Neutral citation: [2004] CAT 7.

IN THE COMPETITION APPEAL TRIBUNAL **Case No. 1024/2/3/04**

Victoria House
Bloomsbury Place
London WC1A 2EB

30 April 2004

Before:
Sir Christopher Bellamy (President)
Michael Davey
Sheila Hewitt

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

-v.-

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED

Intervener

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

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

Miss Elizabeth McKnight (of Herbert Smith) appeared for the Intervener.

Heard at Victoria House on 2 April 2004.

JUDGMENT (PERMISSION TO AMEND THE NOTICE OF APPEAL)

Background

1. A point of practice has arisen in this case regarding an application by the appellant to amend its notice of appeal having regard to rule 11 of the Tribunal's Rules. The circumstances are as follows.

2. On 18 July 2003, Floe Telecom Limited ("Floe") made a complaint to the Director General of Telecommunications ("the Director") to the effect that in disconnecting certain GSM Gateways offered by Floe, Vodafone was acting in breach of the Chapter II prohibition imposed by the Competition Act 1998 ("the 1998 Act"). The disconnection in question is said to have taken place on 11 April 2003.

3. The Director opened an investigation of this complaint on 8 August 2003.

4. Floe was placed in administration on 1 October 2003.

5. In a decision of 3 November 2003 ("the Decision") the Director decided that Vodafone had not contravened the Chapter II prohibition of the 1998 Act by disconnecting GSM gateway services offered by Floe.

6. In the Decision, the Director characterised Vodafone's action as a refusal to supply, but held that Vodafone had an objective reason for that refusal, namely that what he described in the Decision as Floe's "Public GSM Gateway Services" had not been properly authorised by means of a written contract between Floe and Vodafone, either in accordance with Condition 8 of Vodafone's licence under the Wireless Telegraphy Act 1949 ("WTA"), or in accordance with an announcement made by the Government on 18 July 2003 following a consultation carried out by the Radio Communications Agency entitled "Public Wireless Networks – Exemptions of User Stations".

7. Accordingly, so the Director found, Floe's Public GSM Gateway Services were offered in contravention of section 1 of the WTA and were not exempted

by Regulations made under that Act. Section 1 of the WTA is in the following terms:

> "1.(1) No person shall establish or use any station for wireless telegraphy except under the authority of a licence in that behalf granted under this section—
>
> (a) by the Secretary of State …
>
> and any person who establishes or uses any station for wireless telegraphy or installs or uses any apparatus for wireless telegraphy except under and in accordance with such a licence shall be guilty of an offence under this Act:
>
> Provided that the [Secretary of State] may be regulations exempt from the provisions of this subsection the establishment, installation or use of stations for wireless telegraphy or wireless telegraphy apparatus of such classes or descriptions as may be specified in the regulations, either absolutely or subject to such terms, provisions and limitations as may be so specified.
>
> …"

Since, according to the Director, Floe was in breach of section 1 of the WTA Vodafone's refusal to supply was "objectively justified".

8. Paragraphs 3 to 6 of the Decision describe "GSM gateways" in these terms:

> "3. A GSM Gateway is a bank of subscriber Identity Module ("SIM") cards mounted in a device that provides connectivity between a fixed telephone line and a mobile network.
>
> 4. A GSM Gateway uses the SIMs of a mobile network operator ("MNO") on whose network the call is to be delivered to make the call appear to be an on-net mobile to mobile call[1], and so be charged at the MNO's retail rate for on-net calls. The operation of a GSM Gateway utilises the spectrum of the MNO on whose network the call is terminated.
>
> 5. A GSM Gateway can be utilised by companies to connect their Private Automatic Branch Exchange ("PABX") systems to the MNO's network ("Private GSM Gateway"). As with a cellphone, the connection to a public network by a Private GSM gateway is self-provided, and does not involve the provision of commercial telecommunications services to third parties.
>
> 6. Where a GSM Gateway is operated by companies to offer mobile call termination to third parties ("Public GSM Gateway"), the connection to a public network involves the

> provision of commercial telecommunications services to third parties ie services that are not self-provided by the end user."
>
> "[1]A call from a mobile phone to another mobile phone on the same network is known as an "on-net" call."

