BARBADOS

IN THE SUPREME COURT OF JUDICATURE

COURT OF APPEAL

Civil Appeal No. 20 of 2009

BETWEEN:

THE FAIR TRADING COMMISSION **APPELLANT**

V.

BARBADOS NATIONAL OIL COMPANY LTD. **RESPONDENT**

BEFORE: The Hon. Marston C.D. Gibson, Chief Justice, The Hon. Sherman R. Moore, CHB, and The Hon. Andrew D. Burgess, Justices of Appeal.

2012: September 17
2013: July 8
2015: February 25

Sir Richard Cheltenham, QC in association with Ms. Shelley-Ann Seecharan and Ms. Dava Leslie for the Appellant
Mr. Roger Forde, QC in association with Mr. Frank Odle for the Respondent

<u>DECISION</u>

INTRODUCTION

[1] **MOORE and BURGESS JJA:** The appellant in this case, the Fair Trading Commission (the FTC), is a body established by the **Fair Trading Commission Act, Cap. 326B** (the **FTCA**). Its functions are stated in **section 4** of the **FTCA** to be "to enforce the *Utilities Regulation Act, Cap.*

282 and any laws relating to consumer protection and fair competition which the Commission has jurisdiction to administer". By **section 4** of the **Fair Competition Act, Cap. 326C** (the **FCA**), the FTC is vested with the administration of the **FCA**. Two of the principal purposes of the **FCA** are expressly stated in that **Act** to be "(a) to promote and maintain and encourage competition" and "(b) to prohibit the prevention, restriction or distortion of competition and abuse of dominant positions in trade in Barbados and within the Caricom Single Market and Economy".

[2] In pursuance of its function under the **FTCA** in respect of fair competition under the **FCA**, the FTC made findings that the respondent, the Barbados National Oil Co. Ltd. (BNOCL), had abused its position of dominance in the market for the supply of heavy fuel oil (HFO) to the Barbados Light and Power Co. Ltd (BL&P) contrary to **section 16** of the **FCA**. BNOCL appealed some of these findings under **section 36** of the **FCA**. **Worrell J** heard that appeal and made an order setting aside the FTC's findings. The FTC has brought this appeal against that decision of **Worrell J**.

[3] We feel bound to observe by way of introduction that this appeal is potentially of seminal importance. It is the first appeal under the **FTCA** and the **FCA** to be heard by this Court. It raises a complex of novel issues

relating to the **FTCA** and the **FCA** for this Court's determination, including issues of interpretation, procedure and substantive law.

BACKGROUND

1. Brief history of sale and supply of HFO to BL&P

[4] On 17 June 1976, a company called Mobil Oil (Barbados) Ltd entered into a contractual agreement with the BL&P for the sale and supply of HFO to BL&P for the use at BL&P's power plant at Spring Garden. The agreement commenced on the date of the contract and was to continue in force for a period of five years and thereafter from year to year unless terminated by notice given by either party. This contract was subsequently acquired by Shell Antilles & Guianas Ltd (Shell) and later by Simpson Oil Ltd (SOL).

[5] On 13 December 1979, a company called Mobil Exploration (Barbados) Ltd (Mobil) was incorporated under the former C*ompanies Act, 1910-7* to conduct oil exploration in Barbados. This company was a private company limited by shares. The original subscribers to the shares of Mobil were the late Jack Dear (later Sir Jack) and Dorothy Williams, Attorneys-at-Law.

[6] By virtue of a certificate of continuance issued on 17 January 1986, Mobil was continued under the existing **Companies Act, Cap. 308** as the BNOCL. The Crown in right of its Government of Barbados owns the majority of the

shares in BNOCL with the National Petroleum Corporation, a statutory body, holding a minority interest.

[7] BNOCL is the holding company of the Barbados National Terminal Co. Ltd. (BNTCL). BNTCL was incorporated as a company limited by shares on 5 February 1998. The main business which that subsidiary proposed to carry on was stated in its "Request for Name Search and Name Reservation" application to be: "(a) Purchasing of the Mobil Refinery…(b) Coordinating the supply of petroleum products on the island."

[8] After the incorporation of BNTCL and up until 2005, BNOCL pursued the business of sourcing and freighting petroleum products to Barbados. BNOCL, in sourcing refined oil products entered into an arrangement with the state owned oil refinery of Trinidad and Tobago, Petrotin. Under the arrangement, BNOCL sold locally mined crude to Petrotrin to be refined in exchange for the refined products and BNOCL received a discount on the products shipped to it for sale in Barbados.

[9] Ownership of these products was passed from BNOCL to BNTCL at the ship's flange for on sale to the major oil companies (MOCs), namely Esso Standard Oil SA Ltd (ESSO), Texaco West Indies Ltd (TEXACO) and SOL, in Barbados. BNTCL transported the products to various storage facilities, including a storage facility at Needham's Point, from which the HFO was

lifted by truck. BNTCL then sold the HFO to Shell (and later to SOL) at its full cost which then transported it to BL&P to be used by BL&P to produce electricity for use in Barbados.

[10] On 1 March 2005, BNTCL met with stakeholders in the petroleum and related industries to, inter alia, update them on the status of the construction of new or additional terminal facilities at Fairy Valley and Holborn and to inform them of BNTCL's new mandate. Present at the meeting were representatives of the MOCs, the BL&P and the FTC. It is noteworthy that the minutes of the meeting record that the meeting was informed that a major project planned for the ESSO Holborn terminal involved the installation and commissioning of a new 12 inch pipeline running from that terminal to the BL&P Spring Garden power plant. However, the minutes do not record anything to suggest that it was then the intention of either BNOCL and/or BNTCL that the pipeline would be for their exclusive use.

[11] On or about 8 September 2005, the Cabinet of Barbados met and approved a proposal contained in Cabinet Paper (05) 998/MEP 1001 prepared by BNOCL (Cabinet Paper). That Cabinet Paper outlined the existing operations of the BNOCL and the BNTCL and proposed that the commercial relationship between BNOCL and BNTCL should change. It recommended that BNOCL should henceforth source and maintain

ownership of the petroleum product throughout the supply chain and should pursue the competitive supply of fuel oil to BL&P and other users taking into account the implications of alternative arrangements. BNTCL should operate as a terminal facility, charging a throughput fee for refined petroleum products moved through the ESSO Holborn terminal which BNTCL leased from ESSO.

[12] Cabinet agreed to these proposals.

[13] By letter dated 4 October 2005, the Permanent Secretary (ag) of the Ministry of Energy wrote to SOL as follows:

> **"The Supply and Distribution of Petroleum Products**
>
> The Government of Barbados, cognisant of the likely effect of high oil prices on a small developing economy, is seeking to implement a number of measures aimed at mitigating this impending impact.
>
> In this context, the Barbados National Oil Co. Ltd. will be given an expanded role in the downstream petroleum sector.
>
> Accordingly, the Cabinet of Barbados has decided as follows:
>
> - That the Barbados National Oil Company Limited (BNOCL) should assume full responsibility for the sourcing and freighting of gasoline and diesel and that ownership of these products move from Barbados National terminal (sic) Company Limited (BNTCL) to BNOCL within the Terminal;
>
> - That BNOCL pursue the competitive supply of fuel oil to the Barbados Light and Power Company Ltd. and other

users taking into account the implications of alternative arrangements."

[14] Later, by letter dated 15 November 2005, the Permanent Secretary (ag) of the Ministry of Energy also wrote BL&P as follows:

> **"<u>Supply of Fuel Oil to Barbados Light and Power Company Limited</u>**
>
> I am informing that Government has decided that fuel oil will be supplied by Barbados National Co. Ltd. (BNOCL) to the BL&P Spring Garden Plant through the Esso Terminal at Holborn.
>
> You are to note that the General Manager of BNOCL will be meeting with you to implement this arrangement."

[15] Notwithstanding this correspondence from the Ministry, the BL&P by way of a letter and tender document dated 23 December 2005 wrote inviting all oil companies operating in Barbados, including the BNOCL, ESSO, Texaco and SOL, to bid for the opportunity to supply HFO to the BL&P Spring Garden plant. In the letter, BL&P alerted prospective tenderers of the Government's mandate that BNOCL would be the enterprise to supply the HFO to BL&P.

[16] Paragraph 2.6 of the tender document which was headed "**Prices**" provided as follows:

> "The Buyer intends to have a transparent pricing arrangement for Heavy Fuel Oil delivered. Tenders shall be evaluated using the price formula outlined below.

> The price P in US dollars per US barrel shall be calculated for each release as per the following formula:
>
> P = A + B + C +D + E + F + G, where
>
> A = F.O.B price calculated in US dollars per US barrel based on the average of the Shell and Petrotrin Caribbean postings. The prices will be calculated on the 1st and 15th day of each month and shall be based on the prior (2) week average of the Shell and Petrotrin Caribbean postings.
>
> B = Ocean Freight losses and insurance
>
> C = Ocean losses and insurance
>
> D = Inspection
>
> E = Terminal fees
>
> F = Delivery Charge
>
> G = Tenderer's margin".

[17] The MOCs considered the throughput fee an essential element of a proper bid because of requirements E and F, namely, "Terminal fees" and "Delivery Charge", in this formula. Accordingly, on 10 January 2006, SOL wrote to BNOCL as follows:

> "We refer to the invitation to tender for the supply of Heavy Fuel Oil to Spring Garden Power Station, as distributed by the Barbados Light & Power Co. Ltd. Specifically section 2.6, which addresses the pricing mechanism in the tender proposal, terminal fees and delivery charges are required in the final tender submission.
>
> In keeping with Government's Petroleum Distribution Strategy, it is anticipated the newly installed pipeline between Holborn and Spring Garden is the preferred option for delivery. We therefore write requesting a throughput rate, for SOL to use the

> Holborn terminal and connecting pipeline to Spring Garden Power Station."

[18] BNOCL responded to this request in a letter dated 27 January 2006 in which they indicated that they were "not in a position to provide [SOL] with a throughput rate for the use of the pipeline since [SOL's] proposed use of the pipeline is at variance with a decision made by the Cabinet of Barbados regarding the supply of fuel oil to the Barbados Light and Power Company Limited".

[19] Meanwhile, by letter dated 3 February 2006, ESSO wrote to BL&P regretting "to advise that we are not in a position to tender as the Barbados National Oil Co. Ltd. (BNOCL), owners of the pipeline connecting our terminal to your generating station, has informed us that they are not in a position to provide us with a throughput rate for use of the pipeline." A copy of a letter to ESSO from BNOCL in almost identical terms to the letter sent to SOL was attached to ESSO's letter to BL&P.

[20] On or about 3 February 2006, Texaco submitted a bid to BL&P for the supply of HFO to BL&P. The bid was however stated to be "contingent" upon Texaco being able to use the BNOCL owned pipeline running from Holborn to Spring Garden.

[21] It does not appear that Texaco was able to obtain a lease of the BNOCL's pipeline. In consequence, the bid for the supply of HFO to BL&P submitted on 3 February 2006 by BNOCL was the only complete bid tendered to BL&P. There is little surprise in all these circumstances that the contract to supply fuel oil to BL&P's Spring Garden power plant was awarded to BNOCL to commence on 1 June 2006.

2. The complaint by SOL

[22] On the morning of 19 February 2006, SOL met with senior management at the FTC and made an oral complaint against BNOCL. After that meeting, SOL wrote to the FTC and formally lodged a written complaint dated 20 February 2006. That complaint alleged that the BNOCL had abused its dominant position in the petroleum importation and distribution markets to the detriment of SOL. In paragraph 2, SOL complained as follows:

> "There are (2) actions which concern us:
>
> 1. SOL was effectively prevented from participating in the recently concluded fuel oil tendering process undertaken by The Barbados Light & Power Co. Ltd. and
>
> 2. BNOC is pursuing a business model making it the exclusive importer, and supplier of domestic use bulk petroleum products. With a stated intention of becoming a marketer, without employing transparent pricing mechanism which promotes fair competition."

SOL enclosed in the complaint correspondence to FTC, a brief summary of events and correspondence between SOL, BL&P, BNOCL, BNTCL and the Ministry of Energy.

3. The investigation

[23] Following the oral information given by SOL at the meeting and the written information in the complaint correspondence, the FTC proceeded to investigate the complaint in exercise of its functions under the **FTCA** and the **FCA**. The evidence of the FTC is that, based on the nature of the complaint made by SOL, it considered that the conditions for the conduct of an investigation could not be reasonably met by SOL. In light of this and notwithstanding **section 25** of the **FTCA** (which is considered extensively later in this judgment), the FTC determined that the investigation should be commenced by virtue of **section 5 (4)** of the **FCA**.

[24] The FTC's evidence which is not contradicted is that, in conducting the investigation, the staff of the FTC first of all undertook a review of the supporting information accompanying the initial complaint and attempted to verify that information. Given the nature of the allegations, and the nature of the supporting documentation, the FTC sought to gather further information from parties identified as relevant to the investigation.

[25] On 7 March 2006, as part of the FTC's investigation of the complaint by SOL, three staff of the FTC met with three officials of the Ministry of Energy and Public Utilities (the Ministry of Energy) and three members of the management of BNOCL. The minutes of the meeting which were prepared and written by the Ministry of Energy and filed with the FTC are instructive and it may be useful to repeat verbatim the relevant paragraphs of these minutes. These read as follows:

> "The meeting was convened against the background of a complaint submitted by SOL to the Fair Trading Commission (FTC) with respect to the supply of fuel oil to the Barbados Light and Power company (sic) Limited (BL&P).
>
> 2. The FTC representatives indicated that they were in essence seeking to understand the arrangements pertaining to the supply and distribution of fuel oil to the BL&P.
>
> 3. The meeting noted that since the closure of the Mobil Oil refinery in 1998, BNTCL had imported fuel oil which was stored at the terminal at Needhams Point. This fuel oil was bought at the terminal's rack by SOL and the product was transported by trucks owned by Hinds Transport to the Barbados Light and Power Co. power facility at Spring Garden. It was noted that the supply of fuel oil to the BL&P Co. was previously undertaken by Shell; the contract was subsequently taken over by SOL who had bought some of Shell's operations in the Caribbean.
>
> 4. It was noted that a new terminal was subsequently established which included the use of the ESSO Holborn facility.

5. The Ministry officials informed that the Barbados National Terminal Co. Ltd had entered into an agreement with ESSO for the use of this terminal. This terminal would be used for the storage of fuel oil which would now be transported by a designated pipeline to the BL&P Co. (sic) Spring Garden facility.

6. The meeting noted that there was limited provision for trucking facilities at the ESSO terminal at Holborn which meant that it would no longer be possible for fuel oil to be transported by truck to the Spring Garden plant.

7. The Ministry officials further noted that the Cabinet had agreed last year to the recommendation that the Barbados National Oil Co. should be responsible for the importation of fuel oil to Barbados and that this company should pursue the competitive supply of fuel oil to the Barbados Light and Power Co. This decision had been communicated in writing to SOL.

8. It was further stated that SOL would therefore be aware of the implications of this decision for its contract with the BL&P Co. which the Ministry understand would end at the end of May 2006.

9. The BNOCL officials also indicated that the Barbados Light and Power Co. Ltd had invited tenders in December 2005, for the supply of fuel oil to the company and BNOCL had submitted a bid. Sol had requested the information on the throughput fee for use of the pipeline at Spring Garden but the BNOCL did not provide this information since it was not in accordance with Cabinet's decision.

