Telecommunications (Competition Provisions) Appeal Board

Appeal No. 31

Hong Kong Telecommunications (HKT) Limited v The Communications Authority

Date of appeal	:	14 February 2013
Appellant	:	Hong Kong Telecommunications (HKT) Limited
Intervener	:	Apple Asia Limited
Nature of appeal	:	Against the decision of the Communications Authority ("CA") not to issue an urgent interim direction to prohibit the alleged anti-competitive SIM-locking of Apple devices including the iPhone 5, the iPad mini and the iPad (4th generation).
Principal grounds for contesting the decision	:	The Appellant contends that the CA's conclusion that it had insufficient information to deal with the Appellant's competition complaint is inconsistent with its predecessor's findings in the SIM-locking statement that the conduct the Appellant complains of is anti-competitive and with the express prohibition in section 7K(3) of the Telecommunications Ordinance (Cap. 106).
Key relief sought	:	The Appellant seeks orders that the Appeal Board vary the appeal subject matter by substituting the grant of an interim direction directing Apple Asia Limited to immediately remove the SIM-lock which is presently preventing or has prevented cellular enabled devices including the iPhone 5, iPad mini and/or the iPad (4th generation) detecting and connecting to the Appellant's 4G/LTE network in Hong Kong and to refrain from importing or selling telephones, telephone operating systems or other telecommunications equipment programmed to restrict their use by network; alternatively orders that the appeal subject matter be quashed, and that the CA be directed urgently to issue a direction under section 36B of the Telecommunications Ordinance (Cap. 106) directing Apple Asia Limited to immediately remove the SIM-lock which is presently preventing or has prevented cellular enabled devices including the iPhone 5, the iPad mini and/or the iPad (4th

		generation) detecting and connecting to the Appellant's 4G/LTE network in Hong Kong and to refrain from importing or selling telephones, telephone operating systems or other telecommunications equipment programmed to restrict their use by network; and an award of such sum in respect of the costs involved in the appeal as is just and equitable in all the circumstances of the case.
Hearings	:	• The Appeal Board conducted a hearing on 26 April 2013 on the preliminary issue as to whether the Appellant's appeal is within the jurisdiction of the Appeal Board, and concluded in its Decision dated 4 June 2013 (copy attached) that the Appeal Board had no jurisdiction to hear the Appeal. • The Chairman granted leave on 30 July 2013 for the Appellant to state a case to the Court of Appeal. • The Court of Appeal heard the Case Stated (no. CACV 190/2013) on 29 November 2013 and handed down judgment on 17 December 2013 (copy attached). The Court of Appeal decided that the Appeal Board has jurisdiction to hear the appeal and remitted the case to the Appeal Board for reconsideration. • A hearing was scheduled for 16 January 2014 to reconsider the appeal case. On 10 January 2014, the Appellant sought leave to amend its Notice of Appeal. On 13 January 2014, Apple Asia Limited filed an application to intervene. The Appeal Board heard the application on 16 January 2014 and granted leave for Apple Asia Limited to intervene. The Appeal Board also granted leave for the Appellant to amend its Notice of Appeal in accordance with the terms proposed on 10 January 2014. The Appeal Board's Decision on Application to Intervene dated 24 January 2014 is attached.

		• A hearing on the appeal case was held on 10 March 2014. The Judgment of the Appeal Board dated 17 April 2014 is attached.
Outcome of appeal	:	The Appeal Board allowed the appeal to the extent that the Appeal Subject Matter (as defined in the Notice of Appeal) truly engaged section 7K of the Telecommunications Ordinance (Cap. 106), but rejected the Appellant's contentions that Apple Asia has imposed a prohibited SIM-lock as that term is currently defined in the current policy statement on SIM-locking and had engaged in anticompetitive practices prohibited by section 7K(3). The Appeal Board refused to issue or to direct the CA to issue any form of interim relief under section 36B of the Telecommunications Ordinance (Cap. 106) directing Apple Asia to remove the restriction preventing the Appellant’s customers from accessing 4G connectivity on the iPhone 5, iPhone 5C or iPhone 5S. The CA was directed to proceed diligently and expeditiously with its enquires into the Appellant’s complaints under section 7K(1) of the Telecommunications Ordinance (Cap. 106) and to arrive at a decision, including a decision regarding whether or not to make any interim or final direction under section 36B of the Telecommunications Ordinance (Cap. 106) by 1 July 2014.

Appeal No. 31

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

HONG KONG TELECOMMUNICATIONS (HKT) LTD

—Appellant—

AND

THE COMMUNICATIONS AUTHROITY

—Respondent—

DECISION ON JURISDICTION

Neil Kaplan CBE QC SBS
(Chairman)

4th June 2013

A. INTRODUCTION

1 I have before me an interesting and difficult issue relating to the jurisdiction of the Telecommunications Appeal Board. It has been extremely well-presented and argued, for which I am very grateful.

2 The Hong Kong mobile telecommunications market is fiercely competitive and fast moving. The Appellant, Hong Kong Telecommunications (HKT) Ltd ("**HKT**"), is a significant carrier in Hong Kong, being the successor to the former monopolist.

3 On 21 September 2012, Apple launched the iPhone 5 in Hong Kong and in other jurisdictions around the world amidst a wave of considerable marketing and fanfare. At the time of the launch, the Appellant contends that it found that the iPhone 5 handset did not allow PCCW Mobile SIM cards to access the Appellant's 4G network. The SIM cards of other carriers did. This "SIM lock" on iPhones has led to the present Appeal.

4 In a nutshell, the Appellant contends that Apple Asia Limited ("**Apple**") and SmarTone Mobile Communications Limited ("**SmarTone**") introduced into the Hong Kong market the iPhone 5 and iPads, which contained a SIM lock function, the effect of which excluded HKT's 4G LTE network.

5 At the hearing of this jurisdictional issue held at the Hong Kong International Arbitration Centre on 26 April 2013, HKT was represented by Benjamin Yu SC and Roger Beresford, instructed by Clifford Chance. The Communications Authority ("**CA**") was represented by Mr Abraham Chan, instructed by Bird & Bird.

6 Prior to the hearing, written submissions were filed by the Appellant and Respondent, respectively, on 27 March 2013 and 17 April 2013. The Appellant submitted its reply on 23 April 2013.

7 Subsequent to the hearing and pursuant to a request by the Board, each Party simultaneously filed on 16 May 2013 written submissions as to the difference, if any, as between the meaning of "opinion" and "decision", which are terms employed in Section 32N of the Telecommunications Ordinance ("**TO**"). The replies to these submissions were filed by each Party on 23 May 2013. All of these submissions have been taken into account by the Board.

8 Further, on 30 April and 13 May 2013, the Respondent and the Appellant, respectively, wrote to the Board addressing issues as to the setting of the hearing date of the merits in this case.

B. BACKGROUND TO THE COMPLAINT

9 On 28 September 2012, HKT lodged a complaint with the Office of the Communication Authority ("**OFCA**") requesting that the CA issue a written direction to Apple and SmarTone requiring them jointly and severally to take such action as the CA considers necessary to comply with the TO.

10 More specifically, HKT sought an order requiring both Apple and SmarTone to refrain from making the provision of iPhone 5 conditional upon the iPhone 5 purchaser also acquiring any telecommunications service, either from SmarTone or another person. The 28 September 2012 letter stated that the conduct at issue was the introduction of iPhone 5 handsets into the market by Apple and SmarTone, which contained a SIM

lock function in contravention of the CA's 1997 SIM Lock Statement and the Competition Provisions of the TO, in particular section 7K. This letter called for an immediate direction under section 36B of the TO to ensure customer choice and level playing field in the mobile market.

11 The SIM Lock statement referred to in the 28 September 2012 letter was a statement issued by the Authority on 20 February 1997 following industry consultations. In this statement, the Authority stated that

> *"[i]f SIM-lock is solely used for the purpose of tying customers to networks other than for the purposes stated in (a) and (b) [e.g. for deterring theft and fraud], it may adversely affect competition in the mobile industry. Therefore this practice is forbidden"*.

12 HKT complains that Apple, in its iPhone 5 operating system and SIM function arrangements, locked customers to 4G networks selectively chosen by Apple. It further submits that other 4G networks that are not selected by Apple, in particular, HKT's 4G network, are unavailable to iPhone 5 owners unless and until Apple decides otherwise.

13 Following the complaint letter, numerous exchanges took place between HKT and OFCA, which are detailed below.

C. THE LAW

14 The law governing this Appeal is the TO, the relevant provisions of which are set out below.

15 Section 6D(1) of the TO provides that the Authority may, *"for the purpose of providing practical guidance in respect of any provisions of this Ordinance, issue such guidelines as in his opinion are suitable for that purpose"*.

16 Section 7K of the TO provides where relevant as follows:

> *"(1) A licensee 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 telecommunication market.*
>
> *(2) The Authority in considering whether conduct has the purpose or effect prescribed under subsection (1) is to have regard to relevant matters including, but not limited to –*
>
> *…*
>
> *(b) an action preventing or restricting the supply of goods or services to competitors;*
>
> *….*
>
> *(3) Without limiting the general nature of subsection (1), a licensee engages in conduct prescribed under that subsection if he –*
>
> *…*
>
> *(b) without the prior written authorization of the Authority, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specific telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person;*
>
> *(c) gives an undue preference to, or receives an unfair advantage from, an associated person if, in the opinion of the Authority, a competitor could be placed at a significant disadvantage, or competition would be prevented or substantially restricted."*

17 Section 32N of the TO provides as follows:

> *"(1) Any person aggrieved by –*
>
> *(a) an opinion, determination, direction or decision of the Authority relating to –*

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

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

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

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

18 Section 36B(1) of the TO provides that:

"Subject to subsection (2), the Authority may issue directions in writing –

(a) to a licensee requiring it to take such action as the Authority considers necessary in order for the licensee to –

(i) comply with any of the terms or conditions of its licence; or

(ii) comply with any provision of this Ordinance or any regulation made thereunder;

…"

D. THE FACTS

19 The facts as set out below are largely based on correspondence. As will be apparent from the Board's decision below, extensive quotation from the correspondence on record is necessary in this case. I make no apology for quoting at length because in order to consider whether a "decision" or "opinion" has been made, it is necessary to look at the Appellant's request and the subsequent exchanges between the Parties.

20 The iPhone 5 supports 4G wireless broadband technology, in particular Long Term Evolution ("***LTE***") services that utilize the 1800MHz

frequency band. This is in addition to supporting 2G and 3G wireless technologies. All five mobile operators in Hong Kong now operate 1800MHz LTE networks.

21 Owners of iPhones require a SIM card to connect them to a mobile network. "SIM" stands for Subscriber Identity Module. A SIM card contains subscriber specific information and identifies the subscriber to the mobile network for tariff and billing purposes.

22 A convenient starting point for setting out the correspondence in this case is 21 September 2012. On that day Apple launched the iPhone 5 in Hong Kong. In a letter of the same date, Clifford Chance wrote to Apple Asia Ltd noting that,

> *"Our client has tried a PCCW Mobile (hereinafter referred to as 'PCCW') SIM-card in an iPhone 5 purchased today, but it does not work. We trust that this is not because the 4G/LTE capability on the iPhone 5 is restricted in Hong Kong for PCCW SIM-card holders because the iPhone 5 has been set-up so it can only recognise the 1800MHz network of certain carriers. You will appreciate that the PCCW network is also operating a 4G/LTE network in 1800MHz.*
>
> *If, on the other hand, there is a deliberate lack of functionality such that 4G/LTE capability on the iPhone 5 is not available in Hong Kong for PCCW SIM-card holders, we observe that this is contrary to law. Specifically:*
>
> *The TA's Statement of 20 February 1997 forbids SIM-locking for the purposes of tying to an operator's network; and*
>
> *The competition provisions in the Telecommunications Ordinance prohibit both:*
>
> *Tying / bundling without authority from the telecommunications regulator; and*

Conduct that prevents or substantially restricts competition in a relevant telecommunications market in Hong Kong (see ss.7K and/or 7L of the Telecommunications Ordinance).”

23 The letter then requests Apple to respond to a number of questions. For example, it asks whether there have been any agreements, arrangements or understandings between Apple and SmarTone pursuant to which the iPhone 5 recognises SmarTone’s networks and seeks to know when the iPhone 5 will be set-up so that PCCW SIM-cards will receive the benefit of 4G/LTE capability. The letter also asks Apple to explain why the iPhone 5 presently recognises only SmarTone’s 1800MHz network.

24 On the same day, a similar letter was written by Clifford Chance to SmarTone.

25 One week later, on 28 September 2012, the Head of Group Regulatory Affairs of PCCW wrote a nine page letter to the Director-General of Communications (“**DG Com**”) of OFCA requesting

“the Authority to issue a direction in writing to Apple Asia Limited (‘Apple’) and to SmarTone Mobile Communications Limited (‘ST’) requiring them jointly and severally to take such action as the Authority considers necessary in order for Apple and ST to comply with the provisions of the Telecommunications Ordinance (Cap 106).

In particular, we request that the Authority require each of Apple and ST to refrain from making the provision of the iPhone 5 conditional upon:

the person acquiring the iPhone 5 also acquiring any telecommunications service, either from ST or another person; and/or

the person acquiring the iPhone 5 not acquiring any telecommunications service from any other licensee.

Apple holds a Radio Dealers License (Unrestricted) and therefore comes directly within the jurisdiction of OFCA. ST holds a Unified

Carrier License ('UCL') and therefore comes directly within the jurisdiction of OFCA. HKT holds a Radio Dealers License (Unrestricted) and a UCL Licence, and is a competitor of both Apple and ST.

The conduct which requires an immediate direction under Section 36B is the introduction of iPhone 5 handsets into the market by Apple and ST which contain a SIM lock function in contravention of the TA's 1997 SIM Lock Statement and the competition provisions of the Telecommunications Ordinance (e.g. Section 7K). An immediate direction is required to ensure consumer choice and a level playing field in the mobile market. HKT anticipates that it is not alone in having concerns about this anticompetitive conduct by Apple and ST. Other carriers such as China Mobile are also adversely affected.

… HKT respectfully requests that the Authority acts with urgency in performing its statutory duty in order to minimize consumer harm, the infringement of HKT's (and other operators') rights and causing HKT to suffer further financial loss.

The matter is briefly described below. The attachments in the accompanying Annex (various correspondence, news clips etc) provide further information. HKT would note that it has written to both Apple and ST on this matter but has not received a reply. Due to the nature of the conduct, and harm to both users and the competitive process, time is of the essence."

26 A description is thereafter provided concerning the sophistication of the Hong Kong telecoms market, which was liberalised to provide a level playing field in the telecommunications market, which was intended to ensure that consumers were offered the best service in terms of capacity, quality and price. The letter proceeds to explain that the liberalisation effort was designed to encourage competing operators to build their own fixed and mobile networks and infrastructure and to compete among themselves. It continues:

"Along-side encouraging the development of competing infrastructure, the TA has sought to ensure the operators do not create artificial barriers to customers switching between the networks of the competing operators. The obvious reason for this is that, if customers are artificially locked into one network and cannot easily change to a

competing network, competition between the networks to provide the best service and other terms to their customers is dampened (i.e. restricted or reduced). This is reflected in the TA's approach to, for example, number porting and, of direct relevance to the direction sought here, SIM locking to prevent switching.

On 20 September 1996 the TA released a Consultation Paper on whether handsets which incorporated a "SIM lock function" could be allowed for use in Hong Kong. The TA was concerned that the SIM lock could 'adversely affect free competition in the market of GSM/DCS services in Hong Kong.'

In describing the SIM lock function, the TA noted that it can electronically lock a particular handset or certain types of handsets into a network with the result that a customer will have less choice and that open competition would be adversely affected…

….

The TA's Statement titled 'Way Forward of SIM Lock' and released 20 February 1997 adopts the 1996 approach and expressly prohibits SIM locking. This Statement recognizes that locking customers to networks adversely affects both customer choice and competition in the mobile market. This Statement had the broad support of licensees and consumers.

…

Contrary to the TA's SIM Lock Statement, Apple in its iPhone 5 operating system and SIM function arrangements lock (i.e. tie and hard bundle) customers to 4G networks selected by Apple. Other 4G networks that are not selected by Apple, such as the HKT 4G network, are immediately and permanently (until Apple decides otherwise) unavailable to owners of the iPhone 5. While the iPhone 5 can be used by consumers to access HKT's 2G and 3G networks, it cannot be used by consumers to access HKT's 4G LTE 1800 MHz network. This situation is not temporary; nor can a consumer easily remove the locking function. Further, Apple has not discussed the release of its iPhone 5 with HKT or in any way indicated that the iPhone 5 may be easily unlocked for or by consumers who desire to use an iPhone 5 with HKT's 4G LTE 1800 MHz network.

Networks that have signed an iPhone contract are only one channel into the market. Consumers can buy from Apple itself (either at their shops, or on-line); from major authorised dealers (e.g. Broadway, Suning); parallel importers from overseas; people may buy an iPhone

themselves from an overseas outlet when they travel or receive one as a gift. The basic principle in Hong Kong has been that no matter how the consumer acquires a mobile phone (iPhone or otherwise) the consumer has had the right to connect to any network of his choice where such network is technically capable of providing a licensed service. The iPhone 5 breaches that fundamental right (to the detriment of the consumers, to the benefit of Apple and its designated networks).

In previous iPhone releases, a customer could obtain an iPhone, take it to any mobile network operator ('MNO') in Hong Kong and obtain service (e.g. 3G service on the iPhone 4 or 4S) from that MNO via that MNO's SIM card. The iPhone 5 has had this universal connectivity characteristic disabled by Apple. As of today, the iPhone 5 is SIM locked to only work with ST's 4G LTE 1800MlIz network. It will not work with any other 4G LTE 1800 MHz network. Such SIM locking arrangements are unlawful.

Apple and ST should immediately be directed under Section 36B not to make any iPhone 5 handsets available in the Hong Kong market until they comply the TA's SIM Lock Statement.

HKT particularly notes that ST has sent an SMS message to its subscribers (and perhaps others) with the unambiguous message that 4G can be enjoyed ONLY on its network: 'Enjoy 4G on iPhone 5, ONLY at SmarTone. Register your interest on the waiting list now! For a quicker invitation get an Express Pass…'."

27 The letter then describes the visit by one of its employees to CSL and Hutchison stores. Apparently, this employee was informed at those two stores that iPhone 5 was expected to support CSL and Hutchison's 1800 MHz LTE networks in a relatively short period of time. The same employee, the letter says, visited the IFC Apple store and asked why the 4G/LTE was not enabled for the PCCW SIM. An Apple store employee allegedly responded that the iPhone 5 supports only the SmarTone 4G/LTE network in Hong Kong "*at the moment*". The letter adds that these experiences have been repeated by other HKT employees and consumers.

