

IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

Appeal No. 1 of 2012

In the matter of the Infringement Decision issued by the Competition Commission of Singapore, Price-fixing in Modelling Services, CCS 500/002/09, 23 November 2011

Between

Calvin Cheng Ern Lee

... Appellant

And

The Competition Commission of Singapore

... Respondent

DECISION

Dated this 31st day of May 2012

TABLE OF CONTENTS

I	BACKGROUND FACTS.....	1
II	OBJECTION OF THE CCS TO MR CHENG’S APPEAL.....	4
III	CCS’S CONTENTIONS	5
IV	MR CHENG’S CONTENTIONS.....	7
V	THE BOARD’S DECISION	8

IN THE COMPETITION APPEAL BOARD OF THE REPUBLIC OF SINGAPORE

Appeal No. 1 of 2012

In the matter of the Infringement Decision issued by the Competition Commission of Singapore, Price-fixing in Modelling Services, CCS 500/002/09, 23 November 2011

Between

Calvin Cheng Ern Lee

... Appellant

And

The Competition Commission of Singapore

... Respondent

DECISION

I BACKGROUND FACTS

1. On 23 November 2011, the Competition Commission of Singapore (“**CCS**”) issued and handed down its decision (“**Infringement Decision**”) holding that 11 modelling agencies (listed in paragraph 1 of the Infringement Decision) had infringed section 34 of the Competition Act (Cap. 50B, 2006 Rev Ed) (“**Act**”) by entering into an agreement to fix prices for modelling services. Apart from the agency, Mannequin Studio Pte Ltd (“**Mannequin**”), the CCS found that the other 10 of modelling agencies had carried on and continued the price fixing arrangement for the period from mid-2005 to 17 July 2009, and imposed a penalty on each of these 10 modelling agencies. As for

Mannequin, the CCS found at [378 to 380] of the Infringement Decision that the agreement was made before 31 July 2005 and Mannequin's infringing conduct ceased on 2 June 2006. That being the position, the Competition (Transitional Provisions for section 34 Prohibition) Regulations apply, and no financial penalty was imposed by the CCS on Mannequin.

2. As the price-fixing agreement of the 10 modelling agencies was terminated on 17 July 2009, the CCS did not issue any direction pursuant to section 69(1) of the Act in relation to the agreement.
3. Against the Infringement Decision, three Notices of Appeal were filed with the Competition Appeal Board ("**Board**"). They are:
 - (i) Notice of Appeal in Appeal No. 1 of 2012 filed by Calvin Cheng Ern Lee ("**Mr Cheng**") in his personal capacity on 20 January 2012 and served on the CCS on 27 January 2012;
 - (ii) Notice of Appeal in Appeal No. 2 of 2012 filed by 4 modelling agencies, namely Bees Work Casting Pte Ltd, Diva Models (S) Pte Ltd, Impact Models studio and Looque Models Singapore Pte Ltd ("**Looque**") on 20 January 2012 and served on the CCS on 27 January 2012; and
 - (iii) Notice of Appeal in Appeal No. 3 of 2012 filed by another modelling agency, Ave Management Pte Ltd, on 25 January 2012 and served on the CCS on 27 January 2012.

4. Mr Cheng, the appellant in Appeal No 1 of 2012, is a director and a shareholder of a modelling agency, Looque. He was also, at the material time, and is the President of the Association of Modelling Industry Professionals (“AMIP”). That is the position he has been holding since AMIP’s inception. The AMIP was registered with the Registry of Societies on 3 February 2005. At [224] of the Infringement Decision, the CCS found that the AMIP did not play a separate and significant role in facilitating and administering the anti-competitive agreement and therefore did not find that the AMIP was a party to the infringing conduct.
5. The appellants in Appeals Nos 2 of 2012 and 3 of 2012 are 5 of the 10 modelling agencies against whom the CCS had imposed financial penalties.
6. The CCS, in making a finding of contravention of section 34 prohibition on the part of Looque, states at [213 h] as follows:

“...CCS notes that the evidence shows that Calvin Cheng, as then president of the AMIP, played a central role in coordinating the actions of AMIP members. For instance, at the early stages of the infringing conduct, Calvin Cheng was “adamant” about raising rates, and he told the Parties that rates should be raised gradually so as not to attract attention or prompt complaints. When Parties started to implement the agreed-upon rates, Calvin Cheng acted upon complaints of undercutting by non-AMIP members and went to speak to a non-AMIP member about undercutting. He also instructed then AMIP secretary Bhak Yap to remind the Parties to use their own letterheads and tailor rates sheets to make it look like the Parties’ own rates when they quoted to clients.”

