



[2024] JMCC Comm 38

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2024CD00154

BETWEEN	VERTICAST MEDIA GROUP LTD	CLAIMANT
AND	DIGICEL (JAMAICA) LIMITED	1st DEFENDANT
AND	COLUMBUS COMMUNICATIONS JAMAICA LIMITED	2nd DEFENDANT
AND	CABLE AND WIRELESS JAMAICA LIMITED	3rd DEFENDANT

(NO 2)

Mr Douglas Leys KC, Dr Delroy Beckford and Miss Jacqueline Cummings, instructed by Samuel Beckford for the claimant

Mr Maurice Manning KC, Mrs Allyandra Thompson and Ms Dionne Samuels, instructed by Nunes Scholefield Deleon & Co for the 1st Defendant

Mrs Denise Kitson KC and Mr Kevin Williams instructed by Grant Stewart Phillips for the 2nd and 3rd Defendants

Heard: September 16, 2024, and October 23, 2024

Whether to stay civil proceedings pending the outcome of an investigation by the Fair-Trading Commission into allegations of breaches of the Fair Competition Act – Whether to extend time to file defence – The Fair Competition Act

CORAM: JARRETT, J

Introduction

1. The primary question before the court is whether to stay the proceedings in the present claim, pending the Fair Trading Commission's (FTC) investigation into allegations of breaches by the defendants of the Fair Competition Act (FCA). The allegations being investigated by the FTC arise on the claim. In its notice of application for court orders staying the proceedings, filed on May 9, 2024, the 1st defendant seeks in the alternative, an extension of time to file its defence. Before turning to the application, the evidence in support of it, and the parties' respective contentions; it will be helpful to first outline the claim and the procedural background.

The claim

2. The claimant is a company registered in St Lucia and conducts business in Jamaica. It states in its claim filed on April 2, 2024, that it is in the business of creating and providing cable television channels for distribution on multi subscriber cable television networks in Jamaica, to multi subscriber cable television operators. It alleges that the defendants have breached the FCA. More particularly, it contends that the defendants are interconnected companies within the meaning of the FCA; hold a dominant position in the multi subscriber cable television market; have abused that dominance ; and are in breach of section 35(1) of the FCA which prohibits persons from conspiring, combining , agreeing or arranging with another to limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service. For these alleged breaches, the claimants seek declarations, interim injunctive relief and damages.

3. The remedies being sought capture the substance of the allegations being made against the defendants. Set out below, are how they appear in the claim form: -

1. A declaration that the Defendants have directly and/or indirectly conspired and/or colluded or have engaged in a concerted practice with each other which has had and is having the effect of substantially lessening competition or an exclusionary effect in a relevant market, namely ***the market for providing live broadcast of elite sports competitions, on multi-subscriber cable television platforms.***
2. A declaration that each Defendant holds a position of dominance and/or economic strength in the multi-subscriber cable television operator market without effective constraints from each other or from other third-party multi-subscriber cable television operators.
3. A declaration that the Defendants jointly or severally have abused their position of dominance in the multi-subscriber cable television operator market by:
 - (a) restricting the entry of Claimant in the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***
 - (b) preventing or deterring the Claimant from engaging in competitive conduct in the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***

- (c) limiting the production of **providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions** to the prejudice of cable subscriber television consumers of significant live elite sports competition cable television channels.
4. A declaration that the Defendants by their respective dominance in respect of their separate multi-subscriber cable television networks have in effect created an essential facility.
 5. A declaration that the Defendants jointly or severally have refused to deal or engaged in a constructive refusal to deal regarding their essential facility individually or jointly.
 6. A declaration that the Defendants jointly or severally have engaged in anti-competitive conduct by abusing their position of dominance in the multi-subscriber cable television market by refusing to deal or engaging in a constructive refusal to deal regarding its or their essential facility which has had is having or is likely to have the effect of substantially lessening competition in the market for live broadcast of elite sports competitions, on multi-subscriber cable television platforms and/or has had or is having or likely to have an exclusionary effect in a relevant market, that is, the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***
 7. An interim and interlocutory injunction restraining the Defendants from breaching the Fair Competition Act, 1993, whether by themselves, their servants or their agents or employees or otherwise by directly and/or

indirectly conspiring and/or colluding or engaging in a concerted practice with each other which has had and is having the effect of substantially lessening competition or an exclusionary effect in a relevant market, namely the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***