28 Further, the letter notes that China Mobile customers are similarly locked out from accessing the 4G/LTE network on an iPhone 5 handset and that,

> *"It would appear that the device has been locked to prevent it from operating on PCCW Mobile's 4G/LTE network (and indeed China Mobile's 4G/LTE network) with the sole purpose of artificially tying customers to STs network, the very thing which the Authority has been at pains through the years to prevent in Hong Kong because of its anticompetitive effect and the negative impact it has on consumers. Necessarily, if customers are not able choose their network or to switch readily between different networks with the iPhone 5, and particularly in view of its enormous popularity, this will raise artificial barriers to switching, reduce effective competition, deprive consumers of choice and undermine benefits in the community generally."*

29 HKT's legal position under the TO is thereafter set out, notably:

> *"each of Sections 7K(1), 7K(2)(b), 7K(3)(b) and 7K(3)(c) [of the TO] have been breached. This is not a matter where relief can be delayed. The harm to the competitive process, consumers and competitors is both immediate and substantial. An immediate direction under 36B is the appropriate relief.*
>
> …
>
> *… Apple and ST, by tying and hard bundling the availability of the iPhone 5 via a SIM lock function scheme, have violated the long standing TA SIM Lock Statement and Section 7K (including 7K(1), 7K(2)(b), 7K(3)(b) and 7K(3)(c), and perhaps Section 7L).*
>
> *Without the immediate issuance of an OFCA direction the public interest will be adversely affected as allowing the SIM-lock of iPhone 5 sets an unhealthy precedent in the market. …*
>
> *Since the market is likely to be flooded with iPhone 5 handsets over the next few months (as per past experience on previous iPhone models) this is not a trivial matter. The precedent is unhealthy; the number of consumers that will be adversely affected is potentially huge. Accordingly, it is imperative that the Authority takes action immediately to limit the number of consumers that will be affected.*
>
> *Immediate action is also needed by the Authority to limit the harm to HKT (and China Mobile). HKT anticipates that, should the device lock remains* [sic] *in place, it will suffer significant harm from this anti-*

competitive conduct. It is presently difficult to quantify this damage precisely. However, the damage to HKT and other carriers that are denied because of Apple's SIM-lock (both to brand and reputation as well as to commercial interests), will be significant. The action in damages that HKT intends to bring against Apple and ST is not only anticipated to be substantial in nature, it is anticipated to increase significantly with the passage of time."

30 The letter concludes in the following terms:

"Traditionally, Hong Kong has not allowed one operator/handset vendor to tie popular mobile telecommunications devices such as the iPhone to one network to compel consumers who want to use the phone to take up a subscription on that network. Instead, customers have been free to purchase iPhones (and other handsets) separately from the mobile network services. A key reason for this (per the TA Statement we refer to above) is that it promotes better competition between the mobile operators and allowed customer choice both as to handsets and the operator they prefer to contract with, by not artificially increasing barriers to switching.

This matter is clear. Consumer choice has been restricted. This competitive process is under attack. An important pro-competitive TA Statement has been clearly breached. The competition provisions of the TO have also been breached. Time is of the essence. An OFCA direction under Section 36B is required to protect consumer interest and to minimise the damage being cause not only to operators such as HKT, but to the vibrancy and effectiveness of Hong Kong's telecommunications markets. To fail to do so will undermine the importance and legal force of the Telecommunications Ordinance.

Please do not hesitate to contact us should further information be considered necessary.

HKT looks forward to OFCA's prompt action on this matter."

31 On 19 October 2012, HKT Head of Group Regulatory Affairs wrote a six-page letter to the DG Com of OFCA, referring to the 28 September 2012 letter and also a meeting that took place between representatives of HKT and OFCA on 4 October 2012. The letter stated in part:

"It was agreed at the meeting that OFCA would talk to Apple to confirm if/when the SIM lock would be removed. I would be grateful if

you could let me have any update on that front as to the conversation and its results as soon as possible, including the timeframe for Apple's compliance with the TA's 1997 SIM-Lock Statement.

This matter has now become even more urgent as we have begun to make available our 4G LT service at 1800MHz in the MTR … Apple must be required to now give an irrevocable undertaking to open its handsets immediately.

…

… If Apple will not agree voluntarily to remove the SIM lock and stop its hard bundling to selected operators, then we ask that OFCA urgently act and issue an interim direction under Section 36B of the Telecommunications Ordinance ("TO") to Apple and SmarTone as necessary to stop these clear and flagrant breaches of the Statement and the Competition Provisions. There is no doubt that the interests of justice require an interim direction to uphold the prohibition on SIM locking and to prevent irreparable harm to consumers, the competitive process and HKT."

32 A detailed discussion is then set out concerning points raised at the 4 October 2012 meeting, for example, why Apple is not exempt from compliance with Hong Kong's Competition Provisions; how the 1997 SIM Lock Statement applies to Apple's impugned conduct; and the irrelevance of causation as a factor determining whether SmarTone breached any Competition Provisions. That letter concludes:

"OFCA has clear jurisdiction over this issue and the two involved licensees, and should act without delay. The competitive process is under threat. Thousands of consumers are now actively buying iPhone 5 handsets and seeking to use them in the Hong Kong market. Apple has clearly configured the device to lock out certain operators' 4G/LTE networks. There are strong arguments this conduct is in breach of both the long-standing Statement and the Competition Provisions.

This conduct jeopardises not only consumer interests but the very core of the principles upon which effective facilities-based competition has been developed in Hong Kong's liberalised telecommunications markets. The harm to consumers, and to operators such as HKT, will grow exponentially if this conduct is allowed to continue, and there

can be no argument of irreparable harm to Apple if it is required to let consumers access the networks of operators they are presently contracted to or to choose their own operator going forward.

HKT respectfully submits that the only way forward, if Apple refuses or ignores OFCA's request to take urgent steps to unlock the phone, is an urgent interim order under s36B, followed by an expedited investigation."

33 In letters dated 26 October 2012, Clifford Chance wrote separately to SmarTone and to Apple stating that HKT was surprised at the lack of response by those two companies to the Clifford Chance letters of 21 September 2012, and again invited them to respond to the issues raised in those letters.

34 On 31 October 2012, the Head Legal Counsel of SmarTone responded to Clifford Chance stating that, *"we are not obliged at all to respond to the questions raised in your letter of 21 September 2012… For the record, we deny that any of our arrangements are in contravention of the 20 February 1997 TA Statement or ss.7K and/or 7L or the Telecommunications Ordinance"*.

35 On 1 November 2012, Morrison and Foerster, lawyers for Apple Inc, wrote to Clifford Chance stating that its client denied that it was in breach of any aspect of the TO.

36 On 2 November 2012, the Head of Group Regulatory Affairs of HKT wrote to the DG Com of OFCA, asserting that the short responses from SmarTone's and Apple's legal counsel, made it clear that neither company was prepared to provide a substantive response or engage in dialogue with HKT in relation to the matters raised. Again, HKT asserted that urgent steps were needed to protect consumers and the competitive process, which

steps included the issuance of an interim direction under Section 36B of the TO requiring the SIM lock function to be removed, in the event that Apple refused or ignored OFCA's request to take urgent steps to unlock the phone. The letter also requested information as to the results of OFCA's communications with Apple.

37 On 5 November 2012, the Head of Group of Regulatory Affairs of HKT sent an email to OFCA representatives attaching a Law Review article on the tying of Apple iPhones with mobile contracts. The email stated that the article concluded that such tying arrangements were unlawful.

38 On 6 November 2012, the DG Com of OFCA responded to the 2 November 2012 letter by HKT's Head of Group Regulatory Affairs. The letter let it be known that, *"we are processing HKT Ltd's request and will revert to you when we are in a position to do so"*.

39 On 9 November 2012, HKT's Head of Group Regulatory Affairs wrote a six-page letter to the DG Com of OFCA. The letter requested:

> *"that the Authority issue a direction in writing to Apple Asia Ltd ("Apple"), SmarTone Mobile Communications Ltd ("ST") and Hutchison Telephone Company Ltd ("Hutchison") requiring them jointly and severally to make such action as the Authority considers necessary in order for Apple, ST and Hutchison to comply with the provisions of the Telecommunications Ordinance (Cap 106).*
>
> *In particular, we request that the Authority require each of Apple, ST and Hutchison to refrain from making the provision of the iPad (4th generation) and the new iPad Mini (both referred to herein as the "iPad") conditional upon:*
>
> *The person requiring the iPad also acquiring any telecommunications service, either from ST, Hutchison or another person; and /or*
>
> *The person requiring the iPad not acquiring any telecommunications service from any other licensee.*

Apple holds a Radio Dealer's License (Unrestricted) and therefore comes directly within the jurisdiction of OFCA. ST and Hutchison each holds a Unified Carrier License ("UCL") and therefore comes directly within the jurisdiction of OFCA. HKT holds a UCL License and is a competitor of ST and Hutchison.

The conduct which requires an immediate direction under Section 36B is the anticipated introduction of iPad handsets in the near future into the Hong Kong market by Apple, ST and Hutchison which contain a SIM lock function, in contravention of the TA's 1997 SIM Lock Statement and the competition provisions of the Telecommunications Ordinance (e.g. Section 7K). An immediate direction is required to ensure consumer choice and a level playing field in the mobile market. HKT anticipates that it is not alone in having concerns about this anti-competitive conduct by Apple, ST and Hutchison. Other carriers, such as CSL, China Mobile and MVNOs will also be adversely affected."

40 The letter proceeds to repeat much of the information contained in the HKT 28 September 2012 letter, and observes that:

"Hong Kong has not allowed one operator/handset vendor to tie mobile telecommunication devices such as the iPad to one network to compel consumers who want to use the phone to take up a subscription on that network. Instead, customers have been free to purchase devices separately from the mobile network services. A key reason for this (per the SIM Lock Statement we refer to above) is that it promotes better competition between the mobile operators and allows customers choice both as to handsets and the operator they prefer to contract with, but not artificially increasing barriers to switching.

Apple, ST and Hutchison are tying and hard bundling the availability of the iPad via a SIM-lock function scheme, have violated the long standing TA SIM Lock Statement and Section 7K (including 7K(1), 7K(2)(b) and 7K(3)(b) and perhaps Section 7L).

41 On 13 November 2012, the Head of the Group Regulatory Affairs of HKT wrote an email to the Deputy Director-General (Telecommunications) ("DD(T)") of OFCA asking whether Apple ever got back to him in relation to iPhone 5 access.

42 On the same day, the DD(T) replied by email that OFCA had received Apple's reply the previous week. This email further stated that Apple confirmed that the lock was implemented by them and that Apple had *"nothing to do with the MNO.* [OFCA] *will seek the view of the CA on the way-forward soon. Do you wish to modify your position or update your complaint in the light of the market development over the last few days?"*

43 On the same day, the Head of Group Regulatory Affairs of HKT replied by email to the DD(T) stating that in the view of the most recent developments, HKT would extend the complaint to cover CSL and Hutchison.

44 On 12 December 2012, a Telecommunications Regulatory Affairs Advisory Committee ("***TRAAC***") meeting was held. Draft minutes of that meeting indicates that OFCA gave a presentation on *"Restriction of Certain Mobile Terminals in respect of LTE Networks"*. At the end of the presentation (which appears to have consisted of an 11-page PowerPoint presentation – core bundle tab 19-15) the chairman invited Members of the Committee to give their views and comments on, *inter alia*, Apple's restriction on iPhone 5 and iPad working on certain mobile operators' LTE networks only and the role or action of the industry or government that should be taken in respect of such practice. A number of comments were made from different Members of the Committee, including from Mr Peter Lam, HKT's the Managing Director of Engineering. The minutes record the Chairman's closing remarks on this topic as follows:

> *"OFCA had not arrived at any view and would be open-minded on the way-forward of the subject matter. OFCA would approach individual operators after the meeting for further discussion. As regards the*

testing criteria, OFCA was now awaiting Apple's feedback on the concerned information."

45 After the meeting, OFCA received on 14 December 2012, a letter from Mr Lam summarising the views that he had expressed at the Committee Meeting.

46 Also on 14 December 2012, the Group Managing Director of HKT (Alex Arena) wrote to the Chairman of the CA. The letter summarised the complaint made in the 28 September 2012 letter written by HKT and added, *"This matter is of utmost important to consumers and the competitive process. I urge the CA to look into this matter expeditiously"*.

47 On 19 December 2012, China Mobile Hong Kong Company Limited wrote a letter to the OFCA, in which it provided comments on the 12 December 2012 OFCA presentation on the restriction of certain mobile terminals in respect of LTE networks. The letter signed by China Mobile's Director and Chief Executive Officer stated:

"On the issue of iPhone and iPad being restricted to work on certain mobile operators' LTE networks only, we write to express our views as follows:

Our understanding is that by deploying SIM lock, Apple has restricted the owners of the handsets of which network they may choose. If that is the case, there may be issues under the OFCA's Statement entitled 'Way Forward of "SIM Lock"' ('the Statement').

Specifically, we take note that under paragraph (c) of the Statement, 'if "SIM Lock" is solely used for the purpose of tying customers to networks other than for the purposes stated in (a) and (b), it may adversely affect competition in the mobile industry.'

The above SIM lock practice will also have implications under s7K of the Telecommunications Ordinance. Under s7K(3)(b), a licensee will be considered as engaging in anti-competitive practices if the licensee '... makes the provision of ... customer equipment or service

conditional upon the person acquiring or not acquiring a specified ... customer equipment or service, either from the licensee of [sic] *from another person.'*

In this case, the provision of iPhone 5 (customer equipment) by Apple is conditional upon that customer's acquiring service from a specified network service provider (which has distribution agreement with Apple). Such practices seem to have breached the aforesaid s7K(3)(b). Such anti-competitive affects can potentially have material implications on market monopolisation considering that Apple is one of the major leading handset vendors.

Besides, as a top tier global handset manufacturer, the action of publishing operator's name that can support LTE networks may mislead consumers into believing that only those named operators will have better network quality.

We are also concerned that a customer's option to choose its preferred telecom service networks has been severely fettered, [sic] *if not deprived of, under such SIM lock arrangements. It is not fair for customers that have already paid for the device, that have no freedom on operators selection; especially those customers who purchased devices in the open market (i.e. not from operators).*

Last, we are concerned that such practice will set a bad precedent for the industry and such adverse impact will further replicate itself if other vendors follow suit and copy this arrangement. This is definitely detrimental to the healthy development of the telecom market as a whole.

We would urge OFCA to look into the above practices as soon as possible and see if there are any breaches of the Ordinance and the Statement."

48 On 19 December 2012, the DG Com of OFCA responded to the Group Managing Director of HKT. The letter noted the HKT letter of 14 December and added that,

"I trust that you are aware that the matter has been discussed at length in the Telecommunications Regulatory Affairs Advisory Committee held on 12 December 2012. We would like to assure you that the complaint filed by HKT Limited with the CA is being processed by the Office of the Communications Authority ('OFCA') expeditiously in accordance with the established procedures".

49 On 20 December 2012, the HKT's Head of Group Regulatory Affairs wrote to the DG Com of OFCA noting HKT's prior letters requesting urgent action against Apple and three mobile operators. The letter also requested an urgent update on the results of discussions with Apple and further asked whether persistent refusal by Apple to remove immediately the SIM lock would lead to OFCA issuing an urgent interim direction. Additionally, the letter noted that there had recently been media commentary on the subject (in the Apple Daily and the Sharp Daily) and statements made by Legislator Charles Mok.

50 On 2 January 2013, the Head of Group Regulatory Affairs of HKT wrote to the DD(T) of OFCA, noting that HKT was not aware that the TRAAC discussed the complaint at its meeting on 12 December 2012. It added that since its last letters, it became aware that China Mobile had raised similar concerns and that the matter had been raised globally in press reports. The letter concluded by stating that, *"We firmly remain of the view that Apple's SIM locking practice breaches both the CA's 1997 SIM Lock Statement and the express language of Section 7K of the Telecommunications Ordinance, and as such requires the CA's immediate action to protect both consumer choice and the competitive process"*.

51 On 16 January 2013, Clifford Chance wrote to the DG Com of OFCA

> *"to highlight the lack of progress made on our urgent request for OFCA's assistance in removing the SIM-locking of the Apple iPhone 5 which was made* ***over 3 and a half months ago*** *and our client's request for an immediate direction under Section 36B of the TO.*
>
> *HKT's Complaints are based on well-established OFCA policies. As such, OFCA is not being asked to break new ground or to make new policy. First, the 1997 SIM Lock Statement prohibits SIM locking. This bar on SIM locking exists in order to promote consumer choice and*

competition. HKT is requiring that OFCA enforce this well-established policy without further delay. Second, OFCA and not any vendor, has the statutory responsibility for Type Approvals, a responsibility that cannot be usurped by Apple Inc. or its subsidiaries. Handsets that are SIM locked fail to meet the established Type Approval requirements and should not be imported or sold in the Hong Kong market. The Complaints raised clear and flagrant breaches of those policies.

The Section 7K limb of HKT's Complaints is also clear. The TO prohibits licensees from engaging in conduct which prevents or substantially restricts competition. Section 7K(3)(b) explicitly prohibits the hard bundling of customer equipment and services. HKT is requesting that OFCA enforce the plain language of Section 7K(3)(b).

HKT is further requesting that established pro-consumer and pro-competitive policies be enforced. OFCA has the duty to enforce the law and standing policy without delay. There is no suggestion these policies and prohibitions need revisiting. They have been in place for many years and have general industry support. However, if OFCA believes at any stage that they need to be reviewed, then it or the Government may separately and subsequently create a consultation process for the public to consider such a possible change. But that is a different matter and until then the law and policy that OFCA must enforce is clear.

...

We appreciate that a final decision on breach may need to await completion of a full investigation. However, there is a very strong case for OFCA justifying the immediate issuance of an interim direction under section 36B of the TO: a competitive process is clearly under threat, the SIM-locking that is being engaged in is causing significant harm to the market and to consumers and no substantive argument has been advanced (to our knowledge) by either Apple or its distributors (i.e., CSL, Hutchison and ST) as to why they should be allowed to continue to engage in this conduct.

...

We ask that OFCA confirm by 5:00 pm on 28 January 2013 whether and, if so how, the Authority proposes to address our client's request for an urgent interim direction under 36B of the TO.

...

In the absence of confirmation from the Authority that it will be taking immediate action on our client's request for an interim direction, our client will be pursuing its available legal remedies against the Authority. We hope, and trust, that it will not be necessary to adopt this course."

52 On 28 January 2013, the OFCA issued a "*Consumer Alert on the Purchase of 4G Mobile Devices*". In this alert, OFCA alerted:

"Consumers should however take note that while the 4G devices generally support the third generation (3G) services provided by all the local 3G networks, some of them do not in fact support all the local 4G networks.

...

In order to fully enjoy the user experience of 4G services, OFCA would advise consumers to pay particular attention to the following matters when choosing 4G devices, or mobile operators for subscription to 4G services –

Make detailed enquiry with the device vendor as to which 4G networks in Hong Kong are supported by their 4G device before making any purchase decision.

...

On the whole, consumers should make detailed and careful enquiries about the 4G device, its functions and the 4G networks they support before making the purchase decision."

53 On that same day, OFCA's DG Com issued a circular letter to mobile network operators and mobile virtual network operators. It drew attention to the recipients of that letter to the consumer alert that it had issued on that day. It stated in part:

*"**This circular letter draws attention of the mobile network operators ('MNOs') and mobile virtual network operators ('MVNOs') to the Consumer Alert and the implications on them in the context of telecommunications licensees' obligation under section 7M of the Telecommunications Ordinance** ... Under section 7M, MNOs and MVNOs should ensure that in the course of promoting, marketing, or*

advertising, 4G mobile devices and/or 4G services, they do not engage in conduct which, in the opinion of the Communications Authority, is misleading or deceptive in relation to the compatibility of 4G mobile devices with local 4G networks.

In this connection, MNOs and MVNOs should ensure that all their relevant staff, in particular the marketing staff and frontline staff (including sales and hotline staff) are well apprised of the matters requiring attention as highlighted in the Consumer Alert. Proper training and supervision should be in place to enable their relevant staff to provide accurate information to consumers in relation to the compatibility of 4G mobile devices with local 4G networks. MNOs and MVNOs should also review their promotional, marketing and advertising materials in relation to 4G mobile devices and/or 4G services to ensure that materials do not contain any misleading or deceptive information in relation to the compatibility of 4G mobile devices with the local 4G networks."

