CTEA 2/2017
[2020] HKCT 1

IN THE COMPETITION TRIBUNAL OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COMPETITION TRIBUNAL ENFORCEMENT ACTION NO 2 OF 2017

BETWEEN

COMPETITION COMMISSION	Applicant
and	
W. HING CONSTRUCTION COMPANY LIMITED (永興聯合建築有限公司)	1st Respondent
SUN SPARK CONSTRUCTION LIMITED (裕輝建築有限公司)	2nd Respondent
LAU CHUNG YAN (劉頌欣) and LAU CHUN KWOK ADAM (劉鎮國) (in partnership trading as MAU HANG PAINTING & DECORATION CO (茂恒油漆裝飾公司))	3rd Respondent
CHEUNG YIU FAI DANNY (張耀輝) and WONG TUNG HOI (黃東海) (in partnership trading as TAI DOU BUILDING CONTRACTOR (大道建築公司))	4th Respondent
KAM KEE MACHINE ELECTRICAL IRON WORKS COMPANY LIMITED (金記機電鐵器工程有限公司)	5th Respondent
HUI TAK CHEONG KANLY (許德昌) and HUI TAK ON BRYAN (許德安) (in partnership trading as HIP YICK CONSTRUCTION COMPANY (協益建築公司))	6th Respondent
SUEN SIK KAU (孫錫球) (trading as TAI WAH CIVIL ENGINEERING (泰華土木工程))	7th Respondent

POON WAI WOON (潘維桓) and POON KAI WO JULIO (潘啟和) (in partnership trading as WAI SUN IRON & DECORATION CO (維新鐵器裝修公司))	8th Respondent
YEUNG KWOK YEE (楊國儀) (trading as WIDE PROJECT ENGINEERING & CONSTRUCTION CO (百達建築工程公司))	9th Respondent
LUEN HOP DECORATION ENGINEERING CO LIMITED (聯合裝飾工程有限公司)	10th Respondent

Before: Hon G Lam J, President of the Competition Tribunal

Dates of Hearing: 14-16 January 2020

Date of Judgment: 29 April 2020

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A. Background

1. In its judgment dated 17 May 2019 ("**Judgment**"),[1] this Tribunal found that each of the 10 respondents had contravened the first conduct rule in the Competition Ordinance (Cap 619) ("**Ordinance**") by making and giving effect to a market sharing arrangement (the Floor Allocation Arrangement[2]) and a price fixing arrangement (the Package

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1 [2019] HKCT 3.

2 As defined in para 41 of the Judgment.

Price Arrangement[3]) while providing decoration services to individual tenants at a public housing estate, namely, On Tat Estate (Phase 1).

2. In terms of the legal consequences, it is not in dispute that declarations should be made under s 94(1) and paragraph 1(a) of Schedule 3 in accordance with this Tribunal's findings. What remain to be determined, and are dealt with in this judgment, are (1) the amount of pecuniary penalties that should be imposed on each respondent; and (2) whether and, if so, the extent to which the respondents should be ordered to pay the costs of proceedings and the costs of investigation of the applicant ("**Commission**"). The present judgment should be read in conjunction with the Judgment.

3. For the purposes of the sanctions hearing, the Tribunal has been supplied with financial information concerning the respondents including their financial years, turnovers, and revenues derived from the provision of decoration services at public rental housing estates, and the 3rd, 4th and 9th respondents have filed further witness statements. The Commission did not cross-examine the 3rd and 9th respondents' witnesses.

B. The statutory framework for pecuniary penalties

4. Part 6 of the Ordinance deals with enforcement before the Tribunal. The primary sanction provided for is pecuniary penalty. There is no power of imprisonment. There is a power to make an order disqualifying a person from being a director or liquidator of any company if a company, of which the person is a director, is found to have contravened

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[3] As defined in para 77 of the Judgment.

a competition rule.[4] There is also power to make a wide range of other orders specified in Schedule 3 to the Ordinance, including a declaration of contravention, an order restraining conduct that constitutes contravention, an order requiring the disposition of operations, assets or shares of any undertaking, and an order declaring an agreement to be void or voidable or requiring the parties to modify or terminate it.

5. The power to impose a pecuniary penalty is conferred on the Tribunal by s 93(1) of the Ordinance in these terms:

> " 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."

6. In regard to the amount of the penalty, the statute makes two specific provisions. First, s 93(2) sets out certain matters to which the Tribunal must have regard in determining the amount:

> " (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."

7. Secondly, the statute imposes a ceiling which a penalty may not exceed:

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[4] Sections 101-103.

> " (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."

8. For this purpose, s 93(4) defines "turnover" to mean the total gross revenues of an undertaking obtained in Hong Kong, and "year" to mean the financial year of an undertaking. Further, s 2 of the Competition (Turnover) Regulation (Cap 619C), made pursuant to s 163 of the Ordinance, provides:

> " (1) For the purpose of section 93 of the Ordinance, in determining the turnover of an undertaking, the total gross revenues of the undertaking are the amounts derived by the undertaking from the undertaking's ordinary activities in Hong Kong after deduction of the following (if any)—
>
> (a) sales rebates;
>
> (b) taxes directly related to the revenues.
>
> …
>
> (4) Subject to this section, the total gross revenues of an undertaking are to be calculated in accordance with generally accepted accounting principles."

9. Section 155A of the Ordinance provides that a pecuniary penalty may be enforced by the Tribunal in the same manner in which a judgment of the Court of First Instance for the payment of money may be enforced and, in particular, as a judgment debt due to the Registrar of the Tribunal.

C. The role of the Commission

10. The 2nd and 3rd respondents submit that the role of the Commission in relation to the assessment of pecuniary penalty is the same as that of a prosecutor in criminal sentencing. As such, they submit, the Commission should not be permitted to influence the Tribunal in relation to the quantum; nor should it be allowed to make submissions on the bounds of the available range of penalties.

11. As with some of the respondents' other submissions, the underlying theme of this contention is that these proceedings are to be treated in exactly the same way as classic criminal cases. I do not think this is the correct approach. Whilst, for the purposes of Art 11 of the Bill of Rights, the Commission has accepted that these proceedings involve the determination of a criminal charge,[5] and this Tribunal has concluded that the applicable standard of proof is proof beyond reasonable doubt,[6] it does not follow that, for all purposes and in all contexts, contravention of the conduct rules is to be regarded as a criminal offence or that these proceedings are to be regarded as a criminal trial and sentencing. On the contrary, s 171(1) of the Ordinance specifically provides that criminal proceedings for an offence under the Ordinance may *not* be brought in the Tribunal, demonstrating a legislative intent that contraventions of competition rules are not to be regarded as "offences" created by the Ordinance.

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5 Judgment, para 38.

6 Judgment, para 39.

12. Further, s 144(1) of the Ordinance provides:

> " The Tribunal may decide its own procedures and may, in so far as it thinks fit, follow the practice and procedure of the Court of First Instance *in the exercise of its civil jurisdiction*, and for this purpose, has the same jurisdiction, powers and duties of the Court in respect of such practice and procedure, including the jurisdiction, powers and duties of the Court in respect of costs." (emphasis added)

13. In fact, the proceedings both in the present case and in other cases in which pecuniary penalties are sought have been conducted in the Tribunal in a manner broadly similar to civil proceedings in the Court of First Instance, with pleadings and particulars, witness statements and the admission of hearsay evidence.

14. The Australian authority that the 2nd and 3rd respondents rely on for their submission, ie *Barbaro v R* [2014] HCA 2, has been held in Australia not to apply in the context of determination of financial penalties in competition cases, albeit such penalties are classified there as civil penalties: *Commonwealth v Director, Fair Work Building Industry Inspectorate & Others* [2015] HCA 46. In practice, in Australia, the regulator would recommend specific amounts to the court as appropriate penalties for contravention of competition law and it has been said that "the Court can quite properly receive either joint or separate submissions from the parties, and particularly a regulator, as to the facts and penalty": see *Australian Competition and Consumer Commission v Cement Australia Pty Ltd* [2016] FCA 453, §§30 & 208.

15. In any event, even in classic criminal cases in Hong Kong, as pointed out in the *Prosecution Code* of the Department of Justice,[7] a prosecutor has an active role to play in the sentencing process by assisting the court to impose the appropriate penalty and to avoid appealable error; see also *Cross and Cheung*, *Sentencing in Hong Kong* (8th ed), Ch 35.

16. Furthermore, to preclude the Commission from making submissions and recommendations in relation to pecuniary penalty would fundamentally undermine the programme designed to incentivise cooperation with the Commission on the part of undertakings and persons who may have contravened or been involved in a contravention of the Ordinance. Such programme is in principle consistent with the policy of the law, as discussed in section D8(a) below, and should not be unnecessarily obstructed.

17. Accordingly this Tribunal has not precluded the Commission from making submissions on the appropriate penalties including the proper approach and the amounts it recommends.

D. The proper approach for the determination of pecuniary penalties

D1. The Commission's submissions

18. The Commission submits that a principled methodological framework for the determination of pecuniary penalties is desirable and that the Tribunal should adopt an approach similar to those applied in the European Union ("**EU**") and the United Kingdom ("**UK**") respectively.

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7 At para 21.1.

19. In the UK, the penalty is imposed and fixed by the Competition & Market Authority ("**CMA**"), with appeals lying to the Competition Appeal Tribunal. In fixing a penalty, the CMA is by statute required to have regard to the seriousness of the infringement concerned and the desirability of deterring both the undertaking in question and others from infringement.[8] No penalty may exceed 10% of the worldwide turnover of the undertaking.[9] The approach for fixing the amount of the penalty is set out in its *Guidance as to the Appropriate Amount of a Penalty* (18 April 2018) ("***CMA Guidance***"), which the CMA is required by law[10] to prepare and publish, and to which the CMA and the Competition Appeal Tribunal "must have regard" when setting the amount of a penalty.[11] As provided in the *CMA Guidance* at §§2.1–2.33, the determination of a financial penalty imposed by the CMA under s 36 of the (UK) Competition Act 1998 follows a six-step approach:

(1) calculation of the starting point having regard to the seriousness of the infringement, the need for general deterrence and the relevant turnover of the undertaking;

(2) adjusting for duration;

(3) adjustment for aggravating or mitigating factors;

(4) adjustment for specific deterrence and proportionality;

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[8] Section 36(7A) of the Competition Act 1998.

