



[2024] JMSC Civ 179

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2024CV01686

BETWEEN CVM TELEVISION LIMITED APPLICANT

AND THE BROADCASTING COMMISSION OF JAMAICA RESPONDENT

IN CHAMBERS

Ms. Georgia Hamilton instructed by Mesdames Georgia Hamilton & Co. for the Applicant

Mr Kevin Powell and Ms Timera Mason instructed by Hylton Powell for the Respondent

Heard: July 17 & December 18, 2024

Judicial Review – Application for leave – Television station holder of exclusive broadcasting rights to English Premier League matches – Customer complaints to Regulator that applicant advertised matches not broadcast online - Regulator decided applicant engaged in misleading advertising as matches not broadcast as advertised – Suitability of alternate remedies – Grounds and evidence relied on by applicant must disclose arguable case – Failing test of arguability is a bar to grant of discretionary relief

Sections 12, 16, 20 and 22 of the Broadcasting & Radio Re-Diffusion Act

Television and Sound Broadcasting Regulations, Regulation 30**Part 56 of the Civil Procedure Rules 2002****WINT- BLAIR, J****The Application**

- [1] This is an application by CVM Television Limited (“CVM” or “CVM TV”), pursuant to Part 56 of the Civil Procedure Rules 2002 (“the CPR”), for leave to apply for the judicial review of decisions made by the Broadcasting Commission of Jamaica (“the Commission”) to censure it with respect to certain English Premier League (“EPL”) matches advertised but not broadcast, based on a finding that CVM had engaged in, permitted and facilitated misleading advertising.
- [2] A stay of proceedings was granted by this Court on April 15, 2024 of the following remedial action directed to the applicant by the Commission for:
- a. The applicant to transmit the enclosed apology twelve (12) times over the period of one (1) week beginning no later than April 15, 2024. The apologies must be aired between the hours of 7:00 - 8:00 p.m. and 8:00 - 10:00 p.m.
 - b. The applicant to ensure that the apologies are treated in an appropriate manner. They are to be clearly distinguished from the regular programming by use of the preamble, and there is to be no editorial comment, music, or related remarks before, during or after each transmission of the apology.
 - c. The applicant to provide the Commission with the dates, times, and recordings of the apologies as transmitted, no later than April 29, 2024. The recordings should include all material broadcast by the station fifteen (15) minutes prior to and after the airing of the apology.
 - d. The Management of the applicant to attend a meeting with the Executive Director of the Broadcasting Commission (date/time to be determined), to discuss the matter further.

[3] The applicant filed a Without Notice of Application for Court Orders which was argued at the inter partes hearing of the application for leave¹ as reproduced below:

1. An order of certiorari quashing the decision of the Broadcasting Commission of Jamaica, the respondent, made on March 25, 2024 that the Applicant had engaged in and permitted misleading advertising in breach of Regulation 30(e) of the Television and Sound Broadcasting Regulations; and
2. An order certiorari quashing the decision of the Broadcasting Commission to censure the Applicant for facilitating misleading advertising as it is presumed that the Applicant had knowledge that the English Premier League games were not being delivered as expected, due to its close affiliation with Verticast (the Applicant's parent company) and the online brands CSport.tv and CSport app.
3. Pending the outcome of judicial review proceedings herein, a stay in terms outlined at paragraph 2 of the orders sought herein.
4. Liberty to apply.

[4] The grounds on which the applicant seeks the foregoing orders are as follows:

- a. The decision was made in breach of natural justice as it was made without giving the applicant an opportunity to be heard.
- b. The decision was unreasonable and irrational and
- c. The decision to censure the applicant was outside the scope of the Commission's authority and is therefore ultra vires.

The Evidence

Applicant

[5] Ms Debra Shaw, Business Manager of CVM deposed that the applicant is a limited

¹ Filed on April 15 2024.

liability company incorporated under the laws of Jamaica having its registered offices at 69 Constant Spring Road, Kingston 7 in the parish of St. Andrew. It is the holder of a commercial Television Broadcasting licence issued by the Broadcasting Commission of Jamaica (“the Commission”) on the 5th day of March 1997.

- [6] Verticast is the majority shareholder of CVM Television and it owns CSport. Verticast holds the exclusive rights for English Premier League matches (“EPL”) in the Caribbean.
- [7] The Commission is established by the Broadcasting and Re-Diffusion Act (“the Act”) and is a body corporate with registered offices at 9 Central Avenue, Kingston 10, St. Andrew.
- [8] The Commission falls under the Ministry of Information and is governed by the Act and the Television & Sound Broadcasting Regulations, 1996 (“the regulations.”) The Commission monitors and regulates free-to-air television, broadcast radio and subscriber television (cable) services to the technical programming and service standards in the island of Jamaica.
- [9] On the 8th day of February 2024, Mr. Don Dobson, Senior Director, Monitoring, Compliance & Investigations for the Commission sent an email to Mr. Oliver McIntosh, General Manager of CVM TV under copy. This email concerned 'Investigations re Complaints About CSport/EPL' and stated:

“The Broadcasting Commission (“the Commission”) is in receipt of complaints from members of the public regarding CSport and the English Premier League (EPL), both of which have been advertised on Verticast's licensed television service, CVM TV. The Commission is investigating the matter, including whether the imprimatur of your licence is being used against the public interest. Accordingly, you are required to provide the Commission with a detailed response to the following by close of business on Friday, February 9, 2024:

1. *What was advertised/offered to the public in relation to the EPL?*

2. *What has Verticast/CSport failed to deliver?*
3. *Details of the reason for the failure to deliver service as reported by customers*
4. *What will be done to redress the grievances of customers?*

'Verticast may provide any additional information and/or explanation it wishes the Commission to consider in its deliberation on the matter.'

[10] The affiant deposed that the applicant by the heading and content of this email was led to believe that CSport and Verticast were under investigation and the applicant was being asked to co-operate, as its services had been used in the subject matter forming the basis for the complaints.

[11] Mr Oliver McIntosh, General Manager of CVM TV responded on February 9, 2024 complaining about the short time within which the applicant was to respond and that it concerned matters to which the applicant was not privy as well as that apologies had been issued for the non-broadcast of a live EPL match fixed for February 3, 2024 on its channel owing to technical failures.

[12] It was not until February 21, 2024 that the applicant was able to completely respond to the questions raised in the Commission's email and a response was given to this effect.

[13] Before that date, the Commission sent the applicant a second email on February 12, 2024 with the subject the "Investigation of Complaints about Verticast/EPL." The email stated that the information provided was inadequate. The Commission set out the allegation as follows:

"It is alleged that Verticast, an entity licensed by the Government of Jamaica, has failed to provide service/content which it has offered to the public, not only on television, but via cable and online."

[14] The Commission set out the nature of the investigation in the same paragraph:

"The Commission's investigation is to determine whether, under the imprimatur of a licence issued to Verticast, the reasonable expectations of

members of the public were not met based on what was offered.”

