

HONG KONG / JUDGMENT

COMPETITION COMMISSION v. ATAL BUILDING SERVICES ENGINEERING LTD AND OTHERS

[2023] HKCT 9

COURT

Competition Tribunal

DECIDED

25 October 2023

CASE / FILE NUMBER

CTEA2/2023

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CTEA 2/2023

[2023] HKCT 9 IN THE COMPETITION TRIBUNAL OF THE HONG KONG SPECIAL
ADMINISTRATIVE REGION COMPETITION TRIBUNAL ENFORCEMENT ACTION NO 2 OF
2023

BETWEEN COMPETITION COMMISSION Applicant and ATAL BUILDING SERVICES
ENGINEERING 1st Respondent LIMITED JOHNSON CONTROLS HONG KONG LIMITED 2nd
Respondent YORK INTERNATIONAL (NORTHERN ASIA) 3rd Respondent LIMITED JOHNSON
CONTROLS INTERNATIONAL PLC 4th Respondent LEE YUI MING 5th Respondent

Before: Hon Harris J, President of the Competition Tribunal in Chambers Date of Hearing: 29
August 2023 Date of Decision: 25 October 2023

DECISION

On 29 August 2023 I heard the first case management conference in this matter. There were a number of differences between the Respondents over the directions that should be made. What follows are my reasons for making the contentious directions. The Commission and the 1st Respondent issued consent summonses dated 17 and 18 August 2023 for a hearing of a Kam Kwong application on 27 November 2023. This gave rise to a number of issues. First, the 17 August summons envisages an order being made which results in one penalty being imposed for

contraventions of the Competition Ordinance (“Ordinance”) in not only the present proceedings, but CTEA 2/2022. The Commission and the 1st Respondent appeared not to have given thought to whether this was possible. It is far from clear to me that either it is permissible under the Ordinance or that even if it is, it would be appropriate to make such an order. I have directed that this issue be addressed fully by the Parties to both CTEA 2/2022 and 2/2023 at the hearing on 27 November 2023. This specific issues I have asked to be addressed are as follows: “1. Whether one pecuniary penalty can be imposed in 2 different proceedings. 2. If the Tribunal can impose a pecuniary penalty in 2 different proceedings generally (not specifically CTEA 2/2022 and CTEA 2/2023) the matters to be taken into account in determining what penalty to impose. 3. When the pecuniary penalty in CTEA 2/2022 should be determined (this matter was addressed in CTEA 2/2023). 4. If the Tribunal can impose one pecuniary penalty in 2 different proceedings whether or not the facts of CTEA 2/2022 and CTEA 2/2023 make it appropriate for the Tribunal to do so in CTEA 2/2022 and CTEA 2/2023 or whether there are material differences, which make it inappropriate or not practical. Mr. Justice Harris is presently of the view that in practice the presumption must be that different cases should be considered separately and that the determination of 2 cases together will be the exception. It is, therefore, not a matter of comparing in detail the facts of the 2 cases. It will be necessary for the Commission to demonstrate that the present cases lend themselves to being dealt with together. If this cannot readily be done the application is unlikely to be successful. The Commission should bear in mind that its application needs to be formulated in a way, which permits all the Respondents in both cases to assess the application and determine what their position in respect of them is.” Secondly, although the 18 August summons sought consolidation of the 17 August summons with the like summons issued in CTEA 2/2022, no application for consolidation in CTEA 2/2022 was before me and, in fact, no summons for consolidation had been issued in CTEA 2/2022 by the time of the hearing. It is necessary for an application for consolidation to be made in both proceedings and for the Respondents in both proceedings to given the opportunity to make submissions if they wish. It should have been clear to the Commission that the matter could not be dealt with by filing a consent summons in one set of proceedings only signed by the Respondent in CTEA 2/2023 to the proposed Kam Kwong application. Thirdly, the 2nd Respondent in CTEA 2/2023 objected to the Kam Kwong application in the present proceedings being determined before the trial on the grounds that the penalties to be imposed against all Respondents found to have contravened the Ordinance should be dealt with at the same time. It was not in dispute before me that in criminal proceedings the established practice is for all defendants to one criminal case to be sentenced together. This is to ensure consistency in sentencing. It was the Commission’s position that although proceedings before the Tribunal involve the determination of a criminal charge the Tribunal is not required to follow the practice of the criminal courts as is made clear by section 144(1) of the Ordinance, which provides that the Tribunal may decide its own procedures and may, so far as it thinks fit, follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction. In this respect the Commission is correct, however, in my view the real issue is whether or not the reasons for the practice of the criminal courts apply to a case such as the present, it also being clear from section 144(1), that if the Tribunal thinks it appropriate it has the power and discretion to adopt a similar practice to the

