Telecommunications (Competition Provisions) Appeal Board

Appeal No. 3

PCCW - HKT Telephone Ltd v The Telecommunications Authority

Date of appeal	:	29 May 2002
Appellant	:	PCCW - HKT Telephone Ltd
Nature of appeal	:	Against the Direction of the Telecommunications Authority dated 15 May 2002 which directed the Appellant to implement Broadband Type II Interconnection upon receipt of request from the Wharf New T & T Ltd.
Hearings	:	• The Chairman conducted pre-hearings on **4, 5 & 12 July 2002** to consider a. the Telecommunication Authority's application to strike out the appeal on the ground that the Appeal Board did not have jurisdiction over the case; and b. the Appellant's application for interim stay of the Direction of 15 May 2002. The Chairman ruled that :- a. the appeal is within the jurisdiction of the Appeal Board; and b. the Appeal Board does not have authority to grant interim stay.
		The Judgements by the Chairman dated 15 and 29 July 2002 respectively are attached. • The Appeal Board conducted hearings on 29, 30 and 31 July 2002. The Telecommunication Authority's application to state the case to the Court of Appeal was rejected. The Judgement by the Chairman dated 29 July

		2002 is attached. The hearing was adjourned after the hearing on 31 July 2002. • The Appellant sought leave to withdraw the appeal on 21 August 2002. • The Appeal Board resumed hearing on 2 November 2002, and decided that :- a. the Appellant's application to withdraw the appeal was approved; and b. the Appeal Board will state cases to the Court of Appeal on the Appeal Board's jurisdiction in interconnection matters and on the Appeal Board's authority to grant interim relief.
Outcome of Appeal	:	Appeal was withdrawn on 2 November 2002.

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

PCCW-HKT TELEPHONE LIMITED **Appellant**

and

THE TELECOMMUNICATIONS AUTHORITY **Respondent**

JUDGMENT

Background

1. The Appellant in the present proceedings has applied for a temporary stay of a Direction made on 15th May 2002 by the Respondent under Section 36 B(1)(a)(iii) of the Telecommunications Ordinance (Cap. 106), namely that the Appellant, on receipt of a request from Wharf New T&T for interconnection to the local loops of the Appellant, should promptly implement such interconnection. This application is ancillary to an appeal under Section 32 N of the Ordinance against that Direction. Because this is the first application made to the Appeal Board for a stay, and it is of obvious importance both for this and future cases, I have set out my reasoned conclusions hereinafter. I sat alone with the express agreement of both

parties because the issue as to the jurisdiction to hear the appeal was one of law alone : see Section 32 O(1)(b). So too the argument whether the Board has power under the Ordinance to grant a stay is also a question of law. Both are interlocutory applications which, in the absence of Rules, I determined, pursuant to Section 32 O(7), should be heard by the Chairman or Deputy Chairman so as not to waste the time of Board members sitting when they could play no part in the decision.

2. The present application is to stay the operation of the Direction for about one week pending the filing of affidavits by the Respondent relating to whether on the facts a stay is appropriate, and argument on this issue, and further argument whether any stay, if granted, should be extended until the trial takes place later this month.

3. The damage which the Appellant says would be caused by the absence of a stay has been explained to me, and in the light of that I would have granted such a short stay, bearing in mind the balance of convenience. The Respondent argues that I am prevented from so doing on the proper construction of Section 32 N(2) of the Ordinance. I also must consider whether or not in any event there is any power in the Board to order a stay. The Respondent has been invited by the Appellant not to implement the operation of the Direction both for that short period and generally, but, as is its right, is not prepared so to undertake.

4. Section 32 N(2) and (3) of the Ordinance provides :

> *"(2) Subject to sub-section 3, an appeal shall not suspend the operation of the appeal subject matters.*
>
> *(3) Where an appeal is made and the appeal subject matter falls within Section 36C, then the appeal subject matter shall be suspended in its operation from the day on which the appeal is*

made until the appeal is determined, withdrawn or abandoned."

Section 36 C covers the power of the Respondent or of a court to impose financial penalties. Such is not the subject matter of the present appeal.

5. The Respondent submits that the application is misconceived because Section 32 N(2) on its true construction and meaning expressly forbids the Board from having any power to grant a stay. The Respondent further submits that even if the above submission is not correct, nevertheless there is no power under the Ordinance for the Board to grant a stay.

