Re. Independent Committee in relation to the fire at Wang Fuk Court in Tai Po ("IC")

Written Opening Address of the Hong Kong Competition Commission ("CC")

Introduction

1. This is the written opening address of the CC to the IC with regards to §§2 to 4 of the Terms of Reference ("**ToR**").

2. This opening address is broken down into the following sections:

    (1) Part 1 sets out a general overview of the CC's enforcement work relating to the building maintenance and renovation sector[1];

    (2) Part 2 sets out the CC's observations on the systematic problems in large-scale building maintenance works in Hong Kong (§2 ToR);

    (3) Part 3 sets out the CC's observations on the adequacies of existing regulations and penalties to address the said systematic problems (§3 ToR);

    (4) Part 4 sets out the CC's recommendations that are relevant to (2) and (3) above (§4 ToR); and

    (5) Part 5 sets out the CC's concluding observations and next steps.

3. In summary, the CC's position is as follows:

    Re. §2 ToR

    (1) Based on the CC's market study and investigations, there is indeed a widespread, systematic, and longstanding practice among a sizable number of building maintenance contractors to affect the outcome of tenders for building maintenance works.

    (2) Such practices are sometimes (although not necessarily) facilitated by malpractices from supposedly independent consultants that have been engaged by the owners of the relevant building(s) concerned.

    (3) Such practices extend beyond "bid-rigging" *per se* (as defined under

[1] For the purpose of this report, the phrase "building maintenance work" / "building maintenance sector" should be read to encompass renovation works and the renovation sector as well.

s.2 of the **<u>Competition Ordinance</u>** (Cap. 619) ("**CO**") **[Tab-1]**), but almost always involve other anticompetitive practices such as price-fixing and market-sharing.

(4) It is also not uncommon for building maintenance contractors to seek to influence the outcome of tenders through other means that do not constitute "bid-rigging" as defined in the CO. These methods may include:

(a) the exchange of competitively sensitive information (e.g. price) in circumstances that fall short of an actual agreement to rig-bids;

(b) engaging in an overarching market-sharing agreement where, for example, contractors would agree to not "enter" into each other's "territory" ahead of any tender that may come about from buildings located in that territory;

(c) one building maintenance contractor "lending" its template letterheads, company credentials, and email accounts to another building maintenance contractor so that the latter may prepare and submit bids in the name of the other contractor as a "cover" for its own bid. This practice is colloquially known as "Credential Sharing"; and

(d) the setting up of ostensibly independent contractor companies that are, in effect, under the control of the same person / syndicate. These ostensibly independent contractors would, in turn, bid "against" each other in tenders to give the false impression that the underlying tendering process is a competitive one. This practice is colloquially known as "Phantom Bidding".

(5) There exist syndicate-led cartels whereby there are clear systems of "registration", dissemination of "homework", and the presence of ring-leaders / coordinators. These syndicate-led cartels may involve dozens of building maintenance contractors and consultants. In different cases, the CC has observed syndicates working with, as well as competing against, each other to affect the outcome of a tender.

(6) A number of building maintenance contractors and consultants are

believed to be affiliated with triad societies in Hong Kong who, in turn, may facilitate the operation / continuance of these anticompetitive practices through unlawful means (such as the use of threats or actual violence).

Re. §§3-4 ToR

(7) In terms of existing regulation, the CO provides a suite of powers to the CC and prescribes penalties which enable the CC to tackle anticompetitive conduct including those related to building maintenance under existing legal framework. In addition, with a view to reducing procurers' exposure to anticompetitive conduct in the procurement process, in 2017 (later revised in 2023), the CC published a set of model non-collusion clauses ("**NCC**") and non-collusive tendering certificate ("**NCTC**") and encouraged procurers to include the same in their bidding documents and contracts. These have since been widely adopted in the public and private sectors.

(8) While it is still able to tackle building maintenance related anticompetitive conduct under existing legal framework, the CC believes that there is certainly room for legislative changes as well as additional administrative measures which would (1) enhance the effectiveness of CC's enforcement work under the CO; (2) facilitate criminal prosecutions in appropriate cases; and (3) better deter would-be cartelists. In particular:

Enhancing CC's enforcement effectiveness under the CO

(a) the CO should clearly stipulate that the relevant standard of proof which the CC must meet in cases where it seeks pecuniary penalties against undertakings and persons it suspects to have contravened the CO is that of the civil standard (i.e. balance of probabilities). Apart from being consistent with the "civil nature" of competition law that was passed by the Legislature in 2012, this would also render the investigative and enforcement work of the CO much more effective compared to the current status quo whereby the relevant standard is the criminal standard (i.e. beyond any reasonable doubt), in part because the CO is silent on what the appropriate standard of proof should be;

(b) the CO should clearly provide for certain statutory presumptions that are in line with well-established overseas jurisprudence. For example, where it is proven that competitors had exchanged competitively sensitive information, there should be a statutory presumption that the competitors had done so in order to influence each other's behaviour on the relevant market and that such an exchange did, in fact, have that effect. This would negate the need for the CC to prove intent / causation which is inherently difficult especially under a criminal standard of proof; and

(c) the existing definition of "bid-rigging" (s.2 CO **[Tab-1]**) should expressly stipulate that it is not necessary for the CC to show that the relevant anticompetitive conduct was *not made known* to the person calling the tender in order to prove its case. If, in any case, a respondent wants to rely on the fact that it had made the relevant collusive arrangement known to the person calling the tender as a defense or mitigation, the burden should be on the respondent to prove the positive (that the arrangement was made known by "Bidder X" to "Tenderee Y") rather than on the CC to prove the negative (that no one at "Bidder X" had made the arrangement known to anyone from "Tenderee Y").

<u>Facilitating criminal prosecutions / Increasing deterrence</u>

(d) Under the existing laws of Hong Kong, where a building maintenance contractor / consultant had submitted bids that are arrived at by collusion in circumstances where it had expressly warranted by way of the NCTC that it had not engaged in anticompetitive conduct, the breaching of the NCTC could also lead to criminal prosecution under the common law offence of conspiracy to defraud.

(e) The CC fully supports any initiative that seeks to impose criminal sanctions and to increase deterrence against natural persons and undertakings that have been engaged in anticompetitive behaviour when tendering for building maintenance work. To this end, the CC has the following observations:

(i) In terms of short-term measures: that may be immediately taken, to the extent that this is not already done, in all large-scale building maintenance tenders involving public bodies, there should be a requirement for all bidders to execute NCTCs lest their bid will not be counted. If it subsequently transpires that the bidder has, in breach of the terms of the NCTC, in fact engaged in collusion prior to submitting its bid, the bidder can be referred to the relevant authorities for criminal prosecution under the common law offence of conspiracy to defraud.

(ii) Additionally, bidders in such large-scale building maintenance tenders could be required to execute a *Statutory Declaration* confirming the contents of the NCC / NCTCs which, if it is subsequently shown that it is knowingly false, would render the bidder criminally liable for the separate offence of having made a false declaration. The CC views this as being a sensible and effective addition that would make prospective criminal prosecutions easier.

(iii) In terms of mid-term measures: the execution of NCTCs / proposed Statutory Declarations could be required for all large-scale building maintenance tenders and not just for those involving the public sector.

(iv) In terms of long-term measures: amendments to the CO may be made to introduce a criminal regime whereby a specific statutory offence is created targeting natural persons to address anticompetitive behaviour in large-scale building maintenance works while preserving civil penalties for undertakings and natural persons engaged in less egregious conduct. In this regard, the relevant offence should be framed as being one that does not only cover "bid-rigging" *per se* but also capable of catching other anticompetitive conduct that aims to influence the outcome of the relevant tender (c.f. §3(4) above).

(v) Additionally, in civil cases, the maximum penalty for undertakings that have been found to have contravened

the CO as well as the maximum period of director's disqualification orders should be increased.

Part 1: General Overview of the CC's Enforcement Work in the Building Maintenance Sector

4. The CC is the primary law enforcement agency of the CO. In addition to its law enforcement work, one of the CC's statutory functions is to conduct market studies into matters affecting competition in markets in Hong Kong.

5. The CO came into full commencement on 14 December 2015. Prior to the full commencement of the CO, the CC conducted an extensive market study into the building maintenance sector in Hong Kong. At the time, this was done, in part, to address the widespread perception that this sector was rife with anticompetitive behaviour.

6. In May 2016, the CC published its "Report on study into aspects of the market for residential building renovation and maintenance" **[Tab-2]** ("**Report**").

7. In the Report, the CC had sought and obtained from the Urban Renewal Authority ("**URA**") and the Hong Kong Housing Society tender records from a number of tenders for building maintenance works. Applying structural and behavioural economic screening techniques that are commonly deployed by overseas competition agencies to the relevant records, the CC's screening analysis did reveal suspicious patterns that are consistent with there being widespread bid-manipulation practices in Hong Kong. In particular:

   (1) A substantial number of bids which supposedly independent consultants had submitted fell below the minimum cost of providing the relevant services. This would suggest that unless the consultants were willing to engage in loss-making behaviour (which generally makes no commercial sense), these consultants might have expected to be remunerated through other (possibly nefarious) means.

   (2) In a number of instances, consultants were recorded as having priced their bids in circumstances that did not appear to have any meaningful correlation with the size of the project. This, in turn, suggests that these consultants might have priced their bids in circumstances that were unrelated to the projected costs in undertaking the relevant works.

(3) Statistically, the frequency in which certain consultants would end up working with certain contractors would lend support to the existence of some form of vertical cooperation between the consultant and the chosen contractor.

8. As, at the time, the Report was based on analysis of bids submitted prior to the full commencement of the CO, the CC could not take any enforcement actions off the back of the findings of the Report.[2]

9. Between 2016 and 2019, the CC filed 3 enforcement actions against 18 undertakings and 5 individuals for engaging in anticompetitive conduct (price-fixing and market sharing) in the decoration and renovation sector in Hong Kong. In each of these actions, the CC was successful in securing declarations of contraventions, pecuniary penalties, and director disqualification orders against those persons holding office in the relevant companies.

10. In 2022, the CC conducted the first of five investigations into the building maintenance sector in Hong Kong in coordination with the Organized Crime and Triad Bureau of the Police. At present, the CC has five investigations relating to building maintenance works in Hong Kong covering at least:

(1) 68 residential estates;

(2) 15 industrial estates; and

(3) 64 companies.

11. The CC will be filing its first enforcement action concerning price-fixing, bid-rigging, and market-sharing in the large-scale building maintenance sector. Upon the filing of this action, the Originating Notice of Application will become publicly available and the CC will be ready and willing to answer, to the extent permissible under the CO, any questions that may arise from therein.

[2] It is also important to note that absent exceptional circumstances, proof of suspicious patterns alone will not be sufficient to find a case of "bid-rigging" for the purposes of the CO. Screening analysis of this sort are, instead, generally used to identify potential areas for investigation and to support the necessary statutory threshold which must be met before the CC may use its compulsory powers of investigation under the CO.

Part 2: Systematic Problems in Large-Scale Building Maintenance and Renovation Works in Hong Kong (§2 ToR)

12. Based on the CC's investigations, the following observations may be relevant for present purposes:

    (1) The CC believes that there is indeed a widespread, systematic, and long-standing practice between some building maintenance contractors to affect the outcome of tenders for building maintenance works. Such practices can range from and are not limited to:

        (a) a one-off agreement between building maintenance contractors whereby one / some would refrain / drop out from the bidding process (colloquially referred to as "bid-suppression");

        (b) a one-off agreement between building maintenance contractors whereby there would be a pre-agreed "designated winner" of the tender whose chances of winning would be supported by other building maintenance contractors who would purposely submit less attractive bids (colloquially referred to as "cover-bidding"); and

        (c) a market-wide coordinated effort where members of syndicates of building maintenance contractors would agree to / "register" themselves to an overarching scheme where they would facilitate each other's chances of winning over a number of tenders by systematicallyengaging in cover bidding if and when called upon (colloquially / loosely referred to as "bid-rotation").

    (2) These practices are sometimes facilitated by the consultants that are supposedly independently engaged by the owners / incorporated owners ("**IO**") of a building. In these cases, the consultants may, in exchange for compensation (whether by way of outright payment or by taking a "cut" from the final project works), agree to favourably recommend a building maintenance contractor for the owners and IO to select.

    (3) Aside from the practices referred to at §12(1)(a)-(c) above, there exist many other anticompetitive practices on the market for building

maintenance works that while they may fall short of the definition of "bid-rigging" for the purposes of s.2 CO[3] **[Tab-1]**, are nevertheless capable of influencing the outcome of a tender. For example:

(a) an undertaking (whether it may be a bidder / consultant) may exchange competitively sensitive information concerning an ongoing / upcoming tender with an actual / potential bidder, in circumstances where there is no express evidence of an agreement as to how that information will be deployed. This practice is known as "information exchange" and while it is usually, in itself, a standalone contravention of competition law, this is generally not regarded as "bid-rigging' *per se*;

(b) multiple undertakings may engage in a market-wide agreement to allocate territories amongst themselves such that they have agreed, in advance, not to "enter" into each other's geographical market regardless of whatever tendering opportunities that may arise. In competition law, this is known as "market sharing" and is, in fact, separately defined as being a form of Serious Anti-competitive Conduct under s.2 CO **[Tab-1]**;

(c) one building maintenance contractor may agree to lend its company templates, credentials, email accounts to another building maintenance contractors to put in tender in the former's name whenever convenient. This practice is known as "credential sharing" and depending on the extent of the first building maintenance contractor's knowledge, may fall outside the definition of bid-rigging for the purposes of the CO[4]; and

(d) one building maintenance contractor may set up a number of ostensibly independent building maintenance contractors but which are under common *de facto* control. These contractors

[3] Which, broadly speaking, is defined as: (1) the submission of a bid that have been arrived at by agreement that was not made known to the person calling the tender; or (2) an agreement to withdraw / refuse to bid that was not made known to the person calling the tender. It should be noted that for the purposes of the CO, "bid-rigging" is regarded as a Serious Anti-competitive Conduct that enables the CC to directly bring enforcement action before the Competition Tribunal ("**Tribunal**") (c.f. s.2 CO **[Tab-1])**.

[4] At present the CC has only encountered the practice of credential sharing in other industries. The CC however believes that there is no reason why cartelist will not also apply similar malpractices in the building maintenance sector.

will "bid against" each other in tenders for building maintenance works to give the impression that the tender was a competitive one when, in fact, it was not. This practice is known as "phantom bidding" and depending on whether "phantom bidders" may be regarded as truly "separate" businesses, this practice may fall outside the definition of bid-rigging for the purposes of the CO if the Tribunal does not regard this arrangement as amounting to an agreement *between* undertakings.

(4) Finally, the CC has reasons to suspect that a number of building maintenance contractors and consultants are affiliated with triad societies in Hong Kong. In the past, the CC has encountered cases where there was evidence that:

(a) threats of or actual violence were used to compel a bidder for building maintenance works to withdraw from a tender or to follow the instructions of the triad societies on how to submit a tender;

(b) building maintenance contractors that are affiliated with the same triad society would coordinate their bids in accordance with instructions received from a senior member of that triad society; and

(c) even within the same tender for a particular building maintenance contract:

(i) building maintenance contractors from two triad societies would try to influence the outcome of the tender by coordinating the behaviour of their own affiliated building maintenance contractors in "competition" with the other triad society; or

(ii) two triad societies would work *with* each other by cover-bidding for each other.

13. Against all of the above, the CC considers the above practice to be:

(1) <u>Widespread:</u> in that geographically it covers buildings in the whole of Hong Kong and involves a substantial number of building

maintenance contractors and consultants.

(2) Systematic: especially where syndicates are involved whereby there are clear systems of "registration", dissemination of "homework" and existence of ring-leaders / coordinators.

(3) Long-standing: almost every witness who has been willing to attest to the above practices has attributed this to being a long-standing trade practice in Hong Kong. Some of the jargons used (e.g. 「豬標」 and 「豬仔標」) are used by cartelists in other market sectors as well, such as the IT sector and the sector for installation and maintenance of large-scale air-conditioning works.

Part 3: Existing Regulations and Penalties (§3 ToR)

Regulations and Penalties under the CO

14. Under the CO, undertakings are expressly prohibited from entering into any agreement / concerted practices that has the object or effect of harming competition in Hong Kong (referred to as the First Conduct Rule under s.6 CO **[Tab-1]**). This would include paradigmatic cases of bid-suppression, cover-bidding, and bid-rotation.

15. The maximum penalty for undertakings that have entered into anticompetitive agreements (such as bid-rigging) is capped at 10% of its Hong Kong turnover for a maximum of three years for each year the undertaking has contravened the CO (see. s.93(3) CO **[Tab-1]**).

16. For persons involved in the anticompetitive agreement (such as the relevant director / employee), the CO does not specify a maximum penalty as such. It is the CC's position that the maximum penalty is unlimited in these circumstances.

17. Where a company has contravened the CO and if the Tribunal considers that a person's conduct as a director makes the person unfit to be concerned in the management of a company, that person may be disqualified from being concerned in the management of a company for up to 5 years (see. ss.101-103 CO **[Tab-1]**).

18. The Tribunal has previously held that the applicable standard of proof in proceedings where the CC seeks a pecuniary penalty is that of the criminal standard. This is because:

(1) The CO itself is silent on the applicable standard of proof; and

(2) As proceedings involving the imposition of a pecuniary penalty involve a determination of a criminal charge for the purposes of Art. 11 of the Hong Kong Bill of Rights ("**BOR**"), absent express / implied legislative provisions to the contrary, the starting point for such proceedings would normally be the criminal standard of proof.

19. While the Court of Appeal has previously observed *obiter* that there is a "reasonably arguable basis" the Tribunal may not have had sufficient regard to the potential frustration of effective enforcement in assessing whether there had been a derogation of Art. 11 BOR by necessary implication, it declined to definitively come to a determination on this issue (see **W. Hing Construction Company Limited** [2021] 3 HKLRD 219 **[Tab-3]** at 240-244 [75]-[96], [84] in particular).

Regulations and Penalties under the General Laws of Hong Kong

20. It should be noted that bid-rigging *per se* (i.e. where supposedly competing undertakings agree to not compete with each other in response to a call for tender) is not a criminal offence, or at least does not constitute a conspiracy to defraud. In **Chan Wai Yip** (2010) 13 HKCFAR 842 **[Tab-4]**, the Court of Final Appeal expressly held that persons attending an auction owed no obligation to the vendor to compete nor were they required by law to ensure that the vendor achieved the highest possible price, and an agreement not to compete in an auction had no deceptive element and hence not *per se* unlawful.

21. Of particular relevance however was the observation of Litton NPJ (which was in line with the observation of Tang VP (as he then was) of the Court of Appeal in that case) that if the person calling the tender in that case (the FEHD) wanted to protect itself, it could have required a written warranty from each of the potential bidders to the effect that in making a bid, the bidder warranted that he/she had not entered into any prior arrangement to refrain from competitive bidding (**Chan Wai Yip** *supra* at 854 [31] **[Tab-4]**).

22. Against the above, in 2017, the CC recommended the adoption of certain model "non-collusion clauses" and "non-collusive tendering certificates" by both the private and public sectors so that any prospective bidders must expressly warrant that in bidding for the relevant tender, the bidder had

independently prepared the bid and, in essence, had not colluded with any other persons. CC's model NCC and NCTC was further revised in 2023 to enable procurers to more easily ascertain the ultimate beneficial owners of persons submitting bids in tenders containing these provisions **[Tab- 2]**.

23. Armed with the revised NCC / NCTC, the CC takes the view (supported by Counsel's advice recently obtained) that where:

    (1) a company has submitted a bid containing a signed NCTC; and

    (2) it subsequently transpires that employees / agents / other persons relating to the company had engaged in any form of collusion that renders the representations contained in the NCTC a falsity;

    any person that are knowingly parties to the collusive agreement that ultimately led to the submission of the bid which contains the false NCTC may be criminally liable for conspiracy to defraud.

24. By way of illustration:

    (1) where a building maintenance contractor has submitted a bid containing an NCTC and the person executing the NCTC (e.g. the authorised signatory of a company) had colluded with a competitor or the consultant in an attempt to rig the outcome of the tender, any person that is party to the collusion may be criminally liable for a conspiracy to defraud; and

    (2) conversely, even if the person executing the NCTC does not have actual knowledge of the underlying collusion that renders the representation false, although <u>he</u> will not be criminally liable, other employees within the company who intended that the NCTC be signed with false representations (e.g. because <u>they</u> were the relevant persons colluding with the relevant competitor / consultant) will still be liable for conspiracy to defraud - along with any persons who are knowingly involved at the other end of the collusion (e.g. the relevant employees working for the competitor / consultant).

25. Since its introduction in 2017, the CC's model NCC and NCTC have been adopted by many Government bodies in Hong Kong, including the URA. As of today, the CC understands that all tenders that are called pursuant to the URA's SMART Tender scheme contain the CC's model NCC and

corresponding bidders are required to provide an NCTC as part of their bid under the SMART Tender scheme. In the context of Wang Fuk Court, the CC understands that all of the relevant consultancy and contractor tenders contain NCCs and most of the bidders have, in turn, executed NCTCs.

26. In the circumstances and for the purposes of §3 ToR, the existing regulations in Hong Kong are capable of imposing criminal liability at common law on persons that are knowingly parties to bid-rigging in the building maintenance sector provided that there are means to require prospective bidders to provide the relevant written warranties to the procurers (such as an NCTC) as envisaged by the Litton NPJ and Tang VP (as he then was) in **Chan Wai Yip** **[Tab-4]**.