7. At a subsequent part of the Infringement Decision, in deciding the amount of financial penalty to be imposed on Looque, the CCS makes a further statement concerning Mr Cheng at [371] as follows:

“CCS considers the involvement of Looque’s director and shareholder, namely Calvin Cheng, as a central figure in the infringing activities of the Parties. Calvin Cheng had given instructions to the Parties on how to mask the fact that this was a collective action on the part of the Parties raise rates so as to avoid attracting attention and complaints. In view of this, CCS considers all these as aggravating factors and increases the penalty by [15]%...”

8. It is against these parts of the Infringement Decision that Mr Cheng is now appealing to the Board.

II OBJECTION OF THE CCS TO MR CHENG’S APPEAL

9. On 31 January 2012, CCS wrote to the Board in respect of Mr Cheng’s Notice of Appeal, requesting the Board to set it aside, on the ground that Mr Cheng is not a proper party or person within section 71(1) read with section 71(3)(a) of the Act and therefore he has no right of appeal. On 2 February 2012, Lee & Lee, solicitors for Mr Cheng, in response wrote to the Board disputing the contentions of the CCS. It is contended by Lee & Lee that Mr Cheng is a person in respect of whose conduct the CCS made a decision concerning the amount of penalty that was imposed and is therefore a person contemplated within the meaning of section 71(1) of the Act. On 3 February 2012 the CCS responded to the Lee & Lee’s contentions. In substance, the CCS’s contention is that Mr Cheng is not a party falling within section 71(1) of the Act and is not entitled to appeal against the findings made by the CCS.

10. In view of the exchange of correspondence between the parties, a Case Management Conference was held by the Board with the parties on 28 March 2012, at which, among other things, the Board directed that the parties exchange written submissions by 11 April 2012 on the issue of whether Mr Cheng's Notice of Appeal No. 1 of 2012 should be set aside. In compliance with the directions the parties duly filed their respective submissions.

III CCS'S CONTENTIONS

11. The CCS relies on sections 71(1) and 71(1A) of the Act which give a right of appeal against its decision to specific parties. Based on its reading of these provisions, the CCS submits that the Act provides for two groups of persons a right to appeal to the Board. The first group of persons are those described in section 71(1) of the Act, and the second group of persons are those described in section 71(1A) of the Act. The first group of persons, who can appeal are persons against whom the CCS has made a decision as to whether these persons have infringed any of the three prohibitions under the Act, namely, section 34 prohibition, section 47 prohibition and section 54 prohibition. And section 73 of the Act defines what the term "decision" means. Hence, an appeal under section 71(1) is an appeal only against such decision.
12. The second group of persons, who can appeal are persons not covered by section 71(1) but falling within section 71(1A) of the Act, and they are persons against whom interim measures under section 58A or 67 have been made or against whom a direction under section 69 has been made by the CCS. In the case at hand, no interim

measures or directions have been made against Mr Cheng. Hence Mr Cheng is not a party falling within this section 71(1A) of the Act. In any event, Mr Cheng is not relying on the said section 71(1A).

13. In this regard, the CCS refers to Mr Cheng's Notice of Appeal, which states at [29] and [30] the following:

"29. This appeal is brought pursuant to Section 71(1) read with Section 71(3)(a) of the Competition Act (Cap 50B)

30. The Appellant appeals against the CCS' decision with respect to his conduct to the extent that it was based on an error of fact (i.e. that the Appellant's email was not an instruction to the AMIP agencies to mask the infringing conduct)."

