

BARBADOS

IN THE SUPREMECOURT OF JUDICATURE

HIGH COURT

CIVIL DIVISION

No. 1811 of 2006

IN THE MATTER OF the **Fair Trading Commission Act, Cap 326B** of the Laws of Barbados

AND IN THE MATTER OF the **Fair Competition Act, Cap 326C** of the Laws of Barbados

AND IN THE MATTER OF an Investigative Report of the Fair Trading Commission dated the 22nd day of September 2006 in respect of a Complaint made by Simpson Oil Limited (SOL) against the Barbados National Oil Company Ltd (BNOCL) alleging abuse by BNOCL of its dominant position in the Petroleum Market and wrongdoing by BNOCL in preventing SOL from participating in a Fuel Oil Tender Process undertaken by the Barbados Light and Power Company Limited (BL&P)

BETWEEN:

BARBADOS NATIONAL OIL COMPANY LIMITED

APPLICANT

AND

THE FAIR TRADING COMMISSION

RESPONDENT

Before the Honourable Mr. Justice Randall Worrell, Judge of the High Court

2007: Sep 25, 26, 27

Oct 2

2009: Mar 18

**Mr. Roger Forde Q.C. with Ms Bernadette Callender for the Applicant,
Sir Richard Cheltenham Q.C., Kim Griffith-Tanghew and Ms. Dava Leslie for the Respondent**

DECISION

-
-

[1] By originating summons dated October 9, 2006 and amended March 15, 2007, the Applicant seeks an order pursuant to **Section 36** of the **Fair Trading Commission Act Cap 326C** of the Laws of Barbados that the findings set out below made by the respondent be reversed or set aside and/or a declaration that there is no evidence to support the following findings:

1) That the Applicant informed the BL&P (Barbados Light & Power Co Ltd) that it would

be supplying all Fuel Oil to the BL&P and that the said BL&P was not allowed to choose another supplier of Heavy Fuel Oil;

2) That the Applicant denied certain competitors the opportunity to compete for the purchase and supply of Heavy Fuel Oil to the BL&P;

3) That the Applicant sought to deny competitors access to a newly constructed pipeline now considered essential to the economic transportation of Heavy Fuel Oil to the BL&P;

4) That at the date of the complaint by SOL in March 2006, and all material times prior to that date, the market for the delivery of retail Heavy Fuel Oil to the BL&P was competitive;

5) That the Applicant as the designated sole importer and wholesaler/supplier of Fuel Oil in Barbados abused its dominance by unilaterally dictating to the BL&P the exclusive terms under which it will be supplied Fuel Oil.

THE PARTIES

[2] The **Fair Trading Commission (FTC)** is the statutory authority with responsibility for ensuring that there is fair competition in the market. The primary legislative framework is provided by virtue of the **Fair Competition Act Cap 326C (FCA)**.

[3] The **Barbados National Oil Company Limited (BNOCL)** is a state owned company involved in the importation and wholesale supply of fuel oil in Barbados. From 2005, BNOCL assumed a retail role and became involved in competitive supply.

[4] The **Barbados National Terminal Company Limited (BNTCL)** is a wholly owned subsidiary of the BNOCL and prior to 2005 was involved in the retail supply and distribution of fuel oil. From 2005, the mandate of the BNTCL changed and it became responsible for the storage of petroleum products.

[5] BNTCL had responsibility for constructing a pipeline from the Holborn terminal (which it leased from ESSO, another MOC) to the BL&P Spring Garden generating plant.

[6] The complainant, Simpson Oil Limited (SOL), is a private entity involved in the competitive supply of petroleum products as a Major Oil Company (MOC).

THE COMPLAINT

[7] On February 19, 2006 SOL made a complaint to the FTC against the BNOCL. They alleged that the BNOCL was abusing its dominant position in the petroleum market to the detriment of SOL and other Major Oil Companies (MOCs).

[8] The complaint effectively alleged that:

1) "SOL was effectively prevented from participating in the recently concluded fuel oil tendering process undertaken by the Barbados Light and Power; and

2) BNOCL was pursuing a business model making it the exclusive importer and supplier of domestic use of bulk petroleum products with a stated intention of becoming a marketer, without employing a transparent pricing mechanism which promotes fair competition."

THE INVESTIGATION

[9] The FTC's investigation commenced firstly on the basis of verbal and written information provided by SOL and they then sought to obtain information from the key partners identified.

