IN THE COMPETITION COMMISSION

APPEAL TRIBUNAL

Cases Nos. 1002/2/1/01(IR)
1003/2/1/01
1004/2/1/01

New Court
Carey Street
London WC2A 2JT

29 January 2002

Before:

SIR CHRISTOPHER BELLAMY (The President)
ANN KELLY
ADAM SCOTT

BETWEEN:

THE INSTITUTE OF INDEPENDENT INSURANCE BROKERS

Appellant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

Supported by

THE GENERAL INSURANCE STANDARDS COUNCIL

Intervener

and

BETWEEN:

ASSOCIATION OF BRITISH TRAVEL AGENTS LIMITED

Appellant

and

THE DIRECTOR GENERAL OF FAIR TRADING

Respondent

Supported by

THE GENERAL INSURANCE STANDARDS COUNCIL

Intervener

JUDGMENT (costs)

Mr Nicholas Green QC and Mr James Flynn (instructed by Messrs Wilson Browne) appeared for the Institute of Independent Insurance Brokers

Mr Richard Fowler QC and Miss Kassie Smith (instructed by Messrs Nicholson Graham & Jones) appeared for the Association of British Travel Agents Limited

Mr Rupert Anderson and Mr Daniel Beard (instructed by the Director of Legal Services, Office of Fair Trading) appeared for the Director General of Fair Trading

Mr Aidan Robertson (instructed by Messrs CMS Cameron McKenna) appeared for the General Insurance Standards Council

JUDGMENT ON COSTS

Background

1. On 17 September 2001 the Tribunal gave judgment upholding two appeals brought under section 47(6) of the Competition Act 1998 ("the Act") by the Institute of Independent Insurance Brokers ("the IIB") and the Association of British Travel Agents Limited ("ABTA") against two decisions by the Director General of Fair Trading ("the Director"), both dated 11 May 2001, refusing to withdraw or vary a decision adopted by the Director on 24 January 2001 entitled *Notification by the General Insurance Standards Council* ("the GISC Decision"): see [2001] CompAR 62. In the GISC Decision the Director decided that the rules of the General Insurance Standards Council ("GISC" and the "GISC Rules"), notified to him under section 14, did not infringe the Chapter I prohibition set out in section 2 of the Act.

2. The members of GISC comprise most United Kingdom insurers writing general insurance in the United Kingdom as well as a large number of insurance intermediaries. The overall purpose of the GISC Rules is or was to establish a system of self-regulation governing the selling, advising or broking of general insurance in the United Kingdom. The intention of those promoting GISC was that the GISC Rules should apply to all intermediaries active in the supply of general insurance in the United Kingdom. Pursuant to Rule F42, the Members of GISC were required to agree not to deal with intermediaries engaged in the selling, advising or broking of general insurance unless the intermediary concerned was a Member of GISC or the Appointed Agent or Sub-Agent of a Member of GISC.

3. Before the Director, and in their appeals to the Tribunal, both the IIB and ABTA submitted, principally, that Rule F42 of the GISC Rules had as its "object or effect the prevention, restriction or distortion of competition within the United Kingdom" so as to fall within the Chapter I prohibition. Hence the GISC Rules could be permitted, if at all, only by an exemption from the Chapter I prohibition granted under section 4 of the Act. The Director, supported by GISC, which intervened in the proceedings (see Rule 14 of the Competition Commission Appeal Tribunal Rules 2000 SI 2000 no. 261 ("the Tribunal Rules")), argued that Rule F42 did not bring the GISC Rules within the Chapter I prohibition.

4. For the reasons given in paragraphs 166 to 218 of its judgment of 17 September 2001, the Tribunal held that Rule F42 fell within the Chapter I prohibition. At paragraphs 219 to 259 of that judgment,

the Tribunal upheld a subsidiary argument advanced by IIB to the effect that the Director had insufficiently investigated various competition issues arising out of the fact that GISC was intended to be the "sole regulator" of insurance intermediaries. At paragraphs 260 to 267 of the judgment, the Tribunal rejected a subsidiary argument advanced by GISC based on the so-called "rule of reason".

5. Paragraph 272 of the judgment stated:

> "... On those grounds the Tribunal:
>
> 1. Sets aside the decisions of the Director dated 11 May 2001 concerning the Rules of the General Insurance Standards Council addressed to the Institute of Independent Insurance Brokers, and to the Association of British Travel Agents Limited, respectively
> 2. Withdraws the decision of the Director dated 24 January 2001 entitled Notification of the Rules of the General Insurance Standards Council
> 3. Decides that the Rules of the General Insurance Standards Council fall within the prohibition imposed by Chapter I of the Competition Act 1998, by virtue of Rule F42
> 4. Remits to the Director the issues referred to in paragraphs 202 to 204 and 223 to 244 of this judgment
> 5. Reserves the question of costs for further argument"

6. At the handing down of the judgment, the Tribunal invited argument as to how it should approach the issue of costs under Rule 26 of the Tribunal's Rules. That Rule provides:

> "**26. Costs**
>
> (1) For the purposes of these rules "costs" means–
> (a) if the proceedings are taking place before a tribunal in England and Wales, costs and expenses recoverable in proceedings before the Supreme Court of England and Wales;
> (b) if the proceedings are taking place before a tribunal in Scotland, costs and expenses recoverable in proceedings before the Court of Session; and
> (c) if the proceedings are taking place before a tribunal in Northern Ireland, costs and expenses recoverable in proceedings before the Supreme Court of Northern Ireland.
>
> (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 or a taxing officer of the Supreme Court of Northern Ireland or by the Auditor of the Court of Session.

