Neutral Citation Number: [2009] EWCA Civ 47

Case Nos: A3/ 2007/0658 & 2007/0665

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE COMPETITION APPEAL TRIBUNAL
MARION SIMMONS QC (Chairman)
Mr Michael Davey & Mrs Sheila Hewitt
Case No: 1024/2/3/04

Royal Courts of Justice
Strand, London, WC2A 2LL

Date:10/02/2009

Before :

LORD JUSTICE MUMMERY
LORD JUSTICE LAWRENCE COLLINS
and
SIR JOHN CHADWICK

- -

Between :

(1) OFFICE OF COMMUNICATIONS **(2) T-MOBILE (UK) LIMITED**	**Appellants**
- and -	
FLOE TELECOM LIMITED (in liquidation)	**Respondent**

- -
- -

MR RUPERT ANDERSON QC, MS ANNELI HOWARD and MR BEN LASK (instructed by General Counsel, Office of Communications) for the Appellant Office of Communications
MR MEREDITH PICKFORD (instructed by Robyn Durie, Regulatory Counsel, T-Mobile) for the Appellant T-Mobile (UK) Limited
MS MONICA CARSS-FRISK QC MR BRIAN KENNELLY and MR TRISTAN JONES (instructed by Taylor Wessing for the Respondent)

Hearing dates: 4th , 5th & 6th March 2008

- -

Judgment

Lord Justice Mummery:

An extraordinary appeal

1. As a general rule the Court of Appeal only accepts appeals against *orders* made by a "lower court", which is defined in CPR Part 52.1(3)(c) as "the court, tribunal or other person or body from whose decision an appeal is brought." Section 16 of the Supreme Court Act 1981 provides that-

> "Subject as otherwise provided by this or any other Act….the Court of Appeal shall have jurisdiction to hear and determine appeals from any judgment or order of the High Court."

2. According to the commentary in Volume 1 of the White Book (2008) at page 1386,

> "Appeals are against orders, not reasoned judgments…..Accordingly appeal lies against the order made by the lower court, not against the reasons which that court gave for its decision or the findings which it made along the way. Thus a party who has been wholly successful in obtaining or (as the case may be) resisting the relief sought cannot appeal against the judgment, in order to challenge the findings made: **Lake v. Lake** [1955] P 336….If the court wishes to enable a party to appeal against a particular finding contained in the judgment, it may make a declaration embodying that finding. See **Compagnie Noga D'Importation Et D'Exportation SA v. Australia and New Zealand Banking Group Ltd** [2002] EWCA Civ 1142; [2003] 1 WLR 307 "

3. The commentary also notes that the Court of Appeal made an exception to the general principle in **Morina v. Secretary of State for Work and Pensions** [2007] EWCA Civ 749, when it held that there were good reasons for deciding jurisdictional points arising on an appeal by the Secretary of State, even though he was the overall victor below. The Secretary of State had won on the merits before the Commissioner, but he had lost on jurisdictional points, which the Court of Appeal was nevertheless willing to decide.

4. Except in rare and exceptional circumstances, the only legitimate purpose of an appeal is to reverse or vary an order on the ground that the decision of the lower court was wrong, or was unjust because of a procedural or other irregularity in the proceedings in the lower court: CPR Part 52.11(3). The same applies to the case of a second appeal to the Court of Appeal i.e. an appeal from the decision of a lower court which was itself made on appeal: CPR Part 52.13(1). If the party seeking to appeal has obtained the desired order from the lower appellate court, such as, as in this case, an order dismissing an appeal, a further appeal by that party would not normally lie simply for the purpose of overturning or modifying legal reasoning or findings in the lower court's judgment.

5. In this case jurisdiction is conferred on the Court of Appeal by section 49(1)(c) of the Competition Act 1998 (the 1998 Act). An appeal from the Competition Appeal Tribunal (the Tribunal) may be brought on a point of law arising from a decision on an appeal under sections 46 or 47. An appeal may be brought, with the permission of

either the Tribunal or the Court of Appeal, by a party to the proceedings before the Tribunal, or by a person who has a sufficient interest in the matter.

6. The Tribunal's order dated 18 January 2007 gave effect to a judgment handed down on 31 August 2006. The Tribunal dismissed an appeal by Floe Telecom Limited (Floe) against the decision of the Office of Telecommunications (Ofcom) dated 28 June 2005. Ofcom, which succeeded the Director-General of Telecommunications (the Director) in 2003 dismissed a competition complaint originally made by Floe to the Director on 18 July 2003. Floe's complaint was that Vodafone Limited (Vodafone) had breached competition law in abusing a dominant position contrary to Article 82 of the Treaty and section 18 of the 1998 Act by suspending and disconnecting Floe's use of certain mobile phone services called GSM gateways on 11 April 2003. Vodafone considered that the use of unlicensed GSM gateways was unlawful.

7. Very protracted proceedings before the Director, Ofcom and the Tribunal followed the complaint. The proceedings involved a Competition Act investigation by the Director and his report dated 3 November 2003 concluding that there had been no infringement of section 18 by Vodafone; an appeal by Floe to the Tribunal, which delivered a 145 page judgment on 19 November 2004 that the decision of the Director should be set aside on grounds of incorrect and/or inadequate reasoning and made an order remitting the matter to Ofcom for re-investigation; a re-investigation of Floe's complaint by Ofcom, which made the second decision dated 28 June 2005, concluding that section 18 and Article 82 of the Treaty did not apply in respect of the particular facts of the case, because Floe's use of GSM gateways was unlawful and, by ceasing to supply Floe, Vodafone was complying with a "legal requirement"; and another appeal by Floe to the Tribunal, which delivered a 163 page judgment dated 31 August 2006 and made an order on 18 January 2007 dismissing the appeal, but in terms which have given rise to Ofcom's extraordinary appeal to this court.

8. VIP Communications Limited (VIP) made a complaint similar to Floe's against the appellant T-Mobile (UK) Limited (T-Mobile). That complaint was rejected by Ofcom in a decision dated 22 December 2003. VIP appealed to the Tribunal, which ordered a re-investigation by Ofcom. VIP, which has gone into administration, appealed to the Tribunal against the second decision of Ofcom dated 28 June 2005 rejecting the complaint. T-Mobile asserts in this appeal that it has a sufficient interest to support Ofcom and to add some arguments of its own.

9. No-one questions the Tribunal's decision to dismiss Floe's appeal. On its own short findings of fact the Tribunal agreed with and confirmed Ofcom's decision that no infringement of competition law had occurred. If the Tribunal had stopped at that point, the jurisdiction of this court could not, and would not, have been invoked by the appellants Ofcom and T-Mobile, or by the respondent Floe, if it had decided to appeal. The Tribunal made a finding of fact against which there is no right of appeal by any party under the 1998 Act. The Tribunal's dismissal of Floe's appeal was not in consequence of any error of law in the Tribunal's judgment nor was it, in itself, an error of law.

