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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos 1024/2/3/04
1027/2/3/04

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 July 2005

Before:
MARION SIMMONS QC
(Chairman)
MR MICHAEL DAVEY
MRS. SHEILA HEWITT

Sitting as a Tribunal in England and Wales

BETWEEN:

FLOE TELECOM LIMITED
(in administration)

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

supported by

VODAFONE LIMITED
T-MOBILE (UK) LIMITED

Interveners

And

VIP COMMUNICATIONS LIMITED

Appellant

and

OFFICE OF COMMUNICATIONS

Respondent

Supported by

T-MOBILE (UK) LIMITED

Intervener

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CASE MANAGEMENT CONFERENCE

APEARANCES

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

Mr. Rupert Anderson Q.C. (instructed by the 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.

Ms Robyn Durie, Regulatory Counsel, T-Mobile appeared on behalf of the Second Intervener, T-Mobile (UK) Limited

1 THE CHAIRMAN: Good morning. May we begin first by thanking Floe, Vodafone and T-Mobile
2 for their observations on the future conduct of the proceedings? It seems to us on what we
3 have read – subject to the submissions this morning – that the right course to follow is set out
4 in Floe’s application, namely, that it provides a document setting out the grounds of Appeal
5 against the new Decision. We say “a document” as a neutral term. It seems to us that what is
6 important is the substance and not the form. Either that document is an amended Notice of
7 Appeal in accordance with our Judgment on jurisdiction, or if any appeal happens to be
8 successful, it may then technically be a Notice of Appeal. However, we consider that the
9 substance of this matter should not be delayed by procedural wrangles. The content of the
10 application and that document remains the same.

11 It also seems to us, subject to further submissions today, that the appropriate course is
12 to make that order and to fix another case management conference to consider that document
13 and the appropriate directions having regard to its contents. The question therefore arises as to
14 whether Floe is in a position to prepare that document earlier than 29th August. We note that
15 Floe has indicated in its application that it could serve the document on 19th August. If that is
16 still the position then we would suggest fixing a case management conference for Tuesday,
17 20th September at 10.30 a.m. The amended Defence would be due, of course, on that basis on
18 30th September.

19 You are probably going to ask us about permission to appeal, so to pre-empt the
20 question our intention, subject to any disaster, is to hand down our decision on that by the end
21 of the legal term.

22 Mr. Mercer?

23 MR. MERCER: I do not think there is much for me to say at this stage, ma’am, except to confirm
24 that we are still prepared to submit our document by 19th August. We did not put it in the
25 submission but we had in fact intended, having served that, to also serve it as a failsafe Notice
26 of Appeal. We did not particularly want to go all the way through the process and then have it
27 knocked out by something the Court of Appeal did subsequently. We had intended to do that
28 in any event.

29 THE CHAIRMAN: Well I hope there is not going to be any procedural wrangle about this – I think
30 we would not be very happy if there were. The substance as we see it is identical.

31 MR. MERCER: There is nothing more for me to say at this point, ma’am.

32 THE CHAIRMAN: Thank you very much.

33 MR. ANDERSON: On behalf of Ofcom, yet another face for you, ma’am. We think that is a very
34 sensible way forward, provided obviously that it is a free-standing document that attacks, to
35 the extent that they are so advised, what is going to be Ofcom’s new free-standing Decision.

1 We think it is a very good idea to have a case management conference after the Notice of
2 Appeal before any further orders are made, and we would therefore suggest that those further
3 directions which Floe and VIP are seeking should not be made today – matters such as
4 remittal, fixing a date for hearing – all those sorts of matters could be considered, if
5 appropriate, at that next case management conference.

6 THE CHAIRMAN: Yes, but the normal course in this Tribunal is that the first case management
7 conference, if there was a Notice of Appeal, is heard before the Defence, and in this case the
8 date would be 30th September, so we are not changing that system.

9 MR. ANDERSON: No, absolutely, and that is very sensible.

10 THE CHAIRMAN: If something happens at the case management conference then that might
11 change, but at the moment everybody should work to those dates.

