Telecommunications (Competition Provisions) Appeal Board

Appeal No. 25

PCCW-HKT Telephone Limited v The Telecommunications Authority

Date of appeal	:	11 May 2007
Appellant	:	PCCW - HKT Telephone Limited
Nature of appeal	:	To quash the Statement of the Telecommunications Authority dated 27 April 2007 regarding the deregulation for fixed-mobile convergence and to make such other orders as the Appeal Board considers may be appropriate.
Hearings	:	• The Appeal Board conducted hearings on 15, 17 and 18 March 2008 on the preliminary issue as to whether the Appellant's appeal is within the terms of the Telecommunications Ordinance (Cap. 106), and concluded in its Decision dated 2 April 2008 (copy attached) that the Appeal Board had no jurisdiction to hear the Appeal as the statutory provision for appeal (section 32N) had not been engaged. • The Chairman granted leave on 16 July 2008 for the Appellant to state a case to the Court of Appeal. The details of the Case Stated were finalised on 12 September 2008. • The Court of Appeal heard the Case Stated (no. CACV 300/2008) on 17 and 18 March 2009 and handed down judgement on 2 April 2009 (copy attached). The Court of Appeal affirmed, among others, that section 32 was not engaged in the Appeal.
Outcome of appeal	:	The Appeal Board found no jurisdiction to entertain the Appeal.

APPEAL NO. 25 OF 2007

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IN THE MATTER OF the Telecommunications Ordinance (Cap. 106)

and

IN THE MATTER OF an appeal to the Telecommunications (Competition Provisions) Appeal Board pursuant to Section 32N of the Telecommunications Ordinance

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BETWEEN:

PCCW-HKT TELEPHONE LIMITED Appellant

and

THE TELECOMMUNICATIONS AUTHORITY Respondent

_____

JUDGMENT

_____

BEFORE: JOHN SCOTT QC SC

THOMAS CHENG

NEIL KAPLAN CBE QC SBS (CHAIRMAN)

CLERK TO THE BOARD: C T MAK

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INTRODUCTION

1. The Appeal Board ("**the Board**") has before it an appeal by PCCW against a Decision of the Telecommunications Authority ("**TA**") contained in a Statement dated 27th April 2007.

2. This Appeal was launched by PCCW's Notice of Appeal dated 11th May 2007. By their Notice of Appeal PCCW invited the Board to (a) quash the Statement and (b) make such other Orders as the Board considered appropriate.

3. The Grounds of Appeal averred:-

   (a) The Statement was an opinion, determination, direction and/or decision by the TA;

   (b) The Statement relates to Sections 7K, 7L and/or 7N of the Ordinance and/or a licence condition relating to such sections;

   (c) That TA has exceeded its lawful power;

   (d) That TA has erred as a matter fact and/or law, *inter alia*, for the reason that the Statement is an unlawful use of the TA's powers under the

Ordinance and/or that there was no basis, alternatively no proper basis, on the material available to, or known to the TA at the time of making the Statement for the Statement to be made either at all or in the terms that it was made; and

(e) The terms of the Statement are, in all the circumstances, unreasonable.

4. On 14th September 2007 PCCW served further particulars of its Grounds of Appeal. During the course of this hearing before the Board, counsel for PCCW made clear that this appeal would not deal with the issue of deregulation of Local Access Charges ("**LAC**"). PCCW reserved their rights in relation thereto.

5. By a letter dated 8th October 2007 the TA gave notice to PCCW that the TA will be contending that the appeal does not engage the competition provisions in the Ordinance and that it would be seeking an order that the matter of jurisdiction be heard as a preliminary issue.

6. Following two case conference meetings it was ordered by the Chairman of the Appeal Board ("**the Chairman**") that the issue of jurisdiction should be heard as a preliminary issue.

OVERVIEW

7. The Statement in issue in this case was entitled "*THE DEREGULATION FOR FIXED-MOBILE CONVERGENCE - STATEMENT OF THE TELECOMMUNICATIONS AUTHORITY*" ("**the Statement**"). The TA concluded that it would deregulate the existing Fixed-Mobile Interconnection Charge ("**FMIC**"). The regulatory guidance in favour of Mobile Party's Network Pays ("**MPNP**"), contained in the TA's *Statement No. 7 (Second Revision) on Interconnection and Related Competition Issues,* was to be withdrawn subject to a two-year transitional period. The TA also stated that there would be no change in the Any-to-Any ("**A2A**") regime. This appeal in essence relates to those two findings.

PROCEDURE

8. Pursuant to Directions made by the Chairman, both sides served substantial Skeleton Arguments. PCCW's Skeleton was dated 29th February 2008 and ran to 37 pages. The TA's Skeleton Argument dated 7th March 2008 ran to 25 pages. PCCW also served an Expert Report from Professor Janusz Ordover, a Professor of Economics at New York University, which ran to 36 pages excluding appendices.

9. The hearing took place at the Hong Kong International Arbitration Centre on 15th, 17th and 18th March 2008 before Mr. Neil Kaplan CBE, QC, SBS (Chairman of the Board), Mr. John Scott QC, SC and Mr. Thomas Cheng, (Board Members). Professor Ordover gave evidence on behalf of PCCW and he was cross-examined.

10. PCCW was represented by Mr. James Farmer QC and Mr. Roger Beresford instructed by Messrs. Herbert Smith.

11. The TA was represented by Mr. Nicholas Green QC and Mr. Edward Alder instructed by Messrs. Slaughter and May.

12. The Appeal Board and the parties were provided with a live-note facility and a full transcript of the argument was also provided.

BACKGROUND TO THE TELECOMMUNICATIONS INDUSTRY IN HONG KONG

13. The local Fixed Telecommunications Network Services ("**FTNS**") was fully liberalised in January 2003. As of May 2007 there were eleven companies licensed to provide local FTNS on a competitive basis including PCCW. As a result of open competition, as at September 2006, 76% of residential

households were able to enjoy an alternative choice of local fixed network operators.

14. As of March 2007 there were 3.8 million exchange lines in Hong Kong. Telephone density was 95 lines per hundred households – 55.8% by population.

15. Broadband internet access services are extremely popular in Hong Kong and broadband penetration here is among the highest in the world – 73% of households using broadband services.

16. As of May 2007 there were 255 external telecommunication service ("**ETS**") licences in Hong Kong.

17. Competition in mobile services is fierce. As of April 2007 there were 14 digital networks operating. Mobile number portability was introduced in March 1999. By February 2007 the number of mobile subscribers had reached 9.3 million representing one of the highest penetration rates in the world at about 135%. Of the 9.3 million subscribers 1.45 million were 3G service customers.