54 On 28 January 2013, OFCA's DG Com also wrote to HKT, referring to letters received from HKT dated 28 September 2012, 19 October 2012, 9 November 2012, 14 December 2012, HKT's email dated 13 November 2012, and the letter from Clifford Chance dated 16 January 2013 in which alleged anti-competitive conduct on the part of Apple, SmarTone, CSL and/or Hutchison breached section 7K and other Competition Provisions of the TO. The letter outlines HKT's complaint, namely that the conduct of Apple, SmarTone, CSL and/or Hutchison of "locking" iPads and iPhones to selected LTE 1800MHz networks is anti-competitive conduct in breach of section 7K and "perhaps" section 7L of the TO. The letter also notes that HKT's request for the issuance of an immediate direction under section 36B of the TO. It proceeds as follows:

"In accordance with the 'A Guide on How Complaints Relating to Anti-Competitive Practices, Abuse of Dominant Position and Discrimination Practices Prohibited under Section 7K, 7L and 7N of the Telecommunications Ordinance are Handled by the Office of the Communications Authority*' issued on 1 April 2012 (the 'Guide'), we have processed HKT's above complaint and considered whether the matter may be dealt with under the competition provisions of the TO*

and whether the complaint submission contains the requisite information for us to proceed further. We have reviewed HKT's submission in support of its Competition Complaint set out in those correspondence of HKT or on HKT's behalf which are recited in the first paragraph of this letter, and consider that the information provided by HKT is inadequate to enable us to assess whether the complaint raises a genuine competition issue within the scope of the competition provisions of the TO such that the Office of the Communications Authority ('OFCA') may consider it justified to conduct an initial enquiry of the matter, let alone to enable the CA to consider any reasonable ground for suspecting a breach and any justification of enforcement action such as by way of issuing an immediate direction under section 36B of the TO that you have proposed. In this connection, you may refer to the Guide for preparing a more detailed and well-reason to complaint submission to substantiate your claims. Paragraph 7 of the Guide states that,

> 'To facilitate processing of the complaint, we therefore expect a complainant, especially where the complainant is an experienced and well-resourced industry participant, to make **a sufficiently detailed and well-reasoned to complaint submission with arguments and evidence clearly presented. The conduct complained of and the particular Competition Provision(s) which the complainant considers has been breached must be specified, with factual and economic evidence** in support of why it considers the relevant Competition Provision(s) has been breached. A general allegation that conduct is anti-competitive is most unlikely to be considered adequate'."

55 Thereafter, the letter requests HKT to provide the following information in support of its complaint and in accordance with the Information Checklist, as set out in Appendix B of the Guide:

(a) On the conduct being complained of – whether HKT has ever been in contact or negotiation with Apple or its associates with regard to iPhones' and/or iPads' connectivity to the mobile network of HKT.

(b) On the relevant market – any definition of the relevant market(s) proposed by HKT, with supporting relevant data, information and analysis.

(c) On the competitive conditions – any description of the competitive conditions of the relevant market(s), with supporting relevant data, information and analysis. On this point HKT is advised to "

> *define the relevant market, describe the key market participants, qualify itself as a competitor in the relevant market if necessary ... and demonstrate how its estimation of the size of the relevant market(s), market share, turnovers is arrived at."*

(d) On the competitive impact – HKT is advised that it has not articulated in any of its correspondence exactly how the conduct being complained of could harm the competitive process in the relevant market(s) with evidence. On this point, the letter notes that,

> *"it was stated in Clifford Chance's letter of 16 January 2013 that HKT was estimated to have lost 'thousands of new customers and thousands of renewal customers', 'hundreds of millions of dollars' etc (page 5). However, no evidence was provided in support of how such loss was arrived at. In addition, there was no elaboration on how loss of HKT was relevant to HKT's complaint that the relevant market(s) has been subject to sustained competitive harm. In this connection, would HKT please provide us with a more concrete theory of harm as to how the conduct being complained of could harm competition in the relevant market(s) together with supporting evidence, data, analysis and other relevant information?"*

56 The letter also requests that HKT's submission should be certified as having been made with due care to ensure the information contained therein is true, correct and complete to the best of its knowledge and belief. Finally, HKT is requested to file its *"full complaint submission"* by 25 February 2013.

57 On 30 January 2013, OFCA's DG Com responded to Clifford Chance's letter dated 16 January 2013 which alleged lack of progress by the OFCA in handling HKT's complaint. The DG Com's letter states:

> *"The account set in your letter clearly demonstrates that your client is well aware that OFCA has been proactively looking into the matter, so it is not as if your client has no idea of the action that OFCA has been taking in response to the Complaint, namely making enquiries with Apple on some preliminary facts, as well as bringing up the subject ... before the* [TRAAC] *for discussion at its meeting on 12 December 2013* [sic]. *Suffice it to say that the Complaint raises complicated issues on which OFCA is obliged to conduct preliminary studies and enquiries to establish the facts and to consider the issues that your client has raised from various regulatory aspects."*

58 The letter then addresses the complaint that Apple has contravened the 1999 SIM Lock Statement and states that

> *"OFCA is in the course of reviewing the applicability of the TA Statement to the current matter. The subject was discussed at the TRAAC meeting on 12 December 2012 in which representatives of your client also participated and were well aware of the diverging issues expressed by different parties present in the meeting. Given the novelty of the issue, OFCA will need to review the matter carefully, and the Communications Authority ('CA') has not formed any views on it".*

59 Concerning the allegation that the conduct of Apple, SmarTone, CSL and Hutchison is in breach of section 7K, the letter elaborates that:

> *"OFCA has been processing your client's Competition Complaint ... To facilitate consideration of whether the matter being complained of is within the scope of the competition provisions of the TO, OFCA has been conducting preliminary enquiries on the issues raised, with a*

view to confirming the identities of the parties involved and the CA's jurisdiction or otherwise over the Competition Complaint.

Further, we have been reviewing the adequacy of the information provided by your client and consider that the 'complaint submission' of your client is inadequate to enable us to assess whether the Competition Complaint raises a genuine competition issue within the scope of the competition provisions of the TO, such that it is considered justifiable for OFCA to conduct an initial enquiry into the matter. Until that is done, and only after the completion of an initial enquiry, if such is justified in accordance with the information that your client is requested to provide (as per our letter to your client dated 28 January 2013), the CA would not be in a position to form a view on the way forward with the Competition Complaint. As such, there is no basis for your client to request for an immediate issue by the CA of a direction under section 36B of the TO at this stage in relation to the Competition Complaint, whether an interim one or otherwise."

60 The letter goes on to describe the OFCA's efforts to alert consumers as to the issues concerning compatibility of iPhone 5 and iPad with 4G networks and refers to the 28 January 2013 consumer alert and the circular letter of the same date to MNOs and MVNOs. The letter concludes:

"Overall, as evidenced from the above, OFCA has been dutifully following up on the issues brought up by your client's Complaint from various regulatory aspects, by taking active steps to handle the Complaint in accordance with the established procedure and practice, seeking views from TRAAC members upon the restrictions imposed on mobile terminals for connection to LTE networks, and taking prompt action in consultation with the Consumer Council to ensure that consumer interests would not be jeopardised. It is puzzling to us why your client should consider that 'there is still no substantive response' *(last paragraph, page 5 of your letter of 16 January 2013 refers) by this office to the issues raised by your client.*

Finally, in relation to your request for copies of our internal documents and correspondence with other parties, you are aware that the documents under request relate to enquiry or investigation of a regulatory nature. It is not the policy of OFCA to disclose to third parties or complainant such information so as to avoid any prejudice or potential prejudice against the enquiry or investigation."

61 On 14 February 2013, HKT filed a Notice of Appeal with the Appeal Board.

62 On 20 February 2013, HKT filed a Notice of Application for Leave to Apply for Judicial Review in the Hong Kong High Court.

E. APPELLANT'S CONTENTIONS

63 The Appellant submitted its complaint to OFCA in a letter dated 28 September 2012. The letter requested an immediate direction under section 36B of the TO requiring Apple and SmarTone to take such action as the CA considered necessary to comply with the TO. The letter is quoted extensively above.

64 The conduct at issue in the complaint concerned the introduction of iPhone 5 handsets into the market by Apple and SmarTone which contained a SIM lock function. HKT's contention is that Apple's iPhone 5 operating system and SIM function arrangements lock customers to 4G networks selected by Apple. As a consequence, 4G networks that Apple did not select, including HKT's network, are said to be unavailable to iPhone 5 owners.

65 The Appellant alleges that this iPhone 5 SIM lock contravenes the CA's 1997 SIM Lock Statement and the Competition Provisions of the TO. More specifically, HKT asserts that Apple and SmarTone are preventing the supply of 4G LTE service at 1800 MHz to customers which breaches section 7K(2)(b) of the TO and which is deemed anti-competitive conduct under section 7(3)(b) and (c) of the TO. The complaint letter states in its final page that "*An OFCA direction under Section 36B is required to protect consumer interest and to minimise the damage being caused not only to operators such as HKT, but to the vibrancy and effectiveness of Hong Kong's telecommunications markets.*"

66 HKT asserts the Authority's decision that it currently appeals was made in OFCA's letter of 28 January 2013, read together with the OFCA's letter of 30 January 2013. These letters are also quoted extensively above. In substance, two decisions are alleged to have been made by the CA: one that declined the issuance of an immediate direction under section 36B; and another that found, on the evidence presented, that HKT had not raised a genuine competition issue.

67 It further asserts that the Authority cannot deny that an appealable decision has been made on the basis of categorizing it as a mere request for further information. This is more so, says HKT, because the matter was subject to four months of consideration and communications.

68 HKT submits the letter of 28 January 2013 has in itself a decisional character, which is manifest when it states:

(a) OFCA has "*processed HKT's … complaint*".

(b) OFCA has "*considered*" whether the matter may be dealt with under the Competition Provisions of the Ordinance and whether the complaint submission contains the requisite information for OFCA to proceed further.

(c) "*We consider that the information provided by HKT is inadequate … to enable* [OFCA] *to assess whether the complaint raises a genuine competition issue … to enable* [OFCA] *to consider any reasonable ground for suspecting a breach …* [to enable OFCA to consider] *any justification for enforcement action such as … an immediate direction under section 36B …*".

69 Accordingly, HKT takes the position that:

> *"OFCA has plainly decided that there was insufficient evidence and/or grounds to conclude, on the material placed before OFCA, that section 7K had been infringed or that a direction should ultimately be issued under section 36B. It was plainly a decision to refuse the issuance of a direction under section 36B."*

70 HKT additionally takes the view that section 7K(3) of the TO and the SIM Lock Statement are clear in prohibiting the SIM locking of Apple devices and that the information necessary to address this issue has been provided and is before the Authority. Moreover, it says that the information that the Authority has requested, while perhaps relevant to determine a breach of section 7K(1) or 7L, is not necessary to assess a breach of section 7K(3) or the SIM Lock Statement. It adds that even if some or all of the requested information is relevant, it was not an appropriate request for information given HKT's request for an urgent interim direction.

71 Another major limb of HKT's argument is that section 7K(3) is a "*per se*" offence. That is to say that section 7K(3) expressly prohibits SIM locking, and determining whether SIM locking is carried on or not is readily apparent without need for detailed analyses. This type of offence is said to contrast with offences that require a "rule of reason" analysis before illegality is established. For such offences, HKT submits that expensive and time-consuming processes are required, for example, to define markets and to assess the state of competition and the impact of that conduct on the relevant market. Such an approach, in the opinion of HKT, is well beyond the analysis required for the *per se* offence set out in section 7K(3).

72 In applying section 7K(3) as a *per se* rule, HKT contends that the singular question is whether a licensee is, without the prior written authorization of

the Authority, making "*the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person*"? If the answer to that question is "yes", then HKT submits that by definition the licensee is engaging in conduct prohibited by section 7K(1).

73 From HKT's standpoint, the *per se* approach to the SIM Lock Statement is equally straightforward. The Statement expressly prohibits SIM locking for the purposes of tying to a particular operator and its enforcement does not require complex economic or competition law analyses.

74 According to HKT, the questions that OFCA needs to ask when called on to enforce the prohibition are straightforward:

(a) Is a SIM lock being implemented?

(b) If so, is it being implemented, in the words of the SIM Lock Statement, "*solely for the purpose of tying customers to networks*"?

75 Based on its *per se* argument, HKT submits that the information OFCA requested in its 28 January 2013 letter was overly broad and not relevant to assessing a potential infringement of the *per se* prohibition in section 7K(3) or the SIM Lock Statement.

76 HKT argues that OFCA cannot assert that because the SIM Lock Statement was made over 16 years ago it should not be enforced or that the applicability of the Statement now requires review in light of the latest technology. HKT relies on the case *ShiuWing Steel Co Ltd v Director of*

Environmental Protection (2006) 9 HKCFAR 479, at paragraph 26, in support of its position that a repository of power, such as OFCA, must act in accordance with its own guidelines in the absence of cogent reason.

77 HKT adds that prior to its complaint, OFCA had not suggested that the SIM Lock Statement might be revisited, let alone withdrawn. To HKT, licensees such as itself have legitimate expectations that the Authority will continue to give effect to the SIM Lock Statement until such time as it is withdrawn. The failure of OFCA to give the Statement effect, says HKT, is unlawful.

78 HKT contends it is a "*person aggrieved*" under section 32N of the TO. Therefore it takes the view that it has the necessary standing for the purposes of this Appeal.

79 HKT asserts that the Authority has power under section 36B of the TO to issue an interim direction pending the final determination of its investigation. *PCCW-HKT Telephone Ltd v Telecommunications Authority*, HCAL 152/2002, 30 June 2004 (Hartmann J) [paragraph 111], is relied on in support of this proposition. HKT says that Hartmann J found in this case that an interim direction of the Authority was arbitrary and unlawful for reasons other than the ground that there existed no statutory power to issue the interim order, which implies that such a power exists.

80 HKT concludes its arguments by stating it has made strong arguable case of breach of the Competition Provisions, that the Authority failed to consider information before it and to take necessary action called for in the face of HKT's request for an urgent interim direction, that the decision that

there was insufficient evidence to progress the complaint was an express or implied decision that there was no breach of section 7K(3) and/or the prohibition in the SIM Lock Statement.

F. RESPONDENT'S CONTENTIONS

81 The CA's essential case on jurisdiction is that it did no more than make a request of information to clarify and substantiate a complaint. This is not an act, the CA contends, that is appealable because it does not truly engage the Competition Provisions.

82 In the CA's view, to facilitate the consideration of the matter, OFCA's letter of 28 January 2013 requested information to be provided by HKT to support its complaint. The CA contends that instead of complying with this request, HKT filed its Notice of Appeal on 14 February 2013.

83 At the Hearing, Mr Chan submitted for the Respondent that its case on jurisdiction is made up of six core propositions:

(a) First, the true issue is whether an alleged failure or refusal to make a decision under section 36 of the TO is appealable to this Board.

(b) Second, as a matter of law, the Board's jurisdiction depends on there being a decision that truly engages the Competition Provisions.

(c) Third, on the facts of this case, there has been no relevant decision of any kind as to whether the Competition Provisions have been breached, both as a matter of form and substance.

(d) Fourth, HKT's case on jurisdiction involves an approach or a reading to the TO that is contrary to the fundamental statutory purpose of effective competition regulation.

(e) Fifth, insofar as the HKT's case is now focused exclusively on an alleged failure to grant interim relief, and not on the ultimate question of breach, it is particularly weak because the clear intention under section 32N(1) of the TO is for matters concerning interim relief to be addressed, if at all, under section 32N(1)(b).

(f) Sixth, no decision of any kind has been made that embraces the allegation that the CA has made a substantive decision to refuse interim relief.

84 Referring to the Court of Appeal's judgement in *PCCW-HKT Telephone Ltd v Telecommunications Authority* CACV 274/2003, 8 July 2004, at paragraph 37, the CA asserts that not every decision, opinion, etc. of the CA in respect of competition matters or indeed the Competition Provisions are within the Board's jurisdiction. What must be shown, says the CA, is that one or more of the Competition Provisions has been "truly engaged" and that this is a question of fact.

85 The CA adds that a substantive and final quality is required for the CA to engage the Competition Provisions and therefore fall within the Board's jurisdiction. In other words, a definite view must be taken as to whether or not the Competition Provisions have been or will be contravened. A tentative consideration will not do. It is irrelevant whether or not the CA ought to have reached a particular opinion or decision on the materials

before it. It is likewise not enough for HKT to show that it is reasonably arguable that an appealable opinion, decision etc. was formed.

86 The 28 January 2013 letter, the CA argues, reached no conclusion as regards breach of the Competition Provisions. Rather, OFCA's assessment was that further information was needed before the CA could reach any substantive view on HKT's complaint. According to the CA, this is clear from the following provisions of the 28 January letter:

> *"We* [OFCA] *have reviewed HKT's submission in support of its Competition Complaint …, and consider that the information provided by HKT is* ***inadequate to enable us to assess*** *whether the complaint raises a genuine competition issue within the scope of the competition provisions of the TO such that …* [OFCA] *… may consider it justified to conduct an* ***initial enquiry*** *… **let alone to enable the CA to consider** any reasonable ground for suspecting a breach and any justification of enforcement action such as by way of issuing an immediate direction under section 36B"*
>
> *"would HKT please confirm whether it has any concern over the disclosure of its identity … **in the event that** we consider the complaint raises a genuine competition issue within the scope of the competition provisions of the TO …"*
>
> *"We look forward to receiving a **full complaint submission** from HKT …"* (emphases added by CA)

87 According to the CA, the above not only shows that the CA had not yet reached any definitive and final conclusion on breach of the Competition Provisions but that it was indeed far from such a point. The reality was that HKT's complaint was being processed by OFCA (not the CA) and OFCA's assessment was that more information was needed if it were to progress to the Initial Enquiry stage.

88 The CA adds, absent factors such as bad faith, common sense dictates that the best indicator of whether the CA formed a view on breach of the

Competition Provisions is whether it said so. In support of this position, it relies on Appeal No. 24, at paragraph 66, which held in respect of the disputed Direction in that case "[i]*f the breach of the competition provisions had been the reason for issuing the Direction, the Board can see no reason why the TA would not have said so.*"

89 The CA's conclusion that no relevant view on the merits was reached is said to be reinforced by the fact that the CA and OFCA had a number of grounds for seeking particulars and confirmation of facts before reaching a view, including fact verification and further particulars, such as HKT's relationship with Apple and information on the market impact on competition.

90 The CA asserts that even if it were persuaded that Apple's conduct violated section 7K(3), it would wish to hear evidence why market forces will not induce Apple in due course to support HKT's network in order to avoid losing the opportunity to sell the iPhone to HKT customers. Additionally, it asserts that for it to grant interim relief against Apple, it would have to consider the balance of convenience relating to such an intervention, which would require further information gathering on a wide range of matters.

91 As regards, the 1997 SIM Lock Statement, the CA contends that the OFCA was entitled to further information to verify whether Apple's conduct actually fell within the Statement given ostensible factual differences and changed market conditions:

(a) The 1997 Statement targets network operators but Apple is not a network operator;

(b) The SIM lock practice that the1997 Statement targets involves the complete blocking of access/connection to a network to which a customer subscribes but on HKT's own case the current situation still allows customers to access HKT's 2G and 3G network capabilities. It is only 4G/LTE data capabilities that are said to be affected.

