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Costs and Financing in Private Third Party Competition Damages Actions

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This article considers the prospect for third party recovery of damages arising out of anti-competitive practice. Amongst a background of a positive substantive law regime for potential claimants under section 47A of the Competition Act it focuses on one area of difficulty in bringing cases: the financing of litigation and the potential costs liabilities arising from it. It examines the cost regimes in the High Court and the Competition Appeal Tribunal and suggests the latter will be a more benign environment for prospective claimants, particularly, coupled with the procedural innovation of Specified Body proceedings.

1. INTRODUCTION

The most damaging combination of blows to punish an opponent in the boxing ring is the left right combination: the most effective curb on anti-competitive behaviour is a combination of regulatory and private action. This article considers the emerging environment of costs and financing in England and Wales for those damaged by anti-competitive practice who wish to seek recompense in the High Court or in the Competition Appeal Tribunal (CAT). The focus is on actions in the High Court or the CAT claiming damages for breaches of Articles 81 and/or 82 EC or national law and, in particular, claims arising out of cartel activity.[1]

2. TO SUE OR NOT TO SUE?

Although, private action has been available to victims for some years there has been little or no activity. Cases such as *Crehan*[2] demonstrate that taking action, albeit with financial support, against determined opponents is not for the fainthearted. In this respect private competition damage actions will differ from many civil cases. In a typical piece of commercial litigation, such as a contract case, there is likely to be a continuing and possibly close relationship between the parties and disputes are often resolved by a pre-litigation settlement. In competition cases, particularly cartel cases, the relationship may be quite distant or even indirect and the implications of a current case for future claims against a defendant by other potential victims may be substantial. This, together with difficulties implicit in getting home in such claims, demonstrates why defendants often defend cases aggressively, exercising all their rights of appeal to *décourager les autres* rather than taking an 'economic view' and settling. *Crehan* also

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1 Such claims may be brought by individuals, in a group action, possibly in a representative action see paragraph 5 below and in the CAT by a specified body.

2 *Inntrepreneur Pub Company CPC and others v Crehan* [2006] 3 WLR 148.

suggests that in this developing area of law the lawyer's words, 'this is an interesting case in a developing area of the law', will have a chilling effect on any party of limited means.

Faced with these prospects potential claimants will balance positive and negative reasons to sue before coming to a conclusion. The elements will vary from case to case but the following will be key factors; the leading factor will almost always be the costs of the litigation.

3. A POSITIVE ENVIRONMENT

The legal environment introduced by s 47A of the Competition Act to all intents and purposes shifts the pressure on to the defendant found to have infringed a prohibition following a decision of the OFT or European Commission. In this respect the claimant would be in a similar position to a road accident victim who can plead a conviction for careless driving against a prospective defendant: while there may be remaining difficulties in winning the case the task is made considerably easier. As the leniency programmes of the competition authorities develop claimants will 'plead a conviction' and defendants will find they start on the back foot. However, even cartel cases with a 'conviction' are not guaranteed to produce an award of damages and payment of costs. Causation must be established and damage and its extent established. There may be legal problems about causation but more often the difficulty will be of moving from the general position of being a target of anti-competitive behaviour to establishing exactly what damage that behaviour has produced for a particular claimant. Economists and forensic accountants acting as experts to quantify a claim are notoriously expensive. Experts are not allowed to charge on a 'no win no fee' basis for obvious ethical reasons[3] and the need for extensive investigations together with high hourly rates can produce staggering bills. Unless, their fees can be covered by a third party funder[4] then they represent a major bar to access to justice. While the Civil Procedural Rules (CPR), and the rules of the CAT, allow for a European style court appointed single expert this provision has been rarely used and is not certain to reduce costs as the single expert still has to investigate both side's arguments and data.

4. THE PROBLEM OF COSTS

While experts may be expensive the major curb on litigation in England is the cost of lawyers. Solicitors involved in competition cases will charge in excess of £300 per hour, that is, around £30 per short letter. To lose a case could mean a total bill for the claimant and defendant's costs (the winning party will recover a substantial part of its costs) of hundreds and thousands of pounds. A number of methods are available which can, in theory, alleviate this bar to action. If a case is clear on liability but quantum of

[3] Section Two of the Code of Practice of the Expert Witness Institute states: 'An Expert who is retained or employed in any contentious proceeding shall not enter into any arrangement which could compromise his impartiality nor make his fee dependent on the outcome of the case nor should he accept any benefits other than his fee and expenses.'

[4] See paragraph 7(b).

damages is uncertain then both the High Court and the CAT have the power to award interim damages which can be used to pay the client's own solicitors bills (normally charged monthly). It may also be possible for the claimant to avoid paying their solicitor by entering into a 'no win no fee' agreement, a conditional fee agreement with a reward (the success fee) to the winning lawyer recoverable from the loser.[5] Potential costs of the other party can be insured against using an After the Event Insurance product (ATEI).[6] While, these conditional fee methods are available in both the High Court and the CAT[7] there is no sign that they are being routinely offered by lawyers or litigation insurers in competition cases. In this developing area of jurisprudence cases can still be complex and their outcome unpredictable making the lawyer or insurer reluctant to bet on the outcome. As leniency programmes develop and more 'convictions' emerge this, together with growing experience, may open up this funding route.

In the CAT the cost regime is more benign for the claimant. As discussed below it appears that the CAT may normally operate a largely neutral cost arrangement in these types of cases with both sides paying their own costs. In this situation if claimants can instruct lawyers on a conditional fee and cover their expert costs by third party funding then they will have risk managed the cost risk without litigation insurance. Consumer claims may, as explained below, benefit from the potential of being supported by a Specified Body.

