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IN THE COMPETITION

Case Nos 1024/2/3/04

APPEAL TRIBUNAL

1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17th February, 2005

Before:
MARION SIMMONS QC
(Chairman)
MR MICHAEL DAVEY
MRS. SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(In administration)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Interveners

AND

VIP COMMUNICATIONS LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

T-MOBILE (UK) LIMITED

Interveners

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

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

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DIRECTIONS HEARING

1 THE CHAIRMAN: Good morning. Can I just make some opening remarks? Can I thank the
2 parties for the detailed documents which they have provided – the Notice of Application and
3 your document. OFCOM have made this application on an alternative basis and, subject to
4 hearing any other submissions this morning, the Tribunal’s preliminary view is that the most
5 appropriate course to take is for it to consider its jurisdiction under the permission to apply
6 provision in the Order of 1st December. It might perhaps have been tidier if the matter had
7 been raised then, but permission to apply seems to us to be the right course to take.

8 The Tribunal is pleased to note that the issue in relation to costs has hopefully been
9 resolved. We note that OFCOM, in its letter of 11th February, has indicated that it is prepared
10 to pay Floe’s reasonable legal costs in relation to OFCOM’s application to this Tribunal, such
11 costs to be assessed if not agreed. We remind the parties that under Rule 55 of the Tribunal
12 Rules the Tribunal has jurisdiction over costs including the assessment of them. It therefore
13 seems to us that if any question arises between OFOM and Floe as to what may be reasonable,
14 and if unfortunately this cannot be resolved between them, then the matter could be raised with
15 us prospectively so that it was sorted out before costs were incurred. Of course I will hear
16 submissions on that but it just seemed that that might be a way of dealing with the matter.

17 Subject to any submissions being made today it appears to the Tribunal that in the
18 light of OFCOM’s offer it is no longer necessary to give any consideration as to whether it
19 would have been appropriate to appoint an advocate to the Tribunal. The Tribunal has
20 carefully looked at the very useful submissions which Floe has provided for this hearing.
21 A number of interesting points have been flagged in those submissions. In particular we note
22 that in para. 22H Floe indicates that there may also be arguments related to the European
23 Convention on Human Rights and, in particular, the right to a fair trial of civil issues. In this
24 regard, we wonder whether the lines of authority which I am about to mention may be of
25 relevance on that point. First, the European Court of Human Rights’ authorities, and I thought
26 it might be useful if I just list them. *Hornsby v Greece* [1997] 24 EHRR 250. The others
27 I think are all not reported in the European Court of Human Rights’ Reports.

- 28 1. *Burdov v Russia* [2202] ECHR 59498/00
- 29 2. *Debenko v Ukraine* [2005] ECHR 74221/01
- 30 3. *Gizzatova v Russia* [2005] ECHR 5124/03
- 31 4. *Popov v Moldova* [2205] ECHR 74153/01

32 Then there are some English authorities which, although they are in completely different areas
33 of law, might be of interest.

- 34 1. *Bennett v Commissioners of Custom & Excise No.2* [2001] Simons Tax
35 cases 137

1 April. I hope that was useful. Mr. Roth?

2 MR. ROTH: Thank you very much, madam. It has been extremely helpful as always in focusing the
3 mind. May I say straight away that the date that you have proposed presents no problems from
4 our side, and we are grateful to the Tribunal for finding a relatively swift date for the hearing
5 of this matter. May I also make clear that even if, as we hope, OFCOM succeeds in the
6 application before the Tribunal when it is heard, that will not affect the progress of this
7 investigation that they are conducting. It is not brought, as we sought to make clear in our
8 Notice of Application, to achieve delay. It is to establish the principle, and of course we are at
9 the moment working pursuant to the Tribunal's order.

10 Dealing with the other matters envisaged by what you have just said, we agree it is
11 clearly something that can be dealt with within a day and we would hope perhaps with written
12 skeleton arguments in less than a day.

13 THE CHAIRMAN: We can see that it may take a day, because I think there are quite a lot of points
14 that will need to be explored.

15 MR. ROTH: The human rights angle certainly expands and the additional authorities, which we
16 shall look at and we are most grateful for, expands the scope of that, although sometimes when
17 authorities are looked at and written arguments are exchanged they do not all have to be gone
18 into in oral hearing.

