Global Yellow Pages Ltd *v* Promedia Directories Pte Ltd [2010] SGHC 97

Case Number : Suit No 913 of 2009/R; Summons No. 156 of 2010/D

Decision Date : 30 March 2010

Tribunal/Court : High Court

Coram : Jeyendran Jeyapal AR

Counsel Name(s) : Lee Huay Yen Adeline and Lim Zhong Yong (TSMP Law Corporation) for the plaintiff; G Radakrishnan (Infinitus Law Corporation) for the defendant.

Parties : Global Yellow Pages Ltd — Promedia Directories Pte Ltd

Competition Law

Copyright

Civil Procedure

30 March 2010 Judgment reserved.

Jeyendran Jeyapal AR:

Background

1 The Plaintiff, Global Yellow Pages Limited, pleaded that it has been in the business of publishing directories and providing classified directory advertising and associated products and services in Singapore for over 42 years. In its Statement of Claim, the Plaintiff added that its printed directories published in annual additions are, *inter alia*, the: (i) Business White Listings; (ii) Yellow Pages Consumer (formerly known as the 'Buying Guide'); and (iii) Yellow Pages Business (formerly known as 'Commercial Industrial Guide'). Further, the Plaintiff claims that it maintains an electronic directory, published on the internet at http://www.yellowpages.com.sg, called the Internet Yellow Pages, and updates this directory daily.

2 The Plaintiff also claims to be, at all material times, the owner of the copyright in the: (i) subscriber information; (ii) compilations; and (iii) artistic works found in the 2003/2004, 2004/2005, 2005/2006, 2007/2008, 2009/2010 editions of its directories. In respect of subscriber information, the Plaintiff claims to possess rights to daily updates of such information from Singapore Telecommunications Limited ("Singtel") and Starhub Limited ("Starhub").

3 The Defendant, Promedia Directories Pte Ltd, is a Singapore incorporated company that carries on the business of providing telephone directory services to its customers. It claims to be in this business since 1980, and states that it has been publishing its printed directory, The Green Book, since that time. In addition, it claims that since 1997 it has been publishing an online directory at www.thegreenbook.com. The Defendant asserts that both the printed and the online directories have been made available to the public at all material times.

4 The Plaintiff alleges that the Defendant has infringed the copyright in the Plaintiff's directories, or parts of them, by reproducing, and / or authorising the reproduction of them, substantially or in part, in the Defendant's printed and online directories. The Plaintiff further alleges that the

reproduction was for the purpose of publishing, and was done without the license or consent of the Plaintiff.

5 The Defendant filed a Defence and Counterclaim, denying all of the Plaintiff's allegations, and counterclaiming that it has suffered loss and damage as a result of alleged threats contained in the Plaintiff's letters to it. Further, the Defendant counterclaims that the Plaintiff has infringed the Defendant's copyright in various advertisements that were placed in its printed and online directories. Two paragraphs in this Defence and Counterclaim formed the subject matter of dispute in the Plaintiff's application against the Defendant.

The Application

6 The Plaintiff applied to strike out paragraphs 5.5 and 9(v) of the Defence and Counterclaim, pursuant to Order 18, Rule 19 of the Rules of Court (2006 Rev. Ed), on the grounds that the paragraphs: (i) disclose no reasonable cause of action and / or defence; and / or (ii) are scandalous, frivolous or vexatious.

7 For ease of reference, the paragraphs in issue are reproduced:

> "5.5 The agreement by which daily updates of the Subscriber Information are allegedly provided by Singtel and Starhub to the Plaintiff for valuable consideration is an act prohibited by Section 34 of the Competition Act (Cap 50B) as it is intended to prevent competition in the telephone directory publication business in Singapore by denying the same Subscriber Information even for valuable consideration to other telephone directory publishers such as the Defendant.
>
> 9(v) The Defendant's alleged copying of the information, i.e. telephone subscriber information, from the Plaintiff's Directories was fair dealing by reason of the anti-competition practice of the Plaintiff and the Service Providers [note: 1] in not making available the same information to other director publishers, such as the Defendant, even for valuable consideration and this is prohibited by Section 34 of the Competition Act."

8 In support of its application, the Plaintiff contended that the Defendant's allegations in relation to Section 34 of the Competition Act are misconceived because: (i) the prohibition in s 34 of the Competition Act is not applicable in this case; and (ii) even if such a prohibition is applicable, this would not be the appropriate forum to raise such an allegation.

9 To this extent, Ms. Lee, for the Plaintiff, argued that telecommunications is an area which has been carved out of the Competition Act, and is instead under the purview of the Info-Communications Development Authority of Singapore ("the IDA"). As such, it would be the IDA's Code of Practice for Competition in the provision of Telecommunication Services 2005 (dated 18 February 2005) ("the IDA Code"), which would be applicable to the subject matter of agreements between the Plaintiff and Singtel / Starhub.

10 In the alternative, Ms. Lee argued that even if s 34 of the Competition Act is applicable to the facts of the present case, any complaints under the said provision must first be made to the Competition Commission of Singapore ("the CCS"), and not to the High Court of Singapore.