10. The most unusual feature of this appeal is that it was Ofcom and T-Mobile, not Floe, who then applied to the Tribunal for permission to appeal to this court. The applications were open to an obvious objection that the Tribunal had dismissed Floe's

appeal. As Ofcom was the overall winner in the Tribunal, there appeared to be nothing for it to appeal against. It is not surprising that permission to appeal was refused by the Tribunal for the reasons set out in a judgment dated 15 March 2007. One of the grounds for refusing permission was that Ofcom's appeal would be academic. That, incidentally, is the very criticism that Ofcom makes in this court about many passages in the Tribunal's 378 paragraph judgment. Ofcom has brought this appeal because it is troubled by much of the content of the Tribunal's judgment. First, the Tribunal decided points of law that were unnecessary for the determination of Floe's appeal. Secondly, the unnecessary rulings were legally wrong and called into question Ofcom's regulatory approach to GSM gateways and were contrary to the "conventional wisdom" of the mobile network operators.

11. This court also refused permission to appeal on a paper application dealt with by Lloyd LJ on 3 May 2007. On a renewed application permission was granted by two other Lords Justices on 19 January 2007. The appeal has proceeded to a full hearing on the unusual basis that Ofcom was prepared, if necessary, to enter into an arrangement funding Floe's reasonable legal costs in opposing its appeal. This was to ensure that both sides of the arguments, which call for specialised knowledge of the relevant technology and the complex regulatory law, could be properly presented to the court.

12. As for Floe, it not only lost its appeal to the Tribunal; it went into administration and then liquidation. It was in no position to afford the costs of a Court of Appeal hearing. It was, however, willing and able to play the part of a funded respondent to Ofcom's appeal.

13. As for the Court of Appeal (if it matters), the situation is that it has more than enough to do hearing appeals from unsuccessful litigants without encouraging appeals from successful litigants. Ofcom is content with the overall outcome of Floe's unsuccessful appeal to the Tribunal, which expressly upheld Ofcom's second decision and declared that

> "2. …that Vodafone had not abused a dominant position when disconnecting Floe's SIM cards is confirmed."

14. So why should Ofcom be allowed to pursue an appeal to the Court of Appeal from its victory in the specialist appellate Tribunal, which has been established to decide competition appeals? Most of the judgment reported at [2006] CAT 72 is devoted to detailed discussion and determination of points, which were argued before the Tribunal, but, as it turned out, were not necessary for its disposal of Floe's appeal. A decision on most of the points was rendered unnecessary by a short finding of fact by the Tribunal as to why there was no breach of competition law by Vodafone in disconnecting Floe's use of GSM gateways.

15. Ofcom wants to appeal against points in the Tribunal's judgment which are reflected in the terms of its order. If the Tribunal's rulings on those points had been cast in the form of a declaration, that would probably have facilitated Ofcom's appeal. However, in its order confirming Ofcom's second decision, the Tribunal took the highly unusual course of expressly "setting aside" parts of that decision as either misconceived or inadequately reasoned-

> "3. In so far as the Respondent's reasoning and conclusions in the Decision differ from the reasons set out in the Judgment the Decision is set aside
>
> a. as being misconceived as is set out under the Summary of the Tribunal's Judgment at paragraphs 12(1) and 12(5) and (6) which paragraphs cross refer to the relevant parts in the Decision and in the main body of the Judgment:
>
> b. as being inadequately reasoned as is set out under the Summary of the Tribunal's Judgment at paragraphs 12(3) and 12(4) which paragraphs cross refer to the relevant paragraphs in the Decision and in the main body of the Judgment."

16. The substance of the differences between Ofcom's second decision and the Tribunal's judgment on Floe's unsuccessful appeal from it will be fully explained in due course. All that need be noted at this stage is Ofcom's concern that, as long as the legal rulings by the Tribunal in its judgment on the construction of Vodafone's licence and on points of EC law, stand that judgment will constitute an "adverse precedent." This is damaging to the public interest in the wider context of Ofcom's statutory regulatory responsibilities. The Tribunal's unnecessary rulings have created uncertainty potentially prejudicing Ofcom's future licensing and radio spectrum management and regulatory obligations, in particular in that part of the telecommunications sector relating to the licensing of mobile network operators (MNOs).

17. The parties are united in pressing for a full judgment from this court on whether the Tribunal was legally correct to "set aside" parts of Ofcom's decision. No-one has raised any objection in principle to Ofcom's appeal from paragraph 3 of the Tribunal's order. It seems that only the court itself has some reservations about the form of the appeal.

18. Should the Court of Appeal decline to decide the appeal? Permission to appeal has been granted, but that does not bind this court to decide an appeal which it ought not to decide. The court has heard full argument from both sides on Ofcom's grounds of appeal and it is late in the day for doubts about the wisdom of entertaining the appeal. However, the doubts need to be discussed and we need to explain the circumstances in which our judgments came to be written and delivered. For all we know the case may go further to a court that questions why the Court of Appeal ever agreed to hear and decide this appeal.

19. There is also the risk of setting a dangerous precedent, which may be used as authority for the proposition that a successful party is entitled to appeal against the reasoning in the judgment of a lower court on points not necessary for its decision and not affecting the overall outcome. That would be contrary to the well established general principle that appeals should be against orders rather than reasons given or findings made along the path to the order of the lower court.

20. It is the unnecessary nature of the Tribunal's legal rulings in its judgment that is most troubling. The court itself drew the attention of the parties at the hearing to **R (Burke) v. GMC** [2006] QB 27. There are sound reasons why courts and tribunals at all levels

generally confine themselves to deciding what is necessary for the adjudication of the actual disputes between the parties. Deciding no more than is necessary may be described as an unimaginative, unadventurous, inactive, conservative or restrictive approach to the judicial function, but the lessons of practical experience are that unnecessary opinions and findings of courts are fraught with danger.

21. Specialist tribunals seem to be more prone than ordinary courts to yield to the temptation of generous general advice and guidance. The wish to be helpful to users is understandable. It may even be commendable. But bodies established to adjudicate on disputes are not in the business of giving advisory opinions to litigants or potential litigants. They should take care not to be, or to feel, pressured by the parties or by interveners or by critics to do things which they are not intended, qualified or equipped to do. In general, more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute.

22. One of the dangers of unnecessary rulings is that, with only the assistance of the parties and without the benefit of wider consultation on relevant aspects of the public interest, the court's opinions, though meant to be helpful, may turn out to be damaging in practice and wrong in law. The court may be unaware of all the available arguments or ignorant of the practical implications of what it says. Those who rely on its advisory opinions when applying the law in practice may be misled or confused. A judgment aimed at giving authoritative advice and guidance may be misused by selective citation in different and unforeseen disputes and circumstances.

23. It is also the case that the Court of Appeal is faced with a dilemma when presented with unnecessarily wide ranging judgments at first instance or, as in this case, at a lower appellate level. If, on the one hand, the Court of Appeal accepts an appeal against unnecessary rulings on points of law, it risks making the situation even worse by itself expressing unnecessary opinions, apparently impressed with greater authority. If, on the other hand, it takes a purist stance and refuses to accept the appeal at all, those who have reasonable grounds to be aggrieved by parts of the judgment of the lower court may have to wait a very long time in the happenstance of litigation before they have an opportunity to challenge those parts of the judgment. Indeed, they may never have the chance to get what has been said judicially examined and, if necessary, corrected.