Part 4: CC's Recommendations

Amendments to the CO

27. The CC considers that while it is able to tackle building maintenance related anticompetitive conduct under existing legal framework, there is always room for legislative changes which would enhance the effectiveness of CC's enforcement work under the CO, facilitate criminal prosecutions in appropriate cases, and better deter would-be cartelists.

28. At present, the CC considers that amendments to the CO along the following lines will prove critical in enhancing the effectiveness of the competition law regime in Hong Kong.

    (1) First, on the question of "standard of proof" for proceedings where the CC is seeking a pecuniary penalty, the existing legislation (s.93 CO for example) should be amended so that it expressly provides that the relevant standard is that of the civil standard (i.e. balance of probabilities). This is not only in line with international best practices, but as the CC had submitted in **W. Hing** [83]-[84] **[Tab-4]**, there is a real prospect that a criminal standard would frustrate effective enforcement of competition law in Hong Kong. This is especially in cases that are complex, technical, and/or where the underlying conduct is well concealed (as one would expect in paradigmatic cases of cartel conduct).

    (2) Second (particularly important if the standard of proof is to remain that of the criminal standard in pecuniary penalty proceedings), the CO should expressly incorporate well-established overseas presumptions lest the criminal standard of proof renders the CC and the Tribunal unable to draw upon such well-established

jurisprudences. For example, in a case of information exchange, where it is shown that a competitor (actual or potential) had transmitted competitively sensitive information to another competitor, this exchange should be presumed (subject to proof to the contrary) to have influenced each other's market behavior (this is known as the *Anic presumption* in EU law). Such statutory presumption is, in effect, similar to that provided for in insider dealing regulations where similar presumption of "use" of information also exists.

(3) Third, on the definition of bid-rigging, the CO should be amended to clearly provide that it is not necessary for the CC to show that the relevant anticompetitive conduct was *not made known* to the person calling the tender in order to prove its case. This will obviate any potential argument that, in any given bid-rigging case, the CC must prove the negative (i.e. that the suspected bid-riggers had not made their relevant arrangements known to any of the relevant persons within the tendering body) - something which will understandably require considerable time and effort on the part of the CC.

(4) Finally, concerning the available sanctions against persons that have contravened the CO, the CC recommends that the relevant penalties / periods for director disqualification be increased in a meaningful manner. In doing so, the CC hopes that, together with the changes in (1)-(3) above, the CO is truly able to strike its message of deterrence at the "hearts" of would-be cartelists.

29. In terms of the actual wordings of the above proposed amendments, the CC, working in collaboration with the Commerce and Economic Development Bureau, will approach the Department of Justice on this matter in due course.

30. Finally, the CC recommends that in addition to requiring all prospective bidders to execute NCTCs in any given tender for large-scale building maintenance works, all prospective procurers should also require all bidders in large-scale tenders (including residential building maintenance works) to execute a Statutory Declaration in terms that are similar to the model NCTC.

31. In doing so, it is the CC's intention to provide for the possibility of subsequent criminal prosecution against persons that have engaged in bid-rigging and have sworn the relevant Statutory Declaration to, further or

alternative to the offence of a conspiracy to defraud, be charged for having made a false declaration under section 36 of the **Crimes Ordinance** (Cap. 200) **[Tab-5]**.

"Criminalising Bid-rigging"

32. As to whether Hong Kong should expressly criminalise bid-rigging in order to sanction egregious cartelists and to deter persons from engaging in such conduct in future, the CC's observations are as follows:

    (1) The CC fully supports any initiative that seeks to impose criminal sanctions and increase deterrence against persons and undertakings that have been engaged in anticompetitive behaviour when tendering for building maintenance work.

    (2) The CC is currently considering the legal and enforcement framework from other jurisdictions that have a dual-track civil and criminal competition regime (e.g. UK, Australia, and New Zealand) which allows differential enforcement routes against cartelists and to what extent the experiences from those jurisdiction may be readily applicable to Hong Kong.

    (3) Given that the overwhelming public concern is about all sorts of anticompetitive behaviour that are capable of influencing the outcome of a tender for building maintenance works, simply criminalising "bid-rigging" as defined by the CO may not be sufficient to address this concern. The criminal "net" must, in the circumstances, be cast wider to capture other forms of anticompetitive conduct that may fall short of / be different from "bid-rigging" (e.g. information exchange, market-sharing, credential sharing, and phantom bidding).

    (4) Finally, it would be prudent for any legislative attempt to "criminalise bid-rigging" to be complementary to (and not designed to supplant) any existing avenues that may already impose criminal liability on would-be cartelist (such as the offence of conspiracy to defraud and the making of false declarations etc.).

33. In this regard, the CC has also been working in collaboration with the Commerce and Economic Development Bureau on possible approaches to criminalization and will consult the Department of Justice on this matter in due course.

Part 5: Concluding Observations

34. The CC hopes that this opening address will prove helpful to the IC in understanding the nature of the underlying problem at hand and the extent to which existing / future regulations may play a role in tackling this problem.

35. The CC will welcome any opportunity to address / assist the IC especially if, after the filing of any enforcement actions relating to the building maintenance sector (c.f. §11 above), it is able to do so with reference to actual real life accounts and evidence.

Dated the 9th day of March 2026

Competition Commission

Re. Independent Committee
in relation to fire at Wang Fuk Court in Tai Po ("IC")

List of Documents

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1. Sections 2, 6, 93, and 101-103 **Competition Ordinance** (Cap. 619).

2. Report on study into aspects of the market for residential building renovation and maintenance dated May 2016.

3. **W. Hing Construction Company Limited** [2021] 3 HKLRD 219.

4. **Chan Wai Yip** (2010) 13 HKCFAR 842.

5. Section 36 **Crimes Ordinance** (Cap. 200).

Dated the 9th day of March 2026

Competition Commission

2. Interpretation

(1) In this Ordinance—

agreement (協議) includes any agreement, arrangement, understanding, promise or undertaking, whether express or implied, written or oral, and whether or not enforceable or intended to be enforceable by legal proceedings;

Commission (競委會) means the Competition Commission established by section 129;

Communications Authority (通訊事務管理局) means the Communications Authority established by section 3 of the Communications Authority Ordinance (Cap. 616);

company (公司), in addition to the meaning given by section 2(1) of the Companies Ordinance (Cap. 622), includes a ***non-Hong Kong company*** within the meaning of that Ordinance and a company registered under Part IX of the Companies Ordinance (Cap. 32) as in force from time to time before the commencement date* of section 2 of Schedule 9 to the Companies Ordinance (Cap. 622) or under Part 17 of the Companies Ordinance (Cap. 622); *(Amended 28 of 2012 ss. 912 & 920 and L.N. 162 of 2013)*

company secretary (公司秘書) includes any person occupying the position of company secretary, by whatever name called;

competition authority (競爭事務當局) means—

(a) the Commission; or

(b) the Communications Authority;

competition matter (競爭事宜) means any matter involving or having a connection with—

(a) a contravention or alleged contravention of a competition rule; or

(b) any decision relating to a competition rule, that has been made or is to be made under this Ordinance;

competition rule (競爭守則) means—

(a) the first conduct rule;

(b) the second conduct rule; or

(c) the merger rule;

conduct (行為) means any conduct, whether by act or omission;

conduct rule (行為守則) means—

(a) the first conduct rule; or

(b) the second conduct rule;

confidential information (機密資料) has the meaning given by section 123;

contract of employment (僱傭合約) means any agreement, whether in writing or oral, express or implied, under which one person (an ***employer***) agrees to employ another and that other agrees to serve the employer as an employee, and also includes a contract of apprenticeship;

director (董事) includes any person occupying the position of director or involved in the management of a company, by whatever name called, and includes a shadow director;

document (文件) includes information recorded in any form;

first conduct rule (第一行為守則) has the meaning given by section 6;

functions (職能), except in section 130, includes powers and duties;

funds of the Commission (競委會資金) means the funds of the Commission, as specified in section 21 of Schedule 5;

Government (特區政府) does not include a company that is wholly or partly owned by the Government;

information (資料) includes information contained in a document;

infringement notice (違章通知書) means an infringement notice issued under section 67(2);

investigation (調查) means an investigation conducted under Part 3;

leniency agreement (寬待協議) means a leniency agreement made under section 80;

member (委員), in relation to the Commission, means a member of the Commission appointed under section 2 of Schedule 5;

merger (合併) has the meaning given by section 3 of Schedule 7 read together with section 5 of that Schedule;

merger rule (合併守則) has the meaning given by section 3 of Schedule 7;

person (人), in addition to the meaning given by section 3 of the Interpretation and General Clauses Ordinance (Cap. 1), includes an undertaking;

President (主任法官) means the President of the Tribunal appointed under section 136;

reviewable determination (可覆核裁定) has the meaning given by section 83;

second conduct rule (第二行為守則) has the meaning given by section 21;

serious anti-competitive conduct (嚴重反競爭行為) means any conduct that consists of any of the following or any combination of the following—

(a) fixing, maintaining, increasing or controlling the price for the supply of goods or services;

(b) allocating sales, territories, customers or markets for the production or supply of goods or services;

(c) fixing, maintaining, controlling, preventing, limiting or eliminating the production or supply of goods or services;

(d) bid-rigging;

Note—

See also subsection (2).

shadow director (幕後董事), in relation to a company, means a person in accordance with whose directions or instructions all the directors or a majority of the directors of the company are accustomed to act, but a person is not to be regarded as a shadow director by reason only that all the directors or a majority of the directors act on advice given by that person in a professional capacity;

statutory body (法定團體) means a body of persons, corporate or unincorporate, established or constituted by or under an Ordinance or appointed under an Ordinance, but does not include—

(a) a company;

(b) a corporation of trustees incorporated under the Registered Trustees Incorporation Ordinance (Cap. 306);

(c) a society registered under the Societies Ordinance (Cap. 151);

(d) a co-operative society registered under the Co-operative Societies Ordinance (Cap. 33); or

(e) a trade union registered under the Trade Unions Ordinance (Cap. 332);

Tribunal (審裁處) means the Competition Tribunal established by section 134;

undertaking (業務實體) means any entity, regardless of its legal status or the way in which it is financed, engaged in economic activity, and includes a natural person engaged in economic activity.

(2) For the purposes of the definition of ***serious anti-competitive conduct***—

bid-rigging (圍標) means—

(a) an agreement—

(i) that is made between or among 2 or more undertakings whereby one or more of those undertakings agrees or undertakes not to submit a bid or tender in response to a call or request for bids or tenders, or agrees or undertakes to withdraw a bid or tender submitted in response to such a call or request; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement; or

(b) a submission, in response to a call or request for bids or tenders, of bids or tenders that are arrived at by an agreement—

(i) that is made between or among 2 or more undertakings; and

(ii) that is not made known to the person calling for or requesting bids or tenders at or before the time when a bid or tender is submitted or withdrawn by a party to the agreement or by an entity controlled by any one or more of the parties to the agreement;

goods (貨品) includes real property;

price (價格) includes any discount, rebate, allowance, price concession or other advantage in relation to the supply of goods or services;

supply (供應)—

(a) in relation to goods, means sell, rent, lease or otherwise dispose of the goods, an interest in the goods or a right to the goods, or offer so to dispose of the goods or of such an interest or right; and

(b) in relation to services, means sell, rent or otherwise provide the services or offer so to provide the services.

(3) A note located in the text of this Ordinance is provided for information only and has no legislative effect.

Editorial Note:
* Commencement date : 3 March 2014.

Chapter 619	Competition Ordinance	19/09/2019

6. Prohibition of anti-competitive agreements, concerted practices and decisions

(1) An undertaking must not—

(a) make or give effect to an agreement;

(b) engage in a concerted practice; or

(c) as a member of an association of undertakings, make or give effect to a decision of the association,

if the object or effect of the agreement, concerted practice or decision is to prevent, restrict or distort competition in Hong Kong.

(2) Unless the context otherwise requires, a provision of this Ordinance which is expressed to apply to, or in relation to, an agreement is to be read as applying equally to, or in relation to, a concerted practice and a decision by an association of undertakings (but with any necessary modifications).

(3) The prohibition imposed by subsection (1) is referred to in this Ordinance as the ***first conduct rule***.

Chapter 619	Competition Ordinance	19/09/2019

93. Tribunal may impose pecuniary penalty

(1) If the Tribunal is satisfied, on application by the Commission under section 92, that a person has contravened or been involved in a contravention of a competition rule, it may order that person to pay to the Government a pecuniary penalty of any amount it considers appropriate.

(2) Without limiting the matters that the Tribunal may have regard to, in determining the amount of the pecuniary penalty, the Tribunal must have regard to the following matters—

(a) the nature and extent of the conduct that constitutes the contravention;

(b) the loss or damage, if any, caused by the conduct;

(c) the circumstance in which the conduct took place; and

(d) whether the person has previously been found by the Tribunal to have contravened this Ordinance.

(3) The amount of a pecuniary penalty imposed under subsection (1) in relation to conduct that constitutes a single contravention may not exceed in total—

(a) subject to paragraph (b), 10% of the turnover of the undertaking concerned for each year in which the contravention occurred; or

(b) if the contravention occurred in more than 3 years, 10% of the turnover of the undertaking concerned for the 3 years in which the contravention occurred that saw the highest, second highest and third highest turnover.

(4) In this section—

turnover (營業額) means the total gross revenues of an undertaking obtained in Hong Kong;

year (年度) means the financial year of an undertaking or, if the undertaking does not have a financial year, a calendar year.

Chapter 619 Competition Ordinance 19/09/2019

101. Disqualification order

(1) In the circumstances specified in section 102, the Tribunal may, on application by the Commission, make a disqualification order against a person.

(2) A disqualification order is an order that a person may not, without the leave of the Tribunal—

(a) be, or continue to be, a director of a company;

(b) be a liquidator or provisional liquidator of a company;

(c) be a receiver or manager of a company's property; or

(d) in any way, whether directly or indirectly, be concerned or take part in the promotion, formation or management of a company,

for a specified period, not exceeding 5 years, beginning with the date of the order.

(3) In this section—

specified (指明) means specified in the disqualification order.

Chapter 619 Competition Ordinance 19/09/2019

102. Circumstances in which disqualification order may be made

The Tribunal may only make a disqualification order against a person if both of the following conditions are satisfied in relation to that person—

(a) it has determined that a company of which the person is a director has contravened a competition rule; and

(b) it considers that the person's conduct as a director makes the person unfit to be concerned in the management of a company.

Chapter 619 Competition Ordinance 19/09/2019

103. Unfitness to be concerned in management of company

(1) For the purpose of deciding under section 102(b) whether a person is unfit to be concerned in the management of a company, the Tribunal—

(a) must have regard to whether subsection (2) applies to the person; and

(b) may have regard to the conduct of the person as the director of a company, in connection with any other contravention of a competition rule.

(2) This subsection applies to a person if as a director of the company—

(a) the person’s conduct contributed to the contravention of the competition rule;

(b) the conduct of the person did not contribute to the contravention, but the person had reasonable grounds to suspect that the conduct of the company constituted the contravention and took no steps to prevent it; or

(c) the person did not know but ought to have known that the conduct of the company constituted the contravention.

競爭事務委員會
COMPETITION
COMMISSION

Report on study into aspects of the market for residential building renovation and maintenance

May 2016

1. The market for residential building renovation and maintenance is an important market for the people of Hong Kong. Building renovation and maintenance costs are often a major expense for ordinary home owners[1], so that outcomes in this market have a significant impact on the family lives and standards of living of many ordinary people. Moreover, a wide variety of sources have expressed deep concern that there is widespread collusive activity in tenders for renovation and maintenance projects, to the detriment of home owners who must pay for the associated costs out of their savings. In view of these concerns, and to enable the Competition Commission to understand how this complex market operates so as to inform its future enforcement and advocacy efforts, the Commission undertook a study of certain aspects of the market for residential building renovation and maintenance since the spring of 2015. This report outlines the results of the Commission's examination of certain activities in this market.

The Commission's general purpose and approach in conducting market studies

2. The Commission's functions include "to conduct market studies into matters affecting competition in markets in Hong Kong" and "to advise the Government on competition matters in Hong Kong and outside Hong Kong".[2]

3. The Commission's market study function provides the Commission with the opportunity to assess whether competition in a market is working effectively. This is particularly relevant where it is desirable to focus on the functioning of the market as a whole or on features of a market in more general terms rather than on a single aspect of it or the conduct of particular firms within it. Market studies may examine any competition problem and may identify the market features causing the problem. A wide range of information may be studied and analysed during the course of a market study. Economic analysis techniques may be used to further identify issues. The use of "screening" techniques applied during this particular study is described in this report.

4. The main objective of a market study is to examine if competition within a market is working well or can be improved; it does not seek to establish general rules and obligations for firms. The Commission can look at the conduct of firms as it relates to the functioning of competition in the market generally, and it can also look for other causes of insufficient competition such as structural aspects of the market (including barriers to entry and expansion) or the conduct of customers. The purpose of a market study is not necessarily to look for contraventions of the Competition Ordinance, and subjects for a market study are not confined to issues that could be contraventions.

[1] We would note that tenants will likely be affected in a similar way to home owners, because higher maintenance and renovation costs will likely be passed on to them to some extent.

[2] Competition Ordinance, section 130.

5. Two things should be noted about the Commission's study in this case. Firstly, and as a general point, the Commission does not have compulsory information gathering powers in conducting market studies unlike in the case of investigations of possible contraventions of the Competition Ordinance. Secondly, this market study relates to activities that occurred before the full commencement of the Competition Ordinance in any event. Thus, in contrast with market studies that the Commission might conduct in the future, the conduct studied would not likely constitute a contravention of the competition rules because they were not yet in force.

6. If the Commission identifies that there are systematic problems of insufficient competition in a market, it can take a number of steps. For instance, if the Commission identifies that there is problematic conduct potentially falling foul of the Competition Ordinance by a number of firms in the market, it may identify that sector as meriting priority in enforcement case selection. Additionally, if the Commission identifies that there is a structural competition deficit within the market that may be solved through Government policies or action, it may make appropriate recommendations to the Government in accordance with its government advisory function. The Commission may also consider whether education of market participants would assist in resolving the problems identified.

Potential competition issues identified in the market for residential building renovation and maintenance

7. The Commission undertook an examination of a segment of the market for residential building renovation and maintenance related to the common areas of residential buildings as it operated just prior to the Competition Ordinance coming into effect. To do this, the Commission sought information from a range of stakeholders and market participants. In particular, the Commission was greatly assisted in its understanding of the market by the Urban Renewal Authority (the URA) and the Hong Kong Housing Society (the HKHS), who provided the Commission with historical information on tenders for projects.

8. The appointment of firms to undertake building renovation and maintenance work for home owners is usually done in a two-stage process. Commonly, the home owners first appoint a consultant to advise them on the type of work that needs to be done and to oversee a tender process for the appointment of a contractor. That firm (that is, the consultant) must include an authorised person registered under the Buildings Ordinance (typically a registered architect, engineer, or surveyor). Second, the contractor – who will undertake the physical renovation and maintenance construction work – is appointed by way of a tender overseen by the consultant.

9. The Commission's examination of the market in this case indicated that different types of bid-manipulation practices appear to be of particular concern in this two stage process. One type of bid-manipulation practice occurs where competing contractors engage in bid-rigging cartel conduct or other collusive behaviour intended to influence the outcome of the tender for their services to their favour, typically resulting in an inflated contract price compared to a more competitive level. The consequence of the higher price is that the consumers of the contractors' services, that is, the home owners who have to pay for the building work, pay more because of the collusive practice.

10. A second type of bid-manipulation practice (which may accompany or facilitate the conduct described in the preceding paragraph) occurs where a consultant and a contractor conspire with each other so that the particular consultant wins the bid to oversee the tender for the physical works (sometimes by putting in an extremely low bid for the consulting services), and then organises for its allied contractor to win the bid for the renovation work at an inflated price. Again, the ordinary home owner pays more because of this bid-manipulation practice.

11. These two practices are very likely not the only conduct engaged in for the purpose of bid-manipulation in this market. The Commission also notes that both practices – potentially in conjunction with other conduct – may be used in combination as part of a broader bid-manipulation scheme. The extent to which specific instances of bid-manipulation could potentially contravene the Competition Ordinance depends on the facts of each case.

12. The Commission received substantial anecdotal and other market intelligence suggesting that bid-manipulation practices may have taken place regularly in Hong Kong in the recent past in relation to the market examined, to the detriment of Hong Kong consumers. The Commission therefore applied screening techniques to analyse the tender records of past actual projects. As explained in more detail below, screening can help competition authorities detect suspicious conduct and decide where to look more closely for evidence of competition law breaches. The screening carried out by the Commission can provide an indication of whether patterns in the data would be consistent with the widely suspected bid-manipulation practices. It also indicates whether the Commission would likely decide to investigate some of the observed patterns if they were encountered today using a more recent set of tender data.

The Commission has undertaken detailed quantitative "screening" analysis on a wide range of projects

13. The Commission examined the past tender results of a wide range of specific building maintenance projects which the URA and HKHS shared with the Commission on a confidential basis. Based on its analysis of these tender records, the Commission found patterns that would be consistent with the above mentioned bid-manipulation practices widely suspected in the building maintenance and renovation market.

14. The projects examined were those subsidised under the Operation Building Bright (OBB) scheme, a government subsidy scheme launched in 2009. OBB consisted of two rounds of funding with a total allocation of up to $3.5 billion. Buildings benefiting from the scheme are of a certain vintage (30 year-old or over). Geographically, the scheme covers Hong Kong Island, Kowloon and the New Territories and involves building works in the common area of buildings, typical of the works undertaken in most building renovation and maintenance projects initiated by owners in Hong Kong. Information on the tenders concerned was collected by the URA and the HKHS during the course of the scheme. The Commission analysed the results of around two hundred tenders for the appointment of consultants to plan and oversee OBB renovation projects, and of around five hundred tenders for the appointment of contractors to carry out the renovation works.

