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PRIVATE ACTIONS RELATING TO ALLEGED CONTRAVENTIONS OF THE COMPETITION ORDINANCE OF HONG KONG: THE FIRST REPORTED HONG KONG JUDGMENTS - PART TWO

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SUMMARY

On 12 October 2021, the Competition Tribunal ("**Tribunal**") handed down its judgment on the merits of the first private action in Hong Kong for a contravention of a competition rule ("**contravention**").

This case concerns an alleged contravention, which was raised as a defence in two High Court actions. The Court of First Instance ("**CFI**") transferred the allegation to the Tribunal for determination. In the 12 judgments published over the course of three years, the CFI, the Tribunal and the Court of Appeal ruled on many important substantive and procedural issues.

Our previous post (Part 1 of 2) provided an overview of the substantive issues. This post (Part 2 of 2) will discuss the procedural issues relating to the nature of the case as proceedings transferred from the CFI to the Tribunal, and the approach taken by the Tribunal in respect of confidential documents and information.

NATURE AND IMPLICATIONS OF THE TRIBUNAL ACTIONS AS TRANSFERRED PROCEEDINGS

In their respective judgments of 12 September 2018[1] and 11 March 2021[2], the Tribunal and the Court of Appeal provided guidance on the nature and implications of the Tribunal actions as transferred proceedings.

Section 113(3) of the Competition Ordinance ("**Ordinance**") refers specifically to the transfer of an allegation of a contravention to the Tribunal. The Tribunal compared such transfer to the trial of a preliminary issue by a specialist tribunal. Once the Tribunal has decided on the competition issues, the High Court actions are to continue in their normal courses. The Court of Appeal further pointed out that *section 113(3)* does not permit the transfer of an entire case to the Tribunal. As a result, the

Tribunal actions were subsidiary to the High Court actions, and the Tribunal's jurisdiction was limited to the competition issues that are transferred to it to determine. The Tribunal has no jurisdiction to hear other parts of the High Court actions.

In this case, the implications were as follows:

- Originating documents prescribed by the *Competition Tribunal Rules*("**CTR**")

In deciding that Meyer was not required to file an originating notice of application in accordance with the CTR, the Tribunal held that the originating documents prescribed in the CTR were not applicable to transferred proceedings. This is because, in a transferred proceeding, the originating document is the writ in the High Court action. Also, the Tribunal only has to determine whether the transferred allegation has been established, rather than to grant any relief. For these reasons, the Tribunal directed Meyer instead to file Points of Defence that comply with *§§88-89 of the Competition Tribunal Practice Direction No.1*.[3]

- Amendment of pleadings

Meyer applied unsuccessfully[4]to amend its Points of Defence to introduce unidentified third parties as participants or facilitators of the alleged contravention, and Meyer appealed against this refusal. The Court of Appeal dismissed the appeal and held that, because of the subsidiary nature of the transferred proceedings, the Points of Defence in the Tribunal actions must not go beyond the scope of the transferred allegation. In this case, the transferred allegation was the collusion between two parties - Taching and Shell. Therefore, Meyer's proposed amendment went beyond the scope of the transferred allegation, and would amount to bringing of an additional claim (which was precluded by *section 108 of the Ordinance*).[5]

- Quantum

Meyer also appealed against the Tribunal's refusal to grant leave to Meyer to adduce expert evidence on the quantum of damages. The appeal was dismissed. Given that only the allegation was transferred to the Tribunal, the Court of Appeal explained, the Tribunal had no jurisdiction to decide on issues of damages and quantum. These were and remained matters for the CFI to decide after the Tribunal had made its rulings as to whether there had been a contravention by Taching and Shell.[6]

CONFIDENTIALITY

The *CTR* and the *Competition Tribunal Practice Direction No.2* contain express provisions for the protection of confidential information in proceedings in the Tribunal. These are in addition to the confidentiality provisions in the Ordinance regarding confidential information provided to or obtained by the Competition Commission in the performance of its functions under the Ordinance.

In this case, the parties proposed to utilise various mechanisms to protect confidentiality, including, by way of example: (a) the imposition of a confidentiality ring and (b) the hearing of evidence in camera. We will look at the Tribunal's decisions on these two matters in turn.

Confidentiality ring

As explained in its decision of 22 February 2019, the Tribunal has the power to impose a confidentiality ring, such that only members of the ring have access to the confidential documents after giving a confidentiality undertaking.[7] However, the parties could not agree as to whether the Chief Executive Officer and the Chief Administrative Officer of Meyer may be included in the confidentiality ring in respect of various confidential documents to be produced by Shell.

