Case No: C1 2005/1689 and 1690

Neutral Citation Number: [2006] EWCA Civ 768
IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
(MARION SIMMONS Q.C. CHAIRMAN)
[2005] CAT 14

Royal Courts of Justice
Strand, London, WC2A 2LL

Thursday, 15th June 2006

Before:

LORD JUSTICE CHADWICK
LORD JUSTICE SEDLEY
and
LORD JUSTICE LLOYD

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Between:

(1) OFFICE OF COMMUNICATIONS **(2) OFFICE OF FAIR TRADING**	**Appellants**
- and -	
FLOE TELECOM LIMITED **(in administration)**	**Respondent**

Transcript of the Handed Down Judgment of
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P M Roth Q.C. and **Gerry Facenna** (instructed by the **Solicitor to the Office of Communications**) for the **First Appellant**
Jon Turner (instructed by the **Solicitor to the Office of Fair Trading**) for the **Second Appellant**
Monica Carss-Frisk Q.C. and Brian Kennelly (instructed by **Taylor Wessing**) for the **Respondent**

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Judgment
As Approved by the Court

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Lord Justice Lloyd:

1. This appeal is about the powers of the Competition Appeal Tribunal (the CAT, or the Tribunal) when dealing with appeals under the Competition Act 1998 (the 1998 Act, or the Act) against decisions made by regulators such as the Office of Fair Trading (OFT) or, as in the instant case, the Office of Communications (Ofcom).

2. Floe Telecom Ltd, the Respondent to this appeal, complained to the Director General of Telecommunications (DGT) (who has since been replaced by Ofcom) that Vodafone had abused its dominant position by disconnecting services which it had provided to Floe. On 3 November 2003 the DGT decided that Vodafone had not abused its dominant position in this respect, because its conduct was objectively justifiable. Floe appealed to the CAT against the decision that there had not been an infringement of the Chapter II prohibition under the 1998 Act. The CAT heard the appeal and allowed it, giving its decision on 19 November 2004. On 1 December 2004 the CAT heard submissions as to what order it should make. It decided to set aside the decision and to remit the whole matter to Ofcom for re-investigation. Ofcom had offered an undertaking to re-investigate but there was a disagreement as to the timetable within which this could or should be done. Ofcom had said that it could and would do it on the basis that, if it decided there was no infringement, it would come to that decision within 6 months, and if it did not come to that conclusion it would set out its case, by a statement of objections, within 12 months.

3. The CAT said, in paragraph 20 of its judgment:

> "The Tribunal therefore seeks an undertaking from OFCOM to issue a non-infringement Decision, or Statement of Objections within five months of today. In default of such an undertaking, the Tribunal will make an order remitting the matter to OFCOM in those terms."

4. The order it made was less peremptory. It was as follows:

> "1. Pursuant to paragraph 3(2)(a) of Schedule 8 of the Competition Act 1998 (the "1998 Act"), the matter, being the Decision in its entirety, is remitted to the Respondent.
>
> 2. Pursuant to the Undertaking, the Respondent re-investigate the matter with a view to issuing either:
>
> > (a) a new non-infringement decision pursuant to section 31 of the 1998 Act; or
> >
> > (b) a statement of objections pursuant to rule 4 of The Competition Act 1998 (Office of Fair Trading's Rules) Order 2004 (SI 2004 No. 2751)
>
> in either case within 5 months of the date of this Order.
>
> 3. A further case management conference is provisionally fixed for 5 May 2005 at a time to be notified to the parties."

5. The question on the appeal is whether the CAT had power to set a time limit for the investigation, as it said it would in paragraph 20 of the judgment, even though it did not do so in terms in the order. A related question is whether it could fix a case management conference as it did in the order.

6. As between the parties the question is academic. Ofcom has undertaken the further investigation. It did not do so within 5 months, but it applied to and obtained an extension from the CAT, and completed it within the extended time allowed. It reached the same conclusion. Floe has appealed a second time. That appeal has been heard and the CAT's decision is awaited. Nevertheless, Ofcom considers that a point of importance is raised as to whether the CAT can impose a timetable in relation to a new investigation, when it sets aside a decision and remits it to the regulator. Ofcom first applied to the CAT for the order made on 1 December 2004 to be set aside. This was refused. It then applied to the CAT for permission to appeal. That was refused. It applied to this court for permission to appeal, and OFT did likewise, being likely to be affected more frequently by such an order on the part of the CAT in future than Ofcom, because so many appeals to the CAT are against decisions of OFT. Carnwath LJ gave permission to appeal to both regulators. Moreover, with a view to ensuring that both sides of the argument were put to the court, the Appellants offered to pay the reasonable costs of Floe in resisting the appeal.

7. Thus it comes about that we have heard argument on a point which is not in terms raised by the order appealed against (except as regards the case management conference), and which does not matter at all as between the parties, and on the result of which not even an issue as to costs depends. This can fairly be described as unusual. The point which has been debated is important in relation to those who may be affected by it in future cases, and it is appropriate to consider the appeal despite the fact that the outcome of the appeal does not matter as between the parties now before the court.

