A salutary lesson for partners: you are liable for your firm's anti-competitive practices even if you were not involved in them

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In our earlier publication "*A sign of things to come: Hong Kong competition enforcement developments and trends*", we reported on the Competition Tribunal (the "**Tribunal**")'s imposition of pecuniary penalties totaling HK$3.97 million on 10 contractors who breached the first conduct rule by participating in a market-sharing and price-fixing arrangement in relation to decoration work in a public housing estate.[1] One of the 10 contractors found liable was a firm of partners, Tai Dou Building Contractor ("**Tai Dou**"), which comprised 4 partners. For unknown reasons, the Competition Commission (**"Commission"**)'s enforcement action (the **"Action"**) was against Cheung Yiu Fai Danny ("**Mr. Cheung**") and Wong Tung Hoi ("**Mr. TH Wong**") (in partnership trading as Tai Dou), not against the firm, Tai Dou, nor against all 4 partners of the firm. The 2 partners named in the Action, Mr. Cheung and Mr. TH Wong, had not been involved in and did not have knowledge of the anti-competitive acts of the firm. They appealed and tried to overturn the Tribunal's Decision that they were liable but were unsuccessful.[2]

In this publication, we consider the Tribunal's factual findings, Mr. Cheung and Mr. TH Wong's arguments against their liability and the Court of Appeal's reasons for upholding the Tribunal's decision on liability despite Mr. Cheung and Mr. TH Wong's lack of involvement in and knowledge of the anti-competitive conduct, and highlight practical takeaways for partners to bear in mind.

Tribunal's factual findings and conclusion

Tai Dou is a partnership consisting of 4 partners, Mr. Cheung, Mr. TH Wong, Pacquet Wong (**"Mr. P Wong"**) and To Suet Chun (**"Madam To"**). The Tribunal noted that in its response to the Action, Tai Dou admitted attending the worship ceremony at the site where lots were drawn for the purpose of allocating desks in the site office. The Tribunal also noted that the evidence showed that Mr. P Wong signed the reply accepting appointment as a decoration contractor, the surety bond and the licence, submitted to the Housing Authority a list of staff and workers, attended the briefing session and named a KC Ho ("**Mr. Ho**") as the contact person. Mr. Ho and a Ma Yick Yin ("**Mr. Ma**") were among the workers who worked in the housing estate in the name of Tai Dou. Mr. Ma considered Mr. Ho the general manager of Tai Dou, where he worked in the estate in accordance with Mr. Ho's instructions and he and the other workers used business cards with Tai Dou's name. Receipts were issued to tenants bearing an oval chop stating "Tai Dou Building Co" in both Chinese and English.

Following consideration of all the evidence, the Tribunal found that there is no doubt that Mr. Ho and the team working there in the name of Tai Dou had engaged in market-sharing and price-fixing arrangements in relation to decoration work in the housing estate.

[1] Competition enforcement developments | LC Lawyers (eylaw.com.hk)
[2] *Competition Commission v W Hing Construction Company & others* [2021] HKCA 877

Mr. Cheung and Mr. TH Wong's unsuccessful challenge on liability

Mr. Cheung and Mr. TH Wong appealed against the Tribunal's finding that they were liable for contravening the first conduct rule.

The Action was against them personally

First, Mr. Cheung and Mr. TH Wong argued that the enforcement action was brought against them as individual partners, and not against Tai Dou, the firm, and they should not be held liable as they were not involved in, nor had knowledge of the contravening conduct.

The Court of Appeal rejected this argument, and ruled that it was clear to all parties when reading the whole Action and in context that the Action was against Tai Dou, the firm. The pleaded acts of contravention were those of Tai Dou, not the individual partners. The Action referred to Tai Dou (not Mr. Cheung nor Mr. TH Wong) as the contractor appointed by the Housing Authority, the recipient of the Housing Authority's letter of appointment and the party that executed the licence. The Action also referred to the allocation of floors to Tai Dou (not Mr. Cheung nor Mr. TH Wong), and the performance of the decoration works by Tai Dou (not Mr. Cheung nor Mr. TH Wong).