11 Ms. Lee also argued that the Defendant's allegations in paragraph 9(v) do not assist the Court in determining whether the fair dealing defence applies.

12 In reply, Mr. Radakrishnan, for the Defendant, argued that s 34 of the Competition Act did not

afford the Defendant an opportunity to lodge a complaint against the Plaintiff, Singtel and Starhub. In this regard, he argued that s 34 of the Competition Act only allows *parties to an agreement* to lodge a complaint of anti-competitive practice to the CCS. Mr. Radakrishnan contended that since the Defendant was not a party to the agreement between the Plaintiff, Singtel and Starhub, the Defendant had little choice but to raise its complaint to the High Court. To this extent, Mr. Radakrishnan further contended that the Competition Act was silent on whether non-parties to an anti-competitive agreement have a standing to lodge a complaint to the CCS. This aspect of the Competition Act, he submitted, required interpretation by the High Court.

13 In relation to the Plaintiff's argument on fair dealing, vis-à-vis paragraph 9(v), Mr. Radakrishnan countered that the paragraph was only meant to raise the plea that the copying was justified under the fair dealing defence in s 35 of the Copyright Act, i.e., the Defendant only copied because it had no access to the data that was made available to the Plaintiff.

14 Towards the tail end of the hearings, however, Mr. Radakrishnan submitted that should I decide to strike out the two paragraphs in respect of the Competition Act point, the Defendant be given leave to amend paragraph 9(v) to read as follows:

> "The Defendant's alleged copying of the information, i.e., telephone subscriber information, from the Plaintiff's directories was fair dealing by reason of the Defendant not being able to obtain the information from the service providers even for valuable consideration."

15 Ms. Lee countered this application by submitting that even in its amended form, paragraph 9(v) would not assist the court, as s 35 of the Copyright Act was not about whether the Defendant was able to obtain the information at a reasonable price and time, but about whether the public would have been able to do so.

Issues

16 The arguments canvassed by both counsel can be delineated into two main categories:

(a) whether an argument of alleged anti-competitive conduct, in breach of the Competition Act, can be pleaded at a first instance hearing before the High Court; and

(b) whether the defence of fair dealing, under s 35 of the Copyright Act, was properly pleaded.

17 In respect of the first main category, several issues come into play. First, how complaints of anti-competitive conduct are dealt with under the Competition Act. In this regard, it is crucial to determine the various levels to which a complainant may take a complaint. Second, whether s 34 of the Competition Act was meant to govern only parties to an allegedly anti-competitive agreement, and if not, the course of action the Competition Act prescribes to parties such as the Defendant. A determination of these issues would, in my view, conclusively resolve the argument in respect of the Competition Act point.

18 The second category, in my opinion, is far more straightforward. It entails a scrutiny of s 35 of the Copyright Act, some of the cases which have dealt with the defence of fair dealing and an assessment of the pleadings.

(A) Competition Act

Formal complaints process under the Competition Act

19 The Defendant argued that it was unable to turn to the CCS or to the IDA for recourse because s 34 of the Competition Act excluded non-parties to an agreement from bringing a complaint to either body. To understand the Defendant's argument better, it would be imperative to observe the structure that the Competition Act has put in place in respect of complaints of anti-competitive conduct.

20 Part III of the Competition Act, in general, makes it obvious that almost all complaints under the Competition Act will be decided by the CCS at first instance. In this regard, ss 61 to 65 of the Competition Act provide guidelines to the CCS and bestow powers on it to conduct relevant investigations into complaints under the Act. Sections 68 and 69 of the Competition Act, respectively, refer to the decision of the CCS after investigations and how this decision is to be enforced. Those affected by the CCS' decision will be notified of it within 14 days of it being made: s 70 of the Competition Act.

21 Part IV of the Competition Act lists out the avenues of appeal that parties may have in relation to the CCS' decision. Section 71 states that "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 against the CCS' decision to the Competition Appeal Board ("the Board"). [note: 2] The Board is then empowered to make a decision on an appeal from the CCS' decision under s 73 of the Act.

22 The levels of appeal do not end there. Parties may pursue an appeal against the Board's decision to the High Court and the Court of Appeal, pursuant to ss 74(1) and 74(4) of the Competition Act, respectively. This would then be the very first instance that the courts would take cognisance of a complaint of anti-competitive conduct, and even then, the High Court is limited to determining the appeal on: (a) a point of law arising from the decision of the Board; or (b) any decision of the Board as to the amount of a financial penalty: s 74(1)(a) and (b) of the Competition Act.

23 The Competition Act thus makes it amply clear that the courts are not the resort of first instance in respect of matters pertaining to the Competition Act, but will be involved in them only in their appellate capacity.

Parallel complaints regime

24 Apart from these appeal processes, there is a parallel process under which complaints of anti-competitive conduct may be referred. Section 33(4) of the Competition Act state:

> (4) *Nothing in this Part shall apply to* any activity carried on by, any agreement entered into or any conduct on the part of –
>
> (a) the Government;
>
> (b) *any statutory body*; or
>
> (c) any person acting on behalf of the Government or that statutory body, as the case may be, in relation to that activity, agreement or conduct.
>
> (Emphases added.)