- [15]** The Commission went on to request further information in the form of copies of the apologies transmitted by Verticast, the frequency of those broadcasts “on-air” and on CVM’s platforms and/or any other platforms operated by Verticast in Jamaica, any proposed redress for disruption in services. The date for the supply of the requested information was February 16, 2024.
- [16]** By email dated February 22, 2024, the Commission requested copies of the multiple apologies CVM in its letter of February 9, 2024 had indicated that it had aired and information about when they were aired, along with advertisements and promos aired on CVM TV about Verticast’s offering of the EPL between January and February 2024 including any with the outro “C-Sport the Best Way to See Sports.” The dates/times of the broadcasts were also requested. All this information was to be supplied by February 23, 2024.
- [17]** Correspondence flowed between the applicant and the respondent under captions such as “Investigation re Complaints about CSport/EPL”, “Unauthorized Transmission in Jamaica” and “Investigation of Complaints about Verticast/ EPL.” The applicant maintained that it had not received any copies of the customer complaints said to have been sent directly to it and requested that the Commission set out these specific complaints.
- [18]** On April 8, 2024, the Commission sent a notice to the applicant advising that a determination had been made that the applicant was in breach of regulation 30(e).
- [19]** In the said notice of breach, the Commission stipulated that consequent to its findings, the applicant was required to take the remedial action now subject to a stay as has been set out earlier.
- [20]** The applicant states that it co-operated with the Commission's investigative efforts up to February 28, 2024 and heard no more from the Commission until it received the said notice of breach dated April 8, 2024. Between February 8, and April 8, 2024, the Commission did not advise the applicant that it was being investigated

nor was the applicant advised or allowed to participate in any hearing into the matter. The findings of the Commission, as contained in the notice of breach are inconsistent with the information requested by it.

- [21]** On the heels of receiving the aforementioned notice, the applicant had sight of a public statement issued by the Commission that it had taken the decision to censure it as a consequence of the finding that the applicant had committed a breach of regulation 30(e). The matter has since been reported in the press.
- [22]** It was deposed that the contents of the notice of breach speak to an investigation, findings, considerations, determination and remedial action, no hearing took place. At no time did the Commission alert the applicant to the review that was carried out at its sitting on March 25, 2024; nor did it extend an invitation to the applicant to be heard in writing or on paper. The investigation would have been completed before this "review" but, even on the assumption that the applicant was the target of these investigations, the applicant was not alerted to the findings of the Commission's investigations
- [23]** It was submitted that the finding of the Commission that "given the circumstances of their shared ownership [CVM and CSport having Verticast as a common shareholder], CVM TV was aware that CSport was failing to deliver live games as advertised, yet the station aired promotional offerings of CSport" was Wednesbury unreasonable.
- [24]** In the said notice of breach, the Commission stipulated that consequent to its findings, the applicant was required to take remedial action. The applicant is in urgent need of a stay of the remedial actions outlined above in light of the timelines imposed and the challenges that the applicant has raised. The effect of the applicant being made to apologise, at this stage, could be self-incriminating in circumstances where a breach of regulation 30(e) exposes the applicant to a criminal sanction.
- [25]** Damages would not be an adequate remedy for the breaches itemised. The effect

of granting a stay pending the outcome of the matter would not extinguish but would merely defer the right of the Commission to issue the said directives.

- [26]** In addressing delay, it is conceded that the applicant was not prompt in addressing the matter as it needed to convene a meeting of its Board of Directors and thereafter identify counsel, obtain legal advice, convene once more to consider this advice, and thereafter instruct counsel. The applicant instructed its attorneys-at-law to file this application forthwith, having regard to the fact that, without the benefit of a stay, it had to start complying with the directive of the Commission which would be prejudicial.

Respondent

- [27]** Ms Nicole Walford, the Deputy Executive Director of the Broadcasting Commission deposed that on May 2, 2022, the Commission granted Verticast permission to become the majority owner of CVM TV giving it ownership and control of the applicant company . In its submission to the Commission, Verticast indicated, inter alia, that it would be providing "content via multiple platforms into multiple markets all under one umbrella organization".
- [28]** During the month of February 2024, the Commission was alerted to complaints about the failure of CSport to provide the service/content it offered to the public, specifically, live broadcasts of EPL matches on the CSport app. The Commission received direct complaints from members of the public about the matter. CSport offers a paid subscription streaming service to the public.
- [29]** Verticast failed to broadcast any premier league games through the CSport app in February 2024. Accordingly, CSport sent emails on February 17, 2024, and February 24, 2024, apologizing to subscribers for the disruption in service and promising a resolution in 'short order'.
- [30]** It is deposed that it is strikingly misleading for the applicant to state through the affidavit of Debra Shaw that, "*...at all times, the applicant... was led to believe that CSport and Verticast were being investigated by the Broadcasting Commission*

and that the applicant was merely being asked to cooperate with said investigations into two related entities...". The email of February 8, 2024 makes it clear that the Commission was investigating matters including "whether the imprimatur of CVM's licence is being used against the public interest".

[31] A false impression is being given that the applicant was confused about the purpose of the Commission's investigation. It has put before the court two (2) contradictory positions. The first that Mr Oliver McIntosh was led to believe that CVM was merely to "cooperate with said investigations into two (2) related entities", but the extensive letter of February 9, 2024, from the applicant responding to the Commission, pertains entirely to CVM's conduct.

[32] The applicant failed to submit that in its follow-up letter to Mr McIntosh on February 12, 2024, the Commission indicated to the applicant, among other matters that *"...to be absolutely clear, the Broadcasting Commission is not only concerned with Verticast's failure to broadcast the referenced English Premiere League (EPL) match on February 3, 2024, on CVM TV, but also its offering via CSport. At this juncture, the Commission makes no distinction between the method of delivery of EPL matches because the complaints to the Commission have not made those distinctions."*

[33] Despite the clarification in the Commission's letter on February 12, 2024, the applicant persisted to treat the Commission's request for information as if it was limited to the narrow issue of matches that were to be aired on CVM TV and not the specific question of whether the public was being misled by advertisements on CVM TV to subscribe to the CSport app (its sister service) which was failing to deliver EPL matches to the public as advertised.

[34] The Commission had no choice but to write to Mr McIntosh, again, on 22 February 2024, to point out that the information provided in its letter of February 21 2024 remained incomplete, including its failure to provide *"advertisements and promos which were aired on CVM TV in relation to Verti Cast's offering of the EPL"* and that to be clear, the Commission was requesting recordings of any and all

advertisements and promos concerning the EPL which were transmitted on CVM TV in January and February 2024, including any with the outro "*CSport The Best Way to See Sports*".

