that the originals of all disclosable documents are preserved and made available for disclosure to the other party.

In addition to legal professional privilege and privilege against self-incrimination referred to above in section E(a)(iii), two other classes of documents are privileged from production and inspection although they must be disclosed (i.e. included in the list of documents provided on discovery). These are documents protected on the grounds of public policy (public interest privilege) and without prejudice communications (which is to enable the parties to negotiate, without risk of their proposals being used against them if negotiations fail). However, confidential material which does not fall within one of the four categories of privilege is not normally protected from disclosure whether the document is confidential in nature or damaging to the party giving disclosure. Privilege, therefore, may not be claimed in respect of the document merely because it was supplied in confidence by a third party.

Nevertheless, in certain cases the Court may control the degree of disclosure, for example limiting disclosure to the lawyers in the case and requiring them not to disclose to their lay clients. An example would be where a party claims secrecy of

35 The idea behind track allocation is that cases should be dealt with procedurally on a basis that is justifiable given the overall importance of each case in accordance with the Court's overriding objective of dealing with cases justly by active case management. In exercising their case management powers, Courts will seek to ensure that they are dealt with expeditiously and fairly. Each case should be allotted an appropriate share of the Court's resources and be dealt with proportionately bearing in mind factors such as the importance and complexities of the issues and the monetary value of the claim. The smallest and simplest cases will therefore be assigned to the small claims track. These cases will usually be given an immediate date for hearing, with limited preparation being required, and the strict rules of evidence do not apply. Cases with a monetary value in the range of £5,000 - £15,000 will usually be allocated to the fast track with standard directions and tight timetables of up to 30 weeks of the completion of the preparatory status before trial. Larger and more important cases will be assigned to the multi-track. The Courts enjoy significant flexibility in the management of the multi-track cases which will mainly be dealt with at Civil Trial Centres which are the larger Court venues.

relevant material such as a secret process in a patent infringement action. Here the Court will order a controlled measure of disclosure deciding in each case what measure of disclosure is appropriate, to whom it should be made and upon what terms. The CAT has followed this approach in certain appeals under the CA 1998, it is understood.

Pre-action disclosure

Under the Supreme Court Act 1981, s33(2) and the Civil Court Act 1984, S52(2), the Court has power to make an order for pre-action disclosure against the likely defendant if the following four conditions are satisfied:

- the applicant appears likely to be a party to subsequent proceedings;
- the defendant appears likely to be a party; and
- the defendant appears likely to have or have had relevant documents in his or her possession, custody or power; and
- advanced disclosure is desirable to dispose of the anticipated proceedings fairly, or to prevent the need to commence proceedings, or to save costs.

If the conditions are met, the Court may, not must, order the defendant to disclose the relevant documents and to produce them to the applicant, or to the applicant's legal or other professional advisers. The applicant, therefore, may be precluded from seeing the document. The order is limited to such documents as the defendant ought to disclose by way of standard disclosure (CPR, Rule 31.16(4) and (5)):

"An order under this rule must –

- (a) specify the documents or the classes of documents which the respondent must disclose; and
- (b) require him, when making disclosure, to specify any of those documents.
 - (i) which are no longer in his control; or
 - (ii) in respect of which he claims a rightful duty to withhold inspection.

such an order may

- (a) require the respondent to indicate what has happened to any documents which are no longer in his control;
- (b) specify the time and place for disclosure and inspection.

Under the Supreme Court Act 1981, S34(2) and the Civil Court Act 1984, S53, the Court has a similar power to order a non-party to produce documents before trial. In the absence of this power witnesses could only be required to produce documents in response to a witness summons (see above), which would mean the documents otherwise could only be required to be produced at trial.

Witnesses

Factual evidence is normally given by written witness statements, appending documents, which are exchanged before trial and form the basis for oral examination (often limited to reference to the witness statements themselves as a party's evidence-in-chief) and oral cross-examination at trial.

Scope of discovery of documents

The admissibility of evidence obtained by a party to UK court proceedings from the EC Commission after a Commission negative decision when the documents concerned have been classified as confidential business secrets is questionable as a

matter of public policy but not tested. In English courts, all evidence which is sufficiently relevant to prove or disprove a fact in issue is admissible and must be disclosed, regardless of its location if it has not been excluded by any rule of the law of evidence, such as privilege. Documents to be disclosed are not limited to those which are within the jurisdiction. If a material document outside the jurisdiction is in a party's power, it must be disclosed. This is because disclosure must be made of documents which are, or have been, in a party's control. "Control" is defined as covering documents which are or have been in a party's physical possession, and also where a party had a right to possession or to inspect or take copies (CPR, Rule 31.8).

Expert witnesses

Expert witnesses, third parties and interveners are all subject to the ordinary rules (CPR) of the ordinary civil courts. Expert witnesses are an exception to the general common law rule that witnesses must state facts not opinions. The following four common law conditions must be satisfied before expert evidence will be admissible:

- the matter must call for expertise;
- the evidence must be helpful to the Court in arriving at its conclusions³⁶
- there is a body of expertise in the area in question;³⁷
- the particular witness is suitably qualified as an expert in the particular field of knowledge.

Directions dealing with expert evidence will usually be made when the case is allocated to the fast track or multi-track, or on the case management conference. The primary rule is that no party may call an expert or put in evidence an expert's report without the Court's permission. In the absence of a direction, therefore, expert evidence is inadmissible. In deciding whether to grant permission, and if so to what extent, the Court will seek to restrict expert evidence to that which is reasonably required to resolve the proceedings (CPR, Rule 35):

- expert evidence shall be restricted to that which is reasonably required to resolve the proceedings (CPR, Rule 35.1);
- no party may call an expert or put in evidence in an experts report without the Court's permission (CPR, Rule 35.4(1));
- the party who fails to disclose an experts report may not use a report at the trial or call the expert to give evidence orally unless the Court gives permission (CPR, Rule 35.13).

Until the 1998 civil procedural rules were introduced, each party would instruct its own expert where expert evidence was permitted by the Court. This is still the most likely approach in large cases allocated to the multi-track. (Expert evidence is not allowed in small claims track cases). Since 1998, joint instruction of a mutually acceptable expert to produce an objective and unbiased report is favoured by the CPR. (This is in fact the approach favoured in fast track cases). The Court now has the power to direct the joint instruction of experts where two or more parties wish to submit expert evidence on a particular issue, the Court may direct that the evidence on that issue is to be given by one expert only (CPR, Rule 35.7(1)). If the Court makes the direction, unless the parties agree on the expert to be instructed, the Court may select an expert from a list submitted by the parties, or direct how the expert should be selected. Once selected, each instructing party may give instructions to the expert, sending a copy to the other instructing party.

The joint instruction of experts is expected to be the normal direction by the Judge in the fast track procedure unless there is a good reason not to do so. On the other hand, it is still normal in multi-track cases to have the separate instruction of experts. Another shift in emphasis from the pre-1999 procedural system is that the Civil Procedure Rules 1998 emphasise the importance of experts remaining independent of the parties and confirm that the expert's primary duty is to the

36 *Midland Bank Trust Ltd v Hett Stubbs and Kemp* [1979] 1 Chancery 379.

37 *Barings plc v Coopers & Lybrand*, The Times 7 March 2001.

court rather than the party paying his fees (CPR, Rule 35.3). For example, in the Crehan case, there were 8 expert witnesses.

In the CAT, CAT Rule 19(h) provides for directions regarding the appointment of experts. Experts are normally instructed by the parties in the same way as in ordinary civil Courts. There is no reported case where the Tribunal itself has instructed an expert, although it has the power to do so.

CAT Rules 2003

The CAT has its own statutory authorised Rules of Procedure adopted by the Secretary of State in exercise of the powers conferred by section 15 of and Part 2 of Schedule 4 to the Enterprise Act 2002. The Competition Appeal Tribunal Rules 2003 (SI 2003 No. 1372) effective from 20 June 2003 and applicable to all proceedings before the CAT from that date contains the rules applicable to damages claims under sections 47A and 47B CA 1998. The applicable rules are set out in Part IV and in Part I, Part II (except for Rules 8 to 16) and Part V of the CAT Rules. Rules 8 to 16 in Part II apply only to appeals against OFT and the sectorial regulators' administrative decisions. In particular Rule 16 on intervention does not appear to have any application to claims for damages under Part IV.

The statutory basis for the CAT rules is Schedule 4 EA 2002. Three main features of the CAT rules can be illustrated by selected examples (as this chapter is not intended to be a handbook to the CAT procedure). First, the CAT is intended to be far more interventionist than the ordinary civil courts (like the CFI), although the overriding principles of the 1998 civil procedure rules introduced in 1999 are adopted as the relevant criteria for the exercise of the tribunal's case management powers generally in determining claims for damages. In particular CAT rule 44(1) requires the active exercise of the Tribunal's powers set out in rules 17 (Consolidation), 18 (Forum), 19 (Directions), 20 (Case Management Conference etc), 21 (Timetable for the oral hearing), 22 (Evidence), 23 (Summoning or citing of witnesses) and 24 (Failure to comply with directions) with a view to ensuring that the case is dealt with justly. Rule 44(2) describes dealing with a case justly as including, so far as is practicable:

- (a) "Ensuring that the parties are on an equal footing;
- (b) saving expenses;
- (c) dealing with the case in ways which are proportionate –
 - (i) to the amount of money involved;
 - (ii) to the importance of the case;
 - (iii) to the complexity of the issues; and
 - (iv) to the financial position of each party;
- (d) ensuring that it is dealt with expeditiously and fairly; and
- (e) allotting to it an appropriate share of the Tribunal's resources, while taking into account the need to allot resources to other cases."