10. It was suggested by the FTC officials that there appeared to be a lack of transparency in the exercise of the use of the pipeline with respect to the reluctance of BNOCL in granting this information to SOL. The FTC officials also indicated that there seemed to be evidence of a monopolistic position by BNOCL which would now be the dominant player

> in the market in respect to the importation and distribution of fuel oil.
>
> 11. It was also suggested by the FTC that the provision of the information to SOL would have made the tender more transparent.
>
> 12. There was further discussion on the issue which resulted in the decision taken by the Ministry that it would consider the matter further and respond to the FTC by March, 2006."

[26] Another step taken by the FTC in its investigation of the SOL complaint was the forwarding of a letter to BL&P dated 15 March 2006 requesting information on fuel supply arrangements to BL&P. BL&P responded to this request in a letter dated 27 March 2006 to which was attached a document titled "BARBADOS LIGHT AND POWER COMPANY LIMITED…FUEL OIL SUPPLY ARRANGEMENTS…PRESENT AND FUTURE…24 March 2006". The letter states in its relevant paragraphs as follows:

> "We are advised that the Barbados National Oil Company will be the sole importer of heavy fuel oil, diesel and gasoline in the island. Jet Fuel (kerosene) will continue to be handled by the majors – Esso, Shell and Texaco.
>
> The prices of heavy oil (Bunker C) and jet fuel are adjusted monthly in line with world prices. The diesel price is set by the Government.
>
> Over 90% of BL&P's production is on heavy fuel oil and BNOC will be the sole supplier."

[27] The attachment in its relevant section informed as follows:

"**SPRING GARDEN**

Product: Heavy Fuel Oil

Application: Low Speed Diesel and Steam Units

Present

Fuel is transferred from Needhams Point to the BL&P Spring Garden facility via road tankers. This arrangement will cease within the next few weeks.

Future

Future supplies of heavy fuel oil to BL&P Spring Garden will be from the ESSO facility at Holborn via pipeline which has already been installed and is expected to be commissioned shortly. Our understanding is that BNOCL will import the heavy fuel oil through the Bridgetown Port and into the Holborn facility which will continue to be owned and operated by ESSO under a storage arrangement with BNTCL. The product will be owned by BNOC. With the exception of BL&P, all other heavy fuel oil customers will be supplied by road tankers. All tank truck sales from Holborn will continue to be supplied by the existing marketers. BNOC has stated its intention to be the exclusive supplier to BL&P via pipeline.

ESSO marine bunkering for the sale of fuel to ships in the port will continue to be handled by ESSO."

[28] We would observe *en passant* that BL&P's "understanding" was no doubt based on the letter of 15 November 2005 written to them by the Ministry of Energy.

[29] Returning to the FTC's investigation, on 18 May 2006 the FTC received correspondence from the BL&P and subsequently a letter from SOL dated 31 July 2006, indicating that SOL had been given temporary permission

from BNOCL to utilise the newly constructed pipeline to transport HFO to BL&P. The Needham's Point facility, having by that time been closed, this measure was designed to allow SOL to fulfil their contractual obligations to BL&P which ended on 31 May 2006. SOL indicated further that they were verbally advised at the time that the throughput rate for the use of the pipeline was "US 0.219/barrel", but that information was quoted long after the date for submission of bids to BL&P had passed!

[30] On 19 May 2006, in continuing its investigation of the SOL complaint, the FTC wrote to BNOCL again informing them of the allegations made by SOL and requesting that BNOCL respond to those allegations by 25 May 2006. Despite several requests by the FTC and promises to do so by the Ministry of Energy, no verbal or written responses were received from the Ministry of Energy or from BNOCL within the deadline set by the FTC. Given that the proposed start of the BL&P contract for the delivery of HFO was 1 June 2006 on the expiration of the SOL contract, the FTC considered that time was of the essence and the staff of the FTC proceeded to complete what the FTC maintains was a "preliminary" investigative report.

4. The preliminary report

[31] The preliminary investigative report along with all available evidence from the parties involved was reviewed by the FTC Commissioners. They concluded that BNOCL, acting on the directive of the Cabinet, through the Ministry of Energy, was in breach of the **FCA**. The Commissioners directed that the preliminary findings be communicated to the Ministry of Energy and the Minister with responsibility for the Commission, the Minister of Commerce. This was done.

[32] By a letter dated 29 June 2006, BNOCL wrote to the FTC to express their "deep regret over the fact that they were unable to submit the requested information within the time frame stipulated" in the FTC's letter of 19 May 2006 and to indicate that they intended to submit a response to that letter by 15 July 2006. In fact, BNOCL responded by letter dated 10 July 2006 in which they sought to explain their actions. They also denied that they had acted in breach of the **FCA** and concluded as follows:

> "We are concerned that the tone of your letter suggests that you have predetermined this matter and/or that you have accepted certain allegations made by SOL to be true without testing the same against our rebuttals. Our concern is also fortified by a letter written by you to the Permanent Secretary, Ministry of Energy which also suggests that you have predetermined a breach of the Fair Competition act (sic).

> We have been advised that principles of natural justice dictate that you should not make an adverse finding against a party unless that party has had the opportunity to be heard."

[33] As an aside to the concern and advice expressed in these paragraphs, we cannot resist remembering the FTC's letter of 19 May 2006 to BNOCL informing BNOCL of the allegations made by SOL and requesting BNOCL to respond to those allegations by 25 May 2006; nor can we forget BNOCL's hushed refusal to do so.

[34] Be that as it may, following the receipt of BNOCL's response, further information on a number of points raised in BNOCL's response was formally requested by the FTC from SOL, ESSO and from the Barbados Statistical Service. Having received the information requested, the preliminary investigative report was amended to include BNOCL's views and an analysis of the additional information. This amended preliminary report along with all the evidence compiled in the matter was then reviewed by the Commissioners of the FTC.

[35] On 22 September 2006, the FTC sent a letter to BNOCL which stated that, in accordance with **section 30** of the **FTCA**, it was enclosing a copy of the preliminary investigative report which included the preliminary findings of the investigation of the SOL complaint and asked that BNOCL respond in

writing to the findings in the report. The most critical part of the letter reads as follows:

> "The Commission on reviewing all the available information is of the view that BNOCL appears to be in contravention of the FCA through the abuse of its dominant position. The Commission is therefore providing to BNOCL a copy of the investigative report which is based on all the information received from all parties contacted in the course of the investigation. A chronology of relevant events is attached to the investigative report. A list of all documents referenced in the investigative report is also enclosed for your perusal.
>
> The Commission hereby gives BNOCL notice that it must respond in writing to the said report on or before **October 6, 2006**."

[36] The report itself concluded at page 33 that, from the evidence available and an analysis of the relevant law, it appeared that BNOCL had abused its dominant position in the petroleum importation and distribution markets contrary to **section 16 (3)** of the **FCA**. The bane of the FTC's claim was that BNOCL, as the dominant importer and wholesale supplier of HFO into Barbados, had been given authority through the decision of Cabinet to leverage its dominance founded in the market for the importation and wholesale distribution of fuel oil, into the market for the retail supply of HFO to BL&P. BNOCL implemented this decision by refusing to make a throughput fee available to other competitors and so became the sole retailer of fuel oil to BL&P. This refusal by BNOCL impaired the

competitive tender process proposed by BL&P and automatically excluded all other competing oil companies from the retail supply of fuel oil to BL&P.

[37] By letter dated 4 October 2006, BNOCL responded to the FTC's investigative report of 22 September 2006. BNOCL's response is summarised in the ultimate paragraph of that letter as follows:

> "In summary, we do not agree with your several findings and/ of your summary at Page 30 of the Report to the effect that BNOCL abused its dominance in the market place by unilaterally dictating to the BL&P terms under which it will be supplied with Fuel Oil."

The letter concluded by informing that BNOCL "will be guided by Counsel as to how we shall deal with your findings".

5. BNOCL's appeal under section 36 of the FCA against the FTC's findings in the preliminary report: Suit No. 1811 of 2006

[38] On 9 October 2006, BNOCL commenced an action, Suit No. 1811 of 2006, against the FTC by way of originating summons supported by the affidavit of Mr. Ronald Hewitt, the then General Manager of BNOCL. In that summons, BNOCL claimed, as Applicant, against the FTC, as Respondent:

> "…for an Order pursuant to Section 36 of the Fair Competition Act Cap 326C of the Laws of Barbados that the Findings as set out hereunder made by the Respondent be reversed or set aside and/or a Declaration that there is no evidence to support the said Findings:-
>
> (1) That the Applicant informed the BL&P (which is the Barbados Light & Power Company limited (sic) a company

registered under the Companies Act Cap 308 of the Laws of Barbados), 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 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."

6. The final report

[39] Following service of the summons and affidavit by the BNOCL, the FTC considered the BNOCL's response of 4 October 2006 and acting under **section 17 (2)** of the **FCA** proceeded to issue its final report in the matter. By letter dated 1 December 2006 which enclosed a copy of the final report, the FTC acting under **section 17 (2) (b)** of the **FCA** issued a directive to BNOCL requiring it to cease its abusive conduct by 22 December 2006. BNOCL failed to do so by that date.

7. The FTC's application to the court under section 37 of the FCA: Suit No. 9 of 2007

[40] BNOCL having failed to comply with the 22 December 2006 FTC directive, the FTC by way of an originating summons and affidavit dated 3 January 2007 sworn by Mr. Eversley, the Director of Fair Competition, instituted proceedings in Suit No. 9 of 2007 under **section 31 (b)** of the **FTCA**. In this action, the FTC sought a declaration that BNOCL had acted and continued to act in breach of the **FCA** in light of the evidence contained in Mr. Eversley's affidavit and consequential orders as well as an injunction pursuant to **section 37** of the **FCA** to restrain BNOCL from its continuing contravention of **section 16** of the **FCA**.

[41] Taking the view that as Suit No. 1811 of 2006 and Suit No. 9 of 2007 had arisen out of the same facts and raised similar issues, the FTC applied by way of originating summons and affidavit also dated 3 January 2007 sworn by Ms. Dava Leslie, Senior Legal Officer of the FTC, for a consolidation of the actions which it asked be heard at the same time. Alternatively, it sought an order that the actions be tried one after the other. **Blackman J.** made an order on 30 January 2007, filed on 15 March 2007, in which he granted leave to the Commission to amend its summons by adding the words "1 (a) Alternatively, that the said actions be tried at the same time".

8. Hearing and decision in Suit No. 1811 of 2006

[42] On 25 September 2007, hearings in Suit No. 1811 of 2006 commenced in the High Court before **Worrell J** without any reference to the 30 January 2007 order of **Blackman J**. Evidence from the parties involved was received.

[43] On 18 March 2009, **Worrell J** delivered a judgment and granted the relief sought by BNOCL. In arriving at his decision, the judge made findings in his judgment (i) at para [62], that the FTC did not enquire of BNOCL whether SOL had made a complaint to them in respect of the anti-competitive conduct; (ii) at paras [52-54], that there was no evidence that the use of the pipeline was essential to the transport of fuel oil to BL&P; at para [55], that "a strict test was not done to determine the market"; at para [56], that there was no evidence that BNOCL enjoyed "an absolute monopoly position"; and, at para [69], that the evidence supported a finding under **section 16 (4**) of the **FCA** to the effect that there was no abuse of a dominant position by BNOCL.

ISSUES RAISED IN THIS APPEAL

[44] On 10 December 2009, the FTC, as Appellant/Respondent filed a notice of appeal against the order of **Worrell J** and named BNOCL as Respondent/Applicant.

[45] On 16 January 2013, the FTC filed amended grounds of appeal against the order of **Worrell J** as follows:

"**<u>Ground 1:</u>**

The Learned Trial Judge erred in law in not hearing both SCS No. 1811 of 2006 (the preliminary complaint) and SCS No. 9 of 2007 (final/enforcement proceedings) in accordance with the order of Blackman, J. filed on the 15th day of March, 2007, before making a determination of the issue(s) before him. The Learned Trial Judge failed to appreciate that SCS No. 1811 of 2006 was based on a preliminary report and in treating that report as final and the suits as alternatives, the Learned Trial Judge excluded from his assessment, material evidence without which his decision was, in many respects premature, incomplete and defective.

<u>Ground 2:</u>

Section 16 (4) of the ***Fair Competition Act*** provided a defence to BNOCL as acting for the benefit of consumers and it was its duty to raise it, if appropriate. The Learned Trial Judge misdirected himself in law in interpreting ***section 16 (4) (a)*** and ***(b)*** of the ***Fair Competition Act***, as placing an obligation on the Fair Trading Commission to present a case for BNOCL. In so finding he distorted and misapplied the law.

<u>Ground 3:</u>

(a) The Learned Trial Judge misapprehended the applicable law, namely, ***section 5*** of the ***Fair Competition Act***, under which the Appellant proceeded. Accordingly, the Learned Trial Judge erred in not appreciating that the findings of fact set out in paragraphs 62 to 65 of the decision, that:

(i) SOL had not made a complaint to BNOCL;

(ii) The FTC had not ensured that SOL had made a complaint to BNOCL which it failed to redress, and

(iii) There was no evidence that SOL was incapable of making a written or oral complaint,

were not prerequisites to the Appellant launching an investigation on its own initiative or at the request of any person having an interest in the matter.

(b) The Learned Trial Judge erred in law in holding that the Fair Trading Commission impliedly erred in proceeding in the events that happened under ***section 5 (4)*** of the ***Fair Competition Act*** rather than ensuring that SOL pursue its complaint with BNOCL. The Learned Trial Judge failed to appreciate that the Fair Trading Commission was justified in acting as it did since it had a responsibility to protect competition within the industry once satisfied that the issues raised by SOL's complaint triggered consideration larger than SOL itself and were likely to affect all the players in the industry.

<u>Ground 4:</u>

(a) The Learned Trial Judge's finding at paragraph 70 of the decision, namely, that "FTC's finding would effectively have meant that an entity which uses its funds to deliver a more efficient service to customers could not do so with competitors benefiting from its investment" was fundamentally flawed and inconsistent with the essential facilities doctrine implicit in ***section 16 (3) (b), (c)*** and ***(h)*** of the ***Fair Competition Act, Cap. 326C***.

(b) The finding by the Fair Trading Commission that BNOCL had been involved in exclusive dealing contrary to section 16 (3) (g) of the Fair Competition Act was well grounded and there is no support for the rejection of that finding by the Learned Trial Judge."

[46] It is on these amended grounds of appeal that the written and oral submissions have been presented to this Court for and against the decision of **Worrell J**. In our judgment, grounds 1 and 3 raise questions which are procedural in nature, whilst grounds 2 and 4 raise substantive questions on the ambit and operation of the prohibition against abuse of dominant position provided for in **section 16** of the **FCA**. In fact, ground 2 is a subset of ground 4. Accordingly, in this judgment, we consider ground 1 in the amended grounds of appeal first. This is followed by our consideration of grounds 3, 4 and 2, in that order. Before embarking on a consideration of these grounds, however, it appears to us advantageous to heed the advice of **Sir David Simmons CJ** in the, we dare say, masterful judgment of this Court in **Cable and Wireless (Barbados) Ltd v Fair Trading Commission Civil Appeal No 23 of 2003 (unreported) (Cable & Wireless v FTC)** at para **[53]** and situate these grounds in their legislative context.