9. It appears to be common ground that the provision of Private GSM Gateways as defined above does not require individual licensing under section 1 of the WTA (because such activity is covered by relevant exemption Regulations issued by the Secretary of State). However, according to paragraphs 39 to 57 of the Decision, Floe would be required to have a licence under the WTA in order to offer Public GSM Gateways, unless either Vodafone had expressly authorised in writing the use of Floe's Public GSM Gateway equipment in accordance with condition 8 of Vodafone's WTA licence, or an arrangement had been entered into between Floe and Vodafone according to which Vodafone owned Floe's Public GSM Gateway equipment. According to the Decision, although there was a contract between Floe and Vodafone, this was not sufficient to legalise the operation of Public GSM Gateways by Floe, mainly because the necessary authorisation was not fully set out in writing (see e.g. paragraph 56). In coming to his conclusion the Director asked himself notably two questions: "Are the Public GSM Gateway services provided by Floe illegal?" (paragraphs 39 to 45 of the Decision) and "Has Floe been authorised by Vodafone to provide Public GSM Gateway services under the terms of Vodafone's WTA licence?" (paragraphs 49 to 52). The Director answered the first of those questions in the affirmative, and the second in the negative. At paragraph 57 the Director decided, "Therefore, as the services that Floe was providing were illegal, Vodafone had an objective reason to refuse to supply Floe."

10. On 29 December 2003, the Office of Communications ("OFCOM") took over the responsibilities of the Director, following the coming into force of the Communications Act 2003. Under section 408(5) and Article 3(2) of the Office of Communications Act 2002 (Commencement No.3) and Communications Act 2003 (Commencement No.2) Order 2003 SI no 3142

anything which was done by the Director prior to 29 December 2003 is to have effect after that time as if it had been done by the OFCOM.

11. On 2 January 2004 the administrators of Floe lodged an appeal to the Tribunal under the 1998 Act against the Decision.

12. Floe's notice of appeal dated 2 January 2004 was apparently prepared by the company's administrators without legal advice, although Floe had had solicitors acting for it at an earlier stage. The main points relied on by Floe in the notice of appeal, as summarised on page 3 of that document, are:

> "1. A failure by OFTEL to investigate 'Private' GSM Gateways when they formed part of the complaint.
> 2. A failure by OFTEL to base its investigation on the legislation prevailing at the time.
> 3. The use by OFTEL of an incorrect assumption in coming to their conclusions. OFTEL clearly thought that Floe had been made an interconnection offer. This was not so."

13. The first of these points concerns the fact that Vodafone had allegedly disconnected both Floe's Private and Public GSM Gateways respectively, the former being, according to Floe, legal on any view, but there is no need to go into further detail of that point for present purposes. Similarly, it is not necessary to elaborate the third point.

14. The second point, "failure by OFTEL to base its investigation on the legislation prevailing at the time" is, essentially, a contention by Floe that, contrary to the Director's findings in the Decision, it was operating legally at the time in that its contract with Vodafone, coupled with Vodafone's "knowledge and approval" (according to Floe) meant that Floe was authorised for the purposes of the WTA. Any other view, says Floe, would mean that Vodafone itself would be in breach of its WTA licence. Floe supports those arguments by reference to appendix 2 to the notice of appeal, where it is alleged, in particular, that the Director should not have relied on the Government announcement of 18 July 2003 in respect of the matters occurring before that date, as well as various statements by the Radiocommunications Agency.

15. After lodging its notice of appeal on 2 January 2004, Floe's administrators apparently obtained legal advice from Taylor Wessing, Solicitors.

16. At the first case management conference on 6 February 2004, Mr Mercer of Taylor Wessing indicated that Floe would seek permission to amend the notice of appeal under rule 11 of the Tribunal's Rules. The proposed amended notice of appeal was lodged with the Tribunal on 15 March 2004.

17. Rule 11 of the Tribunal's (Rules SI 2003 no. 1372), is in the following terms:

> "11(1) The appellant may amend the notice of appeal only with the permission of the Tribunal.
> (2) Where the Tribunal grants permission under paragraph (1) it may do so on such terms as it thinks fit, and shall give such further or consequential directions as may be necessary.
> (3) The Tribunal shall not grant permission to amend in order to add a new ground for contesting the decision unless—
> (a) such ground is based on matters of law or fact which have come to light since the appeal was made; or
> (b) it was not practicable to include such ground in the notice of appeal; or
> (c) the circumstances are exceptional"

18. Floe's amended notice of appeal, supported by a witness statement by Mr David Happy, contains what is now referred to as "the Primary Argument", namely:

> "The Appellant … contends that as a matter of law and application of the facts the Respondent erred in coming to the conclusion that the GSM Gateway devices owned or supplied by the appellant were being operated in contravention of section 1 of the Wireless Telegraphy Act 1949."