18. The Hong Kong Government has for some time adopted policies that emphasise the importance of promoting competition for the benefit of

consumers. The policy was formulated in May 1998. In a *Statement on Competition Policy* it was stated that:-

> "*All Government entities, and public and private sector bodies are encouraged to adhere to the following pro-competition principles for the purpose of enhancing economic efficiency and free trade –*
>
> *(1)* *maximizing reliance on, and minimizing interference with, market mechanism;*
>
> *(2)* *maintaining a level-playing field;*
>
> *(3)* *minimizing uncertainty and fostering confidence in system fairness and predictability by –*
>
> *(i)* *consistent application of policy;*
>
> *(ii)* *transparent in account of operation;*
>
> *(iii)* *adherence to equitable and non-discriminatory standards and practices.*" (Core Bundle page 116)

19. This policy has been adopted by the Government in relation to its policy for the telecommunications sector. On the issue of competition in this sector the Government stated in September 1996 that:-

"*The Government is fully committed to the promotion of fair trade and competition. We firmly believe that market forces and minimum Government intervention brings greatest benefit to the community by enhancing competition and efficiency while keeping costs and prices down. This notwithstanding, where necessary, we will use appropriate measures to rectify any unfair business practices, safeguard competition and protect consumer interest.*" (Core Bundle page 116)

BACKGROUND OF THE STATEMENT

20. In early 2005 the TA formed a working group to study issues arising from Fixed Mobile Convergence ("**FMC**").

21. On 21st September 2005 the TA published a First Consultation Paper (B1/13). In December 2005 the TA appointed Ovum Limited ("**Ovum**") as an independent consultant to conduct economic studies on the existing regulatory arrangements and to advise TA on the extent they would affect FMC.

22. The TA published the Ovum Report on 26th April 2006 and on 14th July of that year the TA published the Second Consultation Paper (A/8).

23. On 31st August 2006 PCCW wrote to the TA criticising the consultation process and asking 36 questions relating to the Second Consultation Paper (B/17).

24. On 26th September 2006 the TA responded to PCCW's questions (B2/18). On 11th October 2006 the TA extended the deadline for submissions on the Second Consultation Paper.

25. On 13th February 2007 Reyes J dismissed PCCW's Judicial Review which alleged bias in relation to the consultation process leading to the Statement (HCAL 112/2006 (D2)).

26. On 27th April 2007 the FMC Statement, subject to this appeal, was issued (A/6).

27. In May 2007 PCCW's Judicial Review challenging the TA's Section 36B Direction requiring PCCW to interconnect with Zone/Wharf T&T Ltd was heard by Reyes J (HCAL 6/2007) (Transcript at D/3).

28. As stated above PCCW's appeal in this matter was filed on 11th May 2007 (Appeal Case 25).

29. On 1st June 2007 Reyes J dismissed PCCW's Judicial Review referred to in paragraph 27 above.

30. On 6th September 2007 the Court of Appeal heard PCCW's appeal against Reyes J's Decision in the ***Zone*** case and dismissed it (CACV 60/2007).

31. On 18th September 2007 the Court of Appeal published its Reasons for dismissing the appeal in the ***Zone*** case.

32. Between 16th and 18th October 2007 Mr. Griffiths QC as past chairman of the Board heard a jurisdictional issue in Appeal Case 24 – the ***Zone*** case.

33. On 17th March 2008 Mr. Griffiths delivered his Reasons for finding that the Appeal Board did have jurisdiction in the ***Zone*** case.

34. The Court of Appeal has scheduled 27th July 2008 to hear the appeal against Reyes J's judgment in HCAL 6/2007 (see paragraphs 27 and 29 above).

SECTION 32N OF THE TELECOMMUNICATIONS ORDINANCE

35. The Appeal Board is a creature of statute and can only have jurisdiction in cases falling within Section 32N of the Telecommunications Ordinance ("**TO**"). This Section provides as follows:-

> *"(1) Any person aggrieved by –*
>
> *(a) an opinion, determination, direction or decision of the authority relating to –*
>
> *(i) Section 7K, 7L, 7M or 7N; or*
>
> *(ii) Any licence condition relating to any sub-section; or*
>
> *(b) Any sanction or remedy imposed or to be imposed under this Ordinance by the Authority in consequence of a breach of any such section or any such licence condition,*
>
> *may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be, to the extent to which it relates to any such section*

or any such licence condition, as the case may be." (emphases added)

36. Section 7K deals with anti-competitive practices. Section 7L deals with abuse of dominant position. Section 7M deals with misleading or deceptive conduct. Section 7N deals with non-discrimination. It is common ground that this hearing only concerns section 7K and 7L.

37. In *PCCW-HKT Limited v Telecommunications Authority* (CACV 274/2003) the Court of Appeal gave helpful guidance on the application of Section 32N. Before referring to the factual background to that decision it may be helpful to set out the guidance given by Ma CJHC. At paragraph 37 of the judgment the learned Judge expressed himself in the following way:-

"*In my view, the effect of section 32N(1)(a)(i) of the TO is as follows:-*

(1) It is not enough simply for the relevant opinion, determination, direction or decision of the TA to have some connection (however strong) to competition (or anti-competition), abuse of dominant position, misleading or deceptive conduct or non-discrimination. If this were the only criterion needed, the phrase "relating to" would refer to exactly such terms rather

than specifically to sections 7K, 7L, 7M and 7N. Something else must therefore be required.

(2) What is required is that the person who is aggrieved by the relevant opinion, determination, direction or decision of the TA must also establish that one or more of sections 7K to 7N have been truly engaged. This means that the TA (in issuing or making the relevant opinion, determination, direction or decision) must, expressly or by implication, have arrived at an opinion that the licensee concerned has engaged, or will (if the relevant opinion, determination, direction or decision is not complied with) engage or continue to engage in conduct that contravenes one or more of sections 7K to 7N. I put it in these terms to emphasize that not only is past or present conduct covered but also future conduct. The language of sections 7K to 7N is sufficiently wide (and for good reason) to cover such situations. A good measure of flexibility is therefore given to the TA.

(3) Whether or not in issuing or making an opinion, determination, direction or decision, the TA has arrived at such opinion, is in any given case a question of fact. In his submissions, Mr Roth

raised the spectre of the possibility of there being cross-examination to establish whether or not the TA has indeed reached such an opinion. In my view, it will in most (if not all) cases be fully evident whether or not the TA has arrived at such an opinion. I note here the duty on the part of the TA to provide reasons for any opinion, determination, direction or decision :- see section 6A(3)(b) of the TO. This will no doubt facilitate the exercise.

(4) *As to Mr Gordon's point that breaches of sections 7K, 7L, 7M or 7N are required to be shown before an appeal under section 32N(1)(a) can be triggered, this is really a matter of semantics. Section 32N(1)(a)(i) does not use the word 'breach' (although section 32N(1)(b) does) This matters not. The important point to remember is that an appeal to the Appeal Board under section 32N(1)(a)(i) is possible only where the relevant opinion, determination, direction or decision involves an opinion on the part of the TA along the lines mentioned in sub-paragraph (2) above. Whether or not one chooses to refer to this as a past, present or future breach is immaterial. The important requirement is the TA's opinion under sections 7K, 7L, 7M or 7N.*

(5) I am prepared to accept that opinions, determinations, directions or decisions made or issued by the TA may not necessarily engage sections 7K to 7N but the important point for present purposes is that they may, depending on the facts.

(6) I have found the legislative history to be of limited assistance. The legislative background referred to in the materials shown to us is already evident from the terms of the Ordinance itself."