8. An interim and interlocutory injunction restraining the Defendants from breaching the Fair Competition Act, 1993, whether by themselves, their servants or their agents or employees or otherwise by abusing or continuing to abuse their position of dominance or economic strength in the multi-subscriber cable television operator market by virtue of leveraging said dominance in the market for live broadcast of elite sports competitions, on multi-subscriber cable television platforms and in effect restricting the entry of the Claimant in said market, preventing or deterring the Claimant from engaging in competitive conduct in said market and/or limiting the production of goods or services to the prejudice of cable subscriber television consumers of significant live elite sports competition cable television channels.
9. An order that the Defendants do provide access to the Claimant to their essential facility being their respective multi-subscriber cable television operator network.
10. An Order that the defendants do provide access to the Claimant to their multi-subscriber cable television facility in accordance with section 35(1) of the Fair Competition Act.
11. Additionally, and/or alternatively, an interlocutory injunction mandating the Defendants whether by themselves, their servants or their agents or

otherwise to grant access of their multi-subscriber cable television operator network to the Claimant to enable Claimant to provide live broadcasts of elite sporting competitions through the television channels it has created for that purpose.

12. Damages;

13. Costs;

14. Such further or other relief as this Honourable Court deems necessary or appropriate.

Procedural background

4. On April 2, 2024, along with the filing of its claim form and particulars of claim, the claimant also filed an urgent notice of application for injunctive relief in which the interim injunctions referred to in the claim were sought. That application came before the court on April 4, 2024, April 19, 2024, May 16, 2024, and September 16, 2024, respectively. On April 4, 2024, I ordered that the claim, the urgent application and all affidavits in support were to be served on the FTC, and its representatives were to attend the adjourned hearing on April 19, 2024. Representatives from the FTC were present for the adjourned hearing on April 19, 2024, and at that time, indicated to the court that they had begun an investigation into the issues raised in the claim.
5. On April 19, 2024, I refused the claimant's oral application for an "interim protection order" pending the resumption of the hearing on May 16, 2024.¹ That decision was appealed by the claimant. On May 9, 2024, the 1st defendant filed the current

¹ **Verticast Media Group Limited v Digicel Jamaica Limited , Columbus Communications Jamaica Limited and Cable and Wireless Jamaica Limited [2024] JMCC Comm 22**

application, supported by an affidavit of Dionne Samuels, which was also filed on the same day. Arguments were heard from counsel for the claimant in support of the urgent notice of application for injunctive relief on May 16, 2024, and that application was adjourned part heard to July 5, 2024. Due to the approach of Hurricane Beryl, the July 5, 2024, hearing date was vacated and the hearing rescheduled for September 16, 2024. On September 16, 2024, King's Counsel Mr Leys announced to the court, that the urgent application for injunctive relief was being withdrawn, as the claimant had its rights to broadcast the English Premier League (EPL) live sporting competitions terminated. On that same day, the court was also advised that the appeal of my April 19, 2024, decision had been withdrawn. In the event, I made orders for the filing of affidavits and written submissions on the question of costs on the withdrawal, and informed the parties that I will determine that issue on paper.

6. I turn now to the 1st defendant's application.

The application

7. In its application, the 1st defendant seeks the following 6 orders: -

“1) That time for Notice of the filing of this Application herein be abridged.

2) An order that the proceedings herein be stayed pending an investigation by the Fair Trading Commission pursuant to its statutory powers under the Fair Competition Act or until further order;

3) In the alternative, that the time for the 1st Defendant to file its Defence to be extended to forty-two days from the date of hearing this application;

4) The 1st Defendant is relieved from any sanction to which it may become subject under the Civil Procedure Rules or any other rules,

practice directions or applicable legislation, due to any default in filing its Defence within forty-two (42) days after the service of the claim form.

5) Costs of this Application to the 1st Defendant.

6) Such further or other relief as this Honourable Court deems just.

8. In support of the application it relies on the following 8 grounds: -

“1) Pursuant to Rule 26.1(2) (e) and Rule 1.1 of the Civil Procedure Rules, 2002.

2) The court may exercise its discretion in its general powers of management to stay the whole or part of any proceedings generally or until a specified date or event.

3) On April 19, 2024, at the adjourned hearing of the Claimant’s Urgent Notice of Application for Court Orders for Injunctive Relief, the Fair Trading Commission was present and indicated to the Court that it had begun an investigation into the subject matter of the Claim.

4) Further, on April 19, 2024, the Honourable Miss Justice A. Jarrett made orders which included that the hearing of the Claimant’s Urgent Notice of Application for Court Orders for Injunctive Relief to be further adjourned to May 16, 2024, at 10:00am, and that all documents required to be filed and served are to be served on the Fair Trading Commission.

5) Any Defence to be filed herein by the 1st Defendant is to be properly filed and served on or before May 15, 2024, which is the day before the further adjourned hearing of the Claimant’s Urgent Notice of Application for Court Orders for Injunctive Relief.

6) To properly defend this Claim, the 1st Defendant seeks opportunity for a decision first to be made upon the Claimant's Urgent Notice of Application for Court Orders for Injunctive Relief; and/or for the Fair-Trading Commission to conclude its investigations, before it is required to file its Defence and incur additional costs which may prove to be unnecessary.