The legislation

8. It is convenient to start by referring to the legislation under which the point arises, and first the Competition Act 1998. This deals in Chapter I (sections 1 to 11 as it now stands) with the prohibition against anti-competitive agreements, which corresponds with Article 81 of the EC Treaty (the Treaty), and in Chapter II (sections 17 to 19) with the prohibition against abuse of a dominant position, corresponding to Article 82 of the Treaty. Chapter III (sections 25 to 44) gives the OFT powers to conduct an investigation in a number of circumstances, among which is the case where there are reasonable grounds for suspecting that the Chapter II prohibition has been infringed, and it also deals with investigations, enforcement and penalties. I need to refer to some of the provisions of Chapter III.

9. If as a result of an investigation the OFT proposes to make a decision that a relevant prohibition (whether under the Act or the Treaty) has been infringed, it must give written notice to the person or persons likely to be affected by that decision, and give him or them the opportunity to make representations. This arises under section 31, which has its own definition of "decision". If the OFT has begun an investigation but not yet reached a decision (as defined in section 31) it may accept commitments from an appropriate person or persons to take action (or refrain from taking action) which it considers appropriate.

The CAT's decision on Floe's appeal

17. Floe appealed against the decision by the DGT that Vodafone had not infringed the Chapter II prohibition. The appeal came before the CAT (Marion Simmons Q.C., Mr Michael Davey and Mrs Sheila Hewitt) at a hearing on 19 and 20 July 2004. They gave their decision on the appeal on 19 November 2004, holding that the DGT had failed to take into account a number of matters, spelled out at paragraph 338 and 339 of the judgment, which he ought to have taken into account. They expressed their conclusion as follows in paragraph 340 of the judgment:

> "The Tribunal unanimously considers for the reasons stated above that the proper course to take in this Appeal is to set aside the Decision of the Director on the grounds of incorrect and/or inadequate reasoning and to remit "the matter" to OFCOM under paragraph 3(2)(a) of Schedule 8 to the 1998 Act."

18. On 1 December 2004 a further hearing took place in order to determine the terms of the order, including questions of costs. The order was to be that the whole decision was to be remitted to Ofcom. Ofcom offered the CAT an undertaking in relation to its new investigation of the matter, but not one which the Tribunal was prepared to accept in all respects. The Tribunal explained why it considered that Ofcom ought to be able to proceed with the new investigation on a shorter timescale than that offered by Ofcom, and why it ought to do so in the interests of the parties and of the wider public. It stated its conclusion in paragraph 20 of the judgment, quoted above (paragraph 3), and also said that it would fix a case management conference for five months ahead. Its order was, so far as relevant, in the terms quoted above (paragraph 4).

19. Ofcom then applied to have the order varied so as to remove paragraphs 2 and 3, or for permission to appeal. That application was heard on 5 April 2005, and the CAT gave judgment on 5 May 2005 rejecting the application to vary the earlier order. Its reasoning was fuller and in some respects different from that set out in the judgment of 1 December 2004. Later it refused permission to appeal against either order, but permission was granted, as mentioned above, by Carnwath LJ.

20. Ofcom submits that the CAT does not have power, having set aside a decision and remitted the matter to the relevant regulator, to impose on the regulator a timetable or other directions as to how the matter is to proceed. OFT supports it in this argument. Paragraph 3(2)(a) of the Schedule does not deal with this expressly, so if the power is to exist it must be found as an implied power incidental to the provision for remittal, or in another provision of paragraph 3, or elsewhere.

21. In its judgment on 1 December 2004 the CAT expressed its reasons for considering that greater urgency was required, and should be possible, for the new investigation than was provided for by the undertaking offered by Ofcom. It did not deal with the question of the power to give such directions. The question of jurisdiction was argued at the later hearing, and it was addressed in the judgment given on 5 May 2005. The reasons given by the CAT for holding that it was within its powers to impose the timetable on the regulator are, in summary, as follows:

i) The overriding function of the CAT is to determine the appeal on the merits, under paragraph 3(1), and this shows that the obligation of the CAT may not have been discharged or fulfilled on remission, even of the entire matter, to the regulator.

ii) In the present case, though the matter was remitted to the regulator for re-investigation, the CAT had not been able to determine the whole appeal on its merits on every point.

iii) It can make such an order by way of giving directions under paragraph 3(2)(d), since a direction to complete an investigation within a given time is one which a regulator could give to itself.

iv) It could, in any event, have made such an order as an incidental power under paragraph 3(2)(a).

v) Moreover, because the appeal has not been fully determined, rule 19 applies and a time limit direction can be imposed under rule 19(2)(h), viewing the remittal as being under rule 19(2)(j) as well as under paragraph 3(2)(a).

vi) In addition, the imposition of the time limit was necessary because Ofcom's proposal on 1 December 2004 to act in accordance with a longer timescale showed an intention to act in breach of article 6 of the ECHR. The CAT had to be able to impose a shorter time limit in order to prevent a breach of article 6.

vii) Submissions had been addressed to the CAT as to the relevance of Community law, but it did not find it necessary to base its decision on any such point.

