Neutral citation [2005] CAT 28

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

20 July 2005

Before:

Marion Simmons QC (Chairman)
Mr Michael Davey
Mrs Sheila Hewitt

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

Edward Mercer (of Taylor Wessing) represented the Appellant.

Peter Roth QC and Gerry Facenna (instructed by Polly Weitzman (Director of Competition Law and Head of Legal) Office of Communications) represented the Respondent.

Stephen Wisking (of Herbert Smith) represented the First Intervener, Vodafone Limited

Jon Turner (instructed by the Solicitor to the Office of Fair Trading) represented the potential appellant, the Office of Fair Trading

REASONS FOR REFUSING PERMISSION TO APPEAL

1. For the reasons given below the applications made by OFCOM and by the OFT for permission to appeal from the judgment of the Tribunal handed down on 5 May 2005 ([2005] CAT 14) (the "Judgment") are refused.

I BACKGROUND TO THE APPLICATION

2. On 5 May 2005 the Tribunal handed down a Judgment on OFCOM's application to set aside paragraphs 2 and 3 of the Tribunal's Order in this case dated 1 December 2004 ([2005] CAT 14). The procedural history giving rise to the making of the Tribunal's Order on 1 December 2004 and to the application to set the order aside is set out at length in the Judgment. For the reasons set out in the Judgment the Tribunal dismissed OFCOM's application.

3. On 3 June 2005 the respondent, OFCOM, applied pursuant to section 49(1) of the Competition Act 1998 (the "1998 Act") and rule 58 of the Competition Appeal Tribunal Rules 2003 (SI 2003/1372) (the "Tribunal's Rules") for permission to appeal to the Court of Appeal from the Judgment which dismissed OFCOM's application to set aside the Tribunal's Order of 1 December 2004.

4. Also on 3 June 2005 the Office of Fair Trading ("OFT") which, up to that date had played no part in the proceedings before the Tribunal in this appeal, applied for permission to appeal against the Judgment to the Court of Appeal under section 49(2) of the 1998 Act and rule 58 of the Tribunal's Rules.

5. No party requested that there be a hearing to consider the applications of OFCOM and OFT and we have considered the applications for permission to appeal on the documents and without a hearing.

II OFCOM'S SUBMISSIONS

6. Save where indicated references to paragraph numbers in this section are to paragraph numbers in OFCOM's application.

7. OFCOM submits that it should be granted permission to appeal because:

   (a) this case raises important questions of principle of wide-ranging application and accordingly this constitutes a compelling reason why the appeal should be heard within the meaning of CPR rule 52.3(6)(b); and/or

   (b) the appeal has a real prospect of success within the meaning of CPR rule 52.3(6)(a).

   (paragraph 3).

8. OFCOM submits that the developing jurisprudence of the Tribunal shows that the power to remit a matter to a competition authority pursuant to paragraph 3(2)(a) of Schedule 8 to the 1998 Act is used frequently. Accordingly the Judgment which decided that the Tribunal had jurisdiction to set a timetable when exercising that power and has a continuing role in the appeal is of wide application and significance for the conduct of appeals and investigations following remittal (paragraph 4).

9. The Tribunal found that paragraph 3(1) of Schedule 8 to the 1998 Act contains an "overriding function" and obligation on the Tribunal to "determine the merits of the matter before it" (paragraphs [62]-[63] of the Judgment), such that when a decision of the competition authority is set aside and the matter remitted to the authority under paragraph 3(2)(a) of Schedule 8 the appeal remains open before the Tribunal until it has given such decision as satisfies its overriding function (paragraphs [71] and [80] of the Judgment). OFCOM submits that the Judgment profoundly affects the "institutional balance" between the competition authority and the Tribunal and means that the Tribunal has jurisdiction over the entire re-investigation by the authority (paragraph 5).

10. OFCOM submits that the correct interpretation of paragraph 3(2) of Schedule 8 in itself involves an issue of principle regarding the jurisdiction of the Tribunal to set a time-limit for a re-investigation following remittal (paragraph 6).