19 THE CHAIRMAN: That is the benefit of the written arguments, and the cases may be repetitive.

20 MR. ROTH: Absolutely. I would most respectfully, if I may, endorse your suggestion of sequential
21 skeleton arguments; it seems much more helpful rather than a sort of blind exchange.

22 THE CHAIRMAN: I was wondering whether you would want to have a written response so that we
23 have three levels? The difficulty is the time frame.

24 MR. ROTH: There is of course the Easter week in between, but it still might be possible, I have not
25 worked back to see what sort of time frame ----

26 THE CHAIRMAN: I think I have to leave it to you because there is Easter intervening, but I think it
27 might be helpful.

28 MR. ROTH: Yes. We welcome your view that you can deal with the matter under the permission to
29 apply, which is what we were hoping for, and is clearly the most cost efficient and effective
30 way. It also seems to us, with respect, sensible that this Tribunal should pronounce on this
31 matter in the first instance even if conceivably it might have to be considered further
32 elsewhere.

33 On the costs' issue, we hope this would resolve it, with the additional point, madam,
34 you have made about your control under Rule 55. From a conversation with Mr. Mercer just
35 before the hearing it may be that he wants to say something about that, and I will wait to see

1 what he says.

2 THE CHAIRMAN: I was putting down Rule 55 powers to try and be helpful.

3 MR. ROTH: Yes, I think it is extremely helpful and we have made clear that we will not seek costs
4 and you will see what we have said about paying costs, that of course is of the application
5 before this Tribunal and not about any potential Appeal – that is a quite separate matter which
6 no one has considered yet, but we are not concerned with that.

7 THE CHAIRMAN: We will have to hear what is said about that.

8 MR. ROTH: Yes. I hope that covers everything – and of course, we shall look at the *Bettercare*
9 point on that.

10 THE CHAIRMAN: There may be other points as well. What we were thinking was that if OFCOM
11 produced its skeleton by 17th March, and Floe by the 24th, I think that is immediately before the
12 Easter weekend, so you can see how we have worked back on that basis.

13 MR. ROTH: Yes.

14 THE CHAIRMAN: That would give you an opportunity if you wanted to put in a Reply before 5th
15 April.

16 MR. ROTH: Yes, I think that would work. Thank you. Is there anything else?

17 THE CHAIRMAN: I do not think so. Shall we see what Mr. Mercer says? Mr. Mercer?

18 MR. MERCER: Perhaps if I deal with the costs point first, madam? What OFCOM offer in their
19 letter is not exactly what we asked for in our submissions, and the problem I have is that what
20 I am trying to avoid is the distinct possibility of a shortfall between that recovered and that
21 applied for.

22 THE CHAIRMAN: Well can I just interrupt, because that is why we have referred to our Rules and
23 to the idea of prospective agreement, rather than retrospective agreement.

24 MR. MERCER: Very good, madam. I think we are heading towards the position, if you take what I
25 am trying to head towards, which his the position Mr. McWhirter was in in *Axa*, where he
26 knew what the budget was in advance, because the court said “Right” – in that case it was
27 £100,000 – “that is your limit.” We can try and work to that. What I want to avoid is getting
28 to a position where we have an ordinary basis against indemnity shortfall.

29 THE CHAIRMAN: Hopefully there should be no difficulty, because this is one point on an
30 application which requires an advocate to consider it. Mr. Roth has been instructed by
31 OFCOM, OFCOM has offered to pay reasonable costs – it must be reasonable to have
32 somebody equivalent to Mr. Roth. A brief fee can be negotiated. Your costs will be known,
33 because one knows about how much work you will do on that basis. That can be agreed
34 beforehand. If it cannot be agreed what I am suggesting is that an application is made and you
35 come back.

1 MR. MERCER: Very good, madam.

2 THE CHAIRMAN: But hopefully it can be agreed between you because it is not a huge case, it is
3 just an application. The only issue is that the offer – as I now understand it and I had not
4 understood before – is only in relation to this Tribunal, so there is the question of what happens
5 if there is an Appeal on either side. I had assumed that the offer was an offer of this
6 application being this application and the consequences of it but that is not the position
7 apparently, so there may be an issue there, but that may be something that the parties want to
8 think about.