6. The Appellant submits that Section 32 N(3) makes clear that the bringing of an appeal against a financial penalty imposed under Section 36C automatically suspends the operation of such order pending the decision of the Appeal. Accordingly, it was necessary in the Ordinance to make clear that in the case of other Orders or Directions, there was to be no automatic stay; and that the object of sub-section (2) is to make that clear; and therefore that the sub-section does not prevent the Board granting a discretionary stay for good cause if it has power under the Ordinance to do so, which, it was submitted, the Tribunal has under Section 32 O(7).

7. I have been provided by both parties with both Skeleton Submissions and oral arguments on the above issues, which I have considered and have taken into account. It is not necessary to reiterate or deal with each submission or argument on these issues in view of the conclusions I have reached.

Meaning of Section 32 N(2)

8. The Appellant drew to my attention a similar statute in the United Kingdom and, at an earlier hearing, to a case in which Sir Christopher Bellamy, the President of the Competition Commission Appeal Tribunal, ruled that he

had power to grant an interim stay, and, by consent, did so : Napp Pharmaceutical Holdings Ltd. v. Director General of Fair Trading.

9. I note however that in this regard the United Kingdom statute is different in an important respect from that which I have to apply. The Competition Act 1998 Section 48 makes provision for Rules; in Schedule 8 Part II of the statute itself are to be found provisions governing such Rules; Rule 13 thereof provides as follows :

> *"13(1)Rules may provide for the tribunal to make an order ("an interim order") granting, on an interim basis, any remedy which the tribunal would have power to grant in its final decision.*
>
> *(2) An interim order may, in particular, suspend the effect of a decision made by the Director or vary the conditions or obligations attached to an exemption."*

Section 46(4) provides as follows :

> *"(4) Except in the case of an appeal against the imposition, or the amount, of a penalty, the making of an appeal under this section does not suspend the effect of the decision to which the appeal relates."*

10. It is not surprising to me, bearing in mind Rule 13 which is part of the statute itself, that in these circumstances Sir Christopher Bellamy held that Section 46(4) did not prevent the interim imposition of a discretionary stay by the Competition Commission for good cause, but that it dealt only with an automatic stay. In these circumstances, I do not consider that the United Kingdom statute and its interpretation assist in finding the true meaning of Section 32 N(2) and (3) of the Ordinance.

11. The Appellant submits that there is no ambiguity, obscurity or absurdity of meaning arising from the wording of sub-section (2), and that its meaning is

clear, namely that it can only operate in the manner summarised in paragraph 6 above, and that it only prevents the imposition of an automatic stay; accordingly that it is not permissible to seek assistance in finding the legislative intent of the sub-section by considering the proceedings in the Legislative Council, and what was said there, on the basis explained in Pepper v. Hart (1993) AC 593, especially at 620C-F, 634C-F, namely in cases where the statutory wording is ambiguous or obscure, or where the literal meaning leads to absurdity, to refer to the words of the Minister or promoter of the Bill in order to see if these, by clear words, *"clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words"*.

12. Mr. Peter Roth Q.C., who appeared with Miss Catrina Lam for the Appellant, conceded during argument, rightly in my judgment, that if recourse was permissible to the Hong Kong Hansard (which he submitted in this case was not permissible) that it was clear that the legislative intent underlying the sub-section was to deny to the Tribunal any power to order any stay at any time during appeal proceedings. On the 20th April 2000 in a paper addressed to the Bills Committee of Legco considering the Ordinance, it was stated on behalf of the Information Technology and Broadcasting Bureau:

> *"Therefore, while we propose to empower the Board to review the TA's decisions, the ..... direction and determination which is being appealed against should not be subject to suspension by the Appeal Board as an interim relief, with the exception for the penalties and remedies which the TA may impose under the new Section 36C."*
> (emphasis as in the paper)

One week later Ms. Eva Cheng, then the Acting Secretary for Information Technology and Broadcasting, appeared before the Bills Committee. The minutes of the Meeting (agreed both by the Administration and the

Chairman) show that when discussing the paper referred to above, the Chairman remarked :

> *"Noting that proposed Section 32N(2) and (3) provided that decisions of TA would not be subject to suspension except for the penalty and remedies imposed under Section 36C, the Chairman enquired whether TA would be liable in any action for damages if his decision was subsequently quashed by the Appeal Board....."*

13. It follows that one critical issue in the present application is whether or not sub-section 32 N(2) when read in the context of the rest of the Ordinance is ambiguous, obscure or whether the wording leads to absurdity, namely whether the principles laid down in Pepper v. Hart, supra, permit in this case reference to the above Legco proceedings. If such reference is admissible, then the legislative intent of Section 32 N(2) in my judgment is made crystal clear by the above statements i.e. that the Appeal Board was to have no power to *"suspend..... as an interim relief"*. Because the procedure in Legco is not the same as in the House of Commons, I consider that the above statements are equivalent to a statement by the Minister or promoter of a Bill.

