

Landmark landlord

The Chair of the Bar European Group, *Marie Demetriou QC*, on her involvement in the *Crehan v Innpreneur* litigation and being led by David Vaughan CBE QC

DAVID Vaughan represented Mr Crehan over a period of some 13 years and his efforts involved numerous hearings before the domestic and European courts. Like many of David's cases, the *Crehan* case both established several landmark principles of law and also earned him the firm loyalty and affection of his clients. Mr Bernie Crehan ran two pubs in Staines, the Cock Inn and the Phoenix, which were across the road from one another. The pubs were owned by Courage, the brewer which owned a sizeable proportion of the pubs in the country. Mr Crehan's lease required him to buy most of his beer from Courage and sell it at a price which was substantially higher than the price at which Courage sold its beers to independent pubs.

This made things very difficult for Mr Crehan. He intended to attract a younger clientele to the Phoenix and laid on entertainment there. His plan was to make the Cock Inn attractive to older pub-goers and he provided food there cooked by his wife, Dolores Crehan. Despite the best efforts of the couple, the high beer prices

drove customers away and Mr Crehan was driven out of business less than two years after entering into the leases.

The origins of the claim were an action by Courage against Mr Crehan for some £15,000 in respect of beer delivered to the pubs before they went out of business. Advised by David Vaughan, Mr Crehan did not merely defend the claim in debt but counterclaimed for substantial damages for breach of what was then Article 85 of the Treaty, alleging that the beer tie agreements satisfied the *Delimitis* test. David Vaughan argued on Mr Crehan's behalf that it was difficult for competitors to enter the market or increase their market share for the distribution of beer and that Courage's network of beer ties made a significant contribution to that sealing-off effect.

The European Court's judgment, on a reference from the Court of Appeal on the first of two occasions that this case came before the Court of Appeal, was of seminal importance (*C-453/99 Courage Ltd v Crehan* EU:C:2001:465). It established for the first time that damages are indeed

available against private parties who have breached the EU competition rules; and that this follows from the EU law principle of effectiveness. Until the judgment of the ECJ in 2001, this had not been established before; damages for breach of EU law had been limited to claims against the State. Now, of course, and as a direct result of that judgment, damages claims have mushroomed and are seen as a critical element of competition enforcement.

Following the ECJ's ruling, Mr Crehan pursued his claim for damages before Mr Justice Park in the Chancery Division and there was a month-long trial with 32 witnesses of fact and no fewer than eight experts. The main issues were whether the two *Delimitis* conditions were met such that the beer ties were caught by Article 85(1) (which was then renumbered Article 101(1)); if so, whether the block exemption applied; if it did not, whether the infringement had caused Mr Crehan to suffer loss and, if so, how much loss. In his judgment, Park J found that the first *Delimitis* condition was not satisfied.

In all other respects he would have found in favour of Mr Crehan; in particular, the judge accepted that if he had been wrong to find that the beer ties fell outside Article 101(1), he would have awarded Mr Crehan damages amounting to nearly £1.5 million (*Crehan v Innpreneur Pub Co* [2003] EWHC 1510 (Ch)). But the judge reached his own view on the application of Article 101(1) and did not follow the approach of the European Commission which had found that the *Delimitis* conditions were met by materially identical leases of Whitbread, Bass and Scottish & Newcastle, each of which was at the time also a major landlord of pubs in the UK.

Despite the outcome, David Vaughan relished the trial. During a particularly effective cross-examination by Kim Lewison QC (as he then was) leading for Innpreneur, David stood up all of a sudden and, much to the consternation of the other side, asked if the Court might break for a few minutes. The judge asked whether there was any particular reason for this, to which David answered, 'I need a wee.' The judge smiled and invited David to use the bathroom in his chambers and so David disappeared behind the Bench for a good 10 minutes before returning, looking much more comfortable and having successfully disrupted the other side's cross-examination. On another occasion, there was a discussion within

AGM & SUMMER PARTY

Drinks on the Roof Terrace

The BEG Annual General Meeting and Summer Party will be held on Tuesday, 3 July 2018 at Brick Court Chambers, 7-8 Essex Street, London WC2 3LD

AGM 5.30 p.m. Summer Party 6-8 p.m.

FREE ADMISSION



'Despite the best efforts of the couple, the high beer prices drove customers away.' (Getty)

the team as to whether Bernie's brother would stand up to cross-examination, this time by Martin Roger. 'Don't worry,' said David, cutting through the lengthy discussion, 'nobody will understand a word he says.' And so it transpired: the witness's very thick Irish accent was made even more impenetrable by video-link which meant that no progress whatsoever was made by the other side.

I also remember going through the transcript with David afterwards, both of us helpless with laughter as we read the testimony of one of our pub-going witnesses who, when asked whether he tended to stay at the same pub all evening, replied that he would not. Instead he would 'fast-forward 25' (i.e. pints) at one pub before moving on to another. And when asked what his criteria were for choosing a pub, he replied that it depended on the occasion: 'If I were with my girlfriend, I'd want a pub with a nice bit of carpet.'

David was overjoyed for the Crehans when the Court of Appeal upheld Mr Crehan's appeal (*Crehan v Innpreneur Pub*

Co [2004] EWCA Civ 637). The court reached this conclusion on the ground that the principle of sincere cooperation required the trial judge to give the Commission's decisions in *Whitbread et al* much greater deference than he actually did. The court determined that Mr Crehan was entitled to damages and its decision created another legal landmark to join the others on David Vaughan's list: Mr Crehan was the first claimant to be awarded damages by the English courts for breach of the competition rules. The award of damages was short-lived, however, because the House of Lords stepped in to reverse the Court of Appeal's decision and restore the order of Park J.

The House of Lords held that Park J was not required by EU law to accept the Commission's assessment of the *Delimitis* point because that assessment was not contained in any decision binding on *Inntrepreneur*. The judgment of the House of Lords established another important legal principle, the bounds of the principle of sincere cooperation. In the *Interchange* litigation, we have seen recent

examples of how our courts may reach a very different conclusion to the Commission when considering similar facts (see, for example, *Asda Stores v Mastercard* [2017] EWHC 93 (Comm)), divergence which is likely to increase, of course, post Brexit. Despite putting up a great fight, the outcome was disappointing for the Crehans and for David and the rest of our legal team. But the unyielding loyalty David had shown the Crehans was reciprocated. Bernie and Dolores loved David. They came to court every day during the trial and during the appeals and there was, after the House of Lords judgment, a get-together, appropriately at a pub, where Dolores brought David some of her home-cooked muffins to console him.

When I commented that he'd eaten a fair number, David responded by saying that he could only eat muffins because he 'was on the Atkins diet'. 'But that means no carbs', I replied. 'Exactly, that's why I'm filling up on muffins. They don't have any carbs do they?' he said, as he lifted another from the plate, raised his glass of wine and his laughter filled the room. □