38. The Board makes no apology for setting out these passages in full because so much argument in this appeal centred around them. The facts of that case were concerned with Type II interconnection for broadband services. In November 2000 the TA issued a *Statement on Broadband Interconnection* after consulting the industry. The stated policy objective of the TA as set out in the Statement was to open up the market for broadband interconnection so that the public would have a greater choice. After that Statement was issued from December 2000 onwards one of PCCW's competitors Wharf T&T Limited ("**Wharf**") began negotiating with PCCW with a view to establishing a broadband Type II interconnection using PCCW's existing network. No agreement was able to be reached. In July 2001 Wharf invited the TA to make a determination under Section 36A of the TO. This Section provides that the TA may itself determine

the terms and conditions of any interconnection between parties. PCCW objected to the TA making a determination under Section 36A but submitted a tariff proposal for broadband interconnection. This tariff was made under General Condition 22 of the Terms of PCCW's Fixed Telecommunication Network Service Licence which was issued on 31st March 1998. GC 22 provides that where PCCW intends to introduce any new service or charge it is obliged to notify the TA and in turn the TA is required to give its approval unless such service or charge would lead to a contravention of GC 15, GC 16 or GC 20(4). As the Court of Appeal pointed out GC 15 and GC 16 refer specifically to a prohibition against the licence holder engaging in anti-competitive conduct or abusing its dominant position thus is in terms almost identical to sections 7K and 7L of the TO.

39. Having satisfied himself of the requirements of the licence conditions (namely, that the tariff proposal did not entail any anti-competitive conduct or abuse of dominant position) the TA approved PCCW's tariff in a letter dated 5th October 2001. However, Wharf continued to press the TA to make a determination. Wharf rejected the tariff as forming a basis of any contractual agreement with PCCW saying that the terms and conditions set out in the tariff were "*harsh and unfair and completely disregards the existing regulatory obligations of [PCCW]*" and argued that it had to be rejected outright as it would "*deprive the consumers of effective competition in the broadband market*".

40. Wharf then pressed the TA to issue a direction under Section 36B of the TO to the effect that pending determination PCCW was to permit Wharf to secure a broadband Type II inter-connection. PCCW for its part saw no need for a determination and objected to such. The TA continued to encourage the parties to try and agree an arrangement and it appears that by April 2002 PCCW and Wharf had agreed on an interim arrangement based on all the terms of the tariff save for 3 terms. The TA then wrote to the parties on 16th April 2002 giving his views of the three disputed terms and enclosed for the parties' consideration a draft direction under Section 36B(1)(a)(iii).

41. At the end of April 2002 Wharf strongly objected to the draft Direction. It repeated its stance that the tariff charges were excessive and the terms so restrictive that Wharf believed they were anti-competitive and they went on to say "*consumers are being denied alternative choice of service provider and benefits of competition*". The TA was called upon to "*ensure the consumers will enjoy benefits of competition in the broadband market without further undue delay*". Further reasons were given as to why Wharf thought the tariff was anti-competitive. In short, Wharf was insisting that the tariff was anti-competitive and entailed an abuse of PCCW's dominant position. PCCW maintained its insistence that any interim arrangement ought to be in terms of the tariff.

42. On 15th May 2002 the TA issued the Direction pursuant to section 36B directing that PCCW was obliged upon receipt to a request from Wharf promptly to implement a broadband Type II inter-connection. PCCW sought to appeal the direction to the Appeal Board under Section 32N of the TO.

43. It has to be made clear that whereas PCCW at one time was considered by the TA to be in a dominant position in the market that position of dominance ceased and was so recognised by the TA in 2005.

44. The Appeal Board has referred to the facts of the Wharf case and the guidance given by the Court of Appeal in order to show that the facts of that case were significantly different from the facts in the case presently before the Board and this distinction will be made apparent when the Board turns to consider the submissions that were made by both parties in this case.

PCCW'S LICENCE

45. Because some reference was made in the argument to the terms of PCCW's licence the Board feels for the sake of completeness it should make a brief reference thereto.

46. On 14th January 2005 PCCW was granted a Fixed Carrier Licence (B1/12). Special Condition 1.1 provides:

> "*The licensee shall provide, maintain and operate the network to the satisfaction of the Authority in such a manner as to ensure that, subject to Special Conditions 1.3 and 1.4, a good, efficient and continuous basic service is reasonably available, subject to the Ordinance, to all persons in Hong Kong…*"

47. SC 1.4 provides for PCCW to receive a universal service contribution to assist it in meeting its universal service obligation.

48. SC 3.1 and 3.2 provide:

> "*3.1 The Licensee shall interconnect the service and the network with the external public telecommunications network and services operated by Reach… under its licence granted under the Ordinance and other fixed carriers or fixed telecommunications networks and services licensed under the Ordinance and, where directed by the Authority, other telecommunications networks and services licensed, or deemed to be licensed, or exempt from licensing under the Ordinance.*

3.2 The licensee shall use all reasonable endeavours to ensure that interconnection is effaced properly, efficiently and on terms, conditions and charges and at charges which are based on the licensee's reasonable relevant cost attributed to interconnections."

49. Mr. Green accepted that this mandatory connection obligation applies only between fixed carriers.

PROFESSOR ORDOVER'S EVIDENCE

50. Professor Ordover prepared a comprehensive expert report on behalf of PCCW expressing his opinion on the issue whether the TA's publication of the Statement implies that it has formed an opinion that there will or may be a future breach of the competition provisions of the TO if certain regulations, namely the MPNP, A2A and LAC regimes, are not retained.

51. The opinion that Professor Ordover expressed in the Report is summarised below. As this appeal is confined only to issues relating to the retention of the A2A regulation, only the opinion of Professor Ordover which is relevant to this topic is reproduced:-

(a) The TA's decision to deregulate the current MPNP regime suggests that it is of the opinion that the market is competitive enough such that competitors can negotiate interconnection terms on their own without the risk of market failure.

(b) However, the TA also said in the Statement that the A2A connectivity regulation is to be retained in the interest of the public. More specifically, preservation of the A2A regulation would "*prevent service disruptions as a result of the breakdown of interconnection*".

(c) It is in the interest of the public that telecommunications should be seamless and ubiquitous. Therefore, the Statement shows that the TA is concerned that incumbents and/or entrants to the telecommunications market will fail to connect to each other without A2A regulation. As he put it during cross examination "*That's all I am saying. That is my Report in a nutshell.*" (T93/4). He went on to make clear that he expressed no opinion as to who might in the future be in breach of section 7.

(d) There are many reasons for the failure to implement interconnection among all market participants, e.g. information asymmetry. However, a far more likely reason that exists in Hong Kong is the problem of refusal

to supply – larger or dominant networks in Hong Kong having large number of customers may refuse to let their competitors to interconnect in order to ease their competitive constraints on pricing. However, he accepted that no one had market power in the Hong Kong telecommunication industry and in relation to a refusal to supply he stated "*that the refusal to supply for anti-competition purposes is an infrequent type of anti-trust case"* (T.78).

(e) Thus, despite using the public interest criteria as a basis of retaining A2A regulation, what the TA is really concerned about is that the deregulation of A2A may lead to market failure, which can be "*meaningfully interpreted only as stemming from the risk of failure of an unimpeded telecommunication market to deliver a competitive outcome; that is, from a failure of competition*" (paragraph 14(b) of the Report).

52. Professor Ordover also expressed his opinion that the retention of A2A is inconsistent with its decision to deregulate MPNP, and that the TA's policy is "*puzzling*" and "*redundant*" in light of its power under section 36A of the TO.

53. The Board is grateful to Professor Ordover for his effort in compiling the Report. However, the Board finds that the opinions expressed in the Report relate essentially to the evaluation of the TA's economic policy of partial

deregulation in the telecommunications sector. As the only issue in the hearing of this appeal is one of the Board's jurisdiction, which in turn relates to the interpretation and meaning of section 32N of the TO, the Board is of the view that no direct assistance can be drawn from the Report. Nevertheless we are grateful to Professor Ordover for his interesting insight into the economics of the Hong Kong telecommunications industry and thank him for his attendance.

