

Competition Appeal No 1 of 2013

Between

PANG'S MOTOR TRADING

... Appellant

And

COMPETITION COMMISSION
OF SINGAPORE

... Respondent

DECISION

TABLE OF CONTENTS

I	INTRODUCTION	1
II	BACKGROUND FACTS	2
III	THE CCS'S DECISION.....	5
	FINDING OF INFRINGEMENT.....	5
	DECISION TO IMPOSE FINANCIAL PENALTY	7
	CALCULATION OF FINANCIAL PENALTY	7
IV	PANG'S CONTENTIONS ON APPEAL	9
V	ISSUES ARISING IN THE APPEAL.....	11
VI	THE BOARD'S DECISION ON LIABILITY.....	12
	WHETHER THE CCS HAD ERRED IN DEFINING THE RELEVANT MARKET	12
	WHETHER THE CCS HAD RELIED EXCESSIVELY AND INAPPROPRIATELY ON FOREIGN LAW	14
	WHETHER THERE WAS ANY AGREEMENT AND/OR CONCERTED PRACTICE BETWEEN THE PARTIES TO BID-RIG.....	15
	WHETHER PANG WAS A VICTIM OF CONSPIRACY	24
	WHETHER PANG HAD BEEN DENIED THE OPPORTUNITY TO BE HEARD OR TO INSPECT THE EVIDENCE AGAINST HIM	26
	CONCLUSION ON LIABILITY	28
VII	THE BOARD'S DECISION ON THE FINANCIAL PENALTY.....	28
	WHETHER THE CCS HAD ERRED IN USING GROSS TURNOVER INSTEAD OF NET TURNOVER IN CALCULATING PANG'S RELEVANT TURNOVER	28
	WHETHER PANG'S FINANCIAL PENALTY SHOULD BE REDUCED BECAUSE HE OPERATES IN A "HIGH TURNOVER LOW MARGIN" INDUSTRY	29

WHETHER THE INCREASE OF 255% TO ACCOUNT FOR THE NUMBER OF INFRINGEMENTS COMMITTED BY PANG WAS ERRONEOUS	31
WHETHER PANG’S FINANCIAL PENALTY SHOULD BE REDUCED IN VIEW OF OTHER MITIGATING FACTORS	32
CONCLUSION ON THE FINANCIAL PENALTY	32
VIII COSTS	33
IX INTEREST	34
X CONCLUSION	37

Pang's Motor Trading v Competition Commission of Singapore

[2014] SGCAB 1

Competition Appeal Board — Competition Appeal No 1 of 2013
Goh Joon Seng, Wong Meng Meng and Molly Lim
14 July 2014

14 January 2015

Judgment reserved.

I Introduction

1 On 28 March 2013, the Competition Commission of Singapore (“CCS”) issued its infringement decision (“ID”) holding that 12 motor vehicle traders (the “Parties”) had infringed section 34 of the Competition Act (Cap 50B, 2006 Rev Ed) (the “Act”) by engaging in an agreement to bid-rig at public auctions of motor vehicles conducted by various government agencies. The Parties and the penalties they received are as follows:

Undertaking	Financial Penalty
Pang's Motor Trading	S\$50,733.00
Auto & Carriage Engineering	S\$8,000.00
Gold Sun Motor Vehicle Charter & Rental	S\$8,000.00
Hup Lee Second Hand Auto Parts	S\$8,000.00
Kiat Lee Scrap Vehicles Centre Pte Ltd	S\$8,000.00
Kiat Lee Machinery Pte Ltd	S\$17,566.00
Minsheng Agencies	S\$8,000.00

PKS Scrap Vehicle Centre	S\$8,000.00
Seng Guan Auto Parts	S\$8,000.00
Seng Hup Huat Second Hand Auto Parts	S\$8,000.00
Tim Bock Enterprise	S\$37,795.00
Yong Soon Heng Auto Parts	S\$8,977.00

2 The Appellant (“Pang”) is appealing against the finding of liability and the quantum of financial penalty imposed on him. A number of other undertakings (namely Seng Guan Auto Parts, Auto & Carriage Engineering and Gold Sun Motor Vehicle Charter & Rental) had also filed appeals against the ID, but withdrew their appeals before the hearing.

3 At the appeal hearing, Pang was unrepresented while the CCS was represented by Mr Lee Jwee Nguan and Mr Harikumar Sukumar Pillay.

II Background Facts

4 The following background facts which are undisputed have been set out comprehensively in the ID, and the Board adopts them for the purpose of this decision.

5 Pang, through his sole proprietorship registered in Singapore, has dealt in the retail sale of motor vehicles since 2006. Together with other motor vehicle traders, he regularly took part in public auctions held by the Land Transport Authority (“LTA”), the National Environment Agency (“NEA”), the Singapore Civil Defence Force, Singapore Customs (“Customs”) and the Singapore Police Force to dispose of decommissioned motor vehicles or motor

vehicles and items such as dutiable liquor that they had taken into custody, for reasons such as road tax arrears or unpaid taxes.

6 The auctions were conducted by auction houses (e.g. Knight Frank Pte Ltd (“Knight Frank”), GoIndustry DoveBid Singapore Pte Ltd (“DoveBid”) and/or Quotz Pte Ltd (“Quotz”)), appointed by the respective government agencies. With the exception of Customs and the NEA, both of which switched to an online mode of auction after May 2010 (“online auctions”), the rest of the auctions were held either at hotel ballrooms or on the agencies’ premises (“physical auctions”). Both physical and online auctions were open to the general public.

7 At the physical auctions, bidders made open and ascending bids for the vehicles, over and above a minimum bid price set by the government agency/auction house concerned. The auction for the vehicle ended when there were no more competing bids. As bidding was done through the raising of allocated number tags or hands to indicate interest to the auctioneers, bidders were able to see who was bidding for the vehicles as well as see who the eventual winner was. The online auctions similarly employed an ascending bidding system, but the identities of the bidders were not known. Online bidders were privy to only the current standing bid price and were unable to see or know who had submitted the bid.

8 Before an auction was held, the auction houses would post auction notices on their websites or take out advertisements in newspapers to inform the public of upcoming auctions. They would also send out notices, either by facsimile or email, to persons who had registered at past auctions. Potential and interested bidders were given an opportunity to inspect the vehicles a few

days before the auction, as the motor vehicles were sold “as they lie” with all defects and errors of description.

9 Depending on their description, vehicles that were auctioned off during the public auctions might either be re-registered for use on the roads in Singapore or scrapped or exported. Vehicles that were auctioned under the “scrap/export” categories had to be scrapped or exported within a certain timeframe, usually a month from the date of collection of the vehicle. In order to ensure that such motor vehicles were properly disposed of within the timeframe, winning bidders were required to submit a letter of undertaking and a security deposit (usually twice the amount of the winning bid) to the LTA. The LTA would return the security deposit only when it was satisfied that the motor vehicles had been properly disposed of, e.g. upon show of proof of export (e.g. bill of lading or export permit showing that the item has been shipped out) or of scrappage (e.g. letter of scrappage issued by authorized scrap yards). The above applied to all vehicles that were required to be exported or scrapped, regardless of which government agency conducted the public auctions.

