IN THE COMPETITION APPEAL TRIBUNAL AT PUTRAJAYA
IN THE STATE OF FEDERAL TERRITORY OF PUTRAJAYA, MALAYSIA
APPEAL NOs. 4, 5, 6 and 7 OF 2022

BETWEEN

CALIBER INTERCONNECTS SDN. BHD. & THREE OTHERS
(APPELLANTS)

AND

COMPETITION COMMISSION
(RESPONDENT)

.....

PRESIDING MEMBERS OF THE
COMPETITION APPEAL TRIBUNAL

1. DATO' ABDUL AZIZ BIN ABDUL RAHIM (CHAIRMAN)
2. DATUK SERI DR. VICTOR WEE ENG LYE
3. DATUK MOHD RAFEE BIN MOHAMED

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GROUNDS OF DECISION

(The main appeal)

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Introduction

[1] These four appeals arise from the respondent's decision dated 27 June 2022, pursuant to section 53 of the Competition Act 2010 ("the Act"). Each of the appellants has filed a separate appeal. At the hearing of the appeals, each appellant is represented by counsels of their own; and with consent of all the appellants the Tribunal decided to hear each appeal separately in the following order: Appeal No.7 followed by Appeal No. 5 and 6 (heard together) and finally Appeal No.4.

[2] Appeal No. 7/2022 and Appeal No. 5/2022 and No. 6/2022 were heard on 22nd and 23rd February 2023 and Appeal No. 4/2022 was heard on 28th February 2023.

[3] The four appellants are as follows:

(i) Caliber Interconnects Sdn. Bhd. (appellant in appeal No. 7/2022) ("*Caliber*");

(ii) Novatis Resources Sdn. Bhd. (appellant in appeal No.5/2022) ("*Novatis*");

(iii) Silver Tech Synergy Sdn. Bhd. (appellant in appeal No. 6/2022) ("*Silver Tech*"); and

(iv) Basenet Technology Sdn. Bhd. (appellant in appeal No. 4/2022) ("*Basenet*");

[4] On 27 June 2022 the respondent found all appellants had engaged in an anti-competition conduct by participating in bid rigging in a bidding for the award of a contract pursuant to *Sebut harga and tender* by National Academy of Arts, Culture and Heritage of Malaysia ("*ASWARA*") and

thereby had committed an infringement of section 4 of the Competition Act 2010 [*Act 712*] ["the Act"].

[5] Pursuant to the filing of the appeals all the appellants have also filed applications for stay which were granted.

Brief facts

[6] On 18 July 2016 *ASWARA* sought quotations for four (4) *sebut harga* on its website. They are as follows:

- *Sebut harga A – perkhidmatan membekal, menghantar, memasang, menguji dan mentauliah serta menyenggara (dalam tempoh Jaminan) peralatan sistem bekalan kuasa bersepadu dan backup data;*

- *Tender A – perkhidmatan membekal, menghantar, memasang, menguji dan mentauliah serta menyelenggara (dalam tempoh jaminan) peralatan dan perisian pengkomputeran untuk pembelajaran makmal animasi 2D (2D animation lab), graphic production dan HD projector;*

- *Sebut harga C – perkhidmatan membekal, menghantar, memasang, menguji dan mentauliah serta menyelenggara (dalam tempoh jaminan) perkakasan ICT fakulti animasi dan multimedia; dan*

- *Sebut harga B – perkhidmatan penyelenggaraan active directory untuk ASWARA (configuration Microsoft windows 2008 server, diagnose & troubleshooting active directory problems & configure*

virtual server backup, support for active directory, maintain & support network domain name server).

[7] All the appellants and two other parties (i.e. *Tuah Packet Sdn Bhd* and *Venture Nucleus (M) Sdn. Bhd.* who are not parties to this proceedings) submitted quotations for *Sebut harga A*. There was a total of fifteen (15) bidders for *Sebut harga A*. *ASWARA* accepted *Caliber*'s bid for *Sebut harga A*. Thereafter the respondent received information from *ASWARA* regarding alleged bid rigging arrangement between *Caliber* and *Tuah Packet* in relation to *Sebut harga A*. The respondent then commenced an investigation under section 15 of the Act; and on 4 March 2018 served the proposed decision dated 26 February 2018 on all the appellants as well as on *Tuah Packet Sdn. Bhd*. This proposed decision was eventually made final by the respondent on 27 June 2022 and given to the parties on 05 August 2022. The final decision has minor amendments, but these amendments are not significant to these appeals. The gist of the respondent findings can be seen by referring to paragraphs 345 and 349 of the respondent's decision dated 27 June 2022 which are produced below:

> *"345. Therefore, the commission finds there is strong and convincing evidence, on balance of probabilities, that an infringement of section 4 prohibition had been committed; and this we have elaborated on in the foregoing paragraphs".*
>
> *"349. As explained above, the commission considers that all infringement took place in the supply of relevant services at ASWARA as below:*
>
> *I. Sebut harga A;*
>
> *II. Tender A;*

III. Sebut harga C; and

IV. Sebut harga Active directory."

[8] On the finding of the infringement, the respondent imposed a financial penalty of various amounts as between the appellants. The financial penalties have yet to be paid by the appellants.

Submissions and arguments by the parties.

[9] For the purpose of this decision, the Tribunal will address each appeal separately and individually in the order of their presentation. However, before we proceed to examine and analyze the submissions by the parties, and the evidence in these appeals, it would be helpful if we familiarize ourselves with the concept and legal meaning of 'bid rigging' so that can we put everything in its proper perspective.

[10] We will begin by looking at section 4 of the Act. Under section 4(1), a horizontal or vertical agreement between enterprises is prohibited in so far as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods and services. Under section 4(2)(d) of the Act, without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which has the object to perform an act of bid rigging is deemed to have the object of significantly preventing, restricting or distorting competition in any market for goods and services; and any enterprise which is a party to such an agreement shall be liable for infringement of the prohibition under section 4(3) of the Act. Thus, having an agreement amongst the parties bidding for a contract in a tender process is harmless under section 4 of the Act; it is the objective and the effect of that agreement that is critical. If the objective and the effect is to significantly prevent, restricting or distorting

competition in any market for goods or services, it could amount to an infringement.

[11] The term 'agreement' is defined under section 2 of the Act as '*any form of contract, arrangement or understanding, whether legally enforceable, between enterprises, and includes a decision by an association and concerted practices.* Thus, section 4 prohibition applies to both legally enforceable and non-enforceable agreements, whether written or verbal. A verbal agreement may be reached in person or by telephone, letters, email or through other means. An agreement would still be caught under section 4 prohibition even if an enterprise did not have the intention to implement or adhere to the terms of the agreement. For the purposes of making a finding that an enterprise is a party to an agreement or a concerted effort or practices, it is sufficient for the respondent to show that the enterprise concerned participated in meetings at the agreement was concluded, without manifestly opposing them or publicly distancing itself from what was discussed and agreed.

[12] Section 2 of the Act defines 'concerted practice' to mean '*any form of coordination between enterprises which knowingly substitutes practical co-operation between them for the risks of competition, and includes any practice which involves direct or indirect contact or communication between enterprises, the object or effect of which is either (a) to influence the conduct of one or more enterprises in market; or (b) to disclose the course of conduct which an enterprise has decided to adopt or is contemplating to adopt in a market, in circumstances where such disclosure would not have been made under normal conditions or competition'.* It has been established in European Union (EU) law that it is not necessary to characterize the conduct in question as exclusively an agreement or a concerted effort. It would be sufficient that the conduct in

question amounts to one or the other. Also, the 'object' and 'effect' in section 4(1) of the Act, are alternative and not cumulative requirements. This is the plain reading of that section. Also, to be noted is that the MyCC has stated in its guidelines that if an agreement has its object the restriction of competition, it is unnecessary to prove that the agreement would have an anti-competitive effect in order to find an infringement of section 4.

[13] Section 4 of the Act does not say much about what bid rigging is. The section simply mentions that any agreement between two or more enterprises, be it horizontal or vertical agreement, which has the objective of significantly preventing, restricting or distorting competition in any market for goods and services would amount to an infringement of section 4(2)(d) of the Act. According to the guidelines published by MyCC, bid rigging is said to be a form of price fixing and allocation of markets. It occurs when two or more bidders in a tender exercise collude to distort the normal conditions of competition. The bidders agree amongst themselves who should win the tender and at what price. Instead of submitting the best tender, the parties fix the tender.

[14] Thus, by looking at section 4 and the statement by MyCC in its guidelines we can attempt to summarize the features or characteristics of bid rigging as follows: (1) there must be two or more enterprises involved in any tender process or price fixing, (2) there must be some form of agreement, regardless whether it is enforceable or not, between the parties with the objective to significantly distort the normal conditions of competition, (3) that the parties to the agreement have agreed amongst themselves who should win the tender, (4) there must be collaboration and collusion between the parties to the agreement with clear intention to distort the normal conditions of competition, and (5) all the above must be

done in a concerted effort amongst the parties to the agreement. But it is not necessary all the five elements to be present in a bid rigging attempt.

[15] Bid rigging can take many forms. MyCC guidelines highlighted some of these:

(1) *Bid suppression* – this occurs when some of those who collude do not make a bid and thus permit a predetermined party to get the tender.

(2) *Bid rotation* – this occurs when bidders take turns to submit the most competitive tender price or the lowest bid (and therefore winning the contract). They rotate the winning bid amongst themselves.

(3) *Bid withdrawals* – this is where colluding bidders deliberately withdraw their bid at the end of the tender period thus leaving their chosen bidder to win the bid.

(4) *Cover pricing* – this involves colluding bidders who submit a bid price that is deliberately higher than that submitted by the bidder they have determined should get the tender. Such collusive tendering is also known as 'courtesy bidding' or 'complementary bidding'; and

(5) *Non-conforming bids* – this is where colluding bidders deliberately submit bids not in accordance with the terms or conditions specified in the tender, except by the bidder who is intended to win the tender.

Keeping these features of bid rigging in mind, we will now consider the submissions and arguments of each appellant in challenging the finding of the respondent, and the response by the respondent to these submissions and arguments.

Submissions by Caliber

[16] The first appeal is by *Caliber*. For *Caliber's* appeal, only *Sebut harga A* is relevant. In its decision the Commission made two findings of infringement under section 4 of the Act. The first is that there was an alleged bilateral bid rigging arrangement between *Caliber* and *Tuah Packet Sdn. Bhd.*, another party who had participated in the bidding for *Sebut harga A* but not successful. The second finding is that there was an alleged separate bid rigging arrangement coordinated by *Novatis* together with *Basenet, Silver Tech* and *Venture Nucleus*. Learned counsel for *Caliber* submitted that only the first finding is relevant to his client's case.

[17] In this case it was claimed that *Caliber's* expertise is in relation to the installation of cabling and electrical works for the UPS system but has insufficient expertise to implement the backup system required by *ASWARA*. *Tuah Packet Sdn. Bhd.* on the other hand has expertise in backup systems and servers.

[18] Both *Caliber* and *Tuah Packet* submitted their bids for *Sebut harga A*. However, *the Tuah Packets'* bid was lower than the bid by *Caliber*. *Tuah Packets'* bid was RM433,353.00 while *Caliber's* bid was RM467,727.00. Despite this, *Caliber's* bid was accepted.

[19] On being awarded the contract for *Sebut harga A*, *Caliber* approached *Tuah Packet* for proper estimation of *Tuah Packet* quotation in order to carry out the subcontract works on the backup systems and servers.