22. The CAT did refer to previous decisions of its own as precedents. Each of them, however, was somewhat different from the present case, and in none was the point as to jurisdiction taken. In *Freeserve.com plc v DGT* [2003] CAT 6, the CAT set aside a decision of the DGT by which he had rejected a complaint by Freeserve, and dismissed the rest of the appeal. The DGT offered an undertaking to provide a fuller statement of his reasoning on the point on which the CAT had found it inadequate. On that basis the CAT did not remit the matter. It did direct that the new statement be issued within 3 months, rather than the 2 month period suggested by the DGT, with provision for an application for an extension. Later there had to be two further extensions: see [2003] CAT 15 and 22.

23. In *Aberdeen Journals (No. 1)* [2002] CAT 4 a decision was set aside and the matter remitted to the DGFT, with a direction that a new notice under the then relevant rules be issued within 2 months. However it seems to have been accepted that the original appeal remained in being, and the second appeal, after the DGFT's second decision, was consolidated with the original appeal: see [2003] CAT 11. In *Argos and Littlewoods* a decision was referred back, the appeal being treated as still subsisting, and it was dealt with together with the second appeal against the later decision: see [2003] CAT 16.

10. On the other hand, if the OFT has made a decision that an agreement or conduct infringes a relevant prohibition, it may give such directions to appropriate persons under sections 32 and 33 as it considers appropriate to bring the infringement to an end. It also has power to give directions under section 35 by way of interim measures. Under section 36 it may impose penalties for any infringement which, if not paid, may be recovered by it as a civil debt under section 37. Sections 42 to 44 create offences.

11. Coming to provisions more directly at issue on this appeal, sections 46 and 47 provide for appeals to the CAT, and they are supplemented by Schedule 8. Some other categories of "decision" within section 46 have been added by subsequent legislation, but they do not matter for present purposes. Section 46(1) to (3) are as follows:

> "(1) Any party to an agreement in respect of which the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (2) Any person in respect of whose conduct the OFT has made a decision may appeal to the Tribunal against, or with respect to, the decision.
>
> (3) In this section "decision" means a decision of the OFT
>
> (a) as to whether the Chapter I prohibition has been infringed,
>
> (b) as to whether the prohibition in Article 81(1) has been infringed,
>
> (c) as to whether the Chapter II prohibition has been infringed,
>
> (d) as to whether the prohibition in Article 82 has been infringed,
>
> (e) cancelling a block or parallel exemption,
>
> (f) withdrawing the benefit of a regulation of the Commission pursuant to Article 29(2) of the EC Competition Regulation,
>
> (g) not releasing commitments pursuant to a request made under section 31A(4)(b)(i),
>
> (h) releasing commitments under section 31A(4)(b)(ii),
>
> (i) as to the imposition of any penalty under section 36 or as to the amount of any such penalty,
>
> and includes a direction under section 32, 33 or 35 and such other directions under this Part as may be prescribed."

Section 47(1) and (2), which deal with what are described as third party appeals, are as follows:

> "(1) A person who does not fall within section 46(1) or (2) may appeal to the Tribunal with respect to
>
> > (a) a decision falling within paragraphs (a) to (f) of section 46(3);
> >
> > (b) a decision falling within paragraph (g) of section 46(3);
> >
> > (c) a decision of the OFT to accept or release commitments under section 31A, or to accept a variation of such commitments other than a variation which is not material in any respect;
> >
> > (d) a decision of the OFT to make directions under section 35;
> >
> > (e) a decision of the OFT not to make directions under section 35; or
> >
> > (f) such other decision of the OFT under this Part as may be prescribed.
>
> (2) A person may make an appeal under subsection (1) only if the Tribunal considers that he has a sufficient interest in the decision with respect to which the appeal is made, or that he represents persons who have such an interest."

12. In Schedule 8 the provisions which matter for present purposes are those of paragraph 3, subparagraphs (1) to (4), which are as follows:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may
>
> > (a) remit the matter to the OFT,
> >
> > (b) impose or revoke, or vary the amount of, a penalty,
> >
> > (d) give such directions, or take such other steps, as the OFT could itself have given or taken, or
> >
> > (e) make any other decisions which the OFT could itself have made.
>
> (3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the OFT.

> (4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

13. Section 47A allows for monetary claims arising from the infringement of a relevant prohibition, which may be brought before the CAT. Section 49 provides for appeals to the Court of Appeal (or in Scotland the Court of Session) against a decision as to the amount of a penalty under section 36, from decisions on monetary claims and, under section 49(1)(c), on any point of law arising from any other decision of the CAT on an appeal under section 46 or 47.

14. Section 54 deals with sectoral regulators, including Ofcom, which may exercise the powers of the OFT within their relevant sectors.