[9] Section 36(8) of the Competition Act 1998; calculated in accordance with The Competition Act 1998 (Determination of Turnover for Penalties) Order 2000 (SI 2000/309) as amended by SI 2004/1259.

[10] Section 38(1) of the Competition Act 1998.

[11] Section 38(8) of the Competition Act 1998.

(5) adjustment if the maximum penalty of 10% of the worldwide turnover of the undertaking is exceeded and to avoid double jeopardy; and

(6) adjustment for leniency, settlement discounts and/or approval of a voluntary redress scheme.

20. In the EU, fines for infringement of the Treaty provisions on competition law[12] are imposed by the European Commission, subject to appeal to the General Court which has unlimited jurisdiction to review decisions fixing a fine.[13] Article 23 of Regulation 1/2003[14] provides, *inter alia*, that the fine shall not exceed 10% of an undertaking's total turnover in the preceding business year and that in fixing the amount of the fine, regard shall be had both to the gravity and duration of the infringement. The detailed approach of the European Commission for fixing the amount of a fine is explained in its published *Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003* [2006] OJ C210/2 ("***EU Guidelines***"). These guidelines set out a two-step methodology.

21. First, a "basic amount" for the fine is determined as a proportion of the value of the sales to which the infringement relates during the last full business year of its participation in the infringement, multiplied by the number of years of infringement. This proportion depends on the gravity of the infringement, assessed on a case-by-case basis taking account of all the relevant circumstances, including the nature of the infringement,

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12 Articles 101 and 102 of the Treaty on the Functioning of the European Union.

13 Article 31 of Regulation 1/2003.

14 Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty.

the combined market share of all the undertakings concerned, the geographic scope of the infringement and whether or not the infringement has been implemented. As a general rule, the proportion may be set at a level of up to 30% of the value of sales. An amount of between 15% and 25% of the value of sales will be included in the basic amount to deter undertakings from even entering into horizontal price-fixing, market-sharing and output-limitation agreements; this is sometimes called the "entry fee" to a cartel.

22. The second step involves taking into consideration circumstances that result in an adjustment to the basic amount. This is done on the basis of an overall assessment which takes account of all the relevant circumstances. Five specific matters are mentioned in the *EU Guidelines*:

(1) aggravating circumstances, which may lead to an increase from the basic amount; examples set out include where an undertaking is a recidivist, refusal to cooperate with or obstruction of the European Commission in its investigation, and acting as leader or instigator of the infringement;

(2) mitigating circumstances, which may lead to a reduction of the basic amount; the examples mentioned are early termination of infringement upon intervention by the European Commission, negligent (as opposed to intentional) infringements, limited involvement in the infringement, cooperation with the European Commission outside the scope of the leniency notice, and where the infringing conduct has been authorised or encouraged by public authorities or by legislation;

(3) specific increase for deterrence, for example where the undertakings have a particularly large turnover beyond the sales to which the infringement relates;

(4) the leniency rules and any applicable leniency notice; and

(5) in exceptional cases, the undertaking's inability to pay may be taken into account.

23. Drawing from the EU's and UK's practice, the Commission advocates a seven-step approach as follows.

(1) Step 1 involves the determination of a base penalty, by applying a "gravity percentage" to the value of the undertaking's sales directly or indirectly related to the contravention in the relevant geographic area within Hong Kong. The initial sum thus obtained is then multiplied by the number of years of the undertaking's participation in the contravention to derive the base penalty.

(2) Step 2 involves consideration of aggravating and mitigating circumstances, leading to an increase and decrease respectively of the base penalty expressed as a percentage.

(3) Step 3 involves an uplift to the base penalty where the person has previously been found to have contravened the Ordinance.

(4) Step 4 involves consideration of the loss or damage, if any, caused by the conduct.

(5) Step 5 involves possible adjustment for specific deterrence.

(6) Step 6 involves the application of the statutory cap in s 93(3).

(7) Step 7 involves the application of any reduction to reflect cooperation with the Commission.

24. According to the Commission's submissions, application of this approach (and including a possible downward adjustment of $50,000 as a "buffer") would yield the following results:

Name	**Recommended Range of Pecuniary Penalty after Steps 1 to 5 (HKD)**	**Statutory Cap (HKD)**	**Recommended Range or Amount of Pecuniary Penalty (*after* Statutory Cap and rounded down to the nearest thousand HKD)**
1st Respondent	1,030,658 - 1,080,658	37,800,033	1,030,000 - 1,080,000
2nd Respondent	267,858 - 317,858	132,441	132,000
3rd Respondent	715,456 - 765,456	318,940	318,000
4th Respondent	656,471 - 706,471	1,825,263	656,000 - 706,000
5th Respondent	903,885 - 953,885	397,452	397,000
6th Respondent	299,315 - 349,315	145,548	145,000
7th Respondent	703,261 - 753,261	313,859	313,000
8th Respondent	946,796 - 996,796	415,332	415,000
9th Respondent	1,135,130 - 1,185,130	2,417,376	1,135,000 - 1,185,000
10th Respondent	958,914 - 1,008,914	420,381	420,000

D2. The respondents' submissions

25. The 1st respondent is "generally agreeable" to the seven-step approach put forward by the Commission, and only takes issue on how this framework is applied in so far as the 1st respondent is concerned.

26. The 2nd and 3rd respondents submit that the imposition of pecuniary penalties is a process of criminal sentencing, that flexibility consonant with the discretionary judgment in a sentencing exercise should be retained, that a process of what has been called "instinctive synthesis" in Australian cases should be preferred, and that a mathematical and two-tier or multi-step approach for fixing the penalty such as that practised in the EU and UK should not be adopted.

27. The Australian approach has been described as follows:[15]

> " The fixing of a pecuniary penalty pursuant to s 76 of the Competition and Consumer Act involves the identification and balancing of all the factors relevant to the contravention and the circumstances of the contravenor, and making a value judgment as to what is the appropriate penalty in light of the protective and deterrent purpose of a pecuniary penalty."

This process includes the following features:[16]

> " 4. The Court should not adopt a mathematical approach of increments or decrements from a pre-determined range, or assign specific numerical or proportionate value to the various relevant factors;
>
> 5. It is not appropriate to determine an 'objective' sentence and then adjust it by some mathematical value given to one or more factors such as a plea of guilty or assistance to authorities;
>
> 6. The Court may not add and subtract item by item from some apparently subliminally derived figure to determine the penalty to be imposed."

28. The 2nd and 3rd respondents advocate for an instinctive synthesis to replace the Commission's Steps 1 to 5, but accept that the

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15 *Australian Competition and Consumer Commission v Australia and New Zealand Banking Group Ltd* [2016] FCA 1516 at §84.

16 *Australian Competition and Consumer Commission v Renegade Gas Pty Ltd (trading as Supagas NSW)* [2014] FCA 1135 at §80.

statutory cap and discount for cooperation (ie Step 6 and Step 7 in the Commission's approach) should be retained and applied at the end as they serve "non-sentencing purposes".[17] In particular, they accept that the statutory cap is not to be taken into account in arriving at the penalty in the instinctive synthesis, and is only to be applied after assessing what the penalty should be, to make sure the ceiling is not exceeded.

29. The 4th respondent makes no submission on the general approach.

30. The 5th respondent agrees with the Commission that a "principled and methodological approach" should be adopted for the determination of pecuniary penalty and that the EU and UK methods are to be preferred to the Australian approach. It is also "in broad agreement" with the Commission's seven-step approach subject to three points:

(1) First, the statutory maximum penalty should be reserved for the most serious offence of its type. It is not reasonable to propose the imposition of the maximum penalty in the present case (which the Commission's submissions will lead to, in the case of all the respondents except the 1st, 4th and 9th respondents).

(2) Secondly, proportionality should be considered in Step 5 and the Tribunal may make appropriate downward adjustment having regard to an undertaking's size and financial position to ensure that the penalty is not disproportionate.

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[17] *per* McHugh J in *Markarian* at §74.

(3) Thirdly, the Tribunal ultimately retains the power and discretion to reduce the penalty in a case where the undertaking would otherwise experience financial hardship, and should not impose penalties exceeding a certain percentage (eg 50%) of the undertaking's adjusted net assets or net profit after tax.

31. The 6th, 7th, 8th and 10th respondents "do not take issue with" the framework proposed by the Commission and agree that the Tribunal is entitled to adopt it, but they also put forward a number of principles on sentencing that they ask the Tribunal to take into account, including that the maximum fine should not be imposed where the case is not the worst of its kind.

32. Like the 2nd and 3rd respondents, the 9th respondent advocates for the adoption of the Australian approach. As a fall-back position, it is submitted that the Tribunal is not confined to the mitigating circumstances set out in the *EU Guidelines* and the *CMA Guidance* and that a number of other circumstances relating to the 9th respondent are relevant and should be taken into account.

D3. Whether a multi-step approach should be adopted

33. The overarching question raised by the competing submissions is whether it is open to and appropriate for this Tribunal to adopt a multi-step methodology for assessing the pecuniary penalty.

34. While the language of s 93(2)(a)-(d) is, as counsel for the 2nd, 3rd and 9th respondents respectively submit, close to s 76 of the Competition

and Consumer Act 2010 (Cth) of Australia,[18] this is in my opinion not necessarily an indication of a legislative intention that the Australian approach in the assessment of penalties should be followed. On the whole, those parts of the Ordinance that lay down the conduct rules and the efficiency defence are clearly modelled on the equivalent provisions in the EU. For the purposes of enacting s 93, reference was made to Australian legislation because it served as a model for the design of the judicial enforcement regime, which Hong Kong has adopted in preference to the administrative enforcement model in the EU and the UK. Neither the Australian provision nor s 93, however, stipulates whether expressly or implicitly any specific approach or methodology in determining pecuniary penalties except that the tribunal is mandated to have regard to certain specified considerations and the amount of penalty is subject to a statutory cap.

