Telecommunications (Competition Provisions) Appeal Board

Appeal No. 26

i-Cable WebServe Limited v The Telecommunications Authority

Date of appeal	:	20 November 2007
Appellant	:	i-Cable WebServe Limited
Nature of appeal	:	Against the decision of the Telecommunications Authority dated 6 November 2007 that there was a breach of section 7M of the Telecommunications Ordinance ("TO") in relation to i-Cable's promotional sales on a bundled Internet broadband and pay television services.
Hearings	:	• The Appeal Board conducted hearings from 22 to 24 April 2008. Prior to giving decision, at the request of the parties the Appeal Board stated a case to the Court of Appeal on questions of law concerning the standard of proof (criminal or civil one) in determining whether section 7M of TO has been contravened and the scope of the licensee-employer's liability on the true construction of section 7M. • The Court of Appeal heard the case (no. CACV 329/2008) on 7 April 2009 and handed down judgement on 11 June 2009 (copy attached). In brief, the standard of proof is the civil one, and the licensee-employer is not exempt from the liability if the conduct giving rise to a contravention of section 7M was committed by an employee in the course of his employment but contrary to a prohibition by the licensee-employer.
Outcome of Appeal	:	The Decision of the Appeal Board dated 30 June 2009 was attached. The appeal was dismissed and the TA's decision upheld.

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CACV 329/2008

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 329 OF 2008

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 (Cap. 106)

BETWEEN

I-CABLE WEBSERVE LIMITED Appellant

and

THE TELECOMMUNICATIONS AUTHORITY Respondent

Before: Hon Rogers VP, Le Pichon and Yuen JJA in Court

Date of Hearing: 7 April 2009

Date of Handing Down Judgment: 11 June 2009

J U D G M E N T

Hon Rogers VP:

1. This was an appeal by way of case stated by the Telecommunications (Competition Provisions) Appeal Board ("the Appeal

Board") pursuant to section 32R of the Telecommunications Ordinance, Cap. 106 ("the Ordinance"). The facts of the case are set out in the case stated. For present purposes it is sufficient to say that by a notice pursuant to section 36C of the Ordinance, dated 6 November 2007, the Telecommunications Authority ("the TA") notified the appellant that he had been satisfied that the appellant had contravened section 7M of the Ordinance and the TA exercised the powers under section 36C to require the appellant to pay a financial penalty of HK$100,000.

2. In brief it can be said that the TA was satisfied beyond reasonable doubt that on two occasions salespersons acting on behalf of the appellant had assured members of the staff of the Office of the TA, who were acting as investigators, that they would be able to enjoy English football programmes for the full period of the service contract if they signed for the appellant's service for a set period. At the time the appellant did not have the rights to the English football programmes for the whole period and as matters transpired, it was ultimately unable to secure them. In the case summary the TA said at paragraph 40:

> "The Authority would also comment that the appropriate standard of proof to be applied in this case is the civil standard of "on the balance of probabilities". That said, given that a finding of breach results in sanctions in the form of financial penalty, the Authority has taken great care in the assessment of the case to ensure that there is solid and reliable evidence before finding that the breach has occurred. Indeed, with the overwhelming strength of the evidence as detailed above, the Authority would find (the appellant) in breach of section 7M even if the standard of proof to be applied were the criminal standard of "beyond reasonable doubt." "

3. The matter was taken to the Appeal Board and, prior to giving its decision, at the request of the parties it stated the following questions of law for this court:

> "(1) for the purpose of forming an opinion as to whether there has been a contravention of section 7M, whether the applicable standard of

proof is the criminal one (beyond reasonable doubt) or the civil one (on the balance of probabilities);

(2) if (a) the legislature in enacting section 7M, together with section 36B and section 36C, intended to create a disciplinary or regulatory scheme with financial penalties having the character of civil sanctions, but (b) the answer to question (1) is the criminal standard of proof by virtue of the financial penalty provisions in section 36C and the consequences thereof under Articles 10 and 11(1) of the BOR, what is the appropriate relief or remedy, if any, to be granted or ordered under section 6(1) of the BORO; and

(3) on the true construction of section 7M, whether:

(i) the licensee-employer shall be held not liable if the conduct giving rise to a contravention of section 7M was committed by an employee in the course of employment but contrary to a prohibition issued by the licensee-employer, or

(ii) liability on the licensee-employer's part for conduct on the part of employees can only be excluded by completely effective preventative measures and any ineffective steps taken by the licensee to prevent such conduct may rank only in mitigation of penalty."

4. In my view, the answers to the questions are straightforward. The Ordinance lays down a means of licensing the providers of telecommunications services. Sections 7K, 7L, 7M and 7N seek to control the actions of licensees in various ways. Section 7K requires that the licensee shall not engage in conduct which has the purpose or effect of restricting competition in the telecommunications market. Section 7L seeks to prevent the licensee from abusing a dominant position in the market in a way which also has the purpose or effect of preventing competition. Likewise section 7N seeks to prevent a licensee who is in a dominant position in the telecommunications market from discriminating in a way which would have the purpose or effect of preventing or substantially restricting competition. In slight contrast, section 7M reads as follows

"7M. Misleading or deceptive conduct

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."

5. Thus section 7M, unlike the other three sections referred to above, is not limited to cases where the purpose or effect of preventing the conduct complained of would be to prevent or restrict substantially competition in the telecommunications market. It extends to any misleading or deceptive conduct with regard to the services provided. It thus extends to conduct which might affect the customer but does not necessarily (or directly) affect any competitor. Ms Carss-Frisk QC, who appeared for the respondent on this appeal, argued that the purpose of the section was to ensure competition. Whereas it can be said to have that effect, it seems to me that the purpose and effect of the section goes beyond ensuring fair competition and is directed to consumer protection in a wider sense.

6. Under section 36B of the Ordinance the TA may issue directions to a licensee requiring it to take action in respect of, amongst other things, compliance with the provisions of the Ordinance. It is with section 36C that this case is concerned. For convenience it is set out here:

> "**Authority or court may impose financial penalties**
>
> (1) The Authority may, by notice in writing addressed to a licensee, require the licensee to pay to the Government the financial penalty specified in such notice in any case where the licensee fails to comply with-
>
> (a) any licence condition;
>
> (b) any provision of this Ordinance or any regulation made thereunder; or
>
> (c) any direction issued in respect of the licensee by the Authority under section 36AA(1) or 36B(1)(a).
>
> (2) The Authority may, by notice in writing to any person of the description mentioned in section 36B(1)(b), require that person to pay to the Government the financial penalty specified in such notice in any case where that person fails to comply with the requirement of any

direction issued in respect of that person by the Authority under that section.

(3) A financial penalty imposed under subsection (1) or (2) shall not exceed-

(a) $200000 for the first occasion on which a penalty is so imposed;

(b) $500000 for the second occasion on which a penalty is so imposed; and

(c) $1000000 for any subsequent occasion on which a penalty is so imposed. (Amended 36 of 2000 s. 23)

(3A) Without prejudice to subsections (3) and (3B), the Authority may, by notice to a licensee who has committed a breach of a licence condition or provision in this Ordinance or regulation made thereunder, or a breach of a direction, require the licensee-

(a) to disclose to the public, to a particular person or to a class of persons, in such manner as is specified in the notice, such information, or information of such a kind, as is so specified, being information that relates to the breach and is in the possession of the licensee or to which the licensee has access;

(b) to publish, at its own expense, in newspapers corrective advertisements in such manner, at such times and on such terms as are specified in the notice and for this purpose, the Authority may specify among other things the newspapers in which the advertisements shall be published, the languages that shall be used, the days on which the advertisements shall be published, the content of the advertisements and the size and prominence of the advertisements in the newspapers.

