Neutral citation [2004] CAT 6

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1023/4/1/03

Victoria House
Bloomsbury Place
London WC1A 2EB

28 April 2004

Before:

Sir Christopher Bellamy (President)
Mr Peter Clayton FCA
Mr Adam Scott TD

BETWEEN:

IBA HEALTH LIMITED

Applicant

-v-

THE OFFICE OF FAIR TRADING

Respondent

supported by

(1) iSOFT PLC

(2) TOREX PLC

Interveners

Mr Nicholas Green QC and Mr Aidan Robertson (instructed by Macfarlanes) represented the applicant.

Mr Jonathan Crow and Mr Daniel Beard (instructed by the Director of Legal Services, Office of Fair Trading) represented the respondent.

Mr David Anderson QC and Ms Kelyn Bacon (instructed by Ashurst) represented iSOFT Group PLC.

Torex PLC was represented by Mr Theo Savvides of Osborne Clark

JUDGMENT ON COSTS

Introduction

1. On 3 December 2003 the Tribunal granted an application for review under section 120 of the Enterprise Act 2002 ("the 2002 Act") lodged on 21 November 2003 by IBA Health Limited ("IBA") against a decision ("the Decision") made by the Office of Fair Trading ("the OFT") under section 33(1) of the 2002 Act not to make reference to the Competition Commission ("the Commission") in respect of an anticipated acquisition by iSOFT Group plc ("iSOFT") of Torex plc ("Torex"): see [2003] CAT 27 ("the Tribunal's judgment"). IBA's application was the first of its kind to come before the Tribunal under the provisions contained in Part 3 of the 2002 Act which came into force on 20 June 2003.

2. On 10 December 2003 IBA lodged, pursuant to the order of the Tribunal, its application that the OFT and/or iSOFT and Torex pay its costs in the sum of £222,051.40, being all of the costs incurred by its application for review of the Decision of the OFT before the Tribunal. That application is resisted by the OFT, iSOFT and Torex who submit, in essence, that the Tribunal should make no order as to costs or, in the alternative, an order for only a proportion of the costs incurred by IBA.

3. On 19 December 2003 the Tribunal granted permission to the OFT and iSOFT to appeal to the Court of Appeal of England and Wales in respect of its Order of 3 December 2003 setting aside the OFT's Decision: see [2003] CAT 28.

4. Four principal issues were considered by the Court of Appeal in its judgment: (1) the correct interpretation of the test for a reference to the Commission by the OFT under section 33(1) of the 2002 Act; (2) whether the Tribunal wrongly reversed the burden of proof; (3) whether the Tribunal wrongly applied the concept of administrative unreasonableness in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223; and (4) whether the Tribunal was right to conclude that either the OFT had applied the wrong test as to the likelihood of the merger having an adverse effect on

competition, or that it had failed adequately to explain or justify its conclusion in accordance with the right test.

5. On 19 February 2004 the Court of Appeal dismissed the appeal on grounds (2) to (4) but concluded in respect of ground (1) that the Tribunal had applied the wrong test under section 33(1): see [2004] EWCA Civ 142. On that basis the Court of Appeal ordered the OFT and iSOFT to pay 75 per cent of IBA's costs of the proceedings before the Court of Appeal, they being severally liable for half of that figure to be subject to detailed assessment if not agreed. According to the parties the Court of Appeal refrained from making any order as to the costs of the proceedings before the Tribunal.

Matters post-dating the Court of Appeal's judgment.

6. On 20 February 2004 the Registrar of the Tribunal wrote to the parties indicating that any additional observations any of the parties wished to make regarding the question of costs in the proceedings before the Tribunal in the light of the Court of Appeal's judgment should be lodged no later than 5 pm on 27 February 2004. Brief supplemental observations were received in writing from IBA, the OFT and iSOFT in addition to those lodged prior to the judgment of the Court of Appeal.

7. On 11 March 2004 the Tribunal received a letter from the Treasury Solicitor, on behalf of the OFT, drawing to the Tribunal's attention the fact that IBA has reached a settlement agreement with iSOFT and Torex should the OFT decide upon reconsideration to clear the merger. Under the terms of that agreement IBA has apparently agreed not to enforce against iSOFT or Torex any order for costs in its favour. The Treasury Solicitor, on the OFT's behalf, stresses in her letter that if the Tribunal is minded to make an order against the OFT, iSOFT and/or Torex it should specify that liability should be several rather than joint. IBA, for its part, stresses that it remains necessary for the Tribunal to make a costs order in the event that the settlement agreement does not become effective.