35. Section 93(3), which sets out the statutory cap, is in fact closer to Singaporean legislation,[19] which provides for a ceiling of 10% of the undertaking's annual turnover in Singapore for each year of infringement up to a maximum of three years. The approach adopted by the Competition and Consumer Commission of Singapore for calculating financial penalties

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[18] Section 76 provides:

"If the Court is satisfied that a person:

(a) has contravened any of the following provisions: …

the Court may order the person to pay to the Commonwealth such pecuniary penalty, in respect of each act or omission by the person to which this section applies, as the Court determines to be appropriate having regard to all relevant matters including the nature and extent of the act or omission and of any loss or damage suffered as a result of the act or omission, the circumstances in which the act or omission took place and whether the person has previously been found by the Court in proceedings under this Part or Part XIB to have engaged in any similar conduct."

[19] Section 69(4) of the Competition Act (Chapter 50B).

is a structured six-step approach similar in substance to that applied in the UK and the EU.[20]

36. The purpose of the Ordinance, as stated in its long title, is, *inter alia*, to prohibit conduct that prevents, restricts or distorts competition in Hong Kong. This is to be achieved by having a regulator, ie the Commission, that conducts investigation and brings enforcement proceedings, and a judicial tribunal, ie the Tribunal, which hears enforcement actions and imposes sanctions where infringement is found. As the primary sanction provided for in the Ordinance, the pecuniary penalty serves the principal purpose of deterring undertakings from anti-competitive conduct. It is through this sanction that undertakings are to be deterred from activities which might otherwise be highly profitable to them and competition norms are reinforced for all including the law-abiding. Speaking of the financial penalties provided for in s 76 of the Trade Practices Act 1974,[21] French J said in *Trade Practices Commission v CSR Ltd* (1991) 13 ATPR 41-076 at §40 that retribution and rehabilitation had no role to play and that:

> " The principal, and I think probably the only, object of the penalties imposed by s.76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act."[22]

37. In my view, the object of deterrence is best served in Hong Kong by a structured and methodological approach. Contraventions of

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[20] See the Competition and Consumer Commission of Singapore's *Guidelines on the Appropriate Amount of Penalty in Competition Cases*.

[21] Now known as the Competition and Consumer Act 2010.

[22] Adopted by the High Court of Australia in *Commonwealth v Director, Fair Work Building Industry Inspectorate & Others*, at §55.

competition law "do not occur as a result of passion or accident".[23] They are often the result of conscious attempts to achieve financial gain. Through the pecuniary penalty, the law imposes a "price on contravention" in order to deter undertakings from engaging in anti-competitive conduct. Such deterrence works better the more transparent and predictable the process of determining the penalty.

38. This is not to say that the Australian approach necessarily lacks certainty and predictability. The approach adopted by each jurisdiction does not operate in a vacuum but on the basis of an entire body of jurisprudence, social trends, consensus and traditions. In *Markarian v The Queen* (2005) 228 CLR 357 at §76, McHugh J said:

> " In fact, although a sentencing judge does ultimately select a number, it is not from thin air that the judge selects it. The judicial air is thick with trends, statistics, appellate guidance and, often enough these days, statutory guidance."

39. In Hong Kong, however, where competition law is still a nascent subject, a structured approach is in my view necessary to provide the desirable level of certainty, clarity and transparency in the assessment of the pecuniary penalty. In Australia itself, it was recognised that:

> " The law strongly favours transparency. Accessible reasoning is necessary in the interests of victims, of the parties, appeal courts, and the public. There may be occasions when some indulgence in an arithmetical process will better serve these ends."[24]

40. Starting with a base amount that is linked to the volume of commerce affected by the contravention, as involved in the structured

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[23] *Australian Competition and Consumer Commission v ABB Transmission and Distribution Limited (No 2)* [2002] FCA 559, §14, *per* Finkelstein J.

[24] *Markarian v The Queen* at §39.

approach, also serves to take account, in some measure, of the likely gain made by the undertaking and the harm to society flowing from the contravention, and thereby to deter any cynical calculation that it may be worth the risk of detection and sanction. This is a practice adopted by many jurisdictions apart from the EU, UK and Singapore, including Germany, Japan, Korea and the United States.[25]

41. Furthermore, greater predictability of outcome in penalty also serves the public policy involved in promoting cooperation with the regulator. As the High Court of Australia observed in *Commonwealth v Director, Fair Work Building Industry Inspectorate*, *supra*, at §46:

> " such predictability of outcome encourages corporations to acknowledge contraventions, which, in turn, assists in avoiding lengthy and complex litigation and thus tends to free the courts to deal with other matters and to free investigating officers to turn to other areas of investigation that await their attention."

42. While they eschew a structured methodology, Australian authorities show that much the same kind of considerations as proposed by the Commission here are taken into account in determining penalties for breach of competition law: see the list of factors in French J's judgment in *Trade Practices Commission v CSR Ltd* at §42; [26] and *Australian*

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[25] See OECD (2018) *Pecuniary Penalties for Competition Law Infringements in Australia*, Ch 3.4.

[26] 1. The nature and extent of the contravening conduct; 2. The amount of loss or damage caused; 3. The circumstances in which the conduct took place; 4. The size of the contravening company; 5. The degree of power it has, as evidenced by its market share and ease of entry into the market; 6. The deliberateness of the contravention and the period over which it extended; 7. Whether the contravention arose out of the conduct of senior management or at a lower level; 8. Whether the company has a corporate culture conducive to compliance with the Act, as evidenced by educational programs and disciplinary or other corrective measures in response to an acknowledged contravention; 9. Whether the company has shown a disposition to co-operate with the authorities responsible for the enforcement of the Act in relation to the contravention.

Competition and Consumer Commission v Coles Supermarkets Australia Pty Ltd (2015) 327 ALR 540, §§8-9.

43. While the EU Commission and the UK CMA are executive enforcement agencies, the approach they have adopted for determining financial penalties is in my opinion not inconsistent with the judicial function of the Tribunal in determining the amount of penalties under the judicial enforcement model in Hong Kong. The penalties imposed in those jurisdictions are frequently upheld by the EU courts and the UK Competition Appeal Tribunal respectively. In the US, where fines are imposed by courts, there are also sentencing guidelines that suggest that, for antitrust contraventions, a base fine is determined in a similar way as a percentage of the volume of commerce affected, before aggravating and mitigating elements and, finally, a maximum statutory limit, are then taken into consideration.[27]

44. I am also satisfied that in contrast with the "weight of authority"[28] that exists in Australia against a tiered approach, there is nothing in Hong Kong jurisprudence that precludes its adoption. Even in sentencing for criminal offences, Hong Kong courts regularly adopt an approach that begins with identifying a starting point based on gravity and blameworthiness, before making enhancement and reduction on account of

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[27] See *US Sentencing Guidelines*, §2R1.1, where it is also stated in the commentaries: "Tying the offense level to the scale or scope of the offense is important in order to ensure that the sanction is in fact punitive and that there is an incentive to desist from a violation once it has begun. The offense levels are not based directly on the damage caused or profit made by the defendant because damages are difficult and time consuming to establish. The volume of commerce is an acceptable and more readily measurable substitute".

[28] See *Markarian v The Queen* at §37, quoting from *Wong v The Queen* (2001) 207 CLR 584 at §76.

aggravating and mitigating factors respectively: see eg *HKSAR v Islam Azharul* [2020] HKCA 29.

45. For all these reasons, I consider that a structured methodological approach should be adopted in Hong Kong.

D4. The proper approach

46. In my opinion, the determination of the pecuniary penalty under the Ordinance should be approached in four main steps:

Step 1	determining the Base Amount
Step 2	making adjustments for aggravating, mitigating and other factors
Step 3	applying the statutory cap
Step 4	applying cooperation reduction and considering plea of inability to pay, if any

47. As will be seen, this is not fundamentally different from the approach advocated by the Commission, but involves a re-grouping of the constituent elements into what I consider to be a broadly based scheme. These elements will be further explained below.

D5. Step 1 — determining the Base Amount

48. The starting point is the determination of the "**Base Amount**". This is intended to reflect in broad terms one of the mandatory considerations set out in s 93(2) of the Ordinance, namely, the nature and extent of the conduct which constitutes the contravention.

Value of Sales

49. As a starting point, the value of the undertaking's sales directly or indirectly related to the contravention in the relevant geographic area within Hong Kong in the financial year in question ("**Value of Sales**") is identified as a metric that seeks to capture a sense of the scale of the infringement, which is relevant to the potential impact of the conduct on the public weal. Value of Sales is a different concept from the turnover of the undertaking since it refers not to the revenues from all of the undertaking's activities but only from the affected commerce.

Gravity Percentage

50. To reflect the seriousness of the conduct in question, a "**Gravity Percentage**" will be identified, to be applied to the Value of Sales. The percentage itself is not calculated by any scientific method but provides a broad scale to reflect the gravity and blameworthiness of the conduct. For serious anti-competitive conduct (as defined in the Ordinance[29]), the range of 15% to 30% suggested by the Commission appears to be broadly in line with international practice and, in my view, appropriate for Hong Kong as well. While the Gravity Percentage is not to be directly equated with the likely cartel overcharge in respect of the contravention, it may be noted that

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[29] "serious anti-competitive conduct" is defined in s 2 to mean

"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".

studies have suggested that the median cartel overcharge in other jurisdictions lies between 17% and 30%.[30]

Duration Multiplier

51. To reflect the temporal extent of the conduct in question, the amount thus obtained is multiplied by the number of years of the undertaking's participation in the contravention ("**Duration Multiplier**") to derive the Base Amount. This also provides an incentive for an infringing undertaking to cease its contravention as soon as possible.

D6. Step 2 — making adjustments for aggravating, mitigating and other factors

52. Step 2 is a broad process that involves consideration of the surrounding circumstances, in a wide sense, that may have a bearing on the proper penalty.