THE LEGISLATIVE CONTEXT

[47] As we stated above, the issues in this appeal turn on an interpretation of the **FTCA** and the **FCA**. Our abiding task in pursuing such an interpretation is to ascertain the intention of Parliament. This we must do by giving the language of the Acts a meaning and interpretation that reflect that intention. The traditional approach to doing this was for courts to adopt a

strict literal construction of the words in question. However, there has been a radical shift away from the literal approach to what is called the contextual or purposive approach. The contextual or purposive approach was adopted by the Caribbean Court of Justice in the Barbadian case of **Campbell v AG of Barbados (2009) 76 WIR 63 at 66 para [43].** The same interpretative approach was also warmly embraced by **Sir David Simmons CJ** in this Court in **Cable & Wireless v FTC** at **paras [53]** to **[55]**.

[48] What the contextual or purposive approach involves was explained by Viscount Simonds in the English House of Lords decision of **Attorney-General v Prince Ernest Augustus of Hanover [1957] I All ER 49** at **53** as follows:

> "[W]ords, and particularly general words, cannot be read in isolation; their colour and content are derived from their context. So it is that I conceive it to be my right and duty to examine every word of a statute in its context, and I use context in its widest sense which I have already indicated as including not only other enacting provisions of the same statute, but its preamble, the existing state of the law, other statutes *in pari materia*, and the mischief which I can, by those other legitimate means, discern that the statute was intended to remedy."

[49] A dictum of Lord Griffiths in the landmark English House of Lords case of **Pepper v Hart [1993] AC 593** at **617**, as it were, gilds the lily. He said there:

> "The days have long passed when the courts adopt a strict constructionist view of interpretation which required them to adopt a literal meaning of the language. The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at extraneous material that bears upon the background against which the legislation was enacted."

[50] An important contextual consideration in approaching the interpretation of the **FTCA** and the **FCA** is that these two Acts form part of a legislative programme commenced in the year 2000 aimed at microeconomic reform in Barbados. It commenced with the enactment of the **Utilities Regulation Act, Cap. 282 (URA)**. This was followed by the **FTCA**, the **FCA**, the **Consumer Protection Act, Cap. 326D** (**CPA**), the **Telecommunications Act, Cap. 282B** (**TCA**) and the **Consumer Guarantees Act, Cap. 326E** (**CGA**). The FTC is entrusted under **section 4 (1)** of the **FTCA** with the enforcement and administration of these various pieces of legislation.

[51] These Acts may be said to be, to borrow the words of **Sir David Simmons CJ** in **Cable & Wireless v FTC** at **para [15]**, "*in pari materia*, covering much of the same subject matter in some parts, but with specific applicability in other parts. They may not properly be characterised as a code, but they certainly comprise a comprehensive system for the conduct and regulation and operation of (competition among business

enterprises).” Inevitably therefore, the meaning of much of the **FTCA** and the **FCA** is best gained by reading the **FTCA** in the context of the **FCA** and *vice versa* and also by reading both these Acts in the context of the other pieces of legislation administered by the FTC under the **FTCA.**

[52] With the foregoing firmly in mind we now consider the issues in this appeal.

GROUND 1 - ROLE AND FUNCTION OF THE COURT IN THE FTC’S ENFORCEMENT OF THE FCA.

[53] Two interrelated matters are raised in ground 1. The first is whether BNOCL’s action under **section 36** of the **FCA**, Suit No. 1811 of 2006, and the FTC’s application under **section 37** of the **FCA**, Suit No. 9 of 2007, should have been consolidated and heard at the same time, or alternatively, one after the other as ordered by **Blackman J**. The second is whether the trial judge in the hearing of Suit No. 1811 of 2006 excluded from his assessment, “material evidence without which his decision was, in many respects premature, incomplete and defective”.

[54] In our judgment, determination of these issues depends upon the prior question of what is the role and function of the courts in the enforcement of FTC findings and directions under the **FCA**. Unfortunately, this elemental question was not raised by counsel before **Worrell J** and was not considered by him. We now turn to answering it.

[55] **Part VII** of the **FCA** is headed "Enforcement and Appeals". This part contains three sections: **section 36** dealing with the function and role of the court in respect of "appeals" to the court against the findings of the FTC by an aggrieved person; **section 37** dealing with applications by the FTC to the court in respect of sanctions for contravention of the **FCA;** and **section 38** dealing with and the effect of an "appeal" under **section 36**. It is important that we examine the provisions of these sections carefully.

[56] First, **section 36.** This section provides as follows.

> "36.(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 part of the matter that is referred for reconsideration.
>
> (4) In reconsidering the matter, the Commission hall have regard to the Judge's reasons for giving a direction under subsection (2) and (3)."

[57] As is clear from the express language of this provision, **section 36** must be construed in the context of **section 30** of the **FTCA**. **Section 30** of the **FTCA,** in turn, is best understood in the context of the complaints and investigations procedure before the FTC contained in **sections 23** to **31 (1) (b)** in **Part IV** of the **FTCA** which is headed "Complaint, Investigation and Procedure before the Commission". In this regard, **sections 23** and **24** make provision for complaints to be made against a service provider or business enterprise to the FTC. **Section 25** mandates that the FTC investigate such complaints except in specified cases. **Sections 26** to **28** invest the FTC with extremely wide powers of investigation utilising its substantial human and financial resources. **Section 29** regulates the termination of an investigation which in the opinion of the FTC does not justify further investigation.

[58] **Section 30**, the section mentioned in **section 36** of the **FCA**, makes general provision for where, on the conclusion of the investigation, the FTC

determines that there may be a breach of the prohibition investigated. This section imposes a duty on the FTC, on the conclusion of such an investigation to "in a timely manner serve a copy of the finding of its investigation, or a copy of the complaint, on the service provider or business enterprise together with a notice requiring the service provider or business enterprise (i) to satisfy the finding or complaint; or (ii) to respond to the finding or complaint in writing, within such reasonable time as may be specified in the notice.

[59] It is worth noting here also that the general provision in **section 30** of the **FTCA** is amplified in relation to abuse of a dominant position in **section 17 (2)** of the **FCA**. **Section 17 (2)** provides as follows:

> "(2) Where the Commission finds that an enterprise has abused or is abusing a dominant position, the Commission shall prepare a report indicating the practices that constitute the abuse and shall
>
> > (a) notify the enterprise of its finding accompanied by a copy of the report; and
> >
> > (b) direct the enterprise to cease the abusive practice within a specified period."

[60] Finally, **section 31 (1) (b)** of the **FTCA** makes provision in respect of the action to be taken by the FTC where a business enterprise fails to comply with a notice served by the FTC in accordance with **section 30**. In such an

eventuality, **section 31 (1) (b)** provides that the FTC "shall institute proceedings in the High Court in respect of a…finding alleging a breach of any section of a law relating to…fair competition…"

[61] Something that is conspicuous by its absence from the provisions in the **FTCA** is any procedure for an aggrieved person to challenge the findings of the FTC. **Section 37 (1)** of that Act is not such a provision. That section provides for an appeal "on a question of law to a judge of the High Court from a decision or order" of the FTC. So, no provision is made in **FTCA** to enable the settlement by the court of matters relating to FTC's findings before the FTC institutes proceedings pursuant to **section 31 (1) (b)** of the **FTCA** without the expense of bringing an action in the usual way.

[62] In our judgment, **section 36** of the **FCA** is to be read as a legislative attempt aimed at remedying that lacuna in the **FTCA** in fair competition matters. That section provides for an aggrieved person "to appeal to a Judge in Chambers" against a finding of the FTC as a step prior to the FTC instituting proceedings pursuant to **Section 31 (1) (b)** of the **FTCA**. The procedure under **section 36** is expressly limited to dealing only with findings of the FTC and not to extend to the determination of serious questions of law, like for instance, whether there was a breach of natural justice. The section leaves serious questions raised by a person against the FTC in a competition

matter to proceed under **section 37(1)** of the FTCA or under the **Administrative Justice Act, Cap. 109B** or in the usual way under the inherent jurisdiction of the High Court.

[63] It is crucially important to underline that the procedure under **section 36** of the **FCA** is expressly stated to be by way of "an appeal" and that it is "to a Judge in Chambers". In law, "an appeal" is a proceeding taken by a higher decision making body to rectify an erroneous decision of a lower decision making body. Broadly speaking, there are two types of appeals, namely, appeals on the record and *de novo* appeals. In a *de novo* appeal, the higher decision making body re-hears the case without any reference to the lower decision making body. In appeals on the record, the decision of the lower decision maker is challenged by arguing that, for instance, he or she misapplied the law, came to an incorrect factual finding, considered evidence which he or she should not have considered, or failed to consider evidence that he should have considered. In its usual understanding, an appeal involves an evaluation or review of the decision of the lower decision making body by the higher decision making body and not a re-hearing of the matter decided by the lower decision making body. Where an appeal is intended to be by way of a re-hearing, this is usually expressly stated in the relevant instrument as is the case with **Rule 60.8** of **the Supreme Court**

(Civil Procedure) Rules 2008 dealing with appeals to the High Court and **Rule 62.5** dealing with appeals to the Court of Appeal.

[64] There is nothing in **section 36** or indeed anything in the provisions or wider context of the **FCA** to suggest that "an appeal" is to be given other than its usual meaning. The procedure under **section 36** of the **FCA**, therefore, is simply for the Judge in Chambers to take the record on which the FTC based its findings as he/she finds it and to review and evaluate the fact finding methodology, the probative weight of legitimately obtained evidence and to ascertain whether that evidence supported the findings made by the FTC. The procedure under **section 36** does not contemplate "an appeal" against the FTC's findings being determined in a formal hearing of the case in the High Court in which the Court's decision is then based on the evidence led before that Court. That would not be by way of "an appeal to a Judge in Chambers" as is stipulated under **section 36** of the **FCA**.

[65] A final point needs to be stated about proceedings under **section 36** of the **FCA**. It is that proceedings under that section are not intended to result in a final determination of the enforcement of an FTC's ruling that a person has contravened a provision or provisions of the **FCA** or that a person failed to comply with a direction of the FTC. This is evident from **section 36 (2), (3)** and **(4). Section 36 (2)** empowers the Judge in Chambers to either

confirm, modify or reverse the FTC's finding or, importantly, "any part thereof" or to direct the FTC 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". **Section 36 (3)** allows him or her to give such directions as he or she thinks just concerning a direction to reconsider the whole or any part "of the matter that is referred for reconsideration", and **section 36 (4)** mandates that where reconsideration is directed by the Judge in Chambers, the FTC "shall have regard to the Judge's reasons for giving [the] direction". These provisions are hardly consistent with a conclusion that proceedings under **section 36** of the **FCA** could lead to a final determination by the Judge in Chambers of whether or not an FTC's ruling that a person has contravened the **FCA** or has not complied with an FTC direction is enforceable.

[66] In fact, such final determination is provided for in **section 37** of the **FCA.** This section deals with applications by the FTC to the court in respect of sanctions for contravention of the **FCA** and failure to comply with directions of the FTC. It provides as follows:

> "37. (1) Where the Court is satisfied on an application by the Commission that any person has
>
> > (a) contravened any of the obligations or prohibitions imposed in Parts III, IV or VI; or

> (b) failed to comply with any direction of the Commission,
>
> the Court may grant an injunction restraining the person from engaging in the conduct that constitutes the contravention or failure.
>
> (2) In exercising its powers under this section, the Court shall have regard to
>
> (a) the nature and extent of the default;
>
> (b) the nature and extent of any loss suffered by any person as a result of the default;
>
> (c) the circumstances of the default; and
>
> (d) any previous determination against the person.
>
> (3) The Court may, in addition to a penalty imposed under this section, order the payment of compensation to a person who has suffered loss as a result of any anti-competitive agreement or trade practice."

[67] This section only makes sense if it is read in light of **section 31 (1) (b)** of the **FTCA**, which, as has been seen, decrees that where a business enterprise fails to comply with a notice served by the FTC in accordance with **section 30** of the **FTCA,** the FTC must "institute proceedings in the High Court" in respect of a finding alleging a breach of any section of a law relating to fair competition. Reference to "the Court" in this section, **section 37** of the **FCA**, is therefore reference to the High Court, and reference to "an application by the Commission" in this section is a reference to proceedings instituted

by the FTC pursuant to **section 31 (1) (b)** of the **FTCA**. In this regard, it is important to note that **section 37 (4)** of the **FCA** expressly provides that in proceedings under **section 37** of the **FCA**, the FTC must prove its case on "the standard of proof applicable in civil proceedings" or, in other words, on a balance of probabilities. That provision in **section 37 (4)** of the **FCA** also leads to the irresistible conclusion that proceedings under **section** 37 are by way of a hearing of the findings of the FTC.

[68] A proper interpretation of **sections 36** and **37** of the **FCA**, therefore, reveals that proceedings under **section 36** and proceedings under **section 37** differ sharply in two fundamental respects. The first is that, unlike proceedings under **section 36**, proceedings under **section 37** are by way of a hearing of the findings of the FTC and not by a review of those findings. The second is that proceedings under **section 36** of the **FCA** are not intended to result in a final determination of the FTC's ruling that a person has contravened a provision or provisions of the **FCA** or that a person failed to comply with a direction of the FTC. A final determination can only be made in proceedings under **section 37** of that Act.

[69] Given the radical difference between the nature and purpose of proceedings under **section 36** and those under **section 37,** it is difficult to see how actions instituted under these provisions could have been properly consolidated

pursuant to **Order 4** of the **Rules of the Supreme Court 1982**. In any event, it has not been argued before us that **Blackman J** considered the nature and function of proceedings under **section 36** and proceedings under **section 37** in making his order for consolidation. For this reason, we cannot find that **Worrell J** was in error in hearing Suit No. 1811 of 2006 separately and without reference to Suit No. 9 of 2007.

[70] That said it is our judgment that the proceedings in Suit No. 1811 of 2006 were irretrievably flawed. First, the action proceeded as a High Court matter and not as "an appeal to a Judge in Chambers" as is stipulated in **section 36**. Second, the matter proceeded by way of a hearing of evidence and not as a review of the findings of the FTC. Third, because the matter proceeded as a High Court hearing, and not as a review and evaluation of the evidence on which the FTC based its findings, the judge allowed only such evidence as is admissible in a civil court trial to be led before him. Fourth, it is clear from his judgment and especially paras [41] to [69], that the judge based his decision on the evidence led before him in the hearing and not on a review and evaluation of the evidence on which the FTC based its findings. Fifth, because he did not review and evaluate the evidence on which the FTC based its decision but relied on the evidence adduced in the hearing before him, the judge failed to consider evidence relevant to

material issues in the case and in so doing did not give sufficient weight to the substance of other important evidence. For these reasons, we hold that the judge fell into error in his treatment of the evidence relevant to the evidence on which the FTC based its findings against which the appeal in Suit No. 1811 of 2007 was brought.

[71] Fortunately, however, this Court is invested under **section 61 (1)** of the **Supreme Court of Judicature Act, Cap. 117A** with "all the jurisdiction of the original court", in this case the Judge in Chambers. This jurisdiction allows us to substitute ourselves for the Judge in Chambers as contemplated by **section 36** of the **FCA**. It is this jurisdiction that we have invoked in arriving at a determination of the matters raised before **Worrell J**.

GROUND 3 - FTC'S JURISDICTION TO INITIATE INVESTIGATION

[72] This ground arises out of a submission in the court below by Mr. Forde QC, counsel for the respondents, that the FTC had no jurisdiction to initiate the investigation into the conduct of BNOCL and that in consequence any evidence gathered by the FTC in that investigation could not be used against BNOCL. Mr. Forde QC premised that submission on the fact that the FTC is a body established under the **FTCA**, in his words, is a "creature" of that Act, and therefore must comply with that Act.

