JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 92/97

BEFORE: THE HON. MR. JUSTICE FORTE, P
THE HON. MR. JUSTICE WALKER, J.A.
THE HON. MR. JUSTICE PANTON, J.A.

BETWEEN	**JAMAICA STOCK EXCHANGE**	**PLAINTIFF/ APPELLANT**
A N D	**FAIR TRADING COMMISSION**	**DEFENDANT/ RESPONDENT**

R.N.A. Henriques, Q.C., Allan Wood, R. Braham instructed by Livingston, Alexander & Levy for Appellant

Hilary Phillips, Q.C., Denise Kitson, Wendy Duncan instructed by Grant, Stewart, Phillips & Company for Respondent

February 14, 15,16,17,18,21,22,23,24,28,29;
March 1,2,3, 6,9,10,13,14,15,16,17,2000 and
January 29, 2001

FORTE, P.

The appellant brought an action in the Supreme Court in which it claimed the following orders:

(1) A declaration that upon its proper construction, the Fair Competition Act is not applicable to the Plaintiff as the Plaintiff is expressly governed by the provisions of the Securities Act.

(2) Further or alternatively, a declaration that the action and proceedings being taken and pursued by the Defendant against the Plaintiff whereby the Defendant is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and void.

(3) Further or alternatively, a declaration that the action of the Defendant purporting to act under the provision of the Fair Competition Act in interrogating and examining Directors and Council members of the Plaintiff after having instituted proceedings against the Plaintiff is ultra vires.

(4) Further or alternatively, a declaration that the Defendant has acted in abuse of its statutory powers and/or has sought to exercise its powers

for an improper purpose and consequently the actions of the Defendant are ultra vires and void.

(5) Further or alternatively, a declaration that the Fair Competition Act and or the action and proceedings instituted by the Defendant against the Plaintiff whereby the Defendant performs the function of investigator, interrogator, complainant and adjudicator is in breach of, and an abrogation of the Plaintiff's constitutional right pursuant to Section 20(2) of the Jamaica Constitution and also infringes the principle of separation of powers enshrined by the Constitution of Jamaica.

(6) Further or alternatively, a declaration that the action and proceedings taken by the Defendant against the Plaintiff concerning the conduct of the Plaintiff's business is in breach of and an abrogation of the Plaintiff's constitutional right of the freedom of association provided for by Section 23 of the Jamaica Constitution.

(7) An Injunction restraining the Defendant, its officers and/or agents from continuing the proceedings and action taken against the Plaintiff and interrogating any of the Directors or Council members of the Plaintiff until the trial of the action herein or further Order.

The action, having been heard before Theobalds, J the learned judge refused all the declarations and the order for injunction sought, and in what appears to be an oral judgment summarily disposed of the arguments presented to him.

The appellant the Jamaica Stock Exchange now appeals to this Court.

In coming to a determination on the contentions advanced, I do not intend to deal with the grounds seriatim but rather will deal with the important issues as I see them. Further any reference to the facts and history of the case can be derived from (i) the judgment of Panton, J.A. which I have had the opportunity to read in draft and (ii) the necessary references in this judgment to the complaint of the Fair Trading Commission (FTC) which resulted in this action. The appeal can be determined on a resolution of the following issues:

(1) Do the provisions of the Fair Competition Act apply to the Jamaica Stock Exchange?

(2) Is the doctrine of the Separation of Powers which it is contended is a creature of the Constitution likely to be

breached if the Fair Trading Commission is permitted to hear its complaint against the Jamaica Stock Exchange?

(3) Is there likely to be a breach of the rules of natural justice, if the hearing by the Fair Trading Commission is pursued?

The question posed in (1) (supra) can if answered in the negative dispose of the appeal, but having regard to the arguments advanced on the issues stated in (2) and (3), no matter the determination in question (1), it is felt that some opinion ought to be expressed. Some other interesting arguments have been advanced in respect, inter alia, to abuse of power, and the right to freedom of association. I will however confine myself to the above issues.

(1) Does the Fair Competition Act Apply to <u>the Jamaica Stock Exchange</u>?

The first issue that arises for consideration is whether the plaintiff/appellant i.e. The Jamaica Stock Exchange (the "JSE") comes within the purview of the Fair Competition Act (the 'FCA") and consequently can be the subject of investigation and be directed by the Fair Trading Commission (the "FTC") performing its function under that Act.

The appellant contends that the Jamaica Stock Exchange concerned as it is, with securities, is governed and regulated by the Securities Act to the exclusion of the provisions of the FCA. In response, counsel for the FTC contends that the FCA has special application to competition issues in "all industries and entities save those which are specifically excluded by Section 3 of the FCA".

It may be a good starting point, in the determination of this issue, to set down the exceptions dealt with in Section 3:

"3. Nothing in this Act shall apply to –

(a) combinations or activities of employees for their own reasonable protection as employees;

(b) arrangements for collective bargaining on behalf of employers and employees for the purpose of fixing terms and conditions of employment;

(c) the entering into of an agreement in so far as it contains a provision relating to the use; licence or assignment of nights under or existing by virtue of any copyright, patent or trade mark;

(d) the entering into or carrying out of such an agreement or the engagement in such business practice, as is authorized by the Commissioner under Part V;

(e) any act to give effect to a provision of an arrangement referred to in paragraph (c);

(f) activities expressly approved or required under any treaty or agreement to which Jamaica is a party;

(g) activities of professional associations designed to develop or enforce professional standards of competence reasonably necessary for the protection of the public;

(h) Such other business or activity declared by the Minister by order subject to affirmative resolution".

It is seen that there are in fact no provisions contained in Section 3 excluding the Stock Exchange from the provisions of the Fair Competition Act.