5. CAN INSURANCE SOLVE THE COST PROBLEM?

While, in theory, ATEI solves the cost problem it is unlikely to be routinely available for these claims. ATEI works best in commoditised litigation such as road traffic cases with risk spread across a wide and homogeneous case load.[8] Competition claims like all commercial litigation are one off cases so litigation insurers are likely to be more risk averse and at best conservative on setting premium levels which may make them uneconomic. For example, in *BCL Old Co Ltd v Avenetis* the joint and un-particularised estimates of ATEI insurers would look to a premium of between 25% and 33% of costs at risk to offer cover in such a case[9] and as the case progressed the premium would increase. While, the premium is recoverable in the event that the case is

[5] A variety of CFAs are possible including those with no success fee or with a discounted rate if the case is lost.

[6] For a premium the insurer will cover the contingent risk of both sides' costs if the case is lost, or, more commonly, the opponent's costs with 'own side' costs being covered by a CFA. If the case is won the premium can be recovered under the provisions of the Access to Justice Act 1999.

[7] For the latter see Hurst, *Civil Costs*, 3rd Ed, London, Thompson/Sweet & Maxwell, 2004, pp 273.

[8] 'Litigation Funding', Law Society, August 2006, the leading practitioner journal in this area, reports details of 30 ATEI providers. Only 10 stray beyond the confines of the personal injury market.

[9] [2005] CAT. The total of costs at risk would depend on whether solicitors for either party , normally the claimant, was prepared to offer a CFA on a 'no win no fee' or 'no win discounted fee' basis.

successful it has to be paid in advance[10] and if money is borrowed to pay it the interest is not recoverable. It is almost certain that ATEI cover in this type of case has never been placed.

6. PROCEDURAL PROBLEMS

In the United States there is a substantial Bar taking up claims by consumers, often after Justice Department findings of ant-trust behaviour.[11] These cases are conducted as 'opt out' class actions where lawyers acting for what may be a small group of litigants can ask the courts to establish a class to benefit a wider group and, incidentally, to engage the pressure to settle that a large class can exercise on a defendant.

In claims involving numbers of potential victims (as in the current vitamin cases) England has procedural arrangements for dealing with a number of related claims through one case. Under Civil Procedural Rule 19.6 a representative action may be brought by one or more individual claimants who have the *same* interest as a wider group against one defendant or a defendant representative of a wider group. The representative then brings the action or defends the action on behalf of the wider group who are not parties.[12] Any judgment could then be utilised by a member of the wider group but only with the court's permission. This limitation, together with the difficulty of cost sharing and general case management in such an action would make them more suitable for cost sharing arrangement through a Group Litigation Order (GLO).[13] In a GLO the actual and potential cost of generic issues, both claimants' and defendants, will be shared equally between members of the group with each claimant bearing his or her costs and defendants' adverse costs, depending on the outcome.[14] This is an 'opt in' arrangement and is significantly less procedurally efficient than the US class action approach. One commentator notes: 'The regime is therefore expensive and individual claim-based and unlikely to provide cost-effective resolution of smaller damage claims'.[15]

7. FINANCING CLASS ACTIONS AND GROUP ACTIONS

While the risk of losing is a factor the incentives for lawyers are crucial to the development of private damage actions particularly for individuals who will be reluctant to take the risk of paying their own lawyers fees in any event. In the USA class actions are intimately bound up with entrepreneurial lawyers operating on a contingency fee

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[10] In routine personal injury work the premium is normally not paid in advance. If the case is lost it is paid out of the policy proceeds (the 'magic bullet'): if the case is won the loser pays the premium. See Peysner J, 'What's Wrong with Contingency Fees?' (2001) 10(1) Nott LJ 30.

[11] For examples of typical activity see Jones, *Private Enforcement of Antitrust Law*, Oxford, OUP, 1999, p 84.

[12] For example, in *Ventouris v Montain* [1990] 3 All ER 157 the claim was against a representative underwriter.

[13] 'Given the limitations of representative proceedings, those contemplating litigation where a number of parties (whether claimant or defendants) share a common interest should instead consider the feasibility of a Group Litigation Order…' Zuckerman, *Civil Proceedings,* London, Lexis Nexis, 2003.

[14] Mildred, 'Cost Sharing in Group Litigation: Preserving Access to Justice' (2002) 65 MLR 597.

[15] Mildred, 'Consumer Claims Under the Enterprise Act 2002' (2004) 3(1) Comp LJ 46.

basis where the lawyer takes a case for a share of the winnings. Contingency fees are potentially more attractive than CFAs because the reward can be much higher. For example, lawyers might look to a substantial percentage of a settlement fund rather than a simple multiplier of their hourly paid fee as in a CFA. In the event that a case is speedily settled following limited work by the successful lawyers the effective hourly rate can be astronomical.[16] Of course, the law firm takes all the risk as under a contingency fee arrangement the client will not normally pay and, often, the law firm will have to pay the cost of outgoings such as experts. This suggests that English law firms will be interested in taking on clear cases with prohibition findings but their reward - the CFA success premium - when set against the procedural difficulties outlined above will make them cautious.

8. EXTERNAL FUNDING BY THIRD PARTIES

The balance between positive and negative factors outlined above suggests that except in the clearest cases negative cost issues, including the cost of disbursements, will trump positive influences in England. Can this problem be ameliorated by external funders? In such a situation law firms might well be interested in acting because although they will not necessarily receive a reward - they may act on an hourly rate only - they could receive payment even if the case is lost.