THE APPELLANT'S SUBMISSIONS

54. Mr. Farmer for PCCW laid before us most attractively a detailed and elaborate argument to the effect that when one analyses the Statement fully, section 32N must have been truly engaged. We have read his submissions with care and no discourtesy is intended by not replicating all his argument fully in this judgment. However the essence of his argument is as follows:

(a) The jurisdiction of the Board is limited to matters relating to the competition provisions (*viz*. sections 7K to 7N).

(b) Applying the propositions laid down by Ma CJHC in CACV 274/2003, the jurisdiction of the Board will only be established if one or more of sections 7K to 7N are truly engaged.

(c) The TA in its Statement stated its decision that regulation in relation to MPNP should be withdrawn, while regulation in the form of A2A connectivity should be retained.

(d) The reason for the deregulation of MPNP is that in the opinion of the TA, the telecommunications market in Hong Kong is already very competitive, and that matters in relation to MPNP can be satisfactorily resolved by market forces in the process of competition.

(e) However, inconsistent as it may seem, the TA has come to the view in its Statement that to maintain effective competition it is necessary that there should be A2A regulation.

(f) In support of his propositions, Mr. Farmer went through in detail the special conditions in the license granted to PCCW by the TA. Special conditions 3 relates to interconnection pricing which Mr. Farmer argued is a form of regulatory control imposed by the TA measured against potential breaches or contraventions of the competition law provisions. The TA's decision not to withdraw A2A as a regulatory requirement must be regarded as indicating a concern that without the regulatory requirements, breaches of the competition provisions would occur.

(g) Mr. Farmer has also taken the Board through the Statement, again in great detail, which in his submissions shows that the only reason that the TA decided to maintain A2A regulation is to prevent market failure. As Mr. Farmer puts it in paragraph 67 of his Skeleton:

> "*The Authority's decision to deregulate and his opinion that the A2A requirement should be 'preserved' relate to one or more of sections 7K to 7N because, by implication, he arrived at an opinion that licensees (of whom PCCW is of course a significant one) will (if the A2A requirement is not retained) engage in conduct that contravenes one or more of sections 7K to 7N*."

55. Mr. Farmer also relied on the judgment of Ma CJHC that it is not necessary to find a proven breach of the competition provisions. It is sufficient to infer that the TA must have thought that it was likely that there might be a breach in the future for it to have found it necessary to continue the regulation. He submitted that this is exactly what happened in this case in the Statement regarding the continuation of the A2A guidance.

56. Mr. Farmer referred to another decision of the Appeal Board by Mr. John Griffiths in relation to a complaint about advertisements which was said to be in breach of section 7M. Although the TA found that there was no breach of

that section, Mr. Griffiths held that there was an appeal right in favour of the complainant nonetheless (Appeal Case 23 of 2006).

57. It does not matter, he said, that only sections 36A and 36B but not sections 7K to 7N were mentioned in the Statement. It is submitted by Mr. Farmer that when faced with anti-competitive conduct, the TA can invoke both sets of provisions, although sections 36A and 36B can also be invoked in situations where parties cannot agree on the price of interconnection for perfectly legitimate reasons. The important point is that the link between market failure and abuse of market power is the very thing that the TA was looking for when deciding whether or not to maintain the A2A regulation.

58. When asked by Mr. Scott, Mr. Farmer agreed that whenever a reference in the Statement is made to "*market power*" that may be attributable to a fixed operator, that indicates that the author of the Statement has had in mind behaviour that amounts to anti-competitive practices under section 7K. What Mr. Farmer said was *"…it's the market failure from the exercise of market power that we would say gives rise to the jurisdictional link to 32N(1)(a)*" (Transcript - Day 2 page 49 line 18).

59. Mr. Farmer also said that the very reason for setting up the Board is to get away from the situation where decisions of the TA of any kind can only be

dealt with by judicial review. It is unsatisfactory for the court to deal with important matters of policy which have an effect on competition, present or future. In his submission, such cases should be dealt with by the Board.

60. Mr. Farmer submitted that one should not draw distinctions between the use of the words "*under*" the competition provisions and "*relating to*" the same, as was explained in Ma CJHC's judgment. Objectively speaking, if the effect of conduct is one of preventing or substantially restricting competition, then that will be enough to invoke section 7K and thus to invoke the appeal right.

61. Finally, in relation to the words "*persons aggrieved*" in section 32N, and in response to the TA's arguments, Mr. Farmer said that PCCW is in a sense a person "*in the dock*" because the retention of A2A regulation puts fixed line operators such as PCCW at a considerable and unfair disadvantage in negotiations. He submitted that this case involved a $600 million revenue transfer per year from the fixed network operators to the mobile network operators. He submitted that PCCW's portion of this sum will be prejudiced with, at the same time, its arms tied behind its back by the A2A regulation.

THE RESPONDENT'S SUBMISSIONS

62. Mr. Green submitted that it was impossible for PCCW to meet the test laid down by Ma CJHC. He pointed out that there was no decision or direction actually directed at PCCW. He said that PCCW was not a party aggrieved because the decision to keep A2A was not directed at PCCW which was not, as he put it, on the TA's radar at that particular time. He pointed out that the decision with regard to A2A was merely a decision not to change the existing guidelines in favour of A2A which had been an important plank of TA's policy over the years. A2A ensured that universal connectivity will continue and there would be no consumer frustration nor uncertainty nor "*negotiation hold-up*" which might be the result of that policy being withdrawn.

63. Mr. Green submitted that there was no breach of the relevant sections contemplated by the TA. Even if the TA had in mind in the future that someone, perhaps PCCW, might be in breach, there must be a higher degree of nexus or proximity between the conduct objected to and the TA's opinion.

64. As to the word "*implication*" used by Ma CJHC, this word, submitted Mr. Green, was used to show that on the facts of that case, even though the sections were not mentioned, it was obvious that they were on the mind of the TA when they made the direction in issue.

65. Mr. Green referred to the word "*conduct*" used in the section and submitted that there was no conduct in this case which could be relied upon to engage the section.

66. Mr. Green also emphasised the word "*under*" used in the section. He submitted that there must be an exercise of power under section 7K to 7N. There is none here. The necessary specificity is missing.

67. Finally he relied upon the phrase "*truly engaged*" used by Ma CJHC. There was some discussion whether the word "*truly*" added anything to the word "*engaged*" or whether this was mere surplusage. Mr. Green accepted that they were important words because their use showed that Ma CJHC thought you could not have "*a false engagement*" with section 7K, L, M or N.

CONCLUSION

68. The Board notes that the decision impugned before us has not been the subject of a judicial review wherein it was alleged that the decision was illogical, unreasonable or disproportionate. The judicial review based on bias referred to above was not made in relation to the Statement, but in relation to the consultation process leading to the Statement.

69. Having considered all the written and oral material as well as the relevant case law on the subject, the Board is clearly of the view that it does not have jurisdiction to hear this appeal.

70. The Board prefers the submissions of the TA to that of PCCW.

71. The Board has to apply a purposive construction to section 32N and, like the Court of Appeal, it is not assisted by a reference to the legislative history of section 32N. Having considered all the arguments, the Board is not of the view that the section is ambiguous thus obviating the need for reference to that history.