15. The other legislation to which it is necessary to refer is the Competition Appeal Tribunal Rules 2003, SI 2003/1372. These provide for appeals to be made by sending a notice of appeal to the Registrar within a stated time, which must comply with provisions as to form and content under rule 8, the details of which do not matter. The rules also contain uncontroversial provisions for procedural matters in relation to appeals. Rule 19 is in a group of rules headed Case Management. Paragraphs (1) and (2) are as follows:

> "(1) The Tribunal may at any time, on the request of a party or of its own initiative, at a case management conference, pre-hearing review or otherwise, give such directions as are provided for in paragraph (2) below or such other directions as it thinks fit to secure the just, expeditious and economical conduct of the proceedings.
>
> (2) The Tribunal may give directions
>
> > (a) as to the manner in which the proceedings are to be conducted, including any time limits to be observed in the conduct of the oral hearing;
> >
> > (b) that the parties file a reply, rejoinder or other additional pleadings or particulars;
> >
> > (c) for the preparation and exchange of skeleton arguments;
> >
> > (d) requiring persons to attend and give evidence or to produce documents;
> >
> > (e) as to the evidence which may be required or admitted in proceedings before the Tribunal and the extent to which it shall be oral or written;
> >
> > (f) as to the submission in advance of a hearing of any witness statements or expert reports;
> >
> > (g) as to the examination or cross-examination of witnesses;

(h) as to the fixing of time limits with respect to any aspect of the proceedings;

(i) as to abridgement or extension of any time limits, whether or not expired;

(j) to enable a disputed decision to be referred back in whole or in part to the person by whom it was taken;

(k) for the disclosure between, or the production by, the parties of documents or classes of documents;

(1) for the appointment and instruction of experts, whether by the Tribunal or by the parties and the manner in which expert evidence is to be given;

(m) for the award of costs or expenses, including any allowances payable to persons in connection with their attendance before the Tribunal; and

(n) for hearing a person who is not a party where, in any proceedings, it is proposed to make an order or give a direction in relation to that person."

16. Rule 20 deals with case management conferences. Paragraphs (1) and (4) are as follows:

> "(1) Where it appears to the Tribunal that any proceedings would be facilitated by holding a case management conference or pre-hearing review the Tribunal may, on the request of a party or of its own initiative, give directions for such a conference or review to be held."
>
> "(4) The purpose of a case management conference or pre-hearing review shall be
>
> (a) to ensure the efficient conduct of the proceedings;
>
> (b) to determine the points on which the parties must present further argument or which call for further evidence to be produced;
>
> (c) to clarify the forms of order sought by the parties, their arguments of fact and law and the points at issue between them;
>
> (d) to ensure that all agreements that can be reached between the parties about the matters in issue and the conduct of the proceedings are made and recorded;
>
> (e) to facilitate the settlement of the proceedings."

The extent of the CAT's statutory powers

24. It is natural that the CAT should attach importance to the provision in paragraph 3(1) which requires it to determine the appeal on the merits. This distinguishes an appeal of this kind from an appeal against a decision releasing, or not releasing, commitments under section 31A; such appeals, by virtue of paragraph 3A of Schedule 8, are to be decided on judicial review principles. Paragraph 3(1) does two things: it makes it clear that the appeal is on the merits, and it also limits the appeal to the points taken in the notice of appeal.

25. If the appellant challenges a decision by a regulator, and establishes, on grounds taken in the notice of appeal, that the decision was wrong, whether as a matter of procedure or because of some misdirection of law or because the CAT takes a different view of the facts on the evidence before it, the Tribunal has a choice of a number of courses open to it. It may set aside the decision and remit the case to the regulator. It may feel able to decide itself what the correct result should have been, so that no remission or reference back is necessary. It may wish to retain for itself the task of deciding the eventual outcome but require further findings from the regulator, in which case it will not remit but may refer all or part of the decision back under rule 19(2)(j), with a view to deciding the appeal with the benefit of the result of that referral.

26. It seems to me that the CAT's decision of 5 May 2005 invests paragraph 3(1) with more significance than it can bear. It does not, for example, require the CAT to investigate and rule on every point taken in the notice of appeal, if they do not all need to be decided in order to determine the outcome of the appeal, namely whether the relevant decision is to stand, to be varied or to be set aside. In the present case, the CAT said on 5 May 2004, at paragraph 63:

> "This requires the Tribunal to arrive at a decision on the merits of the matter before it and not merely to quash or set aside the competition authority's decision or to remit the matter to the competition authority for a reconsideration by the authority of the matter *de novo*. The powers set out in sub-paragraph 3(2) of Schedule 8 are subordinate to this overriding function of the Tribunal provided for in sub-paragraph 3(1)."

In the same vein, at paragraph 70 it said this:

> "As noted above, in our view sub-paragraph 3(2) is to be read in the context of the Tribunal's overriding function set out in sub-paragraph 3(1). In that context the power to remit the matter to the competition authority under sub-paragraph 3(2)(a) may not necessarily fulfil the overriding obligation of the Tribunal which is to determine the merits of the appeal by reference to the grounds of appeal. There may be cases, as was the position in this appeal, where it transpires that notwithstanding the competition authority's investigation of the matter there is a deficit of evidence which makes it difficult for the Tribunal to reach a conclusion as to the merits of the appeal."

Later, at paragraph 72 it said this:

> "In this appeal on the material and submissions before us we were not yet in a position to determine the merits of all of Floe's grounds of appeal in particular with regard to: (a) whether OFCOM's interpretation of the relevant legislation was in conformity with relevant European legislation; (b) whether OFCOM's new interpretation of Vodafone's licence, contrary to the view expressed in the Decision, was indeed correct; and (c) if OFCOM's new interpretation is correct, whether Vodafone's conduct was or was not objectively justified for the purposes of the Chapter II prohibition. Therefore, the substance of the merits of the issues which were conveniently set out in Floe's "First Alternative Argument" and "Second Alternative Argument" have not yet been determined and accordingly remain before the Tribunal. In all these circumstances the Tribunal is not functus officio if it sets aside the decision of the competition authority and exercises its powers provided for by sub-paragraph 3(2) of Schedule 8."