25 Additionally, ss 35 and 48 of the Competition Act state that the prohibitions against anti-competitive conduct in ss 34 and 47 of the Act "shall not apply to such matter as may be specified in the Third Schedule." The Third Schedule then lists several activities which do not fall under the prohibitions in ss 34 and 47 of the Competition Act. The most pertinent exclusion, for the purposes of the present application, is found at paragraph 5 to the Third Schedule, which reads:

> **Goods and services regulated by other competition law**
>
> **5**. The *section 34 prohibition and the section 47 prohibition shall not apply* to any agreement or conduct which relates to any goods or services to the extent to which any other written law, or code of practice issued under any written law, relating to competition *gives another regulatory authority jurisdiction in the matter*.
>
> (Emphases added.)

26 The rationale behind the list of exclusions in the Third Schedule was well expressed during the Second Reading of the Competition (Amendment) Bill, during the Parliamentary sitting on 21 May 2007. The Member of Parliament, Mr. Inderjit Singh, posited, and this is particularly relevant in the present context:

> Sir, finally, I note that we have decided again not to bring the telecommunications sector within the fold of the general Competition Act framework. It is still regulated by the Code of Practice for Competition in the Provision of Telecommunications Services and therefore excluded from the Competition Act. My concern is that we would develop two separate bodies of law and regulations for these sectors in time to come. It may be better to consider integrating these bodies of regulations now when it is still early enough as the competition law is still in its infancy in Singapore. It may be harder to integrate these later. In fact, the telecommunications sector is quite open right now, and I see no reason why we still want to regulate it separately from the rest.

27 In response, the Minister of State for Trade and Industry, Mr. Lee Yi Shyan, said:

> Sir, I will now touch on the sectoral exclusions from the Competition Act. Mr Inderjit Singh suggested that we should consider integrating the regulatory framework in the telecommunications sector within the fold and framework of the generic Competition Act. This is indeed our long term goal. When the Competition Act was enacted in 2004, the number of sectoral authorities and respective regulatory frameworks had already been established. To acknowledge their continued operations, the Competition Act has provided exclusions from sections 34 and 47 in the Third Schedule and exclusions from section 54 are given in the Fourth Schedule to the Act.
>
> The Government then explained that the sectoral regulators, such as the Info-Comm Development Authority, will continue to have oversight of their respective sectors. *This is because these regulators are in a better position to handle competition issues in their sectors*. Nonetheless, the Government remains committed to the goal of alignment and coordination of the various competition regimes. An inter-agency committee has been operating since 2005 to coordinate the application of competition law at the different sectors in Singapore. The Ministry of Trade and Industry has also earlier indicated that it will review sectoral exclusions under the Competition Act three years after the Act has been enforced, ie, in 2009.
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> (Emphasis added.)

28 Clearly, s 33(4) and the Third Schedule to the Competition Act set in motion a separate complaints regime, quite apart from the complaints process through the CCS. It is important to appreciate that these separate regimes exist, as Parliament has expressly deemed that regulators in certain exempted sectors would be better positioned to handle the competition law issues that arise in their respective sectors. Singled out for mention was the IDA. How does the parallel complaints regime then pan out in respect of this case?

Complaints to the IDA

29 The IDA is a statutory body [note: 3] established and incorporated under the Info-communications Development Authority of Singapore Act (Cap 137A, 2000 Rev. Ed.). As envisaged, and consequently exempted in paragraph 5 of the Third Schedule, the IDA handles competition law issues in its sector through the IDA Code. This the IDA does pursuant to its powers in ss 26(1)(a) to (e) and (g) of the Telecommunications Act (Cap 323, 2000 Rev. Ed.).

30 In particular, in respect of IDA's licensees, s 9 of the IDA Code lays out the codes of conduct that licensees must abide by in respect of competitive practices. In fact, at s 9.1.2, the IDA Code states that the:

> IDA may take enforcement action (on its own motion or pursuant to a request from a *private party*) against any Licensee that enters into an agreement with another Licensee or any non-licensed entity that has the effect of unreasonably restricting competition in the telecommunication service or equipment market in Singapore.
>
> (Emphasis added.)

31 Further, s 11.4.1 of the IDA Code provides an opportunity for private parties to request that the IDA takes enforcement action against any of its licensees which conduct themselves in contravention of the IDA Code. These enforcement actions can range from warnings [note: 4] to financial penalties, [note: 5] and even suspension or cancellation of licences. [note: 6]

32 It was not disputed, in the course of the hearing, that both Singtel and Starhub were licensees of the IDA. The Plaintiff nevertheless supported this by producing the licences that the IDA had issued to Singtel and Starhub. [note: 7] Both licences contained similar terms, and in particular, identical terms in respect of the provision of integrated directory and directory enquiry services (the subject matter of the dispute), and also in respect of restrictions against anti-competitive arrangements.

33 It was also the Plaintiff's position that it contracted with Singtel and Starhub to obtain rights to daily updates of subscriber information from the two entities. The Plaintiff therefore submitted that since the IDA Code was applicable to the subject matter of the agreements between the Plaintiff, Singtel and Starhub, the Defendant should have lodged its complaint with the IDA, instead of inserting it into paragraphs 5.5 and 9(v) of the Defence and Counterclaim.