14. Further, the CCS draws the Board's attention to [34(a)] of the Notice of Appeal of Mr Cheng in which he seeks the following relief:

"(a) For the findings in the ID [Infringing Decision] relating to the Appellant initiating the infringing conduct and being a central figure in the same to be set aside."

15. In the present case, the CCS has made a decision and imposed financial penalties against 10 modelling agencies (including Looque) that they had infringed the section 34 prohibition by their agreement to fix the prices of modelling agencies. But the CCS has not made any decision or imposed any penalty on Mr Cheng. Hence Mr

Cheng is not a party entitled to appeal under section 71(1) of the Act. Accordingly, his appeal should be set aside.

IV MR CHENG'S CONTENTIONS

16. It is contended on behalf of Mr Cheng that in those parts of the Infringement Decision (set out at [6] and [7] above) the CCS uses the words “considers” and “notes”, and such use of those words is adventitious, as the CCS could have used the words “decision” or “direction” in stating that Mr Cheng was the “*central figure*” in the alleged infringing activities and played a “*central role*” in the activities. In substance and effect, the CCS makes a decision regarding Mr Cheng’s conduct. Therefore, Mr Cheng is “*a person in respect of whose conduct the [CCS] has made a decision*” within the meaning of section 71(1) of the Act, and is entitled to appeal pursuant to that section.
17. Mr Cheng criticises that the CCS adopts a “highly restrictive” interpretation of section 71(1) of the Act. It is submitted that it is evident from section 71(1) that the following four types of persons who are affected by a decision of the CCS can appeal pursuant to that section:
- “(a) *Any party to an agreement in respect of which the CCS has made a decision;*
 - “(b) *Any person in respect of whose conduct the CCS has made a decision;*
 - “(c) *Any party to an anticipated merger in respect of which the CCS has made a decision; and*
 - “(d) *Any party involved in a merger in respect of which the CCS has made a decision.*”

It is submitted that Mr Cheng is a person referred to at (b) above.

18. It is further submitted that even if Mr Cheng is not such a person, there is nothing in section 71(1) that prohibits other persons who are affected by a decision of the CCS from appealing against its decision. In Mr Cheng's submission, section 71 does not indicate that only the four named types of persons can appeal against the CCS's decision. It is not exhaustive as to the persons who can appeal.
19. Thirdly, as a matter of principle and/or policy, any person whose conduct has been impugned by the CCS and/or whose rights are affected by a decision of the CCS ought to be given the opportunity to appeal to the Board. This is especially so when the person concerned was not given a right of hearing and the opportunity to explain his conduct.
20. Mr Cheng complains that those parts of the Infringement Decision quoted above are highly damaging to his character, and his rights have been directly and adversely affected by the Infringement Decision. Clearly, he was not an uninvolved or an uninterested third party. He has sufficient interest and seeks redress from this Board.

V THE BOARD'S DECISION

21. The Board turns first to section 71 of the Act, which is in the following terms:

"Appealable decision

71. (1) *Any party to an agreement in respect of which the Commission has made a decision, any person in respect of whose conduct the Commission has made a decision, any party to an anticipated merger in respect of which the Commission has made a decision or any party involved in a merger in respect of which the Commission has made a decision, may appeal within the prescribed period to the Board against, or with respect to, that decision.*
- (1A) *Any person, other than a person referred to in subsection (1), to whom the Commission has given a direction under section 58A, 67 or 69 may appeal within the prescribed period to the Board against, or with respect to, that direction.*
- (2) *Except in the case of an appeal against the imposition, or the amount, of a financial penalty, the making of an appeal under this section shall not suspend the effect of the decision to which the appeal relates.*
- (3) *In subsection (1), “decision” means a decision of the Commission as to –*
- (a) *whether the section 34 prohibition has been infringed by any agreement*
 - (b) *whether the section 47 prohibition has been infringed by any conduct;*
 - (c) *whether the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or*
 - (d) *whether the section 54 prohibition has been infringed by any merger,*
- and includes a direction given under section 58A, 67 or 69 (including the imposition of any financial penalty under section 69 or as to the amount of any such financial penalty) and such other decision as the Minister may by regulations prescribe.”*


