IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

[2020] SGCAB 1

Competition Appeal Nos. 2, 3, 5, 6 of 2018

In the matter of Notice of Infringement Decision issued by the Competition and Consumer Commission of Singapore on infringement of section 34 of the Competition Act (Cap. 50B, 2006 Rev Ed) in relation to the sale and distribution of fresh chicken products in Singapore, CCCS 500/7002/14, 12 September 2018

Between

(2) Gold Chic Poultry Supply Pte. Ltd.
(2) Hua Kun Food Industry Pte. Ltd.

(3) Toh Thye San Farm

(5) Lee Say Group Pte. Ltd. / Lee Say Poultry Industrial
(5) Hup Heng Poultry Industries Pte. Ltd.
(5) Leong Hup Food Pte. Ltd.
(5) Prestige Fortune (S) Pte. Ltd.
(5) ES Food International Pte. Ltd.

(6) Ng Ai Food Industries Pte. Ltd.

… *Appellants*

And

Competition and Consumer Commission of Singapore

… *Respondent*

DECISION

[Competition Law]

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Re Market-Sharing and Price-Fixing in Sale and Distribution of Fresh Chicken Products in Singapore: Gold Chic Poultry Supply Pte. Ltd. and others

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Competition Appeal Board — Competition Appeal Nos. 2, 3, 5, 6 of 2018
Molly Lim, *SC*, Hong Tuck Kun, Tan Ying Hsien and Shanker Iyer
5-8 August; 3 September; 27 November 2019; 13, 20 July 2020.

4 December 2020

Introduction

1 These appeals are against the Infringement Decision ("**ID**") issued by the Competition and Consumer Commission of Singapore ("**CCCS**") on 12 September 2018 against 13 undertakings who are fresh chicken traders and distributors ("**the Undertakings**") for contravening s 34 of the Competition Act (Cap. 50B) ("**the Act**").

2 By reason of s 34 of the Act, agreements between undertakings or concerted practices which have as their object or effect the prevention, restriction, or distortion of competition within Singapore are prohibited unless they are exempted in accordance with the Act.

3 In the ID, CCCS found that the Undertakings had participated in anti-competitive agreements and/or concerted practices to not compete for one

another's customers, which amounted to market-sharing referred to by CCCS as the "Non-Aggression Pact", and to coordinate the quantum and timing of price movements in relation to the supply of fresh chicken products in Singapore which amounted to price-fixing, referred to by CCCS as the "Price Discussions", between 19 September 2007 and 13 August 2014.

4 Anti-competitive practices of market-sharing and price-fixing are harmful conduct that are detrimental to the free market and consumers. The present case is notable as it involves a product that is widely consumed in Singapore, and CCCS had meted out the largest amount of financial penalty in a single case in the ID – a total of $26.9m. This is the first appeal to the Competition Appeal Board ("**the Board**") involving so many parties. This decision also tackles many novel issues in the Singapore competition law context, such as various evidential and procedural issues (which includes the Board's role and powers) and the probative value of leniency statements. This case also demonstrates the difficulties of competition investigations where direct evidence may be limited, given the secret nature of anti-competitive practices. Although such difficulties must be appreciated and appropriate inferences may still be drawn from fragmented or sparse evidence, it does not detract from the fundamental requirement for CCCS to establish infringement based on the civil standard of proof.

The appeals

Parties

5 The following Undertakings found to have infringed s 34 of the Act had filed their respective appeals against the ID:

(a) Gold Chic Poultry Supply Pte. Ltd. / Hua Kun Food Industry Pte. Ltd. ("**Gold Chic/Hua Kun**" or "**A2**") vide Appeal No. 2 of 2018;

(b) Toh Thye San Farm ("**TTS**" or "**A3**") vide Appeal No. 3 of 2018;

(c) Kee Song Food Corporation (S) Pte. Ltd. ("**Kee Song**" or "**A4**") vide Appeal No. 4 of 2018;

(d) Lee Say Group ("**A5**") vide Appeal No. 5 of 2018, comprising:

(i) Lee Say Group Pte. Ltd. / Lee Say Poultry Industrial (jointly, "**Lee Say**");

(ii) Hup Heng Poultry Industries Pte. Ltd. ("**Hup Heng**");

(iii) Leong Hup Food Pte. Ltd. (formerly KSB Distribution Pte. Ltd.) ("**KSB**");

(iv) Prestige Fortune (S) Pte. Ltd. ("**Prestige Fortune**");

(v) ES Food International Pte. Ltd. ("**ES Food**"); and

(e) Ng Ai Food Industries Pte. Ltd. (formerly Ng Ai Muslim Poultry Industries Pte. Ltd.) ("**Ng Ai**" or "**A6**") vide Appeal No. 6 of 2018.

6 The remaining Undertakings who had not filed any appeals, and had all earlier applied for leniency under paragraph 3 of the *CCS Guidelines on Lenient Treatment for Undertakings coming forward with Information on Cartel Activity Cases 2009* ("**the 2009 LG**") are:

(a) Tong Huat Group, comprising Tong Huat Poultry Processing Factory Pte. Ltd. ("**Tong Huat**") and Ban Hong Poultry Pte. Ltd. ("**Ban Hong**");

(b) Sinmah Poultry Processing (S) Pte. Ltd. ("**Sinmah**"); and

(c) Hy-fresh Industries (S) Pte. Ltd. ("**Hy-fresh**").

7 Four of the appellants, namely A2, A3, A5 and A6, had appealed against both CCCS's findings on liability that each had infringed s 34 of the Act, and on the quantum of the financial penalties imposed. Kee Song (A4) had appealed against quantum only.

8 At an earlier stage of the hearing before the Board, Kee Song reached an agreement with CCCS on the quantum payable on terms set out in the parties' consent order dated 8 August 2019, and did not continue with its appeal.

9 The remaining four appellants, namely A2, A3, A5 and A6 (collectively "**the Appellants**") continued with their respective appeals.

Directions

10 To progress the appeals, case management conferences were held, pursuant to which various directions were given.

11 Firstly, since there were common issues of facts and law raised by the Appellants, pursuant to reg 18 of the Competition (Appeals) Regulations ("**the Appeals Regulations**"), the Board directed, with the agreements of the Appellants and CCCS (as Respondent) (collectively "**the Parties**"), that there be a joint hearing for the four appeals.

12 Secondly, directions and timelines were given for the Parties to submit their respective documents for the hearings. Pursuant to this, the Parties had submitted various bundles, including a common bundle of documents on liability and on quantum, bundles and documents specific to each appeal, and their respective witnesses' statements.

13 Thirdly, the first tranche of the hearing for the taking of evidence from the witnesses was set for 2½ days from 26 June 2019 to 1 July 2019. A6's expert, Mr James Michael Mellsop ("**Mr Mellsop**"), an economist and the Managing Director of NERA Economic Consulting, was scheduled to give his evidence before the Board on 26 June 2019.

14 However, as one of the three Board members, Mr Hong Tuck Kun ("**Mr Hong**") was taken ill on 25 June 2019, the hearing dates from 26 June 2019 to 1 July 2019 had to be vacated as, pursuant to s 72(8) of the Act, the Board requires a quorum of "*not less than 3 members*" to exercise its powers or perform its functions in relation to the appeals.

15 The Parties attended before the Board on 26 June 2019 to take dates for the adjourned hearing.

16 At this hearing, Counsel for A6 informed the Board that Mr Mellsop, who had flown out from New Zealand, was in Singapore to take the stand on 26 June 2019 as originally scheduled. Consequently, A6 had already incurred considerable costs for Mr Mellsop's fees and expenses. A6's concern was having to incur additional costs to have Mr Mellsop fly out to Singapore and attend before the Board at the next adjourned hearing.

17 To mitigate against such costs, the Board directed that Mr Mellsop be permitted to give his evidence by video-conferencing at the adjourned hearing fixed for 5, 6, 7 and 8 August 2019.

The hearings

18 The hearings before the Board eventually took place on 5, 6, 7 and 8 August 2019 and 3 September 2019, during which the following witnesses gave evidence:

(a) on 5 August 2019:

(i) Mr Ong Kian San ("**Ong**"), Managing Director of Kee Song, who was cross-examined by the respective counsel for Gold Chic/Hua Kun and Ng Ai;

(ii) Mr Toh Eng Say ("**Toh Eng Say**"), Manager of Tong Huat, who was cross-examined by the respective counsel for Gold Chic/Hua Kun, TTS, and Ng Ai;

(iii) Mr Ng Lay Long ("**Ng**"), Senior Director of Hy-fresh, who was cross-examined by the respective counsel for TTS and Ng Ai;

(iv) Mr Ho Chong Hee ("**Ho**"), Sales Manager of Ban Hong, who was cross-examined by counsel for Gold Chic/Hua Kun;

(v) […], who was cross-examined by counsel for CCCS;

(b) on 6 August 2019:

(i) Mr Mellsop was due to give his evidence via video-conferencing;

(ii) however, Mr Hong was suddenly taken ill and could not attend the hearing;

(iii) A6 (with the agreement of the other Parties) requested that, to avoid having to incur the costs and expenses of adjourning the hearing and/or postponing the taking of Mr Mellsop's evidence, the Board continued with the hearing in Mr Hong's absence, and for the recordings of Mr Mellsop's evidence to be made available to Mr Hong on his recovery;

(iv) on that basis, the Board proceeded with the hearing of Mr Mellsop's evidence via video-conferencing;

(v) Mr Mellsop was cross-examined by counsel for CCCS;

(c) on 8 August 2019, at the request of A6, the Board (in the absence of Mr Hong and on the same terms as regards the taking of Mr Mellsop's evidence) heard the evidence from A6's witnesses:

(i) Mr Tan Chee Kien ("**Tan Chee Kien**"), Chief Executive Officer of Ng Ai, who was cross-examined by counsel for CCCS;

(ii) Ms Tan Sze Nee (Chen Shini) (also known as Shiny Tan) ("**Shiny Tan**"), personal assistant to Tan Chee Kien, who was cross-examined by counsel for CCCS;

(d) to address the Parties' concerns as to the Board's inability to continue with the subsequent hearing of the appeals (if it lacked the three-member quorum again), and to meet the quorum requirement, the Chairman of the Competition Appeal Board appointed Mr Shanker Iyer ("**Mr Iyer**") on 13 August 2019 as the fourth member of the Board on terms that Mr Iyer, together with the other members of the Board, would continue with the hearing of the appeals without the need to re-adduce the evidence or documents tendered to date. Mr Iyer would apprise himself of the evidence adduced to date. The Parties accepted this; and

(e) on 3 September 2019, the Board (all four members) heard the following witnesses:

(i) Ms Yeo Hui Chuan ("**Yeo**"), former officer of CCCS, who was cross-examined by the respective counsel for Gold Chic/Hua Kun, TTS, and Ng Ai;

(ii) Mr Soh Yan Wei ("**Soh**"), former officer of CCCS, who was cross-examined by the respective counsel for TTS and Ng Ai;

(iii) Mr Kho Qin Yao ("**Kho**"), former officer of CCCS, who was cross-examined by counsel for Ng Ai;

(iv) Mr Lim Soh Hua ("**Lim**"), Manager of Gold Chic/Hua Kun, who was cross-examined by counsel for CCCS;

(v) Ms Lin Xuan Hui Kay, employee of Gold Chic/Hua Kun, who was cross-examined by counsel for CCCS;

(vi) Mr Goh Jee Tee, sole proprietor of Sin Kee Famous Chicken Rice (an existing client of A2), who was cross-examined by counsel for CCCS; and

(vii) Mr Huang Chin Leng, shareholder and director of Fitra Foods Pte. Ltd. (an existing client of A2 and Hup Heng), who was cross-examined by counsel for CCCS.

Submissions and the Board's request for additional information

19 After the conclusion of the hearings, pursuant to directions given by the Board, the Appellants submitted their respective written closing submissions, including combined submissions on the applicable law on 27 September 2019. CCCS submitted its written closing submissions in the respective appeals, as well as its combined submissions on the applicable law on 23 October 2019.

20 On 31 October 2019, the Board requested for certain additional information from the Parties. The requested information concerned the fresh chicken industry and the Appellants' costs and operational structure, market segmentation, and pricing strategy or methodology. The Parties responded and furnished the requested information by 22 November 2019.

21 Meanwhile, the Appellants submitted their respective written reply submissions on 7 November 2019, and CCCS submitted its written reply submissions for the respective appeals on 22 November 2019.

22 On 27 November 2019, the Parties' respective counsel appeared before the Board for oral submissions, to amplify and/or clarify their respective written submissions.

Clarification Hearing

23 Thereafter, upon reviewing the evidence and the Parties' respective submissions, the Board was of the view that it still required certain clarifications or explanations from the Parties.

24 Under s 73(8)(*a)* of the Act, the Board is empowered, *inter alia*, to remit the matter to CCCS to gather the additional clarifications or explanations required. S 73(8)(*a*) provides as follows:

> **Powers and decisions of Board**
>
> 73.— (8) The Board may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may —
>
> (*a*) remit the matter to the Commission;
>
> …

25 However, taking into consideration the length of time which had elapsed since CCCS first commenced its investigation on 7 March 2014, the Board was of the view that it would not be "*just, expeditious and economical*" (in line with reg 19 of the Appeals Regulations) to remit the matter to CCCS. Instead, since the Board had not yet made its decision, the Board could exercise its powers under reg 22(6) of the Appeals Regulations to call for further evidence or explanation from the Parties and/or their witnesses (including those who were not called) on the further evidence or explanations required. Reg 22(6) of the Appeals Regulations provides as follows:

> The Board may, *at any time* before notifying the appellant of its decision, *call for such further evidence or explanation* from all or any of the parties to be given, in the presence of the other party or parties, *as it may consider necessary*.
>
> [emphasis added]

26 Consequently, the Board arranged for the Parties' respective counsel to attend before the Board for a case management conference held on 16 March 2020. During the said conference, the Board informed the Parties that it would require certain clarifications or explanations from the Parties in writing (for which the Board would send a list of questions to the Parties) and would also require some witnesses (a list of which was given to the Parties) to attend before the Board to respond to the questions that would be posed by the Board during the clarification hearing ("**Clarification Hearing**"). The Clarification Hearing was initially fixed for 5 and 6 May 2020.

27 By their email dated 1 April 2020, the Board requested for the written clarifications from the Parties to supplement the information already presented to the Board. The Parties provided their respective responses in April 2020, save for A5, who requested for an extension of time to provide their response, and did so in parts on various dates from 8 May 2020 to 6 July 2020.

28 Due to the COVID-19 pandemic situation and the extended circuit-breaker period, the Clarification Hearing on 5 and 6 May 2020 was rescheduled and eventually fixed on 13 and 20 July 2020, after Singapore ended the circuit-breaker period. During the Clarification Hearing, the following witnesses were questioned by the Board:

(a) on 13 July 2020:

(i) Ms Wu Xiao Ting ("**Wu**"), General Manager (formerly Deputy Admin Personnel Manager) of Sinmah, who was also cross-examined by the respective counsel for Ng Ai and CCCS;

(ii) Mr Ma Chin Chew ("**Ma**"), Managing Director of Hup Heng, who was also cross-examined by the respective counsel for Gold Chic/Hua Kun, Ng Ai, and CCCS; and

(iii) Tan Chee Kien, Chief Executive Officer of Ng Ai, who was also cross-examined by counsel for CCCS; and

(b) on 20 July 2020:

(i) Mr Tan Koon Seng ("**Tan Koon Seng**"), Executive Director of Lee Say, who was also cross-examined by the respective counsel for Gold Chic/Hua Kun, TTS, and CCCS;

(ii) Lim, Manager of Gold Chic/Hua Kun, who was also cross-examined by the respective counsel for Ng Ai and CCCS;

(iii) Mr Harikumar Pillay ("**Harikumar**"), former officer of CCCS, who was also cross-examined by the respective counsel for TTS, Lee Say Group, and Ng Ai; and

(iv) Kho, who was also cross-examined by the respective counsel for TTS and Lee Say Group.

29 The matter was then adjourned for the Board's consideration.

Oral decision

30 On 15 October 2020, the Parties and their respective solicitors attended before the Board, during which the Board informed them orally of its following decisions:

(a) each of A2's, A3's, A5's (leaving aside Prestige Fortune's) and A6's appeals against CCCS's finding of liability for the Non-Aggression Pact against them is allowed;

(b) each of A2's, A3's, A5's and A6's appeals against CCCS's finding of liability for the Price Discussions against them is dismissed;

(c) each of A2's, A3's, A5's (leaving aside Prestige Fortune's) and A6's appeals against the quantum of financial penalties imposed on them is allowed in part. The reduced quantum of financial penalties would be computed based on the following formula:

(i) for A2, A3 and A6: 6.83 years x Turnover for the financial year 2013 x […]%;

(ii) for A5 (save for Prestige Fortune): 6.83 years x Turnover for the financial year 2013 x […] %;

(d) for Prestige Fortune, all of its appeals against liabilities for the Non-Aggression Pact, the Price Discussions, and the quantum of financial penalties are dismissed, with costs payable to CCCS, which costs are to be agreed or taxed;

(e) the financial penalty of $5,000 imposed upon Prestige Fortune by CCCS remains;

(f) the financial penalties payable by each of A2, A3, A5 (including Prestige Fortune) and A6 are to be paid within 14 days of the

Board's written decision, to be handed out to the parties in due course;

(g) interest will be chargeable on all unpaid penalties after the expiration of the said 14 days at the rate of 4% per annum until date of full payment;

(h) each of A2, A3, A5 (save for Prestige Fortune), A6 and CCCS is to bear its own costs of the appeals; and

(i) the direction for written undertakings imposed by CCCS on each of the Appellants is to remain.

31 The Board directed each of the Appellants (save for Prestige Fortune) and CCCS to work out the financial penalties payable by each Appellant and to inform the Board of the same by 6 November 2020.

Parties' computation of financial penalties

32 The Board received the Parties' final submissions on the financial penalties payable by 12 November 2020. Except for A2, there were disputes between CCCS and some of the other Appellants as regards the computations of their respective financial penalties. These disputes were submitted to the Board for its decision.

33 The Board met on 25 November 2020 and determined that the financial penalties payable by each of the Appellants are as follows:

(a) for A2, as agreed with CCCS, the financial penalty payable is $513,992;

(b) for A3, notwithstanding its dispute with CCCS as to its turnover figures to be used, as A3 was prepared to accept CCCS's turnover figure of $[…], the financial penalty payable is $724,507;

(c) for A5, the Board is inclined to accept CCCS's computation as set out in its email dated 6 November 2020, such that the total penalty payable is $9,096,260, comprising the penalties payable by the various entities in Lee Say Group as follows:

(i) Lee Say: the sum of $2,106,097;

(ii) Hup Heng: the sum of $1,168,044;

(iii) KSB/ES Food: the sum of $2,127,570;

(iv) Lee Say and Hup Heng: the sum of $851,277;

(v) Lee Say, Hup Heng and Prestige Fortune: the sum of $467,856;

(vi) Lee Say, Hup Heng, ES Food, KSB and Prestige Fortune: the sum of $2,370,416;

(vii) Prestige Fortune: the sum of $5,000; and

(d) for A6, its relevant turnover should not exclude the rebates given, and the financial penalty is $537,678.