- [35] The Executive Director's email of February 23, 2024 in response to that of the applicant's legal officer requesting more time and the specific customer complaints indicated that it had been provided with "*adequate information about the nature of the matters being investigated*" and "*there was no requirement for the Commission to go beyond particularizing the nature of its investigation, sufficient for CVM/Verticast to have a proper understanding of the matters under review.*" The applicant was requested to expedite the submission of the material.
- [36] The correspondence made it clear that the connection between CVM TV, Verticast and CSport in relation to the promotion and advertisement of the EPL matches was being investigated "*not only on television but via cable and online.*"
- [37] The applicant had ample opportunity to provide the Commission with the information and in its email of February 8, 2024, the Commission expressly indicated to Verticast that it was at liberty to provide, "*any additional information and or explanation it wishes the Commission to consider in its deliberation on the matter.*"
- [38] The assertion that the applicant claims it had no knowledge it was being investigated is false. Further, it is simply untrue and misleading for the applicant to state that the Act and regulations do not set out the procedure for a finding that a licensee has acted in contravention of its licence. In addition, the word "censure" in its ordinary and literal meaning in no way conflicts with the notice of breach which the Commission issued to the applicant.
- [39] There is no basis to challenge the Commission's finding. The Commission has provided a rationale for its conclusion that the applicant engaged in misleading advertising because of what must have reasonably been within its knowledge arising from the common parentage with CSport, and because the applicant was

itself a promoter of the EPL games and not an innocent third party which was only broadcasting content in which it had no direct or indirect interest. The decision is in harmony with the objectives of the Act and regulations to protect the interest of the viewing and listening public.

Submissions

Applicant

- [40] Regarding the threshold requirement for leave for judicial review, Ms Hamilton relied on the case of **Deborah Patrick Gardner v Collete Roberts Ridsen Permanent Secretary in the Ministry of Labour & Social Security**² and rules 56.3(1) to (4) to submit that the applicant has satisfied the requirements for the grant of leave. Counsel submitted that neither the Act nor the regulations, provide a right of appeal from the respondent's decision nor is there any alternative form of redress. Further, there was no delay on CVM's part in making this application.
- [41] Counsel relied on the cases of **Auburn Court Ltd v The Kingston and Saint Andrew Corporation and others**³ and **Derrick Wilson v The Board of Management of Maldon High School and The Ministry of Education**⁴ to submit that it is trite that the rules of natural justice for both sides to be heard must be observed even in the absence of a procedure governing the process by which the Commission arrives at its decisions to sanction licenses falling within its remit. Counsel submitted the following summary on the audi alteram partem rule in Halsbury's Laws of England⁵ as follows:

"The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet..."

The particulars set out in the notice should be sufficiently explicit to enable

² [2023] JMSC Civ 100

³ [2004] UKPC 11

⁴ [2013] JMCA Civ 21

⁵ 5th Edition, Vol 61, para. 640

the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously, and a want of detailed specification may exceptionally be held to be immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice."

- [42]** It was submitted that the Commission in the past, has observed the right of licensees to be heard before making a decision that a licensee has acted in breach. The Commission abandoned that process altogether by moving from the investigative stage to a determination of the matter. Outside of the investigative stage, the applicant was not invited to participate in the matter. In an email from Mr. Dobson to Mr. Hill sent on 20 March 20, 2024, Mr. Dobson refers to tiers to the Commission's deliberations - first by the Commissioners specifically responsible for these matters and then by the full Commission - yet at no time, was CVM invited to be heard. At no point was the applicant alerted to a hearing or that the Commission was undertaking a "review" process in which it was invited to participate whether orally or on paper. The Commission made a finding against the applicant, purely by inference.
- [43]** The applicant complied with the regulator's request for information as part of its investigations. The provision of this information is not tantamount to a hearing for the purposes of judicial review. The Commission requested responses to questions which had nothing to do with the regulatory breach that has now been found to have been committed.
- [44]** The Commission carried out a quasi-judicial function by finding that the applicant breached regulation 30(e) and sanctioned it by public censure as well as by requiring that the applicant take remedial steps, the latter which, if taken, would have resulted in the applicant incriminating itself.
- [45]** The applicant contends that it was not aware that it was the target of an investigation by the Commission, and, in fact, it first became aware of the charge when it received the notice of breach.

- [46]** The Commission, in a process which excluded the applicant, found that it had aired an advertisement placed by CSport which it knew or had reason to believe was false or deceptive on the basis that CSport and itself were owned by Verticast, and CVM had aired an advertisement of EPL offerings, twinning the logos of CVM and CSport. This is a novel legal theory seeking to mimic the concept of piercing the corporate veil.
- [47]** Admittedly, Verticast is the majority shareholder in CVM, and CVM operates a popular television channel known as "CVM TV". The applicant has a broadcasting license that was issued to it by the Commission and is therefore governed by the Commission. Verticast also owns another platform known as "CSport". However, this is separate and independent of CVM. That platform has no licence from the Commission. The Commission does not govern either CSport or Verticast, under its governing legislation or the regulations.
- [48]** The Commission having received complaints from the public concerning CSport, an entity over which the Commission has no jurisdiction concluded that process creatively by punishing the applicant over which it had jurisdiction. The respondent found that CVM was presumed to know that the advertisements were misleading because it had a common shareholder with CSport. The Commission found that the applicant therefore knew that CSport was failing to deliver games as advertised when the applicant aired advertisements on behalf of CSport for access to EPL matches. This reasoning is flawed.
- [49]** On this point, it is important to peruse the Commission's letter dated 12 February 2024, in which, the Commission made it clear that they were investigating Verticast for its failure to air matches. The Commission never put the applicant on notice that they were investigating the applicant for knowingly airing false advertisements. None of the questions posed to the applicant concerned whether it had any knowledge that the advertisements aired on the CVM Channel, at the request of CSport, were false. There was no reasonable basis for the applicant to know it was being investigated for knowingly airing false advertisements on the CVM Channel.

- [50] Further, after a regulator completes its investigations, the rules of natural justice, requires that it shares its findings with those who would be affected by its decision and invite them to make submissions (whether orally in person or in writing) before it makes a determination. In considering whether the applicant was given a fair opportunity to set out the facts which it thinks are relevant to the charges. In this case, merely providing information to a request from the regulator would not suffice, as the charges were unknown to the applicant. CVM was only asked questions and it responded and was found guilty of a regulatory breach which has nothing to do with the questions it was asked.
- [51] Counsel relied on **Makar v Triad Group plc**⁶ to contend that the Commission's finding that CVM aired misleading advertisements concerning the EPL which it knew or had reason to believe was false or deceptive is irrational or Wednesbury unreasonable.
- [52] From the review of the Act and applicable regulations, there is no provision that enables the Commission to censure licensees. In contrast, there are other statutory bodies that Parliament has seen it fit to give that power. Counsel relied on **Hazell v Hammersmith & Fulham London Borough Council & Ors, the Times**⁷ to submit that the Commission is a creature of statute and is confined to the powers conferred by its parent statute.
- [53] Regarding alternative remedies, counsel cited **Malica Reid v Indecom & Anor**⁸ to submit that the suitability of the alternative remedy is a vital consideration for if the alternative is not suitable nor effective then there will be no bar to the applicant seeking relief by way of judicial review. In addition, the question of whether the alternative statutory remedy will resolve the issue fully and directly was considered in **Regina (on an application by JD Weatherspoon Plc) v Guilford Borough Council**⁹.