19. The Primary Argument is developed in Schedule 1 of the amended notice of appeal.

20. The essence of the Primary Argument as there set out is that, on the true interpretation of section 1 of the WTA, the "user" of the relevant Gateway Services was at all material times Vodafone, rather than Floe, that Vodafone's "use" was authorised by Vodafone's WTA licence, and that no further or

separate authorisation was required by Floe. The appellant relies notably on Vodafone's control over the SIM card and its ability to disable the IMEI. The appellant considers that its analysis is supported by Directive 2002/20/EC of the European Parliament and of the Council of 7 March 2002 on the authorisation of electronic communications networks and services OJ 2002 L108/21 ("the Authorisation Directive"), which came into force on 25 July 2003.

21. That Primary Argument is then followed by two alternative arguments. The two further arguments are, first, that on the facts the Director should in any event have reached the view that Floe's services were lawful ("the First Alternative Argument") and, secondly, that in any event Vodafone acted towards Floe in an arbitrary and discriminatory manner ("the Second Alternative Argument").

22. The respondent OFCOM does not object to the amendment described by Floe as the First Alternative Argument since it is accepted that this is a development of matters already in the original notice of appeal. However, OFCOM objects to the proposed amendment relating the Primary Argument, and also to the Second Alternative Argument (discrimination) on the grounds that the provisions of rule 11 of the Tribunal's Rules, set out at paragraph 17 above, are not satisfied.

Arguments of the parties

23. OFCOM argues that both the Primary Argument and the Second Alternative Argument constitute a "new ground" within the meaning of rule 11(3), and that none of the circumstances referred to in Rule 11(3)(a) to (c) are satisfied. Hence the Tribunal has no power to give permission to amend. Even if it had power, the Tribunal should in its discretion refuse permission to amend, in order to discourage the practice of parties introducing "rough and ready" notices of appeal, and then "improving" them later by amendment.

24. According to OFCOM, the Primary Argument has never been raised before, and is fundamental, since it puts in issue the validity of the Wireless

Telegraphy (Exemption) Regulations 2003 (SI 2003 no. 74) and the United Kingdom's implementation of the Authorisation Directive. It is not reflected at all in Floe's second ground of appeal in the original notice (failure to base its investigation on the legislation prevailing at the time), and is a fundamentally new way of putting the case, which amounts to a "new ground" of appeal within the meaning of rule 11(3). It is neither a matter of law which "came to light" since the appeal was made under rule 11(3)(a), nor a matter which was "not practicable" to raise in its original notice of appeal under Rule 11(3)(b). Floe's argument on the latter point that it had no legal representation when drafting the notice of appeal is not well founded, not least since Floe had assistance from solicitors at an earlier stage prior to submitting its initial complaint to the Director. OFCOM seeks, in any event, its costs of and occasioned by the proposed amendment.

25. In oral argument, Mr Hoskins for OFCOM submitted that the function of the Tribunal was to resolve the dispute between the parties by reference to the pleadings, and not to raise points of its own motion. Floe is a commercial company, well able to look after itself, which had the benefit of legal advice, and which made a complaint. That complaint was fully investigated and a decision reached. The system envisaged by the 1998 Act and the Tribunal's Rules would "unravel" if a party was allowed to raise a new point every time new lawyers thought of a new argument at the appeal stage. That applies equally to points of law, unless the provisions of rule 11 are satisfied. Moreover, according to the Tribunal's decision in *Freeserve v Director General of Telecommunications* [2003] CAT 5, it would not have been open to Floe to include this point in its original notice of appeal, because the point had not been raised in the original complaint. It would be "a waste of regulatory time" to permit such new matters to be raised at the appeal stage. Appealing parties have a duty to raise all points as early as possible. Floe's Primary Argument now changes the whole basis of the appeal, and must be a "new ground" because it is inconsistent with the premise of the original appeal, namely that it was Floe who was the relevant "user" for the purposes of section 1 of the WTA.

26. Miss McKnight, for Vodafone, supported OFCOM's submissions and further submitted that the Primary Argument was, in any event, unfounded.