53. As provided in s 93(2)(c) of the Ordinance, the circumstances in which the conduct took place must be taken into account. This exercise includes consideration of aggravating circumstances and mitigating circumstances, leading to an increase and decrease respectively of the Base Amount.

54. Not all of the factors mentioned in the Commission's submissions have relevance to the present case. For the record, the Commission submits that aggravating circumstances may include where an

[30] Connor, J. M. & Bolotova, Y., (2006) *Cartel overcharges: survey and meta-analysis*, International Journal of Industrial Organisation, 24(6), 1109-1137; Connor, J. M. & Lande, R. H., *The Size of Cartel Overcharges: Implications for U.S. and EC Finding Policies*, 51 Antitrust Bull. 983 (2006), at 1019.

undertaking acts as a leader in or instigator of the contravention; where it takes coercive or retaliatory measures against other persons to ensure the implementation, continuation or concealment of the contravention; where directors and senior management are involved in the contravention; where the conduct is of a particularly egregious nature; where the anti-competitive practice is reflective of widespread industry practice such that there is a need for general deterrence; where the conduct is serious anti-competitive conduct and the undertaking has continued with it despite being aware of the Commission's investigation; and where an undertaking obstructs the Commission's investigation. Since the Commission does not contend for any increase on account of any aggravating circumstances in the present case, it is not necessary to discuss them.

55. The Commission submits that mitigating circumstances may include where there was genuine uncertainty as to the lawfulness of the conduct in question; where the undertaking's participation in a contravention is limited; and where an undertaking has taken steps to ensure genuine compliance with the Ordinance that reflect a corporate commitment to competition compliance.

56. Another mandatory consideration, set out in s 93(2)(b) of the Ordinance, is the loss or damage, if any, caused by the conduct. Where specific and concrete loss or damage is evident, there may well be justification for increasing the amount of penalty, but I do not think it is the legislative intention for the Tribunal to have to embark upon a detailed quantitative analysis in every case for the sole purpose of determining the penalty. As submitted by the Commission, where the Tribunal would have already implicitly given some consideration to the likely loss or damage caused by an infringement by object when determining the Gravity

Percentage in Step 1, a further adjustment to the figures on account of loss and damage may not be necessary; see also §§99-100 below.

57. Also encompassed within this stage is the question whether the person in question has previously been found to have contravened the Ordinance, ie the mandatory consideration set out in s 93(2)(d) of the Ordinance. Where there is a previous contravention, one can expect an uplift to the Base Amount, having regard (without limitation) to whether there is more than one previous contravention; the time lag between the previous and current contraventions; whether any of the individuals involved in the previous contravention are connected with the current contravention; and the nature of the previous contravention.

58. The Commission submits that another possible consideration to take into account is specific deterrence, ie to deter those persons who have been found to have contravened or been involved in a contravention of a conduct rule from engaging in further anti-competitive practices. As no adjustment has been suggested for the present case on this basis, it is unnecessary to discuss this further.

59. Proportionality is relevant throughout the process of assessment but should in particular be considered here to give an overall sense check. It is important to stand back and look to see whether, subject to the subsequent steps, the amount arrived at would be a just and proportionate penalty for the contravention by the undertaking in the circumstances.

D7. Step 3 — applying the statutory cap

60. Step 3 involves the application of the statutory cap stipulated in s 93(3). The Commission submits that the Tribunal should first arrive at the provisional amount of the penalty by the earlier steps without regard to the statutory cap. Where the amount so calculated exceeds the cap, the statutory maximum is to be imposed (subject to any final adjustments in the last step).

61. The 2nd and 3rd respondents also submit[31] that the statutory cap (as well as the cooperation reduction referred to in the next step) is not to be taken into account in arriving at the penalty in the instinctive synthesis, and is only to be applied after assessing what the penalty should otherwise be, to make sure the ceiling is not exceeded. This, it is said, is permissible within the instinctive synthesis approach because these matters are "not related to sentencing purposes".[32]

62. In contrast, some of the other respondents submit that the statutory cap should be viewed as the "maximum sentence", to be reserved for a case that is the worst case of its kind that can be realistically envisaged, citing criminal authorities such as *R v Harrison* [1909] 2 Cr App R 94 and *HKSAR v Tran Van Ha* (unrep, HCMA 1000/2002, 20 December 2002).

63. True maximum sentences prescribed in the statute, such as a maximum period of imprisonment and a fixed maximum amount of fine, are regarded as providing a legislative view of the seriousness of the crime

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[31] In their written submissions it was contended that the maximum penalty should be reserved for the more serious cases, but in oral submissions counsel accepted that the statutory cap should only be taken into account towards the end after the *prima facie* penalty has been assessed.

[32] *Markarian v The Queen* [2005] HCA 25, §74, *per* McHugh J.

in question: *R v Lawrence* (1980) 32 ALR 72, 110; *Attorney General v Ho Yu Ping* (CAAR 8/1993, 10 September 1993); *Attorney General v Chan Ching-ho* [1994] 2 HKCLR 218, 220. The issue is whether the statutory cap in s 93(3) should be viewed in this way.

64. The statutory cap is calculated by reference to overall turnover of an undertaking, not the value of the kind of sales affected by the infringement. While the Ordinance follows the EU and the UK in adopting a limit of 10% of the turnover, s 93(3) differs in that (1) the turnover is confined to revenues obtained in Hong Kong as opposed to worldwide turnover; and (2) the limit is applied for each year of infringement up to a maximum of 10% of the turnover for the 3 years with the highest turnover. In these two respects s 93(3) is similar to the equivalent provision in Singapore.[33]

65. In all these jurisdictions the legal limit is applied only towards the end of the process of assessment so as to ensure that the maximum is not exceeded, and not treated as part of the general considerations in arriving at the amount of the penalty in the first place.[34] In this way the statutory cap functions as an ultimate backstop which, on a general level, takes into account the impact of the penalty on the finances of the undertaking.

66. In my view the same approach should be applied under the Ordinance. The statutory limit is based on the general turnover of an

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[33] Section 69(4) of the Competition Act (Chapter 50B).

[34] *EU Guidelines*, paras 32-33; *CMA Guidance*, para 2.25; Competition and Consumer Commission of Singapore's *Guidelines on the Appropriate Amount of Penalty in Competition Cases*, para 2.19.

undertaking, which has no intrinsic relationship to the scale and impact of the infringement. A large undertaking with a high general turnover can commit a contravention in relation to a particular product with a low Value of Sales, with the rest of its turnover being derived from a range of other activities wholly unrelated to the infringement. Conversely, a small undertaking's turnover may consist entirely of the Value of Sales relevant to its contravention. In designating a legal limit by reference to general turnover, the legislature seems to me to be providing for a long stop, to draw a line in terms of turnover beyond which the penalty will not reach, rather than providing a scale to measure the seriousness of the infringement. The statutory cap in s 93(3) is more akin to a jurisdictional limit than and different in nature from provisions stipulating, for example, the maximum period of imprisonment or the maximum fine in fixed monetary terms for an offence.

67. With respect, the respondents' submission is an opportunistic one. If the respondents were large conglomerates with a high overall turnover, of which their revenues derived from On Tat Estate were but a tiny fraction, one suspects that they would be saying that their turnover had no relation at all to the assessment of the appropriate penalty. Similarly, if the Legislature were to amend s 93(3) to increase the limit, I doubt if any respondent would say that such a move indicated a new legislative view of the seriousness of contravention of competition law, to be reflected in higher penalties generally.

D8. Step 4 — applying cooperation reduction and considering plea of inability to pay

(a) Cooperation reduction

68. Step 4 involves the application of reduction to reflect cooperation with the Commission.

69. An incentive in the form of a possible reduction in the amount of pecuniary penalty to encourage cooperation with the regulator is a feature commonly found in competition law systems around the world and, in my view, an appropriate factor to be taken into account by the Tribunal in setting the fine. As this Tribunal said in *Competition Commission v Nutanix Hong Kong Ltd & Others* [2018] HKCT 1 at §29:

> " Leniency is an important investigative tool found in the competition law and practice of many jurisdictions to combat cartels. Hard-core cartels are virtually universally condemned by competition authorities as being economically harmful. By their very nature they are also usually difficult to detect, investigate and prove. This has led to the adoption of leniency programmes which are, in essence, schemes designed to reward co-operation by a cartel member to aid in exposing cartels. A leniency programme operated by an enforcement agency typically offers persons involved in a cartel immunity from fines (or sometimes a reduction) which might otherwise be imposed, in return for cooperation, often in the form of provision of information and evidence. The value of such a programme extends beyond dealing with the immediate case to creating "a general climate of uncertainty among potential cartel members which may inhibit the actual formation of cartels"."

70. While that was said in relation to leniency, and leniency agreement as mentioned in s 80 of the Ordinance refers to an agreement not to bring or continue proceedings for a pecuniary penalty,[35] similar

[35] See the Commission's *Leniency Policy for Undertakings Engaged in Cartel Conduct* published in November 2015.

considerations apply to lesser incentives such as a reduction in the amount of the pecuniary penalty imposed on an undertaking that does not benefit from a leniency agreement.

71. In the enforcement system adopted under the Ordinance, it is, of course, for the Tribunal rather than the Commission to determine the amount of any pecuniary penalty in the first instance. There is, however, as stated above, nothing to prevent the Commission from recommending to the Tribunal a reduction for cooperation.

72. In the case of cartel conduct, the cooperation reduction that the Commission will recommend will be the sum of discounts determined in accordance with the Commission's *Cooperation and Settlement Policy for Undertakings Engaged in Cartel Conduct* (April 2019). There is, in particular, a gradation of the recommended discount based upon the order in which undertakings have expressed their interest to cooperate.

73. As none of the respondents in this case has any claim for reduction for cooperation, this is not the occasion to consider in detail the effect of, or the weight to be placed on, the Commission's recommendation of a reduction of penalty. As a matter of principle, the following may be said:

(1) The Tribunal, as an independent tribunal, is not bound by any such recommendation of the Commission.