In summary, the Tribunal's approach was as follows:

- Normally, the burden is on the party holding the documents to show that the documents are not relevant and, therefore, not discoverable. If confidentiality is asserted, then relevance is assumed and it is for the party seeking inspection to show that inspection is necessary for the fair disposal of the action and for saving costs.
- If there is a *prima facie* case for disclosure and inspection indeed is necessary, the Tribunal will consider whether the loss of confidentiality can be mitigated by redaction or by limiting disclosure to external legal advisers only.
- In civil proceedings, it would be exceptional to exclude the party, being the person interested in and affected by the decision, from access to information that would play a substantial part in the case. However, it is well recognised in competition law that one man's market advantage is another's market advantage. This may justify the use of a confidentiality ring, but it remains to be an exception rather than the rule.
- It is for the party seeking to restrict disclosure to prove the confidential and sensitive nature of the information, and that sufficiently exceptional circumstances exist to justify the proposed restrictions.
- Even if the party initially is excluded from the confidentially ring, it may be appropriate at a later stage, when the disputed issues have crystallised and there is greater clarity as to the relevance of the documents, for the legal adviser to make a "*much more focused application*" for disclosure of some or all of the documents to the party.

The Tribunal recognised that it must be vigilant to the difficulty for the harmed party to prove the breach of a confidentiality undertaking and the extent of commercial harm suffered as a result. (In the Tribunal's words, "*it is virtually impossible to quantify the extent of advantage gained by other market players*".) The Tribunal also recognised that a relatively small enterprise may not have sufficient resources to satisfy any claim for damages.[8]

However, given that Meyer was not a competitor of Shell, and that Meyer voluntarily limited itself to having only two employees within the confidentiality ring, with an express confidentiality undertaking, the Tribunal decided in Meyer's favour.[9]

Hearing witness evidence in camera

Although trials in the Tribunal generally should be heard in open court, the Tribunal held that it has a discretion under *rule 28 of the CTR* to hear evidence in camera.

Sitting in camera involves restricting the open administration of justice, which should be imposed only where and to the extent necessary, and the making of such an order must be justified and supported by cogent evidence.[10]Therefore, the Tribunal must consider and balance all pertinent interests, rights and freedoms, including the ultimate goal of doing justice between the parties and the parties' rights and interests outside of the case.

Relevant factors include: (a) the nature of the information, (b) the effect of its publication (the Tribunal considered this to be a critical factor), (c) the nature of the proceedings, (d) the relationship between the information and the proceedings as a whole, specifically whether the restriction would undermine the public's understanding of the case and the judgment, and (e) the relationship between the person seeking to restrain publication of the information and the proceedings themselves, specifically whether that person is the party who puts in issue the confidential information in the first place or is a third party.

Turning to Shell's application for one of its witnesses to give evidence in camera on Shell's pricing policies, the Tribunal held that (i) the evidence would contain confidential and commercially sensitive information, (ii) the leakage of which would harm Shell's business interests, (iii) the information was not necessary for the public to understand the core issue of collusion and Shell's defence to such allegations, (iv) it was not practical to delineate the evidence into confidential and non-confidential portions, and (v) it was Meyer, not Shell, who put the confidential information in issue. Accordingly, the Tribunal gave directions to hear part of the witness evidence in camera.

CONCLUSION

The key takeaways on procedural issues are as follows:

- There are real and practical consequences arising from the subsidiary nature of proceedings transferred to the Tribunal under *section 113(3) of the Ordinance*. Parties to such proceedings must give careful considerations as to the forum in which they should make their applications.
- The Tribunal's judgments provide an excellent demonstration of its approach to safeguard confidential information disclosed in transferred proceedings. This should give businesses increased clarity and comfort as to the confidentiality protections they will receive in private competition actions in Hong Kong.

It remains to be seen whether private parties will consider it advantageous to raise competition contraventions as a defence to civil proceedings commenced against them. However, this series of judgments illustrate the Tribunal's ability to handle allegations of contraventions raised by private parties in defence to civil actions.

As discussed in our previous post, the Ordinance prohibits private parties from bringing standalone claims for competition contraventions, and requires those who have suffered loss or damage as a result of a contravention of a conduct rule to bring a claim only after a judicial finding of contravention has been made by the Tribunal. Legislative amendments would be needed in order to create a standalone private right of action for competition contraventions in Hong Kong.

1. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited (Intended Intervener)* [2018] HKCT 4.
2. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2021] HKCA 294, on appeal from [2020] HKCT 2.
3. [2018] HKCT 4, at paras.7-25.
4. [2020] HKCT 2.
5. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2021] HKCA 294, at para.31. For a discussion of *section 108 of the Ordinance*, see our previous post.
6. [2021] HKCA 294, at paras.56 and 59.
7. *Section 143(1)(b) of the Ordinance and rule 24(4) of the CTR*, as explained in Taching *Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2019] HKCT 1, at paras.10 and 11.
8. [2019] HKCT 1, at para.28.
9. [2019] HKCT 1, at paras.44 and 48-49.
10. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2021] HKCT 2, at para.102.

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