[20] It was submitted that the alleged period of infringement identified by the Commission for *Sebut harga A* is 16 days starting from 18 July 2016 to 2 August 2016. This period is not in dispute.

[21] In its decision, the respondent found that *Caliber* and *Tuah Packet* had entered into a cover bidding-cum-subcontracting relationship arising from the principle that competitors who agree not to bid or agree to submit a losing bid in exchange of receipt of a subcontracting agreement has infringed section 4(2)(d) of the Act.

[22] In his submissions, both oral and written submissions dated 23.12.2022, learned lead counsel for *Caliber* submitted that the alleged bid rigging arrangement was wrongly construed by the respondent. He argued firstly that there was no such 'agreement' entered by *Caliber* and *Tuah Packet* for *Sebut harga A* during the alleged infringement period. It was also submitted that if there was such an agreement, it was a vertical agreement and cannot result in the parties performing an act of bid rigging prohibited by section 4(2)(d) of the Act. It is not horizontal agreement. Further, it was submitted the agreement, if any, did not have any restriction on competition either by 'object' or 'effect; and this the respondent had failed to consider. Regarding the respondent's finding on cover pricing or cover bidding, learned counsel for *Caliber* submitted that there was absolutely no cover-bidding-cum subcontracting arrangement between *Caliber* and *Tuah Packets* as the basic components that make up a cover bid do not exist and or have not been proven. It was submitted that there was no agreement between them on which party should win or lose the bid for *Sebut harga A*. Both parties, learned counsel submitted, had every intention to win the bid and did not at any material time share any information in relation to the final bid price. Each party had independently submitted its bid to ASWARA. It was argued that in this

case *Caliber*, which submitted a higher bid price compared to *Tuah Packets* bid price for *Sebut harga A* won the bid; this is contrary to the understanding that in cover bid the lower price would win. Further, it was argued that there was no 'kick-back' or compensation given to *Tuah Packets*. Another issue raised by learned counsel in his written submissions is that *Caliber* does not even operate in the relevant market that was identified or defined by the respondent in its decision. It was argued that the respondent had failed to apply the right test in determining the relevant market. Instead, the respondent had applied its own test and had taken an overly simplistic approach which resulted in the identification of a market where *Caliber* is not even a player. *Caliber*, the appellant, also complained that financial penalty imposed is excessive by every reasonable measure given the circumstances and the baseless allegation by the respondent that *Caliber* was the instigator for the alleged bid rigging arrangement; but there is no shred of evidence to support this allegation. As regard the treatment of the evidence in this case the appellant *Caliber* argued that the respondent had taken into consideration the irrelevance and had relied on the evidence (of events and communications) of the alleged bid rigging, the majority of which that took place after alleged infringement period.

[23] The above submissions by learned counsel for the appellant *Caliber* suggest to us that the appellant is challenging the respondent findings on two main fronts. The first is that there is no agreement between the appellant and *Tuah Packets* to bid rig the ASWARA tender for *Sebut harga A*. The second front is that the relationship between the appellant *Caliber* and *Tuah Packet*s is that of main contractor and subcontractor. The rest of the issues raised in the learned counsel submissions are, in our view, peripheral. We will now examine the evidence found by the

respondent to see whether they support the respondent's finding and whether the respondent was right to reject the argument as to the main contractor and subcontractor relationship.

[24] Learned counsel for *Caliber* also submitted that there are strong merits to *Caliber's* appeal. He said the finding by the respondent was flawed because there was no agreement to enter a cover bid in this case due to the simple reason that *Caliber's* winning bid was higher than *Tuah Packet's* bid of RM433,353.00. It was argued that in a cover bidding agreement, it is the lowest bid that wins, and the unsuccessful party with the higher bid is compensated. In this case it is the opposite. Learned counsel for *Caliber* further submitted that the respondent has not shown in its decision that there exists a cartel between the 15 parties that bid for and fixed *Sebut harga A*. It was argued that the period of infringement was from 18 July 2016 to 2 August 2016 and there was no alleged subcontracting agreement prior to this period or during the period. There was no evidence of this shown by the respondent. It was argued that the alleged subcontracting agreement, if there is one, could have only been entered into on or after 7 September 2016 when the letter of acceptance was issued; and this date falls outside the period of infringement.

[25] It was also submitted that the respondent has erred in the interpretation of several crucial statutory provisions of the Act relevant to the appeal and had erred in the computation and calculation of the alleged infringement period, hence the computation of the financial penalties imposed on *Caliber* which it was submitted disproportionate and erroneous.

[26] Lastly learned counsel for *Caliber* submitted that the respondent was unable to show any nexus or connection between *Caliber* and the

other bidders that *Caliber* is the instigator in the bid rigging of *Sebut harga A*.

[27] All the above submissions learned counsel for *Caliber* said show that there are strong grounds of appeal in favor of *Caliber.*

[28] As for the existence or non-existence of an agreement between the appellant *Caliber* and *Tuah Packets*, learned counsel cited the case of *Bayer v Commission* [2000] ECR 11-3383 and the case of *Seven Tuition and Daycare Centres* to show that for an agreement to be formed there must be concurrence of will or joint intention of the parties. In this case he submitted the respondent had failed to show the existence of such concurrence of will or joint intention between the appellant *Caliber* and *Tuah Packets* to conduct themselves in a specific way on the relevant market or in relation to *Sebut harga A*. In that regard, learned counsel for the appellant *Caliber* also referred to other cases from the European Union namely *Suiker Unie And Others* v *Commission* and *Suiker Unie* v *Commission* [1975] ECR1663 to show that there is no concerted practice or efforts between the appellant *Caliber* and *Tuah Packet* to conduct themselves in specific ways which conduct does not correspond to the normal conditions of the market in order to distort or manipulate competition in the relevant market. He further argued that the evidence as to concerted practice must be evaluated as a whole and it must show that it is within the knowledge of the parties that their respective decisions concerning the bidding process are complementary. Learned counsel for the appellant submitted that the respondent failed to do this. Learned counsel also cited another European Union's case *No. L 230/1 Polypropylene* (1986)6/398 EEC to show the difference between concerted practice and a definite agreement in that concerted practice is undertaking by parties by colluding in an anti-competitive manner falling

short of an agreement to evade the application of article 85(1) of the European union treaty which is the equivalent of our section 4 of the Act.

[29] We have read and scrutinized the final decision by the respondent. We are of the view that there is evidence that strongly supports the respondent's finding and conclusion. The evidence consists mainly in the form of email correspondence and witness statements from various personnel (including directors, shareholders, and managers) of the appellant and *Tuah Packet*. The respondent examined and analyzed the evidence in detail in paragraphs 92 to 114 of its decision. From the email correspondences and email messages, the respondent found that Encik Zuzairi of *Tuah Packets* had come to know of the appellant's participation in *Sebut harga A* and communicated with En Fauzi of the appellant *Caliber* several times regarding *Sebut harga A* between the advertisement date and the closing date of *Sebut harga A*. The respondent had also considered an internal email correspondence dated 25.7.2016 between Mimie, Zuzairi and Rani of *Tuah Packets* – see paragraph 94 of the respondent's decision. In the email Mimie informed Rani and Zuzairi about sebut harga for *ASWARA* and requested for backup data and informed the two gentlemen that *Caliber* and *Tuah Packets* bid for the sebut harga. The respondent concluded on this evidence that there is a prior agreement and consensus between the appellant *Caliber* and *Tuah Packets* to work together in the event *Tuah Packets* were to win *Sebut harga A*. Beside the evidence of this email correspondence, the respondent had also considered the statement made by and recorded from Fauzi of *Caliber* dated 31.7.2018. In his statement Fauzi said that *Caliber* can undertake the project relating to cabling and wiring and *Tuah Packet* can do the project relating to 'server' since *Tuah Packets* offer is better compared to other companies. In fact, in his statement Fauzi said

categorically that he would offer *Tuah Packet* the subcontract for the project if the appellant *Caliber* won *Sebut harga A*. There are many other statements recorded by the respondent from witnesses from *Caliber* and *Tuah Packets* as well as from *ASWARA* which show agreement between *Caliber* and *Tuah Packets* to together bid for *Sebut harga A* with the objective of ensuring one of them can win the bid. These are statements which were recorded from Mohammad Hisham bin Rahim, the technical manager, director and shareholder of *Tuah Packets* dated 11.6.2018, statements recorded from Mohammad Saifuddin bin Mazlan the sale administrator of *Caliber* dated 31.7.2018 and statements recorded from Ku Aznal Bin Ku Abd Hamid the chief assistant secretary (information technology department) of *ASWARA* dated 23.7.208, and they clearly shows that *Caliber* and *Tuah Packets* were bend on working together and collaborate with each other in such a way to bid for *Sebut harga A* and to ensure that either of them would win the bid; and much more it also show that there was an agreement between the two parties that if either of them wins the bid the other party will be offered the subcontracting works.

[30] Next, we will consider the argument by learned counsel for *Caliber* that there was no agreement between *Caliber* and *Tuah Packet* to manipulate the bid. Their arrangement he said was just a simple relationship of a contractor and subcontractor because of each other party's limitations of its technical capability to complete on its own the project which each of them have submitted bid. We find this argument unacceptable. In our view, a subcontractor is a person, or a company hired by a main contractor to perform part of the work undertaken by the main contractor in a contract. Generally, a subcontractor will either relieve a main contractor of part of the contract work or will be able to perform the work undertaken at a lower cost or at a greater skill level than the main

contractor could. In most cases a main contractor attempts to form a good working relationship with several subcontractors. This allows a main contractor to select the preferred subcontractor for a particular contract based on competitive pricing and the right skill level. The subcontractor is chosen by the main contractor to carry out part of the contract work. They then enter into a contract only between themselves and the main contractor. Neither the client's consultants (i.e., architects, engineers, and quantity surveyors) nor the client himself can influence the appointment or the conditions, although the main contract normally carry a provision for the approval of a domestic subcontractor by the client. Therefore, the subcontractor would not bid for or undertake any contract directly from the client/employer as they would typically be hired by the main contractor.

[31] In this instant case, we noted from the evidence recorded that there were preliminary discussions between appellant *Caliber* and *Tuah Packets* on the possibility for them to co-operate on the project. That is not harmful. It is normal in our view that an enterprise eyeing to bid for a project would take some preliminary steps to identify possible collaborators to work with in the event it wins the bid for a project. However, as events unfolded, those preliminary discussions went further than just mere discussion of possible collaboration. In this regard, the respondent had considered the evidence of an internal email of *Tuah Packet* dated 25.7.2016 originating from one Mimie Kamaruddin to En Zairi and En Rani of *Tuah Packet* which informed the latter two gentlemen of *ASWARA's Sebut harga* and the need of a backup system as well the enterprises that bidded for the contract. In his statement dated 11.6.2018 to the respondent Zuzairi (the full name of En Zairi) stated that on the date of email ie 25.7.2016 *Tuah Packets* had agreed with the appellant *Caliber*

to use *Caliber's* services for the electrical works for the *Sebut harga A* if *Tuah Packet* wins the bid.