[73] Mr. Forde QC then pointed to **section 23** of the **FTCA** which provides that:

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

[74] Next, Mr. Forde QC cited **section 25 (1)** of that Act which provides as follows:

> "The Commission shall only investigate a complaint made against a…business enterprise where the complainant satisfies the Commission that he has submitted a complaint to the …business enterprise and has failed to obtain reasonable redress."

[75] Finally, Mr. Forde QC argued that there was an absence of anything in the Report "to suggest that the pre-condition of complaining to the enterprise was considered and satisfied by the FTC". This, he argued, supported the conclusion that "the FTC lacked the jurisdiction to investigate and/or acted *ultra vires*".

[76] This argument found much favour with **Worrell J**. After citing **sections 23**, **24** and **25** of the **FTCA** at paras [58], [59] and [60] of his judgment, **Worrell J** continued:

> "[61] To my mind the Act must be read as a whole. The FTC can (sic) pick and choose which parts of the Act it wishes to follow. Every complainant, regardless of whether they are (sic) 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 it."

[77] We do not agree that there was no evidence before the FTC that SOL did not submit a complaint to BNOCL. Naturally, the question whether or not there was such evidence depends upon the object of **section 25 (1)**. It is our judgment that that subsection is not intended to operate as a "gotcha" provision affording loopholes for cute evasion of the prohibitions in the Acts administered by the FTC. Rather, that subsection is a mechanism aimed at ensuring that parties attempt resolution of their disputes before the involvement of the FTC. That is why the **FTCA** does not require any formalities for a complaint under the **subsection**. All that is required is for the aggrieved person to make the business enterprise aware of his grievance so as to afford the business enterprise an opportunity to remedy the grievance by offering the aggrieved person reasonable redress. Ultimately, then, the question whether or not there has been a complaint is therefore a question of fact and must depend on the circumstances of each case.

[78] Given the nature of the matter involved in this case, SOL's letter to BNOCL of 10 January 2006 requesting a throughput rate was in the nature of a

complaint and sufficient to satisfy the requirement for a complaint under **section 25 (1)**. The BNOCL's letter of 27 January 2006 denying SOL's request was evidence that SOL failed to obtain reasonable redress. Seen in this light, the evidence before the FTC made it clear that SOL's request alerted BNOCL to SOL's grievance and that BNOCL was not prepared to offer reasonable redress.

[79] Quite apart from the foregoing, however, it is our judgment that if the **FTCA** is read as a whole and in its full context, as **Worrell J** correctly suggested that it should be, **section 4 (6)** of the **FTCA** and **section 5 (4)** of the **FCA** present monumental roadblocks to arriving at the conclusions reached in paras [61] and [62] of the judge's judgment cited above at para [73] and to Mr. Forde QC's submissions in support of these conclusions. Let us explain.

[80] Turning first to **section 4 (6)** of the **FTCA,** which was surprisingly not cited by Mr. Forde QC in his submissions and which was not considered by **Worrell J**., which provides:

> "The Commission may on its own initiative or on the request of any person carry out any investigation that it considers necessary or desirable in connection with matters falling within the provisions of this Act…and any laws relating to consumer protection and fair competition which the Commission has jurisdiction to administer."

This subsection forms part of a section which sets out the functions of the FTC and how the FTC is to carry out those functions. **Section 4 (1)** is a particularly important stepping stone in interpreting **section 4 (6). Section 4 (1)** provides:

> "The functions of the Commission are to enforce the *Utilities Regulation Act, 2000* and any laws relating to consumer protection and fair competition which the Commission has jurisdiction to administer."

[81] It is patently obvious from **section 4 (1)** that the FTC's jurisdiction in respect of utilities regulations, consumer protection and fair competition is protean. Its enforcement functions range from the complexities of establishing principles for arriving at rates to be charged under **section 3 (1) (a)** of the **Utilities Regulation Act, Cap. 282** to the relatively mundane task of investigating complaints that a supplier supplies "goods to which more than one price is appended at a price greater than the lower, or lowest, of the prices in question" contrary to **section 18 (1)** of the **Consumer Protection Act, Cap. 326D.**

[82] Taken in that context, the purpose of **section 4 (6)** of the **FTCA** becomes very clear. That purpose is to invest the FTC with power to either "on its own initiative" or, "on the request of any person" carry out investigations that it considers necessary or desirable in connection with any of the laws it

has jurisdiction to administer. Investigations under **section 4 (6)** may therefore be separated out and conveniently referred to as "FTC initiated investigations" and "complainant initiated investigations".

[83] Given the variation in the complexity of the matters that could arise before the FTC, it is perfectly understandable why the subsection creates these different types of investigations. The first type is intended to empower the FTC to initiate an investigation *sua sponte* especially in matters of particular complexity. The second type is intended to allow investigations, especially in relatively straightforward matters, on the request of any person. Thus, contrary to **Worrell J's** conclusion at para [61] of his judgment, cited at para [76] above, **section 4(6)** of the FTCA does allow the FTC to "pick and choose", or in the words of the subsection "to determine", whether to pursue an FTC initiated investigation or a complainant initiated investigation.

[84] The spectrum of the operation of the procedure established in **sections 23** and **25** of the **FTCA** must therefore take colour in light of **section 4 (6)** of that Act. For this reason we think it important to return to our analysis of **sections 23** and **25** at paras [77] and [78] above and to amplify their operation in relation to the initiating of investigations under **section 4 (6)**.

[85] **Section 23** affords to any person aggrieved by an act of a service provider or business enterprise which is contrary to any law administered by the FTC the important remedy of complaint to the FTC. The practical significance of that remedy is that it allows an aggrieved person, as for example an individual consumer where typically the cost of securing evidence involves expenses totally disproportionate to the claim, to set in motion the wide powers of investigation of the FTC and to benefit from the deployment of the substantial human and financial resources of that institution.

[86] **Section 25**, in turn, sets out the conditions which must be satisfied before the FTC can investigate a complaint by an aggrieved person made pursuant to **section 23**. These are that (i) the complainant has submitted a complaint to the service provider or business enterprise and (ii) that the complainant has failed to obtain reasonable redress. We note here that the logic of stipulation (ii) in **section 25** dictates that that section contemplates its application only to those complaints for which the complainant can "obtain reasonable redress" from the service provider or business enterprise. The converse is true. **Section 25** has no application where the complaint is of a kind for which the complainant cannot "obtain reasonable redress" from the service provider or business enterprise.

[87] So **sections 23** and **25** have application only to a complainant initiated investigation. These provisions have no relevance to or bearing on an FTC initiated investigation. The fundamental question therefore becomes whether the investigation conducted by the FTC in the case at bar was an FTC initiated investigation and therefore outside of the ambit of operation of **section 25** of the **FTCA** or a complainant initiated investigation and therefore subject to the operation of **section 25**? It goes without saying that determination of this question depends on a proper understanding of the nature of an FTC initiated investigation and of a complainant initiated investigation under the **FCA**.

[88] We have already explored the nature of a complainant initiated investigation at paras [85] and [86] above. And so, we turn to FTC initiated investigations. FTC initiated investigations are investigations initiated by the FTC *sua sponte* and not on a complaint by an aggrieved person. In relation to the **FCA**, there are two sources of *sua sponte* investigations. The first is found in **section 5 (1) (b)** where it is expressly stated that the FTC has power to carry out an investigation in relation to the conduct of trade "on its own initiative". The second is found in **section 17 (1)** of the **FCA** which specifically provides for an FTC initiated

investigation in the case of a breach of the prohibition against abuse of dominant position, the matter at issue in this case. **Section 17 (1)** provides:

> "Where the Commission has reason to believe that an enterprise that has a dominant position in a market has abused or is abusing that position, the Commission may, conduct an investigation into the matter."

[89] It is plain from these provisions that the FTC's power to initiate an investigation does not depend only on any complaint by any person. **Section 5 (1) (b)** confers an unconditional power on the FTC and **section 17(1)** a power subject only to the FTC having reason to believe that a dominant position has been abused or is being abused. Both of these provisions trump **section 25** of the **FTCA**. The question therefore becomes whether the FTC can invoke either of these provisions to found jurisdiction in this case.

[90] In our view, the FTC cannot invoke **section 5 (1) (b)**. This is because the evidence is undisputed that the investigation by the FTC was initiated after a complaint by SOL and therefore fell to be governed by **section 5 (4)** of the **FCA**, which is examined in the next paragraph of this judgment. The FTC may, however, invoke **section 17 (1)** as the investigation concerned an alleged breach of the prohibition against abuse of dominant position. **Section 17 (1)** is a specific provision governing initiation of an

investigation of a breach of the prohibition against abuse of dominant position. On the well-established principle of *generalia specialibus non derogant,* (a general provision must admit to the specific provision), **section 17 (1)** allows the FTC to initiate an investigation *sua sponte* and to ignore **section 25** of the **FTCA** whether or not a complaint was made by SOL to BNOCL prior to the FTC initiating the investigation.

[91] The second type of FTC initiated investigation under the **FCA** is found in **section 5 (4)** of that **Act**. That subsection provides

> "Notwithstanding section 25 of the *Fair Trading Commission Act*, where the Commission determines that the conditions for the conduct of an investigation cannot reasonably be met by the complainant, the Commission may conduct an investigation pursuant to a complaint received under section 23 of that Act."

[92] On its express language, **section 5 (4)** confers the power on the FTC to initiate an investigation where a complaint is received from a complainant and where the FTC "determines that the conditions for the conduct of an investigation cannot reasonably be met by the complainant". What then are "the conditions for the conduct of an investigation"? These are to be found in **section 25 (1)** of the **FTCA**. They are, as has been seen at para [86] above, (i) that the complainant has submitted a complaint and (ii) that the complainant has failed to obtain reasonable redress.

[93] The first condition, the submission of a complaint by the complainant, presents no serious interpretative issues. As we explained at paras [77] and [86] above, this stipulation means simply that the complainant must have brought his grievance to the attention of the business enterprise in an effort to obtain redress. In all but the most exceptional cases, it is difficult to contemplate a case where the FTC could reasonably determine that the first condition, namely the submission of a complaint by the aggrieved person to the business enterprise, cannot reasonably be met.

[94] The second condition, failure of the complainant to obtain reasonable redress, is more complex and requires closer analysis. The logic of that condition demands that the act or practice complained of must be amenable to the complainant obtaining reasonable redress, as was seen at para [86] above. However, the question as to whether the act or practice complained of is amenable to the complainant obtaining reasonable redress depends ultimately on the nature of the act or practice prohibited under the **FCA**.

[95] Some of the prohibited acts or trading practices in the **FCA** are amenable to a complainant obtaining reasonable redress whereas others are not. For instance, the prohibition in **section 13 (3) (a)** against agreements that directly or indirectly fix purchasing or selling prices or determine any other

trading conditions may be reasonably redressed by the excision of offending provisions from the agreement on a complaint by a complainant. The prohibition against agreements containing exclusionary provisions in **section 14** is of a similar nature.

[96] The prohibition against abuse of dominant position in **section 16 (1)**, on the other hand, is not one for which reasonable redress may be obtained by a complainant. That prohibition is one against acts or practices which impede "the maintenance or development of effective competition in a market". Thus, it is aimed at "competition in a market" not "competitors" in a market. By its very nature then, breach of the prohibition in **section 16 (1)** is not amenable to reasonable redress on a complaint by a complainant as that prohibition does not relate to a complainant's grievance but rather to competition in a market.

[97] In our judgment, in cases which involve the breach of a prohibition which is not amenable to reasonable redress on a complaint by a complainant, (the second condition in **section 5 (4)**), the FTC may reasonably determine that "the conditions for the conduct of an investigation cannot reasonably be met by the complainant". In such a case, **section 5 (4)** operates to permit the FTC to initiate an investigation on a complaint received without more.

[98] As has already been pointed out at para [96] above, the prohibition against abuse of dominant position is a prohibition which is not amenable to reasonable redress on a complaint by a complainant. The FTC could therefore reasonably determine in this case that the conditions for the conduct of an investigation cannot reasonably be met by SOL, the complainant. The implication of this is that **section 5 (4)** would then allow an FTC complainant initiated investigation to ignore the stipulations in **section 25 (1)** of the **FTCA.**

[99] In light of all of the foregoing, our conclusion on the question of jurisdiction is that the FTC had jurisdiction to initiate the investigation into the conduct of BNOCL even if it were assumed that SOL did not satisfy the conditions stated in **section 25 (1)** of the **FTCA**. This is so for any of three reasons. First, as the matter concerned the prohibition against abuse of dominant position, it was governed by **section 17 (1)** of the **FCA**. That provision does not contemplate the satisfaction of the conditions stipulated in **section 25 (1)** of the **FTCA** as a precondition to an FTC initiated investigation. Second, **section 5 (4)** of the FCA permits the FTC to disregard the stipulations in **section 25 (1)** of the **FTCA** in the circumstances which were present in this case. Third, in any event, there

was evidence before the FTC to support the conclusion that the requirements of **section 25 (1)** were met.

GROUND 4 – ABUSE OF DOMINANT POSITION

1. **Elements of abuse of dominant position prohibition**

[100] The second and fourth grounds raised in this appeal which concern the prohibition against the abuse by an enterprise of a dominant position which that enterprise holds, was introduced into our law for the first time by **section 16** of the **FCA**. That section provides:

> "(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.

(4) An enterprise shall not be treated as abusing a domination position

(a) if 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 the market is the result of its superior competitive performance; or

(c) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trademark except where the Commission is satisfied that the exercise of those rights

> (i) has the effect of lessening competition substantially in a market; and
>
> (ii) impedes the transfer and dissemination of technology."

[101] The FTC contends that BNOCL holds a dominant position in the HFO market and that, in breach of **section 16** BNOCL abused its position of dominance in two ways. The first is that BNOCL, contrary to the prohibition in **section 16 (3) (g),** engaged in conduct which amounted to exclusive dealing. The second is that BNOCL, effectively denied access to its competitors to the use of its pipeline by refusing to offer them a throughput rate for the use of the pipeline, which the FTC claims is an essential facility, and in doing so engaged in conduct prohibited in **section 16 (3) (b), (c)** and **(h)**. The FTC further contends that BNOCL failed to provide any evidence pursuant to **section 16 (4)** which would justify BNOCL not being treated as abusing a dominant position.

[102] Reduced to its essentials, the FTC's contention is that when **section 16** is read as a whole, it is clear that three elements must be shown to establish a breach of the prohibition in that section. These elements are that:

(a) the enterprise holds a position of dominance in a market;

(b) the enterprise abuses its position of dominance; and

(c) the behaviour of the enterprise is not justified.

The FTC maintains that the evidence gathered by it in its investigation considered in light of these elements established that BNOCL breached the prohibition in **section 16**.

[103] We now turn to considering this contention. Before doing so, however, we wish to state that, as a point of comparison for a nascent Barbadian law on abuse of dominant position, we deem it especially advantageous to reference the jurisprudence of the United States on *Section 2* of the *Sherman Act 1890*, which seeks to control the exercise of private economic power by preventing monopoly and punishing cartels, and that of the European Community on *Article 82 (ex 86)* of the *Treaty of Rome 1958*, on abuse of dominance. This choice of comparative focus is evident in the case law of such Commonwealth jurisdictions as Canada, Australia and New Zealand, where heavy reliance is placed on US and EC authorities in interpreting and applying the provisions in their legislation *in para materia* with **section 16**.