34 I both agree and disagree with the Plaintiff's argument. The parallel regime does suggest that complaints against the IDA's licensees in respect of any form of anti-competitive arrangements which they engage in must be made to the IDA. In so far as paragraph 5.5 of the Defence and Counterclaim is concerned, I agree that the complaint is within the purview of the IDA. In this regard, it is pertinent to note that the Defendant had pleaded that the "*agreement* by which daily updates of the Subscriber information are allegedly provided *by Singtel and Starhub to the Plaintiff* for valuable

consideration is an act prohibited by Section 34 of the Competition Act". The thrust of the Defendant's complaint in paragraph 5.5 rests on the agreement that two of the IDA's licensees had engaged in. As such, yes, the IDA may have purview over the agreement, and also Singtel and Starhub.

35 However, this does not then mean that the IDA has purview over the *Plaintiff*. The IDA Code was clearly meant to govern only the IDA's licensees. The Plaintiff is not such a licensee. The Plaintiff only claims that it was incorporated sometime in 2003 as Yellow Pages (Singapore) Pte Ltd, and acquired the business, assets and liabilities of Singtel Yellow Pages Pte Ltd. It also claims that it was then listed on the Singapore Stock Exchange in 2004, and subsequently, in 2009, was renamed Global Yellow Pages Limited. Nowhere was it pleaded that the Plaintiff was under a license from the IDA. As such, even if the Defendant had lodged a successful complaint against the Plaintiff to the IDA, the IDA would only have the powers, under the IDA Code, to take enforcement action against Singtel and Starhub.

36 Additionally, paragraph 9(v) of the Defence and Counterclaim only alleges that the Plaintiff had engaged in anti-competitive practices. Once again, since the Plaintiff is not the IDA's licensee, paragraph 9(v) raises no cause for complaint to the IDA. Therefore, in my view, for the purposes of this case, the parallel complaints regime is irrelevant.

37 Having determined this, I then moved on to assess if the Defendant's argument – that it had no standing under s 34 of the Competition Act to bring a complaint to the CCS – could hold water.

Whether s 34 of the Competition Act applies to non-parties to an alleged anti-competitive agreement

38 Section 34(1) of the Competition Act reads:

> **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.
>
> (Emphasis added.)

39 Contrary to the Defendant's argument, it is clear that s 34(1) of the Competition Act is not meant to govern only "agreements between undertakings", [note: 8] but also "decisions by associations of undertakings" or "concerted practices". Of course, the phrase "agreements between undertakings" clearly takes the Defendant out of the ambit of s 34(1) of the Competition Act. However, the remaining phrases do not leave the Defendant out in the cold, in particular, the phrase "concerted practices". It would be useful, at this juncture, to turn to some of the European Court of Justice's ("ECJ") decisions to understand what "concerted practices" actually means.

40 In *Case C-8/08 T-Mobile Netherlands BV and Others v Raad van bestuur van de Nederlandse Mededingingsautoriteit* [2009] ECR 0000, the ECJ referred to Article 81(1) of the European Commission Treaty ("the ECT"), which reads:

> The following shall be prohibited as incompatible with the common market: all agreements between undertakings, decisions by associations or undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the

prevention, restriction or distortion of competition within the common market, and in particular those which:

(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;

(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.

41 Article 81(1) of the ECT is similar to ss 2(1) and 2(2) of the United Kingdom's Competition Act 1998 (c. 41), on which, notably, our own ss 34(1) and (2) of the Competition Act are based.

42 At paragraph 26 of its grounds in *T-Mobile Netherlands BV*, the ECJ defined "concerted practices" as:

"…a form of coordination between undertakings by which, without it having been taken to the stage where an agreement properly so-called has been concluded, practical cooperation between them is knowingly substituted for the risks of competition."

43 The phrase "concerted practices" is thus a reference to coordinated conduct by undertakings that are targeted at creating an abnormal situation in an otherwise free market: see also *Suiker Unie and Others v Commission* [1975] ECR 1663, at paragraphs 26 and 27. Whether such practices amount to anti-competitive conduct will then depend on several factors, including, the type of products involved, the position of the undertakings in the market and the size and nature of the market: *Suiker Unie v Commission* (*supra*).

44 It is clear from this that "agreements between undertakings" and "concerted practices" are different concepts, although there is nothing preventing the two from overlapping. In fact, in the ECJ's decision in *Case IV/37.614/F3 The Community v Interbrew NV and others (re The Belgian Beer Cartel)* [2004] CMLR 2, also cited at paragraph 45 of the CCS' own decision in *Re Certain Pest Control Operators in Singapore* [2008] SGCCS 1, it was held that:

The concepts of "agreement" and "concerted practice" are variable and may overlap. Realistically, it may even be impossible to make such a distinction, since infringement may simultaneously have the characteristics of both forms of prohibited behaviour, whereas, taken separately, some of its elements may correctly be regarded as one rather than the other form. It would also be artificial from an analytical point of view to split what is clearly a continuous, collective enterprise with a single objective into several forms of infringement. A cartel may for instance constitute an agreement and a concerted practice at the same time.

