BARBADOS

[Unreported]

IN THE SUPREME COURT OF JUDICATURE
HIGH COURT
CIVIL DIVISION

No. 168 of 2013

BETWEEN:

SUNBEACH COMMUNICATIONS INC. **CLAIMANT**

AND

CABLE & WIRELESS (BARBADOS) LIMITED **DEFENDANT**

Before the Honourable Madam Justice Elneth O. Kentish, Judge of the High Court

2013: February 19, 20, 27
March 13, 22
2014: April 10

Appearances:

Mr. Bryan Weekes and Mr. Philip McWatt for the Claimant
Mrs. Sherica Mohammed-Cumberbatch and Mr. Frank Odle of Carrington & Sealy for the Defendant

DECISION

[1] On 22 March 2013 I gave an oral decision in this matter refusing the Claimant's application for interim injunctive relief against the Defendant. I indicated that I would give written reasons for that decision and I now do so.

Background

[2] Both parties to this action are licensed telecommunications service providers in accordance with the ***Telecommunications Act, Cap. 282B***.

[3] On 1 July 2004 the parties entered into an agreement under which the Claimant agreed to purchase and the Defendant agreed to provide Internet Service Provider ("ISP") Connect Services. The material terms of this agreement may be summarised as follows:

> (a) The Claimant purchases wholesale internet service referred to as 'ISP Connect Service' from the Defendant; and
> (b) The Defendant sells to the Claimant the ISP Connect Service consisting of access to the Defendant's Internet backbone via an ISP Connect Circuit together with a block of eight Internet Protocol addresses to enable the Claimant to provide internet connectivity services for resale to the Claimant's subscribers at prices (charges) agreed between the Claimant and the Defendant.

[4] The charges as imposed under this agreement are not disputed by the parties.

The Claim and Applications

[5] On 30 January 2013 the Claimant filed an action ("the substantive action") for damages for breach of **ss. 13 and 16 of the *Fair Competition Act Cap. 326C* ("the FCA")** pursuant to **s. 44 of the FCA** injunctive relief and costs. Concurrently, the Claimant by Notice of Application applied, *inter alia*, for interim injunctive relief in the following terms:

1. That the Defendant be enjoined from terminating any of the telecommunications services which it provides to the Claimant pursuant to an agreement currently in force between them until the final determination of the substantive issues in this matter by the Court, provided that the Claimant remains current in its payments for the Defendant's charges for the services actually provided.

[6] In support of its application for interim injunctive relief the Claimant filed two affidavits by its Chairman and Director Scott Weatherhead on 30 January 2013 ("the first affidavit of Weatherhead") and on 8 February 2013 ("the second affidavit of Weatherhead") respectively.

[7] On 4 February 2013 the Defendant filed an application seeking a declaration that the court has no jurisdiction and/or should not exercise any jurisdiction which it may have to try the claim and/or grant the relief sought by the Claimant.

[8] In support of its application the Defendant filed two affidavits by its Head of Legal and Regulatory Windwards and Leewards Sylvia Nicole Jordan on 4 February 2013 ("the first affidavit of Jordan") and on 12 February 2013 ("the second affidavit of Jordan") respectively. A third affidavit of its Vice President Derrick Devotan Nelson ("the Nelson affidavit") was filed by the Defendant on 15 February 2013.

The Facts and Issues

[9] At a hearing of the matter on 19 February 2013 the parties, at the court's request, agreed the facts giving rise to the Claimant's application as well as the issues that required determination by the court on the application for interim injunctive relief.

[10] The agreed facts were as follows:

1. There exists a service agreement between the parties for ISP Connect Services at an agreed monthly charge (Service Provider Agreement dated 1 July 2004);
2. The agreement commenced on 1 July 2004 ("the 2004 Agreement") under which an agreed price for services was fixed. There was a renewal of that agreement on 12 January 2006 ("the Renewed Agreement") when the monthly charges were modified.
3. Both the 2004 Agreement and Renewed Agreement contain an express provision for arbitration in the event of a dispute in relation to the level of charges (Clause 9.11 of the General Terms and Conditions Schedule to the Agreements).
4. At the date of hearing, the Renewed Agreement remained in force to date;

5. Over the period of the agreements the Claimant has been in arrears of the monthly charges. As at January 2013 the arrears stood at $648 840.87. These arrears were calculated pursuant to the level of charges set out in the 2004 Agreement and the Renewed Agreement;

