Neutral citation [2003] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case: 1023/4/1/03

New Court
Carey Street
London WC2A 3BZ

19 December 2003

Before:

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

BETWEEN:

IBA HEALTH LIMITED

Applicant

-v-

THE OFFICE OF FAIR TRADING

Respondent

supported by

iSOFT PLC

and

TOREX PLC

Interveners

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

Mr Peter Roth QC, 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 Goup PLC.

Torex PLC was represented by Mr Theo Savvides of Osborne Clark

Decision on applications for permission to appeal

DECISION ON THE APPLICATIONS FOR PERMISSION TO APPEAL

General

1. The Tribunal gave judgment in this matter on 3 December 2003.

2. The OFT announced on 5 December 2003 that it will now reconsider its contested decision on the iSOFT/Torex merger, in accordance with the Tribunal's judgment, within a further period of 40 working days, with a view to taking a new decision by 2 February 2004. Any additional comments from third parties have been invited by 19 December 2003. The original decision took 68 working days, well over the administrative limit of 40 working days (paragraph 68 of the judgment). Apparently the OFT still needs a further 40 days - making 108 working days, or nearly six months in all - to complete a "first screen" of whether it "may be the case" that the merger may be expected to lead to a substantial lessening of competition.

3. Written applications for permission to appeal to the Court of Appeal under Section 120(7) of the Enterprise Act 2002 (the Act) and Rule 58 of the Tribunal's Rules[1] were received from iSOFT and Torex on 9 December 2003, and from the OFT on 11 December 2003. We gave IBA a brief opportunity to comment which it did on 15 December 2003, opposing the applications for permission. We now give our decision, with written reasons, under Rule 59(2) of the Tribunal's rules.

4. For the reasons set out in the judgment, and briefly below, we are not persuaded that the appeal would have a reasonable prospect of success within the meaning of CPR 52.3(6)(a), which we apply by analogy.

5. As to whether there is some other compelling reason why the appeal should be heard within the meaning of CPR rule 52.3(6)(b), we face the difficulty that in our view no applicant for permission accurately represents what it was that the Tribunal decided, or the context in which it did so; nor do we accept that the judgment, properly understood, significantly lowers the threshold for referring mergers to the Competition Commission, or that there are likely to be significant repercussions in a manner not intended by Parliament.

[1] The Competition Appeal Tribunal Rules 2003 S.I. 2003 no. 1372

6. However, this is the first case under the Act. If the OFT's duty under section 33(1) is as discretionary as the OFT appear to believe, this case does raise legal and constitutional issues as to the respective roles of the OFT, the Competition Commission and the Tribunal under the legislation in question.

7. Accordingly, we grant permission to appeal on the basis that, unusually, "there is some other compelling reason why the appeal should be heard". We briefly set out below why in our respectful view the points made in the requests for permission to appeal are unpersuasive.

The appellants' case

8. The broad thrust of the appellants' case is:

   i) that the OFT has a much wider latitude in deciding whether a relevant merger situation should be referred to the Competition Commission under section 33(1) than the Tribunal's interpretation of that section would suggest;

   ii) that under section 120 the Tribunal should only interfere with a decision of the OFT not to refer if the applicant can show that the OFT's decision was irrational, applying the traditional *Wednesbury* test; and

   iii) that the Tribunal has "reversed the onus of proof" by requiring the OFT to demonstrate grounds for not referring a merger to the Competition Commission

9. It is appropriate first to clarify the context of this case, what the Tribunal decided, and what it did not decide.

The context of this case

10. The essential context of the present case is as follows:

(1) The case concerns a complex factual matrix: paragraph 239, supported by paragraphs 21 to 53, 146, 147 and 248 to 263 of the judgment.

(2) There were strong arguments, not least from the contents of the OFT's own issues letter, that there was a reasonable alternative view, to which the OFT could reasonably have come, that the merger may be expected to lead to a substantial lessening of competition: see paragraphs 169 to 177, 235 and 238 of the judgment. The contrary has not been seriously suggested.