(3B) Where the Authority considers that if he were to impose a financial penalty under subsection (3) it would not be adequate for a breach referred to in subsection (1)-

(a) the Authority may-

(i) within 3 years of the commission of the breach; or

(ii) if the breach comes to the notice of the Authority within 3 years of its commission, within 3 years of it so coming to the notice of the Authority,

whichever is the later, make an application to the Court of First Instance; and

(b) upon such application, the Court of First Instance may, without prejudice to any powers conferred on the Authority by any provision of this Ordinance or any regulation made thereunder or any licence condition, impose upon the licensee

who has committed the breach a financial penalty of a sum not exceeding 10% of the turnover of the licensee in the relevant telecommunications market in the period of the breach, or $10000000, whichever is the higher.

(4) The Authority shall not impose a financial penalty under this section unless, in all the circumstances of the case, the financial penalty is proportionate and reasonable in relation to the failure or series of failures concerned giving rise to that penalty.

(5) Subsection (1), (2) or (3A) shall not apply in the case of the licensee or person concerned unless the Authority is satisfied that the licensee or person, as the case may be, has been afforded a reasonable opportunity of complying with the requirement of any licence condition, provision of this Ordinance or regulation made thereunder, or direction, in respect of which that subsection is sought to be applied.

(5A) A financial penalty imposed under this section shall be recoverable as a civil debt due and payable to the Government.

(6) The imposition of a financial penalty under this section, in relation to a licence, shall not be construed as affecting the application of section 34(4).

(7) The Authority shall, before imposing a sanction under this section on a licensee or person concerned, afford the licensee or person concerned, as the case may be, a reasonable opportunity to make representations and shall consider all representations made before the Authority decides whether or not to impose such sanction."

7. Looking at the Ordinance as a whole and, in particular, the provisions of sections 36B and 36C, I consider that there is no doubt that the effect of those provisions is what can be described as regulatory or disciplinary. As far as this case is concerned I do not consider that there is any relevant distinction to be drawn between the two. Whatever might be said, those sections do not make a contravention of section 7M a criminal offence.

8. In contrast, it can also be observed that there are specific sections in the Ordinance which clearly do provide for criminal offences. In this regard, Part V contains a number of sections which make that clear. Furthermore, as was pointed out in the course of argument, section 7M is directed only to licensees under the Ordinance who operate in the telecommunications sphere.

9. The fact that the penalties which can be imposed under section 36C cannot be described as *de minimis* does not of itself make the matters under section 7M criminal in nature.

10. Reference can also be made to section 6A(3) which provides that the TA shall only form an opinion or make a determination, direction or decision on reasonable grounds, having regard to relevant considerations, but it is also required to provide reasons in writing. Section 6C gives the power to the TA to consult (a) the persons who may be directly affected by the performance of that function or the exercise of that power, as the case may be; or even (b) members of the public. Again, it has to be emphasised that all these provisions have to read together. Nevertheless, these are scarcely provisions which could be expected to be found in respect of prosecution of a criminal offence. They would, in some respects, be otiose and, in other respects, be entirely inappropriate.

11. In my view the answer to question 1 is clearly that the standard of proof is a civil one, but the TA was entirely correct in its approach in paragraph 40 quoted above.

12. In those circumstances the second question does not arise.

13. Turning to the question of whether the licensee-employer should not be liable if the act was committed by an employee in the course of his employment but contrary to a prohibition issued by the licensee-employer, in my view the question must be answered in the negative. On the basis that section 7M does not create a criminal offence but is part of the regulatory regime, what it is there to do is to regulate how the licensees should go about their business and, in particular respects, what they should not do. Since the licensee can only act through its employees, if an employee is employed to do a particular act, in this case to negotiate with potential customers, the licensee

must be responsible for what that employee does in the course of his employment and in carrying out the duties which the employee does as part of his employment.

14. It would appear that on a simple contractual basis the employer must be responsible for any representation made by an employee who is employed to negotiate and sell products or services to a potential customer and makes the representation in the course of doing that. In those circumstances, if an employee, when carrying out his duties, so to speak, oversteps the mark in relation to representations or promises which he makes to potential customers, the employer must be responsible unless it can be demonstrated that the employee was on a frolic of his own. That simply could not be the case where the employee was doing precisely what he was employed to do, namely, entice customers to enter contractual relations with his employer.

15. Whilst there is nothing in the Ordinance which specifically provides that the employer's responsibility and liability can only be excluded by "completely effective preventative measures", that is, in effect, the result which is achieved. Doubtless, the Authority will take into account what steps were taken and the extent to which the employer tried to prevent its employees from putting it in breach of the Ordinance.

16. I would therefore answer the questions posed in the case stated as set out above, namely:

Question (1): the standard of proof is the civil one

Question (2): inapplicable

Question (3):

(i) the licensee-employer is not exempt from liability if the conduct giving rise to a contravention of section

7M was committed by an employee in the course of his employment but contrary to a prohibition issued by the licensee-employer;

(ii) liability on the licensee-employer's part for conduct on the part of employees acting in the course of their employment can only be excluded by completely effective preventative measures and any ineffective steps taken by the licensee to prevent such conduct may rank only in mitigation of penalty.

17. I would therefore order accordingly and make an order *nisi* of costs in favour of the respondent.

Hon Le Pichon JA:

18. I agree.

Hon Yuen JA:

19. I agree.

Hon Rogers VP:

20. There will accordingly be an order in terms of paragraphs 16 and 17.

(Anthony Rogers)	(Doreen Le Pichon)	(Maria Yuen)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Rimsky Yuen SC, instructed by Messrs Jones Day, for the Appellant

Ms Monica Carss-Frisk QC & Mr Edward Alder, instructed by Department of Justice, for the Respondent

Appeal No. 26

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 (CAP 106)

BETWEEN

I-CABLE WEBSERVE LTD

—Appellant—

AND

THE TELECOMMUNICATIONS AUTHROITY

—Respondent—

DECISION

Larry Kwok BBS JP
Professor Lin Ping
Neil Kaplan CBE QC SBS
(Chairman)

30th June 2009

A. INTRODUCTION

1 The Appeal Board (**"the Board"**) has before it an appeal by I-Cable Webserve Ltd. (**"I-Cable"**) against a decision of the Telecommunications Authority (**"TA"**) dated 6 November 2007 by which the TA found I-Cable guilty of a contravention of section 7M of the Telecommunications Ordinance (**"TO"**). Exercising its powers under section 36C, of the TO the TA imposed a penalty of HK$100,000.

2 At the hearing of this appeal between 22 and 24 April 2008, I-Cable was represented by Rimsky Yuen SC instructed by Jones Day. The TA was represented by Edward Alder of counsel and Ms Cecilia Siu of the Department of Justice, both instructed by the TA.

3 This appeal has been excellently and thoroughly argued on both sides. I-Cable has raised a number of grounds of appeal each of which will be considered separately. The parties have served copious rounds of written submissions. The citation of legal authorities has been extensive—running to no less than 74 separate items.

4 The reason why this Decision is delivered so long after the hearing of this appeal is because at the end of the oral hearing both sides invited the Board to State a Case for the opinion of the Court of Appeal pursuant to section 32R of the TO. Having heard submissions on the issue, the Board Stated a Case. The questions submitted to the Court of Appeal were: (1) whether the criminal or civil standard of proof applied to considerations of offences under section 36C, (2) *[…]* and (3) whether an employer can be held liable for contravention of section 7M of the TO committed by an employee in the course of employment but contrary to a prohibition issued by the employer.

5 In a judgement handed down on 11 June 2009 the Court of Appeal under CACV 329/2008 answered to questions posed by holding:

(1) *"The standard of proof is the civil one."*;

(3)(1) *"The licensee-employer is not exempt from liability if the conduct giving rise to a contravention of section 7M was committed by an employee in the course of his employment but contrary to a prohibition by the licensee-employer."*; and

(3)(2) *"Liability on the licensee-employer's part for conduct on the part of employees acting in the course of their employment can only be excluded by completely effective preventative measures and any ineffective steps by the licensee to prevent such conduct may rank only in mitigation of penalty."*

B. THE FACTS

6 The facts fall within a small compass. I-Cable is a subsidiary of the Wharf Company and it carries on a telecommunications business which is covered by the TO. HK Cable TV is another Wharf subsidiary which, as its name suggests, is involved in broadcasting activities governed by the Broadcasting Ordinance (**"BO"**).

