Telecommunications (Competition Provisions) Appeal Board

Appeal No. 23

Hong Kong Broadband Network Ltd. v The Telecommunications Authority

Date of appeal	:	9 May 2006
Appellant	:	Hong Kong Broadband Network Ltd.
Nature of appeal	:	Against the decision of the Telecommunications Authority dated 25 April 2006, inter alia, the methodology to determine the assessment that there was no breach of s.7M of the Telecommunications Ordinance in relation to HKBN's complaint against PCCW-IMS Limited for engaging in misleading or deceptive conduct in its advertisements and direct marketing materials to promote, market and advertise its broadband services.
Hearings	:	Hearing on the appeal held on 23, 24 and 25 January 2007.
Outcome of hearing	:	The Judgement of the Appeal Board dated 24 April 2007 is attached. Appeal was allowed and the TA's decision was quashed.

Case No. 23 of 2006

BETWEEN

HONG KONG BROADBAND NETWORK LIMITED **Appellant**

And

THE TELECOMMUNICATIONS AUTHORITY **Respondent**

JUDGMENT

Background

1. In April 2005, the Appellant made a complaint to the Telecommunications Authority (**"the Authority"**) alleging that some advertisements of PCCW-IMS Limited (**"PCCW"**) in promoting its internet broadband service were misleading or deceptive, and that such conduct amounted to a contravention of Section 7M of the Telecommunications Ordinance (**"the Ordinance"**).

2. Section 7M is in the following terms:

> *"A licensee shall not engage in conduct which, in the opinion of the Authority, is misleading or deceptive in providing or acquiring telecommunications networks, systems, installations, customer equipment or services including (but not limited to) promoting, marketing or advertising the network, system, installation, customer equipment or service."*

3. The impugned advertisements were published in printed media and distributed by way of promotional pamphlets to the general public in the second half of

2004. The Appeal Board have been referred to 3 specific samples of the advertisements containing the following contents (as translated):

(1) "Subscribed to 'Netvigator' Broadband now
IMMEDIATELY HAVE two free round-trip tickets to Bangkok
- Upgrade to 6M 'Individual dedicated line'"

(2) "Only 'Netvigator' Broadband
enable you to access the internet while watching NOW Broadband TV
Immediate subscribed to 'Netvigator' Broadband
Pay $38 more
- upgrade to 6M*"

(3) "Immediate choose real broadband
free gift of mini-computer worth $4,108!
Pay $24 more to upgrade to 6M 'Individual dedicated line'
And free 8 NOW broadband TV Channels"

4. The Appellant's complaint was that the reference to "6M" in these marketing materials was applicable only to the maximum "speed" for downloading of data. The materials did not disclose the asymmetric nature of the service and made no mention of its "uploading speed" which was merely 640 kbps.

5. After an investigation of the complaint, the Authority considered that the complaint had not been established and that the marketing materials did not give rise to a breach of section 7M of the Ordinance (**"the Decision"**).

6. Dissatisfied with the Decision, the Appellant appealed to the Appeal Board under section 32N of the Ordinance by lodging a Notice of Appeal dated 9 May 2006.

The Facts

7. From about 2000 to the material time in 2004, there were 4 main internet broadband service providers, namely, the Appellant, PCCW, i-Cable and Hutchison.

8. The service operated by the Appellant is characterized as "symmetrical" in respect of the bandwidth provided for data download on the one hand and upload on the other. The service operated by PCCW was "asymmetrical", and those by i-Cable and Hutchison were both *"symmetrical"* as well as *"asymmetrical"*.

9. We are informed that bandwidth is a measurement of capacity. In the present context, it refers to the rate of transmission of data, and is used interchangeably with throughput and speed. The throughput of communication links is measured in bits per second (bps). We are told that "6M" would have been equivalent to about 6,000,000 bps, or 6,000 kbps.

10. In the present appeal, there is no dispute that as the service operated by PCCW was asymmetrical in nature, the advertised maximum throughput of "6M" was achievable only in respect of downloading and not uploading of data, the maximum throughput for uploading being only about 640 kbps.

