

Insights

COMPETITION TRIBUNAL ADOPTS THE CARECRAFT PROCEDURE FOR SETTLEMENTS IN COMPETITION LAW CASES

Sep 22, 2020

SUMMARY

In Competition *Commission v Kam Kwong Engineering Company Ltd & others* [2020] HKCT 3, the Competition Tribunal (the “**Tribunal**”) adopted the Carecraft procedure for disposing of enforcement proceedings against respondents who admit liability for contravention of competition rules under the Competition Ordinance (Cap. 619) (the “**Ordinance**”).

CASE HISTORY

Competition Commission v Kam Kwong Engineering Company Ltd CTEA 1/2018 is the third case brought to the Tribunal after the Ordinance came into effect on 14 December 2015.

This case concerns the cartel conduct of three renovation contractors approved by the Hong Kong Housing Authority to carry out decoration works in a new subsidised housing estate in Hong Kong. According to the facts agreed to by the 1st, 2nd and 4th Respondents, the contractors divided and allocated potential customers among themselves by reference to the floor and unit numbers of the housing units. Specifically, the 4th Respondent, who was the sole shareholder and a director of the 1st Respondent, maintained a table setting out the housing units allocated to each of the 1st, 2nd and 3rd Respondents. The 1st Respondent further admitted that, whenever it was approached by the owner of a housing unit allocated to another Respondent, the 1st Respondent would decline to accept the business and refer the owner to the relevant Respondent. In that way, the 1st Respondent performed renovation works exclusively on units allocated to it. Furthermore, according to the statement of agreed facts, the Respondents exchanged and coordinated the contents and prices of standard decoration packages offered to owners of the housing units. In particular, the 4th Respondent prepared a set of leaflets for each of the 1st, 2nd and 3rd Respondents, and the three sets of leaflets shared the same design and format. Likewise, the items of renovation works in the packages offered by the 1st, 2nd and 3rd Respondents were the same, and the differences in prices were minimal.

The case involved the First Conduct Rule. The First Conduct Rule prohibits businesses from making or giving effect to an agreement, or engaging in a concerted practice, if the object or effect is to prevent, restrict or distort competition in Hong Kong.

On 6 August 2019, the Competition Commission (the “**Commission**”) and the 1st, 2nd and 4th Respondents submitted an application for the Tribunal’s approval to dispose of the proceedings by consent. The proposed orders included declarations that the 1st and 2nd Respondents had contravened the First Conduct Rule and that the 4th Respondent was involved in such contravention.

TRIBUNAL’S POWER IN SETTLEMENTS OF ENFORCEMENT PROCEEDINGS

Competition Tribunal Rules (Cap. 619D) (“**CTR**”) r 39(1) provides for the Tribunal’s power to make orders by consent. *Competition Tribunal Practice Direction No. 1* (“**CTPD1**”) r 72 further provides that “*one of the underlying objectives of the procedures of the Tribunal is to facilitate the settlement of disputes.*”

Where the Ordinance empowers the Tribunal to exercise a power upon being satisfied of certain facts, the application for a consent order must be accompanied by a statement of agreed facts. The Tribunal may then make an order with or without a hearing having regard to the proposed terms and the agreed facts.

In respect of enforcement proceedings before the Tribunal, *Rules of High Court* (“**RHC**”) O 42 r 5A regarding consent judgments and orders is dis-applied. The rest of *RHC O 42* applies subject to *CTR* r 39. Therefore, it has become necessary for the Tribunal to create or adopt an appropriate procedure for dealing with applications to dispose of competition law enforcement proceedings by consent.

THE CARECRAFT PROCEDURE

In the Reasons for Decision dated 7 July 2020, the Honourable Mr Justice Harris held that the Tribunal should adopt the *Carecraft* procedure.

Under the *Carecraft* procedure, the Tribunal is confined to the facts set out in the statement of agreed facts when determining a consensual application. Of course, it remains the case that the Tribunal must satisfy itself that there has been a contravention of a competition rule. Likewise, the decision as to whether an order should be made, and if so on what terms, remains for the Tribunal.

Harris J identified the following justifications for adopting the *Carecraft* procedure:

1. The *Carecraft* procedure is consistent with the Tribunal’s powers to make consent orders and facilitate settlements under the *STR* and *CTPD1*, and is supported by the requirement for statement of agreed facts under *CTPD1* r 72.

2. In establishing the *Carecraft* procedure, the English Court in *Re Carecraft Construction Co Ltd* [1994] 1 WLF 172 drew analogies to competition and criminal cases.
3. The *Carecraft* procedure is an accepted mechanism in Hong Kong for disposing of director's disqualification proceedings under the Companies Ordinance and the Securities and Futures Ordinance, which are comparable contexts to competition law. Therefore, it provides "a *readymade blueprint*" for disposing of enforcement proceedings under the Ordinance.
4. It is well recognised by courts in other comparable jurisdictions (the U.K., the E.U. and Australia) that the benefits of providing a mechanism for settlements in competition law cases are overwhelming. In particular, settlements save public and private resources from lengthy litigation.

Based on the facts set out in the agreed statement of facts, the Tribunal was satisfied that the 1st and 2nd Respondents had contravened the First Conduct Rule and the 4th Respondent had aided, abetted, counselled or procured the contravention and had been knowingly concerned in it. Further, declaratory relief was an appropriate relief because of the following:

1. The proposed declaration would resolve a significant legal controversy.
2. The Commission has a legitimate interest in the declaratory relief. In particular, the Tribunal acknowledged that a declaration of contravention is a precondition under the *Ordinance s 110* for persons suffering loss or damage as a result of the contravention to seek compensation in "follow-on" proceedings.
3. The 1st, 2nd and 4th Respondents have an interest in opposing the proposed declaration.

The Tribunal adjourned the proceedings to a further hearing where it would consider the other relief sought by the Commission and the question of costs.

BCLP PERSPECTIVE

Kam Kwong Engineering clarifies the procedure that the Tribunal will apply in settlements of proceedings under the *Ordinance*.

The adoption of the *Carecraft* procedure is a welcomed development because it provides a time and cost-efficient way forward for respondents who admit their liability for competition law contraventions.

It should be noted that the settlement dealt with in this judgment covers the 1st, 2nd and 4th Respondents only. It will be interesting to see how the Tribunal will deal with any impact the settlement may have on the ongoing proceedings against the 3rd and 5th Respondents. Specifically, how the Tribunal will approach the facts and evidence put forward by respondents contesting the enforcement proceedings if such facts and evidence are inconsistent with those admitted by respondents who settled.

Further, according to the Competition Commission's Register for Current Cases in the Competition Tribunal, this is the first case in which the Tribunal has made a finding against an individual for being involved in a competition rule contravention under the *Ordinance section 91*. Under the *Ordinance*, a person may become liable in enforcement and "follow-on" proceedings for being involved in a contravention of a competition rule in any of the following manner:

1. attempting to contravene a competition rule,
2. aiding, abetting, counselling or procuring another person to contravene the rule,
3. inducing or attempting to induce, by threat or promises or otherwise, another person to contravene the rule,
4. being in any way, directly or indirectly, knowingly concerned in or party to the contravention, or
5. conspiring with another person to contravene the rule.

Finally, by considering international jurisprudence concerning settlement mechanisms for competition law cases, *Kam Kwong Engineering* demonstrates that the Tribunal continues to look internationally for guidance while Hong Kong's competition law remains in its development stages.

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