72. The Board does not consider that section 32N has been engaged truly or otherwise.

73. The decision to keep the guidance in favour of A2A is more consistent with the TA's aim to minimize disruption and avoid uncertainty than it is with a fear of market failure. Even if, which we do not find, the TA had at the back of its mind an unexpressed assumption that an absence of A2A might conceivably lead to market failure, we think that it is far too remote a factor. The Board takes the view that to engage section 32N the TA has to have in mind the

conduct of a particular entity. Applying the guidelines given by Ma CJHC the Board find it impossible to hold that section 32N has been engaged for the reasons advanced by the TA.

74. In a sense by way of a postscript and without it in any way being part of the Board's reasoning, it is with a sense of relief that the Board will not have to undertake a review of the TA's telecommunications policy which has been formulated so carefully over the last few years and which has contributed significantly to Hong Kong being a world hub for telecommunications – all to the benefit of Hong Kong consumers and persons wishing the do business with Hong Kong. The Board doubts very much that the legislature intended that issues related to broad policy issues such as this would be subject to a complete review by this Board and we hold that the terms of section 32N precludes this approach on the facts of this particular case.

75. Finally the Board refers to section 32O(1)(b) of the TO which provides that questions of law shall be determined by the Chairman or Deputy Chairman. The issues before the Board in this case are essentially ones of mixed fact and law. The Chairman can confirm that any decision on legal issues is one that he has taken himself after discussions with his colleagues. All decisions on issues of fact are the unanimous view of the Board. (We have in mind the observations of Ma CJHC set out in paragraph 37(3) of the judgement referred

to in paragraph 37 above. This issue was raised with the parties who seemed to be ad idem as to the correct approach as can be seen from Transcript, Day 2, pp. 1-2).

DISPOSAL

76. In the light of the above conclusions, the Board hereby declares and finds that it does not have jurisdiction to entertain PCCW's appeal in this matter and the appeal set out in PCCW's notice of appeal is hereby dismissed.

77. The parties are invited to write to the Board with their submissions on costs and any outstanding matters referable to this appeal.

78. The Board would like to thank counsel and solicitors on both sides for their enormous assistance in dealing with this appeal.

Dated this 2nd day of April 2008.

……..……..

NEIL KAPLAN CBE QC SBS
(Chairman)

…… ……

JOHN A SCOTT QC SC **THOMAS CHENG**
(Board Member) **(Board Member)**

Clerk to the Appeal Board
C T Mak

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CACV 300/2008

IN THE HIGH COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION COURT OF APPEAL

CIVIL APPEAL NO. 300 OF 2008

IN THE MATTER OF THE TELECOMMUNICATIONS ORDINANCE (CAP. 106)

and

IN THE MATTER OF APPEAL NO. 25 TO THE TELECOMMUNICATIONS (COMPETITION PROVISIONS) APPEAL BOARD MADE UNDER SECTION 32N OF THE TELECOMMUNICATIONS ORDINANCE (CAP. 106)

BETWEEN

PCCW-HKT TELEPHONE LIMITED Appellant

and

THE TELECOMMUNICATIONS AUTHORITY Respondent

Before : Hon Cheung JA, Suffiad and A Cheung JJ in Court

Date of Hearing : 17 and 18 March 2009

Date of Judgment : 2 April 2009

JUDGMENT

Hon Cheung JA :

The change

1. For many years telecommunications service in Hong Kong was provided by a monopoly, namely, Hong Kong Telephone Company ('HKTC') whose successor is PCCW-HKT Telephone Limited ('PCCW'). By a series of reforms introduced by the government beginning from 1995 the market was opened for competition, first by allowing other operators of fixed line telecommunications services ('FTNS'), such as Hutchison Communications Ltd, Wharf New T & T Hong Kong Limited and New World Telephone Limited to compete with HKTC and later by allowing other mobile telecommunications operators to enter the market as well. In 2007 there were eleven companies (including PCCW) licensed to provide local FTNS with 3.8 million exchange lines. Telephone density was 95 lines per one hundred households - 55.8% by population. There were also 14 digital network operators in the mobile service with a total of 9.3 million mobile subscribers. This represents one of the highest penetration rates in the world at about 135%.

2. The liberalisation of the telecommunications market has been in line with the government's policy on this sector namely,

> ‘that the widest range of quality telecommunications services should be available to the community at reasonable cost;
>
> that telecommunications services should be provided in the most economically efficient manner possible; and
>
> that Hong Kong should serve as the pre-eminent communications hub for the region now and into the next century.’

See “*Government response to the Consumer Council’s Report on Achieving Competition in the Liberalised Telecommunication Market*” dated September 1996.

3. The overriding objective of this policy is:

> ‘ The Government is fully committed to the promotion of fair trade and competition. We firmly believe that market forces and minimum Government intervention bring greatest benefit to the community by enhancing competition and efficiency while keeping costs and prices down. This notwithstanding, where necessary, we will use appropriate measures to rectify any unfair business practices, safeguard competition and protect consumer interests.’

4. With the opening of the market a Telecommunications Authority (‘the Authority’) was set up to regulate the telecommunications industry. His work was carried out by the Office of Telecommunications (‘OFTA’). The legislative framework is the *Telecommunication Ordinance* (‘the *Ordinance*’) (Cap. 106).

‘Any to Any’ regime

5. To ensure competition is truly effective in an industry which is network-based, it is a prerequisite for any customer of a network to communicate with, or gain access to, the customers or services to other networks. This ability to connect is regulated by the *Ordinance* and in the licence conditions of the operator. This is known as ‘Any to Any’ (also referred to as A2A) regime : operators are expected to ensure Any to Any connectivity and the Authority is granted powers to compel them to do so by intervention as a last resort. This is achieved by directing interconnection pursuant to section 36B of the *Ordinance* on terms and conditions which will be subsequently determined by agreement or the Authority pursuant to section 36A of the *Ordinance*.

6. An example of the licence conditions relating to ‘Any to Any’ can be found in Special Condition 3 of PCCW’s licence which provides that,

> ‘ 3.1 The Licensee shall interconnect the service and the network with the external public telecommunications network and services operated by Reach... under its licence granted under the Ordinance and other fixed carriers or fixed telecommunications networks and services licensed under the Ordinance and, where directed by the Authority, other telecommunications networks and services licensed, or deemed to be licensed, or exempt from licensing under the Ordinance.
>
> 3.2 The licensee shall use all reasonable endeavours to ensure that interconnection is effaced properly, efficiently and on terms, conditions and charges and at

charges which are based on the licensee's reasonable relevant cost attributed to interconnections.'

7. There is a mandatory requirement to be connected to fixed line operators on the one hand and connection to other operators as directed by the Authority on the other hand.

8. As part of the implementation of the principle of Any to Any, the Authority established regulations for payment of interconnection charges between operators for the use of the other's network. This is known as the 'interconnection charge'. From a historical perspective, PCCW, because of its long establishment with a large infrastructural network received a huge market share of the interconnection charge.

Statement on 'Deregulation for Fixed-Mobile Convergence'

9. The liberalisation of this industry resulted in fixed and mobile telecommunications services regulated under different licensing regimes, with different licensing rights and obligations for these two types of operators. The distinction between fixed and mobile networks and services, however, has become blurred with faster changing technology developments and dynamic market conditions. This phenomenon is known as Fixed Mobile Convergence ('FMC').

10. The Authority reviewed this development and after consultation published a Statement on 27 April 2007 on 'Deregulation for Fixed-Mobile Convergence' ('the Statement').

In the Statement the Authority considered it should deal with issues relating to FMC without delay.