8. By a press release (56/04) of 24 March 2004 the OFT announced that, following the reconsideration of its decision, the completed acquisition would not be referred to the Commission if iSOFT gives suitable undertakings to address certain competition concerns arising from the merger. The competition concerns identified by the OFT arise from its belief that it may be the case that the merger may be expected to result in a substantial lessening of competition in the supply of laboratory information management systems ("LIMS"). According to the press release, iSOFT has apparently indicated that it is willing to offer an undertaking to divest the Torex LIMS business, including employees, intellectual property rights, and legacy contracts. In the press release the OFT states that it is inviting comments on the proposed undertaking. The text of the undertakings the OFT proposes to accept from iSOFT were published on the OFT's website on 6 April 2004. Those wishing to make observations have until 28 April 2004 to submit their views in writing.

IBA's submissions

9. IBA submits that the relevant principles that the Tribunal should apply in making an order for costs are the same as those applied in appeals under the Competition Act 1998 ("the 1998 Act") and in particular as explained by the Tribunal in *IIB v Director General of Fair Trading* [2002] CAT 2, [2002] Comp AR 141 ("*GISC: costs*").

10. IBA further submits that the Tribunal should have regard to the principles relating to the award of costs in claims for judicial review under Part 54 of the Civil Procedure Rules.

11. IBA points out that the Tribunal in its judgment in *GISC: costs* observed that there was no general principle that costs should only be awarded against the OFT where it was guilty of a "manifest error or unreasonable behaviour". In a case such as the present where, according to IBA, the OFT was guilty of such an error, it follows that the Tribunal should order the OFT to pay IBA's costs in full.

12. As to its own conduct of the case, IBA observes that in succeeding in its appeal it has not been guilty of the kind of behaviour that may justify the reduction of the costs awarded to the winning party, such as losing on particular issues, incurring costs on irrelevant matters, or of secondary importance, or acted unreasonably, or in ways which added unnecessarily to the length or complexity of the proceedings (see *GISC: costs* at [51]). The expedition with which IBA brought its appeal meant that the Tribunal was able to deal with the case expeditiously and reduced the overall costs. For example, there was no need to determine its application for interim measures.

13. IBA also submits that it is appropriate that it should recover costs against the interveners, as they chose actively to intervene in the case (see *GISC: costs* at [80]) and that those costs should include the costs of IBA's application for costs. IBA estimates that 15 per cent of its total costs of the proceedings before the Tribunal are attributable to the intervention by iSOFT and 2.5 per cent by the intervention by Torex. In particular iSOFT submitted documentation in support of its intervention in excess of 1,200 pages (the OFT's defence only contained approximately 300 pages).

14. In its supplemental submissions on costs dated 27 February 2004 IBA points out that in essence the Court of Appeal's judgment confirmed the Tribunal's judgment in 3 out of the 4 challenges made to it. The Court of Appeal's judgment does not cast any doubt on the correctness of the substance of the case advanced by IBA before the Tribunal. IBA submits that there is no basis for the Tribunal to adopt a less favourable approach to IBA's application for costs than that adopted by the Court of Appeal. IBA, relative to iSOFT and Torex, is a small company and the costs of these proceedings are substantial. In those circumstances, the Tribunal should award IBA its costs of its successful application for judicial review.

The OFT's submissions

15. The OFT points out that the Tribunal's judgments on costs in the context of appeals under the 1998 Act indicate that no general rule or presumption should be applied in relation to orders for costs under the Tribunal's Rules. The Tribunal's approach has been to weigh a range of relevant factors in the circumstances of particular cases. The OFT submits that this approach is appropriate in relation to applications for review under section 120(4) of the 2002 Act.

16. The OFT submits that the relevant rules that the Tribunal should follow are those set out in rule 55 of the Tribunal's rules. Section 120(4) of the 2002 Act requires the Tribunal to apply the principles that would be applied by a court on an application for judicial review when it determines a challenge to a decision by the OFT under Part 3 of the 2002 Act. However, in awarding costs the Tribunal is not determining the application and its discretion under rule 55 of the Tribunal's rules is not constrained by section 120(4).