10 On 31 May 2010, after receiving information from other government agencies, the CCS began investigations into an anti-competitive arrangement involving the Parties in respect of the submission of bids at the public auctions. As part of its investigations, the CCS:

- (a) conducted surveillance of six different government auctions between 23 June 2010 and 3 March 2011;
- (b) conducted an inspection without notice under s 65 of the Act at Kola Food Centre, where the Parties had gathered on previous occasions after the public auctions were held at a nearby LTA office;

- (c) conducted inspections without notice under s 65 of the Act at the premises of four of the Parties, including that of Pang;
- (d) interviewed 14 individuals under s 63 of the Act, including Pang; and
- (e) obtained records relating to the auctions from the government agencies and auction houses.

III The CCS's Decision

Finding of infringement

11 Section 34 of the Act provides as follows:

Agreements, etc., preventing, restricting or distorting competition

34.—(1) Subject to section 35, agreements between undertakings, decisions by associations of 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 exempt in accordance with the provisions of this Part.

(2) For the purposes of subsection (1), agreements, decisions or concerted practices may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they —

- (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
- (b) limit or control production, markets, technical development or investment;
- (c) share markets or sources of supply;
- (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; or
- (e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to

commercial usage, have no connection with the subject of such contracts.

(3) Any provision of any agreement or any decision which is prohibited by subsection (1) shall be void on or after 1st January 2006 to the extent that it infringes that subsection.

(4) Unless the context otherwise requires, a provision of this Act which is expressed to apply to, or in relation to, an agreement shall be read as applying, with the necessary modifications, equally to, or in relation to, a decision by an association of undertakings or a concerted practice.

(5) Subsection (1) shall apply to agreements, decisions and concerted practices implemented before, on or after 1st January 2006.

12 Based on the evidence, the CCS was satisfied that there was an agreement or concerted practice among the Parties since at least 2008 to forbear from bidding against each other for vehicles at the public auctions conducted by the various governmental agencies. Instead, Pang would be the one bidding for the vehicles most of the time, and then the Parties would adjourn to a nearby location after the public auctions where Pang would hold a second round of “private auctions” where the Parties would bid among themselves for the vehicles won by him. The difference in price between the public auction and the private auction would then be put into a common pool to be shared among all of those who were present at the private auction. The agreement to refrain from bidding against each other also applied to auctions held by Customs when they shifted to online auctions, though only Pang, Kiat Lee Scrap Vehicles Centre Pte Ltd, Minsheng Agencies and Tim Bock Enterprise participated.

13 The CCS determined that the agreement or concerted practice among the Parties had the object of preventing, restricting, or distorting competition at the public government auctions. Consequently, the CCS found that the Parties’ conduct had infringed the s 34 prohibition.

Decision to impose financial penalty

14 Under s 69 of the Act, where a party has infringed the s 34 prohibition, the CCS may impose a financial penalty on the party if it is satisfied that the infringement had been committed intentionally or negligently. The CCS was satisfied that this was the case with respect to the Parties, since bid-rigging is by its very nature likely to have been committed intentionally. Further, the CCS considered that the Parties were no strangers to the trade and would have known that they were competitors and would normally have to make their business decisions, including the submission of bids, independently. Further, they would have, or ought to have, known that the purpose of conducting auctions is to ensure a competitive process in the award of items on auction. CCS found that the Parties, by agreeing to forebear from bidding against each other at the public auctions, must have been aware that they would be depriving the beneficial owners of the vehicles (including the Government) as well as the auctioneers their proper share of the ultimate sale prices of items purchased at public government auctions and sold later for higher prices at “private” auctions. Consequently, the CCS was satisfied that the Parties had intentionally or negligently infringed the s 34 prohibition and imposed financial penalties on them.

Calculation of financial penalty

15 In relation to Pang, the CCS imposed a penalty of S\$50,733.00. This is the highest penalty of all the penalties imposed on the Parties. The CCS arrived at this quantum of penalty by applying the following a five-step approach:

- (a) Step 1 – ascertain the seriousness of the infringement and apply a starting percentage to the undertaking’s relevant turnover (this refers

to the turnover from the sale and/or rental of motor vehicles obtained by each of the Parties from public government auctions);

- (b) Step 2 – adjustments for the duration of the infringement;
- (c) Step 3 – adjustments for aggravating and mitigating factors;
- (d) Step 4 – adjustments for all other relevant factors; and
- (e) Step 5 – adjustments to prevent the maximum penalty from being exceeded.

16 For Step 1, the CCS considered that the bid-rigging arrangement in this case was a serious infringement of the Act. Taking into account the nature of the product, the structure of the market, the effect of the Parties' infringement on other parties and the Parties' representations, the CCS fixed the starting point for the penalties at [...] % of the Parties' respective relevant turnovers. Where an undertaking's relevant turnover was less than 2% of its total turnover, the CCS uplifted the base amount to 2% of the undertaking's total turnover for the purposes of calculating its financial penalty. This minimum deterrent threshold ("MDT") was considered necessary because the base amount would otherwise be insufficient to attain the policy objective of general and specific deterrence. In Pang's case, [...].

17 For Step 2, the CCS did not make any adjustments for duration to the penalties to be imposed because it considered that none of the discrete incidents of bid-rigging spanned more than a year.

18 For Step 3, the CCS treated multiple infringements as an aggravating factor and considered it appropriate to increase the penalties by a multiplier of 5% for each additional infringement that was committed by the Parties. The

CCS also considered it an aggravating factor where an undertaking was a leader in, or instigator of, an infringement.

19 As Pang had registered for 52 separate government auctions between January 2008 and January 2011, the CCS considered each of these a separate infringement and increased his penalty by 255% (ie, 51 x 5%). Further, the CCS found that he had played a leading role in the infringements and increased his penalty by a further [...]%. The CCS considered that there were no mitigating factors in his case meriting a downward adjustment of his penalty. Therefore, his penalty was adjusted upwards by a total of [...]% to S\$50,733.00.

20 For Step 4, the CCS considered that the figure of \$50,733.00 was sufficient to act as an effective deterrent to Pang and to other undertakings which may consider engaging in bid-rigging arrangements and did not make any adjustments to the penalty at this stage.

21 It was not necessary to make any adjustments at Step 5 because the penalty amount of \$50,733.00 did not exceed the maximum financial penalty that the CCS could impose under s 69(4) of the Act.

IV Pang's Contentions on Appeal

22 Pang is appealing against the CCS's findings on liability or, in the alternative, for a reduction of the financial penalty imposed.