It was also plain from the response filed by Tai Dou to the Action (the "**Response**") that its lawyers understood that the Action was against Tai Dou, the firm, instead of Mr. Cheung and Mr. TH Wong personally. The Court of Appeal observed that had Mr. Cheung or Mr. TH Wong believed that they had been sued as individual without the firm being made a party, the Response should have set out Mr. Cheung and Mr. TH Wong's lack of participation in the business concerning the decoration works in question (rather than refer to the affairs of the firm) and been verified by a statement of truth made by Mr. Cheung and Mr. TH Wong (rather than Mr. Ho as "General Manager" of Tai Dou).

Finally, the Court of Appeal noted that the Tribunal had held Mr. Cheung and Mr. TH Wong liable by virtue of their roles as partners of Tai Dou instead of any personal acts and conduct on their parts as individuals, and in doing so had dealt with arguments advanced by Mr. Cheung and Mr. TH Wong that they should not be liable as they were only a "salaried partner" and "silent partner" respectively. In endorsing the Tribunal's finding, the Court of Appeal held that such legal consequences flowed from the law relating to liabilities of a partner for the civil obligations of a partnership, in particular Section 11 of the Partnership Ordinance (Cap. 38), which states that every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner.

The Action was criminal in nature and they could not be liable if they had no knowledge

Second, Mr. Cheung and Mr. TH Wong argued that as the Action was for pecuniary penalties and criminal in nature, they should be treated as separate from the firm, and the Commission had to establish *mens rea* (i.e. knowledge) on their part before they could be found to be liable for the acts of another partner.

The Court of Appeal also rejected this argument on the grounds that the Competition Ordinance (Cap. 619) does not create a statutory offence of contravention of the first conduct rule, and there is no basis for importing the requirement of *mens rea* on the part of the individual partners into the proceedings for pecuniary penalties.

The Action is defective against the firm as not all partners were sued

Third, Mr. Cheung and Mr. TH Wong argued, relying on civil procedural rules, that as the liability of partners is joint and not several, any action against a partnership is defective for want of parties unless all partners are sued. The Court of Appeal rejected this argument, and held that (i) there is no rigid rule that a plaintiff must join all parties who were jointly liable in advancing a claim on joint liability, although if objection is taken by one of the defendants that there are others who were jointly liable, the court may consider if such other persons should be joined in the interest of justice, and (ii) Mr. Cheung and Mr. TH Wong had not complained about the non-joinder of Mr. P Wong and Madam To. The Court of Appeal also rejected the argument that it was unjust for the Commission to target only Mr. Cheung and Mr. TH Wong in seeking pecuniary penalties, noting that as the penalty was ordered against the firm, the firm's assets would be subject to execution. Further, even assuming that enforcement actions were taken against the personal estates of Mr. Cheung and Mr. TH Wong, they would have the right to seek indemnity or contribution from their partners, Mr. P Wong and Madam To, under the general law of partnership. Therefore, as partners of Tai Dou, there was no injustice in sanction being imposed against Mr. Cheung and Mr. TH Wong.

Key takeaways

It is apparent from the Tribunal and Court of Appeal decisions that partners in firms are jointly liable for any anti-competitive conduct of their firms irrespective of whether they were individually involved and/or were aware of the anti-competitive conduct because the liability flows from their capacity as partners of the firms, not in their capacity as individuals distinct from the firms. Arguing that one is merely a silent partner, salaried partner, not involved and/or ignorant about what is happening in the business is not a defence, and simply not an option.

We set out below some practical steps that partners in firms can take to protect their firms and themselves from liability for anti-competitive conduct:

- **Understand what practices are anti-competitive and prohibited** by the Competition Ordinance and put in place policies and procedures to identify and remediate any potential anti-competitive practices.
- **Stay involved in the partnership's business and operations.** Partners should be aware of the engagements/ projects their fellow partners are working on, and how they are sourcing and executing such engagements.
- Ensure that **employees and contractors know the policies and procedures** and are **periodically trained** on them.
- Periodically **review business practices and contracts** and **carry out internal compliance audits** to identify and remediate any potential anti-competitive practices.
- Seek **legal assistance** if anti-competitive practices and issues are identified and need to be reported and remediated.

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