17. In its judgment the Tribunal concluded that the OFT had made an error of law in respect of the test to be applied under section 33 of the 2002 Act. However, that issue was one that was identified not by IBA but by the Tribunal of its own initiative. IBA submitted that the approach articulated by the OFT in its guidance was correct.

18. In its judgment the Tribunal emphasised that its view turned largely on the process that should be followed under the 2002 Act, a matter on which the OFT had not previously had any judicial guidance. The OFT did not make a "manifest error" as suggested by IBA, but conscientiously followed its published guidance which both it and IBA submitted to be correct.

19. The OFT submits that under rule 55(2) of the Tribunal's Rules the Tribunal should take account of IBA's conduct of the application and not award any costs in its favour.

20. The OFT contends that IBA's conduct of its appeal was "scattergun". Issues raised to which the OFT was required to respond but which were not

subsequently pursued included points relating to the impact of European Law including reference to Article 10 of the EC Treaty and references to the EC merger regime which were not pursued at the oral hearing. Also, it initially alleged that the National Programme for Information Technology ("NPfIT") might not proceed as planned and that the OFT should have taken this into consideration. IBA did not subsequently pursue that allegation at the oral hearing.

21. Central issues relied on in the notice of application such as the nature of a "substantial lessening of competition" neither featured heavily in subsequent submissions, nor were they matters relied upon by the Tribunal in its judgment.

22. IBA raised a "huge range" of factual contentions which were inappropriate in the context of a review jurisdiction and the expedited basis on which the case was dealt with at IBA's instigation. Those matters included reliance on material which it had not submitted to the OFT prior to its decision. That material, which included the witness statement of Mr Wallhouse and the Output Based Specification ("OBS") document, was material that was not even mentioned in the notice of application but was then heavily relied upon at the oral hearing.

23. If the Tribunal is minded to grant IBA a proportion of its costs (appropriately limited to specific heads) the OFT submits that the costs IBA incurred of approximately £222,000 are "wholly excessive and unnecessary" and the product of IBA's disproportionate conduct of the application, notably its preparation of extensive additional documentation including the expert evidence of Mr Wallhouse which could only have been relevant to an appeal on the merits. This is highlighted by the fact that costs incurred by OFT officials and representatives working on the case amounted to no more than £50,000 even though the burden of responding to such an application is likely to fall most heavily on the respondent. Any award of costs should represent only a small proportion of the sums claimed and the bill of costs should be made subject to detailed assessment.

24. In relation to the costs of the interveners, the OFT submits that those costs should be dealt with in line with the Tribunal's previous judgments on costs in relation to interventions in appeals under the 1998 Act, namely that in general, the cost of interventions should be broadly 'cost neutral' and allowed to lie where they fall.

25. In a letter to the Tribunal of 3 March 2004 the OFT pointed out, referring to *GISC: costs*, that if the Tribunal was minded to make an order for costs against the OFT that should not include any costs incurred by iSOFT's intervention.

iSOFT's submissions

26. iSOFT submits that there is no presumption under rule 55 of the Tribunal's Rules that a successful party should recover its costs. Although the Tribunal is free to take into account the principles relating to the award of costs in relation to applications for judicial review under Part 54 of the Civil Procedure Rules the Tribunal is not and should not be bound by such principles.

27. iSOFT submits that there should be no award of costs in IBA's favour. iSOFT points out that the correct approach to section 33 of the 2002 Act was the central element of the Tribunal's judgment but that was a matter that the Tribunal, not IBA, raised. In its judgment the Tribunal said that it implied no criticism of the OFT which had no proper guidance to go on as to the proper limits of its role under the Act.

28. The issues that were relied upon by IBA were manifestly misconceived. IBA alleged errors of procedure, errors of law and errors of fact had been committed by the OFT. IBA went so far as to argue that the latter in itself constituted a ground of review in its own right. In fact the Tribunal based its conclusions on issues of statutory construction and whether in the light of the correct approach to the interpretation of section 33 the OFT's reasoning was adequate. IBA's conduct of the case therefore incurred costs in relation to matters which were either irrelevant or of secondary importance. iSOFT notes

that in *Freeserve: costs* [2003] CAT 6, where Freeserve had succeeded on "what was probably the main issue in the case" but had failed on the other issues raised in its application no order for costs was held to be the appropriate order.