However, it was contended by the appellant that a closer examination of the provisions of the FCA demonstrates that the Legislature did not intend that the Act should apply to securities. The contention is supported by the fact that both Acts were passed in the House on the same day, indicating, that each was intended to deal with separate issues, to the exclusion of the other, the one with competition, the other with securities. Reliance is placed on the definitions of the words 'business" and 'goods" which are to be found in Section 2 of the FCA. "Business" is defined as meaning "any activity that is carried on for gain or reward or in the course of which goods or services are manufactured produced or supplied, including the export of goods from Jamaica".

It is agreed on both sides that the JSE undertakes no activities in the course of which goods are manufactured, produced or supplied. It is however clear from the definition that the JSE would in carrying out its functions be supplying services, and therefore would be engaged in 'business" as defined, given the fact

that it is also admitted that it does so for "reward" though none of the monies made are paid out either by way of dividend or otherwise to its members: (see clause 4(a) of its Memorandum of Association).

The appellant however contends that the definition given to "goods" clearly indicates that the FCA was not intended to apply to securities. This definition reads as follows:

> "Goods" means all kinds of property other than real property, money, securities or choses in action".

Where therefore any provision of the FCA speaks to "goods" this must be interpreted to exclude the matters set out in the definition and in particular for the purposes of this case – securities and choses in action. So, for instance, a broker dealing in the purchasing and selling of securities could not be controlled by the provisions of the FCA for the reason that the broker would be supplying and purchasing securities for its clients. The question therefore is whether the Stock Exchange providing, as it does the services which facilitate the trading in securities which as will be seen hereunder comes within the regime of the Securities Act, would a fortiori be exempt from the provisions of the FCA by virtue of the definition of "goods".

The application of these definitions must of course be done in the context of the complaint which the FTC seeks to investigate and determine, to see whether the particular provisions of the FCA upon which it relies can be applicable to the JSE. The second amended complaint which speaks to the final allegations against the JSE reads as follows:

> "Take notice that in the exercise of its general functions as set out at Section 5(1)(d) of the Fair Competition Act as well as its powers to make findings and issue directions in relation to abuse of dominant position under Section 21(1) of the Fair Competition Act. The Fair Trading Commission will on a date to be announced and a place to be designated publicly hear and decide on all evidence and submissions relating to the following issues:

Whether the conduct, operations and rules of the respondent as regards membership amount to:

(a) an abuse of a dominant position in the market for publicly traded stocks by restricting entry of persons into the market or by preventing or deterring persons from engaging in competitive conduct in the market or by directly or indirectly imposing unfair purchase prices in breach of Section 20;

(b) an agreement which contains provisions that have as their purpose the substantial lessening of competition or has or is likely to have the effect of substantially lessening competition in a market, as defined by Section 17;

(c) an agreement containing exclusionary provisions as defined by Section 18"

These complaints are predicated on the "whereas" clauses by which the notice is introduced. These read as follows:

"Whereas the Fair Trading Commission has investigated the operations and rules of the Respondent and has before it information relating to the Respondent's procedure for the admission of new members and its rules relating to the requirements for new members and to the number of new brokers to be admitted.

AND WHEREAS there is information before the FTC to the effect that the Respondent –

(i) has by its membership requirement, specifically

(a) that relating to the purchase of a share in the Jamaica Stock Exchange and the amount being demanded for that share, and

(b) that relating to the contribution of $3.8 million to the compensation fund, created barriers to the entry into the market for brokerage services and

(ii) has failed to respond to the applications for admission within a reasonable time; and

(iii) has by its rules given itself the ability to limit the number of brokers without restraint, and whereas there is information also to the effect that the Respondent is in a dominant position in the market for publicly traded stocks.

AND WHEREAS the Fair Trading Commission wishes to make a determination as to whether the Respondent has acted in abuse of a dominant position by its aforementioned procedure and rules".

The complaint alleges breaches of Sections 17, 18 and 20 of the Fair Competition Act which are set out hereunder.

I begin with Section 20 which reads:

(1) 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 person into that or any other market;
(b) prevents or deters any person from engaging in competitive conduct in that or any other market;
(c) eliminates or removes any person from that or any other market;
(d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
(e) limits production of goods or services to the prejudice of customers;
(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".

Section 19 defines "dominant position' as follows –

> "For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors'.

How do these provisions relate to a Stock Exchange, dealing as it does with traders in the securities market? In particular how do the provisions relate to the complaint made in clause (a)? This complaint

alleges that the JSE holds a dominant position in the market for "publicly traded stocks" and abused it in the following ways –

(a) by restricting entry of persons into the market, or

(b) by preventing or determing persons from engaging in competitive conduct in the market, or

(c) by directly or indirectly imposing unfair purchase prices in breach of Section 20.

These allegations are based on the content of the "WHEREAS" clauses appearing in the complaint (supra). Paragraph (ii) of the second "WHEREAS" clause was never the subject of any serious submissions in this appeal, and, consequently, I would consider that complaint as no longer being of any significance, as the applications for membership of the JSE were eventually considered, and indeed each of the three offered membership. It is the conditions attached to those offers that have caused the issues in this appeal to arise. Those conditions are the subject of the complaints in paragraph (i)(a) and (b) of the same 'WHEREAS" clause (supra), paragraph (i)(a) concerning the required purchase of a share in the JSE and the amount demanded for that share, and paragraph (i)(b) relating to the required condition, that, the applicant subscribe to a compensation fund, and the amount of that contribution.

In my view the complaint in clause (a) of the complaint (supra) on the face of it defeats itself, when considered against the background of the definitions in the FCA as outlined above. To begin with, as is a necessary pre-condition in any allegation of anti-competitive behaviour, the FTC in its complaint identifies the market in which the abuse of dominance is alleged as the market for publicly traded stocks. That being so, it can be regarded as a reference to a market for goods – those goods being "publicly traded stocks". There can be no contention against the fact that "publicly traded stocks" are securities and would

therefore be expressly excluded as “goods” in the Fair Competition Act. Indeed, it may be just as well, to indicate here that the complaint concerning the price of the share required for membership in the JSE cannot be the subject of an investigation by the Fair Trading Commission as shares are securities which are specifically excluded by the definition of “goods’. The prohibition or abuse referred to in Section 20(1)(d) in my view contemplates the imposition of unfair purchase or selling prices of goods which as we have seen do not include securities.