11. OFCOM also submits that the Tribunal's ruling that OFCOM proposed to act in a manner in contravention of Article 6 is of great significance for the competition authorities given that OFCOM initially offered an undertaking that it would use best endeavours to complete the re-investigation in this case in accordance with its *Guidelines* (paragraph 7).

12. As to whether the appeal would have a real prospect of success OFCOM submits that the test of "real prospect of success" means only that there is a realistic, as opposed to a fanciful, prospect of success (*Tanfern Limited v Cameron-McDonald* [2000] 1 WLR 1311 at [21]). OFCOM submits that there are strong arguments that can be deployed against the reasoning in the Tribunal's judgment and on which the Court of Appeal may reach a different view to that of the Tribunal (paragraph 8).

13. OFCOM submits that as regards the Tribunal's function under paragraph 3(1) of Schedule 8, this was not directly addressed in the argument before the Tribunal. OFCOM submits that that paragraph is properly to be regarded not as a basis for enlarging what would otherwise be the role of the Tribunal but as limiting the Tribunal's determination only to the grounds of the appeal set out in the notice of appeal. Further, OFCOM submits that the requirement in paragraph 3(1) to make a determination "on the merits" refers to the merits of the appeal and not the merits of the "matter subject to investigation". As regards the merits of the appeal OFCOM submits that the Tribunal is not required, any more than any other court, to determine every point raised in a notice of appeal but only such as are necessary in order for it to give judgment. Accordingly, when the Tribunal gives a reasoned judgment setting aside a competition authority's decision it has made a final determination and is *functus officio* (paragraph 9).

14. OFCOM submits that the Tribunal's holding regarding its overriding function under paragraph 3(1) of Schedule 8 expressly influenced its interpretation of paragraph 3(2) of Schedule 8 as regards its rulings both as to whether that paragraph confers an express power or an implied power to give directions to a competition authority as to time periods (paragraphs [70] to [73] and [82] to [83] of the Judgment). OFCOM submits that the Tribunal's error regarding paragraph 3(1) accordingly casts doubt on

the reasoning in paragraph 3(2). Further, OFCOM submits that the inclusion of a "direction" within the definition of "decision" in section 46(3) does not mean that such a direction is encompassed within sub-paragraph 3(2)(e) of Schedule 8. Sub-paragraph 3(2)(e) expressly refers to any *other decision* and section 46(3) makes clear that there are a whole range of decisions, some of which are not included within sub-paragraph 3(2)(d). OFCOM submits that the powers of the Tribunal under sub-paragraphs 3(2)(b) to (e) are only to take such steps vis-à-vis third parties that the regulator could have taken. It follows that if the Tribunal does not have the power to give directions to competition authorities, the imposition of a time limit cannot be necessary or incidental to the exercise of such a power (paragraphs 10 and 11).

15. As regards the Human Rights Act and the European Convention on Human Rights, OFCOM submits that when proceedings engage Article 6 it is only substantial delay that will constitute a breach of the right to a fair trial set out in that provision, relying as authority for that proposition on the decisions of the ECJ and CFI cited to the Tribunal at the hearing of its application. OFCOM referred to its offer on 1 December 2004 to give an undertaking to the Tribunal to use its best endeavours to complete a new investigation in accordance with its *Guidelines* (which set maximum time periods of 6 months if OFCOM considers there are no grounds for action or 12 months if OFCOM proposes to issue an infringement decision). The Tribunal required OFCOM to issue either a negative decision or a statement of objections within 5 months. In those circumstances OFCOM submits that the Tribunal was wrong to find that OFCOM was proposing to act in breach of Article 6(1) of the Convention (paragraph [122] of the Judgment) and to require OFCOM to issue a further decision or statement of objections within 5 months (paragraph 12).

III THE OFT'S SUBMISSIONS

16. On 3 July 2005 the OFT, which had previously played no part in these proceedings, also applied for permission to appeal to the Court of Appeal against the Tribunal's Judgment. References to paragraph numbers in this section are, save where otherwise indicated, to paragraph numbers in the OFT's application for permission to appeal.