criminal courts. In my view the reasons for the Tribunal following a similar practice is that it assists in achieving consistency in penalties and it is more efficient for the Tribunal to deal with sentencing at one hearing when it will be at its most familiar with the facts of the case. The Commission and the 1st Respondent (who understandably would prefer to dispose of the complaint against it as soon as possible) argue that to delay the determination of penalties would discourage respondents from settling proceedings against them. I find this wholly unconvincing. The suggestion that a respondent having concluded that it is better to settle the case will continue to fight because the penalty agreed in principle with the Commission will not be determined by the Tribunal until after trial or all the respondents have reached a Kam Kwong settlement seems to me specious. Why would they do so? Out of spite? It would seem to me that in the present case, and generally in future cases, the appropriate procedure is for the Tribunal to determine liability first and adjourn the determination of the penalty until after trial or after all the respondents have agreed to a Kam Kwong settlement. This is how the Kam Kwong application in the present case should proceed. Fourthly, certain terms of the confidentiality order in particular the definition of “Non-confidential Document”. The issue here is whether or not the definition should (as the 2nd to 4th Respondents contend) refer to documents which have not been designated by the Commission or the originator of the document as confidential or (as the Commission contends) refer to documents which have been designated as non-confidential. The significance, of what at first appears a fine distinction, goes to the process of resolving a dispute over whether a document should be treated as confidential. The 2nd to 4th Respondents say that the Commission’s wording results in the more procedurally cumbersome and time consuming requirement for a party, who is told that a document has not been designated as non-confidential, to challenge the consequence of this when it should be for a party disclosing a document to make a positive decision whether or not it is confidential and that in the absence of such a decision the default position should be that the other parties are entitled to treat it as non-confidential; although as Mr Shieh emphasised, the recipient will still be subject to the normal restrictions on the use of disclosed documents. He also submitted that the authorities have made it clear that the presumption is that all evidence should be made available to a person who defends a criminal complaint, and that the onus is on the party asserting confidentiality to prove it by evidence and the Commission’s formulation effectively reverses this burden. The Commission argue that the Commission having to decide whether a document is non-confidential would be extremely burdensome. If its formulation is used a party which considers that it should be permitted to use a document free of the restrictions imposed by the confidentiality order can ask the Commission, and if it does not agree the Tribunal, to look at the individual document and make a decision. It will be apparent from the Commission’s argument that it is proceeding on the basis that it will not decide at the time of discovery whether or not a document should be designated as confidential. I agree with the 2nd to 4th Respondents. The Commission’s proposal is inconsistent with the principles established by the authorities. The Commission’s argument also seems to me rather disingenuous. One might reasonably expect its formulation to indicate that a party complying in good faith with the directions, in particular the Commission, would take the trouble to ascertain whether a document should fairly be disclosed free of any assertion of confidentiality. The Commission’s argument concedes that the