34 On 26 November 2020, the Board was informed that Prestige Fortune and CCCS had agreed that the costs payable by the former to CCCS be fixed at $12,000 (all inclusive) comprising $10,800 in costs and $1,200 in disbursements in lieu of taxation.

35 In the circumstances, the Board directs Prestige Fortune to pay the costs of $12,000 to CCCS.

36 We set out below the grounds for our decision.

GROUNDS OF DECISION

Background facts

37 The background facts have been set out in considerable detail in the ID. We adopt the facts described therein and outline only the salient facts herein.

CCCS's investigations

38 The events leading to the ID are as follows:

(a) on 20 November 2013, CCCS received information from a whistle-blower alleging collusion amongst the poultry slaughterhouses to "fix prices";

(b) on 7 March 2014, CCCS formed an investigation team supervised by Harikumar, with the principal team leader being Kho;

(c) on 13 August 2014, CCCS conducted "dawn" raids on Lee Say, Hup Heng, Kee Song, Sinmah, Tong Huat, and The Poultry Merchants' Association, Singapore, collected documents and evidence, and conducted a first wave of interviews ("**the First Inspections**") with relevant employees, directors and officers. The statements taken from the witnesses were recorded by CCCS's various officers and reproduced in their respective Notes of Information ("**NOI**"). A

further round of interviews was conducted in March and April 2015, and a third wave of interviews was conducted in June and July 2015. There were further isolated interviews in the second half of 2015;

(d) on 8 March 2016, CCCS issued a Provisional Infringement Decision ("**PID**") against the Undertakings;

(e) between 19 April 2016 and 6 May 2016, the Undertakings submitted written representations to CCCS. Five of the Undertakings, namely, Lee Say Group (A5), Tong Huat Group, Ng Ai (A6), Sinmah, and TTS (A3), requested for and subsequently made oral representations to CCCS; and

(f) on 27 September 2016, CCCS conducted a meeting (referred to by the Appellants as the "State-of-Play Meeting") during which the Undertakings were informed that CCCS would be conducting further investigations, and that the Undertakings were at liberty to apply for leniency under the 2009 LG.

39 The following parties applied for leniency markers and made leniency submissions as follows:

(a) on 12 October 2016, Tong Huat Group, represented by Dentons Rodyk & Davidson LLP, applied for a marker relating to anti-competitive agreements between fresh chicken distributors for the distribution of whole and cut fresh chickens, […] under paragraph 3 of the 2009 LG. On the same day, Tong Huat Group was granted a marker for leniency;

(b) on 17 October 2016, Sinmah, represented by Drew & Napier LLC, applied for lenient treatment under paragraph 4 of the 2009 LG. On the same day, Sinmah was granted a place in the leniency queue;

(c) on 26 October 2016, Kee Song (A4), represented by Harry Elias Partnership LLP, applied for lenient treatment under paragraph 4 of the 2009 LG. On the same day, Kee Song was granted a place in the leniency queue; and

(d) on 10 November 2016, Hock Chuan Heng/Hy-fresh, represented by Aptus Law Corporation, applied for lenient treatment under paragraph 4 of the 2009 LG. On the same day, Hock Chuan Heng/Hy-fresh was granted a place in the leniency queue.

40 In the course of the further investigations, CCCS conducted interviews with key personnel and sent further notices pursuant to s 63 of the Act to each party requiring the production of additional information and documents.

41 In response to and acting on information contained in the representations, CCCS sent a list of guiding questions to those parties applying for leniency. The relevant parties provided their answers to CCCS on various dates.

42 Based on the information received from the representations, leniency applications and further responses to guiding questions for the undertakings applying for leniency, CCCS issued a Supplemental Proposed Infringement Decision ("**SPID**") on 21 December 2017.

43 The ID was eventually issued on 12 September 2018.

44 In November 2018, the appeals by A2, A3, A5 and A6 were filed.

The fresh chicken market in Singapore

45 In considering the above, we have had regard to some of the factual background of the fresh chicken market in Singapore as set out in the ID, supplemented with the information provided by the Parties during the Clarification Hearing and/or in response to the Board's queries.

46 It is helpful to set out some key points to provide economic and historical context to the evidence presented to the Board.

47 A number of the businesses involved in the fresh chicken market at the relevant time of the alleged infringement of s 34 of the Act were family-owned, and a number of the owners and personalities involved in the businesses were known to each other.

48 In the past, most of these businesses reared chickens, slaughtered them, and sold them to wholesale and retail customers. The Singapore Government prohibited the rearing of live chickens in June 2005 (limited to Pulau Ubin only) and the businesses then became dependent on sourcing live chickens from chicken farms. Whilst there is very little direct evidence of the nature of the competition in the decades before the prohibition of chicken breeding in Singapore, there appears to have been very cordial relationships among many of the families involved in the chicken farming and supplying business then. References were made by Lim and Tan Chee Kien to "kampong spirit" and the ethos of helping each other out even whilst competing in the same market. The evidence presented by A2 and A6 referred to this business environment which evolved and changed in the second half of the 1990s through to the present day.

49 Specifically, there were two striking developments. One was the involvement of a younger generation of family members that brought different perspectives to the fresh chicken industry in Singapore. The other was a more significant involvement of Malaysian commercial interests after the banning of chicken breeding in Singapore in June 2005 (limited to Pulau Ubin only). Some of the businesses had connections with chicken breeding farms in Malaysia and some of the businesses were to some extent vertically integrated by the time of the alleged infringement, e.g. A5. Economically and practically, this created a different cost structure for the Singapore chicken distributors relying on the cost of chickens from Malaysia instead, and to some extent costs related to transport and regulatory requirements for the import of chickens into Singapore. These are factors referred to by a number of the witnesses with regard to issues relating to the pricing of the chicken products that the distributors were selling in Singapore.

50 Another cost factor referred to by some of the Appellants was the impact of the avian flu (which occurred in 2004 and 2007) on supply, especially for those distributors that were totally reliant on independent chicken suppliers in Malaysia. That impact may have been somewhat ameliorated for those distributors who owned their own breeding farms, but even this would have been an issue for these distributors where there was widespread culling at the Malaysian farms due to the avian flu crisis. The key point to be kept in mind is that a significant driver of the cost of supplying chickens by the distributors in Singapore to their local customers was the cost of Malaysian chickens, some of which were controlled by certain of the Singapore distributors.

51 For the purposes of these appeals, another cost factor to be borne in mind is the ownership of slaughterhouses by some of the distributors in Singapore.

For those that owned slaughterhouses, their costs could be better controlled and managed, as opposed to those who had to pay slaughterhouse fees to the distributors that owned slaughterhouses.

52 It was evident that, for many of the Singapore distributors, profitability was a significant challenge which led to a period of consolidation of local and increasing investment by Malaysian businesses. On the latter point, many of the owners of the businesses named in the ID had, during the period of CCCS's investigation and since then, been acquired by Malaysian businesses.

53 The evidence by Lim, Ma and Tan Koon Seng also indicate the change in dynamics between the players from the apparent past "kampong spirit" to a more assertively divisive market conduct especially in the period of the mid-2000s, when there was apparently a price war of a spiralling undercutting between Hup Heng and Lee Say and decried by Lim as "chaos". Although this price-cutting war was only specifically referred to in Ma's NOI of 5 June 2015 and relied on by CCCS in the ID at [215], the impact of such tactics between two not insignificant market players may have led to: (a) the suggestions of price and cost pressures; and (b) the consistent statements by Chiew Kin Huat (Sinmah) ("**Chiew**"), Lim and Alex Toh Cheng Hai from A3 ("**Alex Toh**") that a certain price level had to be maintained to ensure survivability of the market players; as well as (c) references not to undercut prices. Characteristic of this period was significant customer-poaching between at least Lee Say and Hup Heng. Indeed, Ma gave evidence that he triggered price-cutting in response to Tan Koon Seng's poaching of Hup Heng's customers. It would therefore appear that, in the period in the mid-2000s up to about 2006 or 2007, there may have been significant price competition and customer-poaching based on the evidence of Ma and Tan Koon Seng and confirmed by Lim.

54 This period of price-cutting disorder appears to have resolved by mid-2007, as suggested by the price increases in October 2007 of between 30 and 90 cents per kilogram as reported by The Straits Times,[1] followed by the orderly lock-step price movements as shown in the ID at [353]. It was also during this period of relative price stability that several acquisitions were made, mainly by Malaysian companies buying into the Singapore chicken distributors, further demonstrating a market consolidation amongst the major players. It should be noted that two of the Undertakings, namely Hup Heng and Prestige Fortune, were acquired by Lee Say by 2012. Of the original players, only A2, A6 and Sinmah have remained independent, with A2 and A6 focusing on […] segments.

The Poultry Merchants' Association, Singapore

55 All of the Undertakings are members of The Poultry Merchants' Association, Singapore ("**the Association**") which is an association registered with the Registry of Societies since 10 December 1986. The Association shares the same registered address as Sinmah.

56 The object of the Association is to promote friendly relationships, goodwill, mutual help and common welfare among poultry merchants in Singapore. The Association is also aware of the need to comply with competition law. This is evidenced by its constitution expressly prohibiting any recommendation or arrangement "*which has the purpose or is likely to have the effect of fixing or controlling the price or any discount*".

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[1] ID at [270]

57 The Undertakings are represented in the Association by their various personnel, who are key management figures in their respective companies. Accordingly, the Undertakings are aware of competition law compliance requirements and the prohibition as set out in the Association's constitution.

Preliminary issues – evidential and procedural matters

58 Apart from issues against liabilities, the Appellants have also raised common preliminary issues of law involving evidential and procedural issues. The Appellants' and CCCS's submissions on these issues are contained in their respective bundles entitled "*Combined Submissions on the Applicable Law*". We deal with these issues below.

Burden and standard of proof in competition matters

59 It is not disputed by the Parties that CCCS bears the burden of proving that an infringement has been committed on the civil standard of balance of probabilities (see also *Konsortium Express and others v Competition Commission of Singapore* [2011] SGCAB 1 at [85]), or that CCCS has to produce "*strong and compelling evidence*" to prove the infringement within this civil standard under s 34 of the Act.[2] However, CCCS and the Appellants had placed different emphases on the conclusions to be drawn from this.

60 In *Napp Pharmaceutical Holdings Ltd v Director General of Fair Trading* [2002] All ER (D) 54 ("***Napp Pharmaceutical***"), the UK Competition Commission Appeal Tribunal ("**UK CAT**") held (at [105]) that the structure of

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[2] Appellants' Combined Submissions on the Applicable Law ("**ACSAL**") dated 27 September 2019, at [5]; Respondent's Combined Submissions on Applicable Law ("**RCSAL**") dated 23 October 2019 at [31]; ID at [151].

the UK Competition Act pointed to the application of the civil standard for infringements of Chapter I or II prohibitions. The UK CAT then followed Lord Nicholls's holding in *In re H and others (Minors) (Sexual Abuse: Standard of Proof)* [1996] AC 563 that, within the civil standard of proof, "*the more serious the allegation, the more cogent should be the evidence before the court concludes that the allegation is established on the preponderance of probability*", and held that competition infringements were serious matters attracting severe financial penalties and thus required "*strong and compelling evidence*".

61 The Appellants submit that this reference to "*strong and compelling evidence*" *in effect* required the burden of persuasion to be that of the criminal standard of beyond reasonable doubt, and that because the imposition of penalties is akin to fines, the burden *in practical application* is "*closer*" to the criminal standard.[3] The Appellants further cited with emphasis the UK CAT's remarks in *Napp Pharmaceutical* at [108] and [109] as being relevant to CCCS's standard of proof:

> 108 … whether we are, in technical terms, applying a civil standard on the basis of strong and convincing evidence, or a criminal standard of beyond reasonable doubt, *we think in practice the result is likely to be the same*. We find it difficult to imagine, for example, this Tribunal upholding a penalty if there were a reasonable doubt in our minds, or if we are anything less than sure that the Decision was soundly based.
>
> 109 In those circumstances the conclusion we reach is that, formally speaking, the standard of proof in proceedings under the Act involving penalties is the civil standard of proof, but that standard is to be applied bearing in mind that infringements of the Act are serious matters attracting severe financial penalties. It is for the Director to satisfy us in each case, *on the basis of strong and compelling evidence, taking account of the seriousness*

[3] ACSAL at [7].

> *of what is alleged, that the infringement is duly proved, the undertaking being entitled to the presumption of innocence, and to any reasonable doubt there may be.*
>
> [emphasis added in Appellants' submissions]

62 The Appellants also pointed out that in *JFE Engineering Corp v European Commission* (Joined Cases T-67/00, T-68/00, T-71/00 and T-78/00) 8 July 2004 ("***JFE Engineering***"), it was held (at [178]):

> Given the nature of the infringements in question and the nature and degree of severity of the ensuing penalties, *the principle of the presumption of innocence* applies in particular to the procedures relating to the infringements of the competition rules applicable to undertakings that may result in the imposition of fines or periodic penalty payments …
>
> [emphasis added in the Appellants' submissions][4]

63 The Appellants' reliance on these observations is misconceived. First, the Appellants have not cited any basis whatsoever for the operation of the principle of presumption of innocence for matters and proceedings under Singapore's Competition Act. The reference to and application of this principle in *JFE Engineering* (see [178]) and *Napp Pharmaceutical* (see [92]-[94], [98]-[99]) was the direct result of Article 6(2) of the European Convention for the Protection of Human Rights which has no relevance in our context.

64 Second, the UK CAT's remarks at [108] of *Napp Pharmaceutical* on the practical result when applying the criminal standard and the civil standard in competition matters that required strong and convincing evidence as being "*likely to be the same*" clearly do not go so far as to place the burden on CCCS "*closer to that of the criminal standard of proof beyond reasonable doubt*", as

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[4] ACSAL at [8].

the Appellants submit.[5] The standard of proof remains the civil standard, as the UK CAT itself clarified "*formally*" shortly after its remarks on the practical result. As CCCS rightly points out, the UK CAT subsequently held in *JJB Sports plc and Allsports Limited v Office of Fair Trading* [2004] CAT 17 ("***JJB Sports***") (at [203]-[204]) that this passage in *Napp Pharmaceutical* does not introduce the criminal standard through the back door and should not be interpreted as meaning that something akin to the criminal standard is applicable.

65 However, we agree with the Appellants that the approach taken by the Courts in weighing and assessing evidence where allegations of fraud are made in civil cases is analogous to the approach to be taken in competition matters.[6] The underlying principle that operates in both is that the more serious the allegation, the more cogent is the evidence required to overcome the unlikelihood of what is alleged and thus to prove it, as expressed by Ungoed-Thomas J in *In re Dellow's Will Trusts* [1964] 1 WLR 451 and cited by Lord Nicholls in *In re H*, which both the UK CAT followed in *Napp Pharmaceutical* (at [107]) for competition matters, and likewise the Singapore High Court in *Super Group Ltd v Mysore Nagaraja Katik* [2019] 4 SLR 692 ("***Super Group***") (at [107]) which the Appellants cited.[7]

66 Requiring "*strong and convincing evidence*" does not however mean that the standard of proof is higher or more onerous than the ordinary civil standard, or that it is "*closer*" to the criminal standard; there is no third or intermediate legal burden of proof apart from the civil burden of balance of probabilities and

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5 ACSAL at [7].
6 ACSAL at [6].
7 ACSAL at [6].

the criminal burden of beyond reasonable doubt (see *Super Group* at [105]; *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [158]–[160]; *Napp Pharmaceutical* at [107]). The principle merely goes to the quality of evidence that would sufficiently establish an infringement on a balance of probabilities.

General evidentiary principles

67 What evidence is likely to be sufficiently strong and convincing to prove the infringement will still ultimately depend on the specific circumstances and the facts of each case (see *JJB Sports* at [205]).

68 It is also trite that in competition matters, the evidence should be assessed holistically as a whole and not in isolation, taking into account the specific features of the market in question. The inquiry is to ascertain whether there is a firm, precise and consistent body of evidence pointing to the infringement: see *Ahlstrom Osakeyhtio and others v European Commission* [1993] ECR I-1307 (Cases C-89/85 etc) 31 March 1993 ("***Ahlstrom***") at [70] and [127]; *Imperial Chemical Industries Ltd v European Commission* [1972] ECR 619 (Case 48/69) at [68]; *JFE Engineering* at [179]. However, it is not necessary for each and every piece of evidence to satisfy that criteria (of being firm, precise and consistent) in relation to every aspect of the infringement. It is sufficient if the body of evidence relied on, viewed as a whole, meets that requirement: *JFE Engineering* at [180].

69 In addition, it should be appreciated that anti-competitive practices and agreements are by their nature hidden and secret. Given the clandestine nature of such activities, it would follow that the associated documentation *could* be reduced to a minimum and that the evidence CCCS can obtain may be only

fragmentary and sparse, such that it is necessary to reconstitute certain details by deduction. Under such conditions, it is possible that the existence of an anti-competitive practice or agreement has to be inferred from a number of coincidences and indicia which, taken together, may, in the absence of another plausible explanation, constitute evidence of an infringement of the competition: see *Pilkington Group Ltd v European Commission* (Case T-72/09) 17 December 2014 at [83]; *Aalborg Portland and others v European Commission* (Joined Cases C-204/00 P, C-205/00 P, C-211/00 P, C-213/00 P, C-217/00 P and C-219/00 P) 7 January 2004 ("***Aalborg***") at [55]-[57]; *JFE Engineering* at [203]; *Claymore Dairies Ltd and Express Dairies PLC v Office of Fair Trading* [2003] CAT 18 at [3]; *JJB Sports* at [206]; *Napp Pharmaceutical* at [110]. CCCS is thus well entitled to draw inferences or presumptions from a given set of circumstances. It is not required to produce documents expressly attesting to contacts between the economic operators concerned, and fragmentary and sporadic items of evidence that are available can be supplemented by inferences that allow the relevant circumstances to be reconstituted: *Silec Cable SAS v European Commission* (T-438/14) [2018] 5 CMLR 14.

70 On that note, the case law also suggests that where CCCS has no documents or other evidence that *directly* establish the existence of concertation among the parties concerned, it would be necessary for this Board to consider and assess whether there are alternative plausible explanations apart from that of concertation: see *Ahlstrom* at [70], [126]-[127]; *Limburgse Vinyl Maatschappij and others v Commission* (T-305/94) [1999] ECR II-931 at [724]-[728]; *JFE Engineering* at [186]; *CRAM and Rheinzink v Commission* Cases 29

and 30/83 at [16]. The Board should also not make inferences "*from speculation based on imprecise evidence*".[8]

71 In our view, these various considerations above could be useful in the Board's assessment of all the evidence placed before us. However, the overarching principle in the inquiry is to be satisfied that there is a firm, precise and consistent body of evidence, based on the specific circumstances and facts of each case.

72 Whether certain details are important and determinative of the case would be dependent on the whole body of evidence assessed holistically. Specifically, to the duration of the infringement, the requirement of precision and coherence does not apply to establishment of the *existence* of the infringement but merely serves to determine the extent to which the fine should be commensurate with the duration of the infringement: *JFE Engineering* at [61]. Where the existence and anti-competitive purpose of the agreement has also been sufficiently established, the specific mechanism by which that purpose was attained possibly need not be established: *JFE Engineering* at [203].