Second, the CAT rules are largely concerned with case management with a view to ensuring that the overriding objectives designed to ensure that the case is dealt with justly are satisfied. In particular, the CAT rules on case management in Rule 19 (Directions) and Rule 20 (Case management conference etc) are clearly influenced by the CFI rules on measures of organisation of procedure and measures of enquiry. For example, the tribunal may give directions (including on its own initiative):

- (a) as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the oral hearing;

...

- (b) requiring persons to attend and give evidence or to produce documents;
- (c) as to the submission in advance of a hearing of any witness statements or expert reports;
- (d) as to the examination or cross-examination of witnesses;
- (e) as to the fixing of time limits with respect to any aspect of the proceedings;
- (f) to enable the disputed decision to be referred in whole or in part to the person by whom it was taken;
- (g) for the disclosure between or the production by, the parties of documents or classes of documents;
- (h) for the appointment and instruction of experts, whether by the Tribunal or by the parties and the manner which expert evidence is to be given;
- (i) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal; and
- (j) for the hearing of a person who is not a party where, in any proceedings, it is proposed to make an order or give the direction in relation to that person."

Further rule 19(3) provides that the Tribunal may, in particular, of its own initiative:

- (a) "put questions to the parties;
- (b) invite the parties to make written or oral submissions on certain aspects of the proceedings;
- (c) ask the parties or third parties for information or particulars;
- (d) ask for documents or any papers relating to the case to be produced;
- (e) summon the parties' representatives or the parties in person to meetings"

Third, the other main feature of the CAT rules themselves (also reflected in the Tribunal's practice in the context of appeals against OFT decisions where it has turned to the CPR 1998 as guidance for interpreting its own rules) is that the rules themselves are either very similar to, and occasionally adopt, the CPR 1998 approach. However, the Rules are subject to maximum flexibility under the control of the Tribunal, as in the case of the CFI. For example CAT rule 23 on summoning or citing witnesses allows Tribunal to issue a summons (or in relation to proceedings taking place in Scotland "a citation") requiring any person wherever he may be in the United Kingdom to attend as a witness before the Tribunal and to answer any questions or produce any documents or other material in his possession or under his control which relate to any matter in question in the proceedings. The basic rule and the specific provision in rule 23(3) requiring payment for a witness to attend court as a pre-condition for his attendance mirror the equivalent rules of the CPR discussed above. In the context of conditional fee arrangements, CAT Rule 65 expressly provides that the rules on funding arrangements made under the Civil Procedure Rules 1998 as amended apply to proceedings before the Tribunal.

The President of CAT, Sir Christopher Bellamy QC has explained that the CAT procedure was deliberately modelled on the CFI procedure but without excluding the best features of the common law adversarial rules of procedure and evidence (see below). As an example of a specific rule which mirrors the CFI process, and at the same time is not known to the ordinary CPR, it is CAT rule 53 dealing with requests for confidential treatment. Rule 53 applies to claims for damages as well

as to other proceedings before the CAT. Parties wishing to claim confidential treatment of documents including business secrets are permitted to apply to the CAT to have them excluded provided the request is made in writing by the person who submitted the document at the latest within 14 days after filing the document indicating the relevant words, figures and passages for which confidentiality is claimed and supported in each case by specific reasons and, if so directed by the Registrar, the person making the request must supply a non-confidential version of the relevant document. Where there is a dispute as to whether confidential treatment should be accorded, the Tribunal must decide the matter after hearing the parties taking into account the need for excluding, so far as practicable the matters listed in paragraph 1(2) of Schedule 4 to the EA 2002:

- "(a) information the disclosure of which would in its opinion be contrary to the public interest;
- (b) commercial information the disclosure of which would or might, in its opinion, significantly harm the legitimate business of the undertaking to which it relates;
- (c) information relating to the private affairs of an individual the disclosure of which would, or might, in its opinion, significantly harm his interests."

It is interesting to note in this context that the CAT will be in a better position to protect confidential information and business secrets communicated to it by the European Commission under Article 15(1) of Regulation 1/2003 and the notice on co-operation with national courts than the ordinary civil courts where the judges will have to rely on their power to control disclosure as there is no category of privilege from disclosure applicable to confidential information.

The CAT applies a public interest test for disclosure of confidential documents in the possession of the Competition authorities in appeals against their decisions, and as against whistle blowers. However, disclosure was ordered by the CAT in the *Claymore Case* against the OFT and in the *Argos/Littlewood case* against Hasbro in respect of its leniency application in the public interest to ensure "equality of arms" for the appellant against the OFT.

The following is a summary of the CAT procedure:

"Following a DTI consultation document³⁸, the Secretary of State adopted the Competition Appeal Tribunal Rules 2003³⁹. The Commission itself has published *A Guide to Appeals under the Competition Act 1998*⁴⁰. The rules of the CAT are based on five main principles: first, early disclosure of each party's case, and of the evidence relied on; secondly, active case management by the CAT to identify the main issues early on and avoid delays; thirdly, strict timetables, with straightforward cases to be completed within six months: for example, when rejecting an application for an extension of time in which to lodge an appeal in the *Hasbro case*, the CAT said that respect for the deadline in commencing proceedings is, in many ways, the "keystone" of the whole procedure⁴¹; fourthly, effective procedures to establish contested facts; and fifthly the conduct of oral hearings within defined time limits⁴². The procedure before the CAT is predominantly written; submissions should be kept as short as possible. Where an expert is asked to produce a report, for example by an applicant to the CAT, that expert's duty is to assist the Tribunal, and this overrides its obligation to the person from whom the instructions were received and from whom payment was

38 URN 99/1154, October 1999.

39 SI 2003/1372, repealing and replacing, for cases commenced on or after 20 June 2003, the earlier Competition Commission Appeal Tribunal Rules 2000, SI 2000/261.

40 1 June 2000, available at <http://www.cattribunal.org.uk/>; see also Rayment "Practice and Procedure in the Competition Commission Appeal Tribunal" (2002) 1 Competition Law Journal 23; it is understood that a new *Guide to Proceedings* under the 2003 CAT Rules of Procedure will be published in due course on the CAT's website.

41 Case No. 1010/1/1/03 *Hasbro UK Ltd v Director General of Fair Trading* [2003] CAT 1; see also the CAT's judgments in Case No. 1000/1/1/01 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2001] CAT 2, [2001] CompAR 21 and in Case 1007/2/3/02 *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 15.

42 *Annual Review & Accounts of the Competition Commission 1999/3000*, p.10.

received⁴³. The oral hearing should be regarded as an opportunity to debate contentious issues rather than to state a case which has already been made in writing. As a general proposition new evidence that could have been made available during the OFT's investigation will not be allowed to be submitted to the CAT⁴⁴, although the CAT will allow some flexibility⁴⁵. Where third parties appeal against a decision of the OFT or a sectoral regulator, the CAT considers that the onus is on the complainant to show that the decision should be set aside: in particular sophisticated complainants with the resources to present a properly supported case should produce evidence rather than relying on unsupported assertion⁴⁶. The Competition Appeal Tribunal Rules 2003⁴⁷ enable the CAT to make such order as it thinks fit in relation to costs^{48, 49}.

As can be seen from this useful summary of the CAT's Guide to its proceedings, the procedure before the CAT is different to that before the ordinary civil courts with more emphasis on the written procedure as in the CFI. However, the English procedural rules and law of evidence are applied through the CAT's own Rules and subject to strict control its President⁵⁰.

(b) Proving the infringement

(i) Is expert evidence admissible?

Yes. Parties usually each appoint expert(s) to report to the court on technical issues provided the court gives permission. Written questions may be put by parties on an opponent's expert report for clarification purposes. The court may direct a meeting between experts to narrow issues in proceedings. Single joint experts are rare. It follows that experts are party led not court appointed. UK civil court practice does not favour use of joint experts, despite preference expressed by CPR. Joint or Court appointed experts are not known before the CAT, although the CAT has the power to make such directions (see E(a)(iv) above).

(ii) To what extent, if any, is cross-examination permissible?

The court may (usually will) order the exchange of witness statements and experts reports (for example witnesses who may give opinions as to market dominance or restriction of competition) in advance of trial. In the civil courts, witness statements are exchanged and the witness tendered for cross-examination by the other parties at the trial. The Court does not cross examine. The Courts and CAT have the power at all times to ask questions of a witness or of the lawyers. In particular, the CAT has the specific case management power to give directions as to the examination or cross-examination of witnesses (Rule 19(2)(9)). The CAT also has the power to limit cross-examination of witnesses to any extent or in any manner it deems appropriate (Rule 51(4)), under its power regarding procedure at the hearing.

(iii) Under which conditions does a statement and/or decision by a national competition authority, a national court, an authority from another EU Member State have evidential value?