29. iSOFT argues that even if the Tribunal considers it appropriate to make an award of costs in IBA's favour it should not make any order against the interveners. As the Tribunal pointed out in *Freeserve: costs* the general position is that the costs of interveners will very often, in the interests of justice, be allowed to lie where they fall. It was entirely reasonable to expect the interveners to intervene in the appeal. There are no reasons in the present case to depart from that general position as there were in *GISC: costs*. There is no evidence to support IBA's contention that the interventions significantly increased the amount of work it had to undertake; that contention is unfounded and does not support the percentage figure of 17.5 which IBA puts forward as being the work attributable to dealing with the interventions. iSOFT caused IBA to incur only "nominal" costs.

30. In its supplementary submissions of 27 February 2004 iSOFT maintains the position set out in its original submissions on costs. In addition it observes that the Court of Appeal, in its judgment, overturned the Tribunal's interpretation of section 33 of the 2002 Act and confirmed iSOFT's submissions in relation to the nature of judicial review under the 2002 Act. The Court of Appeal also rejected, as did the Tribunal, IBA's submissions that as a matter of fact the merger created a substantial lessening of competition. The Court of Appeal found that the contested decision was defective. That was due to the failings of the OFT and is not something for which iSOFT should be penalised.

Torex's submissions on costs

31. Torex in a very brief submission of 19 December 2003 points out that given the number of factual allegations made by IBA it was best placed to put forward specific factual evidence to rebut those allegations.

The Tribunal's costs jurisdiction

32. The Tribunal's jurisdiction to award costs is set out in rule 55 of the Competition Appeal Tribunal Rules SI 2003, no. 1372 ("the Tribunal's Rules"). Rule 55 replaces rule 26 of the Competition Commission Appeal Tribunal Rules 2000, SI 2000 no. 261. The Tribunal's decisions on costs referred to below were decided under rule 26 which is materially in the same terms as rule 55 of the Tribunal's Rules. The principles stated in those decisions are of equal relevance to the application of rule 55.

33. Rule 55 of the Tribunal's Rules provides as follows:

> "55. – (1) For the purposes of these rules "costs" means costs and expenses recoverable in proceedings before the Supreme Court of England and Wales …
>
> (2) The Tribunal may at its discretion, 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.
>
> (3) Any party against whom an order for costs is made shall, if the Tribunal so directs, pay to any other party a lump sum by way of costs, or such proportion of the costs as may be just. The Tribunal may assess the sum to be paid pursuant to any order made under paragraph (2) above or may direct that it be assessed by the President or Chairman or dealt with by the detailed assessment of the costs by a costs officer of the Supreme Court …"

34. In *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] CAT 3, [2002] Comp AR 160 ("*Napp: interest and costs*") the Tribunal at paragraph 22 made the following observations on the old rule 26(2):

> "[Rule 26(2)] gives the Tribunal a wide discretion on the question of costs, to be exercised in the particular circumstances of the case. There is no explicit rule before the Tribunal that costs follow the event, but nor is there any rule that costs are payable only when a party has behaved unreasonably. All will depend on the particular circumstances of the case."

35. The Tribunal has now emphasised on a number of occasions in appeals under the 1998 Act that the wide discretion conferred by rule 55 to award costs is designed to enable it to deal with cases justly. In the early stages of the development of cases under the 1998 Act the Tribunal is proceeding on a case by case basis, dealing with different, and not always foreseeable, circumstances as they arise. The Tribunal is also of the view that its decisions as to costs should not be allowed to harden into rigid rules: see generally *Institute of Insurance Brokers v Director General of Fair Trading* [2002] CAT 2, [2002] Comp AR 141 ("*GISC: costs*") at [39] and [48]; *Freeserve.com v Director General of Telecommunications* [2003] CAT 6, ("*Freeserve: Costs*") p.11, lines 13 to 24; *Aberdeen Journals Limited v Office of Fair Trading* [2003] CAT 21 ("*Aberdeen Journals: costs*") at [19] and *Aquavitae (UK) Limited v Director of Water Services* [2003] CAT 23 at [17].

36. In our view the flexible approach that the Tribunal has taken to the question of costs in appeals under the 1998 Act is also appropriate in relation to applications for review under the 2002 Act. As the Tribunal's judgments in appeals under the 1998 Act make clear, there is no presumption under rule 55 that costs should necessarily be borne by the losing party. In particular, in the case of applications for review in respect of a decision by the OFT to clear a merger under section 33 of the 2002 Act, it seems to us that such a rule would run the serious risk of frustrating the objectives of the 2002 Act by deterring potential applicants who may, in many cases such as the present, be very much smaller than the parties to the merger.