6. Under the Renewed Agreement the Defendant has the right, as it did under the 2004 Agreement, to disconnect or terminate service to the Claimant on the grounds of non-payment of charges (Clause 14.3.1 of the General Terms and Conditions Schedule to the Agreement);

7. At the date of the hearing, the Defendant had disconnected service to the Claimant on one occasion. That disconnection lasted for approximately one day;

8. From time to time over the period of the agreements, the Claimant made several proposals to liquidate the arrears. The most recent proposal was put forward in January 2013, its terms being:

    (a) From the proceeds of sale of a property the Claimant would pay to the Defendant the sum of $100 000.00 towards the arrears; and

(b) The Claimant would maintain current on the monthly charges in the sum of $70 000.00 or thereabouts.

9. Of the several proposals made by the Claimant, none have been implemented;

10. In November 2012, Mr. Weatherhead and Mr. Derrick Nelson entered into discussions and it was then agreed that the Claimant would make a payment of $100 000.00 towards the arrears. This payment was to be facilitated by way of a bank loan and was to be made in December 2012. However, as a result of subsequent negotiations, it was agreed that instead of the initially agreed payment of $100 000.00 being made in December 2012, a payment of $150 000.00 would be made in January 2013;

11. It was further agreed that after the initial payment of $100 000.00 or $150 000.00 that the balance of the arrears would be settled in full upon completion of the sale of the property, on 3 March 2013;

12. On 25 January 2013 the Defendant received a letter from the Claimant's Attorney-at-Law, Mr. Azaz Juman, stating that from

the proceeds of the sale of the property only the sum of $100 000.00 would be paid to the Claimant;

13. On 28 January 2013 the Defendant wrote to the Claimant and threatened suspension of their services to the Claimant without further notice;

14. From on or about 22 March 2012 the Claimant initiated communication by e-mail with the Fair Trading Commission ("the Commission") eliciting its assistance on the basis that the Defendant was abusing its dominant position in the market place and was providing services to the Claimant at anti-competitive prices. These communications with the Commission were without notice to the Defendant;

15. During the discourse between the Commission and the Claimant, the Commission indicated that it would take some time to resolve the issues raised and that they would consider the material submitted by the Claimant and revert to the Claimant in due course. There was no resolution of the matter by the Commission;

16. On 30 January 2013, faced with the threat of disconnection, the Claimant initiated these proceedings in the High Court; and

17. The Claimant has failed to keep current with the monthly charges.

[11] The parties did not identify any facts in dispute which would affect a determination of the application for interim injunctive relief.

[12] The issues as agreed are:

1. Whether under the provisions of the ***Fair Trading Commission Act, Cap. 326B*** **("the FTCA")** and the FCA, the court has jurisdiction to hear the substantive matter; and

2. If the answer is in the affirmative, whether or not in the circumstances of this action the court should exercise its discretion to grant the interim injunction sought?

The Law

[13] An appropriate starting point for a consideration of this matter is an examination of the preambles to the FTCA and the FCA.

[14] The preamble of the FTCA states that it was enacted to provide for:

> "…the establishment of a Fair Trading Commission to safeguard the interests of consumers, to regulate utility services supplied by service providers, to monitor and investigate the conduct of service providers and business enterprises, to promote and maintain effective competition in the economy, and for related matters."

[15] The preamble of the FCA states that it is an Act:

(a) to promote and maintain and encourage competition;
(b) to prohibit the prevention, restriction or distortion of competition and the abuse of dominant positions in trade in Barbados and within the Caricom Single Market and Economy;
(c) to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the market place; and
(d) for connected matters.

[16] **S. 4 of the FCA** stipulates that the Fair Trading Commission established by **s. 3 of the FTCA** shall be responsible for the administration of the FCA.

[17] The ambit of the Commission is encapsulated in **s. 5 of the FCA** which provides, that it shall, *inter alia*:

(a) be responsible for the promotion and maintenance of fair competition;
(b) carry out, on its own initiative or at the request of any person that has an interest in the matter, such investigations or inquiries in relation to the conduct of trade
    (i) as will enable it to prevent the use of trading practices in contravention of [the] Act;
    (ii) as it may consider necessary or desirable in connection with any matters falling within the provisions of [the] Act;
(c) keep under review commercial activities to ensure that practices that may adversely affect the interests of consumers are prevented or terminated;
(d) carry out such other investigations or inquiries as the Minister may request;
(e) take such action as it considers necessary to
    (i) prevent the abuse of a dominant position by any enterprise;
    (ii) eliminate anti-competitive agreements;
    (iii) prevent or control mergers;
(f) …

