

PRICE FIXING PROCEEDINGS AGAINST HONG KONG PROPERTY AGENCY

HONG KONG COMPETITION COMMISSION TAKES MIDLAND TO COURT WHILST ITS RIVAL CENTALINE BENEFITS FROM LENIENCY

On 14 November 2023, the Hong Kong Competition Commission (the **Commission**) announced that it had commenced proceedings against real estate agencies Midland Realty International Limited (**Midland Realty**), Hong Kong Property Services (Agency) Limited (**HK Property**), their parent company Midland Holdings Limited (collectively, **Midland**) and five members of its senior management (the **Individual Respondents**). The Commission alleges that Midland and the Individual Respondents engaged in serious anti-competitive behaviour in the form of price fixing and the exchange of competitively sensitive information with competing property agencies, Centaline Property Agency Limited and Ricacorp Properties Limited (collectively, **Centaline**).

This Client Briefing provides an overview of the Commission's allegations and highlights some of the interesting points arising from the Commission's fifteenth case that it has brought before the Hong Kong Competition Tribunal (the **Tribunal**).

Competing agencies allegedly agreed to set their "*minimum net commission rate*" at 2%

In Hong Kong, real estate developers engage certain property agencies such as Midland and Centaline (the **Agencies**) to promote, market and sell new build (or first-hand) residential property to end customers. Property agencies are then paid a commission (as a percentage of the purchase price) of the properties that are sold, which is determined by the developer. In order to compete with one another, these agencies use this commission to offer rebates to end customers. As a result, rebates offered by real estate agencies ultimately reduce the amount of money that end customers pay for new-build residential properties.

In the present case, the Commission alleges that, between December 2022 and March 2023, Midland and Centaline agreed to fix the "*minimum net commission rate*" for the sale of first-hand residential properties in Hong Kong at 2% (the **NCR Agreement**). The minimum net commission rate is the commission paid by developers to agencies *less* the rebate that the agencies offer their end customers. The Commission alleges that the fixing of the minimum net commission rate at 2% had the effect of fixing or restricting the maximum level of rebates which frontline estate agents of Midland and Centaline could offer to home purchasers.

Central to the allegations are five physical meetings which were held between representatives of Midland and Centaline following the 25th anniversary ceremony of the Hong Kong Estate Agents Authority. The Commission claims that these meetings culminated on 15 December 2022 when Midland and Centaline reached the NCR Agreement. The Commission further alleges that the Agencies each published internal memos regarding the NCR Agreement that were almost identical in nature (the **Internal Memos**). The Internal Memos were allegedly then distributed to the Agencies' frontline agents to ensure that the NCR Agreement would be implemented (unless otherwise approved by a director) from 1 January 2023 onwards.

In addition to Midland's holding company and its two operating subsidiaries, the Commission is taking action against the five Individual Respondents who allegedly attended some or all of the five physical meetings and were informed of the relevant discussions. On the other hand, there are no proceedings against Centaline as it applied for leniency, i.e. it agreed to fully cooperate with the Commission in exchange for the Commission not taking any legal proceedings against Centaline and its officers or employees.

Key takeaways

The Commission's case against the Midland and the Individual Respondents highlights some interesting issues which may influence how companies and individuals may choose to respond to future allegations.

