



Summary of Judgment

Television Broadcasts Limited (“TVB”) v Communications Authority (“Comma”) and Chief Executive in Council (“CE in C”) HCAL 151/2016 & HCAL 47/2017; [2020] HKCFI 3180

Decision : **Both applications for judicial review dismissed**
Date of Hearing : **16-18 May 2018**
Date of Judgment/Decision : **31 December 2020**

Background

1. In these two judicial reviews applications, TVB challenged two respective decisions of the Comma (collectively, the “Decisions”) by which TVB was found to have breached two Codes of Practice (“the Codes”)¹ issued by the Comma regulating indirect advertising².

(a) The subject TV programme in HCAL 151/2016 was the “TV Awards Presentation” first broadcasted on 13 December 2015. In a segment of the said TV programme, fried chicken and soft drinks from Kentucky Fried Chicken (“KFC”), with KFC’s logo clearly shown (with close-up shots) on food boxes and soft drink cups, were presented to guests. The Comma found on 24 May 2016 that TVB breached the Codes and imposed a financial penalty of \$150,000 on TVB for the breach (“the KFC Decision”). TVB lodged an appeal to the CE in C pursuant to section 34 of the Broadcasting Ordinance (Cap. 562) (the “BO”) against the KFC Decision (the “Appeal Proceedings”). The Appeal Proceedings were stayed as a result of these proceedings.

(b) The subject TV programme in HCAL 47/2017 was “Scoop”, which was an

¹ The relevant paragraphs of the Codes were:-

- (a) paragraph 1 of Chapter 11 of the then effective Generic Code of Practice on Television Programme Standards (“TV Programme Code”) which stated that advertising material may only be placed at the beginning, end or in a natural break of a programme (which in effect prohibits indirect advertising) while paragraph 10 of Chapter 9 of the TV Advertising Code and
- (b) paragraph 10(a) of Chapter 9 of the then effective the Generic Code of Practice on Television Advertising Standards (“TV Advertising Code”) which allowed instances of product or programme sponsorship provided that the exposure or use was “*clearly justified editorially, not obtrusive to viewing pleasure and not gratuitous*”.

(collectively, the “the two Relevant Paragraphs”).

² Since July 2018, Comma relaxed the regulation of indirect advertising, which is now permitted in TV programmes except for news programmes, current affairs programmes, children's programmes, educational programmes, religious services and other devotional programmes.



infotainment programme. The CommA found on 22 November 2016 that two editions of “Scoop” had breached the Codes through the hosts’ discussion of “myTV SUPER”, a paid over-the-top service offered by a wholly-owned subsidiary of TVB (“the Scoop Decision”). TVB did not lodge any appeal to the CE in C in respect of the Scoop Decision.

2. Leave to apply for judicial review has been granted, and the substantive hearing of these two applications were heard together on 16 to 18 May 2018. On 31 December 2020, the Court of First Instance (“Court”) handed down judgment dismissing both applications on all grounds (see paragraph 3 below).

Issues in dispute

3. The main issues in disputes are:-

- (1) Whether the scheme of determination of breach of the Codes by the CommA (with an appeal to CE in C) is unconstitutional for non-compliance with Article 10 (“BOR 10”) of the Hong Kong Bill of Rights (“BOR”)³;
- (2) Whether the two Relevant Paragraphs of the Codes amounted to an unconstitutional intrusion on the right to free expression under Article 16 of the BOR and Articles 27 and 39 of the Basic Law, and whether they were *ultra vires* the BO;
- (3) Whether CommA erred in law in finding that the relevant paragraph of TV Programme Code applied in both cases;
- (4) Whether CommA’s Decisions were *Wednesbury* unreasonable;
- (5) Whether the fine (imposed under the KFC Decision) was manifestly excessive or not supported by sufficient reasons; and
- (6) Whether CommA erred in law in finding that the references to “myTV SUPER” constituted “advertising” or “advertising material”.

The CE in C⁴ was only involved in Issue (1).

Department of Justice’s Summary of the Court’s rulings

(Full text of the judgment at

https://legalref.judiciary.hk/lrs/common/search/search_result_detail_frame.jsp?DIS=132729&QS=%2B&TP=JU)

³ BOR 10 provides that “All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. ...”

⁴ CE in C was named as the one of the Respondents in HCAL 151/2016 and was joined as an interested party in HCAL 47/2017.