[104] *Article 82* (*ex 86*) of the *Treaty of Rome* provides:

> Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States. Such abuse may, in particular, consist in:

> (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
>
> (b) limiting production, markets or technical development to the prejudice of consumers;
>
> (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
>
> (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

[105] And, *section 2* of the *Sherman Act* provides:

> "Every person who shall monopolize, or attempt to monopolize, or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by a fine not exceeding $10,000, 000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or both said punishments, in the discretion of the court."

[106] It will be observed that *Article 82* (*ex 86*) closely resembles **section 16** in that it specifies examples of abusive conduct and does not prohibit the acquisition or possession of market power but, rather, seeks to limit the exercise of that power. *Section 2* of the *Sherman Act,* by contrast, is worded differently from **section 16.** Despite its wording, however, *section 2* of the *Sherman Act* has been held not to prohibit the mere possession of monopoly power: ***United States v Grinnell Corp* 384 US 563 (1966) *(Grinnell)***. It has

been held to require commercially reprehensible conduct on the part of a monopolist in the sense of the use of non-legitimate tactics by a business entity in seeking to advance its competitive position in the market: See, for example, ***United States v Klearflax Linen Looms Inc* 63 F Supp 32 (1945)** and ***Lorain Journal Co v United States* 342 US 143 (1951)**. Thus, under the respective legislation it is the conduct of the powerful, or dominant, business enterprise which is subject to scrutiny and not their position of power or dominance. It is for this reason that case law on *section 2* of the *Sherman Act* is also instructive in interpreting **Section 16**.

[107] With the foregoing caveat in mind, we return to the question whether there was sufficient evidence in respect of the three elements which must be shown to establish a breach of the prohibition in **section 16** against abuse of a dominant position to justify the FTC's finding that BNOCL was in breach of that section.

2. Did BNOCL hold a dominant position in the market for the supply of HFO to BL&P?

[108] As appear from para [102] above, the first element to consider in the FTC's finding that the BNOCL was in breach of the **section 16** prohibition is whether there was evidence to support the FTC's finding that BNOCL held a position of dominance in the market to supply BL&P HFO. In approaching

this element, we are in agreement with Mr. Forde QC that in order to determine whether an enterprise occupies a dominant position in a given market under **section 16** involves a two stage analysis. The first stage involves defining the relevant market. It is only after this is done that it becomes possible for the effect of the economic power of the enterprise concerned to be evaluated as dominant or not, which is what is involved in the second stage. Accordingly, we examine these two stages in turn.

(i) Defining "market"

[109] At paragraph 39 of the Skeleton Arguments, Mr. Forde QC submits as follows:

> "In respect of defining the relevant market, it is submitted that the Commission in its report failed to define the markets and/or to give a proper analysis and/or reasoning as to how it defined the markets in question. It is submitted that matters such as substitutes for Heavy Fuel Oil, various statistical tests, the views of consumers and competitors, barriers and costs associated with switching to potential substitutes ought to have been discussed. In addition, it is submitted that the FTC ought to have delineated the market for sale and the market for transportation. It is submitted that these matters were not analysed in the Report and as a result therefore, the Findings should be set aside. See **Continental Can Company Inc. v Commission of the European Communities EU case No 6/72 1973 E.CR 215, United Brands Company and United Brands Continental BV v Commission of the European Communities EU case No 27/76 1978 ECR and Richard Whish Competition Law pages 26 to 34**."

[110] In order to weigh these submissions, it is necessary to develop some understanding of the term "market" as used in **section 16** of the **FCA**. In doing so, we note that this term must be interpreted in the context of the **FCA**, an Act whose theoretical underpinnings derive from the discipline of economics. Indeed, the **FCA** is basically a legislative attempt at micro-economic reform intended to regulate economic behaviour in Barbados. Accordingly, the term "market" in the **FCA** is to be understood in the context of microeconomic theory. Thus understood, the term refers to a place or context in which buyers and sellers buy and sell goods, services, and resources. As the renowned economist John Kenneth Gailbraith puts it in his book, co-authored with Nicole Salinger, ***Almost Everyone's Guide to Economics (Penguin Books, London 1978) at p 45***:

> "Originally…it was a place where buyers and sellers actually came together and bought and sold food, cloth, clothing, cattle, intoxicants, and other things of like reward. But now, by long custom, it is an abstraction; a reference to the market is to the general, continuing purchase and sale of some product or some service. There is no longer any geographical connotation."

[111] This understanding of the expression "market" defines the boundaries that identify groups of sellers and buyers of goods. The concept of a "market" also implies a delineation of the product and geographic lines within which specific groups of goods, buyers and sellers interact to establish price and

output, giving rise to what is called the product market and the geographic market. It is for this reason that we agree with Mr. Forde QC that it is necessary to define market both from the standpoint of the product and from the geographic point of view. Per contra, for reasons which we discuss hereafter, we do not agree with Mr. Forde QC that the FTC failed to delineate "the product market and geographical market" or that "these matters were not analysed in the Report as a result thereof".

[112] The questions which must therefore be now confronted are (i) whether there was evidence available to the FTC of a market in the sense of boundaries that identifies groups of HFO sellers and a buyer of that product; (ii) what was the product market; and (iii) what was the geographic market.

(ii) The market for supply of HFO to BL&P

[113] The FTC maintains that there was overwhelming evidence before it of a market for supply of HFO to BL&P. According to the FTC, the evidence before it was that BNOCL was party to an arrangement with Petrotrin, the state-owned oil refinery of Trinidad and Tobago whereby BNOCL sells locally mined crude to Petrotrin to be refined by Petrotrin in exchange for refined products. Under the exchange arrangement with Petrotrin, BNOCL received a discount on the products sold in Barbados. Up until 2005, the

arrangements were that BNOCL sold fuel oil at the ship's flange to BNTCL which was stored at the terminal at Needham's Point owned by BNTCL. BNTCL then sold the HFO at the terminal's rack at its full cost to one of the local MOCs which then transported it by trucks and sold it to BL&P. BL&P then used the HFO in the production of electricity for the island of Barbados.

[114] The FTC further avers that a new arrangement came into effect from 1 January 2006. Under this arrangement, BNOCL continued to supply HFO. However, under a lease agreement between BNTCL and ESSO, HFO was stored at the ESSO terminal at Holborn and piped directly to the BL&P Spring Garden plant through a dedicated pipeline constructed by BNTCL. BNTCL now operates as a terminal facility, charging a throughput fee for product moved through Holborn. BNOCL now retains ownership of the HFO throughout, once it has been purchased from Petrotrin.

[115] This, the FTC claims at page 10 of its Report, is evidence of "two markets or areas of economic activity in Barbados.

> a) A market involving the importation and wholesale supply of fuel oil **in Barbados** wherein BNOCL can be considered by designation as the dominant operator; and
>
> b) The second market for **the delivery of fuel oil to BL&P where all local** oil companies compete for the opportunity to supply."

[116] The FTC claims to base these findings on the tender offer document of BNOCL to the BL&P: "*Barbados National Oil Company Limited-Offer for the Supply of Heavy Fuel Oil to Barbados Light and Power Limited at Spring Garden Power Station February 3rd, 2006*". The FTC also claims to rely on the explanation of the BNOCL in their Cabinet paper of 18 August 2005 to Cabinet: "*Cabinet Note: (05) 998/MEP 101-Proposal to Supply and Distribute Petroleum Products in Barbados by the Barbados National Oil Company Limited (BNOCL)*".

[117] This, in our view, constitutes ample evidence before the FTC of the existence of a market for the supply of HFO to BL&P within the meaning of **section 16**. True, as Mr. Forde QC argued, the condition of monopsony existed in that market. But that condition does not deny the existence of a market; its relevance is that it goes to describing the market structure in which BL&P is the single purchaser for HFO.

[118] We do not therefore accept the basic contention of BNOCL that the FTC "failed to define the markets and/or to give a proper analysis and/or reasoning as to how it defined the markets in question". BNOCL's further quarrel with the FTC's defining of the relevant market appears to us to raise questions in relation to the FTC's definition of the product market and

the geographic market. Accordingly, we consider these under these subheads hereafter.

(iii) The product market

[119] Gellhorn, Kovacic and Calkins in their classic **Antitrust Law and Economics (5thed 2004 West) at p 117** restate what is generally accepted by both legal and economics authority, namely, that in defining the product market, it is necessary to locate all substitutes available to buyers of the seller's product and to ascertain whether the seller's product competes with other products, and whether these products limit the seller's ability to raise price. The reason for so doing is explained very well by Wilcox J in **TPC v Australia Meat Holdings Pty Ltd [1988] ATPR 40, 876** at **49, 480** where he said:

> "A market is the field of activity in which buyers and sellers interact and the identification of market boundaries requires consideration of both the demand and supply side. The ideal definition of a market must take into account substitution possibilities in both consumption and production. The existence of price differentials between different products does not by itself place the products in different markets. The test of whether or not there are different markets is based on what happens (or would happen) on either the demand or supply side in response to a relative price."

[120] Decided cases such as, for instance **United Brands v Commission of European Communities Case 85/76, [1978] ECR 297**; **[1978] 1**

CMLR 429 (**United Brands)** and the leading case in the United States of **United States v E I Du Pont de Nemours & Co 353 US 586 (1957)**, accept that an appraisal of the cross-elasticity of demand between substitute products is the test to determine whether products are reasonably interchangeable for the same purposes, price, use and qualities considered. At the same time, these cases support the view that in determining whether given products are sufficiently close to be included within a given product market can sometimes pose difficult empirical questions.

[121] The BNOCL relies on this general observation to argue that the FTC's Report, "in respect of defining the relevant market", did not contain any appraisal of the cross-elasticity of demand between HFO and substitutes "and as a result thereof, the Findings should be set aside". The FTC's response to this argument is that, while it accepts the test of substitutability as a general principle, it did not apply in this case because there was no substitution in the market. In the verbatim testimony of Mr. Eversley: "It was not necessary to do any tests because there was no real substitute in relation to BL&P producing electricity".

[122] Let us apply a common sense approach to resolving these competing contentions regarding substitutability of HFO in the market for the production of electricity by BL&P.

[123] It is an established fact that the operation of an electric power system involves a complex process of forecasting demand and then scheduling and dispatching power generating plant to meet this demand. Since demand varies from moment to moment during the course of the day, a stable power system requires that generators either increase or reduce their supply of electricity instantaneously to meet the varying demand.

[124] To do this, utilities operate and dispatch a variety of power plants on the basis of economic merit and these generally fall into two categories, namely, base load plant and load following plant.

[125] First, there is a large base level of customer demand that must always be satisfied (day and night) and below which generation output never falls. Generation plant designated as base load plants are used to meet this large constant demand for electricity. They run at full output as much as possible and while it may be possible to vary their output, this is hardly ever done because their low cost of operation encourages continuous maximum operation. Base load plants are operated exclusively on HFO the cheapest fuel, and are dispatched first because of their economic merit. Steam turbines and high efficiency diesel plant make up base load generation.

[126] Second, there is a component to customer demand that varies continuously that must be balanced by a supply that varies accordingly. This variation in load is met typically with load-following (or cycling) generation plant. Load-following plants are further categorized into intermediate plant and peaking units.

[127] Intermediate plants are used to meet most of the day-to-day variable demand. They may be low speed diesel plant (HFO) but due to the fact that they 'follow' the load up and down, they are less efficient and more costly to operate than if they were employed in a base load duty cycle. However, they perform an important function in that their outputs could be altered to balance supply with demand.

[128] Peaking units are exclusively gas turbines (diesel) and are the most expensive plant to operate. They are used infrequently only at peak demand hours. Gas turbines are important in that they can be operated at very low levels of output (partial loads) and can do so more efficiently than the other plants. They also have the capacity to ramp up and down their output very rapidly and reliably during peak hours, incurring significantly less wear and tear than other plants in the process. This is a task they are frequently asked to perform and which requires a high level of reliability.

[129] We have recounted all of this to better understand the uniqueness of HFO in electricity generation at the BL&P and consequently available substitutes in the market for HFO. Our understanding is buttressed by the Tender Document itself which stipulates that the tender is for the supply of HFO and paragraph 1.2 of that document which reads:

> "The Barbados Light & power Company Limited, hereafter called the Buyer, is an investor-owned, vertically integrated electric utility which supplies electricity to the island of Barbados. The Buyer operates generating units at Seawell, Garrison and Spring Garden Power Stations.
>
> The fuel used at the Spring Garden Generating Station is primarily Heavy Fuel Oil in the Steam and Low Speed Diesel units, which are designated as base load plant. A small quantity of diesel fuel is used for starting and stopping the units."

[130] It follows from the foregoing considerations that BNOCL's argument that the FTC should have conducted an appraisal of the cross-elasticity of demand between HFO and substitutes in this case can only be described as an argument that the FTC should have engaged in the fanciful. We are in agreement with the FTC that there was no real substitute in relation to BL&P producing electricity. The conclusion is compelled therefore that the FTC correctly defined the relevant product market as the market for the supply of HFO to BL&P.

(iv) The geographic market

[131] As already intimated, the question of whether or not an enterprise is in a position of dominance in a market can only be determined if the market to which the enterprise's position relates is defined. For purposes of the **FCA**, determination of the relevant geographic market begins with **sub clause (b)** of the purpose clause of that **Act** which reads:

> "An Act…(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*." (Emphasis added).

[132] This provision implies that the relevant geographic market for purposes of the **FCA** is Barbados and the Caricom Single Market and Economy. Put another way, as a general rule, Barbados and the Caricom Single Market and Economy will provide the natural geographic setting equivalent to the commercial area in which competition is taking place for purposes of the **FCA**.

[133] We are of the view that there is nothing in this case to displace that general rule. All the evidence shows that the distribution arrangements of HFO of BNOCL and the MOCs, and in particular SOL, were on a national basis. In addition, there was absolutely no evidence that BL&P, the only customer for HFO, had any ready access to an alternative source of supply. In these

circumstances, the FTC was palpably correct in regarding Barbados as the relevant geographic market. BNOCL has not pointed to anything in the circumstances of this case, and we have not seen anything, which warrants any other definition of the geographic market for the supply of HFO and BL&P.

(v) Is BNOC in a dominant position in the HFO market in Barbados?

[134] Having determined that there was sufficient evidence available to the FTC to support their finding that there was a market for purposes of **section 16**, we next turn to consideration of whether there was evidence before the FTC to support a finding that BNOCL held a dominant position in that market as required by **section 16**.

[135] As has already been seen, **Section 16 (2)** defines of "a dominant position" as follows:

> "For 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."

[136] We would note parenthetically that that definition reflects the concept of *"dominance"* found in the case law of the European Court of Justice (ECJ).

Thus, for instance, in ***United Brands*** the ECJ, at **para 2** of the summary stated a position of dominance to be:

> "[A] position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers."

The ***United Brands'*** definition was repeated in **Hoffman-LaRoche v. Commission of the European Communities Case 85/76 [1979] ECR 461; [1979] 3 CMLR 221 (Hoffman-LaRoche)**, where the ECJ added that:

> "Such a position does not preclude some competition which it does where there is a monopoly or quasi-monopoly but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop, in any case to act largely in disregard of it so long as such conduct does not operate to its detriment."

