Neutral citation [2007] CAT 15

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

15 March 2007

Before:

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

BETWEEN:

FLOE TELECOM LIMITED
(in liquidation)

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

REASONS FOR REFUSING APPLICATION BY OFCOM FOR PERMISSION TO APPEAL

1. For the reasons given below, the application made by the Office of Communications ("OFCOM") for permission to appeal (the "application") from the judgment of the Tribunal handed down on 31 August 2006 ([2006] CAT 17) (the "Judgment") is refused. In giving our reasons for refusing the application we have not rehearsed in detail the grounds on which the application is premised or passages from our Judgment, but instead cross refer to these below.

BACKGROUND

2. On 31 August 2006, the Tribunal handed down a Judgment dismissing an appeal by Floe Telecom Limited (in liquidation) ("Floe") against a decision of OFCOM dated 28 June 2005 (the "Second Decision") that Vodafone Limited ("Vodafone") had not infringed section 18 of the Competition Act 1998 (the "1998 Act") or Article 82 of the EC Treaty by disconnecting the services it was providing to Floe for use in telecommunications equipment known as "GSM gateways". The procedural history of the appeal is set out in detail in the Judgment. The Second Decision replaced an earlier decision dated 3 November 2003 (the "First Decision") of the Director General of Telecommunications (the "Director") which was set aside by the Tribunal's judgment of 19 November 2004 ([2004] CAT 18).

3. In addition to dismissing Floe's appeal, the Judgment set aside parts of the Second Decision, in part as being misconceived and in part as being inadequately reasoned. Since the appeal failed, no part of the matter was remitted to OFCOM. A final order dismissing the appeal was made and drawn on 18 January 2007.

4. By an order made on 13 September 2006, the time for written applications for permission to appeal the Judgment was extended generally until further order by the Tribunal. One of the reasons for this was to allow a related case

involving VIP Communications Limited (in administration) ("VIP") and T-Mobile (UK) Limited ("T-Mobile") (Case 1027/2/3/04 *VIP Communications Limited v Office of Communications*, "the VIP appeal"), which had been stayed pending the Floe appeal, to be heard by the Tribunal and for any application for permission to appeal to the Court of Appeal and any consequent appeal in the Floe appeal to be considered at the same time as any request for permission to appeal in the VIP appeal. If permission was granted that would allow an appeal from the judgments in the Floe and in the VIP cases to be heard by the Court of Appeal at the same time.

5. Notwithstanding the Order of the Tribunal on 13 September 2006, both the respondent, OFCOM, and the second intervener, T-Mobile, have applied pursuant to section 49(1) of the 1998 Act and rule 58 of the Tribunal Rules (SI 2003/1372) (the "Tribunal Rules") for permission to appeal to the Court of Appeal from the Judgment. No application for permission to appeal has been received from the appellant, Floe, or the first intervener, Vodafone.

6. On 14 December 2006, the Tribunal wrote to Floe inviting them to make written submissions on T-Mobile's and OFCOM's applications by 29 December 2006. On 27 December 2006, Floe submitted an application for a pre-emptive costs order, but has not provided any other written submissions. Both applications for permission to appeal have been dealt with on paper. The application by T-Mobile is dealt with in a separate ruling (see [2007] CAT 16).

THE TRIBUNAL'S REASONS

7. Floe's appeal was dismissed by the Tribunal. An appeal to the Court of Appeal by OFCOM can have no bearing on the outcome of Floe's appeal and can be of no benefit whatsoever to Floe. The appeal to the Tribunal brought by Floe is now exhausted. This is admitted in paragraph 38 of the application.

8. OFCOM is seeking declaratory relief from the Court of Appeal as to the law in circumstances where there is no longer any live dispute between the parties.

Accordingly an appeal by OFCOM to the Court of Appeal in the context of the original appeal to the Tribunal by Floe is purely academic.

The "Licence Grounds"

Ground 1(a): interpreting the licence in conformity with EC law. The Tribunal sought to construe the licence contrary to its explicit wording in order to give effect to the Tribunal's interpretation of the RTTE and Authorisation Directives.

9. This ground has no real prospect of success in that OFCOM's submission that the Tribunal misunderstood the scope and requirements of its duties under Article 10 EC is misconceived (see paragraph 8 of its application).

10. The principles relied upon by the Tribunal for the construction of the licence are contained in paragraph [87] of the Judgment. The Judgment does not use the *Marleasing*[1] principle to construe the licence but instead correctly uses the *Marleasing* principle to construe national law and in turn construes the licence in the context of national law. The Tribunal refers to *Marleasing* in paragraphs [273] and [318] of the Judgment. It is clear from these paragraphs that the Tribunal did not consider that the licence was part of national law but rather that the licence must be construed in the context of the national statutory and regulatory scheme, the licence forming part of the national regulatory scheme (see paragraph [87] of the Judgment).