8.1. Legal Aid

In theory legal aid might be available in England for some private damage actions. If available, it would offer a high degree of cost protection as legally aided individuals are wholly or partly protected against an adverse cost award. However, in practice a grant of legal aid is highly unlikely. Matters arising out of the carrying out of a business were specifically excluded from legal aid support by the Access to Justice Act 1999.[17] From then on those in business, like Mr Crehan, who allege that anti-competitive activity has damaged their business and may have reduced them to below the legal aid eligibility level will not be supported. However, individual consumers are not specifically excluded but they have a mountain to climb. The Legal Services Commission which administers the legal aid scheme is bound by a series of Funding Codes.[18] Certain areas, such as claims against public authorities and claims where human rights are engaged, are prioritised and dealt with in specific funding codes. The balance, including a consumer competition damage case, would fall into the general Funding Code.

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[16] For a critique of activity by class action lawyers from a liberal economic perspective see Olson, *The Rule of Lawyers*, New York, Truman Talley Books, 2003. For various academic approaches see Galanter, 'Anyone can fall down a manhole: the contingency fee and its discontents' (1998) 47 De Paul Law Review 457; Graffy, 'Conditional Fees: Key to the Courthouse or the Casino' (1998) 1(1) Legal Ethics 70; Peysner, 'What's Wrong with Contingency Fees?', (2001) 10(1) Nott LJ; and, for a specific examination of contingency fee based class action anti-trust activity in the USA together with a proposal for a Europe wide CLAF (Contingency Legal Aid Fund) see Riley and Peysner, 'Damages in EC Antitrust Actions: Who Pays the Piper?' (2006) 31 ELRev 748.

[17] Schedule 2.

[18] Access to Justice Act Section Eight.

In a matter involving multiple claimants, such as consumers, the Funding Code[19] states that the Commission's starting point would be that a test case approach will be the most effective option. However, there is no evidence that defendants, particularly, cartelists will be prepared, having lost a test case on damages, to make a generalized offer of compensation on application using a 'product recall' approach. Most likely individual consumers would use the results of the test case to issue cases. If these were below £5,000 there would be no cost implications[20] if the case was lost, except for the court fee and limited expert fees, if appropriate, but the claimant would have to pay his or her own solicitors costs if instructed.[21] Defendants might continue to take points on a case by case basis making this route unattractive to an unrepresented claimant.

A more appropriate approach would be a group action. Indeed defendants would have a good argument that a group action that decides generic issues followed by individual cases and which incorporates a cut off point beyond which new members cannot join the group gives more certainty than a host of individual cases. However, for consumer cases the prospect for multi-party legal aid funding is quite remote and there is no evidence of any activity by legally aided claimants in this area. The Funding Code[22] places multi-party actions in the 'very expensive' category that requires the pressures on the overall budget to be considered and which will take into account the fact that multi-party actions have been very expensive to the legal aid fund.[23] In particular, the Legal Services Commission will want the great majority of those supported to be financially eligible, which at present will exclude all but the poorest.[24] Those who are not eligible will be expected to contribute to the costs. Further, a group action might be excluded if suitable for a CFA;[25] if not a strict cost benefit test is applied. High risk cases with low quantum are unlikely to pass such a test; consumer competition damage cases may well fall into this category.

Almost certainly, consumers with a common claim for damages arising out of anti-competitive activity will be directed by the Legal Services Commission to what will be seen to be the cost effective Specified Body approach outlined in section 10 below.

8.2. Commercial Funders

If public funding is unlikely could private funding be possible? *Arkin v Borchard Lines Ltd*[26] was a claim against an alleged shipping conference cartel. While it was ultimately

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19 Part C Paragraph 15.7.8.

20 They would be issued in the Small Claims Track (CPR 27).

21 If the case is won the claimant's own solicitors costs might wipe out any damages.

22 Funding Code, Legal Services Commission Manual, Volume Three Part C (Very Expensive Cases), p 130.

23 Hodges, *Multi-Party Actions,* Oxford, OUP, 2001, p187. The legal aid costs of the Benzodiazapine litigation was estimated at £28.6 million in a parliamentary answer (Lord Chancellor's Department on the 16th February 1995). Shortly afterwards, Legal Aid support was withdrawn and the case collapsed.

24 Legal Aid Board, *A New Approach to Funding Civil Cases* (1999) paras 12.17 and 12.18.

25 Although as indicated above this is unlikely.

26 [2005] EWCA Civ 655, [2005] 1 WLR 3055, [2005] 3 All ER 613.

unsuccessful - the Court of Appeal referred to it as 'disastrous litigation' - it offered guidance on the question of the liability of third party funders for costs. The funder, Managers and Processors of Claims,[27] had earlier been involved in the *Factortame*[28] saga assisting Spanish fishermen in their claims against the UK government. In both cases funds were needed to deal with expert evidence and documentary evidence. Such a funder will normally be paid on a contingency fee based on a percentage of damages recovered. The question then arose as to what was the cost position of such a funder if, as in *Arkin*, the case was lost; the claimant had no assets and there was no ATEI. Finding the jurisprudence uncertain the Court of Appeal in a policy decision balanced the interests of successful defendants to be indemnified in costs with the need to allow claimants to engage funders to allow them to access justice. For each £1 that a funder advanced to a party they would have a contingent liability of £1 towards the other party's or parties' costs if the case was lost by the funder's client. In the *Arkin* case the advance was £1.2 million and the funders contribution to the defendants' costs was capped at £1.2 million. The effect is likely to encourage third party funding in a *good* case as the down side liability is now predictable and the investment on a total loss basis is predictable. This will allow them to adjust the percentage of damages they require to fund the case according to a matrix of the amount advanced, the contingent cost liability and the predicted chance of success. Clients, particularly groups of SMEs, might be prepared to instruct a law firm on a normal hourly rate, or a discounted rate if the case is lost, with the expert costs underwritten by a funder. However, in *Arkin* the claimant's lawyer acted on a CFA and it is likely that most third party funders would prefer the lawyer to act on a CFA to indicate commitment to the cause.