(c) Market conditions in Hong Kong had developed considerably since 1997. Customers who felt that they were harmed by Apple's restrictions had the option of acquiring a smart phone from a competing manufacturer who did not impose such restrictions. And it would be irrational for the CA to blindly apply the 1997 Statement without determining whether its underlying assumptions and concerns apply to the current market conditions.

92 The CA considers the current Appeal as not justiciable because it is said to be akin to judicial review based on the irrationality of the CA. In answer to this, CA argues that had it taken the position advocated by HKT, Apple would have successfully judicially reviewed it for operating an unfair and irrational procedure.

93 A contextual and purposive reading of section 32N, in the CA's view, shows an intention for the CA to be a master of its own procedure with wide discretionary judgment. A vital aspect of this discretion is said to be for the CA to determine the information needed to process a complaint, which is a matter of administrative policy. The CA continues to argue that there is nothing to suggest that the TO intended for the Board to assume oversight of the CA and to review the exercise of its administrative discretion on matters such as whether to take legal action on the basis of a

breach of the Competition Provisions. That role, says the CA, belongs to the High Court in its judicial review jurisdiction.

94 The CA adds that it cannot be the proper function of the Board to act as micro-manager of regulatory practice and policy. If HKT is correct in its analysis of the Board's jurisdiction, any person claiming to be aggrieved could challenge the CA's position before it reached any final substantive determination as to breach. The consequence, asserts the CA, would be its ability to process competition complains in an efficient and orderly manner through to final decision would be severely impeded. The argument goes that if appeals may be brought against tentative or procedural decisions, there is a risk that the CA's investigative role may be stultified.

95 In relation to the *per se* argument proffered by HKT, the CA contends that this is a United States competition doctrine that is not recognised in Hong Kong. It asserts that the position that violation of section 7K(3) of the TO may be established even if conduct complained of neither harmed nor was intended to harm competition is novel and surprising.

96 The CA finally requests the Board to take note that under section 32N(1)(b) of the TO, any sanction or remedy imposed is appealable only if it is in consequence of a competition finding by the CA. That provision, the CA says, confers no right to appeal against a refusal to grant an interim remedy.

G. THE DECISION

97 This case is not as easy to decide as at first it seemed. Both counsel have submitted powerful and persuasive arguments. I have given all the matters raised in this Appeal the most careful and anxious consideration and have now come to a very clear view.

98 I accept both counsel's exhortations to construe section 32 in a purposive manner. As will be seen later this is no idle mantra.

99 Let me also make clear, that I am in no way concerned with issues of maladministration or a failure to act in accordance with a statutory duty. If such allegations are to be made, they must be reserved for a court hearing the Appellant's application for judicial review on the assumption that leave is eventually granted.

100 Mr Chan made the point that there is some inconsistency between the Appellant's position in this Appeal and in the judicial review proceedings. In this Appeal, the Appellant contends that a decision has been made whereas the gravamen of the complaint in the judicial review is that no decision has been made and an order requiring a decision on the complaint is sought. This is a neat forensic point, but in reality the Appellant is only seeking to cover a situation where the Board finds that no decision has in fact been made. As there are time limits in seeking judicial review, the Appellant simply wanted to preserve its position out of an abundance of caution and accordingly, I do not think that the issue of the judicial review impinges in any way on the issues before me.

101 All that said, I have to say I have some sympathy with the position of the Appellant. As soon as the iPhone 5 arrived in Hong Kong, the Appellant realised that it was locked in such a way so as to exclude the Appellant's 4G network. They took the matter up immediately and made a complaint to OFCA on 28 September 2012. They considered then, and they consider now, that their claim for an order under section 36B should have been a foregone conclusion given the terms of section 7K(3) and the 1997 SIM Lock Statement.

102 However, it appears that OFCA did not share the same view and that in late January 2013, they stated that more information was required. Whether or not they should have done this sooner or been more diligent in dealing with this complaint is not a matter for me in this application.

103 I have set out the facts quite copiously above because in order to see whether a decision has been made or an opinion rendered it is necessary to see precisely the context of what was sought and how matters developed thereafter. In this regard, I accept that whether or not a decision has been made is a matter of substance not form.

104 A lot of discussion took place as to whether any decision or opinion was made. In my view, on a true and contextual reading of the correspondence, it seems clear that a decision/opinion was made, namely, that as at 28 January 2013, OFCA was not prepared to make the order under section 36B as sought.

105 However, as both counsel clearly recognised, that is not the end of the matter. To trigger the jurisdiction of this Board, the Competition Provisions of the Ordinance must be "*truly engaged*" by the decision/opinion (per Ma CJHC in *PCCW-HKT Telephone Ltd v Telecommunications Authority* CACV 274/2003, 8 July 2004, at paragraph 37).

106 The Authority's essential case on jurisdiction is that a request for more information to clarify and substantiate a complaint is not appealable because it does not truly engage the Competition Provisions. The Authority contends that they have done no more than to make a request for further information and thus the Board's jurisdiction is not engaged.

107 It is perfectly true that the Appellant sought an order relying on the Competition Provisions. But as this Board has made clear before, the mere reference to the Competition Provisions is not of itself sufficient to satisfy the truly engaged test.

108 In order to find jurisdiction I have to be satisfied that the decision as set out in its 28 January 2013 letter truly engaged the Competition Provisions.

109 The crux of the problem in this case in my opinion was exposed by the question I put to Mr Yu and his response thereto. I asked whether assuming that jurisdiction was found, would the Appellant be seeking at the substantive hearing an order from the Board under section 36B – the very order that OFCA had declined to make. He replied affirmatively.

110 This I think is where the purposive approach becomes important. Could it have been the intention of the legislature that a Board set up to hear appeals by aggrieved persons against decisions of the Authority should itself have the power *de novo* to grant that which OFCA was not itself ready at that time to consider granting? I think not.

111 This Board, comprised of multi-disciplinary individuals, was set up to provide a mechanism for challenging the Authority's substantive decisions relating to competition. In a usual case, a complaint is made and OFCA investigates. It hears from relevant parties and it might seek expert economic evidence. The Authority then makes a considered decision. Anyone aggrieved by that decision on the merits can appeal to this Board.

112 But if the Appellant is correct in this case, the whole procedure gets turned on its head. Instead of a considered view of the Authority, which the Board can analyse, consider, affirm or alter, in this case the Board would

be asked to trespass on the Authority's jurisdiction and itself make a decision without making any investigation at all. It goes without saying that this Board has no resources whatever to conduct this investigation and nor does it have the skills to do so. I do not believe that this could have been intended.

113 This conclusion is supported by the language of section 36B itself. It states "*the Authority may issue decisions in writing* …". What the Appellant seeks in this case is that this Board should issue a direction in writing. And it would be a direction in writing without the benefit of the usual analysis conducted by the Authority which has been set up by statute to regulate this complex industry.

114 The Appellant submitted that there was a distinction in competition law between a per se breach and a rule of reason breach. This distinction apparently emanates from the jurisprudence of the United States and I must confess to never having heard of this dichotomy in all the years I have been involved in this Board. There is apparently no jurisprudence in this jurisdiction to support this dichotomy and it is certainly not a matter about which OFCA has opined in this case. So I simply cannot accept an argument that is based on the breach being so obvious that no investigation is required by the Authority charged with investigating these matters.

115 I well appreciate that the Appellant will be disappointed with this decision because clearly they feel the matter is urgent and they feel helpless in seeking redress. However, as Mr Chan made clear, this investigation is not closed and as soon as the information requested has been provided or has otherwise been dealt with, OFCA will proceed to consider the complaint

on its merits. If after a considered view, the Authority still declines to make the order sought, an appeal will lie to this Board.

116 It is noted that we are dealing here with a rapidly changing technology where new models are quickly superseded and I would hope that OFCA will bear this in mind when continuing to deal with this matter.

117 Further, I was informed that the Appellants are considering instituting a civil action for damages against Apple and SmarTone and if this is pursued this may provide the Appellants with an opportunity to seek recovery for its alleged losses.

118 Accordingly, for the reasons stated above, when read with the Authority's full submission, I have concluded that the Board has no jurisdiction to hear this Appeal and I so order.

119 Mr Chan made a number of other points of a jurisdictional nature. However, it is not necessary to deal with these points as this Appeal fails on the basis that the decision was not one that engaged the Competition Provisions. It would follow that the same result would ensue if it were to be held that there was no decision within the meaning of section 36B.

120 In this decision, OFCA and the CA are used interchangeably but it must be recalled that it is only a decision of the Authority that can be appealed. OFCA appears to be the executive and investigation branch of the Authority, who after appropriate analysis and investigation of the complaint, makes the appropriate recommendation to the Authority, who in turn will accept or reject it. In view of the decision at which I have arrived, it is not necessary to analyse in detail the separate functions of OFCA and the CA.

121 I have taken into account all of the submissions even if they have not all been set out herein. I have decided such issues as I feel necessary for ascertainment of the main issues relating to the jurisdiction of the Board. I should confirm that I have not had the benefit of any submission apart from the Parties to the Appeal and thus have not had the benefit of the views of other parties referred to herein.

122 I will give the parties 14 days from today to see if they can agree all issues relating to costs. If not either party may apply to me for an order relating to costs.

Dated this 4th day of June 2013

Signed ……..…

Neil Kaplan CBE SC SBS (Chairman)

CACV 190/2013

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

CIVIL APPEAL NO 190 OF 2013
(ON APPEAL FROM TELECOMMUNICATIONS (COMPETITION PROVISIONS) APPEAL BOARD APPEAL NO 31)

BETWEEN

HONG KONG TELECOMMUNICATIONS (HKT) LTD	Appellant
and	
THE COMMUNICATIONS AUTHORITY	Respondent

Before: Hon Cheung CJHC, Kwan and Barma JJA in Court
Date of Hearing: 29 November 2013
Date of Judgment: 17 December 2013

JUDGMENT

Hon Cheung CJHC:

The facts

1. This is an appeal by way of case stated from the decision of the Chairman of the Telecommunications (Competition Provisions) Appeal

Board dated 4 June 2013. It raises a single question of jurisdiction of the Appeal Board.

2. The facts can be very briefly stated. Apple launched iPhone 5 on 21 September 2012. iPhone 5 is installed with a SIM-Lock device which does not allow access to the appellant's PCCW 4G/LTE network. When iPhone 5 was first launched, only SmarTone's 4G/LTE network could be accessed. Subsequently, the 4G/LTE networks of CSL and Hutchison were enabled, but access to PCCW's 4G/LTE network remains denied.

3. The appellant takes the view that this restriction on the functionality of iPhone 5 is in breach of a statement issued by the former Telecommunications Authority on 20 February 1997 entitled "Way Forward of 'SIM Lock'" as well as the competition provisions in the Telecommunications Ordinance (Cap 106).

4. On 28 September 2012, the appellant complained to the Office of the Communications Authority ("OFCA"), the executive arm of the respondent, which is the successor of the former Telecommunications Authority. It alleged that the restriction breached section 7K of the Ordinance. It asked the respondent to issue an immediate direction under section 36B of the Ordinance to Apple and SmarTone to require action to comply with the Ordinance. In short, the appellant asked that the SIM-Lock device on iPhone 5 be unlocked to allow access to the appellant's 4G/LTE network. The letter stressed that due to the nature of the conduct and harm to both users and the competitive process, time was of the essence.

5. Between September 2012 and January 2013, many letters were exchanged between the appellant (and its solicitors) and OFCA (and the respondent), and there were also meetings with representatives of OFCA, in which the appellant repeated its request to the respondent through OFCA to issue an immediate direction under section 36B; but all this was to no avail. In their letter dated 16 January 2013, the appellant's solicitors reiterated its request for the immediate issue of an interim direction and threatened proceedings against the respondent.

6. On 28 January 2013 and 30 January 2013, OFCA wrote to the appellant and its solicitors setting out its position. Of particular significance is this passage in the letter of 28 January 2013 :

> " In accordance with the '*A Guide on How Complaints Relating to Anti-competitive Practices, Abuse of Dominant Position and Discriminatory Practices Prohibited under Sections 7K, 7L and 7N of the Telecommunications Ordinance are Handled by the Office of the Communications Authority*' issued on 1 April 2012 (the 'Guide'), we have processed HKT's [ie the appellant's] above complaint and considered whether the matter may be dealt with under the competition provisions of the TO [ie the Ordinance] and whether the complaint submission contains the requisite information for us to proceed further. We have reviewed HKT's submission in support of its Competition Complaint set out in those correspondence of HKT or on HKT's behalf which are recited in the first paragraph of this letter, and consider that *the information provided by HKT is inadequate to enable us to assess whether the complaint raises a genuine competition issue [within] the scope of the competition provisions of the TO such that the Office of the Communications Authority ('OFCA') may consider it justified to conduct an initial enquiry of the matter, let alone to enable the CA [ie the respondent] to consider any reasonable ground for suspecting a breach and any justification of enforcement action such as by way of issuing an immediate direction under section 36B of the TO that you have proposed.*" (emphasis added)

The appeal below

7. On 14 February 2013, the appellant filed a notice of appeal to the Appeal Board to appeal against the "decision" of the respondent and in particular its "refusal" to make an immediate direction under section 36B.

8. After hearing arguments on whether any such decision or refusal had been made and therefore whether the appeal was competent, the Chairman of the Appeal Board delivered his decision on 4 June 2013. In his decision, the Chairman observed that "on a true and contextual reading of the correspondence, it seems clear that a decision/opinion was made, namely, that as at 28 January 2013, OFCA was not prepared to make the order under section 36B as sought" (para 104).

9. The Chairman went on to consider whether OFCA's request for more information to clarify and substantiate a complaint "truly engaged" the competition provisions in the Ordinance and rendered that request appealable. The Chairman was daunted by the suggestion that if jurisdiction was found, the appellant would be seeking at the substantive hearing of the appeal an order from the Appeal Board under section 36B, the very order that OFCA had declined to make. He considered it was not the legislative intent that the Appeal Board set up to hear appeals by aggrieved persons against decisions of the respondent should itself have the power *de novo* to grant that which OFCA was not itself ready at that time to consider granting. In such a scenario, the Appeal Board would be asked to trespass on the respondent's jurisdiction and itself make a decision without making any investigation at all. He observed that the Appeal Board has no resources whatever to conduct this sort of investigation and nor does it have the skills to do so. The Chairman reasoned that this could

not have been intended by the legislature when laying down the appeal mechanism. See paras 105 to 112 of the decision. The Chairman concluded that the Appeal Board had no jurisdiction to hear the appeal.

This appeal

10. Dissatisfied with the decision, the appellant appealed to this court pursuant to section 32R of the Ordinance. In the case dated 30 August 2013 signed by the Chairman, he posed the following question for the determination of this court:

> "Whether the letters issued by the Office of the Communications Authority dated 28 January 2013 and 30 January 2013, which include the statement that there is insufficient information to assess whether the appellant's complaint raises a genuine issue of breach of the competition provisions, involve any decision or opinion on the part of the Communications Authority relating to (i.e. which 'truly engages') section 7K for the purposes and within the meaning of section 32N(1)(a)(i) of the Telecommunications Ordinance so as to engage the jurisdiction of the Appeal Board."

The law on jurisdiction

11. Section 32N(1) reads:

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

the case may be, to the extent to which it relates to any such section or any such licence condition, as the case may be."

12. Sections 7K, 7L, 7M and 7N are competition provisions. The appellant relies on the following provisions in section 7K :

"(1) A licensee 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.

....

(3) Without limiting the general nature of subsection (1), a licensee engages in conduct prescribed under that subsection if he –

(a) enters into an agreement, arrangement or understanding that has the purpose or effect prescribed by that subsection;

(b) without the prior written authorization of the Authority, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person;

(c) gives an undue preference to, or receives an unfair advantage from, an associated person if, in the opinion of the Authority, a competitor could be placed at a significant disadvantage, or competition would be prevented or substantially restricted."

13. In *PCCW-HKT Telephone Limited v Telecommunications Authority*, CACV 274/2003, 8 July 2004, para 37(2), the Court of Appeal explained the circumstances in which the appeal procedure in section 32N(1)(a)(i) is engaged. Relevantly, the intended appellant must establish that one or more of sections 7K to 7N have been "truly engaged". In that case, at issue was whether the interim direction requiring the supply

of unbundled local loops by PCCW to Wharf T & T was a direction relating to sections 7K and 7L of the Ordinance. On those facts, the court elaborated, "truly engaged" meant that the Telecommunications Authority, in issuing the direction, must, expressly or by implication, have arrived at an opinion that the licensee concerned has engaged, or will (if the relevant direction is not complied with) engage or continue to engage in conduct that contravenes one or more of sections 7K to 7N.

14. The "truly engaged" test was applied in a subsequent decision of this court, that is, *PCCW-HKT Telephone Limited v The Telecommunications Authority*, CACV 300/2008, 2 April 2009, which concerned a policy formulation. In para 43(3), Cheung JA explained :

> " ... the previous decision of this Court [ie CACV 274/2003] which is binding on us and of which I respectfully agree clearly requires a specific anti-competition conduct rather than a general anti-competition consideration canvassed in a policy formulation. The wording of section 7K excludes the adoption of a general approach : a licensee shall not engage in (anti-competition) conduct. The previous judgment is in line with the wording of the section. Its tenor is not to allow general issues which may arise in policy consideration, as illustrated in the present case by the Statement, to be the subject matter of an appeal by the Appeal Board. Hence a specific anti-competition conduct based on, for example, refusal to interconnect or interconnection at an exorbitant charge is required."

The arguments

15. In this appeal, there is no dispute that the "truly engaged" test represents the true test of jurisdiction under section 32N(1)(a)(i). The only question is whether, in the two letters in question, there was any opinion, determination, direction or decision of the Authority which "truly engaged" one or more of sections 7K to 7N.

16. Mr Benjamin Yu SC, Mr Roger Beresford with him, for the appellant, made a number of submissions against the Appeal Board's determination that it had no jurisdiction to entertain the appeal. In essence, Mr Yu contended that the two letters, particularly the passage cited above, constituted or evidenced a decision on the part of the respondent not to issue an interim direction under section 36B on the ground that the information provided by the appellant was "inadequate" to enable the respondent to assess whether the complaint raised a genuine competition issue within sections 7K to 7N such that OFCA might consider it justified to conduct an initial inquiry of the matter, let alone to enable the respondent to consider any reasonable ground for suspecting a breach and any justification of enforcement action such as by way of issuing an immediate direction under section 36B. Mr Yu submitted that that clearly was a decision which "truly engaged" section 7K, the section relied on by the appellant. The respondent was saying, Mr Yu argued, that the material presented by the appellant was not sufficient and adequate to make out a case of breach of section 7K so as to justify the granting of an immediate direction.

17. For the respondent, Mr Abraham Chan argued that read in context, OFCA's two letters were doing no more than asking for further information and details from the appellant. It was an administrative decision which did not truly engage section 7K. The whole point of asking for further information was that on the existing material, OFCA was unable to assess whether there was any genuine breach of the competition provisions and, by definition, therefore, no substantive decision on whether there was a breach (thus justifying an immediate direction) of section 7K had been made by either OFCA or the respondent.

