HOUSE OF LORDS SESSION 2005–06
[2006] UKHL 38
on appeal from [2004] EWCA Civ 637

OPINIONS

OF THE LORDS OF APPEAL

FOR JUDGMENT IN THE CAUSE

Inntrepreneur Pub Company (CPC) and others (Original Appellants and Cross-respondents) *v.* Crehan (Original Respondent and Cross-appellant)

Appellate Committee

Lord Bingham of Cornhill
Lord Nicholls of Birkenhead
Lord Hoffmann
Lord Rodger of Earlsferry
Lord Walker of Gestingthorpe

Counsel

Original Appellants and Cross-respondents:
Iain Milligan QC
Nicholas Green QC
James Flynn QC
Martin Rodger
Dinah Rose
(Instructed by Sprecher Grier Halberstam)

Original Respondents and Cross-appellants:
David Vaughan QC
Mark Brealey QC
Marie-Eleni Demetriou
Michael Bools
(Instructed by Maitland Walker)

Interveners

Sir Jeremy Lever QC, Jon Turner and Ronit Kreisberger for the Office of Fair Trading
Stephen Morris QC, Helen Davies and Colleen Hanley (instructed by Freshfields Bruckhaus Deringer) for Visa Europe Limited and Visa UK Limited

Hearing dates:
6, 7, 8 and 12 June 2006

ON
WEDNESDAY 19 JULY 2006

HOUSE OF LORDS

OPINIONS OF THE LORDS OF APPEAL FOR JUDGMENT IN THE CAUSE

Inntrepreneur Pub Company (CPC) and others (Original Appellants and Cross-respondents) *v.* Crehan (Original Respondent and Cross-appellant)

[2006] UKHL 38

LORD BINGHAM OF CORNHILL

My Lords,

1. I have had the great advantage of reading in draft the opinion of my noble and learned friend Lord Hoffmann. I agree with his analysis and conclusions and would make the orders which he proposes. His summary of the facts (already the subject of detailed recitation by Park J and the Court of Appeal: [2003] EWHC 1510 (Ch), [2003] EuLR 663; [2004] EWCA Civ 637, [2004] EuLR 693) and of the relevant materials enables me to express my reasons for concurring without repetition. Like my noble and learned friend I shall for convenience refer to the current numbering of the Treaty articles.

2. The sharpness of the issue between the parties to this appeal tends to conceal the bedrock of common ground which underlies the case. I think it is worth drawing attention to a number of important matters which are not contentious.

3. There is, first of all, no question about the importance of article 81 EC prohibiting, as incompatible with the Treaty, agreements and practices which prevent, restrict or distort competition between Member States. As the Court of Justice of the European Communities observed in *Eco Swiss China Time Ltd v Benetton International NV* (Case C-126/97) [1999] ECR 1–3055, para 36, and repeated in *Courage Ltd v Crehan* (Case C-453/99) [2002] QB 507, 521, para 20,

> "Article [81] of the Treaty constitutes a fundamental provision which is essential for the accomplishment of the tasks entrusted to the Community and, in particular, for the functioning of the internal market."

It is indeed clear that without effective competition transcending national boundaries there can be no effective common market.

4. It is also clear, secondly, that article 211 EC imposes a duty on the Commission to ensure the proper functioning and development of the common market. That duty applies in the field of competition as in other fields, as is made clear by article 85 EC. In *Stergios Delimitis v Henninger Bräu AG* (Case C-234/89) [1991] ECR 1-935, para 44, the Court stressed the responsibility of the Commission for the implementation and orientation of Community competition policy, a point reiterated in *Masterfoods Ltd v HB Ice Cream Ltd* (Case C-344/98) [2000] ECR 1-11369, para 46. English decisions have recognised the primary responsibility of the Commission and its specialist expertise in determining competition questions: *Iberian UK Ltd v BPB Industries PLC* [1997] EuLR 1, 16; *Coal Authority v H J Banks Co Ltd* [1997] EuLR 610, 620; *Morgan Stanley Dean Witter Bank Ltd v Visa International Service Association* (unreported), 2 May 2001, p 7 Toulson J.

5. But, thirdly, it is well-established that article 81 is directly enforceable. This means that national competition authorities and courts share, and have always shared, with the Commission the duty to give effect to the prohibition in article 81(1), and the legal consequences of automatic avoidance under article 81(2) have always been a matter for determination by national courts alone. Article 9(1) of Council Regulation (EEC) 17/62 conferred sole power on the Commission to make declarations of inapplicability under article 81(3) of the Treaty, and it was for the Commission to grant negative clearance under article 2. But in general the Community competition regime has rested on a duty of wholehearted (or sincere) cooperation owed by Member States to the Community (and, presumably, each other). The source of this duty is found in article 10 of the Treaty, imposing as it does both positive and negative duties on Member States. They are duties comparable with those which English law readily implies into contracts: *Mackay v Dick* (1881) 6 App Cas 251, 263; *Stirling v Maitland* (1864) 5 B&S 840, 852. The Court of Jutice has invoked these duties on many occasions: in *Deutsche Grammophon Gesellschaft mbH v Metro-SB-Grossmärkte GmbH & Co KG* (Case 78/70) [1971] ECR 487, para 5, it

recognised the provision as laying down "a general duty for the Member States, the actual tenor of which depends in each individual case on the provisions of the Treaty or on the rules derived from its general scheme". The particular importance of wholehearted cooperation between national courts and the Commission in the field of competition is reflected in the Commission's 1993 "Notice on Cooperation between National Courts and the Commission in Applying Articles 81 and 82 of the EC Treaty" (OJ 1993 C 39/6), in Council Regulation (EC) No 1/2003 "on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty" ("the modernisation regulation") and in the Commission's "Notice on cooperation within the Network of Competition Authorities" (2004/C 101/03).

6. It is common ground, fourthly, that under article 249 of the Treaty a Commission decision is legally binding in its entirety upon those to whom it is addressed. The converse is also true: such a decision is not legally binding on those to whom it is not addressed. That is important, since it is not suggested that any relevant decision of the Commission was addressed to Inntrepreneur, the effective appellant before this House.

