

The CAT's Powers Redefined

Court of Appeal clarifies the CAT's powers when remitting a matter back to the regulator

By Alan Bates
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Ofcom and the OFT v. Floe Telecom Limited (in administration) [2006] EWCA Civ 768, judgment of 15 June 2006

No power for CAT to impose a timetable for the taking of a new decision

CAT does not have "a general statutory function of supervising regulators"

The appeal to the Court of Appeal concerned the judgment given, and order made, by the CAT¹ when allowing an appeal by Floe Telecom Limited (in administration) ("Floe") against a decision of the Director General of Telecommunications ("the DGT") that Vodafone had not infringed the Competition Act 1998 ("CA98").²

On 19 November 2004 the CAT had allowed Floe's appeal against the decision of the DGT (whose functions had since been subsumed within those of the communications regulator, Ofcom) on the ground of inadequate reasoning.³ The Tribunal set aside the DGT's decision and remitted the whole matter to Ofcom.⁴

The existence of a power in the Tribunal to remit a matter back to the original decision-maker was uncontroversial.⁵ What was in issue between the parties, however, was whether the Tribunal could require that the new decision be taken within a specified timescale and, if so, what timescale was reasonable in the circumstances. Ofcom offered the Tribunal an undertaking to use its best endeavours to take a non-infringement decision within 6 months, or an infringement decision within 12 months. The

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¹ Competition Appeal Tribunal.

² Dated 3 November 2003.

³ [2004] CAT 18.

⁴ [2004] CAT 22.

⁵ The power to remit is provided for in CA98: Sch 8, para 3(2)(a).

Tribunal thought that timescale too long and sought to confine Ofcom to a shorter period, stating:

*"The Tribunal ... 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."*⁶

The order made by the Tribunal was less peremptory, however, requiring that Ofcom re-investigate the matter *"with a view to issuing"* either a new non-infringement decision or a statement of objections within 5 months. The Tribunal also provisionally fixed a case management conference for a date just over 5 months from the date of its order.

Ofcom considered that a point of importance had been raised as to whether the CAT had the power, when setting aside a decision and remitting the entire matter back to the regulator, to impose a timetable for the regulator's new investigation. Ofcom therefore applied to the Tribunal to set the relevant paragraphs of its order aside. The Tribunal refused to do so,⁷ justifying that decision by reference to its "overriding function" of determining CA98 appeals on the merits⁸ and to the fact that, although the original decision had been set aside, the Tribunal had not been able to determine the whole of Floe's appeal on the merits on every point. The Tribunal also reasoned that it was necessary for it to be able to impose a time limit in order to ensure compliance with Article 6 of the ECHR, which required that civil rights and obligations be determined within a reasonable time. Permission to appeal to the Court of Appeal was refused.⁹

Ofcom and the OFT then successfully sought permission to appeal from the Court of Appeal itself, the latter regulator noting that it was the party likely to be most frequently affected by the issue which had been raised.

By the time the appeal was heard, the issue had been rendered academic as between Ofcom and Floe. Ofcom had already completed its further investigation and taken a new non-infringement decision. Although Ofcom had taken that decision a little more than 5 months after the date of the Tribunal's order, the Tribunal had granted an 8-week extension within which period the decision had been rendered. The Court of Appeal (Chadwick, Sedley and Lloyd LJ) nevertheless agreed to decide the point of substance raised by the appeal, noting its importance for future cases.

The Court unanimously found that the CAT did not have the power to impose a timetable on the regulator when setting aside a regulator's decision and remitting the matter back to it.

The main judgment was given by Lloyd LJ, who began by considering the significance of the Tribunal's jurisdiction to decide appeals on the merits. That jurisdiction did not require the Tribunal to rule on every point taken in the notice of appeal. The Tribunal had simply to decide whether the appealed decision should stand, be varied, or be set aside. Where the Tribunal exercised the power in Rule 19(2)(j) of the Tribunal Rules¹⁰ so as to refer certain points in an appeal back to the regulator for consideration, but without determining the appeal itself, the appeal remained live and the CAT was able to give a direction as to the time within which the matters referred had to be dealt with. Once the Tribunal had decided that an appeal should succeed, the decision be set aside and the matter remitted back to the regulator, however, the appeal came to an end, and there was nothing left for the Tribunal to determine. In those circumstances, the Tribunal was not entitled to regard the appeal as continuing to subsist in order that all the points raised by the notice of appeal could be ruled upon; nor was the Tribunal entitled to set a date for a future case management conference: there was no longer an appeal in existence for the Tribunal to manage.