⁶ EAT/0513/06

⁷ House of Lords decision of 25th January 1991

⁸ Claim No 2011HCV00981

⁹ [2006] EWHC 815 (Admin) at para 90

- [54] In response to the respondent's submissions, that CVM had been cited for breaches in the past and thereafter sought dialogue, counsel submitted that these examples are of no evidential value and are merely prejudicial.
- [55] The Commission's submission that approaching the regulator for dialogue as an alternate form of redress must fail as the Commission's purported willingness to give more time or to have dialogue is not an alternate remedy for judicial review. Dialogue is an inappropriate remedy as firstly; past practice is irrelevant as the ownership and management of CVM has now changed. Secondly, the Commission having decided the issue, from the reasonable bystander's point of view, is now apparently biased and the applicant could not be duty bound to approach the respondent before coming to the Court. Thirdly, Sections 11H, 20 and 22 of the Act, show that there is no adequate, suitable, or effective remedy. The test is not simply whether an alternate remedy exists but whether it is an adequate, suitable, and effective statutory remedy.
- [56] In response to the respondent's authorities, counsel submits that the applicant is challenging the procedure whereby the Commission came to find that it has breached Regulation 30(e). The Commission contends that the right to be heard does not arise until section 22 is triggered. However, section 20 gives a licensee, such as the applicant, an express right to be heard or to waive this right and instead abide by the remedial action advised by the Commission, which was denied to the applicant. The irrational findings of an administrative body are reviewable.
- [57] Regarding **Angella Robinson**, the factual matrices of both matters could not be more different. **Angella Robinson** always knew and acknowledged the existence of the issues. She was invited to a meeting which she missed, owing to no fault of the Council. She was encouraged to arrange a meeting with the Council but never did. In fact, on two previous occasions, she was afforded leniency by the Council on her undertaking to engage a registered pharmacist. The Court found that the applicant in **Angella Robinson** was given a chance to be heard. The

right to be heard does not equate to a right to a formal hearing. On the other hand, in this case, the applicant was not afforded any hearing at all, whether informally, on paper or formally. As the Court in **Angella Robinson** emphasized, citing previous authorities, the demands of fairness will vary from case to case.

[58] Counsel distinguished **R v IDT ex parte J Wray & Nephew** from the case at bar in which the applicant is contending that the finding that CVM knew or had reason to believe it was airing misleading advertisements is irrational based on the material it relied on.

[59] In **Ivey v FLA & The Firearm Act**, the regulatory provisions under consideration in that case were markedly different from the instant. The Act gives CVM an express right to be heard, a right that cannot be dispensed with as that would amount to an illegality. Not only did the Commission breach the rules of natural justice, but its refusal to also abide by the clear provisions of section 20 is a direct breach of the Act. The submission that the demand for a right to be heard is premature arises from a misreading of section 20.

[60] The facts in **Robert Ivey** are distinguishable as the right to be heard is expressly provided for after the decision to revoke or refuse a firearm license. In this case, the Act does not provide any scope for CVM to seek a review or challenge to the decision of the Commission made under section 20 of the Act. Additionally, the avenue for redress provided in section 22 only arises where additional sanctions are not contemplated. This review process, with all due respect, is not triggered by section 20.

[61] To apply the reasoning of His Lordship at paragraph 22 of the **Robert Ivey** decision to the circumstances on this case, it is necessary to look at the procedure in its setting and ask the question whether it operates fairly to the taxpayer to the point where the courts must supply the legislative omission. In this case, the procedure was unfair. The applicant posits that there was not just a breach of the rules of natural justice and specifically its right to be heard but a significant disregard for the clear provisions of section 20 of the Act, amounting to an

illegality.

Respondent

[62] Counsel relied on **Angella Robinson v The Pharmacy Council of Jamaica**¹⁰ and **R v Industrial Disputes Tribunal (Ex parte J. Wray and Nephew Limited)**¹¹ to submit that CVM does not have a realistic prospect of succeeding on any of the grounds on which it relies.

[63] In relying on **Robert Ivey v Firearm Licensing Authority**¹² counsel submits that the starting point is to determine whether CVM has a realistic prospect of success on this issue by looking at the circumstances of the instant case and applying the principles from **Wiseman v Borneman and others**¹³. In any event CVM was treated fairly as the Commission had a prima facie basis for arriving at its decision and acted in good faith. While CVM may argue that it was not informed that it was the subject of the investigation that led to the decision, this argument is not sustainable based on the following facts:

- a. CVM is licensed under the Act and its operations are subject to the Regulations and to regulation by the Commission.
- b. Verticast is not a licensee under the Act and its operations are not subject to regulation by the Commission.
- c. At the initiation of its investigation, the Commission identified to CVM that the subject of investigation was the advertisement of C-Sport and the English Premier League on CVM TV and the use of CVM's licence against the public interest.
- d. The Commission received at least one complaint about the alleged

¹⁰ [2020] JMSC Civ 171

¹¹ [2009] HCV04798, judgment delivered October 23, 2009

¹² [2021] JMCA App 26

¹³ [1971] AC 297 at 309 and 317

false and misleading advertising of C-Sport on CVM TV.

- e. Verticast is CVM's majority owner and also owns and operates C-Sport which exclusively broadcasts the English Premier League.
- f. Verticast's President and Chief Executive Officer is also CVM's General Manager and CVM personnel share a Verticast email domain address.
- g. In January and February 2024, CVM promoted C-Sport as a broadcaster of the English Premier League at a time when C-Sport was not broadcasting games in the English Premier League as advertised; and
- h. Prior to coming to the decision, the Commission requested and received information from CVM that enabled it to make a determination on the issue.

[64] The Commission arrived at the decision based on material which supported a prima facie basis for the decision and did so in good faith. Further, the relevant statutory provisions show that contrary to CVM's assertions, there are sufficient safeguards for fairness in these types of matters.

[65] Section 12 of the Act establishes the Commission as a body corporate. Section 16 sets out the Commission's functions which include monitoring the operations of licensees and investigating complaints in relation to any matter under the Act.

[66] Section 20 of the Act gives the Commission the power to give a licensee notice in writing that it has contravened its licence and to require the licensee to justify its actions or otherwise take remedial action as the Commission specifies. The Commission must inform the Minister of any such notice it issues. Section 20 does not impose any sanction on the licensee if it fails to comply with the Commission's notice. Instead, where the licensee fails to justify its actions or fails or refuses to take the remedial action it has been directed to take, the Commission

must notify the Minister.