73 In a sense, there is an ongoing tension between on the one hand, a need for a firm, precise and consistent body of strong and convincing evidence (considering that such infringements are serious matters that could attract severe financial penalties), and on the other, the need to reconstitute certain details by deduction due to the clandestine nature of concerted practices and normally fragmentary and sparse quality of the evidence.

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[8] *Soliver NV v European Commission* [2014] ECLI 867 at [58].

The role and powers of the Board

74 Next, we deal with the appellate process under the Act and the Appeals Regulations and the issues concerning the Board's role and powers.

75 The Appellants take the position that their respective appeals constitute a "*rehearing of the case*",[9] and some of them argue that the Board should hear their appeals on a *de novo* basis.[10] We are of the view that this is ill-conceived and mistakes the Board's *power* to substitute CCCS's decision on appeal as a *duty* to step into the shoes of CCCS as the primary decision-maker.

76 The Board is established under the Act, and the Board's powers and duties (as well as the nature of the appeal process) depend on an examination of the legislation. We set out the relevant provisions in the Act and the Appeals Regulations below:

(a) Under s 73 of the Act:

> **Powers and decisions of Board**
>
> 73.—…
>
> (2) The Board shall have all the powers and duties of the Commission that are necessary to perform its functions and discharge its duties under this Act.
>
> …
>
> (7) All appeals under this section shall be determined, having regard to the nature and complexity of the appeal, as soon as reasonably practicable.
>
> (8) The Board may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may —

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[9] ACSAL at [2].

[10] A3's Reply Submissions dated 7 November 2019 at [3], [6]-[11]; A2's Response to Respondent's Reply Submissions dated 7 November 2019 at [5].

> *(a)* remit the matter to the Commission;
>
> *(b)* impose or revoke, or vary the amount of, a financial penalty;
>
> *(c)* give such direction, or take such other step, as the Commission could itself have given or taken; or
>
> *(d)* make any other decision which the Commission could itself have made.
>
> (9) Any decision of the Board on an appeal has the same effect, and may be enforced in the same manner, as a decision of the Commission.
>
> (10) If the Board confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based.

(b) Under reg 26 of the Appeals Regulations:

> **Procedure at hearing of appeals**
>
> 26.— …
>
> (2) The Board shall, so far as it appears to it to be appropriate, seek to avoid undue formality in its proceedings and shall conduct the hearing of an appeal in such manner as it considers to be appropriate for the clarification of the issues before it and generally for the just, expeditious and economical conduct of the proceedings.

77 In cases where the appeal is by way of rehearing, the relevant legislation will state so. For example, Order 55 rule 2 of the Rules of Court (Cap. 322) states that "*An appeal to which this Order applies shall be by way of rehearing.*" In this case, the Act does not expressly state that an appeal to the Board is "*by way of rehearing*".

78 Although the Appellants appear to use the terms rehearing and hearing *de novo* interchangeably, the two are not necessarily the same. The Court of Appeal in *Senda International Capital Ltd v Kiri Industries Ltd and others and another appeal* [2019] 2 SLR 1 clarified (at [43]) that:

> In such an appeal [by way of rehearing] the Court makes its decision based on the record of the proceedings at trial, including the exhibits received into evidence. In some cases the Court may receive fresh evidence. The Court may draw inferences from the evidence before the trial court and evidence, if any, which it receives. The appeal by way of rehearing however is *not the same as an appeal* de novo *in which a court hears a matter afresh* and is *not bound by the course of proceedings at trial.* Indeed, *such an "appeal" is in truth an exercise of original jurisdiction.*
>
> [emphasis added]

79 The Court of Appeal then proceeded to cite the High Court of Australia's remarks in *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194 ("***Coal and Allied Operations***") at [14]:

> Ordinarily, if there has been no further evidence admitted and if there has been no relevant change in the law, a court or tribunal entertaining an appeal by way of rehearing can exercise its appellate powers *only if satisfied that there was error on the part of the primary decision-maker.* That is because statutory provisions conferring appellate powers, even in the case of an appeal by way of rehearing, are construed on the basis that, unless there is something to indicate otherwise, the power is to be exercised for the correction of error. However, the conferral of a right of appeal by way of a hearing *de novo* is construed as a proceeding in which the appellate body is required to exercise its powers *whether or not there was error at first instance*.
>
> [footnotes omitted; emphasis added]

80 As quoted also by the Court of Appeal in an earlier case of *Sanum Investments Ltd v Government of the Lao People's Democratic Republic* [2016] 5 SLR 536 ("***Sanum***") (at [41]), in the *Black Law's Dictionary* (Bryan A Garner gen ed) (Thomson Reuters, 2014, 10th Ed), the term "*hearing* de novo" is defined (at p. 837) as "*a reviewing court's decision of a matter anew, giving no deference to a lower court's findings*" or "*a new hearing or matter, conducted as if the original hearing had not taken place*". In the context of the court's task in reviewing an arbitral tribunal's ruling on jurisdiction, a hearing *de novo* was hence where the court would consider the matter afresh. In doing so, it will of

course consider what the arbitral tribunal has said as that might well be persuasive. But beyond that, the court conducting a *de novo* review is not bound to accept or take into account the tribunal's findings on the matter.

81 There are also a number of other cases that set out varying permutations of categories (from appeals *stricto sensu*, appeals by way of rehearing to appeals *de novo* and other "*hybrid*" categories): see *Fox v Percy* (2003) 214 CLR 118 at [20]; *Turnbull v NSW Medical Board* [1976] 2 NSWLR 281 at 297–298; and *The Environment Centre Northern Territory (NT) Incorporated v Minister for Land Resource Management* [2015] NTSC 30 ("***Environment Centre***") at [28]-[29].

82 However, we would have reservations on trying to classify appeals in accordance with the categories suggested in these cases that are concerned with different statutory schemes from other jurisdictions. After all, as has been noted in most of these cases, the necessary questions must still be answered by reference to the particular legislation concerned. There is no definitive classification of appeals, and the broad categories and labels are merely descriptive phrases that can only offer a limited measure of guidance (see *Coal and Allied Operations* at [11] and [70]; *State Transit Authority of New South Wales v Fritzi Chemler* [2007] NSWCA 249 at [64]; *Environment Centre* at [8] and [83]).

83 The main bow in the Appellants' submission is s 73(8)(*d*) of the Act, which gives the Board the power to "*make any other decision which the [CCCS] could itself have made*" when deciding the appeal. However, we cannot accept that this means that the Board *has* to hear all appeals to it on a *de novo* basis, such that the Board always considers the matter afresh and steps into the shoes

of CCCS to substitute the latter's decision. Instead, s 73(8)(*d*) of the Act only relates to one of the many powers conferred upon the Board.

84 As CCCS points out, the existence of a power under the Act does not shed any light on "*how the power should be exercised*".[11] In *Environment Centre*, the plaintiff made the argument that a provision that empowered the Minister for Land Resource Management to "*substitute for the Controller's decision the decision that, in the opinion of the Minister, the Controller should have made in the first instance*" was language that suggests that the Minister's function on review was to "*do it over*" what the Controller did. This contention was not accepted by the Supreme Court of Northern Territory, as this provision only related to one of many powers conferred upon the Minister. In that case, the Minister also had the discretion to refer the matter back to the Controller, and in such circumstances, it would be the Controller, not the Minister, who would be required to consider any issues afresh and who would make a new decision. Likewise, in our context, the Board can decide, in appropriate cases, to remit the matter back to CCCS under s 73(8)(*a*) of the Act.

85 The Act's provisions were modelled after provisions in the UK Competition Act. The powers granted to the Board under s 73(8) of the Act in the former are *in pari materia* with most of paragraph 3(2) of the Schedule 8 in the latter:

> The Tribunal may confirm or set aside the decision *which is the subject of the appeal*, or any part of it, and may—
>
> (a) *remit the matter to the CMA*;
>
> (b) *impose or revoke, or vary the amount of, a penalty*,

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[11] CCCS's Reply Submissions to A2 dated 22 November 2019 at [7].

> (c) grant or cancel an individual exemption or vary any conditions or obligations imposed in relation to the exemption by the CMA,
>
> (d) *give such directions, or take such other steps, as the CMA could itself have given or taken*, or
>
> (e) *make any other decision which the CMA could itself have made*.
>
> [emphasis added]

86 Thus, cases that examine the nature of appeals to the UK tribunal would provide useful guidance, when examining the nature of appeals to the Board.

87 Based on our review of the jurisprudence and the statutory framework that the Parliament has laid down in the Act, our reading of the appellate framework is as such:

(a) Part IV of the Act covers the appeal process for matters under the Act. The Board is established to hear appeals against the decisions of CCCS, and the Board will be an independent body comprising members appointed by the Minister: see s 72(1) of the Act; and Second Reading Speech of the Competition Bill 2004. Further appeals may be made against the decisions of the Board to the High Court, and thereafter to the Court of Appeal, but only on points of law and the amount of the financial penalty: see s 74 of the Act.

(b) Section 73(8) of the Act gives the Board wide jurisdiction and Parliament has equipped the Board with the power to, among other things, substitute its decision, including an infringement decision, for that of CCCS under s 73(8)(*d*) of the Act. However, the reference to "*any other decision which [CCCS] could itself have made*" in s 73(8)(*d*) of the Act is a reference to the *kind* of decision which CCCS could have made, and not to the procedure by which

it made them: see *Albion Water Ltd v Water Services Regulation Authority (formerly Director General of Water Services* [2008] Bus LR 1655 at 1696; *VIP Communications Ltd v Office of Communications* [2007] CAT 3 ("***VIP Communications***").

(c) In addition, if the Board confirms the decision which is the subject of the appeal, it may nevertheless set aside any finding of fact on which CCCS's decision was based: s 73(10) of the Act.

(d) A decision under s 73(8)(*d*) of the Act is only one of several types of decisions the Board can make, when confirming or setting aside part or the whole of CCCS's decision that is *the subject of the appeal*. The Board can also decide to remit the matter to CCCS.

(e) The Board's approach in an appeal should be sensitive to the circumstances, with the overriding objective of deciding cases justly. How the Board should decide the case, and whether it should remit or substitute its decision for CCCS's will depend on what is necessary to meet justice in each individual case, bearing in mind the overriding needs for fairness, expedition and cost savings: *Freeserve v Director General of Telecommunications* [2003] CAT 5 at [113].

(f) Although the Board can decide to make its own decision, it should be mindful that it should not turn itself into a primary decision maker without good reason; the Board is essentially an appellate tribunal, and not a tribunal of first instance, and the primary task is usually to decide whether CCCS was correct in arriving at the conclusion that it did: *Burgess v Office of Fair Trading* [2005] CAT

25 ("***Burgess***") at [129]-[130]; *VIP Communications*; *Bettercare Group Limited v Director General of Fair Trading* [2003] ECC 40 at 473; *Aberdeen Journals Ltd v Director General of Fair Trading* [2002] CAT 4 at [177].

(g) Generally, the Board should however, if necessary, make its own decision rather than remit the matter, if: **(i)** it has or can obtain all the necessary material; **(ii)** the requirements of procedural fairness are respected; and **(iii)** the course the Board proposes to take is desirable from the point of view of the need for expedition and saving costs: *Burgess* at [132]. The Board has full jurisdiction to find facts, make its own appraisals of economic issues, apply the law to those facts and appraisals, and determine the amount of any financial penalty where applicable.

(h) Where, however, the justice of the case so requires, the Board may remit the matter to CCCS. Where consideration of further information, further investigation and/or analysis of market and competitive conditions are required, remittal may be appropriate: see *Flynn Pharma Ltd v Competition and Markets Authority* [2018] CAT 11 and [2018] CAT 12.

88 Hence, we cannot agree with the Appellants' submission that the Board should and has a duty to hear the present appeals *de novo* and for the Board to conduct a "trial" afresh. This contention is clearly at odds with the statutory scheme in the Act. We agree with CCCS that the appeal process is generally a focused exercise, with the starting point and "*subject of the appeal*" being CCCS's decision (see s 73(8) of the Act). The discipline of keeping the case within bounds is imposed through a structure that envisages CCCS defending

its decision against a pleaded notice of appeal, where leave must be sought to amend the notice of appeal or add new grounds of appeal: see regs 8(1)(*b*) and 11 of the Appeals Regulations. The grounds of appeal can include the extent to which an appellant contends that *CCCS's decision* was based on an *error* of fact or was *wrong* in law (see reg 8(1)(*b*)(ii)(B)), and the extent to which the appellant is appealing *against CCCS's exercise of discretion* in making the contested decision (see reg 8(1)(*b*)(ii)(C)).

89 The power to make any decision which CCCS could itself have made under s 73(8)(*d*) of the Act was granted to the Board as part of the variety of courses open to it for the Board to do justice for each case. Under this statutory framework, the Board can make such decision that CCCS could itself have made where appropriate, but it is not required to in all circumstances.

90 Whether this power when exercised amounts to the exercise of original and *de novo* jurisdiction in the true sense, where **(a)** it does not matter whether or not there was error at first instance by CCCS, and **(b)** no deference is given to CCCS's exercise of discretion, is strictly *not* in issue in these appeals. Although A2 has submitted that s 73(8)(*d*) of the Act means that the Board is "*not bound only to consider if CCCS had made an error in arriving at its ID*",[12] all the Appellants have in fact mounted their cases in their pleaded notices of appeal on the basis that CCCS's findings in respect of liability and the quantum of penalties imposed were wrong or incorrect, that CCCS had "*erred*", "*made an error*", or that the ID was "*based on errors*", etc.[13]

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[12] A2's Response to Respondent's Reply Submissions dated 7 November 2019 ("**A2's Reply Submissions**") at [10].
[13] Notices of Appeal in A2, A3, A4 and A6.

91 Even if it amounts to conferring jurisdiction to decide *de novo*, we are of the view that it does not translate to a duty to always exercise that power or to always *hear* appeals "afresh". As to the former, on exercising that power, it is merely one of several options when deciding to confirm or set aside the decision. Whether the Board would resort to that will depend on each case.

92 As to the latter on hearing appeals afresh, regardless of whether s 73(8)(*d*) of the Act amounts to *de novo* jurisdiction, when the Board decides to exercise its power under s 73(8)(*d*) of the Act, it does not mean that it should be pursuant to or necessitate a full and complete "rehearing" (in the literal sense) of the evidence and all that had occurred before CCCS. A *de novo* re-run of the original investigation is not necessary, where all witnesses who had been interviewed by CCCS will be necessarily called back and all that transpired before CCCS would be disregarded. There is no necessity to begin completely afresh. It simply means that the Board can still have regard to what CCCS has said in its decision and that the Board is at liberty to consider the material before it, unfettered by any principle limiting its fact-finding abilities (see *AQZ v ARA* [2015] 2 SLR 972 at [57], cited with approval in *Sanum* at [43]; *Lau Liat Meng & Co v Lum Kai Keng* [2002] 2 SLR(R) 593; reg 22 of the Appeals Regulations). After all, as part of the Board's overriding objective of deciding cases justly, it should bear in mind the need for expedition, to determine appeals "*as soon as reasonably practicable*" (see s 73(7) of the Act) and to ensure the "*efficient*", "*just, expeditious and economical conduct*" of its proceedings (see regs 19(1), 20(1)(*a*) and 26(2) of the Appeals Regulations).

93 We would also reject CCCS's proposed framework on the appellate process and the treatment of evidence by the Board.

94 First, there is no presumption that the Board should admit and accept evidence that is "*unchallenged*" by the Appellants. CCCS has conflated the appeal process and grounds of appeal and the Board's treatment of evidence. If part of the infringement decision is unchallenged in an appeal, it would *prima facie* stand and remain as it is. However, where the Appellants have appealed against the finding of infringement itself and their liability, the Board is not simply obliged to accept all relevant evidence as it is, especially when the Appellants have taken issue with the overall quality of the available evidence to support the ID. The appeal is indeed generally a focused exercise for the Board to consider the grounds and points of each appeal, but this does not lead to the proposition that the Board should simply accept or treat as unchallenged any specific evidence not mentioned in the grounds of appeal. After all, the Appellants have contended that there is no strong and convincing evidence to support the ID, and the Board would have to consider all the evidence before it to decide if CCCS's findings of infringements are correct.

95 We would agree with CCCS to the extent that the Board would generally look at the arguments raised by parties, as well as the evidence contested by parties. However, the Board is not necessarily constrained because of that or would *de facto* and unblinkingly and wholly accept "unchallenged" evidence as accepted or true. The Board is empowered to consider and raise new issues for instance for parties to submit on, and the Board controls its procedure. It would not serve the interests of justice if the Board is of the view that there were errors in the conclusions or assessment of the probative value of certain evidence that have been "unchallenged" but is constrained from examining them.

96 In the same vein, we would then reject the A2's contention that *no* weight should be given to statements of witnesses that were not cross-examined, simply

on that basis.[14] The Board will still consider all the evidence available before it, and place the appropriate weight based on an assessment of their veracity and relevance, including whether they have been tested in the hearing.

97 Second, the evidential burden does not shift based on whether witnesses are called or not in the appeal before the Board. CCCS is incorrect to suggest that Appellants bear the burden of calling witnesses if they wish to challenge their evidence. There is no "*burden*" on the Appellants to call witnesses if they wish to challenge the veracity of certain witness statements, *per se*. Parties are free to run their cases as they wish; it is not incumbent on anyone to call any witnesses, even if material to their case. If witnesses are not called or cross-examined during hearings before the Board but parties make submissions on those witnesses, the Board will consider what is before us as it is, including the ID's findings about those witnesses' evidence, the witnesses' statements recorded, the Parties' submissions, etc. The Board will assess the whole body of evidence before it holistically and place the appropriate weight and make any appropriate inferences based on their reliability and relevance.

Issues for the Board's determination

98 Section 34 of the Act prohibits agreements between undertakings or concerted practices which have the object *or* effect of restricting, preventing or distorting competition in Singapore. In addition, "*object*" infringements by their very deleterious nature which involve restrictions of competition by object, e.g. market-sharing or price-fixing, can be made out under this provision even if the agreement and/or concerted practices do not have an "*effect*" on the market:

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[14] A2's Reply Submissions at [35]-[44].

Trefilunion SA v Commission [1995] ECR II-1063; *P Huls AG v Commission* [1999] ECR I-4287; *Argos Limited and Littlewoods Limited v OFT* [2004] CAT 24 ("***Argos***").

99 In the ID, CCCS found that the Appellants had infringed the s 34 prohibition by participating in two agreements and/or concerted practices which amounted to:

(a) market-sharing by not competing for each other's customers referred to by CCCS as the Non-Aggression Pact ("**NAP**"); and

(b) price-fixing by determining the quantum and timing of price movements in relation to the sale and distribution of fresh chickens in Singapore referred to by CCCS as "**Price Discussions**". The Price Discussions include the exchange of price information and future pricing intentions.[15]

100 CCCS decided that the NAP and Price Discussions were distinct infringements that also constituted a "*single continuous infringement*" in pursuit of the common objective to distort the normal movement of fresh chicken prices ("**SCI**").[16] The finding on SCI has important implications on the quantum of financial penalties as it impacts the relevant duration of infringement.