(2) The Tribunal may, however, properly have regard to the Commission's recommendation bearing in mind the policy justifications. As the Tribunal said in *Competition*

Commission v Nutanix Hong Kong Ltd & Others [2018] HKCT 1 at §58:

> " … there is in my view an at least equally strong public interest in facilitating the kind of cooperation and settlement envisaged in the Leniency Policy (as well as other forms of cooperation and settlement referred to below in relation to Class 5). Such arrangements enable the Commission to carry out its investigations more efficiently, save the public time and costs, and (especially in the case of settlement) give early redress to any harmful conduct, thereby benefitting society as a whole."

(3) It is appropriate that the cooperation reduction is dealt with *after* applying the statutory cap, to ensure that even if the pecuniary penalty would already be limited by the statutory cap, there would still be a real benefit for someone to offer cooperation. Otherwise one could find a situation where the cooperation reduction was rendered immaterial and therefore provided no incentive, because both the original and reduced amounts would exceed the statutory cap.

(b) Inability to pay

74. In many jurisdictions it is recognised that exceptionally, a firm's financial inability to pay the penalty may be taken into account to justify a reduction of the amount assessed. In the *EU Guidelines*, it is stated:[36]

> " In exceptional cases, the Commission may, upon request, take account of the undertaking's inability to pay in a specific social and economic context. It will not base any reduction granted for this reason in the fine on the mere finding of an adverse or loss-making financial situation. A reduction could be granted solely on the basis of objective evidence that imposition of the fine as provided for in these Guidelines would irretrievably

[36] At §35.

> jeopardise the economic viability of the undertaking concerned and cause its assets to lose all their value."

A reference to financial hardship in exceptional circumstances is also found in the *CMA Guidance*.[37]

75. As explained in section E4(b) below, while the point has been raised by the 5th respondent in this case, there is no sufficient material to engage the question and it is unnecessary to discuss the principles involved.

E. Application to the respondents

76. The above approach will be applied to the respondents as shown below.

E1. Step 1 — Base Amount

(a) Value of Sales

77. The Value of Sales of each respondent, being the value of its respective sales directly or indirectly related to the contravention within Hong Kong, has been calculated by the Commission based on each respondent's work orders and invoices issued for renovation works at On Tat Estate (Phase 1). Subject to the arguments raised by the 1st and 4th respondents dealt with below, the amounts are not in dispute and are as follows:

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[37] At §2.33.

Name	Value of Sales (HKD)
1st Respondent	4,502,740
2nd Respondent	1,324,410
3rd Respondent	3,189,400
4th Respondent	2,943,630
5th Respondent	3,974,520
6th Respondent	1,455,480
7th Respondent	3,138,588
8th Respondent	4,153,318
9th Respondent	4,938,040
10th Respondent	4,203,810

78. The 1st respondent submits that whilst the works done in the name of "W. Hing Construction Company Limited" at On Tat Estate (Phase 1) amounted to $4,502,740, its Value of Sales should be taken as only $200,000, being the lump sum it received from its subcontractor for the right to work in that name.[38] I reject this contention. The contravention of competition law that has occurred is that committed by the single undertaking that carried on renovation business in the Estate in the name of W. Hing, in the form of making and giving effect to the Floor Allocation Arrangement and the Package Price Arrangement; the contravention is not the transfer of the "licence" by the 1st respondent to its subcontractor. The correct focus is on the Value of Sales in relation to the contravention found of the undertaking responsible. For the undertaking comprising the 1st respondent, the Value of Sales is therefore $4,502,740.

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[38] See paras 287-288 of the Judgment.

79. There is no dispute that the value of the work orders done at On Tat Estate (Phase 1) in the name of Tai Dou Building Contractor is $2,943,630. The 4th respondent submits, however, that the person who carried on renovation business there was KC Ho, not the partnership Tai Dou or the two individuals named in the Originating Notice of Application, namely, Mr Cheung Yiu Fai Danny ("**Mr Cheung**") and Mr Wong Tung Hoi ("**Mr TH Wong**"). The Value of Sales of the 4th respondent is therefore nil.

80. This submission is also to be rejected. The undertaking that is alleged by the Commission and found by this Tribunal to have operated in On Tat Estate (Phase 1) and, in the course of such operations, contravened the first conduct rule is Tai Dou, the partnership, as an undertaking. The "sub-contractor defence" was held not open to the 4th respondent.[39] In any event, having regard to the Tribunal's conclusions with respect to the defence raised by the 1st and 9th respondents, it would not have absolved the 4th respondent altogether. At most it would have meant that KC Ho together with Tai Dou constituted the relevant undertaking.

81. As is clear from the Originating Notice of Application, Mr Cheung and Mr TH Wong are proceeded against herein as persons "in partnership trading as TAI DOU BUILDING CONTRACTOR (大道建築公司)" although, as a partnership, Tai Dou was registered as having four partners including, in addition, Madam To Suet Chun and Mr Pacquet Wong (the brother of Mr TH Wong). The Response that the 4th respondent filed jointly with some other respondents did not in any way contend that the Commission has proceeded against the wrong person, and indeed

[39] See §324 of the Judgment.

contained a statement of truth signed by KC Ho as the "general manager of Tai Dou" on behalf of the 4th respondent.

82. It is asserted in Mr Cheung's witness statement filed for the sanctions hearing that he was a "salary partner" of Tai Dou, but it is not entirely clear what that means. His counsel did not advance an argument that he was not to be regarded as a partner of Tai Dou. In fact, Mr Cheung was stated in Tai Dou's business registration to be a partner of Tai Dou. He entered into a written partnership agreement dated 19 November 2012 with the other three partners, and executed a power of attorney of the same date in favour of Pacquet Wong. He had been registered with the Buildings Department as an authorised signatory of Tai Dou from 2001 to 2019. Within Tai Dou he was entitled to 0.5% of the payments for construction projects under his supervision. The fact that he might not have received any share of profits from the renovation works carried out in On Tat Estate is simply the result of the partnership's own internal arrangement and does not mean Mr Cheung was not a partner.

83. Mr TH Wong asserts that he was a "silent partner" of Tai Dou and had not in fact received any share of profit from Tai Dou at all. He was, however, also a party to the partnership agreement and power of attorney dated 19 November 2012 and indisputably a partner of Tai Dou at all material times.

84. It is submitted that for the purposes of criminal law, a partnership is treated as a separate entity from the partners who are members of it. On this basis it is submitted that in proceeding against Mr Cheung and Mr TH Wong, the Commission has sued the wrong persons.

85. Counsel relies upon *R v W Stevenson & Sons (a Partnership) and others* [2008] 2 Cr App R 14, which is an English decision concerning offences of failing to submit a sales note containing the requisite details pursuant to the (UK) Sea Fishing (Enforcement of Community Control Measures) Order 2000. A partnership with eight partners was charged on indictments with such offences, was found guilty after trial on one indictment and pleaded guilty on the others. The partnership and the partners applied for leave to appeal, arguing that the indictments and convictions were nullities as they failed to identify the individual partners as defendants and were secured against an entity that had no separate legal status. In §30 of its judgment the English Court of Appeal said "there is no reason why a partnership should not be treated for the purposes of the criminal law as a separate entity from the partners who are members of it". It should be noted, however, that the court was there discussing the effect of specific statutory provisions under which a partnership, and its partners if certain conditions were met, could both be held liable for an offence.

86. Reliance has also been placed on the English decision of *Riley v Crown Prosecution Service* [2017] 1 WLR 505, where four partners of a partnership had been convicted for an offence under the Animal Welfare Act 2006 but the convictions of three of the partners were subsequently quashed because they were not criminally liable for the acts of the other partner without proof of their own requisite *mens rea* required for the offence.

87. In contrast with these two cases, we are not here concerned with criminal offences and *mens rea*. As explained in the Judgment,[40] while

[40] At §303.

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),[41] 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 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.

(b) Gravity Percentage

88. The Commission submits that a Gravity Percentage of 24% is appropriate in the present case for each of the respondents.

89. The 1st respondent submits that the Gravity Percentage applicable to itself should be much lower than that applicable to the 2nd to 8th and 10th respondents and should be in the region of 10% to 15%, because,

[41] Which provides that "person" includes "any public body and any body of persons, corporate or unincorporate, and this definition shall apply notwithstanding that the word 'person' occurs in a provision creating or relating to an offence or for the recovery of any fine or compensation".

having regard to the sub-contractor defence, the culpability of the 1st and 9th respondents is much lower. I reject this submission. As discussed in relation to Value of Sales above, the focus is on the undertaking and its contravention of the first conduct rule. The gravity of the contravention by the undertaking of which the 1st respondent formed part is essentially the same as that of the others. The role played by the 1st respondent within that undertaking is a matter to be taken into account, if at all, in Step 2 below.

90. The 6th to 8th and 10th respondents submit that the Gravity Percentage should be fixed at the lower end of the spectrum, at around 15-20%. The 9th respondent contends that 20% is sufficient to show disapproval of the conduct complained of and for general deterrence.

91. I am unable to accept the underlying premise of these contentions. It is to be recalled that the respondents are found to have contravened the first conduct rule by engaging in market sharing and price fixing, both of which are "serious anti-competitive conduct" as defined in the Ordinance. While the respondents may be relatively small enterprises (and this is reflected in the lower Value of Sales and statutory cap), the breaches in question are not technical or trivial as their submissions tend to suggest. These cartel arrangements represent some of the most serious kind of collusive conduct that directly strikes at how competitive markets are supposed to work.

92. The respondents decorated a total of 867 out of 2,582 flats in the Estate, representing an aggregate 38% of the tenants who engaged decoration contractors[42] and 100% of those who engaged Appointed DCs

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[42] See para 128 of the Judgment.

as their contractors. On either view this represents a substantial market share. Their conduct was calculated to and did eliminate competition among themselves who were mutually their closest direct rivals.

