

Appealing Against One's Own Success

(1) Office of Communications, and (2) T-Mobile UK Ltd v Floe Telecom Ltd (in liquidation) [2009] EWCA Civ 47

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It is trite to say that an appeal is a losing party's prerogative. However, the Court of Appeal in its recent judgment in (1) *Office of Communications, and (2) T-Mobile UK Ltd v Floe Telecom Ltd (in liquidation)* granted the Office of Communications ('OFCOM') and T-Mobile (UK) Ltd ('T-Mobile') permission to appeal from the Competition Appeal Tribunal ('the Tribunal'), even though those parties had been successful in resisting the appeal by Floe Telecom Ltd ('Floe'). The decision which OFCOM had reached and which had been challenged by Floe had been upheld by the Tribunal on the facts. However, OFCOM and T-Mobile succeeded in obtaining permission to appeal, and indeed successfully appealed, against the Tribunal's additional findings on the law.

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The case concerned a decision¹ by OFCOM that Vodafone, in ceasing to supply Floe with Subscriber Identity Module cards ('SIMs'), had not abused a dominant position, in breach of s.18 Competition Act 1998 ("the Chapter II prohibition") or Article 82 EC. Floe used the SIM cards obtained from Vodafone for devices known as 'GSM Gateways', which enable calls from fixed phones to mobile networks to be routed directly, through the GSM link, to the relevant mobile network. This makes those calls appear to originate on the mobile network, such that the call is charged at the cheaper on-net tariff rather than the higher fixed to mobile tariff. OFCOM concluded that Floe's use of a commercial multi-user GSM Gateway (a 'COMUG'), to provide a business service to multiple end-users, was unlawful. Vodafone was therefore complying with a 'legal requirement' in ceasing to supply Floe with SIMs for use in them, such that there was no breach of Competition law.

The Tribunal's decision

The Tribunal held² that on the facts there had been no abuse of a dominant position by Vodafone. Contrary to Floe's contention, there had been no agreement between it and Vodafone that it would be supplied with SIMs for use in COMUGs. Vodafone did not know of the use to which Floe intended to put its SIMs, and had it known would not have authorised that use. The appeal was disposed of on that basis, and OFCOM's decision upheld.

The Tribunal went on to consider further the arguments canvassed before it as to whether such an agreement between Floe and Vodafone, had it in fact been reached, would have been permissible under the terms of (a) Vodafone's public mobile operator licence (under Section 1(1) Wireless Telegraphy Act 1949) ('the Licence'); (b) the applicable EC Directives. In respect of these legal issues the Tribunal held that a blanket prohibition on the use of COMUGs would be incompatible with EC law, in particular with Article 7 Directive 99/5/EC on Radio Equipment and Telecommunications Terminal Equipment ('RTTE'). The Licence therefore required to be construed as permitting Vodafone to authorise their use to ensure compatibility with EC law.

In its order giving effect to this latter part of its judgment, the CAT ordered that OFCOM's reasoning in its decision, insofar as it differed from the reasoning in the CAT's judgment, was to be set aside.

'An extraordinary appeal'

OFCOM took the unusual step not only of appealing against the judgment in which it had been successful, but of offering to fund Floe's legal costs in opposing its appeal. Its and T-Mobile's applications for permission to appeal were refused by the CAT and by the Court of Appeal on paper, but granted on hearing by the Court.

Mummery L.J., with whom Lawrence Collins L.J. and Sir John Chadwick agreed, emphasized the exceptional nature of the Court's decision to grant permission in this case. The implication of CPR Part 52 is that *'except in rare and exceptional circumstances, the only legitimate purpose of an appeal is to reverse or vary an order on the ground that the decision of the lower court was wrong, or was unjust because of a procedural or other irregularity...'* (Paragraph 4). However, he noted that the Tribunal's judgment on most of the points was not necessary in view of its finding of fact (Paragraph 11) and he acknowledged OFCOM's concern that the 'unnecessary' parts of the judgment would stand as an 'adverse precedent' binding upon it in the exercise of its regulatory functions, and creating uncertainty as to how its future licensing and radio spectrum management powers should be exercised. In this connection he observed:

"The wish [of specialist Tribunals] to be helpful to users is understandable. It may even be commendable. But bodies established to adjudicate on disputes are not in the business of giving advisory opinions to litigants or potential litigants. ...In general, more harm than good is likely to be done by deciding more than is necessary for the adjudication of the actual dispute. One of the dangers of unnecessary rulings is that, with only the assistance of the parties...the court may be unaware of all the available arguments or ignorant of the practical implications of what it says..."