(4) Unless the tribunal otherwise directs, any order or direction made pursuant to paragraphs (2) and (3) above may be made in the decision, if the parties so consent, or immediately following delivery of the decision.

(5) The power to award costs pursuant to this rule includes the power to direct any party to pay to the tribunal such sum as may be appropriate in reimbursement of any costs incurred by the tribunal in connection with the summoning or citation of witnesses or the instruction of experts on the tribunal's behalf.

(6) If a party against whom an order for costs has been made fails to pay those costs within 28 days of the later of
(a) the date of that order, or,
(b) where costs are assessed in accordance with paragraph (3) above, the date of that assessment

the person to whom the outstanding amount is due may recover that amount from the debtor as a civil debt due to him."

7. All parties have provided statements of costs. The IIB and ABTA lodged written submissions on costs on 29 September and 1 October 2001 respectively. The Director and GISC lodged written submissions on 22 October 2001. The IIB and ABTA lodged further submissions in reply on 16 November 2001. The Director replied briefly by letter of 21 November 2001.

Arguments of the parties

The IIB

8. The IIB submits that, as the winning party, it should be awarded its costs in accordance with the normal rule in litigation. There is no principled basis upon which the IIB could be refused its costs. The IIB invites the Tribunal to assess its costs summarily in the sum of £68,359.70, to which should be added a further £7,285.00 relating to the costs application, making £75,644.70 altogether.

9. According to the IIB, the Tribunal's discretion under Rule 26(2) of the Tribunal's Rules should be exercised judicially having regard to the practice under the Civil Procedure Rules ("CPR"), the practice in judicial review proceedings, and the practice under the Rules of Procedure of the Court of First Instance of the European Communities ("the CFI Rules").

10. In civil litigation under the CPR the normal rule is that costs follow the event: CPR r. 44.3(2). That remains the general rule, although the court may make orders which reflect the outcome of

different issues: see Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507 at p.1522H; see also Swinton Thomas LJ in *London Borough of Brent v Aniedobe*, 24 November 1999, (CA); and Lightman J in *BCCI v Ali* (No.3) [1999] 149 NLJ 1734 at paragraph 7. The position is the same in judicial review: see paragraph 18 of the Administrative Court's Notes for Guidance on applying for judicial review.

11. Article 87 of the CFI Rules positively requires the Court of First Instance to award costs to the winning party if they have been requested, although Article 87 also allows flexibility where "each party succeeds on some and fails on other heads, or where the circumstances are exceptional". The IIB submits that Article 87 of the CFI Rules suggests appropriate principles by which the Tribunal should, as a rule of thumb, exercise its discretion.

12. The IIB further notes that the wide discretion in Rule 26(2) of the Tribunal's Rules contrasts with the position pertaining under the rules of some other statutory tribunals and also under section 1 of the Restrictive Practices Act 1976. Accordingly those other rules are not appropriate models on which the Tribunal should base its practice.

13. A width of discretion, similar to that provided by Rule 26(2), exists in the Copyright Tribunal, but the Court of Appeal in the *AEI Rediffusion* case, cited above, made it plain that the appropriate basis for assessment was the relative degree of success of the opposing parties, and where there was a winner, costs could be awarded accordingly. Any other approach, says the IIB, would deter the bringing of challenges to legally questionable decisions made by the Director, and would be undesirable in policy terms. Considerations of the cost to the public purse should play no part in this analysis, any more than they do in judicial review applications. Had it been the legislator's intention that costs should lie where they fall, Rule 26(2) would have been framed differently.

14. According to the IIB, the above considerations apply with all the more force in connection with an application brought under section 47(6) of the Act, which follows a procedure under which the Director has been explicitly requested to reconsider his original decision on specified grounds.

15. In relation to recovery of its costs from the intervener GISC, the IIB estimates that one-sixth to one-fifth of its total costs were occasioned by GISC's intervention. These included the IIB's application for interim relief, made under Rule 32 of the Tribunal's Rules, which was necessitated by GISC's members' conduct; the evidence adduced by the IIB to counter aspersions in GISC's

statement of intervention as to the functions and competence of the IIB as a regulator; and dealing with the legal arguments relating to the "rule of reason" raised by GISC, but not by the Director.

ABTA

16. ABTA seeks costs in the sum of £128,187.01, to be summarily assessed by the Tribunal, to which should be added a further £15,309.50 relating to the costs application, making £143,496.50 altogether.

17. ABTA emphasises that Rule 26(2) of the Tribunal's Rules is quite different from the regime under Rule 58 of the Rules of the Restrictive Practices Court 1976. Although Rule 26(2) makes no reference to the general rule applicable in the civil litigation, that is explicable by the many different circumstances with which the Tribunal may have to deal. However, where there is a clear "winner" and "loser", the Tribunal's wide discretion does not prevent the Tribunal from ordering the loser to pay the winner's costs: see Mummery LJ in the *AEI Rediffusion* case at 1518 C-E. The principles referred to by Mummery LJ in that case (at p. 1518 A-B) are relevant here. Since the Tribunal reached a clear and unequivocal decision that the Director's decision that the GISC Rules did not infringe the Chapter I prohibition was wrong in law, it is fair and equitable that ABTA should recover its costs. Were ABTA not to be awarded its costs, in such a clear-cut case as this, other third parties would be discouraged from challenging decisions of the Director that are clearly wrong.

