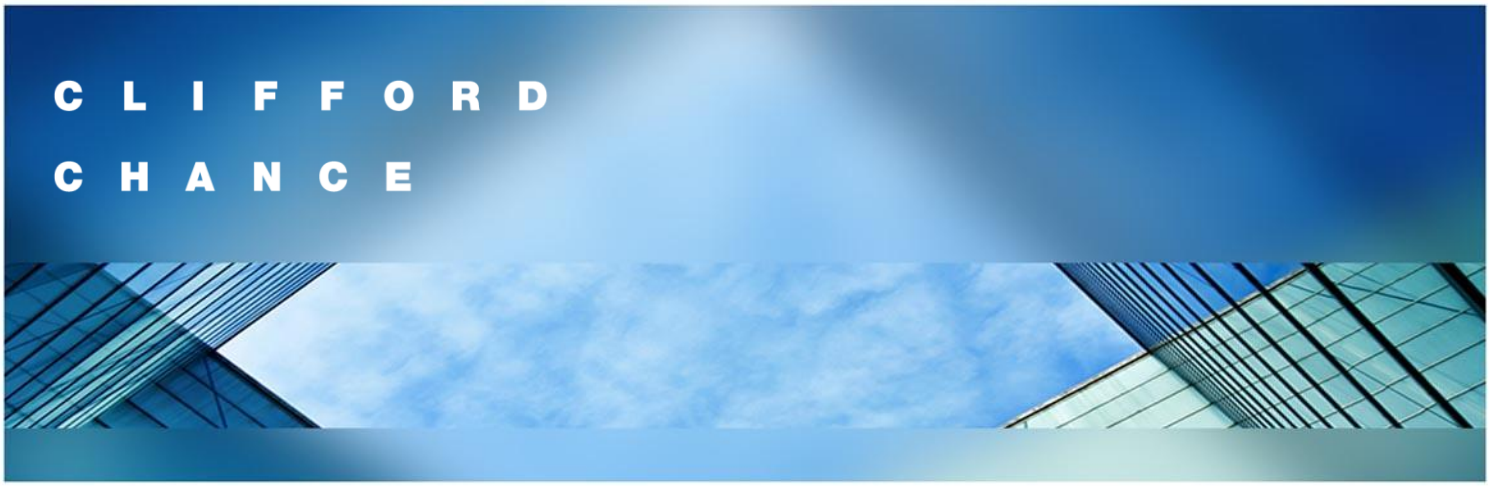

HONG KONG COMPETITION TRIBUNAL RULES ON THE FIRST CASE BETWEEN PRIVATE PARTIES

On 12 October 2021, the Competition Tribunal (Tribunal) handed down its first judgment in two proceedings between private parties. As the first case of its kind, the Tribunal's judgment provides useful insight and guidance with respect to legal and procedural matters regarding the application of the First Conduct Rule in the context of civil claims between private parties.

Key issues

- The civil standard, i.e. balance of probabilities, is to be applied to Tribunal proceedings between private parties.
- Parallel conduct alone cannot be regarded as proof of collusion unless that collusion constitutes the only plausible explanation for such conduct.
- It is important to bear in mind the subsidiary nature of proceedings before the Tribunal where they are transferred from the Court of First Instance under section 113(2) of the Competition Ordinance.
- Potential ways of protecting confidential information in Tribunal proceedings include setting up a confidentiality ring, hearing evidence in camera and publishing a redacted copy of the judgment.

BACKGROUND

The Tribunal's judgment in [2021] HKCT 2 (Judgment) concerns two separate actions, commenced by Taching Petroleum Company Limited (Taching) and Shell Hong Kong Limited (Shell) in HCA 1929/2017 and HCA 1069 / 2018 (High Court Actions) respectively. The claims were against Meyer Aluminium Limited (Meyer) for the payment of industrial diesel sold and delivered. Clifford Chance represented Shell in these proceedings.

Meyer's sole defence was based on the allegation that Taching and Shell had contravened the First Conduct Rule by agreeing or engaging in a concerted practice to fix price. The prices charged by both suppliers were calculated based on a list price which was subject to changes from time to time (List Price) minus a fixed discount. Meyer's allegation was based on two factors: (i) Taching and Shell made the same adjustments to their respective List Price in their adjustment notices during the relevant period; and (ii) the adjustments of the List Price specified in such notices were not public information and the uniformity in such changes could not be explained by mere coincidence.

Taching and Shell denied Meyer's allegation. Taching's case was that it sourced industrial diesel only from Sinopec (Hong Kong) Petroleum Co Ltd and therefore the adjustments of its List Price followed that of Sinopec. Shell's case was that the adjustments to its List Price were independently and internally determined by Shell in accordance with its own policy.