7. Thus the divisive question arises: should the trial judge in this case have treated the Commission's factual assessment of the UK beer market in its *Whitbread*, *Bass* and *Scottish and Newcastle* decisions as effectively binding upon him although not formally so? This was the burden of the closing submission made by Mr Crehan's counsel, as recorded by the judge in para 156 of his judgment:

> "So in this case was it difficult, because of beer ties and similar agreements, for aspiring entrants to gain access to the relevant United Kingdom market? Mr Vaughan and Mr Brealey have presented several different arguments on the basis of which they say that I should answer the question: yes. I think that logically their first argument is that in *Whitbread* the Commission decided that the answer was yes, and that that ought to be good enough to determine the issue for me. They point out that the Commission has had much experience of matters involving the United Kingdom pub and beer markets. It has a staff of skilled economists. It has itself investigated aspects of the market from time to time over the years. It has a special understanding of the concepts which underlie the competition principles of Community law, including in

> particular article 81. Mr Vaughan and Mr Brealey say that I should not take on the task of deciding for myself whether I share the view of the Commission. I should simply say that the body best qualified to decide the question has decided it, and I should not second guess that body. I should adopt the findings which the Commission made in *Whitbread* and proceed with the rest of the case on the footing that *Delimitis* condition 1 is satisfied."

As my noble and learned friend observes, the judge recognised the obvious attractions of following this course but concluded he ought not to do so. To have done so without himself addressing the facts would not, I think, have been a judicial response to the case as presented to him.

8. In the *Whitbread* decision, which may fairly be treated as the leading example, the Commission reviewed in some detail the market (the 1989 Monopolies and Mergers Commission's Report, the Beer Orders, supply factors, competition between brewers, market entry at brewing level, market entry at retail level, changes in arrangements between pub tenants and their landlords) and the particular agreements under consideration. It then made its legal assessment, first on *Delimitis* 1, and then on *Delimitis* 2 and other issues. It concluded that article 81(1) applied but granted exemption under article 81(3).

9. In his particulars of claim in this action dated 10 June 2002, Mr Crehan's pleading turned (at para 122) to *Delimitis* 1 and foreclosure of the market. Facts were then pleaded to show that the *Delimitis* 1 condition was satisfied and the market foreclosed. At para 128 it was pleaded:

> "Mr Crehan will further rely on the facts and matters in the Commission Decisions (referred to in paragraph 119 above) in support of this contention: in particular *Whitbread* (paragraphs 108-127), *Bass* (paragraphs 125-144), *Scottish & Newcastle* (paragraphs 95-114). He will further rely on the MMC Reports referred to below."

This appears to suggest that Mr Crehan would rely on the facts found by the Commission, as he was of course entitled to do, but not that those facts, even if persuasive, were effectively binding on the judge.

10. This, as I understand, is how Inntrepreneur understood the issue. It denied (in para 57 of its amended defence and counterclaim of 19 December 2002) that article 81(1) applied. Para 67 of this pleading read:

> "67. The decisions of the Commission in relation to Bass, Whitbread and Scottish & Newcastle (S&N) are not binding on the court, and, in so far as they conclude that the United Kingdom market was foreclosed, misapply the guidance of the European Court in *Delimitis* and are vitiated by inadequate and incorrect analysis. Notably the Commission failed to give any or adequate attention to the possibilities of expansion for existing players in the market, but focussed on the possibilities of entry to the market for overseas competitors. Furthermore, the Commission's analysis in these decisions should be reassessed in the light of its own later views in [sic] the correct scope and application of Article 81, as referred to in paragraph 64 above. It is averred that the fact that the Commission's conclusions on foreclosure were not appealed to the CFI is irrelevant."

Thus, as it seems to me, issue was squarely joined on the foreclosure issue and the reliability of the Commission's assessment in *Whitbread* and the other decisions. To address that issue the parties adduced very detailed factual evidence from over 30 witnesses, supplemented by a large number of experts, culminating in a very lengthy trial. This was not an appropriate procedure if it was to be said that the judge should not look beyond the Commission reports. As it was, I consider that the judge was bound to address the evidence adduced before him, analyse it in a conscientious judicial manner and express his conclusions, giving particular attention to those points on which he differed from the Commission.

11. If the procedural course adopted for trial of this case had led to a decision incompatible with the law of the Community, the plain duty of a national court would of course be to give effect to the latter. Community law prohibits the making by national courts of decisions which contradict decisions of Community institutions on the same subject matter between the same parties, and strongly discourages the making by national courts of decisions which may be inconsistent with decisions which may yet be made by Community institutions on the same subject matter between the same parties. But it does not, as my

noble and learned friend's analysis of the relevant authorities shows, go the length of requiring national courts to accept the factual basis of a decision reached by a Community institution when considering an issue arising between different parties in respect of a different subject matter. Were this otherwise, the Commission's letter and enclosure of 24 November 1997 to Mr Crehan's solicitors, written nearly two months after its article 19(3) notice to Whitbread, would have been very misleading if not disingenuous, since whether or not article 81(1) was applicable to Mr Crehan's agreement would not in any real sense have been a question which the national court would be in a position to decide.

12. The judge had either to accept the Commission's assessment, which (unless required) would have been an abdication of the judicial function, or form his own opinion, giving such weight to the Commission's assessment as in his judgment the evidence merited. He chose the latter course, and save on one limited point (on which it regarded his view as tenable) the Court of Appeal did not criticise his findings. Its difference was one of approach, holding that he was effectively bound to adopt the Commission's conclusions. As already explained, I do not, with respect, accept the Court of Appeal's approach as correct. I would accordingly uphold the judge's decision on *Delimitis* 1, and would make the orders which my noble and learned friend proposes.

LORD NICHOLLS OF BIRKENHEAD

My Lords,

13. I have had the advantage of reading in draft the speeches of my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. For the reasons they give, with which I agree, I would allow this appeal.

LORD HOFFMANN

My Lords,

14. The Commission is the central institution responsible for the administration of European competition policy. It has power, among other things, to decide whether an agreement prevents, restricts or distorts competition in breach of article 81 of the EC Treaty. Since article 81 is directly applicable in all member states, national courts have concurrent jurisdiction to decide the same question. If an action before a national court raises a question of fact which has already been decided by the Commission in proceedings relating to other participants in the same market, ought the national court to follow the Commission or is it free to reach a different conclusion? Park J, after hearing evidence, rejected a finding by the Commission that in 1991-1993 it was difficult for sellers to enter the English on-the-premises beer market. The Court of Appeal held that he should have followed the Commission and reversed his judgment. In my opinion Park J was entitled to decide for himself and his judgment should be restored.

15. The proceedings have been long and complex but only a brief sketch is needed to explain the point which the House has to decide. A full and admirably lucid narrative is given in the judgment of Park J [2003] EuLR 663. In 1991 the claimant Mr Crehan entered into agreements to take leases of two public houses in Staines from the defendant Inntrepreneur Pub Company (CPC) ("Inntrepreneur"). They were in standard form containing ties which obliged him to buy his beer from Courage Ltd ("Courage") at its list prices. Both businesses failed because, as the judge found, Mr Crehan could not compete with other public houses who were able to buy their beer at lower prices and he therefore did not do enough trade to cover the rent he had agreed to pay. Mr Crehan surrendered his two leases in March and September 1993, having lost a substantial sum of money.