(g) …

[18] The Claimant has based its claim on an alleged abuse by the Defendant of its dominant position in the telecommunications market place. As a result, **s. 16 of the FCA** arises for consideration. That section reads:

> (1) Subject to subsection (4), the abuse by an enterprise of a dominant position which the enterprise holds is prohibited.
> (2) For the purposes of this Act, an enterprise holds a dominant position in a market if, by itself or together with an affiliated company, it occupies such a position of economic strength as will enable it to operate in the market without effective competition from its competitors or potential competitors.
> (3) An enterprise abuses a dominant position 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 enterprise into that or any other market that supplies or is likely to supply a substitute for the good or service supplied in that market;
> *(b)* prevents or deters any enterprise from engaging in competitive conduct in that or any other market;
> *(c)* eliminates or removes any enterprise from that or any other market;
> *(d)* directly or indirectly imposes unfair purchase or selling prices that are excessive, unreasonable, discriminatory or predatory;
> *(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;

> *(g)* engages in exclusive dealing, market restriction or tied selling; or
> *(h)* uses any other measure unfairly in its trading operations that allows it to maintain dominance.

[19] Pursuant to **s. 6(1)(a) of the FCA**, the Commission has the power to declare business practices an abuse of a dominant position.

[20] The procedure for making a formal complaint to the Commission is set out in **ss. 23 to 25 of the FTCA**.

[21] **S. 23** provides:

> "Every person who is aggrieved by an act done by a service provider or business enterprise which is contrary to any law which the Commission has jurisdiction to administer, may make a complaint against the service provider or business enterprise."

[22] **S. 24** provides:

> (1) Any person who has a complaint against a service provider or business enterprise may
> (a) make the complaint in writing to the Commission; or
> (b) make an oral complaint before a member of the staff of the Commission designated by the Chief Executive Officer.
> (2) Where a person makes an oral complaint pursuant to subsection (1), that complaint shall be recorded in writing by a member of staff of the Commission and
> (a) shall be read and signed by the complainant; or
> (b) where the person is visually impaired, unable to read or unable to write, shall be read to that person and marked by him.
> (3) A complaint made pursuant to subsection (1) shall set out any act by any service provider or business

enterprise which is in breach of any law that the Commission has jurisdiction to administer.

[23] **S. 25 of the FTCA** relates to the investigation of complaints by the Commission and reads:

> (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.
> (2) Upon the making of a complaint pursuant to section 24, the Commission shall proceed to investigate the complaint unless it is satisfied that
> (a) the complaint is trivial, frivolous or vexatious;
> (b) the complaint is not made in good faith; or
> (c) the complainant does not have *locus standi* in the matter.

[24] **Ss. 36 and 37 of the FCA** speak to enforcement and appeals.

[25] **S. 36** provides:

> (1) Where pursuant to section 30 of the *Fair Trading Commission Act* a notice has been served on a business enterprise, any person who is aggrieved by a finding of the Commission may, within 15 days after the date of receipt of the notice, appeal to a Judge in Chambers.
> (2) The Judge in Chambers may
> (a) confirm, modify or reverse the Commission's finding or any part thereof; or
> (b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.
> (3) In giving any direction under this section the Judge shall
> (a) advise the Commission of his reasons for doing so; and

(b) give to the Commission such directions as he thinks just concerning the reconsideration of the whole or any part of the matter that is referred for reconsideration.

(4) In reconsidering the matter, the Commission shall have regard to the Judge's reasons for giving a direction under subsections (2) and (3).

[26] Under **s. 37(1) of the FCA** the court is empowered, *inter alia*, on an application by the Commission to grant an injunction restraining a person from contravening any of the obligations or prohibitions imposed in **Parts III, IV or VI of the Act** where the court is satisfied of such a contravention or of a failure by that person to comply with any direction of the Commission.

[27] And by **s. 37(3)** the court may, in addition, order the payment of compensation to a person who has suffered loss as a result of any anti-competitive agreement or trade practice.

Correspondence Between the Claimant and Representatives of the Commission

[28] In the context of this case, extracts from e-mails passing between the director of Sunbeach Communications Inc. and the Commission are of some significance and are reproduced below:

E-mail From: Scott Weatherhead
To Peggy Griffith (CEO, Fair Trading Commission)
Date: 22 March 2012 6:11:54 PM AST

Good Afternoon Peggy,

Thank you for returning my phone call this afternoon.