15. The Commission examined these tender records by using a method known as screening. Originally proposed by academic economists, screening has been used by competition agencies around the world to facilitate cartel detection. Cartels cause significant economic harm and fighting them is a priority for competition authorities. However, cartels operate in secret and they are hard to detect. Leniency programmes that offer cartelists immunity or reductions in fines in exchange for information on cartel conduct have been used by many competition authorities with great success. Screens represent an additional tool competition authorities can use to uncover cartel behaviour and can – as such – complement leniency programmes and other detection techniques.

Background information about screening

16. Generally, screens can be classified into two types – structural and behavioural.[3] Structural screens are based on the structural characteristics of a market (e.g. the number of competitors and product homogeneity) and aim to identify markets that are more susceptible to collusion. Such structural screens can provide useful guidance to competition authorities in deciding which markets within the economy to prioritise when enforcing cartel prohibitions.

17. Behavioural screens, on the other hand, look for behaviour on the part of market participants within a specific market that appears more likely to be consistent with collusion rather than competition.[4] These screens can again be classified broadly into two categories: (1) screens that look for patterns that are very unlikely to occur under competition and (2) screens that look for patterns that appear inconsistent with some benchmark (for example, a market in another region or some measure of costs). In both cases the screen flags behaviour/patterns that appear(s) inconsistent with competition, indicating that the market concerned may be affected by some form of collusion. The Commission has applied both types of behavioural screens in this market study. A brief review of screens applied elsewhere in the world below illustrates how such screens can work in practice.

[3] OECD Directorate for Financial and Enterprise Affairs – Competition Committee (2014), Ex officio cartel investigations and the use of screens to detect cartels, Background Note by the Secretariat, p.225. Available at http://www.oecd.org/daf/competition/exofficio-cartel-investigation-2013.pdf

[4] Ibid, p.20

18. A prominent example internationally is the uncovering of collusive conduct in the setting of the LIBOR benchmark interest rate in the financial market through the use of screening techniques.[5] LIBOR is an important benchmark interest rate – that is, a price of borrowing money – used widely in financial markets. It was set daily in London by the British Bankers Association based on individual quotes on the costs of borrowing money from a number of banks. Journalists initially flagged suspicious patterns in the LIBOR benchmark. Academics then followed up with more detailed screening analysis. One of the results of this screening was that many banks had submitted identical quotes for extended periods of time. This is a pattern that seems highly unlikely if the banks made their decisions independently of each other without any coordination. Subsequent investigations by competition authorities and financial regulators in several jurisdictions led to substantial penalties.

19. Screens have also been used to detect collusive behaviour in the construction sector. For example, the screening of highway paving project tenders in New York State in the United States suggested that certain known cartelists who had previously participated in bid-rigging rings elsewhere in New York State also rigged the tenders under study.[6] Specifically, the authors of the study looked into the relationship between the level and ranking of bids and the underlying costs of the bidders. They found that the level and ranking of bids submitted by the non-cartel firms could be explained by relevant cost indicators while this was not the case for the bids submitted by the cartelists. The authors interpreted these results as an indicator of cover bidding – where bidders agree to submit bids with higher prices or less attractive (or unacceptable) terms as compared with the bid of the designated winner – by those parties with a prior history of cartel conduct.

The results of the Commission's use of screening techniques

20. The Commission applied a number of different and complementary screening techniques to the tender records it had obtained. One screen the Commission applied focused on tender participation and tender success. The motivation for this screen flows directly from the forms of bid-manipulation widely suspected in this market and outlined above: if certain groups of bidders conspire to influence tender outcomes in their favour, one might expect those groups of bidders to participate in the same tenders frequently. Furthermore, where such groups do participate in the same tender, group members' chances of winning the tender should also increase. The Commission screened the tender data for such patterns.

21. More specifically, the Commission first looked for indications of consultants and/or contractors participating in the same tenders more often than would be expected if they were making their decisions to participate independently of each other. It is, of course, difficult to decide in practice which level of participation in the same tenders is consistent with independent decision making and which level is not.

[5] See, for example, Abrantes-Metz, Rosa M., Michael Kraten, Albert D. Metz and Gim S. Seow (2012), LIBOR Manipulation?, Journal of Banking and Finance, 36(1), pp. 136-150.

[6] Porter, Robert H. and Zona, J. Douglas (1993), Detection of Bid Rigging in Procurement Auctions, Journal of Political Economy, 101(3), pp. 518-538.

22. The Commission therefore looked at different measures of participation. One measure evaluated participation from a statistical perspective. The Commission first asked: how often would we expect to see consultant/contractor and contractor/contractor pairs in the same tender if participating together occurred at random (or put differently, if participation were statistically independent)? The Commission then compared this benchmark level of anticipated pairs with actual pairs in the data. It labelled pairs that appeared too frequently as being possibly associated.[7] A second measure of groups of contractors started from actual participation in tenders. The measure looked for groups of contractors where each group member (1) participated with some frequency in tenders in general and (2) satisfied some threshold of participation in other group members' tenders. Again, the Commission considered groups of contractors that fulfilled these requirements as being possibly associated. As a result of these analyses, the Commission identified possible associations in the data between certain consultants and contractors as well as between certain contractors.

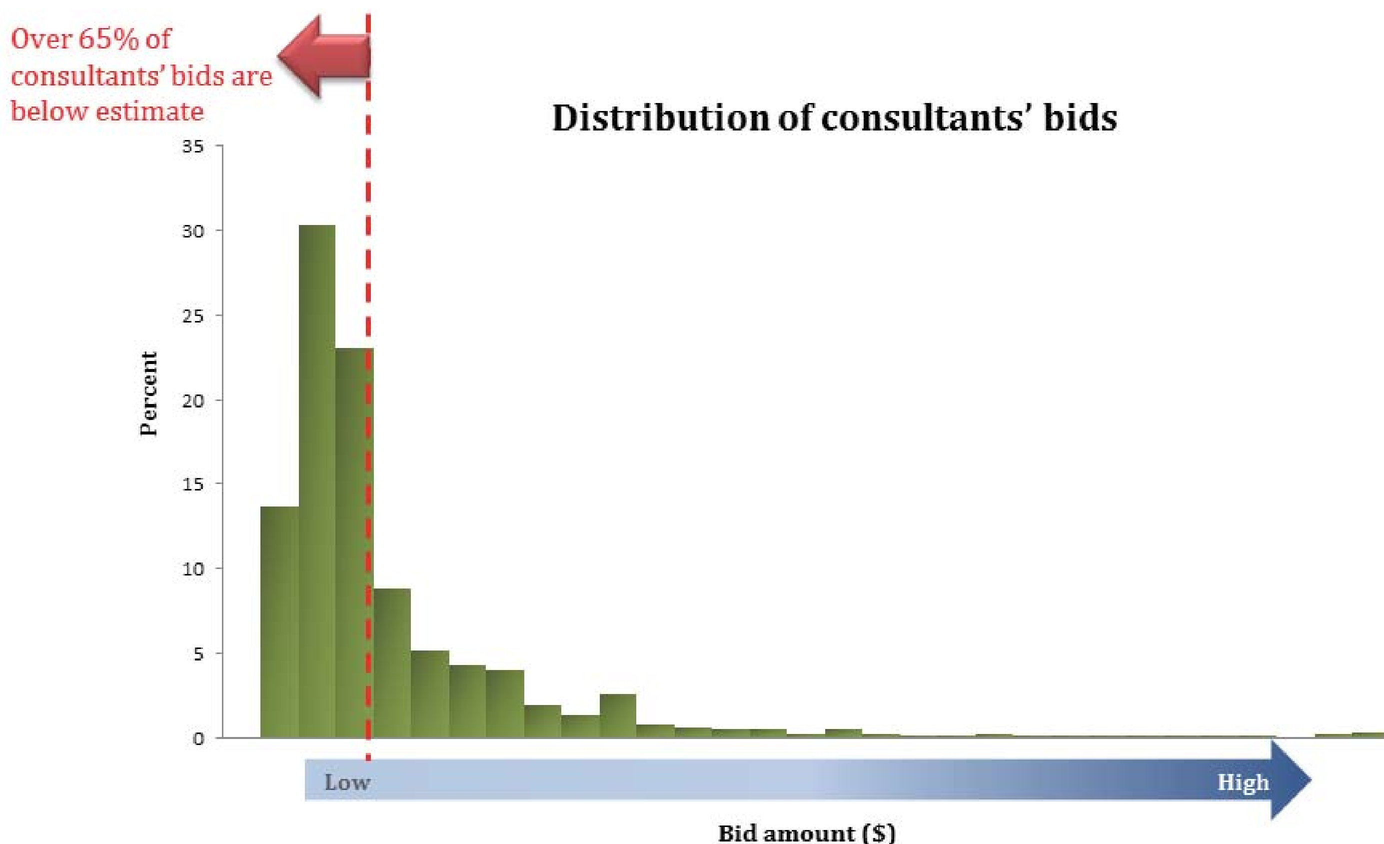
23. The Commission then went on to check whether the presence of an association between bidders – as indicated by the above screening analysis – increased the prospect of winning a tender. The result is that it did. Contractors were more likely to win a tender where our screening indicated they were associated with the consultant organising the tender. Similarly, contractors were more likely to win a tender the higher the number of associated contractors – again, as indicated by the above screening analysis – participating in the tender.

24. Overall, these results suggest that participation patterns in the tender data appear consistent with the widely alleged bid-manipulation practices described at the outset of this report. While the results do not prove that such practices were present, they would – if encountered today using more recent data – likely lead the Commission to investigate particular tenders.

25. In a separate analysis, the Commission screened for bid amounts that appear not to be reflective of the costs of providing the underlying goods and services. The motivation for the screen is that in a competitive environment there should typically be a relationship between the cost of providing the goods and services and the bid submitted: the higher the costs underlying the bid, the higher the level of the bid. The Commission's analyses indicate that bidding patterns of consultants often appear out of line with the underlying costs. There are two ways by which the Commission arrived at this conclusion.

26. In the first part of the analysis, the Commission compared the values of consultants' bids with an estimate obtained from an industry expert of the minimum costs of providing the services associated with even the most basic consulting project. The figure below illustrates this analysis.

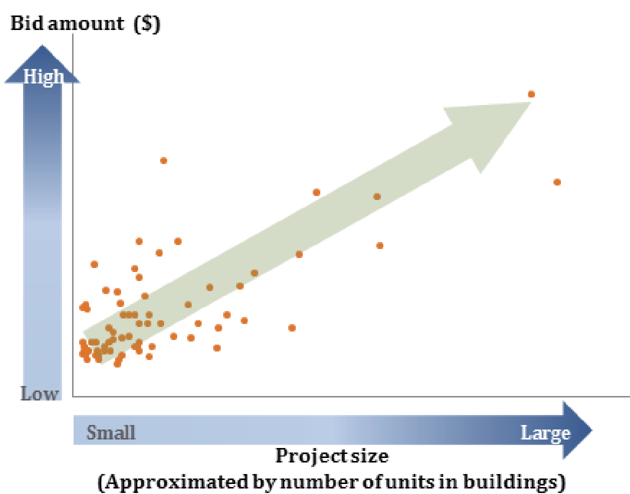
[7] The word "associated" as used in this paragraph is not intended to imply any legal association in a corporate sense. The word merely refers to the fact that particular parties appear together in particular tenders more often than might be anticipated if they made their decisions completely independently.



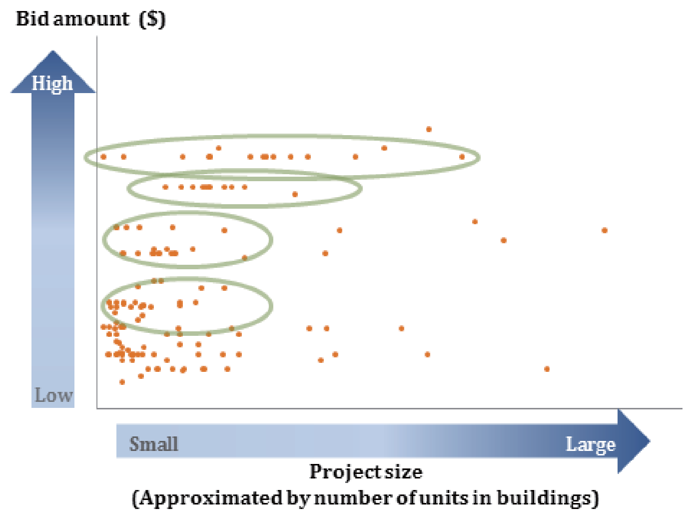
27. The figure shows the distribution of consultants' bids with respect to their value (the bid amount). The red line in the figure indicates the minimum estimate of costs associated with even the most basic consultancy project as provided by an industry expert. More than 65% of the bids submitted by consultants fall below that estimate. This may suggest that consultants' bids are suspiciously low in many projects. One possible interpretation would be that consultants bid aggressively low in order to win a project and subsequently benefit from awarding renovation work to particular contractors.

28. In the second part of the screening analysis of the costs underlying bids, the Commission analysed whether consultants' bids increased with the size of a project. While genuine bids should show a relationship between project size and bid value, this need not necessarily be the case for cover bids that are not intended to win a project. The results indicate that some consultants' bids did vary in line with project size, but other consultants' bids did not (or at least much less). The figure below illustrates the result.

Correlation between cost and bid amount



Weaker correlation between cost and bid amount



29. The figure shows the relationship between bid amounts and project size (approximated by the number of units in a building) for two consultants. The consultant on the left submitted bids that tend to increase with project size. This is a pattern one would expect under competition: the larger the project, the higher the associated costs and the higher the value of the bid. The consultant on the right, on the other hand, submitted bids that show no clear relationship with the size of the project (and often take on the same value for projects of very different size). One possible interpretation for this latter pattern is that certain consultants may have submitted bids that were unrelated to their costs in certain tenders.

30. Overall the results of the Commission's screening analyses would be consistent with the widely alleged bid-manipulation practices outlined above having been present to an extent. They are, however, no proof of such activities having actually taken place; our screening analyses are neither suited nor intended to conclusively prove contraventions. The purpose of screens is primarily to identify patterns that are suspicious in order to focus an investigation and decide where to look more closely for additional evidence. As a consequence, the Commission has neither concluded that any specific practices led to the patterns observed during the study, nor that the conduct underlying these patterns would have contravened the Competition Ordinance had it been in full effect at the relevant time. Nevertheless, if encountered today, the results would likely lead the Commission to initiate further investigations into certain aspects of this market.

The Commission will investigate future bid-rigging collusion that is now illegal under the Competition Ordinance

31. The Competition Ordinance came into full effect on 14 December 2015. Under the First Conduct Rule in the Ordinance, businesses must not make, give effect to or facilitate agreements that have the object or effect of preventing, restricting or distorting competition in Hong Kong. If the Commission were to encounter similar patterns detected in the context of this study today, it would likely raise concerns that there may be conduct underlying them that could contravene the First Conduct Rule and warrant further investigation. If such investigations eventually confirmed suspected contraventions of the First Conduct Rule, the conduct could be brought to the Competition Tribunal for the imposition of penalties. In particular, where there is evidence of collusion on bids between competing contractors as part of a bid-rigging cartel, the practices may constitute serious anti-competitive conduct as defined by the Competition Ordinance and may attract very serious penalties.

32. Moreover, if a consultant conspires with, aids or is in any way knowingly concerned in a bid-rigging cartel, the consultant is also exposed to pecuniary penalties under the Competition Ordinance. Market participants are advised to bid for projects on a competitive basis and to avoid collusive practices or conspiring with others in support of such practices now that the Competition Ordinance is in full force.

33. The methods used in the Commission's study of the building renovation and maintenance sector have potential implications for future confidential investigations and law enforcement actions to be undertaken by the Commission. As a result, the Commission proposes to limit the amount of detail it provides on the methods employed in this case.

34. The Commission's enforcement and advocacy activities will be informed by the results of the screening exercises in this study, as it attempts to uncover bid-rigging and other contraventions of the Competition Ordinance now that the law is in full force. To the extent that bid-rigging cartels, in particular, can be prevented, Hong Kong home owners and tax payers will benefit from more competitive contract prices.

35. Home owners and other members of the public are encouraged to be alert to the prospect of bid manipulation and are encouraged to come forward and report any specific information to the Commission and other authorities for further examination. The Commission will be issuing educational materials about bid-rigging including brochures and videos. This will include detailed guidance to relevant stakeholders, such as procurement officers, on how to structure tenders to avoid potential bid manipulation and how to detect bid manipulation more readily.

The Commission supports the URA's, the HKHS's and the Government's initiatives in this market

36. The Commission wishes to acknowledge that in administering the OBB Scheme, the URA and the HKHS have taken a number of important steps to address the problem of bid-rigging. Their formulation of OBB Maintenance Guidelines and New Tender Arrangements ("NTA") in consultation with the ICAC has gained notable success in improving the competitiveness of the tender process for OBB projects.

37. Under the NTA, three tender procedures originally handled by the authorised person, building management company and/or owners' corporation members of buildings under the OBB scheme were managed by an independent accounting firm appointed by the URA or HKHS. The whole process from collecting, acknowledging and recording expressions of interest, distributing tender documents as well as collecting and opening the returned tenders was carried out and certified by a certified public accountant. In order to encourage more building contractors to take part in the tendering process and in line with the OBB Maintenance Guidelines, 10 additional registered general building contractors were selected by the appointed independent accounting firm from a computer ballot to add to the list of tenderers.[8]

38. Before and after the introduction of the NTA in September 2013, in the cases handled by URA, the average number of expressions of interest for an OBB project rose from around 20 to 50, and the number of bids submitted rose from around 16 to 29. The most striking change was an increase in the share of projects for which actual award prices were in line with independent consultants' pre-tender estimates from around 54% to 93%.

39. The Commission also understands that the URA and the HKHS have referred suspected cases of bid-rigging with criminal elements to the Police and the ICAC.

40. The Government of the HKSAR has recently announced additional measures to combat bid-rigging. Specifically, on 10 May 2016 the URA launched the "Smart Tender" Building Rehabilitation Facilitating Services (pilot scheme) which will (1) set up an electronic bidding platform for property owners to invite bids and receive expressions of interest from contractors for building renovations, thereby keeping confidential the identity of the bidders until the bid opens, and (2) provide access for home owners to professional advice regarding the recommended scope of building renovation projects and estimated value of works.[9]

[8] See announcement by URA and HKHS, available at http://www.ura.org.hk/en/media/press-release/2013/20130918.aspx

[9] See http://www.ura.org.hk/en/media/press-release/2016/20160510.aspx

41. The Commission supports and encourages these Government initiatives. Hong Kong home owners will benefit significantly if markets for this important expense operate competitively – home owners would receive better prices, better quality services, and more choices in building renovation and maintenance. The electronic bidding platform proposed by the Government can, by partly anonymising bids, help tenders operate more effectively and protect against the establishment of bid rigging cartels. Similarly, the access to the professional advisory services proposed by the Government can assist home owners to be better informed and more able to distinguish between legitimate and collusive bids, and assist them to make better, more informed and competitive choices as to how to spend their money on the renovation and maintenance of their homes. The Commission welcomes these positive outcomes.

Going forward

42. The techniques developed in the context of this study could potentially be used to detect possible competition law violation going forward. The Commission now has the tools developed over the course of the study at its disposal. The ability to conduct a meaningful screening exercise depends very much on the amount and quality of data that are made available for analysis. In this connection, the Commission calls upon both the public and private sectors to work on collecting and building databanks of building maintenance-related tenders. For example, the Commission will explore with the Government the possibility of assessing data on different projects collected via the electronic bidding platform mentioned in paragraph 40 above.

43. As the tender process home owners use to award contracts may expose them to certain forms of bid-manipulation, information about how to prevent and detect bid-rigging is important. It is also important that consultants and contractors understand their obligations. The Commission has identified the need to undertake further education and outreach activities on bid-rigging. The Commission is launching a series of brochures, videos and exhibitions on this topic, and all participants or would-be participants in tenders are urged to actively find out more.

44. More generally the Commission could also see that there is considerable scope to work with stakeholders such as the URA and the ICAC and other government bodies to closely review the process of awarding work in this area and to recommend measures that could help protect home owners. This could, for example, involve recommended changes to the tendering process and tender documents. For example, consultants and contractors could be required to declare that no bid-rigging has occurred when submitting tenders. This would ensure that bidders turn their minds to the need to ensure no bid-rigging has occurred. Additionally, if the bid is subsequently found to be rigged the tenderer may be able to take private action in respect of the misleading declaration.

45. Consultants of different professions and contractors play an essential role in building maintenance projects. The market study has highlighted possible concerns about the participation of some of these players in bid-manipulation practices. In this connection, the Commission calls upon the relevant industries and professional bodies to develop and strengthen the codes of conduct for their members to give due regard to the competition rules. The Commission stands ready to facilitate these industries and professional bodies in such an exercise.

Conclusion

46. This market study has considered the issue of bid-manipulation in residential building renovation and maintenance project tenders. The Commission's use of screening techniques to analyse tender outcomes has revealed patterns that would be consistent with the wide-spread feeling among the public that there may have been problems in building renovation and maintenance markets. If the Commission were to obtain similar results today, it would very likely investigate further certain patterns highlighted by the analysis. The results of the study will be used to inform the Commission's enforcement and advocacy activities now that the Competition Ordinance is in full effect.