23 On the issue of liability, he makes the following arguments:

- (a) the CCS did not properly define the relevant market for the purposes of determining whether the agreement and/or concerted practice between the Parties had an appreciable effect on competition;
- (b) the CCS had relied excessively and inappropriately on foreign law in coming to its decision;
- (c) the Parties' conduct at the auction amounted only to "passive conscious parallelism", and there was no agreement and/or concerted practice among them to bid-rig;
- (d) he was a victim of conspiracy by the other Parties who might have been induced into providing statements against him in exchange for reduced financial penalties; and
- (e) he was not given a fair opportunity to inspect the evidence against him or a right of hearing by the CCS.

24 On the issue of the quantum of financial penalty imposed, Pang makes the following arguments:

- (a) the CCS had erred in using gross profits instead of net profits in calculating his relevant turnover;
- (b) the CCS should have given a discount to his financial penalty because he operates in a "high turnover low margin" industry;
- (c) the increase of 255% to account for the number of infringements committed by him was erroneous, as some of the vehicles won by him at the auctions were purchased and sold under non-infringing circumstances; and

- (d) his financial penalty should be reduced because he had cooperated with the investigating officers by surrendering his records and accounts and offering to compound the matter at \$10,000.

V Issues Arising in the Appeal

25 In relation to liability, the issues arising for the Board's decision are as follows:

- (a) whether the CCS had erred in failing to properly define the relevant market for the purposes of determining whether the agreement and/or concerted practice among the Parties had an appreciable effect on competition;
- (b) whether the CCS had relied excessively and inappropriately on foreign law in coming to its decision;
- (c) whether there was any agreement and/or concerted practice among the Parties to bid-rig at the public auctions;
- (d) whether Pang was a victim of conspiracy; and
- (e) whether Pang had been denied the opportunity to be heard or to inspect the evidence against him by the CCS.

26 In relation to the financial penalty, the issues arising for the Board's decision are as follows:

- (a) whether the CCS had erred in using gross profits instead of net profits in calculating Pang's relevant turnover;

- (b) whether Pang's financial penalty should be reduced because he operates in a "high turnover low margin" industry;
- (c) whether the increase of 255% to account for the number of infringements committed by Pang was erroneous; and
- (d) whether Pang's financial penalty should be reduced in view of other mitigating factors.

VI The Board's Decision on Liability

Whether the CCS had erred in defining the relevant market

27 In the ID, the CCS took the view that a distinct market definition was unnecessary to establish liability in this case because agreements and/or concerted practices that involve bid-rigging are, by their very nature, regarded as restrictive of competition to an appreciable extent. Nonetheless, it set out the following market definition for the purpose of assessing the appropriate level of penalties (at [72]–[73]):

72. In this case, CCS identifies the focal product to be motor vehicles (including but not limited to cars, vans, fire trucks, motorcycles and scooters) acquired by way of public auctions by government agencies. As the main purpose of market definition in this case is for calculating penalties, CCS is of the view that there is no need to consider any substitute to the focal product or lack thereof, as any such substitute would not contribute to the relevant turnovers of the parties.

73. It should be noted that, in this case, there is a conduct market – where the public auctions take place and where the bid suppressions occur – and an affected market – where the parties subsequently sell the vehicles obtained via the bid suppressions. CCS is of the view that the relevant market is the latter for two reasons. First, the parties incur their costs in the conduct market and earn their revenues in the affected market. For the purpose of calculating relevant turnover, it is the affected market where such turnover is generated. Second, the revenues earned from the affected market reflect more accurately the underlying economic value of the vehicles than

the proceeds from the public auctions in the conduct market do, because the bids were suppressed by the parties.

28 However, Pang contends that the CCS had not discharged its burden of properly defining the “relevant market” on which his conduct is said to have a material adverse effect. He submits that the only parties materially affected by his conduct were the auctioneers and owners who were selling off their “unwanted junk” and therefore were already making a profit by selling anything for more than \$0. In fact, most of the vehicles won at the relevant auctions were then scrapped or exported for little value, sometimes at a loss. He further asserts that his conduct allowed him to pass on savings to consumers or, in cases where the vehicles were exported, add to Singapore’s gross domestic product.

29 The CCS maintains that a comprehensive market definition is unnecessary for cases like the present which involve bid-rigging. It cites the case of *Argos Limited & Littlewoods Limited v Office of Fair Trading* [2005] CAT 13, where the United Kingdom (“UK”) Competition Appeals Tribunal (“CAT”) held that “in Chapter I cases involving price-fixing it would be inappropriate for the [Office of Fair Trading] to be required to establish the relevant market with the same rigour as would be expected in a case involving the Chapter II prohibition” (at [178]) (Chapter I of the UK Competition Act 1998 covers infringements similar to those under s 34 of the Act). In any event, the CCS submits that the market definition set out in the ID was sufficient for the present case.

30 The Board agrees with the CCS’s submissions. As stated in the *CCS Guidelines on the Section 34 Prohibition* at para 3.2, bid-rigging or collusive tendering is a type of agreement that is, by its very nature, restrictive of competition to an appreciable extent. The reason for this is obvious: bid-

rigging involves parties agreeing not to compete against each other at an auction to the extent that they would otherwise have if they had submitted their bids independently. It is a type of agreement that, by definition, has the *object* of restricting or distorting competition. The Board considers that the phrase “object or effect” in s 34(1) is disjunctive in nature, and it is not necessary for the CCS to also prove that a bid-rigging agreement had the *effect* of restricting or distorting competition in Singapore.

31 The Board further notes that under s 34, it is not a defence for an undertaking to show that its bid-rigging agreement allowed it to pass on cost savings to consumers. Although para 9 of the Third Schedule to the Act excludes from the ambit of s 34 any agreement that contributes to (a) improving production or distribution or (b) promoting technical or economic progress, such agreements must not (*inter alia*) “impose on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives”. As stated in the *CCS Guidelines on the Section 34 Prohibition* at para 10.10, restrictions relating to price-fixing, bid-rigging, market sharing and output limitation agreements are unlikely to be considered indispensable. In any event, Pang did not provide any evidence aside from bare assertions that the Parties’ bid-rigging arrangement had produced net economic benefit in the relevant market.

Whether the CCS had relied excessively and inappropriately on foreign law

32 Pang submits that it was inappropriate for the CCS to rely on cases from the UK, the United States (“US”) or the European Union (“EU”) in the ID because those cases were decided in countries with different legal, political and socioeconomic climates. According to him, Singapore’s competition law

should be developed according to local conditions and foreign decisions should serve as “background information” at best.

33 This argument is plainly untenable. As the CCS points out, decisions from the UK and the EU are highly persuasive because the s 34 prohibition in our Act was modelled closely after Chapter I of the UK Competition Act 1998 and Art 101 of the Treaty of Functioning of the European Union (formerly Art 81 of the European Community Treaty). Indeed, the Board has previously stated that decisions from these jurisdictions were highly persuasive (*Re Abuse of a Dominant Position by SISTIC.com Pte Ltd* [2012] SGCAB 1 (“*SISTIC*”) at [287]). The Board further considers that decisions from other jurisdictions like the US or Australia might still provide useful guidance despite the material differences in the wording of their competition laws, insofar as their laws target similar types of anti-competitive conduct as ours (see e.g. s 1 of the US Sherman Act and s 4D of the Australian Competition and Consumer Act 2010, which are the equivalents of s 34 of our Act).

