ORDER OF THE COURT (First Chamber)

8 July 2004 *

In Case C-286/95 P-DEP,

Imperial Chemical Industries plc (ICI), represented by S. Berwick, Solicitor,

applicant,

v

Commission of the European Communities, represented by J. Currall, acting as Agent,

defendant,

APPLICATION for taxation of recoverable costs following the judgment of the Court of 6 April 2000 in Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341,

* Language of the case: English.

THE COURT (First Chamber),

composed of: P. Jann (Rapporteur), President of the Chamber, J.N. Cunha Rodrigues, N. Colneric, E. Juhász and E. Levits, Judges,

Advocate General: C. Stix-Hackl,
Registrar: R. Grass,

after hearing the Advocate General,

makes the following

Order

1 By application lodged at the Registry of the Court of Justice on 30 August 1995, the Commission of the European Communities brought an appeal pursuant to Article 49 of the EC Statute of the Court of Justice against the judgment of 29 June 1995 in Case T-37/91 *ICI* v *Commission* [1995] ECR II-1901, by which the Court of First Instance annulled a Commission decision against Imperial Chemical Industries plc (hereinafter 'ICI') relating to a proceeding under Article 86 of the EEC Treaty (which became Article 86 of the EC Treaty, and is now Article 82 EC). By judgment of the same date in Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, the Court of First Instance also annulled a Commission decision against ICI relating to a proceeding under Article 85 of the EEC Treaty (which became Article 85 of the EC Treaty, and is now Article 81 EC). No appeal was brought against that judgment.

2 By judgment of 6 April 2000 in Case C-286/95 P *Commission* v *ICI* [2000] ECR I-2341, the Court of Justice dismissed the appeal against the judgment of the Court of First Instance in Case T-37/91 and ordered the Commission to pay the costs of the appeal.

3 As no agreement had been reached between ICI and the Commission as to the costs to be recovered, ICI requested the Court of Justice to fix the costs pursuant to Article 74 of the Rules of Procedure, by document lodged at the Court Registry on 16 October 2003.

Arguments of the parties

4 ICI requests the Court to fix the recoverable costs at GBP 76 910 (approximately EUR 115 000). That sum is broken down as follows:

— Counsel's fees and expenses for drafting written pleadings before the Court

— senior counsel GBP	22 901
— junior counsel GBP	12 459

— Counsel's fees and expenses for preparation for and attendance at the hearing before the Court of 7 October 1999

— senior counsel GBP	25 226
— junior counsel GBP	10 058

— Travel and accommodation expenses in relation to visit to Brussels by senior counsel and two ICI in-house solicitors who attended lawyers' meetings on 14 November 1995, 13 March 1996 and 28 September 1999

GBP 2 010

— Travel and accommodation expenses in relation to visit to Luxembourg by senior and junior counsel and the two ICI in-house solicitors who attended the hearing before the Court (GBP 1 873) and the hiring of a conference room (GBP 1 488.99), making a total of

GBP 3 361.99

— Costs of having an address for service paid to a law-firm in Luxembourg

GBP 894

that is to say a total of GBP 76 909.99.

5 In support of those figures, ICI produced to the Court two notes of fee from its senior counsel, one of 17 June 1996 for GBP 23 625 and the other of 13 January 2000 for GBP 26 023, together with three notes of fee from its junior counsel, the first of

13 December 1995 for GBP 9 781.25, the second of 13 June 1996 for GBP 3 071.25 and the third of 10 November 1999 for GBP 10 375.

6 ICI argues that the case in question was exceptionally complex and technical and that the documents involved were voluminous. There were new and extremely difficult questions of law to address, particularly in view of the absence of precedent in the area of rebating. Questions of, inter alia, dominant position, abuse and inter-State trade required extensive research and argumentation.