11. Among the issues related to FMC is the Fixed-Mobile Interconnection Charge ('FMIC'). FMIC is an interconnection charge for circuit-switched traffic (i.e. voice and non-voice traffic over the conventional circuit-switched networks) exchanged between Fixed Net Operator ('FNO') and Mobile Network Operator ('MNO'). Currently, regulatory guidance is given to the industry in the Authority's Statement No. 7. That guidance assumes a payment structure based on a Mobile Party's Network Pays ('MPNP') mechanism. This charge is paid by a MNO to the interconnecting FNO for telephony traffic both from a fixed line to a mobile phone and from a mobile phone to a fixed line.

12. The Authority is of the view that the market-driven approach should be adopted in relation to FMIC and in this context it has concluded that it is unnecessary and inappropriate to retain the regulatory guidance in favour of MPNP. The guidance will be withdrawn, subject to a transition period. However, at the same time, the Authority is of the view that the existing Any to Any regime prescribed in the relevant powers in the *Ordinance* and the licence conditions should be preserved in its entirety.

Appeal to the Appeal Board from decision of the Authority

13. To ensure that there should be proper avenues of appeal against the decisions of the Authority a Telecommunications

(Competition Provisions) Appeal Board ('the Appeal Board') was established.

Case-stated to the Court of Appeal from the Appeal Board

14. Section 32Q of *Ordinance* provides that, subject to section 32R, the determination of an appeal by the Appeal Board or any order as to costs made by the Appeal Board shall be final.

15. However, section 32R, provides that the Appeal Board may refer any question of law arising in an appeal to the Court of Appeal for determination by way of case stated.

The present appeal

16. In the present case, PCCW lodged an appeal to the Appeal Board (Mr. Kaplan SC, Mr. John Scott SC and Mr. Thomas Cheng) against the Authority's decision arising from the Statement. PCCW asked for the deregulation of Any to Any. The Appeal Board, however, declined jurisdiction to appeal on the ground that the statutory provision for appeal had not been engaged and dismissed the appeal on 2 April 2008. PCCW then applied to the Appeal Board to state a case for the consideration of this Court. This Court now considers the four questions in the case stated by the Appeal Board.

Question 1

17. The first question is:

In what circumstances can the Appeal Board state a case for the Court of Appeal and was it competent for the Board to state a case in this Appeal?

18. The first question arises because the Appeal Board wished to clarify the position whether the case stated procedure is still available after it has made a decision.

The Authority's view

19. The Authority argued against invoking this procedure after the decision had been given by the Appeal Board.

20. Mr. Green QC and Mr. Alder who appeared as counsel for the Authority submitted that the jurisdiction to refer a case stated arises only during the course of a hearing and relates only to issues 'arising'; it does not relate to issues which 'arose' but which have been determined in a judgment. They argued that the logic behind this is that the Appeal Board is instituted to hear appeals relating to anti-competitive behaviour; appeals will involve complex economic and accounting evidence and are time consuming and expensive; if an important point of law arises, it makes sense that it be determined before the Appeal Board determines the appeal, otherwise the Appeal Board risks ruling upon an incorrect legal premise which will be inefficient.

My view

21. The finality of the decision of the Appeal Board under section 32Q is subject to the provision of section 32R which enables the Court of Appeal to hear an appeal from the Appeal Board by way of case-stated on a point of law. The use of the phrase 'subject to section 32R', means section 32R is the prevailing provision. As Cooke J (as he then was) so succinctly stated in *Harding v. Coburn* [1976] 2 NZLR 577 at 582 the qualification 'subject to' is a standard way of making clear which provision is to govern in the event of conflict, see further *C & J Clark Ltd v. Inland Revenue Commission* [1973] 1 WLR 905 at 911 per Megary J (as he then was).

22. My view is that as a matter of statutory interpretation the case-stated procedure is available to a party during an appeal as well as after a decision has been rendered by the Appeal Board for the following reasons:

(1) Apart from the word 'arising' which is an ordinary word there is no indication in the section that the case-stated procedure is available only during the currency of an appeal before the Appeal Board. The use of a present participle, namely 'arising' instead of the past participle 'arose' cannot be determinative of the issue.

(2) While points of law may be identified in the course of appeal before the Appeal Board, there clearly are occasions when

points of law can only be appraised after a decision has been given by the Appeal Board. In such a situation and if the Appeal Board has erred on the point of law, justice requires the Court of Appeal to determine the law and to make consequential directions, including an order to remit the case to the Appeal Board for reconsideration in the light of the Court's determination (section 32 R(2)(b)).

(3) Although in *Harris Simon & Co. Ltd v. Manchester City Council* [1975] 1 All ER 412, Lord Widgery CJ in construing the appeal by case-stated procedure provided by section 10 of the *Courts Act 1971* stated that 'it is a form of consultation with the Court of Appeal to obtain an answer on law', it does not mean in the context of this case that the consultation must be done in the course of an appeal before the Appeal Board.

(4) Even where a point of law has been identified in the course of appeal, there may well be situations where the Appeal Board may choose to proceed with the appeal instead of interrupting the appeal and referring the point of law to the Court of Appeal first. For example, it may be of the view the point of law is not of such a significance that the proceeding should be suspended pending determination by the Court of Appeal or that the interest of the parties may require a decision to be given first. The Appeal Board is of course entitled, as it did in Appeal No. 24, to give a provisional decision, subject to the parties applying for it to state a case within a specific period, before the decision becomes final. But ultimately it is a matter of statutory

interpretation as to whether the case-stated procedure is available after the final decision.

(5) The provision of section 32R(3) that the Appeal Board shall not determine an appeal before the Court of Appeal determines the point of law is relevant only where the reference is made in the course of an appeal. This does not preclude a referral to be made after a decision has been given.

(6) The absence of a time limit for referral should not be used against a referral after a decision. Section 32U provides for the Secretary for Commerce and Economic Development ('the Secretary') to make rules to provide for the lodging of appeals and relating to the practice and procedure of the Appeal Board. The relevant time limit to state a case is clearly a matter relating to the practice and procedure of the Appeal Board. The omission is in the making of the rules only. The Authority is urged to ensure that subsidiary legislation should be promulgated by the Secretary as soon as possible.

Jurisdiction of the Appeal Board

23. I turn now to the issue of jurisdiction. The jurisdiction of the Appeal Board will only be invoked if the appeal falls within the ambit of section 32N of the *Ordinance* which provides that

> ' (1) Any person aggrieved by —
>
> (a) an opinion, determination, direction or decision of the authority relating to —

(i) Section 7K, 7L, 7M or 7N; or

(ii) Any licence condition relating to any sub-section; or

(b) Any sanction or remedy imposed or to be imposed under this Ordinance by the Authority in consequence of a breach of any such section or any such licence condition,

may appeal to the Appeal Board against the opinion, determination, direction, decision, sanction or remedy, as the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be.' (emphases added)

Sections 7K and 7L

24. The issue before the Appeal Board was whether sections 7K and 7L were engaged.

25. Section 7K as its heading shows is concerned with anti-competitive practice. It provides that a licensee shall not engage in conduct which has the effect of preventing or substantially restricting competition in a telecommunications markets.

26. Section 7L deals with abuse of dominant position. It states that a licensee in a dominant position in a telecommunications market shall not abuse its position.

27. In this Court, Mr. Farmer QC who appeared with Mr. Beresford as counsel for PCCW, further limited the issue of the appeal to those relating to section 7K only.