(3) However, the OFT's decision was, in practical terms, to the effect that there was no substantial lessening of competition, thus prejudging and pre-empting either any investigation by the Commission (paragraph 195), or the obtaining of undertakings under section 73 (paragraph 205).

(4) The OFT's decision was apparently taken in principle on 8 October. That was only a week after the OFT had set out the opposite view in the issues letter dated 30 September, following two months' consideration: paragraphs 89 and 236.

(5) The OFT's decision was taken in the context of a "first stage screen" with the limitations on the investigation that a "first screen" implies: paragraphs 201 to 204.

(6) In reviewing the legality of the decision, the Tribunal found that the facts were not sufficiently set out in the decision, such as to enable the Tribunal to be reasonably satisfied that a sufficient factual foundation for the decision had been established: paragraphs 240 to 247 and 254 to 263, especially 263.

(7) The Tribunal found that the evidence relied on by the OFT to support its conclusion on material matters was not set out in the decision, nor was it accessible to the Tribunal, in a way which would enable the Tribunal to rule in any satisfactory way on whether there was material on which the OFT could reasonably have come to the conclusion which it did: paragraphs 248 to 265.

(8) On important matters, the OFT's reasons were either not to be found in the decision, contrary to section 107 of the Act, or were in the Tribunal's view inadequate: e.g. paragraphs 237, 246, 255 to 258, 264 to 265.

11. It was in those specific circumstances that the Tribunal considered that it had no alternative but to invite the OFT to look at the matter again, without however giving any further direction: paragraphs 266 to 269. The OFT, as we understand it, will complete its reconsideration by 2 February 2004.

Did the Tribunal stray impermissibly into the merits?

12. The Tribunal does not accept the appellants' suggestion that the Tribunal has strayed impermissibly into the merits of this case. For example, paragraphs 169 to 177 set out the factual context of the case in which the issues arise, which is a necessary foundation for a judicial review. Paragraphs 248 to 263 set out various factual issues which were raised while making it clear that "self evidently, issues like those cannot be resolved, or even gone into on an application for judicial review" (paragraph 263). Indeed our view was that we did not have enough material even to carry out an effective review (see e.g. paragraphs 243, 250, 253 and 263), let alone reach a decision on the merits. Paragraphs 208, 224 and 225, 232, 240, 250 and 266 to 269 expressly indicate that we were not deciding either that the proposed merger does substantially lessen competition, or what the OFT's decision should be after reconsideration.

Does it follow from the Tribunal's judgment that more mergers will be referred?

13. The principal argument advanced by the appellants is that the Tribunal has lowered the threshold for referring a merger to the Commission in a way contrary to the intention of Parliament. We, for our part, do not accept the premise that our construction of the Act will necessarily lead to more mergers being referred to the Commission than would otherwise have been the case under this new legislation.

14. Again, the context of the present case is important. First, it concerns a horizontal merger between the largest and second largest competitors in particularly complex sectors, with a large gap between the merged concern and the next largest competitor. Secondly, the

present case concerns a complex factual matrix. Thirdly, the OFT has not relied on section 33(2), and has deprived itself of the ability to obtain undertakings under section 73.

15. According to the Competition Commission, a combined market share of over 25% may give rise to a "substantial lessening of competition" (paragraph 172 of the judgment). In this case the combined market shares are over 50%. We hope and anticipate that the number of complex cases which give rise to combined market shares of over 50% in which it can *confidently* be said, *on a first screen*, that there is no substantial lessening of competition within the meaning of section 33(1), will be few in number.

16. We thus see no reason to doubt the comment in the White Paper "Productivity and Enterprise: a World Class Competition Regime", cited in paragraph 54 of the judgment, and referred to in iSOFT's application for permission, that "the OFT will carry out first stage investigations which will be sufficient to decide most cases". In our view, that will continue to be the case. As we pointed out at paragraphs 74, 77 and 196 of the judgment, most cases coming before the OFT raise no competition issues. In a small number of cases the issue is clear the other way, and a reference is made, or undertakings obtained under section 73. The present case presents specific and unusual features in the small "grey area" in between. We anticipate that there will be only a very limited number of such cases.