11. There is also no dispute in this appeal that the impugned promotional materials were indeed published in printed media and distributed to the general public in the latter half of 2004.

12. The Authority reached its Decision principally, in summary, for the following reasons and said:

    (1) Until recently (referring to the time of the Decision), on the basis of anecdotal evidence, rudimentary service provider surveys and industry advertisements, *"ordinary broadband users historically have had little interest in the upload speed of their broadband services"*;

(2) The Appellant *"has not provided any evidence to support its claim that upload speed is such a critical aspect of a broadband service that it must be disclosed to consumers or else they are likely to be misled."*

(3) The Appellant *"has not shown that ordinary consumers necessarily assume that all broadband services are symmetrical such that PCCW-IMS may have an obligation to disclose this aspect of its service."*

(4) *"The specification of an upload capacity in promotional literature may actually be meaningless when translated into actual consumer experience."*

(5) The Appellant's claims *"are essentially technical and in terms of genuine consumer interest ring hollow in the absence of actual consumer complaints."*

Approach on Appeal

13. Section 32N of the Ordinance so far as material provides that:

"(1) Any person aggrieved by –

(a) an opinion, determination, direction or decision of the Authority relating to –

(i) section ..... 7M ...; or

(b) .....

may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be ....."

14. Section 32 O so far as material provides that:

"(1) In the hearing of an appeal –

(a) .....

(b) every question before the Appeal Board shall be determined by the opinion of the majority of the members hearing the appeal except a question of law which shall be determine by the Chairman or

Deputy Chairman and in the case of an equality of votes the Chairman or Deputy Chairman shall have a casting vote;

(c) .....

(d) ..... *the Appeal Board may –*

(i) subject to subsection (2), receive and consider any material, whether by way of oral evidence, written statements, documents or otherwise, and whether or not it would be admissible in a court of law .....

(ii) by notice in writing signed by the Chairman or Deputy Chairman, summon any person –

(A) to produce to it any document that is relevant to the appeal and is in his custody or under his control;

(B) to appear before it and to give evidence relevant to the appeal;

(iii) to (viii) .....

(4) *After hearing an appeal, the Appeal Board shall determine the appeal by upholding, varying or quashing the appeal subject matter and may make such consequential orders as may be necessary."*

15. We have borne in mind Section 32 O(1)(b). It was indicated at the hearing, (and the parties having expressly indicated they had no objection) that in the Appeal Board's deliberations the Chairman would discuss both matters of fact and law with the other 2 members of the Board. But so far as matters of law are concerned it is the Chairman, and him alone, who has *"determined"* and decided upon those questions.

16. The parties differ as to the approach which should be adopted by the Appeal Board in the determination of the Appeal. The parties have referred to a number of authorities from other jurisdictions on the question. Whilst decisions in other jurisdictions may sometimes be useful as a reference, their relevance is necessarily limited by the context of the legislative provisions under which they are given. We consider that the question of the proper approach should, first and

foremost, be resolved by focusing on the relevant provisions under the Ordinance itself.

17. Section 32 O(1)(d) gives the Appeal Board broad powers in the reception of evidence. Subject to the question of relevance and possibly privilege, subsection (d)(i) makes it clear that the nature of the material and evidence that the Board is entitled to receive is not otherwise circumscribed. While Section 32 O(2) disentitles any person to *"require"* the Appeal Board to receive and consider any material which was not before the Authority at the time of its decision, there is no provision in the Ordinance which has the effect of confining the Board's consideration to that which has been made available to or was considered by the Authority.

18. Given its wide powers in the reception of evidence, it is clear that the Appeal Board is vested with a fact-finding function under the Ordinance. Such function is to be discharged by viewing, considering and weighing the materials and evidence presented to it in the appeal. In this manner, the appeal proceeds by way of a *re-hearing* in the light of such materials and evidence, rather than as a mere *review* of the decision of the Authority.

19. The Appeal Board would, of course, accord such weight as is appropriate to *"the opinion"* of the Authority. However, as is evident from the provisions under Part VC of the Ordinance, it is for the Appeal Board, on the basis of the materials and evidence presented to it, to form its own view including matters of fact and conclusions to be drawn on such facts, in its determination whether to uphold, vary, or quash the subject decision of the Authority.