18. In relation to costs orders against public bodies, ABTA contends that the usual practice in judicial review proceedings is that costs follow the event: see *R v Lord Chancellor ex parte Child Poverty Action Group and others* [1998] 2 All ER 755, at 764 b-j. Similarly under Community law, if an applicant is successful before the CFI, the European Commission's decision will be annulled and the Commission will be ordered to pay the costs.

19. As to the impact of this costs order on future cases, ABTA submits that the Tribunal should not fetter its discretion contrary to the legislative intention displayed in Rule 26(2) of the Tribunal Rules. If an order were made against the Director in this case, it would not necessarily follow that an unsuccessful appellant could be ordered to pay the costs (see the *Child Poverty Action Group* case, at 762 j to 763 c and 765 a). The Tribunal should retain its broad discretion to deal with the issue of costs on a case by case basis (see the *AEI Rediffusion* case, per Lord Woolf MR, at 1522 D and 1525 A-C).

20. Finally, as regards the position of interveners, ABTA submits that the usual practice in judicial review cases is that an intervener will bear its own costs unless it has unsuccessfully run separate and independent arguments that have forced the other party to incur extra cost. The Tribunal should take a similar approach. In the present case, ABTA submits that the Tribunal might consider it appropriate to order that GISC should bear some proportion of ABTA's costs, on the basis that (a) members of GISC continued to pressurise intermediaries to join GISC even after the proceedings had commenced; (b) that GISC did not operate an effective waiver system which might have avoided the costs of these proceedings; and (c) GISC submitted an argument based on the "rule of reason" that was not argued by the Director, and which was rejected by the Tribunal.

The Director

21. The Director confines himself to considering the present situation, which arises where he has taken a decision following a notification under section 14 of the Act, and there has subsequently been a successful appeal against that decision under section 47.

22. The Director considers that the wide, unfettered discretion as to costs which has been conferred on the Tribunal means that it is under no obligation to adopt any particular principle, such as costs should follow the event, or that parties should bear their own costs. The Tribunal should approach the question of costs in a flexible manner, recognising the special nature of the proceedings before it.

23. According to the Director, a decision under section 14, confirmed by a rejection of an application to withdraw or vary that decision under section 47, is part of the regulatory process under the Act, where the Tribunal and the Director are part of a single system of competition law enforcement. Appeals to the Tribunal lie as of right, and may involve complex issues, on which reasonable people might reach different conclusions, but the Tribunal's jurisdiction is not limited to judicial review. The Director's decision could be subject to multiple challenges on a wide range of grounds. Such a potential exposure to multiple claims for costs could have serious implications for the public purse.

24. Moreover, were the Tribunal to adopt a general rule that costs should follow the event, undertakings with a legitimate interest in challenging decisions, including smaller companies and consumers, could be deterred from bringing appeals and in so doing undermine the effective

operation of the Act: see the dicta of Lord Woolf in the *AEI Rediffusion* case (at 1524G-H) and the costs rules that apply before employment tribunals.

25. In those circumstances, submits the Director, the Tribunal should not adopt the straightforward principle that costs should follow the event. In the case of an unsuccessful party, whether the Director or a private appellant, costs should normally be awarded against a party only if that party has adopted an unreasonable position, or has committed a manifest error of law or fact, or has conducted the proceedings in an inappropriate manner. Interveners, says the Director, should normally bear their own costs.

26. In support of his position, the Director submits that the provisions of the Act in relation to the award of costs are entirely neutral: had Parliament intended to indicate a general principle as to costs, it could have legislated to that effect. This position is in contrast to ordinary civil proceedings and applications for judicial review. In any event there is no direct analogy here with judicial review proceedings where the reviewing court is strictly limited in the extent to which it can reconsider the primary decision-maker's decision. Reliance on the *AEI Rediffusion* case, cited above, is misplaced, since the issue there was how the rule that costs follow the event should be applied, and not whether that rule was the appropriate starting point. Similarly, comparison with the CFI is misplaced, since the jurisdiction of that court in respect of competition decisions taken by the European Commission is one of judicial review.

27. The Director refers to appeals to the Secretary of State against a planning permission decision of a local planning authority, where costs lie where they fall unless either party has engaged in unreasonable conduct or behaviour. Rule 58(1) of the Restrictive Practices Court Rules 1976 provides another precedent for not adopting the general rule that costs should follow the event.

28. According to the Director, the risk of exposure to costs, particularly in view of the potential for multiple appeals against single decisions, is likely to become a factor that the Director takes into account in marginal cases when considering whether to take a formal, appeallable, decision or to deal with a matter informally. By contrast, an approach of the kind suggested by the Director would remove costs as a factor in the Director's decision-taking process, whilst at the same time providing an additional incentive to ensure that he reached the right decision in accordance with the Act. By the same token, there may be cases where it would be appropriate for an unsuccessful appellant to pay the Director's costs, if the appellant had acted unreasonably.