[32] In examining the conduct and inter-reactions of the various key personnel from the appellant *Caliber* and *Tuah Packet* namely Fauzi of *Caliber*, Hisham and Zuzairi of *Tuah Packet* as well as Anuar, the director of *Caliber*; the *respondent* concluded at paragraph 104 of its decision that '*Based on the factual circumstances Caliber had in fact taken* the lead role *as instigator in bid rigging arrangement with Tuah Packet by approaching Tuah Packet and requested Tuah Packet to prepare Caliber's technical documents and deciding to select Tuah Packet as the 'subcontractor' which is a form of reward in relation to Sebut harga A.'* The fact that *Tuah Packet* was in possession of a copy of the technical Letter of Authorisation issued by Emerson Network Power and the quotation documents of *Caliber* is not denied by the appellant *Caliber*. Emerson Network power is the supplier of the necessary UPS equipment to comply with the technical specification of *Sebut harga A*. There is also evidence of admission by Zuzairi of *Tuah Packet* that he had requested the technical documents from the supplier Emerson for the purpose of preparing *Caliber's* technical documents for *Sebut harga A*. The respondent found as a fact that this admission by Zuzairi was affirmed by Hisham of *Tuah Packet* and Fauzi of *Caliber* in their respective statements given to the respondent dated 11.6.2018 and 31.7.2018 respectively.

[33] Regarding the claim by the appellant *Caliber* that it had agreed to work with and appoint *Tuah Packet* as its subcontractor because *Caliber* on its own could not have completed the project due to its lack of expertise in preparing and setting up the UPS backup system, we agree with the respondent to reject this ground of claim. At paragraph 124 of its decision the respondent had noted that the appellant *Caliber* had received a score

of 90.6% on its technical specifications for *Sebut harga A*, which is one of the important winning factors. We can conclude from this observation by the *respondent* that the appellant *Caliber* has the capability to undertake the whole project works on its own. The appellant may of course contract out part of the works as an option to get the best skill expertise level and on economic consideration of saving cost. But we are of the view that the consideration to contract out should be taken after the award of the contract. Learned counsel for the appellant *Caliber* in his written submission dated 22.12.2022 reasoned that *Caliber* had to engage *Tuah Packet* because it did not possess the required technical capabilities or expertise for the work to be done and that *Tuah Packet* was engaged to provide the necessary inputs and information in relation to the works which were legitimately subcontracted when preparing for technical documents for the bid submission. To seek help from another party such as outsourcing for technical information in order to prepare for technical documents' submission is normally done by a party which does not have such capability. But in this instant case the appellant *Caliber* not only sought assistance from *Tuah Packet* for the technical information that it needed to prepare the tender documents for submission to *ASWARA*, but it also had in fact requested *Tuah Packet* to prepare the technical documents that it needed and submitted the documents through a representative of *Tuah Packet*. In return, as the evidence in this case shows, *Caliber* will appoint *Tuah Packet* as its subcontractor if *Caliber* wins the bid. This conduct clearly in our opinion, shows that the two enterprises i.e. the appellant *Caliber* and *Tuah Packet* were collaborating in concerted effort to bid for *Sebut harga A* in such a manner that one of them would stand a chance to win the bid. This fact was noted by the respondent in the paragraph of its decision that we quoted above.

[34] Another argument by learned counsel for the appellant *Caliber* is that *Caliber* and *Tuah Packet* each submitted their bids independently of each other. We find this claim is not supported by the evidence found by the respondent. It is an undeniable fact in this case that *Caliber* and *Tuah Packet* exchanged information with each other in preparing the tender documents and in relation to how they intend to submit the documents. The appellant *Caliber* vehemently denied that it colluded and collaborated with *Tuah Packet* to rig the tender bid, instead it said that it needed *Tuah Packet's* expertise in preparing the technical documents for the tender and that *Tuah Packet* had provided the lowest pricing compared to other service providers. However, the evidence found by the respondent shows that *Tuah Packet* had assisted, and in fact prepared the tender bid for Sebut harga A for the appellant *Caliber*. Since Tuah Packet had provided the technical inputs for Caliber's bid and competed for the same *Sebut harga A* and the two parties have direct contact and knowledge of each other's bid, the bids are not independent and therefore non-competitive. We are of the view that the relationship between the appellant *Caliber* and *Tuah Packet* went beyond the arrangement of a contractor and subcontractor. From the conduct of the two enterprises, i.e. *Caliber* and *Tuah Packet*, in the preparation of the tender bid in this case it is obvious and natural that there were exchange of information and documents between the two parties. It could also be inferred that in preparing the technical documentations for *Caliber* for submission to ASWARA Tuah Packet would have advised *Caliber* on the costings as well. This exchange would give *Tuah Packet* the opportunity to prepare a similar bid in collusion and in a co-ordination with *Caliber* for submission to ASWARA. It is to be noted that it is not normal for a subcontractor to submit a bid in competition with the main contractor or its employer in the same project. In this case it was argued that *Tuah Packet* had submitted an independent

bid for *Sebut harga A* to ASWARA. This act by *Tuah Packet* not only unethical but also against the principle of the relationship between main contractor and subcontractor that we mentioned above. Thus, we do not accept the argument that *Tuah Packet* submitted independent bid for *Sebut harga A* without the knowledge of the appellant *Caliber*. It may be said that the submission was done separately; but the preparation of the tender bid was done in collusion and in concerted practice between the two enterprises to ensure that one of them would have a chance to win the bid. The fact that Caliber and Tuah Packet competed for the same *Sebut harga A* placed them at the same horizontal level. This fact dismisses the argument that they are in vertical arrangement.

[35] Two other points to be noted regarding the claim by the appellant *Caliber* that its relationship with *Tuah Packet* was nothing more than that of employer and subcontractor are these: First, the appellant *Caliber* never disclosed or informed ASWARA about this contractor-subcontractor relationship or that it intended to appoint *Tuah Packet* as its subcontractor for the technical part of the project. This non-disclosure had annoyed ASWARA so much so that at the first kick-off meeting after the appellant *Caliber* had been awarded with the contract the presiding officer from ASWARA called off the meeting when he realised that representative of *Tuah Packet* was also present. The appellant *Caliber* excuse for this was that the present of the representative from *Tuah Packet* was to assist *Caliber* in the briefing to ASWARA on the technical issues regarding the project. Seeking *Tuah Packet* assistance to prepare the technical documents for the purpose of submitting the bid to ASWARA is one thing; but to bring *Tuah Packet* into the kick-off start meeting with ASWARA without informing ASWARA beforehand is another. We find it quite surprising that the appellant *Caliber*, a player in the market which has

several years of experience in this kind of projects could not handle the briefing (including the technical part of it) on its own. We would like to think that at the documentation preparation stage Tuah Packet, which had assisted the appellant *Caliber* with its technical documents, would have briefed the appellant *Caliber* on the technical parts of the project of which *Tuah Packet's* expertise was engaged. That, in our view, would be sufficient for the appellant *Caliber* to handle the briefing to ASWARA on its own. The second point is that throughout the process of preparing the tender bid documents there had been exchange of information and direct contact between the appellant *Caliber* and *Tuah Packet*. This should not have happened in a situation where the bids were submitted independently. The inference and the interpretation that we can draw from this conduct between appellant *Caliber* and *Tuah Packet* is that they had been working closely together to bid for ASWARA *Sebut harga A* in collusion and concerted practice. This perhaps explained why *Tuah Packet* also submitted for the tender bid though it claimed to do so independently. This is to ensure one on them would have a chance to win the contract.

[36] Another point of appeal raised by *Caliber* is that the respondent had failed to prove the existence of a horizontal agreement between *Caliber* and *Tuah Packet* that has the object or effect of significantly preventing, restricting or distorting competition in the market for goods or services to invoke the deeming provision under section 4(2) of the Act. Regarding this ground of appeal, learned counsel for *Caliber* argued that there was no such agreement, and even if there was one it was a vertical agreement that could not be said to have the effect envisaged under section 4(1) of the Act. We are not convinced by this argument. We have said earlier in this decision that the type of agreement -whether horizontal or vertical –

is less important than the objective or effect of the agreement. It is to be remembered that under section 2 of the Act the term "agreement" is defined very widely. It is not confined to the meaning of agreement as understood under the Contract Act of 1950. Even non-enforceable agreement can be taken into consideration for the purpose of the Competition Act 2010. Another observation to be made is that section 4(2) of the Act is couched in a language that is without prejudice to the provision of section 4(1). This means, in our view, that even if it is vertical agreement or any type of agreement at all – whether enforceable or not enforceable – will be caught by the deeming provision under section 4(2) if the object or effect of such agreement is one that is envisaged by section 4(1).

[37] Earlier we mentioned that *Caliber* and *Tuah Packet* had worked in collusion and concerted practice. The EU case of *Schunk and Schunk Kohlenstoff-Technik v Commission* – Case T-69/04 [2008] ECR II-2567 had said that '*a concerted practice constitutes a form of coordination between undertakings which, without having reached the stage where an agreement properly so-called has been concluded, knowingly substitutes practical cooperation between them for the risk of competition*'; and the Court further added that '*Although the requirement of independence does not deprive economic operators of the right to adapt themselves intelligently to the existing and anticipated conduct of their competition, it strictly precludes any direct or indirect contact between such operators with the object or effect either to influence the conduct on the market of an actual or potential competitor or to disclose to such a competitor the course of conduct which they themselves have decided to adopt or contemplating adopting on the market.*" [see paragraph 116 of the Decision]. In this instant case, the direct contact, and the exchange of

information between *Caliber* and *Tuah Packet* is a proven fact. In the EU case that we referred to above, such direct contact it was said to have been unlawful concerted action [see paragraph 117 of the Decision]. In section 2 of the Competition Act 2010, the term 'concerted practice' is defined in the same vein as defined by the EU case referred to above; and in the definition in the Act the '*disclosure'* is done in circumstances where such disclosure would not have been made under normal conditions of competition. There is ample evidence found by the respondent in this case that meets this definition. In this regard we agree with the submission by the respondent that the arrangement between the appellant *Caliber* and *Tuah Packet* went beyond a genuine arrangement for subcontracting work in a project. The submission of tender documents to ASWARA by *Tuah Packet* created a false impression that the bids were independent, separate and competitive. Thus, in our view the respondent has correctly applied the provisions of section 4 of the Act. The co-operation and concerted practice between *Caliber* and *Tuah* Packet have the effect of rigging the bidding process.

[38] Regarding the plea by the appellant that there has been a breach of natural justice and procedural impropriety committed by the respondent, we are of the view that this plea is unsustainable. This plea is grounded on several arguments. Firstly, the respondent had failed to consider material facts and was selective in omitting material facts disclosed and presented by the witnesses for *Caliber* during the interview with the respondent. Secondly, the respondent failed to properly record the witness statement of ASWARA's officials that were interviewed in relation to *Sebut harga A*. Thirdly, the respondent failed to properly record the statement of witnesses for *Caliber* and failed to record the questions raised by the respondent investigation officers during the interview of the

witnesses. Fourthly, the respondent failed to provide the appellant *Caliber* with reasonably sufficient time to access and review documents and evidence relied on the respondent. In reply to this plea, learned counsel for the respondent submitted that the appellant *Caliber* had two occasions or opportunities on 13.3.2019 and 29.5.2019 to access the respondent's files. We noted that the respondent, after their investigation completed, had prepared a proposed decision which the respondent gave to the parties to comment, and the parties can even request for oral hearing before the respondent to raise issues regarding the proposed decision. In our view the offer to question the proposed decision before the respondent making it final, fulfils the requirement of natural justice – that is the allegedly wronged party is given the opportunity to correct whatever errors in and on the record so that the respondent can arrive at fair and correct decision in its finality. Given this opportunity, but if the party concerned did not make full use of it, then the blame is on the party itself. The lack of diligence on its part to scrutinize the proposed decision for any errors cannot be an excuse to say the respondent had breach the rule of natural justice. The blame should lie where it falls.