34 It goes without saying that foreign decisions should not be uncritically applied in the local context without due appreciation for local conditions and the facts of a particular case. However, Pang has not even attempted to show how any of the foreign decisions cited by the CCS in the ID were applied incorrectly or resulted in prejudice to him in the present case. The Board therefore finds that this ground of appeal has not been made out.

Whether there was any agreement and/or concerted practice between the Parties to bid-rig

35 Pang submits that the CCS had erred in finding that there was a bid-rigging agreement and/or concerted practice among the Parties to bid-rig at government auctions of motor vehicles. Even if there was, Pang says that he

was never a party to such an arrangement, let alone its leader. His arguments in its regard may be summarised as follows:

(a) The Parties who attended the auctions probably abstained from bidding because they lacked confidence or risk appetite. They independently deferred to Pang because they judged that he was the most experienced bidder and the strongest contender at the auctions.

(b) The Notes of Information (“NOI”) provided by a couple of individuals suggest that Pang was not part of the bid-rigging group, if there was one. For instance, Toh Kim Zee (“Toh”) of Hup Lee Second Hand Auto Parts stated that he was “told off by quite a few people” when he tried to bid at an auction, although he also said that Pang was at his side. This shows that even if there was an agreement between the Parties to abstain from bidding, it did not come from Pang. In addition, Andy Goh (“Goh”) of Kiat Lee Scrap Vehicles Centre Pte Ltd stated that he could not recall who told him about the second round of each private auction that was held at Kola Food Centre after LTA auctions. If he could not recall such an important detail, it was questionable how he could be so sure that Pang was in fact involved in the arrangement or played the role of ringleader.

(c) There were at least 50 people turning up at each of the physical auctions, so it was impossible for the Parties – who constituted a minority – to have controlled the other members of the public and the bidding process.

(d) It was not possible for the Parties to rig or tamper with the online auctions conducted by Quotz because the identity of the other bidders was not made public.

36 In the Board's view, there is a substantial amount of evidence to show that Pang was not only complicit in the bid-rigging arrangement among the Parties, but also took on the leadership role. In the ID, the CCS referred to the NOIs of nine different individuals, all of which confirmed the existence of the bid-rigging arrangement and identified Pang as the person who would usually bid for vehicles on the Parties' behalf and then hold a separate "private auction" at a nearby location where the Parties would bid among themselves for the vehicles that he had won. The relevant statements were summarised in the ID at [79]–[97], which the Board reproduces below for ease of reference:

79. Chan Chiow Kwee ("Chan") said that "...sometime last year, Steve Pang approached me and asked me not to bid higher than him, so that we can have a second auction and I can get the vehicle at a lower price. Then I started going to the second auction whenever I am keen to buy vehicle". Chan also said that "...[t]his Ah Pang told me if I want to bid, I can carry on but he can beat my price. He told me I should let him get a lower price, then we can go out of the LTA office to have a second auction." Further, Chan said that "Steve Pang told us not to bid higher so that we can get it lower at the second auction."

80. Ng Seng Guan stated in his NOI that "[i]f I bid, other interested parties would also bid and we might not be able to control the level of the bidding price. Hence Mr Pang or Steve Pang asked us not to bid so that he will be the only one to bid and we can also buy from him at a second auction. We will also be given rebate when we win the bid." He elaborated that "...most of the time, Steve Pang will bid as he told us not to bid and we can buy from him at a second auction. I have no choice but to follow this arrangement because if I bid and end up paying a high bidding price when Steve Pang tries to outbid me, then it will not be worth it as there is a risk that the car might not be in working condition. Sometimes Steve Pang does not bid when he is not sure about the market price of the vehicles and when this happens, we will bid." He added that the arrangement had been in place for "at least 2-3 years." Ng Seng Guan also described the process of the arrangement:

"Steve Pang will tell us which vehicles he had won at the LTA auction and the LTA auction prices. Then anyone present at the Kola Food Centre can bid for the car if he is interested. The bidding price is usually the additional amount which we are willing to pay on top of

the LTA auction price. The highest bidder will win the bid. The top up amount will be split among those who are present at Kola food centre. Those who won the bid will get 2 more shares of the top up amount, which will be deducted from the top amount and treated as a form of rebate. I can only receive a share of the top up amount if I do not bid at the LTA auction. If I bid at LTA auction, Steve Pang will not allow me [sic] participate in the second auction and I will not get a share of the money. In the group, even if I don't bid for vehicle at the second auction, I will still get a share of the money... On the average, I get about \$50 to a few hundred dollars at each auction, either in cash or as a form of rebate if I buy vehicles from Steve Pang."

81. George Lim stated in his NOI that "...we all turn up at the LTA auction if we are interested in any of the vehicles. However, we will not participate in the bidding because of an understanding that only Steve Pang will bid for the group as we do not want to jack-up the end price too high". He also said that "...after the LTA auction, we come to Kola Food Centre to bid for the vehicles we are interested in".

82. In his second NOI, George Lim elaborated on the entire arrangement as follows:

*"Everyone in the group has an understanding to gather at Kola Food Centre after the LTA auction. Once Steve Pang arrives at the food centre, he will start the private auction. He does his own recording. For example, if Steve wins a bid for a vehicle at the LTA auction at \$10,000, the opening bid at the private auction will start at \$10,000. Let's say the final bid price at the private auction is \$15,000, \$5,000 is considered the "top-up" price. **This top-up price is handed over to Steve Pang in cash on the spot, and is later distributed equally among those of the group present. Steve will later invoice the winner at the private auction, separately, at the price won at the LTA auction, which is \$10,000 in the example.** Steve will combine all the "top-up" prices of all the vehicles at the private auction, and divide this total amount among all the members present. In the event that no one in the group wants to bid at the starting private auction price, which is the LTA auction winning price, we will reverse the process. We will start to lower the bids until someone wants to take the vehicle. So let's say someone wins the vehicle at \$9,000 at the private auction, then the difference of \$1,000 will be taken from the "pool" of money from the combined "top-up" prices..."*

83. Toh Kim Zee said in his NOI that "...once I was bidding, and I was told off by quite a few people. It was many years ago, it was not an LTA auction, I think it was a Customs auction. Steve Pang was there, he was at one side. It was my first time, I was bidding, then I got scolded by a few people. They nudged me and said 'don't anyhow bid'... I felt a bit strange - why did they 'scold' me? I decided to keep quiet and not bid. At the end of the auction, they asked me to go and have coffee at Newton Food Centre. So I went with them to Newton, and we just waited for Pang to arrive." He also said that, "...when Pang bid and get a car at LTA auction, the cars are later auctioned privately at Kola Food Centre. The differences between the bidding price at LTA and the private auction are then totalled up and splitted *[sic]* equally between all who attended the auction throughout..."