Did the OFT apply the correct test?

17. Coming more specifically to the test under section 33(1), in this case none of the applicants for permission to appeal puts in issue the Tribunal's conclusion at paragraph 233 that

> "the OFT's approach was to seek to decide which of two plausible views the OFT preferred, rather than … [asking itself] whether there were, reasonably, two views that could be taken".

18. At paragraph 190 of the judgment the Tribunal put the test in this way:

> "even if those responsible at the OFT are themselves of the view that a merger may not be expected to result in a substantial lessening of competition, it still "may be the case", within the meaning of section 33(1), that the merger may be expected to lead to a substantial lessening of competition, if there is, in fact, an alternative credible view that cannot be reasonably rejected by the OFT on the basis of a "first screen"."

19. We put what is essentially the same test at paragraphs 197 and 198 of the judgment:

> "197. What is the correct approach in cases in the "grey area" in between? In a case where real issues as to the substantial lessening of competition potentially arise, it seems to us that the words "it may be the case" imply a two-part test. In our view the decision maker(s) at the OFT must satisfy themselves (i) that as far as the OFT is concerned there is no significant prospect of a substantial lessening of competition and (ii) there is no significant prospect of an alternative view being taken in the context of a fuller investigation by the Commission.
>
> 198. It is, as we have said, implicit that the OFT in any event must have sufficient material to support its view. It also seems to us implicit in the second limb of the test that the OFT must be able reasonably to discount the possibility of the Competition Commission coming to a different view after a more in-depth investigation. It must be borne in mind throughout that the role of the OFT under the Act is "a first screen".

20. Paragraphs 190, 197 and 198 must be read together. These paragraphs refer to what the OFT must be satisfied of, or, in the words of section 33(1), believe. The OFT must be satisfied (i.e. believe) that there is no significant prospect of a substantial lessening of competition. The OFT must further be satisfied (i.e. believe) that the possibility of the Competition Commission coming to a different view after a more in-depth investigation may reasonably be discounted. We stress the word "reasonably" which occurs both in paragraph 190, paragraph 198 and paragraph 233. "Reasonably" means both that the OFT's own belief must be reasonable, and that its decision to discount the alternative credible view must be reasonable. In judicial review terms, that means it must be a decision that it was reasonably open to the OFT to take (paragraph 225 of the judgment).

21. We understood, from the OFT's letter to the Tribunal of 1 December 2003, that the OFT's position had moved towards that of the Tribunal on this point. In the OFT's letter of that date they accepted that it would be bound to refer if there was "an alternative credible view", albeit only if the alternative credible view was sufficiently persuasive to lead the OFT to believe that there was a significant prospect of a substantial lessening of competition.

22. However, the remaining difference between the Tribunal's approach and the OFT's approach in its letter of 1 December 2003, albeit narrow, is highly important. In the Tribunal's view, the questions to be asked should not be wrapped up in a single composite

question, i.e. does the OFT believe there is a significant prospect that the merger may be expected to lead to a substantial lessening of competition. For the reasons set out in the judgment, the test, in our view, has to be separated into two component parts, i.e. (i) what is the OFT's own view? (ii) can the alternative view be reasonably discounted by the OFT?

23. That two-part test is important for two reasons. First, in our view, it is an analytically clearer expression of the meaning of "it may be the case" in sections 22(1) and 33(1), as we construe the Act. Secondly, splitting the test into two parts emphasises, correctly in our view, that under the scheme of the Act the OFT is *not* the only relevant decision maker. The OFT is the "first screen", in an investigation that is necessarily limited in scope and largely opaque as far as the outside world is concerned. The second part of the test is an important safeguard against any, no doubt unintended, tendency for the "first screen" at the level of the OFT to become a means of pre-empting a fuller investigation by the Commission in those cases where a reference would properly be justified. This point is emphasised in paragraphs 197 and 198, and elsewhere, in the judgment.

24. We supported our view by the textual arguments set out at paragraphs 178 to 198, and by the arguments from context set out at paragraphs 199 to 214 of the judgment. We made it clear, and we stress again, that when discussing the situation where there is "room for two views" (paragraphs 191 to 195) we envisaged a case where the alternative view was one that had a reasonable and credible basis, not a view that was fanciful or far fetched (paragraph 193).