17. The OFT submits that it has sufficient interest to appeal against the Judgment pursuant to section 49(2)(a) of the 1998 Act. The OFT submits that it accepts the merit and critical importance of judicial control of its administrative conduct under the 1998 Act by the Tribunal. However the OFT states that it applies for permission to appeal in this case in the light of:

    (a) the fundamental importance of the point of principle in issue as respects the correct institutional balance between the (administrative) competition authority and the (judicial) appeal tribunal; and

    (b) the major potential implications of the ruling for the OFT's future competition enforcement work and, in the OFT's view, in view of the potential for significant harm to consumer interests if its ability freely to organise its own priorities in conducting investigations is impaired.

    (paragraphs 21 and 23).

18. According to the OFT the Tribunal's Judgment decided a crucial point of principle concerning the "institutional balance" between the Tribunal and the OFT under the 1998 Act as, according to the Judgment, if the Tribunal remits a matter to the OFT or other sectoral regulator with powers under the 1998 Act the Tribunal may determine the priority that should be given to further administrative investigation by the OFT and may set a timetable for the completion of such investigation. According to the OFT the correct "institutional balance" is not as set out in the Judgment but provides for the OFT to have complete discretion to make its own assessment of the priority to be given to matters remitted by the Tribunal to it, taking account of the OFT's own perception of the relative "public interest importance" and the demands of other cases being handled by the OFT at the time and the need to employ its own human resources efficiently (paragraphs 2 to 4).

19. According to the OFT the Tribunal's Judgment sets out a general power and does not limit the Tribunal's power to set time limits only to those cases where the competition authority has already shown that it does not intend to make reasonable efforts to

progress the further investigation required expeditiously or even to cases where the competition authority intends wrongly to decline to embark on the re-investigation ordered by the Tribunal (paragraphs 5 to 7).

20. According to the OFT, following the handing down of a judgment which sets aside a decision of a competition authority, the authority might offer the Tribunal an undertaking to use its "best endeavours" to complete the re-investigation within a reasonable period. Such an undertaking would be conditioned by the competition authority's own assessment of the work required to re-investigate the case, its knowledge of other aspects of the authority's case load and the state of its resources. The assessment of priority is, according to the OFT, a matter for the competition authority and is to be made relative to the entirety of the current case load of the authority and not in isolation (paragraph 8).

21. According to the OFT the Tribunal's judgment has a considerable impact on the work of the OFT as the OFT is the principal competition authority under the 1998 Act. According to the OFT's submissions the OFT receives over 1,000 complaints of infringements of the 1998 Act each year. The OFT's "Competition Enforcement Division" has the capacity, broadly speaking, to conduct about 30 investigations at any one time under the Act. The OFT submits that the efficient deployment of its resources is a difficult and delicate operation for the OFT that requires judgment on the basis of a wide range of factors. In exercising its functions the OFT must take into account its own view of the relative public interest importance and the relative degree of urgency of the cases within its entire case load on a continual basis (paragraphs 9 to 14).

22. The OFT submits that where the Tribunal remits a matter to the OFT it becomes necessary for the OFT to consider in the light of any views expressed by the Tribunal as to the public importance of the matter the relative priority to be given to the matter in terms of its overall case load which involves balancing its undoubted importance against a range of factors that are beyond the knowledge of the Tribunal. The OFT has in the past proceeded on the basis that it has a discretion in relation to the progression of investigations remitted to it by the Tribunal (paragraphs 15 and 16).

23. The OFT relies on the judgment of the Tribunal on the admissibility of the appeal in *BetterCare v Director General of Fair Trading* [2002] CAT 6 at paragraph 80 where the Tribunal noted:

> "Thirdly, and correctly in our view, BetterCare does not challenge in any way the Director's main submission that he has a discretion under the Act whether or not to conduct an investigation and whether or not to proceed to a decision, whether on an application under section 14 or section 22 or otherwise…we for our part would accept that the Director has a discretion under the Act whether (i) to open an investigation under section 25, or (ii) proceed to a decision as to whether or not there has been an infringement. In particular, in our view, a complainant has no right to compel the Director to proceed to take a decision that there has been an infringement, subject only to the as yet unexplored possibility of judicial review of the exercise of his discretion."