*NB the study is especially intended to consider private actions brought by third parties which are **not** based upon pre-existing national or Commission decisions or*

43 Case No. 1009/1/1/02 *Aberdeen Journals Ltd v Office of Fair Trading* [2003] CAT 11, para 288.
 44 See Case No. 1000/1/1/01 *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 1, [2001] CompAR 13, para 59.
 45 [2002] CAT 1, [2001] CompAR 13, paras 60 ff; see also the final judgment of 22 May 2001 Case No. 1000/1/1/01 [2002] CAT 1, [2002] Comp AR 13, [2002] ECC 177, paras 114-126; a strict approach was taken to the issue of fresh evidence by the CAT in Case No. 1005/1/1/01 *Aberdeen Journals Ltd v Director General of Fair Trading* [2002] CAT 4, [2002] CompAR 167, paras 162 - 189.
 46 See Case No. 1007/2/3/02 *Freeserve.com plc v Director General of Telecommunications* [2003] CAT 5, paras 114-115.
 47 SI 2003/1372
 48 SI 2003/1372, r 55(2).
 49 See, Whish, page 401.
 50 See Sir Christopher Bellamy QC: "Some Reflections on Procedure in Competition Cases", Chapter 14, at pages 189-191 in "A True European" in honour of Sir David Edward QC CMG (2003) where he states: "so it was that the CAT was, in the event, modelled on the CFI."

court judgments. Therefore the question of proving the infringement must primarily focus on situations where such decisions or judgments do not exist

For the binding status of OFT/Commission decisions on the CAT (under s47A CA 1998) and of OFT decisions under Chapter 1/Chapter 2 Prohibition and Articles 81/82 EC on the ordinary courts (under s58A CA 1998), see Section A(i) and B(ii) and (iii) above.

Under the normal practice of the UK Courts foreign law (which may include foreign NCA decisions but there are no reported cases one way or the other) is treated as a question of fact, , if relevant at all. The value of decisions of other national courts cited by parties in UK unrelated cases, for example, is their persuasive jurisprudential value. There have been no examples in the context of competition damages cases to date.

In order to admit the report of a non-English decision, or its summary, into the evidence it must be translated and certified. Questions of enforcement of foreign judgments will be dealt with under Regulation 44/2001 where it applies.

(c) Proving damage

(i) Are there any specific rules for evidence of damage?

In the case of Articles 81 and 82 anyone who suffers loss as a result of a breach of statutory duty may claim damages. Claims for breach of statutory duty are subject to the general rules applicable to tort.

To prove a claim for damages, therefore, it has to be established that the loss suffered is directly attributable to the alleged breaches of Articles 81 and 82.

The evidential test is a balance of probabilities. Normally, as in *Crehan*, the court will assess the reliability of the expert evidence relating to the assessment of the quantum of loss.

(d) Proving causation

(i) Which level of causation must be proven: direct or indirect?

To prove causation, the claimant must show that it is more likely than not that the damage would not have occurred "but for" the breach of duty. In other words, if the damage would have occurred regardless of the infringement, the "but for" test would not be satisfied.

Causation is a question of fact; only damage directly caused by the infringement may be claimed (but including loss of profits or out of pocket expenses where causation is proven etc., (see *Crehan* case). The English tort rules distinguish direct loss from consequential damage but in the context of economic torts such as infringement of Articles 81 and 82 EC, the question of remoteness of damage overlaps with causation as interpreted by the ECJ i.e. there must be a causal link proved for damage to be recoverable (see also Section D(iii)(b) and (c) above).

F. Grounds of justification

(i) Are there grounds of justification?

No; only in accordance with substantive EC competition law under Article 81(3) post 1 May 2004, and Article 82 (objective justification). Concepts such as force majeure, consent and necessity are relevant only to breach of contract in English law.

(ii) Are the 'passing on' defence and 'indirect purchaser' issues taken into account?

Open question (no decided case where passing-on issues have been discussed by a court yet).

Passing On

Against the background that damages in English law are compensatory in nature and that loss has to be proved as a prerequisite to an award of damages, the question arises as to whether damages can be recovered from an infringer of EC competition law if the claimant is the first in a chain of purchasers (eg a direct purchaser from a cartel) and has passed on all or part of the overcharge to the next purchaser down the line.

There has been no case in the English courts in which the limits of such a defence have been tested and conclusively established. However, in the light of the authors practical experience in cases where the issue of passing-on has been raised, the following overview of the relevant UK law reflects the legal arguments used by parties to damages claims in the UK Courts and which are likely to be decided by those Courts in the first case that is not settled.

English law requires a claimant claiming damages to mitigate its loss if it is reasonably able to do so. To enable a claimant who has passed on its loss to recover the whole of an overcharged amount (apart from the issue of giving the claimant a windfall) would conflict with this principle.

The requirement for a direct causal link between the Article 81 infringement and the damage caused already provides a significant limitation on the class of persons who can claim.

A direct purchaser who has passed on will not have suffered a loss on a "but for" type analysis but will have properly mitigated its loss to a greater or lesser extent and will thus have no (or a diminished) claim. This approach is consistent with the passing reference to the desirability of avoiding "unjust enrichment" by the ECJ in the *Crehan* case.⁵¹

The concept of unjust enrichment is a developing doctrine in English law where it would apply equally to restitution as to a damages claim. One possible approach that would be consistent with the English law principles of causation and the duty to mitigate would be as follows. Direct purchasers should be encouraged to claim against the infringer for all losses that they have not been reasonably able to mitigate (or pass on). However, the direct purchaser should be under a duty to prove that he will not be unjustly enriched by identifying all customers to whom he has passed on his potential loss caused by the infringer and to notify these indirect purchasers so that their claims against the direct purchaser may be joined to the direct purchaser's claim. In this way, the Court can either order damages to be paid by an infringer by reference to the direct loss proved to have been caused by the infringement for each class of purchaser, or the whole loss could be ordered to be paid to the direct purchasers, with a second order requiring the direct purchaser to meet the claims of the indirect purchasers.

Claimants in UK cases will invoke by analogy the current approach in the United States, where under Federal law, the passing on defence is not available to a cartel. However, the courts have also restricted the class of potential claimants so that only those who are direct purchasers from the cartels may sue. Such a restriction is justified on the principle that it is better that there should be a windfall to a claimant in certain circumstances than that a cartel should be able to benefit from its infringing activity. Likewise, the restriction on indirect purchasers suing (or so called "offensive" passing-on) is justified as a necessary adjunct to disallowing the defence so as to prevent multiple liability being imposed on the cartel. It is also considered more likely to facilitate successful private enforcement of competition law if the damage cannot be laid

51 See, note 2.

off to a more and more dispersed (and proportionately less affected) class of claimant who will have less incentive (and probably less money) to bring the necessary claims to hold cartelists to account. It is also thought that the potential difficulties of proof for an indirect claimant in tracing overcharge should not be something from which a cartelist should benefit.

In the absence of Community law governing competition law damages procedure and remedies, there is no reason at present why any English court should not consider that the problems of proof (expense, evidential difficulty) posed by tracing an overcharge through the hands of a potentially long chain of purchasers of a product are outweighed by the desirability of having an effective recovery mechanism available to all affected purchasers, should they wish to sue.

Again, the broad language used by the ECJ in the *Crehan* Case in identifying those who can sue for loss caused by infringement of Article 81 EC as encompassing all individuals so harmed suggests that EC law would not restrict indirect purchasers from claiming because such purchasers are entitled to effective protection, However, they will have to prove loss and causation to be able to claim.⁵²

(iii) Is it relevant that the plaintiff is (partly) responsible for the infringement (contributory negligence leading to apportionment of damages) or has benefited from the infringement? Mitigation?

Where the claimant is a co-contractor, the defence of *in pari delicto* (may not claim damages in reliance on own illegality) may apply if the claimant can be shown to be responsible on the *Crehan* tests (but no question of negligence). The principle of unjust enrichment is still to be clarified. In English law there is a general duty to take reasonable steps to mitigate loss. Thus, assuming that the direct purchaser genuinely is unaware of a cartel between its suppliers the direct purchaser should charge a profit maximising price to the extent that the relevant market place will permit.

G. Damages

(a) Calculation of damages

Damages are available in English tort law to compensate the victim of a wrong. They are designed to make good, so far as possible, the pecuniary or non-pecuniary loss suffered by the victim by putting him or her into as good a position as if no wrong had occurred.

In cartel cases, what is generally claimed by way of damages by a party claiming to have been affected in the market by the existence of a cartel is the "overcharge" i.e. the amount by which the price of the good in question has been inflated over and above the price that would have been charged had there been no cartel i.e. the cartel price less the "market price." (See, economics report).

(i) Are damages assessed on the basis of profit made by the defendant or on the basis of injury suffered by the plaintiff?

English tort law recognises physical loss as the primary head of damage. In the controversial area of economic loss, loss of profit directly caused by the tort will be recoverable as a head of damage. Beyond that, each case must be considered on its merits since future economic loss normally is considered too remote a head of damage,, as is the loss of a chance. Non-material loss (moral damages) are not a standard head of damages in UK tort law. As discussed further in Section G(a)(iii) below, the *Crehan* Case shows that compensation for loss must be assessed at the time of the injury caused by the wrong. Whether application of the heads of damage normally available in English tort is compatible with the ECJ case law on

52 See, note 2.

"effective remedies" or "full compensation" for infringement of directly effective provisions remains open to further clarification.

Damages are normally assessed on the basis of injuries suffered by the claimant in English tort law (but there has been no decided case rejecting a request for account of profits or restitution and the following discussion is made by reference to general tort law as there are no reports of argument of this nature in Competition cases). (See Section D(i) above).

Claims by the victims of cartelists in English law will tend to be framed as claims in tort rather than in contract, albeit that there may be a contractual relationship between the claimant and the cartel defendant. In English law, historically, restitutionary accounting remedies have only been available in tort cases where the nature of the tort in issue has a proprietary element e.g. passing off, breach of confidence, breach of copyright and so on. Whether competition law infringements equate to the historical class of proprietary torts is undecided. It is the wrongful exploitation of property that justifies the unusual step of stripping a tortfeasor of profit e.g. the misuse of confidential information. It is also the proprietary element that makes the benefit obtained comparatively easy to identify. The same features do not appear to be present in competition law cases, particularly in relation to cartels.