16. In 1993 Courage sued Mr Crehan for £15,226 outstanding on the beer account and Mr Crehan counterclaimed against Courage and Inntrepreneur for damages, alleging that his losses had been caused by a tie agreement which was unlawful under what was then article 85 and is now article 81, to which, for convenience, I shall refer to ~~it~~ throughout my speech as article 81:

"1. The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market…

2. Any agreements or decisions prohibited pursuant to this article shall be automatically void.

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

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

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

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

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

17. The central role of the Commission in administering this article (and article 82, which deals with abuse of a dominant position) is created by regulations made under article 83 (formerly article 87). This article gives the Council of Ministers power to make regulations to "give effect to the principles set out in articles 81 and 82", including in particular regulations which "ensure compliance with the prohibitions laid down in article 81(1)", "lay down detailed rules for the application of article 81(3)", "define the respective functions of the Commission and of the Court of Justice" in applying the regulations and "determine the relationship between national laws and the provisions contained in this section or adopted pursuant to this article".

18. At the relevant time, the applicable regulation was the Council Regulation (EEC) No 17/62 (hereafter "17/62"). It has since been

revoked with effect from 1 May 2004 and replaced by Regulation (EC) No 1/2003.

19. 17/62 granted the Commission extensive powers. Under article 2 it could grant an applicant "negative clearance", that is to say, a statement certifying that, on the basis of the facts in the possession of the Commission, an agreement gave no grounds for action under article 81(1). Under article 3, anyone having a "legitimate interest" could apply for a decision that an agreement infringed article 81(1) and an order, backed by the possibility of a fine, that the undertaking bring the infringement to an end. Under article 9, the Commission had sole power to declare article 81(1) inapplicable pursuant to article 81(3). Subject to certain exceptions in article 4(2), anyone who wanted to apply for an exemption under article 81(3) had, by article 4(1), first to notify the agreement in question to the Commission. The Commission had power under article 6(1) to backdate an exemption but, in the case of an agreement which had to be notified, not to a date earlier than the date of notification.

20. 17/62 also dealt with the procedure for granting negative clearance or an exemption under article 81(3). By article 19(1) the party seeking the clearance or exemption had to be given an opportunity to be heard and by article 19(3), if the Commission was disposed to grant the clearance or exemption, it had to publish a notice to this effect and invite observations from all interested third parties.

21. Pursuant to article 83, the Council also made Regulation 19/65/EEC which conferred upon the Commission power to make regulations specifying in general terms, pursuant to article 81(3), that article 81(1) would not apply to certain specified categories of agreement. Such regulations made by the Commission are called "block exemptions" and by Title II of Commission Regulation (EEC) No 1984/83 a block exemption was granted for beer supply agreements which satisfied certain specified conditions.

22. Even before Mr Crehan launched his counterclaim in 1993, Inntrepreneur was well aware that its tie agreements might be said to contravene article 81. Mr Crehan was by no means the first to complain of the terms of the Inntrepreneur lease, which was something of an innovation in the trade. The background to its introduction was that in 1991 Courage and Grand Metropolitan plc entered into an agreement by which Grand Metropolitan transferred its brewing interests to Courage

and the two companies set up Inntrepreneur as a jointly owned company to which they transferred the ownership of all their tied public houses. As a result, Inntrepreneur acquired the ownership of some 7,355 tied public houses. It was decided that Inntrepreneur would re-let its public houses on new 20 year leases, much longer than had previously been customary, with ties requiring the tenants to buy their beer from Courage.

23. The agreement for merging the public house estates of Courage and Grand Metropolitan was subject to the consent of the Secretary of State for Trade and Industry, as UK competition authority. As a condition of consent the Secretary of State required undertakings that the number of tied public houses would be reduced to 4,350 by 31 October 1992 and that all the tenants would be released from the ties by 28 March 1998.

24. The undertaking to reduce the number of tied houses by 31 October 1992 reflected a general UK policy of opening up the market which had been given effect by the Supply of Beer (Tied Estate) Order 1989 (SI 1989/2390) and the Supply of Beer (Loan Ties, Licensed Premises and Wholesale Prices) Order 1989 (SI 1989/2258) ("the Beer Orders"). These orders required breweries or brewery groups owning more than 2000 retail outlets substantially to reduce their holdings by sales or releases from tie by 1 November 1992. The result was that in the few years between the making of the orders and November 1992, a great many public houses came on the market or were released from ties. The Orders did not apply to Inntrepreneur because it was not a brewery or brewery group. But the undertakings made it subject to the same rules and, in respect of the 1998 limit, went even further.

25. More or less from the inception of the Inntrepreneur tied estate, some of its tenants complained that the tie in its standard form of lease infringed article 81(1). In an attempt to put this question to rest, Inntrepreneur on 17 July 1992 notified the agreements to the Commission pursuant to article 4(1) of 17/62 and applied for negative clearance pursuant to article 2, or alternatively a decision that the agreements fell within the beer supply block exemption or, in the further alternative, an exemption under article 81(3). There followed lengthy negotiations between Inntrepreneur and the Commission, which were in progress when Mr Crehan launched his proceedings and which I shall in a moment describe in more detail. While they continued, Mr Crehan and a large number of similar claimants agreed to their actions being informally stayed.

26. Although Inntrepreneur had applied for negative clearance on the ground that their agreements did not infringe article 81, the Commission was extremely unreceptive to this argument. In *Delimitis v Henninger Bräu AG* (Case C-234/89) [1991] ECR I 935, 995 the Court of Justice had given authoritative guidance, in the context of a German beer supply agreement, on the conditions which had to be satisfied for article 81 to apply:

> "A beer supply agreement is prohibited by article 85(1) of the … Treaty if two cumulative conditions are met. The first is that, having regard to the economic and legal context of the agreement at issue, it is difficult for competitors who could enter the market or increase their market share to gain access to the national market for the distribution of beer in premises for the sale and consumption of drinks. The fact that, in that market, the agreement in issue is one of a number of similar agreements having a cumulative effect on competition constitutes only one factor amongst others in assessing whether access to that market is indeed difficult. The second condition is that the agreement in issue must make a significant contribution to the sealing-off effect brought about by the totality of those agreements in their economic and legal context. The extent of the contribution made by the individual agreement depends on the position of the contracting parties in the relevant market and on the duration of the agreement."