7 The telecommunications market in Hong Kong is highly efficient, sophisticated and fiercely competitive. For more details on these issues the Board refers to its Decision in Case 25 delivered on 2 April 2008.

8 By letter dated 27 September 2006 sent to the TA from PCCW (the former monopolist and still a major market player), PCCW made a complaint against I-Cable. The letter stated, inter alia:

> *"PCCW has this week made its own investigations and has oral and physical evidence that Cable Television is bundling Broadband and Cable Television on the promise that customers will be able to enjoy English Premiership League ("EPL") for the duration of their contract including contracts of 18 or 24 months duration that extend past the May 2007 cut-off period (for which Cable Television own the EPL rights). Obviously the auction of EPL rights in coming months is critical to competition in Hong Kong and it is grossly unfair for Cable Television to unlawfully tie customers to a period beyond which they hold EPL rights."*

9 This letter then referred to a PCCW employee whom it was alleged had signed a broadband contract offered to him on the basis that he would enjoy cable TV coverage for EPL for 24 months. PCCW complained that in so doing I-Cable was offering EPL beyond the date of its rights. Affidavits and statements were offered and the TA was urged to makes its own investigations.

10 Mr Bernard Hill, Head of the Competition Affairs Branch (**"CAB"**) of OFTA provided a statement in which he told the Board that because of the competition between the various parties he thought it prudent that the TA makes its own independent enquiries to ascertain whether there was any substance in the allegations made by PCCW. At the outset, the Board wishes to state that it considers that this was a prudent course of action. Had the complaint before the Board been based on PCCW's allegations alone, it is not difficult to imagine the suggestions which would inevitably have been made.

11 Mr Hill was responsible for all aspects of case management relating to this allegation concerning a possible breach of Section 7M of the TO and the subsequent enquiry. He had reporting to him Elaine Hui, Principal Regulatory Affairs Manager, as well as Ms Iris Fung, a Regulatory Affairs Manager. In his statement he helpfully outlined the CAB's role in these matters:

> *"3. The Competition Affairs Branch of OFTA ('CAB') has responsibility for the administration and enforcement of those provisions of the TO which deal with anti-competitive practices (sections 7K, 7L and 7N); control of mergers and acquisitions which might substantially lessen competition (section 7P); and unfair competition in the form of misleading or deceptive conduct (section 7M). In addition, the CAB is responsible for advising the TA on the impact on competition and consumer welfare of existing and proposed interventions pursuant to the TA's regulatory powers in the TO.*
>
> *4. The prohibition in section 7M of the TO against misleading and deceptive conduct is unique in Hong Kong in that it only applies to the provision of telecommunications services (including promotions, marketing and advertising) by telecommunication licensees. This prohibition (alongside those in respect of anti-competitive practices and control of mergers) are applied by the TA to protect the strong state of competition in the provision of telecommunications services which has emerged as the result of the programme for deregulation of the sector which has been ongoing since the mid-1990s.*
>
> *5. In particular, Section 7M is applied by the TA to ensure that telecommunication services are traded on their true merits, so that the impact of consumer choice on productive efficiency is optimised. Because rivalry for customers can distort the competitive process if misrepresentations are involved, OFTA maintains its own direct surveillance of market place advertising and sales conduct and accepts information and complaints from competitors and the public.*

6. Historically, close to half of all the section 7M cases handled by the CAB have arisen either from information provided by competitors or OFTA's own surveillance. More recently, since 2004, consumer complainants have considerably outnumbered industry informants. Most consumer complaints handled by OFTA concern 'mis-selling', that is incidents of misrepresentation by individual salespersons, rather than misrepresentations contained in the content of advertisements or marketing materials. A marked feature of the telecommunications market in Hong Kong following deregulation is that substantial use has been made of 'direct selling' product distribution channels, that is sales made by door to door canvassing in residential estates and sales made from temporary sales booths at strategic street level locations.

7. Since January 2005, OFTA has handled some 181 incidents involving alleged misrepresentations by telecommunications salespersons. Of these, the great majority, including many involving the Appellant, were not pursued to a full investigation by OFTA due to insufficiency of evidence or their falling factually outside the scope of section 7M."

12 In paragraph 9 et seq. of his statement Mr Hill refers to the receipt of a letter of complaint from PCCW and sets out why he considered the matter raised a serious issue. He stated:

"*10. In the letter, PCCW alleged that the Appellant and/or its associated company HKCTV was illegally promoting a bundled broadband and pay TV service package by promising that new customers entering into a 18 or 24 month contract would be able to watch English Premier League ("EPL") football matches for the duration of their new contracts. PCCW offered to provide sworn evidence as to the alleged misrepresentations. At the time, HKCTV did own rights to broadcast EPL matches, but only up to the end of the 2006/7 football season ending in May 2007. The rights for seasons following were then actively in contention, and HKCTV and PCCW were being discussed in the media as rivals for the rights for the following three seasons.*

11. The information in the letter raised a serious issue in terms of the close competition between PCCW and the Wharf Group in relation to what are converging markets for communication services. As a standalone service, pay TV is not a telecommunications service and is therefore outside the jurisdiction of the TA, at least as far as section 7M of the TO is concerned. However, because of the Wharf Group, PCCW and others are now able to offer a range of communications services via their networks, it is common for these and other operators to offer a 'bundle' of services, such as internet access, fixed telephony and pay TV and to promote those bundles as a single product. These bundled services packages generally require the customer to enter into a term of contract varying between 12 to 24 months. Within the contract period, the customer is effectively 'locked in' for the duration, because penalty charges will apply if they switch to another operator before the expiration of the contract period.

12. From a competition law and policy point of view, in market segments where competition is effective, such as the internet access, fixed telephony and pay TV markets in Hong Kong, the offer of bundled services packages and term contracts of the kind in these proceedings may enhance consumer welfare and overall competition between rival companies. For instance, the Wharf Group has, by commercial cooperation among its member companies, been able to establish a market share in the internet access and fixed telephony markets, where it is a new entrant, by 'leveraging' the established market share of HKCTV's ubiquitous cable TV network. Conversely, PCCW has been able to establish a foothold in the pay TV market, where it is the new entrant, by leveraging the long established market share of its ubiquitous fixed telephony and internet access network.

13. For Hong Kong consumers this competition between service bundles of the kind offered by the Wharf Group and PCCW has resulted in multiple choice of service providers, innovative services and lower prices overall.

14. However, these benefits from competition and deregulation are put at risk if service bundles are allowed to be promoted by the use of misrepresentations. In the

context of the close competition between the Wharf Group and PCCW, and the uncertainty in September 2006 about which of them would have the rights for the following seasons, the possibility of the use of misrepresentations about the EPL rights was of particular concern to OFTA because it is widely believed that in Hong Kong the EPL rights are the key to contesting long held market shares."

13 On 29 September 2006, Ms Elaine Hui reported back to Mr Hill that Ms Gladys Kwong, an Assistant Inspector employed by TA, had made telephone enquiries of I-Cable's telephone hotline and that the staff operating the hotline had correctly informed her that HKCTV had not yet secured the rights to EPL matches after May 2007.

14 To ensure that this correct response by telephone was matched by I-Cable operators on the ground, Mr Hill directed officers Hoi and Sung to continue enquiries at relevant sales booths. This was achieved by OFTA inspectors making anonymous enquiries of I-Cable's sales persons at sales booths, one located near the Johnston Road exit of the Wan Chai MTR Station and the other at Sai Yeung Choi Street in Mong Kok. As will be apparent later, I-Cable contend that such anonymous approaches are not permitted by the TO.

15 The two officers chosen to conduct these enquiries were Ms Gladys Kwong and Mr Ku Man Leong. The results of their enquiries made at the two street sales booths were recorded in their respective signed statements dated 5 October 2006.