18. Mr Chan made the further point that in any event, whatever decision that had been made in the two letters, it was only made by OFCA, but not the respondent. Mr Chan drew the court's attention to the fact that the respondent had never delegated, pursuant to section 18(1)(b) of the Communications Authority Ordinance (Cap 616), its power under section 36B to make a direction to the Director-General who heads OFCA. The power to make such a direction remains with the respondent. This being the case, counsel argued that section 32N of the Ordinance does not give the appellant a right of appeal to the Appeal Board from a decision of OFCA (as opposed to that of the respondent).

The issues

19. Section 32N of the Ordinance is very clear in its wording. Any person aggrieved by an opinion, determination, direction or decision of the respondent relating to section 7K, 7L, 7M or 7N may appeal to the Appeal Board against the opinion, determination, direction or decision, as the case may be, to the extent to which it relates to any such section.

20. In the present case, there is no doubt, and the Chairman of the Appeal Board rightly recognised, that the two letters in question contained or evidenced a decision (leaving aside whose decision it was for the time being) not to grant the interim direction asked for as at 28 or 30 January 2013. The fact or possibility that the respondent might be prepared to do so at some future time does not affect this understanding of the two letters (in the context of the entire correspondence). Nor does the fact that in the two letters OFCA asked for further information and details from the appellant change the fact that as at the time of the two letters, there was or had been made a conscious and deliberate decision not to

accede to the repeated requests for a direction to be made, on the material and information then before OFCA.

21. In *CACV 274/2003*, the facts were that an interim direction had been issued. Therefore, in explaining what "truly engaged" meant, the court spoke in terms of a past, present or future breach of a competition provision. In the present context, where the decision is said to be one of refusal of an interim direction, a mechanical application of that explanation of "truly engaged" to the facts here would obviously lead to an absurd result, that is, that there was no decision on the part of the respondent that there had been or was or would be a breach. I am happy to note that neither counsel has advanced such an argument, and in particular, the respondent has not argued that a refusal of a direction on the ground that there was no breach of any of the competition provisions means that there was no decision which truly engaged the competition provisions, a position which in my view would be wholly untenable.

22. That, therefore, leaves only two substantive questions. First, whose decision was it? Second, was it a decision relating to section 7K in the sense that it "truly engaged" the section?

23. I would put aside the first question for the time being but go straight to the second question, which is the nub of this appeal.

"Truly engaged"?

24. In my view, the answer to that question is "yes". I accept Mr Chan's argument that not every decision is appealable to the Appeal Board. A similar point has been made by the UK Competition Appeal

Tribunal in *Cityhook Limited v Office of Fair Trading* [2007] CAT 18, under comparable but different statutory provisions in the Competition Act 1998 :

> "225. As to whether any decision is 'appealable' within the meaning of sections 46 and 47 of the 1998 Act, the relevant legal principles are summarised at paragraph 122 of the Tribunal's judgment in *Claymore*[1], cited above, as follows:
>
> 'In our view the main principles to be derived from *Bettercare*[2] and *Freeserve*[3] are:
>
> (i) The question whether the Director has 'made a decision as to whether the Chapter II prohibition is infringed' is primarily a question of fact to be decided in accordance with the particular circumstances of each case (*Bettercare*, [24]).
>
> (ii) Whether such a decision has been taken is a question of substance, not form, to be determined objectively, taking into account all the circumstances (*Bettercare*, [62], [84] to [87], and [93]). The issue is: has the Director made a decision as to whether the Chapter II prohibition has been infringed, either expressly or by necessary implication, on the material before him? (*Freeserve*, [96]).
>
> (iii) There is a distinction between a situation where the Director has merely exercised an administrative discretion without proceeding to a decision on the question of infringement (for example, where the Director decides not to investigate a complaint pending the conclusion of a parallel investigation by the European Commission), and a situation where the Director has, in fact, reached a decision on the question of infringement (*Bettercare*, [80], [87], [88], [93]; *Freeserve*, [101] to [105]). The test, as formulated by the Tribunal in *Freeserve*, is whether the Director has genuinely abstained from expressing a view, one way or the other, even by implication, on the question whether there has been an infringement

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[1] *Claymore Dairies Limited v Director General of Fair Trading* [2003] CAT 3

[2] *Bettercare Group Limited v Director General of Fair Trading* [2002] CAT 6

[3] *Freeserve.com Plc v Director General of Telecommunications* [2002] CAT 8

> of the Chapter II prohibition (*Freeserve*, [101] and [102]).
>
> ...
>
> 232. In paragraph 83 of *Bettercare* the Tribunal was addressing the question whether the decision there in issue was to be analysed as the exercise of an administrative discretion not to conduct an investigation under section 25 of the 1998 Act, or as a decision that the Chapter II prohibition was not infringed. The Tribunal said:
>
> > 'In addressing this central issue, it is not in our view helpful to use the concept of a 'decision to reject a complaint' because such a term is ambiguous. The Director may decide to 'reject a complaint' for many reasons. For example, he may have other cases that he wishes to pursue in priority (compare Case T-24 and 28/90 *Automec v Commission* [1992] ECR II-2223); he may have insufficient information to decide whether there is an infringement or not; he may suspect that there may be an infringement, but the case does not appear sufficiently promising, or the economic activity concerned sufficiently important, to warrant the commitment of further resources. None of these cases necessarily give rise to a decision by the Director as to whether a relevant prohibition is infringed."

25. I am prepared to accept that depending on the facts, some of these so called discretionary administrative decisions may not be appealable to the Appeal Board under our Ordinance in that they may not be able to satisfy the "truly engaged" test. A simple request for further information is, for instance, unlikely to be appealable because, first, it may not contain or evidence any decision at all not to grant an interim direction and, secondly, even if such a decision was made, it may not be one which "truly engaged" any of the competition provisions.

26. But not so in the present case. In the present case, the two letters are very clear on the reason why OFCA asked for further information and details. The reason specifically given was that the

information already supplied was "inadequate" to enable OFCA to assess whether the complaint raised a genuine competition issue within the scope of the competition provisions such that OFCA might consider it justified to conduct an initial inquiry, let alone to enable the respondent to consider any reasonable ground for suspecting a breach and any justification of enforcement action such as by way of issuing an immediate direction. That, in my view, was simply a long way of saying that the appellant had, on the material it had presented thus far, failed to establish a case of breach or a prima facie case of breach justifying the grant of an interim direction – and thus no interim direction was granted.

27. I reject the argument that no decision on the merits, based on the material already presented, had been made by that stage. Quite to the contrary, I accept Mr Yu's argument that OFCA was saying that the appellant had failed even to make it to the first base. Indeed the material presented was so poor and inadequate that they failed even to raise "a genuine competition issue".

28. As I said, the fact that OFCA's letters effectively asked the appellant to try again and come back with further material and details, is really neither here nor there and does not affect the above analysis.

29. In my view, the decision not to issue an immediate direction was a decision relating to, in the sense that it truly engaged, section 7K.

30. I am not troubled by the possible difficulties described by the Chairman in his decision following the entertaining of the present appeal if he were to find jurisdiction to hear it, which were given as a main reason for finding against jurisdiction in terms of legislative intent. I am not sure

if, assuming that there is jurisdiction to hear the appeal as I think there is, the substantive appeal before the Appeal Board would be as daunting as the Chairman has portrayed. After all, the issue raised in the appeal is a relatively limited one, that is, whether the material already presented was adequate or inadequate to enable the respondent to decide whether to make an interim direction. At the substantive hearing, I would imagine, OFCA's representative would explain to the Appeal Board why it was considered that the material presented was inadequate, what further information and details would be required, and why. It would be up to the Appeal Board to make up its mind as regards the adequacy of the material presented. Assuming that the Appeal Board was with the appellant, it would then be up to the Appeal Board to decide what to do next, including whether to remit the matter to the respondent to decide how it should exercise its undoubted discretion under section 36B regarding the issue of an interim direction.

31. In any event, I accept Mr Yu's submission that an appeal before the Appeal Board is a *de novo* hearing. In my view, the very extensive powers given to the Appeal Board under section 32O of the Ordinance regarding the hearing of an appeal would certainly suggest a legislative intention that is much wider in scope, in terms of the role and function of the Appeal Board, than that envisaged below.

Whose decision?

32. That leaves the first question, that is whether the decision not to grant an interim direction was one made by OFCA or the respondent. Stated that way, the answer is plain. It is common ground that OFCA or the Director-General who heads OFCA does not have the delegated power

to make, or, therefore, refuse, any direction under section 36B. As Mr Yu rightly submitted, it must therefore follow that the decision not to grant an interim direction as contained in or evidenced by the two letters must have been a decision of the respondent. After all, it has to be remembered that OFCA is the executive arm of the respondent. In the present context, it assists the respondent and acts on its behalf of to handle complaints. Its action (or inaction), on the facts of the present case, is attributable to the respondent. And in fact, Mr Chan, for the respondent, accepted below and repeated at the hearing before this court, that the letter of 28 January "does state the position of OFCA and the CA [ie the respondent] for the purposes of this litigation" and the letter was "written for itself and on behalf of the CA".

33. On the facts (and reading the correspondence as a whole), the only fair conclusion is that OFCA had been handling the complaint on behalf of the respondent and the decision not to make an interim direction on the stated ground of inadequacy of information regarding the alleged breach of section 7K was a decision made by the respondent through OFCA as its executive arm.

34. I also note Mr Yu's point that in relation to this first question, there has not even been a respondent's notice seeking to support the Chairman's decision on jurisdiction on this alternative basis.

35. For all these reasons, I have come to the conclusion that there is indeed jurisdiction on the part of the Appeal Board to hear the appellant's appeal.

Relief

36. That leaves me with the appellant's further contention that this court, instead of the Appeal Board, should actually deal with the substantive appeal; but not only that, it should also grant the interim direction sought.

37. It should, however, be noted that Mr Yu did not vigorously pursue this item of relief as he did in relation to the jurisdiction point. Further, it has to be appreciated that at least from the appellant's point of view, the matter has dragged on for a rather long time – particularly given the type of product and service one is concerned with here.

38. Nonetheless, I am firmly of the view that the only right course for this court to take is to remit the case to the Appeal Board for reconsideration in the light of this court's determination on the question of jurisdiction: section 32R(2)(b). In other words, it will be for the Appeal Board to hold a substantive hearing and decide the question of interim direction where appropriate. Given that the present appeal is one on a question of law arising from the decision of the Chairman of the Appeal Board sitting alone pursuant to section 32O(1)(b) – his jurisdiction, sitting alone, is limited to questions of law, it would be a very strange outcome if this court, sitting on appeal from the Chairman's decision, were to deal with the substantive merits of the appeal, something which even the Chairman when sitting alone cannot do.

Disposition

39. For all these reasons, I would answer the question of law posed in the affirmative, allow the appeal, and remit the case to the Appeal Board

for reconsideration in the light of the court's determination of the question of law.

40. As regards costs, both parties are agreed that they should follow the event. I would, therefore, set aside the costs order made below and award those costs to the appellant instead. I would also award the costs of this appeal to the appellant, with a certificate for two counsel.

Hon Kwan JA:

41. I agree with the judgment of the Chief Judge.

Hon Barma JA:

42. I agree.

Hon Cheung CJHC:

43. Accordingly, the court answers the question of law and makes the orders as indicated in paragraphs 39 and 40 above.

(Andrew Cheung) Chief Judge of the High Court	(Susan Kwan) Justice of Appeal	(Aarif Barma) Justice of Appeal

Mr Benjamin Yu SC and Mr Roger Beresford, instructed by Clifford Chance, for the appellant

Mr Abraham Chan, instructed by Bird & Bird, for the respondent

Appeal No. 31

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

HONG KONG TELECOMMUNICATIONS (HKT) LTD

—Appellant—

AND

THE COMMUNICATIONS AUTHROITY

—Respondent—

DECISION ON APPLICATION TO INTERVENE

Mr John Scott, SC (Chairman)
Professor Suen Wing-chuen
Professor Mark Williams

24 January 2014

A. BACKGROUND

1. The Board has before it an application under section 36B of the Telecommunications Ordinance, Cap. 106, to intervene in Appeal Case 31 pursuant to letters dated 9, 13 and 15 January 2014 from Messrs Morrison & Foerster on behalf of Apple Asia Limited ("**Apple**").

2. The Chairman decided on 14 January 2014 that Apple's application should be heard at 9:30 a.m. on 16 January 2014 prior to commencement of the hearing in Appeal Case 31. The Chairman has further requested that the Appellant, Hong Kong Telecommunications (HKT) Ltd ("**HKT**") and the Respondent, the Communications Authority ("**CA**") submit short written submission on or before noon on 15 January 2014 if they wish to comment on the application to intervene.

3. Written submissions were filed by the Appellant and Respondent, respectively, on 15 January 2014. Apple then submitted its reply to the comments made by the Appellant and Respondent on the same date.

4. Prior to the hearing, the Chairman disclosed that both Professor Mark Williams and himself own an iPhone5 with 4G connectivity, through different brands of the CSL network. Furthermore, Professor Suen Wing-chuen's wife owns some shares in Apple and he will write separately to the Appeal Board for circulation to the parties of that disclosure. The Appellant, Respondent and Apple have no objection to the composition of the Board hearing this Appeal.

5. At the hearing of the application to intervene held at the Hong Kong International Arbitration Centre on 16 January 2014, HKT was represented by Mr Benjamin Yu, SC, assisted by Mr Roger Beresford, instructed by

Messrs Clifford Chance. The CA was represented by Mr Johnny Mok, SC, assisted by Mr Abraham Chan, instructed by Messrs Bird & Bird. Apple was represented by Mr Russell Coleman, SC, assisted by Mr Julian Lam, instructed by Messrs Morrison & Foerster.

B. DECISION

6. The Appeal Board has carefully considered all the written materials placed before it by the Appellant, the Respondent and Apple, for which the Appeal Board is grateful. After hearing their oral submissions on 16 January 2014, the Appeal Board has arrived at the decision and ruled in favour of the application by Apple to intervene in the Appeal Case 31. The ruling is set out in the following paragraphs.

7. The application is opposed by the Appellant, HKT, and is represented in this opposition by Mr Benjamin Yu, SC. Mr Yu draws our attention to the fact that the first hearing of this appeal was advertised on the website of the Appeal Board administrator on 11 March 2013, inviting any party wishing to intervene to do so by 9 April 2013, with a view to a hearing later on 26 April 2013.

8. At the hearing held on 26 April 2013, where Mr Neil Kaplan, SC, sat alone as a chairman ruling on procedural matters, the learned former chairman of the tribunal held that there was no jurisdiction in this matter.

9. That matter then went on appeal to the Court of Appeal of Hong Kong. The Court of Appeal handed down their ruling on 17 December 2013, having heard a case stated, ruled that this Appeal Board did have jurisdiction to determine the matter, and directing this Appeal Board to

hold a substantive hearing and decide the question of interim direction, where appropriate.

10. Since then, HKT has sought leave to amend its Notice of Appeal in these proceedings and, by a letter dated 10 January 2014, Messrs Clifford Chance, on behalf of HKT, have indicated that they wish to amend in terms of a Notice of Appeal, asking that this Appeal Board directs that the Appeal Board:

> "*... vary the Appeal Subject Matter by substituting the grant of an interim direction directing Apple Asia Limited to immediately remove the SIM-lock which is presently preventing or has prevented cellular enabled devices including the iPhone 5, iPad mini and/or the iPad (4th generation) detecting and connecting to the Appellant's 4G/LTE network in Hong Kong and to refrain from importing or selling telephones, telephone operating systems or other telecommunications equipment programmed to restrict their use by network.*"

11. HKT, as the appellant, objects to this late application by Apple, having regard to the fact that the previous hearing was advertised on the Appeal Board's website, and is in breach of paragraph 12 of the Guidelines on Practice and Procedure ("**Guidelines**") previously promulgated by the former Chairman of the Appeal Board, which requires:

> *"Any person wishing to intervene ("Intervener") in the Appeal shall seek the leave the Chairman or the Appeal Board to do so at the earliest opportunity and in any event no later within 28 days of publication of the announcement of the Notice of Appeal on the*

website ... The Chairman and Appeal Board may grant leave to intervene later in the Appeal proceedings if the intervener can demonstrate that it was not feasible for it to have sought leave within the time limit."

12. It is suggested by Apple that it was not feasible for it to have sought leave, within that time limit, to intervene in this appeal. The Appeal Board has considered this submission in the light of the protracted steps that have been taken to review the earlier decision of the previous chairman, and the successful appeal by HKT against his earlier ruling.

13. In the light of that, and in the application to amend which HKT made on 10 January 2014, the Appeal Board is satisfied that the dynamics of this appeal have altered sufficiently to permit Apple to make this application to intervene, albeit that the Appeal Board believes it to be unfortunate that they have taken so long to seek to make their position as an intervener clear.

14. The Appeal Board is keenly aware of the public interest as well as the interests of the parties in resolving this matter as soon as practically possible.

15. The Chairman directed that, as Apple is now a party in the Appeal Case 31, it is entitled to all materials that have previously been filed, and this includes the transcript of this and previous hearings.

16. The Appeal Board also granted leave for the Appellant to amend its Notice of Appeal in terms of Messrs Clifford Chance's second letter dated 10 January 2014.

17. A one-day substantive hearing of the appeal case is to be held on 10 March 2014 starting from 9:30 a.m. with the location to be confirmed.

18. The information about the hearing and the amended relief sought in the Notice of Appeal will in due course be published in the website of the Appeal Board with wording agreed amongst the parties.

19. The Appellant is to provide Apple with the papers filed thus far, which is the hearing bundles and the various submissions and authorities, against Apple's usual undertaking in relation to photocopying charges, and will do so by close of business on 17 January 2014.

20. The Chairman directed that Apple should file its submission, together with any materials that it will rely on, by 7 February 2014. The Chairman also directed the Appellant and the Respondent to file evidential responses by 21 February 2014. On or before 3 March 2014, three parties should exchange a summary of submission. If there are any further reply submissions that are required, or any party wishes to put in, they can do so within a reasonable time before the hearing date set on 10 March 2014.

21. For the process of preserving confidentiality on the materials, the Chairman referred the parties to paragraph 16(4) of the Guidelines and made it clear that if there is an application by the Intervener, or anybody else, to assert confidentiality in accordance with these Guidelines, the Guidelines should be observed.

22. Pursuant to paragraph 21(2) of the Guidelines, the Appeal Board invited Apple to make their position clear in relation to two areas of this case. Apple is to give information, first, so as to explain the process by which customers of HKT have been prevented from accessing the 4G network in

Hong Kong when using the iPhone 5, iPad mini and/or iPad 4th generation. Secondly, the Appeal Board would like to have information or evidence from Apple as to what, if any, agreements or arrangements Apple Inc. and Apple Asia Limited have entered into with other Hong Kong telecom licensees. In the absence of evidence in those two areas, the Appeal Board will consider any submission made on behalf of any other party to this reference that all necessary adverse inferences will be drawn against Apple or the Respondent in this appeal.

23. All costs issues will be reserved until the substantive disposal of the appeal.

Dated this 24th day of January 2014

Signed ……..…

Mr John Scott, SC (Chairman)

Signed……..…… Signed……..

Professor Suen Wing-chuen Professor Mark Williams

Appeal No. 31

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

HONG KONG TELECOMMUNICATIONS (HKT) LTD Appellant

AND

THE COMMUNICATIONS AUTHROITY Respondent

DECISION AND RULING

Mr John Scott, SC (Chairman)
Professor Suen Wing-chuen
Professor Mark Williams

Dated 16 April 2014

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SUBJECT PAGE

INTRODUCTION

1. This is an appeal which has had a long and difficult history and which came before the Telecommunications (Competition Provisions) Appeal Board for a substantive hearing over a year after the Notice of Appeal was served on behalf of the Appellant, Hong Kong Telecommunications (HKT) Limited ("HKT"). This delay in convening a substantive hearing is a matter of regret.