27. Mr Mercer for Floe pointed out that even if the Tribunal did not hear the Primary Argument, it would be open to Floe to make a new complaint and obtain a decision on the Primary Argument. Floe would seek an adjournment of this appeal in the meantime. But that, in Floe's submission, would be a very unsatisfactory state of affairs. Mr Mercer submitted that the Primary Argument was within "the four corners of the appeal", which turns on whether Floe's activities are lawful. He also submitted that the point had "come to light since the appeal was made" and that it was "not practicable" to raise the point earlier, within the meaning of rule 11(3)(a) and (b) respectively. Alternatively, the circumstances are "exceptional" within the meaning of rule 11(3)(c).

The Tribunal's analysis

28. It seems to us that, in the High Court and most tribunals, permission would be given to Floe to amend its notice of appeal in order to advance the Primary Argument, subject as appropriate to terms as to costs, depending on the rules as to costs in the particular jurisdiction in question.

29. We would see that approach to be in accordance with the overriding objective set out in the Civil Procedure Rules ("CPR") Part 1, and also in accordance with the rules governing amendments in CPR Part 17. Thus for example:

> "The overriding objective (of the CPR) is that the court should deal with cases justly. That includes, so far as practicable, ensuring that each case is dealt with not only expeditiously but also fairly. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs, and the public interest in the efficient administration of justice is not significantly harmed" per Peter Gibson LJ in *Cobbold v London Borough of Greenwich*, August 9, 1999, CA.

30. However, rule 11 of the Tribunal's Rules is on its face more restrictive than the practice in the High Court, having regard to the terms of rule 11(3). As

appears from paragraph 2.1 of the *Guide to Appeals under the Competition Act 1998* ("the Guide to Appeals"), issued in 2000 by the Tribunal's predecessor, the Competition Commission Appeal Tribunal, the Tribunal's Rules are intended to reflect the general philosophy of the Civil Procedure Rules, including the overriding objective. At the same time, the Tribunal's largely written procedure reflects the Rules of Procedure of the Court of First Instance of the European Communities ("the CFI") OJ 1991 L 136/1, as subsequently amended. The CFI rules have been found from experience to be, in broad overview, a suitable model for the kind of cases the Tribunal is asked to determine.

31. The CFI rules are, however, based on the continental system of pleading, which do not have any system of "amendment" of the kind familiar to the common law. Article 48(2) of the CFI's Rules of Procedure provides that "No new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure". The CFI Rules, it should also be noted, do not permit a party to appear without legal representation (see Article 59) and require that pleadings must only be signed by a qualified lawyer or agent (Article 43).

32. It should be noted that the term "plea in law" which appears in Article 48(2) of the CFI's Rules of Procedure does not mean "any legal argument" but is a term of Scottish origin thought to be the nearest, albeit inexact, translation into English of the phrase "moyen nouveau" which occurs in the original French version of Article 48(2). That term reflects the distinction in continental pleadings between "le moyen" (the basic ground relied on) and "les arguments" (the arguments in support of the ground). Thus "le moyen" is the basic plea, such as error of law, illegality, discrimination, procedural failure, and so on, and "les arguments" are the arguments in support of each such plea. In order to mitigate the apparent rigidity of the continental system, there are some "moyens" which the Court can raise of its own motion if the parties fail to do so. Moreover, although a "moyen nouveau" cannot be raised by the parties, there is no objection to the parties advancing additional "arguments" in support of an existing "moyen".

33. Rule 11 of the Tribunal's Rules is not intended to introduce the technicalities of continental-type pleadings before the Tribunal. However, the basic thrust of rule 11 is to limit the possibilities of amendment after an appeal has been introduced. That forms part of the case management system of the Tribunal, which is in general based on the philosophy that an appellant is expected to set out his arguments on appeal as fully as possible in writing at an early stage, in accordance with paragraph 2.4 of the Guide to Appeals:

> "2.4 Each party's case must be fully set out in writing as early as possible, with supporting documents produced at the outset."

34. That principle is in turn part of the Tribunal's emphasis on written procedure, which itself is directed to assisting the Tribunal in deciding often complex cases expeditiously and efficiently. It should also be noted, in this connection, that most appeals come before the Tribunal following an administrative procedure in which many points will already have been canvassed.