84. Andy Goh said that "...I know that when I go to LTA auctions, the arrangement was already in place. I started going to LTA auctions five years ago. I do not recall who told me about this arrangement; they tell me that there is a second round of auction happening at Kola Food Centre and for me to come along. We know that there will be a second round of auction after the close of the LTA auction, we all know to go to Kola Food Centre for the second round of auction if you are interested and you can buy from there" and that "...I know that if Pang gets the vehicle at LTA auction, it is certain that the vehicle will be put up for sale at the second round of auctions. Therefore, I will not compete against Pang in the auction." Andy Goh also described in detail the arrangement during and after the "private" auction:

"...based on my experience, the winner of the second round will pay the difference from the second auction price of the vehicle to Pang on the spot. The winner will then settle the LTA bid price amount with Pang later on. The winner will go and collect the vehicle by tow by producing the receipt that Pang has obtained..."

85. Kwek Yeong Meng said that "Steve will record prices that we bid at the second auction, the highest bidder will win. The difference in price between the highest bidder at the second auction and the LTA bid placed by Steve Pang will be split between all who are present at the second auction. For example, the Lot 16 that I won from Steve Pang, I offered to top up \$250, but I needed to pay Steve Pang \$200 for the top up as \$50 was my rebate. The \$200 that I paid to Steve Pang would be split amongst those present." Kwek Yeong Meng also admitted that his undertaking was a competitor to the others present at Kola Food Centre on 3 March 2011 but said that "...we usually choose not *[sic]* compete with each other as it will only benefit the supplier."

86. Yeo Kheng San said that "...the private meetings after auction at the coffee shop have been around for the past 4-5 years. But in the past, we would have meetings there. And I used to participate in these private meetings in which the winners of the various auction bids would come together to discuss how we would distribute the vehicles with the rest of the group. Even those who did not win would come to participate to see if they would be distributed the vehicles. We would only distribute the vehicles to those who know one another. We would not have **to outbid each other at the public auctions to avoid driving up the bid price. Instead, we would distribute the vehicles among ourselves for the same (or higher) price at the private meetings after the auction.**" He also said that "I can get to share in the profits from participating [sic] the private auction i.e. the coffee money distributed. I would also get a discount off the GST amount of the vehicle since the winner can usually get GST refunds." Yeo Kheng San also described in detail the process at the 'private' auction:

"Everyone in the group would go for the public auction and see who wins the bids at the public auction. Someone would usually suggest that they adjourn for coffee, but there was not always a coffee session. The person with the most winning bids would start the private auction session, and invite the members to bid. Most of the time, this would be Pang. The starting price would be the winning bid price. The highest bidder of the second auction would get the vehicle. The winner at the second auction would be given the receipt of the public auction to collect the vehicle and put a deposit. I have not seen anyone recording the transaction. No one person keeps the price differential, it would feed into the common pool; and be evenly distributed. Everyone would stay until the very end to distribute the money. There are people who do not participate in the public auction, and just come for the private auction to get a share of the money. Only those who attend the coffee session will be entitled to a share of the money. They should be representatives of a company."

88. George Lim clarified that when Customs moved from a system of physical auctions to online auctions, the group that participated in the "understanding" was reduced to only four undertakings – Pang's Motor [Steve Pang], Kiat Lee [Andy Goh], Minsheng [Victor Khoo] and Tim Bock [George Lim]. George Lim said that whenever there was an online auction, "Steve will call some of us to allocate who to buy which vehicles from Customs online...", and "...Steve will tell us which vehicles to bid for and how much to bid at... if we do get

the vehicles, Customs will inform us of our successful bid about three days after the auction... after that, Steve Pang will contact the group again to tell us the date and time to meet at Newton Hawker Centre... based on the same system as the LTA auction..."

89. Chan Chiow Kwee said that Steve Pang was "...the ringleader of the whole arrangement."

90. George Lim said that Steve Pang was involved in the agreement to forbear from bidding at LTA and that Pang knew everybody there. Steve Pang was also the one conducting the 'private' auction and he would also try to make arrangements with newcomers to join the agreement not to bid for vehicles so as not to jack up the prices in general. He also identified Steve Pang as the main member and that "...everyone knows Steve Pang more than anyone else." George Lim stated in his NOI that whenever "...we have problems or questions about this arrangement we will all ask Steve Pang, so I would suppose he started it" and that "I always go to Steve Pang, no one else."

91. Andy Goh said that Pang conducted the auction at Kola and that 99% of the time it would be Pang's Motor who would buy the vehicles and then sell all of those vehicles at the second round. Andy Goh also said that most of the time "Pang would lead the bidding, collect and distribute the money."

92. Ng Seng Guan said that "Mr Pang or Steve Pang asked us not to bid so that he will be the only one to bid and we can also buy from him at a second auction." According to Ng Seng Guan, Steve Pang would also be the person who would inform them to go to Kola Food Centre after the LTA auction. Further, Ng Seng Guan said that Steve Pang would "...tell us whether we should or should not bid before the auction."

93. Soh Kok Meng said that "...Steve Pang will put all the money together, and he will give a share to those who bought the cars. Those who did not buy will also get some money." He also said that "...all I know is that if the rest don't bid, then it will be Steve Pang who bids. That's all I know." Further, he said that Pang would put up the cars for sale and ask for offers for the cars that he has.

94. Toh Kim Zee said that "Ah Pang [Steve Pang] will bid for the vehicles at the LTA auction and then we will all adjourn to Kola Food Centre or other places to bid for vehicles separately and these will be conducted by Ah Pang."

95. Yeo Kheng San said that "...the winners of the public auction would conduct the 'private' one" and that it would usually be Pang's Motor as Steve Pang "...usually wins the

most vehicles at the public auction". He also said that "...the person with the most winning bids would start the private auction session, and invite the members to bid. Most of the time, this would be Pang."

96. Steve Pang's brother-in-law, one Ang Leong Lai, was also present at Kola on 3 March 2011. Ang Leong Lai said that he also attended the LTA public auction on 3 March 2011 with Steve Pang. He added that he was there to help "look after" Steve Pang's bag that contained various documents such as invoices and sales contracts. Ang Leong Lai said that he would help Steve Pang at auctions on his "off days" for the past two years. Ang Leong Lai said that apart from the LTA public auctions at Sin Ming Road, he also helped Steve Pang at the public auctions at a "Newton Road hotel."

97. The auction schedule for the 3 March 2011 auction was found on Ang Leong Lai at Kola and he explained that the handwritten figures in the "Remarks" column of the Schedule were of the winning bids made at the LTA public auction. Ang Leong Lai claimed that he recorded the figures to help Steve Pang calculate the amounts payable to LTA. Ang Leong Lai admitted that he would "sometimes" record the sales made at Kola, but that he did not do so on 3 March 2011. Ang Leong Lai denied that he knew any of the "details" of what happened at Kola.

