



Neutral citation: [2004] CAT 22

IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

1st December, 2004

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

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Interveners

AND

VIP COMMUNICATIONS LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

Supported by

T-MOBILE (UK) LIMITED

Intervener

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RULING: ORDERS AND DIRECTIONS FOLLOWING JUDGMENT

APPEARANCES

Mr. Edward Mercer (of Taylor Wessing) appeared for the Appellants.

Mr. Mark Hoskins (instructed by the Director of Competition Law, Office of Communications) appeared for the Respondent

Mr. Stephen Wisking (of Herbert Smith) appeared for the First Intervener, Vodafone Limited.

Mr. Meredith Pickford (instructed by Robyn Durie, Regulatory Counsel, T-Mobile) appeared on behalf of the Second Intervener, T-Mobile (UK) Limited

THE CHAIRMAN:

I REMITTAL OF THE MATTER TO OFCOM

- 1 The Tribunal's judgment in this case was handed down on 19 November 2004 (see: [2004] CAT 18).
- 2 In that judgment the Tribunal set aside the decision of the Director General of Telecommunications dated 3 November 2003 that Vodafone Limited had not infringed section 18 of the Competition Act 1998 by disconnecting the telecommunications services it was providing to Floe Telecom Limited (the "Decision"). The Director's powers under the Competition Act 1998 have now been transferred to OFCOM.
- 3 Following delivery of that judgment the parties have submitted written observations to the Tribunal as to the consequential orders and directions that should now be made, and there has been further discussion of those matters before us at a hearing today. In particular there has been considerable discussion of the terms upon which the Tribunal now remits the matter back to OFCOM and the period within which OFCOM completes its further investigation in this case.
- 4 It has been submitted by OFCOM that only paragraphs 39 to 61, the first two bullet points of paragraph 71 and the whole of paragraph 72 of the Decision be remitted. That would leave the Director's analysis of the discrimination point as per the Decision.
- 5 We consider that the reasons why we have decided to remit this matter may have repercussions on the decision the Director came to on the discrimination issue.
- 6 Having regard, in particular, to what we said in paragraph 275 of our judgment, we consider for the purposes of para 3(2)(a) of Schedule 8 of the Competition Act 1998, the matter to be remitted to OFCOM is the Decision as a whole. OFCOM will then be in a position to consider the ramifications of the judgment on the Decision. If the judgment has ramifications for the discrimination issue then it will follow that this should be included in the re-investigation. If there are no ramifications for the discrimination issue then there will be no need for such re-investigation.

- 7 OFCOM proposes, in accordance with the approach adopted by the Tribunal in the *Association of British Insurers* case, to offer an undertaking to the Tribunal in respect of its new investigation of the matter. We pause to note at this point that in this case, unlike the *Association of British Insurers* case, the Tribunal has issued a final judgment and therefore the issues connected with how the investigation now proceeds in this case are not necessarily identical to that case.
- 8 OFCOM has provided the Tribunal with a draft undertaking in the Floe case to the effect that it will open a new investigation into the matter and consider whether Vodafone has infringed section 18 of the Competition Act 1998 and will use its best endeavours to complete that investigation in accordance with its “*Guidelines for the handling of competition complaints and complaints and disputes about breaches of conditions imposed under EU Directives*” issued in July 2004. That document, in particular, sets out the maximum time that OFCOM intends to take to complete investigations of competition complaints as six months, if OFCOM considers there are no grounds for further action, and twelve months, if OFCOM decides to issue an infringement decision. At paragraph 86, those guidelines further state that OFCOM will always seek to complete investigations within the shortest timeframe possible.
- 9 We do not consider, at the stage of remitting this matter back following the appeal before us, that the maximum time frame should determine the approach to be taken to the period in which a re-investigation should be conducted. In the context of a decision remitted to OFCOM by this Tribunal account should be taken of the delay which has already occurred during the period of the original investigation and during the appeal process. This period of delay may have significant consequences for the Appellant, and for the public, and in that regard in particular, the delay may have particular consequences for the existence of a fair competitive market.
- 10 According to OFCOM, while a certain amount of work has already been undertaken during the process leading to the Decision of 3 November 2003, OFCOM now requires the maximum time set out in its guidelines to complete its re-investigation, in the light of the nature and the scope of the matters identified by the Tribunal for further investigation in our judgment. OFCOM refers, in particular, to the indication given by the Tribunal in paragraph 283 of our judgment that, in view of OFCOM’s change of position as to the meaning to be given to