9 MR. ROTH: Well the position is this, once you have given a Judgment on this point and if following
10 that Judgment either side feel so advised as to take it further then the question of what risks
11 they bear for that is a quite separate matter once we have reached that stage, when you have
12 pronounced on it. We have made the proposal because, as you pointed out, this could have
13 been raised at the previous hearing and Floe cannot be blamed for that, it is OFCOM who
14 could have raised it, so we brought the matter back, and to establish that by Judgment is a point
15 of principle, but if it goes any further it will be for the Court of Appeal to decide how to deal
16 with the costs.

17 THE CHAIRMAN: Yes, I can see that. It is taking it stage by stage.

18 MR. ROTH: Taking it stage by stage.

19 THE CHAIRMAN: It depends on how it gets resolved at this stage as to what happens at the next
20 stage.

21 MR. ROTH: Yes, we have not precluded the possibility but we are not making the ongoing
22 commitment.

23 THE CHAIRMAN: No. I think that deals with the point, does it not, that we are taking it stage by
24 stage?

25 MR. MERCER: Yes, that is how we thought ----

26 THE CHAIRMAN: Are you happy with that?

27 MR. MERCER: Yes.

28 THE CHAIRMAN: So I think your concerns can be met by the idea of dealing with it prospectively
29 and then one can deal with it on a reasonable agreement basis rather than having to make an
30 order, and have to consider whether an order would be appropriate.

31 MR. MERCER: Yes.

32 THE CHAIRMAN: Is that all right?

33 MR. MERCER: Yes, I think I know what the Tribunal wants us to try and do.

34 THE CHAIRMAN: If it turns out there is not agreement, which would be very unfortunate, you will
35 have to come back and we will have to reconsider.

1 MR. MERCER: Yes, very good madam. On the other points, I do not think we have any trouble
2 with the date – subject to my GSM and GPRS system working and I have read an accurate
3 form of my diary. We have no problems with suggested dates for the provision of skeleton
4 arguments. We will consider what you said about the choice of advocates, madam, though it
5 had not been our intention until now to change horses in this matter – for reasons of cost if for
6 no other reason.

7 THE CHAIRMAN: There is not a problem with cost in that sense because that is going to be met.

8 MR. MERCER: If “reasonable costs”, as it appears to this morning, is to include instructing an
9 advocate who has not been involved previously ----

10 THE CHAIRMAN: Yes, it does. Mr. Roth is nodding vigorously.

11 MR. MERCER: Then that is fine, madam.

12 THE CHAIRMAN: Not that you are not an advocate.

13 MR. MERCER: No, madam, but we will take what the Tribunal says on board.

14 THE CHAIRMAN: The question is whether it would be appropriate to instruct someone of the
15 equivalent experience to Mr. Roth and in an area which is not your specialist area.

16 MR. MERCER: Yes, madam, though that makes one assumption about me and particularly human
17 rights.

18 THE CHAIRMAN: You told us last time that you were a specialist in telecommunications law, so
19 that is what I was relying on.

20 MR. MERCER: As OFCOM know only too well, I am a bit too fond of quoting the convention on
21 human rights, but that is another matter which has not quite made it here yet and nor, insofar as
22 it involves broadcasting licences, is it ever likely to.

23 That only leaves us with asking for some further clarification from OFCOM about
24 one matter, in that as I understand Mr. Roth he was saying that the timetable will be adhered to
25 in this case – the five months will be adhered to.

26 THE CHAIRMAN: They are working to it.

27 MR. ROTH: What I was saying was at the moment we are of course working to it because that was
28 the order of the Tribunal which we are subject to. I was not committing us to meeting it,
29 indeed I can say that we would know nearer the deadline, which is the end of April, whether it
30 can be met, or whether we would need – assuming nothing changes – to come back and apply
31 to vary in the ordinary way just to extend the time. The other point I was making is that
32 success in this application on the jurisdiction point is not going to delay the progress of the
33 investigation – it is not a delaying tactic. I cannot go further than that.