- [67]** Section 22 of the Act provides that where a licensee does not comply with any directions given to it, the Commission must refer the matter to the Minister and recommend to the Minister what action may be taken against the licensee. However, before the Minister takes any action the licensee must be given an opportunity to be heard. It is at this point that the licensee is given the chance to make representations in relation to any action that may be taken by the Minister against the licensee.
- [68]** Section 22 of the Act sets out a regime for dealing with the issuance of notices of breach. If the licensee fails to comply with the directive, the Commission may recommend that the licence be suspended for a period not exceeding three (3) months. However, Section 22(2) stipulates that before suspending a licence the Minister shall direct the Commission to notify the licensee accordingly and shall afford the licensee an opportunity to show cause why the licence should not be suspended. It is also instructive that the Notice of breach indicates that if the applicant fails to comply with the remedial actions as directed it "risks" being found in breach of Section 20 of the Act. The usage of the word "risks" is itself indicative of flexibility and that the sanction under Section 22 is not inevitable.
- [69]** The court is not required to intervene to fill a legislative omission. It is the Minister who has the power to take action that could be detrimental to a licensee, and it is at that stage that the Minister is obliged to give the aggrieved licensee an opportunity to be heard before taking any decision.
- [70]** For this same reason, CVM's application is premature. The Act provides a procedure for aggrieved licensees to be heard before any action is taken against them. CVM, having not exhausted the alternate statutory remedy should not be granted leave to commence a judicial review claim.
- [71]** The established practice of the Commission has been to reconsider its decisions when requested to do so by CVM. The evidence of this practice is undisputed. It

does not assist CVM to argue that a change in its shareholders means that the practice would not apply to CVM. This consistent practice is another factor in support of a conclusion that there is no infringement in the rules of fairness as it was always open to CVM to request a reconsideration of the decision.

- [72] It is submitted that when the matter and the investigation are considered as a whole, the principles of natural justice were not infringed and as a result, CVM's application should fail on this ground.
- [73] Counsel relied on **Angella Robinson** to submit that the decision was not irrational. Further, regulation 30(e) prohibits licensees under the Act from transmitting any advertising matter which the licensee knows or has reasonable cause to believe to be false or deceptive in whole or part. In forming its view that CVM breached section 30(e), the Commission articulated in clear and cogent terms its findings which led to the decision.
- [74] Counsel contended that CVM's argument is that the Commission had no power to "censure" it and therefore acted ultra vires in doing so. First, the Commission made no decision to "censure" CVM. The decision sets out the full terms of the action taken by the Commission.
- [75] Having made the decision, the Commission had a duty to communicate to the public that it had "censured" CVM. The Commission has the authority to monitor and regulate free-to-air television, broadcast radio and subscriber television services to ensure their operation at appropriate levels in relation to technical, programming and service standards in the island of Jamaica. The exercise of this authority is connected to an overriding duty to the public and its interest in ensuring reliable and responsible programming for the public. The Commission is under the duty to "*monitor the operations of licensees*"¹⁴ and to "*receive and investigate complaints in relation, to any matter under this Act*"¹⁵.

¹⁴ Section 16 (e) of the Act

¹⁵ Section 16 (f) of the Act

- [76] A necessary part of monitoring a licensee's operations is to ensure that it is not engaged in the transmission of "*any advertising matter which the licensee knows or has reasonable cause to believe to be false or deceptive in whole or in part*"¹⁶.
- [77] As a matter of public interest and given the complaints the Commission received about C-Sport's failure to broadcast EPL matches, the Commission had a duty to inform the public that it had undertaken an investigation and taken action. The Commission did not act outside the scope of its authority and for that reason, CVM's application should fail on this ground.
- [78] In response to the applicant's authorities, counsel agreed with the principle outlined in **Auburn Court Ltd.** and **Derrick Wilson** that natural justice requires that before a decision is made by a tribunal which will affect the rights of a party, the party should be given an opportunity to be heard. However, as the Board recognised in **Auburn Court Ltd.** "*... the question of fairness must be answered by looking to the whole of the procedure which is provided by statute...* ". The relevant provisions in the Act show that there is sufficient safeguard for fairness in these types of matters. The applicant did not exhaust that route before invoking the jurisdiction of the court with this application.
- [79] Further **Makar** is distinguishable from the instant case for two reasons. First, it is not a judicial review case, therefore it does not explain or address issues that are relevant to applications for leave to apply for judicial review (or judicial review claims in general). Second, and more importantly, the passage refers to the test to be applied when considering the exercise of a tribunal's discretion in making case management decisions.
- [80] Counsel submits that **Hazell** assists the Commission, not the applicant. In the instant case, the Commission has a duty to monitor the operations of licensees. In doing so, it must ensure that licensees are engaged in responsible broadcasting practices.

¹⁶ Section 30 (e) of the regulations

[81] Regarding **Malica Reid**, the applicant relies on this decision for the submission that if an alternative remedy to judicial review is not suitable or effective it will not act as a bar to grant an applicant leave to apply for judicial review. This principle is not disputed. Additionally, the applicant has not exhausted the remedies that are available to it. It is normal practice for a licensee to write the Commission in response to a notice of breach to request reconsideration of remedial actions.

[82] The facts of the instant case and the relevant statutory framework establish that the applicant had an alternative remedy under the provisions of the Act and in the established practice between the parties for reconsideration of decisions by the Commission.

Law

[83] Section 16 (f) of the Act provides:

“16. It shall be the duty of the Commission, with a view to the carrying out of the provisions and objects of this Act-

(f) to receive and investigate complaints in relation to any matter under this Act.”

[84] Section 20 of the Act provides:

“20(1) Where there is a contravention of any licence the Commission shall give to the licensee notice in writing-

(a) specifying particulars of such contravention; and

(b) requiring that licensee to justify its actions to the Commission or otherwise to take such remedial action as may be specified in the notice.

(2) Where the Commission gives any notice under sub-section (1), the Commission shall send a copy of such notice to the Minister for his information.

(2A) Where the Commission gives notice under sub-section (1) to the holder of an international relay service licence, the Commission shall send a copy of that notice to any person who provides broadcasting apparatus in order to facilitate the relay within Jamaica of non-commercial broadcasting by the

licensee.

(3) Where a licensee fails to justify its actions to the satisfaction of the Commission or fails or refuses to take my remedial action specified in the notice issued under subsection (1) the Commission-

(a) shall notify the Minister in writing of the fact of such failure or refusal;

(b) may direct such licensee, where the Commission considers it appropriate, to broadcast or transmit an apology at such time and at such intervals as the Commission may determine.”

[85] Section 22 of the Act provides:

“22(1) Where a licensee fails to comply with any directions given by the Commission under section 20 or 21, the Commission may-

(a) on the first occasion of such failure, recommend to the Minister that the licence be suspended for a period not exceeding three months; or

(b) if the failure occurs on any second or subsequent occasion, recommend to the Minister that the licence be suspended for such period as the Commission considers appropriate or cancelled.