35. Thus paragraphs 5.4 to 5.6 of the Guide to Appeals provide:

> "5.4 In accordance with Rule 6(5) [now Rule 8(4)], the application should contain not only the grounds relied on for the appeal, but a succinct presentation of each of the arguments supporting those grounds. It should not therefore resemble a 'notice of appeal' of the traditional kind, which by its nature is designed to be supplemented later in the proceedings by skeleton argument and oral debate. On the contrary, the application initiating the appeal to the tribunal should already contain a written development of each of the factual, legal or other grounds of appeal relied on, so that the tribunal is seized in writing, from the outset, with the substance of the case advanced on the appeal.
>
> 5.5 In this respect, the role of the application is essentially the same as the role of the application in appeals to the CFI from the decisions of the European Commission under Articles 81 and 82 of the EC Treaty. The two-month period allowed for appealing to the tribunal is significantly more than the a period allowed for appeals to some other appellate tribunals or to the Court of Appeal, precisely so as to give the applicant sufficient time to prepare a detailed written argument, and to assemble any evidence not already presented during the procedure before the Director.

5.6 Two important consequences flow from this approach. The first is that applicants are expected to develop all the grounds of appeal relied on, together with any supporting documents, in the initial application, and not to add wholly new grounds of appeal in the course of the proceedings. Rule 9(3) [now Rule 11(3)] provides that the tribunal may not give permission to amend the application to add a new ground of appeal unless the new ground is based on matters of law or fact which have come to light since the application was made; or it was not practicable to include the new ground in the original application; or the circumstances are exceptional."

36. Paragraph 11.1 of the Guide to Appeals provides:

"11.1 Rule [11] provides that an application can be amended only with the permission of the Tribunal. Since the form of the application is not that of a traditional pleading such as a statement of case in High court litigation, but rather a narrative presentation of factual and legal argument, the concept of 'amendment', as traditionally applied to a pleading in the High Court, cannot be directly transposed to proceedings before the Tribunal. Thus it will not normally be necessary to apply formally to 'amend' simply to put into different words the written submissions made in support of a ground of appeal which already figures in the application. Permission to amend will however be necessary where the applicant seeks to raise a new ground of appeal that lies outside the four corners of the original application. In that event, the conditions of Rule [11(3)] apply (see paragraph 5.6 above)."

37. It is important that this approach is in general adhered to as regards the notice of appeal, not least so that the respondent authority may properly plead, in its defence, to the notice of appeal, and that the Tribunal itself may, at an early stage, begin to read into the case, the basic framework of which is set by the notice of appeal and defence.

Would Floe have been entitled to include the Primary Argument in the original Notice of Appeal?

38. Against that background we deal first with OFCOM's submission that the Tribunal would not have allowed the Primary Argument to proceed, even if it had been included in the original Notice of Appeal, because it had not been raised in Floe's original complaint, apparently prepared, at that stage, with the benefit of legal advice. The background to that submission is this.

39. In appeals against infringement decisions, an appellant to the Tribunal is not limited to points that have been raised in the administrative procedure: see *Napp v Director General of Fair Trading (Preliminary issue)* [2001] CAT 3, [2001] Comp AR 33 at [76]. Moreover the Tribunal has permitted an appellant in infringement proceedings to put in a fairly exiguous notice of appeal, provided that the main points of the appeal are clear enough and it is clear that there will be no ambush at a later stage of the proceedings: see the Order of the Tribunal of 23 October 2003 in Case 1022/1/1/03 *JJB Sports plc v Office of Fair Trading*, which may be found on the Tribunal's website, www.catribunal.org.uk.

40. However, the position is not necessarily identical in appeals to the Tribunal by complainants in relation to rejections of their complaints. That is essentially because the Tribunal, as an appellate jurisdiction, is reluctant to risk turning itself into a jurisdiction in which complainants can raise, for the first time, new matters which are entirely outwith the original complaint and on which, therefore, the respondent has not adjudicated. This aspect is discussed in the Tribunal's judgment in *Freeserve*, cited above, at [101] to [121]. It is however right to point out that the Tribunal's indicative approach in *Freeserve* is heavily qualified by the opening words of [101]:

> "101. In our view, at this early stage in the development of the 1998 Act, it is neither desirable nor possible to lay down hard and fast rules as to the Tribunal's approach in appeals brought by complainants in a case where the Director has declined to find that the conduct in question amounts to an abuse of a dominant position within the meaning of the Chapter II prohibition. Apart from anything else, there is an infinite variety of circumstances in which such appeals may arise in future cases."