24. In the extraordinary circumstances of this case I am now satisfied, despite reservations initially and on reflection, that it was right for this court to hear the full appeal. This does not, however, mean that this court should express opinions on all the points which have been dealt with in the judgment of the Tribunal or on all aspects of the appeal which were argued in the skeleton arguments or at the hearing. This court should take care to confine its judgment to those points on which there are very good reasons, in the interests of the parties and in the public interest, for departing from the normal prudent course of deciding only what is necessary for the adjudication of the actual dispute between the parties.

The parties

25. There are two appellants. The first appellant is the regulator Ofcom. It is the successor to the Director to whom Floe's complaint was made. It made the second decision, which was unsuccessfully appealed to the Tribunal by Floe. The second appellant is

T-Mobile, which was given leave to intervene in the Tribunal hearing on the ground of a sufficient interest, as it was also on the receiving end of a similar complaint of breaches of competition law raising similar issues of law.

26. The respondent is Floe. It no longer has any particular interest in the judgment of the Tribunal or the outcome of this appeal, but has been funded to perform a useful function on this appeal.

GSM gateways: factual background

27. The dispute is about the authorisation and regulation of telecommunications devices called GSM gateways (**G**lobal **S**ystem for **M**obile communications). They are used in mobile phone networks. The agreed Statement of Facts contains this description of GSM gateways-

> "3. GSM gateways are devices containing one or more SIMs [described below] for one or more mobile networks, which enable calls from fixed phones to mobile networks to be routed directly via a GSM link into the relevant mobile phone network.
>
> 4. A call made via a GSM gateway appears to the mobile phone network to have originated from a mobile registered to that network and so attracts a cheaper call rate.
>
> 5. A purpose of the GSM gateway is to take advantage of the lower tariff of on-net calls on a mobile network compared to fixed-to-mobile calls. "

28. The function of an SIM card is also described. SIM is an acronym for **S**ubscriber **I**dentity **M**odule cards. A SIM card is a uniquely numbered "smart card" containing subscriber specific information. Its main purpose is to identify the subscriber to the mobile network for tariff and billing purposes.

29. This dispute is about public, rather than private, GSM gateways. The distinction arises from the wording of regulation 4(2) of the Wireless Telegraphy (Exemption) Regulations 2003 (the Exemption Regulations). The regulation refers to relevant apparatus "by means of which a telecommunications service is provided by way of business to another person." The term "public GSM gateway" is used for a GSM gateway falling within that description.

30. According to the Agreed Statement of Facts (paragraph 10) "the operator of a public GSM gateway typically

    a. is the owner of that GSM gateway;

    b. has the GSM gateway installed in his own premises or at premises which it otherwise has the right to control and, if it has switching equipment, has the GSM gateway connected to its own switching equipment;

    c. subscribes for the SIMs to be placed into the GSM gateway, and places them into the GSM gateway;

d. enters into contracts with corporate and/or individual customers to supply them with fixed-to-mobile calls at on-net prices below those charged by mobile operators for fixed-to-mobile calls; and

e. installs or procures the installation of connectivity and operates the GSM gateway so that it can supply those customers [this was not agreed by Floe which does not accept that a public GSM gateway is 'operated' by a public GSM gateway operator] ;

f. operates the GSM gateway in order to provide services to a number of corporate customers."

31. A public GSM gateway is likely to generate more traffic than a private one. It can cause congestion by concentrating significant volumes of traffic in a particular cell and at particular times of day.

32. Floe's GSM gateways were connected to Vodafone's network in the same manner as a mobile handset is connected to a mobile operators network. At the date in April 2003 when Vodafone disconnected Floe, Vodafone and others in the industry, like T-Mobile, believed that the operation of public GSM gateways was illegal.

33. Ofcom has licensing and radio spectrum management obligations under the Communications Act 2003 and the EC telecommunications regime. On 29 June 2005 it published a consultation paper *Future Regulation of GSM Gateways under the Wireless Telegraphy Act* and began a consultation process. The licensing and regulatory regime affects MNOs, such as Vodafone and T-Mobile, who operate under standard form Public Mobile Operator Licences granted under section 1(1) of the Wireless Telegraphy Act 1949 (the 1949 Act).

34. The central issue canvassed in this appeal is whether such licences permit MNOs to operate, and/or authorise others to operate, commercial multi-user GSM gateways. They are called COMUGs. GSM gateway equipment is thereby used to provide an electronic communications service by way of business to multiple end-users.

35. By reference to EC directives the Tribunal construed Vodafone's licence as authorising it and as permitting it to authorise Floe to establish and use COMUGs. As the Tribunal held that this was allowed by the standard form of licence, such as T-Mobile also had, and was not prohibited under domestic law, the Tribunal went on to hold there was scope for competition law to apply to the licence and to the suspension and disconnection of GSM gateways by Vodafone.

36. Ofcom disputes the Tribunal's construction of the standard licence and its conclusions on the relevance of EC law. It contends that, on the true construction of the licences held by MNOs, such as Vodafone and T-Mobile, no-one is legally entitled to provide the COMUGs services which Floe wished to provide. It follows that competition law could not be used to compel one party to supply another so as to enable an illegal service to be provided.

37. T-Mobile's interest in the correct construction of the Licence is that its licence dated 3 May 2002 is in materially identical terms to Vodafone's licence. It faces threats from other GSM gateways operators on the basis of the Tribunal's decision. On 22 July

2003 VIP submitted a complaint alleging that T-Mobile had infringed competition law by periodically suspending VIP's GSM gateway services on the grounds of unlawful activity, yet still permitting GSM gateway services by others, including its own service providers.

Abuse of dominant position: the facts

38. Whatever the proper construction of the Licence, the crucial point on the appeal to the Tribunal was that, on the facts found by it, Vodafone had not abused its dominant position in breach of Article 82 or section 18 of the 1998 Act.

39. The main dispute of fact was whether, as Floe claimed, Vodafone and Floe had entered into an agreement authorising Floe to provide COMUGs. The Tribunal found that Vodafone and Floe had not entered into such an agreement. It was found that Floe had not requested Vodafone, and Vodafone had not agreed, to supply it with SIMS for use in COMUGs. GSM gateways contain SIMS for the mobile networks with which they communicate. Thus, in the case of Floe, when a customer connected to GSM gateway made a call from a fixed phone to a mobile phone on Vodafone's network, the GSM gateway would select a SIM registered to Vodafone's network and transmit the call via radio to a base transceiver station forming part of Vodafone's mobile network. From the base transceiver station, the call would then be routed to the mobile phone being called. In communicating with base transceiver stations, the GSM gateways use the same set of frequencies used by mobile phones on that particular network.

40. The Tribunal found that Vodafone did not know that Floe intended to use the SIMS provided to it by Vodafone for that purpose. It could not have authorised such activity by Floe, of which it had no knowledge and in respect of which Floe had never made any request to Vodafone for such authorisation.

41. On the basis of those facts the Tribunal dismissed Floe's appeal against the Ofcom decision that Vodafone had not breached competition law. See, in particular, the Tribunal's judgment at paragraphs 150-158 and the summary at paragraph 12(2).