47. Those who might be tempted to manipulate bids in contravention of the competition rules should know that the Commission is watching and it has at its disposal a number of different tools to detect such contraventions. The Commission understands what has been taking place, and it will investigate where it can. Those contemplating rigging a bid should abandon such projects. Those already involved in rigging bids should realise that they are involved in serious anti-competitive conduct and should do the right thing by approaching the Commission to apply for leniency under the Commission's Leniency Programme to avoid the risk of facing substantial penalties and other sanctions. The Commission has identified bid-rigging cartels as a priority for enforcement and will use the full extent of its powers to end bid-rigging cartels.

48. The study also provides an opportunity for the Commission to share knowledge with relevant government departments and public authorities to assist them to identify where potentially anti-competitive bid-rigging conduct has occurred, and measures that can be taken to minimise the risk of it occurring in the future. Additionally, where the Commission identifies bid-manipulation that is unlikely to contravene the Competition Ordinance, but may be an offence under other laws (e.g. anti-corruption or bribery laws) the Commission will refer relevant cases to the appropriate authorities such as the Police and the ICAC.

24 May 2016

競爭事務委員會
COMPETITION
COMMISSION

Room 3601, 36/F, Wu Chung House
213 Queen's Road East
Wanchai, HONG KONG

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Competition Commission

and

W Hing Construction Co Ltd

(永興聯合建築有限公司)

[2021] HKCA 877

(Court of Appeal)

(Civil Appeal No 257 of 2019)

Lam V-P, Barma and Au JJA

5 May, 18 June 2021

Competition law — Competition Tribunal — proceedings for breach of "first conduct rule" — proceedings against partnership for pecuniary penalty — liability of individual partners — no basis to import requirement of mens rea on part of individual partners — Competition Ordinance (Cap.619)

Competition law — Competition Tribunal — proceedings for pecuniary penalty — standard of proof — inappropriate for Court of Appeal to determine issue at high level of abstraction — Competition Ordinance (Cap.619)

Civil procedure — appeal — Court of Appeal — discretion to entertain appeal where lis between parties had gone — inappropriate to determine at high level of abstraction

競爭法 — 競爭事務審裁處 — 違反「第一行為守則」的法律程序 — 針對合夥的金錢處罰的法律程序 — 個人合夥人的法律責任 — 沒有基礎去引入個人合夥人該部分的犯罪意圖之要求 — 《競爭條例》(第619章)

競爭法 — 競爭事務審裁處 — 金錢處罰的相關法律程序 — 舉證標準 — 不適合由上訴法院於高度抽象的層面上裁定爭議—《競爭條例》(第619章)

民事訴訟程序 — 上訴 — 上訴法院 — 在訴訟方之間的爭議已消失的情況下受理上訴的酌情決定權 — 不適合於高度抽象的層面上裁定爭議

R4 was found by the Competition Tribunal (the Tribunal) to have contravened the "first conduct rule" under the Competition Ordinance (Cap.619) (the Ordinance). Subsequently, the Tribunal imposed sanction by way of pecuniary penalties. In the Originating Notice of Application, the Competition Commission (the Commission) had named R4 as "Cheung Yiu Fai Danny and Wong

Tung Hoi (in partnership trading as Tai Dou Building Contractor)". Xs, the two named individual partners, appealed against their liability, submitting, *inter alia*, that: (i) since it was conceded before the Tribunal that the Commission was not proceeding against the unnamed partners, the Commission could not have been suing in respect of their joint liability stemming from the acts of the firm and was actually suing Xs as individuals regarding their own personal involvement in respect of the contravention of the first conduct rule; (ii) because the liability of the partners was joint, and not several, the proceedings were defective by virtue of the failure to join the unnamed partners; and (iii) taking into account the criminal nature of the proceedings, Xs should not have been held liable in the absence of personal acts or *mens rea* on their part constituting breach of the first conduct rule. Xs did not seek to disturb the Tribunal's finding that the firm was liable. The Commission, by respondent's notice, sought to challenge the determination that the standard of proof for proceedings for a pecuniary penalty under ss.92 and 93 of the Ordinance was proof beyond reasonable doubt. It contended, *inter alia*, that the Ordinance had impliedly derogated from the criminal standard, otherwise applicable pursuant to art.11 of the Hong Kong Bill of Rights, by necessary implication by virtue of potential frustration of effective enforcement.

Held, dismissing the appeal and declining to address the respondent's notice, that:

(1) Although the naming of R4 in the Originating Notice of Application and its description therein was ambiguous, reading it as a whole and in context, the acts and conduct pleaded as contraventions of the first conduct rule were those of the partnership. In any event, all parties had proceeded in the Tribunal on the basis that the firm was R4, and Xs were proceeded against by virtue of their capacity as partners. There was no rigid rule that in advancing a claim on joint liability all parties jointly liable must be joined. (See paras.28, 34, 65, 67.)

(2) Notwithstanding the application of criminal standard of proof by virtue of art.11 of the Hong Kong Bill of Rights in terms of procedural safeguards, on the proper construction of the Ordinance, proceedings in respect of contraventions of the first conduct rule did not involve the trial of a substantive statutory criminal offence. Accordingly, there was no basis to import the requirement of *mens rea* on the part of Xs; their liability flowed from the liability of partners for the civil obligations of a partnership (*Competition Commission v TH Lee Book Co Ltd* [2020] HKCT 12 approved; *Secretary for Justice v Cheung Kai Yin* [2016] 4 HKLRD 367 applied; *R*

v W Stevenson & Sons (A Partnership) [2008] 2 Cr App R 14, *Riley v Director of Public Prosecutions* [2017] 1 WLR 505 distinguished). (See paras.39, 45–46, 57–58, 61.)

(3) The Court was not persuaded that it should determine the implied derogation point in the respondent's notice at a high level of abstraction, having dismissed Xs' appeal on other grounds. The discretion to hear an appeal where the *lis* between the parties had gone was to be exercised with caution. In the absence of argument concerning potential frustration of enforcement objectives having been tested where the application of the criminal standard would have a real impact, it was not appropriate to determine the issue (*R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450, *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465 applied; *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170, *Competition Commission v Nutanix Hong Kong Ltd* [2019] HKCT 2, [2019] 3 HKC 307 considered). (See paras.76, 84, 86, 88–89, 94–96.)

Appeal

This was an appeal by two individual partners named in the title of the proceedings as the partners of a firm from the decision of Godfrey Lam J, sitting as the President of the Competition Tribunal, that the firm had contravened the "first conduct rule" under the Competition Ordinance (Cap.619) (see [2019] 3 HKLRD 46), and, by respondent's notice, an appeal by the Competition Commission concerning the applicable standard of proof in proceedings for pecuniary penalties under that Ordinance.

Mr Daniel Beard QC, Mr Abraham Chan SC and Mr Byron Chiu, instructed by King & Wood Mallesons, for the applicant.

Mr Martin Hui SC, Mr Solomon Lam and Mr Joshua S Kanjanapas Wong, instructed by Henry Yu & Associates, for the 4th respondent.

Legislation mentioned in the judgment

Competition Ordinance (Cap.619) ss.6, 45, 45(3)(a), (b), 52–55, 93–96, 130, 133, 144, 147, 148, 148(3), 154, 155, 155A, 155A(2)(b), 171, 171(1), 172–175, Sch.3, 3 paras.1(b), (c), (d), (e), (g), (h), (j), (k), (l), (m), (n), (o), (p), (q), Pt.4 Divisions 1, 2, 3, 4, Pt.6 Divisions 2, 3, 5

Competition Tribunal Rules (Cap.619D, Sub.Leg.) s.4

Hong Kong Bill of Rights Ordinance (Cap.383) s.8 art.11, 11(1)

Partnership Ordinance (Cap.38) s.11

Rules of the High Court (Cap.4A, Sub.Leg.) O.81 rr.1, 5

Cases cited in the judgment

Beghal v Director of Public Prosecutions [2015] UKSC 49, [2016] AC 88, [2015] 3 WLR 344, [2016] 1 All ER 483, [2015] 2 Cr App R 34
Chit Fai Motors Co Ltd v Commissioner for Transport [2004] 1 HKC 465
Competition Commission v Nutanix Hong Kong Ltd [2019] HKCT 2, [2019] 3 HKC 307
Competition Commission v TH Lee Book Co Ltd [2020] HKCT 12, [2021] 2 HKLRD E2, [2020] HKEC 4147
Hin Lin Yee v HKSAR (2010) 13 HKCFAR 142, [2010] 2 HKLRD 826, [2010] 3 HKC 403
JJB Sports PLC v Office Fair Trading [2004] CAT 17, [2005] Comp AR 29
Koon Wing Yee v Insider Dealing Tribunal (2008) 11 HKCFAR 170, [2008] 3 HKLRD 372
Kot See For v Lam Man Cheung [2021] 2 HKLRD 263, [2021] HKCA 348
Kulemesin v HKSAR (2013) 16 HKCFAR 195, [2014] 1 HKC 1
Napp Pharmaceutical Holding Ltd v Director General of Fair Trading [2002] CAT 1, [2002] ECC 13
R v Secretary of State for the Home Department, ex p Salem [1999] 1 AC 450, [1999] 2 WLR 483, [1999] 2 All ER 42, (1999) 11 Admin LR 194
R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115, [1999] 3 WLR 328, [1999] 3 All ER 400, [1999] EMLR 689
R v W Stevenson & Sons (A Partnership) [2008] EWCA Crim 2732008] 2 Cr App R 14
Riley v Director of Public Prosecutions [2016] EWHC 2531 (Admin), [2017] 1 WLR 505
Robinson v Geisel [1894] 2 QB 685
Secretary for Justice v Cheung Kai Yin [2016] 4 HKLRD 367, [2016) 6 HKC 25

Other materials mentioned in the judgment

Halsbury's Laws of England (5th ed., 2020), Vol.79, para.84
Hong Kong Civil Procedure 2021 Vol.1, para.81/1/10
Lindley & Banks on Partnership (20th ed.), paras.14-02, 14-43, 14-44

REASONS FOR JUDGMENT

Lam V-P (giving the reasons for judgment of the Court)

1. This is an appeal by two individual partners named in the title of the proceedings as the partners of the firm Tai Dou Building

Contractor (**Tai Dou**) against the judgment of 17 May 2019, [2019] HKCT 3 (**the Judgment**) by Godfrey Lam J sitting as the President of the Competition Tribunal. By that judgment, the learned President found that "the 4th respondent" contravened the first conduct rule under the Competition Ordinance (Cap.619) (**the Ordinance**). In light of the contentions before us, we shall have more to say as to the identity of the 4th respondent at the proceedings below as well as in this appeal.

2. We should also record that Mr Hui SC (who argued the appeal together with Mr Lam and Mr Wong) informed this Court at the hearing of the appeal that he only acted for the two named individuals Mr Cheung and Mr Wong. Counsel also said he had no instructions to act for the partnership firm Tai Dou.

3. Subsequent to the Judgment, the President imposed sanction by way of pecuniary penalties by another judgment of 29 April 2020, [2020] HKCT 1 (**the Sanction Judgment**). There is an appeal by the Commission in respect of the penalties in CACV 143/2020. That appeal is to be heard later.

4. This Court is only concerned with the appeal against liability in the present appeal.

A. Background

5. The relevant factual background can be taken from the Judgment as there is no appeal against those findings, at least as far as Tai Dou is concerned.[1] As we shall explain, the focus of Mr Hui is whether the two named individual partners Mr Cheung and Mr Wong should be held liable in light of the absence of personal acts or *mens rea* constituting the breach of the first conduct rule on their part.

6. At the hearing, Mr Hui also confirmed that he did not challenge the conclusion of the President that the partnership Tai Dou Building Contractor was liable. Counsel confined his arguments in the appeal to the personal liabilities of Mr Cheung and Mr Wong.

7. The case concerned anti-competition arrangements in 2016 of several decoration contractors appointed by the Housing Authority under its Decoration Contractor System to divide the market for three buildings in Phase 1 of On Tat Estate, Kwun Tong which was then a new public housing estate. The findings regarding the anti-competitive scheme by which the breach of the first conduct rule was carried out were set out at [330]–[332] of the Judgment:

> [330] Between June and November 2016, the respondents, each an Appointed DC in On Tat Estate (Phase 1), made

1 Insofar as there were paragraphs in the Amended Notice of Appeal suggesting that some findings of fact were challenged in a general manner, they have not been pursued at the hearing of the appeal.

and gave effect to an agreement — the Floor Allocation Arrangement — with one another, whereby they were each allocated 4 floors in each of the 3 buildings in the pattern set out in §29 above for the purposes of taking up decoration business. They agreed not to actively seek business from tenants on floors allocated to the other respondents. If approached by those tenants, they would direct them to the respondents who had been allocated the relevant floors and, unless the tenants insisted, they would decline business from them. This agreement was implemented, resulting in the pattern of distribution of the flats decorated by the respondents as shown in Appendix 2. Such conduct consisted of the allocation of market for the supply of services and hence constituted 'serious anti-competitive conduct'.

[331] During the same period of time, the respondents made and gave effect to an agreement — the Package Price Arrangement — with one another, whereby they agreed on the prices of the Packages to be put on a joint Flyer for On Tat Estate (Phase 1). Each of them agreed to and contributed financially to the printing of the Flyers. The Flyers were used by the respondents for promotional purposes and distributed to tenants. The prices in the Flyer served as a starting point or anchoring reference point for negotiations with many if not all customers where their requirements included the Package items. In a number of contracts, the prices in the Flyer were or were near the final prices. Such conduct consisted of fixing the price for the supply of services and therefore also constituted 'serious anti-competitive conduct'.

[332] Both the Floor Allocation Arrangement and the Package Price Arrangement had the object of preventing, restricting or distorting competition in Hong Kong.

8. The actual works done by the respondents in accordance with the Floor Allocation Arrangement were set out at [28]–[30] of the judgment:

[28] Between June and November 2016, out of the total of 2,582 flats in the 3 buildings, the respondents carried out decoration works for 867 flats. It is not entirely clear how many tenants moved in without decoration, or decorated the flats by themselves or their friends or relatives, or engaged commercial decoration contractors other than the Appointed DCs (**outside contractors**).

[29] It has since been discovered that the distribution of the vast majority of the flats decorated by the 10 respondents fell into a strikingly regular pattern. According to this pattern, each respondent worked on 4 and only 4 floors in each of the 3 buildings. The 4 floors each respondent worked on in each building are each 10 floors apart, so that the last digit of the floor number is constant. The pattern is shown in the following table:

Appointed DC	**Floors worked in Chun Tat House**	**Floors worked in Oi Tat House**	**Floors worked in Shing Tat House**
W Hing (R1)	1, 11, 21, 31	4, 14, 24, 34	8, 18, 28, 38
Sun Spark (R2)	2, 12 , 22, 32	5, 15, 25, 35	9, 19, 29, 39
Mau Hang (R3)	3, 13, 23, 33	6, 16, 26, 36	10, 20, 30, 40
Tai Dou (R4)	4, 14, 24, 34	7, 17, 27, 37	1, 11, 21, 31
Kam Kee (R5)	5, 15, 25, 35	8, 18, 28, 38	2, 12 , 22, 32
Hip Yick (R6)	6, 16, 26, 36	9, 19, 29, 39	3, 13, 23, 33
Tai Wah (R7)	7, 17, 27, 37	10, 20, 30, 40	4, 14, 24, 34
Wai Sun (R8)	8, 18, 28, 38	1, 11, 21, 31	5, 15, 25, 35
Wide Project (R9)	9, 19, 29, 39	2, 12 , 22, 32	6, 16, 26, 36
Luen Hop (R10)	10, 20, 30, 40	3, 13, 23, 33	7, 17, 27, 37

30. 832 of the 867 flats worked by the respondents follow this pattern, while 35 flats do not. …

9. Tai Dou was one of these appointed decoration contractors found by the President to have participated in the anti-competitive conduct.

10. The business of Tai Dou and its organisation was discussed by the President at [324]–[328] of the Judgment:

[324] Tai Dou (R4) is a partnership consisting of 4 partners, being the two persons named in the Originating Notice of Application (namely, Cheung Yiu Fai Danny and Wong Tung Hoi) as well as Mr Pacquet Wong and Madam To Suet Chun.[39] It attempted at a very late stage to raise a similar argument but, for the reasons set out in this Tribunal's Reasons for Decision dated 31 October 2018, was not allowed to do so. In so far as counsel sought in closing submissions to run the sub-contractor defence on behalf of Tai Dou (R4), I consider that the argument is inadmissible.

[325] On the basis of its existing Response (filed jointly with the 2nd, 3rd, 6th, 7th, 8th and 10th respondents), Tai Dou (R4) admits that it attended the worship ceremony at the Site Office on 16 June 2016 and that lots were drawn there (though it is averred it was for the purpose of allocating desks in the Site Office). From the evidence, it can be seen that Pacquet Wong, an undisputed partner of Tai Dou (R4), signed the reply accepting the appointment as an Appointed DC, signed the surety bond, signed the Licence, signed and submitted to HKHA a list of staff and workers, attended the briefing session on 20 August 2015 and named KC Ho as the contact person. The evidence shows that those working in On Tat Estate (Phase 1) in the name of Tai Dou (R4) included KC Ho and Ma Yick Yin.

[326] A witness statement of KC Ho was originally filed on behalf of Tai Dou (R4), in which he described himself as the General Manager of Tai Dou (R4). In early October 2018, Tai Dou (R4), having replaced its previous lawyers, indicated that it would not be calling KC Ho. The 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents then indicated their intention to call him and also filed a witness statement of Ma Yick Yin. Eventually, KC Ho was not called to testify, and his statement is therefore to be disregarded. Ma Yick Yin was called, and said that he considered KC Ho the general manager of Tai Dou (R4),

that he worked in On Tat Estate (Phase 1) in accordance with KC Ho's instructions, and that he and the workers used business cards with Tai Dou (R4)'s name. There are also receipts issued to tenants bearing an oval chop stating 'Tai Dou Building Co' in both Chinese and English.

[327] Despite KC Ho's absence, based on all the other evidence there is no doubt that KC Ho and the team working there in the name of Tai Dou (R4) had engaged in the Floor Allocation Arrangement and the Package Price Arrangement. Counsel's argument that there is a possibility that Tai Dou (R4) did not enter into any arrangement with others but simply obtained decoration work from the remaining floors because they were not allocated to any of the other respondents, seems to me, with respect, to be wholly unrealistic.

[328] It is clear that the undertaking operating in On Tat Estate (Phase 1) was the partnership Tai Dou. The two named persons each being a partner must be held responsible as persons comprised in the undertaking. Counsel's argument that there is nothing to show that they personally took part in or were aware of the conduct impugned is beside the point.

11. At footnote 39 at [324], the President noted as follows:

It is not clear why only two of the four partners have been named as respondents, but the Commission accepts that as such, only the two named persons can be subjected to any sanctions and orders imposed by the Tribunal in these proceedings.

B. The appeal

12. In the context of the present appeal, this Court (Lam V-P and Au JA) held in a judgment of 16 November 2020, [2020] HKCA 930 (the Striking Out Judgment) that it was an abuse of process for the 4th respondent to attempt to revive the sub-contractor defence (which had been held by the President to be inadmissible due to case management reasons) in the appeal when there was no appeal against the President's case management ruling as set out in the judgment of 31 October 2018, [2018] HKCT 6. Parts of the Notice of Appeal were struck out by the judgment of 16 November 2020.

13. The 4th respondent filed an amended Notice of Appeal on 4 February 2021 to reflect the outcome of the Striking Out Judgment.

14. In the Striking Out Judgment, this Court identified the permissible arguments to be entertained in this appeal at [34], [36] and [37]:

> [34] In our judgment, any attempt by the 4th Respondent to rely upon the sub-contractor defence without appealing the Dismissal Decision constitutes an abuse of process and should be struck out. Without the sub-contractor defence, and in light of the pleaded case of the 4th Respondent as outlined above, we agree with Mr Chiu that the 4th Respondent should not be permitted to rely on any arguments in the appeal challenging the attribution of the acts of Mr KC Ho to the Partnership by the Tribunal.
>
> …
>
> [36] The position regarding the other parts of the Notice of Appeal is different. To some extent, the position on the face of the Notice of Appeal was not very clear because of the inherent ambiguity in the reference to 'the 4th Respondent': it can either be taken as a reference to the Partnership (viz the firm) or a reference to Mr Danny Cheung and Mr Wong Tung Hoi personally.
>
> [37] Based on Mr Lam's submissions, we understand that the arguments raised in paragraphs 8(b), (c) and 9 are directed not at the finding against the Partnership (the firm), but rather at the finding that the 4th Respondent (i.e. Mr Cheung and Mr TH Wong) should be held liable because of the finding against the Partnership. In that sense, paragraphs 8(b), (c) and 9 do not engage the impermissible challenge of attribution which Mr Cheung and Mr TH Wong are precluded by the Dismissal Decision from advancing in this appeal.

C. The identity of the 4th respondent

15. After reading the respective submissions of Mr Hui and Mr Beard QC (who appeared with Mr Chan SC and Mr Chiu for the Commission), this Court discerned that a fundamental difference between the two sides stems from their respective understanding as to who were the 4th respondent in these proceedings. At the hearing, upon query by the Court, Mr Hui intimated that his team only acted for the two named individual partners and as mentioned above had no instruction to act for Tai Dou, the firm.

16. On the other hand, the stance of the Commission is that Tai Dou, the partnership firm, was the 4th respondent and parties had always proceeded on that basis in the Tribunal.