41. The Tribunal said this in *Freeserve* at paragraphs 116 to 117:

> "116. It seems to us difficult to justify a rule of law to the effect that a complainant may not submit new material to the Tribunal that was not before the Director. Apart from the lack of a legal basis for any such rule, there is the practical difficulty that, until he sees the decision, the complainant does not know what grounds he has for an appeal, nor will he necessarily know what steps the Director has or has not taken in the course of his investigation. In the nature of the appellate process, certain points raised by the complainant before the Director are likely

> to become more fully developed, as indeed may the arguments of the Director. We accept, however, the Director's basic argument that, in principle, the original complaint sets the framework within which the correctness of the Director's decision is to be judged, taking account of the material that he had or ought reasonably to have obtained. An appeal is not an occasion to launch what is in effect a new complaint and then expect the Director and the Tribunal to deal with the matter on an entirely new basis.
>
> 117. We accept the Director's submission that, in considering the sufficiency of the decision in a complainant's case, the starting point will normally be to consider the essence of the complaint made and then go on to see whether the reasons given in the Director's decision constitute a sufficient answer to that complaint, taking account of all the circumstances."

42. In *Freeserve* the Tribunal is essentially saying that the original complaint sets the general framework of the case – for example, a complainant cannot raise on appeal a complaint of excessive pricing when the original complaint was one of predatory pricing. However, *Freeserve* is not intended to preclude the possibility of a complainant elaborating his case on appeal, especially if it is a matter of new arguments of law. In our view, *Freeserve* does not preclude a complainant raising on appeal new arguments in support of matters raised in the original complaint, or having a sufficient nexus with the original complaint, at least to the extent that the new arguments require little or no further factual investigation.

43. In particular, in this developing jurisdiction the Tribunal must, in our view, retain a degree of flexibility sufficient to ensure that cases are disposed of fairly. It is now becoming increasingly apparent that appeals before the Tribunal cover a very wide section of cases ranging between, on the one hand, cases brought by well-funded major companies with access to virtually unlimited expert advice and assistance, to cases brought by small companies, or even sole traders, and with few resources, little or no access to legal advice, but having a genuine sense of grievance. Such cases may, as in the present case, involve companies who have, allegedly, been forced to cease to trade by virtue of the allegedly abusive activities of an allegedly dominant enterprise. In our view the Tribunal's rules and procedures should not be interpreted in an unduly restrictive manner so as to make it unreasonably difficult for such

appellants to have recourse to the Tribunal in proper circumstances. The Tribunal's case management powers in our view give ample scope for protecting the interests of the respondent public authority and for allowing sensible case management decisions to be arrived at.

44. In the specific circumstances of the present case, the Director characterises Floe's complaint as one of refusal to supply an existing customer without objective justification, which the Director investigated under Chapter II of the 1998 Act, following an investigation opened on 8 August 2003 (paragraphs 17, 23 to 25 and 38 of the Decision). The Director then went on to consider the question, are the Public GSM Gateway Services provided by Floe illegal? (paragraphs 39 et seq. of the Decision). In paragraphs 40 and 41 of the Decision the Director found:

> "40. Under Section 1 of the WTA, it is an offence to establish or use any station for wireless telegraphy unless authorised to do so by a licence or unless specifically exempted from the requirement to hold a licence. The use of GSM Gateways falls within this provision. Floe is not licensed to use GSM Gateway equipment under the WTA.
>
> 41. Regulation 4(1) of the Wireless Telegraphy (Exemption) Regulations 2003 provides that the requirement to obtain a licence under Section 1 of the WTA does not apply to certain types of apparatus and use. However, regulation 4(2) provides that this exemption does not apply where such apparatus is being used to provide a telecommunications service "by way of business to another person". The use of Public GSM Gateway services, as carried out by Floe, falls within the scope of regulation 4(2) and therefore Floe does not benefit from exemption under regulation 4(1). Such use is therefore illegal."

45. In our view that is a plain finding by the Director, based on his interpretation of section 1 of the WTA, that Floe's activities were illegal under section 1 of the WTA unless Floe was licensed. The Director then went on to consider whether Floe could nevertheless be considered to be authorised by virtue of Vodafone's licence, and came to the conclusion that the contract between Floe and Vodafone did not constitute sufficient authorisation (paragraphs 42 et seq. of the Decision).