29. As regards interveners, the Director submits that there is a real public benefit in not discouraging legitimate intervention, either in support of a decision or in opposition to one. Equally the Director recognises the public benefit in not unduly encouraging intervention. Accordingly, the Director suggests that the Tribunal's approach to interveners' costs should be neutral i.e. that interveners should be neither liable for other parties' costs, nor able to recover their own costs, although that approach could be departed from in appropriate cases. In particular the Director should not have to pay any additional costs occasioned to an appellant as a result of distinct points raised by an intervener.

30. In relation to the present case, the Director submits that the Tribunal in its judgment of 17 September 2001 recognised that none of the authorities cited precisely matched the circumstances of the case. According to the Director, his legal assessment of Rule F42 was not manifestly wrong. On the question of regulatory competition, the Director submits that the legal position is not clear.

31. As to the reasonableness with which the Director has conducted himself, he submits that he acted as swiftly and expeditiously as possible – he prepared his case for an oral hearing in less than four weeks from the close of pleadings. Similarly, the Director rejects the IIB's application for the costs of its interim application as unfounded since the Director acted with utmost cooperation and expedition in order to obviate the need for any interim relief to be granted.

32. Specifically, the Director submits that, should the Tribunal make an award of costs in favour of the IIB and ABTA, he should only be liable to pay one set of costs since there was a significant degree of overlap between the submissions. A proportionate reduction of each of their costs should therefore be ordered. Moreover, any award of costs should be subject to a detailed assessment. The Director also opposes the IIB's suggestion that he should be ordered to pay the costs of the application for costs.

GISC

33. GISC agrees with the Director that, as a general rule, costs should lie where they fall, and that GISC should bear its own costs. GISC should not be ordered to pay any of the IIB's or ABTA's costs, since its intervention enabled the appeal to be disposed of in an efficient and expeditious manner and did not add materially to the length and complexity of the appeal or to the appellants' costs.

34. According to GISC, there is no good reason why an intervener who has notified an agreement should be at risk of paying an appellant's costs because of the Director's failure to carry out the correct assessment of the intervener's application for negative clearance. An award of costs, submits GISC, should only be made against an intervener where the intervener has unreasonably added to the costs by making submissions which duplicate those of the Director or of another party, or which are otherwise irrelevant, or in some other way cause the proceedings before the Tribunal to be unnecessarily extended. In the present case, GISC submits that its intervention positively assisted the Tribunal in its deliberations. Had GISC not intervened, a number of factual issues would need to have been investigated by the other parties, adding to their costs and increasing the length of the proceedings. Moreover, it was GISC's only formal opportunity to respond to the appellants' arguments.

35. In relation to the specific points raised by the IIB and ABTA, GISC submits firstly that it should not in any way be liable for the IIB's costs in relation to its application for interim relief under Rule 32 since (a) this was made before GISC had been given permission to intervene; and (b) the interim measures issue was resolved at the case management conference on 21 June 2001 thanks to GISC's undertaking to write to its members informing them of the correct legal position that GISC Rule F42 was not in force. Secondly, GISC's legal submission before the Tribunal on the "rule of reason" was not unreasonable and in any event was not the subject of prolonged argument. Thirdly, GISC's evidence as to the IIB's functions and competence as a regulator assisted the Tribunal. Fourthly, ABTA's reference to GISC's waiver policy is irrelevant to GISC's liability for costs, since the proceedings relate to the decision of the Director to grant the GISC Rules negative clearance, and not to the decision of GISC to adopt the Rules themselves.

36. Like the Director, GISC submits that, should costs be awarded against it, the Tribunal should make an order for detailed assessment under Rule 26(3).

Findings

The application for costs against the Director

— *General observations*

37. This is the first occasion on which the Tribunal has had occasion to consider the principles on which costs may be awarded against the Director under Rule 26 of the Tribunal's Rules. Before

dealing with the instant case, we take this opportunity to make some general observations, albeit that our observations are not binding in future cases.

38. Rule 26(2) provides:

> "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."

39. Apart from the reference, in the latter part of Rule 26(2) to "the conduct of all parties in relation to the proceedings" that Rule appears on its face to give the Tribunal an unfettered discretion as to costs, leaving it to the Tribunal to develop the relevant principles in the light of circumstances and experience.

40. As all the parties have pointed out, Rule 26(2) does not refer to the rule that applies, as a starting point, in civil litigation and judicial proceedings under CPR r. 44.3(2)(a), namely that the unsuccessful party will be ordered to pay the costs of the successful party. A close reading of the *AEI Rediffusion* case, cited above, indicates that the Copyright Tribunal had in fact adopted a similar rule by way of a practice direction, albeit that Rule 48 of the Copyright Tribunal Rules 1989 did not so require: see Lord Woolf's judgment at p. 1521D to 1522D.

41. Nor does Rule 26(2) adopt a rule to the effect that costs will be awarded against a losing party only if that party has behaved unreasonably, frivolously or vexatiously. Examples of such rules include Rule 58 of the Restrictive Practices Court Rules 1976 (which applied to certain (but not all) proceedings before the Restrictive Practices Court), Rule 34(1) of the Employment Appeal Tribunal Rules (which reflects also the position before employment tribunals), Rule 21 of the Special Commissions (Jurisdiction and Procedure Regulations 1994), and the practice followed by the Secretary of State on certain planning appeals: DoE circular 8/93. No doubt many other examples exist before courts and tribunals of various sorts. Rules of that kind, it seems to us, normally reflect a specific policy decision on the part of Parliament that the particular objectives of the legislation in question can best be met by restricting the circumstances in which costs may be awarded.