(paragraph 17)

24. As to the OFT's grounds of appeal the OFT submits that there is a fundamental point of principle in issue as respects the correct "institutional balance" between the OFT and the Tribunal and that the Tribunal's judgment gives rise to the potential for significant harm to consumer interests if its ability freely to organise its own priorities in conducting investigations is impaired. In the OFT's submission these considerations provide a compelling reason why the appeal should be heard by the Court of Appeal (by analogy with CPR Part 52.3(6)(b)) even were it not the case that the appeal has a realistic prospect of success (paragraphs 23 and 24).

25. The OFT submits that the Tribunal erred in deciding that the "directions" or "steps" referred to in paragraph 3(2)(d) of Schedule 8 to the 1998 Act include directions that might be given to itself or steps taken internally by the OFT in order to follow a timetable in the investigation of the matter remitted. The OFT submits that the natural and correct meaning to be given to these words is that they refer to outward-facing acts by the OFT. The OFT submits moreover, that it has no power to bind itself to a timetable for its own investigations without paying regard to the demands of its other cases (which may be urgent) or the state of its own resources and would be abusing its discretion under public law were it to do so (paragraph 29(1)).

26. The OFT submits that the Tribunal was wrong to decide that its interpretation of Schedule 8, paragraph 3(2)(d) was needed in order to avoid covering the same ground as paragraph (e). Paragraph (e) empowers the Tribunal to "make any other decision the OFT could itself have made." This is a reference to matters other than the directions or steps already covered under the preceding paragraph (d) (paragraph 29(2)).

27. The OFT submits that the Tribunal erred in relying on Schedule 8, paragraph 3(1) to support the proposition that the Tribunal has the power to give "time period" directions to a competition authority after having set aside the competition authority's decision. The OFT submits that the Tribunal's jurisdiction is an appellate one which ends when the appeal has been decided by setting aside or confirming the decision which is the subject of the appeal. Paragraph 3(1) does not grant or indicate that the Tribunal has an ongoing supervisory role over a further investigation by the OFT where a matter is remitted to it by the Tribunal. The OFT submits that the Tribunal has confused the "appeal" against the OFT's decision with the "matter", which must be dealt with by the OFT at the administrative level (paragraph 29(3)).

28. The OFT submits that the Tribunal erred in referring to rule 19 of its Rules as an alternative basis for imposing time period directions available after setting aside the competition authority's decision. The OFT submits that the proceedings in an appeal are not still on foot when a decision is set aside (paragraph 29(4)).

29. The OFT submits that the Tribunal erred in referring to an "overriding function" under the 1998 Act on its part to support the proposition that it has an implied power to give directions to a competition authority as to the time within which a further investigation must be completed. The OFT submits that the Tribunal further erred in holding that its function in "appeals" before it (to which paragraph 3(2) of Schedule 8 applies) as being to determine the "matter" on the merits (paragraph 29(5)).

30. The OFT submits that the Tribunal erred in relying on a comparison with the powers of the Administrative Court to give directions when making a mandatory order as the

Administrative Court issues mandatory orders to enforce compliance with a statutory duty in the event of a failure to do so (paragraph 29(6)).

31. The OFT further submits that the Tribunal erred in deciding that when faced with a deficit of evidence it could set aside a decision of a competition authority and remit the matter for reconsideration and then hear the merits of the appeal (paragraph 86 of the Judgment) (paragraph 29(7)).

32. The OFT submits that the Tribunal's view that its powers to remit and give directions would be in jeopardy unless it could impose time period directions was in error. In *BetterCare* (cited above) the OFT submits that the Tribunal acknowledged that the OFT has a discretion as to the further investigation of the matter following remission to it by the Tribunal and correctly respected the institutional balance provided for under the 1998 Act (paragraph 29(8)).

33. The OFT submits that if Article 6 is engaged on the facts of a particular case the right to a fair trial will only be infringed where any delay is, in context, substantial. In this case the Tribunal erred in apprehending a contravention of Article 6 ECHR in circumstances where OFCOM had offered an undertaking to the Tribunal to use its best endeavours to complete a re-investigation within a timetable constrained by the demands of its other cases and the need to ensure the most effective deployment of its own resources (paragraph 29(9)).