However, this is an area subject to potential development in English law. Accordingly, whilst a restitutionary damages claim may add nothing to a tort claim (for example the same arguments will arise in respect of passing on) and whilst none of the currently recognised grounds for an accounting remedy apply in the case of a claim for cartel damages, there remains a theoretical possibility that the court will consider claims made on this basis.

Such a claim would be calculated differently from ordinary damages with a different approach to the measure of loss. The loss compensated by ordinary damages is the loss suffered by the claimant. A restitutionary damages claim seeks to recover the benefit gained by the tortfeasor. In other words, it constitutes an "unjust enrichment" claim. Arguments along these lines have been rejected in the past by the English courts on the basis that a claimant should not have a right to substantial damages if no loss has been suffered by it. However, in recent years this area of the law in England has developed considerably and there is a certain amount of academic opinion which supports the restitutionary approach to damages, particularly in circumstances where the tortfeasor has cynically and in a calculated fashion flouted the Claimant's proprietary rights. He should therefore not be permitted to retain the benefit he has gained.

Such a claim might therefore be framed as an unjust enrichment claim by reference to the excess price achieved as a result of the cartel's overcharge. It is difficult to see, however, how this adds to the claim for ordinary damages. In theory, an account of profits remedy would enable recovery of any amounts made or received by a cartel as profit over and above the overcharge, if any, but there must be a question how this could be properly characterised as unjust enrichment since it will be virtually impossible to demonstrate at whose expense such profit is made.

Since restitution is a discretionary remedy (i.e. within the discretion of the Court unlike damages which are not in principle) it is thought that the court would be unlikely to award it in most circumstances, not least on public policy grounds because it undermines the limits set by the rules on awarding exemplary damages in cases of torts committed intentionally with a view to profit. All of that being said, it is an area of English law which is expanding (as opposed to exemplary damages which, whilst anomalous, are relatively well defined) and ripe for development in the English context. Any party to claims involving Article 81 infringements should therefore be aware of the potential in this area for enhancing claims for damages by reference to concepts from the law of restitution. However, restitution has not been discussed in the *Crehan* Case the only decision where damages for breach of Article 81 or 82 have been awarded to date.

(ii) Are damages awarded for injury suffered on the national territory or more widely (EC or otherwise)?

Damages may be awarded for injuries suffered on the territory of England and Wales, Scotland and Northern Ireland i.e national territory and territory where the claimant over which Court accepts jurisdiction has suffered damage including damage suffered by foreign claimants e.g. *Provimi* and *Trouw* cases).

(iii) What economic or other models are used by courts to calculate damage?

As demonstrated by the Court of Appeal judgment of 21 May 2004 in the *Crehan* Case, the English courts apply general principles of foreseeability and quantum applicable in tort claims where loss of profits are claimed i.e to restore the claimant to the position it would have enjoyed but for the unlawful conduct (see *Crehan* and *Arkin* cases). Economic loss beyond the loss of profits or loss of value of a business directly caused by the infringement are difficult to quantify and, therefore, will not be recoverable as purely speculative. Thus in the *Crehan* Case, the High Court accepted a sum for the hypothetical loss of future profits less 15 per cent to cover uncertainties and loss in value of the business claimed by Mr Crehan on the basis of his expert witness evidence. In ordinary English tort law, losses other than direct damage (which is typically physical damage) are not recoverable as being too speculative or remote. Consequently, the Court of Appeal overturned the High Court's assessment of damages and limited the award of damages to those caused at the date Mr Crehan surrendered his pub leases, albeit on the hypothetical basis that the pubs were operated without a beer tie. Thus the Court of Appeal awarded sums only for lost profits and loss in the sale value of the business at the date of injury. (See Section D(iii) above and Economics Chapter for economic models).

(iv) Are ex-ante (time of injury) or ex-post (time of trial) estimate used?

Ex-ante (time of injury) estimate is the orthodox approach. In the *Crehan* case⁵³, the High Court held that the damages should be assessed at the date of judgment, not at the date of loss which was accepted as the normal rule. Park J considered that interest on damages calculated at the date of loss was not an appropriate way to assess Mr Crehan's loss. The Court of Appeal has overturned that approach reducing Park J's damages figure of £1,311,500 (including interest) to £131,336 (with interest and the incidence of tax still to be assessed). There was no dispute in the Court of Appeal about the High Court's measure of the losses actually suffered (including lost profits) during the period when Mr Crehan operated the two public house premises until the surrender of the leases. The dispute covered the assessment of loss of future profits from that date and the value of the business free of the beer – tie restriction on the same date. As the Court of Appeal has granted permission to appeal to the House of Lords, the issues of liability and assessment of damages remain uncertain.

(v) Are there maximum limits to damages?

There are no maximum limits to damages.

(vi) Are punitive or exemplary damages available?

Exemplary damages are available in English law in limited circumstances. There is no decided competition case where exemplary damages have been considered. In the *Factortame* case, the English courts rejected a claim for punitive or exemplary damages since the tests were not satisfied under English law, although that law was held to be compatible with Community law by the ECJ on the Article 234 reference concerned.

Exemplary damages were claimed in the *Provimi* case but the case settled before there was any consideration of evidence or legal argument.

53 See, note 2.

Exemplary Damages

Exemplary damages are anomalous in English law, in that they offer a quasi-criminal sanction in a civil litigation context. They are punitive and are intended as a deterrent to wrongful conduct. It follows that to prove entitlement to them, a claimant must produce evidence of wrongful conduct. Whether they are available for a claimant against a cartel is not established in English law. The leniency programme of the Commission may be relevant here, since the Commission's leniency notice suggests that national Courts should take into account a defendant's whistle blowing conduct when assessing the civil law consequences of the voluntarily disclosed infringement.

Rookes v Barnard provides that exemplary damages are only ever granted in very exceptional circumstances namely (i) oppressive, unconstitutional behaviour by public officers (ii) calculated profit cases, where a defendant cynically calculates that damages are worth incurring because the profits of their action will outstrip the damages, and (iii) where statute provides. If these conditions are satisfied, there is no reason why exemplary damages for the breach of statutory duty constituted by an infringement of Article 81 would not be awarded under English law.

It is a principle of EC law that if specific damages, such as exemplary damages, may be awarded pursuant to claims or actions founded on domestic law then it must be possible to award them pursuant to claims or actions founded on Community law (Factortame No. 3), such as an infringement of Article 81.

It was decided in Factortame No. 5 that, since the ECA 1972 did not expressly provide for exemplary damages, they are not available for a breach of duty arising under that Act i.e. that a right to exemplary damages for breach of statutory duty (as opposed to common law torts) could only exist if that statute provided so, expressly. However, this has been met with academic criticism since, if exemplary damages were available for the direct commission of a similar tort in domestic law under heads 1 and 2 of the Rookes v Barnard formulation, then they should be available in similar tort claims at the European level and not restricted simply because the mechanism by which the claim is implemented in England is a breach of statutory duty under the ECA 1972. It would still, of course, be necessary to show that exemplary damages should be awarded under heads 1 or 2 of the Rookes v Barnard formulation.

Public policy may be relevant here. There will probably already have been a punitive fine levied at the European level. Should the cartel be further punished (as exemplary damages are intended to achieve) in the domestic court? And what if the cartel was a whistleblower under the EC leniency provisions whose fine has been remitted in whole or in part as a result of the provision of evidence of the cartel to the authorities? The English court is likely to have regard to the principle that there should be consistency between the Commission and national court's decisions (e.g. the decision to waive punishment) and that public policy should not permit the leniency programme to be undermined. However, this has not been judicially determined.

It is worth noting that reform of the English law on exemplary damages is widely anticipated.

Aggravated Damages

Aggravated damages are a further category of damages available in English law. In contrast to exemplary damages, they are intended to be compensatory. They are available to compensate a Claimant for injury to feelings arising as a result of the Defendant's actions. They effectively increase ordinary compensatory damages awards and are calculated on a non-pecuniary basis. Given that they are not to reflect any punitive element, they are only available in respect of a limited category of torts, such as sex discrimination and breach of confidence. Such damages were, however, a head of claim in the *Provimi* case. It seems unlikely that such a claim could be made good before the

English courts since it is difficult to equate the operation of a cartel to cases involving real injury to feelings. Cartel cases will tend to be concerned with purely commercial relationships and damages for injury to feelings, dignity or reputation will simply not be in issue.

(vii) Are fines imposed by competition authorities taken into account when settling damages?

See above re-exemplary damages. There is no case either way as to whether fines imposed by Competition Authorities are taken into account when settling damages – there is an implied recommendation to the national court to do so by the European Commission in its leniency notice.

(b) Interest

(i) is interest awarded from the date

- **the infringement occurred; or**
- **of the judgment?; or**
- **the date of a decision by a competition authority?**

Interest is awarded from the date the infringement occurred up to the date of judgment, and on the judgment debt at the judgment rate if applicable after the judgment.

In *Crehan* (para 267), Park J confirmed that "the normal rule is that damages are assessed at the date of loss, not at the date of judgment, and that it is assumed that interest will compensate the claimant for the passage of time between the time when he suffered his loss and the time when he gets judgment in respect of it. However, I believe the legal position to be that that is not an invariable rule of law, and that if the justice of the case requires damages to be measured at the date of the judgment the court may award damages on that basis instead. This can arise, for example, in times of high inflation when interest would not be any form of acceptable compensation." However, the Court of Appeal has overturned this approach in its judgment of 21 May 2004, returning to the normal assessment of damages at the date of loss, plus interest.