25. We did not say, and did not intend to say, that a credible alternative view merely meant an "arguable" view as iSOFT/Torex suggest, nor do we think analogies from the context of the Civil Procedure Rules such as "arguable case" are useful in the present context. By a credible view, we mean a serious view, reasonably based.

26. Nor have we eliminated from section 33(1) "the OFT's belief" as iSOFT/Torex suggest. We have, however, sought to analyse more closely the circumstances in which that "belief" gives rise to the duty to refer under section 33(1).

27. The case for the OFT on appeal appears to be that those responsible at the OFT never needed to ask themselves "whether there was an alternative credible view which could not

reasonably be rejected on the basis of a first screen", before deciding not to refer. That is so despite the clear existence, in this case, of an alternative credible view (paragraph 235) and the OFT's own statement that in this case "the OFT fully recognises that there may be room for differences of opinion as to whether there would be a substantial lessening of competition" (paragraph 238).

28. If it is now suggested by the appellants that the OFT has no duty to refer, even if it is *not* satisfied, on the basis of a first screen, that it can reasonably discount the possibility of an alternative view being taken in the context of a fuller investigation by the Commission, then the Tribunal considers the appellants' view to be incorrect for the reasons set out in paragraphs 178 to 214 of the judgment.

29. The five key points made by the Tribunal in those passages of the judgment are (i) the construction of the Act (paragraphs 178 to 198), (ii) the limited nature of the OFT's first screen investigation, especially in cases with a complex factual matrix (paragraphs 201 to 204), (iii) the need to safeguard the possibility of accepting undertakings under section 73 (paragraph 205), (iv) the greater transparency of proceedings before the Commission (paragraph 206) and (v) the difficulty of conducting an effective review under section 120 without knowing what material was before the OFT (paragraphs 207 to 213).

30. We particularly emphasise the dangers of the OFT trying to do too much on the basis of a "first screen" under section 33(1) in cases with a complex factual matrix raising real issues as to a substantial lessening of competition, without reference to either section 33(2) or obtaining undertakings under section 73.

31. In our view, contrary to a submission made by iSOFT, in paragraph 25 of its application for permission, the same analysis applies as regards either section 33(1)(a) or section 33(1)(b). The words "it may be the case" in the second line of section 33(1) govern both section 33(1)(a) and 33(1)(b). As regards section 33(1)(a), cases can and do arise where it is not clear whether "arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation". That is a matter that in doubtful cases can be investigated more fully by the Commission.

32. The Tribunal is not saying, as iSOFT asserts, that the OFT is not entitled to investigate the facts in order to form a view on whether relevant arrangements exist. On the contrary, the OFT can, and should, seek to substantiate the facts. But if, having investigated the matter as far as possible, it cannot, on the facts available to it, reasonably discount the possibility that such arrangements may be in progress or contemplation, then section 33(1)(a) is satisfied.

33. For those reasons we adhere to the construction of the Act set out in paragraphs 178 to 214 of the judgment.

The need for the analysis to be demonstrated

34. We would also emphasise, however, that the Tribunal has not sought to exclude the possibility that the OFT may, in this or any other case, properly reach a decision not to refer under section 33(1), even in complex cases raising real issues as to a substantial lessening of competition, if in practice the OFT is satisfied that it can exclude or discount any alternative credible view. That, in our view, is implicit in the test explained at paragraphs 190 to 198 of the judgment.

35. What, however, the Tribunal *is* saying is that, having regard to the general scheme of the Act, and the factors set out at paragraphs 178 to 214 of the judgment, the OFT should be slow *not* to refer in cases of direct mergers between companies who compete horizontally involving substantial increases in market shares in cases with complex issues: see e.g. paragraphs 199, 229, 246 and 267 of the judgment.