16 Ms Gladys Kwong provided a witness statement in this Appeal in which she explained that at about 4:30 pm on 29 September 2006 she went to the Wan Chai MTR Station and there met a salesman of I-Cable who was manning a sales booth located near the Johnston Road exit. She subsequently learned

that his name was a Mr Wong. She asked Mr Wong a number of questions about bundled broadband and pay TV services. After she had talked to Mr Wong for about 10 minutes, she left the booth and went down into the Wan Chai MTR Station and recalled the key words of her conversation and made some notes in her note book. She produced these notes. On 30 September 2006, Ms Gladys Kwong was off duty as well as on Sunday 1 October 2006, and 2 October 2006 which was a public holiday so she resumed her duties on 3 October 2006. When she returned to the office she reported the results of her enquiries to Ms Iris Sung and she was instructed to write down the main dialogue between herself and Mr Wong which she did, and which she exhibited to her witness statement.

17 In essence, what she was told by Mr Wong, the salesman of I-Cable, was that EPL could be watched during the contract period. Therefore if she signed for 2 years, she could watch for 2 years. When asked specifically whether if she signed today that meant she could watch EPL until September 2008 the response was, according to her: *"Yes. We have an EPL channel, therefore you can certainly watch"*. She then pointed out to Mr Wong that she had been told by her son that I-Cable's rights expired in May 2007. He denied that, and stated specifically: *"We have signed up for 2 years. You can watch for 2 years."* A little later she got this confirmed by asking: *"that means it is sure that EPL could be watched in both years '07 and '08"*, and the response was: *"yes"*.

18 Ms Kwong gave oral evidence and was cross-examined at the hearing of this Appeal and we will turn to consider that oral evidence at a later stage in this Decision.

19 Mr Ku also gave a witness statement. In this statement he outlined how on 29 September 2006 at about 6 pm he went to an I-Cable sales booth at Sai Yeung Choi Street in Mong Kok and there spoke to a salesman made known to him as Mr Ng. Shortly after this conversation, he walked away and made some notes of that conversation on a piece of A-4 paper. Later that evening, he made use of these notes and wrote out the conversation he had with Mr Ng in dialogue form. He too returned to the office on 3 October 2006 and he converted the dialogue into a Chinese document. Attached to that was a translation. In this dialogue Mr Ku records he asked some specific questions about whether the EPL channel will stop broadcasting during the contract period. The answer was: "*No. EPL channel will not stop broadcasting*". Mr Ku than asked this question: *"I know that the EPL broadcasting rights for the next season is still under negotiation. Is it possible that there will be no live broadcast to watch during the contract period?"* The answer to this was: "*No. Definitely can watch*". Mr Ku also gave oral evidence and was cross-examined and we will return to that in a late stage in this Decision.

20 By letter dated 9 October 2006, OFTA wrote to I-Cable setting out details of the allegation, and expressing the TA's concerns. By this letter, the TA requested certain information from I-Cable which they were requested to provide by 23 October 2006.

21 By letter dated 6 November 2006, I-Cable responded to the TA and identified the two salespersons, namely Mr Wong aged 21, and Mr Ng aged 16. They attached their sales records, a list of the bundled services available in the month of September 2006, the relevant sales forms and various promotional materials. At paragraph 8.3 of this letter, I-Cable made

the point that no service installation would have been arranged by Wong and Ng unless they have had successfully completed the Quality Control (**"QC"**) verification process.

22 By letter dated 19 December 2006, OFTA wrote to I-Cable, stating that it had studied the representation and the information and it enclosed its preliminary findings, and proposed action in an attached draft Case Summary. In this letter the TA also set out that it considered that a financial penalty of HK$100,000 was proportionate and reasonable, and they enclosed the draft Notice of Penalty. The letter then concluded by the TA inviting I-Cable to make any representations in respect of the factual findings made as well as whether I-Cable was in breach of section 7M of the TO, and to comment if necessary on the TA's proposed actions. This further information was requested by 8 January 2007.

23 By letter dated 19 January 2007, Jones Day, acting on behalf of I-Cable, responded to the TA and requested further and additional information in order for them to consider the matter fully and properly. They requested the following:

(1) A copy of any tape recording and/or notes made contemporaneously by the TA's staff of the relevant conversation between Ms Kwong and Mr Wong, and between Mr Ku and Mr Ng;

(2) The name of the complainant;

(3) A copy of the written complaint and/or notes made by the TA regarding the complaint if the TA discussed the complaint with the complainant; and

(4) The stage at which the TA determined that the complaint in this case merited full investigation.

24 This letter went on to request the opportunity of interviewing Ms Kwong and Mr Ku and the complainant in respect of this matter, once they had received and had an opportunity to consider the information.

25 On the 23 January 2007, after responding to Jones Day's letter by complaining of the delay in responding to their letter of 19 December 2006, and imposing an unreasonable time limit on the TA to reply, this letter went on to state that the TA acknowledged that the subject matter of the complaint should be given a fair and reasonable opportunity to make representations, and it set out in the rest of the letter that such fair and reasonable opportunity had been given. The TA referred to its first letter dated 9 October 2006 which enclosed signed witness statements of Ms Kwong and Mr Ku, together with a sample contract with written remarks made by the salesperson to Ms Kwong. The TA acknowledged receipt of submissions from I-Cable on 6 November 2006, after receipt of which the TA prepared a draft Case Summary. The TA then stated that I-Cable would be given a further month from 19 December 2006 to 22 January 2007 to comment on the draft Case Summary. However, without prejudice to what they have said, they enclosed the following:

(1) A copy of the hand-written notes made by Ms Kwong after she had spoken to Mr Wong. They also confirmed there were no tape recordings; and

(2) A copy of a letter from PCCW dated 27 September 2006 with enclosures of the names of the PCCW's employees was redacted.

26 This letter then went on to state that the TA did not consider that an interview of OFTA staff would be necessary for the fair and just disposal of this case, therefore the invitation to interview Ms Kwong and Mr Ku was declined. Accordingly, Jones Day was given until the 31 January 2007 to respond to the Case Summary.

27 Jones Day did respond by letter dated 31 January 2007 in which they set out a number of complaints which will feature later when we come to deal with the specific grounds of appeal. However, this letter concluded by submitting that it would not be proper for the TA to find that I-Cable had committed any breach of section 7M of the TO.

28 By letter dated 18 May 2007, OFTA responded to the point made by Jones Day in their letter dated 31 January 2007 and again, we will deal with these at later stage of this Decision. Because these will be dealt with when we go through the various submissions, it is not necessary to set them out at this stage. Suffice it to say that this correspondence continued through June and July 2007 and culminated with the TA's decision dated 6 November 2007 which is the subject matter of this Appeal.

C. PROCEDURE

29 As stated above, both sides delivered helpful and detailed written submissions, and referred to many authorities. I-Cable relied upon a witness statement of Mr Lam Luen Yeung Ocean dated 31 December 2007. The TA relied upon witness statements from Ms Gladys Kwong dated 30 January 2008, Mr Ku dated 29 January 2008, and a witness statement from Mr Bernard Matthew Hill dated 30 January 2008.

30 The hearing took place at the Hong Kong International Arbitration Centre, commencing on Tuesday 22 April 2008, and concluded on 24 April 2008.

31 The TA called Mr Ku who was briefly examined, then cross-examined by Mr Yuen QC, and then re-examined. The TA also called Ms Gladys Kwong who was examined, cross-examined by Mr Yuen, and re-examined.