37. Unlike the position which obtains in other areas of civil justice in the United Kingdom, Parliament has not created any presumption that in proceedings before the Tribunal costs should "follow the event". In those circumstances we accept that although the Tribunal is to determine applications under section 120(4) of the 2002 Act in accordance with the principles that would be applied by a court on an application for judicial review, section 120(4) does not extend to questions of costs, albeit that is not to say that helpful analogies cannot be

drawn by the Tribunal from other procedural rules applied in the various United Kingdom jurisdictions where appropriate.

38. Different considerations are likely to apply where an unfounded application is brought by a corporate appellant with significant financial resources at its disposal. The Tribunal has already acknowledged in penalty cases that if cases are not kept within manageable bounds the appeal system may not function correctly and that, in those circumstances, it may be appropriate to make orders for costs against unsuccessful appellants in penalty cases depending on the specific circumstances of the case: see *Aberdeen Journals: costs*, at [20].

39. In cases under the 2002 Act where it is the OFT which is unsuccessful we consider that, as in the case of appeals under the 1998 Act, there can be no general principle that if the OFT loses it should be liable to pay costs to a private party only if it has been guilty of a manifest error or unreasonable behaviour.

40. The Tribunal also recognises, however, that the system of statutory appeals under the 2002 Act may not function properly if public authorities are not encouraged to make and stand by honest, reasonable and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged: see *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000), cited in *GISC: costs* at [43], [44] and [56].

41. The Tribunal is aware that the costs of litigation in this area are high. Just as it is important that smaller companies are not deterred from bringing well founded applications before the Tribunal, it would be unsatisfactory if the risk of having to pay large orders for costs for having defended reasonably, albeit unsuccessfully, an application under section 120(4) was adversely to affect the performance by the OFT of its statutory functions, which after all exist to benefit the public generally, including other companies as well as individuals.

42. The Tribunal seeks to use its case management powers to ensure that proceedings are kept within reasonable bounds. Where necessary the Tribunal will use its power to award costs to ensure that the costs awarded are proportionate to the matters at stake. Many factors may be relevant to the question of what, if any, order for costs should be made. Such factors may include whether the applicant has succeeded to a significant extent on the basis of new material introduced after the OFT's decision, whether resources have been devoted to particular issues on which the appellant has not succeeded, or which were not germane to the solution of the case, whether there is unnecessary duplication or prolixity, whether evidence adduced is of peripheral relevance, or whether, in whatever respect, the conduct of the successful party has been unreasonable: see *GISC: costs* at [60].

43. It is to be hoped that the nature of applications for review under the 2002 Act may, in general, be expected to generate somewhat less expense than penalty appeals under the 1998 Act, which may by their nature require a full investigation of the merits of the OFT's decision, including substantial evidential issues.

44. Bearing these considerations in mind we turn to consider the application of rule 55 of the circumstances of this particular case.

Analysis

45. In our view it is appropriate to exercise our discretion to make a costs order against the OFT in favour of IBA.

46. We accept, as the OFT points out, that the issue of the correct interpretation of section 33(1) of the 2002 Act was raised, not by IBA, but by the Tribunal on 27 November 2003, the day before the oral hearing. The Tribunal accepts that, in those circumstances, it is arguable that any significant costs specifically incurred by IBA in dealing with that issue should not be borne by the OFT. However, the Tribunal has had difficulty identifying any specific costs claimed against the OFT by IBA in respect of the question of the correct

interpretation of section 33. That is in marked contrast to the proceedings before the Court of Appeal where the issue was the subject of much more detailed submissions by the parties in the light of the Tribunal's judgment and accounted for a significant proportion of the costs incurred.

47. It seems to us that the essential thrust of the OFT's submissions on costs are that IBA's notice of application was "scattergun" with some issues being raised that were not later pursued at the oral hearing and that this approach, coupled with IBA's lodging of extensive documentation, including expert evidence, has incurred "wholly excessive and unnecessary" costs. In addition the OFT contends that IBA in its application focussed on detailed factual matters relating to the merits of the OFT's decision, which was inappropriate in judicial review proceedings.