7) The 1st Defendant seeks costs in circumstances where the substance of the complaint falls squarely within the statutory jurisdiction of the Fair-Trading Commission and should have been first brought before that body.

8) The orders sought are in keeping with the overriding objectives, particularly the court's duty to deal with cases justly."

The evidence in support of the application

9. Dionne Samuels is one of the attorneys-at-law with conduct of this matter on behalf of the 1st defendant. She says in her affidavit in support of the application, that the 1st defendant was served with the claim form, the particulars of claim and the urgent notice of application for injunctive relief on April 3, 2024. It was at the adjourned hearing on April 19, 2024, that the 1st defendant first became aware that the FTC had launched an investigation into the issues arising on the claim. It is therefore evident, she says, that the alleged breaches of the FCA in the claim before the court, are the subject of a concurrent FTC investigation. Further yet, the claimant has filed a Notice and Grounds of Appeal in respect of the court's April 19, 2024, decision, refusing the claimant's request for an interim protection order. This means that the parties are also to appear before the Court of Appeal for an aspect of this matter.

10. According to Dionne Samuels, the 1st defendant wishes to avoid a duplication of costly deployment of legal resources by having to respond to this court, the FTC

and the Court of Appeal. The grant of a stay of the proceedings in this court will do justice in the circumstances by facilitating the investigative process by the FTC, which is the tribunal established by parliament to decide these specialised disputes. The 1st defendant's defence is due May 15, 2024, and this date is relevant because it is the day before the further adjourned hearing of the urgent notice of application for injunctive relief.

11. The 1st defendant is in the disadvantageous position of responding to the claimant's affidavit evidence in support of its urgent application, preparing a defence to the claim and preparing to respond to any matters raised by the FTC during its investigation. Its resources are consequently stretched thin, as it also seeks to attend to its day-to-day business affairs. She says further that it is in the best interest of all the parties that the FTC's investigation be completed first. This investigation and the FTC's report will likely impact the parties' legal position, the direction of the proceedings before the court, and even whether these proceedings continue or can be maintained. It is the 1st defendant's desire to reduce the costs that may be thrown away or wasted by the premature filing of a defence ahead of the investigation. An extension of time to file the defence and a suspension of that time pending the FTC's investigation and report will not cause prejudice to any other party.

The submissions

The 1st defendant

12. In the written submissions filed on behalf of the 1st defendant in support of the application, it is submitted that the interest of justice favours the grant of the stay. It is recognised that in this case there are no concurrent criminal proceedings, but what exists are the urgent notice of application for interim injunction, the appeal of the decision of April 19, 2024, and the FTC's investigation. In his oral submissions, Mr Manning KC acknowledged that the appeal and the urgent notice of application for interim injunctive relief, had both been withdrawn.

13. In addressing the court's power to grant a stay of proceedings, Mr Manning cited **sections 48(e) of the Supreme Court Act, CPR26.1(2) (e) and Civil Procedure Volume 12(2020) para 1028 of the Halsbury's Laws of England**. With respect to the latter authority, the submission is, that among other things, the learned authors describe the object of the stay of proceedings as being:

“...to avoid the trial or hearing of the claim taking place, where the court thinks it is just and convenient to make the order, to prevent undue prejudice being occasioned to the opposite party or to prevent the abuse of process.”

14. The decision in **The Assets Recovery Agency v Andrew Hamilton et al [2022] JMSC Civ 45**, was also cited by Mr Manning. In this decision, Jackson-Haisley J in deciding whether to grant a stay of civil proceedings, relied on the court of appeal decision in **Omar Guyah v Commissioner of Customs and Attorney General of Jamaica and Audrey Carter [2015] JMCA Civ 16**, and said this at para 25: -

“[25] The **Omar Guyah** case also featured an application of the core principles extracted from the Privy Council decision of **Donald Panton and Others v Financial Institutions Services Limited [2003] UKPC 86** which can be read at paragraph 11 of the judgment as follows:

‘Both courts began with the need to balance justice between the parties. The plaintiff had the right to have its civil claim decided. It was for the defendants to show why that right should be delayed. They had to point to a real and not merely a notional risk of injustice. A stay would not be granted simply to serve the tactical advantages that the defendants might want to retain in the criminal proceedings. The accused right to silence in criminal proceedings was a factor to be considered, but that right did not extend to give a defendant as a matter of right the same protection in contemporaneous civil

proceedings. What had to be shown was the causing of unjust prejudice by the continuance of the civil proceedings.”