(2) Before suspending or cancelling a licence the Minister shall direct the Commission to notify the licensee accordingly and shall afford the licensee an opportunity to show cause why the licence should not be suspended or cancelled.”

[86] Regulation 30(e) provides:

30. *No licensee shall permit to be transmitted –*

(e) any advertising matter which the licensee knows or has reasonable cause to believe to be false or deceptive in whole or part;

[87] Issues

1. Are there any discretionary bars to the grant of the application?
2. Is there an arguable ground for judicial review with a realistic prospect of

success?

- i. Whether the respondent acted ultra vires;
- ii. Whether the respondent breached the principles of natural justice by not affording the applicant an opportunity to be heard;
- iii. Whether the respondent acted unreasonably or irrationally

Judicial Review

[88] The court's role is to exercise a supervisory jurisdiction in relation to inferior bodies or tribunals exercising judicial or quasi-judicial functions or who were making administrative decisions affecting the public. This court is primarily concerned with the decision-making process of the Commission and not with the decision itself.

The Threshold Test

[89] Our courts have consistently been guided by the seminal decision of **Sharma v Brown-Antoine et al**¹⁷ the principles of which are regarded as the modern test for leave to apply for judicial review. The Judicial Committee of the Privy Council held that judicial review will only be granted where there is a realistic prospect of success and there is no discretionary bar to the grant of leave.

[90] In the case of the **Hon. Shirley Tyndall, O.J. et al v Hon. Justice Boyd Carey (Ret'd) et al**¹⁸, Mangatal J (as she then was) stated:

"It is to be noted that an arguable case with a realistic prospect of success is not the same thing as an arguable ground with a good prospect of success. The ground must not be fanciful nor frivolous. A ground with a real prospect of success is not the same thing as a ground with a real likelihood of success. The Court is not required to go into the matter in great depth,

¹⁷ [2007] 1 WLR 780

¹⁸ Claim No. 2010HCV00474, unreported, judgment delivered on February 12, 2010

though it must ensure that there are grounds and evidence that exhibit this real prospect of success."

Are there any discretionary bars to the grant of the application?

- [91] Whether there are alternate remedies and their suitability arises for consideration. Delay does not arise as the decision of the Commission upon which the applicant relies was made on March 25, 2024 and the instant application was filed on April 15, 2024.

Whether there is an alternate remedy

- [92] Section 16 sets out the Commission's functions which include monitoring the operations of licensees and investigating complaints in relation to any matter under the Act. The respondent raises as an alternate remedy, the practice of the Commission to customarily reconsider matters upon the invitation of the licensee and further that the statute provides for an aggrieved licensee to be heard at the stage where the Minister would take action to its detriment. In light of this, the application before this court ought to be considered premature.
- [93] The applicant does not dispute the existence of alternate remedies, arguing instead that these are not suitable in the circumstances of this case.

Suitability of any alternate remedy

- [94] The applicant disagrees that the proposed alternate remedies are suitable and seeks judicial review as more suitable. However, it is the duty of the applicant to state why judicial review is more appropriate as was indicated in **Sharma v Brown-Antoine**. The instant applicant has not done so, relying instead on the position that dialogue is unsuitable, as the respondent is biased having already made a decision and neither the primary legislation nor regulations provide a method of appeal. The applicant has not argued for the suitability of judicial review rather, it has argued against the suitability of dialogue and the non-existence of an appeal as a way to challenge a negative finding of the respondent.

[95] The authorities suggest that the applicant is to justify at this the leave stage, whether the alternate remedy is more suitable than judicial review, meaning that the applicant is not to simply state a position but must demonstrate why this is so by reference to the evidence and case law.

[96] In **Regina (on an application by JD Weatherspoon Plc) v Guilford Borough Council** Beaston, J said:

“The test of whether a claimant should be required to pursue an alternative remedy in preference to judicial review is the ‘adequacy,’ ‘effectiveness’ and suitability of that alternative remedy. See ex parte Cowan R v Devon CC, ex parte Baker (1985) 1 All ER 73 at 92, 91 LGR 479, 11 BMLR 141. In R v Leeds CC ex parte Hendy (1994) 6 Admin LR at 443 it was said that the test can be boiled down to whether ‘the real issue to be determined can sensibly be determined’ by the alternative procedure and in R v Newham LBC ex parte R 1995 ELR 156 at 163 that it is whether the alternative statutory remedy will resolve the question at issue fully and directly.”

[97] Judicial review is the remedy of last resort.¹⁹ The fact that the applicant could have used other proceedings does not automatically mean that it has a suitable alternative remedy in the claim it does wish to bring, which is to challenge the decision making process of the regulator. The test is whether the real issue to be determined can be sensibly determined by the alternative procedure.

What is the real nature of the dispute between the parties.

[98] The first question in determining whether the alternate remedy is a bar to the success of this application is what is the real nature of the dispute between the parties.

[99] The applicant asserts a right to a hearing at the investigative stage and is

¹⁹ Lim and another v Secretary of State for the Home Department (2007) EWCA Civ 773

aggrieved at the decision of the respondent to censure it on the basis that this is unlawful as well as to challenge the finding that the applicant knowingly engaged in and facilitated false advertising.

[100] The respondent asserts a right to carry out its statutory duty and to reconsider any matter which it has decided. Reconsideration is an alternative to judicial review and the statute provides for a hearing, however, that process was not engaged by the decision it made.

[101] Section 20(1) of the Act provides that where there is a contravention of any licence, the Commission shall give the licensee notice in writing – specifying the particulars of the breach and requiring the licensee to justify its actions or otherwise take remedial actions as specified in the notice of breach.

[102] This would in my view give the licensee the choice between explaining its actions or taking remedial action. It is only after the failure of a licensee to justify its actions or to take remedial action that the Minister is notified of the refusal and this notification is for information purposes. The licensee who takes remedial action would not find itself in the position of being brought to the attention of the Minister at all.

[103] There are therefore a number of alternate remedies. These choices which form part of the statutory remedy are coupled with the ability to request reconsideration of a decision of the Commission as has been demonstrated on the record to have been an established practice. There are sufficiently suitable alternate remedies available to the applicant. However, as this is not necessarily a bar, the circumstances of the case have to be properly examined. Fairness falls to be examined on a case by case basis. I now move on to the next step.

Arguability

[104] There has to be some grounds and evidence on which this court could properly find that there is a realistic prospect of success in that, there was either a breach of natural justice, procedural irregularity or unreasonableness in the impugned

proceedings or error on the face of the record, in order to satisfy the test of arguability. An applicant who does not cross this hurdle is barred from proceeding to judicial review which is a discretionary remedy.