27. It was on that basis that the CAT considered that it had before it a subsisting appeal and could have made the directions under rule 19: see paragraph 77.

28. A case may occur where the setting aside of the decision and remittal of the matter to the regulator does not dispose of the appeal entirely; I would not wish to exclude that possibility altogether, but the facts would have to be very unusual. The CAT considered the variety of courses open to it at paragraphs 86 to 87; I have mentioned the principal options at paragraph 25 above. However, with respect to the CAT, it seems to me that, in the present case, once it had set aside the decision and remitted the matter to Ofcom by the order dated 1 December 2004, there was nothing left of the appeal. Paragraph 3(1) did not compel or allow the CAT to treat the appeal as still subsisting in order to decide points which did not arise once it had set aside the decision complained of. Correspondingly, since there was no longer a subsisting appeal, rule 19 did not apply. That rule applies in the course of an appeal, allowing the CAT to give directions to secure the just, expeditious and economical conduct of the appeal. Once the appeal has been determined, by the setting aside of the decision challenged and the remittal of the whole matter to the regulator, rule 19 no longer applies. I respectfully disagree with what is said at paragraph 77 and 78 of the CAT's judgment on this point, and with paragraph 86 insofar as it suggests that the CAT may set aside the decision and remit the matter to the regulator but still treat the appeal as subsisting. As regards what is said at paragraph 79, it seems to me that the powers under rule 19 remain exercisable up to the moment when the appeal has been determined. They do not expire at the beginning of the hearing of the appeal.

29. Of course, if the decision is not remitted to the regulator, but the power under rule 19(2)(j) is used to refer some point back in a pending appeal, then rule 19 will apply and, for example, the CAT can give a direction as to the time within which the matter so referred is to be dealt with. This was not such a case.

30. It follows that the CAT did not have power to fix a case management conference under rule 19 or 20, because there was no continuing appeal in relation to which the rule 19 powers were exercisable.

31. The time limit direction must therefore be justified, if at all, under paragraph 3. Miss Carss-Frisk Q.C., for Floe, submitted, first, that a time limit direction is a direction such as the CAT is empowered to give by paragraph 3(2)(d), being a direction which the regulator could have given, albeit to itself. I prefer the submissions of Mr Roth Q.C., for Ofcom, and Mr Turner for OFT, that directions referred to in paragraph 3(2)(d) are directions such as the regulator can impose under the Act, in particular under sections 32, 33 and 35. It is no answer to that to say that a distinction has to be drawn between a direction, under (d), and a decision, under (e), on the basis that a direction is itself a decision, and that therefore a direction or other step in (d) must refer to something which is not a decision. Sub-paragraph (e) speaks of "any other decision", so it contemplates that a direction or other step under (d) is also a decision. The content of the two sub-paragraphs could just as well have been set out in a single sub-paragraph, for example as "give such directions or take such other steps as, or make any other decision which, the OFT could itself have given, taken or made". I do not think that the distinction between direction and decision which Miss Carss-Frisk seeks to draw, and which the CAT did draw, could have been made on wording such as that. The choice of a different drafting technique, perhaps to avoid an overlong sub-paragraph, cannot alter the meaning of either phrase.

32. Moreover, it seems to me that the whole of paragraph 3 is focussed on decisions affecting third parties. That is certainly true of the word "decision" in the opening words of paragraph 3(2). Although "decision" is defined by section 46(3) only for the purposes of that section, the same word when used at the beginning of paragraph 3(2) must mean a decision as so defined. The same is plainly true of the word in paragraph 3(4) and, as its seems to me, also in paragraph 3(3), which gives a decision made by the CAT the same force and effect as a decision of the regulator; that must mean effect as against third parties. In that context, it seems to me that the only sensible interpretation of paragraphs 3(2)(d) and (e) is that they both deal with matters affecting third parties as well. Paragraph (d) does not extend to "directions", if that is an appropriate word, which the regulator could have given to itself by way of the internal management of an investigation.

33. For that reason I respectfully disagree with the CAT's reasoning at paragraph 69. If there is a power to impose a time limit on the new investigation it would have to be as an incident of the power to remit under paragraph (a).

34. The CAT was heavily influenced in its view that there was such a power incidental to the express power under 3(2)(a) by its view that it had an overriding function to determine all points taken in the grounds of appeal on their merits, and that therefore allowing the appeal by setting aside a regulator's decision did not necessarily complete the performance by the CAT of its functions in the particular case. The Tribunal, as a statutory body, has the task of deciding such appeals as are brought to it in accordance with the provisions of the 1998 Act and the rules, but it does not have a more general statutory function, of supervising regulators. On that basis it seems to me that the CAT's reasoning is based on a misconception of the relationship between the Tribunal and the regulators. When a decision is set aside and remitted to the relevant regulator, that particular matter is then to be dealt with by that regulator in accordance with its own statutory duties and functions. The regulator will have received a complaint and will have embarked on an investigation, but will not have concluded that investigation, because the decision by which it purported to do so will

have been set aside. Accordingly, as part of its current tasks, it will have the incomplete investigation to consider and process. If it comes to another decision, further rights of appeal may arise under sections 46 or 47, but otherwise the CAT has no role in relation to the regulator's conduct. If the regulator fails to discharge its duties, then it may be amenable to an application for judicial review in the Administrative Court but, unless and until it has given a decision which is subject to a statutory right of appeal, the CAT will have no jurisdiction in the matter.