[emphasis in original]

37 The statements above are supported by documentary evidence showing transfers between Pang and several Parties for the sale and purchase of motor vehicles obtained at public government auctions. These transactions took place within days of the government auctions and at the exact same price at which the motor vehicles were obtained at the government auctions. It makes no sense for Pang to repeatedly sell the motor vehicles that he won at the public auctions to the other Parties for zero profit; the only logical inference is that there had been other undocumented transfers of cash among the Parties, which is consistent with the accounts given by the above individuals of what transpired during the private auctions. Their accounts are further confirmed by reports prepared by a private firm hired by the CCS to conduct surveillance on the Parties, wherein the Parties were observed to be having their own private

auctions (which were chaired by Pang) on several occasions after various government auctions. Obviously, it would have been unnecessary to hold such private auctions unless there was an agreement or concerted practice among the Parties that they were not to bid against each other at the public auctions for the vehicles they wanted, and would instead do so afterwards at the private auctions.

38 As for the two statements by Toh and Goh that Pang has referred to (see [35(b)] above), the Board is of the view that neither of those statements exculpates him. With respect to Toh, his exact statement was:

Q18. So you know that at the LTA auction, Steve Pang will be the only one bidding?

A: I know as it was done before. Once I was bidding, and I was told off by quite a few people. It was many years ago, it was not an LTA auction, I think it was a Customs auction. Steve Pang was there, he was at one side. It was my first time, I was bidding, then I got scolded by a few people. They nudged me and said "don't any how bid", they seemed to be old timers and a few of them are deceased now. I felt a bit strange – why did they 'scold' me. I decided to keep quiet and not bid. At the end of the auction, they asked me to go and have coffee at Newton Food Centre.

So I went with them to Newton, and we just waited for Pang to arrive.

It bears noting that Toh did not say that Pang was at his side (as Pang claims); instead, he said that Pang was "at *one* side", which suggests that Pang was not in Toh's proximity at the auction in question. Therefore, the fact that Pang was not identified as one of the persons who discouraged Toh from bidding is neither here nor there. With respect to Goh, the Board does not consider it fatal to his credibility that he could not remember exactly who told him about the second round of private auctions after the LTA auctions. His inability to recall is understandable given that, as he mentioned in his NOI, he had started

going to the LTA auctions “5 years ago”. In any event, Goh’s evidence against Pang is corroborated by numerous other individuals (as set out in [36] above), whose evidence Pang has failed to rebut.

39 Turning next to Pang’s arguments regarding the Parties’ inability to control the physical or online auctions, these arguments, if seriously made, show a fundamental misunderstanding of the nature of the s 34 prohibition. It is irrelevant whether the Parties were able to fully control the outcome of the auctions; what matters is whether they had participated in an agreement or concerted practice which had as its object or effect the prevention, restriction or distortion of competition within Singapore. The arrangement between the Parties not to bid against each other in the auctions would have restricted the competition *among themselves*, thereby affecting the efficacy of the auctions.

40 The Board therefore concludes that the CCS has established, on a balance of probabilities, that Pang was part of an agreement and/or concerted practice to bid-rig at government auctions of vehicles.

Whether Pang was a victim of conspiracy

41 Pang makes the following contentions relating to his claim of a conspiracy against him:

- (a) “informants” had been planted amongst the Parties to “confuse, mislead and/or entrap them into saying or acting in a certain manner”, namely one Lawrence Tan, one Koh Sin Teng, one Yeo Kang San and one Lim, all of whom “suddenly disappeared from the picture and were not mentioned in the ID”;

(b) there had been a concerted effort by the various parties quoted in the ID to push all the blame onto Pang even though they did not know who the leader of the arrangement was. They simply assumed that he was the leader just because he “happened to win a lot of cars at these auctions and later on happened to offer said cars for sale”. In particular, as George Lim (of Tim Bock Enterprise) had a dispute with Pang before, Pang believes that George Lim may be using this case to get back at him;

(c) the other Parties were only given nominal financial penalties in comparison to Pang, and he suspects that they might have provided statements against him for something in return by the CCS; and

(d) in order for Pang to prove his allegations of conspiracy, the CCS should reveal the individuals who had obtained leniency under its leniency programme.

42 The CCS submits that, save for “Lim” whom Pang has insufficiently identified, the individuals he named at [41(a)] above were not informants planted by the CCS, but individuals who were involved in the investigations. With respect to “Yeo Kang San”, the CCS notes that there was one Yeo Kwan Sun of Kang San Trading Company who was involved in the initial investigations, but the CCS eventually determined that there was insufficient evidence that he was a party to the bid-rigging arrangement (ID at [234]).

43 The CCS further rejects Pang’s accusation that the undertakings had been given “nominal financial penalties” or “something in return” in order to give evidence against him. The CCS says that there were no leniency applicants in this case, and if there were, its practice is to make known the fact that there were leniency applications and the identity of the applicants, as was

done in the *Collusive Tendering in Electrical Building Works* case (CCS 500/001/09).

44 In the Board's view, Pang's allegations of conspiracy are baseless. It is simply not tenable for him to brush away his winning of cars at the government auctions and subsequent sale of those cars to the Parties as mere happenstance. The regularity with which this occurred indicates that he clearly took on the role of bidding for cars at the government auctions on behalf of the Parties, and it is therefore understandable why various individuals identified him as the leader of the arrangement. There is also no evidence to show that George Lim had given false evidence against Pang out of vengeance for a prior dispute, as his statements are consistent with the statements of the other individuals and the surveillance reports commissioned by the CCS.

Whether Pang had been denied the opportunity to be heard or to inspect the evidence against him

45 Pang's submissions on this issue are as follows:

- (a) he was not given a right of hearing or the opportunity to explain matters to the authorities. When the investigating officers approached him at Kola Food Centre, they interviewed the other Parties but not him;
- (b) he was not given a chance to inspect or test any of the evidence that the CCS relied on, such as the notes of evidence reflecting what the other Parties had said at interviews and the transcripts or copies of any surveillance recordings taken;

(c) as no interview was conducted and nothing was explained to him, an unsophisticated lay person, he still did not understand what was happening even at the trial; and

(d) the Board should therefore find that the evidence given by the other Parties is flawed, defective and inadmissible.

46 The Board considers these allegations to be patently false and entirely unfair to the CCS. Contrary to Pang's claim that he had not been interviewed, the CCS had in fact interviewed him twice on 3 March 2011 (at 2.10pm and 8.40pm) pursuant to its investigative powers under s 63 of the Act. He was informed that he was entitled to seek legal advice and bring a lawyer to the interview. The resulting NOIs are signed by him and contain handwritten amendments apparently made by him, and he has not challenged their authenticity in this appeal.