42. As explained above, the reason for Ofcom's appeal is that, instead of simply dismissing the appeal on the basis of the facts found, the Tribunal, while confirming Ofcom's second decision, made an order setting parts of it aside as misconceived or inadequately reasoned. The highly unusual nature of the appeal can be gathered from the fact that the contested issues of construction of the licence and the EC directives relate to the question whether, in principle, an agreement, which was not in fact entered into between Vodafone and Floe, could have lawfully been entered into.

Regulatory law background

43. Before examining how the Tribunal construed the Vodafone licence I should first outline the main features of the regulatory legal framework for the authorisation of the use of the radio spectrum. The MNO licences are granted within that framework.

A. Domestic law

The 1949 Act

44. The 1949 Act provides for the licensing by the Secretary of State of the establishment or use of any station for wireless telegraphy or for the installation or use of any apparatus for wireless telegraphy, which expression is defined as meaning

> "19.(1) ….the emitting or receiving, over paths which are not provided by any material substance constructed or arranged for that purpose, of electromagnetic energy of a frequency not exceeding three million megacycles a second, being energy which either-
>
> > (a) serves for the conveying of messages, sound or visual images (whether the messages, sound or images are actually received by any person or not), or for the actuation or control of machinery or apparatus;
> >
> > (b) ……
>
> and references to stations for wireless telegraphy and apparatus for wireless telegraphy shall be construed as references to stations and apparatus for the emitting or receiving as aforesaid of such electro-magnetic energy as aforesaid:"

45. Under section 1(1) a licence may be granted by the Secretary of State or, since 25 July 2003, by Ofcom. A wireless telegraphy licence may be issued subject to such terms, provisions and limitations as may be thought fit: section 1(2). Regulations may be made exempting specified stations and apparatus from the requirement of a licence: see the proviso to section 1(1).

Exemption Regulations

46. The Exemption Regulations came into force on 12 February 2003. They were made by the Secretary of State pursuant to the power in section 1(1) of the 1949 Act to grant exemptions. They provided for the exemption from section 1(1) of the 1949 Act of the establishment, installation and use of "the relevant apparatus." Regulation 4 provides that-

> "(1) Subject to regulation 5, the establishment, installation and use of the relevant apparatus are hereby exempted from the provisions of section 1(1) of the 1949 Act.
>
> (2) With the exception of relevant apparatus operating in the frequency bands specified in paragraph (3), the exemption shall not apply to relevant apparatus which is established, installed or used to provide or to be capable of providing a wireless telegraphy link between telecommunication apparatus or a telecommunication system and other such apparatus or system, by means of which a telecommunication service is provided by way of business to another person."

47. "Relevant apparatus" means "the prescribed apparatus as defined in Schedules 3 to 9" to the Exemption Regulations: regulation 3(1). "Apparatus" means "wireless

telegraphy apparatus or apparatus designed or adapted for use in connection with wireless telegraphy apparatus."

48. GSM gateways are "relevant apparatus" for the purpose of the Exemption Regulations. According to the definition in Part 1 of Schedule 3 ("Network User Stations") to the Exemption Regulations a "user station" is

> "a mobile station for wireless telegraphy designed or adapted-
>
> (a) to be connected by wireless telegraphy to one or more relevant networks; and
>
> (b) to be used solely for the purpose of sending and receiving messages conveyed by a relevant network by means of wireless telegraphy."

49. "Relevant network " is also defined in the same Schedule as follows-

> "a telecommunication system consisting exclusively of stations established and used under and in accordance with a licence, which has been granted under section 1(1) of the 1949 Act by the Secretary of State and is of a type specified in Part III of this Schedule."

50. It is agreed that the exemption under the Exemption Regulations does not apply to COMUGs. The exemption is granted for self use, not for the purpose of providing a telecommunication service by way of business to another person. A licence is required to operate public GSM gateways. The issue on the appeal is whether, as the Tribunal held, the necessary licence was available to Floe via the Vodafone licence.

B. EC Law

51. The relationship between and the interpretation of various EC directives were relied on by the Tribunal as controlling the construction of the Vodafone licence. Ofcom and T-Mobile contend that the Tribunal erred in law in its conclusions on the impact of the EC Directives on the construction of the licence. They contend that the Tribunal misconstrued the licence itself and misunderstood the impact of the Directives on the licence.

(1) The Licensing Directive-97/13/EC

52. This Directive on a common framework for general authorisations and individual licences in the field of telecommunications services was in force from 20 May 1997 till 25 July 2003. It was in force when Vodafone disconnected service to Floe on 11 April 2003. It has been effectively replaced by the Authorisation Directive referred to below.

53. The Licensing Directive was concerned with procedures associated with the granting of authorisations and the conditions attached to such authorisations for the purpose of providing telecommunications. The authorisations might be either general authorisations or individual licences granted by national regulatory authorities

allowing undertakings to provide telecommunications services and to establish and/or operate telecommunications networks for the provision of such services.

54. Where there is a "general authorisation" regulated by a "class licence" or under the general law, the undertaking in question is not required to obtain an explicit decision by the national regulatory authority before exercising the rights stemming from the authorisation.

55. An "individual licence" means an authorisation which is granted by a national regulatory authority and which gives an undertaking specific rights, or which subjects that undertaking's operations to specific obligations supplementing the general authorisation where applicable, where the undertaking is not entitled to exercise the rights concerned until it has received the decision by the national regulatory authority.

56. In Article 3 the directive laid down the principles governing authorisations. Article 10 dealt with the power of Member States to limit the number of individual licences and the Annex set out the conditions which may be attached to authorisations.

57. The Court of Justice has held that the activity of issuing authorisations is the means of fulfilling the conditions laid down by Community law, for the purpose, inter alia, of ensuring the effective use of the frequency spectrum and the avoidance of harmful interference between radio-based telecommunications systems and also the efficient management of radio frequencies: see **Hutchison 3G UK Limited & Ors v. Commissioners of Customs and Excise** (Case C-369/04-26 June 2007) at paragraph 34 (a VAT case on the Sixth Directive).

(2) The Authorisation Directive-2002/20/EC

58. This came into force on 24 April 2002, but was not required to be transposed into domestic law until 25 July 2003. That was after the date of the relevant events in this case- the date of the Vodafone Licence being 28 January 2002 and the date (11 April 2003) on which Vodafone disconnected GSM gateway services to Floe. It is contended by Ofcom that this directive is not relevant to the legality of Vodafone's actions. It is, however, necessary to say something about it, because it was relied on by the Tribunal for its construction of the licence.

59. The aim of this directive was to implement an internal market in electronic communications networks and services through the harmonisation and simplification of authorisation rules and conditions in order to facilitate their provision throughout the Community. The directive applied to authorisations for the provision of electronic communications networks and services: see Article 1. It did not apply, however, to self use of radio terminal equipment.

60. The relevant provisions dealt with the general authorisation of electronic communications networks and services (Article 3), the minimum list of rights derived from general authorisation (Article 4), the rights of use for radio frequencies and numbers (Article 5), the conditions attached to the general authorisation and to rights of use for radio frequencies and for numbers and specific obligations (Article 6 and Part B of the Annex).

(3) The RTTE Directive-99/5/EC

61. This directive on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity entered into force on 7 April 1999. Member states were required to adopt necessary implementing measures to apply as from 8 April 2000. They have been implemented into domestic law by the **R**adio **E**quipment and **T**elecommunications **T**erminal **E**quipment Regulations 2000 (RTTE). The Regulations are applied to all radio or telecommunications terminal equipment and prescribe the essential requirements that must be satisfied by RTTE equipment. They prohibit RTTE equipment from being placed on the market or put into service until certain provisions have been complied with.