licences issued to Mobile Network Operators under section 1 of the Wireless Telegraphy Act 1949, OFCOM may well feel that it should invite comments more widely than usual before adopting any new Decision in this case.

- 11 OFCOM also makes clear that the undertaking it proposes to give is only to use best endeavours to complete any further investigation according to the proposed timescale. It is important, according to OFCOM to take account of the fact that in allocating its limited resources to this re-investigation OFCOM must also take account of its other commitments and obligations and give priority to cases which OFCOM itself considers may result in serious consumer detriment. It would be inappropriate, in OFCOM's submission, for the Tribunal to impose rigid obligations on OFCOM with respect to the timing of the re-investigation, which might have the effect of interfering with OFCOM's ability to carry out all of its tasks effectively, and the Tribunal must take account of OFCOM's margin of appreciation as to how it conducts its own affairs. OFCOM submitted that the Floe case is at the bottom of the scale as regards the public interest.
- 12 Floe, for its part, points out that a considerable period of time has now elapsed since it first complained of Vodafone's conduct to OFCOM, and submits that the matter should now be given priority, with any further investigation being completed by April 2005. Floe challenged OFCOM's characterisation of the Floe case in public interest terms, and emphasised the importance of this case for small companies. Floe also emphasised that it is in administration and that its future might be dependent on the results of the re-investigation.
- 13 The Tribunal has considered all the submissions made to us by the parties. The Tribunal considers that the judgment of 15 July 2003 in the case of *Freeserve v Director General of Telecommunications* ([2003] CAT 15) is particularly relevant in this context. In that judgment, at paragraph 11, the Tribunal held that it attaches importance to the speedy resolution of matters remitted by it to the relevant competition authority. The Tribunal noted, when a matter is remitted by the Tribunal the public interest in matters being disposed of quickly, fairly and efficiently is self-evident both from the point of view of the complainant (such as Floe) and the undertaking complained of.
- 14 In addition, the matter is not confined to the interests of the immediate parties, nor those of the competition authority: the wider public interest in the existence of a fair, competitive, market

for the benefit of consumers and users is of paramount importance. In the *Freeseve* case the Tribunal commented, at paragraph 16 of the judgment, that the Tribunal is in general reluctant to countenance a period of more than six months, at the most, for the adoption of any new Decision on a matter already considered. The Tribunal also considered that in many (if not most) cases, the period will need to be much shorter than that, and that normally a period of three months would be adequate.

- 15 In this case OFCOM has rightly pointed out that one of the matters to which further consideration will be given is the true scope of Vodafone's licence under the Wireless Telegraphy Act, which is a matter of wider significance. We have suggested in our judgment that it may be appropriate for OFCOM to consult more widely than is usual. In our view that aspect of the case, especially in the light of OFCOM's change of position before us, underlines particularly strongly the public interest beyond the interest of the particular parties in this case in reaching a concluded view as to the true scope of the licences issued to Mobile Network Operators, and to that view being reached with all due expedition.
- 16 The Tribunal is not convinced that OFCOM's reference to its own guidelines on the handling of competition complaints is relevant at this stage. Those guidelines, to the extent that they are relevant at all, apply at the outset of a matter when OFCOM has no knowledge or understanding of the issues which a particular complaint raises. This matter is at a very different stage. The complaint has already been the subject of one administrative investigation. Various aspects of the case have been further considered by OFCOM for the purposes of the appeal before us and have been fully argued before the Tribunal.
- 17 In our judgment, the fact that the Tribunal has found OFCOM's earlier investigation wanting, and has raised various matters that ought now to be investigated, points to an increased need for expedition when the matter is remitted. In this respect the Tribunal has also taken note of the fact that the Appellant in this case is in administration and the Appeal is being conducted by the Administrator.
- 18 With regard to the submissions that have been made to us concerning the allocation of OFCOM's limited resources and other commitments, and its "margin of appreciation" in conducting investigations, while the Tribunal would not wish to circumscribe unduly the conduct of investigations, and other matters by OFCOM, when a matter is remitted following