III THE SUBMISSIONS OF FLOE AND THE INTERVENERS

34. On 6 June 2005 the Tribunal invited submissions from the appellant Floe and the Interveners on the applications of OFCOM and the OFT. On 14 June 2005 Floe's solicitors, Taylor Wessing, wrote to the Tribunal stating that having considered the matter carefully Floe had decided not to make any formal representations on the applications of OFCOM and the OFT as to do so would not be a prudent use of its limited resources, save as follows:

(a) Floe submits that there are no grounds for appealing the Tribunal's Judgment of 5 May 2005 which have a real prospect of success;

(b) if permission to appeal is given then the appeal should be expedited because Floe should not be left in the invidious position of not knowing whether the CAT has the jurisdiction set out in the judgment of 5 May 2005;

(c) if permission to appeal is given then Floe intend to apply to the Court of Appeal for a pre-emptive costs order in relation to the appeal proceedings.

35. On 6 June 2005 Herbert Smith, solicitors for Vodafone Limited wrote to the Tribunal to the effect that Vodafone did not oppose the applications of OFCOM or the OFT but did not propose to make any written representations.

IV THE TRIBUNAL'S REASONS

OFCOM's application

36. The application by OFCOM to set aside paragraphs 2 and 3 of the Tribunal's Order of 1 December 2004 was expressly made by OFCOM on the basis that it was made to clarify and establish an important principle and not as a delaying tactic in the re-investigation. On 28 June 2005 OFCOM made a fresh non-infringement decision following the re-investigation it had carried out pursuant to the Order of 1 December 2004. The issues raised in OFCOM's application for permission to appeal are accordingly only relevant for future cases and do not have any impact on the implementation of the Tribunal's Order of 1 December 2004.

37. The jurisdiction of the Tribunal is derived from the 1998 Act. The Tribunal does not consider that the matters referred to in OFCOM's and the OFT's requests for permission to appeal raise any issue as to the construction of the 1998 Act which has a real prospect of success. The matters set out in the requests for permission to appeal

concerning what has been termed by OFCOM and the OFT as the "institutional balance" are extraneous to, and do not alter, the true construction of the 1998 Act. Accordingly, and in particular because the construction of the Act as set out in the Tribunal's Judgment (paragraphs [61] – [88]) is clear, there can be no other compelling reason why the appeal should be heard.

38. We set out below our detailed reasons for refusing the application for permission by reference to the paragraph numbers of the applications made by OFCOM and the OFT.

OFCOM paragraphs 5 and 9:

39. OFCOM submits that the Tribunal erred over the interpretation of paragraph 3(1) of Schedule 8 in that the Tribunal misdirected itself as to the meaning of the "merits of the appeal". OFCOM, in paragraph 9 of its application for permission to appeal submits that the determination "on the merits" which the Tribunal must make refers to the merits of the appeal, and not the merits of the "underlying matter subject to investigation". However, the Judgment proceeded on the basis that the determination the Tribunal is required to make "on the merits" refers to the merits of the appeal i.e the merits of the grounds of appeal set out in the notice of appeal. Nowhere in the Tribunal's Judgment was it suggested by the Tribunal that the reference to a determination "on the merits" in paragraph 3(1) of Schedule 8 was to the underlying subject of the investigation outside the grounds set out in the notice of appeal nor that paragraph 3(1) enlarged the role of the Tribunal (see paragraphs [62] and [63] of the Judgment). Each of the issues remitted to OFCOM by the Tribunal for re-investigation were included in the grounds set out in Floe's amended notice of appeal (see paragraphs [72] and [80] of the Judgment).

40. OFCOM submits in paragraph 9 of its application that the Tribunal is not required, any more than any other court, to determine every point raised in the notice of appeal but only such points as are necessary for the Tribunal to give judgment in the case. Accordingly, OFCOM submits that when the Tribunal gives a reasoned judgment setting aside a regulator's decision, it has made such a determination and is functus

officio. For the reasons which we set out in paragraphs [64] to [72] of our Judgment we consider that these submissions of OFCOM are misconceived.