The alleged contravention of the First Conduct Rule in the High Court Actions was transferred to the Tribunal for determination in CTA 1 and CTA 2 of 2018 (Tribunal Actions) respectively, pursuant to section 113(3) of the Competition Ordinance (Cap 619) (Ordinance).[1] The Tribunal Actions and the High Court Actions were heard together by the Deputy President of the Tribunal, the Honourable Madam Justice Queeny Au-Yeung (the Judge).

[1] See the decision in [2018] HKCFI 1074 transferring Meyer's defence in HCA 1929/2017. The transfer of the defence in HCA 1069/2018 was agreed between Shell and Meyer.

Some three years after the transfer to the Tribunal, the trial took place in July and August 2021. The Judge found in favour of Taching and Shell in the Tribunal Actions that the alleged contravention was not established. Judgment was also handed down in the High Court Actions against Meyer for payment of the outstanding purchase price to Taching and Shell respectively.

In addition to discussing principles set out in the substantive Judgment, this briefing also covers various novel procedural issues arising out of these proceedings and sets out at the end the availability of stand-alone private actions in other jurisdictions.

BURDEN AND STANDARD OF PROOF

There was no dispute that the burden of proof in establishing the price-fixing allegation was on the party alleging the contravention, Meyer. With respect to the standard of proof, the Tribunal confirmed that the applicable standard is the civil standard of proof on the balance of probabilities. In contrast, in enforcement actions, the criminal standard of proof of beyond reasonable doubt is applied.

Whilst the civil standard of proof will not be heightened because of the gravity of the allegation, the more serious the allegation, the stronger the evidence is required before the Tribunal will conclude that the allegation is established on the balance of probabilities[2].

PARALLEL CONDUCT

In an earlier decision on 29 May 2020[3], the Tribunal set out three methods for proving that an agreement or concertation exists in the context of parallel conduct. Meyer's case was concerned with the third method, where there is no direct or indirect evidence of any explicit collusion. In such case, parallel conduct alone cannot be regarded as proof of collusion unless that collusion constituted the only plausible explanation for such conduct.

The tribunal noted that parallel conduct in itself cannot constitute proof of concerted practice because such conduct can be the "very essence" of competition.

Taking Meyer's case to its highest, it only had the corresponding List Price adjustment notices from Shell and Taching and the unilateral and equivocal conduct of Taching in following the pricing of Shell. The Tribunal found that such facts (even if established) were not sufficient to establish a *prima facie* case of agreement or concertation. It was further found that on balance of probabilities, Shell and Taching's respective case was credible and plausible.

NATURE OF THE TRIBUNAL ACTIONS

Interestingly, various interlocutory applications in these proceedings turned on the scope and nature of the proceedings transferred to the Tribunal. It is easy to lose sight of the fact that the transferred Tribunal Actions stem from the High Court Actions and do not have a life of their own.

In late 2019, Meyer applied to amend its pleadings in the Tribunal Actions, by expanding its allegation of price fixing between two parties (i.e. Shell and Taching) to a wide allegation involving "other suppliers and/or other facilitating third parties". Meyer's proposed amendment was rejected by the Tribunal on

[2] *Re H* [1996] AC 563
[3] [2020] HKCT 2

the basis that it was lacking in particulars. Meyer, however, appealed to the Court of Appeal.

In its judgment dated 11 March 2021[4], the Court of Appeal (CA) emphasised at the outset the subsidiary nature of the Tribunal Actions, noting that the Tribunal only has jurisdiction to determine whether there has been contravention of the First Conduct Rule and that the transfer under s.113(3) of the Ordinance is limited in scope. As no application was made by Meyer to amend its pleadings in the High Court Actions and the scope of the amendment sought went beyond the alleged contravention transferred to the Tribunal, Meyer's application was doomed to fail.

Before the CA was also Meyer's application for leave to adduce expert evidence on whether it had suffered loss and damage as a result of the alleged collusion and the quantum of damages. The CA considered that the issues of damages and quantum did not form part of the allegations transferred to the Tribunal; these were issues to be determined in the context of the High Court Actions. As Meyer did not issue an application in the High Court Actions, the Tribunal did not have the jurisdiction to entertain such application. This appeal again failed on a procedural ground, in light of the nature of the transferred Tribunal Actions.

As demonstrated by the CA's decision, commencing an interlocutory application in the wrong court is not a procedural issue that can be readily remedied; it is instead a jurisdictional matter which can be detrimental to the prospect of such application.

PROTECTING CONFIDENTIALITY

An important issue that arose in these proceedings was the mechanisms available for protecting the parties' confidential information. There are specific provisions in the Competition Tribunal Rules (Cap 619D) and Competition Tribunal Practice Direction No. 2 addressing the protection of confidential information in the context of proceedings before the Tribunal.