CACV 274/2003

28. This Court (Ma CJHC, Rogers VP and Le Pichon JA) had considered the effect of section 32N(1)(a)(i) in *PCCW-HKT Ltd-Telecommunications Authority* (CACV 274/2003). Ma CJHC stated that:

> ' In my view, the effect of section 32N(1)(a)(i) of the TO is as follows:-
>
> (1) It is not enough simply for the relevant opinion, determination, direction or decision of the TA [i.e. the Authority] to have some connection (however strong) to competition (or anti-competition), abuse of dominant position, misleading or deceptive conduct or non-discrimination. If this were the only criterion needed, the phrase "relating to" would refer to exactly such terms rather than specifically to sections 7K, 7L, 7M and 7N. Something else must therefore be required.
>
> (2) What is required is that the person who is aggrieved by the relevant opinion, determination, direction or decision of the TA must also establish that one or more of sections 7K to 7N have been truly engaged. This means that the TA (in issuing or making the relevant opinion, determination, direction or decision) must, expressly or by implication, have arrived at an opinion that the licensee concerned has engaged, or will (if the relevant opinion, determination, direction or decision is not complied with) engage or continue to engage in conduct that contravenes one or more of sections 7K to 7N. I put it in these terms to emphasize that not only is past or present conduct covered but also future conduct. The language of sections 7K to 7N is sufficiently wide (and for good reason) to cover such situations. A good measure of flexibility is therefore given to the TA.
>
> (3) Whether or not in issuing or making an opinion, determination, direction or decision, the TA has arrived at such opinion, is in any given case a question of fact. In his submissions,

Mr Roth raised the spectre of the possibility of there being cross-examination to establish whether or not the TA has indeed reached such an opinion. In my view, it will in most (if not all) cases be fully evident whether or not the TA has arrived at such an opinion. I note here the duty on the part of the TA to provide reasons for any opinion, determination, direction or decision:- see section 6A(3)(b) of the TO. This will no doubt facilitate the exercise.

(4) As to Mr Gordon's point that breaches of sections 7K, 7L, 7M or 7N are required to be shown before an appeal under section 32N(1)(a) can be triggered, this is really a matter of semantics. Section 32N(1)(a)(i) does not use the word 'breach' (although section 32N(1)(b) does). This matters not. The important point to remember is that an appeal to the Appeal Board under section 32N(1)(a)(i) is possible only where the relevant opinion, determination, direction or decision involves an opinion on the part of the TA along the lines mentioned in sub-paragraph (2) above. Whether or not one chooses to refer to this as a past, present or future breach is immaterial. The important requirement is the TA's opinion under sections 7K, 7L, 7M or 7N.

(5) I am prepared to accept that opinions, determinations, directions or decisions made or issued by the TA may not necessarily engage sections 7K to 7N but the important point for present purposes is that they may, depending on the facts.

(6) I have found the legislative history to be of limited assistance. The legislative background referred to in the materials shown to us is already evident from the terms of the Ordinance itself.'

29. Mr. Farmer did not challenge the correctness of the judgment.

Reason for declining jurisdiction

30. Although at the hearing below the Authority had raised the jurisdictional challenge, the Appeal Board nonetheless heard evidence from the parties before it decided that its jurisdiction was not engaged and did not address the merits of the appeal. The reason it gave for declining jurisdiction is that:

> 'The decision to keep the guidance in favour of A2A is more consistent with the TA's aim to minimize disruption and avoid uncertainty than it is with a fear of market failure. Even if, which we do not find, the TA had at the back of its mind an unexpressed assumption that an absence of A2A might conceivably lead to market failure, we think that it is far too remote a factor. The Board takes the view that to engage section 32N the TA has to have in mind the conduct of a particular entity. Applying the guidelines given by Ma CJHC the Board find it impossible to hold that section 32N has been engaged for the reasons advanced by the TA.'

The reason to retain Any to Any

31. As the Any to Any regime is featured so prominently in this case, I will set out in full the relevant part of the Statement which deals with this issue:

> 97. The policy objective of A2A is founded upon the long-standing expectation of the public that any telecommunications user can communicate with any other user. A2A is, in any event, an internationally recognised principle (it is supported by the latest moves of the UK and Australian regulators to introduce mandatory "any-to-any connectivity" regulation) and all interested parties acknowledged in their submissions that the public has this legitimate expectation.

> 98. A2A connectivity is an important public-interest objective. It would be confusing and frustrating to the public if a user connected to one public switched telephone network (PSTN) could not call, or be called by, any other user connected to any other PSTN in the market. The absence of a universal ability to call any other person would severely undermine Hong Kong's position as a regional telecommunications hub and more broadly, Hong Kong's position as an international finance and commerce centre. It would also effectively prevent any new market entrant from offering a service which any customer would wish to use. Interconnection among the networks and services so as to achieve A2A is therefore clearly in the interest of the public. As a matter of policy, it would have been a retrograde step if the liberalisation of the market in 1995 had led to a fragmentation and deterioration of service through loss or weakening of the A2A features of the pre-liberalisation system. Accordingly, the Government took steps to implement this objective by enacting the necessary provisions in the Ordinance and incorporating the necessary conditions in the licences.
>
> 99. A2A connectivity can also promote and maintain a competitive telecommunications industry. Operators have a common commercial interest to connect as many users as possible between their networks. The greater the number of users to which telecommunications services can connect, the greater the benefit he enjoys from the service he has purchased.
>
> ……'

Overview of the dispute

32. In my view it is important to have an overview on the core dispute between the parties. This is whether the decision by the Authority to retain the Any to Any regime is related to anti-competition conduct of PCCW. If it is then the matter is within the ambit of section 7K and will engage the jurisdiction of the Appeal Board under section 32N.

33. One of the topics focused in this case is on the term 'market failure' used in the Statement. This term embraces many things. It includes defective competition caused by reason of, for example, anti-competition conduct of an entity with significant market power. In the context of this case, the issue is the refusal by such a dominant entity or one with market power to allow new entrants to the market to connect it to the existing network.

34. Leading counsel for the parties who are specialists in competition law have expertly submitted their respective position. Without intending any disrespect to them, I will concentrate on the core issue.

PCCW's case

35. PCCW's case is that it has some 70% share of the fixed line market. As the current total payment by MNO's to FNO's under the MPNP regime amounted to some HK$600 million per year, PCCW has a high stake in the interconnecting charge. Irrespective of whether PCCW is a dominant player, the Authority perceived PCCW to have market power which could prevent new market entrant from offering a service as expressed in paragraph 98 of the Statement.

36. Mr. Farmer submitted that a broad approach should be taken in respect of the interpretation of section 32N(1). He submitted the retention of Any to Any is linked to anti-competition conduct notwithstanding PCCW has not engaged in any actual anti-competition conduct. Imposing Any to Any as a legal

obligation has been limited to and driven by situations where there are firms with market power who can be foreseen likely to use that market power as a means of preventing competition, in particular, new entry. He submitted that this is enough to engage section 7K which triggers the jurisdictional requirement of section 32(N)(1). He contrasted the situation with the more specific provision of section 32(N)(1A) which provides that:

> ‘Any carrier licensee aggrieved by an opinion, direction or decision of the Authority published under section 7P(14) may appeal to the Appeal Board against the opinion, direction or decision (but the licensee may so appeal only if the opinion, direction or decision was formed, issued or made in respect of the licensee).’

37. Under this section an appeal can only be lodged in respect of a decision published under a specific section and which is made in respect of a specific licensee.