62. The RTTE Directive played a key role in the Tribunal's construction of the Vodafone licence. The aim and scope of the RTTE Directive was to establish a harmonised regulatory framework for the placing on the market, free movement, putting into service and withdrawal from service of RTTE: see recital (32) and Article 1(1). Other Articles in the directive set out the relevant definitions of "apparatus" and "telecommunications terminal equipment" and so on (Article 2), the essential requirements applicable to all apparatus (Article 3) and the duty of Member States to ensure that apparatus is placed on the market only if it complies with the appropriate essential requirements (Article 6).

63. Article 7 deals with the putting into service of apparatus and the right to connect-

> "1. Member States shall allow the putting into service of apparatus for its intended purpose where it complies with the appropriate essential requirements identified in Article 3 and the other relevant provisions of this Directive.
>
> 2. Notwithstanding paragraph 1, and without prejudice to conditions attached to authorisations for the provision of the service concerned in conformity with Community law, Member States may restrict the putting into service of radio equipment only for reasons related to the effective and appropriate use of the radio spectrum, avoidance of harmful interference or matters relating to public health.
>
> 3. Without prejudice to paragraph 4, Member States shall ensure that operations of public telecommunications do not refuse to connect telecommunications terminal equipment to appropriate interfaces on technical grounds where that equipment complies with the applicable requirements of Article 3
>
> 4. Where a Member State considers that apparatus declared to be compliant with the provisions of this Directive causes serious damage to a network or harmful radio interference or harm to the network or its functioning, the operator may be authorised to refuse connection, to disconnect such apparatus or to withdraw it from service. The Member States shall notify each such authorisation to the Commission, which shall convene a meeting of the committee for the purpose of giving its opinion on the matter. After the committee has been

> consulted, the Commission may initiate the procedures referred to in Article 5(2) and (3). The Commission and the Member States may also take other appropriate measures.
>
> 5. In case of emergency, an operator may disconnect apparatus if the protection of the network requires the equipment to be disconnected without delay and if the user can be offered, without delay and without costs for him, an alternative solution. The operator shall immediately inform the national authority responsible for the implementation of paragraph 4 and Article 9. "

64. GSM gateways are "apparatus" within the meaning of the RTTE directive, which expressly covers radio equipment and telecommunications terminal equipment: see Article 2(a), (b) and (c).

The Vodafone licence

65. A public mobile operator licence (No 249664) was issued to Vodafone under section 1(1) of the 1949 Act on 28 January 2002. It was issued by the Public Wireless Networks Radiocommunications Agency on behalf of the Secretary of State for Trade and Industry. A licence had originally been granted on 23 July 1992. A licence was granted in similar terms to T-Mobile on 3 May 2002. In this judgment I refer only to the detailed terms of the Vodafone licence.

66. The relevant provisions of the licence are as follows

> "1. This licence authorises [Vodafone-The Licensee] to establish, install and use radio transmitting and receiving stations and/or radio apparatus as described in the schedule(s) (hereinafter together called "the Radio Equipment") subject to the terms set out below."

67. Schedule 1 to the licence (entitled "Licence Category: Cellular Radiotelephones") contains a description of "the Radio Equipment" covered by the licence and the purpose for which the Radio Equipment may be used.

> "1. **Description of Radio Equipment Licensed**
>
> In this Licence, the Radio Equipment means the base transceiver stations or repeater stations forming part of the Network (as defined in paragraph 2 below)
>
> **2. Purpose of the Radio Equipment**
>
> The Radio Equipment shall form part of a radio telecommunications network ("the Network"), in which User Stations which meet the appropriate technical performance requirements as set out in the relevant Wireless Telegraphy (Exemption) Regulations made by the Secretary of State communicate by radio with the Radio Equipment to provide a telecommunications service."

68. Schedule 1 to the licence also contains technical performance requirements for the operation of the Radio Equipment, including frequencies of operation.

> "7. **Frequencies of Operation**
>
> The Radio Equipment is required to operate on any of the following frequency ranges:
>
> **GSM:**

Base Transmits/ Mobile Receives	Base Receives/ Mobile Transmits
935.1-939.5 MHz	890.1-894.5 MHz
947.3-955.1 MHz	902.3-909.9 MHz"

69. The Schedule also contains a definition of "User Station" in paragraph 17 (e) as

> " ..any vehicle mounted or hands portable mobile station designed for mobile use and/or any static fixed station designed or adapted to be established and used from static locations which meet the appropriate technical performance requirements as set out in the Wireless Telegraphy (Exemption) Regulations and either complies with the appropriate Interface Regulation listed in paragraph 11 or for equipment placed on the market before 8 April 2000 is type approved in accordance with a recognised standard relating to the service provided."

70. Clause 3 of the licence deals with the variation and revocation of the licence. Clause 4 provides that the licence may not be transferred. Clause 6 requires the payment of relevant fees as provided for in the relevant legislation and regulations, failing which the licence may be revoked. Clause 8 provides that the licensee must ensure that the Radio Equipment is operated in compliance with the terms of the licence and is only used by persons who have been authorised in writing by the licensee to do so.

71. The interpretation provisions in clause 12 provide that

> "(a) the establishment, installation and use of the Radio Equipment shall be interpreted as establishment and use of stations and installations and use of apparatus for wireless telegraphy as specified in section 1 of the Wireless Telegraphy Act 1949;
>
> ……..
>
> (e) the Interpretation Act 1978 shall apply to the Licence as it applies to an Act of Parliament."

72. It is common ground that mobile phone hand sets and GSM gateways are "User Stations" within the meaning of the licence.

73. Ofcom submits that the use of GSM gateways is not covered by the Vodafone licence. They are not expressly mentioned in clause 1 of the licence, which refers only to "Radio Equipment." "User Stations" are not within the definition of "Radio Equipment" authorised by the licence. The Tribunal held that they are not "base transceiver stations" and it was not argued by Floe that they were "repeater stations." Ofcom therefore contends that the licence does not authorise Vodafone to use GSM gateways, or to license any one else to use them, or to provide GSM gateway services.

Tribunal Judgment/ Order

74. The Tribunal held that the licence entitled Vodafone commercially to exploit the frequencies set out in the licence, including through the use of User Stations, such as GSM Gateways. In construing the licence the Tribunal had regard to, inter alia, the three directives and to whether any particular construction of the licence would mean that the United Kingdom was in breach of EC law. It concluded that a total prohibition on the provision of COMUG services would be incompatible with EC law. In order for the United Kingdom's regulatory scheme to be compatible with EC law it would need to authorise the provision of COMUG services. The Tribunal construed the licence in the light of this conclusion.

75. In paragraph 12(1) of its judgment the Tribunal summarised its finding on the issue whether Vodafone's licence permitted it to authorise Floe to use COMUGs. It disagreed with Ofcom's reasoning for concluding in its second decision that the licence did not cover the use of GSM gateways and said that it was misconceived. The Tribunal held that Vodafone's licence "forms part of the statutory and regulatory scheme for the use of GSM radio frequencies and apparatus for commercial purposes" and that "the true construction of the Licence permits the provision by Vodafone, of a telecommunications service by way of business, including GSM gateways which comply with the requirements of the RTTE Directive."

