



Neutral citation [2009] CAT 23

IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

17 July 2009

Before:

VIVIEN ROSE
(Chairman)
MICHAEL DAVEY
SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

VIP COMMUNICATIONS LIMITED
(in administration)

Applicant

- v -

OFFICE OF COMMUNICATIONS

Respondent

Supported by

T-MOBILE (UK) LIMITED

Intervener

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RULING

APPEARANCES

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

Mr. Rupert Anderson QC and Miss Anneli Howard (instructed by the Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

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

THE CHAIRMAN:

- 1 We have this morning heard argument from the parties as to whether this appeal should be allowed to go ahead to a further stage. The position is that the proceedings in the VIP appeal were stayed some time ago whilst the parallel proceedings in the *Floe* case continued, and VIP agreed to be bound by the results of the *Floe* case.
- 2 The Court of Appeal has recently handed down its judgment in *Floe(2)* and VIP now proposes to amend its notice of appeal in the light of that. The question we have to consider is whether or not there is anything that remains of the current notice of appeal or any arguments which could be raised now by way of amendment that should be allowed to go ahead.
- 3 We have seen correspondence between the parties as to the likely route that VIP will take in its proposed amendments but we have not yet seen a draft pleading. Ofcom and T-Mobile have argued forcefully that there is nothing now that remains of the existing notice of appeal and further that they cannot see what new arguments could or should be raised and on that basis they say the Tribunal should exercise its power under Rule 10 of the Tribunals' Rules to reject the appeal in a way which precludes the proposed application to amend. They say that a further iteration in these proceedings would be a waste of time and of public money.
- 4 Whilst we see some force in Ofcom and T-Mobile's arguments, we do not think it would be right on balance to prevent VIP from attempting to reformulate its case in the light of the Court of Appeal's *Floe(2)* judgment, and to see what, if anything, does or can remain. We are not therefore prepared to shut it out on the basis of the indications in the correspondence. It may be that Ofcom and T-Mobile are right and, as we have indicated at the start of this hearing, we will be looking particularly closely at any proposed amendment to see how legal arguments on the compatibility of legislation with European legislative

Instruments tie in to the basic issue in this appeal which is, we must not forget, a challenge to a non-infringement decision under the Competition Act.

- 5 It is not surprising after all that has happened that there needs to be a formal further step to take stock of the impact of the *Floe* proceedings on VIP's case, having regard, as I said, to the undertaking that VIP gave to be bound by the decisions in the *Floe* proceedings. Whilst we have regard to the importance of the expeditious and economical conduct of this case, we do conclude that it would be right to allow VIP to apply to amend and that any opposition to that amendment should be dealt with in conjunction with the application to reject the appeal under Rule 10.