17. We agree with the Commission and reject the submissions of Mr Hui that only the two named individual partners were the 4th respondent but not the firm Tai Dou.

18. There had been changes of solicitors acting for the 4th respondent. In the Tribunal and in this appeal, the 4th respondent was represented by different firms of solicitors at different stages. However, at every stage of the proceedings before the Tribunal it was clear to all parties that though Mr Cheung and Mr Wong were also named, the undertaking against which the proceedings were brought by way of the 4th respondent was Tai Dou the firm. The liabilities of the named partners flowed from their capacity as partners of that firm, not in their capacity as individuals distinct from the firm.

19. At the time of the appeal hearing, the 4th respondent was represented by Henry Yu & Associates. This firm of solicitors came on record in this appeal by a Notice of Change of Solicitors of 1 February 2021.

20. Mr Hui only came on record when he signed the Amended Notice of Appeal dated 4 February 2021 after the Striking Out Judgment.

21. His juniors, Mr Lam and Mr Wong, acted for the 4th respondent in the striking out application in this Court on the instructions of Bryan Chan & Co. Bryan Chan & Co were the solicitors on record for the 4th respondent in this appeal by a Notice of Change of Solicitors of 2 October 2019.

22. When the original Notice of Appeal was filed on 14 June 2019, the 4th respondent was represented by another firm of solicitors Chan & Associates with another team of leading and junior counsel.

23. The junior counsel signing the original Notice of Appeal, Ms Ng, was also the counsel who acted for the 4th respondent at the trial and sanction hearing before the Tribunal. She was however instructed by two different solicitor firms: by Bryan Chan & Co at the sanction hearing and by Henry Wan & Yeung at the trial.

24. Another counsel Mr Dong acted for the 4th respondent on instruction from Henry Wan & Yeung at the pre-trial review. The application for amendments of the Response (to enable the 4th respondent to take the sub-contractor defence) was made at that hearing and rejected by the Tribunal in a judgment of 31 October 2018, [2018] HKCT 6 (**the Amendment Judgment**).

25. Henry Wan & Yeung actually came on record by a Notice of Change of Solicitors on 14 September 2018. Before that, the solicitors acted for the 4th respondent was JCC Cheung & Co.

26. JCC Cheung & Co became solicitors for the 4th respondent on 25 June 2018 by a Notice of Change of Solicitors. Before that, the solicitors on the record for the 4th respondent was Littlewoods.

27. At the hearing before us, after taking instructions from his clients Mr Hui informed this Court that instructions were given by Mr Cheung and Mr Wong to Henry Wan & Yeung and Bryan Chan & Co. However, counsel could not confirm the identity of the person(s) who gave instructions to JCC Cheung & Co and Littlewoods.

28. Whilst the naming of the 4th respondent in the Originating Notice of Application of 14 August 2017 as "Cheung Yiu Fai Danny and Wong Tung Hoi (in partnership trading as [Tai Dou]" and its description at para.4(4) was ambiguous, upon reading this document as a whole and in context, there is no doubt that the proceedings were brought against Tai Dou the firm. Thus, at paras.22–24, it was pleaded that the respondents (including the 4th respondent) were the Appointed Contractors appointed by the Housing Authority and each of them had received letter from it and executed a Licence. Tai Dou was so appointed, received such letter and executed such Licence, not Mr Cheung nor Mr Wong. Paragraph 33(1) referred to the allocation of floors to Tai Dou, not Mr Cheung nor Mr Wong. Paragraphs 37 and 38 referred to the performance of decoration works by the respondents and paras.40 and 44 referred to the use of the flyers by the respondents to promote their services to the tenants: again Tai Dou did so, not Mr Cheung nor Mr Wong. On the whole, the acts and conduct pleaded as contraventions of the first conduct rule were those of Tai Dou, not the acts or conduct of the individuals.

29. The Response of the 4th respondent was in the same document as the Response of the 2nd, 3rd, 6th, 7th, 8th and 10th respondents which was prepared and filed by Littlewoods on 28 September 2017. The Statement of Truth in that document was signed by Mr KC Ho as "General Manager" of Tai Dou. Thus, Tai Dou was regarded as the 4th respondent, not the two named individuals. It is also plain from the reading of the Response that those acting for the 4th respondent understood that Tai Dou (the firm) was the 4th respondent instead of the two named individual partners. At para.19 of the Response, it was pleaded that the respondents (thus including the 4th respondent) agreed to observe the terms of the Licence (which was executed by Tai Dou). At para.22(a), there was the plea that it was more economical and costs saving for the respondents to carry out decoration works for the flats at the same floor and at paras.22(b) and 32 that the respondents would accept and conduct businesses with the tenants. In the context of the 4th respondent, these pleas had to be referring to Tai Dou, not Mr Cheung and Mr Wong who did not as individuals carry out decoration works or accept business at this estate. Paragraph 29(f) referred to the obligation of the respondents as Appointed Contractors and paras.44 and 46 referred to the use of the flyers by

the respondents. In the context of the 4th respondent, such references had to be taken as referring to Tai Dou rather than Mr Cheung and Mr Wong as individuals.

30. Had it been the belief of Mr Cheung and Mr Wong that they were sued as individuals without having the firm being made a party to the proceedings, their Response would not need to refer to the affairs of the firm. Instead, they should have set out their own lack of participation in the business concerning the decoration works in question. In that case, it would indeed be inappropriate for such response to be verified by a statement of truth made by Mr KC Ho instead of themselves.

31. Not surprisingly, the witness statement of the 4th respondent was made by Mr KC Ho on behalf of Tai Dou and filed with the Tribunal on 19 April 2018: see [7] of the Amendment Judgment. The evidence was prepared on the basis that Tai Dou was the 4th respondent.

32. As mentioned above, there was a late application for amendment of the Response by the 4th respondent to run the sub-contractor defence. It was rejected by the Tribunal in the Amendment Judgment. That application was filed by Henry Wan & Yeung for the 4th respondent. As acknowledged by Mr Hui, at that stage instructions came from Mr Cheung and Mr Wong. The contents of the proposed amended response were set out at [12] and [13] of the Amendment Judgment. In that document, a distinction was drawn between the 4th respondent (which the President understood to be Tai Dou) and its partners. The application was presented on the basis that Tai Dou was the 4th respondent and it was supported by three new witness statements: from Mr Cheung, Mr Wong and another partner Pacquet Wong.

33. At [16] of the Amendment Judgment, the President referred to the explanation put on behalf of Tai Dou as the 4th respondent as regards the delay in making the application. Pacquet Wong, the unnamed partner, authorised Mr KC Ho to handle the defence of the 4th respondent. In [17]–[22], the President further alluded to the involvement of Pacquet Wong (as partner of Tai Dou) being informed of the developments in the litigation by Mr KC Ho. The tenor of the Amendment Judgment clearly bears out that at that stage it was common ground that Tai Dou was the 4th respondent.

34. With the rejection of the amended Response, the trial proceeded on the original Response which, as we have seen, treated Tai Dou as the 4th respondent. Hence, naturally the President regarded Tai Dou to be the 4th respondent in the Judgment, see in particular [324]–[328]. In the sealed judgment of 17 May 2019 (filed on 9 July 2019), it was Tai Dou that was adjudged (as the 4th respondent) to have contravened s.6 of the Ordinance.

D. The liabilities of Mr Cheung and Mr Wong as partners of Tai Dou

35. The President explained the practical consideration for naming Mr Cheung and Mr Wong as partners at [303]:

> [303] While the competition rules target *undertakings*, in accordance with general legal principles, applications brought in the Tribunal and orders made by the Tribunal are necessarily addressed to *legal entities*. Thus ss 92–94 of the Ordinance allow the Commission to apply for and the Tribunal to make orders against *persons* who have contravened or been involved in a contravention of a competition rule. Accordingly, when liability is to be attached for infringement by an undertaking, the infringement must be imputed to one or more person against whom legal proceedings may be instituted and on whom orders including financial penalties may be imposed.[2]

36. In the Sanction Judgment at [79]–[87], the President found it necessary to address the same point in light of the arguments advanced on behalf of Mr Cheung and Mr Wong at the Sanction hearing that they as "salaried partner" and "silent partner" should not be liable for the pecuniary penalty. For present purposes, in light of the submissions of Mr Hui, it would be useful to refer to [87]:

> [87] In contrast with these two cases, we are not here concerned with criminal offences and *mens rea*. As explained in the Judgment, while the competition rules apply to *undertakings*, ss 92–94 of the Ordinance allow the Commission to apply for, and the Tribunal to make, orders against *persons* who have contravened or been involved in a contravention of a competition rule. 'Person' as defined in s 2 of the Ordinance, in addition to the meaning given by s 3 of the Interpretation and General Clauses Ordinance (Cap 1), includes an undertaking. Where a partnership, as an undertaking, has contravened the first conduct rule, it seems to me generally that its partners as such are persons who have contravened the rule. An agreement entered into by a partnership is an agreement to which the partners are

2 Similar analysis was given by the President in the course of closing submissions when he invited submissions from counsel for the 4th respondent on the naming of two instead of all four partners of Tai Dou, see transcript of Day 16 at Appeal Bundle G p.1313–1314, in particular internal pp.20–22. See also the submissions of Mr Beard before the Tribunal on Day 17 at Appeal Bundle G p.1358, internal pp.58–59.

> jointly party. Here, the persons specifically named in the Notice of Application are Mr Cheung and Mr TH Wong in partnership trading as Tai Dou. They were undoubtedly partners of Tai Dou and were proceeded against as such. As partners of Tai Dou, they joined in making and giving effect to the agreements in question which contravened the rule and therefore likewise contravened the rule: *cf Clode v Barnes* [1974] 1 WLR 544. Whether the application could have been brought against the partnership as a 'person' without naming any individuals does not strictly arise.

37. In addition to pecuniary penalties, under s.94 the Tribunal can impose other sanctions against a person who has contravened or been involved in a contravention of a competition rule by way of orders specified in Sch.3 to the Ordinance. Such orders include orders restraining or prohibiting some specified acts or conduct[3] or orders requiring some specified acts to be done.[4] Hence, insofar as the Commission may wish to apply for such orders against any individual partner(s), there is a practical need to name some individuals for each undertaking.

38. It is clear from these paragraphs that the President held Mr Cheung and Mr Wong to be liable for the penalties by virtue of their roles as partners of Tai Dou instead of any personal acts and conducts on their parts as individuals.

39. In our judgment, such legal consequence flowed from the law relating to the liabilities of a partner for the civil obligations of a partnership.

40. Under s.155A of the Ordinance, a pecuniary penalty imposed under s.93 can be enforced in the same manner as a judgment of the Court of First Instance for the payment of money. Subsection (2)(b) further provides that the Registrar is to enforce payment as a judgment debt due to the Registrar. In other words, such pecuniary penalty can be enforced as a civil liability.

41. By reason of s.11 of the Partnership Ordinance (Cap.38), every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner. Thus, Mr Cheung and Mr Wong are jointly liable (together with other partners) for the pecuniary penalty imposed on Tai Dou.

42. Mr Hui submitted that such analysis fails to take account of the criminal nature of the proceedings. Relying on *Lindley & Banks on Partnership* (20th ed.), para.14-02, *R v W Stevenson & Sons* [2008] 2 Cr App R 14, [30]–[31], counsel submitted that in the criminal context, partners should be treated as a separate entity

3 See paras.1(b), (d), (g), (j), (l), (m), (q) of Sch.3.
4 See paras.1(c), (e), (h), (k), (n), (o), (p) of Sch.3.

from the partnership and in the present case Mr Cheung and Mr Wong were named as individuals and they were the only parties identified as the 4th respondent in the proceedings before the Tribunal. Thus, Mr Hui submitted, the President erred in finding liability on the basis that the 4th respondent was the partnership, Tai Dou. He said though it was possible for the Commission to proceed against Tai Dou, this was not the course adopted and it is now bound by the choice it made when instigating the proceedings.

43. Based on that premise, Mr Hui relied on the presumption for the need to prove *mens rea* (citing *Hin Lin Yee v HKSAR* (2010) 13 HKCFAR 142, [10], and *Kulemesin v HKSAR* (2013) 16 HKCFAR 195, [41], and submitted that there was no evidence to establish the *mens rea* of Mr Cheung and Mr Wong in the contravention of the first conduct rule as found by the Tribunal. These partners should not be held criminally liable for the acts of another partner without proof of their own requisite *mens rea* for such contravention, see *Riley v Director of Public Prosecutions* [2017] 1 WLR 505, [32].

44. With respect, these submissions are flawed and we cannot accept the same.

45. First and foremost, though the allegations of contravention are, as held by the President, to be classified as criminal charge for the purpose of s.8 art.11 of the Hong Kong Bill of Rights Ordinance (Cap.383) (**art.11**), it does not follow that the contravention of the first conduct rule is to be regarded as a criminal offence for the purpose of domestic law incorporating the requirement of *mens rea* as submitted by Mr Hui. Unlike the stricter standard of proof, the requirement of *mens rea* is not one of the safeguards prescribed by art.11. It is thus a matter of substantive criminal law and it depends on whether the legislature has created a statutory offence of contravention of the first conduct rule.

46. As submitted by Mr Beard, it is legally possible for such allegations to be determined in civil proceedings (as classified under domestic law) notwithstanding the attraction of art.11 protection based on the autonomous human right definition of criminal charge, see *Secretary for Justice v Cheung Kai Yin* [2016] 4 HKLRD 367, [36] and [37].

47. In that case, this Court held at [25] that the applicability of a stricter standard of proof (by reason of the safeguard under art.11) is a separate question from determining if the proceedings is essentially criminal in character as a matter of domestic law.

48. Likewise, the attraction of the safeguards under art.11 (which guarantees the procedural fairness of a trial on a criminal charge by way of human right protection) is a distinct question from determining if the Ordinance has created an offence of contravention of the first conduct rule with all the incidental characteristics of a

criminal offence. The latter is essentially a question of statutory construction.

49. Adopting such approach, it is plain to us that the Ordinance does not create an offence of contravention of the first conduct rule. The only criminal offences in the Ordinance are those specified in ss.52–55 and ss.172–175. Contravention of the first conduct rule is not included in those parts of the Ordinance. It is also provided specifically in s.171(1) that criminal proceedings for an offence under the Ordinance may not be brought in the Tribunal. Persons charged with such offences would be prosecuted in the criminal courts. It is also pertinent to note that the prosecution of such offences is not within the scope of function and power of the Commission under ss.130 and 133 of the Ordinance.

50. In contrast, proceedings for contravention of the first conduct rule must be brought in the Tribunal and application for pecuniary penalty is only to be brought by the Commission, see ss.92, 108 and 109 of the Ordinance.

51. Subject to modifications in the Competition Tribunal Rules (Cap.619D, Sub.Leg.) (**the Rules**), proceedings in the Tribunal are to follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction: see s.144 of the Ordinance and s.4 of the Rules (which provide for the application of the Rules of the High Court (Cap.4A, Sub.Leg.) to proceedings in the Tribunal). The appeal mechanism as set out in ss.154 and 155 is similar to the one for appeals from a civil judgment of the Court of First Instance, with leave requirement for interlocutory appeals.

52. Thus, there cannot be any prosecution by the Secretary for Justice in a criminal court in respect of the contravention of the first conduct rule.

53. Sections 45 and 148(3) of the Ordinance which provide for inadmissibility of answers given under compulsion in subsequent proceedings refer to criminal proceedings (under s.45(3)(b)) and proceedings for pecuniary penalty (under s.45(3)(a)) separately. Thus, the legislature did not regard proceedings for pecuniary penalty as criminal proceedings.

54. As we have already mentioned, the pecuniary penalty ordered by the Tribunal shall, as provided under s.155A, be enforced in the same way as a civil judgment.

55. As stated in the preamble to the Ordinance, the purpose of the legislation is to prohibit conduct that prevents, restricts or distorts competition and to prohibit mergers that substantially lessen competition. In respect of a contravention of the first conduct rule, the Ordinance provides various options and means to achieve such objective by way of enforcement actions by the Commission:

(a) Acceptance of a commitment by the Commission from a person and the enforcement of such commitment under Division 1 of Pt.4 of the Ordinance;
(b) Issuance of infringement notices by the Commission under Division 2 of Pt.4 of the Ordinance offering not to bring proceedings on condition that the persons involved make a commitment to comply with the requirements of the notice;
(c) The Commission may make a leniency agreement with a person in exchange for his co-operation in an investigation or in proceedings under Division 3 of Pt.4 of the Ordinance;
(d) The Commission may under Division 4 of Pt.4 of the Ordinance issue a warning notice to an undertaking requiring it to cease its contravening conduct and not to repeat the same;
(e) The Commission may apply to the Tribunal for pecuniary penalty under Division 2 of Pt.6 of the Ordinance;
(f) Under s.94 in Division 3 of Pt.6, the Tribunal, whether or not it makes an order for pecuniary penalty, can make other types of order as specified in Sch.3 to the Ordinance;
(g) Under s.95 in Division 3 of Pt.6, the Tribunal can also make interim orders pending its determination of an application under s.94; and
(h) Under Division 5 of Pt.6, the Commission can apply to the Tribunal for disqualification order against a person to debar such person from being a director of a company or in any way be concerned or take part in the promotion, formation or management of a company for a specified period not exceeding 5 years if such person is a director of company which has contravened a competition rule and such person's conduct as director makes him unfit.

56. Options (a)–(d) are enforcement options in the hands of the Commission and cannot be regarded as actions in prosecuting a criminal offence. As regards options (e)–(h), there will be proceedings in the Tribunal. Since the Tribunal does not have any criminal jurisdiction (as it has been made clear in s.171), the applications for such relief cannot be regarded as the prosecution of a criminal offence.

57. Reading the Ordinance as a whole, the contravention of the first conduct rule is not regarded as a criminal offence in the statutory scheme to combat anti-competitive conduct. This accords with the conclusions reached by the President in *Competition Commission v TH Lee Book Co Ltd* [2020] HKCT 12, [2021] 2 HKLRD E2, [2020] HKEC 4147, [7], and in the Sanction Judgment at [129]–[133].

58. There is therefore no basis for Mr Hui to import the requirement of *mens rea* on the part of the individual partners into proceedings for pecuniary penalty under s.93. There is no room for the application of the principle in *R v W Stevenson & Sons* and *Riley v Director of Public Prosecutions* (which concerned convictions and trials of criminal offences) and our analysis above[5] as to the civil nature of the liabilities of each partner for the acts of the firm is not undermined by that case.

59. Lest it be thought that the President had not considered the state of knowledge of Tai Dou as to the anti-competition arrangements, such suggestion is refuted by a reference to [325]–[327] of the Judgment. In particular, the President made this finding at [327]:

> [327] Despite KC Ho's absence, based on all the other evidence there is no doubt that KC Ho and the team working there in the name of Tai Dou (R4) had engaged in the Floor Allocation Arrangement and the Package Price Arrangement. Counsel's argument that there is a possibility that Tai Dou (R4) did not enter into any arrangement with others but simply obtained decoration work from the remaining floors because they were not allocated to any of the other respondents, seems to me, with respect, to be wholly unrealistic.

60. Before us, Mr Hui did not challenge this finding and he accepted that there is no basis for disturbing the President's conclusion on liability against Tai Dou.

61. Hence, with our rejection of the submission that the proceedings involved a trial of a criminal offence, it is plain that Mr Hui's contention based on lack of finding of *mens rea* on the part of Mr Cheung and Mr Wong has no merit.

E. Order 81 Rule 1

62. Coming back to the naming of the 4th respondent, Mr Hui referred to a commentary in *Hong Kong Civil Procedure 2021*, Vol.1 at para.81/1/10 which suggested that because the liability of partners is joint and not several, "a suit by or against an ordinary partnership would have been defective for want of parties unless all the partners were before the court".

63. It follows, Mr Hui submitted, that the Commission could not have been suing in respect of the joint liability stemming from the acts of the Tai Dou the firm since it was conceded by Mr Beard before the Tribunal that the Commission was not proceeding against

5 At [39]–[41] above.

the other two unnamed partners.[6] Therefore, the Commission was actually suing the two named partners as individuals regarding their own personal involvement in respect of the contravention of the first conduct rule.

64. With respect, we cannot accept these submissions.

65. Firstly, such submission ignored the reality as discussed in Section C above. All parties had proceeded in the Tribunal on the basis that Tai Dou the firm was the 4th respondent and Mr Cheung and Mr Wong were proceeded against by virtue of their capacity as partners of Tai Dou. In such circumstances, if there were irregularities in the naming of the 4th respondent, we see no difficulty in granting leave for such irregularities to be rectified insofar as it is necessary to do justice between the parties in light of the fact that Tai Dou had actually been party to the proceedings in substance and those acting for Mr Cheung and Mr Wong in the Tribunal were fully aware of the nature of the claims against them.

66. In so saying, we have not forgotten the concession of Mr Beard on Day 17 which was also taken up by the President at footnote 39 of the Judgment. However, the concession seemed to have been made on the basis it is legally permissible to sue in respect of the liability of the firm with the naming of some but not all the partners. Likewise, the President proceeded on that basis in the Judgment and the Sanction Judgment. As far as we are aware, no point had been taken before the Tribunal that one cannot pursue an application in respect of the liability of the firm without proceeding against all the partners.