2. This appeal arises out of correspondence exchanged between HKT's and its solicitors on the one hand and the Respondent on the other at the end of 2012 and the beginning of 2013. In this correspondence HKT complained about the lack of 4G/LTD[1] functionality when an iPhone 5 handset was utilised in conjunction with a HKT customer's SIM card.

3. The Appeal (in form, if not in substance) was prompted by the following written statements by the Respondent to HKT's solicitors:-

> *"…..we have processed HKT's above complaint and considered whether the matter may be dealt with under the competition provisions of the TO and whether the complaint submission contains the requisite information for us to proceed further. We have reviewed HKT's submission in support of its Competition Complaint set out in those correspondence of HKT or on HKT's behalf which are recited in the first paragraph of this letter, and consider that the information provided by HKT is inadequate to enable us to assess whether the complaint raises a genuine competition issue within the scope of the competition provisions of the TO such that the Office of the Communications Authority ("OFCA") may consider it justified to conduct an initial inquiry of the matter, let alone to enable the CA to consider any reasonable grounds for suspecting a breach and any justification of*

[1] The Appeal Board were informed by HKT (without challenge) at the hearing of this Appeal that LTE ("long term evolution") is synonymous with 4G in describing an industry standard for wireless communication of high speed data for mobile phones. In this decision and ruling the expression "4G" will be employed to described this standard.

enforcement action such as by way of issuing an immediate direction under section 36B of the TO that you have proposed….." (letter dated 28th January 2013)

"*……in relation to your client's complaint that the alleged conduct of Apple contravenes the [SIM-lock Statement] … [g]iven the novelty of the issue, OFCA will need to review the matter carefully, and the Communications Authority ("CA") has not formed any views on it.*

In relation to your client's complaint that the alleged conduct ….is in breach of section 7K, and possibly also other competition provisions under the TO …..

…..we have been reviewing the adequacy of the information provided by your client and consider that the "complaint submission" of your client is inadequate to enable us to assess whether the Competition Complaint raises a genuine competition issue within the scope of the competition provisions of the TO, such that it is considered justifiable for OFCA to conduct an initial inquiry into the matter. ….. As such, there is no basis for your client to request for an immediate issue by the CA of a direction under section 36B of the TO at this stage in relation to the Competition Complaint, whether an interim one or otherwise." (letter dated 30th January 2013)

In the above statements, the "complaint" referred to by the Respondent related to the Appellant lack of 4G/LTE functionality when HKT's 4G SIM card was inserted into the iPhone 5, iPad mini and the iPad 4th Generation, all manufactured by Apple Inc. and sold in Hong Kong by Apple Asia Limited ("Apple Asia"). Apple Asia is the holder of a Radio Dealers (Unrestricted) licence as defined in Section 2 Telecommunications Ordinance.

4. The Notice of Appeal sought orders in the following terms:-

"*FOR ORDERS THAT the Appeal Subject Matter be quashed and the Authority be directed urgently to issue a direction under section 36B of the Telecommunications Ordinance directing Apple Asia Limited to immediately remove the SIM-lock which is presently preventing or has prevented cellular enabled devices including the iPhone 5, the iPad mini*

and/or the iPad (4th generation) detecting and connecting to the Appellant's 4G/LTE network in Hong Kong and to refrain from importing or selling telephones, telephone operating systems or other telecommunications equipment programmed to restrict their use by network.

AND for an award of such sum in respect of the costs involved in the appeal as is just and equitable in all the circumstances of the case."

5. The Grounds of Appeal relied upon by HKT in support of its Notice of Appeal were as follows:-

(1) The Authority was wrong in law in considering, determining, directing or deciding that the Appellant may be required to provide the same information that would be required for the final determination of a complaint in order to determine whether a competition issue had been raised, an initial inquiry ought to be conducted and an interim direction ought to be made. The Authority ought to have found that it had already decided that a competition issue was involved when it issued its SIM-lock Statement dated 20th February 1997, that prohibited SIM-locking due to its anticompetitive effect in limiting consumer choice and competition, that in any event the conduct complained of *prima facie* contravened Section 7K(3)(b) of the Ordinance, that these facts justified at least an initial inquiry and that information establishing a serious issue to be determined was sufficient to require the consideration of the issue of an interim direction.

(2) The Authority wrongly exercised its discretion in refusing to consider the issue of an interim direction because in reaching its decision the Authority relied in part on guidelines specifying what is generally required for a final determination of a complaint and it failed to take any

or sufficient account of the *prima facie* case of breach of the SIM-lock Statement and Section 7K made out by the Appellant, the urgency of the matter, the lack of any prejudice to Apple Asia that would be caused by the issue of an interim direction, the flagrant and cynical disregard by Apple Asia of the SIM-lock statement, Section 7K and the interests of consumers and of competition as a whole and the damage to the Appellant and other carriers who have not signed agreements with Apple. Having regard to the circumstances of the case and Authority ought urgently to have issued an interim direction under Section 36B of the Telecommunications Ordinance directing Apple Asia to remove the SIM-lock and to refrain from importing or selling telephones, telephone operating systems or other telecommunications equipment programmed to restrict their use by network.

(3) There was no or no sufficient basis upon which the Authority could find that it had insufficient information to deal with the Appellant's request for an interim direction. The Authority is familiar with the issue by reason of the industry consultation the Authority's predecessor carried out with reference to the European Commission's 1996 decision that SIM-locking was anti-competitive, its predecessor's consultation paper laying out the competition law issues, including statements of the reasons why such conduct is anti-competitive and the finding of harm that it causes to the competitive process and to consumers, and its predecessor's own SIM-lock Statement dated 20th February 1997. The language of Section 7K(3) is also explicit in its prohibition of such conduct. The Authority has inherited from its predecessor a specialist competition Affairs Branch which is well versed in such matters and

which can advise the Authority on competition law issues where required.

(4) The Authority's conclusion that it had insufficient information to deal with the Appellant's complaint is inconsistent with its predecessor's findings in the SIM-lock statement that the conduct the Appellant complains of is anti-competitive and with the express prohibition in Section 7K(3) of the Ordinance.

6. It is important to note at this stage that the Grounds of Appeal quoted above invoke Section 7K of the Telecommunications Ordinance Cap. 106 ("the Telecommunications Ordinance" or "the Ordinance" as the context requires), including but not limited to Section 7K(3) thereof. This point also appears from paragraphs 63 and 106(a) of HKT's Summary of Facts annexed to its Notice of Appeal. The relevance of this will be considered further below.

7. Filing of the Notice of Appeal on behalf of HKT on 14th February 2013 was followed by a challenge by the Respondent to the Appeal Board's jurisdiction to determine the issues raised in the Notice of Appeal.

8. On 10th March 2013 the previous Chairman of the Appeal Board made a ruling following a case management conference held on 8th March 2013, issuing directions for the resolution of the issue of jurisdiction, to which we will return below, and established a timetable for submissions with a view to resolving the issue of jurisdiction as a preliminary issue prior to the determination of the substantive merits of the Appeal.

9. To that end, submissions were made by the Parties and a hearing took place on 26th April 2013 at the Hong Kong International Arbitration Centre where the previous Chairman of the Appeal Board, pursuant to Telecommunications Ordinance section 32(O)(vii) sitting alone, heard and proceeded to make a ruling on the jurisdiction of the Appeal Board to hear the current Appeal.

10. The Decision on jurisdiction was handed down by the previous Chairman on 4th June 2013. In this ruling the Chairman expressed the opinion that:-

(1) The Decision appealed against, i.e. that contained in letters dated 28th and 30th January 2014 from OFCA to HKT was a decision that the Respondent was not prepared to make an order under section 36B as sought by the Appellant but that

(2) the Appeal failed on the basis that the Decision was not one that "engaged" the Competition Provisions.

11. Dissatisfied with this ruling on jurisdiction, HKT invited the Chairman of the Appeal Board to state a case for the opinion of the Court of Appeal under Section 32R Telecommunications Ordinance and the Chairman did so pursuant to a written Case Stated dated 30th August 2013.

12. The essential question identified in the Case Stated was as follows:-

> "*Whether the letters issued by the Office of the Communications Authority dated 28th January and 30th January 2013, which include the statement that there is insufficient information to assess whether the appellant's complaint raises a genuine issue of breach of the competition provisions, involve any decision or opinion on the part of the Communications Authority relating to (i.e. which "truly engages")*

section 7K for the purposes and within the meaning of section 32N(1)(a)(i) of the Telecommunications Ordinance so as to engage the jurisdiction of the Appeal Board."

13. The Court of Appeal heard this Appeal by way of case stated on 29th November 2013 and handed down the Judgment on 17th December 2013, answering the question of law posed in the affirmative, thereby disagreeing with the Ruling handed down by the Chairman, allowing the Appeal and remitting the case to the Appeal Board for reconsideration in the light of the Court to determination of the question of law in the case stated. This Direction was made by the Court of Appeal pursuant to Section 32R(2)(b) observing that:-

"….. *it will be for the Appeal Board to hold a substantive hearing and decide the question of interim direction where appropriate.*"

14. The Respondent served a Notice of Intended Application for Leave to Appeal against the Judgment of the Court of Final Appeal by way of a Notice of Intended Application dated 6th January 2014. This Application was supported by a Notice of Motion dated 14th January 2013. By Order dated 21st March 2014 the Court of Appeal dismissed the Respondent's application to appeal to the Court of Final Appeal.

15. By a letter dated 13th January 2014 Messrs. Morrison & Foerster on behalf of Apple Asia applied to intervene in the Appeal on the ground that it believed Apple Asia's participation and the proceedings before the Appeal Board would be necessary "to the extent that the Appeal Board is minded to consider issuing a substantive direction against [Apple Asia] in response to HKT's complaint". This application to intervene was heard by the Appeal Board on 16th January 2014, prior to the then scheduled date for commencement of the substantive hearing in Appeal Case No. 31. At the hearing Apple Asia, represented by

Solicitors and Counsel, developed their application to intervene. The Appeal Board ruled in favour of the application by Apple Asia, despite the fact that the hearing of the Appeal was advertised in the website of the Appeal Board administrator on 11th March 2013 and the fact that Apple Asia's application was therefore late, having regard to the date already set for the hearing of the Appeal.

16. The result of Apple Asia's successful application to intervene was that the substantive hearing previously scheduled for 16th January 2014 was adjourned to 10th March 2014 and Directions were given regarding service of further Submissions by way of the Decision on Application to Intervene made orally by the Appeal Board on 16th January 2014 and confirmed on 24th January 2014.

17. One aspect of the case that was discussed during the course of the hearing on 16th January 2014 and which subsequently became a live issue by way of correspondence, was the assertion of confidentiality over certain evidence sought to be filed by Apple Asia.

18. This issue arose by reasons of the Appeal Board's Direction that Apple Asia were to provide information so as to explain the process by which customers of HKT had been prevented from accessing the 4G network in Hong Kong when using the iPhone 5, iPad mini and/or iPad 4th generation. At the hearing on 16th January 2014 the Appeal Board also directed that the Appeal Board wished to have information or evidence from Apple Asia as to whether any agreements or arrangements had been entered into with other Hong Kong Telecom Licensees regarding 4G connectivity.

19. This Direction gave rise to an application made by Messrs. Morrison & Foerster on behalf of Apple Asia under cover of a letter dated 7th February 2014 for certain directions preserving the confidentiality of its evidence sought to be presented to the Appeal Board. The Chairman of the Appeal Board made Directions responding to this Application under cover of a letter from the Appeal Board dated 12th February 2014 and again on 19th February 2014, dealing with further procedural matters regarding the redaction and distribution of the evidential material sought to be deployed by Apple Asia.

20. So as to avoid any doubt as to the jurisdiction of the Chairman of the Appeal Board sitting alone to issue these directions, the directions dealing with confidentiality described above were confirmed by the Board sitting as a three-men tribunal at the hearing on 10th March 2014.

21. Following the Chairman's Directions issued under cover of the Appeal Board's letters dated 12th and 19th February 2014, one of the Hong Kong mobile network operators ("MNO") who had entered into a written agreement with Apple Asia, which in a redacted form, was sought to be put in evidence by Apple Asia, themselves sought to intervene in the substantive appeal by letters dated 18th and 20th February 2014 from Messrs. Holman Fenwick Willan on their behalf, seeking further redaction and limitations upon the use of evidence concerning the MNO which they represented.

22. The Chairman dismissed both these applications under cover of Directions dated 25th February 2014 and there then followed an attempt by that MNO to apply to bring proceedings for judicial review against the Chairman's decision rejecting the MNO's application to intervene. An application for leave to bring judicial review proceedings was made on an urgent basis before Mr. Justice Ng

who scheduled a substantive hearing on 28th February 2014 and delivered a Judgment on 4th March 2014. In that Judgment Mr. Justice Ng dismissed all applications for leave to bring judicial review proceedings and refused any injunctive interim relief.

23. Thus it was, that by reason of the Parties' hard work and praise-worthy observance of the procedural timetable, the hearing on 10th March 2014 proceeded without further adjournment. This hearing took place at 23rd Floor, One Island East, Quarry Bay, Hong Kong beginning at 9:30 a.m. and ending at 5:45 p.m.

FACTUAL AND TECHNICAL BACKGROUND

24. Having reviewed at some length the procedural background giving rise to this hearing, it is now necessary to return to the facts relevant to the issues that the Appeal Board was called upon to address in the course of the hearing.

25. On or about 21st September 2012 Apple Asia, a subsidiary of Apple Inc., launched the iPhone 5 in Hong Kong. Representatives of HKT inserted one of their SIM cards into the iPhone 5 and discovered that 4G connectivity was not obtained. In fact on that date and for some time thereafter, the only Hong Kong MNO whose SIM card was able to achieve 4G connectivity on an iPhone 5 was that of SmarTone Mobile Communications Limited ("SmarTone").

26. At about the same time (i.e. late September and early October 2012) SmarTone commenced an advertising campaign describing itself as the only MNO in Hong Kong able to provide 4G connectivity for the iPhone 5. HKT, through its solicitors Messrs. Clifford Chance, engaged in an exchange of correspondence with SmarTone requesting information as to how it was that only SmarTone SIM cards recognised Apple's functionality of 4G. SmarTone refused to become engaged in any discussion on the subject and refused to provide any further information to HKT.

27. At the same time HKT and its solicitors entered into correspondence with the Director-General of the former Office of the Telecommunications Authority ("OFTA") on the same subject matter pointing out that neither Apple nor SmarTone was prepared to provide a substantive response or to engage in a dialogue with HKT in relation to the concern that had been raised "….

regarding the SIM locking function of the iPhone 5 to limit access solely to SmarTone 4G LTE network".[2]

28. In parallel with the formal process of correspondence, Mr. Stewart Chiron, Group Head of Regulatory of HKT engaged in an email correspondence with OFCA (as it had by then become). On the 13th November 2012 at 11:33 a.m. Mr. Chiron wrote to Mr. Ha Yung Kuen of OFCA as follows:-

> *"Good morning, did Apple ever get back to you re iPhone 5 access?"*

The reply from Mr. Ha to Mr. Chiron was as follows:-

> *'Yes, we have received their reply last week. They confirmed that the lock was implemented by them, and it had got nothing to do with the MNO [Mobile Network Operator]. We will seek the view of the CA [Communications Authority] on the way forward soon.*
>
> *Do you wish to modify your position or update your complaint in the light of the market development over the last few days?"*

That last request concerned the fact that two other MNOs, namely CSL and Hutchison had at some time in early November 2012, managed to obtain 4G connectivity for their SIM cards when inserted into an iPhone 5. Later on 13th November 2012 Mr. Chiron wrote another email to Mr. Ha saying that HKT did wish to extend the complaint to CSL and Hutchison. HKT (in this email) also recorded Apple's admission and pointed out that:-

> *"….. the effect on the market place is recognised via the Contracts Apple has with ST [SmarTone], CSL and Hutchison.*"

[2] See HKT's letter dated 2nd November 2012 to the Director General OFTA (as it then was)

29. The topic became one of public interest and numerous press reports emerged discussing the different treatment which the different MNOs SIM cards received when inserted into the iPhone 5, the iPad mini and the iPad 4th generation.

30. There followed extensive discussion of the matter at the Telecommunications Regulatory Affairs Advisory Committee ("TRAAC") held on 12th December 2012, for which purpose OFCA prepared a Power Point presentation which made their concerns clear that some, but not all, MNO networks were supported by the iPhone 5. This Power Point presentation also recorded consumer complaints that had been received by OFCA and invited the members, of the TRAAC to give their views on these arrangements.

31. At the meeting of the TRAAC, Miss Yolanda Ma of OFCA presented the Power Point presentation and the Chairman of this Committee invited members' comments. It is worth pointing out at this juncture that the TRAAC has a wide range of consumer industry and governmental representatives as its members as can be seen from the identity of the persons present from the draft minutes of meeting published after the meeting.

32. In response, Mr. Peter Lam of HKT was particularly vocal as regards his concerns that the MNOs, who had achieved connectivity for 4G network on the iPhone 5 had breached the SIM lock statement issued by the former Telecommunications Authority in 1997.

33. Dr. Victor Hung of the Consumer Council also expressed concern about "any pre-selection arrangement" but thought the subject matter fell under the ambit of consumer protection rather than competition. Dr. Andrew Simpson,

apparently representing himself and no particular interested body or corporation, expressed the view that the matters in question were not generally to be regarded as causing competition problems, unless the vendors of one product had market power forcing consumers to purchase another product. He noted that there was little information available regarding Apple's business strategies but stated that in his view he would be surprised by any comment that there was serious competition issues on the subject matter.

34. Two days after the TRAAC meeting, Mr. Peter Lam followed up his comments at that meeting by a letter dated 14th December 2012 to OFCA referring again to the 1997 SIM lock statement and objecting to the current practice of denying the "interworking" of iPhone 5 and the new iPad model with specific 4G LTE networks. He asserted that HKT's 18,000 MHz 4G network met the relevant international technical standard and that Apple Asia's unilateral and non-transparent selection process contradicted the pro-competition and pro-customer choice principles of the Hong Kong SAR Government established in the liberalisation of the telecommunications market. This letter continues with the reference to Section 7K Telecommunications Ordinance (which will be considered below) and makes an urgent plea for action to protect the consumer interests and to minimise damage caused not only to operators such as HKT but to the vibrancy and effectiveness of Hong Kong telecommunications market. Similar sentiments were expressed (albeit more succinctly) in a letter to the Chairman of the Communications Authority ("CA") Mr. Ambrose Ho SC in a letter from HKT of the same date.

35. It is now necessary to turn to the responses which these serious and heart felt complaints from HKT received from OFCA. To any one concerned with the

implementation, administration and enforcement of competition provisions in Hong Kong, they do not make satisfactory reading.