14. I have considered the literal reading of sub-section 32 N(2), and in my judgment it is ambiguous. There are in this case two possible types or grounds of stay : automatic or discretionary for good cause. The wording of Section 32 N(2) does not in my judgment clearly indicate which type, or indeed whether both types, are contemplated by the sub-section.

15. Mr. Anselmo Reyes S.C., who appeared for the Respondent, submitted that the wording and intention of sub-section 32 N(3) is clear; he then drew attention to the fact that the wording of Section 32 N(3) commences :

> *"Where an appeal is made.....",*

whereas the commencing words of sub-section 32 N(2), in contra-distinction, are

"an appeal shall not suspend…….".

This led to his further submission that accordingly whilst sub-section (3) crystallises as soon as *"an appeal is made"*, the wording of sub-section (2) covers the entire period of an appeal; which, he submitted, indicated that at no time during an appeal was there to be a suspension of the Direction or other order made, which indicated that it must be stays for cause, and not just automatic stay, which are covered. Further that if sub-section (2) were intended, as Mr. Peter Roth Q.C. submitted, only to make clear that there is to be no automatic suspension, then, in the same way as in sub-section (3), one would expect to find similar commencing and operative words as therein, but of course to the opposite effect. I agree that this analysis of the wording is some indication that the two sub-sections do not both deal only with automatic suspension.

16. Further, in my judgment, the words of sub-section (2) do not clearly and unambiguously and expressly contain the meaning for which Mr. Peter Roth Q.C. contends (paragraph 6 above). Section 32 N(2) provides that *"an appeal shall not suspend the operation of the appeal subject matters"*. On the literal reading of the words, it is not clear to me whether this refers only to an automatic suspension or covers a discretionary suspension for cause. Some further indication other than the wording itself is needed to decide which is intended. I can see some force in the arguments each side addressed to me as to which of the two meanings was intended. I note in particular the argument rehearsed in paragraph 15 above. On the other hand, I agree with Mr. Peter Roth Q.C.'s submissions that there are no express words in Section 32 N forbidding the Board from granting a discretionary stay. I note also that the effect of the words *"subject to sub-section (3)"* may be said to be some indication that the sub-section deals only with automatic suspension as does sub-section (3). There is nothing in my

judgment elsewhere in the Ordinance which gives guidance as to what is the legislative intention of sub-section (2).

17. I rule therefore that it is permissible in view of the ambiguity to look at the proceedings in Legco. Having done so, I conclude that the legislative intention of sub-section 32 N(2) is to prevent the Board at any stage of an appeal granting a stay, and I accept that the true meaning of the sub-section is that put forward by Mr. Anselmo Reyes on behalf of the Respondent.

18. Accordingly in my judgment the Board has no power to grant an interim stay, and is expressly prevented by Section 32 N(2) from so doing.

19. In case my interpretation of the sub-section is held to be incorrect, I shall also consider whether there is in the Ordinance any power to grant a stay. The Board being a creature of statute, it would be necessary for there to exist some statutory power to do so before a stay could be granted.

Effect of Section 32 O(7)

20. Section 32 O(7) provides that :

> *"The Chairman may determine any matter of practice or procedure relating to the hearing of appeals where no provision governing such matter is made in this Ordinance or in regulations made thereunder."*

There are at present no such Rules.

21. So far as interim stays for good cause are concerned, I have held above that the effect of Section 32 N(2), on its true construction, is to prevent the Board having power to grant such a stay. Accordingly in my judgment it is not permissible to grant an interim stay under Section 32 O(7) in those circumstances, because a *"provision governing such matter is made under this Ordinance"*, namely a provision which forbids the grant of a stay.

22. But, in case this matter goes further, and my decision on Section 32 N(2) is held to be wrong, then I now deal, with the powers of the Board under Section 32 O(7) on the assumption that Section 32 N(2) only covers automatic stays.