- [105]** To this end, the issue of fairness at the investigative stage is raised by the applicant. The licensee complained on the record that it wished for further and better particulars of the regulatory breach it was said to have committed. This means it was exposed to a criminal sanction. Yet, its request was not granted.
- [106]** Regulation 34 states that a contravention of the regulations is an offence punishable on conviction before a Resident Magistrate by a fine not exceeding ten thousand dollars or imprisonment not exceeding twelve months. However, in my view regulation 30(e) when viewed using the purposive approach to statutory interpretation is a strict liability offence with a defence of justification.
- [107]** This defence was available to the applicant and was exercisable by some explanation of any action taken or reason for inaction on its part. The applicant exercised its right to justify its actions by stating that it did not exercise control over online platforms and it responded to all the correspondence between itself and the Commission. Having answered the Commission's questions, the applicant submits that this is not the same as making representations in a hearing.
- [108]** However, in all of the evidence and submissions before this court, the real complaint of the applicant is that it really wants to challenge the correctness of the decision of the respondent and not so much whether the statute was correctly employed by the Commission.
- [109]** This court is not to lightly interfere with the decision maker's discretion to make the decision that it did, as it is best placed to do so, nor is this court to substitute its own views for that of the respondent. The applicant was not placed before a criminal court. There was no suspension of its licence, no variation of the said licence, no threat of revocation or refusal to renew the said licence and no urgency raised on the instant application which was shown to have affected the licensee in

its operations or among its competitors.

[110] There is no evidence of pecuniary loss, nor any implication of misconduct as the record discloses that previous notices had been sent to it. There was no deprivation of the applicant's livelihood, nor any diminution in the value of the existing licence on the evidence. There were no rights which were adversely affected on all of the evidence. Having said this, I now move on to the grounds.

Grounds

[111] The grounds set out by counsel for the applicant can be condensed into three for the purposes of this decision

Ground 1 - Whether the decision of the Commission was made without giving the applicant a hearing

[112] There is a requirement for the Commission to have afforded the applicant a hearing prior to making its decision. The Commission allowed the applicant to have some input at the stage where the justification was first being considered. That is to my mind what the statute means by its use of the word "justify." This input from the applicant was not limited to the answers to questions, that is what the applicant chose to do.

[113] The Commission expressly invited any additional information *and/or explanation it wishes the Commission to consider in its deliberation on the matter.*" Having failed to avail itself of the opportunity to place **any material it wished** before the Commission; the deliberations were made in the absence of this material.

[114] The appropriate question, for the court to consider is whether the procedure, when taken as a whole, is "objectively fair". There is a statutory requirement for the Commission to give a licensee who is found in breach of its license the right to make submissions justifying its actions.

[115] In my view, a hearing on paper arises from the language of the Act and the applicant was afforded the opportunity by the Commission as was required by the

statute to make submissions by way of justification, presenting any material it desired.

[116] Justification is the point at which the applicant can be heard. There is no requirement for a formal hearing. The allegations were given to the applicant. “It is alleged that Verticast, an entity licensed by the Government of Jamaica, has failed to provide service/content which it has offered to the public, **not only on television, but via cable and online.**” (Emphasis added.)

[117] The Commission set out the nature of the investigation in the same paragraph. The particulars provided were framed as questions pursuant to section 17 of the Act namely:

What was advertised/offered to the public in relation to the EPL?

What has Verticast/CSport failed to deliver?

Details of the reason for the failure to deliver service as reported by customers

What will be done to redress the grievances of customers?

[118] While it has been submitted that the applicant did not by this correspondence realize that it was under investigation, miscommunication was not the issue, as CVM responded in a letter of February 21, from its General Manager stating that it does not manage Verticast’s subscription service and in another letter, that it had not received the complaints said to have been sent to it. The Commission responded saying it made no distinction in its letters as to the method of delivery. There was nothing preventing the applicant from getting the required information to the regulator. CVM instead chose to use the opportunity to question why the Commission had failed to stop unlicensed cable operators from transmitting programmes. This was the material CVM relied on during the correspondence concerning this issue of which it now complains.

[119] In **Cooper v The Wandsworth Board of Works**,²⁰ in making the important point that where there are no positive words in a statute requiring a hearing, it is a

²⁰ (1863) 14 CB (NS) 180

fundamental rule of natural justice that the party likely to be affected shall be heard prior to the imposition of any decision which is adverse to him. Byles J said, “though the statute has not directly provided for it, the common law will supply the deficiency and will not allow a person to be punished without being heard.”

[120] The rules of natural justice are designed to operate in the interests of fairness and they operate where Parliament may have omitted to provide for the right of an affected person to be heard before any decision adverse to his interest is made. This is not such a case.

[121] There is insufficient evidence to find that a decision was made that is adverse to the applicant or that no opportunity for a hearing was afforded to the applicant such that the common law requirement for a hearing should be imposed and the statute discounted. This ground fails.

Ground 2 - The finding of the Commission that the applicant was in breach of Regulation 30(e) of the regulations is irrational

[122] There is no dispute that the regulator is entitled to carry out its mandate. It is also not in dispute that Verticast’s President and Chief Executive Officer is CVM’s General Manager and that CVM personnel share a Verticast email domain address.

[123] Schedule E of the Amended and Restated Articles of Association of Verticast Media Group Ltd. “IBC”, as registered under the International Business Companies Act, cap 12.14: section 10(5), of St Lucia states at paragraph 77 that:

*“The officers shall perform such duties as shall be prescribed at the time of their appointment subject to any modification in such duties as may be prescribed thereafter by resolution of directors or resolution of members, but in the absence of any specific allocation of duties it shall be the responsibility of the Chairman of the Board of Directors to preside at all meetings of directors and members, the Vice-Chairman to act in the absence of the Chairman, **the President to manage the day to day affairs of the Company....**”* (Emphasis added.)

[124] In Verticast’s submission to the Commission dated March 17, 2022 at the time

when it was then engaged in acquiring the issued shares in CVM Television Limited, it wrote:

“While Verticast will endeavour to expand its broadcast footprint when the opportunity provides itself, its near term focus will be on assuming operations of CVM and expanding its reach and content...”

Strategy:

*The Company’s unique and unprecedented strategy is to provide the widest reach of an FTA channel in Jamaica and as technologies continue to evolve (ie: DSO, OTT) to provide Jamaicans with the option to access content how and when they want to watch. **The foundation of this strategy is the headquarters of our broadcast and distribution being based at CVM, with distribution via multiple means (fibre, satellite, towers) allowing never before reached penetration.** (Emphasis added.)*

Compliance:

Verticast, in operating CVM under the jurisdiction of the Broadcasting Commission of Jamaica, shall ensure continued compliance with the terms of the licence granted to CVM by the BCJ.

In particular, but without limiting the generality of the foregoing, VMG commits to operating CVM channels at all times, in the interest of the Jamaican public.