48. In its notice of application and skeleton argument IBA identified a number of the matters in respect of which it alleged the OFT's decision was defective. Those matters included the absence of any clear exposition of the markets with which the decision was concerned, the fact that the merged entity's market share would be very high and significantly ahead of its nearest rival, the fact that the merger would eliminate the long standing rivalry between iSOFT and Torex, the existence of high barriers to entry and the difficulties created by the merger for competitors such as IBA whose products are distributed in the UK by Torex. IBA submitted that those factors would ordinarily merit a reference to the Competition Commission. According to IBA the analysis in the OFT's decision failed adequately to explain how these difficulties were addressed by the new procurement strategy intended to be introduced as part of the NPfIT.

49. In its judgment the Tribunal found that in its decision the OFT had failed to explain sufficiently clearly the factors which rebutted the case made for a reference as set out in the OFT's own issues letter. Some of the specific matters raised in the issues letter, which pointed to the appropriateness of a reference but which were not rebutted with sufficiently clarity in the decision, were set out by the Tribunal in its judgment at paragraph 237. In approaching this issue the Tribunal bears in mind that in preparing its notice of application

IBA had not at that stage seen, nor was it even aware of, the existence of the OFT's issues letter. Even without access to the issues letter, it seems to us plain, as set out in the Tribunal's judgment, that IBA had identified in substance a number of the issues which the Tribunal subsequently found the OFT had failed adequately to explain in its decision. The Tribunal considers that had the issues letter been available it would have been much easier for IBA to have focussed its arguments as to the ways in which the decision was inadequate. The Tribunal is therefore not persuaded that it should decline to make an order for costs in IBA's favour on this ground.

50. The OFT submits that the matters raised by IBA indicate that it impermissibly approached the case as a challenge to the merits of the OFT's decision rather than an application for a review. The Tribunal considers at first sight that there is some force in the OFT's contention that IBA at times approached the case in a manner more akin to an appeal on the merits. That impression derives no doubt from the fact that IBA placed considerable weight, initially in its notice of application, and in more detail in its skeleton argument, on error of fact as a ground of review in its own right. IBA also effectively submitted that the OFT was wrong to conclude that there was no likelihood of a substantial lessening of competition as a result of the merger.

51. It is trite law that applications for judicial review are not principally concerned with disputes of fact but rather with issues of law and process. That said, applications for judicial review arise in a wide variety of statutory contexts. In the particular statutory context of the 2002 Act cases are likely to arise in which the underlying "factual matrix" of the case is complicated, as was the case here.

52. When the Tribunal is called upon to consider whether there was material on which the OFT could reach the views that it did, whether material considerations have been left out and so on, it is important that it has been provided with, and understands, the facts. In this regard the Tribunal derived assistance from the matters raised by IBA and the material it submitted. Documents such as the witness statement of Mr Wallhouse and the OBS

document were valuable in helping to gain a clear understanding of complicated factual background to the case and notably the NPfIT.

53. The criticisms made by IBA of the OFT's decision were all largely referred to by the Tribunal as matters which were inadequately addressed in the OFT's reasoning contained in its decision. Both the Tribunal and the Court of Appeal ultimately decided that the OFT's analysis was defective the light of the factual circumstances in which the case arose. In those circumstances, looking at the matter in the round, it seems to the Tribunal difficult to criticise IBA to any substantial extent for relying on the factual matters which it drew to the Tribunal's attention.

54. In addition to IBA's submissions based on error of fact as a ground of judicial review, the OFT also point to other specific matters such as IBA's submissions which referred to Article 10 of the EC Treaty and to the position under the EC Merger Regime. IBA also referred to the possibility that the NPfIT might not go ahead as planned. Those issues were not, according to the OFT, pursued by IBA at the hearing and did not form part of the Tribunal's reasoning in its judgment.

55. In this regard the Tribunal bears in mind the speed with which the application had to be prepared. The application was lodged by IBA on 21 November 2003 in less than the 4 week period laid down in rule 26 of the Tribunal's Rules. Skeleton arguments were filed and served and the Tribunal was able to hear the matter on 28 November 2003. In those circumstances, it is understandable if the notice of application raised a range of issues some of which in the end turned out to be somewhat peripheral to the central issues in the case. That said, the Tribunal would not necessarily accept that the question of whether the NPfIT would go ahead in its planned form or at all did not contribute to the Tribunal's conclusions. A number of the factors identified by the Tribunal in its judgment which were not adequately explained by the OFT in its decision were to a greater or lesser extent interconnected with the question of how the NPfIT might develop in the future.