I would like to outline an issue which we are facing with LIME as it relates to services they provide to Sunbeach Communications Inc in Barbados.

What I am trying to understand is if the board of directors and management of Sunbeach is missing something, or if our maths skills are poor, or if LIME is in fact abusing its dominance in the market place and providing services to its competitor Sunbeach in such a way, and at such prices, that it's [sic] competitor Sunbeach cannot compete against LIME or even survive in the market.

We need to better understand this, and have the Fair trading Commission look at these numbers in their most basic form with us, so we can understand if we have a case for review by the Commission or before the Law courts for anticompetitive pricing by LIME.

here are the basics…

there are only two (2) internet service providers in Barbados who provide residential internet access services via ADSL using copper lines. These are LIME and Sunbeach.
…

We have tried unsuccessfully to negotiate with LIME fair and reasonable rates for the provision of services to Sunbeach which only LIME can provide, but even the most recent offer by LIME yesterday for new pricing to be effective as of April 1st, does not even come close to being fair, reasonable or competitive.
…

This is the case we would like you to look at with us, and help us to understand if we are missing something and if we have a case worthy of review. We can provide documentation to prove

all the above information, including contracts, rates, offers etc. from LIME.

…

LIME is pressuring us to commit to new long term contract rates before April 1st 2012 for bandwidth which we believe is unfair, and also to address more than $400,000 of past debt due to LIME under the current contract, the rates for which we believe are anticompetitive. LIME is threatening termination of the services they provide to us if we cannot come to an agreement by 31st March and meaningfully address the past debt, which we feel we are due a credit on.

LIME threatens to close down Sunbeach by March 31st 2012 if we do not comply with their terms.

We believe LIME is being unreasonable, unfair and anticompetitive and abusing their dominant position in the market place while attempting to run their only ADSL competitor out of business with their unfair business practices.

Time is NOT on our side, and while we continue to have dialog with LIME on this issue we would greatly appreciate it if the Fair Trading Commission would look at it with us and help us to get this resolved amicably.

Sincerely,

Scott N. Weatherhead

E-mail From: Peggy Griffith
To: Scott Weatherhead
Date: 24 March 2012 10:18:09 AM AST

Thank you Scott. I got your e-mail yesterday. I have asked Decourcey Eversley, Director of Fair Competition, to contact you. This is unlikely to be before Tuesday – we are closed on Monday.

Best Regards,

Peggy Griffith

E-mail From: Antonio Thompson (Chief Economist, Fair Trading Commission)
To: Scott Weatherhead
Date: 24 March 2012 3:54:22 PM AST

Good Afternoon Mr. Weatherhead

Thanks for the information you have provided to the Commission with respect to the query.

The Commission will consider the material and revert to you in due course.

Please feel free to contact us in the event that the situation changes or if there are any further questions you may have.

Kindest Regards,

Antonio Thompson

E-mail From: Scott Weatherhead
To: Antonio Thompson
Date: 28 March 2012 5:40:56 PM AST

Hi Antonio,

Thank you for looking into the case for us.

The basic things we need to determine are as follows:

1) Is the wholesale Price that LIME is Charging to Sunbeach or other resellers or international Bandwidth Fair in the context of the retail price LIME sells the same service to its own subscribers for?

> 2) Is LIME using its dominant position (Abuse of Dominance) as the largest of 2 local suppliers of International bandwidth and the largest ISP in Barbados to keep wholesale Internet prices to competitors high retail rates low and thus prevent fair competition in retail ADSL Internet from existing in Barbados?
>
> …
>
> We believe from our calculations, LIME is deliberately keeping wholesale rates high for the International IP capacity while keeping retail rates very low for Internet services so as to drive out the competition in ADSLL residential Internet from Sunbeach.
>
> I will send further proof in e-mails.
>
> Scott

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[29] The foregoing extracts are instructive as they demonstrate that the Claimant was at all times aware that its initial recourse is and was to the Commission having regard to its complaint that the Defendant was abusing its dominant position in the marketplace. So the question is, what induced the change of course of the Claimant? It could not be that the Claimant did not recognise that the proper avenue for the adjudication of its complaint was to the Commission. That is clear from the correspondence.

[30] During oral submissions, in response to an inquiry from the court, Counsel for the Claimant stated that it was apparent from the wording of the Second Affidavit of Scott Weatherhead and exhibits attached thereto that the

Claimant regarded this correspondence to be a formal complaint to the Commission. Counsel also stated that in his opinion a formal complaint had been made. He conceded, however, that it was arguable whether the statutory procedure for making a complaint to the Commission had been complied with.