(ii) What are the criteria to determine the levels of interest?

Statute provides the basis of recovery interest. Since the level and amount are in the Courts discretion, recovery depends on evidence and the Court's view of the events, as well as parties' conduct. The CAT adopts a similar approach (Rule 56(2)).

The amount of interest that may be awarded by a UK Court such as the Commercial Court in a successful claim for damages is as follows.

(a) Interest on damages awarded: Statutory, or "discretionary" interest

The practice of the Commercial Court is to award discretionary interest, pursuant to section 35A Supreme Court Act 1981, at the base rate (ie UK Clearing Banks Base Lending Rate) plus 1% . However, this is no more than a presumption which may be displaced if its application would be substantially unfair to either party. (This would normally only be the case where the defendants can produce any evidence to that effect.)

In a case where the Commercial Court practice would have an unfair result, and in the absence of any contractual provision to the contrary, interest on damages will usually be awarded by the judge, in his discretion, at the rate of eight per cent. per annum. This is because, when the Court is considering the appropriate rate of interest for a period from the date of the cause of action to the date of judgment, the rate payable on judgment debts (8% per annum) is viewed as a convenient starting point. Additionally, reference to the rates of

the Judgment Act 1838 (applicable to judgment debts, see below) is the rate awarded on default judgments and in most cases by the Masters in the Queen's Bench Division.

Discretionary interest is simple, not compound interest. It is usually applied to the amount of the damages awarded, and for the period from the time the loss arose until judgment, unless the claimant has delayed for part of that period. Where the loss in a contract case is not quantifiable until judgment, the Court may apply interest from the date of the breach.

(b) Interest on damages awarded between the time of the award and the time of payment

Interest on a sum for which judgment is given was set at 8 per cent. per annum in April 1993 by the Judgment Debts (Rates of Interest) Order 1993.

(c) Interest on costs awarded

Interest on costs awarded will be on the same rate of interest as judgment debts, i.e. 8 per cent, and has been since April 1993.

(iii) Is compound interest included?

No, simple only on damages (but Law Commission recommendation favours compound interest).

H. Timing

(i) What is the time limit in which to institute proceedings?

The time limit in which to institute proceedings is determined by the limitation period of six years for tort damages determined by S2 Limitation Act 1980 (LA 80). The time limit starts on the date the wrongful act caused the damage in issue, subject to fraudulent concealment (s.32LA 80).

Damages claims to the CAT must be brought within two years of the OFT/EC Commission decision relied upon under S47A (see CAT Rules of Procedure).

(ii) On average, how long do proceedings take?

On average first instance High Court proceedings take 2-3 years. Queen's Bench: in 2002 average waiting time from issue of claim to start of trial across all centres=149 weeks; average time between setting down and start of trial=47 weeks. But much depends on length of hearing, e.g., average waiting time for trials up to 5 days was 4-6 months, between 5-10 days 6-8 months and from 10 days+, 9-12 months.

Average waiting times between setting down (as opposed to issue) and start of trial in other significant courts: Chancery - trials up to 3 days, 3 months; up to 5 days, 6 months; from 10 days +, 8 months; Technology and Construction Court - trials up to 4 days, 6 weeks; up to 8 days, 6 weeks; between 9 and 16 days, 9 weeks; over 17 days, 18.5 weeks; Admiralty and Commercial Court - applications up to half a day, 2 months; trials up to 4 weeks, 7 months.

(iii) Is it possible to accelerate proceedings?

It is possible to accelerate proceedings by requesting the relevant court to order expedition. Summary judgment rules of court may apply in clear cases (strike out and summary judgments are covered by the CPR rules 3 and 24 respectively. CAT has power to give summary judgment to claimant or defendant as appropriate); procedures exist to obtain orders for interim payments during lengthy trials in the ordinary courts and the CAT.

It is sometimes possible to obtain an expedited hearing (e.g., commercial judicial review) and the Commercial Court, for example, "is able to provide an expedited trial in cases of sufficient urgency and importance."

It is also generally possible to apply for a "speedy trial" order which can significantly reduce the lead-time to trial. No specific rules; at court's discretion. Three recent cases: trial within 9 to 11 weeks. Note also that Patents Court has a "streamlined procedure".

(iv) How many judges sit in actions for damages cases?

In the High Court, one Judge normally sits in actions for damages. A lay assessor who could be an economist or accountant may sit with the Judge in certain cases. Following the "Competition Regulation" Practice direction of January 2004, all competition cases must be begun or transferred to the Chancery Division of the High Court under CPR, Rule 30.8. In the CAT, the president or a lawyer tribunal chairman will sit with two other members of the tribunal who will not normally be lawyers.

(v) How transparent is the procedure?

Procedure is transparent to the extent that hearings take place in open court. However, written pleadings are not made public by the ordinary courts. On the other hand, the CAT publishes nearly every step in the procedure before it on its website including skeleton arguments of the parties and transcripts of oral hearings in selected cases.

I. Costs

(i) Are Court fees paid up front?

Court fees are payable by the parties as they go, but are recovered like any other legal cost.

(ii) Who bears the legal costs?

The parties must pay as they go, generally. Costs are in the Court's discretion and are increasingly decided on an issue by issue basis but the party that loses the case will normally be ordered to pay the costs of the party that wins on the basis that costs normally follow the event. However, a successful party is unlikely to recover more than 70% of the legal costs involved. In the CAT, costs are within the tribunal's discretion and increasingly awarded on an issue basis (Rule 55). The CAT has also decided not to award costs against an unsuccessful appellant in a number of cases with the intention not to discourage appeals as a matter of policy.

Courts should generally make a summary assessment of costs at the conclusion of a hearing which has lasted not more than one day, in which case the order will deal with the costs of the application or matter to which the hearing related. If this hearing disposes of the claim, the order may deal with the costs of the whole claim. Otherwise assessment of costs usually dealt with separately by way of a detailed assessment.

(iii) Are contingency fees permissible? Are they generally available for private enforcement of EC competition rules?

Contingency fees in the form of Conditional fee agreements are permissible subject to specific terms and conditions and the procedural rules. The detailed rules are complex and outside the scope of this brief summary. In essence, a solicitor may accept instructions on a contingency basis with a mark-up on the ordinary fee rate of up to 100 per cent. if the claim is successful. A Barrister may accept instructions from a solicitor on the same terms. Normally, an insurance policy will be taken out by the claimant to cover the defendant's costs in the event that the claimant loses.

There is no reason why contingency fees should not generally be available for private enforcement of EC Competition law to the same extent that they are generally available (e.g. *Arkin* case, where the claimant is understood to have benefitted from a conditional fee agreement and the High Court declined to award costs against the unsuccessful claimant).

(iv) Can the plaintiff/defendant recover costs? Are there any excluded items?

The Claimant or defendant will normally recover up to 70% of their costs if they win the case.

(v) What are the different types of litigation costs?

The different types of litigation costs include the following orders for costs: costs in cause (i.e. costs will be awarded to the party which ultimately wins the case); costs in any event (i.e. whichever party wins, the party awarded costs for the specific proceeding will be paid those costs); wasted costs (ordered against the lawyers responsible for wasting unjustifiably the Court's and other parties time); and indemnity costs (a higher percentage of costs which should cover all the parties' costs not just the less than total cost that would normally be paid after taxation).

There are no standard fees in the UK. The types of litigation costs will include fees payable to the Court, lawyers, experts, (whether or not appointed by the Court) witnesses and for disbursements such as translation etc. The amount of fees will depend on the complexity of the case and volume of work. Most professionals charge hourly fee rates.

(vi) Are there national rules for taxation of costs?

There are rules for taxation of costs i.e. scrutiny by a costs judge. Normally lawyers fees charged to a client will exceed the rates allowable on taxation which largely explains why the successful party is unlikely to recover more than 70 per cent of the total costs..

(vii) Is any form of legal aid insurance available?

Legal aid for civil claims is severely limited. Under rules that would no longer apply, Mr and Mrs Crehan have been legally aided in the *Crehan case*.

Legal expenses insurance may be available to cover a claimant if the claim falls within the contractual terms and conditions, but unlikely in the case of a defendant since it is likely to be against public policy and would involve breaches of disclosure obligations applicable to a contract of *uberimae fide* (ultimate good faith). The authors are unaware of any insurer which will insure a defendant against damages caused by breach of EC competition law or related court proceedings.

(viii) What are the likely average costs in an action brought by a third party in respect of a hard-core violation of competition law?

The likely average costs in an action brought by a third party in respect of a hard-core violation in competition law will vary enormously according to the nature of the party and the violation. Average costs are likely to range from £200,000 to £300,000.

J. General

(i) Are some of the answers to the previous questions specific to the private enforcement of competition rules? If so, in what way do they differ from the general private enforcement rules?

Yes.

The main way that the private enforcement of competition rules differ from general private enforcement rules is where the CAT is involved. In particular, following S47A CA1998 added by S18EA 2002 as from 20 June 2003, decisions by the OFT and European Commission (even if adopted prior to that date but provided that the time for appealing has expired) are binding on the CAT in monetary claims; and under Section 58A CA1998 added by S20EA 2002, decisions of the OFT only are binding on ordinary civil courts. But this does not make bringing claims based on European Commission decisions more difficult because of the doctrine of supremacy of Community law and the *Masterfoods* case law which from 1 May 2004 will apply expressly by virtue of Article 16(1) of Regulation 1/2003 and the Notice on Cooperation with national courts.