OFCOM Paragraphs 7 and 12:

41. OFCOM submits that the Tribunal's ruling that the action proposed by OFCOM prior to the making of the order would have been in contravention of Article 6 is incorrect in circumstances where an undertaking is offered to the Tribunal that OFCOM will use its best endeavours to complete a new investigation within 6 months, if it considers that there are no grounds for action, or 12 months if it issues an infringement decision. However, this submission of OFCOM ignores the fact that the undertaking offered to the Tribunal in this case was subject to a caveat indicating that low priority would be given to the remitted matters, as set out in the submissions made by OFCOM to the Tribunal on 1 December 2004 summarised in paragraphs [7] and [120] of the Judgment. Having regard to that caveat and to the factors referred to in paragraphs [119] to [123] of the Judgment, the submissions of OFCOM have no real prospect of success. The Tribunal also notes that this submission of OFCOM is inconsistent with OFCOM's primary submission that the Tribunal has no jurisdiction as regards the timing of the further investigation. If the Tribunal has jurisdiction to accept an undertaking from OFCOM as to the time frame of the new investigation *a fortiori* it must have jurisdiction to make an order equivalent to the undertaking. As to the exercise of the Tribunal's discretion as to whether to accept an offer of an undertaking or when making an order related to time we refer to paragraphs [123] and [125] to [126] of the Judgment.

OFCOM paragraph 10:

42. OFCOM submits that the Tribunal misdirected itself as to the interpretation of paragraph 3(1) of Schedule 8 which misdirection casts doubt on the interpretation given by the Tribunal to paragraph 3(2) of Schedule 8. The Tribunal considers that there is no substance in this submission because paragraph 3(2) provides for the relief which the Tribunal can give in the context of the exercise of the Tribunal's jurisdiction under paragraph 3(1) (see paragraphs [70] to [73] and [82] to [83] of the Judgment).

43. OFCOM further submits that the inclusion of a "direction" within the definition of "decision" in section 46(3) of the 1998 Act does not mean that such a direction is encompassed within sub-paragraph 3(2)(e) of Schedule 8 which expressly refers to "any *other* decision". OFCOM submits that section 46(3) makes clear that there are a whole range of decisions, some of which are not included in sub-paragraph 3(2)(d) and so fall within sub-paragraph (3)(2)(e) and referred to a passage from Hansard in support of its submission. The Tribunal considers that these submissions have no real prospect of success as the true construction of paragraph 3(2) is clear: "the decision" of the competition authority referred to in the opening words of paragraph 3(2) must be an appealable decision under section 46(3) or section 47(1) of the 1998 Act. Sections 46(3) and 47(1) define decisions that can be appealed to the Tribunal to include "directions" made pursuant to the OFT's statutory powers, the imposition of conditions or obligations and the acceptance or release of commitments. This is explained by the Tribunal in paragraphs [67] to [69] of the Judgment. Accordingly, the word "decision" in sub-paragraph 3(2)(e) and the opening words of paragraph 3(2) of Schedule 8 must be given the same meaning which is as defined in sections 46(3) and 47(1). OFCOM's submission to the contrary would require the word "decision" in sub-paragraph 3(2)(e) to have a different meaning from the meaning in the opening words of paragraph 3(2). We consider that such a construction would be perverse and accordingly we consider this submission has no real prospect of success.

44. As explained in the Judgment, under paragraph 3(2)(e) the Tribunal can take "any other decision" which the OFT could itself have taken having confirmed or set aside the decision taken by the OFT, or any part of it. The words "any other decision" in paragraph 3(2)(e) mean any decision other than the decision taken by the competition authority. The Tribunal could therefore, for example, substitute its own direction for the purposes of sections 32 or 33 of the Act in place of the decision of the OFT under paragraph 3(2)(e) of Schedule 8. The direction included in a decision for the purposes of sections 46 and 47 of the 1998 Act must therefore necessarily be different in specie from the directions referred to in paragraph 3(2)(d) of Schedule 8. We refer to paragraphs [66] to [69] of the Judgment as to the true construction of paragraph 3(2)(e) of Schedule 8.

