

**FINAL DECISION OF THE
COMMUNICATIONS AUTHORITY**

**BREACH BY GENIUS BRAND LIMITED OF
GENERAL CONDITION 12.1 OF UNIFIED CARRIER LICENCE**

Licensee Concerned:	Genius Brand Limited (“GBL”)
Issue:	Use of radiocommunications installation not specified in Schedule 3 to the Unified Carrier Licence (“UCL”) held by GBL
Relevant Instruments:	General Condition (“GC”) 12.1 of GBL’s UCL No. 007
Decision:	Breach of GC 12.1 of GBL’s UCL No. 007
Sanction:	Financial Penalty
Case Reference:	OFCA/O/F/37 C

BACKGROUND

In February 2014, the Office of the Communications Authority (“OFCA”) received a complaint from a member of the public about a suspected installation of an authorised radio base station at the rooftop of a building in Sai Kung (“the concerned premises”). Following investigation, OFCA found that GBL had operated a radio base station for provision of its telecommunications services at the concerned premises (“the Station”). The Station is not a radiocommunications installation specified in Schedule 3 to its UCL.

2. GC 12.1 of the GBL's UCL provides that:

“12.1 Each radiocommunications installation operated by or on behalf of the licensee shall be used only at the location and with emissions and at the frequencies and of the classes and characteristics specified in Schedule 3 to this licence and with such power and aerial characteristics as are specified in that Schedule in relation to the class and characteristics of the emission in use”.

GBL's APPLICATION

3. GBL, a joint venture between Hutchison Telecommunications Hong Kong Holdings Limited and HKT Trust and HKT Limited, submitted an application to OFCA on 14 May 2014, for the prior approval of the Communications Authority (“CA”) for the use of the Station at the concerned premises which receives and transmits frequencies in the bands 2500-2520 MHz and 2620-2640 MHz respectively. These frequency bands were assigned to GBL for the provision of public telecommunications network services. Installation of radio base stations at the concerned premises is subject to a temporary waiver issued by the Lands Department (“LandsD”) and Hong Kong Telecommunications (HKT) Limited (“HKT”) had submitted a temporary waiver application on behalf of the owner of the concerned premises. However, LandsD had advised OFCA on 9 April 2014 (i.e. prior to the GBL's application of 14 May 2014 to OFCA) that the application for the temporary waiver would not be acceded to because of unauthorized building works found at the concerned premises. In view of the fact that the installation of the Station would be in breach of the LandsD's requirements, OFCA had put on hold the application of GBL, pending measures taken by the owner of the concerned premises to rectify the breach.

4. On 16 May 2014, OFCA advised GBL that the application for the use of the Station could not be processed until the issue regarding the application for LandsD's approval of temporary waiver submitted by HKT on behalf of the owner of the concerned premises was resolved.

THE COMPLAINT AND OFCA'S INVESTIGATION AND ASSESSMENT

5. On 24 February 2014, OFCA received a complaint from a member of the public about a suspected installation of an unauthorised radio base station. In response to the complaint, OFCA conducted on-site measurements in April 2014 and detected radio transmissions at frequencies in the band 2620-2640 MHz from the Station. As the frequency band is assigned to GBL, OFCA suspected that the Station was GBL's. On 13 May 2014, OFCA informed GBL of the measurement results and invited it to provide information.

6. In response to OFCA's enquiry, GBL provided information and representations on 27 May 2014 and 13 June 2014. GBL admitted that the Station had transmitted at frequencies in the band 2620-2640 MHz between 11 November 2013 and 13 May 2014. While GBL alleged that the initial purpose of the transmissions was to test the equipment at the concerned premises, it also admitted that the Station had been utilised to improve the service coverage surrounding the concerned premises.

7. In its representations, GBL explained that the application for the use of the Station was supposedly submitted to OFCA on 27 February 2014 together with those applications by HKT for the use of radio base stations at the same location. It was not until receipt of OFCA's letter of 14 May 2014 that GBL discovered that the applications submitted to OFCA in February 2014 had included only the HKT's radio base stations, but missed out that concerning the use of the Station by GBL. GBL admitted that it had accidentally omitted to submit the GBL's application due to an oversight. To avoid recurrence of the oversight, GBL has instructed its staff to double check future applications before submission to OFCA.

8. In its representations, GBL also attributed its use of the Station (not specified in Schedule 3 to its UCL) to the allegedly long lead-time required for obtaining the LandsD's approval of a temporary waiver. According to GBL, the Station had been in operation over a period of about

six months (viz. between 11 November 2013 and 13 May 2014) and had been deployed to provide public telecommunications network service to its customers during the period.

9. OFCA is of the view that the Station had essentially been used as a normal radio base station for providing public telecommunications network services. GC 12.1 of GBL's licence states that "*each radiocommunications installation operated by....the licensee shall be used only at the location... specified in Schedule 3 to this licence*". The wording of GC 12.1 makes it clear that the use by the licensee of radiocommunications installation (including the alleged testing purpose) outside the specification of Schedule 3 is prohibited.