27. These two conditions are commonly called "*Delimitis 1*" and "*Delimitis 2*". Inntrepreneur took the view that neither condition was satisfied: they considered that, in the upheaval which had been caused by the Beer Orders (and their own undertakings to the Secretary of State), it was not difficult to gain access to the market (in the common shorthand, the market was not "foreclosed") and if it was, their agreements did not make a significant contribution. But the Commission was unwilling to hear argument on these points. Nor was it impressed by the submission that the agreements fell within the block exemption order.

28. The Commission was however sympathetic to granting an individual exemption under article 81(3). On 30 July 1993 it published a notice pursuant to article 19(3) of 17/62. The notice described the market and said (in paragraph 6):

> "As a result of the above characteristics, foreign brewers or indeed new brewers who own few or no on-licensed premises still have difficulty selling substantial quantities of draught or bottled beer independently in the United Kingdom"

29. It went on to say that many foreign brewers therefore licensed major UK brewers to brew and distribute their products. That might be taken as expressing the opinion that the market was foreclosed. The notice ended by saying that the Commission intended to grant a retroactive exemption pursuant to article 81(3).

30. The notice stirred up a hornets' nest of disaffected Inntrepreneur tenants. They not only opposed the grant of an exemption but applied under article 3 of 17/62 for a decision that article 81(1) was infringed and for appropriate action by the Commission. Among the applicants was Mr Crehan. On 19 December 1994 the Commission wrote to Inntrepreneur saying that in the light of the objections they were having second thoughts about granting an exemption. There followed further negotiations between Inntrepreneur and the Commission, in the course of which Inntrepreneur put forward a new scheme of looser ties under the name of RetailLink, which was put into effect on 25 February 1997. The Commission indicated that it was likely to grant an exemption for RetailLink and on 26 March 1997 Inntrepreneur formally notified it under article 4(1). This led eventually to another article 19(3) notice saying that the Commission was disposed to grant exemption and finally to a "comfort letter" dated 24 January 2000 in which the Commission said that the agreements notified in 1997 appeared to contain restrictions infringing article 81(1) but that the requirements of article 81(3) appeared to be satisfied.

31. The question which arose after Inntrepreneur had elected to pursue an exemption for its new agreements was what should be done about the applications relating to the period before RetailLink was adopted. They were, on the one hand, Inntrepreneur's application for negative clearance, application of the block exemption or individual exemption, and, on the other, the tenants' applications under article 3 of 17/62 for a determination that they infringed article 81(1).

32. The Commission was distinctly unenthusiastic about proceeding with any of these applications which, so far as it was concerned, were now only of historical interest. Mr Mensching, the senior DG IV official

who had been involved in the case from the beginning, suggested that Inntrepreneur withdraw its 1992 notification. On 14 October 1997 Inntrepreneur did so. That left the article 3 applications by the tenants. The Commission dealt with them by a letter dated 24 November 1997 addressed to the complainants, including Mr Crehan, saying that they proposed to reject the applications. The reasons given in an annex to the letter are important and need to be quoted at some length. The Commission noted that there were proceedings on foot in England claiming damages, which raised the question of whether article 81(1) had been infringed and in which this issue could be decided. While Inntrepreneur were seeking exemption under article 81(3), the Commission had to remain seised of the case because only the Commission could grant an exemption. But now that Inntrepreneur had withdrawn its application, there was nothing that the Commission could decide which could not equally be decided by the national court. Accordingly there was no Community interest in the Commission proceeding with the case:

> "There is…no more request for exemption pending for the 'old' lease. This means that the only remaining question with regard to the application of Community competition law to the 'old' lease is whether or not article [81](1) is applicable.
>
> This is a question which the national court is in a position to decide. It can be added that the national court can take into account some factual and legal elements which the Commission has made public on earlier occasions. With regard to a general market description, reference can be made to the earlier mentioned 19(3) notice [of 30 July 1993] and to similar such notices in the Bass and Whitbread cases. As to the legal point of the applicability of article [81](1), indirect guidance can be taken from the Commission's intention indicated in the earlier mentioned Inntrepreneur 19(3) notice to grant an exemption to the lease.
>
> Furthermore, in the event that the national judge finds that article [81](1) is applicable, he is in a position to determine the civil law effects following from the prohibition set out in article [81](2)…The judge can also award compensation for loss suffered as a result of an infringement of article [81]. …
>
> The Commission considers that there are insufficient grounds for granting the complainant's application as, in the absence of a request for exemption pursuant to article

> [81](3), it would lead to a duplication of procedures and is therefore not in the Community interest for the Commission to rule upon the complainant's request that the 'old' lease has infringed article [81](1) since the date of its introduction."

33. The result was that the Commission washed its hands of the old leases and never decided whether they infringed article 81(1) or not.

34. At this point it is necessary to say something about the Bass and Whitbread cases, to which reference is made in the Commission's letter. Inntrepreneur was not the only owner of tied houses to notify its agreements to the Commission. Other large-scale proprietors were also doing so during the late 80s and throughout the 90s. Bass plc notified its tie agreements on 27 October 1987 and a new form of agreement on 12 June 1996. Whitbread plc notified its agreements on 24 May 1994. Scottish & Newcastle plc also did so, on 25 April 1996. In each of these cases the Commission adhered to the view which it had expressed informally to Inntrepreneur, namely, that the relevant market was foreclosed. By the time of the letter to Mr Crehan and the other complainants against Inntrepreneur, the Commission had published article 19(3) notices in respect of the Bass and Whitbread applications, saying that they were minded to grant exemptions under article 81(3). This implied that they regarded article 81(1) as prima facie infringed. Afterwards, the Commission gave formal decisions in all three cases, in similar terms, which were more explicit. The *Whitbread* decision dated 24 February 1999 said in recital 127:

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

35. After the recitals, the actual decision of the Commission was relatively brief:

"The Commission of the European Communities…has adopted this decision:

Article 1

1. The provisions of article [81](1) of the Treaty are, pursuant to article [81](3), declared inapplicable to the individual lease agreements…

2. This decision shall apply from 1 January 1990 until 31 December 2008.

Article 2

This decision is addressed to Whitbread plc."

36. The Commission having decided to make no decision on the old Inntrepreneur leases, the scene then shifted to the Strand, where the litigation with the tenants resumed. Mr Crehan's case was chosen as the lead action in group litigation and in 1998 it came before Carnwath J on the preliminary issue of whether a party to an agreement could in principle recover damages from the other party on the ground that it contravened article 81. Following an earlier decision of the Court of Appeal, Carnwath J [1999] Eu LR 409 held that there was no such cause of action and struck out the claim. There followed a reference to the European Court of Justice, which ruled that a party to the agreement could have a cause of action: see *Courage Ltd v Crehan* (Case C-453/99) [2002] QB 507. Accordingly, the action came on for trial before Park J in February and March 2003 and was heard over 29 days.