[10] On March 7, 2006 the FTC met with the Applicant's representatives to discuss issues surrounding the

complaint. The minutes of the meeting indicate that the FTC was “*in essence seeking to understand the arrangements pertaining to the supply and distribution of fuel oil to the BL&P.*” During that meeting the applicant confirmed that they had not given the complainant (SOL) a throughput rate as they were carrying out a directive of the Cabinet of Barbados.

[11] The FTC also contacted the other parties with a view to obtaining more information from them. They subsequently wrote SOL and BNOCL requesting that they provide written responses to potential breaches of the **Fair Competition Act Cap 326C** arising from the applicant's actions. The FTC indicated that those breaches were:

- 1) BNOCL had taken the unilateral decision to exclusively supply all Heavy Fuel Oil to the BL&P, regardless of the preferences of BL&P;
- 2) BNOCL had denied competing oil companies the opportunity to compete for the purchase and subsequent supply of heavy fuel oil after importation for on-sell to BL&P; and
- 3) BNOCL having constructed a pipeline facility, now essential to the economic transportation of heavy fuel oil to BL&P, was seeking to deny its competitors access to the said facility.

[12] Having received correspondence from all parties the FTC sought to consider all the information and set out its findings on the same.

[13] In its report, the FTC indicated that the allegation being investigated involved two ‘markets’ or areas of economic activity. They were:

- 1) A market involving the importation and wholesale supply of fuel oil in Barbados wherein BNOCL can be designated as the dominant operator;
- 2) A second market for the delivery of fuel oil to the BL&P where all local oil companies compete for the opportunity to supply.

[14] Under the first head, the report detailed that all the fuel oil used in Barbados was supplied and freighted by BNOCL and sold to Barbados National Terminal Company Ltd (BNTCL) at the ship's flange. The product was then purchased by SOL and sold to BL&P and other end users. After 2005, that arrangement would change and BNOCL would take over the retail role of BNTCL.

[15] Under the second head, the report indicated that the market for the delivery and retail sale of fuel oil to the BL&P was competitive. BNTCL (a subsidiary of BNOCL) had constructed a pipeline as an integral part of a petroleum distribution project of identifying the most efficient manner of supplying fuel to the BL&P.

[16] All the local MOCs were free to bid for the opportunity to deliver fuel oil to the BL&P but there were to be changes in the market from January 1, 2006.

[17] At that time, SOL had the existing contract to deliver fuel oil to BL&P and that contract was to end in May 2006. SOL serviced this contract by using trucks under a road transportation arrangement but was allowed by BNOCL to fulfill its contract by temporarily using the pipeline. SOL's contract was one for exclusive supply prior to 2006 and the BL&P was now opening the door to a tendering process.

[18] In its investigation of the complaint, the FTC indicates that they had to make two determinations. Firstly, they had to consider whether that Applicant held a position of dominance in the marketplace and secondly, whether the Applicant used that dominance to impede the maintenance or development of effective competition in the

market.

A POSITION OF DOMINANCE

[19] Under this head, the Commission considered the marketshare of the firm relative to other market participants. They opined that a firm which had a particular market share of 50% or more was likely to be in a position of dominance.

[20] The FTC reported, making reference to a designation of the Government of Barbados, that BNOCL was the primary importer of fuel oil into Barbados and most of that fuel oil was destined for BL&P. They also stated that BNOCL indicated in a Cabinet Paper that all fuel oil used in Barbados was supplied and freighted by BNOCL and then sold to BNTCL at the ship's flange prior to 2006.

[21] The Commission indicated that this statement verified that BNOCL was the *dominant importer and wholesale supplier of fuel oil* into Barbados.

[22] Nothing was said of BNOCL's post 2006 position with respect to the retail market or of BNTCL's new mandate.

ABUSE

[23] The FTC indicated that to establish a charge of abuse, they had to show that the Applicant through its actions had restricted competition in the particular market. They referred to a letter from the Ministry of Energy to the BL&P dated October 4, 2005 which read as follows:

"That the BNOCL will assume full responsibility for the sourcing and freighting of gasoline and diesel ownership of these products move from BNTCL to BNOCL within the terminal;

"That BNOCL pursue the competitive supply of fuel oil to BL&P and other users taking into account the implications of the alternative."

[24] By letter dated November 15, 2005 the Ministry of Energy indicated to SOL and BL&P that "Government has decided that fuel oil will be supplied by BNOCL to the BL&P, Spring Garden Plant through the ESSO terminal at Holborn."