- (1) **The Commission can act quickly and decisively on information it receives:** The current proceedings come less than 12 months after the Commission announced that it was looking into the Internal Memos. In January 2023, there were press reports that Midland and Centaline had issued the Internal Memos. The Commission was quick to announce it would be looking into the matter and these proceedings demonstrate that it can conduct and conclude an investigation very quickly. Companies should therefore take similar announcements from the Commission seriously and seek legal advice where appropriate.
- (2) **Real estate is a key sector of concern for the Commission:** In its January press release, the Commission reiterated that it pays particular attention to sectors such as the property market given its major effect on the livelihoods of people in Hong Kong. It added that *“over the past two years, real estate and property management has been one of the top three sectors where the Commission has received the most number of complaints”*. Furthermore, in the Commission’s press release announcing these proceedings, it stated *“the Commission wishes to reiterate that it will spare no effort in disrupting hardcore cartels that affect people’s livelihood, particularly in sectors such as the property market”*. Prudent businesses operating in this sector would be wise to ensure that their competition law policies are up to date and that staff receive adequate training on how to ensure compliance with competition law obligations.
- (3) **Broad definition of ‘director’ under the Ordinance used to bring proceedings against the Respondents:** Only two of the five Individual Respondents against whom the Commission brought proceedings are board members of the Midland companies. Accordingly, the Commission is relying on the broad definition of *“director”* under section 2(1) of the Competition Ordinance to bring proceedings against the other three Individual Respondents, namely any person *“involved in the management of a company, by whatever name called”*. In this case, the three non-board members held senior management positions: Director (Hong Kong District) of Midland Realty, Chief Operation Officer (Kowloon and New Territories) of Midland Realty and Chief Executive Officer of HK Property.
- (4) **Attendance at some of the relevant meetings and knowledge of the NCR Agreement sufficient for the Commission to take action:** Only one of the Individual Respondents attended all five of the meetings with Centaline representatives. Whilst the other four Individual Respondents attended three meetings or less, the Commission’s case against them mostly relies on discussions had, and actions taken, to implement the NCR Agreement (e.g. publication and dissemination of the Internal Memos). Interestingly, the Commission does not detail any such evidence against one of the Individual Respondents, but instead simply relies on his attendance at two of the meetings with Centaline. It therefore seems that the Commission will seek to persuade the Tribunal that Mr. Cheong has contravened Hong Kong’s competition law simply because he had *“actual knowledge”* of the NCR Agreement and *“took no steps to prevent it”*.
- (5) **The Commission is seeking a pecuniary order against the Individual Respondents:** This is one of the rarer cases where the Commission has sought a pecuniary order against individuals as employees of the relevant undertaking. Employees (particularly senior management) should remember that they may have financial exposure to anti-competitive conduct in their personal capacity and must therefore be vigilant against any involvement in conduct that may raise competition concerns. It will be interesting to see how the pecuniary penalty for these individuals will be calculated by the Tribunal.
- (6) **A lack of proceedings against Centaline reiterates the advantages of leniency applications:** In its press conference, the Commission highlighted the *“significance and benefits”* of the Commission’s Leniency Policy for both companies and individuals. It also called on businesses already involved in cartel conduct to approach the Commission for leniency or co-operation. Centaline was able to benefit from Type 2 leniency as it was the first cartel member to provide substantial assistance to the Commission in relation to an ongoing investigation. As a result, the Commission has agreed not to take any legal action against Centaline nor any of its officers or employees. The stark difference in the position of Midland and Centaline in the current proceedings highlights the clear benefits of being the first to approach the Commission for leniency.

Business as usual?

We are just at the beginning of the Tribunal process and it is too early to assess the full impact of this case on Midland and the Hong Kong property sector as a whole. According to the Real Estate Developers Association of Hong Kong, “collaboration with Midland will not change because of this incident, and [developers] will continue to do business with them.”¹ In addition, Midland’s Mr. Sammy Po (one of the Individual Respondents), has already been keen to stress that Midland is operating “normal as usual”². However, Midland will now face costly and lengthy legal proceedings which, under the Competition Ordinance, may culminate in disqualification orders for the Individual Respondents and a fine of up to 10% of Midland’s annual turnover in Hong Kong.

What is clear from the proceedings against Midland is just how serious the Commission takes anti-competitive behaviour in sectors affecting the livelihoods of people in Hong Kong. It also shows that individuals in managerial positions are equally susceptible to prosecution by the Commission as those belonging to a company’s board of directors. Finally, the fact that Centaline has been able to walk away from the allegations unharmed is testimony to the benefits that successful leniency applications can bring.

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¹ Source: [Hong Kong developers keep the faith in property agent Midland Realty despite commission fixing allegations](https://www.scmp.com/news/hong-kong/property/article/20230510/hong-kong-developers-keep-the-faith-in-property-agent-midland-realty-despite-commission-fixing-allegations) | South China Morning Post (scmp.com)

² Source: [Property agencies 'tried to stop destructive trend'](https://www.standard.net.hk/article/20230510/property-agencies-tried-to-stop-destructive-trend.html) | The Standard