Neutral citation [2007] CAT 16

IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1024/2/3/04

Victoria House
Bloomsbury Place
London WC1A 2EB

15 March 2007

Before:

Marion Simmons QC
(Chairman)
Mr Michael Davey
Mrs Sheila Hewitt

BETWEEN:

FLOE TELECOM LIMITED
(in liquidation)

Appellant

-v-

OFFICE OF COMMUNICATIONS
(formerly the Director General of Telecommunications)

Respondent

supported by

VODAFONE LIMITED

and

T-MOBILE (UK) LIMITED

Interveners

REASONS FOR REFUSING APPLICATION BY T-MOBILE FOR PERMISSION TO APPEAL

1. For the reasons given below, the application by T-Mobile (UK) Limited ("T-Mobile") for permission to appeal ("the application") from the judgment of the Tribunal handed down on 31 August 2006 ([2006] CAT 17) ("the Judgment") is refused. In giving our reasons for refusing the application we have not rehearsed in detail the grounds on which the application is premised or passages from our Judgment, but instead cross refer to these below.

BACKGROUND

2. T-Mobile was the potential infringer in Case 1027/2/3/04 *VIP Communications Limited v Office of Communications* ("the VIP appeal"). That case concerned a decision taken by the Director General of Telecommunications (the "Director") following a complaint made to him by VIP Communications Limited (in administration) ("VIP") following the disconnection of its GSM gateway services by T-Mobile. That decision is similar to the decision taken by the Director in respect of a complaint by Floe Telecom Limited (in liquidation) ("Floe").

3. Further to a case management conference on 2 April 2004 and correspondence between all parties and, in particular, an undertaking given by VIP through their solicitors Taylor Wessing to be bound by the Tribunal's final judgment in the appeal by Floe, the Tribunal made two Orders on 20 April 2004, the first of which granted T-Mobile permission to intervene in Floe's appeal; and the second of which ordered that VIP's appeal be stayed pending determination of Floe's appeal and that the Tribunal would give such consequential directions in the VIP appeal as might be appropriate in the light of the Judgment in the Floe appeal after considering any observations of the parties.

4. On 31 August 2006, the Tribunal handed down a judgment dismissing an appeal by Floe against a decision of OFCOM dated 28 June 2005 (the "Second Decision") that Vodafone Limited ("Vodafone") had not infringed section 18 of the Competition Act 1998 (the "1998 Act") or Article 82 of the EC Treaty by disconnecting the services it was providing to Floe for use in

telecommunications equipment known as "GSM gateways". The procedural history of the appeal is set out in detail in the Judgment. The Second Decision replaced an earlier decision of the Director dated 3 November 2003 (the "First Decision") which was set aside by the Tribunal's judgment of 19 November 2004 (see [2004] CAT 18).

5. In addition to dismissing Floe's appeal, the Judgment set aside parts of the Second Decision, in part as being misconceived and in part as being inadequately reasoned. Since the main appeal failed, no part of the matter was remitted to OFCOM. A final order dismissing the appeal was made and drawn on 18 January 2007.

6. The stay in the VIP Appeal was lifted by order of the Tribunal on 13 September 2006 following the Judgment in the Floe appeal. A main hearing in the VIP appeal to hear the factual and legal issues concerning the question of authorisation as regards the relationship between T-Mobile and VIP has been fixed for 21 May 2007 with a time estimate of three days.

7. By an order made on 13 September 2006, the time for written applications for permission to appeal the Judgment was extended generally until further order by the Tribunal. One of the reasons for this order was to allow the VIP appeal to be heard by the Tribunal and for any application for permission to appeal to the Court of Appeal and any consequent appeal to be considered at the same time as any request for permission to appeal in the VIP appeal and if permission was granted that would allow an appeal from the judgments in the Floe and in the VIP cases to be heard by the Court of Appeal at the same time.

8. Notwithstanding the Order of the Tribunal on 13 September 2006, both the respondent, OFCOM, and the second intervener, T-Mobile, have applied pursuant to section 49(1) of the 1998 Act and rule 58 of the Tribunal Rules (SI 2003/1972) for permission to appeal to the Court of Appeal from the Judgment. No application for permission to appeal has been received from the appellant, Floe, or the first intervener, Vodafone.

9. On 14 December 2006, the Tribunal wrote to Floe inviting them to make written submissions on T-Mobile's and OFCOM's applications by

29 December 2006. On 27 December 2006, Floe submitted an application for a pre-emptive costs order, but has not provided any other written submissions. Both applications for permission to appeal have been dealt with on paper. The application by OFCOM is dealt with in a separate ruling (see [2007] CAT 15).