9. COMPARISON BETWEEN THE COST REGIMES IN THE HIGH COURT AND THE CAT

While the balance to be struck between the positives and negatives mostly straddles both jurisdictions there are specific differences in the cost and procedural rules between High Court procedure in the Chancery Division where damage cases will be heard and those launched in the CAT. The following analysis considers both jurisdictions in detail and sums up their balance of advantage.

9.1. The High Court

The basic cost rule under the CPR clearly establishes that the loser pays but there are significant exceptions:

> CPR: 44.3
>
> (1)The court has discretion as to - (a) whether costs are payable by one party to another; (b) the amount of those costs; and (c) when they are to be paid.

[27] Now called Elision.

[28] *Factortame Ltd v Secretary of State for the Environment, Transport and the Regions (Costs) No2* [2002] EWCA Civ 932.

> (2) If the court decides to make an order about costs - **(a) the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party;** but (b) the court may make a different order
>
> (4) In deciding what order (if any) to make about costs, the court must have regard to all the circumstances, including - (a) the conduct of all the parties; (b) whether a party has succeeded on part of his case, even if he has not been wholly successful; and (c) any payment into court or admissible offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Part 36).[29]

The level of costs paid is dependent on a number of factors:

> CPR 44.5 The court must also have regard to - (a) the conduct of all the parties, including in particular - (i) conduct before, as well as during, the proceedings; and (ii) the efforts made, if any, before and during the proceedings in order to try to resolve the dispute; **(b) the amount or value of any money or property involved; (c) the importance of the matter to all the parties; (d) the particular complexity of the matter or the difficulty or novelty of the questions raised; (e) the skill, effort, specialised knowledge and responsibility involved**; (f) the time spent on the case; and (g) the place where and the circumstances in which work or any part of it was done.

It is clear that competition damage case are likely to fall into (b) - even small consumer cases will be aggregated into large amounts - (c) (d) and (e); all factors which increase the rate at which costs are assessed.

The gloss on the general 'loser pays' rule is that:

a) The court may make an issues based or percentage order. It may find that the claimant advanced ten arguments but only five were successful. Rather than getting all its costs it may receive either the costs of the five winning issues and pay the other side's costs of the five issues it won or only recover 50% of its costs (which, of course, may be a different figure)

b) As mentioned above, the court may decide that conduct, that is misconduct, by a party can alter the basic cost rule. If a defendant has acted in a dilatory fashion or otherwise failed to co-operate with the court or opponent then it may suffer a reduction in the costs it can recover even though it was successful.

c) Any party can make an offer to settle the case under Part 36 of the CPR. This system which is complex in its operation enables a party to effectively shift the cost burden over and above the impact of 44.5(a)(ii). Failure to beat an offer of settlement e.g. refusing to accept an offer of £100,000 and only obtaining £90,000 at trial has the general effect of making the offerer get all its costs from the date of the offer despite losing the case. This is as very potent weapon.

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[29] In this and following quotes the editing and bold additions are by the author.

9.2. Cost Control in the High Court

Claimants embarking on High Court damage claims will hope to control both their own and other parties' expenditure so as to limit their contingent loss if the are unsuccessful. Two recent developments - estimates and cost capping - assist this objective.

(a) Estimates of Costs

Generally speaking claimants who are the victims of anti-competive behaviour, particularly cartel activity, will be individuals or Small and Medium Sized Enterprises (SMEs) facing defendants with deeper pockets who may put pressure on the claimant by threatening to outspend them in the litigation and face them with the prospect of having to pay a huge bill if the claim fails.

Section 6 of the Practice Direction supplementing Parts 43 to 48 of the CPR (the cost rules) introduced in October 2005 requires parties to litigation to estimate their costs and disbursements prospectively at various points in the litigation process. This would allow the court, of its own motion or at the request of a party, to consider ordering case management directions with the objective of saving costs. This section allows a claimant to watch how the other party's case develops as reflected in the estimates and ask the court to intervene to trim the proposed bill. For example, the court might reduce the number of experts that a party can have or split the liability from the quantum issue in the hope that the decision on liability will suggest a settlement or withdrawal all with the intention of saving costs. At the end of the case if costs cannot be agreed then the paying party, for example a losing claimant, may be able to use the winner's mis-estimate to reduce the cost bill on the ground that it is unreasonable or disproportionate to the 'weight' of the case, both factors which can be used by the court to reduce recoverable costs.

> PD 6.6…
>
> (2) In particular, where - (a) there is a difference of 20% or more between the base costs claimed by a receiving party and the costs shown in an estimate of costs filed by that party; and (b) it appears to the court that - (i) the receiving party has not provided a satisfactory explanation for that difference; or (ii) the paying party reasonably relied on the estimate of costs; the court may regard the difference between the costs claimed and the costs shown in the estimate as evidence that the costs claimed are unreasonable or disproportionate.

While the requirement to submit estimates was introduced in 1999 it had no teeth, was honoured in the breach and was ineffective as a cost control measure.[30] It is too early to say if this new development will be more successful in controlling costs.

[30] Peysner and Seneviratne, *The Management of Civil Cases: the Courts and the Post-Woolf Landscape*, (2005), Department of Constitutional Affairs, Research Department website.