[39] In the final analysis, the appeal by *Caliber* ought to be dismissed and the decision of the respondent affirmed. Regarding the issue of penalty imposed on *Caliber,* we will address it at the end of this decision together with the other three appellants after we have scrutinized their appeals.

[40] The next three appeals are by Novatis (Appeal No 5/2022), Silver Tech (Appeal No. 6/2022) and Basenet (Appeal No. 4/2022). After careful perusal of the submissions by the respective learned counsels for these three appeals, we decided to address them together. This is because most of the grounds raised in these three appeals are based on similar

arguments. However, where it is necessary to address any issue which is specific and peculiar to the individual appeal, we will do the analysis specifically. But first we will capture the submissions and argument made by counsels in each of the three appeals.

SUBMISSIONS BY NOVATIS and SILVER TECH

[41] *Novatis* and *Silver Tech* were represented by same set of counsels; so, we shall deal with their submissions as one. Firstly, learned counsel for *Novatis and Silver Tech submitted* that the respondent failed to adequately appreciate the subcontracting relationship of the parties and to evaluate the evidence in the context of that relationship. Each of the parties has their respective expertise in IT industry; and it is common for contractors in the IT industry to pool their resources or expertise to fulfill the scope of work required for a project as subcontractor. Therefore, it is unfounded and without basis for the respondent to view the subcontracting relationship between the parties as not genuine but as part of a larger scheme to rig *Sebut harga A*. It was argued that the respondent was wrong in its reasoning that enterprises that are in a genuine subcontracting relationship will not compete against each other in the same tender.

[42] Learned counsel also submitted that the respondent failed to consider the evidence given by *Basenet, Venture Nucleus and Silver Tech* that they did not put in a separate bid for *Sebut harga A*. The three bids in the name of *Silver Tech, Basenet and Venture Nucleus* were put in by *Novatis* who decided unilaterally to do so using the names of the three enterprises without their knowledge. [*Venture Nucleus* was originally one of the appellants, but the appeal was struck off on objection by the respondent on the ground that it was filed out of time]

[43] Next, learned counsel submitted that the respondent has failed to appreciate or completely misunderstood cover bidding or cover pricing. It was argued that the respondent had misconstrued evidence relied upon, mainly the emails between the parties as well as statements given by the witnesses by the parties in the context of subcontracting relationship and therefore wrongly arrived at the conclusion that the parties performed an act of bid rigging by placing cover bids for *Sebut harga A*. Learned counsel referred to us the UK case of *Apex Asphalt and Paving Co Limited v Office of Fair Trading* [2005] CAT 4 which laid down the principle that in *'cover bidding a supplier submits a price for a contract that not intended to win the contract. Rather it is a price that has been decided upon in connection with another supplier that wishes to win the contract. Cover bidding gives the impression of competitive bidding but in reality, suppliers agree to submit token bids that are usually too high'.* It was submitted that there is no direct evidence of collusion between the parties to rig or submit cover bids for *Sebut harga A*. The evidence relied upon by the respondent did not show any discussion or agreement between the parties on the pre-selected loser or winner for *Sebut harga A*. On the contrary, there is evidence given by *Novatis* that the bidding price was decided unilaterally by it. But this evidence by *Novatis* was rejected by the respondent on the ground that the parties had given their implicit acquiescence to allow *Novatis* to use their documents and information to submit bids for Sebut harga A based on established understanding or practice. Learned counsel submitted that the evidence relied on by the respondent to come to this conclusion was the exchange of twelve emails [see paragraphs 140-143, 156-157, 175 and 188 of the Decision] between the parties. But, learned counsel submitted, all the emails were not put to their senders or recipients for verification and the parties were not given an opportunity to explain them during the investigation by the respondent or to comment on

them during the representations. Further, learned counsel submitted that the contents of the emails are not relevant to *Sebut harga A*. They are about collaboration between the parties in other tender biddings for other projects with other government departments. The contents of the emails merely showed one party requesting or providing information or documents to the other party in connection with a tender or bidding exercise. Learned counsel submitted that a closer look at the emails or the documents and information provided through the emails did not show they were about ultimate pricing to be submitted in a bid for *Sebut harga A*. Therefore, learned counsel said the inference or conclusion drawn by the respondent from the emails and the information and documents provided through them was erroneous. He argued that the respondent made an erroneous finding and drew the wrong inference from the circumstantial evidence and failed to demonstrate that the evidence led to no other plausible explanation other than three separate bilateral collusions between *Novatis*, *Silver Tech* and *Venture Nucleus*. He submitted that the respondent had failed to take into consideration all relevant evidence before it that shows there is no any underlying concerted practice between the bidding parties that can prove there was collusion amongst them to rig the bid in *ASWARA*'s *Sebut harga A*. Learned counsel had detailed the various aspect of the evidence that was allegedly misconstrued by the respondent in arriving at its decision, at paragraph 24 to paragraph 26 and paragraph 40 of his written submissions dated 23 December 2022.

[44] Next, and still on the issue of the respondent's failure to appreciate evidence in favour of the appellants, learned counsel submitted that the respondent failed to adequately consider the explanation given that the presentation of company stamps belonging to another party was due to

subcontracting relationships and that the respondent failed to prove a 'concerted practice' between the parties to rig *Sebut harga A*. Learned counsel cited the case of *Compagnie Royale Asturiennes des Mines SA and Rheinzink GmbH v Commission of the European Communities* [Joined cases 29,30/83] which at paragraph 16 of its decision, the Court said:

"16. The commission's reasoning is based on the supposition that the facts established cannot be explained other than by concerted action by the two undertakings. Faced with such an argument, it is sufficient for the applicants to prove circumstances which cast the facts established by the commission in a different light and which thus allow another explanation of the facts to be substituted for the one adopted by the contested decision".

Besides, learned counsel submitted and argued, regarding the above evidential principle that *Novatis*, *Silver Tech* and *Basenet* are not competitors for *Sebut harga A*. Learned counsel argued that each of the parties does not have the ability to meet the entire specifications or scope of work for *Sebut harga A* on its own, hence the collaboration and the subcontracting relationship. He argued that companies maximizing and taking advantage of their synergies does not amount to bid rigging. It is a common knowledge amongst enterprises that depends on government contracts for their business that to participate in a tender or bid for government project they must be registered with MOF and the relevant ministry which they wish to trade their expertise. To have them registered, MOF and the relevant ministry must be satisfied that the enterprises have the necessary skills and expertise to carry out the work they bid for. Therefore, in this case before the appellants submitted their bids for ASWARA Sebut harga A they must have fulfilled this requirement and

must have the expertise to undertake the work that they bid for. Thus, the argument that appellants, individually and on their own, do not possess the necessary expertise to undertake the ASWARA project is hard to swallow.

[45] On the plea of procedural impropriety and infringement of *Novatis* and *Silver Tech* right of defence, learned counsel submitted that the respondent has raised for the first time in its final decision the issue of three separate bilateral agreements between *Novatis, Silver Tech* and *Basenet (and another party Venture Nucleus who was originally another appellant in this proceedings but the appeal was struck off on objection by the respondent for being filed out of time)* without giving the appellants any opportunity to be heard or to respond to the issue during the oral or written representation. In the proposed decision, at paragraphs 90, 115,155(1) and (3) and at paragraph 160, the respondent had dealt with the appellants as one group – the losing group. But in its final decision the respondent raised the issue and made findings of fact of three separate bilateral agreements between the parties and treating them as acting individually and not as a group – (see paragraphs 96,138 and 226 of the respondent final Decision). Learned counsel argued that the respondent has shifted the goalpost in its final decision from its original position in the proposed decision when it based its findings against the appellants grounded on the three separate bilateral agreements of which the appellants was not given the opportunity to make known their views and representation on the issue. Learned counsel submitted that this departure by the respondent from its proposed decision and acting on 'fresh evidence' raised in the final decision without giving the appellants the opportunity to explain has severely prejudiced and infringed the appellants right of defence. Learned counsel draws our attention to ***EC's***

Notice on Best Practices for the conduct of proceedings which contain a principle that '*should the commission intend to depart in its final decision from the elements of fact or of law set out in the Statement of Objections to the disadvantage of one or more parties or should the commission intend to take into account of additional inculpatory evidence, the party or parties concerned will always be given the opportunity to their views known thereon in an appropriate manner'.*

[46] The 'fresh evidence' which the appellant alleged the respondent had relied on for its finding are the twelve (12) new emails which learned counsel has listed in paragraph 63 of his written submissions dated 23 December 2022. Prior to 'discovery' of these 12 emails, the respondent relied largely on the statements given by the employees of the parties and on two emails dated 3.8.2016 and 10.8.2016 to substantiate the charge against the appellants.

[47] Riding on the plea and argument that the parties collaborated because none of them individually could fulfil the requirements of the work scope *of Sebut harga A* on its own, learned counsel also raised the plea that the respondent had wrongfully rejected the appellants request for relief of liability under section 5 of the Act. Section 5 of the Act is a provision that allows an enterprise to be excused from infringement of section 4 and therefore not found liable for infringement if it can fulfill the four economic conditions stated in section 5.

[48] In response to the above submissions by appellants *Novatis* and *Silver Tech*, learned counsel for the respondent submitted and maintained that there was an established bilateral understanding and/or concerted practice between the appellant *Novatis, Silver Tech* and *Basenet* and *Venture Nucleus* where they used each other's company name in bidding

and prepared documents for one another. Learned counsel submitted that the respondent discovered, and relied on, an overwhelming number of communications (emails, telephone conversations or otherwise) between the parties; and in these communications the respondent discovered the parties supplied company's confidential information (including latest bank statements) to *Novatis* who then used this information to fill in and submit bids for the parties. Learned counsel further submitted that the respondent also discovered parties' draft and/or finalized bid documents in the laptop of Mohamad Hanis, an employee of the appellant *Novatis.* At paragraph 6 of his written submission in *Novatis's* appeal learned counsel for respondent states that the intention and conduct of the parties remain the cornerstone of the respondent's findings. To support this contention, learned counsel alluded to several evidence found by the respondent in particular –

(1) There is direct admission by the appellant's personnel that he had consulted with the parties on the cover bids and this amounts to an anti-competitive agreement between the appellant and the parties.

(2) Communication between the appellant and the parties in the form of emails where confidential information relating to the bids was exchanged.

(3) Bid documents found on the appellant's laptop that do not belong to the appellant.

(4) The appellant's staff submitted the bid documents (inclusive of financial and technical submissions – which are confidential and sensitive) to ASWARA for the appellant and the parties.

(5) Quid pro quo agreements between the appellant and the parties in the event either party wins the bids.

(6) The agreement to allow the use of each other's company name between the appellant and the parties in bid submissions.

(7) The appellant submitted its documents with the lowest price in comparison to the other parties to maximise its chances of winning *Sebut harga A*.