THE TRIBUNAL'S REASONS

Generally

10. Floe's appeal was dismissed by the Tribunal. An appeal to the Court of Appeal by T-Mobile can have no bearing on the outcome of Floe's appeal and can be of no benefit whatsoever to Floe. The appeal to the Tribunal brought by Floe is now exhausted. This is admitted in paragraph 38 of the application by OFCOM for permission to appeal (referred to above).

11. Vodafone was the potential infringer and was the first intervener in the Floe appeal from the First and the Second Decisions but no application has been received from Vodafone requesting permission to appeal to the Court of Appeal from the Judgment.

12. T-Mobile will have an opportunity to appeal the judgment of the Tribunal in the VIP appeal including in respect of those matters of law which the Tribunal decided in the Floe appeal. It is not appropriate for T-Mobile to be granted permission to appeal in its own right in the Floe appeal in circumstances where:
    a) it was not the potential infringer in the Floe appeal;
    b) it was an intervener in the Floe appeal solely because of the VIP appeal to the Tribunal;
    c) the facts in issue between VIP and T-Mobile have not yet been decided; and
    d) VIP would not be a party to the appeal to the Court of Appeal from the Judgment in the Floe appeal since it is not a party to the Floe appeal and so would not itself have an opportunity to counter the submissions made by T-Mobile.

13. It is inappropriate for T-Mobile as an intervener in the Floe appeal to rely on grounds of appeal which are not relied upon by OFCOM. This is particularly

so in respect of T-Mobile's submissions with regard to legal certainty at paragraph 54.2 of its application for permission to appeal.

14. T-Mobile's application for permission to appeal the Judgment in the Floe case is not only misconceived but it is premature having regard to T-Mobile being the principal intervener in the VIP Appeal before the Tribunal.

15. The appeal by Floe failed before the Tribunal because of the discrete findings of fact which the Tribunal made on the evidence adduced before it by Floe and Vodafone. The parties had agreed a list of legal issues ("the Agreed Legal Issues") for the Tribunal to consider (see paragraphs [12], [18] and [45] of the Judgment) and at the hearing submissions were made on both the Agreed Legal Issues and on the factual evidence. Having regard to the findings of fact made by the Tribunal the Agreed Legal Issues became hypothetical and irrelevant to the matters in dispute between OFCOM, Vodafone and Floe. However since at the hearing full submissions had been made on the Agreed Legal Issues (on the basis that the Tribunal may have decided the factual issues in favour of Floe) the Judgment of the Tribunal considered in detail and made findings on the Agreed Legal Issues.

16. Accordingly because of its findings of fact the Tribunal did not come to any conclusions as to how the law was to be applied to any factual scenarios at all. In so far as T-Mobile seeks to submit that the Tribunal did so, such submissions are misconceived and inconsistent with T-Mobile's agreement to the approach to be taken at the main hearing of the appeal against the Second Decision. That approach was for the Tribunal to make findings as to the Agreed Legal Issues independently of any factual scenarios so that those findings of law could be applied to such factual scenarios as may have existed (including those that may thereafter have found to exist in the VIP appeal). Having regard to the findings of fact made by the Tribunal, the Tribunal did not proceed to apply the law to any factual scenario. Having regard to its findings of fact it was unnecessary for the Tribunal to do so. Moreover, having regard to the Tribunal's conclusion that paragraphs [148] - [158], [161] and [170] of the Second Decision were inadequately reasoned it would have been inappropriate for the Tribunal to have made any comment on the application of the Agreed Legal Issues to any

factual scenarios which might have existed, but which did not exist in the Floe appeal having regard to the Tribunal's actual findings of fact in the Floe appeal. In these circumstances the Tribunal did not remit any part of the matter to OFCOM (see paragraph [377] of the Judgment).

17. In the absence of any continuing live issue between the original parties, it is inappropriate to ask the Court of Appeal to consider the Agreed Legal Issues in the abstract.

18. Furthermore, the application suffers from a distinct lack of clarity. In seeking permission to appeal against a ruling or judgment of the Tribunal it is important that the appealing party or parties clearly identify those sections of the judgment with which they disagree, the point of law which they seek to raise on appeal and demonstrate why, in their view, the Tribunal has erred in its assessment or application of that point of law. T-Mobile's application identifies a number of conceptual errors that it alleges are contained in the Judgment. However, the application does not clearly explain or identify the paragraphs in the Judgment to which T-Mobile objects, the precise points of law on which it relies, or – importantly – T-Mobile's own view as to the correct interpretation of the applicable law. In all respects, the reasoning in the application is vague and confused.