12 MR. ANDERSON: Absolutely, we are content with that.

13 MR. WISKING: For Vodafone we are content with that too.

14 MISS DURIE: And T-Mobile is content as well.

15 THE CHAIRMAN: Then the answer is I make the order, which is that you are going to provide your
16 ‘document’ by 19th August.

17 MR. MERCER: Yes, ma’am.

18 THE CHAIRMAN: And we will have the case management conference on 20th September at 10.30,
19 and at the moment the Defence will be due on 30th September. Have you any other
20 applications?

21 MR. WISKING: There was one minor matter that was raised I think in both our correspondence and
22 that of T-Mobile, which was, if it is convenient for Floe, could the Interveners be served with
23 this document at the same time as Ofcom?

24 MR. MERCER: I have no difficulty with that, ma’am.

25 THE CHAIRMAN: So interveners to be served by Floe with the document. Is it necessary for there
26 to be two documents that are identical. Is everybody happy that we proceed on this basis of
27 one document, and if it turns out that the Court of Appeal said that there had to be a new
28 Notice of Appeal we will accept that as a new Notice of Appeal? Or do you want two
29 documents?

30 MR. ANDERSON: We are certainly content with there being one document, though there may be
31 parts of it that relate specifically to one of the two Appellants on the facts, if that is what you
32 mean ----

33 THE CHAIRMAN: No, what I meant was what Floe was suggesting that it was going to put in two
34 documents, one headed “Notice of Appeal” and one headed “Amended Notice of Appeal”.

1 MR. ANDERSON: We are content with one document provided that one document contains all their
2 arguments relating to this Decision.

3 THE CHAIRMAN: Absolutely.

4 MR. ANDERSON: We are not interested in having two documents, no.

5 THE CHAIRMAN: Is that all right?

6 MR. WISKING: That is fine, and I support my friend's submissions that it is new in the sense that it
7 addresses the latest Decision, and I also assume there will be two documents in the sense that
8 there will be one for Floe, and one for VIP.

9 THE CHAIRMAN: Yes. Is that all right? You do not have to duplicate it again and serve two
10 different documents. If it turns out that the judgment is overruled by the Court of Appeal on
11 jurisdiction then it will be accepted that the document is a Notice of Appeal and not an
12 amended Notice of Appeal.

13 MR. MERCER: Yes, I follow that, ma'am, and that makes things simpler. It will save at least one
14 small part of another tree.

15 THE CHAIRMAN: Absolutely, because there is no point ----

16 MR. MERCER: Duplicating everything.

17 THE CHAIRMAN: -- just for the heading. There will be two documents, one is Floe and one is
18 VIP.

19 MR. MERCER: Yes, because there are differences in the factual base behind the two.

20 THE CHAIRMAN: The document will be comprehensive as to the matters on which you are
21 appealing?

22 MR. MERCER: I intended it to be as full as possible, because that is the way to save time.

23 THE CHAIRMAN: Does that deal with your points?

24 MR. ANDERSON: Yes, ma'am.

25 MISS DURIE: I am not trying to be difficult, but in the VIP case, Ofcom's original Decision has
26 been withdrawn so I am not quite sure of the status of the Appeal from the original Decision.
27 I do not think it matters and we are content whatever the document says, but it probably will
28 just be a Notice of Appeal rather than an Amended Notice of Appeal in the VIP case.

29 THE CHAIRMAN: I am not sure what was done here about the withdrawal. (After a pause) The
30 order made on 1st December 2004 was effectively in the same form as the Floe order, and what
31 happened was, by way of determination of the Appeal in respect of the Decision, the Decision
32 was set aside; and pursuant to the undertaking the respondent reinvestigate the matter. So I
33 think probably the same applies. When we were dealing with the Judgment – the jurisdiction
34 point – it was accepted that the same applied to VIP as did Floe, so I think probably it is all
35 under the same umbrella. Thank you for pointing it out.

