

JUDGEMENT

SUIT NO. C.L.J 127 OF 1994

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW

BETWEEN JAMAICA STOCK EXCHANGE
A N D FAIR TRADING COMMISSION

PLAINTIFF
DEFENDANT

Before: The Honourable Mr. Justice Theobalds

R.N.A. Henriques, Q.C., Allan Wood, Ransford Braham instructed by
Messrs. Livingston, Alexander and Levy for the Plaintiff.

Hilary Phillips and Denise Kitson of Messrs. Grant, Stewart, Phillips &
Co. instructed by C. Dale for the Defendant.

Heard: June 3rd to 14th 1996; April 7th to 22nd,
June 17th to 19th, 23rd to 27th and July 4th 1997.

THEOBALDS, J.

The Acts which are the subject of the litigation, the Securities Act and the Fair Competition Act, are both said to have been passed on the same day-March 9, 1993. One is in fact numbered 8 of 1993 and the other one 9 of 1993.

I reject the submission of the Plaintiff that these two Acts cannot be classified as concurrent legislation and construed accordingly. It is my view that it is inconceivable that the legislature-the law makers of this country would not, without expressly so stating, have expected them to operate concurrently. In other words, they did expect them to operate concurrently. Clearly, although the Securities Act contains specific rules governing securities and governing the Securities Commission and Companies operating in and trading in securities, that would not per se be sufficient to oust the general jurisdiction of the Fair Trading Commission (FTC) over all organisations operating under its umbrella.

The next submission that the Jamaica Stock Exchange (JSE) and the activities thereof could not be included in the definition of goods is rejected. They are not under the umbrella of goods, but it is my view that they provide services to the general public. The JSE was not trading in goods, but clearly provided a facility for profit under which its members also for profit, provide services also to the general public.

The submission that the JSE is exempted because it was a private company is rejected. If that were so, any private individual or company who wished to operate outside of the Fair Competition Act could simply form a private company and claim to be outside the jurisdiction of the FTC.

The unfortunate statements made by the officers of the FTC, I refer to both Miss Geraldine Foster and Mr. Phillip Paulwell, in their respective capacities, could not justify this Court in granting the Declarations sought at this stage. The hearing is still pending and these points should properly be taken at the hearing if there is a hearing before the FTC.

Miss Foster clearly is an authorised officer of the FTC and she is authorised and directed by the Commission to assist in the performance of its functions under the Act. The functions of the Commission are clearly set out at section 5(1)(a) of the Fair Competition Act. The FTC like any body corporate carries out its functions through authorised officers, agents or functionaries and the only function which cannot be delegated is its final judicial function. Powers to summon and examine witnesses are all functions which can properly be delegated, and it is only because of an abuse or corrupt use of power by the authorised officer, that any declaration should be sought, granted or considered.

The Nation is passing through difficult times when it comes to abuse of power and corrupt use of power and every effort should be made to see that legislation designed to protect the interest of the public should not be stymied by alleged breaches of constitutional rights before the final hearing of the Commission. The principle touched on in *Bob Marley v Dino Michele* which discusses the ever widening Tort of Passing Off applies to the need for a liberal construction of a statute whose purposes are for the protection of the general public.

Questions were put to the witness, Mark Golding, by the Court. My assessment of him was that it was completely out of character for him to draft the lengthy letter exhibited and pass it to Mr. Bunting for signature. It is my recollection that Mr. Golding agreed with my assessment. Although this was just before the adjournment for the evening and I expected it to be followed up in the morning by cross-examination with the probability of exposing some improper motive, but this was not done. If there was the slightest proof or taint of improper motive this would have certainly affected the final decision of the Court.

For the purpose of the record I will now deal with certain strong points raised by learned Counsel Mr. Henriques, Q.C. and say which I accept and which I reject.

He raised the point that the Securities Act is a special statute dealing with Securities and the Fair Competition Act is a general statute dealing with suppliers of goods and services. That is indubitably so, but it does not mean that the special statute that is, the Securities Act is sufficient to oust the general jurisdiction of the Fair Competition Act and that is my finding.

The second point raised by Mr. Henriques, Q.C. is that the Jamaica Stock Exchange does not fall within the definition of suppliers of goods and services. According to Counsel it merely provides a facility for its members, brokers who in turn provide a service to the public. It is my view that the functions of the Jamaica Stock Exchange do, in fact through its members (brokers), provide a service to the public, and the law does say "goods or services" and for that reason I come to a finding of fact that the Jamaica Stock Exchange falls within the jurisdiction of the Fair Competition Act.

Another point raised by Mr. Henriques, Q.C. is that the definitions of goods and services puts it beyond question that the Fair Competition Act could not apply to "securities." I have already dealt with that on the basis of my previous findings, in that although "securities" are defined in the Act, the requirement is for "goods or services", and I have already found that a service is provided by the broker to the general public and these brokers are members of the Jamaica Stock Exchange.

Finally, Mr. Henriques, Q.C. said that the Jamaica Stock Exchange is not in the market. My earlier finding is that the members of the JSE, namely brokers, are in the market, they are providing a service, they are in competition with one another.

Turning now to the Endorsement on the Writ of Summons, I do not propose to go through the details thereof. Suffice it to say that Items 1-4 under which the Plaintiff claims relief in the form of a Declaration are all refused. Item 5 which seeks an injunction restraining the Defendant, its officers and or agents from continuing the proceedings and action taken against the Plaintiff or from interrogating any of the Directors and Council members of the Plaintiff is also refused.

It is my view that the Fair Competition Act empowers the Defendant to proceed in the manner

in which it has proceeded. There has been no breach of the constitutional right of Freedom of Association. There has been no breach of the Rules of Natural Justice. My view is that the Fair Competition Act was designed specifically for the protection of the interest of the public, and there having been no proof adduced that either Mr. Mark Gidding, Miss Geraldine Foster or Mr. Phillip Paulwell were acting from any improper or malicious motive, it is my view that this action fails. Dealing specifically with the evidence of Mr. Phillip Paulwell I can only describe him as a candid, forthright and fair witness. Miss Foster's evidence may have been perhaps tainted, but not in any measurable way by the use of the word "staff." She could have said she was acting for the Executive Director and the Commission and not use the word "staff" with monotonous regularity. But these are subsidiary findings. I find that these allegations cannot be substantiated. The action fails. The Declarations and the Injunction cannot be justified and indeed are not justified.

Costs to the Defendant to be taxed if not agreed.

Stay of proceedings for six weeks granted to the Plaintiff

Approved

[Signature]

J. 22/1/97.