34 THE CHAIRMAN: No.

35 MR. MERCER: My problem, madam, is that this was until December what I might describe as a

1 “static” matter in terms of nothing else having happened since the matters giving rise to the
2 original allegations. That changed, I am afraid, in December when Vodafone sent a
3 communication to all its dealers informing them to stop selling SIM cards to any form of
4 gateway use whatsoever. We have been in correspondence with OFCOM about the matter,
5 and they have declined to take any interim measures in respect of this, and we for costs reasons
6 as much as anything else, and for timing reasons – if we start an Appeal now in respect of them
7 not having provided interim measures, we would about catch up with each other in May time –
8 there is very little point it seems to us in doing that. But I just wanted the Tribunal to be aware
9 that this matter has not stood still in terms of the allegations since we last met, and we have
10 noticed that when we were contacted by OFCOM and shown copies of what was going on to
11 their website in respect of the matter going forward, we noticed that they had expected to start
12 a consultation about the meaning of the Vodafone licence by the end of January and that has
13 not started yet, as far as we know, so there is already slippage and that gives us a concern.
14 This matter is now a dynamic one again and we have slippage. We are just concerned, though
15 my learned friend’s warm words are very friendly about nobody is going to lose out on this, we
16 are already beginning to see slippage and lose out over it, and a firmer commitment would be
17 appreciated by us.

18 THE CHAIRMAN: I am not sure it is this application that has caused the slippage. I think that is
19 what Mr. Roth is saying, that this application is not going to cause any delay. Whether the
20 timetable is met or not is other considerations, not this application.

21 MR. MERCER: Well, I am sure if Mr. Roth says that it must be correct, madam, but I wanted to
22 express my client’s feeling that matters were already slipping and other things were already
23 happening.

24 THE CHAIRMAN: Mr. Roth, do you have any further submissions to make on what has just been
25 said?

26 MR. ROTH: No madam. I think that goes to a potential interim measures application which is not
27 before the Tribunal and is not being and Mr. Mercer’s clients are, of course, at liberty to make
28 one if and when they think appropriate.

29 THE CHAIRMAN: That is as far as Mr. Roth can go, Mr. Mercer.

30 MR. MERCER: I accept that madam. If only the real business world were as neat and packageable
31 as we lawyers sometimes try to make it, and one of the difficulties some people will level at
32 using competition law to control conceptual disputes is the time and degree of evidence which
33 people believe is necessary in order to be able to satisfactorily try competition matters, and this
34 is a difficulty, and I appreciate what he says, this is not a matter that is before you today, but
35 my clients wanted me to make you aware of the matters.

1 THE CHAIRMAN: But unfortunately we cannot do anything today unless there is an application
2 before us.

3 MR. MERCER: That is true, madam, but it is perhaps something which I thought, madam, you
4 should have in your mind going forward.

5 THE CHAIRMAN: Thank you. So we will make the usual order which will have the 17th for
6 OFCOM's skeleton, the 24th March for Floe's submission, and what about the agreed bundle of
7 authorities? I am just concerned about the Easter break. Thursday of that week – would that
8 be possible?

9 MR. ROTH: Can I take instructions? (After a pause) What we were actually thinking, working
10 backwards, is perhaps to advance the skeleton dates – it puts us under greater pressure – but to
11 bring everything forward a bit because of Easter, and to bring it forward three days. We would
12 do our skeleton by 14th March, that Floe would reply by 21st March and on that basis we could
13 do any reply and lodge bundles on 31st March, which is the Thursday before the hearing, the
14 hearing being on a Tuesday and that perhaps might work better – otherwise we would get a
15 skeleton just before Good Friday and people are away, and we will put ourselves under the
16 greater pressure before, and if that works for the other side – it is just bringing everything
17 forward by three days.

18 THE CHAIRMAN: That is very useful. Are you happy with that?

19 MR. MERCER: Yes, madam.

20 THE CHAIRMAN: All right. OFCOM skeleton 14th March, the Floe skeleton 21st March, the
21 OFCOM reply skeleton is 31st March, and the authorities bundle is also 31st March, and
22 OFCOM are going to prepare that, so that needs to be agreed, but the cases will be in the Floe
23 skeleton so there should not be a problem. There are no other documents that are going to be
24 relevant, are there? I cannot see that there are any?

25 MR. ROTH: I do not think so.

26 THE CHAIRMAN: There are no other documents, apart from authorities?

27 MR. MERCER: Not as far as I am aware, madam.

28 THE CHAIRMAN: No. The order will be drawn up by the Registry and provided to the parties as
29 usual. Thank you very much.

30 (The hearing concluded at 11.10 a.m.)