20. On behalf of the Authority, Mr. Alder submitted that the approach on appeal is that "*the Appeal Board rehears, that is reviews, the evidence*". He further submitted that "*the Appeal Board only substitutes* [its own views] *where an 'error' has been made out*". Mr. Alder refers the Board to the decision of the Federal Court of Australia in ***Poulet Frais Pty. Ltd. v. The Silver Fox Company Pty. Ltd.*** (2005) ALR 211. ***Poulet Frais*** was an appeal against the decision of the trial judge who found the appellant to have engaged in misleading and

deceptive conduct in contravention of section 52 of the (Australian) Trade Practices Act 1974. It will be noted that those findings were made after a full judicial process in which, obviously, the trial judge was discharging a judicial function. On appeal, the appellate process was governed by the Federal Court of Australia Act 1976.

21. It is clear therefore that the context of the Federal Court's observations as to the approach of the appellate court is necessarily different from that obtained in our present appeal under consideration. First, the Authority performs an administrative role under the Ordinance and in forming an opinion as to whether a complaint is made out, there is no question of the Authority conducting proceedings in the nature of a judicial process. In addition, and as already noted above, the Appeal Board is vested with a fact-finding function, which the Board may discharge by way of receiving fresh materials and evidence. Thus, the observations in ***Poulet Frais*** afford little assistance on the proper approach to be adopted by the Appeal Board in dealing with the present appeal under Part VC of the Ordinance.

22. The Authority also refers to ***Ghosh v. General Medical Council*** [2001] 1 WLR 1915; ***Stepney Borough Council v. Joffe*** [1949] 1 KB 599; **Securities and Futures Appeals Tribunal,** ***Application No.2 of 2004***; and ***Freeserve.com PLC v. Director General of Telecommunications*** [2003] CAT 5. Observations in these decisions were made in a variety of contexts. Suffice it for us to say that they do not bear directly on the issue at hand, and nothing contained in these decisions detract from our views expressed above.

23. In this connection, we would adopt the following observations of a differently constituted Appeal Board in ***PCCW-HKT Telephone Limited v. The Telecommunications Authority***[1]:

> *"8. (b) The appeal has proceeded by way of re-hearing as is envisaged in section 32O(1)(d)(i)* ('receive and consider any material ....."). *It is to be noted that section 32 O(2)*

[1] Appeal No.4 of 2002 (15 August 2003)

disenables any party 'to require' *the Board to* 'receive and consider' *material which was not before the TA at the time of the Decision; but the obverse of this is that the Board accordingly is entitled to consider such fresh or other evidence if in its judgment it considers it right in the circumstances of the case so to do, as appears to be the legislative intention of Part VC of the Ordinance. .....*

9. *(c) In the General Conditions and in the Ordinance the words* 'in the opinion of the Authority' *appear, but as the Appeal is a re-hearing it is plain that when deciding whether to* 'uphold vary or quash' *the Decision, it is the opinion of the Board, not of the TA, which matters."*

The Broadband Users

24. From the nature of the marketing materials and the manner of their publication it is obvious that the purpose was to attract subscriptions for the broadband service on offer. The targeted potential subscribers were the general public at large. They included existing users of internet broadband services (whether of PCCW's or other service providers') as well as non-users, the occasional as well as the regular ones, those who performed only simple operations on the internet as well as those who used the service for a variety of functions, those who knew little about (and probably have little interest in) the technical operation of the internet as well as the sophisticated knowledgeable "savvy" users.

25. Among the materials presented at the hearing was an article published by the Consumer Council in the October 2004 issue of its Choice Magazine. It was based on a survey of over 3,000 broadband-service users conducted by the Council in May and August 2004. Views of the users were gathered in relation to a number of aspects of the services, including their downloading and uploading speed. The article also included a survey of the range of activities and functions for which the users would require the broadband services. According to the survey, a large majority of the users used the services for browsing

websites on the internet and sending and receiving emails. In addition, there was a substantial proportion of users (over 50%) who used the services for downloading and uploading files, and over 36% for playing on-line games.