[31] Having regard to the provisions of **ss. 23 and 24 of the FTCA** (see paras [21] and [22] above), I find that the Claimant did not make a written complaint to the Commission. On a proper interpretation of the e-mails the Claimant was merely eliciting the assistance of the Commission's personnel, firstly, in order to determine whether the Claimant had a case for review by the Commission and secondly, in order to reach an amicable settlement of its ongoing contractual disputes with the Defendant on rates without engaging the procedures of a formal complaint.

[32] That the Commission did not treat the e-mails as a formal complaint is evident from the response of its Chief Economist, Antonio Thompson, dated 24 March 2012, in which he thanked Mr. Weatherhead for the "information…provided to the Commission with respect to [his] query."

The Submissions - Jurisdiction

The Claimant's Submissions

[33] Counsel for the Claimant, Mr. Bryan Weekes, contended that the court's jurisdiction cannot be ousted except by the clear words of a statute. For this contention he cited the dicta of Viscount Simonds in ***Pyx Granite Co. Ltd v Minister of Housing and Local Government*** **[1960] AC 260 at 286** that:

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in Francis v. Yiewsley and West Drayton Urban District Council [1957] 2QB 136, 148; [1957] 1 ALL ER 825, a "fundamental rule" from which I would not for my part sanction any departure."

[34] Counsel submitted that, properly construed, the FCA, by virtue of s. 44, provides to a person who has suffered loss by the conduct of another in contravention of the obligations or prohibitions imposed in Parts III, IV or VI ("the prohibited conduct") of the FCA a right of action for damages and that action is by direct access to the High Court. Put another way, a person aggrieved by prohibited conduct may, at his option, elect to file an action in the High Court to recover damages or engage the complaint procedure stipulated by Part IV of the FTCA. It is a matter of election.

[35] To support this submission Counsel relied on **s. 44(2) of the FCA** which he argued specifically gives the court power to entertain an action brought at

any time within three years from the time when the cause of action arose. He urged that the use of the words "at any time" in that section is critical as Parliament does not use language in vain. And those words, he contended, buttress the Claimant's contention that an action for damages for breach of the provisions of Parts III, IV and VI of the FCA lies directly to the High Court.

[36] In further support of this submission Counsel cited the Canadian case of ***Pindoff Record Sales Ltd v CBS Music Products Inc*** (**1989), 27 C.P.R (3d) 380; 1989 Carswell Ont 490; 44 C.P.C (2d) 308** and the English authority ***Garden Cottage Foods Limited v Milk Marketing Board*** **[1984] AC 130**.

[37] By analogy Counsel referred the court to **s. 36(1) of the Competition Act R.S.C 1985 ("the Canadian Act")** which provides that:

> (1) any person who has suffered loss or damage as a result of
> (a) conduct that is contrary to any provision of Part VI; or
> (b) the failure of any person to comply with an order of the Tribunal or another court under this Act,
> may, in any *court of competent jurisdiction*, sue for and recover from the person who engaged in the conduct or failed to comply with the order an amount equal to the loss or damage proved to have been suffered by him, together with any additional amount that the court may allow not exceeding the full cost to him...(Emphasis added)

[38] In this regard he also referred the court to the Canadian case ***Pro-Sys Consultants Ltd. v Microsoft Corporation (No. 2),*** **2006 Carswell BC**

1691; 2006 BCSC 1047, [2006] B.C W.L.D 5233. In that case certain provisions of the Canadian Act, including s. 36(1) set out above, fell for consideration by the court. And Counsel cited the dicta of Tyscoe J at para [24] that:

> "The Defendants concede that conduct which constitutes an offence under Part VI of the *Competition Act* satisfies the second element of the tort. It is not necessary for the offender to be first found guilty of the offence before the conduct can be regarded as illegal. **There is no jurisdictional issue because it is the courts, not the Competition Tribunal, which try allegations of offences under Part VI and s. 36(1) specifically provides that claims for loss or damage as a result of conduct that is contrary to Part VI may be pursued in the courts.**" (Emphasis added)

[39] Part VI of the Canadian Act deals with offences in relation to competition which prohibit conspiracies, agreements or arrangements between competitors.

[40] It seems to me that Counsel's reliance on s. 36(1) as providing support for his contention that the court has jurisdiction to entertain an action under s. 44 of the FCA is entirely misplaced.