Section 2(3), however defines “market’ when used in the FCA to be a reference to a market in Jamaica for goods or services as well as other goods or services, that as a matter of fact and commercial common sense, are substitutable for them. It has been conceded that the JSE does not trade in goods. It does however offer services to public companies by listing their stocks on the Stock Exchange, and to its members an opportunity to trade for themselves or their clients in those shares on the Stock Exchange. It does not buy nor does it sell stocks or shares except by privately selling shares in its own company which is, under its rules, a criterion for membership. It’s services however relate solely to and is integrally tied up with, the trading in stocks and shares, although it does not itself trade. In fact, under the supervision of the Securities Commission, it is itself a regulatory body controlling the conduct and business practices of its members which are prescribed in its rules, and can reprimand, fine, suspend, expel or otherwise take disciplinary action against a member dealer who contravenes those rules: (See Section 22(2)) of the Securities Act).

The respondent argued that the JSE has dominant position in the provision of services in publicly traded stocks. In this regard, the JSE being the only registered stock exchange in Jamaica, it could be argued that it has a dominant position in that market but only in so far

as providing its services is concerned. This service however, is confined to its ability through the licence granted to it, to list shares of public companies on its Exchange for the purpose of trading. It offers no service to its members except to give them the opportunity to trade in shares listed on its Exchange. It is open to anyone interested in creating another Stock Exchange, to apply to the Securities Commission so to do. Though there is evidence that it would be difficult to set up another Stock Exchange there is no conclusive evidence to suggest that this could not be successfully done. The point of discussion here however, is whether the exclusion applicable to the trading in securities in so far as the FCA is concerned applies equally to the JSE which offers services that facilitate the trading in those securities.

Implicit in the complaint at clause (a), from the evidence, and from the "WHEREAS" clauses is that one of the methods in which the FTC alleges that the JSE is lessening competition relates to the condition for membership set down by the JSE and that is the required contribution to the compensation fund. It is difficult to see how such a complaint could have merit given the specific provisions of the Securities Act. Section 27 provides as follows:

> "27.-(1) A recognized stock exchange shall establish and keep a compensation fund which shall be administered by the board of the exchange.
>
> (2) The assets of the compensation fund are the property of the recognized stock exchange but shall be-
>
> (a) kept separate from all other property; and
>
> (b) held in trust for the purposes specified in the Part."

Then Section 28 speaks to the moneys that shall constitute the compensation fund. It states:

> "28. – The compensation fund of a recognized stock exchange shall consist of -

(a) all moneys paid to a recognized stock exchange by member dealers in accordance with the provisions of this Part;
(b) the interest and profits from time to time accruing from the investment of the fund;
(c) all moneys paid to the fund by the recognized stock exchange;
(d) all moneys recovered by or on behalf of the recognized stock exchange in the exercise of any right of action conferred by this Part; and
(e) all other moneys lawfully paid into the fund."

Section 30(1) then speaks to the application of the fund. It provides that the fund shall be held and applied for the purpose of compensating persons who have suffered pecuniary loss as a result of a defalcation or fraudulent misuse of securities in documents of the title to securities or of other property by a member dealer or any of its directors or employees in the course of or in connection with the business of that dealer, where securities documents or other property –

> "(a) were entrusted to or received by a member dealer or any of its directors or any of the dealer's employees for or on behalf of any other person; or
>
> (b) where entrusted to or received by the member dealer or any of its directors or any of the dealer's employees as trustee or trustees for or on behalf of the trustees of such securities, documents or property."

Section 33 empowers the stock exchange to make a levy on its members to meet the liabilities of the compensation fund. It states:

> "33. – (1) If at any time a compensation fund is not sufficient to satisfy such liabilities of the recognized stock exchange as are ascertained, the exchange may impose on every member dealer a levy of such amount as it thinks fit.
>
> (2) The amount of such levy shall be paid within the time and in the manner specified by the recognized stock exchange either generally or in relation to any particular case."

These provisions clearly make it mandatory for the JSE to have a compensation fund, and give the Exchange, the power to impose a levy of such amount "as it thinks fit" on its members, who shall pay it in such a manner and within a time specified by the Exchange.

This power, being statutory, and supervised as it is by the Securities Commission, cannot in my opinion, (and quite apart from the fact that these are matters concerned with securities for which the FTC has no jurisdiction), be the subject of an investigation by the FTC to determine whether the obedience to the statutory provision is an act which either has as its intention, or in its result would have the effect of substantially lessening competition in the market. It would in my view follow, that any complaints in respect to the amount of levy for contribution to the fund, would have to be made to the Securities Commission, which has the overall responsibility for the Stock Exchange and, consequently, its member dealers.

We have seen then that there can be no foundation for the investigation by the FTC in respect of (i) the selling and price of the share in the JSE and (ii) the contribution and the amount of such contribution to the compensation fund.

The only other basis advanced in the complaint upon which the FTC seeks to have an enquiry relates to the number of members of the JSE and what the respondent describes as an agreement either to restrict or lessen competition in the market. These complaints appear in paragraphs (b) and (c) of the complaint. Paragraph (b) is purported to have as its basis the provisions of Section 17, and speaks of an agreement which contains provisions that have as their purpose the substantial lessening of competition or has, or is likely to have, the effect of substantially lessening competition in a market. Paragraph (c) alleges a possible breach of Section 18 which deals with agreements

containing exclusionary provisions. Perhaps before dealing with the provisions of Section 17, it may be appropriate to dispose of the complaint made in paragraph (c). Section 18 reads:

> "18 – (1) For the purposes of this Act, a provision of an agreement is an exclusionary provision if –
>
> (a) the agreement is entered into or arrived at between persons of whom any two or more are in competition with each other; and
> (b) the effect of the provision is to prevent, restrict or limit the supply of goods or services from, any particular person or class of persons either generally or in particular circumstances or in particular conditions, by all or any of the parties to the agreement or if a party is a company, by an interconnected company."