36. By a letter dated 19th December 2012 addressed to the Group Managing Director of HKT (Mr. Alex Arena) OFCA simply said:-

> "*We would like to assure you that the complaint filed by HKT with the CA is being processed by OFCA expeditiously in accordance with the established procedures.*"

Something similar was said by OFCA in a letter dated 28th December 2012 to Mr. Chiron. Nothing else was heard from OFCA prior to the end of 2012 and by 16th January 2013 HKT's complaints had still not been addressed in any meaningful or substantive way by OFCA. Messrs. Clifford Chance on behalf of HKT then wrote to the Director-General of OFCA at length and in detail requesting "*immediate action on our requests for an interim direction.*"

37. OFCA's response was, the Appeal Board is sorry to relate, far from adequate. OFCA, having summarised inadequately the nature of the complaints made by and on behalf of HKT, then placed reliance as to its own guidelines as to how complaints relating to anticompetitive practices were to be handled and held that the information provided by HKT was "*inadequate to enable us to assess whether the complaints raises a genuine competition issue with* (sic) *the scope of the competition provisions of the TO such that OFCA may consider it justified to conduct an initial enquiry of the matter, let alone to enable the Communications Authority to consider any ground for suspecting a breach and any justification of enforcement action.…*" The letter from OFCA dated 28th January 2013 then set out a number of questions and made further reference to its "guide" on handling complaints.

38. Perhaps aware that its letter dated 28th January 2013 was a wholly inadequate response to the complaints which had been raised by HKT earlier, OFCA wrote again, unprompted on 30th January 2013 making reference to HKT's reliance on the SIM lock statement, stating only that it was "*in the course of reviewing the applicability of this statement*" and repeating OFCA's view that the information provided by HKT was inadequate. This letter closes by refusing to divulge any documents or information to HKT regarding the investigation which OFCA said it was conducting. The Appeal Board returns to the inadequacy in the Respondent's treatment of HKT's complaint in more detail below.

39. The issue that arose as a result of the jurisdictional of challenge by the Respondent concerning whether the letters of 28th and 30th January 2013 from OFCA whether separately or together comprised a decision by the Authority that it will not issue the urgent interim direction under Section 36B that was requested by HKT has already been posed, argued and decided by a Decision of the Court of Appeal in Hong Kong which is no longer under appeal.

40. That Judgment provides guidance to the effect that, on their true construction, these letters were a refusal that amounted to a decision relating to Section 7K in the sense that that section was "*truly engaged*".[3]

41. Because this Court of Appeal Judgment in *Hong Kong Telecommunications (HKT) Limited v. The Communications Authority* provides the necessary clear guidance for the future conduct of the current appeal, the Appeal Board

[3] See paragraphs 22 and 24 to 29 Court of Appeal Judgment CACV 190/2013 handed down 17th December 2013

considers it worthwhile setting out in full the following paragraphs from this Judgment:-

> "*27. I reject the argument that no decision on the merits, based on the material already presented, had been made by that stage. Quite to the contrary, I accept Mr. Yu's argument that OFCA was saying that the appellant had failed even to make it to the first base. Indeed the material presented was so poor and inadequate that they failed even to raise "a genuine competition issue".*
>
> *28. As I said, the fact that OFCA's letters effectively asked the appellant to try again and come back with further material and details, is really neither here nor there and does not affect the above analysis.*
>
> *29. In my view, the decision not to issue an immediate direction was a decision relating to, in the sense that it truly engaged, section 7K.*
>
> *30. I am not troubled by the possible difficulties described by the Chairman in his decision following the entertaining of the present appeal if he were to find jurisdiction to hear it, which were given as a main reason for finding against jurisdiction in terms of legislative intent. I am not sure if, assuming that there is jurisdiction to hear the appeal as I think there is, the substantive appeal before the Appeal Board would be as daunting as the Chairman has portrayed. After all, the issue raised in the appeal is a relatively limited one, that is, whether the material already presented was adequate or inadequate to enable the respondent to decide whether to make an interim direction. At the substantive hearing, I would imagine, OFCA's representative would explain to the Appeal Board why it was considered that the material presented was inadequate, what further information and details would be required, and why. It would be up to the Appeal Board to make up its mind as regards the adequacy of the material presented. Assuming that the Appeal Board was with the appellant, it would then be up to the Appeal Board to decide what to do next, including whether to remit the matter to the respondent to decide how it should exercise its undoubted discretion under section 36B regarding the issue of an interim direction.*

31. In any event, I accept Mr. Yu's submission that an appeal before the Appeal Board is a de novo hearing. In my view, the very extensive powers given to the Appeal Board under section 32O of the Ordinance regarding the hearing of an appeal would certainly suggest a legislative intention that is much wider in scope, in terms of the role and function of the appeal Board, than that envisaged below.

……..…..

38. …. I am firmly of the view that the only right course for this court to take is to remit the case to the Appeal Board for reconsideration I the light of this court's determination on the question of jurisdiction: section 32(2)(b). In order words, it will be for the Appeal Board to hold a substantive hearing and decide the question of interim direction where appropriate. Given that the present appeal is one on a question of law arising from the decision of the Chairman of the Appeal Board sitting alone pursuant to section 32O(1)(b) – his jurisdiction, witting alone, is limited to questions of law, it would be a very strange outcome if this court, sitting on appeal from the Chairman's decision, were to deal with the substantive merits of the appeal, something which even the Chairman when sitting alone cannot do.

Disposition

39. For all these reasons, I would answer the question of law posed in the affirmative, allow the appeal, and remit the case to the Appeal Board for reconsideration in the light of the court's determination of the question of law."

42. In the light of these observations, we now turn to the relevant evidence adduced before the Appeal Board.

HKT's CASE REGARDING SIM LOCK ON iPHONE 5

43. Although the original complaint advanced by HKT related to the connectivity to HKT's 4G network by the iPhone 5, the iPad Mini and the iPad 4th generation, by the time the matter came before the Appeal Board for hearing, HKT confined its complaint to the restriction on 4G connectivity to only iPhone 5, iPhone 5S and iPhone 5C items of equipment produced by Apple Inc. and sold by Apple Asia in Hong Kong. This was because, we understand that sometime prior to the hearing of the Appeal connectivity of the iPad Mini and iPad 4th generation to HKT's 4G network has been achieved.

44. As appears from a structure chart handed to us by Mr. Benjamin Yu SC, Counsel for HKT at the hearing, there are currently two MNOs whose SIM cards do not achieve iPhone 5 connectivity. These are HKT itself and China Mobile. The other three licensed MNOs operating in Hong Kong: SmartTone, CSL and Hutchison, or more accurately their customers, can achieve 4G connectivity through the use of those MNOs SIM cards in iPhone 5 telephones. This structure chart is annexed hereto as Schedule 1.

45. A further technical distinction that it is necessary at this stage to note is that the iPhone 5, which was first made available for purchase in Hong Kong at the end of 2012 operated on the 18,000 MHz frequency, whereas the iPhone 5S and iPhone 5C operate on the 26,000 MHz frequency.

46. The significance of this is that HKT and Hutchison share a 26,000 MHz 4G network radio infrastructure operated by a joint venture formed between those two companies called Genius Brand Limited. As Mr. Richard Midgett, HKT's witness in these proceedings, points out, the fact that Apple Inc. and/or Apple

Asia permit the iPhone 5C and iPhone 5S to operate on Hutchison's 4G network but prohibit HKT's customers using an iPhone 5S and iPhone 5C to access the 4G network, can therefore not be attributable to any defect or shortcoming in the Genius Brand Limited radio infrastructure. We find this noteworthy and relevant for the reasons considered below. So far as the below-ground core transmission network employed by HKT is concerned, Mr. Richard Midgett stated and we accept that HKT's core transmission network that is not part of this Genius Brand joint venture is superior to Hutchison. There cannot therefore in the Appeal Board's view have been any shortcomings in HKT's core transmission network justifying the exclusion of connectivity by reasons of defect in this part of HKT's network.

47. Mr. Coleman SC on behalf of Apple Asia has drawn the Board's attention to the many features of the iPhone 5, iPhone 5S and iPhone 5C smart phone handsets. These all have a number of features which provide their owners who have access to an MNO's network with multiple types of services and different types of access. This includes SMS, 2G and 3G network access, voice mail, emergency calls and other features, none of which are affected by exclusion of the customer from a 4G network, the complaint that lies at the heart of HKT's case in this Appeal. It would not be correct, therefore, to categorise HKT's complaint as a complete lock out of HKT's customers from using the iPhone 5 out of HKT's network. It is only one type of service or access that is excluded, namely access to the 4G network by HKT's customers using the iPhone 5 series handsets. This is graphically demonstrated by a Venn Diagram which Mr. Coleman SC provided to us and is annexed hereto as Schedule 2.

48. HKT's essential case, which the Appeal Board accepts as an accurate summary of the technical position can be extracted from the 1st Affidavit of Mr. Midgett:-

> *"46. Although Apple says that 'LTE [i.e. 4G] functionality ….. has not been enabled for HKT's network', it is apparent the customers of approved networks can nevertheless use HKT's 4G networks in Hong Kong (and that HKT's customers are being denied access to Apple approved 4G networks overseas)."*

49. Apple Asia's case is that the reason that 4G functionality has not been enabled for HKT's network is because that network has not been tested for compatibility nor optimised for operation with iPhone 5 handsets. It is said on behalf of Apple Asia[4] that such verification is necessary to ensure iPhone 5 performance and functionality.

50. In support of the Submissions Apple Asia has submitted as Appendix A to its Submissions a document which the Appeal Board has ruled should be treated as confidential to the Parties to this Appeal that describes in some detail the testing and enabling process. The essence of this evidence (in so far as it can be divulged in this Decision and Ruling) and as a further supplement to this document which was filed by Apple Asia subsequently shows, is that because HKT's 4G network has not been tested, the 4G connectivity has not been enabled to HKT's customers using iPhone 5 handsets.

51. It is said on behalf of Apple Asia that there is no commercial reason underlying the preference shown to three MNOs who do have 4G connectivity using iPhone 5 handsets but that HKT (and presumably China Mobile) have not had their networks tested and therefore no connectivity has been enabled. In the

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[4] See Apple Asia's Submissions dated 7th February 2014 paragraphs 35 to 45

course of an exchange between Mr. Coleman SC and members of the Appeal Board, it was accepted by Apple Asia that no testing of HKT's network has taken place and that no testing of HKT's network was planned in the future. It was suggested to Mr. Coleman SC that in the light of this failure to test, when combined with the fact that no technical shortcomings had been identified to HKT's network, it must be open to the Appeal Board to conclude that whatever Apple Asia or Apple Inc's objections to HKT's network may be, they are not based on that network's technical performance. That proposition was not accepted by Mr. Coleman SC on behalf of Apple Asia who stated:-

> "*The objection is based upon a lack of comfort as to technical performance because it has not been tested*."

However, Professor Williams noted in the course of this exchange that Apple Asia and Apple Inc. have not set a date when testing of HKT's network will take place[5] and Apple Asia's evidential material fails to provide any detail as to who tested the approved MNO's network, how many technicians were used, what tests they carried out and what was done. As Professor Williams noted, if the process was as vigorous and important as Apple Asia suggests, that is the sort of material that would have been necessary in order to convince us as an Appeal Board that there were bona fide objections based on technical grounds to HKT's networks that the three approved MNOs were able to satisfy. We are, in short, not satisfied that Apple Asia's objections to HKT's network on technical grounds are bona fide, and we so hold.

52. HKT's networks are constructed to international standards which are monitored by the Global Certification Forum, an independent certification scheme and are built to meet or exceed the strict specification set out by OFCA in its guidance

[5] Transcript pages 175 - 176

to MNOs constructing 4G network as set out in Tab 4 to Exhibit "RWM-1" to Mr. Midgett's 1st Affidavit.

53. Furthermore, as described in the 3rd Affidavit of Mr. Midgett dated 9th March 2014 and as demonstrated in a live demonstration during the course of the hearing on 10th March 2014, foreign SIM card owners utilising the iPhone 5, iPhone 5C and iPhone 5S are all able to use roaming onto HKT's network and thereby obtain 4G functionality. If there were any genuine objection to HKT's network for providing 4G connectivity to iPhone 5 handsets, we have been provided with no reason we find convincing as to why foreign roaming SIM card owners should be enabled by Apple Asia or Apple Inc. to make this connectivity whilst HKT's customers would not be able to make that connectivity to the same network providing 4G services.

54. For these reasons we find that the denial of connectivity to HKT's 4G network by HKT's customers using a HKT SIM in an iPhone 5, iPhone 5C or iPhone 5S was not justified by any genuine concern on the part of Apple Asia or Apple Inc's regarding the performance of HKT's network, nor by any professed need to test and enable that network.

IS APPLE AISA / APPLE INC. SIM LOCK A BREACH OF THE 1997 SIM LOCK STATEMENT?

55. At the forefront of HKT's case in this Appeal is the proposition that the restriction imposed by Apple Asia on HKT's customers accessing 4G using iPhone 5 handsets is a breach of the 1997 SIM Lock Statement. The 1997 SIM Lock Statement comprises a statement by the Telecommunications Authority of Hong Kong (as it then was) published on its website following an earlier 20th September 1996 OFTA consultative paper inviting views and comments from the Mobile Telecommunications Industry and other interested parties as to whether the SIM lock function should be adopted in Hong Kong and if so, the measures to be imposed for safeguarding competition in the mobile phone market in Hong Kong. It is important to bear in mind that at the time this statement was published by OFTA mobile telephone handsets were still somewhat in their infancy and certainly lacked many of the advanced functions that the current generation of iPhone 5 handsets (for instance) offer to the consumer. The definition of a SIM lock in the 1997 SIM Lock Statement is derived from an earlier consultative paper dated 20th September 1996 which describes a SIM lock in the following terms:-

> *"What is the "SIM Lock" function?*
>
> *2. The Subscriber Identity Module (SIM) card is a kind of smart cards which contain the relevant personal information and identity of a GSM/DCS customer. Before a customer can access and use the network to which he/she subscribes, he/she needs to insert the relevant SIM card into the handset and then power it up so that the network operator can verify his/her identity and status. The SIM card was originally designed so that a handset could work with different SIM cards to access the services of different networks. However, the proposed "SIM Lock" function can electronically lock a particular handset or certain types of handsets into a network with the result that a customer will have*

to buy a new handset in order that he/she will be able to use a new GSM or DCS network."

56. The essence of the SIM lock function under discussion in this consultative paper was an electronic lock of the handset into a network, such that if the customer wanted to access a different network he would have to buy a new handset. It is against that background and bearing in mind this important definition that the 1997 SIM Lock statement then proceeded to state that OFTA had decided that the way forward on the SIM lock issue was to be as follows:-

"TA's Final Considerations

5. Taking into consideration the comments in the submissions and the rulings of the EC, the TA decides that the way forward on the 'SIM Lock" Issue should be as follows:-

a. The TA does not restrict operators and dealers to use "SIM Lock" for protection of subsidy of equipment provided that the customers are well informed of the amount of any subsidy, the "SIM Lock" arrangement and the conditions for repayment of the subsidy to unlock the "SIM Lock" at the time of purchase of the equipment;

b. The TA would allow operators and dealers to deploy SIM locked equipment to customers for the purpose of deterring theft and fraud or for the enforcement of the rental or instalment contracts with the customers concerned. However, the following conditions governing such deployment of "SIM Lock" will apply –

- *For anti-theft and anti-fraud applications, operators and dealers should inform the customers clearly about such "SIM lock" arrangement and also provide them with the necessary procedures and methods of unlocking the equipment by the customers themselves or by the operators and dealers free of charge to the customers;*

- *Where the equipment is rented or paid by instalments by the customers, operators and dealers will have to advise the customers concerned about the SIM locking arrangement and provide them with the detailed unlocking procedures if they have already paid up the total equipment costs.*

c. If "SIM Lock" is solely used for the purpose of tying customers to networks other than for the purposes stated in (a) and (b), it may adversely affect competition in the mobile industry. Therefore, this practice is forbidden.

d. The European Telecommunications Standards Institute (ETSI) is now developing the specification for the "SIM lock" feature as part of the GSM/DCS standard. The TA requires that the "SIM Lock" feature to be implemented in Hong Kong must be in conformity with the ETSI specification and standard."

57. The prohibition embodied in this passage was that a SIM lock was objectionable if it tied a customer to a network other than for the purposes of avoiding fraud or ensuring payment by instalments for the equipment.

58. Apple Asia point out in their Submissions to the Appeal Board that the restriction imposed on the connectivity to HKT's 4G network does not amount to a SIM lock within the narrow definition provided by the 1997 SIM Lock Statement. Apple Asia point out, correctly in the view of the Appeal Board, that iPhone 5 handsets can be used with the SIM cards of any carrier in Hong Kong, including HKT. The iPhone 5 handsets are not SIM locked in this sense and will operate on the 2G and 3G networks of all the local carriers, including HKT and will provide SMS and voice calls on all Apple Asia's equipment (amongst other services) without restriction. Apple Asia express the belief (and there is no evidence to contradict this) that they are between 25,000 to 30,000 HKT's customers currently using iPhone 5, iPhone 5C and iPhone 5S

handsets who are not locked out of any HKT's functionality, apart from 4G connectivity. This, in the Appeal Board's view is a vital point.

59. Apple Asia accept that in some countries a full SIM lock is imposed where permitted in those markets and stress that the restriction placed on the iPhone 5 handsets in Hong Kong are not a SIM lock in the sense contemplated by the 1997 SIM Lock Statement.

60. HKT on the other hand urges the Appeal Board to take a broad view of the expression "SIM lock" and suggests that in the present case the fact that the lock only applies to HKT's 4G networks is immaterial and the precise mode of locking is irrelevant. In short, and based upon the evidence of Mr. Midgett's 1st Affidavit, it is asserted that Apple Asia or Apple Inc. have imposed a SIM lock "pure and simple".

61. The Appeal Board does not feel able to take such a broad view of the 1997 SIM Lock Statement as HKT urges upon us. The 1997 SIM Lock Statement was issued against the background of the consultative paper and plainly adopted the definition of a SIM lock contained in the consultative paper and using the definition quoted above. It would not be proper, in the Appeal Board's view, to apply a wider definition than that which gave rise to the 1997 SIM Lock Statement, even though the technology concerned has evolved significantly since 1996 and 1997. The Appeal Board is not in a position to speculate what view of the present restrictions on HKT 4G connectivity to handsets the telecommunications industry and relevant market players would take in the light of technological developments, since to do so would involve the Appeal Board speculating as to the different and possibly competing policy

considerations which may arise from an extended definition of a SIM lock in the present era.

62. The Appeal Board believes it to be a matter of regret that OFTA and its successor OFCA have not consulted the telecommunications industry and customers more extensively and more recently so as to arrive at an up-to-date definition of SIM lock and to update the "Way Forward" since the 1997 Statement. The Parties to this Appeal, the telecommunications industry and the consumer interest have all been harmed by the failure of the Authority concerned to update its views and comments in the light of the rapidly evolving technology and the Appeal urges OFCA to address this failure and issue an updated SIM Lock Statement at the earliest possible opportunity.

BREACH OF TELECOMMUNICATIONS ORDINANCE SECTION 7K: ANTI-COMPETITIVE PRACTICES: SECTION 7K(3)

63. HKT's case in this Appeal is founded upon an allegation that Apple Inc. and/or Apple Asia engaged in anti-competitive practices contrary to Section 7K Telecommunications Ordinance. Where relevant, this provides as follows:-

> *"7K Anti-competitive practices*
>
> *(1) A licensee 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.*
>
> *(2) The Authority in considering whether conduct has the purpose or effect prescribed under subsection (1) is to have regard to relevant matters including, but not limited to –*
>
> *(a) ……*
> *……*

> *(c) agreements between licensees to share any telecommunications market between them on agreed geographic or customer lines;*
>
> ……..
>
> *(3) Without limiting the general nature of subsection (1), a licensee engages in conduct prescribed under that subsection if he –*
>
> *(a) enters into an agreement, arrangement or understanding that has the purpose or effect prescribed by that subsection;*
>
> *(b) without the prior written authorisation of the authority, makes the provision of or connection to a telecommunications network, system, installation, customer equipment or service conditional upon the person acquiring it also acquiring or not acquiring a specified telecommunications network, system, installation, customer equipment or service, either from the licensee or from another person;*

64. It is to be noted that the overall prohibition set out in Section 7K(1) is couched in general terms with guidance given to the authority in Section 7K(2) as to relevant considerations that the authority should (on a non-exclusive basis) have regard to in reviewing the conduct complaint of.