26. As we understand it, when one uses the internet, one interacts with it. Data are downloaded from the internet server onto the user's computer and uploaded in the other direction. Some activities typically involve a great deal more data to be downloaded than uploaded. Generally speaking, browsing websites is one such activity.

27. In the case of sending and receiving emails, there can be significant variance in the amount of data transmitted in either direction. The attachments to emails may contain large files, for example, songs, audio and video clips etc. While receiving of emails and attachments involves mainly downloading of data, sending them will need the data to be uploaded. With large attachments, it is necessary to upload a substantial amount of data for transmission.

28. Playing on-line games is an interactive activity. The characters on the screen are controlled by the players sending commands from their respective computers. In the process, commands are being sent at the same time as they are received. On-line games involve transmission of data in both directions.

29. In addition, at about the relevant time in 2004, *"peer-to-peer"* activity had just started to be on the rise, although it cannot be said to be a popular or common use of the broadband services then. It involves the sharing of the information resident in the computers of the participants, typically, songs, video clips and even feature films. The participants operate as communities, by uploading information to be shared as well as taking down information from others. As the information transmitted involves very large files, the activity requires substantial capacity by way of data transmission.

30. In these proceedings, a crucial issue is to identify the characteristics of the notional "*ordinary broadband users*" at the relevant time. This consists not of a search for a *"typical"* or an *"average"* user, but identification of *a range of*

users within the class of potential and existing users. The Appeal Board finds helpful guidance from the case of ***Taco Company of Australia Inc. v. Taco Bell Pty. Ltd.*** (1982) 42 ALR 177. In ***Taco***, when considering whether an individual, who opened a restaurant, with a name that bore similarities to that of a large American chain of restaurants, had engaged in conduct which was misleading or deceptive in contravention of the Trade Practices Act 1974, Deane and Fitzgerald JJ. said, at 202-3:

> *"In a case, such as the present, where the suggested misrepresentation has not been expressly made and it is alleged that the relevant deception or misleading is, or is likely to be, of the public, the following propositions appear to be established as affording guidance.*
>
> *First, it is necessary to identify the relevant section (or sections) of the public (which may be the public at large) by reference to whom the question of whether conduct is, or is likely to be, misleading or deceptive falls to be tested ....*
> *Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it, 'including the astute and the gullible, the intelligent and the not so intelligent, the well educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations': **Puxu Pty Ltd v Parkdale Custom Built Furniture Pty Ltd (1980)** 31 ALR 73, per Lockhart J at 93: see also; **World Series Cricket v Parish**, supra, per Brennan J (16 ALR at 203).*
> *Thirdly, ..."*
> (our emphasis)

31. As a preliminary observation, the Appeal Board notes the following in the Authority's Guidelines on Misleading or Deceptive Conduct in Hong Kong Telecommunications Markets published on 21 May 2003:

> *"2.10 The TA must form an opinion as to whether a licensee is engaging, or has engaged, in misleading or deceptive conduct. In forming his opinion, the TA will make an assessment of all of*

the circumstances of the conduct. He will examine the facts and ask whether a 'reasonable person' would be misled or deceived by the licensee's conduct.

2.11 *A 'reasonable person' is an ordinary member of the target audience of the conduct; that is, a person at whom the conduct is directed. ..... [The] level of comprehension expected, and therefore the standard of care required by the licensee, will differ depending on the target audience."*

(our emphasis)

32. As already noted, the intended audience of the impugned promotional materials was the general public. The class of the target audience possesses a wide range of characteristics. Therefore, when one reads the Authority's Guidelines as to identification of "a reasonable person", it is important to appreciate that the exercise is not to identify the characteristics of the one "reasonable person" to represent the class, but to identify a range among the target audience which would constitute "the reasonable person", or in the present case, the notional "ordinary broadband users".

33. At the relevant time among the potential and existing broadband users, clearly there were those who, by reason of the activities they currently engaged in or expected to do so in future, would have an interest not only in the service's performance for data download but also *upload*. The on-line game players would readily come to mind, among others, as members of such a group.