101 Based on the Parties' submissions and grounds set out in the Appellants' Notices of Appeal, the main issues for the Board's determination were:

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[15] ID at [147].
[16] ID at [432]-[444]

(a) whether each of the Appellants had infringed s 34 of the Act by having participated in:

(i) the NAP; and/or

(ii) the Price Discussions,

that had the anti-competitive object of market-sharing or price-fixing respectively;

(b) if so, whether such participation in the NAP and/or Price Discussions by the relevant Appellants constituted a SCI; and

(c) for Appellants that have infringed s 34 of the Act, the quantum of financial penalties payable.

General observations on the evidential representations

102 At the outset, before discussing the substantive issues, we would observe that when examining the evidence before us holistically, the Board should be clear what evidence would support which distinct infringement specifically. If CCCS's case is that the NAP and Price Discussions are distinct infringements, they should not approach the evidence in a general broad-brush manner to treat relevant evidence as pointing to participation in a general collective "*Anti-Competitive Discussions*" constituting both NAP and Price Discussions. Evidence allegedly indicating participation in the Price Discussions cannot simply be taken to also indicate participation in the NAP, and *vice versa*; the specific details and circumstances of each piece of evidence would have to be carefully examined.

General remarks on probative value of leniency statements

103 The Appellants have generally submitted that little probative weight should be placed on leniency statements,[17] that it is wrong to conclude that all leniency statements are reliable simply because some parts of these statements are potentially self-incriminating.

104 We agree with CCCS that leniency statements may have probative value and that they must be examined in the light of all the relevant facts of the case, including whether they run counter to the interests of the declarant and whether they may be untrue given the declarant's state of mind and incentives at the relevant time.

105 Leniency policy is an important policy tool to allow CCCS to pierce the cloak of secrecy that anti-competitive practices usually operate under, and to obtain inside information or evidence on infringements. The policy of granting lenient treatment to undertakings that co-operate outweighs the policy objects of imposing financial penalties on such undertakings: see *CCCS Guidelines on Lenient Treatment for Undertakings coming forward with Information on Cartel Activity 2016*. Similar leniency programmes are common in other competition law regimes internationally.

106 We agree with CCCS that leniency statements in themselves are not necessarily undermined by the very fact of the economic incentives in submitting a leniency application. The fact of seeking to benefit from the application of leniency to obtain lower penalties does not necessarily create an

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[17] ACSAL at [18]-[25].

incentive for other participants to submit distorted evidence: see *Dole Food Company v Commission* (T-588/08) [2015] CMLR 967 at [91]. Moreover, attempts to deceive or mislead CCCS would jeopardise the leniency application in the first place as it would call into question the sincerity and completeness of cooperation being extended to CCCS: see *Peroxidos Organicos v Commission* [2006] ECR II-4441 at [70].

107 To that end, we generally agree with CCCS's reliance on the factors cited in *Toshiba Corp v Commission* [2014] 5 CMLR 8 ("***Toshiba***") that may be relevant when examining and assessing the reliability of the leniency statements: higher probative value may be ascribed to statements that:

(a) are reliable;

(b) are made on behalf of an undertaking;

(c) are made by a person under a professional obligation to act in the interests of that undertaking;

(d) go against the interests of the maker of the statement;

(e) are made by a direct witness of the relevant circumstances; and

(f) are provided in writing deliberately and after mature reflection.

108 These appear to be general evidential propositions that should not be controversial or also taken as determinative. We also agree with the Appellants that the reliability of the statements and credibility of the maker should be tested for both internal and external consistency, be it against or taking into account

the maker's potential motives and incentives, testimony during the hearing, the maker's previous statements as well as other evidence, or even the maker's demeanour. Not all aspects or parts of a leniency statement may also have the same probative value as well.[18]

109 In summary, the reliability of each statement must be carefully examined, and this applies to statements made beyond the context of leniency applications as well. It is not the case that leniency statements are inherently or immediately unreliable in themselves.

Limited reliance on Chiew's evidence

110 Before dealing with our decisions on the NAP and the Price Discussions, the Board notes that CCCS relied heavily on the statements of Chiew, apart from others, in support of its case against the Appellants. A2 and A6 had challenged Chiew's evidence and required CCCS to produce Chiew at the hearings for cross-examination. On 24 June 2019, at the request of CCCS, the Board had issued a Summons for Chiew's attendance at the hearing as a witness, to be cross-examined.

111 However, Chiew was unable to attend any of the hearings as he was then suffering from multiple medical conditions. Chiew's doctor had deemed Chiew to be unsuitable for court attendance and opined that it would be difficult for Chiew to provide a reliable testimony. In support, CCCS had tendered Chiew's medical reports dated 20 June 2019 and 6 August 2019.[19]

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[18] ACSAL at [20].
[19] Exhibit marked "**R-2**" tendered at the hearing on 3 September 2019. See Notes of Evidence ("**NE**") 3/9/19, p. 198, lines 1-6.

112 Chiew was also unable to attend the Clarification Hearing on 13 and 20 July 2020 for the same medical reasons.

113 As Chiew was not available for cross-examination, A2 and A6 did not have the opportunity to test the veracity or otherwise of his evidence. In the circumstances, and in view of the challenge to Chiew's evidence, the Board did not have regard to Chiew's evidence except where it pertained to Sinmah as a matter of prudence and fairness to the Appellants when considering the evidence for the appeals.

Our decision on the NAP

114 CCCS has taken the following indicia together as supporting evidence that the NAP was implemented, and that the Parties had participated in the NAP:

(a) statements by Chiew, Ong, Ng, Alex Toh, and Quek Cheaw Kwang ("**Quek**") from Prestige Fortune;

(b) statements by employees that it is industry practice to focus on their own customers and not accost customers belonging to other distributors;

(c) statements from customers stating that fresh chicken distributors do not approach them to encourage switching, or that it was difficult to switch distributors;

(d) specific incidents involving refusals to compete as recounted;

(e) statements by employees confirming a policy not to compete for customers; and

(f) enforcement of the NAP through informal sanctions by the Parties.

115 CCCS's case is that the above evidence indicates the implementation of the NAP.[20] In support, CCCS relied primarily on the evidence given on behalf of Sinmah, Tong Huat Group, Hy-Fresh, and Kee Song (A4) (collectively, "**the Four Non-Parties**"), who had admitted to the existence of and their respective participations in the NAP. Each of the Four Non-Parties had accepted liability for having infringed s 34 of the Act by reason of the NAP and paid the penalties imposed. On the basis that each of the Four Non-Parties did not dispute liability of the NAP, the Board accepts that the NAP existed as amongst these parties.

116 As against the Appellants, CCCS's case is that each of them had similarly, like the Four Non-Parties, participated in the NAP not least because each of the Appellants' representatives, namely Lim (A2), Alex Toh (A3), Tan Koon Seng (A5) and Tan Chee Kien (A6) had been identified as having been present in various meetings where the NAP was discussed.

117 However, each of A2, A3, A5 and A6 denied that their respective representatives had participated in any NAP and challenged CCCS's evidence against them.

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[20] ID at [225].

Appeal No. 2 of 2018 by Gold Chic / Hua Kun (A2) on the NAP

Ong's and Toh Eng Say's statements

118 CCCS's case against A2 is that Lim, its Manager, had participated in various meetings, social or otherwise during which "Anti-Competitive Discussions" were held. Lim was identified by witnesses (other than Chiew) such as Ong and Toh Eng Say as having attended these Anti-Competitive Discussions. CCCS had defined Anti-Competitive Discussions to include discussions on the NAP and/or Price Discussions.

119 However, it is not clear from Ong's and Toh Eng Say's statements whether, during the meetings attended by Lim, the NAP was specifically discussed or at all.

120 For example, the statements made by Ong were quite vague. Ong mentioned that Lim was present at their meetings but it was not clear if those meetings were where the NAP or the Price Discussions (or both) were discussed, as some of the questions posed by CCCS were in relation to Lim's attendance in "Anti-Competitive Discussions",[21] which was defined to include both the NAP and the Price Discussions.

121 As mentioned in paragraph 102 above, to support its finding that A2 had participated in the NAP, CCCS must show that the evidence relied upon pointed specifically to A2's participation in the NAP.

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[21] ID at [177].

122 As such, based on the statements of the witnesses relied on by CCCS, we are unable to find evidence of A2's participation in the NAP.

Reasons for not competing for other Undertakings' customers

123 In support of its case against A2 for NAP, CCCS also relied on the fact that Lim had admitted that "*we do not steal each other's customers*", that A2 did not compete for other undertakings' customers, thereby proving the implementation of the NAP.

124 Lim's evidence was that:

> A. I believe that between good friends there may be an understanding that we do not steal each other's customers, for example between Chew Kin Huat (Sinmah) and myself or Tong Huat and myself. I am on good terms with the bosses from Tong Huat because I was on very good terms with their father. But we cannot stop our employees from snatching customers from each others' companies. However, my employees know that I am on good terms with the bosses of Sinmah and Tong Huat, and they understand they should not steal Sinmah and Tong Huat's customers. If their customers approach us, we may still conduct business with them.[22]

125 The fact that A2 did not compete for some customers does not by itself mean that it had infringed s 34 of the Act.

126 To find an infringement under s 34 of the Act, the evidence must show that the reason for A2 not competing for customers of others (i.e. the NAP) was because of agreements and/or concerted practices agreed between A2 and the

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[22] ID at [365].

other undertakings not to compete for each other's customers with the *object or effect* of distorting, restricting or preventing competition.

127 In this case, Lim's evidence was that A2's reason for not competing with Tong Huat and/or Sinmah was because of its close relationships with them. There was no evidence that the reason for not competing for the other undertakings' customers was because of their agreements and/or concerted practice not to do so for anti-competitive arrangements.

128 Having regard to the close historical relationships amongst the fresh chicken distributors as outlined above, we find Lim's explanation plausible. It is not uncommon for some business practices not to poach or steal clients of another not because of any anti-competitive arrangements, but more because of their personal, close or familial relationships.

129 Having considered the evidence as a whole, the Board could not find, on a balance of probabilities, that A2 had participated in the NAP.

130 Consequently, A2's appeal against liability for the NAP is allowed.

Appeal No. 3 of 2018 by TTS (A3) on the NAP

131 In support of its finding that A3 had participated in the NAP, CCCS relied primarily on the evidence of Ng, who had provided direct evidence of A3's participation in the NAP.

132 Based on his NOIs, Ng's evidence was that:

(a) there were discussions to not actively compete for each other's customers,[23] although he would still compete and the other parties would call to scold him;[24]

(b) they would call each other to find out whether a particular customer was already being supplied by each other, and may even quote prices way higher than the market price to chase the customer away;[25] and

(c) A3 had called to scold him when he attempted to compete for their customers,[26] and Alex Toh had called Ng to request that he release A3's customer. When Ng did not accede to Alex Toh's request, A3 stole […], from Hy-fresh.[27]

133 Alex Toh had denied Ng's allegations that he had called Ng or demanded the return of customers whom Ng had poached from A3, or that A3 had taken […] from Hy-fresh in retaliation.[28] Instead, Alex Toh's case was that […] had switched suppliers on its own accord because of quality issues with Hy-fresh's products.

134 At the hearing on 5 August 2019, in cross-examination, Ng conceded that the reason why […] had stopped purchasing from Hy-fresh was due to the

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[23] Answers to questions 31 and 36 of Ng's NOI dated 4 May 2015; answer to question 1 of Ng's NOI dated 3 June 2015.
[24] ID at [202]; answers to questions 31 and 40 of Ng's NOI dated 4 May 2015.
[25] Answer to question 48 of Ng's NOI dated 3 June 2015.
[26] Answer to question 41 of Ng's NOI dated 4 May 2015.
[27] Answer to question 42 of Ng's NOI dated 4 May 2015.
[28] Answers to questions 67 to 74 of Alex Toh's NOI dated 19 October 2016.

deteriorating quality of Hy-fresh's chickens, and that […] had not been stolen by A3, but that the former had independently switched to A3.[29]

135 Ng, when questioned as to which customers he had taken from the other parties, could only give the names of the customers of Hup Heng and KSB, but not those of A3.[30]

136 A3 had produced […] as its witness to rebut Ng's above evidence. In cross-examination, […]'s evidence was that:

(a) […] had become acquainted with A3 through a […];[31]

(b) […] had been dissatisfied with the deteriorating quality of Hy-fresh's chickens and customer service, and therefore decided to stop purchasing from Hy-fresh;[32] and

(c) A3 had never approached […] to solicit business.[33]

137 Since CCCS's finding that A3 had participated in the NAP was based primarily on Ng's evidence, in light of Ng's change of evidence and […]'s evidence set out above, the Board finds that A3 has raised serious doubts about the credibility and veracity of Ng's evidence.

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[29] NE 5/8/19, p. 118, lines 4-12.
[30] NE 5/8/19, p. 116, line 21 to p. 117, line 3; answer to question 43 of Ng's NOI dated 4 May 2015.
[31] NE 5/8/19, p. 133, lines 8-16.
[32] NE 5/8/19, p. 133, line 17 to p. 134, line 2.
[33] NE 5/8/19, p. 134, lines 3-7.

138 In the circumstances, the Board finds that CCCS has not, based on Ng's evidence, proven its case that A3 had participated in the NAP.

139 The Board is also not persuaded that the other evidence relied on by CCCS, namely the statements of Ong and other witnesses, had established that A3 had participated in the NAP for the same reasons as those given for A2 above.

140 CCCS had also relied on the statements made by Alex Toh himself that fresh chicken distributors agreed that "*it is better to have no competition*" because competition then was "*very fierce*".[34] CCCS's case was that, by Alex Toh's aforesaid statements, A3 had admitted that it had participated in the NAP. We are unable to agree with such an interpretation of Alex Toh's statements. Alex Toh did not, by the above statements, confirm or admit that A3 had participated in the NAP. Instead, all he had said was that, whilst he did not recall which parties had told him that it was better to have no competition, he had responded that "*it is up to the customers*".[35]

141 In fact, A3 has categorically denied that it had participated in the NAP, as it had […] due to a change in business strategy.[36]

142 A3's case is also that it had been actively competing in the market, which went against the spirit of the NAP, thus showing that A3 was not a party to the NAP. In particular, A3 relied on the NOI of […], who had stated that A3 had

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[34] Answers to questions 77 and 79 of Alex Toh's NOI dated 23 April 2015; ID at [209].
[35] Answer to question 79 of Alex Toh's NOI dated 23 April 2015.
[36] Answer to question 19 of Alex Toh's NOI dated 19 October 2016; A3's Written Submissions dated 27 September 2019 at [54].

approached them to solicit business, and apart from A3, no other supplier had approached them since they had started operations.[37]

143 A3 had submitted that, although the interview with […] was conducted by CCCS on its own volition, CCCS had wrongly claimed that "*soliciting business from one customer does not negate the finding of its participation in the infringing conduct*".[38]

144 For the reasons given above, the Board could also not find, on a balance of probabilities, that A3 had participated in the NAP.

145 Consequently, A3's appeal against liability for the NAP is allowed.

Appeal No. 5 of 2018 by Lee Say Group (A5) on the NAP

146 Lee Say Group (A5) comprises five entities, one of which (i.e. Prestige Fortune) was acquired by Lee Say in 2012. For the purpose of A5's appeal, the Board will regard Prestige Fortune as a distinct party from Lee Say Group comprising the remaining four entities, namely Lee Say, Hup Heng, KSB, and ES Food (collectively referred to as "**A5's four other appellants**").

147 A5's four other appellants have denied having participated in any NAP. In the case of Hup Heng, which is now part of Lee Say Group (having been acquired by the latter in 2011 but was an independent entity during the period

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[37] A3's Notice of Appeal at [3.3.28]; A3's Written Submissions dated 27 September 2019 at [32].

[38] A3's Written Submissions dated 27 September 2019 at [33]; CCCS's Defence dated 4 March 2019 at [97].

from 2007 to 2011), it had denied participation in the NAP or in any discussions in relation thereto.

148 The statements of Steven Tan Soon Teck from KSB (which was an independent party during part of the relevant period from 2007 to 2012, as it was acquired and became part of Lee Say Group in 2012) refers to "no policy to actively acquire new customers since 2004" but denied the existence of the NAP in questions 47 and 48 of his NOI dated 14 July 2015, whilst CCCS cited only statements in response to questions 19 and 20 of the said NOI, which merely confirm that KSB did not poach other suppliers' customers. However, none of his statements could be construed as conclusively pointing to the existence between KSB and other parties of a NAP. A closer examination of Steven Tan's answers to questions 21 to 41 in the said NOI point to a qualified admission of the practice but it is not clear from the answers if this was simply a practice of KSB or that of the industry; his answer to question 47 is a clear denial supported by his answer in question 48 that he claimed no knowledge of the NAP.

149 The evidence given during the Clarification Hearing showed that Tan Koon Seng, on behalf of Lee Say Group, had in mid-2000 been competing for other undertakings' customers by undercutting its sale price to gain a bigger share of the market.

150 The evidence in Ma's NOI and the oral testimonies by both Tan Koon Seng and Ma during the Clarification Hearing showed that, in the mid-2000s, Hup Heng (then independent of Lee Say Group) and Lee Say engaged in a price-cutting war that was triggered by Lee Say's poaching of Hup Heng's customers.

151 Although this price war apparently came to an end around 2007, there is no definitive evidence that Lee Say had stopped poaching other suppliers' customers. Indeed, the statements cited by CCCS of complaints of customer-poaching by some of the Undertakings in support of a market-wide NAP seem to the Board to suggest the opposite in the context of the events that led to the price war between Lee Say and Hup Heng, indicating that customer-poaching as practised by Lee Say persisted beyond the resolution of the price war. There is no clear evidence that Hup Heng ceased customer-poaching after the cessation of the price war, but there is also no clear evidence that Hup Heng participated in any NAP. On the contrary, Ma clearly denies any such agreement as far as it concerns Hup Heng.

152 With regard to Koh Yeok Boon (Sales Manager from Lee Say), the statements relied on by the CCCS in the ID were in response to questions 44 and 45 in his NOI dated 13 August 2014 and as set out in the ID:[39]

> Q44. Will you try to steal someone who you know has a supplier?
>
> A: Usually we will try not to…
>
> Q45. You will focus on your own customers?
>
> A: …It is better to maintain our customer base and take good care of them. There is no need to aggressively go after other suppliers' customers.

153 Although Koh Yeok Boon's answers could have been construed as resulting in a market practice arising out of a NAP, they did not definitively confirm or suggest the presence of any such market practice.

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[39] ID at [226].

154 Indeed, in his NOI dated 28 November 2014, Koh Yeok Boon further confirmed his statement that he never instructed his staff not to touch customers with existing suppliers:

> Q13. Have you ever instructed your staff not to touch other customers because they belonged to your friends (suppliers other than Lee Say)?
>
> A. No.
>
> Q14. Can you explain why Azmira has informed us that you have instructed her not to touch other customers because they belonged to your friends and that you didn't want to disturb the customers belonging to other suppliers?
>
> A. I have not given Azmira such instructions before. I do not know why she would say such a thing. I would only have told her not to sell to customers if there were problems with the delivery arrangements, low quantity and network.