76. The Tribunal also disagreed with Ofcom's conclusion in its second decision that issues of compatibility of the position in the United Kingdom with EC Law were irrelevant to Floe's appeal. In its summary in paragraph 12 (5) and (6) of its judgment it said that Ofcom's conclusion was misconceived. While holding in paragraph 12(5) of its judgment that "on the true construction of the Licence as part of the statutory scheme for the authorisation of the use of GSM radio frequencies and apparatus national law is compatible with Community law", the Tribunal went on to hold that, had national law been incompatible with Community law, then Ofcom would have been under a duty to disapply such incompatible national law when exercising its powers under the 1998 Act or under Article 82.

77. In its summary in paragraphs 12 (3) and (4) of its judgment the Tribunal criticised as inadequately reasoned those parts of Ofcom's decision that concluded that its construction of Vodafone's licence is compatible with Community law. The conclusions related to the compatibility of the restriction in regulation 4(2) of the Exemption Regulations with Article 7(2) of the RTTE Directive and the Authorisation Directive.

78. Ofcom asks this court to set aside paragraph 3 of the order made by the Tribunal on 18 January 2007 in consequence of its conclusions on misconceived construction of the licence and the inadequate reasoning of Ofcom on issues of compatibility with EC law. There are three possible responses to this.

79. The first is that the Court should simply exercise its discretion to refuse to accept the appeal on the ground it does not affect the outcome of the dispute that was before the Tribunal. I would reject that response for the reason already given. I recognise that the Tribunal's judgment on the construction of the standard licence is a matter of public interest, as it may adversely affect Ofcom's performance of its regulatory functions.

80. The second, which would be less than Ofcom and T-Mobile hope for, would be for the court simply to set aside the whole of paragraph 3 of the order on the ground that the Tribunal erred in law in making it, not because the substance of it was wrong, but because it was a plainly wrong exercise of its discretion on the appeal to make an order setting aside parts of the reasoning in the second decision while confirming the correctness of its dismissal of Floe's complaint. It was unnecessary to do that in order to decide Floe's appeal. It had no practical impact on the outcome of the appeal and it was contrary to well established principles that appeals are against decisions and orders, not against the reasons given or findings made along the way. This response would leave Ofcom in the position that there was no order reflecting the judgment of the Tribunal but in the unsatisfactory position that parts of the Tribunal's judgment, which are objected to as an adverse precedent, would still be there.

81. The third response is a halfway house. The construction of the Vodafone licence, though unnecessary for the Tribunal's decision of the appeal, is at least a concrete issue between the parties and is of a kind which the court can decide. It is an issue of some practical significance affecting other parties with licences in similar form. The points on incompatibility with EC law are, however, open to the more serious objection that they were not only unnecessary for the Tribunal's decision and do not affect the result of the appeal to it, but they are too general and hypothetical to be decided in this case. They might have an impact on future cases and be best left for decision in a case in which a decision is necessary.

82. References of questions on the interpretation of EC law to the Court of Justice are confined to cases in which it is necessary for the purposes of reaching a decision on the case. In my judgment, a similar approach is, in general, appropriate in cases in which the domestic court is asked to rule on the incompatibility of domestic law with EC law.

Vodafone licence and EC law

83. Ms Carss-Frisk QC, on behalf of Floe, sought to uphold the Tribunal's approach to construction of the Vodafone licence by reference to the need for compatibility with EC law. She supported the Tribunal's conclusion that the licence entitled Vodafone commercially to exploit the frequencies set out in the licence and that this included the use of User Stations, such as GSM gateways and the provision of COMUG services. The licence covered Radio Equipment, which shall form part of a network the very purpose of which is to provide a telecommunications service.

84. The Tribunal's starting point was that a total prohibition on the provision of COMUG services would be incompatible with EC law, in particular the RTTE Directive, which required any restrictions placed on radio equipment after its entry into force to be related to permitted reasons set out in the Directive. The Tribunal rejected Ofcom's contentions that a total prohibition on the provision of COMUG services could be justified under Article 7(2) of the RTTE Directive in order to avoid "harmful interference" or for reasons related to "the effective and appropriate use of the radio spectrum."

85. Thus, for the United Kingdom's regulatory scheme to be compatible with EC law, the Tribunal held and Ms Carss-Frisk submitted that it would need to authorise the provision of COMUG services. There was clear evidence before the Tribunal that if Floe (or any other company) had applied for an individual licence to provide COMUG services the application would have been refused. The only way to achieve compatibility was to construe the licence in accordance with EC law. It followed that it must be construed as authorising Vodafone to provide COMUG services.

86. At the heart of the dispute is the question whether the **Marleasing** principle of EC law applies to the construction of the licence. Under Article 249 of the Treaty a directive is binding, as to the result to be achieved, upon each Member State to which it is addressed, but leaves to the national authorities the choice of forms and methods. According to the settled case law of the Court of Justice, in the absence of proper transposition into national law, a directive cannot of itself impose obligations on individuals: see **Centrosteel Srl v. Adipol GmbH** [2000] ECR-6007 at paragraph 15, a case on the interpretation of national rules affecting the validity of commercial agency contracts. A directive cannot of itself impose obligations on an individual and cannot therefore be relied upon as such against an individual: **Pfeiffer v. Deutsches Rotes Kreuz** [2005] ICR 1307 at paragraph 108.

87. It is, however, also clear from the case law of the Court of Justice referred to in paragraph 16 of **Pfeiffer** that, when applying the provisions of domestic law or settled domestic case law, the national court must interpret that law in such a way that it is applied in conformity with the aims of the directive.

88. This principle of consistent interpretation was laid down in **Marleasing SA v.La Comercial Internacional de Alimentacion SA** [1990] ECR 1-4135 at paragraph 8 following earlier cases, such as **Von Colson v. Land Nordrhein-Westfalen** [1984] ECR 1891, paragraph 26 :

> "8. …in applying national law, whether the provisions in question were adopted before or after the directive, the national court called upon to interpret it is required to do so, as far as possible, in the light of the wording and the purpose of the directive in order to achieve the result pursued by the latter and thereby comply with the third paragraph of Article 189 of the Treaty."

89. Ms Carss-Frisk's primary submission was that the **Marleasing** principle applied because the licence is part of "national law." That expression has a broader meaning than domestic legislation enacted to implement the directive in question. The principle extends to "the whole body of rules of national law" so as not to produce a result

contrary to that sought by the directive: see **Pfeiffer v. Deutsches Rotes Kreuz** (see above) at paragraph 115 and 118.

90. The licence, it was submitted, is part of the whole body of rules of national law. It falls to be construed consistently with the EC law in the relevant directives. It was pointed out that the use of any apparatus for wireless telegraphy without a licence involves the commission of an offence contrary to section 1(1) of the 1949 Act. The licence is required in order to avoid criminal liability. The licence is in a standard form subject to unilaterally imposed conditions and issued to all MNOs. It is not an individually negotiated transaction between Vodafone and the Secretary of State or Ofcom. It is not a contract for the breach of which an action in damages would lie. The terms of the licence and other decisions relating to it would be open to challenge in public law proceedings. A restriction on the use of GSM gateways and on putting them into service falls to be justified under the RTTE Directive. So that restriction must be construed in accordance with the same directive. The 1949 Act and the Exemption Regulations are legislation subject to the **Marleasing** principle and must be construed consistently with the directives. So, it was submitted, must the licence granted under and in the context of national law.