34. In this connection, the Appeal Board takes note of the evidence that even in 2002 (2 years prior to the material time in question), i-Cable was already highlighting the *upload* speed as a promotional feature for its service. Further, in the November 2004 issue of the e-Zone Magazine, a feature article was published of a high-capacity broadband service. Attention was drawn to both the speed of downloading as well as uploading. The Appeal Board appreciates the fact that the readership of e-Zone was probably those who were already experienced users or were interested in the various internet technologies or functions requiring performance in uploading. But on the whole of the evidence,

the Appeal Board would consider that at the relevant time, those having an interest in the *upload* performance of the service should be included in constituting the notional "ordinary broadband users".

35. On this question as to the users' interest in *upload* speed, the Authority has fairly accepted that his contention was not that uploading was an immaterial feature of broadband services or there existed only a trivial level of interest in it. Indeed as was pointed out in the Authority's submissions, the Authority had made no finding to that effect. Rather, the Authority emphasized that what was of interest to the users was actual performance, not theoretical capacity. This contention raises a question as to the relevance of the users' actual experience and will be dealt with in the next section.

36. Returning to the notional broadband users, the Appeal Board has no doubt that the class would include some more sophisticated who were aware that the service offered by PCCW would be asymmetric in nature. But equally within the range would include a substantial number who were ignorant of the asymmetry (or otherwise) of its service.

37. The question is, given there to be those who were interested in the *upload* performance, whether one is able to say confidently that such a group would have known of the *asymmetry* so that they would be aware that the stated capacity applied only to the download and not upload? Or, whether there would be those who would simply not have appreciated any question as to symmetry or otherwise of the service, or if they did, would have simply assumed the stated capacity to apply in both directions? Applying what is essentially common sense, the Appeal Board considers the latter scenario to be much the more likely. Even among those interested in the *upload* performance, there would certainly be ones to whom it would not have occurred to consider whether the system was asymmetrical, or even if such a question did cross their mind, would have assumed the stated capacity to apply in both directions.

38. Hence, the Appeal Board considers the notional *"ordinary broadband users"* would consist of a broad range possessing the characteristics identified above.

Among them, there is no basis for discounting as unreasonable, improbable or insignificant, those who would have been attracted by the advertised capacity of "6M" and have assumed that "6M" applied to the performance both in the direction of downloading as well as uploading data.

Misleading and Deceptive

39. It is common ground that the throughput capacity advertised in the impugned promotional materials applied only to the download and not upload. The Authority's view was that:

> *" ..... it is technically possible that a large nominal upload capacity may be no faster than a much smaller nominal capacity in circumstances where other constraints elsewhere along the transmission pathway neutralize the apparent speed advantage of the former. Accordingly the specification of an upload capacity in promotional literature may actually be meaningless when translated into actual consumer experience"*: para. 18 of the Decision
> (our emphasis)

40. The Appeal Board is prepared to accept that existing or potential users would be primarily concerned with their actual experience as to the speed to be delivered by the service and that the nominal capacity was one only of a number of factors affecting the speed.

41. However, that is nothing to the point when the advertised throughput, insofar as it was referable to upload, was not achievable at all. It was the inability to meet the claimed throughput capacity in the upload direction that in our opinion rendered the impugned marketing materials inaccurate and misleading.

42. The Authority's reference to the users' actual experience causes confusion. As already noted, among the notional ordinary broadband users would be those who would indeed be influenced and attracted by such matters as the nominal capacity. To these consumers, they would be entitled to have delivered to them a service that would correspond to the specifications as advertised. It mattered

not that their actual experience would depend on a number of other factors in addition to capacity.

43. The point is best illustrated by an example discussed in the course of the Appellant's submissions. An advertisement promoting a high-performance motor vehicle, say, by claiming an acceleration rate of "0 – 100 k/hr in 6 seconds" is no doubt misleading when, technically, its best performance could only reach "0 – 100k/hr in 10 seconds". Such an advertisement is no less misleading even if no potential buyer ever intends to put the vehicle to a vigorous performance test to verify its actual limits. Nor is the advertisement any less misleading even if all potential customers realise that manufacturers' claims as to maximum acceleration rate can be achieved only under ideal factory conditions and not otherwise. The fact remains that its best performance can never achieve its advertised claims, and those claims must therefore be misleading on any view.