37. The action raised a number of issues. One was whether the agreement infringed article 81, which involved deciding whether the two *Delimitis* conditions were satisfied. A second was whether the agreements fell within the block exemption in Title II of Regulation (EEC) No 1984/83. And then there were questions on the type of damage recoverable and the amount of such damage, if any, for which Mr Crehan was entitled to recover.

38. Although the parties came to court armed not only with witnesses of fact about the state of the market in 1991-1993 (19 for Mr Crehan and 14 for Inntrepreneur) but also with economic and other experts (three for Mr Crehan and five for Inntrepreneur), counsel for Mr Crehan submitted that the court should decide the *Delimitis I* issue simply on the basis of the Commission's opinion expressed in the recitals to its decision in *Whitbread*. The judge should not try to "second guess" the Commission. The judge said that there were "obvious attractions" in taking such a course but refused to do so. By that time he had heard

lengthy and detailed evidence which satisfied him that, in respect of the period 1991-1993, the Commission's opinion could not be sustained. He concluded [2003] Eu LR 663, para 197:

> "I am not prepared to find that the United Kingdom market was foreclosed to that extent simply because the Commission thought that it was and said so in its decision in *Whitbread*. I have made up my own mind on the basis of the extensive evidence which has been placed before me. I do not suggest that the market was 100% open to all comers. The tied estates, even after the Beer Orders, cannot be brushed aside as insignificant and they did to some extent seal off a part of the market. But the sealing off was not complete even within the tied estates. Much more importantly, leaving the tied estates aside, there were in my view, amply sufficient fully contestable other outlets to mean that *Delimitis* condition I was not satisfied."

39. The adverse decision on *Delimitis 1* meant that Mr Crehan's case failed. There was no infringement of article 81(1). Although the judge went on to consider *Delimitis 2*, the block exemption and damages, he dealt with these matters only in case the Court of Appeal should find that he was wrong in saying that there had been no infringement of article 81.

40. This turned out to have been wise, because the Court of Appeal said that he had been wrong not to follow the Commission on this point. In making his own decision, he had not complied with what is generally called the "duty of sincere co-operation" imposed upon the institutions of member states by article 10:

> "Member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks.
>
> They shall abstain from any measure which could jeopardise the attainment of the objectives of this Treaty."

41. The Court of Appeal [2004] Eu LR 693 said that, on the facts of the case, sincere co-operation required the judge not to entertain a

submission that the view of the Commission in *Whitbread* had been wrong:

> "97. …In our judgment, in the present case the English court was obliged under the duty of sincere cooperation to give to the Commission much greater deference than that which the judge, with all respect to him, was prepared to give. We accept that the Commission and the ECJ left it to the English court to determine whether the application, made by this court on making the reference, that the beer tie in the Inntrepreneur lease contravened article 81(1) was correct. However, it is apparent from what the Commission said in the letter of 24 November 1997 to [the complainants], that it expected the English court to take into account its earlier conclusions not only in respect of Inntrepreneur but also in cases such as *Whitbread*, even though not final decisions. The fact that it was considered unnecessary and therefore undesirable for the Commission itself formally to give the decision as to whether article 81(1) applied when the English court was in a position to give the decision and to award compensation (which the Commission could not do) did not leave the judge free to reconsider the Commission's earlier conclusions afresh. Still less was the judge free so to do in 2003, by which time the *Whitbread*, *Bass* and *Scottish & Newcastle* decisions with its conclusions, central to those decisions, on the foreclosure of the relevant market had been published and the comfort letter of 24 January 2000 relating to RetailLink had been issued. We accept that it is a ready inference from that letter that in the Commission's view article 81(1) applied to the Inntrepreneur leases throughout the period relevant to Mr Crehan's case.
>
> 98. Inntrepreneur in its evidence and submissions to the judge did not attempt to distinguish the present case from *Whitbread* and the other decisions of the Commission going to the applicability of article 81(1) to the relevant market. Instead it attacked those decisions as fundamentally flawed. In our judgment it was inappropriate for the judge to adopt the approach that he should receive such evidence and hear such submissions, as the effect of the judge second-guessing the Commission and concluding that the Commission was wrong has been to create an irreconcilable inconsistency in the application of the Community's competition policy to the relevant market. We do not say that the Commission is infallible;

> far from it. We do say that if the Commission is to be shown to be wrong in its decisions on the applicability of article 81(1), that has to be decided not by the national court but by the ECJ or CFI. The judge's decision offended against the principle of legal certainty in the Community. In our opinion the judge failed to comply with the duty of sincere cooperation and thereby erred in law."

42. Apart from saying, at para 99, that they were not satisfied that the Commission had committed "egregious errors" and commenting on one point (loan ties with short termination periods), on which they described the judge's view as "at its lowest…tenable" (para 107) but not entitling him to reject the contrary view of the Commission, the Court of Appeal made no comment on the judge's analysis of the facts. In their opinion it was an exercise on which he should not have embarked at all.

43. Did the judge err in law? The potentiality for conflict between decisions of the Commission and the national courts is a matter on which the Court of Justice and the Commission itself have provided fairly detailed guidance. In *Delimitis v Henninger Bräu AG* [1991] ECR I 935, 992, para 47 the Court of Justice said in general terms:

> "Account should here be taken of the risk of national courts taking decisions which conflict with those taken or envisaged by the Commission in the implementation of articles [81](1) and [82], and also of article [81](3). Such conflicting decisions would be contrary to the general principle of legal certainty and must, therefore, be avoided when national courts give decisions on agreements or practices which may subsequently be the subject of a decision by the Commission…"

44. This is a useful caution, so far as it goes, but leaves open the question of what counts as a conflicting decision. The comments of the Court of Justice have to be read in the context of the situation of potential conflict which arose in that case. In *Delimitis* the German court was being asked by the tenant to say that his tied tenancy had contravened article 81(1). But the agreement belonged to a category which did not have to be notified under article 4 of 17/62 and it was therefore always open to the Commission to grant a retroactive exemption which would conflict with a judgment in the tenant's favour

by the German court. The conflict envisaged was thus an inconsistency between the legal effects of the two decisions, the Commission saying that an agreement did not contravene article 81 and the German court saying that it did. It was in this context that the court spoke of the risk of conflicting decisions and advised on what to do about avoiding it:

> "50. If the conditions for the application of article [81](1) are clearly not satisfied and there is, consequently, scarcely any risk of the Commission taking a different decision, the national court may continue the proceedings and rule on the agreement in issue. It may do the same if the agreement's incompatibility with article [81](1) is beyond doubt and, regard being had to the exemption regulations and the Commission's previous decisions, the agreement may on no account be the subject of an exemption decision under article [81](3).
>
> 52. If the national court…considers in the light of the Commission's rules and decision-making practices, that that agreement may be the subject of an exemption decision, the national court may decide to stay the proceedings or to adopt interim measures pursuant to its national rules of procedure. A stay of proceedings or the adoption of interim measures should also be envisaged where there is a risk of conflicting decisions in the context of the application of articles [81](1) and [82]."