15. It is argued that since the FTC has commenced an investigation, the 1st defendant may be: “called to answer” to facilitate the investigative process. As competition law is technical and complex, the court would benefit from the FTC’s specialized knowledge in the area. Therefore, the court’s overriding objective to deal with cases justly and in a reasonable manner, requires that time be given to the FTC to conduct its investigation. It is also submitted that the FTC may offer an opinion on whether the defendants have engaged in the anticompetitive conduct in breach of sections 17 and 35 of the FCA. To avoid a duplication of efforts and the incurring of additional costs in responding both to the claim and the FTC investigation, the FTC should be given the opportunity to conclude its investigation, before the claim is addressed. Furthermore, the claimant will not suffer any prejudice because of a stay. In fact, it ought first to have brought its complaint to the FTC. Not doing so amounts to an abuse of process.

16. In relation to the alternative relief sought, Mr Manning argued that the application for an extension of time to file defence was made before the time limited for the 1st defendant to file its defence. He said the fact that the 1st defendant is seeking a stay of the proceedings, is a good reason for not filing the defence on time. King’s Counsel relied on the affidavit filed on behalf of the 1st defendant in opposition to the urgent notice of application for injunctive relief and submitted that that affidavit reveals that the 1st defendant has a good defence.

The 2nd and 3rd defendants

17. The 2nd and 3rd defendants supported the 1st defendant’s application for a stay. In their submissions filed in opposition to the urgent notice of application for injunctive relief, it is argued that the definition of the relevant market falls within the exclusive remit of the FTC and cannot be done in this forum. They submit further that the

relief sought in the claim cannot circumvent the FTC's process; the claimant ought to have complained to the FTC rather than initiating these proceedings and therefore, the claim ought to be struck out as vexatious, or alternatively, stayed pending the outcome of the FTC's investigation.

The claimant

18. The claimant opposes the application for both a stay and the alternative remedy of an extension of time to file defence. Dr Beckford submitted that none of the parties have indicated by affidavit evidence that the FTC's findings would be binding on them, and thereby determine conclusively the issues surrounding liability for the alleged breaches of the FCA. The legislative scheme of the FCA indicates that the findings of the FTC can be appealed or may be the subject of judicial review. Dr Beckford cites section 49 of the FCA for this proposition. Relying on section 46 of the FCA, it was further submitted that a finding of the FTC is not considered automatically binding on the parties to an investigation without an application to the court for an order of enforcement. According to Dr Beckford, as the FTC is not a court of record with concurrent jurisdiction with the Supreme Court, there can be no legal possibility of duplication of proceedings and inconsistent decisions. Furthermore, the scheme of the FCA does not foreclose the court's jurisdiction until the FTC makes a finding regarding alleged breaches of the FCA. The court of appeal decision in **Infochannel Limited v Telecommunications of Jamaica Limited SCCA No. 40/95**, was relied on for this latter proposition.

19. On the question of prejudice, it was argued that the 1st defendant would suffer no prejudice if the claim proceeded to trial, as there is no legal possibility of inconsistent binding determinations by different bodies that would result in increased costs to the 1st defendant. On the other hand, it is the claimant who would suffer prejudice in being denied its right under section 48 of the FCA to bring a civil claim.

20.With respect to the extension of time to file defence, Dr Beckford submitted that the application to stay proceedings should not have prevented the 1st defendant filing its defence, as the application is based on grounds that could not prevail.

Analysis and discussion

21.Although the decision in **Guyah**, cited by the 1st defendant, involved the staying of civil proceedings pending the outcome of criminal proceedings; and although the FTC's investigations are not criminal proceedings, I believe that the principles outlined by the court of appeal in that case, of; a) the need to balance the justice between the parties; b) placing the burden on the applicant to show why the respondent's right to have its civil claim decided ought to be delayed; and c) the need for the applicant to show some real and not merely a notional risk of injustice to itself, should the stay not be granted; are applicable to the application before me.

22.When the claimant's urgent notice of application for interim injunctive relief first came before me on April 4, 2024, I enquired of counsel for the claimant, Dr Delroy Beckford, why, rather than bring the current civil claim, the claimant did not report its allegations to the FTC so that that body could commence an investigation under the FCA. His response then, was that the claimant was entitled under the civil liability provision in section 48 of the FCA, to bring the claim. I admit to initially considering the submissions of King's Counsel Mr Manning to be very attractive. But a careful review of the submissions of the parties, and an equally careful examination of the FCA and of relevant decided cases have changed my initial views. I will endeavour to show why.

The scheme of the FCA

23.I start with the FCA. Section 4 establishes the FTC as a body corporate. Its functions are contained in section 5(1). They are as follows: -

“(a) to carry out, on its own initiative or at the request of any person such investigations in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;

(b) to carry out such other investigations as may be requested by the Minister or as it may consider necessary or desirable in connection with matters falling within the provisions of this Act;

(c) to advise the Minister on such matters relating to the operation of this Act, as it thinks fit or as may be requested by the Minister;

(d) to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise; and

(e) to carry out such other duties as may be prescribed by or pursuant to the Act .”