93. All of the respondents are found to have been primary contravenors as opposed to persons involved in contravention by others. The conduct in question targeted and affected low-income tenants from public rental housing estates, and was engaged in despite express warnings from the Hong Kong Housing Authority that Appointed DCs should not practise "pie-sharing".[43]

94. In these circumstances, I consider that 24% is the appropriate Gravity Percentage.

(c) Duration Multiplier

95. The Commission submits that a Duration Multiplier of 1 should be applied. Some of the respondents[44] submit that the multiplier should be 0.42 based on a period of 5 months (June to October 2016) in which the contravention in this case took place. They refer to two decisions of the European Commission in 2014 in which a multiplier of less than 1 was applied: *Swiss Franc Interest Rate Derivatives* (Case AT.39924) and *Power Exchanges* (Case AT.39952). Reliance is also placed on *Bellamy & Child, European Union Law of Competition* (8th ed), §14-031, where it is stated that rounding up the duration of the infringement for the purposes of determining the multiplier breaches the principles of proportionality and equal treatment. For its part, the Commission submits that the Duration

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43 See para 16 of the Judgment.

44 Especially the 1st and 9th respondents.

Multiplier is intended to be a *multiplier*, not a *divider*, and that both of the EU decisions referred to are settlement decisions not indicative of any principle or general practice. The statement in *Bellamy & Child* is based on the decision in Case T-566/08 *Total Raffinage Marketing v European Commission* EU:T:2013:423 at §§539-554, where the General Court criticised the EU Commission's decision to round up a period of infringement of 12 years and 7 months and 6 years and 6 months to 13 years and 7 years respectively for the purpose of calculating the fine. The court was not there dealing with a multiplier less than 1. Reliance is also placed on §2.16 of the *CMA Guidance* which states that where the total duration of an infringement is less than one year, the CMA will treat that duration as a full year for the purpose of calculating the number of years of the infringement.[45]

96. It is in my view unnecessary in the present case to resolve this debate on principle. The Value of Sales in this case captures for each respondent only the sales of that respondent within the period of infringement, rather than sales spread over an entire financial year. In other words, the Value of Sales is already limited to the 5 months in which the contravention occurred. There is no warrant to prorate the figures further to the period of infringement. It seems to me that to apply a Duration Multiplier of 0.42 would "double-count" the effect of time and would be unsound in principle. A Duration Multiplier of 1 is appropriate.

[45] See also Competition and Consumer Commission of Singapore's *Guidelines on the Appropriate Amount of Penalty in Competition Cases*, §2.11.

(d) Base Amount

97. On the above basis, the Base Amount for each respondent is calculated as follows:

Name	Value of Sales (HKD)	Gravity Percentage	Duration Multiplier	Base Amount (HKD)
1st Respondent	4,502,740	24%	1	1,080,658
2nd Respondent	1,324,410	24%	1	317,858
3rd Respondent	3,189,400	24%	1	765,456
4th Respondent	2,943,630	24%	1	706,471
5th Respondent	3,974,520	24%	1	953,885
6th Respondent	1,455,480	24%	1	349,315
7th Respondent	3,138,588	24%	1	753,261
8th Respondent	4,153,318	24%	1	996,796
9th Respondent	4,938,040	24%	1	1,185,130
10th Respondent	4,203,810	24%	1	1,008,914

E2. Step 2 — adjustments for aggravating, mitigating and other factors

98. I shall first consider whether there are aggravating factors. In terms of the mandatory consideration in s 93(2)(d) of the Ordinance, none of the respondents has previously been found to have contravened the Ordinance.

99. As regards the loss or damage caused by the conduct impugned, which is another mandatory consideration, I accept the Commission's submission that there is no adjustment required in this case since in having regard to the nature of the conduct under Step 1, the Tribunal has already implicitly taken account of the likely impact of the infringement. There is

no need for a detailed quantitative analysis at this stage of the effects of the restriction on competition.

100. The 2nd and 3rd respondents submit that the Tribunal should not make assumptions about the effects of the contravention on the tenants of On Tat Estate. I accept that the Tribunal should not assume any quantifiable loss suffered by the tenants. However, I do not accept the submission made by some of the respondents that the absence of evidence of specific quantifiable loss is a mitigating factor. In cases concerning infringement "by object", there will usually be no evidence adduced to prove the concrete effects of the anti-competitive conduct, because the essential feature of the types of coordination between undertakings that involve a restriction of competition by object is that they "reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects". "Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers": see Case C-67/13P *Groupement des Cartes Bancaires v European Commission*, cited in the Judgment at §105(1).

101. The Commission submits that there are two aggravating factors present in this case when one examines the circumstances in which the conduct took place:

(1) First, as far as the 5th and 8th respondents are concerned, there were directors and senior management involved in the contravention. However, given the relatively small size of the undertakings, their operations would be likely to involve their senior personnel. The Commission therefore does not contend for any increase on this account.

(2) Secondly, the Commission submits that there is evidence that the anti-competitive arrangements found in this case reflect long-running and widespread industry practice. However, in the circumstances of the present case, the Commission does not invite the Tribunal to make upward adjustments for this factor, though the Commission emphasises that this does not mean it would not seek an increase in other cases in future.

102. I accept that there is no uplift called for by the circumstances of the present case.

103. Turning to the matters put forward as mitigating circumstances, the 1st and 9th respondents submit that they did not directly participate in the conduct impugned, but that each of them became liable only as a result of letting their "licence" to a "subcontractor" who was found to have engaged in the infringing conduct. The details of their arrangements with their respective "sub-contractors" have been described in section H of the Judgment, where it was held that each of these two respondents formed an undertaking with its subcontractor in relation to the contravening conduct. While the Base Amount, as explained above, is assessed with reference to the undertaking, the fact that the penalty is sought only against the respondent is a factor that can, in my view, be taken into account in its assessment. In the circumstances of the present case, the association of the respondent and the subcontractor was an *ad hoc*, temporary one; they were not companies in a group or individuals in partnership. There may or may not be some private arrangement between the respondent and the subcontractor on the responsibility for the consequences of these proceedings, but the issue has not been inquired into, and I do not think that it would be right or safe to assume the respondent would be able to recoup

what it has to pay from the subcontractor. I consider that to reflect their role as part only of the undertaking in question, there should be a reduction of the Base Amount by one-third for the 1st and 9th respondents.

104. Although the 4th respondent was held not entitled to run the subcontractor defence to liability,[46] it is not seriously in dispute that, in fact, the renovations at On Tat Estate (Phase 1) were actually carried out by KC Ho in the name of Tai Dou, in a manner similar to the way in which the business was run directly by the subcontractors of the 1st and 9th respondents in the name of W Hing and Wide Project respectively. It seems to me that a similar reduction ought to be given to the 4th respondent.

105. The 3rd respondent is named as Ms Lau Chung Yan and Mr Lau Chun Kwok Adam (in partnership trading as Mau Hang Painting & Decoration Co). Mr Lau and Ms Lau are brother and sister. Mr Lau says in his statement that the business was established and run by their father as a sole proprietorship and transferred to them in January 2012 in view of his serious illness. Their father told them that all businesses in future could be passed to his friend Mr Chan Kam Shui who would share some of the profits with them. Mr Lau and Ms Lau themselves have no experience in the decoration industry at all. For the works in On Tat Estate (Phase 1), following their late father's instruction, they simply "passed" the project to Mr Chan who agreed to share profits with them in the fixed sum of $280,000. As such, although the 3rd respondent did not run the subcontractor defence at trial, it seems to me that based on Mr Lau's

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[46] See para 324 of the Judgment.

evidence, which was unchallenged, a similar reduction should in these exceptional circumstances be given to the 3rd respondent.

106. Many respondents have stressed that they are undertakings that are small in size and turnover, and that construction is a relatively low-margin activity compared to some other sectors. These are, in general terms, not disputed by the Commission. However, it may be noted that while construction work may in general have a relatively low margin, the gross profit margin for at least some of the Appointed DCs in On Tat Estate appeared to be considerable (over 30%, according to Chan Yiu Kwai's evidence for the 6th respondent; 31% for the 5th respondent — see §121 below; and see also §269 of the Judgment). Further, the fact that the respondents are not large corporations has been reflected in the relatively small Values of Sales and (for seven of them) in the penalties being capped with regard to their low turnovers.

107. Some of the respondents have submitted that the Ordinance was a new law and there was genuine uncertainty about its application to the arrangements in question. I do not think these matters carry much weight. As I have said in the Judgment (at §110), the infringements in this case are paradigmatic, not penumbral, cases. The respondents had been warned by the Housing Authority not to engage in pie-sharing. While this is only the second case in the Tribunal, in all the circumstances the novelty of the law does not in my view call for a reduction in the penalty (though it has an effect on costs as explained in section F below).

108. There is also a submission that the subcontractor defence was a novel point with no precedent even in overseas case law, and that this merits a reduction. The same factual situation and argument might not have arisen before, but the principles are far from novel. In any event, having regard to the adjustment that the Tribunal is prepared to make above, no further reduction for novelty in this defence is warranted.

109. Some of the respondents have stated that their registered status under the DC System of the Hong Kong Housing Authority has either been given up, or suspended or terminated. This may mean there is little risk of the particular respondent infringing the first conduct rule as an Appointed DC again in another public housing estate, and to that extent the need for specific deterrence is reduced. But apart from that I do not regard it as a weighty mitigating factor.

110. Some of the respondents submit that if costs are awarded against them, that liability would represent a significant additional punishment. This is not a trial of the respondents for criminal offences and I do not think a costs order itself should be looked upon as a punishment in the present context or aggregated with the pecuniary penalty.

111. Taking into account the adjustments above and rounding down to the nearest thousand dollars, and accepting the buffer of $50,000 as mentioned by the Commission, the provisional amounts at the end of Step 2 are as follows:

Name	Adjusted Amount after Step 2 (HKD)
1st Respondent	670,000
2nd Respondent	267,000
3rd Respondent	460,000
4th Respondent	420,000
5th Respondent	903,000
6th Respondent	299,000
7th Respondent	703,000
8th Respondent	946,000
9th Respondent	740,000
10th Respondent	958,000

E3. Step 3 — statutory cap

112. All the respondents, except the 4th respondents, have provided the Commission with their turnover figures for the financial year covering the period in question. The disclosed turnover of each of the 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents was equivalent to the Value of Sales in respect of that respondent in Step 1 above. In other words, these respondents claim not to have had any revenue in that financial year other than the income from the renovation works at On Tat Estate (Phase 1). Apart from the 5th respondent, these claims are not supported by any audited accounts (although some respondents have disclosed their tax assessments), though under s 55 of the Ordinance it is an offence for a person to provide materially false or misleading information to the Commission pursuant to its investigation. Counsel for the Commission have expressed scepticism for the low turnover figures of these respondents but it seems to me that, in

the absence of any forensic examination of this issue, this Tribunal should proceed for present purposes on the footing that their turnover was indeed limited to their respective Value of Sales.