45. It will be noted that in the very last sentence, the Court of Justice adverted to the possibility of a conflict arising, not only from the Commission exercising its exclusive power to grant an exemption under article 81(3) but also from the exercise of its concurrent jurisdiction to decide whether or not an agreement infringed articles 81 or 82, presumably on applications for rulings under article 3 of 17/62. (Whether the same would be true of applications for negative clearance under article 2 is a question to which I shall return). The Court of Justice clearly envisaged that if the Commission decided that an agreement infringed article 81(1), a national court would be obliged to follow that decision and, if such a decision was pending, should stay its own proceedings until the Commission had made its decision.

46. After *Delimitis*, the Commission issued a Notice on Cooperation between National Courts and the Commission in Applying Articles 81 and 82 of the EC Treaty (OJ 1993 C39/6) which enlarged upon the

guidance which had been provided by the Court of Justice. It described the respective functions of the Commission and the national courts:

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

47. The notice went on to say, at para 20, that a national court, before answering the question of whether an agreement infringed article 81:

> "should ascertain whether the agreement, decision or concerted practice has already been the subject of a decision, opinion or other official statement issued by an administrative authority and in particular by the Commission. Such statements provide national courts with significant information for reaching a judgment, even if they are not formally bound by them."

48. The matter was taken further by the decision of the Court of Justice in *Masterfoods Ltd v HB Ice Cream Ltd* (Case C-344/98) [2000] ECR I – 11369. Masterfoods Ltd, a subsidiary of Mars Inc, brought proceedings in Ireland against HB Ice Cream Ltd, a subsidiary of Unilever, for a declaration that its agreements to provide retailers with freezer cabinets on terms that they stocked only HB ice cream contravened articles 81 and 82. On 28 May 1992 the High Court dismissed the action and, on HB's counterclaim, granted an injunction to restrain Masterfoods from inducing retailers to break their agreements by stocking Masterfoods ice cream. On 18 September 1991 Masterfoods made a complaint to the Commission under article 3 of 17/62 and on 4 September 1992 it gave notice of appeal to the Supreme Court. In the course of discussions with the Commission, HB offered to make some changes in its agreements and the Commission issued a notice saying that it proposed to grant exemption under article 81(3). However, as in this case, the Commission changed its mind and on 11 March 1998 issued a decision (98/531) stating that HB's agreements infringed articles 81 and 82. HB immediately applied to the Court of First Instance to annul the decision of the Commission. That was the state of affairs when the appeal came before the Supreme Court in June

1998. The court made a reference to the Court of Justice seeking guidance as to how it should proceed. It asked whether it should stay the Irish proceedings pending the decision of the Court of First Instance and whether the decision of the Commission on the HB agreements prevented HB from seeking to uphold the contrary decision of the national court.

49. Advocate General Cosmas, starting from the proposition that it was necessary to avoid conflict between the decisions of Community institutions and national courts, discussed the question of what counted as a conflict, at para 16. There could be no risk of conflict, he said, where:

> "where the legal and factual context of the case being examined by the Commission is not completely identical to that before the national courts."

50. Significantly for the situation in the present case, he gave as an example of such lack of identity a case in which:

> "the national courts are examining the legality of an exclusivity agreement in respect of the use of ice cream freezer cabinets between a particular company and retailers 1, 2 and 3 in Ireland, whilst the Commission is monitoring a similar agreement in respect of the same products in the same market between another company and retailers 4, 5 and 6"

51. In such a case, said the Advocate General:

> "The Commission's decision may provide important indications as to the appropriate way to interpret Articles 85(1) and 86, but in this case there is no risk, from a purely legal point of view, of the adoption of conflicting decisions."

52. A risk of conflict:

> "only arises when the binding authority which the decision of the national court has or will have conflicts with the grounds and operative part of the Commission's decision. Consequently the limits of the binding authority of the decision of the national court and the content of the Commission's decision must be examined every time."

53. In *Masterfoods*, the High Court had examined the agreements and the Irish ice cream market as they stood before its decision in 1992, whereas the Commission had examined the amended agreements and the market as it stood in 1996. It followed that the decisions of the High Court and the Commission were not necessarily in conflict. Conflict would arise only if the High Court's injunction continued to apply after the Commission had ruled that the agreements were unlawful. But that was exactly what HB were asking the Supreme Court to do. The appeal therefore presented an imminent risk of conflict.

54. The Court of Justice accepted the Advocate General's analysis that the risk of conflict arose out of the possibility of the Supreme Court continuing an injunction to enforce agreements which the Commission had held to be unlawful:

> "59. In this case it appears from the order for reference that the maintenance in force of the permanent injunction granted by the High Court restraining Masterfoods from inducing retailers to store its products in freezers belonging to HB depends on the validity of Decision 98/531."

55. The ruling of the Court of Justice was that the Irish courts had to give priority to the decisions of the European institutions on the validity of the agreements which they were being asked to enforce. The Supreme Court could suspend the proceedings until the outcome of the application to the Court of First Instance for annulment was known. Or it could make a reference to the Court of Justice for a preliminary ruling on the validity of Decision 98/531. What it could not do was dismiss the appeal and enforce the injunction while the Commission's decision remained in effect.

56. It is clear that the duty to avoid conflicting decisions, as stated by the Court of Justice in the two leading cases of *Delimitis* and

Masterfoods, has no application to the present case. There is no possibility of conflict, in the sense discussed in those cases, between a decision of the Commission that the Whitbread agreements infringed article 81 and a decision of the national court that the Inntrepreneur agreements did not. The case rather resembles Advocate General Cosmas's example of the two ice cream manufacturers operating in the same market.