In respect of the claim re Section 18 of the Act, there is no evidence that the JSE entered into any agreement to restrict the supply of services to any particular person or group of persons, nor in my view can it be concluded on the evidence, either prima facie or otherwise, that the content of the agreement restricted the acquisition of services from a particular person or group of persons. I say this because there was evidence that the three applicants were in fact offered memberships but two failed to take up the offer because of the conditions stated heretofore and which they challenged and are continuing to challenge in this case.

Section 17 reads as follows:

> "17 - (1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.
>
> (2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provision that -

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;
(b) limit or control production, markets, technical development or investment;
(c) share markets or sources of supply;
(d) affect tenders to be submitted in response to a request for bids;
(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
(f) make 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,

being provisions which have or are likely to have the effect referred to in subsection (1)"

As the words of the complaint confine the alleged breaches to the provisions as defined in Section 17, it is a necessary implication that the allegation relates to one of the matters defined in Section 17(2), but that subsection is without prejudice to the generality of subsection (1). As there are no allegations that in fact would come within the areas defined by Section 17(2), the FTC would have to depend on the generality of Section 17(1).

The agreement upon which the FTC wishes to base the complaint under Section 17 is the Memorandum of Association of the JSE. Having regard to the broad definition of "agreement" in Section 2(1) of the FCA there is nothing in principle which precludes a Memorandum of Association from being relied upon as an agreement under that Act One therefore has to examine the Memorandum to see whether there are provisions therein that have as their purpose the substantial lessening of competition or have or are likely to have the effect of

substantially lessening competition in the defined market. The respondent says it does in the following ways:

(i) Clause 3 of Memorandum of Association expressly states that one of the objects is as follows:

> "3. The objects for which the company is formed are to:
>
> (a) – (e) …
> (f) amalgamate, enter into partnership or into any arrangement for union interest, co-operation, joint venture or reciprocal concession, or for limiting competition relative to any of the objects of the Company;" (emphasis mine) and

(ii) membership in the Company is restricted to twenty (20) as is required in any private company: (clause 8)

It is on the basis of paragraphs (i) and (ii) that the breach of Section 17(1) of the FCA is alleged.

These allegations however have to be considered against the background that the FCA has through its definition of goods exempted any consideration in this regard, as the JSE is concerned exclusively with the business of publicly traded stocks which being securities, are excluded. Miss Phillips Q.C. for the respondent placed reliance on the case of ***Harold Silver v. New York Stock Exchange*** 373 US 341 [reported at 83 S.Ct 1246 (1963)] in support of her contention that the self regulatory ability of the Stock Exchange was found in that case not to exclude the applicability of Anti-trust legislation to the New York Stock Exchange. That decision however was arrived at, in circumstances where there was no similar provision in the Sherman Act (i.e. the Antitrust Act) as appears in the Jamaica statute in respect of the definition of "goods." That led Goldberg J who delivered the opinion of the Court to state:

> "The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statue. This means that any repealer of the anti-trust laws must be discerned as a matter of implication, and it is a cardinal principle of construction that repeals by implication are not favored."

In the case of the FCA, by the process of reasoning offered heretofore, the definition of the word "goods" when related to the allegations against the appellant, and the context of the legislation, together with the obvious intention of Parliament, must lead to the conclusion that the functions of the JSE concerned as it is with securities are excluded from the application of the FCA.

Having said that, I am nevertheless aware of the implications which may arise from this decision and commend the following passage of Goldberg J, in the ***Silver*** case (supra at page 1258) for consideration:

> "" Since the antitrust laws serve, among other things, to protect competitive freedom, i.e. the freedom of individual business units to complete unhindered by the group action of others, it follows that the antitrust laws are peculiarly appropriate as a check upon anticompetitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. Applicability of the antitrust laws, therefore, rests on the need for vindication of their positive aim of insuring competitive freedom. Denial of their applicability would defeat the congressional policy reflected in the antitrust laws without serving the policy of the Securities Exchange Act. Should review of exchange self-regulation be provided through a vehicle other than the antitrust laws, a different case as to antitrust exemption would be presented."

This passage is particularly applicable to the JSE's Memorandum of Association which has, as one of its objects, the entering into partnership of arrangements for limiting competition relative to any of its objects. This provision is repulsive given the modern trend to encourage competition in the market place, and the Legislature's obvious intention expressed through the enactment of the FCA to discourage the limitation and restriction of competition. If the

legislature, as in my view it did, intended to exclude the JSE or any other dealer in securities from the provisions of the FCA, then some legislation ought to be enacted either by amendment to the Securities Act or otherwise to encourage competition in the securities market.

In my view the express exclusion of securities from the definition of "goods" carries with it a clear and unambiguous inference that the FCA excludes securities generally from the ambit of its provisions. This view is supported by the fact that there are exhaustive provisions in the Securities Act, dealing with the Stock Exchange, and its obligation and responsibility to answer to the Securities Commission set up under that statue for, inter alia, the purpose of supervision and regulating stock exchanges to the extent that it has powers of inflicting penalties for any breaches of the rules.