(b) Cost Capping

A developing area of cost jurisprudence is that of cost capping where a party, possibly basing their application on estimates, applies to the court for their opponent or opponents' *recoverable*[31] costs to be capped. The cases relevant to damage claims fall into three groups:

(i) Group Actions

It is generally recognised that group actions for large numbers of individuals suffer from the tendency that their costs can go out of control. This was addressed in *A B & others v Leeds Teaching Hospital NHS Trust,*[32] where a costs capping order was made in a case where group litigation order had been made. The court reduced the prospective claim for costs by the claimants from £1,000,000 to a cap of £500,000.[33] In *Various Ledward claimants v Kent and Medway Health Authority*,[34] a cost capping order was made, again in group litigation, capping the costs of both parties. In V*arious Claimants v TUI UK Limited and Others* (2005)*,* again a group litigation case, the claimants' costs up to the date of the group litigation order totalled £1.6 million; there were further costs of £217,000 after that date and an estimate of future costs of over £1.4 million. The cost capping order made (effective only from the date it was made) was just over £880,000.

(ii) Single Cases

Although in the leading authority of *Smart v East Cheshire NHS Trust*[35] the judge refused to impose a cap on the claimant's costs he did set out general guidelines that the court should consider making such an order only where the application showed:

1. That if such an order was not made there was a risk that costs would be disproportionate or unreasonable;
2. That risk could not be controlled by conventional case management and a detailed assessment at the end of the case and;
3. It was just to make such an order.

This approach has been adopted with varying results in defamation cases: *King v Telegraph Group*[36] and *Henry v BBC*[37] where the argument was that the Article 6 right of free expression was engaged and that defendant media should not be held to ransom by claimants running up huge bills without effective ATEI cover. Whether, in the different circumstances of competition damage cases caps would be imposed or not is difficult

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31 Recoverable costs are often less than the fees paid to the party's own lawyer. However, a party who is successful in capping the other party's costs may have made a similar arrangement with its own lawyer.

32 [2003] EWHC 1034 (QB).

33 In the unlikely event that out turn costs were less than £500,000 then only actual costs would be recoverable.

34 [2003] EWHC 2551 (QB).

35 [2003] EWHC 2806 (QB).

36 [2004] EWCA Civ 613.

37 [2005] EWHC 2503 (QB).

to predict and will almost certainly depend on the court's perception of whether the litigation can broadly be characterised as in the public interest rather than having a purely commercial objective.[38]

(iii) Protective Cost Caps

In two cases: *R v Secretary of State for Trade & Industry, ex parte Corner House Research* (2005) and *Weir v Secretary of State for Transport* (2005) claimants applied at or before the launch of litigation for a protective cost cap limiting the defendant's costs if the case was lost. These were public law cases and whether the principle is capable of being extended to, for example, individual victims of cartel activity is untested.[39]

9.3. Conclusions on Cost Control in the High Court

It is too early to say if the cost control measures outlined above will have the effect of curbing the huge risk of costs and encouraging claimants to bring cases. However, prospects are not encouraging. An instructive example comes from *Bernard Crehan v Inntrepreneur Pub Company*[40] in the Court of Appeal:

> Finally, I come to the question of costs. Mr Crehan asks for the payment by Inntrepreneur of all his costs here and below, on the footing that he has been the victor in this litigation. Inntrepreneur accepts that Mr Crehan is entitled to most of his costs for the very reason that he has been successful on the more substantial issues, but it says that the court under the CPR should exercise the power which it now has to take account of the parties' respective successes and failures on the various issues. Mr Milligan says that Inntrepreneur has won on two other substantial issues, that is to say on the abuse of process point and on the date of the assessment of damages. Whilst the judge would have awarded some £1.3 million by way of damages to Mr Crehan, this court has awarded only £131,336. Accordingly, Mr Milligan says that that is a substantial success which should be taken into account … In my judgment, to attribute only 10% of the costs of the action and of the appeal to those issues on which Inntrepreneur succeeded and on which it would be entitled to its costs, which is what an award of 80% of Mr Crehan's costs entails, is by no means to overstate the proportion of the proceedings taken up with the issues on which Mr Crehan lost. It seems to me that an award of 80% is the appropriate amount. I do not accept Mr Vaughan's submissions that a higher award should be made because of the risk that Mr Crehan's damages award will be reduced to meet those costs. We were told that there is no special agreement that the other parties, whose cases have awaited the outcome of Mr Crehan's proceedings, as the lead case, would pay any part of his costs. We have also been told that there is some overall agreement with the Legal Services Commission, whereby Mr Crehan will not necessarily have to pay out of the damages awarded to

[38] But see Paragraph 10 in relation to Specified Bodies.

[39] But see Paragraph 10 in relation to Specified Bodies.

[40] [2004] EWCA 637.

> him all the costs, to the extent that there are issues which are common to the other cases subject to legal funding which had not yet been tried.

The *Crehan* case remains the leading case in the High Court because it is, essentially, the only case. It was only mounted with legal aid support which is now not available for money claims. It seems that after the Court of Appeal decision Mr Crehan would have received little or nothing from his long battle as the difference between damages of £131,336 and his 20% liability for his opponent's costs might be small or non existence. In other words unless a party can recover all of his costs, which is unlikely even in a generally successful case, or unless damages are high enough to offer a cushion against 'own side costs' then it may be heads you win and the damages are absorbed by the costs; tails you lose and there are no damages. This is hardly an attractive proposition and not an exemplar that has been followed by others. In the event the House of Lords has made this argument academic[41] by allowing Inntrepreneur's appeal with the result that Crehan's cross appeal on damages fell. All in all it seems unlikely that the High Court will be an arena for damage claims brought by individuals, groups of individuals or SMEs. They will have to look elsewhere.

9.4. The Competition Appeal Tribunal

There is more optimistic news for those able to bring cases within the jurisdiction of the CAT. Costs are not based on the loser pays principle but are within the discretion of the CAT.[42]

> CAT Rules 55. -
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> (2) The Tribunal may at its discretion, subject to paragraph (3), at any stage of the proceedings make any order it thinks fit in relation to the payment of costs by one party to another in respect of the whole or part of the proceedings and in determining how much the party is required to pay, the Tribunal may take account of the conduct of all parties in relation to the proceedings.