Learned counsel for the respondent argued that the cumulative effect of the above evidence meets the requisite facts under section 4(2) of the Act that justifies the invocation of the deeming provision. Leaned counsel for the respondent described the contentions by the appellant that it is common for contractors in the IT industry to pool their expertise to fulfil the scope of work of a contract and that the respondent had failed to consider consistent evidence by the parties that they did not put in a separate bid on their own and the explanation by the appellant that it unilaterally decided to put in three (3) more bids as a selective way of describing the relationship between the appellant and the parties. Learned counsel for the respondent contended that the evidence collected during the investigation clearly showed that there was a common intention to rig Sebut harga A. Learned counsel for the respondent submitted that the appellant's (i.e. *Novatis*) personnel, Hanis, admitted having consulted the parties and put in a cover bids on behalf of the parties for *Sebut harga A* and that the bid documents submitted by the appellant Novatis on behalf of the parties contained documents that only the respective parties would have in ordinary circumstances. He further argued that there is no reason for the appellant to have the parties bank statements, MOF's Business Registration Certificate or the parties Bumiputra Certification, if they were merely in a subcontracting relationship. Learned counsel for respondent referred to the decision of UK Competition Appeal Tribunal in *Makers UK*

Ltd v Office of Fair Trading [2007 CAT 11] that lay down the principle that the Commission can draw inferences from the available evidence if there is no direct evidence to show concerted practice and collusion to stage rigging on the bid. *Makers* also involved three parties' dealings and exchanged information like the case before us. In that case the Tribunal said that obtaining a quotation by *Makers* when both parties knew that the other was involved in the bidding process infringed against the principle that each undertaking must determine independently the policy it intends to adopt on the market. The Tribunal went further to say that *Aspalthic* (one of the other parties in *Makers's* case) should not have given the information to *Makers* and *Makers* should not have received and used them. Learned counsel for respondent also referred to us the case of *People's All India Anti-corruption and Crime prevention society v Usha International Ltd & Others* Case No. 90 of 2016. In that case India Competition Commission stated that there is rarely direct evidence of action in concert and in such situation the Commission must determine whether those involved in some dealings had some form of understanding and acting in co-operation with each other. The Commission in that case also said that in most cases, the existence of an anti-competitive practice or agreement must be inferred from several coincidences and indicia, which, taken together, may in the absence of another plausible explanation, constitute evidence of an infringement of the competition rule. Likewise, in the appeal before us Hanis, the sale manager of the appellant, in his statement given to the respondent on 9.7.2018 had stated that the appellant was interested to bid for *Sebut harga A* and he was directed by his superior Yusri Ton Alias to contact the other appellants *Silver Tech* and *Basenet* and two other parties (not relevant for our purpose) to find out whether they also interested to participate. And Hanis did just that – he contacted the relevant parties. From the evidence

collected, this is the first communication that took place between the parties regarding the bid for *Sebut harga A*. According to Hanis's statement of the same date, the other parties indicated to him that they have no objection for the appellant *Novatis* to use their company's name to bid for the contract of *Sebut harga A*. Regarding the argument that the appellant *Novatis* was acting unilaterally, learned counsel for the respondent submitted that in addition to the overwhelming evidence found by the respondent that all three appellants had colluded to rig the bid for ASWARA *Sebut harga A*, unilateral conduct can still constitute an agreement if acquiesced tacitly as shown in the *Bayer* case. He added that in absence of tacit acquiescence or even in the case of one party unilaterally cheating the other parties, an anti-competitive agreement and concerted practice can still exist so long parties pursued a single, common and continuing objective to distort or restrict competition. Learned counsel for the respondent submitted that on the evidence, the appellant *Novatis* played an active role in coordinating the bid rigging for *Sebut harga A* and really has no excuse to absolve itself from any liability of infringement.

[49] On the issue of breach of natural justice and procedural impropriety, learned counsel for the respondent submitted that the appellant's right to be heard was not compromised. He argued that there was no shifting of goalpost by the respondent as claimed by the appellants. The issue and essence of the bilateral agreements, he said, were already captured in the proposed decision by the respondent. He added that the respondent is permitted to reassess and restructure its finding in the proposed decision based on the evidence and objection by the parties and that the final decision of the respondent need not be an exact replica of the proposed decision. He supported this proposition by citing the EU case of *T-588/08*

Dole Food v European Commission and referred to us paragraph 335 of that case the gist of it is the above stated principle.

[50] Another issue related to the plea of procedural impropriety raised by the appellant is the issue of the composition of the respondent that made the final decision. The appellant said that some of the members of the respondent that made the final decision after hearing all representations and objections by the parties on the proposed decision were not part of the panel that heard the appellant's oral representations; and therefore, validity and lawfulness of the final decision is tainted. Learned counsel for the respondent responded to this challenge by submitting that there is no legal requirement for the panel who heard the appellant's representation to be the same panel to issue the final decision. Thus, learned counsel said that the change in some the panel members does not in any way negate the validity and lawfulness of the respondent's decision. Furthermore, learned counsel for the respondent submitted that the change in the members of the panel of the commission is allowable under section 9 of the Competition Commission Act [*Act 713*]. He added that Item 8 (a) of the Schedule of Act 713 provides that any vacancy or defect in the constitution of the respondent is not a ground for the appellant to challenge the validity of the Decision. We noted from the record that five (5) out of eight (8) members of the respondent including the chairman attended and heard the appellants' oral representations. In any event, learned counsel for the respondent said, the appellants had submitted their written representations to the respondent and the full transcripts of the appellants' oral representation sessions were also available to all members of the respondent.

[51] The appellant *Novatis* also argued that the appellant's right to defence was undermined because the respondent failed to properly record the content of the interviews conducted on its employee Hanis and refused to provided transcripts. Regarding this allegation, learned counsel for the respondent replied that the procedure followed by the respondent is that all interviewees are required to make express declaration that the information they provided is true and accurate and complete and that they are not aware of any other information which would make the information provided misleading or untrue. Learned counsel for the respondent also submitted that prior to the signing of the written statements recorded and given by the interviewees, all interviewees were given time to review and verify the accuracy of the information and the statements made. This procedure, he said, was also followed in the case of Hanis's recorded statements. Learned counsel for the respondent also submitted that the statements and evidence that formed the basis of the proposed decision were given to the appellants when the respondent served the proposed decision on the appellants; and the appellants were also given access to the non-confidential documents in the respondent's file at the respondent's office. Thus, it was argued that the appellants have sufficient documents for it to comment on the respondent's finding on an informed basis.

[52] Regarding the appellants' complaint that the interview transcripts were not provided to them, learned counsel for the respondent submitted that the transcripts were not used by the respondent in arriving at its decision. Further he said the issue of non-provision of the interview's transcript were argued and discussed in the *Tribunal Case No. 1,2 and 3 Of 2022 (Langkawi Ro-Ro Ferry Services Sdn Bhd & 4 Others V Competition Commission,* and the Tribunal in that case rejected the

appellant's argument that there was procedural impropriety in the respondent's failure to provide transcripts of the interviews.

[53] Regarding the argument by the appellants that the respondent had unreasonably rejected its undertaking pursuant to section 43(1) of the Act, learned counsel for the respondent argued that it is the discretion of the respondent either to accept or reject the undertaking given. He also told the Tribunal that the appellants undertaking was only offered after the respondent had issued the proposed decision. Learned counsel further submitted and argued that the late offer of the undertaking on the terms proposed by the appellants was a calculated move to exonerate the appellants because by the time the appellants made the offer (which is without admission of liability) the respondent had gathered sufficient evidence to establish infringement. It is *fait accompli*.

[54] On the issue of the respondent's failure to consider the relief of liability under section 5 of the Act, learned counsel for the respondent submitted that the appellants bear the burden to prove that they were entitled to the reliefs sought. This, he said, was decided in the *Langkawi Ro-Ro Ferry Services* case (supra). Learned counsel added that in this case the appellants had failed to prove that they have fulfilled all the conditions under section 5, which is cumulative, to entitle them to the relief from liability of infringement.

[55] Before we consider the respondent findings on the financial penalty, we must consider the arguments specific to the appellant *Basenet*. As the record shows, the respondent had grouped the appellants alleged in committing the infringement in two groups. Group No. 1 is the winning group comprising of the appellant *Caliber* and three others; and Group

No. 2 is the losing group comprising of the appellants *Novatis, Silver Tech, Basenet* and two others.

[56] Regarding the appeal by the appellant *Basenet*, in addition to the grounds raised by *Novatis,* and *Silver Tech*, the appellant *Basenet* also challenged the validity of the respondent decision on the ground that the respondent erroneously considered purported conduct that had taken place long after the alleged period of infringement. This purported conduct was said to have taken place between 9 months and 1 year and 8 months after the alleged period of infringement. It is undisputed that the alleged period of infringement was from 18.7.2016 until 2.8.2016. Learned counsel for *Basenet* submitted that there were two sets of conduct which arose from the exchanged of emails and attachments between the appellant *Novatis* and *Basenet*; and which the respondent had categorized as '*conduct one*' and '*conduct two'*.

[57] *Conduct one* consists of e-mail thread and attachments from *Novatis* to appellant *Basenet* dated 10.5.2017 to 15.5.2017 – over a period of 9 months after the alleged period of infringement. *Conduct two* consists of e-mail thread and attachment between *Novatis* and the appellant *Basenet* dated 7.3.2018, 12.3.2018, 18.3.2018 and 19.3.2018 – over a period of 1 year and 7 months after the alleged period of infringement. There is another set of e-mail thread and attachments between *Novatis* and *Basenet* dated 21.4.2018 – over a period of 1 year 8 months after the alleged period of infringement; this set of e-mail and attachments the respondent labelled it as '*conduct three*.' For ease of reference all three sets of conduct stated above will be referred to as '*the said purported conduct'* collectively. And based on the said purported conduct, the respondent concluded that there was 'an existing

understanding between the parties to rig the bid for ASWARA *Sebut harga A*.

[58] Learned counsel for *Basenet* argued that this finding of existing understanding between the parties (ie between *Basenet, Novatis* and *Silver Tech*) is absurd and without merit. This is because, he argued, the said purported conduct on which the respondent based its findings was conduct that occurred long after the end of the infringement period; and therefore, cannot be sustained and is erroneous. Accordingly, it was submitted that had the respondent excluded the said purported conduct from its consideration, the respondent would not have the evidence to make such finding and would not be able to establish any bid rigging agreement between the appellant *Basenet* and *Novatis* and the other parties. Learned counsel for *Basenet* further submitted that the appellant did not in fact participate or had knowledge that its name was being used in the bid for *Sebut harga A*. In this regard learned counsel submitted that the respondent had failed to appreciate that the preparation of the forged quotation purportedly implicating the appellant. In fact, he submitted, forged quotation was prepared unilaterally without the knowledge of the appellant by Hanis, an employee of *Novatis.* This is evidenced by Hanis's own statement given to the respondent. Relating to the so-called forged quotation, learned counsel for *Basenet* submitted that Hanis of Novatis had admitted to the preparation of the forged quotation without the knowledge and consent of the appellant *Basenet*. The letterhead of the appellant used in bid documents was outdated letterhead of the appellant and the purported company stamp of the appellant used in the forged quotation is not the appellant's actual company stamp. Further, learned counsel for *Basenet* submitted that the signatures of the appellant's director and purchasing coordinator were forged. Also, he said, the

appellant's company name and the appellant contact number were wrongly stated. There are also glaring factual errors committed by the respondent, said learned counsel for *Basenet*. He submitted that the respondent had stated at paragraph 169 of its final decision that the address of the appellant *Basenet* as stated in bank statement attached to the e-mail correspondence dated 10.8.2016 corresponded to the appellant address as stated in the *Borang Kehadiran Taklimat/Lawatan Tapak*. However, learned counsel for *Basenet* submitted, in the *Senarai Kehadiran Taklimat Lawatan Tapak* dated 25.7.2016 the address of the appellant *Basenet* was not stated at all. He added that the *Senarai Kehadiran Taklimat Lawatan Tapak* which is dated 25.7.2016 precedes the e-mail correspondence dated 10.8.2016. Therefore, he submitted the conclusion by the respondent as to the address of the appellant *Basenet* is erroneous.