4. The Court first set out the role of the CommA to regulate the broadcasting and telecommunications industries in Hong Kong and its function to, amongst others, secure proper standards of television broadcasting with regard to programme content and advertisements. The Court further summarised the Codes which were issued by the CommA, which, inter alia, prohibits the licensee to place advertisements or advertising materials within a programme unless that fulfils any of the criteria provided under the Codes as an exception, one of the criteria being that the indirect advertising is “clearly justified editorially, not obtrusive to viewing pleasure and not gratuitous”. (§§ 17-40)
5. On **Issue (1)**, the Court held that BOR 10 rights are not engaged as the Decisions and the system underlying the Decisions did not involve determination of “rights and obligations in a suit at law” under BOR 10. In coming to this ruling, the Court summarised the applicable legal principles from authorities as follows:-
 - The phrase “rights and obligations in a suit a law” bears the same meaning as “civil rights and obligations” under Article 6 of ECHR.
 - The nature of the civil rights is to be determined on a case-by-case basis.
 - The prominent test is whether the rights and obligations are essentially or predominantly private rights in nature. The Court is entitled to look at whether the outcome of the decision is decisive for private rights and obligations.
 - BOR10 is not engaged when the public dimension is predominant.(§§ 230-236)
6. Applying the principles to the facts of the two applications, the Court held that:-
 - The statutory framework of the BO is regulatory in nature and is intended to protect public values and interests. CommA plays the role of the guardian of public interest in making the Decisions.
 - The public interest considerations include consumer protection as some audience may not be fully aware of the advertising element in a programme, preservation of programme integrity, and consumer enjoyment in terms of no obstruction to viewing pleasure.
 - TVB’s rights to freedom of expression are by their nature public law rights.
 - The financial penalty imposed is per se insufficient to turn a public law issue into a private law right.(§§ 237-259)
7. Having held that BOR10 is not engaged, the Court found it neither necessary nor



appropriate to determine, whether the CommA and CE in C can be regarded as independent and impartial tribunal; and if not, whether the availability of judicial review is curative of any possible defects of procedural fairness. (§§ 277-278)

8. On **Issue (2)**, the Court found that the two Relevant Paragraphs of the Codes did not infringe the right to freedom of speech and expression and were not *ultra vires*.
 - (a) The Court relied on recent authorities from the Court of Appeal and the Court of Final Appeal which held that absolute precision or certainty is not required, and that the proper question is whether the provision under challenge is able to enunciate some boundaries which create an area of risk to guide conducts of the affected individual, with legal advice if necessary. In the premises, the Court held that the language in the Codes were sufficiently clear and hence met the prescribed by law test. (§§ 71-92)
 - (b) In respect of the proportionality test, the Court accepted the restrictive measure under the two Relevant Paragraphs were rationally connected to the legitimate aims of customer protection and protection of viewing pleasure. The Court also held that such restrictions were proportionate measures balancing the limited restrictions on the manner and form but not content of advertising which were of a limited value and the overwhelming public interest to protect consumers and viewing interests. (§§ 93-126)
 - (c) In respect of the issue of *ultra vires*, the Court held that the CommA has the authority to issue the two Relevant Paragraphs of the Codes to “secure proper standards of television and sound broadcasting with regard to both programme content (including advertisements) and technical performance of broadcasts” under the Broadcasting (Miscellaneous Provisions) Ordinance (Cap. 391) and the BO. (§§ 127-148)
9. On **Issue (3)**, the Court held that the CommA did not err in law in finding that the relevant paragraph of TV Programme Code applied in both cases. The Court rejected TVB’s argument that the two Relevant Paragraphs (see footnote 1) were inconsistent with each other, and held that they served the purpose of striking a balance between the need to allow revenue generating by advertisement and the need to protect as practically as possible viewing pleasure. (§§ 149-154)
10. On **Issue (4)**, the Court held that the Decisions were not *Wednesbury* unreasonable or irrational and rejected TVB’s argument that the two Relevant



Paragraphs were inconsistent (see also para. 9 above). The Court also held that the different rulings in previous cases by the CommA were not helpful as each case turns on its own facts and circumstances, and that CommA had provided detailed reasons for the Decisions. (§§ 169-212)

11. On **Issue (5)**, the Court held that the fine was not manifestly excessive and was supported by adequate reasons. The questions of penalty are a matter for the decision-maker and the Court will intervene only on the ground of *Wednesbury* unreasonableness. The Court rejected this ground by finding that the penalty imposed was appreciably lower than maximum penalty allowed under the relevant provisions and was supported by the severity of the breach, and the fact that TVB had repeatedly breached the relevant provisions of the Codes. (§§ 213-223)

12. On **Issue (6)**, the Court held that the references to “myTV SUPER” amounted to “advertisement” or “advertising materials” and the exclusion under the TV Advertising Code relied upon by TVB did not apply as (i) myTV SUPER and TVB were clearly different entities for the purpose of the relevant regulations, and (ii) only “identification” of a station, channel or programme service were excepted from the definition of advertising material, yet the relevant segment of Scoop promoting myTV SUPER’s products and services were not for such an identification purpose. (§ 155-168)

13. In the circumstances, TVB failed on all grounds of judicial review. The Court dismissed the two substantive applications for judicial review with costs to CommA and CEIC.

Civil Division

Department of Justice

4 January 2021