



Neutral citation [2005] CAT 35

IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

13 October 2005

Before:

Marion Simmons QC (Chairman)

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

Mr Edward Mercer (of Taylor Wessing) appeared for the Appellant.

Mr Rupert Anderson QC (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

Mr Stephen Wisking (of Herbert Smith) appeared for the First Intervener, Vodafone Limited

Ms Robyn Durie appeared for the Second Intervener, T-Mobile (UK) Limited

Heard at Victoria House on 12 October 2005

RULING: STRIKE-OUT APPLICATION

1. This is an application by Vodafone to strike-out from this appeal any reference by the appellant, Floe Telecom Limited (“Floe”) to the supply by Vodafone of telecommunications services to a company called Recall Support Services Limited (“Recall”). Floe seeks to adduce such evidence to support an allegation in its Further Amended Notice of Appeal of discrimination by Vodafone contrary to the Chapter II prohibition of the Competition Act 1998. I have heard this application sitting alone pursuant to the Tribunal’s order of 20 September 2005.
2. The appeal concerns Vodafone’s disconnection of the telecommunications services Floe provided on a commercial basis over GSM gateway devices to multiple users. The background to this matter is that OFCOM’s predecessor the Director General of Telecommunications made a decision on Floe’s complaint on 3 November 2003. The joint administrators of Floe appealed to the Tribunal against that decision which was set aside by the Tribunal’s judgment of 19 November 2004 [2004] CAT 18 and pursuant to paragraph 3(2) of Schedule 8 to the 1998 Act the Tribunal remitted the matter to OFCOM for further investigation. OFCOM made their second decision on 28th June 2005 (the “June Decision”).
3. The evidence in respect of Recall was identified by Floe after OFCOM had taken the June Decision and accordingly was not drawn to OFCOM’s attention during their re-investigation.
4. In paragraph 338(j) of the Tribunal’s judgment of November 2004 the Tribunal decided that the Director ought to have taken into account but failed to take into account inter alia:

“whether the criteria established by Vodafone on which it based its decision to disconnect Floe were capable of distinguishing between “public” and “private” use (and/or single use and multi-party use, if relevant)”.
5. OFCOM, in paragraphs 288 to 293 of the June Decision, set out the criteria which Vodafone had used to identify “Commercial Multi-User GSM Gateways” and stated that it was satisfied that the criteria Vodafone adopted for identifying Commercial

Multi-User GSM Gateway use were reasonable. The criteria adopted by Vodafone are described in paragraphs 289 and 290 of the June Decision as follows:

“Vodafone stated that what first led it to suspect that particular SIMs were being used in Commercial Multi-User GSM Gateways, including those used by Floe, was a combination of the following two factors:

- a) very high mobile to mobile usage; and
- b) no fixed to mobile calls.

Vodafone then carried out further analysis of SIMs it suspected of being used in Commercial Multi-User GSM Gateways. Vodafone considered that SIMs used in Commercial Multi-User GSM Gateways would typically have the following additional characteristics:

- they had very high mobile-to-mobile usage, on average 407.3 minutes usage per SIM per day;
- they used price plans with low on-net rates;
- they were originating calls from fixed locations;
- they were in batches of sequential SIMs; and
- they were associated with congestion on Vodafone’s network”

6. In paragraphs 313 to 332 of the June decision OFCOM considered Floe’s complaint of discrimination and concluded that:

“319. On the basis of the evidence provided to it by Vodafone, it does not appear to Ofcom that Vodafone has discriminated in its treatment of companies which it has suspected of using Commercial Multi-User GSM Gateways on its network.

“320. As noted above, Vodafone identifies the use of Commercial Multi-User GSM Gateways on its network by examining the traffic profile and call volumes of SIMs. Vodafone has confirmed to Ofcom that, in each case that it has identified suspected Commercial Multi-User GSM Gateway use on its network, it has either taken steps to disconnect the SIMs itself or, in the case of certain SIMs supplied by Vodafone service providers, the service provider has disconnected the SIMs.

(...)

“325. Vodafone has confirmed that it has disconnected SIMs used by a total of 38 companies, including companies that had purchased SIMs directly from Vodafone Corporate and which Vodafone suspected of operating Commercial Multi-User GSM Gateways, and also SIMs used by its service providers where Vodafone suspected that either those service providers or the service providers’ customers were using the SIMs in commercial multi-user GSM Gateways. Vodafone stated that this amounted to between [X] SIMs in total.”

7. In paragraph 10 of its Further Amended Notice of Appeal Floe referred to the evidence of Mr Stonehouse and Mr Happy (discussed below) and stated that:

“.. it is clear that Vodafone and its service providers have continued to provide SIMs for use in GSM Commercial Multi-Use Gateways throughout the period from the hearing on 19 and 20 July 2004 and how the first intervener continued to support SIMs which it knows provide Commercial Multi-Use GSM Gateway services as at the date of this document. It is apparent from [the evidence of Mr Happy and Mr Stonehouse] that though they had a concerted programme of removing from service SIMs associated with Commercial Multi-Use Gateways (COMUGs) significant numbers of SIMs providing such services were retained in operation by Vodafone in respect of some customers still utilising COMUGs until the date hereof.”