46. In those circumstances, the Tribunal can see no basis on which it could have excluded the Primary Argument from consideration had it been expressly

included in the original notice of appeal. That argument goes expressly to challenge the Director's interpretation of section 1 of the WTA and his conclusion at paragraphs 40 to 42 of the Decision that, absent authorisation by Vodafone, Floe's activities were illegal. Had Floe included the Primary Argument in the original notice of appeal, that in our view would have been a legitimate direct challenge to one of the Director's key findings on which the rest of the Decision is premised.

47. As to the fact that the particular legal interpretation of section 1 of the WTA was not advanced by Floe in the course of the administrative procedure, Floe's complaint was and is one of unlawful refusal to supply. In advancing the Primary Argument before the Tribunal Floe is not making a "new complaint", since its original complaint, that of refusal to supply, remains the same. The question of the interpretation of section 1 of the WTA goes to objective justification, which is primarily a matter relied upon by OFCOM and Vodafone rather than by Floe. In challenging the Director's interpretation of section 1 of the WTA the Primary Argument does not raise any new allegation of abuse. It does not involve any new disputed facts. It does not involve any further investigation. It is an issue of law.

48. In all those circumstances we reject OFCOM's submission that the Tribunal would not have allowed, or would not have adjudicated on, the Primary Argument had it been included in the original notice of appeal.

The effect of rule 11

49. We therefore come to the question whether we should allow the original notice of appeal to be amended so as to advance the Primary Argument. The first issue that arises is whether the proposed amendment to advance the Primary Argument raises a "new ground" of appeal within rule 11(3).

50. While the Tribunal fully accepts the general need to maintain discipline in the appeals before it, in our view that objective has to be balanced with the need to deal with cases justly, and in particular to take account of the fact that not all

appellants have access to specialised legal advice or extensive financial resources. In our view the Tribunal's Rules should in general be interpreted against that background.

51. In the present case, the second ground of appeal, prepared by Floe's administrator without, apparently, access to legal advice, was the Director's failure "to base [his] investigation on the legislation prevailing at the time." Although couched in terms directed against the Director's finding in the Decision that Floe was not duly authorised under its contract with Vodafone for the purposes of the WTA, this ground is essentially contending that the Director made an error of law in deciding that Floe was acting illegally for the purposes of section 1 of the WTA. In our view this ground of appeal can reasonably be interpreted as an "error of law" in the Director's interpretation of the WTA, which forms the basis of his decision, notably at paragraphs 40 and 41 and 57.

52. In our view, in advancing the Primary Argument, for the purposes of rule 11(3) the appellant is advancing a new argument of law in support of an existing ground, rather than advancing a "new ground" for the purposes of that rule. The "ground" in the existing notice of appeal is an error of law consisting of the misapplication or misconstruction of the requirements of section 1 of WTA, and the Primary Argument in the amended notice of appeal is an alternative legal argument in support of the same conclusion. It goes to a matter that is central to the decision, and is a pure point of law unlikely to involve disputed facts. It is not in our view a "new ground" in the sense that, for example, an allegation of "predatory pricing", "excessive pricing" or "tying" would be.

53. We would also point out that, in the circumstances of this particular case, OFCOM does not object to the First Alternative Argument in the amended notice of appeal, which is to the effect that, in any event, Floe was properly authorised for the purposes of section 1 of the WTA by virtue of its contract with Vodafone. In our view it would be very difficult for the Tribunal to address coherently and on a sound legal footing the First Alternative

Argument without first determining whether or not authorisation was in fact required under section 1 of the WTA – which is the very matter covered in the Primary Argument.

54. Moreover, as OFCOM submits, the Primary Argument raises a point that is fundamental to the regulatory system and the United Kingdom's implementation of the Authorisation Directive. We would feel distinctly uncomfortable in giving the words "new ground" in rule 11(3) a meaning which would preclude the Tribunal from deciding a point of law of that kind, the determination of which is in our view necessarily implicit in the existing ground of appeal.

55. Had we taken the contrary view, we would have been inclined to agree with OFCOM that the Primary Argument has not "come to light" since the appeal was made within the meaning of rule 11(3)(a). That provision, it seems to us, is primarily directed to a situation where previously unknown facts emerge or there is, for example, a new court decision, e.g. by the Court of Justice or Court of Appeal.