[137] Taking the definition in section **16 (2)** and the relevant ECJ case law into account, it is manifest that the key to the question as to whether BNOCL was in a dominant position is whether that enterprise occupied such a position of economic growth as would enable it to operate in the HFO market in Barbados without effective competition from its competitors or potential competitors. What therefore is the test for determining that question?

[138] Case law in both the US courts and the ECJ treat market shares as the basic test for determining whether or not an enterprise holds a position of dominance, or in other words, in determining the competitive significance of an enterprise in a given market. The approach taken in these cases is that, having defined the relevant product and geographic market, which we have done at paras [131] to [133] of this judgment, to look at the market share of the enterprise relative to the other market participants.

[139] Case law in the US courts and the ECJ accept that choosing the correct measurement yardstick for determining market shares can be a demanding task. However, this same case law also propounds that once the market share equation is solved, and it is finally determined that an enterprise has a large market share, a presumption of dominance is to be inferred. Thus, in **Hoffman-LaRoche**, the ECJ stated that, even though the issue of market share may vary from one market to another, a large market share in itself, save and except in exceptional circumstances, is evidence of the existence of a dominant position. In **Akzo v. Commission C-62/86, [1991] ECR I-3359, [1993] 5 CMLR 215 (Akzo)**, the ECJ expressed the view that the large market share stated in **Hoffman-LaRoche** is evidenced by a market share of 50% or more. What is more, the ECJ in **Akzo** opined that the

presumption of dominance based on market share increases as the market share held by the enterprise gets larger.

[140] All of that said, we recognise that market share is not synonymous with market power and that consequently the presumption raised by large market share can be rebutted by factors such as entry conditions, the size and stability of market shares over time, and profitability: see **Grinnell, Hunt-Wesson Foods Inc v Ragu Foods Inc 627 F 2d 919 (9th Cir 1980)**. Thus, for instance, in the US case of **Los Angeles Land Co v Brunswick Corp 6 F 3d 1422 (9th Cir 1993) 138, 139**, despite the defendant corporation having 100% market share, it was held that the defendant lacked monopoly power due to ease of entry to the market.

[141] In our judgment, the approach of the FTC to its finding that BNOCL was in a dominant position was entirely, and we would add commendably, consistent with established legal norms developed in respect of comparable statutory and treaty provisions which we have just cited. That this is so emerges clearly from page 14 of the Report which reads as follows:

> “To assess whether or not a firm holds a position of dominance the Commission will, having defined the market, look at the market share of the firm relative to other market participants. The Commission may then assess the consequent level of competition in the particular market based on the relative strength of the competitors and the contestability of existing barriers to entry to the market. If a firm has a large market

> share, then it may not be effectively constrained by its competitors.
>
> As a general guide, the Commission considers a firm that has had a sustained market share of 50% or more is likely to be in a position of dominance. A firm with a market share of less than 40% is less likely to hold a position of dominance.
>
> By designation of the Government of Barbados, BNOCL is the primary importer of fuel oil into Barbados. Checks with BSS (*fn9 Faxes dated July 27, 2006, from BSS to Fair Trading Commission*) regarding fuel oil import data; and the annual requirements of BL&P, confirmed that practically all (over 90%) (*fn10 See Table A and B of this document*) of the fuel oil imported into Barbados is destined to BL&P. The Commission was informed that all the fuel used by BL&P is imported by BNOCL through a special arrangement with Petrotrin.
>
> BNOCL itself confirms in the Cabinet paper that all fuel oil used in Barbados is supplied and freighted by BNOCL and sold to BNTCL at the ships' flange prior to 2006. This statement verifies that BNOCL is the dominant importer and wholesale supplier of fuel oil in Barbados."

[142] In addition to that statement in the Report, the evidence of Mr. Hewitt was that BNOCL had 85% of the market share in the importation and supply of petroleum products. Consistent with case law authority, a percentage share of 85% imposes a presumption of dominance on BNOCL. There was no evidence available to the FTC to rebut this presumption. In the absence of any such rebuttal evidence, the FTC was justified in its finding that BNOCL occupied a position of dominance. Indeed, we agree with Sir Richard Cheltenham QC's submission that the presumption of dominance was

buttressed by the fact that there were no other significant importers of HFO and that a licence was required to import the same which was *prima facie* evidence of difficulty of entry to the market for importation and supply of HFO in Barbados.

3. Did BNOCL abuse its position of dominance?

[143] Having decided that BNOCL held a position of dominance in the market to supply HFO to BL&P, we next turn to the second element in **section 16**, namely, the question of whether BNOCL abused that position. In this regard, the FTC's finding was that BNOCL had abused its position of dominance in two regards. The first is that BNOCL breached **section 16 (3) (g)** by unilaterally undertaking the exclusive supply of HFO to BL&P. The second is that BNOCL breached an implied prohibition **in section 16 (3) (a)**, **(c)** and **(h)** against denying its competitors access to the pipeline, which was an essential facility in the supply of HFO oil to BL&P, and consequently the opportunity to compete for the supply of HFO to BL&P.

[144] We consider *seriatim* hereafter the FTC's findings in respect of BNOCL's abuse of its position of dominance by engaging in exclusive dealing and BNOCL'S denial of access to MOCs of an essential facility.

A. FTC's finding that BNOCL unilaterally undertook the exclusive supply of HFO to BL&P contrary to section 16 (3) (g).

[145] The FTC claims that there was evidence that BNOCL was in fact engaging in exclusive dealing in the supply of HFO to BL&P. According to the FTC, this practice by BNOCL had its foundation in two letters written by the Permanent Secretary in the Ministry of Energy addressed to BL&P. The first of these, dated 4 October 2005, informed BL&P:

> "[T]he Cabinet of Barbados has decided as follows:
>
> - That the Barbados National Oil Company Limited BNOCL will assume full responsibility for the sourcing and freighting of gasoline and diesel and that ownership of these products move from Barbados National Terminal (sic) Company Limited (BNTCL) to BNOCL within the Terminal;
>
> - That BNOCL pursue the competitive supply of fuel to the Barbados Light and Power Company Limited and other users taking into account the implications of alternative arrangements."

[146] The second letter, dated 15 November 2005, reads:

> "I am informing that Government has decided that fuel oil will be supplied by Barbados National Oil Co. Ltd. (BNOCL) to the BL&P Spring Garden Plant through the Esso Terminal at Holborn.
>
> You are to note that the General Manager of BNOCL will be meeting with you to implement this arrangement."

[147] The FTC maintains that these letters were evaluated in light of the relationship between BNOCL and the Government in respect of the policy

for the supply and distribution of petroleum products in Barbados. Most especially, the FTC points to the recommendation of BNOCL in its paper of 18 August 2005 to Cabinet: "Cabinet Note: (05) 998/MEP 101-Proposal to Supply and Distribute Petroleum Products in Barbados by the Barbados National Oil Company Limited (BNOCL)". In this paper, BNOCL, indicating that they intended to seek a contract with BL&P for the supply of HFO for the Spring Garden plant, recommended that Cabinet:

> "…v. Agree that BNOCL pursue the competitive supply of fuel oil supply of fuel oil to the Barbados Light and Power Co. Ltd. and other users;
>
> …vii. Note that BNOCL will continue to supply fuel oil to Barbados on the commissioning of the new terminal."

[148] The FTC further maintains that the directive in the letter dated 15 November 2005 that "Government has decided that fuel oil will be supplied by Barbados National Oil Co. Ltd. (BNOCL) to the BL&P Spring Garden Plant through the Esso Terminal at Holborn" was the brainchild of BNOCL. At page 16 of its Report, the FTC felt able to draw the conclusion from these letters as follows:

> "BNOCL therefore, as the primary importer and wholesale supplier of fuel oil into Barbados, had been 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 the retail supply of fuel oil to BL&P, under a monopoly arrangement.
>
> The directive made BNOCL the sole retailer of fuel oil to BL&P irrespective of the competitive tender process proposed by BL&P. That action automatically excluded all other MOCs from this retail activity."

[149] The FTC noted, however, that despite the "directive from the Ministry of Energy", BL&P on 23 December 2005, in a letter to local MOCs invited tenders for the supply of HFO to BL&P's Spring Garden generating plant. It was stated in that invitation that:

> "The Company (BL&P) also wishes to make all tenders aware of correspondence from the Ministry of Energy & Public Utilities, which indicates that the Barbados National Oil Company Limited (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"."

The FTC concluded that "this communication confirms that BNOCL had established an exclusive trading arrangement with BL&P which they communicated to all tenderers."

[150] In response to these FFC's findings, BNOCL argues that the letters relied on by the FTC to support the finding of abuse of dominant position by BNOCL contrary to **section 16 (3) (g)** do not constitute evidence against BNOCL for three reasons. The first is that those letters were not written by BNOCL and

that accordingly "it cannot be said that BNOCL prevented or deterred any person from entering into any market or BNOCL eliminated or removed any person from a particular market." The second is that BNOCL did not authorise anyone to write these letters. The third is that, in the words of BNOCL, "BNOCL does not form part of the Crown. However, the Ministry is part of the Crown. A construction of the letters may be that the Crown sought to "restrict the entry of an enterprise….." However, such a construction is unreasonable for the letter speaks of 'possible competition'."

[151] With respect to the substantive finding by the FTC that BNOCL unilaterally undertook the exclusive supply of HFO to BL&P contrary to **section 16 (3) (g)**, BNOCL makes two submissions. First, it denies that it unilaterally undertook the exclusive supply of HFO to BL&P. Its specific assertion is that:

> "BNOCL has not taken a unilateral decision to exclusively supply all heavy oil to BL&P as was alleged. In fact BNOCL responded to a public tender advertised by BL&P in December 2005, for supply of heavy fuel oil."

This first submission may be characterised as the "it is not us" defence.

[152] Second, BNOC avers that the supply of HFO to BL&P was never open to competition or was never supplied following a tendering process. BNOCL's specifically states:

> "Prior to the construction of the BNTCL pipeline the contract for the supply of fuel oil to the Barbados Light & Power had never **been tendered or open to competition**. There was an exclusive arrangement/deal between BL&P, Mobil Shell and SOL."

The implication of this statement is that, if no tendering process was in fact undertaken, this would not be unusual given that no tendering process was ever observed in identifying a supplier of HFO to BL&P.

[153]This submission may be classified as the "there was no competition in the market" defence. It is grounded in **section 16** which makes it clear that exclusive dealing by itself does not constitute a breach of **section 16 (3) (g)**. There can only be such a breach if the exclusive dealing "impedes the maintenance or development of effective competition in a market". There can therefore be a breach if the market is shown to be competitive.

[154] Based on the respective submissions of the FTC and BNOCL, then, three broad issues arise for our determination on the question of whether the exclusive dealing prohibition was breached by BNOCL. The first is whether there was evidence of exclusive dealing contrary to **section 16 (3) (g)**. The

second is, assuming exclusive dealing, whether BNOCL was responsible for such exclusive dealing. The third is whether the market for the supply of HFO to BL&P was competitive.

Was there evidence of exclusive dealing contrary to section 16 (3) (g)?

[155] Determination of the first issue, whether there was evidence of exclusive dealing, turns on the question what constitutes exclusive dealing for purposes of **section 16 (3) (g)**. In this regard, we recall that ***section 2*** of the ***FCA*** defines "*exclusive dealing*" as meaning:

> "any practice whereby a supplier of goods
>
> (a) as a condition of supplying the goods to a customer, requires that customer to
>
> (i) deal only or primarily in goods supplied by or designated by the supplier or his nominee; or
>
> (ii) refrain from dealing in a specified class or kind of goods except as supplied by the supplier or his nominee; or
>
> (b) induces a customer to meet a condition referred to in paragraph (a) by offering to supply the goods to the customer on more favourable terms or conditions if the customer agrees to meet that condition."

[156] It is our view, that this definition is best understood against the backdrop of exclusive dealing arrangements in the marketing of products in modern commerce. In that context, exclusive dealing is mainly used to describe

contractual arrangements in which a buyer is obligated to purchase most or all products or services from one seller, usually for a set period of time. Exclusive dealing arrangements can take many forms. Some common examples include agreements forbidding a buyer from purchasing products or services from a seller's competitors, contracts preventing a distributor from selling the products of a different manufacturer, and requirements contracts obligating a buyer to purchase all, or a substantial portion of, its total requirements of specific goods or services from one supplier. It is important to note, however, that central to this type of exclusive dealing, is the existence of a signed contractual agreement with covenants procuring exclusivity. This kind of exclusivity is known as *de jure* exclusivity based as it is on the provisions of a contract.

[157]The case law on exclusive dealing in Commonwealth courts has dealt mainly with *de jure* exclusivity. This is because our common law could only remedy exclusive dealing by invoking the doctrine of restraint of trade: see, e. g., the English House of Lords landmark decision of **Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269**. That doctrine allowed courts to circumvent the perils of exclusive dealing by declaring the contract on which the exclusive dealing was based void on grounds of public policy. Not surprisingly, therefore, the only relevant exclusive dealing

encountered in the case law is *de jure* exclusivity and this presupposes the presence of a contractual exclusive dealing arrangement. However, exclusive dealing as defined in **section 2** is not limited to *de jure* exclusivity. **Section 2** has introduced two other kinds of exclusive dealing, namely, what is called in competition law *de facto* exclusivity **(section 2(a)** and, what is called induced exclusivity **(section 2(b))**.

[158] **Section 2 (a)**, which is in issue in this case, defines "exclusive dealing" as "any practice" of a supplier of goods that has the effect of requiring a customer, as a condition of supplying goods to that customer, to do any of the acts specified in **(a) (i)** and **(ii)**. The act in **(a) (i)** is to deal only or primarily in goods supplied by or designated by the supplier or his nominee and that in **(a) (ii)** is to refrain from dealing in a specified class or kind of goods except as supplied by the supplier or his nominee.

[159] On the express language of **section 2 (a)**, then, there is no need to show that there was an exclusive dealing contract between the supplier and the customer nor, consequently, any exclusivity covenants in a contractual agreement to support a claim of exclusive dealing. All that is required under **section 2** is evidence of a "practice" of the supplier. It does not matter whether that "practice" is based on a contractual arrangement or not, as long as the "practice" has the *de facto* effect of exclusivity. **Section 2 (a)** is

therefore to be read as meaning that where any practice of a supplier has the effect of requiring a customer to do the acts specified in **(a) (i)** and **(ii)** there is exclusive dealing on the part of the supplier of goods.

[160] The definition of exclusive dealing in **section 2 (b)** is not in issue in this case but that subsection throws useful light on the interpretation of **section 2 (a)**. Under **section 2 (b),** exclusive dealing occurs where any practice of a supplier of goods has the effect of inducing a customer to do any of the acts specified in **section 2 (a) (i)** and **(ii)** by offering to supply goods to the customer on more favourable terms or conditions "if the customer agrees" to the specified act. Exclusive dealing under **section 2 (b)** is induced exclusivity and, unlike *de facto* exclusivity under **section 2 (a) (i)** and **(ii)**, can only be established if an agreement between the supplier and the customer to do the act is shown.

[161]We agree with the BNOCL that the evidence before the FTC does not support a finding of *de jure* exclusivity as there is no clear evidence of any exclusive dealing contract between BNOCL and BL&P. But, that is not the kind of exclusive dealing that the FTC is claiming. The FTC's claim is that there was exclusive dealing as defined in **section 2 (a) (i)**, or in other words, *de facto* exclusive dealing. According to the FTC, the letters of 4 October 2005 and 15 November 2005 from the Ministry of Energy to the

BL&P established the framework for BNOCL's practice of supplying HFO to BL&P. This practice, for which there is an abundance of evidence and which is not denied by BNOCL, had the effect of requiring BL&P to deal only or primarily in the fuel oil supplied by BNOCL and as such constituted *de facto* exclusive dealing within the meaning of **section 2 (a) (i)**.