an Appeal, as here, the Tribunal expects OFCOM to prioritise the matter and to give due priority to the re-investigation. This is particularly so given the wider public interest referred to by the Tribunal in the *Freeseerve* judgment, which we have already noted applies particularly strongly in this case.

- 19 Taking all those considerations into account the Tribunal has concluded that OFCOM ought to be capable either of issuing a new non-infringement Decision, or a Statement of Objections pursuant to rule 4 of the Office of Fair Trading's Rules (SI 2004 No. 2751) within five months of today. The Tribunal proposes to fix a Case Management Conference at the end of that period, and wishes to indicate today that on the submissions we have heard today, if an infringement Decision is to be taken, then that should be capable of being made within a further period of five months.
- 20 The Tribunal therefore seeks an undertaking from OFCOM to issue a non-infringement Decision, or Statement of Objections within five months of today. In default of such an undertaking, the Tribunal will make an order remitting the matter to OFCOM in those terms.
- 21 The Tribunal proposes, as I have said, to hold a Case Management Conference in this case in five months' time. The Registry will be in contact with the parties through the usual channels to arrange that date.

II COSTS

- 22 Also before us today is an application by Floe for costs. Floe submits that it would be just to award it its costs because it was the clear winner and the Tribunal has set aside the Decision and remitted the matter to OFCOM. Floe submits that OFCOM in effect disowned a substantial part of the Decision. In the circumstances it has been required to incur extra costs as it has had to fight the Appeal and now deal with the matter being dealt with by OFCOM again. Floe also applied for its costs to be awarded on the indemnity basis.
- 23 As to who should pay its costs, Floe applies for at least 25 per cent. of its costs to be met by the First Intervener, Vodafone. Floe submits that Vodafone should make a contribution to its costs because Vodafone is a large and well-resourced intervener, and there is little doubt that it was in Vodafone's interest to intervene. Vodafone was unsuccessful and its intervention was

substantial and led to a situation where Floe faced, in effect, two Respondents. The remainder of its costs, Floe submits, should be met by OFCOM.

- 24 OFCOM submits that it should pay only two-thirds of Floe's costs save those costs ordered to be paid by Vodafone, and Floe should pay OFCOM one-third of OFCOM's costs. This is on the basis that Floe did not succeed on the "primary argument" and that the Tribunal should adopt an "issues-based" approach to costs orders.
- 25 Vodafone opposes Floe's application against it. It submits that as an Intervener it should not be ordered to pay a proportion of Floe's costs in this case and, in the alternative, in the event that it is ordered to pay a proportion of Floe's costs, there is no basis for such an award to be made on the indemnity basis.
- 26 Vodafone refers to what it describes as "the general practice of the Tribunal" that the costs of an Intervener should lie where they fall, subject to the particular circumstances of each case, and submits that there are no special circumstances in this case which would warrant the making of a costs' order against Vodafone.
- 27 Vodafone refers in particular to the Tribunal's Judgment in *GISC: costs* ([2002] CAT 2) and other cases where the Tribunal has indicated that the general position is that the costs of an intervention will very often in justice be allowed to lie where they fall, although acknowledging that in exercising its discretion on costs' applications, the Tribunal will proceed on a case-by-case basis and decisions as to costs should not be allowed to harden its rigid rules.
- 28 Vodafone submits, in particular, that in this case its role did not extend beyond that of an intervener, and that its Statement of Intervention of 21 pages, and its participation in agreeing the Statement of Facts was hardly excessive given the difficulty and importance of the issues raised by the Floe's appeal. Vodafone cannot, it would submit, be criticised simply because it put its case in a different way to that of OFCOM. Vodafone submits that any difficulty in agreeing the Statement of Facts is, in any event, attributable to the conduct of Floe rather than Vodafone, as initially Floe sought to include irrelevant, controversial and overly complex technical material couched in non-neutral language within the statement.