(ii) EC competition rules are regarded as being of public policy. Does that influence any answers given?

The English courts have regarded EC competition rules as being part of public policy and that influenced the decision in the *Iberian* case, which held that the English court should not admit fresh evidence intended to contradict a European Commission competition decision by the addressee of that decision since it would be against public policy of competition law enforcement generally. Refusal to disclose a complaint letter sent to EC Commission was upheld on the basis of public policy and the need for complaints to be unprejudiced if competition law is to be enforced: *Hasselblad (GB) Ltd v Orbinson* [1985] QB 475

(iii) Are there any differences according to whether defendant is public authority or natural or legal person?

There are no differences according to whether a defendant is a public authority or a natural/legal person in general, provided that the public authority is an undertaking subject to Articles 81 and 82.

(iv) Is there any interaction between leniency programmes and actions for claims for damages under competition rules?

There is no established interaction between leniency programmes and actions for claims for damages under competition rules since there has been no decided case where this issue has been adjudicated.

(v) Are there differences from region to region within the Member State as regards damages actions for breach of national or EC competition rules?

Scotland, and to a lesser extent Northern Ireland, have a different court structure, different substantive law (in Scotland) and different procedure and terminology (in Scotland). However, Articles 81 and 82 EC, the CA1998 and EA2002 are applicable throughout the United Kingdom with necessary modifications for the different court structure and procedures. (See Annex 1).

(vi) Please mention any other major issues relevant to the private enforcement of EC competition law in your jurisdiction

The following are some of the other major issues relevant to the private enforcement of EC competition law in England and Wales (Scotland and Northern Ireland):

- limitation issues
- joint and several liability in tort
- joint tort feasons and the joining of such as defendants
- the knowledge of lawyers and the judiciary is improving but could be better
- both competition law and judicial remedies in the field are novel and therefore have involved lengthy proceedings to date such as *Crehan* and *Arkin*
- forum shopping
- lack of clarity over standard of proof
- uncertainty over availability of exemplary damages and pass-on defence

(vii) Please provide statistics about the number of cases based upon the violation of EC competition rules in which the issue of damages was decided upon

The statistics show that there are a very small number of cases based on the violation of EC competition rules in which the issue of damages was decided upon because there have been very few decided cases. The first case was *Arkin* where the English High Court decided that there was no violation of EC competition law although a claim for damages had been made and was considered. The second case was *Crehan* where similarly the English High Court decided there was no violation of EC competition law although it gave consideration to the quantum and calculation of damages claimed for that alleged breach. The *Provimi* case settled after strike out application so the question of damages was not determined. A new claim for damages against Aventis and Hoffman La Roche has been initiated in the CAT in February 2004.

III. Facilitating private enforcement of Articles 81 and 82 EC

(i) Which of the above elements of claims for damages (under sections II) provide scope for facilitating the private enforcement of Articles 81 and 82 EC? How could that be achieved?

The following elements may facilitate private enforcement by increasing the possibility of speedy award of damages (and, therefore, of settlement of claims in favour of the claimant):

- pre-trial disclosure
- broad discovery rules
- costs awarded to winner
- pre-judgment interest
- contingency fees
- full jurisdiction for all EU claims by claimants against the same defendant corporate group under Aventis case
- binding nature of prior OFT and European Commission decisions on the CAT; and of OFT decisions (and Commission decisions) on ordinary civil courts.

S47A CA1998 imposes the obligation on the CAT to be bound by OFT in English and EC competition violation cases and by European Commission decisions in EC competition cases once the time for appealing has expired or any appeals made been dismissed.

The statutory provision in the CA1998 could be introduced in other national laws.

The most important development in the UK is the case management approach to procedure and the strict time limits followed by the CAT. The CAT is intended to blend the best of the CFI civil style process with the adversarial tools of discovery and cross examination under the common law system where the tribunal agrees.

(ii) Are alternative means of dispute resolution available and if so, to what extent are they successful?

Alternative means of dispute resolution are available – the CPR applicable in the ordinary English courts (and by analogy applied in practice by the CAT which has the power under Rule 44(3) to encourage and facilitate the use of ADR if it considers it appropriate) specifically require conciliation to be considered where appropriate. Mediation is on the increase. Historically, practically every claim for damages brought

by one party against another for breach of EC competition law in the United Kingdom has been settled. This explains why there are so few decided cases. It can be reliably predicted that those settlements have been the result of an alternative means of dispute resolution however informal those negotiations for settlement may have been. It will be misleading to suggest that they are based on formal conciliation or arbitration but the expense of litigation in the United Kingdom would normally drive the parties to settle disputes where their differences relate to the amount of compensation as the only issue.

ADR is generally more successful than not. There are no reported settlements resulting from mediation or amortisation processes.

IV. Bibliography

Please refer to the citation guidelines given above.

Richard Whish *Competition Law* (LexisNexis Butterworths, 5th ed, 2003)

Smith *Competition Law: Enforcement and Procedure* (Butterworths, 2001)

Bellamy and Child *European Community Law of Competition* (Sweet and Maxwell, 5th ed, 2001, ed Roth)

Kerse *EC Antitrust Procedure* (Sweet and Maxwell, 4th edn, 1998)

Furse *Competition and the Enterprise Act 2002* (Jordans, 2003)

V. National case law summaries

Please provide a summary of each judgment using the following format:

Summaries taken from Lawtel of the four main decisions referred to in this Chapter are set out below:

1. **GARDEN COTTAGE FOODS LTD v MILK MARKETING BOARD (1983)
HL (Lords Diplock, Wilberforce, Keith, Bridge and Brandon) 23/4/83**

Facts and Legal Issues

Whether damages or injunction was an appropriate remedy in the House of Lords and the Court of Appeal

Appeal by the Milk Marketing Board, from the Court of Appeal decision restraining it from refusing direct supplies of butter to the plaintiff.

HELD: Lord Wilberforce dissenting. In Hadmor Productions Ltd v Hamilton(1982) the House had stressed that an appellate court should only interfere with a judge's decision in well defined circumstances. Those circumstances were absent and the judge was entitled to hold that damages provided an adequate remedy. The company's business was such that his view was correct. Whether the plaintiffs would be entitled to damages might be arguable but apart from family proceedings, if there was no pecuniary loss there was no cause of action in English law.

Appeal allowed.

**(1983) 3 WLR 143 : (1984) AC 130 : (1983) 2 All ER 770
Document No. AC1410138**

2. **Y ARKIN v BORCHARD LINES LTD & ORS (Defendant) & BORCHARD LINES LTD
(Part 20 Claimant) & ZIM ISRAEL NAVIGATION COMPANY LTD & ORS (Part 20
Defendants) (2003)**

[2003] EWHC 687 (Comm)

QBD Commercial Court (Colman J) 10/4/2003

Facts and Legal Issues

Action by the claimant ('X') for damages for breach of Art.82, alternatively Art.81 Treaty of Rome. X was managing director of a liner company ('BCL'). In 1988, BCL entered into shipping routes between Israel and the United Kingdom and Israel and north Europe ('the relevant market') in which the only regular liner services were run by two liner conferences of which all the defendants were part. BCL built up a small share at the bottom end of the market but the conferences saw it as a serious competitor and engaged in vigorous anti-competitive activities. In 1987 EC Regulation 4056/86 ('the block exemption') came into effect, which exempted from unlawfulness agreements or concerted practices by liner conferences that otherwise would have been unlawful anti-competitive conduct under Art.81 of the Treaty. In 1990, a new company ('MSC') entered the relevant market and quickly obtained a market share of over 30 per cent, seriously reducing BCL's share and reducing the conferences share to between 50 and 60 per cent. BCL withdrew from the relevant market in October 1991 and subsequently ceased trading in May 1992. In 1997 X, as assignee of BCL, commenced these proceedings claiming damages on the basis that the conferences had abused their dominant position in the market in breach of Art.82 of the Treaty by: (i) their rate setting policy in the course of a rate war which involved predatory pricing; (ii) their use of "fighting ships" which involved the conferences setting reduced rates for individual ships that were to sail on similar dates and routes to BCL's ships; and (iii) spreading rumours that BCL was insolvent or would have to leave the relevant market. Alternatively that the conferences had not been entitled to the protection of the block exemption because they did not charge uniform and common freight rates and had therefore breached Art.81 of the Treaty by their price fixing agreements or concerted practices, which had forced BCL to suffer heavy losses and eventually forced them out of the market. X accepted that he could not rely on any conduct of the defendants occurring prior to 18 April 1991 as a result of the Limitation Act 1980.