An examination of the Securities Act discloses that there is a whole Part and more, of the enactment dedicated to the Stock Exchange and that Statute, inter alia, places the regulation of the Stock Exchange under the control of the Securities Commission which is there created. It may be useful, to refer at this stage to the functions of the Securities Commission which are to be found at Section 5 which reads as follows:

> "5. – The functions of the Commission shall be-
>
> > (a) to regulate the securities industry in accordance with this Act and to ensure that appropriate standards of conduct and performance are maintained in the industry in accordance with this Act or any rules or regulations made hereunder;
> > (b) to consider applications for licences or registration under this Act and to grant or refuse such licences or registration or to suspend or cancel any licences or registration so granted;
> > (c) to advise the Minister on all such matters relating to the operation of this Act as it thinks fit or as may be requested by the Minister;
> > (d) to promote public understanding of the law and practice relating to the securities industry;

> (e) to enforce the rules of a recognized stock exchange whenever the Commission considers it necessary so to do;
> (f) to perform such other duties as may be prescribed by or pursuant to this Act."

Thereafter Parts III and IV deal specifically with the Stock Exchange, Section 18 giving to the Commission the power, on application, to grant a licence to a company to establish and operate a stock-exchange, "subject to such terms and conditions as the commission may specify." Before doing so however, the Commission must be satisfied that:

> "the establishment of the stock exchange is necessary in the public interest having regard to the nature of the securities industry; and the applicant satisfies the requirements of the Second Schedule."

It should be noted that the Jamaica Stock Exchange existed before the coming into effect of the Securities Act but was brought within its provisions by virtue of Section 18(2) and (3) which states:

> "18 – (1) …
>
> (2) From and after the 6th December, 1993, the Jamaica Stock Exchange (hereafter referred to as 'the Exchange') shall, subject to subsection (3), be deemed to be licensed under this section.
>
> (3) The Exchange shall, not later than six months after the 6th December, 1993 or such longer period as the Commission may allow -
>
> (a) take such steps as are necessary to ensure that it satisfies the requirements of the Second Schedule; and
> (b) notify the Commission in writing of the steps so taken."

Of relevance is the particular provision of the Second Schedule which is:

> "For the purposes of section 18, the requirements referred to in that section are as follows:
> 1. ……
> 2. The applicant's rules make such provisions as the Commission considers satisfactory with regard to –
>
>   (a) …
>   (b) …
>   (c) qualifications for membership.
>   …"

The Commission, therefore, has the statutory power to determine whether the rules of the Stock Exchange as to the qualification for membership are satisfactory. In this regard, it would be open to any of the applicants for membership in the JSE to challenge the required conditions for membership by a complaint to the Securities Commission.

By virtue of Section 23(1) where it appears to be in the public interest the Commission has the power, which must be obeyed, to issue directions to the Stock Exchange with respect to the following:

> " …
>
> (a) trading on or through the facilities of that stock exchange or with respect to any security listed on that stock exchange;
> (b) the manner in which a recognized stock exchange carries on its business; or
> (c) any other matters which the commission considers necessary for the effective administration of this Act, …".

There are thereafter, provisions for appeal to the Minister where the Stock Exchange is aggrieved by the directions. The Commission pursuant to Section 23(7), may in the public interest or for the protection of investors, after giving the manager of the Stock Exchange an opportunity to be heard, by notice in writing, direct the Board of the Stock Exchange to remove or suspend the manager from office or employment for the following reasons:

i. where the manager has willfully contravened the Act, or any Regulations made thereunder, or the rules of the Stock Exchange, or
ii. has, without reasonable cause, or excuse, failed to enforce compliance with such provisions by a member dealer or a person associated with that member dealer.

Such directions must be complied with by the Stock Exchange.

I have set out those sections, without apology, to demonstrate the comprehensive and exhaustive jurisdiction which the Securities Act gives to the Securities Commission to licence, regulate and supervise the manner in which the Stock Exchange operates.

Of more direct application to the issues being discussed however are the provisions of Sections 44 to 51, which makes detailed provisions for the control of dealers in the securities market. Setting out the details of the provisions of those sections would result in the unnecessary lengthening of this judgement. It is sufficient to state that they deal with (i) false trading and market rigging transactions (section 44); (ii) stock market manipulations (section 45); (iii) making a statement, or disseminating information, that is false and misleading in a material particular with the intention of inducing the sale of purchase of securities etc (section 46); (iv) fraudulently inducing a person to deal in securities (section 47); (v) inducement to purchase or sell securities by dissemination of information to the effect that the price of any security will or is likely to rise or fall (section 48); (vi) employment of manipulative and deceptive devices (section 49); (vii) making or pursuing a takeover of a public company except in accordance with such rules in respect thereof as the Commission may prescribe (Section 50); and (viii) prohibition of dealings in securities by insiders (section 51).

Many of these offences are also provided for in the FCA eg (i) price fixing (section 34); (ii) bid-rigging (section 36); and (iii) misleading advertisement (section 37).

The cited sections of the Securities Act clearly demonstrate that the Legislature intended through their application, to control the manner in which business is to be done in relation to the Securities market and explains the reason for the exclusion of securities (per the definition of goods), from the provisions of the FCA.

I would conclude therefore that the Legislature by excluding securities in the definition of 'goods' in the FCA was clearly signalling its intention that securities, money, and choses-in-action were not areas of business in which the question of competition would need investigation under the FCA, given the exhaustive provisions of the Securities Act and other Acts which deal specifically with Financial and Banking Institutions. Nevertheless as there are no provisions in the Securities Act dealing with the lessening of competition in the market for securities and having regard to the objects in the Memorandum of Association of the JSE stated above I would again emphasize and recommend for consideration the passage in the judgement of Goldberg, J in the ***Silver*** case (supra).
For the above stated reasons, I would find that the FCA has no applicability to the Securities Industry and, consequently, no applicability to the JSE.