(Emphasis added.)

45 The ECJ's holding was aimed at showing that, in practice, both concepts may occur simultaneously. The main thrust of the holding in *The Belgian Beer Cartel* case was to highlight the

artificiality in splitting the two forms of prohibited behaviour and dealing with them separately, when in fact, they formed a chain of conduct that led to the eventual, intended anti-competitive outcome.

46 However, it is crucial to recognise that both concepts are still variable in nature, and it does not mean that a complaint cannot be made on the basis of "concerted practices" alone, without also involving a complaint that "agreements between undertakings" were in breach of the prohibited conduct in s 34(1) of the Competition Act (or for that matter, art. 81(1) of the ECT or ss 2(1) or 2(2) of the UK Competition Act 1998).

47 Therefore, I was certain that the Defendant's argument, that it was unable to lodge a complaint against the Plaintiff for conduct infringing s 34 of the Competition Act because it was not a party to the agreement between the Plaintiff, Singtel and Starhub, must fail. The Defendant still retained the option of filing its complaint on the basis of "concerted practices" amongst the said three undertakings, and in support of its complaint, the Defendant could refer to the alleged anti-competitive agreement amongst them. On this basis alone, I was unable to agree that the Defendant had no recourse to the Competition Act and therefore had little choice but to bring the case before the High Court at first instance.

48 Further, and quite apart from this, I found several other bases to reject the Defendant's argument.

Cartels v Refusals to deal

49 I was of the view that s 34 of the Competition Act did not appear to sit well with the Defendant's complaint against the Plaintiff. The Defendant contended that the Plaintiff refused to provide it with the information it sought, despite the Defendant's offer of valuable consideration. This meant that the Defendant's complaint is in the nature of a refusal to deal.

50 However, s 34 of the Competition Act, especially on a scrutiny of sub-section (2), appears to be designed to eradicate cartel-like behaviour in respect of specific types of conduct e.g. various undertakings in a market coordinating or colluding with each other to fix prices or volume of output amongst themselves for the purpose of, or resulting in, the restriction or ousting of competitors from that market. In this regard, s 34(2) of the Competition Act reads:

> (2) for the purposes of subsection(1), agreements, decisions or concerted parties may, in particular, have the object or effect of preventing, restricting or distorting competition within Singapore if they –
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development or investment;
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> (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.

51 On a cursory perusal of s 34(2), it is quite clear that the type of conducts that the provision was targeting was different from the substance of the Defendant's complaint. A refusal to deal is, *technically*, a different form of anti-competitive conduct from cartel-like behaviour. Cartel-like behaviour, usually, tends to involve a number of undertakings colluding and coordinating their conduct to veritably oust competitors from the market – see *Associated Press v United States*, 326 U.S. 1 (1945), where the US Supreme Court describes undertakings that group together and conduct themselves in an anticompetitive manner:

> The Sherman Act [which is a key antitrust legislation in the United States] was specifically intended to prohibit independent businesses from becoming "associates" in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the groups compete. Victory of a member of such a combination over its business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* "enterprise and sagacity"; such hampering of business rivals can only be attributed to that which really makes it possible – the collective power of an unlawful combination.

52 Refusals to deal need not necessarily involve several undertakings, but could simply involve one undertaking that holds a dominant position in the market: see *Aspen Skiing Co. v Aspen Highlands Skiing Corp*, 472 U.S. 585 (1985). It could hold this dominant position due to various reasons e.g. a strong and long standing reputation in the market or by the very fact that it is the only real player in the market (or, and quite insidiously, it could have arrived at its dominant position due to a sustained period of anti-competitive behaviour that was left unchecked).

53 Of course, there could also be situations where cartels form to create a dominant whole of sorts and thereafter, plainly refuse to deal with a potential competitor: see *United States v. Terminal Railroad Association*, 224 U.S. 383 (1912), a case which involved a group of railroad operators controlling access in and out of St. Louis by refusing other railroad operators use of its railway bridge. As a result, none of the operators were able to compete with the errant group. Additionally, the magnitude of the costs and the geography of the location made it virtually impossible for the other operators to rebuild identical facilities in order to stand a chance of competing in the market. The US Supreme Court held that the group's conduct fell foul of antitrust laws, as it was an illegal restraint of trade and a clear attempt at monopolising the market for railroad services.

54 The permutations may vary, depending on the industries involved. In fact, a patent on a product may be read differently in another market, or an essential facility may not be considered as such in another jurisdiction. However, in the present case, the Defendant has drawn the boundaries very clearly. It did not complain that the Plaintiff had fixed sale or purchase prices of the information, restricted informational output or offered dissimilar terms to it that placed it at a competitive disadvantage to, say, Singtel or Starhub. There were also no allegations that the Plaintiff, Singtel and Starhub, together, as a collective whole, had strong-armed the Defendant out of the market by toying with pricing and production policies.

55 The only allegation that the Defendant made was that the Plaintiff had refused to provide it with the information it sought. This clearly characterised the Defendant's allegation as a *pure* refusal to deal, and therefore, out of the ambit of s 34 of the Competition Act. In my view, the Defendant's complaint was based on s 47 of the Competition Act.