This discretionary cost power can be compared with that of the employment tribunal:

> Employment Tribunal Procedural Rules: if a party has in bringing the proceedings, or he or his representative has in conducting the proceedings, acted vexatiously, abusively, disruptively or otherwise unreasonably, or the bringing or conducting of the proceedings by the paying party has been misconceived.[43]

In other words the CAT has wider powers to award costs than an employment tribunal but not on the virtually automatic basis of the CPR. This general rule can be altered by the application of an offer to settle rule which will operate like the Part 36 rule referred to above:

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41 For the reference see footnote 2 above.

42 Hurst, *Civil Costs*, 3rd Ed, London, Thompson/Sweet & Maxwell, 2004, pp 273.

43 Rule 40(3).

> 43. - (1) A payment to settle is an offer made by way of payment into the Tribunal in such manner as may be prescribed by practice direction.
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> (2) A payment to settle the whole or part of a claim may be made by a defendant once a claim for damages has been commenced.
>
> (6) Where a claimant accepts a defendant's payment to settle the whole or part of the proceedings, he shall be entitled to his costs of the proceedings or such costs relating to the part of the proceedings to which the offer related, up to the date of serving notice of acceptance, unless the Tribunal otherwise directs.
>
> (7) Notwithstanding rule 55(3), where following a substantive hearing a claimant fails to better a payment to settle, the Tribunal will order the claimant to pay any costs incurred by the defendant after the latest date on which the payment or offer could have been accepted unless it considers it unjust to do so. The Tribunal may order such costs to carry interest from that date and to be paid on an indemnity basis.
>
> (9) A payment to settle under this rule will be treated as "without prejudice" except as to costs.
>
> (10) This rule does not preclude either party from making an offer to settle at any time or by any other means. In the event that, following a substantive hearing, a claimant recovers less than the amount offered by a defendant other than by way of a payment to settle, the Tribunal may take that fact into account on the issue of costs…

In other words there is a strong incentive for a defendant to make an offer to settle a case as the effect will be to potentially shift the CAT jurisdiction from a no cost to a cost bearing basis. However, for cases which are test cases fought by defendants to the finish, without offers of settlement, to prevent other cases being brought the cost pressures typical of the High Court are not automatic. This opens up the question as to how the CAT will exercise its discretion.

9.5. Straws in the Wind: The First Cases

The CAT jurisdiction in damage claims is a new one and there has been little activity yet. An analysis of how it will proceed must extrapolate from limited evidence.

Deans Foods Limited v Roche Products Limited, F Hoffmann-La Roche AG, and Aventis SA[44] and *BCL Old Co Limited, DFL Old Co Limited, PFF Old Co Limited v Aventis SA et al*[45] were the first damage claims arising out of the vitamin cartel. All the claims were dismissed (some mysteriously 'with prejudice') with no costs orders. What happened here?[46] It seems most likely in the light of previous history that these cases were settled

[44] Case No 1029/5/7/04.

[45] Case No 1028/5/7/04.

on payment of damages but behind a veil of confidentiality. Certainly the result of an earlier reported security for costs application, *BCL Old Co Ltd v Avenetis*, is strongly suggestive:[47]

> 28. More generally, the Tribunal notes that this specialised jurisdiction under section 47A has been created by Parliament with a view to facilitating claims for damages or restitution on the part of those who have suffered loss as a result of infringements of domestic or European competition law … However, one question relevant to security of costs in the present case seems to us to be which of the parties should take the financial risk on these various issues. In the circumstances of this case and having regard to the submissions of the parties, we do not consider that the financial risk should be taken by the Claimants, as far as security for costs is concerned…the question which the Tribunal must consider on a security for costs application in any particular case is the risk of the Defendant securing a costs order in its favour, and then being exposed to an impecunious Claimant not being in a position to comply with the terms of that order. In cases under section 47A not involving a possible passing on defence that will not be the position since the Claimant will be entitled to an order of damages. The issue before the Tribunal will only be as to quantum. The Defendants will not, in those circumstances, normally be entitled to costs, subject to special factors such as to payments into court, or unreasonable or vexatious conduct in the part of the Claimants. No such considerations arise in the present case.
>
> … There may be cases where the Defendants can show that the claim for damages is plainly vexatious or very unlikely to succeed. In those circumstances the Defendants may be able to satisfy the Tribunal that a costs order in its favour would be a likely outcome and that it would be just to make an order for security for costs. Again, this consideration does not apply here. Although the Defendants put the amount of the damage in issue, it could not be reasonably suggested that, apart from the passing on defence, the Claimants have suffered no loss … Bearing the foregoing in mind, we are not satisfied, having regard to all the circumstances of this case, that it is just to make an order for security for costs in favour of the Defendants. The essential reason is that, at this stage of the proceedings, we are unable to be satisfied that there is a substantial likelihood that the Defendants may in due course benefit from a costs order in their favour. On the contrary, the Claimants' have, at first sight, a good claim, and the only reason for awarding costs against the Claimants would be if it were established that, in law, "passing on" was a good defence, that the defence applied to the facts of this case, and that in those circumstances the Claimants' damages were properly to be reduced to nil or a very low figure. Moreover, the Tribunal has not yet decided how its ultimate jurisdiction

[46] Tantalising hints are offered by lawyers involved in the case in Randolph & Robertson, 'The First Claims for Damages in the CAT' [2005] ECLR 365. As they acted in the cases they are bound by client privilege not to reveal details of the case nor, of course, any confidential settlement.