[162] It is our judgment, then, that in all the circumstances there was ample evidence to support the FTC's finding of *de facto* exclusive dealing by BNOCL.

Was BNOCL responsible for such exclusive dealing?

[163] The second contention of BNOCL, which is premised on the principle that for there to be exclusive dealing must be based on an exclusive dealing contractual arrangement, is that, if there was an exclusive dealing arrangement, the evidence on which the FTC is relying to support its finding points to those arrangements being made by the Crown, and not BNOCL. This contention is clearly premised on the assumption that for there to be exclusive dealing there must be evidence of an exclusive dealing contractual arrangement between the supplier and the customer. Thus, in its written submissions on this contention, BNOCL urges as follows:

> "(iii) there is a distinction between the Crown and BNOCL. BNOCL does not form part of the Crown. However, the Ministry is part of the Crown. Accordingly a possible construction of the letters is that the Crown (not BNOCL) sought to engage in exclusive dealing."

[164] One of the most fundamental principles of our company law is that a company incorporated or continued under the **Companies Act, Cap. 308** is a legal entity separate and distinct from its members, or in other words, has a separate legal personality. This principle was firmly laid down in the English House of Lords decision in **Salomon v Salomon & Co [1897] AC 22** and is a shibboleth in our law as indeed the entire common law system. Accordingly, BNOCL, being a company continued under **Cap. 308**, is entirely correct in its assertion that it is a separate legal entity distinct from the Crown, notwithstanding the fact that the Crown owns all of the shares in BNOCL.

[165] Be that as it may, BNOCL's contention that because of its separate legal personality it is not responsible for a breach of the prohibition against exclusive dealing in **section 16 (3) (g)** cannot avail. This is so because, as has been seen, such responsibility does not rest on the question of who made the exclusive dealing arrangement or indeed whether there was any exclusive dealing contractual arrangement. It rests entirely on the question whether the supplier of goods engages in a practice which has the

effect of exclusive dealing. In this case, it is not in the terrain of dispute that it was BNOCL who engaged in such a practice and not the Crown. *Ex hypothesi*, the responsibility for a breach of the prohibition against exclusive dealing in **section 16 (3) (g)** rests on BNOCL and not on the Crown as BNOCL contends.

[166] In sum, it is entirely unnecessary to disregard BNOCL's separate legal personality to find it responsible for a breach of the prohibition against exclusive dealing in **section 16 (3) (g)**. BNOCL was a supplier of goods and engaged in a practice which had the effect of exclusive dealing, namely, requiring BL&P to deal only or primarily with BNOCL. Accordingly, BNOCL cannot avoid responsibility for a breach of the prohibition against exclusive dealing in **section 16 (3) (g)** by glibly pointing to the fact that the arrangement which facilitates that practice was made by its controlling shareholder, the Crown.

Was the market for delivery and sale of HFO to BL&P competitive?

[167] The third issue arises from the FTC claims that the market for the delivery and sale of HFO to BL&P was generally competitive and BNOCL's denial of this.

[168] To support its claim, the FTC points to the fact that all local MOCs, including BNOCL, ESSO, TEXACO and SOL, were free to bid for the

opportunity to enter the market for the delivery of HFO to BL&P. According to the FTC, the fact that there were no barriers to entry into this market was demonstrated by BL&P's 20 January 2006 invitation for tender to all MOCs for the supply of HFO to BL&P for a period of three years starting 1 June 2006.

[169] Indeed, states the FTC, at the time of the filing of the complaint, SOL owned the contract to deliver HFO to BL&P. SOL confirmed that this contract was for SOL to supply the BL&P with 100% of BL&P's HFO demands at Spring Garden. BL&P also confirmed this, indicating that the supply arrangement with SOL would come to an end on 31 May 2006 when the supply arrangement would be with the MOC winning the bid pursuant to the 20 January 2006 invitation for tender. Thus, according to the FTC, the market for delivery and retail sale of HFO to BL&P could therefore be described as competitive because all oil companies capable of delivering HFO to BL&P were free to bid for the right to do so under a tendering procedure executed tendering procedure executed by BL&P.

[170] As already intimated, BNOCL disagrees with the FTC that the market for the supply and delivery of HFO to BL&P was ever open to competition or that HFO was ever supplied following a tender process. BNOCL in its response to the FTC stated:

> "Prior to the construction of the BNTCL pipeline 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."

[171] BNOCL also asserts that the FTC, in assessing the competitiveness of the supply and delivery market, did not consider the implications of the fact that the condition of monopsony existed in that market as BL&P was the sole purchaser for HFO. In his written submissions to the court below, Mr. Forde QC posits:

> "Likewise, it is submitted that the concept of monopsony was never raised or considered. Under a monopsony, the Buyer controls the market. BL&P is the major consumer for fuel oil and to that extent, the suppliers such as SOL and/or BNOCL cannot act independently on the market."

[172] Neither of these submissions by BNOCL persuades. First, The FTC was in possession of a tender letter dated 31 March 1998 from BL&P to Shell Antilles & Guianas Ltd which requested proposals for the supply of HFO to the Spring Garden power plant. That letter intimated at paragraph 2: "The proposals are to be submitted by April 22, 1998 and the successful tenderer is expected to commence the supply of fuel oil on August 01. 1998." This is evidence of an invitation for tenders which clearly contradicts BNOCL's assertion that "prior to the construction of the BNTCL pipeline for the

supply of fuel oil to the BL&P had never been tendered or open to competition."

[173] Second, it is difficult to see why the FTC should have "raised or considered" "the concept of monopsony" as the BNOCL insists. There is no doubt that the condition of monopsony existed in the market for the supply and delivery of HFO to BL&P and that in microeconomic theory monopsony can distort the efficient allocation of resources. The way in which a monopsonist can distort efficient allocation of resources is by setting lower prices for the affected input and using fewer resources than it would in a competitive market with many buyers. This is brilliantly explained in *Blair & Harrison*, Monopsony: Antitrust Law and Economics (1993) at pages 36-61. The investigation in this case is not about whether BL&P breached the fair competition rules in the **FCA**; it is about whether BNOCL did so. Consequently, for the FTC to embark in an investigation on whether BL&P's position of monopsony resulted in distortion of the efficient allocation of HFO would be for the FTC to engage in the proverbial wild goose chase.

[174] In light of the foregoing, it is our judgment, there was ample evidence available to the FTC for it to find that the market for the delivery and sale of HFO to BL&P was generally competitive. The documentary evidence

supported that finding and the issue of BL&P's position of monopsony was an irrelevant consideration.

Conclusion on Exclusive Dealing

[175] Our conclusion is that there was sufficient evidence available to the FTC to support its finding that BNOCL unilaterally undertook the exclusive supply of HFO to BL&P contrary to **section 16 (3) (g)**. The undisputed evidence before the FTC was that BNOCL, not any other entity, engaged in the practice of exclusive dealing in the supply of HFO to BL&P and that BNOCL was in a dominant position in the market for the supply of HFO to BL&P. There was ample evidence also that that market was competitive.

B. Denial of Access to an Essential Facility

(1) FTC's finding that BNOCL Denied Access to an Essential Facility Contrary to the Essential Facility Doctrine implicit in Section 16 (3) (a), (c) and (h).

[176] The FTC claims that another way in which BNOCL abused its position of dominance was that it denied the MOCs access to the pipeline owned by its wholly owned subsidiary, BNTCL, by not supplying them with the throughput rate for the use of the pipeline. It will be remembered that the tender document which was issued by BL&P inviting tenders for the supply of HFO to it required MOCs to provide (i) specified quantity of HFO annually; (ii) the method of delivery of HFO; (iii) specified quality of HFO;

(iv) the tenderer's safety and environmental policies and procedures; (v) a transparent pricing arrangement including FOB price, ocean freight, ocean losses and insurance inspection, terminal fees, delivery charge, and tenderer's margin; and (vi) staffing and tenderer's profile.

[177] The FTC noted that on 3 February 2006, BNOCL submitted a bid for the supply of HFO to BL&P in response to this tender document and that the MOCs , seeking to make a similar bid, requested of BNOCL the throughput rate for the use of the pipeline to deliver HFO to BL&P. In response to the request by SOL, BNOCL stated that they were not in a position to provide SOL with the throughput rate for the use of the pipeline as, inter alia:

> "your proposed use of the pipeline is at variance with a decision made by the Cabinet of Barbados regarding the supply of fuel oil to the BL&P."

[178] In the meantime, ESSO indicated to BL&P in a letter of 3 February 2006 that it was not in a position to tender for the supply of HFO to BL&P because:

> "BNOCL owners of the pipeline connecting our terminal to your generating station, has informed us that they are not in a position to provide us with a throughput rate for the use of the pipeline."

However, TEXACO submitted a tender but this was contingent on TEXACO's ability to negotiate a lease for the pipeline owned by BNOCL.

[179] In spite of this documentary evidence, in their letter of 10 July 2006 to the FTC, BNOCL denied that they had refused to offer a throughput fee to the MOCs. They stated in that letter that at the time of the request of the MOCs for a throughput fee the pipeline had not been commissioned. They explained that, while BNTCL had a figure in mind as a throughput fee, the sum could not then have been given because it was not final as any additional cost resulting from the commissioning exercise would have to be taken into consideration. We cannot help but observe that this explanation is at substantial variance with that offered to the MOCs in response to the MOCs' request for a throughput fee.

[180] In light of the foregoing, the FTC concluded that the MOCs were denied the opportunity "to deliver a proper bid" because of their inability to provide a transparent price for the use of the pipeline which they needed in the downstream market for the delivery of the HFO to BL&P. This, the FTC concluded, was evidence of a breach by BNOCL of the essential facility principle.

[181] In its letter of 4 October 2006 to the FTC, BNOCL responded to that conclusion of the FTC, rather raspingly, as follows:

> "**Refusal to Share Throughput Fee**
>
> Neither BNOCL nor BNTCL which is the owner of the Pipeline is obliged to let its pipeline to any of the MOC's. By the same token we are of the view that it would not be unfair competition if Simpson Motors refuses to let one of its limousines to competing garages although it knows that garage requires the limousine for a particular job. Fair competition was never intended to stifle the ability of the enterprise to improve its production or distribution over its competitors. We note SOL's letter dated July 31, 2006, wherein SOL admits delivery could be done by truck and that the risk associated by transportation by truck was manageable. In a competitive environment, there is no law which dictates that all component of cost between competitors ought to be equal. SOL was therefore at liberty to quote the transportation costs by truck (which it knew or was in a position to know) and reduce any other component in the costs, possibly its profit. We are of the view that nothing we did prevented SOL from competing."

[182] BNOCL's response is a reiteration of a fundamental plank which underlies our market economy, namely, the right of asset owners to deal with whom they choose and to use and dispose of their assets as they please. This elemental principle which finds legal expression in the notions of private property and freedom of contract is held sacrosanct in our legal system: see, e.g., per Lord Parker in **Commonwealth of Australia v Adelaide Steamship Co [1913] AC 781 at 794**. BNOCL's response by inference, therefore, is in pith and substance a denial of the FTC's claim of

the existence in the **FCA** of a countervailing principle that where access to a facility is essential in order for a person to operate on a downstream market, the owner of that facility may, in certain circumstances, be obliged to grant access to that person.

[183] Always denying the existence of an essential facility doctrine in our law, BNOCL contends in its written submissions and its oral argument before this Court that, in any event, the evidence before the FTC did not show that the pipeline, which was owned by its subsidiary, BNTCL, not by BNOCL, was an essential facility in the supply of HFO to BL&P.

[184] In light of the respective submissions of the FTC and BNOCL, we are bound to determine three matters in assessing the FTC's claim. First of all, we must determine whether there is an essential facilities doctrine in the **FCA**. Secondly, if we decide that the doctrine does exist, we must then determine whether there was evidence to satisfy the FTC's claim that that doctrine was reached. Thirdly, if we decide that the doctrine was breached, we must then determine whether BNOCL owned or controlled the essential facility and therefore has responsibility for the breach.

Is There an Essential Facilities Doctrine under the FCA?

[185] To begin with, what is the essential facilities doctrine?

[186] The essential facilities doctrine evolved as a free standing doctrine in the United States in the beginning of the 20th century based in particular on the interpretation of *section 2* of the *Sherman Act*. The seminal case on this doctrine is the US Supreme Court case of **US vs. Terminal Railroad Association of St. Louis, (1912) 224 U.S. 383**. In that case, the defendant association owned both the railroad terminal as well as the only bridge link to the terminal. A non-owner, intending to provide competition to the association, was denied access to both the bridge as well as the railroad terminal. The association argued, not unlike BNOCL in the case at bar, that if the non-owner wanted to compete it needed to build similar facilities and incur the relevant cost. The US Supreme Court interpreted *section 2* of the *Sherman Act* to hold this to be a case of monopolization, and directed the association to provide access to essential facilities - namely, the bridge and the railroad terminal - to enable the non-owner to compete effectively. Many other Supreme Court judgments have interpreted *section* 2 of the *Sherman Act* to mean that the denial of access to competitors by the owner of an essential facility can in certain circumstances be a breach of that section: see e. g., **Eastman Kodak Co v Image Technical Services Inc**., **504 US 451 (1992)**; **Lorain Journal Co v US, 342 US 143 (1951)**; **Aspen**

Skiing Co v Aspen Highlands Skiing Corp., 472 US 585 (1985) (Aspen Skiing).

[187] An essential facilities doctrine has developed in EC law based on an interpretation of *Art. 82 (ex 86)* of the *EC Treaty*. As has been seen, that Article specifies four types of abuse of dominant position within the common market. The European Court of Justice has interpreted the express prohibitions in that Article (and in particular *Art. 82 (b) and (c)*) as indicative of an intention on the part of the Treaty makers of imposing on competitors in EC competition law a general duty to deal: See, e. g., **Commercial Solvents; United Brands.** The essential facilities doctrine in EC law is treated, not as a free-standing doctrine as in the US, but simply as a particular application of the general duty to deal embodied in *Art. 82 (ex 86)*.

[188] As an example, the doctrine was so recognised by the European Competition Commission in the case of **Sea Containers v Stena Link, Commission Decision 94/19/EC, 1994 OJ (L 015) 8 (relating to a proceeding pursuant to Article 86 of the EC Treaty (IV/34.689-Sea Containers v Stena Sealink-Interim Measures))**. The facts of that case are that Stena Link was the owner and operator of the port of Holyhead. One of its subsidiaries operated ferry services from the same port. Sea

Containers intended to start ferry services on the same route as Stena Link subsidiary but with a faster ship. Stena Link delayed negotiations, but, after a complaint was lodged with the Commission, it concluded an agreement with Sea Containers. The Commission nevertheless stated at *para 64* that the port was an essential facility, since any other alternative, i.e. another port, would substantially increase the length of sail, and building another port would not be realistic. At *para 66*, the Commission, significantly in the context of the case at bar, asserted that "an undertaking which occupies a dominant position in the provision of an essential facility and itself uses that facility…and which refuses other companies access to other competitors without objective justification or grants access to competitors only in terms less favourable than those which it gives its own services" commits an abuse of dominant position.