35. Of course the CAT can properly express its own view as to how urgently the case should be dealt with after remission, just as it may express opinions on other aspects of the consequent re-investigation. But it does not seem to me to be a proper or necessary incident of the power to remit that the CAT should be able to give directions to the regulator in relation to the conduct of the further investigation, any more than it could give the regulator such directions about an initial investigation. In principle it seems to me unlikely that the Tribunal should be regarded as needing to have such powers or, to put it differently, that Parliament should have intended to confer such powers by implication. If it was intended that the CAT should have powers of that kind, I would expect them to have been identified expressly.

36. As a general matter it is not the function of the CAT to supervise the relevant regulators. It seems to me that some assistance on this question, as regards the relationship between a competition authority and an appeal body, may be found in paragraph 77 of the decision of the Court of First Instance in *Automec II* Case T-24/90 [1992] ECR II-02223, as follows:

> "In that connection, it should be observed that, in the case of an authority entrusted with a public service task, the power to take all the organizational measures necessary for the performance of that task, including setting priorities within the limits prescribed by the law where those priorities have not been determined by the legislature, is an inherent feature of administrative activity. This must be the case in particular where an authority has been entrusted with a supervisory and regulatory task as extensive and general as that which has been assigned to the Commission in the field of competition. Consequently, the fact that the Commission applies different degrees of priority to the cases submitted to it in the field of competition is compatible with the obligations imposed on it by Community law."

37. The relationship between the Commission and the Court of First Instance is not quite the same as that between a regulator and the CAT under the 1998 Act, in particular because there is a general appeal to the Tribunal on the merits in cases of the present kind, but the policy there stated seems to me to be applicable by analogy. The Tribunal cannot know what are the competing demands on the resources of the particular regulator at the given time. It may well be that it cannot properly be told of this by the regulator because of issues of confidentiality as to current investigations. It cannot, therefore, form any proper view as to the relative priority of one case as compared with others.

38. Similar policy reasons, and a similar view of the relationship between a public body which is subject to judicial review and the court dealing with an application for judicial review, seem to me to underlie the refusal of the Administrative Court, when

quashing a decision and remitting it, to instruct the authority as to when or how it is to proceed with the matter, other than that it is to do so in accordance with the law as laid down in the court's judgment: compare *GMC v Spackman* [1943] AC 627, Lord Wright at 647.

39. The CAT cited *R v Bolton Metropolitan Borough Council ex parte B* [1985] FLR 343 as an example of the court instructing a public authority to take a decision within a given time. In that case, however, the nature of the relief sought was an order that the council perform a duty which it had failed or refused to do, and the issue was whether the duty was subject to a time constraint. The judge, having held that the council was obliged to take a decision forthwith, ordered it to do so and specified the latest time by which it could properly do so. That is not a relevant analogy to the present type of case.

40. For those reasons, it seems to me that the CAT was wrong to hold that it had power to direct the time within which the new investigation was to be carried out following the setting aside of the DGT's decision by its order of 1 December 2004. It could certainly express its own view as to the urgency of the matter. But by that order it had disposed of the appeal and could not impose time limits under rule 19. Nor could it give such a direction under Schedule 8 paragraph 3(2)(d), which is limited to directions or other steps which could be the subject of an appeal, being decisions within the meaning of section 46 of the Act. There is no power to give such a direction as an implied incident of paragraph 3(2)(a). Nor could it direct the hearing of a case management conference under rule 19 or 20, since there would be no subsisting appeal in relation to which the case management conference could be held.

The European Convention on Human Rights, article 6

41. The CAT also held that it was necessary that it should be able to impose a time limit on the new investigation, and that it should impose such a time limit in the present case, in order to ensure that article 6 of the European Convention on Human Rights was complied with as regards the implementation of its order within a reasonable time.

42. Ofcom accepts that, on the particular facts of this case, article 6 is engaged, though it would not normally take that position as regards investigations under the 1998 Act. The reason why the article is accepted as applying is that its decision involved determining the legality of Floe's gateway services for the purposes of the Wireless Telegraphy Act 1949.

43. It is also accepted, consequently, that Floe's article 6 rights include a right to have the Ofcom investigation completed within a reasonable time, including the new investigation following the CAT decision (as well, of course, as the appeal to the CAT itself). Decisions of the European Court of Human Rights establish that the decisions of the impartial tribunal which is required for compliance with article 6 must be implemented effectively and within a reasonable time.

44. The CAT considered that it had the power to impose a time limit in order to ensure such compliance, even if it did not have such a power on any other basis, and that it should impose one because the timescale proposed by Ofcom would extend beyond a reasonable time after the CAT's decision. This seems to me to raise two questions:

first, is it for the CAT to see that its decisions are implemented in a reasonable time, and second, if so, could it properly come to the conclusion that Ofcom's proposed timetable would not comply?