[47] [2005] CAT. As this is a developing area of jurisprudence debated in the cases rather longer extracts of cases have been used in this article than the writer would normally employ to illustrate the nature of the debate.

> to award costs under Rule 55(2) is likely to be exercised. In these circumstances we consider it just that at this stage of the proceedings the possible risk as to costs should be borne by the Defendants, who are before the Tribunal as infringers of a public law prohibition, rather than by the Claimants in whose favour liability is, at least prima facie, established.

9.6. Can Other Aspects of CAT Jurisprudence Assist?

So far much of the CAT jurisprudence has dealt with its regulatory jurisdiction dealing with appeals against administrative decisions. Most cases suggest that in these cases, absent vexatious behaviour or an appeal being withdrawn,[48] all parties benefit from the regime being clarified and so costs should lie where they fall (For example *BT PLC v Office of Communications* [2005]) Perhaps, a closer analogy to damage claims collateral to a cartel finding might be in the treatment of interveners such as in *IIB & GISC etc*:

> 78. We see force in the argument that it would be in accordance with the objectives of the Act if the rule as to interveners were broadly cost-neutral. Thus, the prospect of having to pay interveners costs if unsuccessful (as in Kish) could deter some appellants. The prospect of having to pay some part of the appellant's (or even the Director's) costs could deter some interveners. In general, interventions properly managed assist the Tribunal and provide useful background information. … That said, however, we would not wish to fetter our general discretion under Rule 26(2) to the effect that there may never be circumstances where costs orders will be made in favour of, or against, interveners … As regards the present case, GISC represents substantially all major United Kingdom general insurance companies and larger insurance intermediaries. GISC supported the unsuccessful Director, and ran one supplementary argument, on the so-called "rule of reason", which the Tribunal rejected[49]

The same reasoning was followed in *Aquavitae (UK) Ltd v Director of Water Services*:

> 31. As the Tribunal's previous judgments on costs set out at paragraphs [15] to [19] above explain, there is no general rule in appeals before the Tribunal under the 1998 Act that costs should be borne by the losing party. In the Tribunal's view, such a rule would run the serious risk of frustrating the objectives of the Act by deterring appeals by smaller companies, representative bodies and consumers, as the Tribunal made clear in *GISC* costs at paragraph 54. It seems to us that these policy considerations apply in cases such as the present. In particular it seems to us that potential new entrants to regulated sectors, such as Aquavitae, which do not appear to command substantial financial resources, are liable to be deterred from bringing appeals if the Tribunal were regularly to order that such appellants should normally be liable for the Director's costs, as well as their own, in the absence of unreasonable conduct or some other exceptional factor … We understand the Director's concern that in the end the costs that he incurs in such appeals have to

[48] *Hasbro UK Ltd v DG of Fair Trading* [2003] CAT.

[49] [2002] CAT.

> be borne in one way or another by the industry and, ultimately, its customers. However, looked at more generally, the system of regulation in the water industry, as in other regulated sectors, exists to protect a wide range of different interests, including those of the general public. In our view, the system as a whole will function more effectively if complaints can be brought and the regulator's decision can be challenged on appeal, if necessary. The costs incurred in a case such as the present are minuscule by comparison with the total revenues of the water industry taken as a whole, whereas the burden of costs falling on a small complainant, acting reasonably, if unsuccessfully, is likely to be disproportionately heavy. We have already indicated that we consider this appeal was reasonably brought albeit not ultimately successful and in the particular circumstances of this case we consider that the Director's costs of the appeal should be regarded as part of the general costs of regulation in this sector.[50]

To add to the picture where the Office of Fair Trading wins a 'heavy price fixing case' such as *Umbro Holdings*[51] (the football shirt case) then it was awarded costs. However, this is a double edged weapon and where it withdrew a heavily contested defence to an appeal costs were awarded against it.[52]

9.7. Conclusion on Costs in CAT damage claims

While we are yet at early days in this aspect of the CAT it seems more likely than not that, absent offers to settle, claimants in actions under s 47A, particularly in cartel cases, are unlikely to face the same level of costs pressure against them as in the High Court thus opening up access to justice. Perhaps, following *Umbro* they might be regarded as 'quasi regulators' and get their own costs. All this will be further assisted by the specified body procedure outlined below.

10. SPECIFIED BODY

Section 19 of the Enterprise Act 2002 inserts s 47B into the Competition Act 1998 and introduces a new concept, the Specified Body to take up cudgels on behalf of consumers.[53]

The Consumers' Association[54] is the first body appointed, 'as a specified body 'to bring proceedings for claims for damages before the Competition Appeals Tribunal (CAT), on behalf of a group of two or more named individuals.' [55] The Specified Body has a

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[50] [2003] CAT.

[51] *Umbro Holdings Ltd v OFT* Case No. 1019/1/1/03 and associated appeals involving Manchester United and others.

[52] *Mastercard UK Members Forum Limited et al v OFT*, Case Nos. 1054/1/1/05; 1055/1/1/05; & 1056/1/1/05.

[53] See p 44, *Study on the Conditions of Claim for Damages in Case of Infringement of EC Competition Rules,* Comparative Report, August 2004. Prepared by Waelbroeck, Slater and Even-Shoshan of Ashursts for the European Commission. and also Mildred footnote 12.

[54] Which trades as 'Which?'