10. OFCA considers that GBL's explanation of failure to include the Station in HKT's application of 27 February 2014 to OFCA out of an oversight of little relevance to the case it had to answer concerning the contravention of GC 12.1 of its UCL. On GBL's own admission, the Station had been in operation since 11 November 2013, some three months before the application concerning the Station was supposedly submitted to OFCA for consideration and had lasted until mid May 2014. That is to say, GBL had put the Station into use for six months without ever submitting an application for the CA's consideration, let alone obtaining the CA's prior approval.

11. Neither does OFCA consider that the use of any radio base stations (including the Station) prior to the CA's approval could be justified by the allegedly long lead-time for the owner of the premises to obtain the temporary waiver approval from LandsD. To address the lead-time issue, OFCA and LandsD are already adopting a parallel processing procedure¹ under which a mobile network operator can submit an application to OFCA for the CA's approval and another application on behalf of the owner of the premises to LandsD for temporary waiver approval in parallel. To shorten the overall processing time, the CA may even grant approval before the

¹ See paragraph 8 of the "Guidance Note for Submission of Applications by Public Telecommunications Operators for the Installation of Radio Base Stations for Public Telecommunications Services in Buildings and on Rooftops" issued by OFCA.

LandsD's decision on the temporary waiver application. For this particular case however, the fact remains that the Station had been put into use by GBL without it ever submitting an application for the use of the Station for the consideration of the CA. The so called long lead-time required to sort out the land status of the concerned premises simply did not enter into the picture as OFCA had no application to speak of from GBL and hence no enquiry to be made on the land status of the concerned premises.

12. In the light of the findings and having considered the explanation provided by GBL as mentioned in paragraphs 5-11 above, it is OFCA's assessments that GBL has breached GC 12.1 of its UCL for using the Station, which is not specified in Schedule 3 to the licence, without the prior approval of the CA.

THE CA'S CONSIDERATION AND DECISION

13. OFCA completed its investigation and submitted its findings to the CA on 30 August 2014. Having considered the findings of OFCA, the CA issued its Provisional Decision to GBL on 12 September 2014. GBL submitted its representations on 26 September 2014.

14. In its representations, GBL submitted that the CA should consider this case together with another case² of HKT regarding the same radio base station at the same location which OFCA was handling at the same time and impose one single financial penalty (and of a smaller amount, if at all). This was because both cases relate to the same radio base station(s). The CA considers that the request is totally groundless. GBL and HKT are two separate legal entities. Each is authorised to provide public telecommunications network services under its respective UCL, and as such each is responsible for meeting its respective licence obligations. While GBL and HKT are free to install their radio base stations at the same location and share the radio site facilities, they are held accountable separately for their

² OFCA also found that HKT had operated a radio base station at the concerned premises without the CA's prior approval. Another CA's provisional decision was issued to HKT on 12 September to invite it to make representations.

own action or omission, and in this case their respective contraventions of GC 12.1 of their UCLs.

15. Having considered GBL's further representations, the CA is of the final view that GBL has failed to comply with GC 12.1 of its UCL in respect of use of a radiocommunications installation not specified in Schedule 3 to its UCL.

16. In considering the sanction that it should impose, the CA has had regard to all circumstances of the case and notes that:

- (a) GBL had put the Station into use over a period of about six months (viz. between 11 November 2013 and 13 May 2014) without the CA's approval;
- (b) GBL had put the Station into use over a period of about six months without ever submitting an application to the CA for the use of the Station; and
- (c) If OFCA had not received the complaint from a member of the public about a suspected installation of an unauthorised radio base station and proceeded to conduct an investigation, the unauthorised use of the Station and hence the contravention of GC 12.1 could well remain undetected/unrectified by GBL for a long period of time.

Against this background and taking into account full circumstances of the case, the CA has decided that a financial penalty should be imposed on GBL.

17. This is the first occasion on which a financial penalty is imposed on GBL under GC 12.1 of its UCL and the maximum penalty stipulated by the Telecommunications Ordinance ("the TO") is \$200,000. In considering the appropriate level of financial penalty in this case, the CA has had regard to the Guidelines on the Imposition of Financial Penalty under Section 36C of the TO ("the Guidelines"). Under the Guidelines, the CA is to consider the

gravity of the breach (such as the nature and seriousness of the infringement, damaged caused to third parties by the infringement, and the duration of the infringement), whether the licensee under concern has previous records of similar infringements, and whether there are any mitigating and aggravating factors.

18. In considering the gravity of the breach and therefore the starting point for the level of financial penalty, the CA notes that:

- (a) this is the first occasion where GBL is found to commit a breach of this nature;
- (b) the Station fulfilled the telecommunications requirements in respect of electromagnetic compatibility and radiation safety. It did not pose any threat of radiation hazard to members of the public, or had any adverse impact on telecommunications services or telecommunications service users; and
- (c) GBL had operated the Station at its own assigned frequencies to improve mobile coverage so as to better serve its customers.

19. In the light of the above considerations, the CA considers that the appropriate starting point for determining the level of financial penalty should be \$100,000. The CA has not been able to identify any aggravating factors.

20. In considering the mitigating factors, the CA notes that GBL has provided full cooperation to OFCA in the course of the investigation. It has ceased the use of the Station eventually in May 2014.

21. Having considered all circumstances of the case and taken all relevant factors into account, the CA concludes that a financial penalty of \$90,000 is proportionate and reasonable in relation to the breach.

The Communications Authority
December 2014