Commission does not intend to do so. In practice it proposes effectively to assert confidentiality over all documents and leave the Respondents to challenge the “decision” in respect of any document it thinks worthwhile. This seems to me an inappropriate approach. I, therefore, direct that [1.3] and [4] of the 2nd to 4th Respondents’ proposed directions be adopted. Fifthly, it is known that cooperation agreements have been entered into between the Commission and two of the 1st Respondent’s employees. In addition to the cooperation agreements themselves, the 2nd Respondent also seeks disclosure of the correspondence and communications relating to the cooperation agreements. The 2nd Respondent argues that this is justified because it is a well-established principle that where a person is given immunity and presented as a witness against other alleged parties, the court and the defence are to be given a “warts and all” account of the circumstances in which the immunity agreement has been reached. This is explained by G Lam J (as he then was) in *Competition Commission v Nutanix Hong Kong Ltd (No 2)*: “105. ... The phrase originated in this context from the judgment of the Court of Appeal in *R v Tsui Laiying & Others* [1987] HKLR 857, given by Silke JA, where he said (at p 873B): ‘It is clear beyond peradventure that in cases like this the accomplice should be presented to the Court warts and all. The defence, is entitled to know everything about him, the terms of the immunity and any matters surrounding it which could affect the credibility of his evidence. ...’ 106. One example of the reasons for this need was given by Hartmann JA in *HKSAR v Chong Chi Ho* (unrep, CACC 259/2008, 29 May 2009), at §51: ‘For example, the manner in which he came to agree to give accomplice evidence may reveal that he was more interested in protecting himself than giving evidence as to the truth.’” The Commission opposes disclosure of the cooperation agreements and the associated documents. It does so on the following grounds. First, that the cooperation agreements are not relevant; they merely provide the basis for the Commission and the 1st Respondent agreeing to make the Kam Kwong application. The Commission says that it will reconsider its position if it decides to call the two individuals who are a party to the cooperation agreements. Secondly, they are privileged. Thirdly, the associated documents are not relevant. It does not seem to me that the decision referred to in footnote 5 is relevant as it is to be distinguished on the grounds that it involved communications between the Commission and a third party, which did not result in an agreement. The present position is materially different and engages materially different considerations. The Commission says that the originating notice of motion was prepared before the cooperation agreements and that at present there is no live issue as to the accuracy of the information that has been provided to the Commission by the 1st Respondent’s employees and, which will form part of its case as the proceedings proceed. It seems to me that this is to misunderstand what is relevant. The Commission has been provided with information from the 1st Respondent’s employees and this, if I have understood things accurately, would have formed part of the material before them when the Commission decided to commence the proceedings and will inform the way in which the Commission pursues the complaint going forward. The cooperation agreements form the basis on which the 1st Respondent and its employees agreed to provide assistance to the Commission in, inter alia, the prosecution and investigation of the 2nd Respondent. It matters not whether 1st Respondent’s employees are ultimately called as witnesses to give sworn testimony at trial. The cooperation agreements are not relevant only by way of undermining any live witness testimony. The associated documents are relevant for the purpose

of evaluating the credibility of any underlying information provided. This is analogous to the requirement under RHC (Cap. 4A) O.41 r.5(2) that a deponent (who is usually not cross-examined at the interlocutory stage) shall state the source and grounds of his information or belief in his affirmation—the underlying rationale is to enable the contesting party the opportunity to explore those grounds and evidentially counter them: *Commissioner of Police v Lin Xin Nian*. Therefore, it is only fair that the circumstances in which the 1st Respondent and its employees, being the accomplice have cooperated, should be presented to the Court “warts and all” and the 2nd Respondent is entitled to know everything about the terms of the cooperation agreements and the manner in which the 1st Respondent and its employees agreed to provide the information and assistance to the Commission. This is relevant to assessing the veracity of any such information—which is currently being deployed by the Commission against the 2nd Respondent. I agree with the 2nd Respondent that without prejudice privilege does not apply in respect of “successful” communications, i.e. those where leniency or settlement is granted. This is a stance that has been accepted by the Commission: see *Nutanix* at [28]. The without prejudice privilege is founded upon the public policy of encouraging litigants to settle their differences rather than litigate them to a finish: *Nutanix* at [55]. In *R v Bernardo*, Lesage J of the Ontario Court of Justice held that the privilege surrounding the plea negotiations between the Crown and Homolka (an accomplice of Bernardo) did not prevent disclosure of the materials to Bernardo, because the negotiations had resulted in a plea and Homolka was no longer at risk of prejudice [16]–[17]. A person can reasonably be held to expect that if his leniency application is successful, the statements made by him will be disclosed and used vis-à-vis third parties: *Nutanix* at [50]. This is explained by Gordon J in *Cadbury Schweppes Pty Ltd v Amcor Limited*: “...A cartel claim, by definition, involves collusion between two or more actors. In the same way that it is both inevitable and self-evident that the statements of a cooperating criminal conspirator will be used against (ie, disclosed to) the non-cooperating conspirators, it must be taken for granted that a cartel participant contemplating a confession to the authorities knows, or should know, that his statements will be used by the authorities to prosecute the other party or parties.” In the present case, the 1st Respondent and its employees have successfully reached cooperation agreements with the Commission. The disclosure of the associated documents will not result in any prejudice to them. In my view the cooperation agreements and the communications between the Commission and the 1st Respondent and its employees are discoverable. The Commission should circulate the Respondents a draft order reflecting my decision and send the agreed version to my clerk. (Jonathan Harris) President of the Competition Tribunal Mr Norman Nip SC and Ms Leticia Tang, instructed by Dentons Hong Kong LLP, for the applicant Mr Peter So, of Deacons, for the 1st respondent Mr Paul Shieh SC and Mr Jonathan Ng, instructed by Baker & McKenzie for the 2nd to 4th respondents Mr Stephen Crosswell, solicitor advocate, of Baker & McKenzie, for the 2nd to 4th respondents The 5th respondent was not represented and did not appear

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