As to Ground 1: "The Tribunal erred in its construction of the licence whether or not the Tribunal's interpretation of Community law was correct.

Alleged Error 1.1: The Tribunal was wrong to apply a Marleasing rule of interpretation.

19. T-Mobile submits that the Tribunal was wrong to apply a *Marleasing*[1] rule of interpretation to the construction of the licence. This submission misconstrues the Judgment. The Judgment refers to *Marleasing* in paragraphs [273] and [318] of the Judgment. It is clear from these paragraphs that in those paragraphs the Tribunal was considering the consistency of the Exemption

1 See Case C-106/89 *Marleasing SA v La Comercial Internacional de Alimentacion SA* [1990] ECR I-4135, [1992] 1 CMLR 305.

Regulations[2] (national law) with the Authorisation Directive[3] (community law). It is clear from these paragraphs that the Tribunal did not consider that the licence was part of national law but rather that the licence must be construed in the context of the national statutory and regulatory scheme, the licence forming part of the national regulatory scheme (see paragraph [87] of the Judgment). The Tribunal did not consider what consequences follow from the national statutory scheme or the licence (paragraphs [90] and [320]) not being compatible with Community law save that Vodafone (and similarly T-Mobile) would have been entitled to rely on national law unless and until it was disapplied (see paragraph [321]).

20. In considering what is encompassed in the licensing regime it is important to note that in paragraph 140 of the Second Decision, OFCOM states that "the UK has chosen to maintain in force the licensing regime established under section 1 of the WTA" (i.e. the licensing regime established under section 1 of the Wireless Telegraphy Act 1949 ("WTA 1949") being the licence and the Exemption Regulations taken together (see paragraph [89] of the Judgment)).

21. The principles relied upon by the Tribunal for the construction of the licence are contained in paragraph [87] of the Judgment. The Judgment does not use the *Marleasing* principle to construe the licence but instead correctly uses the *Marleasing* principle to construe national law and in turn construes the licence in the context of national law.

22. T-Mobile submits that the Tribunal misunderstood the scope and requirements of its duties under Article 10 EC. We do not believe that to be the case but, even if it were correct, the submissions contained in T-Mobile's application are inconsistent with the English law principles of construction of contracts and licences generally which require that in construing the licence it is important to consider the relevant background to the licence and to place the licence in the context of the statutory and regulatory scheme which was in place at the relevant time for the authorisation of the use of radio frequencies and apparatus for commercial activities applicable to GSM mobile telephony activity in the

[2] The Wireless Telegraphy (Exemption) Regulations 2003, SI 2003/74.

[3] Directive 2002/20/EC on the authorisation of electronic communications networks and services.

UK (see paragraph [87] of the Judgment). T-Mobile's submissions contained in the application seek to ignore the context against which the licence is to be construed.

Alleged Error 1.2: Even if Marleasing applies, the Tribunal erred in its application.

23. T-Mobile's submissions in paragraphs 27 of its application are misconceived and ignore:

a) the Tribunal's analysis at paragraphs [92] – [149] of the Judgment;

b) paragraph 2 of Schedule 1 to the licence which explicitly states that the purpose of the Radio Equipment (i.e. the base transceiver stations) is to form part of a network in which user stations communicate with base transceiver stations to provide a telecommunications service (see paragraph [93] of Judgment);

c) that the licence refers to a telecommunications service which uses the GSM spectrum in both the "MTx" and "BTx" directions as explained in paragraph [94] of the Judgment;

d) the First Decision in which the Director decided that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of Vodafone's licence under the WTA 1949 (see paragraph [3] of the Judgment);

e) the confirmation given by the Radiocommunication Agency ("RA") to the Director as recorded in paragraph 42 of the First Decision that "[t]he RA has confirmed that MNOs' WTA licences contain terms which could enable third parties to legally provide Public GSM Gateways under the MNOs' licences"

f) the RA's view that Vodafone and the other mobile network operators ("MNOs") had been licensed on an "exclusive basis" as referred to in paragraphs [26] – [31] and [95] of the Judgment;

g) the background legislation which in the Tribunal's judgment is essential to an understanding of the licence and to its true construction (see paragraphs [87] and [97] - [149] of the Judgment);

h) the fact that Vodafone and T-Mobile entered into agreements with Floe and VIP respectively which were premised on the basis that the SIMs which they provided Floe and VIP were to be used by Floe and VIP in