67. This bring us to our second ground for rejecting Mr Hui's submissions. As a matter of law, there is no rigid rule that in advancing a claim on a joint liability the plaintiff or applicant must join all the parties who were jointly liable to the proceedings. However, if objection is taken by a defendant that there were other parties who were jointly liable, the court may consider if such other persons should be joined as parties to the proceedings in the interest of justice. Thus, in ***Robinson v Geisel*** [1894] 2 QB 685, the English Court of Appeal refused to grant a stay of the action against some but not all of the joint guarantors because the plaintiff had done everything in his power to serve the remaining joint guarantor without success. In the context of legal proceedings against a partnership, it means that a plaintiff can sue some but not all the partners in respect of the liabilities arising from the business of the firm. Depending on the circumstances of the case, on the application of the defendants, the court may direct the other partners to be joined as parties, see ***Halsbury's Laws of England*** (5th ed., 2020), Vol.79, para.84; ***Lindley & Banks on Partnership*** (20th ed.),

6 As recorded in the transcript of Day 17 at Appeal Bundle G p.1358, internal p.58.

paras.14-43 and 14-44. But the cause of action would not be defeated by non-joinder of parties.

68. As Mr Cheung and Mr Wong did not complain about non-joinder of the other two partners in the Tribunal and there was no application for staying the proceedings on that ground, it is not necessary for us to consider whether in the present case the other two partners should have been joined if such application were made. It suffices for us to hold that in light of the above analysis, Mr Cheung and Mr Wong cannot now rely on the omission to name the other two partners as a ground for challenging the finding of the Tribunal against them in respect of the contravention by Tai Dou.

69. The President did not find it necessary to address the question whether orders could be made against a firm under ss.93–96 as a "person" without naming any individuals. We are sure that the President has not overlooked O.81 r.1 which, as far as we can see, is applicable to proceedings in the Competition Tribunal by reason of s.4 of the Competition Tribunal Rules as there is nothing those rules negating such application. As explained by the President,[7] the definition of "person" in the Ordinance is wide enough to cover a partnership. Hence, in terms of proceedings in the Tribunal in general, it is permissible to name a partnership as a respondent without naming all the partners. The effect would be the same as the naming of a firm in civil proceedings in the High Court, *viz* all the partners are treated to have been joined as respondents.

70. When the individual partners are not named, the enforcement of a judgment against the firm would be subject to the conditions laid down under O.81 r.5.

71. We believe that the President had the practicalities of enforcement of orders other than that of pecuniary penalty in mind (as alluded to by us at [37]) when he eschewed expressing a view on the feasibility of suing a firm without naming the partners.

72. In the present case, as far as we are aware, the Tribunal has only imposed sanction by way of pecuniary penalty. In such context, we cannot see any difficulty regarding enforcement pursuant to O.81 r.5 even if the individual partners were not named.

73. Mr Hui submitted that it was unjust that the Commission only targeted against Mr Cheung and Mr Wong in seeking pecuniary penalty. With respect, counsel failed to take account of:

(a) As the penalty was ordered against the 4th respondent, the assets of the firm Tai Dou would be subject to execution;

(b) Even assuming that enforcement actions were taken against the personal estates of Mr Cheung and Mr Wong, they would

7 At [87] of the Sanction Judgment, cited at [36] above.

have the right to seek indemnity or contribution from their partners under the general law of partnership; and

(c) As partners of Tai Dou, there is no injustice in sanction being imposed against Mr Cheung and Mr Wong.

F. Disposal of the appeal

74. For the above reasons, we dismissed the appeal with costs at the hearing on 5 May 2021.

G. The Respondent's Notice

75. By the Respondent's Notice, the Commission asked this Court to reverse the President's ruling on the standard of proof in proceedings for pecuniary penalty. In *Competition Commission v Nutanix Hong Kong Ltd* [2019] HKCT 2, [2019] 3 HKC 307, the President held that the standard of proof is proof beyond reasonable doubt. That judgment was handed down on the same date as the Judgment. At [39] of the Judgment, the President adopted the same view in the present case. The Commission sought to argue that the standard of proof should be the civil standard of balance of probabilities with cogent evidence being required commensurably with the seriousness of the allegations.

76. Notwithstanding the sustained efforts of Mr Beard, we were not persuaded that we should determine this issue in this appeal when we had already concluded that the appeal by Mr Cheung and Mr Wong should be dismissed on the other grounds set out above. As the Commission is understandably anxious to have the question of standard of proof to be reconsidered at the appellant level, we shall explain in greater detail the reasons for our refusal to determine the issue in this appeal.

77. We have read the judgment in *Competition Commission v Nutanix Hong Kong Ltd* and skeleton submissions of Mr Beard and Mr Hui and discussed the same amongst ourselves before the hearing. Our preliminary view was as follows.

78. Since it is common ground that proceedings for pecuniary penalty involved a determination of criminal charge for the purpose of art.11, the implication of art.11(1) on standard of proof as explained by the Court of Final Appeal in *Koon Wing Yee v Insider Dealing Tribunal* (2008) 11 HKCFAR 170 has to be considered. As mentioned in the course of hearing, one should start from the position that in order to be art.11 compliant criminal standard of proof is the norm for the determination of criminal charges.

79. It is possible to have a statute providing otherwise if the relaxation of standard of proof can be justified according to the proportionality test. However, it is also common ground that the Ordinance does not contain any provision which explicitly spells

out the standard of proof for penalty proceedings. Hence, one must first consider if the Ordinance has laid down by necessary implication that the standard of proof should be the civil standard before one considers the proportionality of such relaxation.

80. In short, if one cannot conclude by way of statutory interpretation that the Ordinance has provided for the civil standard to apply, the criminal standard should be applicable by virtue of the principle of legality as explained by Lord Hoffmann in *R v Secretary of State for the Home Department, ex p Simms* [2000] 2 AC 115, 131. If it is held that criminal standard of proof applies as a matter of statutory interpretation, no issue of proportionality arises.

81. The relevant approach for determining by way of statutory construction if a fundamental right like the one provided for under art.11(1) has been impliedly abrogated was discussed by the Supreme Court in *Beghal v Director of Public Prosecutions* [2016] AC 88 and recently applied by this Court in *Kot See For v Lam Man Cheung* [2021] 2 HKLRD 263. At [42] of the latter case, the Court held that purposive construction should consider whether the statutory objective would be nullified if full effect is given to the fundamental right.

82. The question of implied abrogation or derogation was addressed by the President at [63]–[67] of *Competition Commission v Nutanix Hong Kong Limited*. He could not find such implication from the fact that civil procedure is adopted for the proceedings and the legislative materials. At [68]–[71], the President summarised the other points canvassed by the Commission but held that they were of no avail when there is no express provision or necessary implication for the application of civil standard.

83. One of these points was the difficulty in meeting the criminal standard of proof in the potentially complex and technical nature of the issues in competition proceedings, see [68]–[69]. On our reading of Mr Beard's skeleton submissions, counsel relied strongly on this point to contend that the Ordinance has relaxed the standard of proof by necessary implication by virtue of the potential frustration of effective enforcement of competition law by a criminal standard of proof.

84. Whilst we can see that there is a reasonably arguable basis (and we put it no higher than that) for suggesting the President might not have given sufficient consideration to the potential frustration of effective enforcement in assessing if there is derogation by necessary implication (since he did not discuss this in the context of addressing the issue of necessary implication at [68]–[71] and this could be attributable to how the matter was argued before him by another leading counsel in *Nutanix*), we find it very difficult to assess the validity of this contention based on consideration of potential frustration on a high level of abstraction. With due respect,

we do not think it is sufficient for us to adopt some passages from the decisions of the UK Competition Appeal Tribunal[8] or a textbook[9] on competition law as making good this contention.

85. We are not suggesting Mr Beard intended to invite us to take such a course. Counsel indicated that he would need to take us through the scheme of the Ordinance and the elements that the Commission would have to establish in respect of each type of anti-competition conducts and the different types of evidence the Tribunal would have to assess.

86. Whilst we would not doubt that, with his immense experience in this field, Mr Beard could provide the Court with able assistance, and in so doing, the actual facts and evidence in the present appeal are also relevant to our assessment of whether this appeal afforded a good opportunity to embark on such exercise. On the facts, the President was able to conclude that the contravention of the first conduct rule was proved on the criminal standard. We could discern nothing in the evidence that had been adduced in the trial which can give rise to potential frustration of the enforcement objective because the criminal standard of proof was applied.

87. Mr Beard urged upon us that there are other cases in which the different standards of proof could make a difference, not only in respect of actual penalty proceedings but also in respect of the Commission's investigation and decisions on enforcement options.

88. We took such submission into account. However, in the end, we came to the clear conclusion that it would be much better for the argument of potential frustration of enforcement objective to be tested in an actual case where the application of criminal standard of proof would have a real impact. And it would also be much better if the Competition Tribunal (with its expertise in handling competition cases) have had the opportunity of dealing with this issue squarely and fairly with regard to actual (instead of conceptual or notional) evidential assessment in regard to specific pieces of evidence on a particular competition issue before the point is considered by the Court of Appeal.

89. In this connection, we disagreed with Mr Beard's concern as to the futility of re-arguing the issue of standard of proof before the Competition Tribunal in light of the judgments in *Nutanix* and the present case. As we have highlighted above, it would appear that the angle of potential frustration of enforcement objective had not been fully canvassed, perhaps not surprisingly in light of the evidence and the contentious issues in these cases.

90. Mr Beard also advanced arguments based on the statutory scheme of the Ordinance and its similarities with overseas competition regimes where civil standard of proof is applied.

8 *Napp Pharmaceutical Holding Ltd v Director General of Fair Trading* [2002] CAT 1; *JJB Sports PLC v Office Fair Trading* [2004] CAT 17.

9 Whish & Bailey, *Competition Law* (9th ed.).

However, there are also some special features in our Ordinance which we have highlighted in our directions of 4 May 2021:

(a) There is no parallel regime for criminal offence in respect of anti-competitive conduct as in England; and
(b) In ss.45, 147 and 148, proceedings for pecuniary penalties are treated in the same manner as proceedings for other criminal offences under the Ordinance.

91. Also, at the time when the Competition Bill was debated, the legislature (and the administration which put forward the bill) was aware of the Court of Final Appeal's judgment in *Koon Wing Yee v Insider Dealing Tribunal*. Though the President attached little weight to it, the criminal standard of proof and *Koon Wing Yee* had been alluded to during the legislative debates. Notwithstanding this, the legislature did not include any specific provision in the Ordinance to stipulate that civil standard of proof is to be applied.

92. We do not express any view on these matters as we have not heard counsel on whether these features would affect, and if so how, the assessment of the implied derogation point. However, these may require further research and arguments than those which have already been placed before us.

93. Mr Beard relied on the observations of the Ma CJHC (as he then was) in *Chit Fai Motors Co Ltd v Commissioner for Transport* [2004] 1 HKC 465, [20], to invite this Court to address the issue of standard of proof notwithstanding that we had been able to determine the appeal without doing so. In particular, counsel emphasised that this is a recurrent issue which has great public importance in relation to the development of competition law in Hong Kong.

94. We respectfully agree with Ma CJHC that this Court still retains a discretion to hear an appeal even though the *lis* between the parties has gone (whether by way of settlement or determination on other grounds). We also accept that there are cases where it is appropriate to exercise such discretion because of the great public interest in having the issue determined at the appellate level. However, the Court must still consider whether the appeal is the appropriate occasion to determine such important issue.

95. As highlighted by Lord Slynn of Hadley in *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450, 457 (and cited by Ma CJHC at sub-para.(3) in [20] of *Chit Fai*), even in the public law context, the discretion must be exercised with caution. After all, it would not be in the public interest to have a highly controversial but important point determined when the Court does not find the underlying materials before it provides a solid basis for assessing the competing arguments.

96. Though the question of standard of proof, as analysed above, can be said to be a matter of statutory construction, for the reasons we have given above, the implied derogation point is not an issue which we found appropriate to be determined in the present appeal. We therefore declined to embark on such course.

Certificate for three counsel

97. We have already ordered Mr Cheung and Mr Wong to pay the costs of the Commission in this appeal. The outstanding issue is whether there should be certificate for three counsel.

98. In light of our above reasons for determining the appeal and declining to address the question of standard of proof, we would only give the Commission certificate for two counsel.

Reported by Robert Drake

HKSAR

and

Chan Wai Yip

Bokhary, Chan and Ribeiro PJJ, Litton and Sir Anthony Mason NPJJ
Final Appeal No 4 of 2010 (Criminal)
25 November, 13 December 2010

Criminal law and procedure — conspiracy to defraud — auction by public body — restricted auction of cooked food stalls — secret pre-auction allotment and agreement by defendants not to bid against each other for stalls in order to knock down to reserve price — "knock out" agreements, that is agreements to keep price down, were lawful — valid and enforceable contract could not itself be "dishonest" for purposes of criminal conspiracy to defraud

Ds were convicted of conspiracy to defraud. Ds, tenants of cooked food stalls, were given priority to bid for new stalls in a restricted auction held exclusively for them by the Food and Environmental Hygiene Department (FEHD). The reserve price for stalls was fixed at 75% of the market rent. Ds pre-allotted stalls amongst themselves and agreed that no one else would bid for the same stall. At the auction, there was no competitive bidding and each stall was knocked down to the sole bidder at the reserve price. Ds' appeal against conviction was allowed by the Court of Appeal, which held that an agreement not to compete at an auction was valid and enforceable. At issue was whether a secret agreement between potential bidders not to compete at an auction, or such an agreement followed by participation by such bidders at the auction, fell within the formulation of the common law offence of conspiracy to defraud as formulated in *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386, with the focus on "dishonest means".

Held, dismissing the appeal, that:
(*Per* Sir Anthony Mason NPJ)
(1) A long line of English authorities, which went back almost 160 years, was to the effect that "knock out" agreements, that is agreements to keep the price down, were lawful. A contract which was valid and enforceable could not itself be "dishonest" for the purposes of criminal conspiracy to defraud. Not only had the relevant decisions stood for a very long time, they almost certainly had been taken to represent the law of conspiracy in Hong Kong. If there was to be a change, then it was a matter entirely for the legislature (*Galton v Emuss* [1844] 1 Coll 243, *Re Carew's Estate* [1858] 26 Beav 187, *Heffer v Martyn* (1867) 36 LJ Ch 373, *Jones v North* (1874–75) LR 19 Eq 426, *Rawlings v General Trading Co* [1921] 1 KB 635, *Cohen v Roche* [1927] 1 KB

169, *Pallant v Morgan* [1953] Ch 43, *Harrop v Thompson & Another* [1975] 1 WLR 545, *Norris v Government of the United States of America* [2008] 1 AC 920 applied). (See paras.54–75.)

(2) "Knock-out" agreements in restraint of trade might be void and unenforceable as between the parties, but not illegal. So long as traders individually or collectively were pursuing their own business interests without infringing the rights of others or intending to do them harm, that pursuit was legitimate, even if, by deliberately lowering prices, it drove others out of business (*Mogul Steamship Co Ltd v McGregor Gow & Co* (1888) LR 21 QBD 544 (CA), *Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25 (HL), *Rawlings v General Trading Co* [1921] 1 KB 635 applied; *R v De Berenger* (1814) 3 M & S 67, *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 explained). (See paras.71–73.)

(3) The FEHD could protect itself from "knock out" agreements by fixing a reserve (and not disclosing it) and reserving the right to bid and withdraw (*Harrop v Thompson* [1975] 1 WLR 545 applied). (See para.76.)

(*Per* Litton NPJ)

(4) Where an agreement not to compete in an auction had no deceptive element, the fact that it was made in secret did not by itself render it dishonest in law: the potential purchasers had not set out to do something lawful by unlawful means. Persons attending an auction owed no obligation to the vendor to compete with each other; nor were they required by law to ensure the vendor achieved the highest possible price. Further, there was no suggestion that the pre-allotment arrangement was aimed at harming the FEHD's economic interests. Ds were looking to their own economic interests (*Rawlings v General Trading Co* [1921] 1 KB 635 applied). (See paras.16, 24–27.)

刑法與刑事訴訟程序——串謀欺詐罪——公營機構舉行投標——局限性競投熟食檔位——各名被告人於競投進行前私下分配檔位，並協定不會互相就檔位出價，以期用底價投得檔位——此等「壓價」協議乃屬合法——就串謀欺詐的刑事罪行而言，有效和可予以強制執行的合約本身不能構成「不誠實」

本案各名被告人經原審後被判串謀欺詐罪成立。案情指他們是各個熟食檔位的租戶，而食物環境衛生署（下稱「食環署」）專為他們舉行一場局限性投標，讓他們可優先競投新的熟食檔位。各個檔位的底價，定為市值租金的75%。投標進行前，每名被告人自行認投一個檔位，而他們協定無人會競投同一個檔位。投標過程中，每一個檔位均無人出價競投，結果由唯一承價人以底價投得。各名被告人不服定罪，提出上訴，而上訴法庭判處各人上訴得直，並裁定各人同意不在投標過程中出價競投的協議有效和可予以強制執行。控方不服裁決，上訴至終審法院，所涉爭議點為：參與投標人士私下協定不在投標過程中出價競投的秘密協議或該等人士訂立該等協議後參與投標，是否合乎 *Mo Yuk Ping v HKSAR*

(2007) 10 HKCFAR 386一案對普通法下「串謀欺詐」罪行的表述，特別是當中關於「不誠實方式」的元素？

裁決——駁回上訴（判詞由非常任法官梅師賢爵士作出）：

(1) 根據過往近160年的英國案例典據，「壓價」協議乃屬合法。就串謀欺詐的刑事罪行而言，有效和可予以強制執行的合約本身不能構成「不誠實」。有關的案例典據不但歷史悠久，而且幾乎肯定已被視為代表關於串謀罪的香港法律。假如要改變這方面的法律，則須由立法機關全權決定如何進行（引用 *Galton v Emuss* [1844] 1 Coll 243，*Re Carew's Estate* [1858] 26 Beav 187，*Heffer v Martyn* (1867) 36 LJ Ch 373，*Jones v North* (1874–75) LR 19 Eq 426，*Rawlings v General Trading Co* [1921] 1 KB 635，*Cohen v Roche* [1927] 1 KB 169，*Pallant v Morgan* [1953] Ch 43，*Harrop v Thompson & Another* [1975] 1 WLR 545，*Norris v Government of the United States of America* [2008] 1 AC 920）。（見第54至75段）

(2) 用以限制貿易的「壓價」協議雖然在協議各方之間可能無效和不可予以強制執行，但並非不合法。從商人士個別或集體地謀求本身商業利益的做法，只要是沒有侵犯他人權利或意圖損害他人權益，便屬合法，即使從商人士藉著故意降價而令其他競爭對手無法生存，情況亦然（引用 *Mogul Steamship Co Ltd v McGregor Gow & Co* (1888) LR 21 QBD 544 (CA)，*Mogul Steamship Co Ltd v McGregor Gow & Co* [1892] AC 25 (HL)，*Rawlings v General Trading Co* [1921] 1 KB 635；*R v De Berenger* (1814) 3 M & S 67，*Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724予以解釋）。（見第71至73段）

(3) 為免受「壓價」協議影響，食環署可釐定而不披露投標項目的底價，以及保留出價和撤回投標項目的權利（引用 *Harrop v Thompson* [1975] 1 WLR 545）。（見第76段）

（*判詞由非常任法官烈顯倫作出*）

(4) 對於不在投標過程中出價競投的協議，假如該協議不帶有欺詐成分，則該協議即使是秘密達成，本身也不會令該協議構成法律所指的不誠實：準買家並未開始以不合法方式做合法的事情。出席投標的人士並不對賣家負有互相競投的責任；法律亦沒有要求該等人士確保賣家以可行範圍內的最高價格賣出投標項目。此外，案中沒有證據顯示各名被告人於投標進行前自行認投檔位的用意是損害食環署的經濟利益。各名被告人所關注的，不外是本身的經濟利益（引用 *Rawlings v General Trading Co* [1921] 1 KB 635）。（見第16、24至27段）

Mr Kevin Zervos SC, Director of Public Prosecutions, Mr Wesley Wong, Deputy Director of Public Prosecutions, and Mr Michael Wong, Senior Public Prosecutor (Manager), for the applicant.

Mr Martin Lee SC, Mr Siu Him Lee and Ms Bonnie Tam, instructed by JCC Cheung & Co, for the third, fifth to ninth, thirteenth, fifteenth to seventeenth respondents.

Mr Kenny Chan, instructed by Liu, Chan & Lam for the fourth, tenth and eleventh respondents.

Mr Gibson Shaw, instructed by Lo, Wong & Tsui for the twelfth respondent.
The first, second and fourteenth respondents in person (present).