Section 47 of the Competition Act

56 Section 47 of the Competition Act reads:

Abuse of dominant position

47. — (1) Subject to section 48, any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position in any market in Singapore is prohibited.

(2) For the purposes of subsection (1), conduct may, in particular, constitute such an abuse if it consists in —

(a) predatory behaviour towards *competitors*;

(b) limiting production, markets or technical development to the prejudice of *consumers*;

(c) applying dissimilar conditions to equivalent transactions with other *trading parties*, thereby placing them at a competitive disadvantage; or

(d) making 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 the contracts.

(3) In this section, "dominant position" means a dominant position within Singapore or elsewhere.

(Emphases added.)

57 On a plain reading of s 47(1) of the Competition Act, it is clear that the range of persons who may bring a complaint under this provision is wide. Competitors [s 47(1)(a)], consumers [s 47(1)(b)], trading parties [s 47(1)(c)] and contracting parties [s 47(1)(e)] may all have standing to bring a complaint of anti-competitive behaviour against an undertaking in a dominant position. In fact, it can be envisaged that even those who do not fall within these categories of persons may lodge a complaint under s 47 of the Competition Act. The provision merely creates a prohibition and specifies certain forms of conduct which fall within that prohibition. However, it does not purport to delineate, or restrict, who may bring a complaint.

58 The Defendant, by its very complaint, has put itself out as a competitor to the Plaintiff in the market for directory provision and other related services. This brings the Defendant squarely within the ambit of s 47 of the Competition Act. Therefore, once again, the Defendant's argument that it has no standing to bring a complaint under the Competition Act is clearly nullified.

Section 62 of the Competition Act

59 Of course, it may be argued that since s 47 of the Competition Act, or s 34 for that matter, do not *state* exactly who may bring a complaint under these provisions, they are therefore unclear on that issue. However, it must be understood that the provisions do not function in a vacuum. They must be read in light of the Competition Act as a whole. It cannot be the case that the Competition Act specifies prohibited forms of conduct but lacks a mechanism through which such conduct can be brought to the attention of the CCS or another regulatory authority.

60 In fact, s 62(1) of the Competition Act states:

Power to investigate

62. — (1) The Commission may conduct an investigation if there are *reasonable grounds* for suspecting that —

(a) the section 34 prohibition has been infringed by any agreement;

(b) the section 47 prohibition has been infringed by any conduct;

(c) the section 54 prohibition will be infringed by any anticipated merger, if carried into effect; or

(d) the section 54 prohibition has been infringed by any merger.

(Emphasis added.)

61 The two key words in this provision are "reasonable grounds". In order for the CCS to investigate a complaint of prohibited conduct, they must either carry out their own keen scrutiny or surveillance over the various industries in Singapore, or, logically, have a complainant. In fact, the existence of a complaints mechanism appears to be the very reason why the CCS commenced investigations against the pest control operators in *Re Certain Pest Control Operators in Singapore*.

62 Moving a step further, the CCS' website provides a link to a complaint form, which can be accessed at:

http://app.casebank.ccs.gov.sg/cms/user_documents/casebank/others/ComplaintForm050109.doc

63 In the complaint form, the CCS does not place limits on the type of complainants it will entertain or question their *locus standi*. At Section C of the form, a query is made on the relationship that the complainant has with the organisation against whom he is making the complaint. The options are: supplier, customer, competitor, employee/former employee, *no relationship and others*. The form also requires the complainant to provide information on the nature of the anti-competitive activity complained against, the goods and services it relates to and how such activity affects the complainant or the organisation the complainant is representing. These, in my view, are clear intimations on the part of the CCS that it will investigate all complaints so long as there are reasonable grounds for it to do so.

64 It is therefore not open to the Defendant to argue that the Competition Act does not provide it with an avenue to lodge a complaint against the Plaintiff, and that as a result, it has to bring its allegations before the High Court.

Proper procedure

65 What the Defendant ought to have done is to first assess the nature of its allegations against the Plaintiff. If it had done so, it would have realised that it should have brought its complaint under s 47 of the Competition Act. Next, the Defendant should have lodged its complaint against the Plaintiff to the CCS. As such, the Defendant's act of bringing its fresh complaint to the High Court through paragraphs 5.5 and 9(v) of the Defence and Counterclaim flies in the face of the provisions in Parts III and IV of the Competition Act.

(B) Fair dealing

66 Section 35(1) of the Copyright Act reads:

> Subject to this section, a fair dealing with a literary, dramatic, musical or artistic work, or with an adaptation of a literary, dramatic or musical work, for any purpose other than a purpose referred to in section 36 or 37 shall not constitute an infringement of the copyright in the work.