[55] Specified Body (Consumer Claims) Order 2005/2365.

statutory right to recover costs and damages.[56] It is entitled to recover its costs but what about damages? The legislation requires the Tribunal to order damages to be paid by the defendant to the claimant(s) but *the Tribunal may (with the consent of the individual and the specified body) order that the amount awarded is to be paid to the specified body on behalf of the individual.*[57] The Consumers' Association was granted Specified Body status because, although it has a trading arm, its central aim and objective is to act for consumers generally in the public interest. It would seem possible and appropriate for a Specified Body to offer to consumers to take up their claims, holding them harmless against costs in return for a share of damages sufficient to cover any shortfall in costs recovered *and* to support future actions. This possible hybrid approach - benefiting both individually damaged consumers and the consumer interest generally - would be procedurally novel. A comparison can be made with Germany where, under the provisions of the Act Against Restraints of Competition, Articles 81 and 82 EC, or of an order of the competition authorities, in future certain bodies may be appointed and given the right to claim the profits made by infringers of cartel authorities; provided that the infringement was committed intentionally, a large number of customers are involved, and provided these profits have not yet been claimed by the competition authority i.e. there is no double counting. However, these profits will not be awarded to the plaintiff but to the state, whilst the Federal Cartel office will ensure that plaintiffs are not out of pocket on costs. In effect the English approach steers a middle ground between an entirely private focus in the USA and the German which appears to rely entirely on altruism and collective action.

If Specified Bodies take the approach outlined above, benefiting both individual consumers and *future* injured consumers, this seems to breach the normal bar on champerty; that is the ancient prohibition against maintaining an action for a share of the proceeds.[58] This new statutory approach goes beyond the idea that an organization could assist actions by members on behalf of a membership as a whole (like a trade union acting in a personal injury or equal pay test case) to the idea that an organization might take up a case, no doubt brought to its attention by individual consumers, and then identify a wider group of injured consumers. Such a body is not a representative acting for a group with the same or similar interests so as to utilise either the representative action or GLO approach. It has not itself been injured (except co-incidentally) but acts vicariously, in the public interest, for a group of consumers and, as suggested above, may have a financial interest in the case either to cover a cost shortfall or to recycle damages.

No damage claim has yet been brought by the Consumers' Association on behalf of individuals so how such a case might develop is necessarily speculative. However, it can

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[56] Enterprise Act s 47B(6) and Competition Appeal Tribunal Rules 2003.

[57] Author's emphasis.

[58] Peysner & Walters, 'Event-triggered financing of Civil Claims: Lawyers, Insurers and the Common Law'. (1999) 8(1) Nott LJ 21. The *Arkin* case mentioned above shows that the common law is now not immune to limiting the bar against champerty. See also P Puri, 'Financing of Litigation by Third-Party Investors: A Share of Justice?' (1998) 36(3) Osgood Hall Law Journal 515.

only be a matter of time and a suitable case[59] before the Consumer Association takes action. As ever costs are the major problem. In order to prosecute such a case a Specified Body could employ lawyers or use its own lawyers to act for consumers on a conditional fee basis[60] and speculatively on a contingency fee basis.[61] However, in bringing such an action a Specified Body has no statutory immunity against costs and on the face of it might be at risk of an adverse cost order. However, as the CAT is likely to give the legislation and its own rules a purposive reading it is unlikely that this will constitute a major difficulty in developing this area of activity. Either the CAT might read its costs rules as holding the Specified Body harmless or the Specified Body might benefit from a *Corner House* style protective cost order or, certainly, would be able to obtain to extract a prospective cost cap when an action is case managed in the CAT so as to risk manage its financial commitment.

11. CONCLUSION

Costs are the key to the castle in competition damage cases. So far costs and financing problems have limited the potential for bringing cases even when there is established cartel activity. Although, measures to make costs more predictable and to control costs in the High Court are encouraging they must be set against a history of high litigation costs in England; a culture which will be hard to curb. The CAT as a new tribunal with innovative procedures and a strong European influence is less hide bound by cost rules and looks as if it is developing a cost neutral stance for most cases which will free claimants from the pressure of facing a huge bill from defendants. Certainly, in cartel cases following a finding from the regulatory authorities this approach would be entirely in keeping with access to justice.

NOTE

Since this article was first written there has been progress by the first Specified Body - the Consumers' Association - towards the sponsorship by it of a consumer damage claim.[62] Under their trading name 'Which?' they are recruiting consumers to join an action against JJB Sports following that company's fine of £6.7 million by the OFT in

[59] A suitable case would be clear on liability, possibly a product of the leniency programme, with sufficient individual damages so that individuals are encouraged to 'opt in' making a reasonably substantial case when aggregated.

[60] Probably a collective conditional fee arrangement as used by trade unions. (Collective Conditional Fee Agreement Regulations SI 2000/2988 and Conditional Fee Agreements (Miscellaneous Agreements) Regulations SI 2003/1260. The reward element of a successful CFA used by the Association's own lawyers could also be retained to support future work.

[61] As to whether contingency fees are available in the CAT this is quite speculative. Contingency fees are available in employment tribunals (see Peysner, 'Contingency, Compliance and Access to Justice', forthcoming) but probably not be in the CAT as it has a wider cost jurisdiction than employment tribunals; although, this in itself may not be definitive. However, as the question of costs is in development in the CAT and it has shown itself to be prepared to be procedurally innovative so nothing can be ruled out.

[62] See p 113 and n 59.

2003 for price fixing England and Manchester United football shirts (the delay was occasioned by the company's appeal process). Which?, represented by Clyde & Co solicitors, anticipate the first case management conference in the Competition Appeal Tribunal in April 2007.[63] Interestingly, they suggest that whilst a receipt for purchase would be good evidence a photograph of the consumer in the 'relevant' shirt might be enough. While the annual change of team shirts was one factor in their high price and in engendering recurrent consumer demand it is intriguing that this may be used to identify the year they were produced and, thus, form part of the case against those who sold them at what the OFT found was an excessive price.

[63] See www.which.co.uk/reports_and_campaigns/consumer_rights.