[25] The FTC concluded that BNOCL was given the authority through this directive to leverage its dominance founded in the market for the importation and wholesale distribution of fuel oil into the market for retail supply of fuel oil to BL&P, under a monopoly arrangement. The directive made BNOCL the sole supplier of fuel oil into BL&P irrespective of the competitive tender process proposed by BL&P. They concluded that such action automatically excluded all other MOCs from that retail activity.

[26] By letter dated December 13, 2005 BL&P in its invitation to all 'tenderers' confirmed that "BNOCL will continue the supply of fuel oil to Barbados on the commissioning of the new terminal and the Government of Barbados' intent that fuel oil will be supplied by BNOCL to the BL&P Spring Garden Plant through the ESSO terminal at Holborn."

[27] The FTC then stated two things; firstly that the communication confirmed that BNOCL had established an exclusive trading arrangement with BL&P which they communicated to all 'tenderers' and secondly, that the intent of the action automatically denied the other MOCs the opportunity to purchase fuel oil from BNOCL.

[28] The Commission then went on to examine the refusal to share a throughput fee by BNOCL. BNOCL had not given a fee on the basis that the use of the pipeline by other MOCs was at variance with a decision of the Cabinet of Barbados with respect to the supply of fuel oil to the BL&P.

[29] The Commission concluded that the MOCs were effectively denied the opportunity to deliver a proper bid because of their inability to provide a transparent price for the usage of the pipeline which they needed to use for the delivery of the fuel oil to the BL&P.

[30] In reply BNOCL made a number of submissions which essentially were:

- 1) that they were merely responding to a public tender and took no decision to unilaterally supply all heavy oil to BL&P.
- 2) that prior to the construction of the BNTCL pipeline, the contract for the supply of fuel oil to the BL&P had never been tendered or open to competition. There was an exclusive arrangement/deal between BL&P, Mobil, Shell and SOL.
- 3) that they did not deny other MOCs the opportunity to compete for the purchase and subsequent supply of heavy fuel oil after importation.
- 4) that the pipeline was owned by BNTCL and not BNOCL.
- 5) that BNOCL was not the only supplier of fuel oil in Barbados
- 6) that BNOCL also sold fuel oil to MOCs and they could do what they chose to with it
- 7) that BNTCL built the pipeline and was the owner
- 8) that BNTCL provided the pipeline at its own expense and competitors were free to provide their own transportation system to their buyers which need not be a pipeline

[31] In their summary of findings, the FTC stated that **“from an economic viewpoint, the total monopolization of the entire fuel supply establishes an undesirable precedent. It establishes a monopoly in all subsequent distribution and retail aspects of the supply of fuel oil.**

[32] They then concluded that **“from the evidence available and an analysis of the relevant law that there appeared to have been anti-competitive conduct in relation to the contract for the supply of heavy fuel oil, namely abuse of dominance.”**

BRIEF HISTORY

[33] It is essential to understand the overall context in which this matter presents itself and its incumbent on the court to examine the historical context with respect to this case.

[34] In 1979, a company called “Mobil Exploration Barbados Ltd” was incorporated under the former ***Companies Act Cap 308***. In 1986, they continued under the then existing ***Companies Act Cap 308*** as BNOCL.

[35] In 1998, BNTCL was incorporated as a company limited by shares to, *inter alia*, purchase the Mobil Oil refinery and coordinate the supply of petroleum products on the island. BNOCL would source and freight petroleum products to Barbados, ownership would pass to BNTCL at the ship’s flange and BNTCL would then store and sell to MOCs and other users.

[36] In 2005, the commercial relationship between BNOCL and BNTCL changed and BNTCL would now only be responsible for storage. BNTCL held a meeting in March 2005 to inform stakeholders of its new mandate.

[37] Prior to this change some significant events occurred which put this complaint in its fullest perspective. From the 1960’s Mobil supplied fuel oil to BL&P using trucks under a monopoly arrangement.

[38] In or about 1998, Mobil sold its interest to Shell Antilles Guianas Ltd (Shell). Shell acquired the monopoly rights to supply fuel oil to the BL&P and so did SOL, when it acquired Shell. It was not until 2006 that BL&P opened the

supply of fuel oil to tender. Therefore, SOL's monopoly rights were to come to an end in May 2006.

[39] Arrangements had to be made for SOL to fulfill their contract from January 2006 until May 2006. They were able to use the pipeline in the new facilities to do so.