23. As is summarised in Halsbury's Laws of England (4th Edn) Vol 37 para 10 :

> *"…… the function of practice and procedure is to provide the machinery or manner in which legal rights or status or legal duties may be enforced or recognised by a …… properly constituted tribunal…… the Rules of the Supreme Court are mere rules of practice and procedure, and their function is to regulate the machinery of litigation……"*

Footnote 3 refers, inter alia, to Poyser v. Minors (1881) VII QBD 329 where Lush LJ said :

> *"Practice …… like procedure …… denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right……"*

See also Li Tze Cho v. Ching Hua Ltd. (1961) HKLR 201 at 206-7 where Reece J. applied Poyser v. Minors.

Similarly in Re Jackson (1915) 1 KB 371 at 376 Rowlatt J said:

> *"The words practice and procedure are now generally understood to refer to interlocutory matters arising in the course of proceedings...."*

24. I observe that Section 32 N(4) provides the Board with various powers, on determining an appeal, including quashing the subject matter, and continues:

> *"…….and may make such consequential orders as may be necessary."*

This power includes, in my judgment, if necessary and in appropriate circumstances, the making of an order in the nature of an injunction to forbid the Authority from making again the same Direction as has been quashed.

25. In McHarg v. Universal Stock Exchange Ltd. [1895] 2 QB 81 an interim injunction was regarded by the English Court of Appeal as a *"matter of practice and procedure"* in a case where the final relief claimed was for an injunction.

See too Commonwealth of Australia v. Crothall Hospital Ltd. 36 ALR at 570, 587 where a number of examples of what had been held to constitute *"practice and procedure"* are given.

26. I accept the submission of Mr. Mark Strachan Q.C. (who appeared with Ms. Catrina Lam at the adjourned hearing for the Appellant) that the effect of these provisions in the Ordinance is that it is for the Board to determine in its final judgment what upon the evidence are the legal rights and liabilities arising in the case. But it is for the Chairman under Section 32 N(4) and (7) to decide the interlocutory *"practice and procedure"* which precedes that determination, and whose object, inter alia, is to ensure that those final rights are maintained and not destroyed prior to the hearing. Moreover, if the Board has power in appropriate circumstances to grant an order analogous to an injunction when it makes its final determination, it lies within the power of the Chairman under Section 32 O(7) to make a similar interlocutory order pending that determination so as to preserve the status quo pending the trial.

27. Moreover I agree (absent Section 32 N(2)) with Mr. Mark Strachan Q.C.'s submission that it cannot have been the legislative intent of the Ordinance to confer upon appellants rights of appeal to protect their property and business without at the same time giving the Board power to prevent the damage or total destruction (if that be the case) of those rights during the period pending the hearing.

28. Accordingly (absent Section 32 N(2)) I would have concluded that the Board does have power under Section 32 O(4) and (7) to grant an interim

stay for good cause so as to preserve the position in appropriate cases and prevent possibly irreparable damage pending the hearing of an appeal.

Conclusion

29. I adjudge therefore for the reasons I set out above that the Board has no power to grant an interim stay for good cause because on its true construction Section 32 N(2) prevents the Board so doing, and also that Section 32 N(2) overrides the power under Section 32 O(7) to make interlocutory orders to stay.

Order Nisi

30. I order that the costs of hearing this application be awarded to the Respondent, such order to become absolute if within 14 days no application to vary it is made.

Dated this 15th day of July 2002.

John Griffiths S.C., C.M.G., Q.C.
Chairman
Telecommunications (Competition Provisions)
Appeal Board

Mr. Peter Roth Q.C., Mr. Mark Strachan Q.C. and Ms. Catrina Lam instructed by Denton Wilde Sapte for the Appellant.
Mr. Anselmo Reyes S.C. instructed by Department of Justice for the Respondent.

JG/es/02/0706

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

PCCW-HKT TELEPHONE LIMITED **Appellant**

and

THE TELECOMMUNICATIONS AUTHORITY **Respondent**

JUDGMENT

Background

1. The Appellant in the present proceedings by a Notice of Appeal dated 29th May 2002, amended on 21st June 2002, has appealed under Section 32N of the Telecommunications Ordinance (Cap. 106) ("the Ordinance"), against a Direction made by the Respondent on 15th May 2002 under Section 36B(1)(a)(iii) of the Ordinance, namely that the Appellant, on receipt of a request from Wharf New T&T for Broadband Type II interconnection to the local loops of the Appellant, should promptly implement such interconnection.