HELD: (1) The two conferences were sufficiently connected and their decision taking as to price levels was sufficiently concerted for them to be treated as a collective entity for the purposes of ascertaining whether any of the defendants had abused a dominant position. (2) The size of an undertaking's market share relative to its main competitors would usually be an important factor in determining whether it was in a dominant position. Where an undertaking had a lower level of the market share, even above 50 per cent, the test of dominance was whether the relative strength of the allegedly dominant undertaking and its main competitors was such that the former could either significantly reduce the latter's market share to the point where they could offer materially less effective competition or drive them out of the market. (3) After MSC entered the market the conferences had continued to dispose of market power so great relative to that of MSC that, if they had chosen to do so, they could have substantially distorted, if not eliminated, competition. Therefore, the conferences had occupied a dominant position and retained that position throughout the relevant period. (4) In determining whether there had been abuse of a dominant position it was important to distinguish between the allegedly abusive conduct and the proof of the purpose for which such conduct was being pursued. Whether abnormal conduct of a dominant party was likely to amount to abuse was to be judged objectively (see Commission case 85/76 Hoffmann La-Roche and BP Industries and British Gypsum (1993) 5 CMLR 32). However, where such conduct was not intrinsically abnormal market conduct, such as price reductions, it might amount to abuse if its purpose was to hinder or eliminate competition. When investigating such eliminatory intent the test was subjective. (5) The evidence established that the conferences participation in the rate war did not have as its purpose the elimination or hindrance of BCL or MSC and there was no eliminatory intent in any selective rate fixing, which included the alleged fighting ships. There was no evidence that rumours were spread by members of the conferences. Therefore, the conferences had not abused their dominant position. (6) The conferences had charged uniform rates and were a liner conference within the block exemption and they had not lost that protection by any of the conduct alleged by X. In particular, ordinary competitive pricing by a conference, in the absence of eliminatory intent as in this case, was not inconsistent with Art.81 of the Treaty or the obligation under the block exemption for price differentiation to be "economically justified". (7) In any event, X had failed to prove that any of the alleged breaches of Art.81 and Art.82 by the defendants were the predominant cause of any loss claimed.

Claim dismissed.

LTL 10/6/2003 : (2003) EWHC 687 (Comm)

Judgment Approved - 138 pages

Document No. AC0105146

PROVIMI LTD (CLAIMANT/RESPONDENT) v (1) AVENTIS ANIMAL NUTRITION SA (2) RHODIA LTD (3) RHODIA CHEMICALS LTD (4) AVENTIS SA (DEFENDANTS/APPLICANTS) : (1) TROUW (UK) LTD (2) TROUW NUTRITION DEUTSCHLAND GMBH (CLAIMANT/RESPONDENTS) v (1) RHODIA LTD (2) AVENTIS ANIMAL NUTRITION SA (3) AVENTIS SA (4) RHODIA GMBH (DEFENDANTS/APPLICANTS) : PROVIMI LTD (CLAIMANT/RESPONDENT) v (1) ROCHE PRODUCTS LTD (2) ROCHE VITAMINE EUROPA AG (SWITZERLAND) (3) F.HOFFMAN-LA ROCHE AG (SWITZERLAND) (DEFENDANTS/APPLICANTS : (1) TROUW (UK) LTD (2) TROUW AQUACULTURE LTD (3) TROUW NUTRITION DEUTSCHLAND GMBH (GERMANY) (CLAIMANT/RESPONDENTS) v (1) ROCHE PRODUCTS LTD (2) ROCHE VITAMINE EUROPA AG (SWITZERLAND) (3) F.HOFFMAN-LA ROCHE AG (SWITZERLAND) (4) HOFFMAN-LA ROCHE AG (GERMANY) (5) ROCHE VITAMINE GMBH (GERMANY) (DEFENDANTS/APPLICANTS) (2003)
[2003] EWHC 961 (COMM)
QBD Commercial Court (Aikens J) 6/5/2003

Facts and Legal Issues

Applications by the defendant vitamin manufacturers in related actions to strike out and/or set aside part of the proceedings, on the grounds that the claimants did not have an arguable case and/or that the English courts did not have jurisdiction to determine the claims. The claimants were two English companies and a German company, who were direct purchasers of vitamins from companies within the Roche and Aventis groups. The defendant companies were sellers and associated companies in those two groups. Following a decision of the European Commission dated 10 January 2003 that various companies in the Roche and Aventis groups had participated in various cartels, the claimants sought damages for breach of a statutory duty not to infringe EC competition laws, in particular Art.81 EC Treaty. It was alleged that the claimants had suffered damage because vitamins were sold at an inflated price as a result of the formation and implementation of the cartel. The following issues arose: (i) Whether there was an infringement by a UK subsidiary when it carried out the cartel agreement which had been entered into by the parent and other independent "undertakings" and what knowledge by the subsidiary had to be shown. (ii) Whether a claimant who had not bought vitamins from the UK subsidiary could recover damages from that company. (iii) Whether the claimants satisfied the terms of Art.6(1) Council Regulation 44/2001/EC ('Regulation 44'). (iv) The effect of Swiss, German and French jurisdiction clauses in various contracts.

HELD: (1) It was arguable that where two corporate entities were part of an "undertaking" ('Undertaking A') in the EU competition law sense, and one of those entities had entered into an infringing agreement with other, independent "undertakings", then if another corporate entity which was part of Undertaking A then implemented that infringing agreement, it was also infringing Art.81. It was not necessary to plead or prove any particular "concurrence of wills" between the two legal entities within Undertaking A. The EU competition law concept of an "undertaking" was that it was one economic unit, and the constituent entities had no independence of mind or will and therefore the mind and will of one was, for the purposes of Art.81, to be treated as the mind and will of the other. (2) If so, it was then arguable that all companies within an infringing undertaking by implementing the cartel could cause the loss that the claimants alleged. On this analysis, each infringing entity is a tortfeasor. Each entity would have contributed to a situation where it took part in the cartel, upheld the cartel prices and so (arguably) caused loss. (3) There was therefore a real issue as between the German claimant and the English subsidiaries, and the German claimant's claims were not artificial or advanced solely so that the German company could take advantage of Art.6(1), Lugano Convention or Regulation 44 so as to bring proceedings in England against other non-UK domiciled defendants. (4) The claimants had amply demonstrated that they had the better of the argument that the requirements of the proviso of Art.6(1) were satisfied. It was highly arguable that different national courts would take different approaches to the issues in the case, which could result in irreconcilable judgments and therefore it was expedient to hear

and determine all these claims together to avoid that risk. (5) The scope of the Swiss jurisdiction clauses was not sufficiently wide to include the present claims, in tort, for damages for infringement of Art.81(1). Therefore the defendants could not invoke Art.17/23 and the claimants could invoke Art.5(2) and/or 6(1) of Regulation 44 or the Convention and sue the defendants in England. (6) The scope of the German jurisdiction clauses was insufficiently wide to include the present claims, based on a tort of intent and, effectively, fraud, for breach of Art.81(1) of the Treaty. Therefore the German defendants could not invoke Art.23 of Regulation 44 and rely on the German jurisdiction clauses. It followed that the claimants could rely on Art.6(1) of the Regulation to sue those defendants in England. (7) The French jurisdiction clauses did not apply to the claim as it was currently pleaded as the principal claim was tortious rather than contractual and therefore the scope of the two forms of jurisdiction clause, as they would be interpreted by a French court, was insufficiently wide to embrace the claims as pleaded. The French defendant was not entitled to rely on Art.23 of Regulation 44 and rely on the French jurisdiction clauses. It followed that the claimants could rely on Art.5(3) and/or Art.6(1) of the Regulation to sue those defendants in England.

Applications to strike out and dismiss claims dismissed. Judgment on jurisdiction claims accordingly.

*** 3/6/2003. Permission to appeal granted. Costs of applications given to claimants on standard basis, apart from specific awards to defendants where they had been successful on specific points.

LTL 11/6/2003 : (2003) 2 All ER (Comm) 683

Judgment Approved - 54 pages

Document No. AC0105021

3. **BERNARD CREHAN v (1) INNTREPRENEUR PUB COMPANY (CPC) (2) BREWMAN GROUP LTD (2003)**
[2003] EWHC 1510 (Ch)

Ch.D (Park J) 26/6/2003

Facts and Legal Issues

Trial of a claim by the claimant ('C') for damages for loss of his business as the tenant of two tied public houses of which the first defendant ('IPC') was the lessor and the second defendant ('B') was its nominated drinks supplier. C took the leases of the pubs shortly after the enactment of the Supply of Beer (Tied Estates) Order 1989 SI 1989/2390, which reduced the number of tied houses and led to large numbers of pubs becoming available for sale. IPC was a property company that owned pubs but was not involved in the supply of beer. IPC's leases contained beer ties requiring C to purchase beer supplied by B. The ties were expressed to continue for the terms of the leases (20 years) and were not to expire on the coming into force of the Order. C's business was unsuccessful and he surrendered the leases to IPC. C argued that the beer ties infringed Art.81 EC Treaty and sought damages on the basis that the failure of his business was caused by competition from nearby untied pubs that were able to purchase beer at substantial discounts and retail it at substantially less than C could. IPC contended that the beer ties were not in breach of Art.81, but that even if they were caught by Art.81, they were removed from its effect by the Block Exemption provided for by Art.81(3). Following a reference to the European Court of Justice (see Case C-453/99 Crehan v (1) Courage (2) Inntrepreneur (2001) (2002) ICR 457), which determined that parties to an agreement that infringed Art.81 EC Treaty might have a domestic claim in damages for infringement of Art.81, two central issues fell to be decided: (i) whether, in the context of the beer supply industry in the United Kingdom, the beer ties in IPC's leases infringed Art.81; and (ii) if so, whether the failure of C's business was caused by the beer ties.