Legislation mentioned in the judgment
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Magistrates Ordinance (Cap.227) s.118(1)(d)
Prevention of Bribery Ordinance (Cap.201) s.7

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Mogul Steamship Co Ltd v McGregor, Gow & Co (1889) 23 QBD 598
Mogul Steamship Co Ltd v McGregor, Gow & Co [1892] AC 25
Norris v Government of the USA [2008] UKHL 16, [2008] 1 AC 920, [2008] 2 WLR 673, [2008] 2 All ER 1103
Pallant v Morgan [1953] Ch 43, [1952] 2 All ER 951
R v De Berenger (1814) 3 M & S 67, 105 ER 536, [1814–23] All ER Rep 513
R v Ghosh [1982] 1 QB 1053, [1982] 3 WLR 110, [1982] 2 All ER 689
R v Goldshield Group Plc [2008] UKHL 17, [2009] 1 WLR 458, [2009] 2 All ER 737
Rawlings v General Trading Co [1920] 3 KB 30
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Scott v Metropolitan Police Commissioner [1975] AC 819, [1974] 3 WLR 741, [1974] 3 All ER 1032
Shum Kwok Sher v HKSAR (2002) 5 HKCFAR 381, [2002] 2 HKLRD 793, [2002] 3 HKC 117
Wai Yu Tsang v R [1992] 1 AC 269, [1991] 3 WLR 100, [1991] 4 All ER 664
Welham v Director of Public Prosecutions [1961] AC 103, [1960] 2 WLR 669, [1960] 1 All ER 805
Wickens v Evans (1829) 3 Y & J 318, 148 ER 1201

Cases in the List of Authorities not cited in the judgment
A-G for Northern Ireland's Reference (No 1 of 1975), Re [1977] AC 105, [1976] 3 WLR 235, [1976] 2 All ER 937

A-G of the Commonwealth of Australia v Adelaide Steamship Co Ltd [1913] AC 781, [1911–13] All ER Rep 1120
Attorney-General v Suen Chun Kwong [1980] HKLR 543
Chou Shih Bin v HKSAR (2005) 8 HKCFAR 70, [2005] 1 HKLRD 838
Crofter Hand Woven Harris Tweed Co Ltd v Veitch [1942] AC 435, [1942] 1 All ER 142
Hamlyn & Co v Wood & Co [1891] 2 QB 488, [1891–94] All ER Rep 168
HKSAR v Chan Shu Hung [2001–2003] HKCLRT 325
HKSAR v Ho Yau Yin (2010) 13 HKCFAR 217, [2010] 4 HKC 160
HKSAR v Tse So So (2007) 10 HKCFAR 368, [2007] 3 HKLRD 932
HKSAR v Wong Shiu Fong (unrep., HCMA 1085/2003, [2004] 1 HKLRD A7)
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Norris v Government of the USA [2007] 1 WLR 1730, [2007] 2 All ER 29
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R v Gerald Cooper Chemicals Ltd [1978] Ch 262, [1978] 2 WLR 866, [1978] 2 All ER 49
R v Jones (Margaret) [2007] 1 AC 136, [2006] 2 WLR 772, [2006] 2 All ER 741
R v Lewis (1869) 11 Cox CC 404
R v Rimmington [2006] 1 AC 459, [2005] 3 WLR 982, [2006] 2 All ER 257
R v So Man King [1989] 1 HKLR 142
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Other materials mentioned in the judgment

Atiyah, Patrick, *The Rise and Fall of Freedom of Contract* (1979) pp.408–413

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Smith, ATH, "Auction Rings" [1981] Crim LR 86

Bokhary PJ

1. I agree with the judgment of Sir Anthony Mason NPJ.

Chan PJ

2. I agree with the judgment of Sir Anthony Mason NPJ.

Ribeiro PJ

3. I agree with the judgment of Sir Anthony Mason NPJ.

Litton NPJ

Introduction

4. This appeal raises important questions concerning the conduct of auctions.

5. The essential facts fall within a narrow compass. They are as follows:

(i) An auction of cooked food stalls at the new Tai Po Hui Market was held on 21 July 2004 by the Food and Environmental Hygiene Department (the Department) of the Hong Kong Government.

(ii) This was a restricted auction. The only persons allowed to bid were the stall-holders at the old Tai Po Market: They were, in effect, being re-located to the new market.

(iii) The Department had, some time before, notified the stall-holders of the reserve price for each stall, which the Department said had been fixed at 75% of the market price.

(iv) Before the auction the Department sent to the stall-holders the Rules for the restricted auction. More will be said about these Rules later.

(v) Prior to the auction, thirty six of the stall-holders had met together and had drawn lots with regard to the stall he or she would bid for at the auction. It was agreed that no-one else would bid for the same stall. The Department was unaware of such an agreement prior to the auction.

(vi) The auction on 21 July 2004 was conducted by a Senior Health Inspector. Each stall was put up in turn. There was only one bid. The auctioneer announced the bid three times in the usual way. The stall was then knocked down to the bidder at the reserve price. This process was repeated a total

of 40 times. No bids were offered for 4 of the stalls. 36 of them were knocked down at the reserve price. Each time to a sole bidder.

(vii) The bid price constituted the monthly rent for the stall, good for three years.

(viii) Some time later, the 36 stall-holders were asked by the Department to sign the tenancy agreements for the stalls, which they did. They have been in possession to this day.

6. Arising out of the facts as summarized above, nineteen of the stall-holders were charged with conspiracy to defraud, contrary to common law.

7. The matter went before Deputy Magistrate Mr Eric Cheung Kwan-ming. The trial lasted over 50 days. They were all convicted and sentenced to terms of imprisonment ranging from 9 to 12 months. They all appealed (except for one who testified for the prosecution) and their appeals were referred by the High Court Judge to the Court of Appeal. By the time the Court of Appeal heard their appeal one of the appellants had died. The appeals were allowed. Hence it is the government which appears as the appellant in this Court, with seventeen respondents before us.

The charge

8. The particulars of the charge of conspiracy to defraud are as follows:

> … between a date unknown in June 2004 and the 21st day of July 2004, in Hong Kong, conspired together with AU Wing and other persons unknown, to defraud the Food and Environmental Hygiene Department ("the FEHD"), by dishonestly pre-allotting amongst themselves and their representatives the cooked food stalls at Tai Po Hui Market … prior to the auction held by the FEHD on the 21st day of July 2004 ("the Auction") and agreeing amongst themselves and their representatives not to compete against one another in bidding the aforesaid cooked food stalls at the Auction, thereby deceiving the FEHD into believing that there was only one bid offered at the upset price for each of the aforesaid cooked food stalls and renting the aforesaid cooked food stalls at the upset prices to the aforesaid persons or their representatives.

9. As can be seen the dishonesty as averred was this: The Department was (a) deceived into believing "that there was only one bid offered at the upset price for each of the aforesaid cooked food stalls" and (b) deceived into "renting the aforesaid cooked food stalls at the upset prices to the aforesaid persons or their representatives".

10. As to the alleged deceit (a) above, that was, by the nature of the prosecution case, an impossibility: The very core of the Department's complaint was that there was no competitive bidding. Each stall in turn was knocked down to the sole bidder at the reserve price. The Department could not have been deceived as alleged.

11. As to the alleged deceit (b) above, the act of the Department in renting the stalls at the reserve price — that is to say, offering the tenancy agreements for signature to the respective bidders, with the rent set at the reserve price — simply flowed from the auction itself. Once the Department had accepted the bid, the "renting" was a simple administrative act. There could have been no intervening deceit which caused the Department to rent out the cooked food stall.

12. If there was no deceit involved in the respondents' "plot", that is to say, the "pre-allotting" amongst the stall-holders as averred in the charge, and in the subsequent bids made at the auction, that was the end of the prosecution case. There was no dishonesty in the transaction which might have caused economic loss to the Department. The pre-auction agreement between the stall-holders could not be a criminal conspiracy.

The Magistrate's Approach

13. Unfortunately, that was not the way the magistrate approached the case. Between §333 and §347 of his Statement of Findings he gave a long recital of his understanding of the law on conspiracy, without once adverting to the charge which he had to try.

14. It is worth mentioning here this point: At the trial an Acting Chief Health Inspector was called as a prosecution witness (PW4). He produced a list of auctions of stalls by his Department at various locations which took place in the second half of 2004 (including the one held on 21 July, the subject of the charge). Over 320 stalls were involved: Virtually every one of them was knocked down at the reserve price. At the hearing before us Mr Zervos SC, counsel for the government, accepted that this must have been because, in each case, there was only one bidder. It is inconceivable that the Department was unaware of the fact that the bidders had agreed before hand that they would not bid against each other: And yet it went ahead and signed the tenancy agreements, giving possession of the stalls at the reserve price. The notion that the Department was deceived into renting the cooked food stalls to the various bidders at the reserve price is absurd.

The First Question of Law

15. The first point of law certified for our consideration is as follows:

> Whether the formulation in *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 is applicable to all forms of alleged conspiracy to defraud and ought also to be applied to a secret agreement not to compete at an auction as in any other cases or whether some aggravating feature as required in *Norris v Government of the USA* [2008] 1 AC 920 has to be present before such an agreement is indictable?

16. I would simply answer it in this way: In *Mo Yuk Ping v HKSAR* (2007) 10 HKCFAR 386 a fraudulent scheme to manipulate the stock market was charged and proved: It was to artificially prop up the share price of a publicly-quoted company. In pursuance of the scheme, fictitious accounts were opened with many firms; the bank which had lent money on the security of those shares, and the investing public at large, were massively deceived, as the conspirators had intended.

17. Where an agreement not to compete in an auction has no deceptive element in it, the fact that the agreement was made in secret does not by that fact alone render the agreement dishonest in the eyes of the law. Persons attending an auction owe no obligation to the vendor to compete with each other; nor are they required by law to so conduct themselves that the vendor achieves the highest possible price. As Atkin LJ said in *Rawlings v General Trading Co* [1921] 1 KB 635, 648:

> Why it should be illegal for two possible competitors to agree to a joint adventure in the purchase of an article offered for sale in any of the ways I have mentioned I cannot discern.

One of the ways mentioned by him, earlier in the same passage of that judgment, was for one of the parties to absent himself from the auction or, being there, to refrain from bidding, thereby leaving the other party as the sole bidder. Atkin LJ went on to say that if there was any combination to make misrepresentations with intent to deceive the seller, the agreement would be illegal.

***Rawlings v General Trading Co* was a civil case where the defendant had reneged on a prior agreement not to compete at an auction of surplus stores held by the government. The question was whether it was against public policy that parties should combine in this way prior to a public auction. The majority in the Court of Appeal (Bankes and Atkin LJJ) held that it was not. A later attempt to challenge this proposition in *Harrop v Thompson* [1975] 1 WLR 545 failed. At p.549B Templeman J said:**

> If two potential bidders have entered into some form of agreement which results in one of them keeping his mouth shut at the auction, there is no method open to me in the light of the authorities to distinguish a good agreement from a bad agreement.

18. Misrepresentation and fraudulent conduct calculated to deceive would, of course, be an "aggravating feature", thus rendering an otherwise innocent agreement illegal.

19. In this regard, Mr Zervos SC counsel, for the appellant, relies on Rule 20 of the Rules of the auction which says:

> Any person who defrauds the Department by dishonest means (such as conspiring to refrain from competitive bidding causing everyone to win the bid for their stalls at the upset price) in the auction shall be prosecuted.

This appears under the heading "Prevention of Bribery", in the context of s.7 of the Prevention of Bribery Ordinance (Cap.201), which has no relevance to this case. But even assuming that this statement in Rule 20 was made in the context of the common law offence of conspiracy to defraud, it begs the very question: Is an agreement between the stall-holders "to refrain from competitive bidding causing everyone to win the bid for their stalls at the upset price", without more, a crime? The answer must be No.

20. Dishonesty is an essential element in the common law offence: see *Mo Yuk Ping v HKSAR*, 408F. None was present in this case.

The Second Question of Law

21. The second question certified for consideration by this Court is this:

> Whether the holding of an auction in a commercial context would by its nature necessarily imply that only competitive and genuine bids are acceptable, such as to prohibit any price fixing conduct in respect of it, and to render such conduct dishonest and prima facie indictable?

22. The magistrate convicted the respondents on the basis of their statements to the police. In essence each of them said words to this effect:

(i) They participated in the drawing of lots for the stalls.
(ii) The purpose was to avoid competing with each other to drive up the price.
(iii) The agreement would cause the Department to receive less rent for the stalls.
(iv) The Department might have suffered a loss as a result.

23. In some cases they agreed with the interviewer that the meaning of an auction was to have the item under the hammer to go to the

highest bidder. This lies, in effect, at the heart of the case as presented to this Court by the appellant. Mr Zervos SC argues thus:

> The deception on the Department was that this restrictive auction which the respondents attended was a *genuine competitive auction without the bidders colluding among themselves*. (Emphasis added.)

Apart from the fact that the Department could not, by any stretch of the imagination, have been deceived (as to which see §§10 and 11 above), it begs the question: How was the expectation that this would be a "competitive auction" aroused? What made the Department believe that the stall-holders would compete with each other, so that the Department would get a higher price? By the sole fact that this was an "auction"? Or a "restrictive auction"? Or that the respondents had attended the auction?

24. As Atkin LJ said in *Rawlings v General Trading Co*, 648:

> I see no principle upon which sales by auction differ from an offer of sale by tender or indeed by private treaty, except that at an auction without reserve the goods are offered to the purchaser who there and then offers the highest price.

An auction, just as a sale by private treaty, involves mutual dealings. The purchaser's interest is to obtain the goods at the lowest price: Does the vendor owe a duty to the *purchaser* that he gets the goods at the lowest price? If not, why should the purchaser owe a duty to the *vendor* that he sells at the highest price? Plainly, no such duty exists.

25. A combination, as such, is not illegal. It is only where persons agree to do an unlawful act, or to do a lawful act by unlawful means, that it becomes a criminal conspiracy. As mentioned earlier, for potential purchasers to agree together, before an auction, that they would not compete with each other, is not *per se* unlawful. If the agreement involves no deception of any kind then they have not set out to do something lawful by unlawful means. This analysis of the law is, of course, made in the context of the charge in this case: The common law offence of conspiracy to defraud. It pays no regard to s.7 of the Prevention of Bribery Ordinance (Cap.201)[1]. It does not address the question whether X has offered an "advantage" (as

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[1] Section 7

(1) Any person who, without lawful authority or reasonable excuse, offers any advantage to any other person as an inducement to or reward for or otherwise an account of that other person's refraining or having refrained from bidding at any auction conducted by or on behalf of any public body, shall be guilty of an offence.

(2) Any person who, without lawful authority or reasonable excuse, solicits or accepts any advantage as an inducement to or reward for or otherwise on account of his refraining or having refrained from bidding at any auction conducted by or on behalf of any public body, shall be guilty of an offence.

defined in that Ordinance) to Y when he undertakes to Y not to bid against him when the item "pre-allotted" to Y comes under the hammer. Of course, the "advantage" is mutual, since Y has made an identical undertaking to X. The "advantages", in a sense, cancel out each other.

26. Note also this: In a case like the present, where Rule 8 of the auction rules allows the auctioneer to refuse to accept any bid without explanation, the stall-holders could do no more than to *hope* that, by their arrangement, each would get the allotted stall at the reserve price. Their agreement went no further than to mutually agree not to bid against each other. Full stop. There was no way they could have been sure that the pre-allotted stalls would be knocked down to them at the reserve price. The surprising thing in this case is that the auctioneer continued the auction when it became blindingly obvious very early on in the proceedings that the stall-holders had agreed not to bid against each other, as each stall was knocked down to a sole bidder. And if, as the Department now alleges, the auction was vitiated by fraud, it could have avoided the contract and refused to sign the tenancy agreement.

27. Mr Zervos SC's proposition (at §23 above) therefore boils down to this: By their bare conduct, that is to say, by attending the auction, nothing else, the respondents impliedly represented that they would make it "competitive"; that they would bid against each other; that they had formed no prior agreement to refrain from bidding against each other.

28. Note this: There is no suggestion in Mr Zervos SC's proposition that the pre-allotment arrangement was aimed at harming the economic interests of the Department. The stall-holders were looking to their own economic interests: If each stall was knocked down to them at the reserve price, so much the better for them (and, it might be added, for the consumers who frequented their stalls).

29. Plainly, no such implication as proposed by the appellant can arise: neither by law, nor from the facts of the case. Serious criminal offences like conspiracy to defraud cannot crystallize from such shadowy propositions. The answer to the second question must necessarily be No.

The Third Question of Law

30. The third question is this:

> Whether the incorporation of an express condition in the auction rules to the effect that only competitive and genuine bids are acceptable would prohibit any price fixing conduct in respect of it, and render such conduct dishonest and prima facie indictable?

31. For the appellant, this question fails *in limine* upon the facts of this case. Clause 20 of the Rules (referred to in §19 above) in no way

amounted to a representation by the stall-holders of any kind. It was simply a warning by the Department. As Tang V-P said (§78 of his judgment) the Department could have required a written warranty from each potential bidder. The warranty could have been to this effect: that, in making a bid, the bidder warranted that he/she had not entered into any prior arrangement to refrain from competitive bidding; each bid would then be accepted on that basis. In no way can Rule 20 be construed to operate in this way.

Conclusion

32. These are my reasons for agreeing that this appeal should be dismissed.

Sir Anthony Mason NPJ

Introduction

33. 19 defendants were charged with a single count of common law conspiracy to defraud, punishable under s.159C(6) of the Crimes Ordinance (Cap.200). The particulars of the offence charged were as follows:

> … between a date unknown in June 2004 and the 21st day of July 2004, in Hong Kong, conspired together with AU Wing and other persons unknown, to defraud the Food and Environmental Hygiene Department (the FEHD), by dishonestly pre-allotting amongst themselves and their representatives the cooked food stalls at Tai Po Hui Market at No 8 Heung Sze Wui Street, Tai Po prior to the auction held by the FEHD on the 21st day of July 2004 (the Auction) and agreeing amongst themselves and their representatives not to compete against one another in bidding the aforesaid cooked food stalls at the Auction, thereby deceiving the FEHD into believing that there was only one bid offered at the upset price for each of the aforesaid cooked food stalls and renting the aforesaid cooked food stalls at the upset prices to the aforesaid persons or their representatives.

As will appear, the way in which the conspiracy is formulated is of critical importance in this appeal.

34. The defendants other than the 1st defendant, who pleaded guilty, pleaded not guilty but were convicted by the Deputy Magistrate (as he then was) and sentenced to imprisonment ranging from 9 to 12 months. Their appeals against conviction and sentence were transferred to the Court of Appeal pursuant to s.118(1)(d) of the Magistrates Ordinance (Cap.227). The appeal by the 19th defendant, who died in the meantime, was abated on 2 March 2010.

35. On 15 March 2010 the Court of Appeal allowed the appeal by the other defendants who pleaded not guilty (the respondents

in this Court) and quashed the convictions. On 1 April 2010 the Court published its reasons for allowing the appeal. The principal judgment was delivered by Tang V-P, with Yeung JA and D Pang J agreeing. On 9 July 2010, the Appeal Committee extended the time for applying for leave to appeal and granted the prosecution leave to appeal out of time under s.32(2) of the Hong Kong Court of Final Appeal Ordinance (Cap.484), on the ground that points of law of great and general importance were involved. The prosecutor's appeal to this Court is brought pursuant to that grant of leave.

36. The three points of law on which the Appeal Committee granted leave to appeal are:

(a) Whether the formulation in *Mo Yuk Ping v HKSAR* is applicable to all forms of alleged conspiracy to defraud and ought also to be applied to a secret agreement not to compete at an auction as in any other cases or whether some aggravating feature as required in *Norris v Government of the USA* [2008] 1 AC 920 has to be present before such an agreement is indictable.
(b) Whether the holding of an auction in a commercial context would by its nature necessarily imply that only competitive and genuine bids are acceptable, such as to prohibit any price fixing conduct in respect of it, and to render such conduct dishonest and prima facie indictable.
(c) Whether the incorporation of an express condition in the auction rules to the effect that only competitive and genuine bids are acceptable would prohibit any price fixing conduct in respect of it, and render such conduct dishonest and *prima facie* indictable.

The facts

37. The facts of the case are uncontested. I take them from the judgment of Tang V-P where they are summarised succinctly. The respondents were the tenants or assistants to the tenants of cooked food stalls at the former Tai Po Temporary Market (the Old Market). In 2004, the respondents and other tenants were required by the Food and Environmental Hygiene Department (FEHD) to move from the Old Market to the newly built Tai Po Hui Market (the New Market). They were given priority to bid for stalls at the New Market in a restricted auction (圍內競投) which was held exclusively for them. The bid price would become the rent to be paid. The upset prices for these stalls were fixed at 75% of the market rent as assessed by the Rating and Valuation Department. These upset reserved prices were made known by letters sent by FEHD to the potential bidders including the respondents in early June 2004.

38. The prosecution's case is that before attending the restricted auction, the respondents had attended a pre-allotment exercise held

among themselves and other tenants of the Old Market. The exercise was conducted by way of the drawing of lots. The numbers drawn in the first round would determine the sequence of the draw in the second round. A number drawn in the second round would be the number of the stall in the New Market allotted to the drawer of that number. The participants also agreed amongst themselves that each would only bid for the stall which had been allotted to him/her in this manner.

39. The restricted auction was held on 21 July 2004 and was attended by 36 eligible bidders, including the respondents. 40 cooked food stalls were put up for auction. There was no competitive bidding during the auction and the stalls were knocked down to all the 36 bidders at the upset prices. Lack of competitive bidding was by no means confined to the auctions in question. From materials in evidence it seems to have been a fairly common feature of auctions conducted by the FEHD at this time, involving a single bid with lots sold at the upset price.

40. Included in the documents sent to each of the stallholders who were potential bidders were the rules of the auction. Rule 4 provided that the basic principle of an auction was that the stalls would be knocked down to the highest bidder. Rule 8 provided that the participants of the auction "shall not in any way influence another person in bidding for a stall ...". Rule 20, which appears under the heading "Prevention of Bribery", stated the effect of s.7 of the Prevention of Bribery Ordinance (Cap.201) (the PBO), without identifying the section or the Ordinance. The Rule then provided:

> Any person who defrauds the Department by dishonest means (such as conspiring to refrain from competitive bidding causing everyone to win the bid for their stalls at the upset prices) in the auction shall be prosecuted.

This warning was directed to conspiracy to defraud rather than a breach of s.7.

41. The Senior Health Inspector, Kwan Chi Hung (PW4), who conducted the auction, agreed in cross-examination, however, that he had not mentioned the auction rules before conducting the restricted auction. Nonetheless the stallholders who were potential bidders were notified of the rules and they formed part of the terms and conditions of the auction. I shall refer to r.20 later in these reasons. It is nevertheless clear that, at no stage of the proceedings, did the prosecutor rely on s.7 of the PBO.