67 Section 35(2) then lays out a non-exhaustive list of factors that should be taken into account when considering whether a dealing would be regarded as fair:

> (2) For the purposes of this Act, the matters to which regard shall be had, in determining whether a dealing with a literary, dramatic, musical or artistic work or with an adaptation of a literary, dramatic or musical work, being a dealing by way of copying the whole or a part of the work or adaptation, constitutes a fair dealing with the work or adaptation for any purpose other than a purpose referred to in section 36 or 37 shall include —
>
> (a) the purpose and character of the dealing, including whether such dealing is of a commercial nature or is for non-profit educational purposes;
>
> (b) the nature of the work or adaptation;
>
> (c) the amount and substantiality of the part copied taken in relation to the whole work or adaptation;
>
> (d) the effect of the dealing upon the potential market for, or value of, the work or adaptation; and
>
> (e) the possibility of obtaining the work or adaptation within a reasonable time at an ordinary commercial price.

68 The thrust of the Defendant's argument in paragraph 9(v) as it stood, and in its proposed amendment stemming from Mr. Radakrishnan's oral application is that the Defendant's act of copying the Plaintiff's directories was fair dealing, as the Defendant was not able to obtain the *telephone subscriber information* from the *service providers* even for valuable consideration. The Defendant was clearly relying on the safe harbour provision in s 35(2)(e) of the Copyright Act.

69 The Plaintiff argued that the Defendant could not rely on the fair dealing defence in the Copyright Act, since a key consideration in respect of the defence was whether the copying would strike an appropriate balance between the benefit that the public will derive from such copying and the interests of the copyright holder. In support of this argument, the Plaintiff relied on Justice Andrew Ang's decision in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd & Others* [2009] SGHC 287.

70 The Plaintiff also argued that the Defendant's proposed amendment to paragraph 9(v) did not answer the Plaintiff's claim at paragraph 7 of the Statement of Claim i.e. that the Defendant had copied the Plaintiff's *directories* in part or in whole. In this regard, the Plaintiff argued that the Defendant's reference to "telephone subscriber information" was a reference to the raw data that the Plaintiff had worked upon, and not the Plaintiff's directories.

71 The Defendant countered that its defence is that there is no difference between the raw data in the telephone subscriber information and what was placed in the Plaintiff's directories. Since the Defendant was unable to obtain the telephone subscriber information from the service providers even for cost, it copied the Plaintiff's directories. This, the Defendant asserts, was fair dealing.

72 In respect of paragraph 9(v), as it stands, I have already stated my views in my assessment of the Competition Act point: any allegation of anti-competitive practices is one that must properly be put before the CCS first. As such, paragraph 9(v), in its original form, would subvert the intent behind the provisions in Part III and Part IV of the Competition Act.

73 However, in respect of the Defendant's oral application to amend paragraph 9(v), I was mindful that the case was only at the early interlocutory stages, and that essentially, what may appear obvious now still needs to be proven. In this regard, I had to take cognisance of the fact that the Defendant has put the Plaintiff to strict proof on the issue of whether the raw data in the telephone subscriber information and the Plaintiff's directories were one and the same, and also on the issue of whether the raw data was worked upon to produce a copyrightable product.

74 If I were to accept the Plaintiff's argument that its claim for copyright infringement was over the *directories* only, and therefore decide that the Defendant's proposed amendment be struck out for failing to answer the Plaintiff's pleadings, it would be tantamount to a rejection of the Defendant's pleading that the raw data and the Plaintiff's directories were the same creature – this has yet to be proved.

75 Additionally, at paragraph 4.1 of the Statement of Claim, the Plaintiff asserted copyright over the "Subscriber information (the "Data") found in each of the Plaintiff's Directories". The Plaintiff was therefore also asserting copyright over the raw data that it claims it worked on to eventually produce the directories.

76 As such, on a balance, I was of the view that the question of whether the raw data and the Plaintiff's directories were the same was, without more, one that was still left open for decision. I was not in the best position to make that decision at this stage of the proceedings, especially on a perusal of the pleadings as they stood. Further, I was also of the view that with the issue being so wide open, the Defendant might still have a chance to bring its proposed amendment within s 35(2)(e) of the Copyright Act.

77 As it stands, I could not prevent the Defendant from arguing that the word "work", in s 35(2)(e) of the Copyright Act, referred to the telephone subscriber information. I was also not in a position to decide, without any basis, whether the telephone subscriber information could have been obtained "within a reasonable time" and "at an ordinary commercial price", or, for that matter, what would constitute as "a reasonable time" and "an ordinary commercial price" in the context of this case. It is clear that these considerations are matters which rely heavily on facts and evidence, and may be specific to the industry from which the action emanated (this is evident in the way the courts have dealt with the defence of fair dealing in *RecordTV Pte Ltd* and *Aztech Systems Pte Ltd v Creative Technology Ltd* [1996] 1 SLR(R) 683).

78 Further, although I understood the Plaintiff's point that the defence of fair dealing involved the balancing of the public benefit and the interests of the copyright holder, it cannot be the only consideration that ought to be taken into account. In fact, rationalising in the reverse, in *Aztech Systems Pte Ltd*, the court held, at paragraph 51, that "it does not follow that the defence [of fair dealing] is excluded in every case where the purpose of the copying may be categorised as being of a commercial nature." In my view, based on the pleadings as they presently stood, I had no reason to deny the Defendant the chance to plead the defence of fair dealing.