47 Upon issuance of the Proposed Infringement Decision ("PID") on 6 September 2012, Pang was given notice that he could inspect the documents in the CCS's files that were related to the PID and also make copies of such documents if he wished to, in accordance with r 8(2) of the Competition Regulations 2007. However, he did not exercise his right to inspect the files. He was also informed that he could make both written and oral representations to the CCS, and he did in fact submit written representations to the CCS on 18 October 2012.

48 Finally, the CCS has also tendered evidence of contemporaneous field notes taken by its officers on 3 March 2011 when Pang's offices were raided. The field notes indicate that he did in fact call a lawyer and therefore had the benefit of some legal advice:

17:40	Steve Pang calls someone to get phone no. of his lawyer
17:45-17:50	Steve Pang calls lawyer one "Mr Koh"
17:55	Speaks to him about warrants etc (client privilege)

49 The Board therefore rejects Pang's submissions relating to alleged breaches of natural justice in the CCS's investigative and decision-making process.

Conclusion on Liability

50 For the foregoing reasons, the Board is satisfied that Pang's breach of the s 34 prohibition has been established on a balance of probabilities, and dismisses his appeal against liability.

VII The Board's Decision on the Financial Penalty

Whether the CCS had erred in using gross turnover instead of net turnover in calculating Pang's relevant turnover

51 Pang submits that the CCS had erred in using the figure of \$[...] as his relevant turnover for the purposes of calculating the financial penalty. This is because the use of gross turnover instead of net turnover fails to take into account the "ancillary and unique additional costs" of his business, such as towing costs, purchase of batteries and spare parts for cars that are exported, shipping costs, rent, wages of workers, etc. He says that the relevant turnover figure should be adjusted to \$[...] to accurately reflect his net relevant turnover.

52 In the Board's view, the business costs cited by Pang are unremarkable and do not justify a departure from the gross relevant turnover approach. The use of gross relevant turnover instead of net relevant turnover as a basis for

calculating financial penalties has been accepted by the Board in its previous decisions, such as *Re Price Fixing in Bus Services from Singapore to Malaysia and Southern Thailand: Konsortium Express and Tours Pte Ltd, Five Stars Tours Pte Ltd, GR Travel Pte Ltd and Gunung Travel Pte Ltd* [2011] SGCAB 1 (“*Konsortium*”) at [182] and *Ave Management v Competition Commission of Singapore*, Appeal No 3 of 2012 (Decision of 10 April 2013) (“*Ave*”) at [136]. The rationale for not making deductions for business costs is to avoid inappropriately penalising more efficient firms with lower costs: *Barrett Estate Services Limited and another v Office of Fair Trading* [2011] CAT 9 (“*Barrett*”) at [63].

Whether Pang's financial penalty should be reduced because he operates in a “high turnover low margin” industry

53 Pang further argues that because he operates in a high turnover low margin industry, the starting percentage of [...] % that was used by the CCS for determining the financial penalty at Step 1 should be reduced to [...] %.

54 The fact that an undertaking operates in a unique industry with high turnovers but low margins is a factor that can be taken into account in adjusting the financial penalty: *Bee Works Casting Pte Ltd and others v Competition Commission of Singapore*, Appeal No 2 of 2012 (Decision of 10 April 2013) (“*Bee Works*”) at [137]. In *Ave* and *Bee Works*, the Board made reductions to the financial penalties imposed on the appellants because there was evidence that a significant portion of the appellants’ turnover figures consisted of “monies passed through”, namely, payments made to models and their agencies (*Ave* at [139]–[140]; *Bees Works* at [131]–[137]). Likewise, in *Barrett*, the CAT took into account the fact that a significant proportion of the appellant construction firms’ turnover comprised monies paid over to sub-contractors in adjusting their penalties (at [64]–[66]).

55 However, Pang has failed to provide any evidence that he is operating in a high turnover low margin industry or that a significant proportion of his relevant turnover comprised “monies passed through” to third parties. The Board notes that there is considerable variability in the Parties’ declared profitability. For example:

(a) Pang’s total turnover for FY 2011 was \$[...], while his net profit was \$[...]. His net profit was therefore [...] % of his total turnover;

(b) Kiat Lee Scrap Vehicles Centre’s total turnover for FY 2011 was \$[...], while its net profit was \$[...]. Its net profit was therefore [...] % of its total turnover; and

(c) Seng Hup Huat Second Hand Auto Parts had a total turnover of \$[...] for FY 2011 and a net profit of \$[...]. Its net profit was therefore [...] % of its total turnover.

This variability makes it difficult to conclude that the motor vehicle trading industry as a whole is a high turnover low margin industry.

56 At the appeal hearing, Pang sought to draw a distinction between the scrap car industry, which is the industry he operates in, and the used car industry. He averred that the scrap car business is low risk but has a much lower profit margin than the used car business. When asked to give an example of the sort of margin he was talking about, Pang said that he might obtain a profit of \$[...] from a scrap car that is bought for about \$1,000. Regrettably, these were statements made from the bar and the Board is unable to place much weight on them in the absence of proper evidence.

57 In the Board's view, therefore, there is insufficient evidence to support Pang's contention that his financial penalty should be reduced because he operates in a high turnover low margin industry.

Whether the increase of 255% to account for the number of infringements committed by Pang was erroneous

58 Pang argues the increase of 255% for the number of infringements he committed (52) is erroneous because "some of those 52 vehicles are disputable (i.e. clearly purchased and sold under non-infringing circumstances and that [he was] not the leader of any group) [*sic*]". He made no attempt to explain what he meant by "non-infringing circumstances" or identify which of the "52 vehicles" were purchased and sold under those circumstances.

59 This ground of appeal is misconceived. As mentioned at [19] above, the figure of 52 was based on the number of auctions that Pang had registered for while the bid-rigging arrangement was in effect. It was not based on the number of vehicles he purchased or sold. The Board agrees with the CCS that it is appropriate to treat each auction that Pang participated in as a separate infringement, regardless of whether he won any vehicles at that auction. This is because the Parties' bid suppression would have occurred at each auction regardless of whether any cars were ultimately bought. The Board is cognisant that, for auctions where Pang failed to win anything, that might indicate that the Parties' bid suppression did not succeed in driving down prices to a level acceptable to them. But as noted at [30] above, bid-rigging constitutes an infringement of the s 34 prohibition regardless of whether it had the *effect* of restricting or distorting competition. Therefore, in the Board's view, it is not necessary for the CCS to prove that the efficacy of each auction was in fact adversely affected before it could amount to an "infringement" for the purposes of calculating Pang's financial penalty.

Whether Pang's financial penalty should be reduced in view of other mitigating factors

60 Pang submits that his financial penalty should be reduced from [...] % to 180% because he had cooperated wholly and expeditiously with the authorities when asked to furnish his records and accounts, and had even offered to compound the matter for \$10,000 (an offer which he later raised to \$22,000 after the ID was issued).