38. He further contrasted the wording between section 32N(1)(a) and section 32N(1)(b) : the latter is concerned with breach while the former is couched in general terms.

39. Reliance was further made of the decision dated 27 March 2008 of the Appeal Board (Griffiths SC, Mr. Kwong Kai Sun, Sunny, Professor Malanczuk) in Appeal No. 24 where the Chairman stated that ‘an enforcement of the Any to Any policy against a licensee not wishing to adopt it for any reason, usually will constitute an enforcement designed to prevent anti-competition conduct’.

The Authority's case

40. Mr. Green, on the other hand, submitted that the retention of the Any to Any regime is not concerned with anti-competition conduct but with the wider public interest consideration which is shown in the Statement. This includes the provision of a high level of certainty for operators and users (para 96); it is an internationally recognised principle and is followed, for example, in the United Kingdom and Australia (para 97); the public has a 'legitimate expectation' to connection (para 97); it would be confusing and frustrating to the public if connection is not available (para 98); the lack of a universal interconnection would severely undermine Hong Kong's position as a regional finance and commerce centre (para 98) and it would have been a retrograde step if the liberalisation of the market in 1995 had led to a fragmentation and deterioration of service through a weakening of the Any to Any feature of the pre-liberalisation system (para 98).

41. As to the reference in the Statement to the prevention of new entrant to the market, Mr. Green submitted that the Authority did not view a failure of bilateral network access negotiation to be an indicator of market failure. What the Authority said in its second consultation paper on 'Deregulation for Fixed-Mobile Convergence Replies to Enquiries from Interested Parties Issue No. 1' is this:

> ' In the context of the telecommunications industry, a failure of a bilateral network access negotiation can be an indicator of market failure, but specific analysis is

> always required. As a rule of thumb, the OFTA would expect that in the situation where the particular market structure is supporting strong competitive activity, the failure of a single bilateral negotiation would require strong evidence in terms of detriments to community welfare over time, to establish it as a market failure.'

42. Mr. Green further relied on the evidence of Professor Ordover, the expert of PCCW, who gave evidence before the Appeal Board that a refusal to connect is not 'a per se violation of competition law' and that other factors have to be considered as well.

My view

43. In my view section 32 is not engaged for the following reasons:

(1) Whether jurisdiction is engaged is a question of fact. This is a case where the Appeal Board had heard evidence. Hence its view that the retention of Any to Any is more consistent with the Authority's aim to minimize disruption and avoid uncertainty than it is with a fear of market failure is a matter that it was entitled to make.

(2) In a general way, the deregulation of the MPNP regime which has a built-in fixed charge element means that the competitors may negotiate freely in a free market and the retention of the Any to Any regime which enables the Authority to intervene in appropriate cases may well have a substantial economic impact on PCCW which has a substantial share in the existing market.

This, however, will not make it an aggrieved person for the purpose of invoking an appeal. The ultimate question is still whether a section 7K situation has arisen. What the Appeal Board said in Appeal No. 24 that an enforcement of Any to Any is designed to prevent anti-competition conduct begs the question whether such a conduct under section 7K has been engaged in the first place. When the Authority actually invokes Any to Any it may be said that anti-competition conduct has taken place which requires the intervention of the Authority. But this stage has not been reached in the present case. The retention of Any to Any merely enables the Authority to invoke it as a last resort.

(3) Even if, for the purpose of argument, the retention of Any to Any is to do with anti-competition conduct in the broader sense, it still will not assist PCCW. This is because the previous decision of this Court which is binding on us and of which I respectfully agree clearly requires a specific anti-competition conduct rather than a general anti-competition consideration canvassed in a policy formulation. The wording of section 7K excludes the adoption of a general approach : a licensee shall not engage in (anti-competition) conduct. The previous judgment is in line with the wording of the section. Its tenor is not to allow general issues which may arise in policy consideration, as illustrated in the present case by the Statement, to be the subject matter of an appeal by the Appeal Board. Hence a specific anti-competition conduct based on, for example, refusal to interconnect or interconnection at an exorbitant charge is required. There is no indication and it has not been suggested that PCCW

will engage in any such specific anti-competition conduct or that the Authority is of the view that PCCW will engage in such specific conduct when the new proposals are implemented.

(4) It is not necessary for me to refer to previous decisions to see whether the view of the Authority on the rationale of retaining Any to Any has been affirmed by the Court. Even if the rationale for retaining Any to Any is based with the concern of possible anti-competition conduct in a deregulated market, there should not be a quantum leap from that concern to the presence of likely actual anti-competition conduct which engages section 7K. The current situation is too remote for it to be engaged.

44. This is a short point and I do not think further elaboration will advance the matter further.

Question 2

45. Question 2 is:

Whether section 7K and/or 7L can only be engaged if the Respondent can be proved to have had in mind the conduct of a particular identified entity which would be in breach of these sections and to have exercised power "under" those sections?

46. What I have said above covers the issue raised in Question 2. The answer to that question is 'Yes'.

Question 3

47. Question 3 is:

Whether a finding that a decision of the Respondent was more consistent with an aim by the Respondent to minimize disruption and avoid uncertainty is a sufficient basis for concluding that the Respondent had no relevant concern about market failure or that any such concern was too remote a factor section 7K and/or 7L to be engaged?

48. If market failure is understood in the context of anti-competition conduct, then based on the Appeal Board's reason, the answer to the first part of Question 3 is 'Yes'. My understanding is that the Appeal Board used market failure in that context.

49. In any event irrespective of the concern of the Authority, PCCW has failed to show the presence of specific anti-competition conduct under the ambit of section 7K or 7L. The answer to the second part of Question 3 is 'Yes'.

Question 4

50. Question 4 is:

Whether Special Condition 3 in the licence granted to fixed line operators such as the Appellant constitutes a form of regulatory control imposed by the Authority against potential breaches of the competition law provisions of the Ordinance such that the decision not to withdraw Any to Any as a regulatory

requirement must necessarily be regarded as indicating a continued concern that without that requirement breaches of the Competition Provisions would occur?

51. This is a complex question. It attempts to draw an analogy on the rationale behind Special Condition 3 on the one hand and that of the retention of Any to Any on the other hand. In my view this attempt begs the question whether section 7K or 7L has been engaged in the present case. This question assumes that both of these matters are concerned with anti-competition conduct.

52. Again, even if, for the purpose of argument, one proceeds on such an assumption, for the reasons I have given, the situation is still too remote for the jurisdiction to be engaged.

53. The answer to Question 4 is also 'No'.

Conclusion

54. The answer to Question 1 is that the Appeal Board can state the case both during and after the appeal. It was competent for it to state the case in this appeal.

55. The answer to Question 2 is 'Yes'.

56. The answer to Question 3 is 'Yes' and 'Yes'.

57. The answer to Question 4 is 'No'.

Costs

58. There will be a provisional order that PCCW is to pay the Authority the costs of this appeal.

Hon Suffiad J :

59. I agree.

Hon A Cheung J :

60. I agree.

(Peter Cheung)	(A. R. Suffiad)	(Andrew Cheung)
Justice of Appeal	Judge of the Court of First Instance	Judge of the Court of First Instance

Mr. James Farmer, QC and Mr. Roger Beresford, instructed by Messrs Herbert Smith, for the Appellant

Mr. Nicholas Green, QC and Mr. Edward Alder, instructed by Messrs Slaughter & May, for the Respondent