56. In the Tribunal's view the expedition with which the proceedings came on for hearing inevitably played a role in containing the overall costs incurred and in particular obviating the need for a separate application to determine IBA's request for interim relief.

57. Thus, in the particular circumstances of this case, the Tribunal is not persuaded that the above submissions are sufficient to justify reducing the costs payable by the OFT. Moreover, the Tribunal notes that the Explanatory Note to section 120 of the 2002 Act describes the potential grounds of review in wide terms including material error of fact and a lack of proportionality. Although it was not necessary for the Tribunal to determine those issues, against that background we accept there was an element of uncertainty as to the precise grounds that should be applied by the Tribunal. In those circumstances we do not consider that those issues were unreasonably raised by IBA.

58. We note as pointed out by the OFT that at first sight the disparity in the costs incurred by the OFT and IBA appears to be significant. However, it seems to us that the submissions made by the OFT that the sums sought by IBA are "exorbitant" by comparison with the costs incurred by the OFT is a matter that is more appropriately dealt with when IBA's costs come to be assessed.

59. In those circumstances the Tribunal considers that the OFT should, subject to assessment, pay all of IBA's costs that were not incurred by the interventions of iSOFT and Torex, to which we now turn.

The costs of the interventions

60. As far as the costs of the interventions are concerned, the Tribunal has no reason to doubt the figure of 17.5 per cent put forward by IBA as a reasonable assessment of the proportion of the work involved in responding to the points made by iSOFT and Torex. In the Tribunal's view the active part played in the proceedings by the interveners and the significant set of documents filed in support of their intervention cannot as iSOFT suggests have merely caused IBA to incur only "nominal" costs.

61. The Tribunal has indicated in a number of cases that it may well be the case that the costs incurred by an intervention should lie where they fall. This is notably in the context of unsuccessful or only partially successful appeals by smaller companies. In such cases the functioning of the statutory appeals process is liable to be adversely affected by the prospect of certain classes of applicant routinely having to pay the costs potentially not only of the respondent but also of interveners who, in many cases, are likely to be large and well-resourced companies. Generally speaking where this is the case, the appropriate approach will be to leave the costs of the intervention to be borne by the intervener.

62. Where, however, a large and well-resourced intervener has unsuccessfully intervened in proceedings because it was in its interest to do so the Tribunal has, where appropriate, ordered such interveners to pay the additional costs incurred by the applicant in addressing the issues raised by that intervention: see *GISC: costs*, at [80]. Although it was in general helpful that iSOFT and Torex intervened in the proceedings, iSOFT and Torex did choose to intervene in the proceedings because they considered, entirely legitimately, that such a course was in their commercial interests. In those circumstances we consider that iSOFT and Torex should pay the additional costs incurred by IBA in dealing with their intervention.

63. In our view it would not be appropriate to make the OFT and indirectly the taxpayer bear the additional costs incurred by IBA as a result of iSOFT and Torex's intervention.

64. In ordering the OFT to pay the costs incurred by IBA we wish to make plain, as we did in our judgment, that we recognise the work done and effort made by the OFT in the face of a complex situation. It is inevitable in this regard that issues of the kind that arose in this case need to be sorted out at an early stage of the new Act. In this regard we are conscious that in ordering the OFT to pay the costs of the application those costs have to be met ultimately from public funds. That said, in our view it would be wrong for the burden of that

process to be borne by a relatively small company such as IBA when it has been successful on its application in what was admittedly a novel area. Instead, those costs incurred in clarifying issues under the 2002 Act should be regarded, from a public interest point of view, as the costs of developing and clarifying the system as a whole.

Costs of the application for costs

65. IBA has claimed the costs of its application for costs. In respect of that application it has been successful and the Tribunal considers that the appropriate orders for costs should include IBA's costs of its application for costs.

Conclusion

66. For all of the foregoing reasons the Tribunal unanimously

ORDERS THAT:

(1) the OFT pay IBA 82.5 per cent of its costs in respect of its application to the Tribunal under section 120(4) of the 2002 Act as determined by the Tribunal's judgment of 3 December 2003 ([2003] CAT 27);

(2) iSOFT will pay 15 per cent and Torex will pay 2.5 per cent of IBA's costs;

(3) the parties shall within 28 days of this judgment seek to reach agreement as to the amounts of costs recoverable in paragraphs (1) and (2) above. In default of agreement those costs are to be subject to detailed assessment.

Christopher Bellamy Peter Clayton Adam Scott

Registrar