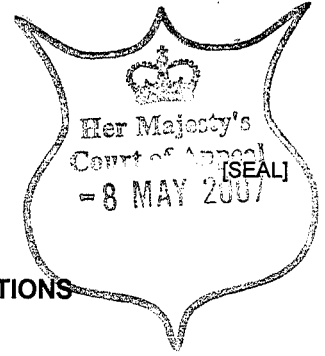




IN THE COURT OF APPEAL, CIVIL DIVISION

REF: C3 2007/0658



FLOE TELECOM LTD -v- OFFICE OF COMMUNICATIONS

1545

ORDER made by the Rt. Hon. Lord Justice Lloyd

On consideration of the appellants notice and accompanying documents, but without an oral hearing, in respect of an application for permission to appeal

Decision: granted, refused, adjourned. An order granting permission may limit the issues to be heard or be made subject to conditions.

Refused

Reasons

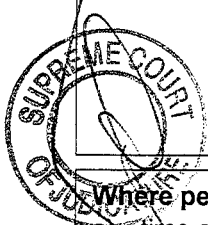
The Appellant's Notice describes the appeal as being against the judgment of the Competition Appeal Tribunal dated 31 August 2006 as well as against its Order dated 18 January 2007 in consequence of that judgment. I find that revealing. An appeal only lies against an order, not against a judgment. The Tribunal's order was to dismiss the appeal by Floe Telecom; in that respect the present Appellant (Ofcom) won. The Tribunal decided the appeal on questions of fact which are not suggested to be of any wider significance. It did, however, disagree, in a manner unnecessary to its decision, with some of the reasoning of Ofcom in the decision under appeal to it. It seems to me that the Tribunal's inclusion in its order of paragraph 3, expressed to set aside part of the basis of Ofcom's decision, though not of course the decision itself which was confirmed by paragraph 2, is somewhat artificial.

Since Floe Telecom does not seek to appeal, the Tribunal's reasoning on these points is academic as between the parties to the proceedings. It is not academic as between the parties to the VIP proceedings, due to be heard by the Tribunal in July. I can also see that it is by no means academic for Ofcom or for entities which are active in the relevant market. Nevertheless, and even assuming that there would be reasonable prospects of success on an appeal on the points of substance, it is a rather surprising proposition that an appeal should be allowed to proceed to the Court of Appeal in order to obtain, as early as may be, in effect an advisory opinion on the issues of law, even if VIP were able to intervene in the appeal so that they could be heard in opposition to T-Mobile (UK) Ltd, the party interested as principal opponent in their proceedings.

The previous proceedings concerning Floe Telecom do not provide a compelling precedent. As Sedley LJ said, at paragraph 52, that was "not really an appeal at all". It did, however, concern a discrete point as to the powers of the Tribunal, rather than the substantive issues which are said to arise in the present appeal. It does not seem to me that what was said in R (Salem) v SSHD [1999] 1 AC 450 or in Bowman v Fels [2005] EWCA Civ 226 provides a sufficient justification for allowing Ofcom to appeal, even assuming that representation and funding of parties interested in arguing the opposite position were suitably dealt with, especially when the same points are likely to arise in the VIP proceedings, from which, it may be, a real rather than an academic appeal might be brought.

Information for or directions to the parties

RECEIVED BY COMPETITION APPEAL TRIBUNAL
DATE RECEIVED 10 MAY 2007
SIGNATURE DalWesto



Where permission has been granted, or the application adjourned

- a) time estimate (excluding judgment)
b) any expedition

RECEIVED BY THE COMPETITION APPEAL TRIBUNAL
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Signed: Timothy Lloyd
Date: 3 May 2007

By the Court

Notes

(1) Rule 52.3(6) provides that permission to appeal will only be given where -

- a) the Court considers that the appeal would have a real prospect of success; or
  - b) there is some other compelling reason why the appeal should be heard.
- (2) Rule 52.3(4) and (5) provide that where the appeal court, without a hearing, refuses permission to appeal that decision may be reconsidered at a hearing, provided that the request for such a hearing is filed in writing within 7 days after service of the notice that permission has been refused. Note the requirement imposed on advocates by paragraph 4.14A of the Practice Direction.
- (3) Where permission to appeal has been granted, the appeal bundle must be served on the respondents within 7 days of receiving this order (see para. 6.2 of the Practice Direction to CPR Part 52). A letter of notification will be sent to the appellant or his solicitors, as soon as practicable (see para. 6.3).

Case Number: C3 2007/0658

**DATED 3RD MAY 2007  
IN THE COURT OF APPEAL**

**FLOE TELECOM LIMITED**

**- and -**

**OFFICE OF COMMUNICATIONS**

**ORDER**

**Copies to:**

**Messrs Ofcom  
Legal Department  
Riverside House  
2a Southwark Bridge Road  
London  
SE1 9HA**

**Messrs Taylor Wessing  
Dx 41  
London  
Ref: EMP/EPM/FR025.01**

**Messrs Herbert Smith Lip  
Dx 28  
London Chancery Lane**

**T-Mobile (Uk) Limited  
Hatfield Business Park  
Hertfordshire  
AL10 9BW**

**Competition Appeal Tribunal  
Victoria House  
Bloomsbury Place  
London  
WC1A 2EB  
Ref: 10242304**

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