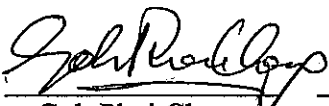
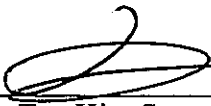
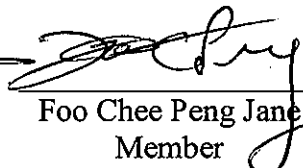
22. Section 71(1) is very specific in that it gives to the following categories of persons a right of appeal against the decision of the CCS:
- (a) any party to any agreement in respect of which the CCS has made a decision;
 - (b) any person in respect of whose conduct the CCS has made a decision;
 - (c) any party to an anticipated merger in respect of which the CCS has made a decision, or
 - (d) any party involved in a merger in respect of which the CCS has made a decision.
23. As may be noted from the provisions above quoted, section 71(1A) also gives to a party or person against whom the CCS has made any interim measure or has given any direction under section 58A, 67 or 69 a right of appeal against that interim measure or direction (as the case maybe) of the CCS. In this case, no interim measure or direction has been made or given by the CCS under section 58A, 67 or 69 of the Act. Hence, this section is not relevant. In any event, Mr Cheng says in his Notice of Appeal that his appeal is not brought under section 71(1A) of the Act.
24. Mr Cheng's submission is that he comes within category (b) as described above as a person in respect of whose conduct the CCS has made a decision and therefore has a right of appeal. However, the term "decision" in section 71(1) has been defined specifically under section 71(3), and under section 71(3) it means a decision of the CCS as to –
- (a) whether the section 34 prohibition has been infringed by any agreement;
 - (b) whether the section 47 prohibition has been infringed by any conduct;

- (c) whether the section 54 prohibition will be infringed by anticipated merger, if carried into effect;
 - (d) whether the section 54 prohibition had been infringed by any merger.
25. So an appealable decision has to be one of the types of decisions defined in section 71(3) of the Act.
26. Turning to the facts in this case, the Board has to determine whether the findings made by the CCS at [213 h] and/or [371] is a decision falling within any of the meaning defined in section 71(3) of the Act. In the opinion of the Board, clearly neither the finding at [213 h] nor the finding at [371] of the Infringement Decision is a decision of the CCS falling within section 71(3) of the Act. Therefore, neither of them is an appealable decision within the meaning defined in section 71(3).
27. Mr Cheng submits that even if he is not a person falling within section 71(1), he is still entitled to appeal against that part of the CCS's decision on his conduct, as there is nothing in section 71(1) that prohibits other persons who are affected by a decision of the CCS from appealing against its decision. He submits further that section 71 does not indicate that only the four named types of persons can appeal against CCS's decision. It is not exhaustive as to the persons who can appeal. However, no authority has been cited by him in support of this contention.
28. In the opinion of the Board, a right of appeal against the CCS's decision is a statutory right, and unless the Act gives a party a right of appeal such a party has no right of

appeal. In this case, unless Mr Cheng is a person or party falling within section 71(1) read with section 71(3) of the Act, he has no right of appeal.

29. Accordingly the Board determines that Mr Cheng in his personal capacity has no right of appeal against the decision of the CCS. The Board sets aside the Notice of Appeal of Mr Cheng in Appeal No. 1 of 2012 with costs.
30. As the Notice of Appeal No. 1 of 2012 is set aside, no further direction in that appeal is necessary. However, with regard to the Appeal No. 2 of 2012, the Board has to make a direction now with regard to the filing of the Defence of the CCS, which was directed by the Board on 22 February 2012 to be deferred pending the Board's decision on this matter. The Board hereby directs that the CCS file and serve its Defence in Appeal No. 2 of 2012 within 2 weeks from the date hereof.

Dated this 31st day of May 2012

 Thean Lip Ping Chairman	 Goh Phai Cheng Member	 Tan Kim Song Member	 Foo Chee Peng Jane Member
---	---	--	---