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IN THE COMPETITION
APPEAL TRIBUNAL

Case No. 1024/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 November, 2004

Before:

MARION SIMMONS QC
(Chairman)

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Interveners

Transcript of the Shorthand notes of
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TRANSCRIPT OF HEARING TO HAND DOWN JUDGMENT

APPEARANCES

MR. PATRICK CLARK (of Taylor Wessing) appeared for the Appellant.

MR. CLIVE GORDON (Director of Telecommunications and Competition Law, Office of Communications) appeared for the Respondent.

MR. STEPHEN WISKING (of Herbert Smith) appeared for the First Intervener, Vodafone Limited.

MR. ERAN TSAFRIR (of T-Mobile) appeared for the Second Intervener, T-Mobile (UK) Limited.

1 THE CHAIRMAN:

2 1 The Tribunal hands down today its judgment on an appeal by Floe Telecom Limited (in
3 administration) against a decision of the Director General of Telecommunications dated
4 3 November 2003. The functions of the Director under the 1998 Act have now been transferred to
5 OFCOM.

6 2 In that decision the Director General decided that Vodafone Limited did not infringe section 18 of
7 the Competition Act 1998 (known as the “Chapter II prohibition”) by disconnecting on or about
8 18 March 2003 the telecommunications services it was providing to Floe.

9 3 In the Decision the Director decided that the telecommunications services supplied by Floe were
10 “Public GSM Gateway services”. According to the Director, Floe was not itself licensed to use
11 Public GSM Gateway equipment pursuant to section 1 of the Wireless Telegraphy Act 1949 and
12 was not expressly authorised in writing to do so under the Terms of Condition 8 of Vodafone’s
13 licence under the 1949 Act. Hence, according to the Director, the services provided by Floe were
14 illegal. Accordingly, Vodafone’s refusal to supply Floe was objectively justified and hence not a
15 breach of the Chapter II prohibition. The Tribunal refers in particular to paragraphs 49 to 52, and
16 55 to 57 of that Decision.

17 4 Floe’s amended notice of appeal challenged the decision under three headings which it called the
18 Primary Argument, the First Alternative Argument and the Second Alternative Argument.

19 5 The Primary Argument is that Floe did not need authorisation under section 1 of the Wireless
20 Telegraphy Act 1949 to provide gateways. Floe formulated its Primary Argument in two ways:
21 First: On a true construction of section 1 as applied to the facts of the case it was Vodafone that
22 “used” the GSM gateways under the auspices of its licence and the GSM gateways were not used
23 by Floe. The Tribunal unanimously rejects that submission.

24 Second: Floe submitted that the prohibition of public GSM gateways by section 1 and the
25 Exemption Regulations issued under section 1 is contrary to the RTTE Directive and the
26 Authorisation Directive. For the reasons set out in the judgment the Tribunal have not found it
27 necessary to decide whether the Exemption Regulations are, on their true construction, in
28 conformity with the RTTE Directive or the Authorisation Directive.

29 6 The first alternative argument is that Floe by entering in the Agreement with Vodafone had been
30 authorised by Vodafone to use the GSM gateways under provisions in Vodafone’s licence. The
31 second alternative argument is that Vodafone is not entitled to disconnect Floe unilaterally since

1 the enforcement of Section 1 and the Exemption Regulations is to be carried out by the relevant
2 regulatory body and not by Vodafone. Accordingly Floe submitted that Vodafone's unilateral
3 disconnection of Floe and refusal to supply Floe without reference to the relevant regulator cannot
4 be objectively justified for the purposes of the Chapter II prohibition in the 1998 Act.

5 7 This Tribunal has unanimously concluded on the evidence before it that the Agreement, properly
6 construed, was one pursuant to which Floe would provide "public GSM gateways" within the
7 meaning of Regulation 4(2) of the Exemption Regulations. It also found that if Vodafone's
8 licence was wide enough to permit it to authorise the use of GSM Gateways, as was believed to be
9 the case by the Radiocommunications Agency and the Director, then, on the evidence before the
10 Tribunal, the Agreement amounted to a written authorisation to Floe to do so. Accordingly the
11 Tribunal has concluded that the Director's reasoning at paragraphs 49 to 57 of the Decision to the
12 effect that Floe had not been authorised by Vodafone to provide public GSM gateway services
13 under the terms of Vodafone's Wireless Telegraphy Act licence is incorrect and/or flawed. In
14 those circumstances the existing Decision cannot stand.

15 8 During the course of the appeal OFCOM resiled from the Director's analysis of Vodafone's
16 licence in the Decision and relied on that part of the Decision being wrong. Before this Tribunal
17 OFCOM advanced a wholly new argument to the effect that, on the true construction of
18 Vodafone's licence under the 1949 Act, Vodafone could never have authorised Floe to provide
19 public GSM Gateway Services. That new argument does not feature in the original Decision, and
20 is contrary to the position taken in the Decision by the Director and the views of the former
21 Radiocommunications Agency, the body responsible for radio spectrum licensing at the time.

22 9 On the materials before this Tribunal, it is not able to find that OFCOM's new argument as to the
23 scope of Vodafone's licence is correct. Since the new argument advanced by OFCOM has
24 potentially wide ramifications for Mobile Network Operators generally, for intermediaries such as
25 Floe, for competition in this sector, and for the management of the spectrum, the Tribunal
26 considers that the proper course in the circumstances is to remit the matter to OFCOM with a view
27 to a new fully reasoned decision being taken on Floe's original complaint. In so doing OFCOM
28 will need to consider whether its new understanding of the scope of Vodafone's licence is correct
29 and whether its new understanding is compatible with the RTTE and the Authorisation Directives.

30 10 Given the uncertainty and the complexity of the legal position at the time of Floe's disconnection
31 by Vodafone, the Tribunal considers that a serious issue arises as to whether Vodafone, in the

1 context of the Chapter II prohibition of the Competition Act, was objectively justified in
2 disconnecting Floe without first referring the matter to the Radiocommunications Agency or
3 leaving it to the Radiocommunications Agency to take enforcement action under the 1949 Act.
4 That issue was not investigated by the Director. Remitting the matter will enable OFCOM to take
5 a reasoned decision on that issue also.

6 11 For the reasons given in the Tribunal's judgment, which is handed down today, the Tribunal has
7 accordingly unanimously decided to set aside the Decision and to remit the matter to OFCOM for
8 reconsideration pursuant to Schedule 8, paragraph 3(2)(a) of the Competition Act 1998.

9 12 The Tribunal will hear argument as to the consequential orders and directions to be made at a
10 hearing fixed for 10.30 a.m. on 1 December 2004.

11 13 On 20 April 2004 the Tribunal stayed a separate appeal concerning a decision taken by the
12 Director under the 1998 Act concerning GSM Gateways and refusal to supply pending the
13 Tribunal's judgment in the Floe appeal (that case was case 1027/2/3/04 *VIP Communications*
14 *Limited v. OFCOM*). The alleged refusal to supply in that case was by T-Mobile (UK) Limited.
15 A directions hearing has been fixed for 10.30 a.m. on 1 December 2004 in that case as well in
16 order to hear the parties on any consequential directions to be made in the VIP appeal as well as in
17 Floe's appeal. The Registry will contact the parties through the usual channels concerning the
18 submission of written observations to be filed by all parties in advance of that hearing.
19 Accordingly, all consequential orders and directions are adjourned until 1 December 2004.

20 Are there any applications? Thank you very much.
21