45. Furthermore, the wording of paragraph 3(2)(d) includes a power to "take such other steps" as the competition authority could have taken. OFCOM does not address these words in its submissions but confines its submissions only to the opening words of the phrase "give such directions". We refer to paragraphs [68] to [73] of the Judgment for the interpretation of paragraph 3(2)(d) in its entirety.

46. We do not consider that OFCOM's reference to Hansard in support of its submissions is of any relevance to the construction of paragraph 3(2) since the meaning of paragraph 3(2) is not ambiguous or obscure nor does the construction given to paragraph 3(2) in the Judgment lead to an absurdity. No application was made by any party to refer to Hansard in support of their submissions before or during the hearing of OFCOM's application to set aside the Tribunal's Order of 1 December 2004.

OFCOM paragraph 11:

47. OFCOM's submission that as the Tribunal does not have the power to give directions to a competition authority and therefore the power to set a time limit cannot be necessary or incidental to the exercise of such a power has no real prospect of success for the reasons set out in paragraphs [81] to [88] of the Judgment.

The OFT's application

48. OFT paragraphs 7, 23 and 24:

The OFT submits that the Judgment is at odds with the "institutional balance" between the Tribunal and the OFT. We do not consider that this is a ground which has a real prospect of success nor provides another compelling reason why the appeal should be heard. The Judgment is either correct as to the construction of the provisions in the 1998 Act and of the Tribunal's Rules or it is incorrect. If the construction was unclear or ambiguous then the "institutional balance" may be a relevant consideration. However, as is apparent from paragraphs [61] to [88] of the Judgment the Tribunal considers that the construction of paragraph 3(2) of Schedule 8 is clear.

49. OFT paragraphs 6 to 8:

The OFT refers to the power of the Tribunal to impose time period directions as a "reserve" or "failsafe" power and to the ability of a competition authority to offer an undertaking to the Tribunal as to the time within which it will complete the further investigation. These references are inconsistent with the OFT's submission that the Tribunal has no power to impose time period directions since even a reserve or failsafe power in the Tribunal must have a foundation based on provisions of the 1998 Act. Similarly, an ability to offer an undertaking must *ex hypothesi* mean that the Tribunal has jurisdiction to accept an undertaking. A Tribunal cannot accept an undertaking in circumstances where it does not have jurisdiction to make an order equivalent to the undertaking being accepted: an undertaking is given in substitution for the Tribunal's order.

50. OFT paragraphs 9 to 20:

The OFT submits that when a matter is remitted to it, it is in the same position as it would have been had no investigation ever been commenced and that it is appropriate for the OFT to give fresh and unfettered consideration to whether, and on what basis, it is to conduct any further investigation of the matter remitted to it. For the reasons set out in paragraphs [8] to [20] of the Tribunal's judgment giving reasons for making the Order of 1 December 2004 ([2004] CAT 22) and paragraphs [8] to [13] of the Judgment we consider that this submission is entirely misconceived and has no real prospect of success nor can it give rise to any compelling reason why the appeal should be heard. We consider that this submission of the OFT negates the Tribunal's powers which are provided for in paragraph 3 of Schedule 8 to the 1998 Act and may have the potential consequence of depriving an appellant of the benefit of a successful appeal to the Tribunal.

51. The OFT's submission that it is appropriate for the OFT to prioritise the re-investigation of matters that are remitted to it as merely one among over 1,000 complaints of infringement of the 1998 Act that it receives each year ignores the fact that before an appeal reaches the Tribunal the OFT has already exercised its discretion:

(a) to investigate the matter (i.e. decided that the matter should become one of the approximately 30 investigations that the OFT has the capacity to conduct referred to in the OFT's submissions); and

(b) to proceed to issue a decision capable of being appealed to the Tribunal (we note that the OFT's Annual Plan 2005-06 envisages that the OFT will proceed to issue between 5 and 10 reasoned decisions arising from the over 1,000 complaints which the OFT submits it receives each year).

