Baker McKenzie.

The Burden of Proof in Competition Cases

**This brief synopsis is drawn from a detailed review of these issues published in the HK Law Journal: Competiton Law: an Exception to Human Rights 52 HKLJ 513, available on Westlaw. Readers interested to explore this subject further are directed to that article for full case citations, references and a 50 page analysis of the issues.*

Financial penalties: civil or criminal?

Regulators and courts in common law jurisdictions around the world are being given significant and increasing powers to impose financial penalties without traditional criminal law safeguards. Competition law has been particularly susceptible to arguments that traditional safeguards should be discarded to aid regulators in securing convictions.

In 2008, Hong Kong's Court of Final Appeal (CFA) issued a landmark human rights judgment in Koon Wing Yee v Insider Dealing Tribunal (Koon), deciding that, regardless of how local law classifies a financial penalty, it is, for human rights purposes, punitive in nature — in substance — a criminal charge. Accordingly, anyone facing such charge is entitled to fundamental human rights protections including privilege against self-incrimination and a fair trial in a court system with the prosecution put to proof beyond reasonable doubt.

In 2019, in the first competition case to go to trial in Hong Kong, the Competition Tribunal held, following Koon, that in competition proceedings seeking financial penalties, the competition regulator had the burden to prove its case beyond reasonable doubt.

Other common law jurisdictions do not take the same approach. Why and will the Hong Kong cases lead them to reconsider whether more safeguards are required when meting out financial penalties?

Why proof beyond reasonable doubt?

Legal professionals in common law jurisdictions are well versed in the importance of the burden of proof. We are told that in civil cases, the balance of probabilities determines the outcome, whereas in criminal cases proof is required beyond reasonable doubt.

The concept is firmly established in the common law and entrenches a desire to be sure of guilt before handing down a criminal sentence. It is a core pillar of the common law. It is both a cornerstone of our adversarial system and a reminder of the severity of the inquisitorial system that preceded it and which we have sought to relegate to history.

Criminal and Civil Standards of Proof — Why the Difference?

Why are there different standards in common law civil and criminal cases? The key point of distinction is in the nature and object of each. Criminal proceedings seek to punish and, thereby, to deter. We have taken a moral position under the common law that persons should only be punished when we are sure of their guilt.

But civil cases — contract, tort, equity — involve a decision between competing claimants: a dispute as to whose interpretation of an agreement must prevail, a contest as to who should bear a loss or when one's conduct is inequitable as against another. One or other of the protagonists must bear the consequences in the dispute, and so it is natural when deciding such cases that the decision must go against the party who, on the balance of probabilities, appears to be in the wrong.

Despite the coherence of this distinction, in recent decades there has been a proliferation of rules seeking to impose what are referred to as administrative fines or civil penalties. They do not easily fit into the classical criminal-civil framework.

Civil Penalties and Administrative Fines

There are a growing number of common law jurisdictions seeking to impose such pecuniary penalties outside the criminal law framework. This includes Canada, Australia, New Zealand, the United Kingdom and the United States. In some, the penalties are generally imposed by the courts (eg the United States, Australia and New Zealand). In others, such

as the United Kingdom and Canada, the penalties are directly imposed by regulators, usually with formal appeal or review processes.

The way it generally works is that those on the receiving end are told that they are being fined for deterrence or to ensure regulatory compliance, rather than as a punitive measure. A cap is then put on the fine, which in some jurisdictions can run into millions of dollars.

Canada

In Canada, numerous administrative bodies have been granted powers to impose substantial financial sanctions, called Administrative Monetary Penalties (AMPs), for what is regarded there as non-criminal regulatory contraventions. They are usually imposed by administrative officials. An exception is the AMPs, which are imposed by the Canadian Competition Tribunal — a specialist quasi-judicial body, under the Canadian Competition Act. It is perhaps no surprise that a quasi-judicial model was thought to be necessary. The fines are very substantial running to CAD$10 million for the first contravention and CAD$15 million for subsequent contraventions.

There have been a number of constitutional challenges, arguing that proceedings involving the imposition of a large AMP in a civil context are equivalent to being “charged with an offence” for the purpose of s 11 of the Canadian Charter of Rights and Freedoms (the Canadian constitutional bill of rights), and, therefore, parties threatened with these AMPs should be entitled to the protections set out in s 11, including putting the regulator to proof beyond reasonable doubt. These arguments have generally been rejected on the grounds that the sanctions are deterrent, not penal.