GSM gateways (see paragraph [156] of the Judgment and paragraph 224 of OFCOM's decision in respect of VIP dated 28 June 2005); and

i) Mr Cliff Mason's evidence to the Tribunal as set out in paragraphs [40] (sub-paragraphs (22), (49), (60), (63), and (66)) and [118] of the Judgment. (Mr Mason is manager of the mobile and broadband wireless policy team at OFCOM and was formerly head of Public Networks Licensing at the RA).

24. Save that the licence granted to T-Mobile is in similar form to the licence granted to Vodafone the matters set out in paragraph 27 of the application relate to Vodafone and not to T-Mobile. In so far as the matters there set out are relevant to the T-Mobile licence and in so far as these matters are in issue in the VIP appeal they should be addressed in the VIP appeal and not in the Floe appeal (no request for permission to appeal the Judgment has been received from Vodafone).

Alleged Error 1.3: The Tribunal left open the possibility that the use of GSM gateways need not be authorised pursuant to the licence or otherwise, and was therefore precluded from the construction of the licence which it adopted.

25. T-Mobile has misstated the purport of the Judgment. The Tribunal decided that the true construction of Vodafone's licence permits the provision, by Vodafone, of a telecommunications service by way of business, including using GSM Gateways *which comply with the requirements of the RTTE Directive*[4] (our emphasis). However, the Tribunal did not find that the use of GSM Gateways *necessarily* complied with the requirements of the RTTE Directive. Instead the Tribunal found that OFCOM's conclusion that the restriction in regulation 4(2) of the Exemption Regulations was compatible with the RTTE Directive and the Authorisation Directive was inadequately reasoned in OFCOM's Decision. Accordingly T-Mobile misstates the Judgment when it submits that the Tribunal said conclusively that "the Licence had to be construed in such a way as permitted the use of GSM Gateways for the

[4] Directive 1999/5/EC on radio equipment and telecommunications terminal (RTTE) and the mutual recognition of their conformity.

provision of services by way of a business" (see paragraphs [110] (at sub-paragraph(e)), [120], [121], [123], [135], [246] and [247] of the Judgment.)

26. It is important in considering the purport of the Judgment to appreciate that questions concerning first the compatibility of the Exemption Regulations with Community law (particularly the RTTE Directive) and second whether there was other material which had not been placed before the Tribunal which would have justified restrictions on the use of GSM gateways, arose in relation to a consideration by the Tribunal of the Agreed Legal Issues. Having regard to the findings of fact made by the Tribunal the Agreed Legal Issues became hypothetical and irrelevant to the matters in dispute between OFCOM, Vodafone and Floe. In the circumstances of the outcome of the Floe appeal it was, therefore, not appropriate for the Tribunal to make any comment on how the Agreed Legal Issues were to be applied to any factual scenarios which might have existed, but which did not exist in the Floe appeal having regard to the Tribunal's actual findings of fact in the Floe appeal. The Tribunal did not come to any conclusion as to how the Agreed legal Issues were to be applied to any factual scenario since this did not arise in the context of Floe's appeal. This approach was particularly important having regard to the outstanding VIP appeal.

Alleged Error 1.4: There was no need for Vodafone's licence to authorise the use of GSM gateways.

27. T-Mobile's submissions are misconceived and ignore:

a) the First Decision in which the Director decided that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of Vodafone's licence under the WTA 1949 (see paragraph [3] of the Judgment);

b) the various statements made by the RA as set out in paragraphs [26] – [31] of the Judgment; and

c) the evidence adduced before the Tribunal of Mr Mason as set out in paragraphs [40] (at sub-paragraphs (22), (49), (60), (63), and (66)) and [118] of the Judgment. (Mr Mason is manager of the mobile and

broadband wireless policy team at OFCOM and was formerly head of Public Networks Licensing at the RA.)

Alleged Error 1.5: The Tribunal's construction of Vodafone's licence renders the Exemption Regulations largely otiose.

28. T-Mobile's submissions are misconceived and ignore:

a) Community law and national law including the Authorisation Directive which applies to commercial use of equipment (not self-use); and

b) that the licence is granted pursuant to national law (and in accordance with Community law as implemented thereby); and

c) the Tribunal's reasoning at paragraphs [133] to [149].