113. The 1st and 9th respondents have disclosed audited accounts from which their turnover appear to be $378,852,482 and $24,173,762 respectively. It is arguable whether, in calculating the turnover of the undertaking that comprised each of these two respondents and its respective subcontractor, one should include the turnover of the subcontractor as well, but since nothing turns on this in this case, it is unnecessary to deal with this question.

114. Although it was initially assumed that the 4th respondent's turnover was limited to the Value of Sales ($2,943,630), based on the documents produced in Mr Cheung's witnesses statement and his oral evidence, it became clear that there were other projects done by Tai Dou generating income, such that its turnover for 2016 was at least $18,252,630 (including the Value of Sales for the renovation works at On Tat Estate (Phase 1)).

115. Applying the statutory cap to the amounts at the end of Step 2 and rounding down to the nearest thousand dollars produce the following results:

Name	Adjusted Amount (*but for* application of Statutory Cap) (HKD)	Statutory Cap (HKD)	Adjusted Amount (*after* Statutory Cap, and rounded down to the nearest thousand HKD)
1st Respondent	670,000	37,800,033	670,000
2nd Respondent	267,000	132,441	132,000
3rd Respondent	460,000	318,940	318,000
4th Respondent	420,000	1,825,263	420,000
5th Respondent	903,000	397,452	397,000
6th Respondent	299,000	145,548	145,000
7th Respondent	703,000	313,859	313,000
8th Respondent	946,000	415,332	415,000
9th Respondent	740,000	2,417,376	740,000
10th Respondent	958,000	420,381	420,000

116. It can be seen that except for the 1st, 4th and 9th respondents, the penalties on the other respondents have effectively been capped by the statutory cap and, as a result, limited to 10% of their takings in On Tat Estate (Phase 1). This has arisen because of the special circumstances of this case where the turnovers of those respondents were made up exclusively by their Value of Sales, so that although the penalties would otherwise be over 20%, they are capped at 10% of their Value of Sales. Conversely, the figures for the 1st and 9th respondents (and to a smaller extent, the 4th respondent) appear higher, even with the reduction mentioned in §§103-104 above, because (i) their Value of Sales are relatively high and (ii) the statutory cap does not "bite" in their case.

E4. Step 4 — cooperation reduction and inability to pay

(a) Cooperation reduction

117. In the circumstances of this case, none of the respondents has any claim for reduction in the penalty for cooperation.

(b) Inability to pay

118. The 5th respondent submits that the level of penalty recommended by the Commission is excessive and would cause it financial hardship and asks for a 40% discount to the proposed penalty. It is submitted that the overarching condition is whether the proposed penalty would seriously threaten the viability of the undertaking concerned. Relying on *GF Tomlinson Group Ltd & others v Office of Fair Trading* [2011] CAT 7, counsel suggest that the Tribunal should in general grant a reduction where the proposed penalty exceeds 50% of adjusted net assets (adjusted to take account of dividends paid in the last three years) or 50% of the net profit after tax (in cases where the fine is not to be paid by instalment).

119. To make out a case of financial hardship, it is in my view necessary for the respondent in question to produce clear and comprehensive evidence of its financial position. The Market Misconduct Tribunal has similarly in its report relating to the securities of *Yorkey Optical International (Cayman) Ltd* dated 27 February 2017 at §66 emphasised the need for disclosure by the person who seeks reduction of a fine for financial reasons:

> " A specified person's financial resources is a matter peculiarly within the personal knowledge of the specified person. If a specified person wishes to raise financial resources as a ground for a lower regulatory fine, he should make a full and frank disclosure of his financial position, assets and liabilities, income and expenditure."

120. In the UK, it is also incumbent upon the undertaking to provide sufficient information for the assessment of its financial position: *Sepia Logistics Ltd (formerly known as Double Quick Supplyline Ltd) & another v Office of Fair Trading* [2007] CAT 13, at §§100-101. It is not necessarily enough just to disclose the audited financial statements. It may, for example, be necessary to look at related entities within the group, directors' emoluments and shareholders' resources in assessing the claim of hardship: *GF Tomlinson Group Ltd & others v Office of Fair Trading* [2011] CAT 7 at §232.

121. In the present case, the 5th respondent relies on its audited financial statements for the years ended 30 April 2015, 2016 and 2017. For reasons not explained, all of these financial statements were dated 18 April 2019, shortly before the Judgment was handed down. According to these statements, for the years to April 2015 and 2016, the 5th respondent had no income, assets of only $359, and liabilities of nearly $2m almost all of which were amounts due to directors. For the year to April 2017, there were revenues of $3,977,440 (which corresponds, within a margin of error, to the Value of Sales identified in §77 above) and gross profit of $1,237,532 (a margin of 31%) but high administrative and operating expenses of $765,880 which included $463,662 in directors' remuneration and $58,500 in entertainment. In the balance sheet, the amounts due to directors had been reduced by almost $0.5m compared to the previous year but the assets

remained at $359. The notes to the accounts under the heading "Going Concern" stated:

> " The shareholders have confirmed their intention to provide continuing support to the company so as to enable the company to meet its liabilities as and when they fall due and to enable the company to continue its existence for the foreseeable future. The directors believe that the company will continue as a going concern. Consequently, the directors have prepared the financial statements on a going concern basis. …"

122. Reduction of the penalty on account of inability to pay should be an exceptional measure, having regard to the effect on the firm's viability. On the materials available there is, in my view, no clear and compelling evidence that the 5th respondent's viability would be undermined by the penalty proposed. No witness has been called to explain the financial position of the company. It is no answer for the 5th respondent to say that it has produced all the documents and information sought in the s 41 notice issued by the Commission, since they were sought for the purpose of the Commission's own calculation of the Value of Sales and statutory cap. Furthermore, according to the financial statements, the 5th respondent had survived with no income at all for two years, and, notwithstanding a negative balance sheet to the tune of nearly $2m, it had continued to trade with shareholders' support. The company is, as submitted by its own counsel, insolvent, so that *any* penalty would exceed its net assets. It is also to be noted that the proposed penalty is less than either the amount of directors' remuneration or the repayment of amounts due to directors in 2017. In sum, as the Commission submits, the information tendered raises more questions than it answers and is far short of what is necessary to make out a case for reduction by reason of financial hardship.

E5. Conclusion on penalties

123. The pecuniary penalties to be imposed on the respondents are therefore as set out in the fourth column of the table in §115 above.

F. Costs of proceedings

124. As to the costs of these proceedings, the Commission submits that the general rule or starting point in civil proceedings, namely that costs follow the event, should apply, relying on s 144(1) of the Ordinance (set out in §12 above) and emphasising that it enables the Tribunal to "follow the practice and procedure of the Court of First Instance in the exercise of its civil jurisdiction".

125. In addition, the Commission submits that the 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents, and the 4th respondent up to the time it abandoned the efficiency defence (26 September 2018), should pay costs on an indemnity basis on the ground that the manner in which they conducted their case was unreasonable, disproportionate, oppressive and wasteful.

126. The Commission accepts that it would be appropriate in this case to order costs against the respondents severally (as opposed to jointly and severally), and suggests that the relevant part of the costs burden be divided among the relevant respondents equally.

127. The 1st and 9th respondents and, as I understand counsel's submissions, the 4th respondent, accept that costs should follow the event. The 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents, however, submit that these proceedings should be categorised as criminal, emphasising that a

respondent is presumed innocent until proven guilty and that the Commission bears the burden of proving guilt beyond reasonable doubt. They contend that the right to be presumed innocent means that the special rule for ordering costs against a defendant in criminal proceedings should be applied rather than the general civil rule that costs follow the event. As such, the correct approach is that explained in *HKSAR v Chan Kwok Wah* [1999] 1 HKC 697 and *HKSAR v Tsang Yam Kuen Donald* [2018] 3 HKLRD 564. In the latter case at §193(2), the Court of Appeal stated:

> " The discretion to order a convicted defendant to pay the prosecution costs (including the costs of investigation) can be exercised if the defendant's conduct in the course of the investigation and/or at trial is unreasonable or improper, resulting in the authority having to incur extra or additional expenses which, in the normal course of events, would not or need not be incurred."

The respondents contend that they have not been guilty of unreasonable or improper behaviour in this sense, and therefore ought not to be ordered to pay any costs at all.

128. In my opinion, what the courts were dealing with in cases such as *Chan Kwok Wah* and *Tsang Yam Kuen Donald* was the special jurisdiction of a criminal court to award costs in favour of the prosecutor, a power dealt with in the Costs in Criminal Cases Ordinance (Cap 492). For example, s 12 of that Ordinance provides that where a defendant is convicted of an offence before the Court of First Instance, the court "may, in addition to such sentence as may otherwise be passed by law, order that costs be awarded to the prosecutor".

129. It is true that this Tribunal held that the criminal standard of proof applies on the basis of the Commission's concession that because of

the order for pecuniary penalties sought, these proceedings involve the determination of a criminal charge within the meaning of Art 11 of the Bill of Rights. It does not mean, however, that this action therefore moves in a binary manner into the criminal realm so that it is in every respect to be treated as a trial for a criminal offence.

130. As the Court of Appeal stated in *Secretary for Justice v Cheung Kai Yin* [2016] 4 HKLRD 367 at §25, "the applicability of a higher standard of proof … are separate questions from whether the court is exercising its criminal jurisdiction". There the court decided that applications by the Secretary for Justice for committal for criminal contempt arising from injunctions granted in civil actions were civil proceedings in nature, to which civil procedural rules applied, even though they amounted to "criminal charges" attracting the safeguards mandated by Art 11 of the Hong Kong Bill of Rights.