The United States

In the United States, civil penalties have grown exponentially in use and have also been subject to over a century of constitutional challenges. The Supreme Court started with a focus on substance, recognising the punitive nature of civil penalties and the requirement for heightened procedural protections, but later moved to a focus on Form. There was a brief suggestion of a return to substance in 1989 in *United States v Halper* but that was overruled a few years later in *Hudson v United States*.

These cases have been looked at through a US constitutional lens, rather than under the rubric of human rights. However, the cases exhibit similar concerns. A good example is the 1893 case, *United States v Shapleigh*, in which the court considered monetary sanctions for false claims against the government and held that the case was *“a criminal case under the cloak of a civil suit"*.

The ECHR approach, in marked contrast

The North American decisions are in marked contrast with the European Court of Human Rights (ECHR) approach, reflected in case law in Hong Kong and the United Kingdom.

The CFA in Koon recognised only very limited situations in which orders to pay a financial sum would not comprise a criminal charge, such as disciplinary proceedings which did not concern the public at large; proceedings under regulatory legislation whose purpose was essentially protective rather than punitive and proceedings for a penalty which was compensatory in nature.

Accepting the inevitability of the principles laid down in Koon, the Commission conceded in the first case to come before the Competition Tribunal that competition proceedings seeking a financial penalty comprised a criminal charge. The fundamental object is to deter by severely punishing anticompetitive conduct with substantial financial penalties. Nor are the penalties compensatory in nature. There are separate provisions under the Competition Ordinance for the Commission or parties harmed by anticompetitive conduct to seek orders for payment of damages.

The UK courts, following ECtHR jurisprudence, also consider that proceedings seeking financial penalties amount to the determination of a criminal charge. The Court of Appeal reached this view in *Han v Commissioners of Customs and Excise*, a case concerning tax penalties. *Han* was followed subsequently by the UK Competition Appeal Tribunal, in *Napp*, in respect of proceedings for financial penalties for breach of competition law.

Why the divergence as to what comprises a "criminal charge"?

Unlike the US, where cases have been decided under the rubric of its Constitutional law, Canada, the UK and Hong Kong have all considered the issue under their respective versions of the International Covenant on Civil and Political Rights (ICCPR). It is, therefore, worth reflecting on why Canada is diverging.

At its most fundamental level, it would appear that the Canadian courts have focused on the purpose of administrative penalties in the rubric of whether they are "regulatory" or punitive and have taken the view that "regulatory" proceedings (whatever is meant by that), even if leading to substantial penalties, are not criminal in nature. Hong Kong's CFA (and the ECHR approach/UK courts), on the other hand, take a more traditional stance, focusing on the distinction between punitive and compensatory proceedings and not allowing a blurring of the lines.

Despite convergence in the UK and Hong Kong that such penalties comprise a criminal charge for human rights law purposes, there continues to be divergence as to the burden of proof and other procedural safeguards that should attach to such cases.

The United Kingdom and Hong Kong: Diverging on the Requisite Burden of Proof?

In *Han*, although it was decided that the case concerned a criminal charge, the UK Court of Appeal did not resolve the question of what procedural safeguards were required to achieve compatibility with art 6(1) of the ECHR. Subsequently, the UK Competition Appeal Tribunal, in *Napp*, determined that, although proceedings for financial penalties for breach of competition law constitute a criminal charge, it was not obligated to apply the criminal standard of proof beyond reasonable doubt.

Napp was considered in Hong Kong and rejected by the CFA in Koon, after careful consideration of the General Comments to the ICCPR, which made clear the requirement for criminal charges to be proved to the criminal standard. It remains to be seen whether the UK courts will, with the benefit of the CFA's reasoning in *Koon*, be persuaded to revisit *Napp* in subsequent cases.

Australia

Australia first introduced civil penalties in the area of competition law, by way of the Trade Practices Act 19744. The concept of civil penalties has since been applied across a broad range of areas, including company law and telecommunications.