[40] The new storage facilities were supposed to be joint projects but, the BNTCL had to construct, on its own, a new terminal and refurbish another one which was to have a pipeline at a cost of S140 million in total.

THE EVIDENCE

[41] The Applicant's case commenced with Ronald Hewitt, in his capacity as General Manager. He indicated that the market share for BNOCL was about 85%

[42] He testified that when the Needham's point facility was closed in 1998, a new storage facility had to be built and this was done at Fairy Valley. Additionally, 'Holborn' which was next to BL&P at Spring Garden, was to be used to supply BL&P. The pipeline was developed at Holborn for that purpose. MOCs could use this pipeline, subject to a throughput fee when BNTCL did not have to use it.

[43] He testified that he did not believe that withholding the throughput fee limited competition when BNOCL was asked to provide a fee by 2 MOCs. The real issue was the economic supply to BL&P. He was not of the view that the pipeline was the only means of supplying fuel to the BL&P. BL&P set the conditions of the bid and BNOCL responded to the details requested.

[44] When asked about charges for storage, Mr. Hewitt indicated that BNOCL did not incur a charge. BNTCL charged for the entire use of the facility including the pipeline. He was not aware of the amount BNTCL charged for the pipeline but testified that BNTCL was paid every month.

[45] In his view use of the pipeline did not restrict competition because there were other ways of supply. Trucks could be used and he could not agree with the statement that trucks could not be properly used at Holborn.

THE RESPONDENT'S CASE

[46] The Respondent's evidence is quite lengthy and the court purposes to summarise the salient parts of it. The evidence was given by DeCoursey Eversley; the Director of Fair Competition at the FTC.

[47] Mr. Eversley testified that they had no evidence of any document from BNOCL to BL&P stating that it would be supplying all the fuel oil to BL&P. Instead he testified that they relied on three letters.

[48] The first letter was from the Ministry of Energy to BL&P. Mr. Eversley admitted that he had no idea whether BNOCL had input into the letter or not. The letter informed the BL&P of the change in status with respect to BNOCL and BNTCL and noted at one point that BNOCL would continue the supply of fuel oil to Barbados.

[49] The second letter was from BNOCL to SOL. SOL had previously written to BNOCL asking for a throughput rate for the use of the pipeline and this was a reply letter. BNOCL stated that they could not provide that rate.

[50] The third letter is one from ESSO to BL&P. In this letter ESSO thanked BL&P for the invitation to tender but advised that they were not in a position to tender as BNOCL could not give them a throughput rate.

[51] The court notes that in none of these three letters relied on by the FTC does any party indicate that BNOCL was to be an exclusive supplier to BL&P.

[52] Mr. Eversley testified that the pipeline was not the only means of fuel oil transport. The FTC, however, had failed to enquire from BL&P the extent to which this was possible. Additionally he indicated **that no where in the tender documents was there anything to suggest that the fuel oil had to be transported by pipeline.**

[53] His evidence was that the FTC made no enquiries of BNTCL as to whether transport by truck was possible nor did they visit 'Holborn' to enquire about this facility. They made no enquiries of BNOCL as to whether BNOCL owned the pipeline. On the contrary they relied on information provided by SOL where SOL stated that when they enquired of BNTCL as to the throughput fee, they were referred to BNOCL. The FTC did not enquire of BNTCL whether SOL had made this complaint.

[54] No enquiry was made as to which entity owned the pipeline and no where in any document did BNOCL or any other party indicate that the pipeline was essential to the transport of fuel oil.

THE MARKET

[55] A strict test was not done to determine the market since there was no real substitute in relation to BL&P producing electricity. There was no legal requirement as to who could import fuel oil but in the FTC's view, it was practically impossible for other parties. They attributed this statement to BL&P. They also noted that no enquiry was made as to whether BL&P could import its own fuel.

[56] The Commission concluded however that the BNOCL did not enjoy an absolute monopoly position.

THE LAW

[57] The court considers it quite important to consider the law surrounding complaints to the FTC. Part IV of the **FTC Act Cap 326B** sets out the procedure to be followed when a complaint is laid before the Commission.

[58] **Section 23** provides that any party aggrieved by the act of a service provider or business enterprise can make a complaint if that act is contrary to any law under which the FTC has jurisdiction to administer.

[59] **Section 24** provides that the complaint may be in writing or presented orally and it also sets out certain requirements to be adhered to where oral complaints are made.