*It shall also ensure compliance with **all applicable laws and regulations** in the conduct of CVM [sic] operations as well as any international treaty, convention, agreement or regulation relating to telecommunication or to broadcast to which the Government of Jamaica may be a party, so far as such provisions are applicable to any television broadcasting station in Jamaica.”*

[125] The position of Verticast as regards the respondent and the laws of Jamaica is at odds with the submission of the applicant that the Commission has no jurisdiction over Verticast. Verticast has by its constituent documents submitted itself to the jurisdiction of the Commission. This submission is therefore contrary to the documentary evidence on the record from Verticast.

[126] The headquarters of Verticast are also situated at CVM with respect to its broadcast and distribution mandate. This means that any communication from the Commission was properly submitted to the applicant as that is where Verticast was

headquartered for the purposes of its operations in Jamaica. In addition, the President of Verticast was the officer in charge of its day to day operations as has been disclosed on the evidence from Verticast. This President was also the General Manager of CVM.

- [127]** Further, the Commission in its notice of breach indicated that Verticast/CSport had promised to refund affected subscribers. This means someone responded on behalf of Verticast on the investigation of the Commission into the complaints of customers.
- [128]** Then there is the unchallenged fact that the applicant was being referred to in correspondence from the Commission as CVM/Verticast without any demur by the applicant. The first email to the applicant from the Commission concerned “*Verticast's licensed television service, CVM TV*” and the investigation concerned whether CVM's licence was being used against the public interest.
- [129]** The applicant cannot disclaim knowledge of the non-broadcast of the matches it had advertised as Verticast's licensed television service because it is in the business of advertising. This court expects that if members of the public were to engage in contracts with an entity within its group, advertised by the applicant on its television channel, that the applicant before it became bound to fulfil that advertising agreement assured itself that the other party would be able to perform their obligations under it. The applicant itself promoted the EPL matches and is not in the position of an innocent third party.
- [130]** This is particularly so in a case where an entity within the group is operating in a space in which there is no statute as yet which directly governs its platform. Otherwise, it would be somewhat disingenuous of the applicant to come before a court of law and equity to ask for relief for itself, leaving affected customers out in the cold while disclaiming all knowledge of what goes on in that entity retreating instead behind the corporate veil.
- [131]** In any event, the rules of natural justice do not render a decision invalid because

the decision maker makes a mistake of fact or law. Only if the decision disclosed illegality, irrationality or procedural impropriety could the decision be open to judicial review.

[132] A fundamental part of the Commission's duty is the ongoing assessment of a licensee's ability to sustain its proposed service throughout the period for which the licence would be in force.

[133] In assessing whether the strength or quality of the evidence required for the allegations being made are likely be proved on a balance of probabilities, potential arguability cannot be the basis for an order to grant leave. Such a grant would be based on speculation and would have the effect of using the processes of the court to strengthen a case for trial on a fixed date claim. The strength and quality of the evidence required to prove a claim on a balance of probabilities is found wanting. This ground is also without merit.

Ground 3 - The decision of the Broadcasting Commission to censure the applicant is outside the scope of its authority and therefore ultra vires.

[134] Remedial action is authorised by the Act. There is no definition of the word "remedial" in the Act, however, remedial action is as specified in the notice of breach. The word "remedial" as defined by Black's Law Dictionary²¹ means:

"Affording or providing a remedy; providing the means of obtaining redress, <a remedial action>. ..."

[135] The discretion of the regulator is wide as to the remedies it may require. Judicial review is directed to examining whether a public authority has acted lawfully or not. So, the general position is that the focus of a judicial review claim is whether the public authority had proper grounds for acting as it did, based on the information available to it.

[136] Finally, as was stated in the extract from Halsbury's. This duty for particularization

²¹ 10th ed.

of a notice of breach is not always imposed rigorously, and a want of detailed specification may exceptionally be held to be immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice."

[137] Finally, as was stated in the extract from Halsbury's. This duty for particularization of a notice of breach is not always imposed rigorously, and a want of detailed specification may exceptionally be held to be immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice."

[138] There is no doubt that it is within the statutory remit of the regulator to afford or provide a remedy for a contravention of a license by a licensee. This ground fails.

Conclusion

[139] There are suitable alternate remedies available to CVM, it could have chosen to explain its actions to the Commission or to take the remedial action the Commission said it should take. CVM could also have requested that the Commission reconsider its decision.

[140] There has to be some grounds and evidence for the court to properly find that there is a realistic prospect of success that the claim will succeed. The grounds and evidence must show that there was either a breach of natural justice, procedural irregularity or unreasonableness in the procedure used by the Commission or that the Commission made an error on the face of the record in order to satisfy the test of whether an arguable case exists. CVM is really challenging the correctness of the decision of the Commission which it cannot do by judicial review, that is only by way of appeal.

[141] Having looked at all the evidence and the grounds filed; I conclude as follows: None of CVM's rights were adversely affected by the decision of the Commission as:

1. CVM though found to be in breach of its licence, did not face a criminal sanction.
2. There was no suspension of its licence.
3. There was no variation of the said licence.
4. There was no threat of revocation of its licence.
5. There was no refusal to renew the said licence.
6. No urgency raised on the application before the court which was shown to have affected CVM in its operations or among its competitors.
7. CVM did not show any evidence of financial loss.
8. There was no implication of misconduct as the record discloses that previous notices of breach had been sent to it which were all resolved.
9. There was no deprivation of the applicant's livelihood.
10. There was no diminution in the value of the existing licence on the evidence.
11. There is a statutory requirement for the Commission to give a licensee who is found in breach of its license the right to justify its actions and this was granted. CVM however did not make good use of this opportunity.
12. In my view, justification means that any material may be submitted to the Commission on paper arises from the language of the Broadcasting and Re- Diffusion Act.
13. The Commission invited information or any explanation from CVM who failed to avail itself of the opportunity to place the material it wished to have had the Commission consider before that body; this means that the Commission's deliberations would have been made in the absence of this material.

14. The rules of natural justice do not render a decision invalid because the decision maker makes a mistake of fact or law.
15. A fundamental part of the Commission's duty is the ongoing assessment of a licensee's ability to sustain its proposed service throughout the period for which the licence would be in force.
16. CVM cannot distance itself from Verticast as CVM is the headquarters of Verticast and Verticast's President is the General Manager of CVM. The President of Verticast is responsible for its day-to-day affairs and Verticast submitted to the jurisdiction of the regulator and is bound by the laws of Jamaica.
17. The Commission had the power to censure CVM and to require remedial action.

[142] CVM is really challenging the correctness of the decision of the Commission which it cannot do by applying to this court for judicial review.

[143] The following orders are made as a consequence of the foregoing.

[144] Orders:

1. Leave to apply for judicial review is refused.
2. No order as to costs.
3. The applicant's attorneys-at-law shall prepare, file and serve the orders made herein.
4. Leave to appeal is refused.

Wint-Blair J