65. Section 7K(3) is the subsection upon which HKT places most reliance in this Appeal. It provides for a number of types of activity which, without the requirement to review more general issues of market impact, are treated as an automatic or *per se* a breach of Section 7K(1). Of the two relevant types of activity set out in Section 7K(3)(a) and (b), the former concerning agreement arrangements or understandings was not pursued in this Appeal and there is no evidence of any such agreement arrangement or understanding before us.

66. Rather, Section 7K(3)(b) is the focus of this Appeal. In this subsection, although the expression "SIM Lock" is not employed, clearly the provision

refers to, inter alia, a similar type of situation. The Legislative Council Brief dated 27th April 1999 concerning the Telecommunications (Amendment) Bill 1999 which introduced this provision, states *inter alia* that the bill sought to:

> Consolidate the provisions for the promotion of fair competition in the market for public telecommunications services, particularly to incorporate into the Telecommunications Ordinance such conditions already written in the Fixed Telecommunications Network Service (FNTS) licence. P.1 Para.3(a).

Thus, Section 7K(3) was incorporated into the amended Ordinance, more or less adopting provisions and conditions that the then existing FTNS licence granted to or imposed upon network operators.

67. The essence of this prohibition strikes at any attempt to tie the provision of a service or equipment with the licensees (or other persons) equipment, without the prior written authorisation of OFCA. The operation of the SIM Lock on HKT's 4G network implemented by Apple Asia, HKT contend, operate in breach of the subsection.

68. During the course of the hearing Mr. Mok SC on behalf of OFCA developed a line of argument, not previously set out into writing, based on the use in this subsection of the phrase "Customer Equipment". Telecommunications Ordinance Section 1 defines "Customer Equipment" in the following terms:-

> "*Customer Equipment" means equipment acquired by a customer of a carrier licensee intended to be connected to the network of that licensee*"

69. Mr. Mok SC placed emphasis upon the closing phrase of this definition "connected to the network of that licensee". In the Appeal under review it is Apple Asia that holds the licence and is therefore the licensee. However, Apple Asia has no network and therefore the provision of Apple Asia's customer equipment, whatever restriction that equipment may impose, is not intended or capable of being conditional upon the purchaser acquiring a network from Apple Asia.

70. This point assumed such importance in the course of the hearing that the Appeal Board required supplementary written submissions from all parties to be served after the hearing closed and these were provided to the Appeal Board on 14th March 2014. We are indebted to Counsel for their additional research.

71. Both OFCA and Apple Asia urge upon us a narrow interpretation of Section 7K(3)(b), having regard to the deeming effect of this subsection.

72. Mr. Mok SC (with him Mr. Abraham Chan) points to the principle of "Doubtful Penalisation": Bennion on Statutory Interpretation pp. 749-755. He invites us to exercise caution before extending the deeming effect beyond the language of the statute.

73. Mr. Coleman SC (with him Julian Lam) stresses the limits placed on Section 7K(3)(b) by reason of the use of the narrow definition of "Customer Equipment" and suggests:-

> "….. *provision of equipment to someone who is not a customer of a carrier licensee, and who does not intend to use such equipment on a network of that carrier licensee, is not the "provision of customer equipment" under Section 7K(3)(b).*"

Apple Aisa also refers to the Chinese text as emphasising this interpretation, a point also made by Mr. Mok SC who observes that the characters "規定" usually mean "stipulates".

74. Mr. Yu SC (with him Roger Beresford) on behalf of HKT urges upon us a broader reading of "Customer Equipment" and suggests that the purpose of the subsection is to "broadly prohibit anti-competitive conduct (whether at the wholesale or retail level) including, relevantly, unauthorized bundling. HKT says that to allow bundling by the supplier of one of the products and not by the supplier of the other merely invites bundling by the first".[6] HKT further urge on us an interpretation of the Telecommunications Ordinance in its social setting, having regard to the long title of the Ordinance and invites our attention to the history of the telephone and earlier consultation paper discussions.

75. The Appeal Board, having considered carefully these Supplemental Submissions, are unable to apply an extended or purposive construction to Section 7K(3)(b). In this regard, we have regard to the observations of Lord Millett in *China Field Limited v. Appeal Tribunal (Buildings) (No.2)*[7] where he observed:-

> "….. *There can be no quarrel with the principle that statutory provisions should be given a purposive interpretation, but there has been a distressing development by the courts which allows them to distort or even ignore the plain meaning of the text and construe the statute in whatever manner achieves a result which they consider desirable. It cannot be said too often that this is not permissible. Purposive construction means only that statutory provisions are to be interpreted to give effect to the intention of the legislature, and that intention must be ascertained by a proper application of the interpretative process. This does not permit the Court to attribute to a statutory provision a*

[6] HKT's Supplemental Submission paragraph 8(3)
[7] (2009) 12 HKCFAR 342

meaning which the language of the statute, understood in the light of its context and the statutory purpose, is incapable of bearing."

Whatever may have been the original statutory and underlying regulatory intention behind the broad restriction on bundling equipment and services and the original purpose behind the SIM-lock statement, we are not able extend the definition of "customer equipment" to cover a situation where Apple Asia is not the provider of a network. To do so, we believe, would offend against the plain and obvious words of the subsection and the definition employed and would not, in our view, be a "proper application of the interpretative process".

76. We reach this conclusion with some reluctance, having regard to the unsatisfactory nature of the evidence adduced by Apple Asia in this Appeal and having regard to the criticism which we have already levelled at OFTA and OFCA for failing to properly update its policy statements in the light of the development of new technology. Nevertheless, and for the reasons set out above, we are of the view that a breach of Section 7K(3) cannot be established by HKT in the circumstances of this case and in the light of the guidance provided by the Court of Appeal as to what is open to us to order by way belief sought by HKT at this juncture.

SECTION 7K(1): ANTI-COMPETATIVE PRACTICES

77. We noted above that the Notice of Appeal referred to Section 7K(1) as well as Section 7K(3) as entitling HKT to an interim direction under Section 36B Telecommunications Ordinance that Apple Asia remove its SIM-lock. We have rejected any automatic application of Section 7K(3) on the grounds that the method of restricting interconnectivity employed in the case of the iPhone 5

handsets here does not fall within either the 1997 SIM-lock statement or the definition of "Customer Equipment" for the purposes of Section 7K(3).

78. Nevertheless we uphold the Appeal to this extent: The material lodged by HKT in its correspondence submitted to OFCA and its predecessor was, in our view plainly sufficient to "truly engage" Section 7K Telecommunications Ordinance in the sense contemplated by paragraphs 28 to 31 of the Judgment of the Hon. Cheung CJHC in the Court of Appeal. Indeed, in their submission before us (as HKT rightly point out), the Respondent scarcely appears to defend the approach adopted by OFCA in this correspondence.

79. In the view of the Appeal Board the Respondent has totally failed to consider paragraph 33 of its Guidelines which provides as follows:-

> "*33. Where the conduct being complained about is still on-going and is alleged to be continually causing serious damage to the consumers or other industry players, the CA may consider taking urgent action within such time frames as the circumstances warrant to deal with the complaint. As such, the CA retains the discretion not to adhere to the time frames set out in this guide and will determine a time frame which it deems appropriate in the circumstances. Where circumstances require and if it considers it justifiable to do so, the CA may also depart from all or any part of the procedures set out in this guide.*

Far from taking the urgent action that the public interest and the telecommunications industry was entitled to expect under this guideline the Respondent's approach was to rely on Appendix B of the Guidelines without any appreciation of the need to take urgent action.

80. The information sought by the Respondent we believe goes far beyond that which may be necessary for the Respondent to take a decision whether or not to issue interim direction of the type sought by HKT.

81. We take the point made in paragraph 20 of HKT's Reply submissions dated 5th March 2014 that remission by us to the Respondent with a direction to make such a substantive decision will likely result in further delay. However, we, as an Appeal Board, are not in a position to investigate all the regulatory, technical commercial and economic issues that would be required for us to form a *prima facie* view of the merits of the overall complaint. That is the task of the Respondent.

82. Mr. Mok SC on behalf of the Respondent informs us that an enquiry is underway to deal with HKT's complaint, although the Appeal Board has seen little evidence that it is proceeding with diligence and dispatch.

83. Despite our dismissal of HKT's Application for an interim direction under Section 7K(3) we are, nevertheless, concerned that competitive conditions in the rapidly evolving and important telecommunications market for 4G services in Hong Kong might have been adversely affected by the circumstances disclosed in the evidence and documents that have been made available to the Board in the course of these proceedings. The investigation and determination of whether a breach of Section 7K(1) has in fact occurred is of course a matter for the Authority. We noted this issue has been 'live' for more than 18 months and that the Authority's own Complaints Guidelines state that complaint investigation should usually be concluded within four months from its commencement (see paragraph 32 thereof).

84. In these circumstances, the Appeal Board felt it necessary to impose on the Respondent a sense of urgency that it has not hitherto shown itself able to adopt on its own behalf.

85. Pursuant to Section 32O(4) Telecommunications Ordinance we make the following Orders:-

(1) The Appeal is allowed to the extent that we hold that the Appeal Subject Matter (as defined in the Notice of Appeal) truly engages Section 7K Telecommunications Ordinance.

(2) The Appeal Board refuses to issue or to direct the Respondent to issue any form of interim relief under Section 36B Telecommunications Ordinance.

(3) The Respondent is directed to proceed diligently and expeditiously with its enquires into HKT's complaints described more fully in the Summary of Facts annexed as Appendix 1 to its Notice of Appeal and as further supplemented by the evidence, submissions and correspondence lodged in the course of this Appeal.

(4) The Respondent is directed to arrive at a decision, including a decision regarding whether or not to make any interim or final direction under Section 36B Telecommunications Ordinance by 1st July 2014.

DISPOSAL OF APPEAL AND CONSEQUENTIAL ORDERS

86. The Court of Appeal having remitted the case to the Appeal Board for reconsideration in the light of the Court of Appeal's determination of the

question of jurisdiction, and having held a substantive hearing as directed by paragraph 38 of the Court of Appeal's Judgment, we have decided the question of interim jurisdiction as follows:-

> "The Appeal Board allows the Appeal to the extent described above but makes no interim order directing Apple Asia to remove any restriction preventing HKT's customers from accessing 4G connectivity on the iPhone 5, iPhone 5C or iPhone 5S."

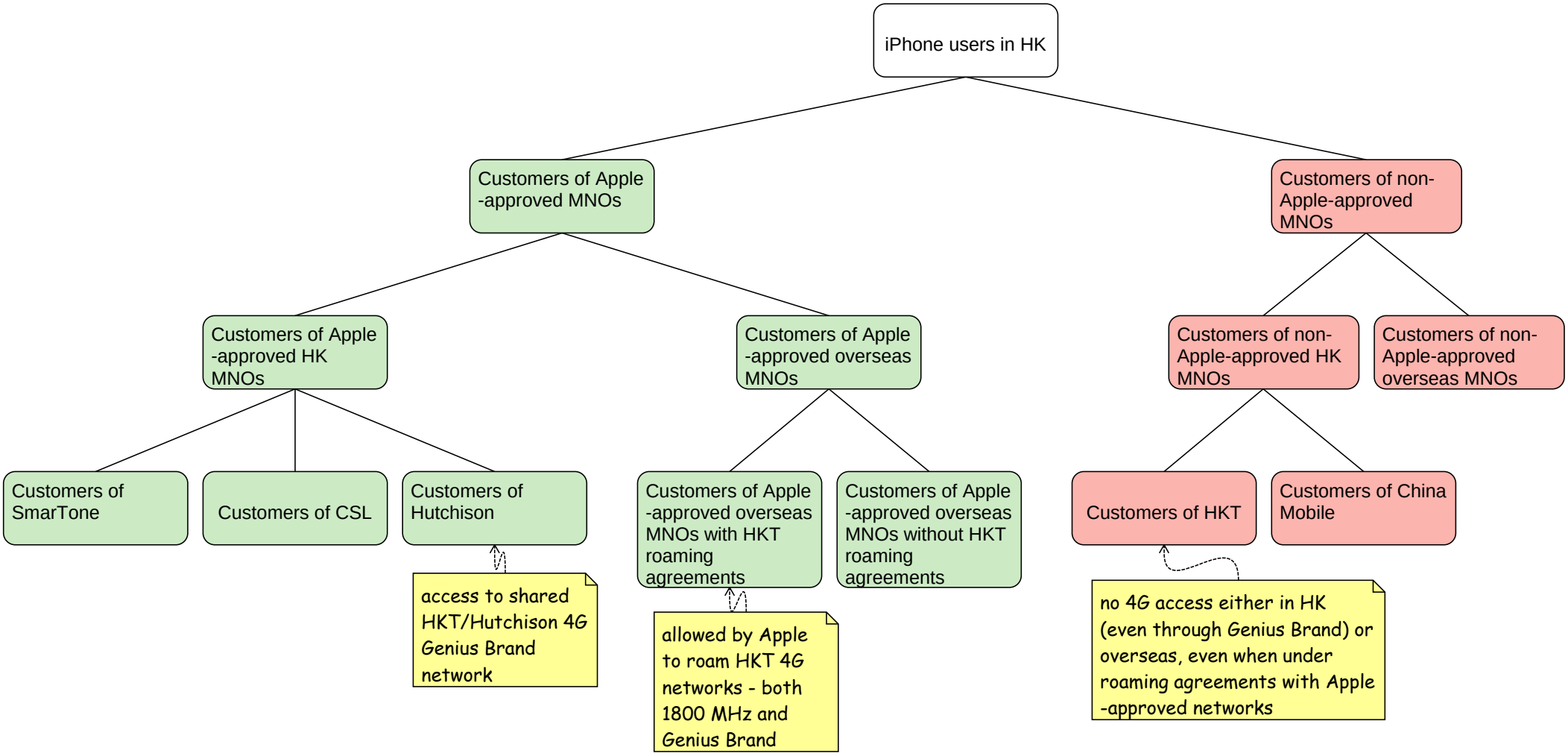
87. We will reserve the question of costs to further submissions.

Dated 16 April 2014

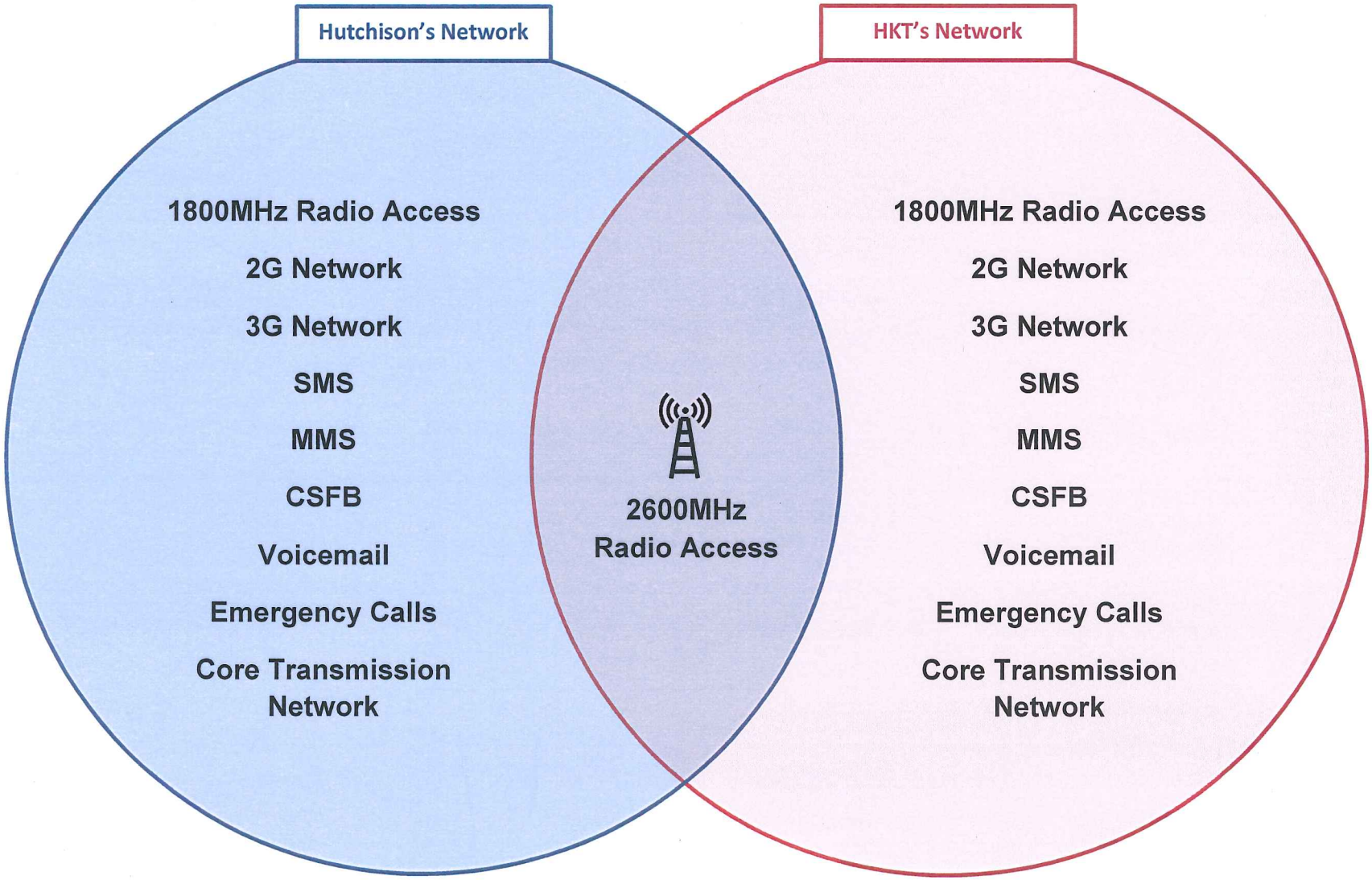
SIGNED

John Scott SC	Professor Suen Wing-chuen	Professor Mark Williams

Schedule 1


iPhone users in HK
Customers of Apple -approved MNOs
Customers of non-Apple-approved MNOs
Customers of Apple -approved HK MNOs
Customers of Apple -approved overseas MNOs
Customers of non-Apple-approved HK MNOs
Customers of non-Apple-approved overseas MNOs
Customers of SmarTone
Customers of CSL
Customers of Hutchison
Customers of Apple -approved overseas MNOs with HKT roaming agreements
Customers of Apple -approved overseas MNOs without HKT roaming agreements
Customers of HKT
Customers of China Mobile
access to shared HKT/Hutchison 4G Genius Brand network
allowed by Apple to roam HKT 4G networks - both 1800 MHz and Genius Brand
no 4G access either in HK (even through Genius Brand) or overseas, even when under roaming agreements with Apple -approved networks

Schedule 2



Sources: Appendix A to the Intervener's Submissions (§§1, 2); Supplement to Appendix A (§§1, 2, 6-9); First Affidavit of Richard Midgett (§§47, 56)