[60] Section 25 is of extreme importance. It provides for the evaluation of a complaint and is set out below:

“(1) The Commission **shall only investigate** a complaint made against a service provider or business enterprise where the complainant satisfies the Commission that **he has submitted a complaint to the service provider or business enterprise and has failed to obtain reasonable redress.**”

[61] To my mind the Act must be read as a whole. The FTC can pick and choose which parts of the Act it wishes to follow. Every complainant, regardless of whether they are a corporate entity or not, must be accorded the same status before the FTC.

[62] It was therefore incumbent on the FTC to follow its own statutory framework. I find it unfathomable that the FTC would launch an investigation of this nature without first ensuring that SOL had made a complaint to the Applicant and that the BNOCL failed to reasonably address the complaint.

[63] It could be argued that **section 5 (4)** of the **Fair Competition Act, Cap 326C** provides an exception to **section 25** of the FTC Act but that is on the basis that the Commission finds that the conduct for the basis of an investigation could not reasonably be met by the complainant. No such finding was made in this matter. The FTC simply chose to use **section 23** of the **FTC Act** and ignore the other provisions.

[64] In his re-examination Mr. Eversley stated that the FTC recognised that the matters under complaint spoke to competition within the Oil industry and that the issues would have impacted all the players. He went on to indicate that they (The FTC) recognised that SOL did not have the powers necessary, skills or knowledge of competition law

and policy. He went on to say that this was the background under which the FTC decided to pursue the matter under **section 5 (4)** of the **FCA**. In his view, they dealt with the matter as one of fair competition and that is why they did not insist on SOL making a complaint to **BNOCL**.

[65] In my view the FTC's reasoning is flawed. **Sections 23 and 24** of the **FTCA Act Cap 326 B** set out the duties of the complainant and they are quite simply that the complainant can make a complaint and that it can be done either written or orally. What **section 5 (4)** of the **FCA Cap 326C** does is indicate that if a party cannot satisfy those conditions, the FTC *could still* conduct the investigation. There is absolutely no evidence to show that SOL was incapable of making a written or oral complaint to the Applicant and I hold the view that the FTC should have instructed SOL to pursue their complaint with **BNOCL** as a first option.

ABUSE OF DOMINANCE

[66] **Section 16 (3)** of the **FCA Cap 326C** sets out the provisions for a finding of an abuse of dominant position. Most notable is **section 16 (4)** which provides that an enterprise shall not be treated as abusing a dominant position if

“(a) it is shown that its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit;

“(b) the effect or likely effect of its behaviour in result of its superior competitive performance;”

[67] The FTC's findings under this head referred to **section 16 (3) (b)** and **(g)** which are as follows:

(3) An enterprise abuses its dominant position if it impedes the maintenance or development of effective competition in a market and in particular, but without prejudice to the foregoing, if it

(b) prevents or deters any enterprise from engaging in competitive conduct in that or any other market

(g) engages in exclusive dealing, market restrictions or tied selling;

[68] The Court has some difficulty in understanding how these findings were arrived at. The evidence before the court is that BL&P made no specifications as to how the fuel oil should be delivered; the FTC made no investigations as to whether delivery by means other than pipeline was possible and that there was nothing to indicate that BL&P considered **BNOCL** to be the only entity capable of supplying fuel oil to them; indeed, the evidence was that they opened up the tender process to all parties and all parties were free to bid.

[69] The pipeline was constructed exclusively by **BNOCL** funding. It was constructed with the express purpose of **BNOCL** providing fuel oil to BL&P from the 'Holborn' terminal. It seems to me that a finding based on **sections 16 (4) (a) or (b)** would be the more appropriate finding. The evidence indicates that **BNOCL** did no more than invest in itself and in so doing, brought a more efficient service to its customer.

[70] The FTC's findings would effectively have meant that an entity which uses its funds to deliver a more efficient service to customers *could not do so* without competitors benefiting from its investment. This is essentially an absolute nonsense in the corporate world because a company does not normally invest in itself and its competitors at the same time.

[71] Additionally, the FTC's findings essentially indicate that BL&P's tender process was farcical since the clear inference from their decision is that BL&P had no intention of hiring any entity except **BNOCL**.

DISPOSAL

[72] Accordingly, the Respondent's findings are set aside. The Applicant shall have its costs to be agreed or taxed. Leave is also granted to appeal.

Randall Worrell
JUDGE OF THE HIGH COURT