CTEA 1/2023

[2023] HKCT 8

**IN THE COMPETITION TRIBUNAL OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**COMPETITION TRIBUNAL ENFORCEMENT ACTION NO 1 OF 2023**

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BETWEEN

COMPETITION COMMISSION Applicant

and

MULTISOFT LIMITED 1st Respondent

MTT GROUP HOLDINGS LIMITED 2nd Respondent

BP ENTERPRISE COMPANY LIMITED 3rd Respondent

NOBLE NURSING HOME COMPANY LIMITED 4th Respondent

KWEK STUDIO LIMITED 5th Respondent

AU YEUNG KIT YEE 6th Respondent  
(trading as YAT YING HONG and in her personal capacity)

FAN SING CHI 7th Respondent

TANG WAI CHUN 8th Respondent

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Before: Hon Harris J, President of the Competition Tribunal in Chambers

Date of Hearing: 2 August 2023

Date of Decision: 2 August 2023

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D E C I S I O N

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1. This is the first case management conference of the present competition matter. I have made directions including directions dealing with a confidentiality ring in generally conventional terms. One issue was, however, raised by Mr Chim for the 1st and 2nd Respondents which I should comment on.
2. The Commission has proposed that the directions provide for disclosure of documents. The Commission’s draft directions did not include a paragraph requiring the filing by the Commission of a verifying affirmation. Mr Chim submitted that as a matter of principle the Commission should be required to do so in order to provide appropriate procedural protection for the Respondents.
3. Mr Chim drew my attention to the Civil Procedure Rules 1998, in particular r.31.10(5), in the United Kingdom and Practice Direction 31A (Disclosure and Inspection). These provide for the kind of verification that Mr Chim invited the Tribunal to make. He also brought my attention to *Arrow Trading v Edwardian Group Ltd*[[1]](#footnote-1) in which Mr Justice Blackburne explains in [45] of the judgment that the disclosure statement is intended to bring home to each party their disclosure responsibilities. It is not a mere technicality.
4. Mr Chim submitted that this was a particularly pertinent consideration in the context of enforcement proceedings because as the Tribunal has confirmed in *Competition Commission v Nutanix Hong Kong Ltd & Ors (No 3)*[[2]](#footnote-2), proceedings for pecuniary penalty under the *Ordinance* involve the determination of a criminal charge. Accordingly the additional layer of protection that verification of discovery would provide is appropriate and justified.
5. Although I understand the arguement, in my view, it is not necessary to routinely order the verification of disclosure by the Commission. My reasons are as follows. In civil litigation general discovery does not give rise to an automatic obligation on the party making disclosure to verify by affirmation or affidavit a list of documents. An order needs to be sought from court.
6. Similarly the Competition Tribunal Rules do not provide for verification and in [5] of the judgment in *Competition Commission v Nutanix Hong Kong Ltd*[[3]](#footnote-3) Mr Justice Godfrey Lam expresses the view that he is not sure an affidavit is ordinarily called for in the absence of some special reason.
7. Mr Chim accepted that in practice the provision of a verifying affirmation or affidavit might not make very much difference. The reason for this, in my view, is that in practice the affirmation or affidavit would be made by a senior member of the Commission’s legal team who supervises other lawyers, and members of the Commission’s staff compiling the list of documents.
8. Unsurprisingly it is quite common in litigation for documents to be initially omitted during the first round of discovery. It does not seem to me that requiring the Commission to provide an affirmation is likely to produce a greater level of diligence on the part of the Commission than in a routine case in which no affirmation is required to be provided. I was also told that in criminal cases the prosecution is not required to verify by affirmation or affidavit, material that it discloses. Presumably that is because it is assumed, as I think it can probably and fairly be assumed by the Tribunal, that those responsible for the prosecution of the case understand the obligations imposed on them to disclose all material which should be made available to a respondent.
9. I accept that there will be cases where it is appropriate to order verification, but such cases should be justified by reference to a special reason which can be explained in supporting evidence.

(Jonathan Harris)

President of the Competition Tribunal

Mr Jenkin Suen SC and Ms Tinny Chan, instructed by MinterEllison LLP, for the applicant

Mr Cater Chim, instructed by Pauline Wong & Co., for the 1st and 2nd respondents

Miss Annie Lai, instructed by Mandy Wan & Co., for the 3rd and 4th respondents

Attendance of C Y Lam & Co, for the 5th and 8th respondents, was excused

The 6th respondent was not represented and did not appear

The 7th respondent was not represented and did not appear

1. [2004] BCC 955. [↑](#footnote-ref-1)
2. [2019] 3 HKC 307. [↑](#footnote-ref-2)
3. [2017] 3 HKLRD 584. [↑](#footnote-ref-3)