91. Miss Carss-Frisk's alternative submission on the approach to construction of the licence is that, even if the **Marleasing** principle does not apply, the directives are, on ordinary domestic law principles, relevant as aids to interpretation and in ascertaining the intentions of the parties to the licence. The directives supply the relevant context for the interpretation of the licence.

92. It was the case, as pointed out by the Tribunal and emphasised by Ms Carss-Frisk, that the Tribunal's construction of the licence was the same as that adopted by Ofcom's predecessor, the Director, and the Radiocommunications Agency, as appeared from the Director's first decision on Floe's complaint.

Discussion and conclusion

93. In my judgment, the Tribunal adopted the wrong approach to the construction of the licence. It did not arrive at the correct construction of it. It ought not to have made an order in the terms of paragraph 3 of its order setting aside parts of Ofcom's second decision on that point.

94. First, purely as a matter of domestic law, the licence was only granted for "Radio Equipment" used by mobile network operators on specified frequencies and subject to specified conditions. According to its own terms the licence covers only the operation of apparatus in the form of base transceiver stations, which transmit, and base transreceiver stations, which receive, on specified frequencies. The licence does not go beyond base stations. GSM gateways are not base transceiver stations nor is it contended that they are "repeater stations" within the meaning of the licence.

95. GSM gateways, like mobile phone handsets, are User Stations. Taken together with Radio Equipment User Stations, such as mobile phones and GSM gateways, it can be said that GSM gateways form a network, but that does not mean that they are Radio Equipment within the meaning of the licence. Mobile phones themselves do not present a problem, because they do not require a licence under the 1949 Act. They are exempt under the Exemption Regulations, being for private use.

96. My reading of the licence, on its natural and ordinary meaning, is that, although GSM gateways are User Stations within the definition of that term in the licence, they are not covered by the licence granted for Radio Equipment as defined in the Licence. As a matter of general law they are not exempt from the requirement of licence under the 1949 Act and under the Exemption Regulations. They are not therefore authorised for use by Vodafone or by undertakings, such as Floe, as authorised by Vodafone.

97. Secondly, the Tribunal was wrong to depart from the ordinary and natural meaning of the licence, as a matter of domestic law, by purporting to construe it in accordance with EC law and so as to be compatible with it by producing the result that it authorises the use of GSM gateways compliant with the RTTE Directive by Vodafone and those, such as Floe, authorised by Vodafone.

98. In its recourse to EC law and, in particular to Article 7 of the RTTE Directive, the Tribunal was wrong to apply the **Marleasing** principle of compliant construction to the Licence. The Tribunal explained its approach to construction of the licence as follows-

> "89. The Licence and the Exemption Regulations must be construed together against the relevant European legislative background and in conformity with Community law, if possible. In that regard, what is relevant is the effect of the provisions of the Licence when read together with the Exemption Regulations.
>
> 90. When construing documents, such as the Exemption Regulations and the Licence, which, in part, give effect to European legislation our task is first to seek to construe those documents to give effect to the Directives. It is only if it is impossible to give effect to the Directives that we have to go on to consider whether the Exemption Regulations and/or the Licence are incompatible with Community law and, if so, what the consequences of such incompatibility may be for the purposes of this appeal."

99. It is true that the Tribunal did not refer to the case of **Marleasing** by name or to the named principle, but what it said and applied was an expression of the substance of that principle.

100. In following that approach to the construction of the licence the Tribunal concluded that it would be consistent with the RTTE Directive to hold that Vodafone was authorised to provide a telecommunications service to customers using the specified frequencies with any apparatus that had been authorised under the RTTE Directive; that to restrict the licence to use by Vodafone of the specified radio frequencies via Base Transceiver Stations only would mean that there was no licence or authorisation in force allowing the provision of a service by way of a business using GSM gateways in the UK; that such a restriction was not compatible with Article 7(1) of the RTTE Directive, unless justified under Article 7(2) and that, if the licence must be construed as a right to use the specified frequencies commercially to provide a telecommunications service with equipment declared compliant with the RTTE Directive, then the licence must be construed to authorise Vodafone to provide

electronic telecommunications services using all equipment which is compatible with the RTTE Directive, unless a restriction could be made out under Article 7(2).

101. The Tribunal concluded that-

> "146. …For the Licence and the Exemption Regulations, taken together, to be compatible with the RTTE Directive (and, later, if relevant, the Authorisation Directive) the Licence must be interpreted in such a way that Vodafone is authorised to provide, for commercial purposes, telecommunications services (and later electronic communications services) using the radio frequencies set out in paragraph 7 of Schedule 1 of the Licence for the purpose set out in paragraph 2 of the Licence..
>
> 149. …For the reasons set out above, after the coming into force of the RTTE Directive in 1999, Floe's construction of the Licence is to be preferred. After that date, it is only if Vodafone is itself entitled to provide a telecommunications service to customers by way of business which includes the use of compliant equipment which has been approved for free circulation under the RTTE Directive (including GSM gateway equipment) that the statutory scheme (the Licence construed together with the Exemption Regulations) is compatible with the RTTE Directive."

102. In my judgment, the Tribunal was wrong in using the **Marleasing** approach to construe the licence and to use the Directives, as construed by it, to control the meaning of the licence. If the issue before the Tribunal was the disputed interpretation of the RTTE Regulations and whether they implemented correctly the provisions of the RTTE Directive the **Marleasing** principle would apply. It is not, however, correct to construe that directive and then to hold that the licence must be construed to be compatible with that directive. It is wrong because the licence is neither domestic law made to implement the EC directive, nor is it any other kind of "law" in the generally understood sense of general rules laid down either in the form of legislation or of case law.

103. The decision of the national regulatory authority to grant a licence and the carrying out of that decision is an administrative act done under and in accordance with the law. A licence is obtained to do things which it is unlawful to do without that licence. It is the legal mechanism for authorising something which is required by the general law to be officially authorised.

104. A licence is also the product of the voluntary acts of the parties to the licence. The person who requires the licence applies to the body responsible for issuing it. That body decides whether to grant it or not and on what terms and conditions. The fact that that process is prescribed by law does not make the product of the process in the form of the licence part of that body of law or rules to which the **Marleasing** principle is applicable.

105. This was made clear by Lord Nicholls in **White v. White and the Motor Insurers' Bureau** [2001] UKHL 9; [2001] 2 CMLR 1 at paragraph 22.

> " The present case does not involve legislation. Despite the contrary argument submitted to your Lordships, I do not see how the *Marleasing* principle, as such, can apply to the interpretation of the [Motor Insurers Bureau] agreement…The *Marleasing* principle cannot be stretched to the length of requiring contracts to be interpreted in a manner that would impose on one or other of the parties obligations which, *Marleasing* apart, the contract did not impose. This is so even in the case of a contract where one of the parties is an emanation of government, here, the Secretary of State. The citizens' obligations are those to which he agreed, as construed in accordance with normal principles of interpretation."