2. The Respondent, at a short hearing held on 4th June 2002 for the purpose of giving directions for the hearing of the substantive appeal, submitted that the Board did not have any jurisdiction under the Ordinance to hear the appeal. The hearing of the substantive appeal was fixed for 29th July 2002, and I determined, pursuant to Section 32O(7), that the issue as to jurisdiction should be heard by the Chairman or Deputy Chairman of the Board as a preliminary issue on 4th July 2002. I sat alone with the express agreement of both parties to hear the issue because it was one of law alone : see Section 32O(1)(b); consequently it would have been a pointless waste of their time to have sat with other Board members who could play no part in the decision.

3. I received written Skeleton Submissions from both parties, and heard oral arguments on this and also upon an application to suspend the Direction, on 4th, 5th and 12th July, after which I ruled that there was jurisdiction under the Ordinance to hear the appeal, and indicated I would give my reasons for that conclusion later. This I now do.

Alleged Facts

4. It was common ground between the parties, and I agree, that the issue as to jurisdiction must be decided on the basis that the facts alleged by the Appellant are considered as assumed proved. Obviously at trial it will remain open to the Respondent to challenge them.

5. Both the Appellant and Wharf New T&T are holders of Fixed Telecommunication Network Services ("FTNS") licenses in similar terms issued under the Ordinance by the Respondent, which authorise them to establish local networks in Hong Kong SAR. Networks terminate in *"local loops"* which are that part of the network between the customer's premises and the local exchange i.e. connecting the individual customers to the network. *"Broadband Services"* are those provided which operate at a

transmission speed in excess of 144k bits per second, and which are able therefore to provide such services as video-on-demand or broadband internet access. *"Narrowband Services"* operate at under this speed and cannot carry some of the services, or operate as efficiently. Such local loops may be of copper wire, hybrid coaxial or optic fiber, or may be an appropriate wireless connection. Type II Interconnection is when carrier A gives direct access to an unbundled copper loop to carrier B, who then takes control of carrier A's local loop. This may be done to implement a decision by a customer to switch his allegiance from carrier A to carrier B. Such interconnection, carrying with it an opportunity for customers to choose between providers offering different terms and conditions, may advance competition, or if refused may hinder it.

6. PCCW and Wharf New T&T have negotiated and signed agreements on commercial terms for, inter alia, Type II Narrowband Interconnection. The Direction of 15th May 2002 mandated Broadband connection as summarised in paragraph 1 above for Wharf New T&T over the Appellant's local loops. The Appellant, as the historical monopoly telephone services provider, owns and controls very many local loops. For reasons explained below no detailed commercial terms are contained in the Direction, nor have the Appellant and Wharf New T&T agreed such terms.

7. In August 2001, under the terms of its licence, the Appellant submitted to the Respondent for approval a Tariff for allowing other licensees access to the Appellant's Broadband Copper Local Loops ("BCLL"). Some terms thereof, submitted to me by the Appellant to be "fundamental", are provisions for providing reciprocal access to each other's networks, limitation of liability and indemnity provisions, and expressing the need before interconnection for the customer to have asked in writing for a change of provider. The Respondent gazetted his approval of the Tariff on 19th October 2001. Approval is mandatory unless the Respondent considers

there to be breaches of conditions 15, 16 or 20(4) of the Licence, which deal with anti-competitive conduct, abuse of position, and unauthorised discounts, by a dominant operator.

8. By letter to the Respondent dated 7th November 2001, Wharf New T&T requested the Respondent to proceed to a Determination under Section 36A of the terms and conditions for interconnection because

> *"it was of the view that the Tariff did not provide any basis on which it could reach a commercial interconnection agreement with..."*

the Appellant. On 19th November 2001 the Respondent invited the Appellant to make representations why there should not be made such a Determination, which would cover all the necessary terms and conditions as would appear appropriate to the Respondent in the prevailing circumstances. The Respondent is in the process of considering what terms are appropriate, and in due course intends to make a Section 36A Determination covering Broadband Type II interconnection between the Appellant and Wharf New T&T, but has not done so yet.

9. On 29th January 2002 the Respondent by letter informed the Appellant that it was considering making a Section 36B Direction to implement interconnection prior to reaching a conclusion on the Section 36A Determination. The Respondent asked if the Appellant would be willing to provide interconnection on the basis of interim charges which would be adjusted retrospectively following the conclusion of the Section 36A Determination. They intimated that Wharf New T&T would agree to this. Left open however were clauses covering other matters such as reciprocity, regarded as "fundamental" by the Appellant.