(Paragraphs 21-22).

¹ A second decision, following Floe's successful appeal to the CAT against the first decision (see: *Floe Telecom Limited (in liquidation) v OFCOM* [2004] CAT 18) and the remittance of the matter to OFCOM for reconsideration

² *Floe Telecom Limited (in liquidation) v OFCOM* [2006] CAT 17

In view of the potential regulatory implications, and the Court's concern about the rendering of 'advisory opinions', the Court of Appeal departed from the usual rule and granted OFCOM and T-Mobile permission to appeal the Tribunal's findings on the law.

Interpretation of the Licence

The Court of Appeal accepted OFCOM's submission that, on a proper construction of the Licence, no-one is legally entitled to provide COMUG services. It held, as a matter of domestic law, that the Licence was granted only in respect of 'Radio Equipment', and the equipment covered by the definition of that term did not extend to GSM gateways. Although the GSM gateways taken together with a Radio Equipment User Station (such as a mobile phone handset) may form a network, they are not 'Radio Equipment' within the Licence definition. As they are neither within the Licence, nor exempted from the requirement to be licensed under the Wireless Telegraphy (Exemption) Regulations 2003, they are not authorised for use by licensees, nor can licensees authorise their use (Paragraph 96).

Aside from the 'extraordinary' nature of the appeal described above, perhaps the most interesting aspect of the appeal for those not intimately concerned with the legality of GSM gateways is that the Court rejected the argument that EC law should be invoked to depart from the interpretation of the Licence set out above. Counsel for Floe had argued that the principle of compatible interpretation, outlined in Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-435, should apply to the construction of the Licence. This principle requires that 'national law' be interpreted consistently with EC law, as far as possible, and this should not be confined to the domestic implementing legislation. The Licence should be considered a part of the 'whole body of rules of national law' that requires compatible interpretation. The Court of Appeal rejected that argument. It held that although the *Marleasing* principle would apply to determine a question of whether the Regulations implementing the RTTE Directive were compatible with EC law, it did not apply to the construction of the Licence. On the basis of Lord Nicholls statement in *White v White and the Motor Insurers' Bureau* [2001] UKHL 9 at paragraph 22, Mummery L.J. held that a licence is merely an administrative device, by which an otherwise unlawful act is authorised, and '*The fact that that process is prescribed by law does not make the product of the process, in the form of the licence, part of that body of law or rules to which the Marleasing principle is applicable.*' (Paragraph 104).

The Court did accept Floe's alternative argument that, if *Marleasing* did not apply, the provisions of EC law are relevant aids with which the Licence should be interpreted. It agreed that where, for example, a licence uses undefined technical terms the relevant definitions in the Directives may be informative as to the meaning intended to be given to the licence. However, in this case the definition given in the Licence itself of 'Radio Equipment' meant that such recourse to the Directives was not necessary (Paragraphs 109-110)

In consequence, the Court ordered the relevant part of the Tribunal's order be set aside.

Conclusions

Although the Court of Appeal was keen to emphasize the unusual nature of its decision to grant permission, the judgment nonetheless has potential implications for all specialist Tribunals. The task of adjudicating disputes which involve complex technical issues as well as regulatory law is perhaps never a straightforward one, and the function of the specialist Tribunal is to garner the expertise necessary fully to address the arguments run before it on such matters. The judgment is, however, a caution to future panels that a fine line requires to be trod between addressing fully those arguments upon which it is necessary to adjudicate, and not proffering opinions on the merits of those arguments which prove superfluous to the disposition of the case.

The Court of Appeal also paid tribute to the late Marion Simmons QC, Chairman of the Competition Appeal Tribunal; members of Chambers join them in that tribute.

Rupert Anderson QC, Anneli Howard and Ben Lask appeared for OFCOM,
and Meredith Pickford appeared for T-Mobile.

For more information on Rupert Anderson QC, Anneli Howard, Ben Lask, Meredith Pickford or Laura Elizabeth John, please contact the Clerks on 020 7405 7211 or consult the 'Find a Barrister' Section at www.monckton.com.