106. That was a case in which the agreement was intended to implement the relevant requirements of Community law: see paragraphs 23 and 46. I note that **White v. White** and **Pfeiffer** (see above) were considered by the Court of Appeal on 21 November 2008 in **McCall v. Poulton & ors** [2008] EWCA Civ 1263. The Court upheld the decision of the County Court Judge to refer to the Court of Justice questions whether **Marleasing** applies to the Motor Insurers Bureau (MIB) Agreement and the question whether the Bureau is an emanation of the State. In that case the MIB Agreement was relied on as fulfilling the obligation of the member state under EC law and the Court held that it was arguable that the **Marleasing** principle should apply to it. Hence the reference to the Court of Justice.

107. In this case the licence is a permission granted on terms laid down by the Secretary of State and accepted by Vodafone. The fact that it is granted under and in accordance with legislation does not make it legislation or any other form of law. Ms Carss-Frisk argued that it is wrong to assume that legislation and administration are fundamentally different forms of power and that there is only a "hazy borderline" between them, so that there is a large area of overlap (see Wade on Administrative Law 9th Edition at pages 857-8). But, as also written in Wade, there are obvious general differences between legislation and administration. The licence, which binds only the parties to it and can even be revoked for non-payment of the fees provided for in it, cannot reasonably be described as law caught by the **Marleasing** principle.

108. On the approach adopted by the Tribunal the meaning and effect of the Licence was controlled by EC directives, in particular the RTTE Directive and the imperative of a construction compliant with them. These are not the normal or correct principles of construction applicable to a bilateral transaction.

109. Floe's alternative argument on construction relied on the EC directives as aids to construction of the licence. Of course, the language in which the licence is expressed must be construed in context. The context may include EC or domestic legislation. For example, a licence may use technical terms without defining them, but against the background of legislation, including EC legislation, in which they are defined. The terms as defined in the related legislation would be aids to the interpretation of the licence.

110. In this case, however, the licence defines its own terms. It is they and not the contents of the directives which control the meaning of the licence. The licence authorises the use of Radio Equipment. The definition of Radio Equipment does not include GSM gateways, which fall within the definition of different apparatus, "User Stations".

111. As for Floe's reliance on the views of the Director and the Radiocommunication Agency and a member of its staff (Mr Cliff Mason), that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of the licence, those views are not shared by Ofcom. I do not think that those views help to determine the correct construction of the licence, which is a matter of law for the Tribunal or the court.

112. T-Mobile's grounds of appeal in respect of its own particular interest in setting aside paragraph 3 of the Tribunal's order largely replicated the grounds advanced by Ofcom, in particular the arguments on the construction of the licence and the **Marleasing** point.

113. T- Mobile also advanced arguments, which were not advanced by Ofcom, as to justification of a complete ban on the use of GSM gateways and as to the point that, even if the licence authorised Vodafone to use GSM gateways to provide telecommunication services to others, it could not be the basis for authorising Floe to do so. I would not express any views on these points. It is unnecessary to do so for the purposes of the court deciding whether or not to set aside paragraph 3 of the Tribunal's order.

Community law incompatibility issues

114. As already indicated it was unnecessary for the Tribunal to become involved in the disputed construction of the licence in order to decide the appeal. It was even more unnecessary for it to become involved in questions of compatibility with EC legislation in order to decide the appeal. In my judgment, such matters are wholly hypothetical in this case if, as I have held, they are not relevant to the construction of the licence or to the complaint made by Floe or to Floe's appeal to the Tribunal. I would not, therefore, express any view at all on what the Tribunal said about EC incompatibility issues.

Result

115. I would allow the appeal by Ofcom and T-Mobile to the extent of setting aside paragraph 3 of the Tribunal's order on the following basis, which would leave Ofcom's second decision unaffected by the order of the Tribunal dismissing Floe's appeal from it.

116. In the light of this judgment it is necessary to consider carefully the terms of the order on this appeal. Ofcom and T-Mobile proposed that the order of this court should allow the appeal, set aside paragraph 3 of the Tribunal's order dated 18 January 2007 and make declarations as to the construction of the Licence and as to the legal position in the absence of a licence under the applicable legislation. I would accept this proposal.

117. They also suggested that this court should expressly make an order setting aside numerous specified paragraphs and particular sentences in paragraphs in no less than

twelve sections of the Tribunal's judgment. The order would be along similar lines to the Tribunal's order in relation to specified paragraphs in the Ofcom Decision. It is also suggested that an order be made that the second decision of Ofcom that Vodafone did not commit an abuse of a dominant position when disconnecting Floe's SIM cards be reinstated in its entirety.

118. In my judgment, the Court should reject these suggestions. First, it is neither necessary nor appropriate for the court to set aside passages in the Tribunal's judgment or expressly to re-instate Ofcom's second decision in order to correct or clarify the legal position on the main points raised on the appeal by Ofcom and T-Mobile. Appropriately worded declarations on the construction issue are sufficient for that purpose. Secondly, the suggestions are in effect inviting this court to do what this court considers the Tribunal should not have done, namely set aside reasons in the decision of the lower court rather than set aside or vary the order that it made.

119. This court should, in my opinion, make the following order on allowing the appeals of Ofcom and T-Mobile against paragraph 3 of the order dated 18 January 2007-

> " IT IS DECLARED THAT:
>
> 1. On its proper construction, the Public Mobile Operator Licence issued to Vodafone on 28 January 2002 under section 1(1) of the Wireless Telegraphy Act 1949 does not authorise the use of GSM Gateways (including commercial multi-use GSM Gateways ("COMUGs")) for providing a telecommunications service by way of business to another person.
>
> 2. In the absence of a licence or exemption granted or made under section 8 of the Wireless Telegraphy Act 2006, the use of GSM gateways (including COMUGs) for the purpose of providing a telecommunications service by way of business to another person is unlawful.
>
> AND IT IS ORDERED THAT:
>
> 1. Paragraph 3 of the order of the Competition Appeal Tribunal dated 18 January 2007 be set aside.
>
> 2. The Respondent's reasonable costs of the appeals are to be paid by the Office of Communications, such amounts to be subject to detailed assessment in the absence of agreement within 3 months."

120. The parties are invited to comment in writing on the terms of the proposed order.

Postscript

121. Since this appeal was heard the regrettable and untimely death of Miss Marion Simmons QC occurred. The obituaries which appeared paid eloquent tribute to her many contributions to the law and to legal education.

Lord Justice Lawrence Collins:

122. I agree with the order proposed by Mummery LJ. The proceedings in the Competition Appeal Tribunal are a vivid illustration of the dangers inherent in a court (especially an appellate court) expressing views on matters which do not arise for decision. As Justice Heydon of the High Court of Australia has said: "It is difficult to solve every aspect of a problem satisfactorily and conclusively when only one element of it is presented for concrete decision. *Obiter dicta* tend to share in the vice of, and even become, advisory opinions": (2006) 122 LQR 399, at 417.

123. I wish to associate myself with Mummery LJ's remarks about the late Miss Marion Simmons QC.

Sir John Chadwick:

124. I agree.