32 The remainder of the time taken up at the hearing was devoted to the oral submissions of both parties.

D. CASE STATED

33 As will be seen later, one of the grounds of appeal is that the evidence of the two OFTA investigators was unreliable, and that the Board should place no or little weight upon them. In giving the decision, the TA had relied upon the evidence of the two investigators and had found their evidence compelling. Mr Yuen invited us to take a different view consequent upon his cross-examination of them. Mr Yuen's submission raised the issue as to whether the standard of proof in an investigation such as this was the civil or criminal standard. It had hitherto been assumed by this Board that the civil standard of proof would apply. However, this was called into question by two decisions of the Court of Final Appeal. The first of these was *Koon Wing Yee v. Insider Dealing Tribunal, FACV 19 of 2007, 18 March 2008*, and *A Solicitor v. The Law Society of Hong Kong, FACV 24 of 2007, 13 March 2008*. Mr Alder, Counsel for the TA, raised the issue whether this Board could State a Case for the Court of Appeal under section 32R of the TO after it had rendered its final decision on the merits of an appeal. This point having been raised, the Board thought it a prudent course to State a Case for the Court of Appeal to decide whether the civil or criminal

standard of proof applied to offences of this nature under the TO. The result of that decision has been stated above. The Board should also add that in Appeal 25 a case was stated to the Court of Appeal which raised, *inter alia*, the issue *"in what circumstances can the Appeal Board state a case for the Court of Appeal and was it competent to state a case in this appeal"*. In Civil Appeal 300/2008, the Court of Appeal handed down its decision on 2 April 2009 and held per Cheung JA: *"My view is that, as a matter of statutory interpretation [of s. 32R of the TO], 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 […]."*

34 As set out earlier, the time it has taken to agree and prepare the Case Stated and the time for that to be considered by the Court of Appeal explains the delay between the hearing of this Appeal and the date of this Decision.

E. The Grounds of Appeal

35 The Appellant relies upon the following grounds of appeal:

Ground 1: No jurisdiction;

Ground 2: No power or unnecessary to conduct covert investigation;

Grounds 3 and 4: Apparent bias and fairness;

Ground 5: Standard of proof and quality of evidence

Ground 6: Meaning of *"providing"* in section 7M;

Ground 7: Issue of agency in section 7M; and

Ground 8: Excessive penalty.

36 In his written submissions for the TA, Mr Alder helpfully identified that these eight grounds of appeal fall into three categories. Grounds 1, 6 and 7 concern the scope of section 7M. Grounds 2-5 concern the investigation and Ground 8 concerns penalty. The Board agrees that it would be most convenient to deal with the grounds of appeal in those groupings and in that order.

Ground 1—No Jurisdiction

37 Section 7M of the TO provides:

> *"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."*

38 It is common ground that the TA only has jurisdiction over matters falling within the ambit of the TO. Mr Yuen invited the Board to bear in mind the distinction between *"telecommunication services"* on the one hand and *"broadcasting services"* on the other. Matters relating to broadcasting, he reminds us, are covered by the Broadcasting Ordinance (Cap 562) (**"BO"**).

39 Having drawn this distinction, Mr Yuen submits that the misleading conduct alleged here was concerned solely with whether a customer of the pay-TV service offered and provided by HKCTV could enjoy EPL after May 2007. Accordingly, he submits, that the conduct alleged to be misleading is not in any way concerned with the telecommunications service offered by I-Cable. Thus, he submits, the pay TV service offered by HKCTV was not a *"telecommunications service"* but was in fact a

broadcasting service. That he says was what was being offered to Ms Kwong and Mr Ku.

40 Mr Yuen also submitted that it was clear that the sales staff of I-Cable promoted and marketed the pay TV services offered by HKCTV not on behalf of I-Cable but on behalf of HKCTV.

41 Mr Yuen then turned to the issue of bundling. He submitted that it was incorrect for the TA to submit that the alleged misleading conduct was within the scope of section 7M because the broadband services offered by I-Cable were bundled together with pay TV services offered by HKCTV. He referred to the TA's reasoning on this issue which is dealt with in paragraph 22-26 of the TA's decision and he submitted that this reasoning *"cannot withstand scrutiny"*.

42 The essence of Mr Yuen's attack was that the broadband services offered by I-Cable and the pay TV services offered by HKCTV remained separate and distinct services and the sales staff could not and did not convert the two services into one. Mr Yuen reminded the Board that the customer was not obliged to take the pay TV services and could have opted just for the broadband services. He thus submitted that the alleged misleading conduct is only in respect of pay TV services and does not extend to the telecommunications services and thus this is not within the TO. Furthermore, Mr Yuen submitted that if the TA's reasoning was valid, there was a risk of double jeopardy as the very same marketing conduct by one agent on one occasion could give rise to responsibility under both the TO and the BO.

43 The TA on the other hand has submitted that bundling is crucial. Mr Alder pointed out that this case relates to conduct on the part of the appellant's staff and not the sales staff of HKCTV. Mr Alder analysed the matter thus:

(1) The Appellant was promoting bundled packages of services that included their telecommunications services. They were also promoting HKCTV's services;

(2) These services were being promoted at the same time;

(3) The Appellant's promoting of bundled packages of services that included the Appellant's telecommunications services is necessarily the promoting of telecommunications services—it was promoting all these items in one bundle; and

(4) Misleading or deceptive conduct in promoting bundled packages of services that include telecommunications services is therefore misleading or deceptive conduct in promoting telecommunications services.

44 As to whether the misleading or deceptive conduct has to relate to features of the subject matter of the promotion, Mr Alder submits that this is not necessary. Had it been so, incorrect statements about a competitor's prices would not have been held to be misleading and deceptive but in *David Golf and Engineering Pty Ltd v Austgolf Corporation Pty Ltd. (1993) ATPR* this is precisely what was held in Australia.

45 The Australian cases cited by Mr Alder are based on section 52 of the Australian Trade Practices Act which provides:

> *"(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."*

46 In the Law of Misleading and Deceptive Conduct by Colin Lockhart, 2nd edition, Lexis Nexis, one finds the following summary:

> *"In the course of comparing goods or services, for example, statements of fact may be made as to one of the subjects of the comparison, such as its price, its attributes or its position in a particular market. If those statements are inaccurate, the comparison will, like any other false statement of fact, be likely to deceive."*

47 The Board agrees that it is not necessary for the misleading or deceptive conduct to relate solely to the features of the subject-matter of the telecommunications services being provided. It can also relate to other services that are bundled together with it and thus sold as a package.

48 The Board does not feel it necessary to set out all the arguments on this point although they have been carefully considered. The Board is quite satisfied that it does have jurisdiction as did the TA. The Appellant's arguments are, it seems to the Board, simply unrealistic. The fact of bundling is vitally important. Subscribers are offered a package and if one element of the package turns out to be not as described that must surely infect the whole package. To attempt to draw a distinction between telecommunication and broadcasting services at this stage when at the time they were being treated as one package is just not acceptable and nor is it mandated by the language of section 7M.

49 An illustration of the absurdity to which this argument could lead to can be seen if one considers the free gift situation. Assume that the salespersons were selling a telecommunications package and as an inducement were

offering two nights at the Mandarin Hotel. If this proved to be untrue because no such arrangement had been agreed to by the Hotel, can it really be suggested that this was not misleading or deceptive conduct even though the non–availability of the gift had nothing directly to do with the telecommunication service? The Board thinks not. The same would apply if a free gift was offered and when taken up it was found that a payment, even a reduced one, had to be made. Surely this would be misleading and deceptive conduct within the ambit of section 7M

50 As to the double jeopardy point, Mr Alder pointed out that there is no proscription of misleading or deceptive conduct in the BO and so it is difficult to see how the situation posited by the appellant could arise.

51 Having considered all the submissions on jurisdiction, the Board is quite satisfied that the TA did have jurisdiction to deal with the complaint under section 7M as does this Board.

Ground 6—Meaning of *"providing"* in Section 7M

52 Mr Yuen submits that there cannot be any contravention of section 7M of the TO unless the conduct in question is misleading or deceptive in *"providing"* (and not just *"offering"*) telecommunications services.

53 Mr Yuen relies on the QC verification process. He submits that there is no evidence to suggest that the QC verification process would not have been effective to detect or clarify the alleged misleading conduct. Hence he submits, that even if the misleading conduct can be established, it would have been detected and clarified before the Appellant provided its broadband services. Accordingly, there would have been no provision of telecommunications services by the Appellant and thus there would have

been no contravention of section 7M. In essence, Mr Yuen invited the Board to look at the entirety of the licensee's conduct including the verification process.

54 For the TA, Mr Alder submits that the matter is very simple. He points out that in section 7M it is stated that "*providing or acquiring*" a telecommunication service includes "*promoting*" one. Accordingly, promotional conduct is regulated by section 7M. In addition, he submits that there is no warrant to interpret the word "*promoting*" as meaning "*successfully promoting*".