10. The Appellant on 5th February 2002 replied that it was not willing so to do, and that the Direction should not be made for the reasons given in their

letter. Wharf New T&T remained unwilling to give reciprocity thereafter, and no agreement as to terms was concluded.

11. On 16th April 2002 the Respondent wrote enclosing its proposed Direction, giving the Appellant the chance to make representations upon the draft proposed Direction. That letter ended :

> *"The Direction is intended to be issued with a view to facilitating the immediate availability of Broadband Type II interconnection ..... and to enabling consumers to enjoy sooner the benefits brought about by increased competition in the market for broadband services....."*
> (my emphasis)

Again on 29th April 2002 the Authority in their letter to the Appellant stated:

> *"The aim* (of the proposed Direction) *is to enable consumers to enjoy sooner the benefits brought about by increased competition in the market for broadband services....."*
> (my emphasis)

12. On 15th May 2002 the Appellant made the Direction described in paragraph 1 above under cover of their letter setting out various objectives and terms and reasons. These included the statement that :

> *"..... W NT&T has reiterated that the Interim Terms (a majority of which are based on BCLC Tariff) are harsh and anti-competitive"*
> (my emphasis)

The Respondent also expressly said in the direction itself that it had *"considered all representations made ..... by PCCW-HKT and Wharf NT&T ....."* which included the representation referred to above.

13. The Direction itself in paragraph 5 stated as follows :

> *"The making of this Direction is intended to promote effective competition in the telecommunication industry, which will in turn*

maximize consumer benefits by enabling consumers to enjoy sooner the benefits brought about by increased competition in the market of broadband services as soon as it is technically feasible"
(my emphasis)

Appeals under the Ordinance

14. Section 32N provides:

(1) "Any person aggrieved by –

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

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

(ii) ..... any licence condition relating to any such section; or

(b) any sanction or remedy imposed ..... under this Ordinance .... in consequence of a breach of any such section.....

may appeal to the Board against the ..... determination, direction ..... to the extent to which it relates to any such section or any such licence condition, as the case may be."

Person Aggrieved

15. There is no doubt in my judgment, and it was not disputed, that the Appellant is *"a person aggrieved"*. The real issue before me is whether the alleged assumed facts in this case fall under Section 32N(1)(a).

Sections 7K to 7N

16. These sections ban licensees in the circumstances set out in the sections from engaging in Anti-competitive practices (7K), or Abuse of position (7L), or indulging in Misleading or deceptive conduct (7M), and enforce Non-discrimination (7N) ("the four Sections").

Section 7K(1) provides :

> *"A licencee shall not engage in conduct which, in the opinion of the Authority, has the purpose or effect of preventing or substantially restricting competition in a telecommunications market."*
> (my emphasis)

The Opposing Arguments

17. The arguments advanced by the parties are to be found in their written skeleton arguments, which were explained and expanded in oral argument which can be seen on the transcript. Accordingly I do not need to set them out now, but I have of course taken them into account in reaching my decision.

"Relating to"

18. First it is to be noted that Section 32N(1)(b) covers appeal against sanctions or remedies imposed for breach of Sections 7K to 7N; it follows that subsection (1)(a) must be intended to cover something wider than that. It is in that context that the words *"relating to"* must be given their true meaning. Crucial to the construction of Section 32N(1)(a) is the meaning to be given to the words *"relating to"* in their context in the Ordinance, bearing in mind the legislative objectives.

19. The New Shorter Oxford English Dictionary gives a meaning for the words as *"establish a connection between"*. In my judgment the words *"relating to"*, in their context, are words of wide connation which cover any connection, direct or indirect, between a Direction (etc.) and the four Sections. In Compagnie Financière v. Peruvian Guano Co. 11 QBD 55, the famous case on discovery, when considering the words *"relating to any matter in question"*, Brett LJ said :

> *"It seems to me any document must be properly held to relate to matters in question..... which it is not unreasonable to suppose does*

contain information which may, either directly or indirectly, enable a party to advance his own case or to damage the case of his adversary.".