[59] Learned counsel for *Basenet* also submitted that the respondent had failed to appreciate the evidence that upon discovery of the 'forged quotation' the appellant had made a police report. Further, he added, the respondent had taken into consideration extraneous matters to come to a finding that there was an agreement to engage in bid-rigging vis-à-vis *Sebut harga A*. Learned counsel submitted that the respondent had relied on evidence of co-operation between the parties in other projects that took place post infringement period in its conclusion on the said three purported conducts. Learned counsel for the appellant *Basenet* also submitted that the respondent had misapplied the principles in *Pre-Insulated Pipe Cartel* (Commission Decision of 21.10.1998 relating to a proceeding under Article 85 of EC Treaty, Case No. IV/35.691/E-4) and *People's All India Corruption and Crime Prevention Society v Usha International Limited & Others (Competition Commission of India Case*

No. 90/2016). Learned counsel argued that in *Pre-insulated case* the agreement in question corresponded with the subject matter of the infringement whereas in the present appellant's appeal the said purported conducts considered by the respondent did not correspond with the subject matter of the infringement which is *Sebut harga A*. Meanwhile in *Usha International case* the Competition Commission of India found that there was insufficient evidence, like in the present appeal, to find Usha International guilty of infringement.

[60] In reply to the submission by the appellant *Basenet*, learned counsel for the respondent submitted that there is ample evidence to support the findings by the respondent as to the existent of agreement or co-operation between the parties to rig the bid for *Sebut harga A*. Learned counsel submitted that the managing director and shareholder of *Basenet* by the name of Rosli, had stated in his witness statement dated 4.7.2018 there was an arrangement or understanding between *Basenet* and *Novatis*. But we noted also that in the same witness statement Rosli had said that the arrangement to use his company's name (ie *Basenet*) was not applicable to ASWARA's tender. In our view this statement does not make any material difference because Basenet's bid documents were submitted together to ASWARA. Learned counsel further submitted that Rosli's statement was corroborated by Hanis's statement of *Novatis* who admitted in his statement dated 9.7.2018 that *Novatis* was interested to bid for ASWARA's Sebut harga A and he received instruction from his superior Encik Yusri Ton Abas to consult appellant *Silver Tech, Basenet* and two other enterprises whether they were interested in joining the bid. Hanis also stated in his statement of the same date that the enterprises that he consulted informed him that '*mereka tidak mempunyai halangan untuk Novatis Resources menggunakan nama Syarikat mereka sebagai*

untuk menyertai tawaran sebut harga tersebut'. Learned counsel also informed the Tribunal in his written submissions dated 23.12.2022 at paragraph 62(c) that the respondent, during its investigation, had discovered soft copy of the bid documents on Hanis's laptop which contained sensitive and confidential information such as appellant's letterhead, MOF business registration certificate, bank statements and appellant's company profile and many others. Learned counsel submitted that these sensitive and confidential information/documents should not have been in possession of Hanis; by its very nature only the appellant should have these information/documents. Learned counsel for the respondent submitted that the evidence of an existing understanding or agreement to allow *Novatis* to prepare and submit a bid for *Sebut harga A* using the appellant's company name is further supported by the appellant and *Novatis* quid pro quo agreement. Learned counsel for the respondent pointed out to the Tribunal that Hanis, in his statement given to the respondent on 9.7.2018 during investigation, had shown that the parties had a standing agreement to pay kickbacks, commissions, fees and/or to appoint the losing parties as subcontractor for allowing to use each other's names in tender exercises [see paragraphs 9 and 10 of Hanis's statement]. Learned counsel also pointed out that Hanis's statement was supported by Rosli of *Basenet* in his statement dated 4.7.2018 at paragraph 31.

[61] Regarding the e-mail thread and correspondence that relates to the three said purported conducts relied upon by the respondent to find the appellant guilty of committing an infringement under section 4 of the Act, learned counsel for the respondent submitted, as we understood it, that though the said purported conduct were post infringement period, it shows

that parties were in continual understanding to collaborate in other projects.

[62] We noted that when Hanis of *Novatis* prepared and submitted the bid documents for all the appellants (except *Caliber*) he had priced the bid for *Novatis* as the lowest at RM435,000.00 followed by the appellants *Basenet, Venture Nucleus* and *Silver Tech* at RM445,000.00, RM452,000.00 and RM463,000.00 respectively.

[63] Regarding the police report by the appellant *Basenet* on the alleged forgery, learned counsel for the respondent submitted that it is a mere 'cover report' lodged for record purposes only and not intended for investigation to take place. Learned counsel further argued that the appellant continues to communicate and work with *Novatis* on other projects after lodging the police report. To date, learned counsel submitted, there are no updates on the police report, or any suit initiated, or actions taken by the appellant *Basenet* following the police report.

[64] In addition to the above reply to the submissions by the appellant, learned counsel for the respondent has also replied point by point in his written submissions dated 23.12.2022 to all the issues raised by the appellant Basenet. We do not think that it is necessary for us to address these details here. All these can be referred to in the written submissions.

[65] The final point of appeal by all the four appellants is the financial penalty imposed by the respondent. We will address this issue for all the four appeals towards the end of this decision. For now, we will consider all the submissions by the parties as we have summarized above and give our opinion on it.

[66] In our opinion we must consider two main issues. The first issue is whether there exists an agreement amongst the appellants to rig the bid for *ASWARA Sebut harga A* and related to this issue is whether the nature of the relationship between all the three appellants namely *Novatis, Silver Tech* and *Basenet* is that of contractor and subcontractor or otherwise.

[67] All the three appellants denied that there exists an agreement between them to rig the bid for ASWARA's *Sebut harga A*. The three appellants claimed that the relationship between them is more of a contractor and subcontractor or at most they said they were cooperating with each other to complete the project. On the evidence collected and considered by the respondent we are of the view that there is an agreement amongst the three appellants and this agreement is an agreement to rig the bid for *ASWARA Sebut harga A*. This agreement may not be the kind of agreement that fulfils all the requirements for a valid and enforceable agreement under the Contract Act 1950. But it does not matter; because for the purpose of section 4 of the Act even an unenforceable agreement can lead to an infringement if the object of the agreement is to significantly distort the fair competition in the market. Scrutiny of the agreement amongst the three appellants leads us to believe that the relationship between the parties to the agreement is not one of a contractor and subcontractor. We are of the view that this claim of being in the relationship of contractor and subcontractor is not supported by the evidence even though each of the three appellants had submitted an individual bid for *ASWARA*'s *Sebut harga A*. However, there was no denial by any of the appellants that all the bids that were submitted were prepared by one party that is by *Novatis* – to be specific by Hanis of *Novatis.* Because of this fact the three bids are not independent and therefore are not competitive. Having carefully reviewed the whole final

decision by the respondent and the evidence considered by it regarding the claim of contractor and subcontractor relationship, we are of the view that the respondent had reasonable grounds to reject this claim.

[68] In our opinion *Novatis* was the main instigator, and it did so without any objection or protest from *Silver Tech* or *Basenet*. It is uncontroverted evidence in the form of Hanis's statement to the respondent, which was referred to above, that *Novatis* was interested to bid for *ASWARA's Sebut harga A*. In his statement Hanis had said that he told his superior and he was instructed to contact *Silver Tech* and *Basenet* and another party to find out whether they would like to join in the bid for *ASWARA's Sebut harga A*. According to Hanis's statement none of the enterprises he contacted had any objection; instead Hanis said *Silver Tech* and *Basenet* told him that they did not mind for *Novatis* to use their company names in making the bid. Much more than that they even supplied, at the request of Hanis, information and documents, some of which are confidential and sensitive documents and information as submitted by learned counsel for the respondent, to Hanis to enable and assist the latter to prepare the bid for ASWARA *Sebut harga A*. The appellants *Silver Tech* and *Basenet* therefore cannot claim that they had no knowledge of Hanis's action in preparing and submitting the bids for *Sebut harga A* for all the appellants. They never raised any objection even at the time when Hanis submitted the completed bid documents to *ASWARA*. In the circumstances it can be reasonably concluded that *Silver Tech* and *Basenet* had tacitly acquiesced, as submitted by learned counsel for the respondent, to the actions taken by Hanis to bid for all the appellants. We have noted above that in preparing the bid Hanis had quoted the lowest bid for *Novatis* followed by *Silver Tech* and *Basenet.* In our opinion this was deliberately done by Hanis with the silent consent of *Silver Tech* and *Basenet* to

ensure *Novatis* would stand a chance to win the bid. If Novatis wins they would be able to share the fruits of that win.

[69] It is also important to note that there is no evidence to show or that can be inferred from that the appellant *Silver Tech* and *Basenet* had distanced themselves from the actions taken by Hanis of *Novatis,* and they also never informed *ASWARA* that they did not submit or participate in the bid process. Neither *Silver Tech* nor *Basenet* publicly declared that they did not participate in the bids that were prepared by Hanis from *Novatis*. It is also not in evidence that any of the appellants had disclosed to *ASWARA* that they were in contractor and subcontractor relationship for the project *Sebut harga A*. We also agree with the submission by learned counsel for the respondent that if the appellants were in a genuine subcontracting relationship, they would have submitted a joint bid as a consortium leveraging on the alleged synergy and cross expertise. Instead, in this instant case each of the appellants had submitted a separate bid but not independently because all the bids submitted were prepared by one person – by Hanis from *Novatis* with tacit acquiesce by *Silver Tech* and *Basenet*.

[70] Regarding *Basenet's* argument that it had lodged a police report on the discovery of the alleged forgery, this comes well after the respondent had commenced investigation into the alleged infringement. Learned counsel for the respondent submitted that this police report is a 'cover report' – a red herring done with intention to create a diversion from the real issue – which is that the parties were in concerted practice and colluded with each other to rig the bid for *Sebut harga A*. We are inclined to agree with the learned counsel for the respondent that the police report by *Basenet* is a 'cover report'. The conduct shown by *Basenet* after the lodging of the police report indicates that it is not serious in making *Novatis*

or *Novatis's* employee Hanis accountable for so called 'forged documents'. There was no follow up on the police report as submitted by learned counsel for the respondent and *Basenet* also has not commenced any civil action either against *Novatis* or Hanis to show its serious concern about the 'forgery'. Also, to be considered is the fact that *Basenet* did not make the police report at the first opportunity available. After the investigation and the completion of the proposed decision, *Basenet* and all other appellants were given the opportunity to review and scrutinize the proposed decision and were allowed to make representations – written and oral – to the respondent. Yet at that point of time when it could and should have discovered the 'forgery' but *Basenet* chose not to do anything until very much later. More importantly, is the 'forgery' really a forgery? The evidence shows that *Basenet* and all the other appellants, had tacitly acquiesced to Hanis to prepare the bids for *Novatis* as well as for the other appellants, and had even assisted Hanis by supplying the company's information and sensitive documents. In this scenario we may infer that *Basenet* implicitly agrees to Hanis being its agent to prepare the bid for them.