In various interlocutory applications, the parties explored with the Tribunal the remit of these procedural safeguards.

Use of Confidentiality Ring and Confidentiality Protocol

To limit the audience who may access the confidential information, a confidentiality ring comprising of representatives of each party was set up and a confidentiality protocol was agreed amongst the parties. Only ring members who had given an undertaking to the Court would have access to the confidential information and documents in these proceedings.

At the beginning of the Tribunal proceedings, there was a dispute as to whether individuals other than external lawyers of the parties could be added to the confidentiality ring. The Tribunal allowed the addition of the Chief Executive Officer and Chief Administrative Officer of Meyer, largely on the basis that Meyer was not a competitor of Shell.[5]

Nevertheless, the Tribunal agreed that it should be vigilant to the following:

[4] [2021] HKCA 294
[5] [2019] HKCT 1

- Confidentiality undertakings are difficult to police and enforce. It would be difficult for a party to prove that an undertaking was breached when market rumours are frequently spread around by industry players in private.
- The commercial harm is often difficult to quantify, for it is virtually impossible for the harmed party to estimate the extent of advantage gained by other market players.
- The party in breach of the confidentiality undertaking may be a relatively small enterprise who may not have sufficient resources to meet any claim for damages.

There are different examples of how the court has allowed or disallowed employees of a party to become members to a confidentiality ring. Every case will have to be assessed in light of its specific circumstances.

Hearing of Evidence in Camera

In the present case, Shell applied, and the Tribunal granted leave, to hear the evidence of one of Shell's witnesses in camera.

The Tribunal acknowledged that trials in the Tribunal should generally be heard in open court, but that it has discretion to direct a matter be heard in camera. The Tribunal considered, amongst other matters, that (i) the witness' evidence would touch upon documents which contained confidential and commercially sensitive information, the leakage of which to competitors and customers would harm Shell's business interests; (ii) it was not necessary for the public to know the specific details of Shell's pricing policy to understand the core issue of collusion and Shell's defence; (iii) confidential information was frequently intermingled with non-confidential information in the same document; it was not practical to delineate the evidence of Shell's witness into confidential and non-confidential portions.

At the end, the Judgment published by the Tribunal was also redacted before publication, to protect the confidential information of Shell and Taching.

CONCLUSION

In recent years, antitrust litigation around the world is attracting record fines and increased media attention. Competition law compliance has become an increasingly important topic for corporates and businesses to consider, as it could give rise significant financial and reputational impact.

The competition regime being relatively new in Hong Kong, it remains to be seen whether the local legislature will be prepared to allow a stand-alone right of private action in Hong Kong. A careful balance will have to be struck between the need to safeguard against frivolous or unmeritorious litigation and the important role of private actions in ensuring an effective enforcement regime. At the end of this briefing is a summary of corresponding positions in Singapore, Mainland China, the UK and the EU; with the exception of Singapore, stand-alone private actions are allowed in the other three jurisdictions.

The Judgment has clearly demonstrated the capability of the Tribunal to handle competition law defences in the context of civil claims and offered certainty and clarity in respect of the assessment of a competition law defence. It has laid the foundation for future antitrust disputes between private parties and paved the way for any future private actions to come.

SUMMARY OF AVAILBILITY OF STAND-ALONE PRIVATE ACTIONS IN OTHER JURISDICTIONS

	Singapore	**China**	**UK**	**EU**
Availability of stand-alone private actions	No	Yes	Yes	Yes
	Section 86 of the Singapore Competition Act creates the statutory follow-on action as a right of private action. However, a standalone private action is not allowed.	Stand-alone actions can be brought under Article 50 of the Anti-Monopoly Law.	Private actions can be brought either as stand-alone actions or follow-on actions. It is also possible to lodge competition collective actions before the Competition Appeal Tribunal.	Private actions can be brought in the courts of EU member states either as stand-alone actions or follow-on actions, as confirmed by the EU's Damages Directive. It may also be possible to lodge collective actions in certain EU member states.

CONTACTS

Helen Wang
Consultant

T +852 2826 3524
E helen.wang
@cliffordchance.com

Ingrid Cheung
Senior Associate

T +852 2825 8834
E ingrid.cheung
@cliffordchance.com

Bai Yong
Partner

T +86 10 6535 2286
E yong.bai
@cliffordchance.com

Ling Ho
Partner

T +852 2826 3479
E ling.ho
@cliffordchance.com

Richard Blewett
Partner

T +32 2 533 5023
E richard.blewett
@cliffordchance.com

www.cliffordchance.com

Clifford Chance, 27th Floor, Jardine House, One Connaught Place, Hong Kong

Clifford Chance

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