55 As to the Appellant's reliance on the QC process Mr Alder has referred the Board to Australian cases which have rejected analogous arguments. In *Trade Practices Commission v Optus Communications Pty Ltd (1996) 64 FCR 326,* Optus advertised a marketing plan for mobile telephones in which local calls were represented as being free up to a limit of $52 per month. In fact, calls from mobile to mobile were not free. The commission sought a declaration that Optus had contravened section 52 (see above). It was held that:

> "*(3) Subsequent conduct, such as the supply of additional material and information by the advertiser, short of an express clear statement, over a sufficient time span, in a reasonably sized print, that mobile to mobile calls are excluded from being 'free local calls' would not neutralise the misleading effect of that advertisement."*

56 At page 340, Tamberlin J said this:

> "*I am not persuaded that any or all of the post-broadcast steps leading to signing of the contract would dispel the impression generated by the misleading message in the television broadcast in all or most cases. Once the impression is engendered by the advertisement, an*

interested viewer would normally be led to make further inquiries of Optus or its representatives. If this occurs, the viewer will probably be led to take those actions as the result of the attractive but misleading publicity set out in the television broadcast. The viewer is enticed into the marketing web by the advertisement: cf the comments of Beaumont J in Tec & Thomas (Australia) Pty Ltd v Mats Umyia Computer Co Pty Ltd (1994) 1 FCR 28 *at 38:*

> *'In my view, to induce the introduction of such a dealing is conduct which contravenes s 52, even if, ultimately, the consumer becomes aware that the equipment he is purchasing is not that of the Hattori Seiko Group, the deception having occurred at a earlier stage: What is relevantly induced is the dealing or the negotiations as distinct of the subsequent purchase itself.'*

While it is true that the Act is not intended to shield the careless or reckless viewer from his or her own pre-existing confusion or pre-conception, many viewers will in practice, not make specific inquiries about whether mobile to mobile calls are within the exclusions. Nor, on the evidence provided, can it safely be taken, that in most cases, the representatives or sales staff of Optus will make clear the exclusions of mobile to mobile phones.

[…]

It is of course not necessary when deciding whether there has been a misrepresentation to find that the contract had been signed on the basis of the misrepresentation."

57 Similar observations were made in *Medical Benefits Fund of Australia v Cassidy 135 FCR 1* at paragraph 43 where Stone J said:

> "*The submission that there is room under the [Trade Practices Act] or its analogues for publication of misleading or deceptive advertising so long as it is corrected by later material is not sustainable. […] Not is it to the point that the misleading or deceptive impression may or will be corrected before or after any contract is made. Whether a representation is misleading or deceptive (or likely to be so) depends on the circumstances in which it is made and not on what might happen in the future."*

58 As to the first point raised by Mr Yuen, the Board is satisfied that section 7M covers conduct in promoting a telecommunications service and that it is not necessary to establish for the purposes of section 7M, when properly construed, that the promotion will be successful.

59 As to the second point raised by Mr Yuen, the Board accepts Mr Alder's submissions. The Board finds the Australian cases under the Trade Practices Act extremely helpful. The Board thinks that the correct analysis is that the conduct in question in this case is properly to be characterised as *"first contact deception"* which—to use the wording in Optus—entices the customer into the marketing web. Accordingly, the argument raised by Mr Yuen that had this conduct occurred it would have all been picked up in the QC verification process is not sufficient to prevent the conduct complained of being in breach of section 7M at the time the statements were made. Accordingly, the Ground of Appeal 6 does not succeed.

Ground 7—Agency

60 The Appellant submits that if Messrs Wong and Ng took part in any misleading conduct then such was committed outside the scope of their authority. In support of this contention, the Appellant relies on the following:–

(1) None of the Appellant's marketing materials contained any misrepresentation;

(2) The Appellant's sample sale script did not contain any misrepresentation;

(3) There was no misrepresentation through the telephone hotline; and

(4) The training and instructions given to sales persons strictly prohibits any misleading or deceptive conduct.

61 This was the second point which was the subject of the Case Stated to the Court of Appeal. The Board can do no better than to quote from the relevant part of the judgment of Rogers VP at paragraphs 13-15 of the judgment:

> "*13. Turning to the question of whether the licensee-employer should not be liable if the act was committed by an employee in the course of his employment but contrary to a prohibition issued by the licensee-employer, in my view the question must be answered in the negative. On the basis that section 7M does not create a criminal offence but is part of the regulatory regime, what it is there to do is to regulate how the licensees should go about their business and, in particular respects, what they should not do. Since the licensee can only act through its employees, if an employee is employed to do a particular act, in this case to negotiate with potential customers, the licensee must be responsible for what that employee does in the course of his employment and in carrying out the duties which the employee does as part of his employment.*
>
> *14. It would appear that on a simple contractual basis the employer must be responsible for any representation made by an employee who is employed to negotiate and sell products or services to a potential customer and makes the representation in the course of doing that. In those circumstances if an employee, when carrying out his duties, so to speak, oversteps the mark in relation to representations or promises which he makes to potential customers, the employer must be responsible unless it can be demonstrated that the employee was on a frolic of his own. That simply could not be the case where the employee was doing precisely what he was employed to do, namely, entice customers to enter contractual relations with his employer.*
>
> *15. Whilst there is nothing in the Ordinance which specifically provides that the employer's responsibility and liability can only be excluded by 'completely effective*

> *preventative measures', that is, in effect, the result which is achieved. Doubtless, the Authority will take into account what steps were taken and the extent to which the employer tried to prevent its employees from putting it in breach of the Ordinance."*

62 The four points relied upon by the Appellant above do not, in the Board's view, assist the Appellant. It would be surprising indeed and very serious if the Appellant's instructions to staff, training materials and telephone hotline, did not expressly disavow misleading conduct in the course of sales and promotion. As the Court of Appeal noted, Messrs Wong and Ng were doing just what they were employed to do but they overstepped the mark. It is noted that Mr Ng was only sixteen years of age.

63 The Board does not think the point needs more elucidation in the light of the clear statement of the Court of Appeal. The TA clearly took the matters relied upon into account when considering this matter including sentence. However, they do not, as a matter of law, relieve the Appellant from liability.

Ground 2—No power or unnecessary to conduct covert investigation

64 Mr Yuen submitted that when Ms Kwong and Mr Ku attended the Appellant's street booths at Wan Chai and Mong Kok respectively they were acting as undercover agents if not *agent provocateur*. Mr Yuen submitted that this ground raised two key issues. The first, whether the TA has the power to conduct covert investigation and the second, if yes, whether the exercise of this power was proper and/or justified in the circumstances of this case.

65 It was Mr Yuen's submission that:

(1) On the true and proper construction of the TO, the TA does not have the power to conduct such covert investigation;

(2) Alternatively, even if the TA does have power to conduct covert investigation, the circumstances of this case do not justify the exercise of such a power and the TA should not have conducted covert investigation at the stage of preliminary investigation; and

(3) Accordingly, in either scenario, the TA is not entitled to act and should not have acted on the evidence of Ms Kwong and Mr Ku and the decision is thus made without any proper evidential basis.

66 Section 6A(1) of the TO, on which the TA bases its alleged convert investigation, provides that *"[t]he [TA] may do all things necessary to be done to perform his functions under this Ordinance"*.

67 The Appellant submits that an authority can only exercise such powers which are conferred to it by statutes and that section 6A(1) of the TO does not allow the TA to conduct covert investigations. Mr Yuen submits that the enumeration of investigative powers in sections 7I, 7J, 33, 35, 35A, 36B and 36D of the TO is an exhaustive one (by way of the principle *expressio unius est exclusio alterius*). Hence, so goes the Appellant's argument, section 6A(1) of the TO has to be read together with those enumerated powers to mean *"that the TA may do all things necessary to exercise the powers laid down in section 7I, 7J, 33, 35, 35A, 36B and 36D of the TO"* (Submissions for the Appellant, paragraph 41). Further Mr Yuen noted that even in the main investigation phase, the method of covert investigation was not provided for in the OFTA's notice on *"How Complaints Related to*

Sections 7K to 7N of the Telecommunications Ordinance are Handled by OFTA" (**"Procedural Notice"**, available from OFTA's website), let alone in the preliminary phase.