The Court of Appeal

42. In the Court of Appeal, the prosecution (the appellant in this Court) relied on the pre-allotment and the agreement not to compete

as the constituent elements of the common law offence of conspiracy to defraud. The prosecution, as at trial, did not rely on any additional element such as fraud, misrepresentation, violence, intimidation or inducement of breach of contract. Instead, the foundation of the prosecution case was Viscount Dilhorne's statement in *Scott v Metropolitan Police Commissioner* [1975] AC 819, 840 that the law is:

> that an agreement by two or more by dishonesty to deprive a person of something which is his or to which he is or would be or might be entitled and an agreement by two or more by dishonesty to injure some proprietary right of his, suffices to constitute the offence of conspiracy to defraud.

In addition to this proposition, Mr Terence Wai, who appeared for the prosecution in the courts below, submitted that FEHD suffered economic loss as a result of the respondents' conduct.

43. The respondents submitted that an agreement by which the parties agreed not to bid against each other at an auction has always been held to be valid and enforceable under English law and has never been held to be criminal. The Court of Appeal upheld this submission and rejected the argument of the prosecution. In doing so, the Court of Appeal relied on a long and consistent line of English authority, beginning with the judgment of Knight Bruce V-C in *Galton v Emuss* [1844] 1 Coll 243, 246 and culminating in the decisions of the House of Lords in *Norris v Government of the United States of America* [2008] 1 AC 920, 936B–E and *R v Goldshield Group Plc* [2009] 1 WLR 458. The Court of Appeal saw no inconsistency between *Norris* and the decision of this Court in *Mo Yuk Ping v HKSAR*.

The arguments in this Court

44. The appellant submits that *Mo Yuk Ping v HKSAR* authoritatively states the constituent elements of the offence of conspiracy to defraud in Hong Kong and that the offence is not limited to cases involving "the aggravating features" identified in *Norris v Government of the United States of America*. The appellant then submits that the essence of the restrictive auction was that it was a genuine competitive auction which would not involve any collusion by the bidders themselves. Yet there was collusion which resulted in deception and therefore dishonesty, falling within the *Mo Yuk Ping* formulation, so that it was not a case of mere price fixing, as the Court of Appeal found.

45. The case for the respondents as argued in the Court of Appeal is that an agreement not to bid at an auction, without any of "the aggravating features" identified in *Norris v Government of the United States of America*, is neither criminal nor dishonest and therefore falls outside the scope of the offence of conspiracy as formulated in *Mo*

Yuk Ping v HKSAR. In any event, the respondents submit that an agreement not to bid at an auction is not, and never has been held to be dishonest or criminal at common law.

The charge

46. Before considering the arguments presented in this appeal, it is necessary to turn to the way in which the charge of conspiracy against the respondents was formulated and the consequences this may have for the disposition of the appeal. In the courts below no attention was given to the terms of the charge. In this Court, however, when Mr Kevin Zervos SC for the appellant was asked in argument how he formulated the elements of the alleged conspiracy, attention was directed to the terms of the charge. It alleged that the defendants conspired to defraud the FEHD by dishonestly pre-allotting among themselves the relevant food stalls so as not to bid against each other, thus (as it is particularised in the charge)

> deceiving the FEHD into believing that there was only one bid offered at the upset price for each of the aforesaid cooked food stalls and renting the aforesaid cooked food stalls at the upset prices to the aforesaid persons or their representatives.

47. The case averred by the prosecution was therefore one of deception, namely that the pre-allotment and the agreement not to compete deceived the FEHD into believing that there was only one bid for each stall at the auction. There are three problems with the case as so pleaded. First, the FEHD was not aware of the pre-allotment and the agreement not to compete until some time after the auction. Secondly, there is no evidence that the pre-allotment on the agreement not to compete induced or deceived the FEHD into believing anything. Thirdly, no doubt the FEHD did believe that only one bid was offered at the upset price for each stall but that belief was founded on the FEHD's knowledge of what in fact happened at the auction. The deception alleged simply cannot be substantiated.

48. Mr Zervos SC frankly admitted that the charge was defective and put his case on two different bases. The first was that the pre-allotment and, in particular, the agreement not to compete amounted to a collusive arrangement intended to deprive the FEHD by dishonest means of a higher price, thereby causing economic loss. The second was that, by participating in the auction on the basis on which they did, the defendants made a false representation to the FEHD causing it loss.

49. The problem with proceeding with the appeal is that we could not allow an appeal and convict the respondents on a charge of conspiracy which cannot be made out. Nor can we convict them of

an offence of conspiracy to defraud which has never been charged. It follows that the appeal could not succeed. The Court made an order dismissing the appeal with costs at the end of the oral argument, stating that reasons would be handed down later. This judgment sets out my reasons for dismissing the appeal.

50. As the principal issue argued in the appeal is of some importance, I shall deal with it on the two bases argued by the appellant.

The common law offence of conspiracy to defraud

51. In *Mo Yuk Ping v HKSAR*, this Court held that the essence of the offence of conspiracy to defraud was becoming a party to an agreement with another or others to use dishonest means (i) with the purpose of causing economic loss to, or putting at risk the economic interests of another; or (ii) with the realisation that the use of those means might cause such loss or put such interests at risk. In stating the elements of conspiracy to defraud in this way, this Court adopted earlier formulations of the offence in both the House of Lords (*Welham v DPP* [1961] AC 103; *R v Scott* [1975] AC 819) and the Privy Council on appeal from Hong Kong (*Wai Yu Tsang v R* [1992] 1 AC 269). The Court pointed out (at p.405D–E) that most cases of agreement to use dishonest means were cases of deceit. The Court rejected the argument that the offence, as formulated in *Mo Yuk Ping v HKSAR*, offended the principle of legal certainty.

52. In *Norris v Government of the United States of America*, as well as *R v Goldshield Group Plc*, the House of Lords did not refer at all to the formulations in its two earlier decisions, though in *R v Goldshield Group Plc* there was a reference to *Wai Yu Tsang v R*. No doubt this was because their Lordships were directing their attention to the precise issue which arose for decision in the proceedings before them. In *Norris v Government of the United States of America*, that issue was whether the defendant's alleged conduct in conspiring with producers of carbon products to operate a price fixing agreement or cartel in several countries, which was the subject of the conspiracy offence with which the defendant was charged in the United States, constituted common law conspiracy to defraud. In *R v Goldshield Group Plc*, the issue was whether arrangements to fix and maintain prices for drugs supplied and for manipulating the supply of drugs constituted such a conspiracy.

53. It was in this context that the House of Lords held, after reviewing the relevant authorities, that:

> [t]he common law recognised that an agreement in restraint of trade might be unreasonable in the public interest, and in such cases the agreement would be held to be void and unenforceable. But unless there were aggravating features such as fraud, misrepresentation,

violence, intimidation or inducement of a breach of contract, such agreements were not actionable or indictable (*Norris* at 933F–G).

54. Neither the appellant nor the respondents contend that *Norris v Government of the United States of America* is inconsistent with *Mo Yuk Ping v HKSAR*. Be this as it may, neither what was decided nor what was said in *Norris v Government of the United States of America* or *R v Goldshield Group Plc* constitutes any reason for this Court to depart from the general formulation of the offence of conspiracy to defraud as expressed in *Mo Yuk Ping v HKSAR*. On the issue of legal certainty, the Court's approach in *Mo Yuk Ping v HKSAR* was consistent with the approach which it had adopted earlier in *Shum Kwok Sher v HKSAR* (2002) 5 HKCFAR 381. On the other hand, the discussion in *Norris* about the common law treatment of price fixing agreements, in particular the conclusion that, absent the so-called "aggravating features", they did not involve dishonesty (see p.936C–E), is a matter that calls for close attention.

The issue for decision in this appeal

55. The issue argued in this Court therefore is whether a secret agreement between potential bidders not to compete at an auction, or such an agreement followed by participation by such bidders at the auction, falls within the formulation of the common law offence of conspiracy to defraud as formulated in *Mo Yuk Ping v HKSAR*. The focus of attention in that formulation was on the expression "by dishonest means", where the word "dishonest" is to be understood in its ordinary sense (see *R v Ghosh* [1982] 1 QB 1053).

The English authorities on agreements restricting bidding at auctions

56. There is no doubt, as the Court of Appeal held, that there is strong English authority to support the proposition that an agreement by potential buyers not to bid at an auction, what is called in England a "knock out" agreement, in order to keep the price down, is neither unenforceable as being contrary to public policy nor criminal. Whether they go so far as to hold that such an agreement, if secret, is dishonest for the purposes of the law of conspiracy, is a question I leave for later consideration.

57. *Galton v Emuss* [1844] 1 Coll 243, *Re Carew's Estate* [1858] 26 Beav 187 and *Heffer v Martyn* [1867] 36 LJ Ch 373 were cases in which two potential buyers agreed that one would not bid against the other at an auction for valuable consideration. The agreement in each case was held to be valid and enforceable, resulting in *Galton v Emuss* and *Heffer v Martyn* in an order for specific performance. In *Re Carew's Estate* the agreement was that the parties would divide

the property between them if it was bought by the bidding party under the sale pursuant to a court order. On a summons to set aside the sale on the ground that the agreement was unlawful, Sir John Romilly MR said (at p.190) that "a mere agreement" between two persons not to bid against each other was not "sufficient to invalidate a sale to one of them".

58. In *Jones v North* (1875) 19 Eq 426, after a corporation had invited tenders for the supply of stone, A, B, C and D who were quarry owners agreed that A should buy stone at a fixed price from the other three and submit the lowest tender. B should not tender, that C and D should tender above A's price and that B, C and D should not supply stone to the corporation during 1875. A purchased the stone as agreed but B sent in a tender, in breach of the agreement, and it was accepted. Bacon V-C held that the agreement was legal and valid. He also said (at p.429) that the case was "on one side at least, a very honest one", a statement which has been doubted (*Norris v Government of the United States of America* [2007] 1 WLR 1730, para.50, (Auld LJ)), indeed criticized (Lever and Pike, "Cartel Agreements, Criminal Conspiracy and the Statutory 'Cartel Offence': Part 1" (2005) ECLR, 90–97). Bacon V-C rejected a submission that the plaintiff could not obtain equitable relief because the arrangement was a device to compel the authority, under the fiction of public competition, to accept tenders not representing the market price of the stone. He held (at p.430) that the agreement was "perfectly lawful".

59. In *Norris v Government of the United States of America*, their Lordships stated that *Jones v North* has never been overruled and treated it as representing the law to-day (see p.936C–E).

60. In *Rawlings v General Trading Co* [1920] 3 KB 30, the question was whether on the sale of Government stores by public auction, where no reserve was fixed, two or more buyers could agree that one of them only would bid in order to keep down the price, and that they would then share the profits between them. At first instance Shearman J concluded (at p.34) that the agreement was one "which it is contrary to public policy to enforce".

61. On appeal (1921) 1 KB 635, the Court of Appeal by majority (Bankes and Atkin LJJ with Scrutton LJ dissenting) allowed the appeal. Scrutton LJ considered (at p.647) that "the agreement was contrary to public policy, as a restraint of trade contrary to the interests of the public", though it was neither criminal nor actionable. On the other hand, Bankes and Atkin LJJ, on the basis of the long line of existing authorities, concluded (at pp.641 and 652 respectively) that the agreement was legal and enforceable. Atkin LJ said (at p.652):

> I can see no reason for saying that this contract is ex facie illegal. It would probably be sufficient to say that for nearly a century Courts

> of equity have held similar agreements legal and enforceable by suit for specific performance. But apart from decided cases, as between the parties it appears to be plainly reasonable, and if the defendant wished to establish that the public interests suffered he should have so pleaded so as to give the plaintiff notice.

62. *Rawlings v General Trading Co* was subsequently followed by McCardie J in *Cohen v Roche* [1927] 1 KB 169, 173. And the legality of a "knock out" agreement was assumed in *Pallant v Morgan* [1953] Ch 43 where a party to such an agreement who became the successful bidder refused to divide the property sold with the other party to the agreement as it provided. The Court declared that the successful party held the property sold for the other party to the agreement.

63. *Rawlings v General Trading Co* was again followed by Templeman J (as he then was) in *Harrop v Thompson* [1975] 1 WLR 545. There specific performance was ordered of an agreement for the sale of two farms purchased at a public auction, despite the existence of an antecedent agreement between the purchaser and another potential bidder that the latter would not bid with the result that the purchaser obtained the property more cheaply.

64. In that case, counsel for the first defendant invited the court to follow the path favoured by Shearman J and Scrutton LJ in *Rawlings v General Trading Co* and to conclude that an agreement not to bid, if not proved to be reasonable, is unenforceable and relieves the vendor from his contract. A "knock out" agreement, he submitted, is an interference with the liberty of the potential bidder to bid at the auction and ought not to be enforceable if the sole or primary object of the knock out agreement is to buy the property cheaply. Templeman J responded to this argument by saying (at pp.548H–549A):

> This submission tends to bring most contracts within the grasp of restraint of trade and therefore unenforceable unless proved to be reasonable, because most contracts interfere with liberty of action one way or another. I am not convinced that the agreement alleged in the present case was in restraint of trade. If it was in restraint of trade, I am not convinced that it therefore invalidated or affected the contract between the vendors and the purchaser.

65. Templeman J went on to say (at p.549D):

> A vendor can protect himself by conditions under which he imposes a reserve and keeps the right to bid and to withdraw. A timid vendor need not sell by auction.

The significance of this observation is a matter to which I shall return.

66. In *Norris v Government of the United States of America*, *Rawlings v General Trading Co*, as well as *Jones v North*, was accepted as correctly stating the law. The other authorities which I have discussed were not referred to in *Norris v Government of the United States of America*, but if *Rawlings v General Trading Co* and *Jones v North* correctly state the law in England so do they.

67. On the other hand, the common law has taken a different approach to agreements the purpose of which is to raise the market value of public funds and shares. In *R v De Berenger* (1814) 3 M & S 67 the defendants were charged with conspiring by false rumours to raise the price of public Government funds and were convicted. On a motion to arrest judgment, which was dismissed, Lord Ellenborough CJ said (at pp.72–73) that the

> purpose itself is mischievous, it strikes at the price of a vendible commodity in the market, and if it gives it a fictitious price, by means of false rumours, it is a fraud levelled against all the public …

Bayley J and Dampier J were of a similar opinion, as was Le Blanc J who said (at p.74):

> the raising or lowering the price of public funds is not *per se* a crime … But if a number of persons conspire by false rumours to raise the funds on a particular day, that is an offence …

68. In *Scott v Brown, Doering, McNab & Co* [1892] 2 QB 724 the Court of Appeal held that an agreement between two or more persons to purchase shares in a company in order to induce persons who might thereafter purchase shares in that company to believe, contrary to the fact, that there was a *bona fide* market for the shares, and that the shares were at a real premium, is an illegal transaction which may be made the subject of an indictment for conspiracy and no action can be maintained on the agreement or the purchase of the shares. The Court of Appeal followed *R v De Berenger* and held that the acts of the plaintiff in ordering shares to be bought for him at a premium was to deceive the public by leading the public to suppose that there were buyers of the shares at a premium on the Stock Exchange. The purchase of the shares was to be equated to a false representation.

Assessment of the English authorities on agreements restricting bidding

69. For present purposes, the English authorities establish that these agreements were lawful at common law. Although *Jones v North* is the only case which expressly holds that such agreements are "honest".

The other cases by holding that they are lawful necessarily negate the possibility that they could be "dishonest" in the sense that they could be the subject of a conviction for conspiracy to defraud. A contract which is valid and enforceable cannot itself be "dishonest" for the purposes of criminal conspiracy to defraud.

70. To an observer familiar with the modern law relating to restrictive trade practices and uninstructed in the way in which the law on this point developed, the proposition that "knock out" agreements are "honest" might seem somewhat surprising. The explanation lies no doubt in the nature of the capitalist economic philosophy which prevailed in England in the period 1800–1870, which strongly favoured freedom of trade and freedom of contract (see Atiyah, *The Rise and Fall of Freedom of Contract* (1979) pp.408–412). One consequence of this approach was that the courts were not concerned with the effect of a contract on third parties but with the legal effect and enforcement of the contract as between the parties to it (see Atiyah, pp.412–413). This serves to explain why the impact of a "knock-out" agreement on the vendor at an auction was not considered in the cases which have been discussed. They were, of course, with the exception of *Cohen v Roche*, cases in which the vendor at an auction was not a party.

71. The different treatment of an agreement to raise prices at an auction may be explained at two levels. First, they were cases which involved a misrepresentation by words or conduct, whereas a "knock out" agreement of itself did not, though it might lead to the making of such a misrepresentation. Secondly, there was a recognition that a false increase in market prices has an adverse impact on the public; such an impact may or may not occur in the case of a false lowering of auction prices. Although a "knock out" agreement may be in restraint of trade because it is restrictive of freedom of competition, it may not necessarily be contrary to the public interest, a matter that was acknowledged in *Rawlings v General Trading Co* (see para.61 above).

72. Until *Rawlings v General Trading Co*, there was no suggestion that a "knock out" agreement might be in restraint of trade. In the period which the cases before *Rawlings v General Trading Co* were decided, the courts were not disposed to invalidate or treat as unenforceable agreements which were restrictive of competition on the ground that they were in restraint of trade. It seems to have been thought that restrictive agreements would not survive the pressure of freedom of competition (see, for example, *Wickens v Evans* (1829) 3 Y & J 318, 330; 148 ER 1201, 1206 which was cited with approval by Fry LJ in *Mogul Steamship Co Ltd v McGregor, Gow & Co* (1889) 23 QBD 598, 628, in a judgment upheld in the House of Lords [1892] AC 25). *Jones v North* itself was a striking illustration of how far the courts were prepared to go in enforcing contracts which, to modern eyes, might seem to be in restraint of trade. There, the court

having rejected the argument that the agreement was in restraint of trade and an unlawful conspiracy, granted an injunction which prevented the defendant from carrying out his contract to supply the Birmingham Corporation to the detriment of its interests, though it was not a party to the proceedings.

73. And even when, at the end of the 19th century, restraint of trade issues were litigated before the courts, arising out of combination, cartel and restrictive trade agreements, the courts were unwilling to hold that they were illegal. They might be void and unenforceable as between the parties but they were not illegal. That was the real point of the decision of both the Court of Appeal and the House of Lords in *Mogul Steamship Co Ltd v McGregor, Gow & Co*. Indeed, the underlying thrust of the reasoning both in the Court of Appeal and the House of Lords in that case was that, so long as traders individually or collectively were pursuing their own business interests without infringing the rights of others or intending to do them harm, that pursuit was legitimate, even if, by deliberately lowering prices, it drove others out of business. In this respect, *Mogul Steamship Co Ltd v McGregor, Gow & Co* is generally consistent with, and supports, the long line of decisions in the "knock out" cases and *Jones v North*.

Should this Court follow the English authorities?

74. The question which arises therefore is whether the Court should, in stating the law of conspiracy to defraud for Hong Kong, declare that the long line of decisions on "knock out" agreements, including *Jones v North*, no longer represents the law of Hong Kong. The argument for taking this course is that such agreements are dishonest and anti-competitive and strike at the very essence of a competitive auction. Even assuming that there is strong reason to take this course in an appropriate case, this is not such a case because the appeal must be dismissed for the reasons already given.

75. And, in any event, to discard the long line of English authority to bring "knock out" agreements within the reach of the law of criminal conspiracy would be a step too far. Not only have the relevant decisions stood for a very long time — they go back more than 160 years — they almost certainly have been taken to represent the law of conspiracy in Hong Kong. For all we know, people in Hong Kong have relied on them. If there is to be a change, then in my view it is a matter entirely for the legislature.

Other matters

76. It is, of course, true that the FEHD can protect itself from "knock out" agreements by fixing a reserve (and not disclosing it) and reserving the right to bid and withdraw, as Templeman J pointed

in *Harrop v Thompson*, p.549D but this expedient leaves unresolved the question whether there should be a criminal sanction against the making of collusive "knock out" agreements.

77. Finally a word about s.7 of the PBO. It seems that it has not been enforced in Hong Kong due to doubts about its efficacy. The section, though expressed in different terms, is broadly similar to s.1(1) of the Auctions (Bidding Agreements) Act 1927 (UK). Professor ATH Smith discusses the section in "Auction Rings" [1981] Crim LR 86 and identifies the problems associated with it.

Conclusion

78. These are my reasons for dismissing the appeal.

Bokhary PJ

79. At the conclusion of the hearing, the Court announced that the appeal was dismissed for reasons to be handed down in due course. The reasons given by Sir Anthony Mason NPJ constitute the reasons of the Court. Costs will be dealt with on written submissions as to which the parties should seek procedural directions from the Registrar.

36. False statutory declarations and other false statements without oath

Any person who knowingly and wilfully makes (otherwise than on oath) a statement false in a material particular, such statement being made—

(a) in a statutory declaration; or

(b) in an abstract, account, balance sheet, book, certificate, declaration, entry, estimate, inventory, notice, report, return or other document which he is authorized or required to make, attest or verify, by any enactment for the time being in force; or

(c) in any oral declaration or oral answer which he is required to make by, under or in pursuance of any enactment for the time being in force,

shall be guilty of an offence and shall be liable on conviction upon indictment to imprisonment for 2 years and to a fine.

(21 of 1922 s. 7 incorporated. Amended 5 of 1924 Schedule)
[cf. 1911 c. 6 s. 5 U.K.]