[41] First, s. 36(1), as Tyscoe J pointed out, specifically provides that claims for loss or damages as a result of conduct that is contrary to Part VI may be pursued through the courts. **S. 44 of the FCA** contains no such provision.

[42] Second, Part VI of the Canadian Act deals, as I have earlier stated, with offences in relation to competition. It does not address claims based on an abuse of dominant position on which the claim before this court is founded.

[43] Third, Tyscoe J, after a review of the "extensive submissions made by the parties regarding the jurisdiction of [that] court to deal with anti-competitive conduct governed by the Competition Act" and the several authorities cited to him (see paras [16] to [19]) stated very clearly and unequivocally at para [20] that:

> "The applicable principles that I derive from the authorities relied upon by the parties are as follows:
> (a) the Competition Tribunal **has exclusive jurisdiction** under Part VIII of the *Competition Act*, and the courts do not have the jurisdiction to make orders under Part VIII;
> (b) if the courts otherwise have jurisdiction to grant a remedy in respect of matters covered by Part VIII, their jurisdiction is not ousted;
> (c) if a breach of the Competition Act serves to satisfy one of the constituent elements of a tort, the courts may rely on the breach to grant a remedy in respect of the commission of the tort…" (Emphasis added)

[44] Part VIII of the Canadian Act is headed: MATTERS REVIEWABLE BY TRIBUNAL RESTRICTIVE TRADE PRACTICES. And it is under Part VIII that s. 79(1), which, like s. 16 of the FCA, prohibits abuse of a dominant position, falls. However, it must be pointed out that though the intent of s. 79(1) and s. 16 are in effect the same, s. 16 is far more detailed

and comprehensive in its terms than s. 79(1). For the purposes of this decision nothing turns on the differences in scope or detail.

[45] Fourthly, in the course of his decision Tyscoe J, in considering conduct under Part VIII for the purpose of determining the Defendant's application to strike out the amended statement of claim of the plaintiffs under Rule 19(24) of the Rules of Court and for an order dismissing the action, held that it was plain and obvious that, in the absence of an order of the Competition Tribunal and with no other reason to make it illegal or unlawful, conduct of the nature described in Part VIII of the Competition Act does not constitute illegal or unlawful means to satisfy the second element of the tort of interference with economic relations. He therefore ordered portions of the statement of claim alleging that conduct of the nature described in Part VIII was illegal or unlawful be struck out.

[46] In my judgement, ***Pro-Sys Consultants Ltd*** does not assist Counsel for the Claimant.

[47] Mr. Weekes also referred the court to ***s. 78 of the Evidence Act, Cap. 121*** which, in so far as material, excluded evidence of decisions in certain proceedings and reads:

> (1) Evidence of the decision in legal or administrative proceedings is not admissible to prove the existence of a fact that was in issue in the legal or administrative proceedings.

> (2) Where evidence of a decision referred to in subsection (1) is relevant otherwise than as mentioned in that subsection, it may not be used for the purpose mentioned in that subsection.

[48] Counsel cited ***National Mutual Life Association of Australasia Limited v Grosvenor Hill (Queensland)*** **[2001] FCA 237** in which the Federal Court of Australia considered s. 91(1) of the Evidence Act 1995 of Australia, the counterpart of s. 78(1). He then submitted that based on this provision, upon an application by a party under ***s. 44 of the Supreme Court of Judicature Act, Cap. 117A*** founded upon a breach of Part III of the FCA, any evidence of a finding of the Commission is inadmissible to prove any fact in issue where that fact was resolved by the Commission.

[49] Counsel conceded that s. 79(1) of the Evidence Act allows for the use of such evidence as opinion evidence. However, he contended that an application of that section to the FCA means that whilst the court may admit into evidence any decision of the Commission and give due weight to that decision, the court cannot use the decision as evidence of any fact in issue. Therefore, Counsel argued, it is incorrect to say that there is a condition precedent, namely a finding by the Commission, which must be satisfied before a party can seek redress from the court for breaches arising under Part III of the FCA as the court is not bound by any decision of the Commission.

[50] It seems to me that Counsel is using ***s. 78 of the Evidence Act*** in a spurious manner to circumvent the provisions of the FCA. The issue before the court is not one of the admissibility of a decision of the Commission but the jurisdiction of the court given the statutory regime enacted by Parliament under the FCA and the FTCA.