57. Before leaving the jurisprudence of the Court of Justice, I should mention the opinion of Advocate General Van Gerven in *HJ Banks & Co Ltd v British Coal Corporation* (Case C-128/92) [1994] ECR I-1209, which was relied upon by Mr David Vaughan QC for Mr Crehan. The reference arose out of an action for damages brought by HJ Banks & Co Ltd ("Banks") against the British Coal Corporation ("British Coal") for abuse of a dominant position, contrary to article 66(7) of the European Coal and Steel Community Treaty ("ECSC Treaty"). This resembles article 82 of the (EC) Treaty in being designed to prevent abuse of a dominant position but differs, as the Court of Justice eventually decided in the *Banks* case, in not being directly enforceable by individuals. However, in proceedings before this judgment had been given, arising out of a complaint to the Commission by the National Association of Licensed Opencast Operators ("NALOO") and two other trade organisations, the Commission issued a decision, in the form of a letter addressed to NALOO and the two other complaining trade organisations, rejecting NALOO's complaint in relevant part. HJ Banks was a member of NALOO and argued that that decision was not binding upon the national court. The High Court in London made a reference asking, among other things, whether article 66(7) of the ECSC Treaty created directly enforceable rights and, if so, to what extent a national court was bound, as to issues of fact or the construction of the ECSC Treaty, by a decision of the Commission. The Court of Justice decided that no directly enforceable rights were created and therefore did not answer the question about the effect of the Commission's decision. But Advocate General Van Gerven dealt with the question in the general terms in which it had been framed.

58. He first put on one side administrative letters issued by the Commission, (such as, in this case, the "comfort letter" issued to Inntrepreneur in 2000). These do not count as "decisions" and were usually given without going through the procedural requirements of article 19 of 17/62. In relation to such documents, the Advocate General cited, at para 60, what the Court of Justice had said in *NV L'Oréal v PVBA De Nieuwe AMCK* (Case 31/80) [1980] ECR 3775, 3789-3790:

> "11 Such a letter…does not have the effect of preventing national courts, before which the agreements in question are alleged to be incompatible with article 85, from reaching a different finding as regards the agreements concerned on the basis of the information available to them. Whilst it does not bind the national courts, the opinion transmitted in such a letter nevertheless constitutes a factor which the national courts may take into account in considering whether the agreements or conduct in question are in accordance with the provisions of article 85."

59. Interestingly, Advocate General Van Gerven classified an actual decision giving negative clearance under article 2 of 17/62 with a comfort letter. He appears to have considered that negative clearance would create a legitimate expectation against the Commission but not bind an individual who brought proceedings for infringement of articles 81(1) or 82 in a national court.

60. Advocate General Van Gerven then turned his attention to decisions that articles 81(1) or 82 had been infringed, addressed to parties not involved in the litigation in the national court. He said that it was self-evident that:

> "no obstacles may be placed in the path of third parties seeking to challenge before the national court findings which the Commission has arrived at in a decision of that kind."

61. Who, for this purpose, is a third party? Obviously not the person to whom the decision was addressed and upon whom, in accordance with article 249, the decision is binding. In *Banks*, that would have been NALOO. But the notion of a third party also excludes persons to whom the decision is of "direct and individual concern" and who would have locus standi under article 225 or 230 to institute proceedings before the Court of First Instance or the Court of Justice for its annulment. In respect of others, however, the decision is not binding but the duty of sincere cooperation nevertheless requires a national court not to give a conflicting ruling. It must be remembered that in *Banks*, if article 66(7) had created private rights in the same way as article 82, the possibility of a conflict of decisions in the *Delimitis* and *Masterfoods* sense would have been very real. The same issue which the court had to decide,

namely whether British Coal had abused its dominant position, had been decided by the Commission. But the Advocate General also dealt with the situation in which the national court took a view different from that of the Commission on some question of fact or law:

> "If, on the basis of the parties' arguments, the national court comes to the conclusion that the issues of fact and/or law decided by the Commission are incorrect or insufficient, or if at any rate it has serious doubts in that regard, then in the light of the *Delimitis* judgment…[it] must take the following course of action: in the case of findings which carried no weight in the final decision and do not therefore underlie the reasoning of the Commission, the national court is at liberty to adopt a different interpretation: in those circumstances the risk of conflicting decisions and the resultant impairment of the principle of legal certainty is extremely small. On the other hand, in the case of findings which have an influence on the final decision arrived at by the Commission, the national court is well advised, in accordance with the provisions of its national procedural law, to suspend the proceedings in the case and to seek the necessary information from the Commission or make a direct reference to the court for a preliminary ruling concerning the validity of the decision in question or the interpretation of the relevant Community competition rules."

62. I cannot say that I find this passage altogether easy to understand; in particular, whether the Advocate General was using the expression "conflicting decisions" in the sense in which it was used in *Delimitis* and *Masterfoods* or in some wider meaning, but the use of the words "the national court is well advised" and the recommendations of asking for information or making a reference, do not suggest that the national court is under any duty to follow the decision of the Commission.

63. The law on the relationship between the Commission and the national courts was, so to speak, codified by article 16 of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in articles 81 and 82 of the Treaty, generally called the Modernisation Regulation, which replaced 17/62 with effect from 1 May 2004. It was of course not in force at the time of the events in this case but its significance is that it appears accurately to reflect the previous case law:

> "*Article 16 Uniform application of Community competition law*
>
> "1. When national courts rule on agreements, decisions or practices under article 81 or article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. They must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay its proceedings. This obligation is without prejudice to the rights and obligations under article 234 of the Treaty.
>
> 2. When competition authorities of the member states rule on agreements, decisions or practices under article 81 or article 82 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which would run counter to the decision adopted by the Commission.

64. This article makes it clear that a relevant conflict exists only when the "agreements, decisions or practices" ruled on by the national court have been or are about to be the subject of a Commission decision. It does not apply to other agreements, decisions or practices in the same market.

65. These authorities therefore show that the Commission stated the legal position accurately in its letter to Mr Crehan which I have already quoted (see para 32), which said that the question of whether or not article 81(1) applied was one which "the national court is in a position to decide"; that it could "take into account" the views expressed by the Commission in its "general market description" in the *Whitbread* article 19(3) notice; and that "indirect guidance" on questions of law could be derived from the article 19(3) notice issued after Inntrepreneur's first application. This letter, coming soon after the *Whitbread* notice, would have been highly misleading if the position was that, provided only that the recipients waited for the Commission to adhere to its view in an actual decision in the *Whitbread* or some other case, the issue in a national court would be concluded in their favour.

66. The Court of Appeal accepted, at para 97, that the Commission left it to the national court to determine whether article 81(1) had been infringed or not. But it said, at para 77, that it was clear that "the

Commission expected the English court to follow its view…that article 81(1) applied". If that means no more than that the Commission thought it was right, I would not think that particularly surprising. But if it means that the Commission thought that the English court would be obliged as a matter of Community law to follow its view, I think that is neither what the Commission said nor what the authorities require. The Court of Appeal said, at para 74, that the Whitbread and other decisions did not "formally bind" Inntrepreneur but nevertheless held that the judge had erred in law in allowing Inntrepreneur to adduce evidence to show that the Commission was wrong This suggests a concept of being informally bound which I find difficult to understand. If, as the Court of Appeal said, the defendant is precluded from adducing evidence to show that the Commission was wrong, the distinction is not visible to the naked eye.