7 As regards the use of two counsel, ICI submits that the senior counsel who had represented it at first instance was no longer available to represent it at the proceedings on appeal. It therefore decided to use the services of a junior counsel who had supported that senior counsel at the first instance proceedings and who had an extensive knowledge of the facts of the case. In light of the importance and complexity of the case, that resulted in less work being required of the senior counsel representing it on appeal.

8 Furthermore, the financial aspect of the case was of fundamental importance to ICI. The fine of ECU 10 million imposed on the company for abuse of its dominant position was at the time one of the largest the Commission had ever imposed.

9 As regards the travel and subsistence expenses incurred in relation to the hearing before the Court, ICI contends that the presence of two counsel and of two in-house company solicitors was necessary in order that the arguments be properly addressed. In particular, the involvement of the in-house solicitors allowed the fees paid to external solicitors to be substantially reduced.

10 The Commission argues that ICI's application for the recoverable costs to be fixed at GBP 76 910 is excessive. The same is also true of the application for GBP 203 340 submitted at the same time by the company to the Court of First Instance in respect of the proceedings before that Court.

11 The Commission asks the Court to fix the recoverable costs in this case at GBP 25 000.

12 It submits that most of ICI's arguments in this case concerned in reality the two proceedings before the Court of First Instance, which addressed two separate decisions, one relating to a concerted practice and the other an abuse of a dominant position. However, the appeal only concerns the second decision annulled by the Court of First Instance, on the single ground that that decision had not been authenticated pursuant to the Commission's Rules of Procedure, and not on grounds involving the substance of the matter. Those arguments are accordingly irrelevant.

13 While the case before the Court of First Instance involving the concerted practice was notable for its complexity, the same does not apply to either the case involving the abuse of a dominant position or the appeal arising from it, which only concerns the lack of authentication of the Commission's decision. A comparison of the lengths of the respective judgments, comprising 83 pages in the European Court Reports for the two judgments of the Court of First Instance and 18 pages for the judgment of the Court of Justice, of itself shows the respective importance of the cases.

14 Moreover, the issue as to the authentication of the Commission's decision is not new. It was debated when the so-called *'PVC 1'* cases were considered, which resulted in the judgment of the Court of First Instance in Joined Cases T-79/89, T-84/89, T-85/89, T-86/89, T-89/89, T-91/89, T-92/89,T-94/89, T-96/89, T-98/89,

T-102/89 and T-104/89 *BASF and Others* v *Commission* [1992] ECR II-315 and the judgment of the Court of Justice in Case C-137/92 P *Commission* v *BASF and Others* [1994] ECR I-2555. In this case, only two issues were raised by the Commission in its appeal, relating to the effects of failure to authenticate and to the way in which the Court of First Instance had applied Article 48(2) of its Rules of Procedure when it allowed ICI to raise the argument as to lack of authentication at a late stage.

15 Furthermore, the Court of Justice itself did not regard the case or the arguments raised as presenting any particular difficulties, as it held that one of the Commission's two grounds of appeal was manifestly unfounded (*Commission* v *ICI*, paragraph 66). The Court thus considered that ICI's task in defending the appeal was not a difficult one.

Findings of the Court

16 Under Article 73(b) of the Rules of Procedure, 'expenses necessarily incurred by the parties for the purposes of the proceedings, in particular the travel and subsistence expenses and the remuneration of agents, advisers or lawyers' are to be regarded as recoverable costs.

17 As Community law does not contain any provisions laying down a scale of fees, the Court must consider all the facts of the case, taking into account the purpose and nature of the proceedings, their significance from the point of view of Community law, as well as the difficulties presented by the case, the amount of work generated by the dispute for the agents and advisers involved and the financial interest which

the parties had in the proceedings (see, inter alia, order of 30 November 1994 in Case C-294/90 DEP *British Aerospace* v *Commission* [1994] ECR I-5423, paragraph 13, and order of 17 February 2004 in Case C-321/99 P-DEP *DAI* v *ARAP and Others*, not published in the European Court Reports, paragraph 16).