[51] Finally, Mr. Weekes pointed out that the Commission itself has no power to grant injunctive relief or levy fines or award compensation, such power being reserved to the court on an application by the Commission pursuant to s. 37 of the FCA.

The Defendant's Submissions

[52] In support of its contention that the court has no jurisdiction to hear claims arising under the FCA, and in particular claims arising under Part III, Counsel for the Defendant, Mrs. Sherica Mohammed-Cumberbatch, made the following submissions.

[53] Firstly, matters pertaining to competition law are in the sole purview of the Commission as the specialist body established under the FTCA and empowered to administer the FCA and impose sanctions in the event of breaches of the FCA.

[54] In this regard, Counsel submitted, the FCA is a 'complete code' and excludes by implication the jurisdiction of the High Court to hear the

substantive matter as well as the powers of the court under ***ss. 44 to 46 Supreme Court of Judicature Act*** to grant an injunction. Counsel cited ***Department of Social Security v Butler*** **[1995] 4 All ER 193** and ***Infochannel Ltd v Cable & Wireless Jamaica Ltd*** **(2000) 62 WIR 176** in support of this submission.

[55] As in the case of ***Department of Social Security v Butler***, Counsel argued that the FCA created a wholly new area of law and a right of action which previously did not exist at common law. She referred the court to the dicta of Morritt LJ at **p. 1540, paras F and G**:

> "In my judgment, neither of those rights is such as would entitle this court, consistently with the decision in The Veracruz I [1992] 1 Lloyd's Rep. 353 to grant *Mareva* relief. The Child Support Act 1991 introduced a wholly new framework for the assessment and collection of the sums required for the maintenance of children by their parents. There is no provision for the enforcement of any maintenance assessment except by the Secretary of State and his methods of enforcement are limited in the way I have mentioned. It seems to me that it would be inconsistent with the Act as a whole in general and with section 33 in particular if the Secretary of State were to be at liberty to apply for *Mareva* injunctions in the High Court. If the conditions in section 33(1) are satisfied then Parliament has clearly laid down that the Secretary of State should proceed first in the magistrates' court and then in the county court. If those conditions are not satisfied then Parliament has clearly ordained that the Secretary of State should not be entitled to enforce the maintenance assessment by court process at all."

[56] The FCA created a wholly new framework which vests the Commission with the exclusive jurisdiction to hear, dispose of and grant sanctions in respect of any breach of its provisions. Counsel therefore contended that the court cannot exercise its ancillary jurisdiction in the granting of an injunction where the court lacks the jurisdiction to deal with the substantive application. Counsel referred to the observations of Evans J in ***Department of Social Security v Butler (supra)*** **p. 1536, paras C to E that**:

> "If the plaintiff seeks to enforce a statutory right which the court can entertain and if personal jurisdiction is established over the defendant, which was the question in issue in The Siskina [1979] A.C. 210, then there is no objection in principle to the limited exercise of the power to make ancillary orders in support of substantive proceedings which may take place in some other tribunal, whether arbitration by agreement or overseas because of territorial imperatives, or both: the Channel Tunnel Group case [1993] A.C. 334 . But if the statutory right is one which the High Court has no power to enforce even when both personal and territorial jurisdiction are established, then in my judgment, arbitration apart, the court cannot exercise an ancillary or partial jurisdiction in a case where it has no substantive powers."

Discussion

[57] I am satisfied, having reviewed the provisions of the FCA and the FTCA, the helpful and detailed submissions of Counsel on both sides and the authorities cited to me, that:

1. Parliament has enacted a special statutory regime to promote and maintain and encourage competition and to prohibit the prevention, restriction or distortion of competition as well as the abuse by business enterprises of dominant positions in Barbados and within the Caricom Single Market and Economy and to ensure that all enterprises, irrespective of size, have the opportunity to participate equitably in the marketplace;

2. The responsibility for the administration of all matters falling with the purview of the FCA is vested in the Commission by **s. 4 of the FCA** which is empowered to make determinations as to whether or not breaches of the FCA have occurred and to declare certain business practices to be abuses of a dominant position (see **s. 6(1) of the FCA**);

3. By virtue of **s. 36 of the FCA** a right of appeal is given to a party aggrieved by a finding of the Commission. Further, by virtue of **s. 37 of the FCA**, the court, on an application by the Commission, is empowered to grant an injunction restraining any person from engaging in conduct that contravenes any of the obligations or prohibitions imposed in **Parts III, IV and VI**

of the FCA or where any person has failed to comply with any direction of the Commission;