67. The Court of Appeal said, at para 76, that it was left "profoundly uneasy" by the judge's decision to allow Inntrepreneur to challenge the Commission's opinion. But I must confess that I am left profoundly uneasy by the unfairness of the Court of Appeal's decision that Inntrepreneur could not do so. The Court of Appeal said that Inntrepreneur could have raised the matter before the Commission in its own application. It is true that if Inntrepreneur had pursued its application for negative clearance on the old agreements, it could have obtained a ruling and, if necessary, challenged that ruling in an application for annulment to the Court of First Instance. But the suggestion that it withdraw that application and litigate the matter in England came from the Commission and the Court of Appeal confirmed the judge's decision that this did not involve any abuse of process. For Inntrepreneur then to find its main defence shut out by a subsequent decision of the Commission in which it took no part seems to me a denial of a fair trial.

68. The Court of Appeal said, at para 98, that the judge's decision had created "an irreconcilable inconsistency in the application of the Community's competition policy to the relevant market". But that again seems to me the opposite of what the Commission said. In its letter to Mr Crehan it said that there was no Community interest which could justify the Commission in deciding whether the old agreements infringed article 81(1) or not. If the Commission had thought that it was important to have uniformity of decision on this point, it could have given a decision on the article 3 applications and, subject to an application for annulment, that would have bound Inntrepreneur: see *Iberian UK Ltd v BPB Industries plc* [1997] Eu LR 1. Instead, as an exercise in subsidiarity, it left the decision to the national court. To leave

a decision to someone else necessarily implies that he may decide it. In my opinion, for the judge to have made his own decision was to respect the policy of the Commission rather than to flout it.

69. There was a good deal of discussion, both before the Court of Appeal and in argument before the House, about the degree of "deference" which a national court should show to a decision of the Commission. Mr Vaughan QC is recorded (in para 96 of the judgment of the Court of Appeal) as having constructed a scheme of three degrees of deference (absolute deference, very great deference and deference) which might have to be paid to a decision of the Commission. For my part, I do not find deference in this context a very helpful expression. It is commonly (if not altogether happily) used in administrative law when a court decides that the decision-making power on a particular question properly belongs to someone else and that the court should not substitute its own view. But the decision-making power on whether article 81(1) applies plainly belonged to the English court, exercising concurrent jurisdiction, and I find it difficult to see how the exercise of this power can be combined with "deference" to the decision of someone else. The correct position is that, when there is no question of a conflict of decisions in the sense which I have discussed, the decision of the Commission is simply evidence properly admissible before the English court which, given the expertise of the Commission, may well be regarded by that court as highly persuasive. As a matter of law, however, it is only part of the evidence which the court will take into account. If, upon an assessment of all the evidence, the judge comes to the conclusion that the view of the Commission was wrong, I do not see how, consistently with his judicial oath, he can say that as a matter of deference he proposes nevertheless to follow the Commission. Only a rule of law, in the nature of an issue estoppel which obliges him to do so, could produce such a result and the Court of Appeal accepted that there was no such rule.

70. Mr Vaughan submitted that if your Lordships did not accept that the judge was obliged to follow the opinion of the Commission, it should make a reference to the Court of Justice asking whether he was so obliged or, alternatively, whether in the light of the judge's findings of fact, the decision in the *Whitbread* case was valid. I see little point in either question: on the first issue, it is conceded that there is no rule of Community law which required the court to follow the Commission, and on the second, the House will either be asking about the validity of a decision about agreements between other parties or else asking the Court of Justice to decide a question of fact which was within the jurisdiction of the national court.

71. In my opinion, therefore, the judge was right in deciding that he could decide *Delimitis 1* for himself and the Court of Appeal was wrong to reverse his decision on the ground that he should have followed the Commission.

72. Although it appears that counsel for Mr Crehan mounted a full-scale appeal against the judge's findings of fact, the Court of Appeal did not suggest that if he had been free to decide the case for himself, his conclusions could not be supported. As I mentioned earlier, on the one point on which they made any comment on his reasoning, they said that his view was ("at its lowest") tenable. Mr Brealey QC, who appeared with Mr Vaughan for Mr Crehan, wished to challenge the judge's findings before the House. But the Court of Appeal gave Inntrepreneur leave to appeal which was limited to the issues on Delimitis 1 and 2, the block exemption and the type of loss falling within article 81. They gave Mr Crehan leave to appeal on the measure of damages. Neither side petitioned the House for leave to argue any other points and the transcripts and other materials which would have been needed for dealing with a full appeal on fact were not made available to the House. Your Lordships therefore declined to hear argument on the facts. It follows that the judge's finding on *Delimitis 1* must stand and the appeal must be allowed. I have had the privilege of reading in draft the speech delivered by my noble and learned friend Lord Bingham of Cornhill and would associate myself with his remarks.

73. It is unnecessary to say anything about *Delimitis 2* (on which the judge, given the artificiality of the necessary hypothesis in the light of his finding on *Delimitis 1*, stated no concluded opinion) or on the block exemption. The block exemption points raised two points of construction which are now obsolete because the relevant regulation has been revoked and replaced by another block exemption in different terms. There is therefore little point in the House expressing a view on what the true construction would have been. Your Lordships did not invite argument on any of the questions relating to damages, which in the circumstances do not arise. The cross-appeal on quantum must therefore be dismissed.

74. Finally, I must mention the intervention of Visa UK Ltd, who are in dispute with the OFT on a point related to the question at issue in this appeal. Mr Stephen Morris QC, who appeared on their behalf, made some succinct submissions which I found very helpful in relation to the questions which the House has to decide. But I say nothing about whether today's decision has any application to Visa, whose position as

against the OFT may well be different from that of Mr Crehan against Inntrepreneur.

LORD RODGER OF EARLSFERRY

My Lords,

75. I have had the privilege of considering the speeches of my noble and learned friends, Lord Bingham of Cornhill and Lord Hoffmann, in draft. I agree with them and for the reasons they give, I too would allow the appeal.

LORD WALKER OF GESTINGTHORPE

My Lords,

76. I have had the privilege of reading in draft the opinions prepared by my noble and learned friends Lord Bingham of Cornhill and Lord Hoffmann. I am in full agreement with them, and for the reasons which they give I too would allow this appeal.