The standard of proof in competition cases is addressed in s 76 of the Trade Practices Act 1974, now rebranded as the Competition and Consumer Act 2010. The words of the provision do not indicate clearly which standard of proof is to be applied. This was intentional. During the enactment process, Members of the Opposition said the civil standard of proof for competition law penalty proceedings was 'grossly unfair, primitive and archaic', and an 'inroad' to the presumption of innocence which is the 'bulwark of the system of criminal justice'. There was no consensus between the Government and the Opposition and so the wording was left ambiguous.

It was decided in *Re Heating Centre Pty Ltd v Trade Practices Commission* that competition proceedings for pecuniary penalties are to be classified as civil. However, commentators have noted that it is unsafe to assume that the Parliament must be taken to have intended that the court should apply the civil standard of proof. It remains to be seen how the position evolves in future.

New Zealand

In New Zealand, again, the first use of civil penalties was in the competition law, when the Commerce Act 1986 was enacted. New Zealand is a jurisdiction that used statutory powers to remove the question of burden of proof from debate. Section 79A of the Commerce Act 1986 expressly provides:

> *"In any proceedings under this Part for a pecuniary penalty (a) the standard of proof is the standard of proof applying in civil proceedings; and (b) the Commission may, by the order of the court, obtain discovery and administer interrogatories."*

The position taken by New Zealand courts is that the primary purpose of pecuniary penalties for anticompetitive conduct is deterrence. However, it is clear that deterrence is achieved through severely penalising offenders. This view is reflected in governmental and Parliamentary observations of civil pecuniary penalties. The Select Committee Report on the Commerce Amendment Bill 2001 stated:

> *"The dominant reason for penalties under competition law is the forward looking aim of promoting general deterrence. To promote deterrence, illegal conduct must be profitless, which means that the expected penalty should be linked to the expected illegal gain.* The courts should **severely penalize** today's offender *to discourage others from committing similar acts."* [Emphasis added]

In 2011, the New Zealand Law Commission undertook a review of civil penalties, and in 2012 it published an Issues Paper citing concern that, since they had been introduced, there had been no consideration of the circumstances in which they should be used, how they should be used alongside other regulatory sanctions or enforcement tools or the procedural protections that should be in place.

In explaining why a review was needed, the Issues Paper noted that the civil penalties were being adopted as a central feature of regulatory regimes, and all indications were that they would become a key way that New Zealand would regulate and punish breaches of the law, giving rise to considerable financial liability.

The Issues Paper noted the opposition to civil penalties on the grounds that they wrongly prioritise efficiency over legal principle and the challenge they make to the traditional distinction between criminal and civil law. The Issues Paper was also quite categorical about the punitive nature of civil penalties and the way they blur that traditional distinction by imposing liability in a civil trial on the civil standard of proof without the protections given to those defending a criminal charge.

Conclusion

It would be an error to argue in Hong Kong that the civil standard must apply to competition law cases by making reference to overseas examples of administrative fines and civil penalties, given the CFA's decision in Koon. The CFA has clearly decided the criminal standard should apply. The question remains susceptible to challenge in Australia and the United Kingdom but may be beyond the scope of challenge in New Zealand. The Canadian courts are clearly even more fundamentally diverging from Hong Kong's CFA, the United Kingdom courts and the ECHR, rejecting the notion that proceedings seeking such financial penalties comprise a criminal charge.

In Hong Kong, the core constitutional principles have been made clear by the CFA. It is hoped that this will cause other jurisdictions to look afresh at how they approach competition law and other economic cases seeking financial penalties and whether there is justification in prosecuting such cases without the traditional criminal law safeguards and human rights protections that underpin our adversarial system.

For defence counsel in jurisdictions where the point remains open to contest in the courts, there is fertile ground to argue for increased criminal law safeguards and human rights protections for clients facing financial penalties. Elsewhere, the only available avenue may be continued debating and lobbying with legislatures and governments. Time will tell whether the desire for expediency will overcome the moral argument for due process.

Stephen Crosswell
Head of Antitrust & Competition Group
Asia Pacific

www.bakermckenzie.com

Baker & McKenzie

14th Floor, One Taikoo Place
979 King's Road, Quarry Bay
Hong Kong SAR

香港鰂魚涌英皇道979號

太古坊一座14樓

Tel: +852 2846 1888
Fax: +852 2845 0476
DX: 009086 Central 1
www.bakermckenzie.com