11. The submissions contained in OFCOM's application are inconsistent with the English law principles of construction of contracts and licences generally in that in construing the licence it is important to consider the relevant background to the licence and to place the licence in the context of the statutory and regulatory scheme which was in place at the relevant time for the authorisation of the use of radio frequencies and apparatus for commercial activities applicable to GSM mobile telephony activity in the United Kingdom (see paragraph [87] of the Judgment). OFCOM's submissions contained in the

[1] See Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, [1992] 1 CMLR 305.

application seek to ignore the context against which the licence is to be construed.

12. The submissions contained in OFCOM's application which isolate the licence from the statutory scheme are inconsistent with what OFCOM stated in paragraph 140 of the Second Decision, namely that "the UK has chosen to maintain in force the licensing regime established under section 1 of the WTA" (i.e. the licensing regime established under section 1 of the Wireless Telegraphy Act 1949 ("WTA 1949") being the licence and the Exemption Regulations[2] taken together). The licence is accordingly part of the statutory scheme. (See paragraphs [89], [318] and [327] of the Judgment.)

13. OFCOM submits in paragraph 11 of its application that in construing the licence the Tribunal ignored the precise words of the licence and rewrote its terms. On the contrary, OFCOM's submission ignores the totality of the wording of the licence which states that the purpose of the Radio Equipment (i.e. the Base Transceiver Stations) is to form part of a network in which User Stations communicate with the Base Transceiver Stations to provide a telecommunications service (see paragraphs [93] - [94] of the Judgment) and ignores the contemporaneous views of the Radiocommunications Agency ("RA") (see paragraphs [40] (sub-paragraph (63)) and [95] of the Judgment).

14. As to paragraph 12 of the application, the Tribunal did not construe the licence so as to avoid making a finding of incompatibility but instead construed the licence in the context of and against the background of the national law (and Community law as implemented thereby).

[2] The Wireless Telegraphy (Exemption) Regulations 2003, SI 2003/74.

Ground 1(b): construed the licence as the relevant "authorisation". The Tribunal construed the licence as the means of "authorisation" for the use of GSM gateways for the provision of telecommunications services by way of business.

15. Paragraph 13 of OFCOM's application incorrectly sets out the Tribunal's reasons in that the Tribunal did not express a view, on the evidence before it, that there was no justification for a restriction on GSM gateways being put into service for their intended use, but rather states that OFCOM misdirected itself as to the evidence on which it relied to establish harmful interference. The Tribunal did not express any view as to whether the restriction in regulation 4(2) of the Exemption Regulations could be justified on the basis of other material not before the Tribunal or whether there may be other restrictions on the use of GSM gateways which could be justified on the basis of the evidence in respect of congestion upon which OFCOM relied in the Second Decision (see paragraphs [12(3)], [246] and [247] of the Judgment). Therefore, other possible grounds for a restriction remain unexamined, unargued, undecided and potentially effective.

16. As regards paragraphs 14 and 15 of the application, OFCOM's submissions:

    a) misconstrue Article 5(1) of the Authorisation Directive[3] which, contrary to OFCOM's submissions, does not mean that the use of GSM gateways could not have been made subject to an individual right of use in that it ignores the opening words "Member States shall, *where possible*…" (our emphasis);

    b) are inconsistent with the confirmation given by the RA to the Director as recorded in paragraph 42 of the First Decision that "[t]he RA has confirmed that MNOs' WTA licences contain terms which could enable third parties to legally provide Public GSM Gateways under the MNOs' licences";

[3] Directive 2002/20/EC on the authorisation of electronic communications networks and services.

c) are inconsistent with the view taken by the Director in the First Decision that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of Vodafone's licence under the WTA 1949 (see paragraph [3] of the Judgment and the First Decision generally and in particular paragraphs 26 and 42);

d) are inconsistent with Mr Mason's evidence to the Tribunal that if Floe or any other undertaking had approached him, in his capacity as Head of Public Networks Licensing at the RA, at any time before July 2003, seeking a licence to operate GSM gateways, he would have considered that the relevant radio spectrum for running a GSM service using GSM gateways had already been licensed to Vodafone and the other mobile network operators and would have refused to grant any further licences on that basis (see paragraph [118] of the Judgment); and

e) would mean that Vodafone had entered into an illegal contract and would give rise to the possibility of Vodafone itself having been in breach of the criminal law in performing the agreement on and from 12 August 2002 (see paragraph [124] of the Judgment).

17. The observations of OFCOM at paragraph 15 of its application ignore the contemporaneous construction that the RA and the Director placed on the licence. They also ignore paragraph [247] of the Judgment.