(2) <u>Separation of Powers</u>

The appellant complained that the FTC was likely to infringe the constitutional doctrine of Separation of Powers, if having held the enquiry, it issued order under Section 21 and 33 of the Act. Though

the complaint related to the particular circumstances of this case, the appellant in general challenged the constitutionality of those two sections on the above stated basis. Before examining the sections, two issues need to be addressed:

(1) The existence of the doctrine in the Jamaican Constitution, and
(2) Whether a Corporation such as the Jamaica Stock Exchange is entitled to such rights.

(1) The answer to this question is provided by Lord Diplock in ***Hinds and other vs. The Queen*** [1976] 1 All E.R. 353, in the following passage at page 359;

> "Because of this a great deal can be, and in drafting practice often is, left to necessary implication from the adoption in the new constitution of a governmental structure which makes provision for a legislature, an executive and a judicature. It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition on the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power on the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively."

As there was no challenge to the existence of the doctrine of the separation of powers in the Jamaica Constitution, it is sufficient only to emphasize the words of Lord Diplock (supra) and to underline the fact that the Jamaica Constitution expressly deals with the legislature, the

Executive, and the judiciary separately and, consequently, the inference to be drawn is that set out by Lord Diplock (supra).

(2) As there has been no challenge to this point, it is again sufficient to refer to the case of ***Attorney General and Ministry of Home Affairs v. Antigua Times Ltd*** [1975] 21 WIR 560 in which it was held that the word "person" in the Constitution includes artificial legal persons. This was an opinion of the Board of Her Majesty's Privy Council, which in my view is equally applicable to Jamaica. Consequently, I would conclude that in so far as the Jamaica Constitution is concerned the same would apply.

I now turn to the gravamen of the challenge to the constitutionality of Sections 21 and 33 of the FCA.

Section 21 reads:

> '(1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall
>
> (a) notify the enterprise of its finding; and
> (b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.
>
> (2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.
>
> (3) …".

Section 3 (2) and (3) read as follows:

> "**33.** – (2) Where on investigation the Commission finds that an enterprise is engaging in tied selling, the Commission shall prohibit that enterprise from so doing.

> (3) Where on investigation the Commission finds that exclusive dealing or market restriction, because it is engaged in by a major supplier of goods in a market or because it is widespread in a market, is likely to -
>
> (a) impede entry into or expansion of an enterprise in the market;
> (b) impede introduction of goods into or expansion of sales of goods in the market; or
> (c) have any other exclusionary effect in the market;
>
> with the result that competition is or is likely to be lessened substantially, the Commission may prohibit that supplier from continuing to engage in market restriction or exclusive dealing and to take such other action as, in the Commission's opinion, is necessary to restore or stimulate competition in relation to the goods."

The appellant complains that the powers given to the FTC is Sections 21(1)(b) and 33(2) and (3) are in breach of the doctrine of the separation of powers, as the powers therein amount to the exercise of judicial power by a body not established as a Court and presided over by persons not appointed as judicial officers under Chapter VII of the Constitution. The real question therefore, is whether the powers given under those sections can correctly be described as judical powers.

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

> "I am of the opinion that the words judicial power as used in Section 71 of the Constitution mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subject, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a

> binding and authoritative decision (whether subject to appeal or not) is called upon to take action."

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

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

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

> "Thus a judicial power involves, as a general rule, a decision settling for the future, as between persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined, to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist. It is right, I think, to conclude from the cases on the subject that a power which does not involve such a process and lead to such an end needs to possess some special compelling feature if its inclusion in the category of judicial power is to be justified."

These words of Kitto J are an exhaustive explanation of what judicial power entails which, if I venture to express in summary terms, would

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

There can be no question that the enactment of the FCA was to fulfil the policy of Government to encourage competition in the market place. The methods of achieving that purpose inter alia, was (i) to discourage abuse of dominance in the market, and (ii) to prevent corporations dealing in the same market place from entering into agreements which inter alia fixed common prices on their commodities, and from indulging in tied selling. Naturally in order to do so, there would first have to be some determination as to whether those factors exist i.e. firstly, whether a company was exercising dominance in a market and, secondly, was abusing that dominance, or e.g. whether there were agreements specifically aimed at lessening competition, or for fixing prices etc.

In my view, these decisions would be purely administrative, though there is the necessity for the operation of the rules of natural justice in that persons or companies against whom/which such allegations are made would have a right to be made aware of the allegations and given adequate opportunity to be heard in response to such allegations before any decision is made to the truth or falsity of those allegations. The decision therefore would be a decision which is directed at

ascertaining whether the required policy of the authorities are in effect being breached by persons in the market. Though the determination is arrived at by a process similar to the processed involved in a Court, it is not dependent on the application of any legal principles except a faithful adherence to the provisions of the Statue.

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

> "49. – (1) Any person who is aggrieved by a finding of the Commission may within fifteen days after the date of that finding, appeal to a Judge in Chambers.
>
> (2) The Judge in Chambers may -
>
> (a) confirm, modify or reverse the findings of the Commission 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 related.
>
> (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 or otherwise the whole or any part of the matter that is referred back for reconsideration.
>
> (4) In reconsideration of the matter, the Commission shall have regard to the Judge's reasons for giving a direction under subsection (1) and the Judge's directions under subsection (3).
>
> **50**. Where an appeal is brought against any findings of the Commission any directions or order of the Commission based

> on such findings shall remain in force pending the determination of the appeal, unless the Judge otherwise orders."

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

The question that is raised by the appellant on this issue, is not so much the determination or whether there is an abuse of dominance or any other breach, but whether the Commission in issuing orders to the offending company or person, is in effect exercising judicial power. The appellant maintains that such orders are akin to injunctive orders which are made by judicial officers appointed by virtue of the provisions of the Constitution and who enjoy security of tenure in keeping with those provisions. The impugned sections do give the FTC the power to issue orders after concluding that the provision of the two sections are being or are likely to be breached. The sections, however do not give to the FTC the power to enforce those orders, but instead empowers the Court to do so.