52. Where a matter is remitted to the OFT by the Tribunal the remission is therefore made in the context of an investigation to which the OFT has already decided to give priority. It has proceeded to make a decision, but in so doing has made some error that requires the matter to be remitted. The position is an entirely different one to the situation in which the OFT is exercising a discretion as to whether or not to investigate a complaint at the outset. Those considerations therefore do not give rise to a ground of appeal which has a real prospect of success nor do they provide any other compelling reason that the appeal should be heard (see paragraphs [8] to [13] of the Judgment and paragraphs [8] to [20] of the Tribunal's judgment of 1 December 2004 ([2004] CAT 22)).

OFT Paragraph 29:

53. We do not consider that the matters raised in paragraph 29 of the OFT's application for permission to appeal have a real prospect of success for the reasons set out above in respect of OFCOM's application and in the Judgment at paragraphs [61] to [88] and [118] to [126].

54. The OFT relies on *Bettercare.* The *Bettercare* case (in which one of us, Mr Davey, was a member of the panel which heard the appeal) was an unusual case which is readily distinguishable from this case and the other cases in which the Tribunal has set a time table upon remitting a matter to a competition authority that are mentioned in the Judgment. In *Bettercare* the Director General of Fair Trading (the predecessor to the OFT) had, in a series of letters to the appellant, decided that the matters of which

the appellant complained were not covered by the 1998 Act at all. The Director therefore took the view, as a matter of principle, that he had no jurisdiction to investigate the complaint because it concerned the activities of a local authority which was not acting as an "undertaking" for the purposes of the 1998 Act. The Director reached that view without investigating the relevant market circumstances any further (see, in particular paragraph 163 of the Tribunal's judgment in *Bettercare*). The Tribunal held that the Director's decision was incorrect as a matter of law. As the Director had not given any consideration to the competition issues raised by Bettercare's complaint, but had decided the prior issue of his jurisdiction as a matter of principle, the consequence of the Tribunal's judgment was that Bettercare's complaint remained pending before the Director and it was for the Director to give further consideration to it and to whether it merited investigation by the OFT (paragraph 292 of the Tribunal's judgment in *Bettercare*). Accordingly, *Bettercare* is a case where the OFT had determined not to investigate the complaint, it was not a case where the OFT had decided that the complaint merited investigation and had reached conclusions following an investigation.

55. We accept that the Judgment has an impact on the OFT as well as on all the other competition authorities with concurrent powers to apply the 1998 Act, which include OFCOM. We do not, however, consider that the matters raised by OFT are peculiar to the OFT and in those circumstances we consider that the OFT does not have any interest additional to OFCOM in this appeal. The submissions made by the OFT largely duplicate those made by OFCOM. Furthermore, the Court of Appeal does not need the assistance of the OFT to read the Tribunal's previous decisions such as *Argos* and *Aberdeen Journals* cited in the Judgment. Accordingly there is no reason for the OFT to be separately represented. Had we granted permission to appeal to OFCOM we would not have considered it appropriate to give the OFT permission to appeal in addition.

56. Furthermore, had we considered that there was a compelling reason why the appeal should be heard we would not ourselves have given permission to appeal in this case. On the hearing of OFCOM's application to set aside paragraphs 2 and 3 of the Tribunal's Order of 1 December 2004 and in respect of the costs of responding to the

applications to the Tribunal for permission to appeal, OFCOM agreed to pay the reasonable legal costs of Floe's administrators (see paragraph 16 of the Judgment). No similar offer has been made in respect of any appeal or application to the Court of Appeal for permission to appeal. Floe indicated that it intends to apply to the Court of Appeal for a pre-emptive cost order if permission to appeal were to be granted. We also note that the matters raised in this appeal are now hypothetical as between the parties and of no relevance to the carrying out of the Order made by this Tribunal on 1 December 2004 (see paragraph 36 above). We therefore would have considered that the Court of Appeal should itself consider whether the applications for permission to appeal should be granted having regard to all the circumstances.

Marion Simmons QC Michael Davey Sheila Hewitt

Registrar July 2005