That conclusion was not undermined by paragraph 3(2)(d) of Schedule 8 to the CA98, which empowered the Tribunal to "give such directions, or take such other steps" as the regulator could

⁶ [2004] CAT 22, at para 20.

⁷ [2005] CAT 14.

⁸ CA98, Sch 8, para 3(1).

⁹ [2005] CAT 28.

¹⁰ Competition Appeal Tribunal Rules 2003 (SI 2003/1372).

itself have given or taken. The “directions” there referred to were those which could be imposed under the Act, and the reference to “other steps” had to be interpreted in that context. Paragraph 3(2)(d) did not, therefore, confer a general power on the Tribunal, after having disposed of an appeal, to give “directions” to the regulator as to matters in respect of which the regulator could otherwise have ‘directed’ itself by way of its internal management of an investigation. Nor could a power to set a timetable be derived from Article 6 ECHR, since it was only possible to consider retrospectively whether the right to a determination “within a reasonable time” had been breached, looking backwards at the period of time that had passed and the reasons for the delay.¹¹

The CAT’s approach appeared to have arisen from a misconception of its relationship with competition regulators. The Tribunal’s function was limited to deciding appeals. It did not have a more general statutory function of supervising regulators.¹² Once a decision had been set aside and remitted, the matter was to be dealt with by the relevant regulator in accordance with its own statutory duties and functions. The CAT could not know what the competing demands on a regulator’s resources were at any given time. If, following the remission of a matter, the regulator failed to discharge its duties (including under Article 6 ECHR), but no further rights of appeal to the Tribunal arose, the proper mechanism for dealing with that failure was an application to the Administrative Court for judicial review. The CAT had no jurisdiction in the matter.

Comments

The Court of Appeal’s decision provides welcome clarification of the respective roles of regulators and the CAT, and is likely to have significant ramifications for the approach taken by the CAT in other cases. In particular, the decision may lead to the CAT taking a more cautious approach in cases where the appellant is seeking to challenge the administrative priority which a regulator is giving to a particular matter, and where judicial review may be the more appropriate forum.

The decision does not, however, completely preclude the CAT from imposing a timetable on regulators’ reconsiderations of appealed decisions. The CAT may decide, for example, to refer only certain issues back to the regulator for reconsideration, thus keeping the appeal alive and enabling the Tribunal both to set a timescale for the reconsideration and to monitor progress through CMCs. The availability of that option will no doubt warrant careful consideration by appellants when formulating their tactics once the Tribunal has signalled that it is unhappy with the approach or reasoning of the decision under appeal. In addition, there is, of course, nothing to stop the CAT from strongly indicating to regulators the timescale within which new investigations should be completed, and regulators would no doubt pay considerable attention to such indications even if not bound by them. It also remains to be seen whether the Tribunal will still regard itself as being able to set a timetable where it allows an appeal under the Communications Act 2003 for a failure to act (which can, in some circumstances, itself be an appealable decision under that Act¹³).

Monckton barristers represented both successful appellants: Peter Roth QC and Gerry Facenna for Ofcom; and Jon Turner for the OFT.

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¹¹ See *Dyer v Watson* [2002] UKPC D1, [2004] 1 AC 379, *per* Lord Bingham of Cornhill at para 52. Furthermore, Lloyd LJ noted that the CAT had subsequently extended time for the taking of a new decision, thus impliedly recognising that a time period of more than 5 months would not necessarily infringe Article 6.

¹² In that regard, Lloyd LJ cited the decision of the Court of First Instance in Case T-24/90 *Automec II* [1992] ECR II-02223.

¹³ See, e.g., the Communications Act 2003, s 192(7)(b). The door to the Tribunal setting a timetable in such cases may have been left ajar by Lloyd’s reference, in para 39 of his judgment, to *R v Bolton MBC, ex parte B* [1985] FLR 343. In that case the nature of the relief sought was an order that the defendant local authority perform a duty which it had failed or refused to perform, and the issue was whether the performance of that duty was subject to a time constraint. The judge, having held that the authority was obliged to take a decision forthwith, ordered it to do so and specified the time by which that decision could properly be taken.