This power is to be found in Section 46 which reads as follows:

> "**46**. If the Court is satisfied on an application by the Commission that any person –
>
> (a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI, VII; or
> (b) has failed to comply with any direction of the Commission,
>
> the Court may exercise any of the powers referred to in section 47."

It seems reasonably clear that the powers to effect any sanction for disobedience to the FTC's orders fall within the jurisdiction of the Court. The following section (47) dispels any conclusion that the

orders given by the FTC after its determination of the complaint, is in anyway akin to an injunction. That is so, because one of the powers of the Court, when satisfied that the directions of the FTC have not been complied with, is the power to issue an injunction to restrain the person from engaging in such conduct. Section 47 must be read however, replacing a reference to section 45 with a reference to Section 46, the former being an obvious error in the legislation.

Section 47 reads:

> "**47.** – (1) Pursuant to section 45 the Court may –
>
> (a) order the offending person to pay the Crown such pecuniary penalty not exceeding on million dollars in the case of an individual and not exceeding five million dollars in the case of a person other that an individual;
> (b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) or section 45
>
> …"

As it is Section 46, when refers to the exercise of the power of the Court under Section 47, the reference to Section 45 must be incorrect. It is worthy of note that Section 45 speaks to, as its marginal note suggests, failure to attend and give evidence and makes that and offences punishable in the Resident Magistrate's Court.

The power to issue injunctions against any offending person, therefore rests with the Court. Before the Court is able to do so, however, it has to be satisfied that the failure to comply with the direction has taken place, and must be satisfied on the standard of proof applicable in civil proceedings [see Section 47(3)]. This suggests that in that process there must be a hearing, the Court having to give regard to the following matters [Section 47 (2)]:

(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;

(d) any previous determination against the offending person.

This ground, for the above reasons, must fail, as the very legislation clearly provides that the power to grant an injunction in the event of a failure to comply with the directions of the FTC both under Section 21 and 33, rests in the Court, and not as has been advanced, with the Commission.

The appellant in its attempt to establish that the FCA is in breach of the doctrine of separation of powers also contended that the doctrine is breached by the provision of Section 9(1) which provides that the Minister may give the Commission such directions of a general nature as the Minister considers necessary in the public interest as to the policy to be followed by the commission and the obligation on the Commission to give effect to any such directions.

This provision must be read in the context of the legislation, which as I have said earlier, relates to, and seeks to achieve, the government's policy of encouraging competition in the market. It follows then that in so far as directions on general policy is concerned, which would be in keeping with, and not in breach of, the provisions of the FCA, that there can really be no objection tot he Minister exercising such a power. The submission that Section 9 may enable the Minister to issue directions relating to specific cases is without merit, and consequently that contention fails.

I turn now to the other aspect of this complaint which maintains that the doctrine is breached by the FCA, on the basis of the several functions

it bestows on the FTC. The contention is that the Act has given to the FTC, a combination of administrative, judicial and legislative functions.

The gravamen of this complaint is that the Act empowers the Commission to legislate in certain areas, to make complaints and to receive complaints, which it investigates, and thereafter to have a hearing and come to conclusions in respect of the same matter which it has investigated. For the purpose of deciding on the merits of this contention, it is conceded that although the Commission is not endowed with judicial powers, it nevertheless exercises judicial functions in that it has an enquiry, at the end of which decisions are made and consequential directions issued to the offending person.

In doing so, the submission continues, it allows the Commission to exercise executive, legislative and judicial functions which no one institution should be allowed to do as, in doing so, there must be a breach of the doctrine.

In order to put the contention in proper perspective an examination of the various sections of the FCA is now appropriate.

What are firstly the legislative functions alleged?

The Commission is given the power by virtue of Section 52 of the FCA to make regulations. The section reads as follows:

> "**52.** – The Commission may, with the approval of the Minister, make regulations generally for giving effect to the provisions of this Act and, without prejudice to the generality of the foregoing, may make regulations-
>
> (a) prescribing the procedure to be followed in respect of applications and notices to, and proceedings of, the Commission;

(b) prescribing any other matters which are required by this Act to be prescribed."

During the course of the arguments, we were informed that up to that time no regulations had been formally made, though there existed some rules which the respondent maintained are for its internal guidance. The section, however, does give to the Commission, as various statutes give to different statutory organizations, the power to make its own rules with respect to its own procedures, those rules to e made with the approval of the Minister. In my view there is nothing objectionable to such a provision, although those powers are sometimes reserved for the Minister himself, and, that could well have been done in this case. I am not however, inclined to the view that the power to make its own rules and to prescribe regulations for the purpose of satisfying the requirement of the Status would per se be unconstitutional. The rules which are purported to be only for internal guidance cannot be regarded as the Regulations made under Section 52, as there is no evidence that they have been approved by the Minister nor that they have been gazetted. Consequently they are of no legal effect.

To my mind the more substantive contention is whether the Commission has, and if so, should have the power to adjudicate upon matters upon which it has itself investigated and itself laid the complaint. These matters are raised in the following sections of the FCA.

Firstly Section 5 speaks to the functions of the Commission:

"**5.** – (1) The functions of the Commission shall be –

(a) to carry out, on its own initiative or at the request of any person such investigations in relation to the conduct of business In Jamaica as will enable it to determine

whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;

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

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

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

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

Subsection 1(a) empowers the Commission to undertake investigations to determine whether any enterprise is engaging in business practices in contravention of the FCA. Subsection 1(b) is apparently referring to investigations at the request of the Minister of which the Commission considers it necessary or desirable to undertake in respect of any other matter falling within the provisions of the FCA. Section 1(d) deals specifically with abuse of dominant position in the market – which in my view is already adequately covered in Section 1(a) unless such abuse is not considered a business practice which is in contravention of the FCA and would be absurd.