18 The amount of the recoverable costs must be assessed in the light of those criteria.

19 As regards the financial interest which the parties had in the proceedings, there can be no doubt that the case was of considerable financial importance for ICI, having regard to the amount of the fine imposed on it by the Commission in relation to the allegation of an abuse of a dominant position.

20 As regards the purpose and nature of the proceedings, it should be noted that the case involved appeal proceedings which are by definition limited to questions of law and do not involve findings as to fact.

21 In this case, the issues on appeal to which ICI required to respond related to two questions of law.

22 The first involved the authentication of acts under the first paragraph of Article 12 of the Commission's Rules of Procedure. In *Commission* v *ICI* the Court held, on the basis of its judgment in *Commission* v *BASF and Others*, that authentication constitutes an essential procedural requirement within the meaning of Article 230

EC, breach of which may give rise to an application for annulment. Furthermore, authentication must occur before the act in question is notified to the parties concerned. The second question on appeal was whether a failure to authenticate may be raised by the Community judicature on its own motion. The Court replied to that question in the affirmative.

23 It is true that those two very narrow questions are significant from the point of view of Community law. However, the first had essentially already been decided in *Commission* v *BASF and Others*, and the second was not a particularly complicated one. Nor were the difficulties presented by the case exceptional in nature.

24 As regards the amount of work generated by the dispute for ICI's advisers, it should be pointed out that they drafted two pleadings relating to the narrow questions referred to above in response to those of the Commission. In addition, the hearing before the Court of 7 October 1999 lasted approximately two hours. The workload imposed on those advisers thus represents a case of some, but not exceptional importance.

25 In those circumstances, the fees and expenses of counsel proposed by ICI and amounting to GBP 70 644 (GBP 22 901 and GBP 25 226 for senior counsel and GBP 12 459 and GBP 10 058 for junior counsel) were not objectively necessary for the defence of that company's interests in the appeal.

26 As regards more particularly the expenses incurred through the use of two counsel, it should be pointed out that the proceedings on appeal were limited to two very specific legal issues which were not connected with the findings of fact which the

Court of First Instance required to make. Furthermore, those findings were of greater importance to the proceedings concerning the infringement of the rules relating to concerted practices than to those relating to the abuse of a dominant position, which was the sole issue on appeal. The incurral of fees relating to the second counsel, on the ground that he was particularly familiar with the proceedings at first instance and the factual aspects of the case, was thus not essential. To ask the Commission to meet those fees is accordingly not justified.

27 In the light of all those matters and having regard to the criteria referred to in paragraph 17 of this order, the recoverable fees and expenses of counsel must be fixed at GBP 25 000.

28 As regards the sum of GBP 2 010 for the travel and subsistence expenses of the two counsel and two in-house solicitors incurred in arranging three meetings in Brussels, ICI has not offered any explanation to the Court as to either the nature of those meetings, or their necessity for the purposes of the appeal proceedings or the need to conduct those meetings in Brussels. That amount cannot therefore be accepted.

29 With respect to the travel and accommodation expenses for the hearing before the Court, which ICI sought to recover for the two counsel and the two in-house solicitors, these should be allowed in respect of only one counsel, as the presence of the second counsel was not essential for the same reasons as are set out in paragraph 26 of this order, and only one in-house solicitor, that is to say a total of GBP 936.50. There should be added to that amount the costs of having an address for service in Luxembourg, namely GBP 894. The hiring of a conference room for GBP 1 488.99 cannot, though, be accepted, as that was not necessary expenditure.

30 In the light of all the foregoing considerations, the costs recoverable in Case C-286/95 P can be assessed on an equitable basis at GBP 26 830.50.

On those grounds,

THE COURT (First Chamber)

hereby orders:

The total costs to be reimbursed by the Commission of the European Communities to Imperial Chemical Industries plc (ICI) in Case C-286/95 P are fixed at GBP 26 830.50.

Luxembourg, 8 July 2004.

R. Grass

Registrar

P. Jann

President of the First Chamber