(my emphasis)

The Courts in many areas of law and many cases (see : Stroud's Judicial Dictionary: 6th Edn: 2000) have given a wide meaning to the phrase, as for instance in Commissioner of Inland Revenue v. Maple & Co. Ltd. (1908) AC 22 where Lord Macnaghten said in relation to the phrase *"relating to"* certain subjects that : *"There is no expression more general or far-reaching than that"*. But of course some causal connection between the *"decision"* (etc.) and the four Sections is imported into the phrase *"relating to"*, and must be shown.

20. Government statements and statements by the Respondent referred to in evidence make clear that there was to be and is an underlying prime policy objective of fostering competition in the telecommunications market. I accept the submission of the Appellant that one of the statutory objectives underlying the four Sections is to promote competition in the telecommunication market by banning conduct which prevents or restricts such competition. Similarly, amongst the statutory objectives underlying Sections 36A and 36B, are also the promotion of competition by granting powers to the Respondent to prevent such anti-competitive conduct : see Section 36A(10). As I see it, the four Sections and Sections 36A and 36B may, in appropriate circumstances, be the opposite sides of the same coin, for competition may be promoted by banning anti-competition behaviour such as is banned in the four Sections, and similarly Directions (etc.) made under the desire to promote competition may in effect prevent anti-competitive conduct.

21. I note that Section 32N(1)(a) expressly empowers the Board to adjudicate on appeals in respect of a *"direction"* (etc.), if it *"relates to"* the four Sections.

The wording used by the Legislature is not a direction made *"under"* the four sections, but one *"relating to"* the four Sections, a wider concept altogether.

22. The Respondent submits that *"relating to"* should be given a restricted meaning, but accepts that were a *"direction"* to order a licencee to refrain from conduct banned under Section 7K or other of the four sections, such *"direction"* would be appealable. That is obviously right. But the question remains whether a *"direction"* which has the effect of banning such conduct, though not naming the section, and even if made for the reason of promoting competition, falls under the appeal provision.

23. In my judgment the question as to whether the Board has jurisdiction is whether, on the assumed facts, there is any causal connection, direct or indirect, between the Direction made on 15th May 2002 and the banned subject matter of the four Sections; – in particular, on the present alleged facts, is there such direct or indirect connection between the Direction and, for instance, conduct by any licensee which *"has the purpose or effect of preventing or substantially restricting competition"* ? (my emphasis). It is not in my judgment the wording of the *"direction"* which is crucial, though it is of course important; it is the underlying circumstances leading to its imposition which are vital, and whether those circumstances had the *"effect"* of substantially inhibiting competition , and whether the existence of those circumstances was causally connected with the Direction.

Conclusion

24. It is clear on the present assumed facts that the Direction made on 15th May 2002 was made in part to promote increased and effective competition in the market for Broadband services so as to maximize benefits to consumers, and to do so sooner than otherwise would be the case : see paragraphs 11 to 13 inclusive above. It is in my judgment plainly arguable on the present

assumed facts that the Respondent considered the Direction was necessary or desirable because of the *"effects"* of the *"conduct"* of the Appellant and Wharf New T&T, each being licencees, in not agreeing, or being able to agree, mutually acceptable terms for Broadband interconnection, so that such interconnection, though technically possible, was thereby prevented, thereby *"substantially restricting competition in a telecommunications market"*.

25. Consequently the Direction in my judgment was indirectly causally connected to anti-competitive conduct banned in Section 7K. The Board therefore has jurisdiction on the present assumed facts because the Appellant was a *"person aggrieved"* by a *"direction relating to"* Section 7K.

Dated this 29th day of July 2002.

John Griffiths S.C., C.M.G., Q.C.
Chairman
Telecommunications (Competition Provisions)
Appeal Board

Mr. Peter Roth Q.C., Mr. Mark Strachan Q.C. and Ms. Catrina Lam instructed by Denton Wilde Sapte for the Appellant.
Mr. Anselmo Reyes S.C. instructed by Department of Justice for the Respondent.

JG/es/02/0733

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

PCCW-HKT TELEPHONE LIMITED **Appellant**

and

THE TELECOMMUNICATIONS AUTHORITY **Respondent**

JUDGMENT

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1. Section 32R of the Telecommunications Ordinance (Cap. 106) provides :

> *"(1) 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. (2)..... (3) where a case is stated under sub-section (1), the Appeal Board shall not determine the relevant appeal before the Court of Appeal determines the relevant point of law."*

2. Also relevant is Section 32Q which 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".*

3. We have before us an application by the Respondent, the Telecommunications Authority, for us to state a case now to the Court of Appeal in respect of a judgment which I gave on 12th July, the reasons for which I handed down on 29th July 2002. It is our unanimous decision not to grant the application for a case stated at the moment.