[71] Regarding the complaint as to the said purported conduct which *Basenet* said were events post infringement period and should not be taken into consideration by the respondent, we agree that the three said purported conducts were related to post infringement event and involving other projects in which the appellant *Basenet* was in co-operation with *Novatis.* However, we do not agree with the submission by learned counsel for *Basenet* that without this evidence of the said purported conduct the respondent would not have any evidence to find *Basenet* in infringement of section 4 of the Act. There is other evidence – stronger evidence – on which the respondent can rely to reach the conclusion that

it did in this case. These evidence, is the statements by the witnesses who were officers and employees of the appellants. We noted from the records and the findings by the respondent that the witnesses in their statements corroborated and lend support to one another as to the facts necessary to support the findings by the respondent.

[72] Regarding the plea of procedure impropriety and denial of appellants legal rights to defence, we are of the view that this plea has no merit. Earlier we discussed the procedures followed by the respondent in their investigation and the process leading to their final decision. We noted particularly that all the appellants, *Basenet* included, were given the proposed decision to review and to make representations on it. Thus, they were given the opportunity and they were heard. With respect to the issue raised by the appellants that the respondent had 'shifted the goalpost' in coming to its final decision without giving the appellant the opportunity to comment on the evidence considered by the respondent in its 'shifting of the goalpost' our view is that there is no 'shifting of the goalpost' as alleged. In our opinion the respondent, after hearing the representations from all the appellants and after reviewing the proposed decision, thereafter, simply restructured and fine-tuned its proposed decision before making it a final decision. In doing so the respondent, in our view, had not taken into consideration new evidence that was not made available to the appellants. The respondent in our view considered only evidence already available and considered in the proposed decision and all the comments made by the appellants in their representation. This is the inherent rights of the respondent to do so.

[73] The second main issue we need to consider is whether there is reasonable and proper appreciation of the evidence of facts found by the respondent. The first point we want to make on this issue is that as a

quasi-judicial body the respondent, so is this Tribunal, is not strictly governed by the rules of evidence of the Court of Justices. This is clear and obvious from the wordings of section 57 of the Act. The primary task of the respondent and this tribunal is to find facts in any given case that would help to promote economic development by protecting the process of competition. In relation to the issue of infringement under section 4 of the Act, any finding of fact to the contrary in any given case will lead to a finding of infringement which will attract a financial penalty based on the formula prescribed by the Act. There is nothing in the Act that requires the respondent or this Tribunal to follow and be governed by the Evidence Act 1950 in dealing with and treating the evidence received by it. The respondent and this Tribunal may receive and accept all evidence that is relevant including hearsay evidence that is reasonably credible to prove a fact. However, in receiving and accepting the evidence the respondent and this Tribunal must act fairly and observe the rules of natural justice. Though the respondent is not bound by the Evidence Act of 1950, the respondent has a duty to scrutinize the evidence it receives before accepting and be satisfied that the evidence is reasonably credible to prove a fact in issue. In other words, the respondent may receive and accept any relevant evidence that is credible and passed the reasonable man test; and reject evidence which do not meet this standard.

[74] In the instant case, we find the respondent had applied this standard and had given proper appreciation of the evidence before it in making its findings. We noted that the respondent had relied heavily on the witness statement by Hanis to conclude that there exists an agreement between the appellants and the appellants were not in genuine contractor and subcontractor relationship. We find nothing wrong with that. The respondent may use and rely on any evidence which in its assessment is

credible. It may select which evidence to focus on and which evidence can be treated as supporting and corroborating evidence. Furthermore, we find that the respondent was satisfied that Hanis evidence was well corroborated by statements from other witnesses some of whom were from the senior officials and employees of the appellants. Other than witness statements, the respondent also had other evidence in the form of company records, documents, e-mail correspondences and records/documents on Hanis's laptop.

[75] The records also show that the respondent had considered and given proper evaluation of all the evidence which the appellants said to be in their favour. We have alluded to some of this evidence above and gave our comments. For example, the appellants said that the respondent did not appreciate the fact that Hanis had said in his witness statement that he alone prepared all the bids and submitted them. Learned counsels for the appellants said the respondent unreasonably rejected this evidence. In our view and having scrutinized the respondent's reasoning on this rejection, the respondent had good ground not to give much weight to this piece of evidence because Hanis also said in his witness statement that he contacted the appellants to find out whether the appellants would like to join in the bid. The appellants, as we have pointed out earlier and above, indicated to Hanis that they did not mind Hanis preparing the bids and used their company's name and company's stamp. Another example is the issue as to the address of the appellant Basenet appearing in the *Borang Kehadiran Lawatan Tapak* and did not appear on the *Senarai Kehadiran Lawatan Tapak*. It is to be noted that the two aforementioned documents are two separate documents. One is *Borang* or *Form* for attending the site visit. Normally this form is filled in by the visitors or contractors with all its details including the office address and other

information that is required in the *Borang* or the *Form*. The other document is the list of all visitors or contractors who attended the site visit. This document is normally prepared by the site owner or its manager to record the name of all the visitors or contractors who attended on a single list. It is reasonable to infer what is listed in the *Senarai Kehadiran* are the names of those presence at site only with no other details as in the *Borang Kehadiran Lawatan Tapak*. We do not think this issue has significantly affected the correctness of the respondent decision. The more important thing to note is that the appellants did not challenge the details in the *Borang Kehadiran Lawatan Tapak* or the list of names of those listed in the *Senarai Kehadiran Lawatan Tapak*. This means that the appellants' presence at the site is a fact that is not in dispute.

[76] As we have said earlier, the primary function of the respondent is to look for facts that show an infringement under section 4 and to look for evidence that is credible and safe to accept that can prove those facts. In this regard the respondent would have to undertake a tedious process of shifting through the mountain of evidence collected and consider and weigh each piece of the relevant evidence and test its veracity by looking for corroborative evidence before accepting it as evidence that proves a fact which needed proof. However, in doing so the respondent need not strictly adhere to the rules of evidence or the Evidence Act 1950. But the respondent must act judiciously and in fairness to all parties. Therefore, in the final analysis, we of the opinion that this complaint that the respondent had not given proper and adequate consideration to the evidence presented by the appellants has no merit.

[77] The final issue in this appeal is the financial penalty imposed on the appellants. The respondent found the appellants guilty of bid rigging in ASWARA *Sebut harga A* and has imposed fines for bid-rigging among the

appellants. The appellants coordinated their bids that gave the pretence of competition.

[78] All the appellants submitted that the penalty imposed is excessive and that the respondent did not apply the formula for imposition of financial penalty correctly.

[79] The provisions for financial penalty for infringement under the Act is section 40(4) read together with section 40(1)(c) of the Act which provides that a financial penalty shall not exceed ten percent (10%) of the worldwide turnover of an enterprise over the period during which an infringement occurred. However, the section does not specify details of how this formula is to be applied and its method of calculation. The determination of the amount of a financial penalty is given by MyCC's Guidelines on Financial Penalty.

[80] The imposition of the financial penalty should reflect the seriousness of the infringement and deter anti-competitive practises that lead to an infringement of the Competition Act 2010. The Guideline does not elaborate on the method to calculate and derive the penalty to be imposed. In an earlier case involving the infringement of Section 4(2)(a) of the Competition Act 2010 by *Twenty-Four (24) Ice Manufacturers of Kuala Lumpur, Selangor, and Putrajaya,* the computation of financial penalties by the respondent consists of the following steps:

- Step 1: Determine the basic figure of financial penalties as a proportion of the relevant turnover earned during the infringement period.

- Step 2: Increase the financial penalties by considering aggravating factors (if any); and decrease the financial penalties by considering mitigating factors (if any).
- Step 3: Verify that the computed financial penalties are no more than 10% of the enterprises' worldwide turnover.

[81] Between them, the appellants raised several grounds as to why the amount of the financial penalty was excessive. In the case of *Silver Tech*, it was argued that the respondent had erroneously and unreasonably adjusted upwards the relevant turnover using a proxy figure. *Silver Tech* submitted to the respondent its total revenue from the provision of UPS and back-up data in 2016 totalling RM109,433.97 as its relevant turnover, and its total worldwide turnover in 2016 totalling RM1,404,949.00. But the respondent unreasonably rejected the relevant turnover amount of RM109,433.97 on the ground that this amount represents 7.79% of *Silver Tech's* worldwide turnover of RM1,404,949.00. Instead, it was submitted that the respondent arbitrarily applied a proxy figure of 10.56% to *Silver Tech's* worldwide turnover of RM1,404,949.00 to impute a higher relevant turnover of RM148,362.61 to *Silver Tech.* It was submitted that this was wrong. Firstly, proxy figure can only be used when the relevant turnover is zero as decided in *Kier Group OLC & 9 Ors v Office of Fair Trading [2011] CAT 3*. Secondly, the turnover of RM109,433.97 represents *Silver Tech* turnover earned from providing UPS and backup services in 2016; and by imputing higher relevant turnover of RM148,362.61 the respondent has unreasonably inflated *Silver Tech* relevant turnover. This is inconsistent with the respondent's position that the relevant turnover will be confined to the turnover in the focal services provided to ASWARA. It was also submitted that using worldwide turnover (instead of relevant turnover) to calculate the base figure is inconsistent with UK and

Singapore position as well the respondent's own practices in other cases. Furthermore, the respondent cannot count the infringement period as a full year when the infringement period is only 16 days. This is contrary to the respondent's Guidelines on Financial Penalties which provides that whereby a period of infringement is less than six months, such a period will be counted as half a year. It was also submitted that the respondent failed to consider mitigating factors in favour of *Silver Tech*.

[82] In the case of *Novatis*, the enterprise submitted RM717,349.00 as its total revenue from the provision of UPS and back-up data in 2016 and RM26,188,723.17 as its total worldwide turnover in 2016. In its decision, the respondent rejected *Novatis's* relevant turnover of RM717,3495.00 on the ground that this amount represents 2.74% of *Novatis'* worldwide turnover but instead applied a proxy figure of 10.56% to *Novatis's* worldwide turnover of RM26,188,723.71 to derive a higher adjusted relevant turnover for UPS and back-up data of RM2,765,529.22. The proxy figure of 10.56% was used to calculate the penalties for the other enterprises. No clear justification was given on the basis and reason why a proxy figure has been used in this case to derive a higher relevant turnover to impose the penalty. A proxy figure can be justified only when the relevant turnover is zero.

[83] Learned counsel for *Basenet* also raised the issue of the respondent's failure to consider mitigating factors as well as the fact that the infringement period was short. In addition, he added, the involvement of the appellant was minimal with low degree of fault.

[84] For the appellant *Caliber*, learned counsel submitted that the respondent in law and in fact, failed to adhere to its own Guideline on Financial Penalties when computing and calculating the amount of the

financial penalty to be imposed on *Caliber*. Further, he submitted that the respondent failed to provide accurate calculation and miscalculated the duration of the infringement period and the amount of the penalty to be imposed for the alleged infringement period. Learned counsel submitted that the respondent had, without appropriate and fair justification, imposed an excessive, unreasonable, and disproportionate amount of financial penalty on *Caliber* for the alleged infringement period. Learned counsel submitted that the respondent alleged that *Caliber* was the 'instigator' in Sebut harga A and for this reason had made an upward adjustment on the financial penalty against *Caliber.* But, in its Decision the respondent was unable to show any nexus or connection between *Caliber* and all the bidders or how *Caliber* was an 'instigator'.