Ground 1(c): construing the licence so as to authorise all RTTE compliant equipment. The Tribunal incorrectly construed the licence as authorising all RTTE compliant equipment, irrespective of whether there were alternative means of authorisation.

18. Ground 1(c) set out at paragraphs 16 and 17 of OFCOM's application ignores the Tribunal's reasoning set out in paragraphs [135] and [147] – [149] of the Judgment. The licence cannot be construed in isolation of the statutory framework. Rather than construing the licence to authorise all equipment

compliant with the RTTE Directive[4], as asserted by OFCOM in its application, the Tribunal interpreted the licence against the background of the relevant applicable law.

The "EC Grounds"

Ground 2(a): interpretation of Article 7(1) too broad. The Tribunal interpreted Article 7(1) of the RTTE Directive too broadly and ignored the express limitations provided therein; and

Ground 2(b): misconstrued relationship between Directives. The Tribunal misconstrued the relationship between the Authorisation and RTTE Directives.

19. These grounds (set out at paragraphs 18 to 25 of OFCOM's application) have no real prospect of success in that:

    a) in paragraphs 19 and 20 of the application:

        i. there is an erroneous reference to "intended use" whereas the words of Article 7(1) are "putting into service of apparatus for its intended purpose" (see paragraph [120] of the Judgment). Contrary to OFCOM's assertion at paragraph 19 of its application, the Tribunal has not "construed this widely to cover *all possible uses*" (see the reasoning in paragraphs [110] (at sub-paragraphs (k) and (l)) of the Judgment). OFCOM has conflated the wording used in Article 7(1) and 7(2) of the RTTE Directive. The Tribunal has expressly recognised in paragraph [110] of the Judgment at sub-paragraph (l) that Member States may restrict the putting into service of radio equipment, but only for reasons related to the effective and appropriate use of the spectrum, harmful interference or matters

[4] Directive 1999/5/EC on radio equipment and telecommunications terminal equipment and the mutual recognition of their conformity.

related to public health (as is set out in Article 7(2) of the RTTE Directive).

ii. No authority is given for the "general controls" referred to in paragraph 19 of OFCOM's application which OFCOM states can be imposed by Member States other than Article 7(2) of the RTTE Directive. Recital 32 of the RTTE, without more, cannot of itself provide such authority. The authority for restrictions is set out in Article 7(2) of the RTTE Directive.

iii. Annex B of the Authorisation Directive is referred to in footnote 16 of the application but no explanation is given as to how the provisions set out in Annex B can restrict the putting into service of "equipment" and there was no material provided to the Tribunal as to this (see paragraph [279] of Judgment).

iv. Paragraphs 20 and 21 of OFCOM's application misstate the Tribunal's construction of the RTTE Directive (see paragraph [110] of the Judgment at sub-paragraphs (g)(ii), (k) and (l)). Article 7(1) of the RTTE Directive refers to "Article 3 and the other relevant provisions of this Directive". OFCOM has not identified any other provision of the RTTE Directive on which it seeks to rely except Article 7(2) and recital 32. Recitals of EU directives assist in the interpretation of the Articles contained within that same directive but a recital alone cannot provide authority. Article 7(2) of the RTTE Directive states that conditions may be attached to an authorisation only for the reasons outlined above. (See paragraphs [110] (at sub-paragraph (l)), [120], [121], [123] and [135] of the Judgment.)

v. As to paragraph 22 of the application, the Tribunal held that Member States may restrict the putting into service of radio equipment in accordance with Article 7(2) RTTE (see paragraph [110] of the Judgment at sub-paragraph (l)); and, as

to the "mechanism" for so doing, we refer to paragraphs [276] – [279] of the Judgment, in particular [278].

b) Paragraphs 23 - 24 of OFCOM's application misstate the Tribunal's Judgment: the Tribunal did not form any final view as to whether the restrictions in 4(2) can be justified: see paragraphs [120] – [123]; [236] – [248]; [257]- [260]; [276] – [279] of the Judgment (in particular [246], in which the Tribunal held that OFCOM's analysis of this issue in the Second Decision was insufficiently reasoned).

c) The Authorisation Directive applies only to commercial use (see paragraphs [142] – [143] of the Judgment) – paragraph 25 of OFCOM's application is accordingly misconceived. Paragraph 25 of the application misstates paragraph [21] of the Judgment. The Tribunal did not characterise the United Kingdom's position as a complete prohibition on the use of GSM gateways.

Ground (2)(c): misinterpretation of "harmful interference". The Tribunal misinterpreted the term "harmful interference" as used in Article 7(2) and defined in Article 2(i) of the RTTE Directive.

