BCLP. Client Intelligent

Insights

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

Jan 05, 2022

SUMMARY

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

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.

We will divide our post into two parts. (i) This present post provides an overview of the substantive issues. (ii) Our next post 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.

BACKGROUND

The parties' relationships

In brief, Meyer Aluminium Limited ("**Meyer**") purchased industrial oil from Taching Petroleum Company Limited ("**Taching**") and Shell Hong Kong Limited ("**Shell**") under separate fixed-term contracts with the two companies. Under the contracts, the price for the industrial oil was calculated on the basis of a List Price less a Discount. Taching and Shell as suppliers were able to adjust the List Price from time to time by issuing Price Adjustment Notices. The Discount was to remain fixed throughout the term of the contract.

Taching and Shell sued Meyer in the CFI for the price of the industrial oil delivered to Meyer, and Meyer argued in defence that Taching and Shell had contravened the First Conduct Rule by agreeing or engaging in a concerted practice to fix, manage or control the price of the industrial oil sold to it. Meyer raised two defences. First, Meyer contended that, as a result of the contravention, the contracts were unenforceable due to their illegality ("**illegality defence**"). Secondly, Meyer argues that it was entitled to damages, which could be used to set off against the price claimed by Taching and Shell ("**defence of set-off**").

Transfer to the Tribunal

In the competition regime of Hong Kong, there is very limited scope for private actions. *Section 108 of the Competition Ordinance* ("**Ordinance**") prohibits private parties from bringing "independent proceedings" in any Hong Kong court for a cause of action against any person for the contravention of a conduct rule or the involvement in such contravention ("**contravention**"). While there is a statutory right under *section 110* for compensation for loss or damage suffered as a result of a contravention, it is available only after a judicial finding of contravention has been made by the Tribunal. As the Court of Appeal observed in its judgment of 11 March 2021[1], there is clear legislative policy in general to preclude private parties from bringing claims for contraventions.

However, *section 142(1)(d) of the Ordinance* provides that the Tribunal has jurisdiction to hear and determine an allegation of a contravention that is raised as a defence. If such allegation is raised as a defence in a High Court action, *section 113(3)* provides a mechanism to transfer the allegation to the Tribunal. Also, the Tribunal has a power under *section 114(3)* to transfer any proceeding transferred to it under *section 113* back to the CFI.

Accordingly, on 17 May 2018, the CFI transferred Meyer's allegations of contravention to the Tribunal for determination.[2]

Also, the CFI took the view that, together, *sections 110, 114(3) and 113(3)* permit a follow-on action to be issued after the Tribunal has made a finding of a contravention, not only in an enforcement action, but also in an action where a contravention is raised as a defence.[3]

The parties' pleaded cases

Meyer's case for contravention relied on (a) the fact that Shell and Taching issued 118 pairs of Price Adjustment Notices during the relevant period, for the same adjustments, typically on the same day or shortly after, and (b) the fact that the Price Adjustment Notices were not public information. The only reasonable inference, Meyer argued, was that Taching and Shell had colluded to fix prices.

Both Taching and Shell denied any wrong-doing. Taching explained that it merely followed the price adjustments made by Sinopec, Taching's sole supplier of the industrial oil. As for Shell, the List Price was reviewed and adjusted in accordance with its internal policy, by designated personnel

who had no direct dealings or negotiations with its customers; the List Price would apply to all of Shell's customers for the relevant product, not just Meyer. Shell contended further that, because oil is a homogeneous product, it is commonplace for Oil Majors[4] to make similar or identical changes in price to maintain the competitiveness of their products.

Standard of proof

The Tribunal confirmed that, in a transferred case where a contravention is raised as a defence to a civil action, the civil standard of proof will apply.[5] The standard of proof remains the same and is not heightened to reflect the gravity of the allegation, but the claimant must prove its case with evidence of commensurate cogency – i.e. the more serious the allegation, the stronger the evidence will be required before the Tribunal will find that the allegation is established.

This confirmation in respect of a transferred proceeding is in contrast with enforcement proceedings, where the criminal standard of proof will apply.

RULING ON MERITS IN THIS CASE

Proving an agreement or a concerted practice in the context of parallel conduct

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. Therefore, Meyer was required to prove that an agreement or a concerted practice existed between Taching and Shell to fix, maintain or control the price of the industrial oil supplied to Meyer.

In contrast, nothing in competition law prevents a business from adapting intelligently to the existing and anticipated conduct of its competitors, such as making an independent business decision to follow its competitors' pricing.

When businesses adopt the prices, economic terms or practices of their competitors, such behaviour is known in competition law as parallel conduct. Although parallel conduct may be the result of a collusion, it also might be the effect of completely independent actions taken by competing businesses. Specifically, in a market where retailers are selling virtually identical products, parallel pricing is a common and expected phenomenon and, in that context, parallel conduct can be the "*very essence*" of competition.

For these reasons, in cases involving parallel conduct, a claimant must put forward *"sufficiently precise and coherent proof*" to demonstrate that the parallel conduct in fact is the result of an agreement or a concerted practice. In its decision of 12 May 2021[6], the Tribunal identified three methods for proving the existence of an agreement or a concerted practice in the context of parallel conduct:

- First method: By direct or indirect factual evidence pointing to an explicit collusion.
- Second method: By some direct or indirect evidence of explicit collusion (which by itself is not sufficient to establish an infringement), supplemented by circumstantial evidence. Overall, the claimant must provide sufficient evidence to render alternative explanations for the parallel conduct implausible.
- Third method: Where there is no direct or indirect evidence of explicit collusion, parallel conduct in and of itself cannot be regarded as proof of collusion unless collusion constitutes the only plausible explanation for the parallel conduct.