42. A variation on the theme, so to speak, not cited to us by the parties, is to be found before VAT and Duties Tribunals. Rule 29 of the Value Added Tax Tribunal Rules 1986 gives those tribunals a wide power to award costs. It appears that, where costs are applied for, the rule in those tribunals is that costs follow the event: see the decision of the President of the VAT and Duties Tribunals in *University of Reading* [1998] VAT DR 27. The Commissioners of Customs and Excise have, however, stated that they will not seek costs against unsuccessful appellants where there has been no misuse of the tribunal procedures, except in "certain narrowly defined cases" comprising "those exceptional tribunal hearings of substantial and complex cases where large sums are involved and which are comparable with High Court cases, unless the appeal involves an important general point of law requiring clarification" (Parliamentary answer by the Minister of State, Treasury, 24 July 1986 Hansard V-1 102, Cols 459-60).

43. In *Bradford Metropolitan District Council v Booth* 164 JP 485 (10 May 2000), also not cited to us, Lord Bingham CJ gave guidance on the approach to costs in the admittedly very different context of a successful appeal to a magistrates court against the decision of an local authority in a vehicle licensing matter. Under section 64(1) of the Magistrates Courts Act 1980, the court may, in such circumstances, order the defendant to pay the complainant such costs "as it thinks just and reasonable". It was argued in that case that where the local authority, in the exercise of its statutory duty, had not acted unreasonably or in bad faith, costs should lie where they fall.

44. Lord Bingham CJ held that the proper approach to costs in such circumstances could be summarised as follows:

> "1. Section 64(1) confers a discretion upon a magistrates court to make such order as to costs as it thinks just and reasonable. That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them.
>
> 2. What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court. The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the subsection.
>
> 3. Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appeared to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities 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."

45. Lord Bingham then concluded, in that statutory context, that there was no rule that costs should follow the event, but neither was there a rule that costs should be awarded against the local authority only if it had behaved unreasonably or in bad faith.

46. In the Court of First Instance of the European Communities in Luxembourg, which exercises a similar but not identical jurisdiction to this Tribunal, the normal order is that the successful undertaking is awarded its costs under Article 87(2) of the CFI Rules (OJ 2001 C34/30). Thus, when the European Commission loses a competition case under Articles 81 and 82 of the EC Treaty, it will be ordered to pay the costs. In practice, however, the bills of costs presented by the successful undertaking are taxed severely downwards, by an admittedly opaque process of reasoning, a narrow view being taken as to the level of expenses that may properly be described as "necessarily incurred" within the meaning of Article 91(b) of the CFI Rules (see for example Case T-78/89 DEPE *PPG Industries Glass v Commission* [1993] ECR II-0573; Case T-2/93 DEPE *British Airways v Air France* [1996] II ECR 0235; Case T-65/96 DEP *Kish Glass v Commission*, order of 8 November 2001, not yet reported). In such cases the sums awarded on taxation often represent somewhere between 25 to 50 per cent of the sum originally claimed. By this "broad brush" means some rough balance is sought to be maintained between the requirements of fairness to the parties, on the one hand, and the need to contain the costs of litigation, on the other hand.

47. Against that background we turn to the particular statutory context with which we have to deal.

— *The discretion under Rule 26(2)*

48. First of all, our wide discretion under Rule 26(2) must be exercised judicially, taking all relevant factors into account. In this new jurisdiction it seems to us that we should not, at this early stage, seek to formulate rigid rules on the question of costs, but should proceed on a case by case basis, retaining flexibility to meet circumstances as they arise. By analogy with the overriding objective in civil proceedings, our principal aim must be to deal with cases justly.

49. As to what factors are relevant to the exercise of our discretion, an obvious factor is the financial prejudice, by way of costs, that the successful appellant has suffered as a result of having brought the case. We do not accept the submission, apparently advanced by the Director, that this Tribunal is in some way merely an extension of the system of administrative enforcement of the Chapter I and Chapter II prohibitions set up under the Act. This Tribunal is constituted as an independent

and impartial tribunal within the meaning of Article 6 of the European Convention on Human Rights and Fundamental Freedoms and proceedings before it are judicial, not administrative. In civil proceedings in each of the three legal systems of the United Kingdom of which this Tribunal forms part, the financial prejudice suffered in costs, as a result of having asserted a lawful right is recognised by an award of costs, the general rule being that the unsuccessful party pays all or some of the successful party's costs. The same is true of proceedings before the Court of Justice and the Court of First Instance in Luxembourg, which exercise a similar jurisdiction to our own as far as the subject matter is concerned. Thus the fact that a successful appellant has been put to expense in exercising his rights under the Act is a factor relevant to the exercise of our discretion, even though we accept that it is not necessarily a decisive factor.

50. Secondly, however, as the *AEI Rediffusion* case demonstrates, the outcome of a particular case may not necessarily result in an order for the payment of costs by one side to the other, because it may not be possible to identify, realistically, whether one party rather than the other is the successful party or "the winner". As *AEI Rediffusion* indicates, it does not seem to us that Rule 26(2) of this Tribunal's Rules requires us to identify some particular "event" which the costs should "follow". There may well be cases before this Tribunal where, whatever the formal outcome, the substance of the result is "a draw" or "somewhere in the middle". It seems to us that in such circumstances, in accordance with *AEI Rediffusion*, the costs should lie where they fall if neither side has prevailed in a decisive way.