155 Further, Koh Yeok Boon admitted in his answer to question 10 of his NOI dated 28 November 2014 that Lee Say would not compete for customers of intermediaries, which may be considered a reasonable commercial practice that in itself does not give rise to a s 34 infringement, given that they would be competing with such intermediary customers (who are a channel for the sale of A5's products) effectively cannibalising their own customer base. Taken together with his clear denial as set out above of any knowledge of a market or industry agreement and denials of instructions to his staff to not steal customers of other suppliers, the Board does not consider that his statements admit to an industry practice of NAP.

156 Accordingly, putting the statements relied on by CCCS in the ID in the context of all the answers he gave in his NOIs, the Board does not agree with the conclusion reached by CCCS that "*Koh Yeok Boon … stated that it is*

industry *practice to focus on their own customers and not accost customers belonging to other distributors*".[40] [emphasis added]

157 CCCS also relies on an email exchange between Ma and Wu as evidence of a NAP. This email exchange occurred shortly after Ma and Wu became better acquainted on a trade trip to Denmark where, according to the evidence provided by both, their interaction pointed to a mentor-mentee type of relationship. The explanations provided by both Wu and Ma with respect to the email exchange in their respective NOIs and in oral testimony were accepted as reasonable and plausible by the Board.

158 In the view of the Board, the email exchange in these circumstances did not definitively point to the existence of a NAP as between Sinmah and Hup Heng, or more widely in the market.

159 In view of the above, the Board is also unable to find, on a balance of probabilities, that A5's four other appellants had participated in the NAP.

160 Consequently, the Board allows the appeals against liability on the NAP by A5's four other appellants.

161 In the case of Prestige Fortune, it had by its director, Quek, admitted that prior to Prestige Fortune being a part of Lee Say Group, it had participated in the NAP as follows:

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[40] ID at [226].

(a) At question 21 of his NOI dated 30 April 2015:[41]

> Q21. Was there a understanding among the fresh chicken distributors not to steal each others' customers?
>
> A: Yes, the fresh chicken distributors verbally said that they will not steal each others' customers, but later on they still continued to snatch each others' customers.

(b) At question 6 of his NOI dated 5 June 2015:

> Q6. You had previously stated that during the bird flu crisis in 2004, you had heard discussions relating to an understanding between fresh chicken distributors to not compete for each other's customers and that the discussions were at gatherings at Riverview Hotel. Please explain the difference with what you are saying now.
>
> A: I did go for the gatherings at Riverview Hotel and also at KTVs. In 2004, during one of the gatherings, I heard discussions about fresh chicken distributors cooperating and not to compete too hard such that no one can make a profit because business was bad during the bird flu crisis in 2004.

162 In view of Prestige Fortune's admission, its appeal against liability for the NAP is dismissed, and CCCS's decision on the NAP against Prestige Fortune is affirmed.

Appeal No. 6 of 2018 by Ng Ai (A6) on the NAP

163 To the extent that CCCS is also relying on the statements of the other witnesses from the Four Non-Parties to support its case against A6 on the NAP, our comments and findings given for A2 apply to A6 as well.

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[41] Answer to question 21 of Quek's NOI dated 30 April 2015; answer to question 6 of Quek's NOI dated 5 June 2015.

164 In addition, for A6, CCCS is relying on the fact that A6 had also admitted that it had implemented the NAP with certain other undertakings because of their "close and kampong ties".

165 In his NOI dated 20 October 2016, Tan Chee Kien was asked if he agreed that A6 was part of friendly groupings or pairings with fresh chicken distributors. Tan Chee Kien replied that A6 has had good relations with Hock Chuan Heng as they had stayed in the same kampong for three generations. He also mentioned that he had business dealings with A2 and they were in the same kampong previously. As such, Tan Chee Kien noted that A6 would not actively compete for customers of Hock Chuan Heng and A2.

166 As is the case for A2, we find that not actively competing for the customers of Hock Chuan Heng and/or A2 or other undertakings because of historical close relationships does not amount to an infringement of s 34 of the Act.

167 There is no evidence before the Board to suggest that A6's reason for not competing was because of agreements or concerted practices made with others akin to market-sharing.

168 Having regard to all the evidence above, on a balance of probabilities, we find that A6 had not participated in the NAP.

169 Consequently, A6's appeal against liability for the NAP is also allowed.

Our decision on the Price Discussions

170 As for the Price Discussions, CCCS has taken the following indicia together as pertinent evidence:

(a) statements by Chiew, Ong, Ng, Alex Toh, and Ma;

(b) Tong Huat Group's Leniency Statements dated 24 October 2016, 17 November 2016, and 3 February 2017 ("**Tong Huat Group's LSs**");

(c) statements from the Appellants' employees that price increases tend to take place concurrently, usually within one or two days;

(d) statements from the Appellants' customers;

(e) issuance of the Association's circular dated 19 September 2007 ("**TSD-011**");

(f) the Association minutes dated 26 June 2013; and

(g) statements from sales staff that the Appellants made price recommendations through the Association.

171 CCCS also cited the following circumstantial evidence as corroborating the existence of the Price Discussions:

(a) increase in prices observed in the relevant periods; and

(b) economic factors in the fresh chicken industry leading to easier or likelihood of collusion.

172 CCCS's case is that the above evidence shows that there were meetings held amongst the Undertakings to discuss prices for the sale of fresh chicken, whether to increase or decrease these prices, the quantum thereof, and the dates to effect the agreed increases or decreases. Such discussions also included the exchange of information and pricing intentions.

173 The Four Non-Parties had admitted that each had participated in the Price Discussions and had infringed s 34 of the Act. Consequently, each had accepted liability for the said infringement and paid the financial penalties imposed. On the basis of their respective admissions, the Board accepts that the Four Non-Parties had participated in the Price Discussions.

174 The Four Non-Parties had in their various statements given to CCCS through their respective representatives identified Lim (A2), Alex Toh (A3), Tan Koon Seng (A5) and Tan Chee Kien (A6) as having also participated in the Price Discussions.

175 CCCS's case against the Appellants is that each, in common with the Four Non-Parties, had similarly participated in the Price Discussions and had infringed s 34 of the Act.

Summary of our findings

176 The Board finds that the Appellants had participated in the Price Discussions to the extent that there was tacit and express concertation amongst the Appellants and the Four Non-Parties in setting the prices of fresh chicken products in Singapore; there were exchanges of price information and/or price signalling as part of an agreement and/or concerted practices not to knowingly

undercut each other in pricing, all of which participation constituted an infringement of s 34 of the Act.

177 The Board did not find that there were price movements of definite quantum on set dates as asserted by CCCS in the ID. As a matter of fact, the Board found that there were contemporaneous price movements by all or the majority of the Undertakings of indefinite quantum on different dates between July 2008 and January 2014. These price movements may not have been identical in quantum. This is unsurprising given the differing nature of some of the end-products, customer segments, policies on profit margin as well as other costs individual to each Undertaking.

178 On the other hand, the Board found it unusual that, given these different individual circumstances of each Undertaking, there was no departure from a lock-step movement of prices at specific times in this period. The Board considered these price movements in the context of all the evidence before it, including that of Mr Mellsop's (A6's expert witness), but did not find the alternative reasons presented by each of the Appellants persuasively plausible to negate the strongly suggestive conclusion that there was a concerted movement of the prices.

179 The Board came to this conclusion after reviewing and assessing all the evidence holistically. In summary, and without exhaustively setting out all the grounds of its decision, the Board, amongst other things:

(a) accepted the statements and admissions by the Four Non-Parties that they had engaged in conduct, including the Price Discussions, that amounted to collusion to raise or lower prices in concert in breach of s 34 of the Act;

(b) found, as a matter of fact, that all the Undertakings had raised prices contemporaneously at the following times: July 2008, May to June 2009, August 2010, January 2011, March to April 2011, January to February 2013, January 2014;

(c) accepted the statements of the Four Non-Parties that the movements, as they pertained to these companies, were the result of an agreement or arrangement to adjust prices in concert;

(d) found that:

(i) notwithstanding the Appellants denying having participated in the Price Discussions, they were aware of the Price Discussions and price movements;

(ii) their acts of adjusting their own prices contemporaneously demonstrated a tacit agreement to act in concert with the parties who had expressly admitted to the Price Discussions, and an agreement to adjust prices in concert;

(iii) the Appellants, by their actions and lack of any expressed dissension, did not publicly distance themselves from the results of the Price Discussions or agreement/arrangement to adjust prices in concert;

(e) in a period of uncertain length during the mid-2000s prior to the July 2008 price increases, the market was in turmoil with a price war and customer-poaching between Lee Say and Hup Heng that may have

affected the profitability of other market participants. This appears to have been exacerbated by increasing costs of supply of live chickens from Malaysia to such an extent that persons not directly involved in the price war between Hup Heng and Lee Say, such as Lim, expressed concern and/or intervened to restore stability;

(f) neither Ma of Hup Heng nor Tan Koon Seng of Lee Say Group had a coherent or persuasive explanation for the end of this market turmoil, nor indeed did any other witness questioned on it, including Lim, who admitted his concerns and awareness of the turmoil and potential economic damage to other market participants. Even so, after the issuance of TSD-011 in September 2007, the prices increased in October 2007 between 30 and 90 cents per kilogram and subsequently moved in lock-step suddenly from July 2008, suggesting that there was an express or tacit agreement or arrangement to resolve the market turmoil by ensuring coordinated price movements. Consistent with this was the evidence that there was an understanding not to undercut each other's sale prices;

(g) social meetings were attended by some or all of the Appellants at various points of the infringement period at one or more of the locations listed in the ID, at which the costs and prices of the relevant products and customer-poaching were discussed. Whether or not such social meetings were held immediately before a price movement, and notwithstanding the presence or absence of any or all of the Appellants at any such social meetings, concerted price changes were implemented contemporaneously as noted above, and those not present were informed by telephone; and

(h) although Mr Mellsop provided one possible alternative economic explanation to the price movements in the period, this alternative explanation did not take into account the other evidence before the Board that pointed to a concertation in price movements, and was not compelling in itself to be a plausible alternative explanation of the lock-step movement of prices given the circumstances of cost pressures and evidence of market turmoil that resolved from 2007 onwards.

180 In making the above findings, we have had primary regard to, *inter alia*, Tong Huat Group's LSs.

Tong Huat Group's LSs

181 In Tong Huat Group's LSs, they confirmed that there were meetings held amongst the Undertakings involved in the sale and distribution of fresh chickens. These meetings were held at Heng Heng Bak Kut Teh Restaurant and sometimes at Riverview Hotel, and were attended by, amongst others, Vincent Chew, Tan Koon Seng or Toh Yong Sheng, Ma, Chiew, Ah Hai (Ong's subordinate), Lim, Tan Chee Kien, and Ng.[42]

182 Vincent Chew or Ma would call for the meetings and would decide on the location.

183 During these meetings, usually over meals, parties attending would discuss the prices, whether to increase or decrease the sale price and by an

[42] [3.3.1] of Tong Huat's Leniency Statement dated 24 October 2016.

agreed value. However, any agreed increase or decrease would depend on Tan Koon Seng's decision as such increases or decreases would have to be approved by him before they can be implemented. Thereafter, the price increase or decrease would be implemented.

184 Tong Huat Group explained that there was no specific formula used in determining the price increase or decrease during the Price Discussions. Instead, the parties would consider the cost price of live birds imported from Malaysia and they would decide to increase the sale prices (if the cost price of live birds increased) and decrease the sale prices (if the cost price of live birds decreased). The increase or decrease in the sale prices would typically be in the range of 30 cents. Tong Huat Group explained that, to avoid detection, the actual increase or decrease in prices would be implemented by the Parties in a staggered manner on different days, and not simultaneously.

185 Tong Huat Group provided information as shown in the table below to reflect the price increases agreed by the parties between the period 24 July 2008 and 21 January 2014:[43]

No.	Date of increase implemented by Tong Huat Group	Parties' agreed price increase on Fresh Whole Chicken Products (whether cut or not) (cents)
1	24 July 2008	20
2	9 May 2009	20
3	20 August 2010	10
4	18 January 2011	20
5	17 March 2011	30

[43] ID at [314].

No.	Date of increase implemented by Tong Huat Group	Parties' agreed price increase on Fresh Whole Chicken Products (whether cut or not) (cents)
6	1 January 2013	30
7	24 September 2013	20
8	21 January 2014	20

186 Tong Huat Group had increased its prices on all eight occasions as agreed.

187 In some instances (in relation to the price increase on 21 January 2014), the discussions were communicated by phone between the parties who attended.

188 As for A3 and Prestige Fortune, Tong Huat Group explained that their representatives were not present at the Price Discussions after 2007, because sometime in 2007, Tan Koon Seng had suggested that fresh chicken suppliers who did not directly own a slaughterhouse should not attend any Price Discussions meetings, so that the Price Discussions could be organised easily.[44] As such, A3 and Prestige Fortune ceased to attend the Price Discussions meetings thereafter, as they did not own any slaughterhouses. However, they were kept informed of the Price Discussions by the slaughterhouses to whom they had sent their live chickens for slaughter. In this regard, A3 had used KSB as their slaughterhouse, and Prestige Fortune had used Tong Huat.[45]

[44] Tong Huat Group's Leniency Statement dated 3 February 2017 at [1(a)]; ID at [319].
[45] Tong Huat Group's Leniency Statement dated 17 November 2016 at [2.1.2]; ID at [319].

Probative value of Tong Huat Group's LSs

189 For the reasons given in paragraphs 103 to 109 above and, contrary to the Appellants' contention, there is no reason why the Board should not accept or rely on the statements made in Tong Huat Group's LSs, as the same met with all the criterion set out in *Toshiba*, unless the Appellants can show that the statements made are untrue, unreliable or contradict the other evidence adduced.

190 In this case, Tong Huat Group's LSs satisfied the factors set out in *Toshiba*, namely that they were made by its board, with the assistance of its solicitors, Dentons Rodyk & Davidson LLP, against Tong Huat Group's own interests, as it had admitted to having participated in the Price Discussions and thereby infringed s 34 of the Act. The statements were made based on inputs by Toh Eng Say, who admitted that he was present at the Price Discussions.

191 Based on Tong Huat Group's LSs, we find that there is strong and compelling evidence before the Board that each of the Appellants had participated in the Price Discussions in the manner described by Tong Huat Group.

192 On the other hand, there is no evidence before the Board to suggest that the statements made in Tong Huat Group's LSs were unreliable or untrue. More importantly, none of the Appellants had produced any evidence which, in the Board's view, had refuted or challenged the reliability of the statements made in Tong Huat Group's LSs.

193 The Board noted that during the cross-examination of Toh Eng Say, Counsel for A6, Mr N. Sreenivasan, *SC*, sought to suggest that Toh Eng Say was in no position to give evidence on Tong Huat Group's LSs (or the truth

thereof) as he (based on his own evidence) was not the maker of the statements and could not confirm their accuracy. Toh Eng Say's evidence was:

> A. …these are documents provided by my employer, my boss, so these are not from me. I'm not in a position to confirm the accuracy.[46]

194 Even if Toh Eng Say was not involved in the preparation or submission of Tong Huat Group's LSs, the Board noted that some of the statements made therein were said to be based on inputs or information given by Toh Eng Say. In particular, statements relating to Toh Eng Say's attendance at the Price Discussions meetings. In fact, Toh Eng Say had in cross-examination confirmed thus:[47]

> Q. Now, when the leniency statements were put up, were you consulted on the contents that the lawyers put and sent to CCCS?
>
> A. Yes.

195 In Tong Huat Group's LSs, Toh Eng Say had in response to questions by Tong Huat's Managing Director, Mr Too Siew Din ("**Too**"), one of its board members, confirmed that he had attended certain discussions where the Price Discussions and the NAP had taken place.[48]

196 In Too's NOI dated 12 October 2016, Too had stated:[49]

> Yes, I went through the PID with Toh Eng Say. Toh Eng Say agreed that most facts have been accurate. Toh Eng Say believed that someone have spilled the beans and that the evidence is sufficient. Toh Eng Say confirmed that the prices relating to Kampong Chicken and whole fresh chicken were discussed.

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46 NE 5/8/19, p. 60, lines 11-13.
47 NE 5/8/19, p. 83, lines 8-11.
48 Tong Huat's Leniency Statement dated 24 October 2016 at [2.3].
49 Answer to question 2 of Too's NOI dated 12 October 2016, 11 LB, S/N 115, p. 284.

> However, it has been a long time since the discussion and hence, he was not able to recall all of the details.

197 We note that none of the Appellants had cross-examined Toh Eng Say on those statements he had made in Tong Huat Group's LSs, which were based on his inputs or his confirmation as to the correctness of the PID and that prices relating to kampong chickens and whole fresh chickens were discussed.

198 In any case, CCCS had, through its counsel, Mr Tan Cheng Han, *SC*, at the hearing held on 5 August 2019 informed the Board as follows:[50]

> MR TAN: … Because of the uncertainty earlier, we asked his managing director to come down. His managing director is in fact here and we're quite happy to offer him up for cross-examination if anybody wants.
>
> CHAIRMAN: Who is the managing director?
>
> MR TAN: Mr Too.
>
> CHAIRMAN: And he's not listed?
>
> MR TAN: No, he's not listed because we were relying on Mr Toh but because of the uncertainty, as a precautionary measure, we asked Mr Too to be on stand where. Mr Too is here and we're quite happy to offer him up for cross-examination if anyone wants to fill in the gaps, if necessary.

199 Mr Tan had arranged for Too to be available for cross-examination by the Appellants on Tong Huat Group's LSs and had invited the Appellants to question Too. However, none of them, including counsel for A6, Mr N. Sreenivasan, *SC*, took up that invitation.

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[50] NE 5/8/19, p. 98, lines 2-15.

200 Instead, counsel for A6 had stated that he did not need to cross-examine Too as "*the gaps are not on our side*".[51]

201 Contrary to counsel for A6's assertion, the "gap" is very much in A6's and the other Appellants' cases as they had failed to refute the reliability and veracity of the statements made in Tong Huat's LSs which proved CCCS's case that the Appellants were involved or had participated in the Price Discussions.

202 Our findings are further fortified by the following evidence:

(a) the statements of the various witnesses from the Four Non-Parties who have identified Lim (A2), Alex Toh (A3), Tan Koon Seng (A5) and Tan Chee Kien (A6) as having been involved or participated in the Price Discussions (these statements were made at the outset of CCCS's investigations, well before CCCS had issued its PID, and before any offer of leniency or Tong Huat Group's LSs); and

(b) the price adjustments (increases or decreases) made by each of A2, A3, A5 and A6 as shown in **Annex A**.

203 We deal with each Appellant's case in relation to the above factors and other issues specific to that Appellant, if any.

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[51] NE 5/8/19, p. 98, line 18.

Appeal No. 2 of 2018 by Gold Chic / Hua Kun (A2) on Price Discussions

Participation in Price Discussions

204 In support of its case that A2 had participated in the Price Discussions, CCCS had (apart from Chiew's evidence) also relied on the evidence of Ong and the corroborative evidence of Ma and Toh Eng Say.

205 CCCS's case is that Lim was specifically identified as one of the parties who had attended meetings during which the Price Discussions took place. Even though Lim claimed in cross-examination that he had stopped attending the gatherings after 2006 when he stepped down as the Association's Chairman, the evidence of the other witnesses was that he was also involved in the Price Discussions after 2006.