[189] The leading authority on the essential facilities doctrine as an application of the duty to deal is the European Court of Justice in **Oscar Bronner GmbH & Co v Mediaprint Zeitungs-und Zeitschriftenverlag GmbH & Co KK, Case C-7/97, 1998 ECR 1-7791, [1999] 4 CMLR 112**. In that case, a question arose as to whether the refusal by a publisher of two newspapers who had established the only nationwide delivery scheme to grant a competing newspaper access to that delivery scheme constituted an abuse of

dominant position. The ECJ held that there could be an abuse of dominant position if (i) the refusal was likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service; (ii) that such refusal was incapable of being objectively justified; and (iii) that the service in itself was indispensable to carrying on that person's business, in as much as there is no actual or potential substitute in existence for the home delivery scheme.

[190] Inspired by the EC and US decisions, courts in the Commonwealth have interpreted provisions in their competition legislation similar to *Art 82* as imposing on enterprises a general duty to deal. Thus, as an example, in **Queensland Wire Industries Pty Ltd v Broken Hill Proprietary Co Ltd (1989) 167 CLR 177 (Queensland Wire)**, the High Court of Australia's landmark ruling on the interpretation of *s 46* of the Australian *Trade Practices Act 1974 (Cth),* BHP's refusal to supply a competitor, which is generally regarded as encompassing the essential facilities doctrine, was held to amount to a misuse of market power.

[191] *Section 46* of the Australian Act provides as follows:

> "A corporation that has a substantial degree of power in a market shall not take advantage of that power for the purpose of -

> (a) eliminating or substantially damaging a competitor of the corporation or of a body corporate that is related to the corporation in that or any other market;
>
> (b) preventing the entry of a person into that or any other market; or
>
> (c) determining or preventing a person from engaging in competitive conduct in that or any other market."

The judgments of Mason CJ and Wilson J at pp 188-190, Dawson J at pp 200-202, and Toohey J at 210 in **Queensland Wire** relied heavily on European and United States' authorities in interpreting and applying this section as encompassing a doctrine of refusal to deal and so the essential facilities doctrine.

[192] It is important to note here that, like **section 16** of the **FCA**, there is no express prohibition in *Art. 82* of the *EC Treaty*, *section 2* of the *Sherman Act* or *section 46* of the *Trade Practices Act*, against denial of access to an essential facility. This notwithstanding, the "abuse of dominant position", "monopolisation" and the "substantial degree of power in a market" provisions of the European Community, United States and Australia, respectively, have been interpreted as encompassing an essential facilities principle. This doctrine has been interpreted to be inherent in the intent of these provisions which *ex facie*, in the US, is to prohibit the acquisition or

possession of market power, and in the EC and Australia, to limit the anti-competitive exercise of that power.

[193] **Section 16 (3)** of the **FCA** mirrors *Art 82* of the *EC Treaty* in its specification of examples of conduct which constitute abuse of dominant position. As has been held in respect of *Art 82*, the intention of the law maker in those examples is to be taken as an implicit recognition of a general duty to deal which includes a particular duty on competitors to grant access to essential facilities owned by them in certain circumstances. As a matter of statutory construction, it must be presumed that Parliament intended **section 16(3)** to be interpreted in light of US and EC decisions, as embracing the essential facilities doctrine as is done by Commonwealth courts. Accordingly, we hold that **section 16 (3)** of the **FCA**, and in particular **section 16 (3) (b), (c) and (h)**, is to be interpreted as establishing an essential facilities doctrine in our fair competition law.

Was there evidence to satisfy the FTC's claim that the essential facilities principle was breached by BNOCL?

[194] Because the essential facilities doctrine represents a divergence from the right of asset owners to deal with whom they choose and to use and dispose of their assets as they please, courts have insisted that the doctrine is to be applied cautiously and only in exceptional circumstances that meet

strict requirements: see **MCI Communications v American Tel & Tel Co 708 F 2d 1081, 1132-33 (MCI Communications)**. The very restrictive test adumbrated by the ECJ in **Oscar Bronner** is reflective of this insistence. As was seen at para [189] above, that test requires that the party claiming unlawful refusal must prove three elements. These are (i) that the refusal was likely to eliminate all competition in the market on the part of the person requesting the service; (ii) that such refusal is incapable of being justified; and (iii) the facility in itself is indispensable to carrying on that person's business, in as much as there is no actual or potential substitute in existence for the facility.

[195] Of course, as Mr. Forde QC submitted, a necessary assumption of the **Oscar Bronner** test is ownership or control of the facility by the person who refuse access to the facility. That said, Mr. Forde QC has not seriously advanced any argument that BNOCL was not in control of the pipeline. True the pipeline was owned by BNTCL, but that company was a wholly owned subsidiary of BNOCL, its directors were the directors of BNOCL and all the evidence shows that it danced to the music of BNOCL. Reduced to legal language, BNTCL was the agent of BNOCL. Case authority such as **Wallersteiner v Moir [1974] 3 All ER 217 (Eng CA)** and **Re FG (Films) Ltd [1953] 1 All ER 615 (Eng Ch D)** establish that courts will infer

an agency relationship between a holding company and its subsidiary in circumstances like this case to frustrate serious impropriety: see Burgess *Commonwealth Caribbean Company Law (2013: Rutledge)* at *pp 99-100*. Thus, BNOCL was undoubtedly in control of the pipeline so that the basic assumption of the **Oscar Bronner** test is satisfied.

[196] Given the foregoing, the question now becomes this: applying the **Oscar Bronner** test to the instant case, was there evidence before the FTC to support the claim that BNOCL abused its dominant position in refusing the MOCs access to the pipeline?

(i) Likelihood of Elimination of Competition

[197] First, we consider the **Oscar Bronner** requirement that the refusal was likely to eliminate all competition in the market on the part of the person requesting the service. As we have already decided at para [174], there was competition amongst MOCs in the market for the supply of HFO to BL&P. BNOCL's refusal to supply the throughput fee and access to the pipeline to those MOCs not only had the potential to eliminate all competition for the supply of fuel oil to BL&P, but it actually did. The evidence before the FTC was that BNOCL refused to provide the MOCs with a throughput rate for the use of the pipeline and that as a consequence, the MOCs could not bid for the supply of HFO to BL&P. The further

evidence was that BNOCL's was the only bid and that the contract to supply HFO to BL&P was awarded to BNOCL!

(ii) Refusal Incapable of Justification

[198] Second, we take the **Oscar Bronner** requirement that such refusal was incapable of being objectively justified. It is true that in **Oscar Bronner,** the ECJ did not consider the question of what amounts to "objective justification". However, it is generally accepted that refusal may be objectively justified if a reasonable owner of the facility who had no interest in any downstream operation would have a substantial interest, acting rationally, to refuse access. BNOCL failed to provide evidence for its refusal that would satisfy that test of objective justification.

(iii) Indispensability of the Facility

[199] Third, we examine the **Oscar Bronner** requirement that the facility in itself must be indispensable to carrying on the business of the person requesting access to the facility. A facility is regarded as indispensable if it exhibits natural monopoly characteristics and hence cannot be duplicated economically and if it occupies a strategic position in the market concerned. Such a facility is indispensable in the sense that access to the facility is required if a business enterprise is to be able to compete

effectively in the upstream or downstream market: **MCI Communications at 1132-32**.

[200] In the context of the case at bar, this means that to establish "indispensability" there must be evidence of two things. The first is that the pipeline occupied such a position in the market for the supply of HFO to the BL&P that access to it was required if the MOCs were to compete effectively in supplying HFO to BL&P. The second is that it would have been uneconomical for the MOCs to develop another pipeline or to supply the HFO by trucks.

[201] The evidence before the FTC concerning the indispensability of the pipeline in the supply of HFO to BL&P was contained in the minutes of the meeting of 1 March 2005 between BNTCL and stakeholders; Cabinet Paper (05) 998/MEP. 101; the Confirmed Minutes of Cabinet Meeting held on 8 September 2005; letter of 4 October 2005 from the Permanent Secretary Ministry of Energy (ag) to SOL; letter of 15 November 2005 from the Permanent Secretary Ministry of Energy (ag) to BL&P; letter of tender document dated 23 December 2005 from BL&P to MOCs; bid by BNOCL submitted to BL&P on 3 February 2006; letter of 10 January 2006 from SOL to BNOCL; letter of 27 January 2006 from BNOCL to SOL; letter dated 3 February from ESSO to BL&P; bid submitted to BL&P by Texaco

on 3 February 2006; written complaint dated 20 February 2006 to the FTC by SOL; minutes of a meeting held on 7 March 2006 between BNOCL, the Ministry of Energy and Public Utilities and SOL; letter dated 27 March 2006 from BL&P to the FTC; letter dated 31 July 2006 from SOL to the FTC; letter dated 19 May 2006 from FTC to BNOCL; letter dated 29 June 2006 from BNOCL to the FTC; letter dated 10 July 2006 from BNOCL to the FTC; letter of 4 October 2006 from BNOCL to the FTC; letter of 31 March 1998 from BL&P to Shell Antilles & Guianas Ltd; fax dated 28 July 2006 from the Barbados Statistical Service to the FTC.

[202] It emerges from these documents (i) that the pipeline was part of the wider national oil strategy; (ii) that the pipeline was constructed as an integral part of a petroleum distribution project identified as the most efficient manner of supplying HFO to the BL&P; (iii) that at the meeting of 1 March 2005, BNTCL insinuated that, in view of the central role which the pipeline occupied in the national oil strategy, the MOCs would be allowed access to the pipeline, subject to a throughput fee; (iv) that, in fact, in May 2006, SOL was permitted by BNOCL to use the pipeline temporarily to fulfil its existing contract to supply HFO to BL&P; (v) that, after the construction of the pipeline and the closure of Needham’s Point which resulted in the virtual cessation of trucking, there was not in existence any actual or potential

substitute for transporting the fuel oil; (vi) that trucking was no longer a viable option (according to the minutes of meeting dated 7 March 2006) as the only facility on the island at Needham's Point where the tankers could be fuelled had been closed down; (vii) that any MOC which may have been awarded the contract would have had to make approximately thirty (30) trips per day using three (3) to five (5) trucks and that the Holborn facility is small and could not effectively accommodate that level of activity; (viii) that there would have been a great differential in cost. Transportation of HFO by truck was forty-eight (48) cents per barrel and twenty-two (22) cents per barrel via the pipeline. Trucking was, therefore, no longer economically viable; (ix) that BNOCL would therefore be in a position to offer a much lower price than MOCs because of BNOCL's exclusive use of the pipeline; (x) that transportation by trucks carried an increased risk of contamination of the potable water supply by accidents and spillage which was largely removed by the construction of the pipeline; (xi) that the construction of another pipeline by individual MOCs was not feasible since there was no guarantee that the pipeline constructed by any given MOC would ever be used on a regular basis or at all if the BL&P contract was not awarded to it; (xii) that trucking from the ship's flange was also not a practical substitute since the ship would only be in port for a limited time; and (xiii) that, therefore, the only real option would have been to deliver the oil via BNOCL's pipeline.

[203] In our judgment, these facts constituted cogent evidence on which the FTC could base its finding that the pipeline was an indispensable facility in the market for the supply of HFO to BL&P after the closure of the Needham's Point facility. The evidence before the FTC clearly pointed to the conclusion that the pipeline occupied such a position in the market for the supply of HFO to the BL&P that access to it was required if the MOCs were to compete effectively in supplying HFO to BL&P. The evidence also supports the finding that it was not economical to construct another pipeline (or, worse, other pipelines) to supply HFO to BL&P.

Conclusion on Denial of Access to an Essential Facility

[204] Our conclusion on the issue of BNOCL's breach of the **FCA** by denial of access to MOCs to the pipeline, an essential facility, is that there was sufficient evidence to support the FTC's finding that there was a breach. There can be little doubt that the **FCA** embraces the duty to deal and the essential facilities doctrine implicit in that duty. The evidence before the FTC satisfies all the elements which need to be proved to establish a breach of that doctrine.

Should BNOCL Not Be Treated As Abusing Its Dominant Position

[205] As has already been seen at para [100] above, notwithstanding that an enterprise has engaged in behaviour characterised as abuse of dominant position under **section 16 (3)** of the **FCA**, **section 16 (4)** of that Act provides that such behaviour is not to be treated as abusing a dominant position if, in so far as relevant to this case, two alternative specified facts are shown. Under **section 16 (4) (a)**, the first alternative is that the enterprise's "behaviour was exclusively directed to improving the production of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit". By **section 16 (4) (b)**, the second is that "the effect or likely effect of (the enterprise's) behaviour in the market is the result of its superior competitive performance". If either of these is shown, the FTC is statutorily mandated not to treat behaviour prohibited under **section 16 (3)** as abusing a dominant position.

[206] We do not agree with Sir Richard's characterisation of **section 16 (4)** as providing a defence. **Section 16 (4)** is not a defence. It is part of the definition of the prohibition of abuse of a position of dominance. It has the effect that the impugned behaviour of an enterprise constitutes an abuse of a dominant position for one of the proscribed behaviours in **section 16 (3)** only when the behaviour cannot be explained within **section 16 (4)**. On

the other hand, if the behaviour can be explained within **section 16 (4)** the enterprise's ostensibly abusive conduct will not amount to a misuse of market power by the enterprise abusing a dominant position.

[207] ***Section 16(4)*** appears to us to be motivated by a general principle which is widely asserted in competition law cases, namely, that anticompetitive conduct is not to be treated as prohibited if it may be justified by legitimate or valid business: see, e. g., **Queensland Wire** at **p 193**; **United Brands** at **p 445**; **Aspen Skiing** at **p 597**. However, ***section 16(4)*** on its plain language is far narrower than the principle as stated in those cases. First, the words "if it is shown" in ***section 16(4) (a)*** clearly argue for a conclusion that it is for the enterprise to adduce evidence to trigger the operation of that subsection. There is no duty on the FTC in its determination of whether there is an abuse of a dominant position under **section 16 (3)** to consider ***section 16(4)*** in the absence of relevant evidence presented by the business enterprise. Second, the only business reasons which avail are those stipulated in ***section 16(4) (a)***: not "valid" or "legitimate" or any such standard stated in the cases.

[208] The question which now arises therefore is whether BNOCL adduced any evidence that would warrant the FTC applying **section 16 (4).**

[209] In addressing that question, it is important that we recall the behaviour complained of. It was that BNOCL (i) engaged in exclusive dealing in the supply of HFO to BL&P contrary to **section 16 (3) (g)**, and (ii) refused to give MOCs a throughput rate for use of the pipeline to facilitate their bid for the supply of HFO to BL&P and denied them access to the pipeline which is an essential facility for the supply of HFO to BL&P contrary to **section 16 (3) (b), (c) and (h)**.

[210] BNOCL did not offer any evidence to the FTC that its "behaviour was exclusively directed to improving the production of goods or to promoting technical or economic progress and consumers were allowed a fair share of the resulting benefit" sufficient to satisfy **section 16 (4) (a)**. Alternatively, BNOCL did not present any evidence to the FTC that the effect or likely effect of its behaviour in the market for the supply of HFO to BL&P was the result of its superior competitive performance within **section 16 (4) (b)**. There was no basis therefore for the FTC to invoke **section 16(4)** and treat BNOCL as not abusing its position of dominance.

DISPOSAL

[211] For all the foregoing reasons, the appeal is allowed, the order of **Worrell J** is set aside. Costs to the appellant to be agreed or assessed.

Justice of Appeal

Justice of Appeal