Alleged Error 1.6: Even if the licence authorised Vodafone to use GSM gateways it did not authorise Floe to do so.

29. T-Mobile's submissions are misconceived and ignore:

a) the First Decision in which the Director decided that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of Vodafone's licence under the WTA 1949 (see paragraph [3] of the Judgment and paragraphs 39 - 45 of the First Decision);

b) the various statements made by the RA as set out in paragraphs [26] – [31] of the Judgment;

c) the evidence adduced before the Tribunal of Mr Mason as set out in paragraph [40] (at sub-paragraphs (22), (49), (60), (63) and (66)) and [118] of the Judgment. (Mr Mason is manager of the mobile and broadband wireless policy team at OFCOM and was formerly head of Public Networks Licensing at the RA);

d) that Vodafone entered into the agreement with Floe; and

e) the reasoning of the Tribunal in paragraphs [91] – [158] of the Judgment.

As to Ground 2: The Tribunal erred as to the true construction of the RTTE Directive and its relationship with the Licensing and Authorisation Directives and accordingly erred in its construction of the licence.

Alleged (Preliminary) Error 2.1: The Tribunal had insufficient regard to the provisions of the Licensing Directive.

30. T-Mobile's submission that the Tribunal paid insufficient regard to the Licensing Directive[5] is misconceived and ignores:

    a) paragraphs [102] – [104] of the Judgment in which the Tribunal considered the Licensing Directive in detail;

    b) paragraphs [108] – [110] (in particular [110] at (n)), [116] – [120] and [123] – [124] of the Judgment in which the Tribunal considered the RTTE Directive;

    c) that it was not submitted to the Tribunal, nor was it part of the Second Decision, that the restrictions were justified as being made under the Licensing Directive;

    d) that in paragraph [123] of the Judgment the Tribunal clearly distinguished between the purpose of the Licensing Directive and the purpose of the RTTE Directive;

    e) that the Licensing Directive was replaced by the Authorisation Directive which entered into force on 24 April 2003 and which was required to be transposed into domestic law by 24 July 2003; and

    f) the Tribunal's conclusion set out in paragraphs [146] – [149] of its Judgment.

31. As to paragraph 39.2 of the application, T-Mobile's submission is misconceived and ignores paragraphs [147] and [148] of the Judgment.

Alleged Error 2.2: The Tribunal misconstrued the relationship between the RTTE Directive and Licensing Directive.

32. In paragraphs 42.1 and 42.2 of it application, T-Mobile misstates the purport of paragraph [123] of the Judgment. In paragraph [123] of the Judgment the

[5] Directive 97/13/EC on a common framework of general authorizations and individual licences in the field of telecommunications services.

Tribunal was considering the submission of OFCOM that the United Kingdom might introduce a complete prohibition on the use of compliant equipment for its "intended purpose" so as to trump the approval of equipment under the RTTE Directive entirely. The Tribunal was not considering the circumstances to which T-Mobile refer in paragraph 42.1 of its application.

33. In paragraph 42.2 of its application T-Mobile misreads paragraphs [119] and ignores paragraph [120] of the Judgment.

34. Furthermore, in relation to paragraph 42.2(a) of T-Mobile's application, the fact that there may be other alternative purposes for the equipment in question does not detract from paragraph [119] of the Judgment in which it is stated that the main intended purpose for GSM gateways is the provision of "least cost routing" of calls made to mobile phones from fixed line phones in the most cost effective way for customers; or the finding at paragraph [123] of the Judgment that the words "without prejudice to conditions attached to authorisations for the provision of the service in accordance with Community law" in Article 7(2) of the RTTE Directive cannot mean, as OFCOM had suggested, that, by way of the authorisation regime, the United Kingdom might introduce a complete prohibition on the use of compliant equipment for its "intended purpose" so as to trump the approval of the equipment under the RTTE Directive entirely.

35. In so far as paragraph 42.2(b) of T-Mobile's application is concerned, T-Mobile has misconstrued paragraphs [119], [120] and [123] of the Judgment and has ignored paragraphs [147] and [148] of the Judgment. The Judgment does not undermine the role of the Licensing Directive. The Tribunal has merely clarified that it was not open to OFCOM to attach a condition to a licence that makes it impossible to use equipment which is compliant with the RTTE Directive for its intended purpose.

Alleged Error 2.3: The Tribunal misconstrued the Authorisation Directive.

