

## Discovery, Public Interest Immunity, and Privilege under Hong Kong Competition Law

***The Hong Kong Competition Tribunal has ruled for the first time on the extent of the Competition Commission's discovery obligations in enforcement proceedings.***

### The Speed Read

A recent Hong Kong Competition Tribunal (Tribunal) decision offers the first judicial guidance on issues of discovery, public interest immunity and privilege under Hong Kong competition law. The decision, *Competition Commission v. Nutanix Hong Kong Limited and others* [2018] HKCT 1 (the Decision) arose from an application by a respondent in underlying enforcement proceedings (Respondent) for orders of discovery against the Competition Commission (the Commission).

Key take-aways from the Decision in respect of enforcement proceedings include:

- **Order 24:** The provisions of O. 24 of the Rules of the High Court (RHC), the rules governing discovery in civil proceedings, apply to the Commission's enforcement actions before the Tribunal with stated exceptions, one notable exception being the lack of automatic general discovery.
- **Scope of discovery:** The scope of discovery the Commission is subject to is as set out in *Securities and Futures Commission v. Wong Yuen Yee* [2017] 1 HKLRD 788, in which it was held that the Securities and Futures Commission's discovery should approach the standard applicable to the prosecution in criminal proceedings, including materials the Commission collects through its investigation but does not affirmatively use or rely upon in its briefing and advocacy — *i.e.*, "unused materials".
- **Public interest immunity and informer privilege:** These apply to enforcement proceedings and permit the Commission to refuse disclosure of certain documents on the basis of public interest immunity and informer privilege, however these privileges are not absolute and are subject to countervailing public interests (such as whether a respondent has all relevant material sufficient to mount its defence).
- **Without prejudice privilege:** The Commission may rely on this privilege and withhold disclosure of its communications with other parties made in an effort to settle a dispute because there is a "strong public interest" for all parties in facilitating cooperation and settlement.

- **Discovery regarding immunity witness:** If a party to the alleged wrongdoing is given immunity and presented as a witness against other parties (such as an immunity witness), the Commission should provide “warts and all” discovery regarding that immunity witness. Respondent is entitled to obtain all relevant draft witness statements of immunity witnesses, including drafts not previously disclosed to the witness.

## Implications

Ultimately, the extent of discovery is at the discretion of the Tribunal. As the Decision explains, this is an area of law in which public policy considerations loom large and the Tribunal will often be required to undertake a delicate balancing exercise of the competing considerations (e.g., the public interest in effective enforcement of competition law and the need for respondents to have complete access to information in mounting their defence). The lawyer’s favoured cliché: that cases will turn on their facts, is likely to hold particularly true in Tribunal proceedings.

The Decision — the first of its kind — provides a great deal of useful guidance and will be of particular significance to any companies that should find themselves subject to enforcement proceedings brought by the Commission. As the Commission will likely have robust disclosure obligations, companies should consider making targeted disclosure applications, bearing in mind the Commission’s obligation to make disclosure of relevant unused materials and give a warts and all account of immunity witnesses.

The Decision does not address the question of respondents’ discovery obligations in enforcement proceedings, only those of the Commission. Respondents are of course in a quite different position, as they are obliged to provide documents to the Commission during the course of the Commission’s investigations and pursuant to the Commission’s investigative powers.

A more in-depth summary and analysis of the Decision and its background follows.

## The Long Read

### Background

Hong Kong’s Competition Ordinance (Cap 619) (the Ordinance) came into effect in December 2015. In March 2017, the Commission commenced the first ever enforcement proceedings under the Ordinance against five undertakings for an alleged contravention of the first conduct rule (concerning anti-competitive agreements) (the Proceedings).

The Proceedings relate to the tender process for the supply and installation of an IT system for the Hong Kong Young Women’s Christian Association (YWCA). The Respondent was seeking additional disclosure from the Commission.