36. Nonetheless, it may occur that the OFT reasonably believes that a decision not to refer is open to it under section 33(1), notwithstanding the raising of real issues as to substantial lessening of competition. In such circumstances, the OFT remains entitled to take a decision to that effect, provided that it is able to demonstrate, on the basis of the facts, reasoning and supporting material set out in the decision, that it could reasonably come to the view that no substantial lessening of competition may be expected to result from the merger: paragraphs 214 and 230 of the judgment.

37. The need for such a demonstration is implicit in the duty to give reasons under section 107. More importantly, in our view, this sphere of the law is not to be viewed as a matter where it is only the interests of the merging parties that are involved. Others are involved, including customers, competitors, suppliers and the public at large. The OFT is performing a public function, under a statutory duty, and applying a much more precise test than was the case under the FTA 1973. What is a "substantial" lessening of competition is a matter which requires clear and transparent analysis.

38. Clarity and transparency in the decision making process is particularly important in the case of a decision not to refer, despite the apparent presence of significant competition issues, in order to demonstrate to all interested parties the matter has received due and proper consideration.

39. The problem in the present case was that the Tribunal was not satisfied that the necessary demonstration had been set out in the decision, for the reasons set out in paragraphs 232 to 265 of the judgment.

The "reverse onus" point

40. The appellants argue that it is incorrect for the Tribunal to place "the onus of proof" on the OFT. We do not agree with that analysis. What the Tribunal actually said was that the OFT needed:

> "to satisfy the Tribunal that it had solid, logical and properly reasoned grounds for not complying with its duty to refer under section 33(1)" (paragraph 214) or
>
> "[to] show good grounds for believing that the matter was not even "grey, but white" (paragraph 214) or
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> "to satisfy the Tribunal that it applied the right test, and that it had solid, sufficiently certain, and properly reasoned grounds for deciding that the relatively low threshold of "may be the case" under section 33(1) was not met" (paragraph 230).

41. Those observations do not go to any "onus of proof". Our observations go to the need for reasons to be given, in accordance with the duty of the OFT to give reasons imposed by Parliament under section 107.

42. Again, in our view the specific context of this case is critical. The Tribunal is not intending to introduce a generalised "reverse onus" on the OFT under the Act, or to displace the normal rule that it is for the applicant in judicial review proceedings to establish the grounds of review, or to itself decide the merits. However, the Tribunal *is* saying that once it is shown that there is a reasonable, credible alternative view that cannot reasonably be discounted, the OFT is prima facie under a duty to refer under section 33(1), unless it can obtain undertakings under section 73, or rely on section 33(2). In those circumstances, if the OFT declines to perform what is, prima facie, its statutory duty under section 33(1), the Tribunal believes that the OFT needs to show in its decision sufficient facts, material and reasoned analysis to demonstrate that a reasonable decision maker in the position of the OFT could reasonably have come to the decision which it did. We respectfully suggest that that view is in accordance with general legal principles applicable to a case such as the present.

43. For the reasons already given, we do not expect the numbers of mergers referred to the Commission to be materially different from what could otherwise have been the case before our judgment. Indeed, the Tribunal's view logically enables the OFT to seek undertakings under section 73 in cases where its own, more restrictive, interpretation of its duty, might have precluded it from doing so. In this and other cases, the OFT retains the three options: (i) to refer, (ii) to seek undertakings, and (iii) to take a properly reasoned and supported decision not to refer, relying on either section 33(1), or section 33(2), or both.

The arguments based on "the previous practice"

44. More generally, an underlying theme of the OFT appeal, in particular, is that the Act was not intended "to alter the previous practice" under the FTA 1973. The same theme is implicit in the iSOFT/Torex appeals.

45. We respectfully point out, first, that the Act sets up a different legal framework from that which existed under the FTA 1973, as indicated in paragraph 61 of the judgment. In our

view, it is the failure fully to appreciate the significance of the legal changes which have taken place which has given rise to the present case.

46. Under the FTA 1973, there were three players

(1) The Director (in effect the OFT) whose role was to advise the Secretary of State (FTA, section 76)
(2) the Secretary of State, an elected Minister directly accountable to Parliament, who had a wide discretion as to whether or not to refer (FTA, sections 64(1) and 75 (1); and
(3) the Commission, who reported to the Secretary of State on the reference (FTA sections 72 and 83).