[85] Before we consider the appellants' arguments on the financial penalties imposed, we will re-visit the respondent's decision regarding the basis of its calculations and justifications for such imposition. At paragraph 353 of its decision, the respondent had based its determination of the amount of financial penalties to be imposed on the Commission's Guidelines on Financial Penalties; and at the same paragraph the respondent also listed the various factors it may consider to arrive at its determination. At paragraph 354 of its decision, the respondent explained that in calculating the financial penalty for each of the appellant it had firstly set a base figure which is computed by taking a proportion of the relevant turnover during the period of infringement. The respondent then adjusted this base figure by considering various factors such as deterrence, aggravating and mitigating considerations to arrive at the ultimate value of the financial penalty. At paragraph 360 of its decision the respondent said that the relevant turnover used to determine the base figure is the enterprise's turnover in the relevant service market and the

relevant geographic market affected by the infringement. For this purpose, the respondent identified and defined the service market at paragraph 350 of its decision; and it had taken the value of the projects according to those service markets to range from RM42,789.90 to RM939,8523.00. For this case, the respondent had decided to confine the relevant geographic market for the above focal services to ASWARA.

[86] Earlier we have mentioned that the respondent determined the base figure by taking a proportion of the turnover for the relevant period of infringement. And, at paragraph 360 of its decision the respondent said that to determine the respective turnover of the enterprises in respect of the relevant service market, it had relied on the financial data submitted by the enterprises (involved in the bidding) in the relevant service market defined by the respondent at paragraph 350 of its decision. In this case, the respondent had, in view of the seriousness of the infringement, taken 10% of the relevant turnover of the enterprises as the base figure to compute the financial penalty. The amount of the turnover is the amount that was submitted to the respondent by the respective enterprise; and it is from this amount that the respondent took 10% as the base figure. Thereafter the respondent adjusted this 10% base figure using a proxy figure to get the adjusted relevant turnover from the appellant to a percentage as the financial penalty to be imposed on the guilty enterprise. It is this part of the respondent decision that we cannot comprehend. As we understand it, the figure of turnover for the relevant service market is the figure that the relevant enterprise submitted to the respondent; and in our opinion it is this figure that should be taken by the respondent to determine the amount of financial penalty that does not exceed 10% of the worldwide turnover for that enterprise. The question we must ask here is whether it is necessary for the respondent to go to the next step of taking

a proportion (in this case 10%) of the relevant turnover submitted to determine the base figure and then adjusted the figure to get the adjusted relevant turnover before determining the percentage of it as the financial penalty to be imposed. In our opinion this is not the correct way of applying the formula provided in the Guidelines. The Guidelines is very clear that the relevant turnover for the relevant infringement period is the figure supplied by the enterprises. Only in cases where the enterprises submitted zero turnover, the respondent must do the necessary adjustment by using a proxy figure.

[87] In its decision at paragraph 364, the respondent found that from the financial data submitted by the enterprises, the appellant *Basenet* and another (who is not a party in this appeal) did not earn any turnover from the respective relevant service market. Therefore, to determine the relevant turnover for *Basenet* the respondent requires a proxy figure. In this regard, the respondent adopted the approach in OFT case of UK relating to bid rigging in the construction industry and the decisions by CCCS of Singapore in infringement cases. Adopting this approach, the respondent calculated the proxy figure based on the percentage of the relevant turnovers out of worldwide turnovers of the respective eight enterprises found by the respondent to have infringed section 4 of the Act. Using this method, the respondent derived a proxy figure of 10.56% of the average of worldwide turnovers of the eight respective enterprises. In our view this is the correct approach to determine the proxy figure. The respondent explained in its decision that the OFT case in UK had computed the proxy figure based on the median percentage of the relevant turnovers; but the respondent had used the average percentage of the relevant turnovers to reflect the seriousness of the infringement. The respondent explained its rationale for taking the average percentage

of all eight enterprises at paragraph 368 of its decision. The respondent said taking the average of all eight enterprises who participated in ASWARA's bid is more reflective in terms of total participation of all enterprises in the procurement projects rather than taking the average percentage of only six who earned relevant turnover.

[88] As for the period of infringement for the purpose of calculating the financial penalty, the respondent had followed the Guidelines on Financial Penalties; in this case the period is one year while the actual period of infringement is less than six months.

[89] From our review of the respondent's decision regarding the approach and methodology in calculating the appropriate financial penalty on the relevant enterprises, we are satisfied that the respondent had followed the Guidelines and was guided by the principles established by decided cases in UK and Singapore. We also noted that the respondent had also considered the aggravating and mitigating factors in arriving at the figure for financial penalty for the relevant enterprises. However, we also notice that in applying these principles, particularly the use of proxy figure, the respondent had not adhered strictly to the Guidelines given.

[90] In the case of *Caliber* the respondent had imposed a financial penalty of RM301,822.45. In imposing this amount, the respondent had also considered *Caliber* as an instigator in one of the infringements, namely for Sebut harga A and *Caliber's* attempt to destroy evidence in relation to Sebut harga A as an obstruction during investigation. For these two factors the respondent had adjusted the base figure [which is the adjusted relevant turnover for *Caliber*] by 50% and 20% upwards respectively. *Caliber* had submitted to the respondent its financial data to show the revenue for 2016. Based on the data submitted *Caliber's*

relevant turnover for 2016 was RM467,727.00 and its worldwide turnover was RM16,812,747.90. But the respondent rejected *Caliber's* relevant turnover because it found the value of the percentage of the relevant turnover out of the total worldwide turnover is 2.75% which is below the proxy figure of 10.56%. Hence the respondent adjusted *Caliber's* relevant turnover upwards by using the proxy figure. In this regard we find the respondent had not applied the formula of using proxy figure correctly. In our view, since *Caliber* had submitted its relevant turnover figure for 2016, the respondent should take this figure as the base figure to determine the financial penalty for *Caliber* without any adjustment using the proxy figure. It may be reminded that proxy figure is only used when the turnover is zero figure. Moreover, the respondent never explained why it cannot accept Caliber's submission of its relevant turnover even though the percentage is only 2.75% of *Caliber's* worldwide turnover. Therefore, we will re-adjust the financial penalty for *Caliber* by imposing an amount that does not exceed 10% of its worldwide turnover based on the relevant turnover for 2016 which is RM467,727.00 which it submitted without any adjustment using the proxy figure.

[91] Likewise in the case of *Novatis,* the respondent had rejected *Novatis* submission of relevant turnover of RM717,349.00 because the value of the percentage of relevant turnover for *Novatis* for 2016 is only 2.74% of its worldwide turnover for 2016 which was RM26,188,723.71. Again, the respondent had adjusted the relevant turnover for the purpose of financial penalty to RM 2,765,529.22 as the base figure by using the proxy figure. The respondent then determined the financial penalty for *Novatis* at 10% of the adjusted relevant turnover which came to a figure of RM276,552.92. Thereafter the respondent took into consideration the role of *Novatis* as an instigator in the infringement of Sebut harga A adjusted the financial

penalty upwards by 50% of the base figure. The final figure for financial penalty for *Novatis* is therefore RM414,829.38. The respondent did not find any mitigating factor in the case of *Novatis*.

[92] In the case of *Silver Tech*, it submitted to the respondent its total revenue from the provision of UPS and back-up data in 2016 totalling RM109,433.97 as its relevant turnover and its total worldwide turnover in 2016 totalling RM1,404,949.00. But the respondent unreasonably rejected the relevant turnover amount of RM109,433.97 on the ground that this amount represents 7.79% of *Silver Tech's* worldwide turnover of RM1,404,949.00. Instead, the respondent arbitrarily applied a proxy figure of 10.56% to *Silver Tech's* worldwide turnover of RM1,404,949.00 to impute a higher relevant turnover of RM148,362.61 as base figure to *Silver Tech.* Again, we are of the view that the respondent had erroneously applied the proxy figure of 10.56% to determine the relevant turnover for Silver Tech and to fix the financial penalty for Silver Tech at RM14,836.26 which is 10% of the adjusted relevant turnover. The respondent found no aggravating or mitigating factors in the case of Silver Tech.

[93] Last but not least is the case of *Basenet*. The respondent found from the financial data submitted by *Basenet*, the latter did not earn any turnover from the relevant service market during the period of infringement. But *Basenet* had a worldwide turnover for 2016 in the amount of RM13,568,488.71. Thus, to determine the relevant turnover for Basenet in 2016 the respondent had used the proxy figure of 10.56% of Basenet worldwide turnover. Using this method, the respondent obtained the adjusted relevant turnover for Basenet in the sum of RM1,432,832.41 as the base figure. This is one instance we think the respondent had correctly applied the proxy figure. Thereafter the respondent imposed

10% of the adjusted relevant turnover as financial penalty on *Basenet*. The respondent also found no aggravating or mitigating factor in the case of *Basenet*.

[94] In our opinion the respondent had incorrectly used the proxy figure of 10.56% to get the adjusted relevant turnover for *Caliber, Novatis and Silver Tech.* These three enterprises had submitted their relevant turnover figure for 2016 for the service market identified and defined by the respondent. In our view, and in accordance with the respondent's own Guideline on Financial Penalties, the turnover figures submitted by these enterprises should be taken as the relevant turnover figures and base figures for the purpose of computing the financial penalty for the respective enterprises without any adjustment, unless the respondent has reasonable grounds to believe that the turnover figures submitted are inaccurate or not true. The rejection of the figures submitted should not be done arbitrarily because the figures constitute less than 10% of the worldwide turnover for the enterprises.

[95] In conclusion, our decision is as follows: regarding the appeal on the finding of infringement, we will dismiss all the appeals.

[96] Regarding the appeal on financial penalty our decision is as follows:

(a) the respondent had erroneously applied the proxy figure to determine the relevant turnover for *Caliber*, *Novatis* and *Silver Tech*. By doing so the respondent had not adhered to the Guideline in using the proxy figure because all the appellants had submitted their relevant turnover for the period of infringement.

(b) Regarding the factors to take into consideration in making the re-adjustment such as aggravating and mitigating factors we accept the finding by the respondent. Therefore, we will allow their appeals in part on the financial penalty by adjusting them to 10% of the relevant turnover figure submitted to the figure of RM46,772.70, RM10,943.40 and RM71,734.90 for *Caliber, Silver Tech* and *Novatis* respectively.

(c) However, taking into consideration the aggravating and mitigating factors found by the respondent, there will be a further adjustment to these base figures as follows:

{i} In the case of *Caliber* – the adjustment is 50% upwards for being the instigator and a further 20% upwards for attempting to destroy evidence in relation to Sebut harga A as an obstruction during the investigation. Therefore, the final figure for financial penalty for *Caliber* is RM79,513.59.

{ii} Regarding instigator,here will be upwards adjustment of 50% for being the instigator; therefore, the final figure for financial penalty for *Novatis* is RM107,602.35.

{iii} There will be no further adjustment in the case of *Silver Tech* since the respondent did not find any aggravating or mitigating factors in its case. Therefore, the final figure for financial penalty for *Silver Tech* remains at RM10,943.40.

{iv} In the case of *Basenet*, our decision is to dismiss both appeals on finding of infringement and the imposition of the financial penalty.

END

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The presiding members of the

Competition Appeal Tribunal

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(YBHG. DATO' ABDUL AZIZ BIN ABDUL RAHIM)

Chairman

.....

(YBHG. DATUK SERI DR. VICTOR WEE ENG LYE)

.....

(YBHG. DATUK MOHD RAFEE MOHAMED)

Date: 19.9.2023

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2. **BASENET TECHNOLOGY SDN BHD** (Appeal No. 4/2022)	: Jeremy Ooi (Counsel) Tetuan Shook Lin & Bok
3. **NOVATIS RESOURCES SDN BHD** (Appeal No. 5/2022)	: Wong Weng Yew (Counsel) Nicole Leong Tetuan Wen & Co
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