### Order for Discovery

At the first case management conference, the Tribunal made an order for:

*“a list of documents ... separating (a) those sought to be relied upon and used by the Applicant in these proceedings and (b) unused materials, with the origination of each of the documents identified”.*

In response, the Commission filed and served four lists of documents. The documents disclosed included all the pre-existing documents the Commission obtained during its investigation. The lists did not individually identify all of the documents but instead categorized them by class.

The Respondent issued an application for discovery, contending that the Commission's disclosure failed to comply with the Tribunal's order.

## Decision

In considering the legal framework for discovery under the Ordinance, the President of the Tribunal, the Honourable Mr. Justice G Lam (Justice Lam) ruled that:

- The Tribunal may decide its own procedure, may follow the practice and procedure of the Court of First Instance and has the same jurisdiction, powers, and duties of the Court (s. 144(1) of the Ordinance).
- Pursuant to r. 24(1) of the Competition Tribunal Rules (CTR) a party may apply to the Tribunal for an order for discovery and production of a document relating to the proceedings.
- The provisions of O. 24 of the RHC are applicable with stated exceptions, one notable exception being the lack of automatic general discovery.
- Pursuant to CTR r. 24(3): Discovery is at the discretion of the Tribunal which must consider all circumstances, including: (a) the need to secure the furtherance of the purposes of the Ordinance as a whole; (b) whether the information contained in the document sought to be discovered or produced is confidential; (c) the balance between the interests of the parties and other persons; and (d) the extent to which the document sought to be discovered or produced is necessary for the fair disposal of the proceedings.
- The scope of discovery the Commission is required to provide is analogous to that set out in *Wong Yuen Yee, i.e.*, that discovery should approach the standard applicable to the prosecution in criminal proceedings. This would encompass "unused materials" which are relevant and which may undermine the Commission's case or advance the defence case.

Justice Lam then considered the classes of documents in dispute, as follows.

### Certain Leniency Documents

The first class of documents the Respondent sought were records of communications with leniency applicants in relation to the Commission's leniency policy. The Commission raised no objection to production of (i) any pre-existing documents which could serve as evidence in the Proceedings provided during the course of the leniency process, or (ii) any "successful" communications (*i.e.*, those where leniency was granted). The Commission, however, objected to production of the requested documents on the grounds of without prejudice privilege and public interest immunity.

#### Public Interest Immunity and Informer Privilege

The Commission claimed that public interest immunity applied to the requested leniency documents because the effectiveness of the Commission's "essential" leniency policy would be "*severely undermined*" if leniency documents were held to be disclosable. The Commission argued that potential informers would be deterred from coming forward.

Justice Lam accepted the common law position that an informer's identity is privileged from disclosure in criminal or civil proceedings (widely known as informer privilege), and found that this should apply to informers to the Commission. Justice Lam ruled, however, that public interest immunity and informer privilege are not absolute in Tribunal proceedings which are enforcement actions seeking pecuniary

penalties: there must be a balancing exercise between the public interest in the protection of informers and the interests of the person seeking disclosure. Given the Commission's disclosure of documents obtained in the leniency process, combined with other factors, Justice Lam determined that in this case the public interest in non-disclosure outweighed any contrary interest in disclosure.

### Without Prejudice Privilege

The Commission also claimed without prejudice privilege to resist production of the requested leniency documents.

Justice Lam held that there is a strong public interest in facilitating cooperation and settlement between the Commission and private parties, even though Tribunal proceedings "are not ordinary civil actions between private parties". Such arrangements not only save public time and costs, but also give early redress to any harmful conduct, thereby benefitting society as a whole. He further stated that, "privilege exists in relation to leniency and settlement negotiations between the Commission and a potential target of investigation or enforcement, at least where they have not resulted in a successful settlement."

Accordingly, the Commission could withhold the requested documents "*on the ground of without prejudice privilege or a privilege akin to it as applied to these proceedings*".

### **Complaint Form**

The next document in issue was the original electronic complaint form, which the complainant submitted to the Commission. The Commission objected to production of this document on the ground of public interest immunity, arguing that it was important that complainants not be discouraged from reporting to the Commission on the basis that the contents of their complaint (including their identity) may be disclosed.