The question of remedies was ultimately also for the Secretary of State (FTA section 73) advised by the Director (FTA section 88).

47. By contrast, under the Act the number of players is reduced from three to two, namely the OFT and the Commission, with the Secretary of State being removed except in exceptional circumstances not relevant here. In strict constitutional terms, the OFT is a government body acting on behalf of the Crown (section 1(2) of the Act). The Commission is not a servant or agent of the Crown (Competition Act 1998, schedule 13, paragraph 7).

48. The removal of any political control over the OFT in its handling of individual cases potentially gives the latter great power as regards the making or not of merger references under section 33(1) of the Act. No doubt to counteract any potential dangers thereby arising, as we see it Parliament expressly introduced three new safeguards into the Act.

49. The first safeguard is that Parliament did not see fit to give the OFT the discretionary power that was formerly enjoyed by the Secretary of State. Instead, under sections 22(1) and 33(1), Parliament placed on the OFT a *duty* to refer. The various headings in Part 3 of the Act use the words "Duty to make references" five times. The significance of this change from discretion to duty, not mentioned in any application for permission to appeal, seems to us to mark a fundamental change from "the previous practice".

50. It is true that the duty imposed by sections 22(1) and 33(1) is "auto-defining", by which we mean that the duty on the decision maker (OFT) arises when the decision maker himself "believes" that the circumstances giving rise to the duty have arisen. The duty therefore includes a certain margin of appreciation as to the underlying facts, which we accept exists. But a margin of appreciation in determining whether there exist facts giving rise to a duty is in our view a very different matter from a situation in which there is no duty at all, only a widely expressed discretionary power. The OFT does not enjoy the wide discretion to refer or not previously enjoyed by the Secretary of State. We do not accept that in sections 22(1) and 33(1) "shall" means "may".

51. That can also been seen from sections 131 and 132 of the Act. The duty to make a merger reference under section 33(1) ("the OFT shall") contrasts with the discretion to make a market investigation reference under section 131 in Part 4 of the Act ("the OFT may"). It is also of interest that if the OFT fails to exercise its discretion to make a market investigation under section 131, the Minister may step in and do so under section 132. No equivalent safeguard exists under Part 3 of the Act.

52. In our view the carrying out by the OFT of its duty under section 33(1) requires an appropriate degree of scrutiny, otherwise what Parliament has characterised as a duty may easily slip back into what is, in practice, the exercise of a relatively wide discretion.

53. The second safeguard introduced by Parliament is the duty to give reasons under section 107, to the importance of which we have already referred. Under the previous legislation there was no statutory duty to give reasons for a non-reference decision.

54. The third safeguard introduced by Parliament was the possibility of an application for a review under section 120 by any person aggrieved. That is a significant change from the previous practice, since under the FTA 1973 it would have been very difficult judicially to review a decision by the Secretary of State not to make a reference, given the wide ministerial discretion conferred by section 75(1) of that Act.

55. In giving "any person aggrieved" a right to apply for a review, it seems unlikely that Parliament intended that officious persons should be able to use "spoiling tactics" to disrupt

prospective mergers on far-fetched or spurious grounds. The Tribunal is alert to that danger, but it does not arise in the present case. IBA has advanced a serious case.

56. As we see it, in giving the wide category of "any person aggrieved" standing to apply for a review, Parliament is not implying that any special precedence should be accorded to the interests of the particular person who happens to be "aggrieved" in a particular case, over and above the interests of other parties concerned. As we have said, these proceedings are not primarily an inter partes matter. As we see it a "person aggrieved" who presents a serious case is simply the catalyst which triggers a review by the Tribunal, in the wider public interest, not of the merits but of the *legality* of what has taken place (paragraph 177 of the judgment). The purpose of that review is to ensure that the decision in question does not thwart or run counter to the policy and objects of the Act: *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, per Lord Reid at p. 1030.

57. Section 120 of the new Act is, however, only a safeguard if a review under that section is capable of being an effective review.