HELD: (1) In order to establish infringement of Art.81 both conditions set out in C-234/89 Delimitis v Henninger Brau AG (1991) ECR I-935 had to be satisfied: (a) whether, having regard to the economic and legal context of the leases, it was difficult for competitors to enter the market or increase their market share, ie whether the market had been "foreclosed" to would-be entrants; and (b) if so, where that was a result of parallel networks of similar leases, whether the network to which the impugned lease belonged

had made a significant contribution to the sealing-off effect created by the totality of the leases in their economic context. (2) The first Delimitis (supra) condition had not been satisfied as the market had not been foreclosed to would-be entrants. In fact, the break-up of the larger breweries tied estates after the Order generated more opportunity for new entrants to the beer supply market than at any time for many years, as a large number of pubs became available for purchase by competitors. A large proportion of the market therefore became fully open to competition. Moreover, for the same reasons, it was not difficult for existing incumbents of the market to increase their market share. That was not to suggest that the market was 100 per cent open to competitors, but it was not foreclosed to the extent required to satisfy the first Delimitis condition. Therefore, the beer ties in IPC's leases did not infringe Art.81 and C's claim failed. (3) The court was bound by authority of the Court of First Instance to conclude that the Block Exemption was not available because the ties in question were "ties by type" of goods and not "ties by brand". (4) The failure of C's business was caused by the beer ties and not by other factors and were it not for the claim failing on other grounds C would have been entitled to damages for loss of profits. The prices charged by B were uncompetitively high and C lost too much business to the nearby competing pubs that his turnover dropped dramatically to the point where he could no longer afford to pay the rent and operational costs. Had he been free of the ties, C would have passed on to his customers the benefit of discounts that he would have been able to obtain from suppliers, thereby competing with the other pubs. C had many years' experience in the pub trade and there were no personal factors that would lead the court to conclude that the business would still have failed even if he had been free of the ties. However, this was no assistance to C's claim once it had been determined that Art.81 had not been infringed.

(Causation)

On the balance of probabilities, based on the evidence before the court, 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, and had it been concluded that the beer ties infringed Art. 81, it would therefore have followed that the infringement of that article caused the failure of the business and thus caused loss to Mr Crehan.

Quantum

If Mr Crehan had been free of tie at both pubs throughout, he would have been better off to the extent of £57,121.

The loss-of-profit element in Mr Crehan's damages claim would be calculated at £946,173, probably to be rounded up to £950,000.)⁵⁴

Counterclaim dismissed.

LTL 17/7/2003 : (2003) 27 EG 138 (CS) : TLR 13/8/2003

Judgment Approved - 112 pages

Document No. AC0105296

For Lawtel reports of earlier proceedings see Courage v Crehan (1998) EGCS 171 and Courage v Crehan (1999) EGCS 85.

BERNARD CREHAN v (1) INNTREPRENEUR PUB COMPANY (CPC) (2) BREWMAN GROUP LTD (2004)

[2004] EWCA Civ 637

CA (Civ Div) (Peter Gibson LJ, Tuckey LJ, Sir Martin Nourse) 21/5/2004

COMPETITION LAW - EUROPEAN UNION

COMPETITION POLICY : HOSPITALITY AND LEISURE : BEER : BREWING INDUSTRY : EUROPEAN UNION : BEER TIES : EC TREATY ART. 81INFRINGED : BLOCK EXEMPTIONS

The respondent's beer ties breached EC Treaty Art. 81 with the result that the appellant was entitled to damages for the failure of his business.

The appellant (C) appealed against a decision dismissing his claim for damages against the first defendant (IPC)for breach of Art.81 EC Treaty. C acquired the lease on two pubs owned by IPC.

54 Added from [2003] EuLR 663, at 665H – 666C.

The lease contained beer ties under which C was obliged to purchase beer from Courage (X). The businesses made a loss and in due course C surrendered his tenancy. He owed arrears of rent to IPC and unpaid debts to X for beer and other goods. X commenced proceedings for the unpaid debts. C counterclaimed and joined IPC as defendants. C alleged that the terms of the IPC lease and the beer ties were in breach of EC Treaty Art. 81. C alleged that the failure of his business was due to competition from nearby untied pubs that were able to purchase beer at substantial discounts and retail it for less. He claimed damages and sought to set-off those damages against any sums owed by him to X. At a preliminary hearing, it was held that the lease and beer ties did not infringe Art. 81 and that C could not sue for damages. C appealed to the Court of Appeal, which made a reference to the European Court of Justice (ECJ). Following the ruling of the ECJ, C's appeal was allowed and the matter remitted for a rehearing. At the rehearing it was held that: (i) beer ties in IPC's leases did not infringe Art. 81 as the first limb of the test in *C-234/89 Delimitis v Henninger Brau AG* (1991) ECR I-935 was not satisfied; (ii) IPC could not obtain a block exemption from Art. 81 because its beer ties were ties by type of goods and not ties by brand, and; (iii) the failure of C's business was caused by the beer ties.

HELD: (1) The European Commission had held in Commission Decision on Lease Agreements for Whitbread 99/230/EC L88 that beer ties in the UK fell foul of the first limb of the *Delimitis* test in that they hindered independent access to the market for new competitors. In the instant case, the trial judge ought to have accepted that finding and had been wrong to decide that the decision in Whitbread in relation to termination provisions could not stand in light of *Neste Markkinointi Oy v Yotuuuli Ky* [2001] 4 CMLR 993. *Neste* was fact specific in that it related to a purchasing agreement between a petrol station operator and a supplier. The central factor in that case was duration i.e. in terms of the notice period for termination of the agreement. The judge ought to have given greater deference to the Whitbread decision and had been wrong to hold that it fell foul of *Neste*. IPC's beer ties fell foul of the first limb of *Delimitis*. (2) The judge had been wrong to hold that the second limb of *Delimitis* could not be met. The facts in the instant case clearly satisfied the second limb. Therefore, IPC's beer ties breached Art. 81. (3) The judge had been correct to hold that IPC's beer ties did not fall within Art. 6(2) of the block exemption. (4) The judge had been correct to hold that C did not share responsibility with IPC for any infringement of Art. 81. Art. 81 precluded a rule of national law under which a party to a contract liable to restrict or distort competition was barred from claiming damages on the sole ground that he was a party to that contract. The judge had correctly identified IPC as the person controlling the network in the instant case and had been entitled to hold that C did not share responsibility. (5) The ECJ in its reference clearly understood the basis of C's claim. It concluded that C had a right under Community law to claim damages. (6) The judge had been entitled to hold on the facts that the beer ties caused the failure of C's business. (7) In the circumstances, given that the beer ties were in breach of Art. 81 and that they caused the failure of C's business, provisional damages of £131,336 plus interest were appropriate.

Appeal allowed.

Counsel:

For the appellant: David Vaughan QC, Mark Brealey QC, Marie-Eleni Demetriou
For the respondent: Iain Milligan QC, Nicholas Green QC, James Flynn QC, Martin Rodger

Solicitors:

For the appellant: Charles Russell
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LTL 21/5/2004 (Unreported elsewhere)

Judgment Approved subject to editorial corrections - 55 pages

ANNEX I

THE CONSTITUTION AND COURT SYSTEMS IN SCOTLAND AND NORTHERN IRELAND

I. INTRODUCTION

We refer throughout this analysis to UK courts and UK law. However, the historical creation of the United Kingdom was such that its constituent parts, England and Wales, Scotland, and Northern Ireland, all retained their own legal systems and law courts. The effect of this is that Scots law, Northern Irish law and the law of England and Wales differ. Where there are relevant differences between the position in England and Wales and that in either Northern Ireland or Scotland we have included an express comment. Where no comment is made, the position is the same throughout the UK.

Scotland

Until 1707 Scotland and England (which then included Wales) were separate Nation States. A Treaty of Union was negotiated in 1706 and ratified by Acts of each of the Scots Parliament and the English Parliament in 1707. The Treaty fused the two kingdoms into one, to be known as "Great Britain".

By Article XIX of the Treaty of Union the Scottish Court of Session and College of Justice was preserved. It was further provided that "no causes in Scotland be cognoscible by the Courts of Chancery, Queens Bench, Common Pleas, or any other court in Westminster Hall". Today Scotland still has its own system of courts, with final appeal in civil, but not criminal, cases to the House of Lords. The Scottish High Court remains the ultimate Court of Appeal on criminal matters. In Scotland private civil proceedings may be entertained in the Court of Session (equivalent to the English High Court) or in the Sheriff Court. The Sheriff Court differs from the English county courts in that there is no pecuniary limit on its jurisdiction.

Northern Ireland

The Union with Ireland Act 1800 united the two kingdoms of Great Britain and Ireland into the United Kingdom of Great Britain and Ireland but the current constitutional position of Northern Ireland is stated in section 1 of the Northern Ireland Constitution Act 1973. This Act declares that Northern Ireland remains part of "Her Majesty's Dominions and of the United Kingdom" and affirms that in no event will Northern Ireland or any part of it cease to be such part without the consent of the majority of the people of Northern Ireland voting in a poll held for the purpose as provided for in Schedule 1 of the Act.

Under the Judicature (Northern Ireland) Act of 1978 the Supreme Court of Judicature of Northern Ireland consists of the High Court of Justice in Northern Ireland the Court of Appeal in Northern Ireland and the Crown Court in Northern Ireland.

Final appeal lies to the House of Lords in London which in Northern Ireland cases sits as the ultimate appellate court for Northern Ireland.

The Northern Ireland courts are jealous of their independence as a separate legal system within the UK and of the fact that the Northern Ireland jurisdiction is separate and distinct from the other jurisdictions within the United Kingdom.

This fact was stressed in the leading Northern Ireland cases of Simpson -v- Harland & Wolff plc [1988] 13 N1JB 10. This was not a competition law case but one concerning damages in a civil action. It was stressed that the Northern Ireland Courts had their own standards of (for example) sentencing in criminal and damages in civil cases.

The judgment has been followed in subsequent cases and thus it should not be assumed that in a competition case a Northern Ireland Court would automatically follow an English precedent laid down by an English Court of equivalent standing.