Justice Lam accepted that "*normally the complaint form ... would not only be confidential but also covered by informer privilege*". However, on the facts, there was no further interest to protect that required the complaint form to be withheld from the Respondent because the Commission had revealed the identity of the complainant in the Originating Notice.

### **1. All "unsuccessful" without prejudice correspondence between the Commission and any Respondent (i.e., in which an agreement had not been reached)**

This class of requested documents covered all without prejudice correspondence and records of without prejudice communications from the commencement of investigation between the Commission and any Respondent in which an agreement in respect of cooperation had not been reached.

The Commission's objection to disclosure of the requested documents was based on the grounds of public interest immunity and without prejudice privilege and was limited in scope, namely: (a) it did not preclude disclosure of pre-existing documents which could serve as evidence in the Proceedings provided during the without prejudice communications; and (b) it covered only *unsuccessful* without prejudice communications (*i.e.*, in which no agreement with the party in question had in fact been reached).

Justice Lam held that, for the same reasons set out in relation to the requested leniency documents, these documents could be withheld on the ground of without prejudice privilege or a privilege akin to it.

## 2. All confidential internal reports, minutes and correspondence relating to the Commission's investigation and present proceedings

The Commission objected to production of these documents on the ground of relevancy and/or that they were “covered by public interest immunity as a class”. There was no dispute that legal professional privilege would apply to the extent the relevant test (dominant purpose of obtaining legal advice) was met.

- **Relevance**

In *Wong Yuen Yee* (also a decision by Justice Lam), it was held that there is a duty to act fairly on the part of the “prosecuting” authority, and the required disclosure “*should ordinarily include the information and documents [the SFC] has obtained from the investigation of the transactions that are eventually relied upon and complained of*”. The Commission submitted that internal documents generated within the Commission do not constitute “materials *gathered or obtained* by it in the investigation”. The Tribunal ruled, however, that it “was unable to accept that a document must be irrelevant because it was originated and was destined within the Commission and was not produced for disclosure outside the Commission”. For example, “*an internal document containing information gathered during the investigation which is not otherwise recorded and disclosed may for that reason be a relevant document.*”

- **Public Interest Immunity**

The Tribunal ruled that public interest immunity claimed over an entire class of documents would not be acceptable. Justice Lam was “*unable to accept the sweeping proposition that every internal communication is privileged on such general grounds*”.

The Commission sub-categorized the internal documents prior to the hearing. Justice Lam applied the above test for public interest immunity to each of the five sub-categories. He noted that the sub-categories formulated by the Commission seemed too broad and he was not in a position to assess whether disclosure may be required for the fair disposal of the Proceedings in respect of some of the sub-categories.

## 3. Witness Documents

The final class of documents related to the preparation of the statement of the Commission's immunity witness (Mr. D), for example, earlier drafts of statements, attendance notes of meetings, and internal communications relating to Mr. D.

In seeking disclosure, the Respondent contended that Mr. D was “*no mere witness*”; “*he was a party to the alleged wrongdoing who has been given immunity in exchange for evidence relied upon by the Commission against [the Respondent]*”. The Respondent relied on the principle that if a party to the alleged wrongdoing is given immunity and presented as a witness against other parties, the court and the defence are to be provided a warts and all discovery.

The Tribunal explained that warts and all doctrine derives from the Court of Appeal judgment in the criminal case of *R v. Tsui Lai-ying & Others [1987] HKLR 857*, in which the court stated that: “*in cases like this the accomplice should be presented to the Court warts and all. The defence, is entitled to know everything about him, the terms of the immunity and any matters surrounding it which could affect the credibility of his evidence ...*”.

Justice Lam in applying this approach noted that “*‘warts and all’ does not mean everything under the sun.*” The Tribunal ruled that the Commission must disclose two internal drafts of Mr. D's witness statement that

had not been shared with the witness or his counsel. However, internal notes Commission officers made *prior* to meeting Mr. D, did not need to be disclosed as these were deemed not relevant.

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