45. I would answer each of those questions in the negative. So far as the first is concerned, the CAT has no role in relation to the time taken by a regulator over an initial investigation even if, as in the present case (however exceptional it may be), article 6 applies at that stage. If the complainant considered that Ofcom was guilty of unreasonable delay in pursuing the initial investigation, its remedy would be to apply for judicial review in the Administrative Court. In my judgment that would also be the correct remedy if the complainant considered that the regulator was guilty of unreasonable delay in proceeding with the investigation after remittal by the CAT.

46. I consider that further support is given to that division of functions, as between the CAT dealing with statutory appeals on the one hand, and the Administrative Court dealing with breaches by a regulator of its duties in other cases, on the other hand, by the fact that it must inevitably be very difficult, and normally impossible, for the CAT, or for anyone, to determine in advance that it would be a breach of a person's rights under article 6 for a particular investigatory process to be carried out in accordance with one timescale rather than another, at any rate as between the rival contentions at issue in the present case. The CAT accepted that whether the right to implementation within a reasonable time had been infringed or not would depend on a consideration of all the circumstances. Necessarily that involves looking at the circumstances as they were at the time by which it is said that the breach has occurred. I do not see how, in any normal case, that exercise could properly be undertaken in advance, at any rate so as to be able to determine that a process which would take between 6 and 12 months in the future would not comply, whereas a process which would take 5 months would not infringe article 6 rights. It would be appropriate for the Administrative Court to consider such a question after the event, if an application for judicial review is made to it, whereas it does not seem to me an appropriate exercise for the CAT to undertake in advance.

47. In *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379, Lord Bingham said at paragraph 52:

> "52. In any case in which it is said that the reasonable time requirement (to which I will henceforward confine myself) has been or will be violated, the first step is to consider the period of time which has elapsed. Unless that period is one which, on its face and without more, gives grounds for real concern it is almost certainly unnecessary to go further, since the Convention is directed not to departures from the ideal but to infringements of basic human rights. The threshold of proving a breach of the reasonable time requirement is a high one, not easily crossed. But if the period which has elapsed is one which, on its face and without more, gives ground for real concern, two consequences follow. First, it is necessary for the court to look into the detailed facts and circumstances of the particular case. The Strasbourg case law shows very clearly that the outcome is closely dependent on the facts of each case. Secondly, it is necessary for the contracting state to explain and justify any lapse of time which appears to be excessive."

48. In the judgment on 5 May 2005 the CAT referred to the fact that this would be a re-investigation, so that Ofcom would not be starting from scratch. It also referred to the importance of the issue for Floe and to the importance of Ofcom dealing with matters promptly in a fast-moving sector of the economy such as telecommunications, a point recognised in the Communications Act 2003. On the other hand, in its judgment on the original appeal it had said, at paragraph 283, that Ofcom might "feel that it should invite comments more widely than usual before adopting a new decision".

49. I do not see how the Tribunal could have concluded that it would be a breach of Floe's article 6 rights if a new decision that there had not been an infringement of the Chapter II prohibition was not reached until 6 months after the CAT's order. In fact Ofcom was not able to reach a decision within 5 months. It applied to the CAT for an extension of 8 weeks, which was allowed. It reached its decision within that extended period, on 28 June. The decision on the application for an extension, [2005] CAT 17, was not referred to before us. I have read it and though I will refer to it, it does no more than confirm the view which I had reached before seeing it. I therefore consider it unnecessary to invite further submissions about it. The Tribunal was reluctant to grant an extension. It did so after taking into account Ofcom's assurance that the investigation was being prioritised, but (understandably) without saying more about the reasons for allowing the extension. On the face of it the grant of the extension appears to be inconsistent with any proposition that Ofcom's failure to reach a decision by the end of 5 months was in fact a breach of Floe's article 6 rights. That is consistent with my impression that, save in the most unusual case, it would not be possible to say in advance that the timescale within which a regulator proposes to undertake and carry out a new investigation would be a breach of the complainant's article 6 rights, and that it was not possible to do so in the present case.

50. The point under article 6 would not matter unless it were the only basis on which the CAT could be said to have power to set a time limit for a new investigation. In my judgment there is no other basis, but article 6 does not provide such a basis either, both because it is not for the CAT to monitor compliance with article 6 by a regulator, except in relation to proceedings pending before it, and because it could not properly proceed on the basis that Ofcom would have been in breach of article 6 if it had followed the timetable which it had itself proposed.

Conclusion

51. For those reasons I consider that the CAT was wrong to order a case management conference and was wrong to consider that it could have ordered the new investigation to be carried out within a given time. Since the case management conference has happened, there is no point in setting aside the order that it should take place. No order was in fact made that the new investigation be carried out within any given time, and in any event the investigation has been carried out. It does not seem to be necessary to make any order on this appeal, since no further relief is needed by any party, and the court's judgments make clear the position in law on the point debated before us.

Lord Justice Sedley

52. For reasons which Lloyd LJ has explained, this is not really an appeal at all. The order made by the Tribunal was that the Ofcom should reinvestigate the matter "with

a view to" issuing an appropriate instrument within five months of the date of the order. This was on no view more than an exhortation. It might therefore have been inapt for inclusion in a formal order, but it could not be legally objectionable. The real issue was the power to which the Tribunal laid claim in its judgment but which it had not in the event purported to exercise. The judgment of Lloyd LJ, with which I respectfully agree but to which I add a little below, is thus, by consent of the parties, declaratory rather than remedial.