206 Ong's evidence was that:

(a) The Price Discussions took place during the meetings that started in about 2008. He stated that Lim and Tan Koon Seng would announce their intentions to increase the sale price of fresh chickens in Singapore. Ma would initiate discussions indirectly by saying that "*business is hard to do*" and ask "*what can be done with costs going up*". Ong stated that "*nobody wants to be the only one to raise prices because then the business would suffer*".[52]

(b) As for the Anti-Competitive Discussions (which included both the NAP and Price Discussions) which took place sometime after 2006

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[52] ID at [196].

and before December 2012 at bars such as Las Vegas once or twice a month, Ong identified Lim as one of the attendees.[53]

207 Ma's evidence was that:

(a) There were discussions between himself and Lim regarding the increase of prices of fresh chickens in Singapore.[54]

(b) He had fought a price war with Lee Say, and Lim or Tan Chee Kien had tried to be the mediator to stop the price war. They asked Ma to "*stop fighting and to adjust the prices*", and told him that if they stopped the war, "*the price may adjust upwards by at least 20 cents*". Ma then agreed to stop the price war with Lee Say and eventually adjusted his prices upwards.[55]

(c) From 2007 to 2009, there were further instances of Price Discussions, during which Lim had asked to raise prices and suggested the amounts of price increases.[56]

208 Toh Eng Say had also identified Lim as having attended the Price Discussions. Whilst Lim might not have attended every single Price Discussion, Toh Eng Say confirmed that the price increases would nonetheless be communicated to the absentees by the attendees.[57]

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53 ID at [198]-[199].
54 ID at [215].
55 ID at [217].
56 ID at [218].
57 ID at [318].

209 By contrast, Lim's evidence was that he was not present at any of the meetings where the Price Discussions took place, especially after 2006 when he stepped down as Chairman of the Association. During his cross-examination at the hearing on 3 September 2019, Lim had reiterated that his involvement ceased after 2006 and thereafter, he had ceased to attend gatherings. In fact, Lim tried very hard to distance himself from any meetings after 2006.

210 Lim's evidence that he ceased to be involved in meetings with other undertakings after 2006 when he stepped down as Chairman is contradicted by his other evidence given at the hearing on 3 September 2019 when he said that his involvement ceased because his wife did not like him to socialise, and that he had stopped his involvement after his quarrel with Chiew in 2012.[58]

211 In any case, Lim's evidence is contradicted by Ong, Ma and Toh Eng Say, all of whom had confirmed that Lim was involved in the Price Discussions even after 2006.

212 We note that Lim had not offered any evidence or credible evidence in support of his case that he was not involved in the Price Discussions after 2006. We note also that Lim had also not produced any evidence to rebut the evidence of Ong, Ma, or Toh Eng Say naming him as one of the parties who had attended the meetings where Price Discussions were held even after 2006. In fact, Lim or A2 did not challenge Ong's or Toh Eng Say's evidence on this in cross-examination.

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[58] NE 3/9/19, p. 165, line 2 to p. 166, line 6.

213 There was no plausible explanation offered to the Board as to why Ong and Toh Eng Say would name Lim as one of the parties who had participated in the Price Discussions if that was not true. This is especially so in the case with Toh Eng Say from Tong Huat whom, according to Lim's evidence, had a close relationship with A2.

Price increases

214 Based on Tong Huat Group's Table on the agreed price increases from July 2008 to January 2014 (shown in paragraph 185 above), A2 had implemented the price increases on seven occasions within contemporaneous proximity of the eight instances in which the Tong Huat Group stated the agreed price increases were implemented. A2's increases are as shown in **Annex A**.

215 A2's case is that it had increased its prices based on its own costings and not based on the Price Discussions. A2 has however not provided any evidence of its costings which led to the increases or any plausible explanations for such increases. Instead, the only plausible reason is that the dates and quantum of increases were the results of the Price Discussions between 2007 and 2014.

Object infringement

216 Even if the Board accepts A2's case that it did not effect the price increases pursuant to the Price Discussions, the Board accepts CCCS's submission that the infringement under s 34 of the Act is an "object" infringement. Consequently, it would suffice for CCCS to show that A2 had,

in common with the other parties, participated in the Price Discussions, whose "**object**" was to prevent, restrict, or distort competition within Singapore.[59]

No specific dates

217 In further challenge to Ong's and Toh Eng Say's statements that Lim (and therefore A2) was present and had participated in the Price Discussions, A2 alleged, amongst other things, that the statements were vague, unparticularised and lacked credibility and disputed the evidence against it.

218 Contrary to A2's allegations, the lack of specific dates or locations is not an absolute barrier to finding that A2 (and the other Appellants) had participated in the Price Discussions.[60] Overall, based on holistic evidence and on an overall balance of probabilities:

(a) the absence of specific dates here is not an absolute bar to finding infringement, given the nature of competition investigations; and

(b) the body of evidence is convincing here, including Tong Huat Group's LSs and circumstantial evidence on the price increases during the relevant periods.

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[59] RCSAL at [13].
[60] ACSAL at [16].

Conclusion

219 By reason of the above, the Board finds, on a balance of probabilities, that A2 had participated in the Price Discussions. Accordingly, A2's appeal against liability for the Price Discussions is dismissed.

Appeal No. 3 of 2018 by TTS (A3) on Price Discussions

Participation in Price Discussions

220 CCCS's case against A3 is that it had, through Alex Toh, participated in the Price Discussions. In support, CCCS also relied on the statements of Ong and Ng, and the corroborative evidence of Quek and Toh Eng Say, who had identified Alex Toh as being involved in the Price Discussions.

221 Ong's evidence was that he had met with other chicken distributors who were members of the Association either during weddings, funerals, or for meals after Association meetings.[61] He had identified Alex Toh as one of those (though less often)[62] as having been present during such meetings where the Price Discussions (though not always) took place. However, Ong said he was rarely present for those meetings after 2009.

222 Ng's evidence was that he would receive calls on price increases, and that he was expected to increase his prices by the proposed amounts, with the last call taking place in 2013. Further, Ng stated that participants of the Price Discussions included Alex Toh.[63]

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[61] Answer to question 11 of Ong's NOI dated 23 April 2015.
[62] Answer to question 16 of Ong's NOI dated 23 April 2015.
[63] Answers to questions 51, 52 and 54 of Ng's NOI dated 4 May 2015; ID at [204]-[205].

223 Quek's evidence was that, since 2000, he had met with the other market players to drink or visit KTVs such as Las Vegas, at funerals and weddings, or for meals. Such social gatherings also took place at Riverview Hotel. Quek had identified Alex Toh as one of the participants of these gatherings, but who showed up very rarely. Although the nature of those gatherings was not business-related, parties occasionally complained about difficulties in doing business and the expensive prices of live chickens.[64]

224 Toh Eng Say had in Tong Huat Group's LSs explained that after 2007, although A3 and Prestige Fortune were excluded from the Price Discussions based on Tan Koon Seng's suggestion as they did not directly own any slaughter houses, they were kept informed of the Price Discussions by the slaughterhouses to whom they had sent their live chickens for slaughter. Toh Eng Say's evidence was that Tong Huat and KSB would inform Prestige Fortune and A3 of the price increases respectively, but he had no direct evidence or proof that KSB had done so.[65] CCCS also had not produced any evidence to prove that KSB had informed A3 of the price increases.

225 By contrast, Alex Toh had denied attending gatherings apart from those related to the Association's matters, that he had only been to Riverview Hotel for an Association meeting, and that he had rarely engaged in social gatherings apart from weddings.[66]

226 Alex Toh's evidence was that he was not present at any of the meetings where the Price Discussions took place but had not offered any evidence in

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64 Answers to questions 9 to 18 of Quek's NOI dated 30 April 2015.
65 NE 5/8/19, p. 89, line 22 to p. 90, line 4.
66 Answers to questions 35, 38 to 46 of Alex Toh's NOI dated 23 April 2015.

support of the same, or to rebut the evidence of Ong, Ng, or Toh Eng Say. In fact, none of A3's officers (including Alex Toh) had given evidence at the hearings.

227 In the absence of any evidence to refute the evidence of Ong, Ng, and Toh Eng Say, the Board accepts their evidence which established that A3 had participated in the Price Discussions:

(a) firstly, through Alex Toh's attendance at some of these meetings where the Price Discussions took place; and

(b) secondly, after 2007, even though A3 did not attend such meetings, it was kept informed of the Price Discussions and proposed price increases through KSB.

228 There was no reason why Ong, Ng and Toh Eng Say would identify Alex Toh as one of the participants if that was not true. No evidence was produced to challenge Ong, Ng, or Toh Eng Say's respective evidence on this. In fact, during their cross-examination, A3 did not suggest that each of them had lied about Alex Toh's presence or A3's involvement. In any case, statements of Alex Toh's participation were even made before the PID was issued, long before each of their respective undertakings had applied for leniency from 24 October 2016 onwards.

Price increases

229 In support of its case against A3, CCCS had also relied on the fact that A3 had increased its prices during the relevant period, which increases as mentioned by Tong Huat Group was agreed to by the Undertakings during the Price Discussions.

230 According to Tong Huat Group, during the period from 24 July 2008 to 21 January 2014, pursuant to the Price Discussions, they and some others had increased their prices.[67]

231 Even though there was no direct evidence that A3 was told by KSB of the price increases, the indirect evidence was that, on two out of eight occasions of price increases documented by Tong Huat Group, A3 had similarly implemented price increases. The two occasions were January 2013 and January 2014. A3 was unable to provide records for five out of those eight occasions, and on the remaining one occasion, there was a negligible price increase.[68]

232 CCCS also pointed out that, the fact that A3's above increases were not on the exact dates of implementation by Tong Huat Group, was also consistent with the latter's evidence that it was agreed amongst the parties to the Price Discussions that each should implement the increases a few days later and not simultaneously, to avoid detection.[69]

233 A3 had denied that it had increased the prices due to the Price Discussions and alleged that the price increases were due to its own internal requirements, attributable to higher costs of supply from Malaysia, and other operational costs.[70]

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67 Table 7 in the ID at [314].
68 ID at [333]-[335].
69 Tong Huat Group's Leniency Statement dated 24 October 2016 at [3.4.1].
70 Answer to question 86 of Alex Toh's NOI dated 23 April 2015; answers to questions 22, 23, 55, 77, 78, 82, 85-87 and 89 of Alex Toh's NOI dated 19 October 2016.

234 However, A3 has not presented to the Board any or sufficient evidence to refute CCCS's case that it had increased its prices due to it having been informed of the proposed price increases agreed to by the other parties to the Price Discussions. A3 has not shown how the increases were decided or the basis therefor, apart from a bare denial that it was not a party to the Price Discussions. There was no plausible explanation before the Board for A3's price increases except that they were the outcome of the Price Discussions during that period.

Accuracy of Alex Toh's statements

235 In further support of its finding that A3 had participated in the Price Discussions, CCCS also relied on the statements made by Alex Toh during his first interview on 23 April 2015, where he had stated that there were instances where his competitors would call to inform him that other competitors were going to increase prices, and that his competitors would similarly increase their prices. These calls took place after the bird flu outbreak in 2007, and that he was unable to recall the competitors who had informed him of the intended price increases. CCCS regarded these statements as evidence of A3's participation in the Price Discussions, not least because it was kept informed of the proposed price increases.

236 However, Alex Toh denied the correctness of the recorded statement. During his second interview on 19 October 2016, Alex Toh explained that the term "*competitors*" used in the context of his answers to the questions asked during his first interview referred to his competitors with slaughtering facilities,

who would inform him of their intention to increase prices of fresh chickens supplied by them to A3.[71]

237 In short, A3's case was that it was informed of the price increases by its suppliers and not competitors, and the recording officer had wrongly interpreted his answers.

238 CCCS's response was that the explanations provided by Alex Toh on 19 October 2016 were afterthoughts intended to limit his involvement in the Anti-Competitive Discussions.[72]

239 To rebut CCCS's response, A3 explained that there was a misunderstanding of the statements made by Alex Toh. A3 had challenged the whole recording process of Alex Toh's statements, especially in view of Alex Toh's lack of proficiency in the English language. A3 also pointed out that there were a number of mistakes and errors in Alex Toh's NOIs, raising doubts as to bilingualism abilities of the CCCS officers who had conducted the translation during the interviews, the neutrality and impartiality of those officers involved, and the incomplete verification by CCCS in relation to Alex Toh's statements.[73]

240 To meet A3's objection, CCCS had produced Yeo and Soh, both of whom had recorded Alex Toh's first NOI, for cross-examination at the hearing:

(a) Yeo, who was cross-examined by Ms Kala Anandarajah ("**Ms Kala**"), counsel for A3, admitted that there were typographical

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[71] Answer to question 47 of Alex Toh's NOI dated 19 October 2016.
[72] ID at [361].
[73] A3's NOA at [4.2]-[4.4]; A3's Written Submissions dated 27 September 2019 at [75]-[87].

errors in Alex Toh's first NOI, in that the CCCS officers who were named as having interpreted and recorded the questions and responses were Mr Kenneth Khoo and Yeo herself. Soh, who was involved in the interpretation, was not named. Further, the language spoken was recorded as English, when it should have been Mandarin;[74]

(b) however, Yeo maintained that CCCS had ensured the accuracy of recording of witness statements, and that the statements recorded were accurate;[75] and

(c) Soh had similarly acknowledged that Alex Toh's first NOI had three errors just on the first page, namely that the language spoken was recorded as English when it should have been Mandarin, that Soh was not stated as having conducted the interpretation, and that the time of recording was wrongly stated (although the mistake was corrected). Even though Soh had agreed that there were typographical errors on the first page, he maintained that such errors were acceptable insofar as the accuracy of the NOI was not affected.[76]

241 It was not disputed that the recording of the statements was less than perfect. The errors were however editorial and not material. Instead, having seen both Yeo and Soh during the hearing and having heard both of them, we find that they were truthful witnesses whose evidence was not seriously

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[74] NE 3/9/19, p. 58, lines 1-21.
[75] NE 3/9/19, p. 69, line 13 to p. 71, line 6.
[76] NE 3/9/19, p. 88, line 23 to p. 89, line 19.

challenged in cross-examination. There is no reason why their evidence that the statements of Alex Toh were correctly recorded should not be accepted.

242 That being the case, the burden was on A3 to prove its contention that the statements were wrongly recorded, owing to Alex Toh's lack of proficiency in the English language, to challenge the evidence of Yeo and Soh.

243 However, A3 had not produced any of such evidence, not least because A3 did not call Alex Toh to give evidence in support of his complaint of the aforementioned inaccuracies.

244 Accordingly, as CCCS's evidence remained unrebutted, the Board finds that the evidence of Yeo and Soh that the statements of Alex Toh had been correctly recorded stands. Consequently, by his statements, Alex Toh had corroborated the evidence given by Ong, Ng, and Toh Eng Say that A3 had participated in the Price Discussions.

Object infringement and no specific dates

245 Our findings on the above as dealt with above in relation to A2 apply also to A3.

Conclusion

246 By reason of the above, the Board finds, on a balance of probabilities, that A3 had participated in the Price Discussions. Accordingly, A3's appeal against liability for the Price Discussions is dismissed.

Appeal No. 5 of 2018 by Lee Say Group (A5) on Price Discussions

Participation in Price Discussions

247 It is clear from the evidence dealt with in the earlier paragraphs that A5 was integral to any price-setting mechanisms in the market.

248 Taking into account the evidence of the other witnesses and the price adjustments, the Board finds that A5 (as represented by Tan Koon Seng) had participated in the Price Discussions. In fact, the evidence shows that Tan Koon Seng was regarded by the others as the leader or instigator as to the price to be adjusted (increase or decrease) for the supply of fresh chickens.

249 In contrast, A5 did not produce any evidence at the hearings to refute its participation in the Price Discussions.

Price increases

250 Instead, the evidence of Ma's NOI dated 5 June 2015, his oral testimony and that of Tan Koon Seng's make it clear that the genesis of the price-cutting war in the mid-2000s lay with these two parties when they were independent parties. A number of the statements in the NOIs regarding Price Discussions related to under-pricing or price-cutting, which is what would have happened during the price-cutting war in the mid-2000s before price stability returned with the lock-step movement of prices from July 2008 onwards.

251 Neither Ma nor Tan Koon Seng provided any persuasive or compelling explanation of why this happened as a plausible alternative to an agreement, tacit or express, not to undercut each other's prices and to move prices in tandem so that no one supplier would be disadvantaged. In the circumstances, by reason

of the end of the price-cutting war, followed by the lock-step movement of prices thereafter, both Hup Heng and Lee Say are strongly implicated as prime movers in any such complicit agreement or arrangement to move prices in concert. This was consistent with the evidence that the market would look to Lee Say Group for indications of a price move.

252 All five companies comprising A5 moved their prices in tandem with the market, providing objective corroboration that they participated in concertation of price movements, including the Price Discussions as set out in the ID.

253 The Board should point out that, until Tan Koon Seng was summoned to attend before the Board for the Clarification Hearing, A5 had not produced any witness in support of its appeal. In the absence of any evidence to the contrary, the Board accepts the evidence against A5 which remains unchallenged.

Object infringement and no specific dates

254 Our findings on the above as dealt with above in relation to A2 apply also to A5.

Conclusion

255 By reason of the above, the Board finds, on a balance of probabilities, that A5 had participated in the Price Discussions. Accordingly, the appeals by A5 (comprising A5's four other appellants and Prestige Fortune) against liability for the Price Discussions are dismissed.

Appeal No. 6 of 2018 by Ng Ai (A6) on Price Discussions

Participation in Price Discussions

256 In finding that A6 had participated in the Price Discussions, CCCS relied also on the evidence of Ong and Tong Huat Group's LSs.

257 Ong had identified Tan Chee Kien as a participant in the Anti-Competitive Discussions.[77]

258 CCCS was informed that if some of the Undertakings did not attend a particular meeting, phone calls would be made between the Undertakings informing each other of the discussed price increases.

259 There is no reason why the Board should not accept the evidence of Ong, who had identified Tan Chee Kien as a participant in the Price Discussions. A6 has not offered any evidence to refute the above.

260 Instead, Tan Chee Kien himself admitted that he had participated in some meetings. He claimed that he was a "minimal or passive" participant at the meetings but had "never heard anyone announcing their intention to increase prices". In A6's representations, A6 had not disputed liability but only the quantum, as it had stated this:[78]

> 3. Nonetheless, in the spirit of cooperation with the CCS, Ng Ai will not contest that it is liable for the proposed infringement for the Non-Aggression Pact and/or the Price Fixing (i.e. the agreement to increase prices as defined as Price Discussions in the PID).
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> …

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[77] ID at [190] and [199].
[78] A6's Written Representations dated 19 April 2016 at [3] and [4(c)].

> 4(c) Ng Ai is a small player in the fresh chicken industry, and only played a minimal and passive role. [In the event that Ng Ai rocked the boat (in the face of any anticompetitive behaviour), it could face duress and/or pressure in the form of restrictions to its supply of live chickens from Malaysia].

261 There is no reason why the Board should not accept A6's representations as reliable or credible as the representations also satisfied the factors listed in *Toshiba*, namely that the representations were made on A6's behalf by its then-solicitors, Rodyk & Davidson LLP, and against its interest.