36. In paragraphs 43 – 45 of its application, T-Mobile has not fully taken into account the Tribunal's reasoning at paragraphs [132] – [146] of the Judgment; but rather, it has cherry-picked those parts of that reasoning with which it agrees, ignored the rest, and referred to selected sections of the Judgment taken

out of context. As is clear from paragraphs [134] (at sub-paragraphs (b) and (c)), the recitals to the Authorisation Directive state that (i) the "self-use" of radio frequencies is not covered by the Authorisation Directive, and (ii) the Authorisation Directive requires the least onerous authorisation system possible. This is taken into account in the Tribunal's reasoning at paragraphs [142] to [146] of the Judgment. Furthermore, in relation to paragraph 45.5 of T-Mobile's application, the Authorisation Directive was part of the new regulatory framework and superseded the Licensing Directive, and, accordingly, must be construed without regard to the Licensing Directive (see paragraph [133] of the Judgment).

Alleged Error 2.4: Community law did not require the Tribunal to interpret the Licence in the way it did.

37. The alleged error 2.4 at paragraph 46 of T-Mobile's application follows from alleged errors 2.2 and 2.3. For the reasons given above, alleged errors 2.2 and 2.3 are unfounded. It is, therefore, not necessary separately to address alleged error 2.4.

As to Ground 3: The Tribunal erred in its conclusion as to the risk of criminal liability if Vodafone had agreed to supply Floe with services so as to enable Floe to provide a telecommunication service to antoher by way of business using GSM gateways.

38. This is not a separate ground of appeal but is a consequence of the true construction of the licence. It is accordingly unnecessary to address this ground separately.

As to Ground 4: The Tribunal erred in its assessment of the evidence as to the views of the Radiocommunications Agency and its then head of public wireless networks, Cliff Mason, on the legality of GSM gateways.

39. This ground of appeal is misconceived. The full reference in paragraph [91] of the Judgment (selectively quoted by T-Mobile in paragraph 49 of its application) is that "[a]s we have mentioned above, the Director and the RA considered that Vodafone's licence did confer the ability to authorise Floe's use

of GSM gateways, but that such authorisation had not, in fact, been given." This was a reference back to paragraph [3] of the Judgment in which it is recorded that the Director decided in the First Decision that it was possible for Vodafone to authorise Floe to use GSM gateway equipment under the auspices of Vodafone's licence under the WTA 1949. The First Decision recorded in paragraph 42 that "[t]he RA has confirmed that MNOs' WTA licences contain terms which could enable third parties to legally provide Public GSM Gateways under the MNOs' licences (see paragraph [3] of the Judgment and the First Decision generally and paragraphs 26 and 42 in particular).

40. The assumption at paragraph 50 of T-Mobile's application is therefore incorrect. The correct reference is to the confirmation by the RA as recorded in the First Decision, not the paragraphs of the Judgment set out by T-Mobile in its application. Consequently, it is not necessary to address paragraphs 50 to 53 of T-Mobile's application any further.

41. Nevertheless, the evidence referred to by T-Mobile in paragraphs 50 to 53 of its application must in any event be considered in the context of what was recorded in the First Decision of the Director including the RA's confirmation at that time that the MNOs' WTA licences contained terms which could have enabled third parties legally to have provided Public GSM Gateways under the MNOs' licences. Accordingly, the Tribunal's assessment of the findings of fact accorded with the evidence before the Tribunal.

CONCLUSION

42. For the above reasons we conclude that none of the grounds of appeal advanced by T-Mobile have a realistic prospect of success. Consequently, and in the absence of any other compelling reason, we are not minded to grant permission to appeal.

43. Even if we had been minded to grant permission, we would not in this case have done so because of the situation as regards costs in an abstract appeal. The original appellant, Floe, is now in liquidation. Floe says that it has no funds available to act as respondent in respect of any appeal proceedings and has applied to the Tribunal for a pre-emptive costs order in terms that OFCOM

should pay Floe's costs in relation to any leave to appeal or appeal on a "come what may – win or lose" basis. The Tribunal considers that it would be inappropriate at this juncture for it to rule now on how the costs of proceedings before the Court of Appeal (if any) should be allocated. Rather, the Tribunal considers it would be more appropriate to leave both the question of whether permission to appeal should be granted and the question of Floe's costs, whether by way of a pre-emptive costs order or otherwise, to the Court of Appeal for its consideration.

Marion Simmons QC Michael Davey Sheila Hewitt

Charles Dhanowa 15 March 2007
Registrar