4. To my mind, on a proper interpretation of **s. 36 of the FCA**, the jurisdiction of the High Court is limited to the hearing of an appeal brought by any person aggrieved by a finding of the Commission and to the hearing of an application instituted by the Commission under **s. 37 of the FCA**; and

5. Further, it seems to me that **s. 44 of the FCA** is an omnibus provision imposing civil liability for the various forms of conduct expressly prohibited by **Parts III, IV and VI of the FCA**. S. 44 does not stand on its own so as to give an aggrieved party direct access to the High Court. In my judgement, there must first be a finding of a contravention under the relevant provisions of the FCA to entitle an aggrieved person to damages under s. 44.

[58] I consider that the foregoing conclusions find support in ***Pro-Sys Consultants Ltd (supra)*** relied on by Counsel for the Claimant. In that case, Tyscoe J, at para [17], referred to the case of ***Chrysler Canada Ltd v Canada (Competition Tribunal)*** **[1992] 2 S.C.R. 394 (S.C.C)** and to the

paragraph in that case relied on by the Defendants, particularly the italicised portion of that paragraph which reads:

> "The *1986 Act* completed the broad division of the *CA* into two substantive parts, one criminal (Part VI) and one civil/administrative in nature (Part VIII), in accordance with proposals put forward as early as in 1969 by the Economic Council of Canada in its *Interim Report on Competition Policy*. Jurisdiction over the criminal part lies with the courts ordinarily dealing with criminal cases, as well as the Federal Court, Trial Division (ss. 67, 73 *CA*). *As for the civil part, Part VIII, as its heading indicates, lists the matters reviewable by the Tribunal. Section 8(1) CTA confirms the jurisdiction of the Tribunal over Part VIII. The civil part of the CA therefore falls entirely under the Tribunal's jurisdiction. It is readily apparent from the CA and the CTA that Parliament created the Tribunal as a specialized body to deal solely and exclusively with Part VIII CA, since it involves complex issues of competition law, such as abuses of dominant position and mergers.* (pp. 405-406)" (Emphasis supplied)

[59] In the case of ***Infochannel Ltd v Cable & Wireless Jamaica Ltd***, a decision of the Court of Appeal of Jamaica, Downer JA, in his judgment, cited with approval Lord Hershell's speech in ***Barraclough v Brown*** **[1897] AC 615 at 619**:

> "My lords, at an early stage in the argument of the appeal the question was raised whether the High Court of Justice had any jurisdiction to entertain a claim for the recovery of expenses under the enactment I have just quoted, or to adjudicate upon it except by way of appeal from a court of summary jurisdiction. Unwilling as I am to determine the appeal otherwise than on the merits of the case, *I feel bound to hold that it was not competent for the appellant to recover the expenses, even if the respondents were liable for them,* by action in the High Court. The respondents were under no liability to pay these expenses

> at common law. *The liability, if it exists, is created by the enactment I have quoted*. No words are to be found in that enactment constituting the expenses incurred a debt due from the owners of the vessel. The only right conferred is "to recover such expenses from the owner of such vessel in a court of summary jurisdiction". I do not think the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right." (Emphasis added)

[60] It is of note that in ***Infochannel***, Harrison JA was at pains to point out **at p. 231** that:

> "The injunctive relief sought by the appellant, is not, in my view, prohibited by the statutory provisions of the Act. Cable & Wireless is not an arm of the OUR [Office of Utilities Regulation] which is a statutory body whose conduct is subject to judicial review by any person who complains of its actions. The appellant's complaint is based on its contractual relations with Cable & Wireless, and therefore is not precluded from proceeding at common law for injunctive reliefs *despite the statutory scheme of the Act*." (Emphasis added)

[61] What emerges from the cases of ***Infochannel*** and ***Pro-Sys Consultants Ltd*** is that the special statutory framework enacted by Parliament to regulate anti-competitive conduct in the market place cannot be by-passed by direct recourse to the High Court where the sole basis of the action relates to breaches prohibited by the statutory regime.

[62] It is otherwise where a party relies on a breach of an existing right at common law either in contract or tort.

Disposal

[63] For the reasons set out above, I confirm my earlier oral decision that:

1. The court has no jurisdiction to grant the injunction sought by the Claimant in this action either by way of an interim or permanent injunction;
2. The application of the Claimant is dismissed with costs to be assessed in favour of the Defendant.

Elneth O. Kentish
Judge of the High Court