24. In carrying out its functions, the FTC has the power under section 7(1) to summon and examine witnesses, call for and examine documents, administer oaths, require that any document submitted to it is verified by affidavit and to adjourn any investigation from time to time. Under section 7(2), it may conduct oral hearings and shall hear any person who has made a written request for a hearing. Part III deals with the control of uncompetitive practices and includes sections 17 to 21. Section 17 (1) states that: -

“17. (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition or have or are likely to have the effect of substantially lessening competition in a market.”

25. Section 19 defines a dominant position in a market as one in which an enterprise whether by itself or together with an interconnected company occupies such a position of economic strength to enable it to operate in the market without effective restraints from its competitors or potential competitors. An enterprise abuses a dominant position in the circumstances outlined in section 20(1):-

“20. (1) ...if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it—

- (a) restricts the entry of any person into that or any other market;
- (b) prevents or deters any person from engaging in competitive conduct in that or any other market;
- (c) eliminates or removes any person from that or any other market;
- (d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
- (e) limits production of goods or services to the prejudice of consumers;
- (f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or according to commercial usage, have no connection with the subject of such agreements.

26. Section 21 (1) provides that where the FTC finds that an enterprise has abused or is abusing a dominant position and that such abuse has or is having the effect of

lessening competition substantially in a market its shall: a) notify the enterprise of its finding and b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned. Under section 35(1)(a), which falls under Part VII of the FCA, no person shall conspire, combine, agree or arrange with another to limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supply of any services.

27. Enforcement, remedies and appeals are dealt with under Part VIII. Section 46 provides that on an application to the court by the FTC, the court, if satisfied that there has been a contravention of Parts III, IV, VI or VII, or has failed to comply with any direction given by the FTC, may exercise any of the powers given to it in section 47. The powers given to the court under section 47 are to order the offending person to pay a pecuniary penalty to the Crown not exceeding one million dollars in the case of an individual and not exceeding five million dollars in the case of a person other than an individual. Under section 49, appeals from the findings of the FTC lie to a judge in chambers and under section 50, unless the judge orders otherwise, the findings of the FTC shall remain in force pending the determination of the appeal.

28. A private person can bring a civil claim by virtue of section 48. That section reads as follows: -

“48. (1) Every person who engages in conduct which constitutes-

(a) a contravention of any of the obligations or prohibitions imposed in Parts III, IV, VI or VII;

(b) aiding, abetting, counselling or procuring the contravention of any such provision;

(c) inducing by treats, promises, or otherwise the contravention of any such provision;

(d) being knowingly conceived in or party to any such contravention; or

(e) conspiring with any other person to contravene any such provision,

is liable in damages for any loss caused to any other person by such conduct.

(2) An action under subsection (1) may be commenced at any time within three years from the time when the cause of action arose.”

29. In **Jamaica Stock Exchange v Fair Trading Commission SCCA 92/97**, Forte P in determining whether the powers given to the FTC under the FCA are judicial powers, held that while the FTC performs judicial functions it does not have judicial powers and therefore its decisions are not binding on the aggrieved parties, but it is the court through the provisions of sections 49 and 50 which is: “the final word in relation to complains investigated and the consequent directions or orders made by the Commission”. I find Forte P’s analysis of the difference between the powers of the FTC and the court within the scheme of the FCA, and the consequences of that difference, to be very helpful in my determination of the issues that arise on the current application. At pages 24 through to 28 of his judgment he said this: -

“Judicial power” has been the subject of definition in many cases, beginning with the definition by Griffiths, C.J. in **Huddart, Parker & Co. Proprietary Ltd v. Mooreland** [1908] 8 C.L.R 330 at 357 which was referred to with approval and described as the “broad features” by Lord Simonds in the case of **Labour Relations Board of Saskatchewan v. John East Iron Works** [1949] A.C. 134 Griffiths C.J. said:

“I am of the opinion that the words judicial power as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subject, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.”

Lord Simonds speaking in the ***Labour Relations*** case (supra), at page 149 said:

“Nor do they doubt, as was pointed out in the latter case, that there are many positive features which are essential to the existence of judicial power, yet by themselves are not conclusive of it, or that any combination of such features will fail to establish a judicial power if as is a common characteristic of so-called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also.”

Then Kitto, J delivering his judgement in the High Court of Australia in ***The Queen v. The Trade Practices Tribunal and others; Ex Parte Tasmanian Breweries Proprietary Limited*** [1970-71] Commonwealth Law Reports 361 at page 374 expressed his views on “judicial power” as follows:

“Thus a judicial power involves, as a general rule, a decision settling for the future, as between persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of

persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined, to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified.”