8. In paragraph 2(a)(ii) of the Appendix to the Further Amended Notice of Appeal (the “Appendix”) Floe contend that Vodafone continued to date to supply SIMs for commercial multi-user gateways and that Vodafone’s motive, rationale and decision to switch off Floe’s SIMs was based on the amount of loss that it was making per SIM and not considerations of harmful interference. It should be noted in parentheses that although the criteria relate to traffic profile and call volumes data it can be seen from paragraph 321 and footnote 149 of the June Decision that consideration of monetary value was also taken into account by Vodafone in deciding the order in which companies should be switched off.

9. In paragraph 2(c)(i), bullet point 9, of the Appendix Floe submits that:

“The criteria established by Vodafone on which it based its decision to disconnect Floe could not have been capable of distinguishing between all “public” and “private” use. This is because some private or single customer uses provide call patterns exactly the same as multi-use gateways. For example call patterns provided by a single use large institution such as a bank with a number of inter-premise and inter-personal connections will be the same as COMUGs.”

10. It appears from paragraph 2(e) of the Appendix that Floe contends that, notwithstanding Vodafone’s submission that its criteria properly identifies all Commercial Multi-User GSM Gateway providers, and that accordingly having applied those criteria it has switched off all such providers, there remain other Commercial Multi-User GSM Gateway providers who have not been switched off by Vodafone. Floe submits that this calls into question whether the criteria used by Vodafone were reasonable for the purpose of identifying Commercial Multi-User GSM Gateway providers.

11. In support of these submissions Floe have provided witness statements from Mr Stonehouse and Mr Happy.

12. Paragraph 4 of the first witness statement of John Stonehouse states:

“I have also had discussions with Recall Support Services Limited (“Recall”) who are a subsidiary of a provider of telecommunications services and were at one time, I believe, a subsidiary of a large defence company or aeronautical company. I have also had a chance to look through their files. To my mind it is undoubtedly the case that both Vodafone Limited (“Vodafone”) and T-Mobile (UK) Limited (“T-Mobile”) supplied SIMs for use in all kinds of gateways to Recall and did so knowingly. Regarding Vodafone, there is still continued operation of the SIMs. In the case of T-Mobile some have now been switched off. Although it is possible, I presume, for Vodafone and/or T-Mobile to argue that SIMs were given to Recall for the purpose of running a large telematics vehicle fleet project, examination of the facts and details show that it is beyond doubt that there was knowledge of what the SIMs were, in the short term, to be used for.”

13. Paragraph 4 of the second witness statement of David Happy states:

“I turn now to the question of the activities of the GSM MNOs over the last two years or so. In particular I want to look at the period when this appeal was first started at the beginning of 2004. It is clear to me from having talked to a number of companies including GCI, Worldwide Connect UK Limited, Recall Support Services Limited (“Recall”) and the Mobile Gateway Operators Association that MNOs have been selling SIMs for use in all kinds of gateways in the relevant period. I have seen what Ofcom says about the investigations it has made in relation to Floe and VIP Communications Limited concerning the information we have already provided. It would appear regrettable in the circumstances that OFCOM appear not to have questioned the sales side of the relevant MNO organisations as opposed to their regulatory and legal departments.”

14. At the case management conference on 20 September 2005 Vodafone and OFCOM made submissions to the Tribunal concerning alleged deficiencies in Floe’s pleaded case. The Tribunal ordered that OFCOM and Vodafone file and serve a list of issues arising from Floe’s statement of case upon which they sought clarification by 21 September 2005. Floe were ordered to file and serve a response to that list of issues by 26 September 2005. Floe duly responded to OFCOM and Vodafone’s request but in the version of the response provided to Vodafone has excised certain information on grounds of confidentiality. Vodafone then sought an urgent hearing before me and made the strike-out application.

15. At the hearing, Mr Mercer explained to the Tribunal that Floe's submission is that Recall falls outside the criteria applied by Vodafone but nevertheless Recall provides, to date, Multi-User GSM Gateways commercially. In these circumstances, Floe are challenging the reasonableness of the criteria which Vodafone used (and which OFCOM accepted as reasonable) to identify commercial multi-user GSM gateways.
16. As set out in paragraphs 319 and 320 of the June Decision, OFCOM's investigation of the issue of discrimination was dependent upon the reasonableness of the criteria chosen to identify Commercial Multi-User GSM Gateways.
17. Since this issue arises out of the June Decision, it was not until the publication of the June Decision that Floe was in a position to challenge OFCOM's conclusions as to the reasonableness of the criteria applied by Vodafone and its effect upon OFCOM's consideration of the discrimination issue itself. If the criteria which Vodafone used to identify Commercial Multi-User GSM Gateways was unreasonable then OFCOM may not have properly investigated the issue of discrimination, since the "pool" of actual users of Commercial Multi-User GSM Gateways may be wider than the "pool" which was identified by Vodafone using the criteria.
18. Vodafone referred the Tribunal to paragraph 116 of the decision in *Freeserve.com plc v Director General of Telecommunications* dated 16 April 2003 ([2003] CAT 5):