44. With regard to the facts of the present case, the Appeal Board is of the view that where a service provider has chosen to make reference to technical details as a promotional feature in their advertisements which were aimed at a broad section of the public and where such details were liable to give rise to an interpretation which would render them inaccurate and misleading, then unless the interpretation so ascribed to the advertisements could properly be discounted as wholly unreasonable or extraordinary or insignificant, it would be the duty of the service provider to ensure the accuracy and clarity of the details so that no such misleading interpretation would arise.

45. For the foregoing reasons, it is the view of the Appeal Board that the unqualified specification of "6M" in the impugned advertisements was indeed misleading when the upload capacity of the service did not in fact meet that specification.

Absence of Evidence of Complaint

46. In the Decision, the Authority stated that:

> *"In the TA's opinion, the complainant has not established a breach of Section 7M in relation to this allegation. ..... The TA also notes that the complainant's claims are essentially technical and in terms of genuine consumer interest ring hollow in the absence of actual consumer complaints"*: para. 19 of the Decision

47. In the submissions on behalf of the Authority, the absence of consumer complaints related not merely to the question whether the Appellant's complaint would be of *"genuine consumer interest"*, but its significance was elevated to being evidence of no deception or that the advertisements were not misleading to a significant section of the target audience.

48. Against this contention, the third proposition summarized in the judgment of Deane and Fitzgerald JJ. in ***Taco*** (supra) makes it clear that evidence of actual complaints is unnecessary:

> *"Thirdly, evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive <u>but is not essential</u>. Such evidence does not itself conclusively establish that conduct is misleading or deceptive or likely to mislead or deceive. <u>The court must determine that question for itself. The test is objective</u> ....."*
> (our emphasis)

49. Similarly, in ***Trade Practices Commission v. Optus Communications Pty. Ltd.*** 23 I.P.R. 176, when commenting on the witness's evidence as to the industry usage, Tamberlin J. said:

> *".... Certainly his opinion can be expressed and taken into account and I have done so. However, I do not consider that I am bound by this opinion. <u>The test is essentially an objective one. It is said that there is no evidence to the contrary. However, it is clearly the position</u>*

that it is not necessary to adduce evidence as to the understanding of members of the community."
(our emphasis)

50. To the submissions made on behalf of the Authority on this point, it will be recalled that in the present case the misleading feature of the promotional materials lies in the non-compliance with the stated nominal capacity. As is discussed in the preceding section, it is not a question concerning users' experience. It follows therefore that lack of consumer complaints cannot have been a weighty consideration.

51. The Appeal Board is not detracted in any way from its conclusion by reason of the absence of evidence of consumer complaints.

Conclusion

52. For the foregoing reasons, the Appeal Board concludes that the impugned promotional materials put out by PCCW were misleading and that the Authority ought to have found that there had been contravention of Section 7M of the Ordinance.

53. This appeal is allowed and the Decision is accordingly quashed. The Appeal Board will make the following consequential orders:

(1) The Authority do, within 14 days from the date of this decision of the Appeal Board, publish on its website a notification to the effect that a finding has been made by the Appeal Board that PCCW's advertisements of its Netvigator broadband service published in 2004 and 2005 were misleading because they did not refer to the asymmetrical nature of the broadband service, i.e. that "6M" referred only to download capacity and not its upload capacity.

(2) The Authority do forthwith consider the appropriate penalties, if any, to be imposed, and PCCW and the persons concerned be at liberty to make representations as to such appropriate penalties.

(3) Costs of and incidental to the appeal be to the Appellant, to be assessed by the Board if not agreed.

* * * * *

Dated 24th April 2007.

Mr. John Griffiths S.C., C.M.G., Q.C.
Chairman

Dr. John Ho Dit-sang, Member

Mr. Ambrose Ho S.C., Member