These words of Kitto J are an exhaustive explanation of what judicial power entails which, if I venture to express in summary terms, would mean the power to settle disputes between parties, applying the necessary law to the determined facts and arriving at conclusions and issuing consequential orders which are binding on the parties. In determining the issue in this case I would also be persuaded by the language of Lord Simonds in the ***Labour Relations*** case (supra) where recognizing the features of the exercise of judicial power, he nevertheless recognizes that even where those features or a combination of them exist it may yet fail to establish that a body is exercising such power “If, as is a common characteristic of so called administrative tribunals, the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by consideration of policy also.”

There can be no question that the enactment of the FCA was to fulfil the policy of Government to encourage competition in the marketplace. The methods of achieving that purpose inter alia, was (i) to discourage abuse of dominance in the market, and (ii) to prevent corporations dealing in the same marketplace from entering into agreements which inter alia fixed common prices on their commodities, and from indulging in tied selling.

Naturally in order to do so, there would first have to be some determination as to whether those factors exist i.e. firstly, whether a company was exercising dominance in a market and, secondly, was abusing that dominance, or e.g. whether there were agreements specifically aimed at lessening competition, or for fixing prices etc.

In my view, these decisions would be purely administrative, though there is the necessity for the operation of the rules of natural justice in that persons or companies against whom/which such allegations are made would have a right to be made aware of the allegations and given adequate opportunity to be heard in response to such allegations before any decision is made to the truth or falsity of those allegations. The decision therefore would be a decision which is directed at ascertaining whether the required policy of the authorities are in effect being breached by persons in the market. Though the determination is arrived at by a process similar to the process involved in a Court, it is not dependent on the application of any legal principles except a faithful adherence to the provisions of the Statute.

The FCA, however as would be expected does not treat decisions of the Commission as final but gives to an aggrieved person the right to appeal to the Courts through the provisions of Section 49 and 50...

Section 50 it is seen also gives the Judge in Chambers the power to stay the "directions or orders" of the Commission until the determination of the appeal. The Court, therefore is empowered to have the final word in relation to any complaints investigated and the consequent directions or orders made by the Commission.

The question that is raised by the appellant on this issue, is not so much the determination or whether there is an abuse of dominance or any other breach, but whether the Commission in issuing orders to the offending company or person, is in effect exercising judicial power. The appellant

maintains that such orders are akin to injunctive orders which are made by judicial officers appointed by virtue of the provisions of the Constitution and who enjoy security of tenure in keeping with those provisions. The impugned sections do give the FTC the power to issue orders after concluding that the provision of the two sections are being or are likely to be breached. The sections, however, do not give to the FTC the power to enforce those orders, but instead empowers the Court to do so.

This power is to be found in Section 46 ...”

30. The fact that the findings of the FTC are not binding on the parties without the court’s intervention is important. It means that there can be no concern about inconsistent decisions of the FTC and the court, because ultimately it is the court’s decisions that are final in respect of the FTC’s investigative findings, directions and orders.
31. While it is true that the FTC is a specialised statutory body with the expertise to make findings and give directions and orders on complex competition law issues, the FCA undoubtedly provides for a private person to bring a civil suit where those very same complex competition law issues are raised. There is nothing in the FCA which mandates that where, as in the present claim, there are complex competition law issues to be resolved in both a civil claim as well as in a concurrent investigation by the FTC, that the former ought to yield to the latter. I therefore agree with Dr Beckford and find, that bringing the current claim instead of making a complaint before the FTC is not an abuse of process. My position on this issue is reinforced by the dicta of the court of appeal in **Infochannel Limited v Telecommunications of Jamaica Limited SCCA No 40/95**, and particularly by that of Patterson JA.
32. The preliminary issue the court of appeal had to determine in **Infochannel** was whether a litigant in a civil claim under section 48 of the FCA, is limited to seeking

only damages. In overturning the decision of the trial judge who held that he had no jurisdiction to grant injunctive relief under section 48 of the FCA, the court determined that in addition to damages, injunctive relief was also available to the private litigant. In coming to his decision, Patterson JA made it plain that a private person may bring a civil claim under section 48 without any regard to the FTC. Starting at page 46 of the judgment he said this:

“It is clear that although the Commission has wide powers under the Act to protect not only the general public but also a person against abuse of a dominant position by an enterprise, nevertheless a person may suffer loss over and above the general public as a result of such abuse, and consequently, such a person is given the right to bring an action on his own with or without reference to the Commission.”...

33. Later at page 50, he said that: -

“The right of a person to invoke the jurisdiction of the court cannot be taken away except by an enactment in clear and unequivocal terms, and the fact that an enactment creates a tort and gives damages as a remedy, does not necessarily preclude any or all other reliefs.”