20. This ground (set out at paragraphs 26 to 28 of OFCOM's application) has no real prospect of success in that:

a) in the First Decision OFCOM did not rely on GSM gateways causing "harmful interference"; it gave no explanation in its Second Decision why it had changed its position and was now relying on "harmful interference"; and did not provide any materials to demonstrate that the restriction of the commercial use of GSM gateways in the Exemption Regulations was imposed specifically to deal with "harmful interference" (see paragraphs [211] – [212] of the Judgment);

b) to give "harmful interference" a colloquial meaning would ignore the definition of "harmful interference" set out in Article 2(1) of the RTTE Directive (see paragraphs [218] – [220] and [223] of the Judgment);

c) the meaning attributed to "harmful interference" by the Tribunal is in accordance with the dictionary definition relating to the use of the word "interference" in "broadcasting and telecommunications" (see paragraph [222] of the Judgment) and was supported by Mr Burns, the independent expert (see paragraph [228] of the Judgment);

d) in paragraph 26 of the application, OFCOM says that as a Community law concept, the term "harmful interference" should have an autonomous meaning; but does not identify or explain that meaning. Such meaning would in any event need to be consistent with the definition in the RTTE Directive.

Other "Compelling Reasons"

21. As set out above, we do not consider that any of the grounds of appeal advanced by OFCOM have a realistic prospect of success. In paragraphs 30 to 40 of its application, OFCOM explains why, in its view, even if the Tribunal considers that none of the grounds of appeal have a realistic prospect of success, the Tribunal should nevertheless grant permission to appeal for some other compelling reason.

22. The original application that came before the Tribunal was an appeal against a non-infringement decision of OFCOM. The Tribunal in its judgment held that the reasoning and conclusions in OFCOM's decision should be set aside, in part for being misconceived, and in part for being inadequately reasoned. OFCOM submits in its application (at paragraph 36) that even if its other grounds of appeal are without merit, there is a compelling need to resolve the interpretation of the relevant EC Directives and the impact (if any) that they have on the scope of licences under the WTA 1949. What OFCOM is in effect asking the Court of Appeal to do is to look at these matters in isolation

of and independently of the circumstances of the case itself. Although part of the reasoning and conclusions of OFCOM's decision were set aside, Floe's appeal was ultimately unsuccessful and nothing was remitted to OFCOM for further consideration. As stated above, no application for permission to appeal has been received from Floe or Vodafone. There is no live dispute between Floe and OFCOM on this matter. As the Court of Appeal said on a previous appeal in this case, the situation in which the Court of Appeal is called on to determine a point that does not matter at all as between the parties can fairly be described as unusual (see *Office of Communications and Office of Fair Trading v. Floe Telecom* [2006] EWCA Civ 768 at [7]). The Tribunal does not consider in these circumstances that an appeal to the Court of Appeal would be an appropriate use of the Court's time and resources. In the absence of any continuing live issue between the original parties, it is inappropriate to ask the Court of Appeal to consider legal issues in the abstract.

23. Furthermore, paragraphs 35 and 36 of the application are misconceived and ignore the relevant European legislation, and in particular the RTTE Directive which provides for restrictions which can be imposed on the putting into service of equipment for its intended purpose (see paragraphs [110] and [120] of the Judgment).

24. In relation to paragraph 40 of the application, in so far as the issues may be relevant in the VIP appeal, it would be premature for the Court of Appeal to hear that appeal now and the parties should await the outcome of the VIP appeal before the Tribunal. VIP is not a party to the Floe appeal, and it would not be appropriate for an appeal to the Court of Appeal on these points to be heard without VIP having an opportunity to be heard on the issues.

25. As to paragraph 41 of the application, there is no automatic right in the Tribunal Rules to an oral hearing, and the Tribunal considers that it would be disproportionate in this case to hold an oral hearing, having regard to OFCOM's opportunity to apply to the Court of Appeal for permission to

appeal in writing and, if refused, to make an oral application (see section 49(2)(b) of the 1998 Act and CPR 52.3(4)).

26. For the reasons set out above, we are not minded to grant permission to appeal. Even if we had been minded to grant permission, we would not in this case have done so because of the situation as regards costs in an abstract appeal. The original appellant, Floe, is now in liquidation. Floe says that it has no funds available to act as respondent in respect of any appeal proceedings and has applied to the Tribunal for a pre-emptive costs order in terms that OFCOM should pay Floe's costs in relation to any leave to appeal or appeal on a "come what may – win or lose" basis. The Tribunal considers that it would be inappropriate at this juncture for it to rule now on how the costs of proceedings before the Court of Appeal (if any) should be allocated. Rather, the Tribunal considers it would be more appropriate to leave both the question of whether permission to appeal should be granted and the question of Floe's costs, whether by way of a pre-emptive costs order or otherwise, to the Court of Appeal for its consideration.

Marion Simmons QC Michael Davey Sheila Hewitt

Charles Dhanowa 15 March 2007
Registrar