4. We consider that the subject of the potential case stated concerns a matter which it would be appropriate for the Court of Appeal to review, because it raises an important point as to the jurisdiction of the Board, and it is the first such case which we have heard, so is the first occasion therefore upon which the Court of Appeal could give helpful and definitive guidance.

5. But we have taken into account in our decision, including other things raised by counsel, the following matters: first, that it is a principle of law when any judgment is given, whether in a court of law or a tribunal, that until overturned that judgment is taken to be an accurate statement of the law, so that when the hearing proceeds we shall proceed upon the basis indicated in my judgment as to jurisdiction, when deciding whether particular parts of evidence, which are objected to as not being relevant, are relevant or not. We do not accept the Respondent's argument as to the difficulty of doing this.

6. Secondly, that we are of the view, and I am supported by Lord Wilberforce in a case - the name of which I regret I can't remember at the moment - I am supported by Lord Wilberforce who, in the House of Lords on a case concerning a preliminary issue, observed to the effect that it is much more helpful for appellate tribunals to consider cases based not upon theoretical facts which can wander a long way sideways, but upon findings of fact made by the appropriate body. [Addition to judgment : the case is Tilling v. Whiteman 1980 AC 1 at 17G-18A, 25B-E.]

7. Thirdly, we have had to bear in mind and weigh in our discretion what hardship would be caused on the one hand by granting such leave now, and on the other hand the hardship if we did not grant it. It is relevant, we think, that under Sub-section (3) of Section 32R, were we to grant a case stated, that the hearing of the

present appeal would have to cease. That, for the reasons advanced by Mr. Roth on behalf of the Appellant, would cause hardship to them. They have also pointed out that, initially, the Telecommunications Authority in a draft Direction had intended to annexe certain terms to it, but that in the actual Direction made on 15th May 2002 there are none of those relevant 'interim terms'. Accordingly, it seems to us that that hardship would also be done to PCCW if this matter were put off for a lengthy period. We have caused enquiries to be made of the relevant listing officer in the Court of Appeal and we are informed by letter from the Telecommunications Authority that the earliest date that could be given in the Court of Appeal conceivably would be December 2002, but it would be more likely to be February 2002. That would mean it would be incumbent upon PCCW to obey the direction at least until that date, including presumably also any further time caused by any appeal, if there were one, to the Court of Final Appeal, and including any further period thereafter prior to this Tribunal being reconvened and deciding the relevant appeal. [Addition : we do not have power to stay the operation of the Direction; nor is it certain, as was canvassed in argument, whether in view of the terms of the Ordinance, the Court of Appeal has, or would exercise, such power.]

8. We do not think that it would be an easy course, and some might say not even an appropriate course, for PCCW with the consent of the Authority, as suggested by the Respondent to us, only to grant interconnection on the basis of the Tariff which has been gazetted. We consider that such terms having been removed from the Direction it would not be possible without the consent of Wharf for that to be done, and we have no means of knowing for sure whether Wharf would or would not consent. But our considered view, such as it is at this moment, is that there is a very serious danger indeed that Wharf, as a commercial organisation, would not consent to all those terms, some of which are comparatively onerous, and which run to many pages.

9. It is for those reasons that we, in our discretion, decide that this matter should proceed now. But that is with liberty obviously to the Authority at a later time to make application to us for a case to be stated : we do not exclude that at a later time.

10. It has been debated before us, but we take no decision as to it at the moment, whether it would be possible for us to make a provisional finding, subject to an appeal, or whether it would be preferable to make findings stated rather like an order nisi for costs, *"not to be enforced if a case stated were granted within a given period of time"*. No doubt if an application is to be made at some later stage the parties and their legal advisers can consider and submit what is the appropriate course to take.

Dated this 29th day of July 2002.

Dr. John Ho Dit Sang
Board Member

Dr. Jane Lee Ching Yee
Board Member

John Griffiths S.C., C.M.G., Q.C.
Chairman
Telecommunications (Competition Provisions)
Appeal Board

Mr. Peter Roth Q.C. and Ms. Catrina Lam instructed by Denton Wilde Sapte for the Appellant.
Mr. Richard Fowler and Mr. Anselmo Reyes S.C. instructed by Department of Justice for the Respondent.

JG/es/02/0801