34. Lastly, on page 52, Patterson JA said: -

“Any person who is adversely affected as a result of the abuse of a dominant position, by any enterprise, has the right to request the Commission to investigate the matter and take such action as it considers necessary (section 5(1)(d)). Any such person who has suffered loss as a result of the same abuse may institute civil proceedings. It would make a mockery of the law if the Commission could, whenever it appears just or convenient, obtain the grant of an injunction to restrain the offender from contravening a person’s rights while that same person whose right is contravened by the same offender could not. It could well be that the contravention is a

continuing one, in which case the loss would also be continuing and would so continue unless restrained by the court. The Act gives a person the right to protect himself against abuse, independent of the Commission, and it is my judgment that nothing is stated in the statute which prevents that person from invoking the court's jurisdiction for the grant of an injunction to protect that right, nor is there anything to that effect. Although the Act creates a new right, it prescribes no special and peculiar remedy for the contravention of that right, different to the common law remedy, and it has not taken away any other remedy that the court may grant in the circumstances. I am not here concerned with the merits of the instant case, but I am satisfied that the court below has jurisdiction to hear the summons filed by the appellant. What is sought is an interim injunction to preserve the status quo and prevent irreparable damage pending the determination of the action. The jurisdiction to hear such a summons has not been taken away by the Act, and it is my judgment that the learned judge fell in error by holding that he had no jurisdiction to hear the matter, and that the appellant has no locus standi to apply."

- 35.** The question of staying civil proceedings pending the outcome of proceedings before an expert competition law tribunal, was also before Lightman J in **Synstar Computer Services (UK) Ltd v ICL (Sorbus) Ltd and another [2001] EWHC 569 (Ch)**. The facts of this case can shortly be stated. The claimant was in the business of supplying hardware maintenance services to mainframe computer owners. In April 2000, it wrote to the Director General of Fair Trading ("Director General") alleging that the defendants had entered into prohibited restrictive agreements and /or abused their dominant position in the market for supplying mainframe computers and related support services, in breach of sections 2 and/or 18 of the Competition Act 1998 (UK), by tying the provision of hardware maintenance to the provision of software maintenance and related support services. In May 2000, the claimant commenced parallel proceedings against the defendants in the High Court seeking damages and/or an injunction. The allegation

being that the defendants' standard contract terms amounted to an agreement between undertakings which distorted competition within the Common Market and had the actual and/or potential effect upon trade between member states of the European Union contrary to article 81 of the Treaty on the European Union and section 2 of the Competition Act 1998 (UK).

36. Alternatively, it was alleged that the standard terms in the defendants' contracts constituted the abuse of a dominant position contrary to article 82 of the Treaty on the European Union and/or section 18 of the Competition Act 1998 (UK). In January 2001, the Director General dismissed the complaint on the basis that there were no reasonable grounds for suspecting that the defendants had infringed the Competition Act 1998 (UK). Whereupon the claimant requested that the Director General's response take the form of a formal decision so that it could be appealed to the Competition Commission Appeal Tribunal. At the case management conference in March 2001, the defendants requested a stay of proceedings pending any appeal by the claimant to the Competition Commission Appeal Tribunal. Although in agreement with the stay, the claimant opposed the immediate effect of it contending that the stay ought to be after the disclosure and the exchange of witness statements, in order for it to be able to satisfy the evidential burden in the appeal.

37. Lightman J acknowledged that the parallel proceedings before the court and the Competition Commission Appeal Tribunal would raise the same preliminary issues and said at paragraph 1 of his judgment that: -

“In both sets of proceedings, the same critical preliminary issue will arise, namely the definition of the relevant market for the purpose of the competition law analysis which must be undertaken. Both parties agree the obvious fact that the expertise of the appeal tribunal uniquely equips that tribunal to decide the preliminary issue and the competition issues raised before the tribunal and that at an appropriate stage the proceedings before

me should be stayed pending the conclusion of the proceedings before the tribunal. The issue has however arisen between the parties as to when that stage should be.”

38. In paragraph 15 of his judgment, Lightman J gave some of the reasons why a stay of court proceedings may be expected, pending the determination by the Director General or the Competition Commission Appeal Tribunal: -

“The 1998 Act has established specialist administrative bodies charged with the enforcement of United Kingdom competition law (of which the Director General is one) and the specialist judicial body to determine appeals from such bodies, namely the tribunal. The same “competition” issue may arise in court proceedings and in proceedings before the specialist body. Where it does, the question will arise whether the court in its discretion should stay the proceedings before the court pending the determination by the Director General or the tribunal. In the ordinary case, such a stay may be expected for a number of reasons which include: (1) the need to avoid the risk that inconsistent decisions are reached by the court and the Director General or tribunal; (2) the specialist expertise of the Director General and tribunal; and (3) the indication to this effect implicit in section 58 of the Act that decisions of fact arrived at after investigations by the Director, if not appealed or if confirmed on appeal, shall (unless the court otherwise directs) be binding on the parties as there provided.”