51. Thirdly, and in line with modern practice in the civil courts, it may well be the case that a party who has in one sense prevailed, may be awarded only a part or even no costs if that party has lost on particular issues, or incurred costs on matters that were irrelevant, or of secondary importance, or has acted unreasonably, or in ways which have added unnecessarily to the length or complexity of the proceedings: see generally by analogy CPR r. 44.3(4) and (5). Any costs orders made by the Tribunal should reflect factors of that kind.

52. Fourthly, different considerations are likely to apply to different kinds of cases. As far as orders for costs against losing appellants are concerned, cases involving penalties will require particular consideration and we do not deal with such cases here. Cases involving regulated industries where the costs of statutory regulation are recovered, in one way or another, from the industry itself may also raise separate issues.

53. Fifthly, it seems to us that any analogy there may be with the rule in civil litigation that the losing party should pay the winning party's costs, should be displaced, in the exercise of our discretion, where we are satisfied that such a rule would frustrate the objects of the Act.

54. At present there seems to us to be force in the contention that a general or rigid rule to the effect that losing *appellants* should normally be liable for the Director's costs, as well as their own, could tend to deter appeals: see Lord Woolf in *AEI Rediffusion* at p.1522D. That, it seems to us, could be seriously counter-productive from the point of view of achieving the objectives of the Act, particularly as regards smaller companies, representative bodies and consumers. Leaving aside frivolous or vexatious cases, or those liable to be struck out under Rule 8 of the Tribunal's Rules, that policy consideration should, it seems to us, militate against the Tribunal awarding the Director his costs against unsuccessful appellants, whether in proceedings under section 46 or 47, at least in the absence of unreasonable conduct or other exceptional circumstances. A similar approach might apply in cases where the Director was concerned to establish a point of general public importance, going beyond the ramifications of the instance case. Such considerations might, however, have less weight in plainly unfounded appeals brought by corporate appellants with large financial resources.

55. As far as cases where (as here) it is *the Director* who is unsuccessful, the principal policy argument advanced by the Director is that it would bear unduly heavily on the public purse if the Director was regularly faced with large bills of costs from successful appellants. The Director stresses that litigation before the Tribunal may be very complex, and the issues may be far from clear cut. The potential liability for costs in such cases would, says the Director, drain his resources, making it very difficult for him to pursue his statutory duty in a proper way, and may even deter him from taking appeallable decisions.

56. We are not without sympathy for the general concerns expressed by the Director. The cost of litigation in the United Kingdom is high. We are aware that there is, within the civil justice system, a wider debate as to what the proper approach to costs should be. In proceedings under the Act powerful companies may well expend very large sums in employing lawyers, instructing experts and taking many points on a "no expense spared" basis. We can understand why the Director may quail at the thought of being ordered to pay costs in such cases. In addition, as Lord Bingham CJ pointed out in *Booth's* case, cited above, there is a public interest in encouraging public authorities 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. Thus we accept that the factors urged on us by the Director are potentially relevant to the exercise of our discretion.

57. Again, however, we think that those factors cannot be decisive. In particular, we think that considerations of public expenditure cannot be decisive in cases where considerations of fairness point in the opposite direction. We also bear in mind that the Act endows the Director, in the public interest, with wide ranging and draconian powers, exercised on behalf of the State, which may substantially affect the civil rights and obligations of those concerned. The costs of the administrative procedures under the Act are not recoverable by the persons affected. However, the Act provides that the exercise of the Director's powers may be challenged, on grounds of both fact and law, before a judicial tribunal. The Tribunal has been given the power to award costs. That power, it seems to us, is a counterbalancing element in the system which both imposes a necessary discipline on all concerned, and enables the Tribunal to deal with the issue of costs as fairly as possible according to the particular case.

58. We think, therefore, it would not be proper, certainly at this early stage, to fetter our discretion under Rule 26(2) by adopting a general principle to the effect that, if the Director loses, he should be liable to pay costs to a private party only if he has been guilty of a manifest error or unreasonable behaviour. *Booth's* case indicates that such a rule is not, as a matter of law, required. To introduce such a rule in the context of this Tribunal could, in itself, be a disincentive to exercising the right to appeal, with possible detriment to the competitive process in the market.

59. In our view, the Director's concerns over costs are better addressed by other means. The aim of the Tribunal's case management procedures is to focus as early as possible on what the main issues are so as to avoid unnecessary escalation of costs. That aim is supported by the use of written procedure, sanctions against prolixity, control over the presentation of expert evidence, limits on oral hearings, and strict timetabling. Disclosure of documents, which is a major source of cost in traditional litigation, is minimised before the Tribunal. While it is, perhaps, inevitable that some cases before the Tribunal will be expensive, the Tribunal's procedures are designed to save costs wherever possible. The Director did not have the advantage of that system under the former Restrictive Trade Practices Acts.

60. Furthermore the Tribunal will, as necessary, use its powers in relation to costs in support of its case management powers. We have already referred to developments in the civil courts designed to

ensure that the costs incurred are proportionate to the matters at stake, and in particular the willingness of the courts to make orders which reflect the parties' degree of success on particular issues. In addition, many factors may be relevant to orders for costs, or indeed whether to make any order at all. Such factors may include whether the appellant has succeeded to a significant extent on the basis of the new material introduced after the Director's decision but not advanced at the administrative stage; 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.