Decision

79 In its summons, the Plaintiff sought for paragraphs 5.5 and 9(v) to be struck out under O18

r19(1)(a) and / or under O18 r19(1)(b) – that the paragraphs disclosed no reasonable cause of action and / or defence, and / or were scandalous, frivolous or vexatious. In *Active Timber Agencies Pte Ltd v Allen & Gledhill* [1996] 1 SLR(R) 478, Justice MPH Rubin expounded on the essence of the rule in O18 r19. Justice Rubin held, at paragraph 13:

> The central point which seems to emerge in all the decided cases is that the object of the rule is to stop cases which ought not to be launched – cases which are obviously unsustainable or patently frivolous or vexatious.

80 In *The Osprey* [2001] 1 SLR(R) 281, the Court of Appeal explained, at paragraph 7, that the phrase "reasonable cause of action" has been defined "as a cause of action which has some chance of success when only the allegations in the pleading are considered". The Court added that the "claim should be struck out only if upon examination of the allegations, it is found that the alleged cause of action is certain to fail."

81 In respect of the words "scandalous, frivolous and vexatious", Justice Tan Lee Meng explains, in *RecordTV Pte Ltd v MediaCorp TV Singapore Pte Ltd & Others* [2009] 4 SLR(R) 43, at paragraph 17:

> What is scandalous, frivolous or vexatious is very clear. In *The Osprey* [2000] 1 SLR 281, L P Thean JA reiterated at [8] that the words "frivolous and vexatious" mean actions which are "obviously unsustainable" or "wrong" and added that this expression also connotes "a lack of purpose or seriousness in the party's conduct of the proceedings".

82 In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582, Justice VK Rajah (as he then was), explained what frivolous proceedings meant. At paragraph 33, Justice Rajah held:

> Proceedings are frivolous when they are deemed to waste the court's time, and are determined to be incapable of legally sustainable and reasoned argument. Proceedings are vexatious when they are shown to be *without foundation* and/or where they *cannot possibly succeed* and/or where an action is brought only for annoyance or to gain some fanciful advantage.
>
> (Emphases court's own.)

83 Keeping these principles in mind, in my view, the defences premised on the Competition Act in paragraphs 5.5 and 9(v) were technical non-starters. An action (or a defence, for that matter) that is brought under the Competition Act could not be placed before the High Court at the first instance; the proper procedural rules in Parts III and IV of the Competition Act must be complied with. Consequently, the Defendant should have brought the complaints in paragraphs 5.5 and 9(v) to the CCS for investigation first.

84 As such, I found that the pleadings in paragraphs 5.5 were frivolous, and accordingly, I allowed the Plaintiff's application and struck out the said paragraph.

85 In respect of paragraph 9(v), I noted that the Defendant's pleadings were essentially an amalgamation of pleadings under both the Competition Act and the defence of fair dealing under the Copyright Act. I found that the pleadings were frivolous in so far as they raised a defence framed under the Competition Act, and to this extent, I allowed the Plaintiff's application and struck out the following aspects of the defence from paragraph 9(v): "by reason of the anti-competition practice of the Plaintiff and the Service Providers in not making available the same information to other director publishers, such as the Defendant" and "this is prohibited by Section 34 of the Competition Act."

86 However, I was unable to agree with the Plaintiff that the Defendant's proposed amendment to paragraph 9(v) had flouted the rule in O18 r19. To me, it was a legally sustainable defence, *on the pleadings as they stood*, and I could not say that the amendment could not possibly succeed. As such, I allowed the Defendant's oral application to amend paragraph 9(v) to read in the following manner:

> "The Defendant's alleged copying of the information, i.e., telephone subscriber information, from the Plaintiff's directories was fair dealing by reason of the Defendant not being able to obtain the information from the service providers even for valuable consideration."

87 I then heard parties on costs. Considering the amount of time that both parties took to argue the application, and the research and submissions involved, I ordered the Defendant to pay costs of $5000 to the Plaintiff, not including reasonable disbursements.

[note: 1] By Service Providers, the Defendant refers to Singtel and Starhub.

[note: 2] Regulation 7(3) of the Competition (Appeals) Regulations (Cap 50B, Section 72(15)) stipulates that a notice of appeal, in respect of decisions or directions taken under ss 34, 47, 67 or 69 of the Competition Act, must be lodged within two months of the date on which the appellant was notified of the CCS's decision or direction. In respect of other decision and directions, for instance, those under ss 54, 58A, 67, 69 or 60A, the notice of appeal must be filed within four weeks: r 7(3A) of the Competition (Appeals) Regulations.

[note: 3] Section 33(6) of the Competition Act defines "statutory body" as a "body corporate established by or under any written law."

[note: 4] Section 11.4.4.1 of the IDA Code.

[note: 5] Section 11.4.4.4 of the IDA Code.

[note: 6] Section 11.4.5 of the IDA Code.

[note: 7] Plaintiff's Bundle of Documents, Tabs 1 and 2.

[note: 8] "Undertakings" are defined in s 2 of the Competition Act as "any person, being an individual, a body corporate, an unincorporated body of persons or any other entity, capable of carrying on commercial or economic activities relating to goods and services.

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