131. Moreover, costs in contempt cases, like costs in other civil proceedings, generally follow the event (see *Donald Koo Hoi-Yan v Kao, Lee & Yip (a firm)* (2009) 12 HKCFAR 904) with the additional special feature that if contempt is established, the contemnor is often ordered to pay costs on an indemnity basis. I do not think this is completely accounted for by the fact that the complainant in committal proceedings stands to gain little directly from an order for committal,[47] for the application is invariably intended to bring about enforcement of an order for the benefit of the complainant. Costs in applications for orders for imprisonment pursuant to an examination of a judgment debtor under RHC Order 49B rule 1B are also governed by civil principles even though the criminal standard of proof

[47] *Cf Lau Yee Ching v Wong Tak Kwong and others* (unrep, CACV 385/2005, 3 March 2006).

applies: *Bank of India v Bhagwandas Kewalram & others* (CACV 12/1991, 1 May 1991). Thus although the defendants in these types of cases are entitled to be presumed innocent, and are also entitled to require the allegations against them to be proved beyond reasonable doubt, they have generally been required to pay costs if they fail.

132. It can be seen from the structure of the Ordinance, including the constitution of the Tribunal by a judge without a jury, the express permission in s 144(1) to follow the practice and procedure of the Court of First Instance in its civil jurisdiction, the specific reference to costs in s 144(1), and the provisions for appeals both interlocutory and final, that it is intended that competition law proceedings are dealt with under civil schemes of proceeding, albeit where pecuniary penalties are sought the infringement has to be proved beyond reasonable doubt. It seems to me that these proceedings, even though they may involve a "criminal charge" for Bill of Rights purposes, should follow civil procedures generally including the principles on costs. For all the interlocutory applications already heard in the Tribunal, the costs approach has been in line with civil procedure.

133. Accordingly, I consider that generally the civil approach on costs should be applied. Applying those principles, there can be little dispute that the respondents should pay the costs of this enforcement action.

134. Even if the criminal approach applies, it may be argued that the incidence of costs relating to the efficiency defence stands to be determined on a different basis, because it was a positive defence raised by some of the respondents who had the burden to prove it on the balance of

probabilities.[48] In the light of my conclusion above, however, it is not necessary to pursue this reasoning. Nor is it necessary to consider whether, even on the principles applicable to criminal cases, the relevant respondents' conduct of the case was such as to justify an order of costs against them.

135. As regards the basis of taxation, while there are many highly unsatisfactory features of the relevant respondents' case on the efficiency defence (as can be seen from §§205-212 of the Judgment), bearing in mind that this is the first case in which this kind of defence has been raised, I do not consider that their conduct was such as to call for an order for indemnity costs. Nor do I think that the 4th respondent's conduct of the case crossed the line so as to warrant an order for indemnity costs against it. Costs should therefore be taxed on a party and party basis, if not agreed.

136. The efficiency defence has formed a separate, large, and fairly self-contained topic with expert evidence adduced on both sides. It is right that the costs relating to that defence should fall only on the respondents who have run it (in the case of the 4th respondent, up to its abandonment), ie (i) the 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents and the 4th respondent up to 26 September 2018; and (ii) the 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents thereafter.

137. As for the rest of the costs generally, the 1st respondent submits that it should only be held responsible for 5%. In a similar submission, the 9th respondent suggests that the 1st and 9th respondents should each bear half of a 1/9 share of the costs. The 4th respondent submits that it should bear at most 1% of the costs. I reject these contentions. Once the costs attributable

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[48] See section G2 of the Judgment.

to the efficiency defence are excluded, there is no clear justification for further reducing these respondents' shares to less than an equal share with the other respondents. None of them actually admitted the agreements and conduct alleged subject to any positive defence they raised, which means that the evidence of virtually all the factual witnesses was relevant for establishing the case against them. Obviously the amounts of time taken up at trial by different witnesses and different counsel are not the same, but the apportionment in this context is not to be done minutely on a stop-watch basis; nor has anyone attempted a precise attribution of the trial time. In my judgment the Commission's general costs should be borne by the respondents in 10 equal shares.

138. Given that this is one of the first cases in the Tribunal, and that more costs would have been incurred because of the novelty of the law than otherwise, I consider it appropriate for there to be a general reduction, by 20%, of the costs payable by the respondents to the Commission.

139. Finally, the Commission seeks a certificate for three counsel. In my view, awarding costs for three counsel is exceptional: *Fu Kor Kuen Patrick v HKSAR* (unrep, FACC 4/2011, 27 August 2012), §5; *Lin Man Yuan v Kin Ming Holdings International Ltd* (HCA 216/2009, 24 December 2015), §28. Recognising that the Commission's counsel had to deal with multiple respondents, and without underestimating the tasks that they had to undertake, I would still not put this case in that exceptional category. I consider that a certificate for two counsel (one senior counsel and one junior counsel) should be granted instead.

G. Costs of investigation

140. As regards costs of investigation, s 96 of the Ordinance provides:

> " (1) The Tribunal may order any person who has contravened a competition rule to pay to the Government an amount equal to the amount of the costs of and incidental to any investigation into the conduct or affairs of that person, reasonably incurred by the Commission in connection with proceedings for the contravention.
>
> (2) In this section—
>
> ***costs*** (***開支***) include fees, charges, disbursements, expenses and remuneration."

141. The Commission has referred to the decision of the Market Misconduct Tribunal on 26 August 2019 in *Re the listed securities of Fujikon Industrial Holdings Ltd*. With regard to s 307N(1)(f) of the Securities and Futures Ordinance (Cap 571), which similarly empowers that tribunal to order a person to pay the costs of investigation incurred by the Securities and Futures Commission,[49] the Market Misconduct Tribunal there held that the notion of investigation costs excluded staff costs and overhead costs.

142. The Commission has adopted the same position here so that it is not claiming staff and overhead costs. Instead, what it claims as costs of investigation is, I was told at the hearing, primarily translation costs estimated to be in the region of $670,000.

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[49] The provision empowers the Market Misconduct Tribunal to order a person to "pay to the Commission the sum the Tribunal considers appropriate for the costs and expenses reasonably incurred by the Commission, whether in relation or incidental to—(i) the proceedings; (ii) any investigation of the person's conduct or affairs carried out before the proceedings were instituted; or (iii) any investigation of the person's conduct or affairs carried out for the purposes of the proceedings".

143. It seems to me the respondents are correct in submitting that in principle it is for the Commission to justify why an order under s 96 should be made. The threshold may not be very high, but there ought to be some materials provided in advance of the hearing to show the heads of investigation costs claimed, what activities they cover, their very approximate amounts, how they constitute costs of and incidental to the investigation into the conduct or affairs of the respondents, and why they should be regarded as having been reasonably incurred by the Commission in connection with proceedings for the contravention. The precise quantum may be left for subsequent assessment,[50] but the Tribunal should be provided with some evidential basis for the exercise of this discretionary power and the respondents should be given an opportunity to contest it. In the present case, in the absence of such basis, I am not prepared to award any investigation costs.

H. Orders

144. The outcome is accordingly as follows. There will be a declaration that each of the respondents has contravened the first conduct rule.

145. There will be an order that within 28 days hereof:

(1) The 1st respondent shall pay to the Government a pecuniary penalty in the amount of $670,000.

(2) The 2nd respondent shall pay to the Government a pecuniary penalty in the amount of $132,000.

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[50] The Tribunal has not been addressed on the question whether the assessment of investigation costs (as opposed to legal costs of the proceedings) can be carried out by the Registrar and will therefore leave that question open.

(3) The 3rd respondent shall pay to the Government a pecuniary penalty in the amount of $318,000.

(4) The 4th respondent shall pay to the Government a pecuniary penalty in the amount of $420,000.

(5) The 5th respondent shall pay to the Government a pecuniary penalty in the amount of $397,000.

(6) The 6th respondent shall pay to the Government a pecuniary penalty in the amount of $145,000.

(7) The 7th respondent shall pay to the Government a pecuniary penalty in the amount of $313,000.

(8) The 8th respondent shall pay to the Government a pecuniary penalty in the amount of $415,000.

(9) The 9th respondent shall pay to the Government a pecuniary penalty in the amount of $740,000.

(10) The 10th respondent shall pay to the Government a pecuniary penalty in the amount of $420,000.

146. As to costs, there will be an order that:

(1) The 2nd, 3rd, 4th, 5th, 6th, 7th, 8th and 10th respondents do each pay one-eighth of 80% of the Commission's costs of and relating to the efficiency defence up to 26 September 2018 (inclusive).

(2) The 2nd, 3rd, 5th, 6th, 7th, 8th and 10th respondents do each pay one-seventh of 80% of the Commission's costs of and relating to the efficiency defence after 26 September 2018.

(3) Subject as aforesaid, the 1st to 10th respondents do each pay one-tenth of 80% of the Commission's costs of this action.

(4) The costs are to be taxed on a party and party basis, if not agreed, with a certificate for two counsel (one senior counsel and one junior counsel).

147. This Tribunal declines to award any sum in respect of costs of investigation in favour of the Commission.

(Godfrey Lam)
President of the Competition Tribunal

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

Mr Harrison Cheung, instructed by Wong & Lawyers, for the 1st Respondent

Mr Carter Chim and Ms Joyce YY Kwok, instructed by JCC Cheung & Co, for the 2nd and 3rd Respondents

Ms Sharon Ng, instructed by Bryan Chan & Co, for the 4th Respondent

Mr Hectar Pun SC, Mr Anson Wong Yu Yat and Ms Allison Wong, instructed by JCC Cheung & Co, for the 5th Respondent

Mr Richard Yip and Ms Tara Liao, instructed by JCC Cheung & Co, for the 6th, 7th, 8th and 10th Respondents

Ms Connie Lee and Mr Tommy Cheung, instructed by Benjamin Au & Billy Chan, Solicitors, for the 9th Respondent