61. In our view the issue of multiple appeals raising the same point, apparently a major source of concern to the Director, can conveniently be addressed in the case management context and the appropriate orders made, if necessary on the Director's application. Similarly the Director's hypothetical example of a case where he loses narrowly on an issue involving a complex economic assessment is a case for another day which we need not rule on now.

62. We turn now to see how the balance should be struck between the various factors we have mentioned in the circumstances of the present case.

The IIB's application

63. In our judgment, in the circumstances of this particular case we should exercise our discretion to award the IIB costs against the Director.

64. From the outset, the issue was whether Rule F42 of the GISC Rules had as its object or effect the prevention, restriction or distortion of competition in the United Kingdom within the meaning of the Chapter I prohibition. From July 2000 onwards the IIB submitted to the Director that it did. When, in the GISC Decision of 21 January 2001, the Director adopted the contrary view, the IIB following the correct procedure under section 47(1) of the Act, invited the Director to withdraw or vary the GISC Decision, again pointing out that Rule F42 was caught by the Chapter I prohibition. The Director rejected that contention in his decision addressed to the IIB of 11 May 2001 ("the IIB Decision"), at which point the IIB availed itself of the only remedy open to it, namely an appeal to this Tribunal under the Act. The Director was thus plainly on notice of the point being taken against him, and had what the IIB describes as a "cost free" opportunity to change his mind.

65. On the main issue, which was a straightforward point of law as to the application of the Chapter I prohibition to Rule F42, the IIB was wholly successful before the Tribunal: see paragraphs 179 to 218 of the judgment.

66. In particular the Tribunal found that neither of the two arguments put forward by the Director in the GISC Decision were sustainable: paragraphs 193 to 201 of the judgment. The argument that became the Director's principal argument – namely that Rule F42 was not a "restriction on competition" because the overall effect of the GISC Rules was not anti-competitive – barely figured, in either the GISC Decision or the IIB Decision, and was rejected by the Tribunal at paragraphs 210 to 217 of its judgment.

67. On this main point regarding Rule F42, it seems to us that the application of a fairly straight-forward legal analysis ought to have led the Director to the conclusion that the IIB was correct. No authority was convincingly cited to us in support of the Director's position on the main issue regarding Rule F42. At the very least, we very much doubt whether it could be said that the IIB or GISC Decisions were taken on "grounds that reasonably appeared to be sound", to use the words of Bingham CJ in *Booth*. Even on the Director's submission, whereby his liability for costs should depend, notably, on whether he had made a "manifest error" (see paragraph 25), it is hard to see how the Director's legal position on Rule F42 could have been successfully sustained.

68. The IIB is a representative organisation of small- and medium-sized insurance brokers, and does not appear to command substantial financial resources. We are satisfied that it has incurred significant financial expense relative to its resources, as a result of bringing the appeal. The IIB's interests were very directly affected by the GISC Decision which would, in effect, have led to its members being compelled to join GISC at the IIB's expense: paragraphs 224 to 228 of the judgment. The delay of nearly three months between the IIB's application under section 47 on 22 February 2001 and the IIB Decision of 11 May 2001 prevented IIB from pursuing its appeal earlier than would otherwise have been the case.

69. Bearing in mind and balancing the various factors we have identified, including those mentioned by the Director, we think it right that, in the circumstances of this case the IIB should, in principle, recover costs in respect of the main application under section 47(6).

70. That takes us to the question of whether any part of the IIB's costs of the main application should be disallowed. We have considered whether the IIB's costs, for instance, relating to the issue of "competition between regulators" (paragraphs 229 to 259 of the judgment) should lie where they fall. In our view, however, in the particular circumstances of this case, we should not separate matters in that strict way. The arguments on this point interrelated within the main Rule F42 point. In any event we rejected the Director's arguments on the "competition between regulators" issue.

71. As regards the IIB's application for interim relief made under Rule 32 of the Tribunal's Rules, it is true that that application was resolved by GISC agreeing to write to its members in terms satisfactory to the IIB, so the Tribunal did not have to rule on it (paragraph 22 of the judgment). Nonetheless in our view that application was properly made and would have resulted in an order in the IIB's favour had the matter not been dealt with by agreement. The making of the application for interim relief helped to preserve the integrity of the appeal and to avoid what might otherwise have been a fait accompli. In those circumstances we think that the costs of the interim relief application, which are not likely to form a large proportion of the whole, are properly recoverable by the IIB.

72. As regards the costs incurred by the IIB as a result of GISC's intervention, we agree with the Director that such costs should not be borne by him. We deal below with the question whether they should be borne by GISC.

ABTA

73. It is true that ABTA was not affected by the GISC Decision as seriously as the IIB, and that ABTA appears to have greater financial resources than the IIB. ABTA did not protest to the Director prior to the GISC Decision as vigorously as did the IIB, although it did object in writing to the Director as regards Rule F42 before the GISC Decision was adopted. Nonetheless ABTA correctly followed the section 47 procedure, and invited the Director to withdraw the GISC Decision on the basis of substantially the same argument as that on which ABTA succeeded before the Tribunal. ABTA has suffered considerable financial detriment by way of costs. We cannot see any sufficient distinction between ABTA and the IIB as regards the principle of an award of costs in ABTA's favour. ABTA, like the IIB, has succeeded before the Tribunal on the basis of a relatively clear cut point of law on which the Director fell into error.