- 29 Vodafone also submits that the issues in this case are not merely of private concern to Vodafone and Floe, but in particular the interpretation of the Exemption Regulations and the licences granted to Mobile Network Operators under the 1949 Act are matters of public significance. Given the Tribunal's conclusion that OFCOM should have withdrawn the Decision if it considered it to be wrong it would be inappropriate for Vodafone to contribute to Floe's costs.
- 30 The Tribunal considers that appropriate order to make in this case is that Floe's costs are met by OFCOM on the standard basis. Although Floe was not successful on the primary argument, it was not an argument that was wholly lacking in merit and, in any event, the Tribunal is yet to be satisfied on, and has remitted to OFCOM, the issue of whether the statutory framework complies with the RTTE and Authorisation Directives.
- 31 Of more significance, in our view, is the considerable time and effort spent before us in considering the first alternative argument. We have found that OFCOM's analysis of the Agreement was flawed. As to the interpretation of Vodafone's licence, OFCOM changed its position before us and submitted new, highly technical, arguments not found in the Decision.
- 32 In those circumstances we have suggested in our judgment that the proper course would have been for OFCOM to have withdrawn the Decision. We have also found that a serious issue arises as to whether Vodafone was objectively justified in disconnecting Floe in all the circumstances. A number of significant and highly relevant issues in relation to that question have not yet been (or at least do not appear to have been) investigated by OFCOM. In those circumstances we consider that it is just and reasonable for OFCOM to pay Floe's costs of the Appeal.
- 33 We do not consider that Vodafone's intervention went beyond that expected of an intervener, or otherwise materially added to the costs of the Appeal. There are no other exceptional circumstances, so we make no order as to costs against the Interveners – they, of course, bear their own costs.
- 34 We have heard no convincing reason for awarding Floe's costs on the indemnity basis.

35 Accordingly, we make an order that Floe's costs of the Appeal, including the costs of today, are met by OFCOM on the standard basis, such costs to be agreed, and failing agreement to be assessed under Rule 55(3) of the Tribunal's Rules on application by any party.

36 I now just turn to the VIP appeal. For the avoidance of doubt, the Tribunal considers that discrimination was an issue in the original appeal. Otherwise, the Tribunal understands that the parties are in agreement as to the Order in the VIP.

MR. HOSKINS: I think that is probably correct, madam, yes.

THE CHAIRMAN: So that leaves the Order to be drawn up. The question is whether there will be an undertaking on the basis of five months, or whether it has to go into the order.

MR. HOSKINS: I think I will need to take instructions on that, but perhaps if you rise for a few minutes.

THE CHAIRMAN: Yes, we will rise ----

MR. HOSKINS: Before you do rise there is one point that I wanted to raise in relation to the judgment because my understanding was that the judgment stated that OFCOM should issue a non-infringement decision or a Statement of Objections within five months of today, a CMC will be fixed at the end of that period and then I understood you to say, madam, if an infringement decision is to be taken it can be taken within five months, and I am not quite sure----

THE CHAIRMAN: A further five months.

MR. HOSKINS: A further five months. Thank you very much. If you would not mind rising I will take instructions.

THE CHAIRMAN: Yes.

(The hearing adjourned at 3.05 p.m.)