262 Even if A6's participation in the Price Discussions was minimal, as it did not publicly distance itself from the Price Discussions, A6's minimal participation would still have infringed s 34 of the Act, since the Price Discussions had the *object* of restricting, preventing or distorting competition within Singapore.

263 In the circumstances, the Board finds that A6 had also participated in the Price Discussions.

Price increases

264 A6 had implemented six out of eight of the agreed price increases as shown in **Annex A**. However, A6 denied that it had increased the prices as a result of the Price Discussions and contended that its price increases were directly related to increases in its supplier prices from Malaysia. A6 also highlighted that it was a small player in the market and […].

265 A6 had appointed Mr Mellsop to support its case on the price increases. Mr Mellsop's terms of reference, *inter alia*, were to analyse various data provided by A6 in order to assess whether the data are more consistent with

competition or collusion, and whether this varies over the time period of the data. His conclusions were as follows:

(a) the cost of the key input to the distribution of fresh chickens, live chickens, is volatile. This means that collusion is likely to be relatively difficult to arrange and sustain;

(b) consistent with this, the best measures of competition (gross margin and churn) generally suggest that Ng Ai was competing across the time period of the alleged collusion (through to 13 August 2014), not colluding; and

(c) while the pattern of price increases by Ng Ai over time could be consistent with collusion, the pattern of price increases is also consistent with input cost increases, which would be expected to be passed through in a competitive market.

266 CCCS's response is that A6's reliance of its price, cost and customer data is irrelevant, as their case is based on object of the Price Discussions and not the effects. They further opined that Mr Mellsop's evidence is in any event ultimately inconclusive on the question of whether A6 acted in a collusive manner with its competitors.

267 As mentioned above, CCCS has relied upon data provided by Tong Huat Group, which showed that A6 had increased its prices on six out of the eight occasions mentioned by Tong Huat Group, including in its […] mentioned above.

268 CCCS pointed out the active role played by Tan Chee Kien in the Association. Much was made by CCCS of the circular TSD-011 and the role

played by Tan Chee Kien's assistant Shiny Tan. We are not persuaded that either Tan Chee Kien or Shiny Tan played a role in actually drafting the said circular, although Shiny Tan might well have assisted to improve the English used therein. Nevertheless, as a senior member of the Association, we believe that Tan Chee Kien would have been well aware of the circular.

269 The Board noted that A6 did not contest its liability for infringement of the Price Discussions in its first representations (in the spirit of cooperation with CCCS) but chose instead to focus on the issue of quantum of financial penalty.

270 Given Tan Chee Kien's deep involvement in this relatively close-knit industry, we find it implausible that he was unaware of the Price Discussions and are satisfied that A6 took advantage of resulting increased prices through parallel conduct and benefited from such conduct.

Object infringement and no specific dates

271 Our findings on the above as dealt with above in relation to A2 apply also to A6.

Conclusion

272 By reason of the above, the Board finds, on a balance of probabilities, that A6 had participated in the Price Discussions. Accordingly, A6's appeal against liability for the Price Discussions is dismissed.

Single continuous infringement issue

273 CCCS had found that, by reason of the Appellants having participated in both the NAP and Price Discussions, the two infringements constituted a SCI.

274 In view of the Board's findings that (save for Prestige Fortune) the other Appellants had not participated in the NAP but only the Price Discussions, the issue of SCI is not relevant to the said other Appellants.

275 In the case of Prestige Fortune, since we have dismissed its appeal on both NAP and Price Discussions, the concept of SCI is relevant, and all of CCCS's findings against Prestige Fortune on the quantum of financial penalties remains.

276 The issue of whether the quantum of financial penalties payable should be lowered applies only to the other Appellants, i.e. A2, A3, A5's four other appellants and A6. Accordingly, references made to the Appellants in the paragraphs below in relation to quantum would exclude Prestige Fortune.

The appeals against quantum

277 In determining the quantum of the financial penalties to be imposed on the Appellants for breach of s 34 of the Act by reason of the Price Discussions, the Board took into consideration the various factors as dealt with below.

The period of infringement

278 CCCS has to prove not only the participation of an undertaking in a breach of s 34 of the Act, but also its duration. If there was no evidence capable of *directly* establishing the duration of breach, CCCS has to adduce at least evidence of facts sufficiently proximate in time for it to be reasonable to accept that the breach continued uninterruptedly between two specific dates: *Silec Cable SAS v European Commission* (T-438/14) [2018] 5 CMLR 14 at [65]-[67].

279 On the basis that there was a SCI, CCCS has identified the period of infringement to be from 19 September 2007 (the date when TSD-011 was issued by the Association) to 13 August 2014 (the date of the First Inspections).

280 In view of our finding that there is no liability for the NAP, the issue of SCI is not relevant. Instead, the period of infringement should be limited to the period of the Price Discussions.

281 CCCS took the date of TSD-011 (i.e. 19 September 2007) as the start period of the infringement. The Board does not agree with this, as the background to the creation of TSD-011 continues to be shrouded in mystery even after the oral hearings, with consistent denials of knowledge of its creation and the reasons for its existence.

282 None of the Four Non-Parties, who admitted liability to the Price Discussions in their leniency applications, made reference to TSD-011 as having any relevance to their conduct. Given the uncertainty around the creation and responsibility for TSD-011, the Board did not consider the document as a reliable marker for the start of concerted lock-step movements in prices by the Undertakings.

283 However, the Board notes that in October 2007, as reported by The Straits Times, there was an increase of between 30 cents and 90 cents per kilogram due to a 20% increase in prices of live birds from Malaysia. Furthermore, figures from the Department of Statistics (for the period from September 2007 to December 2007) showed an increase in the retail prices of fresh chicken in Singapore. This would suggest some form of concertation amongst the various undertakings in relation to the price increases in October 2007.

284 Consequently, we agree to the starting date of 19 September 2007, not because of TSD-011 relied upon by CCCS, but more because the Four Non-Parties had accepted this as the starting date and paid the penalties based on this starting date. In any event, the price increases in October 2007 suggest that the agreements to increase the prices would have occurred prior to the increases. In the absence of any evidence to the contrary, we are inclined to accept the starting date as 19 September 2007.

285 We reject the arguments by:

(a) A2, that the period of infringement should be from 24 July 2008 to 21 January 2014 instead, being the period of the co-ordinated price increases; and

(b) A3, that the year 2012 should be excluded as there were no price increases.

286 The infringement under s 34 of the Act is an object infringement regardless of whether the price increases were effected. In this case, the agreement or concerted practices on the Price Discussions continued until 2014, as evidenced by the price increase in January 2014.

287 In the absence of any evidence to the contrary, we are inclined to accept the end date as 13 August 2014, which is when the First Inspections were conducted. We are of the view that it is more likely than not that the Appellants would have ceased to participate in the Price Discussions after the First Inspections.

288 In view of the above, the infringement period should be from 19 September 2007 to 13 August 2014 (i.e. 6.83 years).

Which set of Penalty Guidelines to apply

289 On the issue of whether CCCS should have used the *CCCS Guidelines on the Appropriate Amount of Penalty in Competition Cases 2016* ("**2016 PG**") instead of the *CCS Guidelines on the Appropriate Amount of Penalty 2007* ("**2007 PG**"), the following timelines are not disputed:

(a) 7 March 2014 – CCCS commenced its investigations;

(b) 8 March 2016 – CCCS issued the PID;

(c) 27 September 2016 – State-of-Play Meeting was conducted, during which the attendees were informed that CCCS would be conducting further investigations, and that they were at liberty to apply for leniency;

(d) 12 October 2016 to 10 November 2016 – CCCS accepted the first leniency applications from Tong Huat, Sinmah, Kee Song, and Hy-fresh ("**the four Leniency Applications**");

(e) 1 December 2016 – 2016 PG came into effect;

(f) 21 December 2017 – CCCS issued the SPID; and

(g) 12 September 2018 – CCCS issued the ID.

290 Counsel for A3, Ms Kala, argued that CCCS was wrong to have applied the 2007 PG for the reasons given in A3's written submissions and Ms Kala's closing arguments. Briefly, A3 argued that CCCS was wrong to have used the 2007 PG as:

(a) CCCS had accepted the four Leniency Applications (between 12 October 2016 and 10 November 2016), after it had issued the PID on 8 March 2016;

(b) by reason of s 68(1) of the Act read with paragraphs 2.2, 3.1, and 4.1 of the *CCCS Guidelines on Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity 2016* ("**LG**") (collectively, "**the Relevant Provisions**"), CCCS could only accept leniency statements before the issuance of the PID and not after;

(c) the four Leniency Applications could be accepted by CCCS only if the SPID (issued on 21 December 2017) was regarded as the PID, which had superseded the PID issued on 8 March 2016;

(d) as such, since the 2016 PG was effective from 1 December 2016, and were the applicable penalty guidelines as at the date when the SPID was issued (i.e. 21 December 2017), the 2016 PG should be used; and

(e) contrary to CCCS's arguments, the LG did not give CCCS the discretion to accept leniency statements after the issuance of the PID as:

(i) the LG provided for such acceptance before the issuance of the PID; and

(ii) the LG did not provide or state that leniency statements could be accepted after the PID, or that CCCS had been given the discretion to so accept.

291 CCCS argued that it was not precluded by the Relevant Provisions from accepting the four Leniency Applications, and that it had the discretion to accept the same even after the PID was issued. As such, the 2007 PG would be applicable. The 2016 PG could not be applied as at the date of the issuance of the PID on 8 March 2016, as the 2016 PG had not yet come into force.

292 In support, CCCS also relied on the European Commission's ("**EC**") equivalent of the LG and the EC's decisions, to justify its ability to accept leniency applications after the PID was issued.

293 A3 disagreed and pointed out that, unlike the LG, the EC Notice on Immunity from fines and reduction of fines in cartel cases (2006/C 298/11) ("**the Notice**") did not expressly preclude the EC from accepting a formal application for a reduction of fine after the Statement of Objections (the equivalent of the PID) had been issued. In fact, the Notice expressly stated that "*[t]he Commission may disregard any application for a reduction of fines on the grounds that it has been submitted after the statement of objections has been issued*", which was fundamentally different from the LG, giving the EC a discretion to accept or reject. CCCS did not have such a permissive right.

294 Having considered the Parties' submissions on this issue, the Board considers that the applicable guidelines are the 2016 PG.

295 Reviewing the chronology of events, CCCS was considering new evidence based on representations made by some of the Appellants subsequent to the issuance of the PID in March 2016 and before the State-of-Play meeting in September 2016. Based on the information received through the Leniency Applications submitted after the State-of-Play meeting, CCCS revised its PID which it then issued as the SPID in December 2017.

296 Although at the time of the PID in March 2016 the applicable Penalty Guidelines would have been the 2007 PG, by the time the SPID was issued in December 2017, the 2016 PG were in force. There are no rules on which Penalty Guidelines are to apply in such a situation where revised PIDs are issued in a period straddling a change of guidelines.

297 In these circumstances and context, there was a considerable lapse of time between the issuance of the PID and the SPID. Also, during this period, the Appellants (with the exception of Prestige Fortune on the issue of the NAP) had not admitted liability, and were contesting the findings by representations to CCCS.

298 It is to be noted that a PID is exactly that; it is provisional and affords the affected parties notice of the grounds of any final infringement decision that may be brought against such parties so that they may contest the provisional findings as part of an administrative process. As at December 2017, there was no final ID, and by inference no final decision on the liability, and susceptibility to financial penalties had yet been determined, and by the time that final decision was made by CCCS sometime between the issuance of the SPID and the ID in September 2018, the applicable Penalty Guidelines were the 2016 PG.

Consequently, the Board considers it fair and just that the 2016 PG should be applied in this situation.

299 Ms Kala submitted that the SPID should be considered the fresh PID for the purpose of arguing the applicability of the 2016 PG. The Board considers this a strained artifice that is not necessary for the application of the 2016 PG in the specific circumstances of this case as set out above. The Board accordingly rejects Ms Kala's submissions in this respect.

300 Further, if each revised PID in an investigation is to be considered a fresh PID, potentially resetting the clock ad infinitum, this has the possible consequence of introducing uncertainty in the administrative process that may be detrimental to CCCS and affected parties alike.

301 In any case, in determining the amount of financial penalty to be imposed, the Board is not bound by the penalty guidelines, which, as the name suggests, were merely guidelines and not statute. The Board has jurisdiction to assess the penalty to be imposed, on its own terms, having regard to the justice of the case.

302 In the case of *Konsortium Express & Others v Competition Commission of Singapore*, Appeal Nos. 1 and 2 of 2009 [2011] SGCAB 1, it was stated that:

> 144. It is convenient at this juncture to say a word of the Penalty Guidelines published by the CCS pursuant to section 61(1) of the Act. In imposing a financial penalty, the CCS follows and applies the Penalty Guidelines. However, the Board is not bound by the Penalty Guidelines and has full jurisdiction to assess the penalty to be imposed: *Napp Pharmaceutical Holdings Limited v Director General of Fair Trading* [2002] CAT 1 at [497]-[500]. That said, the Board will have regard to the Penalty Guidelines where appropriate in reaching its conclusion, unless it is shown that the Penalty Guidelines are wrong or that the CCS has erroneously applied the Penalty Guidelines. In *Argos* case (*supra*), the Competition Appeal Tribunal, in considering an appeal on

> penalty imposed by the OFT as a result of an infringement of the Chapter I prohibition of the United Kingdom Competition Act 1998, made the following observations on the OFT's guidance as to the appropriate amount of a penalty ("**OFT's Guidance**"):
>
> > 168 We observe, first that the *Guidance* is what it says, namely guidance, and is not to be construed as if it were a statute. Secondly, as we have already held, the OFT has a margin of appreciation in applying the *Guidance*. Thirdly, whether or not the OFT correctly applied the *Guidance*, the Tribunal retains jurisdiction under Schedule 8, para 3(2) of the Act, to fix the penalty. In our view that jurisdiction applies even if the OFT has mistakenly applied the *Guidance*, or if the application of the *Guidance* produces a result that, in the Tribunal's view, does not properly reflect the justice of the case. The Tribunal, will however, take into account the *Guidance* when reaching its own conclusions as to what the penalty should be: *Napp*, cited above.
> >
> > 169 The *Guidance* is published with the laudable objective of providing an outline framework for the calculation of penalties by the OFT. In our view, however, it would not be appropriate to analyse each individual 'Step' in arriving at the penalty in isolation from the other Steps.'

303 Further, having regard to all the circumstances of the case, we are of the view that the application of the 2016 PG would more properly reflect the justice of the case, not least because:

(a) the 2016 PG were issued after public consultation to "*better capture the value accrued as a result of the undertaking's infringing conduct*". There will also be greater certainty in terms of the financial figures against which a penalty will be calculated, since the determination of relevant turnover is no longer dependent on when CCCS completes its investigation and moves to issue a PID, and where appropriate, subsequently an ID. The amended 2016 PG would also bring the method of penalty calculation in line with the practices of established competition authorities, such as the EC and the United Kingdom's Competition and Markets Authority; and

(b) the use of the 2007 PG would not provide an accurate reflection of the harm caused by the infringing conduct, since the financial penalty would be based on the undertaking's turnover in the financial year preceding the issuance of the ID. As such, the amount of penalty would have no bearing on the harm caused by the infringing act, but would be dependent on when CCCS completes its investigation and issues the ID. It may be, as in this case, four years after the investigation started. Since the last act of infringement was in 2014, but the ID was issued only in 2018, it would mean that the undertaking's turnover in 2017 (i.e. the year preceding the ID) would have no co-relation with the end date of the period of infringement (i.e. 2014).

304 The application of the 2016 PG would also meet the twin objectives of the Penalty Guidelines, which are to:

(a) reflect the seriousness of the infringement; and

(b) deter undertakings from engaging in anti-competitive practices.

305 For the above reasons, we also find that the amount of financial penalties imposed on the Appellants should be computed with reference to the 2016 PG.

306 Based on the 2016 PG, the turnover to be used to calculate the financial penalties would be the Appellants' turnover for "*the financial year preceding the date when the infringement ended*". As the infringement ended on 13 August 2014, the business year to be taken would be 2013.

High turnover and low profit margin issue

307 The Appellants submitted that the fresh chicken industry in Singapore is an industry with a high turnover and low profit margin, and that the Board should consider the nature of such industry when determining the penalty to be imposed.[79] This is a factor that can be taken into account in assessing whether the overall penalty imposed is excessive or disproportionate, the rationale being that a penalty based on turnover in a high turnover and low profit margin industry would be disproportionately high, compared to an undertaking in an industry with lower margins.

308 In *IPP Financial Advisers Pte Ltd v Competition Commission of Singapore* [2017] SGCAB 1 ("***IPP***"), the Board surveyed the relevant precedents and observed that the focus here is on the amount of "*monies passed through*" to third parties – the undertaking must demonstrate that the "*nature of the industry is such that a significant proportion of the gross revenue earned is not retained but passed on to other independent parties*".

309 In the present case, we are not satisfied that the Appellants have submitted evidence to prove that the fresh chicken industry *as a whole* has a high turnover and low profit margin in that significant amount of monies are passed through to third parties. In fact, the Appellants have not made submissions on how the industry as a whole faces low margins, or how significant amount of monies are passed through to independent third parties. A2's submission on its high operating costs and administrative expenses also goes directly against the observation in *IPP* (at [70]) that operating costs is not relevant to the analysis

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[79] ACSAL at [64]-[65]; A2's Skeletal Submissions dated 27 September 2019 at [116]-[120]; A5's Written Submissions dated 27 September 2019 at [86]-[95].

under this factor, as that would lead to the perverse result of penalising more efficient undertakings that have lower overheads.

310 For completeness, we should point out that we were not particularly convinced by CCCS's argument that it was telling that only two of the Appellants made specific submissions on this point. This was irrelevant, as the point could still have been made out even if just one party manages to demonstrate the relevant circumstances.

Relevant market and turnover issues

311 CCCS found that the focal market segment is for the sale of whole fresh chickens in Singapore, whether cut or not, but excluding black chickens, kampong chickens, speciality chickens, marinated or cooked chickens and chicken parts.[80]

312 The key issue is whether in the relevant market *affected by the infringing conduct* included or excluded these products. In *Argos*, the UK Court of Appeal held that it "*does not matter that the market includes items which are substitutable for others*" or that "*some parts of the market adopted might otherwise be analysed as being in a related or neighbouring market*" (at [189]). Thus, evidence on the relevant market contemplated in the infringing behaviour would determine the product segments in the scope of the relevant market; it is not necessary to conduct a formal analysis in a penalty assessment. What CCCS and now the Board have to be satisfied is, on a reasonable and properly reasoned

[80] ID at [175].

basis, what is the relevant product market affected by the infringement: *Argos* at [170].

Gold Chic / Hua Kun (A2)'s arguments

313 We do not agree with A2's arguments that old fowls and defect chickens should be excluded from the relevant market. Old fowl is a product that is used mostly for soup, while defect chickens are deemed by the market to be generally unwanted and are sold at a lower price. These are nonetheless products that are part of the relevant market affected by the infringement, as identified by CCCS based on the evidence available. A2 has not adduced any evidence to demonstrate that the Parties had intended or agreed to exclude old fowls and defect chickens in their Price Discussions.