68 Even if one assumed that section 6A(1) of the TO could empower the TA to conduct the covert actions in question, the Appellant argues in the alternative that in this particular case, the TA should not have engaged in such conduct as it was not necessary. Mr Yuen further submitted that the TA failed to give reasons in writing for deviating from the Procedural Notice, which—according to Mr Yuen—was required by section 6A(3)(b)(ii) of the TO which provides that *"the [TA] when […] forming an opinion or making a determination, direction or decision under this Ordinance […] shall not depart from guidelines issued under section 6D […] unless he has provided reasons in writing […]"*. Mr Yuen added that the conversation between the sales staff of I-Cable and Ms Kwong and Mr Ku respectively remained a private conversation and formed no part of the public domain, access to which is expressly allowed by the Procedural Notice.

69 Mr Alder on behalf of the TA submitted that section 6A(1) of the TO has to be interpreted in the light of the object of the TO according to section 9 of the Interpretation and General Clauses Ordinance (Cap 1), which is the control of, *inter alia*, telecommunications and telecommunications services. If Mr Yuen's interpretation was true, section 6A(1) would be redundant. Mr Alder submits further that—diametrically opposed to Mr Yuen's submission—section 6A(1) is not restricted by the principle *"expressio unius est exclusio alterius"* cited by the Appellant but rather that section 6A(1) expressly excludes the application of this principle. Hence, in

conclusion, section 6A(1) empowers the TA to undertake investigations such as trap purchases or—like in this case—anonymous inquiries. The investigation undertaken in this case should not, according to Mr Alder, be compared with the other enumerated powers such as search, arrest and seizure, which are far more intrusive. With regard to the Procedural Notice, Mr Alder contends that the Procedural Notice is not a guideline within the meaning of section 6D of the TO. Unlike, for instance, the *"Misleading or Deceptive Conduct Guideline"*, the Procedural Notice was only a guide to inform complainants.

70 With regard to necessity, Mr Alder suggested that, given the alternatives, the course of action taken by the TA was the only reasonable one. The TA had received allegations that oral conduct was going on, so the only way to verify this allegation was to find out whether it was going on.

71 Having considered all the arguments the Board considered that the TA was perfectly entitled to take the course of action which it did.

72 Rightly it was decided not to rely on the PCCW complaint but indeed to seek independent clarification. The actions taken by the two officers were perfectly reasonable in the circumstances of this case. If the TA could not do this, how was the complaint ever going to be considered? There was no statutory constraint on the TA in taking this course of action. The Board concludes that there is nothing in this ground of Appeal.

Grounds 3 and 4—Apparent Bias and Fairness

73 It is appropriate to take these two grounds together.

74 Mr Yuen states the proposition that a decision tainted by apparent bias is liable to be quashed. He relies on the two-stage test in *Porter v Magill* [2002] 2 WLR 37; *Deacons v White & Case* MV 22 and 23/2003 and *Lawal v Northern Spirit Limited* [2004] 1 AER 87. Further, Mr Yuen submits that the TA had a duty to act fairly towards the Appellant when it conducted investigations under section 7M.

75 The crux of the complaint is that, in Mr Yuen's submission, *"a fair-minded and impartial observer"* would be bound to conclude that there was a real possibility that the TA would be biased towards OFTA staff members and would be very inclined to accept the evidence of Ms Kwong and Mr Ku.

76 The Board is surprised at this submission because it raises a serious allegation (albeit in the mind of the alleged of the fair-minded and impartial observer) against the TA. There is absolutely no evidence to suggest that a serious government officer charged with carrying out her duties under the TO would do other than analyse and assess the evidence placed before her, whether from within or without her department. Of course, no actual bias has been alleged, nor could it.

77 But even on the issue of apparent bias, the Appellant's case is hopeless. The Board does not for one minute accept that *"a fair-minded and impartial observer"* viewing the actions and decisions of the TA in this case, in the light of her statutory duties under the TO, could ever conclude that there was a real possibility that the TA would be biased or was biased in favour

of OFTA staff members and would thus have been more inclined to accept the evidence of Ms Kwong and Mr Ku.

78 The Appellant further contends that it was given no opportunity to test the veracity or reliability of the evidence of Ms Kwong and Mr Ku. It is true that solicitors for the Appellant did request an opportunity to interview Ms Kwong and Mr Ku which request was declined. However, copies of the notes taken by one of them and other materials were provided.

79 What followed next were three rounds of written representation each of which was carefully considered. What is of significance is that on no occasion did the Appellant produce evidence in any form from its two staff members, Mr Wong and Mr Ng.

80 It must be remembered that the TA was not acting in a judicial capacity. She is a senior administrative officer, charged with implementing the TO. As this Board stated in *Hong Kong Broadband Network Limited v TA* [Case 23/2006] at paragraph 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."

81 In *Lam Che Wai v Director of Food and Hygiene* [HCAL 53/2003], Chu J said at paragraph 53:

> "*Plainly, the principles of fairness do not operate in a vacuum. What is required of a fair hearing may vary from cases to cases. Whether a fair hearing entails an oral hearing and/or an opportunity to cross-examine the witnesses is dependent on the circumstances of the case in question. In my view, the reasons and purposes for requiring oral hearings and/or cross-examinations, and, conversely, the prejudice suffered by reason of the absence of an oral hearing and/or the opportunity to cross-examine are important considerations in deciding whether an applicant has been deprived of a fair hearing on the ground that there is no oral hearing and/or no opportunity to cross-examine the witnesses."*

82 Chu J, in the above case, relied upon the following observation in *R v Hampshire CC* [2002] EWHC 560:

> "*A fair hearing does not necessarily require an oral hearing, much less does it require that there should be an opportunity to cross-examine. Whether a particular procedure is fair will depend upon all the circumstances including the nature of the Claimant's interest, the seriousness of the matter for him and the nature of any matters in dispute. […]"*

83 In the present case, not only were the notes handed over, but witness statements were provided for the appeal and Mr Yuen was given the opportunity to cross-examine both OFTA officers in the hearing before this Board.

84 The Board is thus quite satisfied there is absolutely nothing in the allegations of bias and procedural unfairness.

Ground 5(a)—Standard of Proof

85 The Court of Appeal has now settled this issue. At paragraph 7, Rogers VP said:

> *"Looking at the Ordinance as a whole and, in particular, the provisions of sections 36B and 36C, I consider that there is no doubt that the effect of those provisions is what can be described as regulatory or disciplinary. As far as this case is concerned I do not consider that there is any relevant distinction to be drawn between the two. Whatever might be said, those sections do not make a contravention of section 7M a criminal offence."*

86 At paragraph 11, Rogers VP said:

> *"In my view, the answer to question 1 is clearly the standard of proof is a civil one, but the TA was entirely correct in its approach in paragraph 40 quoted above."*

87 The reference to *"paragraph 40"* was a reference to the TA applying the civil standard of *"on the balance of probabilities"*.

88 Accordingly, the TA was correct to apply the civil standard and this is the standard this Board has to apply.

Ground 5(b)—Assessment of the Evidence

89 As stated earlier, both OFTA officers Ms Gladys Kwong and Mr Ku gave witness statements and were cross-examined by Mr Yuen. Mr Ku joined OFTA in 1999. He told the Board that on the afternoon of 29 September 2006 Ms Iris Sung assigned him to undertake inquiries into possible

misleading or deceptive conduct by the Appellant's sales persons. He was informed of the nature of the complaint. Ms Kwong was also instructed to undertake the same duties and Mr Ku elected to go to Mong Kok while Ms Kwong chose Wan Chai. Both were instructed to recall details of any relevant conversations.