"It seems to us difficult to justify a rule of law to the effect that a complainant may not submit new material to the Tribunal that was not before the Director. Apart from the lack of a legal basis for any such rule, there is the practical difficulty that, until he sees the decision, the complainant does not know what grounds he has for an appeal, nor will he necessarily know what steps the Director has or has not taken in the course of his investigation. In the nature of the appellate process, certain points raised by the complainant before the Director are likely to become more fully developed, as indeed may the arguments of the Director. We accept, however, the Director's basic argument, that in principle, the original complaint sets the framework within which the correctness of the Director's decision is to be judged, taking account of the material that he had or ought reasonably to have obtained. An appeal is not an occasion to launch what is in effect a new complaint and then expect the Director and the Tribunal to deal with the matter on an entirely new basis."

19. The decision continues:

“117. We accept the director’s submission that, in considering the sufficiency of the decision in a complainant’s case, the starting point will normally be to consider the essence of the complaint made and then go on to see whether the reasons given in the director’s decision constitute a sufficient answer to that complaint, taking account of all the circumstances.”

20. Vodafone (supported by T-Mobile) and OFCOM submitted that Floe should have provided the evidence regarding Recall to OFCOM during its investigation or re-investigation and were given every opportunity to do so and it is not appropriate and it is too late for Floe to adduce this evidence at the appeal stage. It was submitted by Vodafone and OFCOM that Floe is attempting by this route to make an entirely new complaint.
21. Floe, on the other hand, submitted that the necessity for this new evidence emanated from the June Decision and relied on the paragraphs in *Freeserve.com* referred to above for the admissibility of this evidence at the appeal stage. Floe submitted that the relevance of the Recall evidence did not become apparent until the June Decision, since until then Floe did not know that OFCOM would accept the reasonableness of the Vodafone criteria nor that the examples provided to OFCOM by Floe during its investigations (referred to in the June Decision as companies A, B and C and Service Providers X and Y) would all fall within those criteria (which were first identified to Floe in full in the June Decision). Floe submitted that it was only at that juncture that it became relevant to identify companies not falling within the criteria but which nevertheless were Commercial Multi-User GSM Gateway providers in order to establish that the criteria were unreasonable and accordingly the discrimination finding unjustifiable.
22. Having regard to the submissions which I have heard at the hearing and which I have outlined above, I am not persuaded that Floe should be precluded from adducing the evidence concerning Recall and accordingly I dismiss Vodafone’s application (which was supported by OFCOM) for the reasons I set out below.
23. The Recall evidence appears to be relevant to whether the criteria adopted by Vodafone in disconnecting providers of Commercial Multi-User GSM Gateways were reasonable and as to whether all such Commercial Multi-User GSM Gateway providers were properly identified and switched off by Vodafone. The evidence is

accordingly relevant as to whether there has been discrimination by Vodafone in this regard.

24. OFCOM, in its June Decision consider discrimination within the confines of the 38 companies which Vodafone had identified as falling within its criteria. However, this consideration by OFCOM was predicated on its finding that the criteria themselves were reasonable. Having carefully considered the Further Amended Notice of Appeal, the Appendix and the witness statements of Mr Stonehouse and Mr Happy and having heard Floe's oral submissions I am satisfied that it is this finding which Floe are challenging and in respect of which they are adducing the Recall evidence. I am satisfied that by adducing this evidence Floe are not seeking to introduce a new complaint.
25. The issue of the adequacy of the criteria was raised in paragraph 338(j) of the Tribunal's judgment of November 2004 and was addressed by OFCOM at paragraphs 288 to 293 of the June Decision. It was only subsequent to the publication of that decision that Floe became aware that OFCOM's analysis of discrimination was founded on OFCOM's finding that Vodafone's criteria were reasonable. For Floe to challenge these findings of OFCOM (see paragraphs 313 to 332 of the June Decision) in this appeal it has become necessary for Floe to adduce evidence to establish that the criteria used by Vodafone, and accepted by OFCOM, were not reasonable. The evidence which Floe seeks to adduce in this regard is the Recall evidence. In these circumstances that evidence is *prima facie* admissible in this Tribunal.
26. I should make clear that this ruling is only as to whether Floe should be prevented from adducing the Recall evidence at this stage. This ruling should not be taken to provide any indication whatever as to the strength of the relevant evidence or the merit of any argument in the appeal.
27. Floe has, however, in correspondence, refused to provide certain particulars of the Recall evidence to Vodafone on the grounds of confidentiality, although such particulars have been provided to OFCOM. I did not hear oral submissions on the issue of confidentiality. However, this raises the question as to whether the Recall evidence, although *prima facie* admissible, can in the circumstances, be relied upon

by Floe. If the issue of confidentiality cannot be resolved between the parties an application may therefore need to be made to me urgently on this issue.

Marion Simmons QC
Chairman

Charles Dhanowa
Registrar

13 October 2005