As the Tribunal explained in its judgment of 12 October 2021[7], under the third method, a claimant must provide sufficient evidence to prove not only that all the alternative explanations provided by the respondent are implausible, but also that collusion is the only plausible explanation for the parallel conduct. This is the case even if the respondent has put forward no explanation or the respondent's explanations are rejected.

Meyer compared the requirement to prove that collusion is the only plausible explanation for the parallel conduct to applying the criminal standard of proof. The Tribunal rejected this contention.

As explained by the Tribunal, its approach as to the required evidence for proving an agreement or a concerted practice in the context of parallel conduct did not preclude Meyer from seeking to rely on an inference from a number of coincidences and indicia which, taken together, may in the absence of another plausible explanation, constitute evidence of a contravention of a competition rule. However, under the civil standard of proof, an inference of a serious misconduct can be drawn only if (a) it is grounded on primary facts, which (b) form a reasonable basis for a definite conclusion of collusion, and (c) the inference is compelling.[8] The Tribunal would not infer a serious misconduct from primary facts which are capable of giving rise to conflicting inferences of equal degree of probability.

RULING

Meyer had put forward no evidence of any communications between Taching and Shell. Therefore, Meyer had to rely on the "third method" to prove that an agreement or a concerted practice to fix, manage or control price existed. While both Taching and Shell provided their explanations for the parallel conduct, the Tribunal was of the view that Meyer had failed to convince the Tribunal that their explanations were implausible or to show that collusion was the only plausible explanation of the parallel conduct.

Therefore, the Tribunal ruled that no contravention by Taching or Shell of the First Conduct Rule had been established.

REMAINING ISSUES

Thereafter, the same judge, sitting in her capacity as a CFI judge, held in a separate judgment[9] that Meyer's illegality defence and defence of set-off must fail.

In doing so, the CFI did not decide on the availability of the illegality defence in the context of private competition actions. In *obiter*, the CFI pointed out that the Ordinance does not render agreements contravening the First Conduct Rule automatically void. Although the Tribunal has the power to, among other things, declare such an agreement void or voidable, the CFI did not consider it appropriate to comment in the present judgment on how such discretion should be exercised in the context of a private competition action.[10]

As for the availability of the defence of set-off in private competition actions, the Court of Appeal previously had identified three issues for the CFI to address.[11] In simple terms, the three issues are: (a) whether the right of equitable set-off has been impliedly abrogated by the statutory regime, (b) whether the contravention could give rise to a claim for breach of statutory duty, and (c) if so, whether the usual test for connection for raising an equitable set-off could be satisfied. The CFI was of the view that these issues were fact-sensitive, and for that reason considered it more appropriate to leave them to be decided in a future case.[12]

CONCLUSION

The key takeaways are as follows:

- Under the current competition regime in Hong Kong, private parties are prohibited from bringing standalone claims for competition contraventions. Those who have suffered loss or damage as a result of a contravention of a conduct rule may bring a claim only after a judicial finding of contravention has been made by the Tribunal. This case demonstrates that private competition actions also may be "commenced" in Hong Kong by raising allegations of contraventions in defence to civil actions, and applying under the Ordinance for the transfer of the specific allegations/defences to the Tribunal for determination.
- Whether and how the illegality defence and the defence of set-off apply in private competition actions in Hong Kong (where the allegations of contraventions are raised in defence and transferred to the Tribunal for determination) are issues which invite further judicial elucidation.
- The civil standard of proof applies to private competition actions in Hong Kong.
- Sufficiently precise and coherent proof is required to demonstrate that parallel conduct in fact is the result of an agreement or a concerted practice.
- Parallel conduct in and of itself cannot be regarded as proof of collusion unless collusion constitutes the only plausible explanation for the parallel conduct.

In our next post, we will discuss the procedural issues that arose in this series of judgments.

1. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2021] HKCA 294, at para.25.
2. *Taching Petroleum Company Limited v Meyer Aluminium Limited* [2018] HKCFI 1074, at paras.14-19.
3. [2018] HKCFI 1074, at para.41.
4. Defined in *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2021] HKCT 2, at para.10, as Shell, ExxonMobil, Chevron and Sinopec.
5. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2020] HKCT 2, at para.58; [2021] HKCT 2, at para.53.
6. [2020] HKCT 2, at para.161.
7. [2021] HKCT 2, at para.51.
8. [2021] HKCT 2, at paras.69-70. If the criminal standard of proof were to apply, the claimant would have to show that the inference (a) is grounded on primary facts, (b) is a logical consequence of those facts, and (c) is irresistible.
9. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2021] HKCFI 3028.
10. [2021] HKCFI 3028, at paras.9-12.
11. *Taching Petroleum Company Limited v Meyer Aluminium Limited and Shell Hong Kong Limited v Meyer Aluminium Limited (heard together)* [2020] HKCA 1005, at para.25; [2021] HKCA 294, at paras.60-65.
12. [2021] HKCFI 3028, at paras.14-15.

RELATED PRACTICE AREAS

- Litigation & Dispute Resolution
- Antitrust Class Actions
- Business & Commercial Disputes
- Construction Disputes

MEET THE TEAM

Glenn Haley

Hong Kong SAR

glenn.haley@bclplaw.com
+852 3143 8450

Horace Pang

Hong Kong SAR

horace.pang@bclplaw.com
+852 3143 8411