61 However, the CCS contends that Pang had merely complied with information requests made pursuant to its formal investigative powers provided by the Act, and had not done anything over and above that which he was legally obliged to do. The CCS also points out that an infringement of s 34 is not a prescribed offence which is compoundable under s 84 of the Act.

62 The Board agrees that there are no significant mitigating factors in Pang's case warranting a reduction in the financial penalty. He was not forthcoming in his NOIs and denied that there was any bid-rigging arrangement among the Parties or that he had organised any private auctions after the public auctions (he said that they were merely "de-brief" sessions). The Board therefore finds no basis to reduce Pang's financial penalty on the basis of other mitigating factors.

Conclusion on the Financial Penalty

63 For the foregoing reasons, the Board dismisses Pang's appeal against the quantum of his financial penalty.

VIII Costs

64 Regulation 30(1) of the Competition (Appeals) Regulations (Cap 50B, R 5, 2006 Rev Ed) (“the Appeals Regulations”) provides that the Board may, in relation to any appeal proceedings, award costs in its discretion.

65 The CCS submits that if the appeal is dismissed in its entirety, Pang should bear all of the CCS’s costs. In this regard, the CCS has tendered a bill of costs on 23 July 2014 claiming:

- (a) \$8,000 in costs; and
- (b) \$492.10 and half of the bill rendered for transcription services in disbursements.

66 Pang did not make any submission on costs.

67 The principles relating to the award of costs in competition appeals were set out in *Independent Media Support Limited v Office of Communications* [2008] CAT 27 at [6] as follows:

- (a) There is no fixed rule as to the appropriate costs order; how the Board’s discretion will be exercised in any case will depend on the particular circumstances of the case;
- (b) It follows that there is no presumption under rule 55 that costs should be borne by the losing party;
- (c) Subject to the first principle, a legitimate starting point is that a party who can fairly be identified as a winning party should ordinarily be entitled to recover his costs from the losing party;
- (d) The starting point is, of course, subject to a consideration of whether the winning party has incurred costs in arguing issues on which he has lost, or has acted unreasonably in the proceedings;
- (e) Other relevant considerations include whether it was reasonable for the unsuccessful party to raise, pursue or

contest a particular ground of appeal; the manner in which the parties pursued or defended the appeal and whether any award of costs may frustrate the objectives of the Competition Act.

68 In the present case, Pang's appeal has been wholly unsuccessful. Moreover, in the Board's opinion, a number of the arguments he made on appeal were plainly unmeritorious and should not have been raised. The Board therefore considers it appropriate to order Pang to pay the CCS's costs. The Board further considers that the costs and disbursements claimed by the CCS are reasonable.

IX Interest

69 Regulation 31 of the Appeals Regulations provides:

Interest

31.—(1) If the Board imposes, confirms or varies any financial penalty, the Board may, in addition, order that interest be paid on the amount of any such penalty from such date, not being a date earlier than the date upon which the notice of appeal was lodged in accordance with regulations 7 and 8, and at such rate as the Board considers appropriate.

(2) Unless the Board otherwise directs, the rate of interest shall not exceed the rate prescribed in the Rules of Court (Cap. 322, R 5) in respect of judgment debts.

(3) Any interest ordered to be paid under paragraph (1) shall form part of the penalty payable and be enforced according to section 85 of the Act.

[emphasis added]

70 O 42 r 12 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules of Court") provides:

Interest on judgment debts (O. 42, r.12)

12. Except when it has been otherwise agreed between the parties, every judgment debt shall carry interest at the rate of 6% per annum or at such other rate as the Chief Justice may

from time to time direct or at such other rate not exceeding the rate aforesaid as the Court directs, such interest to be calculated from the date of judgment until the judgment is satisfied:

Provided that this rule shall not apply when an order has been made under section 43 (1) or (2) of the Subordinate Courts Act (Chapter 321).

[emphasis added]

71 The Chief Justice has directed that the default interest rate shall be 5.33% per annum with effect from 1 April 2007 until further notice: Practice Direction No 1 of 2007 – Interest on Judgments, Costs and under Order 30 Rule 6(2).

72 However, the CCS is seeking an order of interest at 6% per annum from the date specified in the ID for the payment of the penalty (*ie*, 28 May 2013) to the date of payment. The CCS refers to para 5(1) of the Competition (Financial Penalties) Order 2007 (Cap 50B, S 372/2007) (“the Financial Penalties Order”), which states:

Interest on late payment of financial penalty

5.—(1) Subject to sub-paragraph (3), where a person on whom a financial penalty has been imposed fails to pay in full the financial penalty or any instalment thereof by the date on which its payment is due, that person shall be liable to pay to the Commission interest, calculated on a monthly basis, on the outstanding amount of the financial penalty or instalment (as the case may be), at the rate of 6% for so long as such outstanding amount of the financial penalty or instalment remains unpaid.

[emphasis added]

73 The CCS submits that the imposition of interest is to prevent appeals from being introduced merely to delay payment of the financial penalties, and the rate of interest should reflect the benefit derived by Pang from the suspension of the obligation to make the penalty payment. In this regard, the

CCS cites a number of UK decisions where the CAT had, on the basis of the principle contended for by the CCS, ordered interest to run from the date specified in the Office of Fair Trading's decision for the payment of the penalty to the date of payment.

74 The Board is unable to accept the CCS's submission.

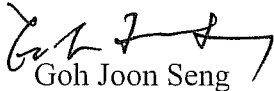
75 First, the ordinary position in reg 31 is that, unless the Board orders otherwise, the rate of interest shall not exceed the rate prescribed in the Rules of Court, which is 5.33%. However, if the CCS's submission were accepted, then the interest rate in every case would effectively be pegged to the interest rate prescribed in the Financial Penalties Order, which is higher than the rate prescribed in the Rules of Court. In the Board's view, this would be contrary to the clear intent of reg 31 that the interest rate ordered by the Board should not ordinarily exceed the rate prescribed in the Rules of Court.

76 Second, the Board has in the past consistently ordered interest to run at the rate 5.33% per annum from the date of its decision to the date of payment (see, eg, *Konsortium* at [212]; *SISTIC* at [363]; *Ave* at [171]; *Bees Works* at [176]). It would be unfair for the Board to now depart from this settled practice for the purpose of this case. This is especially so given that Pang was unrepresented by the time of the appeal hearing and therefore unable to properly respond to the CCS's submissions on interest.


77 The Board therefore sets the interest rate payable by Pang at 5.33% per annum from the date of this decision to the date of payment. The Board however wishes to make clear that its decision on interest is based on the facts of the present case; future cases might call for a different approach depending on their own facts.

X Conclusion


78 For the reasons given above, the Board dismisses Pang's appeal in its entirety. The Board orders him to pay costs to the CCS fixed at \$8,492.10 plus half of the bill rendered for transcription services. The Board further orders that he pay interest on the financial penalty, which has not been paid, at the rate 5.33% per annum from the date of this decision to the date of payment.



Goh Joon Seng
Chairman



Wong Meng Meng
Member



Molly Lim
Member