58. As the judgment points out at paragraphs 208 to 211, 242 to 246 and 251 to 253, a significant problem in the present case is that the material upon which the OFT's decision is based is not accessible. It is thus not known what views the OFT received, e.g. from interested government departments, what lobbying may or may not have taken place, what the evidence was for particular conclusions, and so on. We are *not* suggesting that anything untoward occurred in the present case. We are simply pointing out that the corollary of "taking mergers out of politics" is that decisions should be evidence based, and that it is unsatisfactory not to have set out in the decision the evidence on which the OFT's appreciation was founded. In our view, whatever the proper scope for judicial review, there is a significant risk that a review under section 120 will not, in practice, be an effective review, if the approach suggested by the OFT in this case is correct. As the judgment points out at paragraphs 212 and 213, either the OFT's decision needs to set out the evidence, or the matter should be referred to the Commission, which routinely summarises, in its reports, the evidence on which its conclusions are based.

The scope of review

59. We have already set out our views on the scope of review under section 120 at paragraphs 215 to 225 of the judgment. Again, the context here is atypical. Although the OFT is admittedly a specialised body, it is not more specialised in matters of merger control than the Commission. Moreover, its role is limited to that of the "first screen". The Tribunal is also a specialised tribunal. We cannot immediately think of a similar situation elsewhere in the legal system.

60. The appellants, as we understand it, invite us to apply the traditional test formulated by Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223. As set out by Lord Diplock in the *GCHQ* case, that test of "irrationality"

> "applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it".

Council of Civil Service Unions v Minister for the Civil Service [1985] 1 AC 374, 410.

61. As is well known, the Wednesbury case was dealing with the exercise of a discretionary power conferred on a local authority to include conditions in cinema licences. The licence in question excluded children under 15 from cinema performances on Sundays. It was contended that such a condition was unreasonable. Lord Greene MR said at p.230:

> "The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse. All over the country, I have no doubt, on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere".

62. It is clear that the hallowed test of irrationality thus set out by Lord Greene MR, to the effect that a decision is unreasonable if it is a decision to which no reasonable authority could have come to, arises from a case in which the relevant authority had a wide discretion, on a matter of "high public policy", rather than a duty in respect of its handling of individual cases. Many other leading cases in which the Courts have applied the Wednesbury test have similarly involved policy considerations, or Ministerial decisions on policy matters. For the reasons set out in the judgment, that in our view is not the situation under section 33(1). The fact that the Wednesbury test is advanced by the OFT suggests to our mind that the OFT believes that decisions in individual cases under section 33(1) have an important 'policy element' as they did under the old law. In our view, however, the situation has changed: there is now a duty once the requirements of section 33 have been met.

63. The test for the scope of review set out in paragraph 225 of the judgment is "whether […] the OFT's decision was not erroneous in law, and was one which it was reasonably open to the OFT to take, giving "reasonably" its ordinary and natural meaning". That test includes the orthodox judicial review questions such as: Has the existence of facts giving rise to the OFT's conclusion that it is not under a statutory duty been sufficiently established? What is the evidential basis for these facts? Has the right legal test been applied? Have all material considerations been taken into account? Have irrelevant considerations been disregarded?

64. Within the parameters of those considerations, the OFT's margin of appreciation of the facts remains, bearing in mind its role as a 'first screen' in what is, under the Act, a two stage procedure. The OFT can continue, as before, to give confidential guidance and deal with the vast majority of mergers. However, decisions in borderline cases, where there is danger of the Commission being wrongly prevented from deciding the matter under section 36, need in our view to be solidly based if the scheme of the Act is to be respected.

65. In our view the combination of the wide discretion apparently claimed by the OFT, and the limited judicial review for which it contends, would give the OFT a degree of unfettered discretion in merger cases which, in our respectful opinion, Parliament did not intend to confer.

66. For these reasons, we think the appeals have no reasonable prospect of success. We give permission only on the basis that this is the first case under the Act and important issues have arisen in the course of argument.

Christopher Bellamy Peter Clayton Adam Scott

Charles Dhanowa
Registrar 19 December 2003