53. It does not follow from Lloyd LJ's conclusions that, once remission has been ordered, parties are at the mercy of the Ofcom in respect of time. Any undue delay falls within the supervisory jurisdiction of the High Court and can be met with a mandatory order. If such an order is sought it may well be relevant that the Tribunal has expressed a view, whether in its judgment or in its order, as to the time within which the remitted matter needs or ought to be dealt with. But this will not be the only factor. The Ofcom has other demands on its resources and is entitled, within reason, to set its own priorities. The High Court is unlikely to compel it to readjust these to accommodate a particular case unless the interests of justice and good administration plainly require it.

54. It is not necessary for us to decide whether, as Mr Turner submits is the case, defiance or breach of an order of the Tribunal by the Ofcom is justiciable as a contempt of court. It is evident from *Attorney-General v BBC* [1981] AC 303 (to which no reference was made before us) that the question is not a straightforward one. The Tribunal is not a court of record and possesses no powers of enforcement. Nor does it appear to possess a court of record's ultimate sanction of exclusion from the suit. But breach of an order of the High Court, if one is made in aid of a decision of the Tribunal, can certainly be a contempt.

55. Nor, secondly, does it follow that the Tribunal cannot attach appropriate conditions to an order for remission. Take a case remitted because manifestly necessary expert advice had not been obtained by the Ofcom, or because it has relied on advice or evidence from an unqualified person. Although the Tribunal might be content to spell out in their judgment what should or should not happen on remission, it is implicit in their statutory powers that their formal order may require the Ofcom to obtain the necessary expert advice. In such a case, too, enforcement through the High Court would if necessary be available. The CAT may lack teeth of its own, but its orders can still bite.

Lord Justice Chadwick

56. As Lord Justice Lloyd has explained, this appeal arises from an indication given by the Competition Appeal Tribunal (the "CAT") at paragraph 20 of its judgment of 1 December 2004 that, in the absence of an acceptable undertaking from the Office of Communications, the CAT would make an order remitting the decision under appeal upon terms which required the Office to issue a non-infringement decision or a statement of objections within five months of that date. The Office declined to give an undertaking on those terms or on other terms acceptable to the CAT. If the CAT had made an order in the terms which had been indicated in paragraph 20 of its judgment of 1 December 2004, I would have no doubt that this appeal should be allowed and that the order of that date (to the extent that it imposed those terms) should be set aside.

57. I reach that conclusion for the reasons which Lord Justice Lloyd has set out in his judgment. I agree with his view that, once the CAT had decided to remit the whole of the decision under appeal to the Office for further consideration, this was not a case in which the powers conferred by rule 19 of the Competition Appeal Tribunal Rules 2003 remained exercisable. The appeal had been fully determined. And I agree with his view that there is nothing in the relevant legislation which confers upon the CAT some general supervisory function in relation to the conduct by the Office or other regulators of the investigations which the regulators are themselves required to make in carrying out their statutory functions. The task of the CAT is to determine appeals which come to it under sections 46 and 47 of the Competition Act 1998; and to do so in accordance with the provisions in schedule 8 to that Act. For the reasons which Lord Justice Lloyd has explained, the CAT had fulfilled that task when it allowed the appeal and remitted the whole of the decision to the Office. There was nothing left for the CAT to do in relation to the appeal which had been brought to it.

58. But – for whatever reason - the CAT did not make an order in the terms which had been indicated in paragraph 20 of its judgment of 1 December 2004. The order which it made on 1 December 2004 contained the direction that the Office "re-investigate the matter with a view to issuing" either a non-infringement decision or a statement of objections with the period of five months from that date. As Lord Justice Sedley has observed, an order in that form is no more than exhortatory as to the time within which a non-infringement decision or statement of objections is to be issued. Failure to issue a decision or a statement within the period of five months would not amount to a breach of the order. The CAT's view as to the need for urgency and as to the time within which the Office should be able to issue a decision or a statement would be relevant - but not, necessarily, determinative – if subsequent delay came to be the subject of judicial review proceedings in the High Court; but that is another matter. And, in that context, the fact that the CAT's view was reflected in the order gives that view no more force than if it had been expressed in the judgment; as, perhaps, would have been a more appropriate course in the present case.

59. It follows, in my view, that there is no reason for this Court to make any order in relation to paragraph 2 of the order of 1 December 2004. The paragraph contains no error which this Court needs to correct. Nor is there any need to set aside paragraph 3 of the order; although I agree with Lord Justice Lloyd that the CAT went beyond its powers in purporting to fix a case management conference in relation to the future management of an appeal which it had finally determined. In the events which have happened paragraph 3 of the order of 1 December 2004 is spent.

60. The point which the parties wished this Court to resolve is addressed in our judgments. The appellants have undertaken to pay the reasonable costs of the respondent in resisting the appeal. Subject to any submissions which the parties may wish to make as to the costs incurred before the CAT, I would dispose of this appeal by making no order.