90 At about 6 pm on 29 September 2006, Mr Ku went to Sai Yeung Street in Mong Kok where a lot of temporary sales booths had been set up. Mr Ku approached the Appellant's booth and began a conversation with a man who he later discovered was Mr Ng.

91 After the conversation at about 6:50 pm Mr Ku went to a nearby junction and made notes of his conversation with Mr Ng on a sheet of A4. At about 7:30 pm on the same evening in the Fuk Yuen restaurant he made use of the notes to produce a dialog of the conversation with Mr Ng. He confirmed the accuracy of the dialogue.

92 The following day was a Sunday and the next two days public holidays, so he did not return to the office until 3 October. At his office, at 3 October 2006, he converted the dialogue he had written on the A4 sheet into Chinese word format. He produced that as MLK/1 and 1A as a translation. He also prepared a file not of his visit to the street booth. On 5 October 2006, he produced a witness statement based on the dialogue and the file note.

93 Subsequently, and probably in 2007, Mr Ku discovered that he had lost the A4 sheet. Mr Ku had moved offices in the meantime.

94 Under cross-examination by Mr Yuen, Mr Ku confirmed that he did prepare written notes. He was cross-examined about the content of an OFTA letter dated 23 January 2007 which was not written by him.

95 Having seen Mr Ku, the Board is quite satisfied that he did make the notes. After all, that was what he was sent out to do. It would have been absurd and unacceptable if he had heard deceiving and deceptive statements and not recorded them but only relied upon his memory. He had been a member of the Investigation and Prosecution Subsection of OFTA between 1997 and 2000.

96 In answer to a question from the Chairman, Mr Ku frankly and fairly accepted that he had no recollection of the matters outside of what was written in his notes which formed the basis of his statement.

97 It is of course unfortunate that the original notes have gone missing but nothing sinister about this was alleged nor could it.

98 Having heard and seen Mr Ku under cross-examination, the Board has not the slightest hesitation in accepting his evidence. He made his notes within minutes and then produced the dialogue shortly after that. After the holiday weekend he prepared the statement and attached the dialogue.

99 No evidence has been called to contradict Mr Ku's evidence and, accordingly, the Board finds that Mr Ku's evidence was perfectly reliable applying the appropriate standard of proof. His evidence makes quite clear that deceiving and deceptive statements were made.

100 Ms Kwong joined OFTA in 1999. She, too, had been in the investigation and prosecution team. She had spent eight years in investigation and statement taking and received training from the Hong Kong Police Force.

101 She, too, was asked to investigate PCCW's complaint. She made phone calls to the Appellant's hotline and nothing untoward emerged.

102 On 29 September 2006, she went to the Wan Chai MTR station and met a salesman manning the Appellant's booth. She later learned he was Mr Wong.

103 She discussed the relevant matters with Mr Wong and after ten minutes she went into the station and recorded the key words of the conversation in her notebook. She produced these notes.

104 She, too, returned to the office on 3 October 2006 and verbally repeated the result of her inquiries to Ms Sung. She was instructed to write down the main dialogue which she did and it is attached to her witness statement. She confirmed its accuracy. On 4 October 2006, she made two file notes which she also produced.

105 On 5 October 2006, she was asked to, and did, prepare a formal statement.

106 She, too, was cross-examined by Mr Yuen but in the opinion of the Board the essence of her evidence was unshaken. It was not put to her that she was lying. Various questions were asked about the sequence of events and drafting but none of these in any way raised any doubts in the mind of the Board that she was other than a truthful an accurate witness.

107 The Board has considered all of Mr Yuen's submissions as to the nature of the evidence but can find no substance in any of them. These were two honest and reliable and trained investigators who were asked to do a job and recorded their results. It is quite clear that on the basis of their evidence the Appellant's, through their sales staff, were making the false and misleading statements which are the subject-matter of this appeal. On any onus of proof, the Board would accept the evidence of the two investigators and the TA was perfectly entitled to do likewise.

Ground 8—Excessive Penalty

108 On 15 April 2002, the TA published "*Guidelines on the Imposition of Financial Penalty under Section 36C of the Telecommunications Ordinance"*. The TA deals with the consideration of penalty between paragraphs 45 and 50 of its decision.

109 Mr Yuen contends that the TA failed to take into account two important matters when considering the financial penalty. He contends that entrapment, which is how he characterises the conduct of the two investigative officers, although not a defence to a crime is relevant to sentence. He argues that the same principles should apply to regulatory proceedings.

110 The second matter which it is alleged the TA failed to take into account is that, even if Ms Kwong and Mr Ku had been genuine customers, the QC verification process would have picked up the misrepresentations giving a genuine customer the chance to consider whether to proceed in any event or not to proceed at all.

111 On the basis of the above it is submitted that the penalty is manifestly excessive.

112 It is clear from paragraphs 45-50 of the TA's decision, the subject matter of this appeal, that the TA made clear that it had had regard to its own guidelines. These guidelines are available on its website. The TA has to consider the gravity of the breach, which includes the nature and seriousness of the infringement, whether any repetition is involved and whether there are any aggravating or mitigating factors. As this was a first offense the maximum penalty is stipulated at HK$200,000.

113 As to gravity, the TA considered that the misrepresentation was a material one, given that both the broadband and pay TV markets are subject to intense competition. EPL is extremely popular in Hong Kong and has proved to be quite a draw. Further, this was not an isolated act as two separate salespersons at two different booths made the same misrepresentation and in the view of the TA this suggested, at least, that there were some deficiencies in the training, supervision and monitoring.

114 Having taken the above matters into account, the TA considered this to be a substantial breach of section 7M and decided that the starting point was HK$130,000. In mitigation, the TA took into account that the Appellant reacted promptly to the investigation by implementing remedial and precautionary measures. The TA took into account that the hotline disseminated accurate information. As to the Appellant's point about the QC process, the TA expressed the view that the standard wording may not be specific enough to alert customers to possible misrepresentation by sales staff. The TA found that there were no aggravating factors.

115 In the light of all of the above, the TA imposed a penalty of HK$100,000.

116 It is true that the TA did not give any consideration to whether the penalty should be reduced because of *"entrapment"*. The Board does not think that the TA should have considered this and if it had considered it there would be no reason to reduce the sentence because of it.

117 The Board has already concluded that there was nothing wrong with the sort of investigation carried out in this case. The OFTA staff did not go out to entrap the salesmen. They went to verify whether there was any substance to the complaint that had been made to them. From the conversations that

took place it is clear that the salesmen voluntarily and without any words being put in their mouth made the inaccurate statements the subject matter of this appeal. Accordingly, the Board does not think that the *"entrapment"* issue is relevant to penalty in the circumstances of this case. As to whether or not the QC verification procedures would have picked up these representations, it is clear that the TA considered the point but had some concerns about the wording. The TA was not, in the opinion of the Board, obliged to reduce the penalty further because there was a possibility that the contracts might not have gone through. What had concerned the TA was the misleading conduct at the point of sale. The Board does not think that the penalty should have been reduced further on this ground.

118 Accordingly, and bearing in mind that sentencing is not a science, it seems to the Board that the TA quite properly addressed all the issues and came to a decision which cannot be faulted. Different tribunals may well have come to different conclusions on financial penalties but the Board can see nothing wrong with the decision making process nor the result.

119 Looking at the matter afresh, HK$100,000 for a breach of this nature, in a highly competitive market seems to the Board an appropriate penalty in all the circumstances. The TA was entitled to take into account that two breaches occurred at two separate places at roughly the same time.

120 Having considered all the matters raised by the Appellant, the Board dismisses the Appeal and will make a costs order *nisi* in favour of the TA. That order will become final 14 (fourteen) days after the day of this Decision if no submissions to the contrary are received.

121 The Board would like to thank the legal teams on both sides for their assistance in this Appeal.

Dated this 30th day of June 2009

Original Signed
Signed ……..…
Larry Kwok BBS JP (Member)

Original Signed
Signed ……..…
Prof Lin Ping (Member)

Original Signed
Signed ……..…
Neil Kaplan CBE SC SBS (Chairman)