56. However, even if we had held that the Primary Argument was a "new ground" of appeal for the purposes of rule 11(3), we are not wholly persuaded that it would have been "practicable" to include the Primary Argument in the original notice of appeal, within the meaning of rule 11(3)(b). In a different area of the law, on the question whether it was "reasonably practicable" to present a complaint to an employment tribunal within a certain time limit it has been held that "reasonably practicable" is not necessarily confined to "physically possible": see e.g. *Parker v Southend on Sea Borough Council* [1984] 1 All ER 945. In the present case, Floe was in administration which, we can presume, severely limited the ability of the administrators to obtain advice on how to frame the appeal, notwithstanding that, some months before, prior to its liquidation, Floe had apparently had access to legal advice. While we accept that, in general, "ignorance of the law is no excuse", had the issue turned solely on rule 11(3)(b) we might have felt it necessary further to investigate the facts in order to determine whether, in a specialised field of law such as

this, it was in any reasonable sense "practicable" for Floe's administrators, who are not lawyers, to become aware of, and plead, the Primary Argument in the course of preparing the original notice of appeal.

57. Be that as it may, we are of the view that, in any event, the circumstances are exceptional within the meaning of rule 11(3)(c). The combination of circumstances which lead us to this view are: (i) it is implicit in the case as already pleaded that the Tribunal will have to address the true meaning and scope of section 1 of the WTA in any event; (ii) if the Tribunal were to deal with the First Alternative Argument while shutting its eyes to the Primary Argument, having refused permission to amend, there would be a real risk of the case being decided on a false basis, if the Primary Argument later turned out to be well-founded: that would be an affront to justice and waste costs; (iii) the Primary Argument will have to be decided at some stage, as it is bound to be raised in a further complaint to OFCOM if the Tribunal does not decide it now; (iv) it is in the public interest that a point as apparently fundamental as this is decided at the earliest possible moment; (v) the point does not appear to involve a fresh investigation or disputed facts; (vi) the appellant Floe, being in administration and not having legal advice when the appeal was prepared by an administrator who is not a lawyer, has given a reasonable explanation as to why the Primary Argument was not raised earlier; (vii) the point has been raised at an early stage in the appeal, prior to the defence; and (viii) OFCOM has not relied on a submission that the Primary Argument is frivolous or has no reasonable prospect of success.

58. In all those circumstances we give permission to amend. For the reasons already given, this in our view is a proper case for the exercise of our discretion under rule 11(1) which is not precluded by rule 11(3).

59. We also observe that, contrary to OFCOM's submissions, the Tribunal has power, under Rule 19(3) of its Rules, and in addition to its other case management powers to raise matters of its own initiative, and in particular to "invite the parties to make written or oral submissions on certain aspects of the proceedings." Had we not given permission to amend, we would in any event

have invited the parties to make legal submissions on the scope of section 1 of the WTA and the Regulations thereunder, including on the matters raised by the Primary Argument.

The Second Alternative Argument

60. The Second Alternative Argument is, however, in a different category in our view. The issue of discrimination was originally raised in Floe's complaint, but it does not appear anywhere in the notice of appeal. It is a point which would apparently require further factual investigation, possibly extensively. It potentially affects third parties not before the Tribunal. If Floe's activities are lawful, as a result of the Primary Argument, or the First Alternative Argument, Floe does not need the Second Alternative Argument. On the other hand, if Floe's activities are unlawful, it is difficult to see how an uneven enforcement of the law could aid Floe. We would not therefore be minded to give permission to amend to raise the Second Alternative Argument, in the exercise of our discretion under rule 11(1), without it being necessary to consider the application of rule 11(3) in relation to the Second Alternative Argument.

Costs

61. As to OFCOM's application for the costs of the amendment, we reserve our ruling on that issue. It is not at present clear to us to what extent Floe's application to amend has in fact resulted in wasted costs, or to what extent any such wasted costs are counterbalanced by costs occasioned by OFCOM's unsuccessful opposition to the amendment. Given the Tribunal's wide jurisdiction as to costs under rule 55, which does not follow the same approach as the CPR, we think the proper course is to reserve the question of costs, and to deal with that issue in the context of our ruling on the substantive issue.

Christopher Bellamy,
President of the Competition Appeal Tribunal.

Registrar

30 April 2004