One set of costs

74. In the particular circumstances of this case, we do not think it would be correct to order only one set of costs to be 'shared' between the IIB and ABTA. The Director took two separate decisions on 11 May 2001, there were two separate appeals, and the two parties were in a different position and had different arguments, albeit that their submissions arrived at the same conclusion on the main Rule F42 point. Separate representation was both legitimate and inevitable. Considerable costs were saved by having a relatively short consolidated hearing and it would appear that duplication was kept to a minimum at the hearing. The Tribunal's procedure aims to define the issues as far as possible, and in particular avoid unnecessary costs at the stage of the hearing. Avoidable duplication could still be taken into account at the stage of assessment. The Tribunal agrees with the Director, however, that vigilance is necessary in future multi-partite cases to see that costs are kept to a minimum.

The costs of GISC's intervention

75. We have already said that we do not see any basis under Rule 26 for ordering the Director in this case to pay any additional costs occasioned to the IIB or ABTA by GISC's intervention. We are not aware that it is the practice of the Court of First Instance to make orders of that kind against the European Commission in cases where the costs occasioned by the intervention are material.

76. That leaves the question whether GISC should be ordered to pay some part of the IIB's and ABTA's costs.

77. The practice in the Court of First Instance under Article 87 of the CFI Rules is that a party who intervenes in support of the losing party is ordered to pay the winning party the additional costs occasioned to the latter by reason of the intervention, and vice-versa. (For an example of an intervener recovering costs against a losing appellant, see *Kish Glass*, cited above.)

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 an 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.

79. 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.

80. 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 (paragraphs 260 to 267 of the judgment). Although it was, in general, helpful to the Tribunal that GISC intervened, it was in GISC's interest to do so. GISC's intervention did cause the IIB and ABTA to incur extra costs. Although the error made in this case was that of the Director, it was GISC's application to the Director which contained an application for negative clearance, which GISC pursued, which led to these proceedings in the first place. In those particular circumstances we think we should follow the practice of the Court of First Instance, and order that GISC pay the IIB and ABTA the costs occasioned to them by its intervention.

81. Making for convenience a necessarily broad assessment, we fix the proportion of the costs occasioned by GISC's intervention at 15 per cent of the whole.

The costs of the application for costs

82. It is true that it was the Tribunal which invited the parties to make submissions on the question of costs, and that those costs are higher than they would have been but for the novelty of the situation facing the Tribunal. Nonetheless the issue of costs arose as a result of the IIB's and ABTA's success in the main case. The Tribunal has substantially accepted the IIB's and ABTA's submissions on costs as against the Director. In those circumstances we think the Director should pay the assessed costs incurred by ABTA and the IIB in relation to the application for costs between 17 September 2001 and the date of this judgment.

Assessment of costs

83. The IIB and ABTA ask for summary assessment or, in default, a substantial interim payment pending the detailed assessment. The Director proposes detailed assessment.

84. In our judgment sums of costs of the kind in issue here should be assessed in a summary fashion wherever possible, both in the interests of time and in avoiding further costs being incurred in

detailed assessment. There are clearly advantages to everyone if agreement can be reached. The IIB's and ABTA's request for an interim payment in any event is, however, a reasonable one, and should be met. We have power to make such an order under Rule 26(2) and (3).

85. In those circumstances the Tribunal invites the Director and GISC to seek to reach agreement with the IIB and ABTA within 21 days as to the question of reasonable costs. In default of such agreement, the Director and GISC should, within a further period of 7 days, briefly indicate to the Tribunal their reasons for contesting the costs sought by the IIB and ABTA. The IIB and ABTA will then have a brief opportunity to reply. The procedure to be followed thereafter will be decided by the Tribunal, which will either decide the matter itself or take one of the other courses envisaged by Rule 26(3). Failure to co-operate in a reasonable way may be met by further orders for costs and/or interest.

86. On those grounds the Tribunal hereby

ORDERS:

(1) The Director will pay the IIB and ABTA respectively 85 per cent of such sums as may be agreed between the parties or be determined pursuant to Rule 26 of the Tribunal Rules in respect of the costs of their respective applications under section 47(6) of the Competition Act determined by the judgment of the Tribunal of 17 September 2001, including the costs in respect of the costs of the application for costs.

(2) GISC will bear its own costs, and the costs of the IIB or ABTA occasioned by GISC's intervention, such costs being assessed at 15 per cent of the whole.

(3) The Director will within 28 days make an interim payment on account of costs to the IIB of £45,000 and to ABTA of £45,000.

(4) The Director and GISC shall within 21 days of this judgment seek to reach agreement with the IIB and ABTA as to the balance of the amount of costs recoverable within paragraphs (1) and (2) above. In default of such agreement the Director and GISC shall, within a further period of 7 days make such submissions as they think fit to the Tribunal on the question of the assessment of costs. The procedure to be followed thereafter will be determined by the Tribunal.

(5) The Director will bear his own costs.

(6) Liberty to apply.

Christopher Bellamy Ann Kelly Adam Scott

Charles Dhanowa
Registrar

29 January 2002