39. The scheme of the Competition Act 1998 (UK) is quite different from that of the FCA. The most obvious difference is that an appeal from the decision of the Director General is not to the court but to the Competition Commission Appeal Tribunal. Under section 49 of the Competition Act 1998 (UK), appeals from the Competition Commission Appeal Tribunal are to the court of appeal. Another very important difference, is that by virtue of section 58 of the Competition Act 1998

(UK), unless the court directs otherwise, the findings of the Director General (which under the Act are findings of fact), are binding on the parties if the time for bringing an appeal to the Competition Commission Appeal Tribunal has expired and there has been no appeal, or the finding has been confirmed on appeal by the Competition Commission Appeal Tribunal. As has already been seen, the investigative findings, directions and orders of the FTC are not final and binding on the parties and so there can be no concern about inconsistent decisions as it is the court that has the final word, not the FTC.

The balancing exercise

- 40.** It is clear, based on the scheme of the FCA, that the ground on which the 1st defendant's application is premised, which is that it may incur additional costs by filing a defence which may prove unnecessary, is without merit. Having regard to the foregoing analysis, more need not be said on this, save to say that it is clear, that even if the investigative findings of the FTC support the defendant's position in the claim, those findings are appealable by the claimant to the court and are not determinative of the current proceedings. On the other hand, the claimant has a statutory right to pursue its civil claim. As for the ground that a complaint ought to have first been brought before the FTC, that too is without merit. To borrow from the dictum of Patterson JA in **Infochannel**, the claimant has a right to bring its claim on its own with or without reference to the FTC. Furthermore, as I found earlier, it is not an abuse of process to bring the claim rather than pursue a complaint before the FTC.
- 41.** With the grounds for a stay lacking merit, the 1st defendant has not discharged the burden of showing why the claimant's right to have its civil claim pursued ought to be delayed, and that it will suffer real injustice if a stay is not granted. The application must therefore be refused.

Application for an extension of time to file defence

42. The matters to be taken into account when considering whether to extend time to file a defence are well known. Regard is to be had to the length of the delay, the reasons for the delay and whether the claimant will be prejudiced by the extension being granted. In appropriate cases, regard is also to be had to the merits of the proposed defence. (See **The Attorney General of Jamaica and Western Regional Health Authority v Rashaka Brooks Jnr (A minor) by Rashaka Brooks Snr (His father and next friend) [2013] JMCA Civ 16.**)
43. The 1st defendant's application was made timeously and before the time limited for filing a defence. The reason advanced for not filing the defence when it fell due, is the fact of the application to stay the proceedings. Although I have found that the application for a stay lacks merit, I accept that filed as it was, before the defence was due, is a good reason for not filing a defence within the time limited to do so.
44. Although there is no affidavit speaking to the merits of its defence, Mr Manning indicated during his oral submissions that the 1st defendant was relying on the affidavit of Colin Alcott, its Legal and Regulatory Director, filed on its behalf on April 18, 2024, in response to the claimant's urgent notice of application for injunctive relief. In my view, that affidavit demonstrates that the 1st defendant has a good defence on the merits, and I believe that is a good reason why the extension of time should be granted. In his affidavit, Mr Alcott challenges the methodology used by the claimant to determine the relevant market and asserts that the claimant has not properly defined what that market is. He also denies that the 1st defendant holds a dominant position in the alleged market and challenges the suitability of the data used by the claimant to allege dominance. Additionally, Mr Alcott challenges the claimant's assertion that the 1st defendant is jointly dominant with the 2nd and 3rd defendants. He further denies that the 1st defendant operates an essential facility and says that none of the entities in the Digicel Group is an interconnected company with the 2nd defendant. According to him, the 1st

defendant's decision not to enter into a service agreement with the claimant was based solely on the financial viability of the proposed agreement.

45. In the circumstances of this case, it is my view that the effect of an extension on the claimant will not be prejudicial. The 1st defendant can be given a limited window within which to file its defence and a case management conference set shortly thereafter. Therefore, there ought to be no delays in getting this matter on a path to trial.

46. In all the circumstances, therefore, it is appropriate to extend time to the 1st defendant to file its defence.

Conclusion

47. In the result, I make the following orders: -

- a) A stay of the proceedings is refused.
- b) Extension of time is granted to the 1st defendant to file its Defence within 21 days of this order.
- c) Costs on the application to the claimant to be paid by the 1st defendant. Such costs to be agreed or taxed.
- d) There will be a case management conference on February 19, 2025, at 2pm for 1 hour.
- e) The claimant's attorneys-at-law to prepare file and serve the formal order.

**A Jarrett
Puisne Judge**