314 We would not go so far as to say that arguments on price correlations or price movements *per se* are totally irrelevant – they could be relevant if they can indirectly establish that the infringing agreement and/or concerted practice did not include or contemplate them. The analysis turns not so much on what products share the same economic market, but what products are affected by the infringement. In the present case though, old fowls and defect chickens were also sold by other parties, and we agree that CCCS had a reasonable basis for identifying them as part of the relevant market for the purpose of calculation of penalties. Just because one party may not have implemented the price increases on these products in this context can only go so far as to show whether there was implementation by one party in these segments, and would also not be able to overcome direct evidence on what was intended to be included.

TTS (A3)'s arguments

315 A3 has argued that fresh chicken, which are […], should be excluded from its relevant turnover as they are unique products. We reject A3's arguments and accept CCCS's submissions on why the […] should not be excluded from A3's relevant turnover for the reasons given in CCCS's Defence at [193] to [198].

316 Instead, we agree with CCCS that A3 has not demonstrated how […] is a different type of fresh chicken product, or that they were excluded from the Anti-Competitive Discussions.

Lee Say Group (A5) (excluding Prestige Fortune)'s arguments

317 We also do not agree with A5's submissions that CCCS should have excluded its revenue attributable to […]. Similarly, here, there is no evidence adduced to suggest that the Parties' discussions had excluded supermarkets or […] specifically. There is also nothing to support A5's mere assertion that […] is a price-setter and that the Parties' prices are dictated by and subject to […]'s approval since 2000.

318 As for the submission that its turnover does not reflect discounts and rebates that are agreed verbally, which are subsequently proportioned against the total volume of goods sold to […] (including other non-chicken products), CCCS's response is merely that insufficient evidence has been provided without any further elaboration. This is far from satisfactory when, based on the *face* of the evidence tendered concerning the merchandising allowance granted from […] to Lee Say and KSB,[81] the relevant revenue may not actually have been

[81] Vol. 3, Combined Bundle of Documents (Quantum) ("**CBD(Q)**") at S/N 16.

earned by Lee Say Group in relation to the fresh chicken products sold to […] due to the possible rebates attributable to them. Without further elaboration by CCCS on why A5's evidence is insufficient or any argument against the proposition that rebates granted should be excluded to reflect the accurate turnover, we could be inclined to accept A5's contention on this point.

319 However, it does not escape us that the two tables calculating the rebates allegedly apportioned and attributable to fresh chicken sales amount to possible mere assertions on the part of A5. It is unclear who had drawn up these tables, and the […] tax invoices that purport to grant A5 "*merchandising allowances*" do not refer to fresh chickens specifically and are not accompanied by any further explanations or correspondence with […]. Moreover, A5's submission that prices of fresh chicken products and agreements on discounts and rebates with […] are traditionally agreed and communicated verbally since 1995 and even apparently to date appear to be a mere assertion. This assertion is difficult to believe in the context of two established commercial parties and is in fact contradicted by both the […] tax invoices as well as the price lists emailed by […] to Lee Say and KSB[82] tendered in support of the point above on […] being a pure price-setter.

320 On the other hand, we agree with A5's argument that chicken products to […] should be excluded, on the basis that *only* A5 owns the specially customised machinery used to produce […] chickens. These chickens can thus be analogised to "*speciality*" chickens that no other fresh chicken distributor supplies and would thus have not been intended to be included in the relevant market affected by the infringing conduct.

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[82] Vol. 1, CBD(Q) at S/N 1.

Ng Ai (A6)'s arguments

321 We do not agree with A6's submission that […] should be excluded from the relevant market. As mentioned above, the analysis does not depend on an economic analysis of what products are distinct. Instead, the inquiry focuses on what products are covered by the scope of the infringing conduct. CCCS had a reasonable basis to identify these products as part of the relevant market, based on the evidence available which does not explicitly exclude these products.

322 Although A6 submitted that its turnover figures do not take into account rebates given to its customers, CCCS takes the view that the Excel spreadsheet tendered is not conclusive proof of the amount of rebates given and that the source documents to prove the rebates would be the credit notes. We agree with CCCS that an internal document created by A6 at a later stage is not conclusive proof of the rebates.[83]

323 We also agree with CCCS that it correctly included A6's sales to customers with a tender review process in the relevant turnover, as infringing conduct can still possibly affect the prices quoted by collusive tenderers.

Exclusion

324 For consistency, we will however exclude from the Appellants' respective relevant turnovers the same types of chickens as those excluded by CCCS in the computation of the penalties for A4.

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[83] CCCS's Closing Submissions dated 23 September 2019 at [134].

Mitigating factors and extent of participation

325 The Appellants submitted, and CCCS did not take objection, that the penalties imposed for competition law infringement should be proportionate to the objective gravity of the infringement and the relative gravity of the participation of an undertaking in the infringement.

326 However, CCCS asserted the stark position in the ID that minor and passive participation is not a mitigating factor.[84] This was solely premised on the EC's tightening of its fines guidelines in 2006 ("**2006 EC FG**"), which removed exclusive passive participation as a possible mitigating circumstance to be taken into account. The change was recognised by the General Court in *Panasonic Corp and anor v European Commission* (T-82/13) ("***Panasonic***") as a "*deliberate political choice to no longer 'encourage' passive conduct by those participating in an infringement of the competition rules*". This choice was observed to fall within the discretion of the EC in determining and implementing competition policy. In the ID, CCCS then distinguished European decisions made prior to the 2006 EC FG as being "*of no assistance*" and "*little precedential value*".[85]

327 Unfortunately, CCCS in its decision appears to have adopted and applied its view of European competition policy according to the apparent position in the 2006 EC FG, without justifying the relevance and implication of the 2006 EC FG's change on Singapore competition policy and law. We agree with the Appellants' submission that the 2006 EC FG does not apply.[86] The EC's

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84 ID at [533]-[542].
85 ID at [538] and [541].
86 ACSAL at [63].

competition policy is not the Singapore CCCS's competition policy, and *a fortiori* is not Singapore law.

328 It is not doubted that decisions from the UK and EU are highly persuasive in interpreting the provisions in Singapore's Competition Act, where they have been modelled on similar provisions in UK and EU legislation. The Board has recognised this on several occasions: *Re Pang's Motor Trading v CCS, Appeal No 1 of 2013* [2014] SGCAB 1 at [33]; *Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1 at [287]. However, we must strongly caution against following foreign precedents without examining the specific context and reasoning in them, and their applicability to the Singapore context. These decisions can only be at most very persuasive, and are not binding on CCCS, the Board or the Singapore Courts. Without over-emphasising this point, we also note that the section heading "*Applicability of European Law*" of Part A(i) of Chapter 2 of the ID is strictly inaccurate – European law may be persuasive due to our regime's roots, but it does not apply to govern competition cases in Singapore. Singapore competition law is autochthonous and our local jurisprudence takes into account factors and intricacies unique to Singapore.

329 Hence, without more than a mere citing of the 2006 EC FG, we cannot accept CCCS's proposition that a mere passive or follower role is not a mitigating factor. Although CCCS's administrative guidelines do not have the effect of law and are not binding on CCCS, they serve to provide transparency and clarity to businesses on how CCCS will interpret and implement the competition law regime in Singapore. CCCS revised its Penalty Guidelines in 2016, and there does not appear to be an express adoption of the EC's stricter policy against taking passive participation as a mitigating factor. In fact, it is arguable that the 2016 PG actually reflect the reverse position. First, an active

participating role is expressly stated as an aggravating factor – "*role of the undertaking as a leader in, or an instigator of, the infringement*". Second, "*role of the undertaking,* for example [i.e. including but not limited to the situation where*] the undertaking was acting under severe duress or pressure*" is stated as a mitigating factor. Taking and juxtaposing these two together would suggest that a passive and limited role could amount to mitigating circumstances under the 2016 PG.

330 Moreover, it is not even the case that a limited role of the undertaking cannot be a mitigating factor at all under the 2006 EC FG. The European guidelines states the following as mitigating circumstances:

> where the undertaking provides evidence that its involvement in the infringement is *substantially limited* and thus demonstrates that, during the period in which it was party to the offending agreement, it actually avoided applying it by adopting competitive conduct in the market.
>
> [emphasis added]

331 *Panasonic* does not also appear to have laid down a strict proposition that exclusively passive participation is not a mitigating factor. Although the General Court had "*observed*" (at [181]) that the competition authority stated that this factor was no longer one of the mitigating circumstances under the 2006 EC FG, the Court still went on to examine pre-2006 cases on such "*exclusively passive or follow-my-leader*" participation and concluded that the applicants in that present case had not adopted a "*low profile*" during the infringement, and could not be considered to be playing an exclusively passive role.

332 In light of the above, we find that all the Appellants had participated in the Price Discussions, but their roles and extent of participation differed.

Factor to be used

333 In imposing the financial penalties, CCCS had used the starting point of […]% of relevant turnover for each of the Appellants, on the basis that the Appellants were guilty of two infringements, i.e. the NAP and Price Discussions. Since we find that the Appellants were only guilty of the Price Discussions and not the NAP, the factor to be used should be less than […]%.

334 We find that A2, A3 and A6 were passive participants, which is a mitigating factor, and we will impose a factor of […]% on each of them.

335 In the case of A5 (leaving aside Prestige Fortune), since they were the leaders in the Price Discussions and had a lot of say in the prices, we will impose a factor of […]% for their penalties.

336 As for Prestige Fortune, the Board has decided that it should be treated in the same way as the Four Non-Parties, not least because Prestige Fortune (before its acquisition by Lee Say Group) was guilty of the NAP and the Price Discussions (i.e. two infringements). The factor of […]% was used by CCCS on all the Four Non-Parties and on Prestige Fortune for being guilty of two infringements. Consequently, the penalty of $5,000 as imposed by CCCS on Prestige Fortune remains.

Calculation of financial penalties

337 By reason of the above, the financial penalties payable by each of the Appellants (leaving aside for Prestige Fortune) are computed as follows:

(a) for A2, A3 and A6: 6.83 x Turnover based on 2016 PG x […]%; and

(b) for A5 (leaving aside Prestige Fortune): 6.83 x Turnover based on 2016 PG x […]%.

338 Based on the above formulae, the financial penalties payable by each of the Appellants are as follows:

(a) for A2: the reduced sum of $513,992;

(b) for A3: the reduced sum of $724,507;

(c) for A5: the overall reduced penalty of $9,096,260 comprising:

(i) Lee Say: the sum of $2,106,097;

(ii) Hup Heng: the sum of $1,168,044;

(iii) KSB/ES Food: the sum of $2,127,570;

(iv) Lee Say and Hup Heng: the sum of $851,277;

(v) Lee Say, Hup Heng and Prestige Fortune: the sum of $467,856;

(vi) Lee Say, Hup Heng, ES Food, KSB and Prestige Fortune: the sum of $2,370,416;

(vii) Prestige Fortune: the financial penalty of $5,000 remains; and

(d) for A6: the reduced sum of $537,678.

339 By reason of the above, on the issue of quantum, we allow each of the appeals in A2, A3, A5 (save for Prestige Fortune) and A6 in part, and determine that the quantum of penalties payable by each of the Appellants is as computed above.

Written undertakings

340 All the Appellants' appeals against the written undertakings imposed by CCCS are dismissed. As such, the undertakings imposed by CCCS are to remain.

Time for payment

341 All the Appellants are to pay their respective financial penalties imposed within 14 days from the date of this written decision. Thereafter, interest is payable on the unpaid financial penalties at the rate of 4% per annum until the date of full payment.

342 Taking into consideration the current economic situation, the Board is of the view that the rate of 4% per annum imposed on the unpaid financial penalties would be appropriate.

Costs

343 Having regard to all the circumstances of this case, the Board is of the view that a just order of costs is for all Parties, save for Prestige Fortune, to pay their own costs and disbursements. In case of disbursements where the Parties have agreed to share the same, their liability will be as per their agreement.

344 In the case of Prestige Fortune, it will pay costs of $12,000 to CCCS as agreed.

Summary of our decision

345 In summary, the Board:

(a) allows the appeals by A2, A3, A5 (save for Prestige Fortune) and A6 on their respective liabilities for the NAP;

(b) dismisses Prestige Fortune's appeal on its liability for the NAP;

(c) dismisses the appeals by A2, A3, A5 and A6 on their respective liabilities for the Price Discussions; and

(d) allows in part the appeals by A2, A3, A5 (save for Prestige Fortune) and A6 on the quantum of penalties payable by each of them.

346 The financial penalties payable are as follows:

(a) Appeal No. 2 of 2018 – $513,992 payable by Gold Chic/Hua Kun;

(b) Appeal No. 3 of 2018 – $724,507 payable by TTS;

(c) Appeal No. 5 of 2018 – overall penalty of $9,096,260 payable by Lee Say Group, comprising:

(i) $2,106,097 payable by Lee Say;

(ii) $1,168,044 payable by Hup Heng;

(iii) $2,127,570 payable by KSB/ES Food;

(iv) $851,277 payable by Lee Say and Hup Heng;

(v) $467,856 payable by Lee Say, Hup Heng and Prestige Fortune;

(vi) $2,370,416 payable by Lee Say, Hup Heng, ES Food, KSB and Prestige Fortune;

(vii) $5,000 payable by Prestige Fortune; and

(d) Appeal No. 6 of 2018 – $537,678 payable by Ng Ai.

347 The financial penalties payable by all the Appellants, including Prestige Fortune, are to be paid within 14 days from the date of this written decision, failing which interest at the rate of 4% per annum is payable on the unpaid financial penalties until full payment thereon.

348 All Appellants and CCCS, save for Prestige Fortune, are to pay its own costs. Prestige Fortune is to pay the agreed costs of $12,000 to CCCS.

Other remarks

Board's observations

349 For completeness, the Board makes the following observations on the issues raised in relation to CCCS's investigation, interviewing and recording processes:

(a) the total time elapsed from the formation of the investigation team to the issuance of the ID was four years and six months;

(b) the time between the PID and the SPID was nearly one year and 10 months, during which additional information was gathered by CCCS from the relevant Parties' representations and leniency applications, as well as a handful of interviews in October and November 2016;

(c) it was a further nine months before the ID was issued;

(d) by the time the ID was issued, both Harikumar and Kho had left CCCS;

(e) over the course of the investigation, there were numerous changes of officers on the investigating teams;

(f) the NOIs recorded during the interviews were not recorded verbatim and would be a composite summary of questions and answers;

(g) in the instant case, interviews were either in English or Mandarin, or a mix of both. Where interviews were conducted in Mandarin, there were no official independent interpreters present. Interpretation was provided by CCCS officers; and

(h) the NOIs do not record the places of interviews, although the times of interviews were noted and the names of interviewers were recorded, and on the evidence presented, there were some discrepancies in these recorded details.

Length of time taken

350 In his oral testimony, Harikumar outlined the process of review and approval in CCCS and suggested that the length of time from March 2014 to September 2018 was not unusual in the context of cartel investigations in the European Union and United Kingdom. He further indicated that CCCS investigating teams were investigating multiple significant cases at the same time.

351 The Board accepts that time should be taken to properly gather and review relevant evidence for initiating and conducting investigations with due rigour and care and for the approval processes to take their due course, given the onerous nature of breaching the competition laws of Singapore.

352 Nevertheless, the Board found the process wanting and in particular is of the view that the length of time of the investigation was too long, and that considerably more care and attention should have been paid to details, such as recording persons present at interviews and locations. Although the Board found the former CCCS officers called as witnesses to be credible and did not doubt their professionalism and integrity, the nature of one of the interviews with Wu on 25 November 2014 (which commenced at 10am and concluded at 10pm) was of particular concern to the Board in the way it was documented and raised doubts as to the reliability of the investigating team's judgment in relying on specific information in that interview for the purpose of the showing an infringement of s 34 of the Act.

Interview and recording process

353 The conduct of the interviews in Mandarin also raises questions of impartiality and accuracy, as there were no independent translators provided, which led to disputes in the comprehension and understanding of questions and answers; quite literally, there were potentially points that could have been lost in translation. Much time was spent in cross-examination and submissions with regard to the issue of translation. Whilst CCCS was confident of the ability of its officers to ably understand and communicate bilingually, and there was nothing to suggest that the officers did so with anything but the highest levels of integrity and professionalism, it created varying levels of doubt on the accuracy and completeness of the NOIs which CCCS relied on very heavily to reach many of its conclusions and findings in the ID.

354 Although nothing turned on the process of CCCS's investigations and interviews, as the Board had found that the officers who gave evidence (Yeo and Soh) were credible witnesses, much time was spent (and expended) during the hearing to challenge the process.

355 Perhaps the issues raised above could be addressed by CCCS so as to avoid similar complaints in future and unnecessarily lengthening the hearing of the appeals especially the time taken to cross-examine CCCS's officers on such issues.

356 The Board makes these observations because a substantial part of some of the grounds of appeal, cross-examination and submissions was directed at the defects in the investigation process, and Mr Sreenivasan, *SC* in his submissions also addressed the manner in which the Board questioned some of the witnesses during the Clarification Hearing. The Board noted that this preponderance of

focus on process and procedure outweighed the focus on refuting the substance of the alleged infringements set out in the ID. Specifically, much time was spent on rules of evidence (in spite of reg 22(1)(b) of the Appeals Regulations that the Board shall not be bound by the provisions of the Evidence Act), the nature of an appeal to the Competition Appeal Board, compliance with the CCCS Guidelines, and the nature of the CCCS investigation.

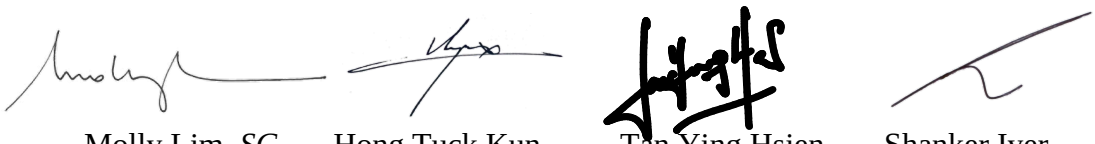
357 Whilst the Board welcomed the opportunity to clarify these areas as competition law is still in its relatively early stages of development in Singapore, the Board felt that more time should have been spent on dealing with the substantive issues of liability instead of debating points of process and procedure. For example, reliance on a strict non-compliance of administrative guidelines (such as the Relevant Provisions) to exclude substantive evidence makes a mockery of the overall objectives of a legal framework that is pointedly economic and business oriented in its formulation and execution. Parliament legislated for very broad powers for CCCS and the Competition Appeal Board that focused on the substance of infringements and somewhat less on the procedural elements as for example waiving the applicability of the Evidence Act and the law of evidence. However, the Board will pay due regard to the principles of fairness underlying the law and rules of evidence to ensure a fair and just outcome in an expeditious and commercial manner.

Note of thanks

358 The Board would like to express its appreciation to all who have assisted in these appeals, including the Parties' Counsel for their assistance and the Competition Appeal Board Secretariat who, notwithstanding the numerous

parties involved and the COVID-19 pandemic, has so efficiently facilitated the administration and co-ordination of these appeals.

Dated this 4th day of December 2020.



Molly Lim, *SC*	Hong Tuck Kun	Tan Ying Hsien	Shanker Iyer
Chairman	Member	Member	Member