Generally, however, Section 5 clearly gives to the Commission the power of investigation in relation to alleged contravention of the provisions of the FCA.

Thereafter Section 7 speaks to the powers of the Commission and reads as follows:

"**7.** – (1) For the purposes of carrying out its functions under this Act, the Commission is hereby empowered to –

(a) summon and examine witnesses;
(b) call for and examine documents;
(c) administer oaths;
(d) require that any document submitted to the Commission be verified by affidavit;
(e) adjourn any investigation from time to time.

(2) The Commission may hear orally any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing that he is an interested party likely to be affected by the result of the investigation or that there are particular reasons why he should be heard orally.

(3) The Commission may require a person engaged in business or a trade or such other person as the Commission considers appropriate, to state such facts concerning goods manufactured, produced or supplied by him or services supplied by him as the Commission may think necessary to determine whether the conduct of the business in relation to the goods or services constitutes an uncompetitive practice.

(4) If the information specified in subsection (3) is not furnished to the satisfaction of the Commission, it may make a finding on the basis of the information available before it."

And Section 8 reads:

"**8.** Hearings of the Commission shall take place in public but the Commission may, whenever the circumstances so warrant, conduct a hearing in private."

A close examination of these sections when read together indicates that the Commission has the function of investigating alleged contraventions of the provisions of the FCA, and, that Section 7 empowers the Commission in pursuit of the investigation to summon witnesses and generally conduct an examination of those witnesses,

receive and examine documents and "adjourn any investigation from time to time."

The Commission by Section 7(2) in its discretion <u>may</u> hear orally any person who may be affected but <u>shall</u> hear the person if a written request has been made for such a hearing.

It appears that the FCA permits the Commission to conduct its investigation without a hearing and may do so without hearing from a person who may be affected unless that person makes a written request to be heard. A possible result could be, if the provisions are strictly adhered to, that the Commission could conduct its investigation, purely on written documents and without hearing from persons who may be affected. Through it can be inferred from the provisions of Section 7 that a hearing could be held into the complaints, it nevertheless does not make a hearing compulsory except where requested by an affected party and consequently empowers the Commission to arrive at its conclusion without such a hearing. Section 8, would not contradict this inference as it only speaks to hearings being in public, a provision which would only come into effect if there is a hearing.

In my opinion, these provisions do not clearly define the distinction between the function of investigation and the function of adjudicating upon matters which are the subject of complaints. The adjudicating function is, according to the provisions of Section 7, merely the method by which the Commission carries out its investigative functions. This in my view is unsatisfactory, as it merges the judicial function into the investigative function. To compound it, the FCA except in Section 10, makes no general provision for the delegation of the investigative functions of the Commission to the staff or other agencies to be administered independently of the Commission. Section 10 permits an

"authorised officer" who is defined in Section 2 to be an officer of the Commission authorised by the Commission to assist in the performance of its functions, to enter and search premises etc in certain defined circumstances. As the FCA stands, and without any regulations, the power rests in the Commission to investigate and adjudicate.

To reinforce the views already expressed the provisions of Section 11 are:

> "**11**. – (1) At any stage of an investigation under this Act, if the commission is of the opinion that the matter being investigated does not justify further investigation, the Commission may discontinue the investigation.
>
> (2) The Commission shall, on discontinuing an inquiry, make a report in writing to the Minister stating the information obtained and the reason for discounting the investigation."

Section 11(1) affirms the fact that it is the Commission which is empowered with the investigative powers, and can discontinue such investigation. Section 1(1) of the Schedule of the Act provides that the Commission "shall consist of such number of persons not being less than three nor more than five as the Minister may from time to time appoint", and, that the Executive Director shall be a member ex officio of the Commission.

In the absence of any provision to the contrary, the functions under the FCA are given to these members who we were informed during the course of the submissions numbered four at the time.

Having determined that the provisions in Sections 5 and 7 of the FCA created a merging of investigating powers with adjudicating functions, it does not however follow, that a breach of the doctrine of separation of powers has been committed. I say this as I have found that the

Commission in giving directions would not be exercising judicial powers as contended for by the appellant. In my view, in coming to the conclusions the Commission is really doing no more than determining whether persons or corporations are acting in contravention of special requirements under the FCA, aimed at encouraging competitive practice in the market, and not coming to conclusions for example as to the commission of offences as is provided for in Part VII of the Act. This leads me to the consideration of another complaint of the appellant namely that the rules of natural justice are likely to be breached if the FTC is allowed to proceed with a hearing of the complaint.

(3) <u>Natural Justice</u>

The fact, that the Commission in the same action is as it were, investigating and adjudicating, would be, given the specific provisions of the FCA, a clear breach of the rules of natural justice. The power given to the Commission to arrive at a conclusion without orally hearing persons who may be affected by its decisions, could result in a decision being made by the Commission without those affected parties having an opportunity to testify personally or to call witnesses whose testimony may place another view on the investigations.

In my view this complication must have arisen because of the provisions of the FCA which confine all decisions to the Commission, instead of allowing the Commission to investigate possible breaches, and then leaving it to the Courts to determine in due process whether the breach has in fact occurred. The very fact that the Commission is obviously appointed to carry out the intention of the legislature i.e. to encourage competition in the market by discouraging all the elements that restrain competition, must lead to the inference that there may be

a real danger of bias if the Commission hears this complaint as it is mandated to protect the stated policy: (See ***Perkins v. Irving*** SCCA 80/97 delivered 31st July, 1997 [unreported])

It is also necessary to emphasize that the appellant does not only rely on the common law rule of natural justice but also seeks support from its constitutional right preserved in Section 20(2) of the Constitution, to have the complaint against it heard by an independent and impartial tribunal. The respondent in answer to this complaint relied on the fact that there are several examples in this jurisdiction of authorities being given the power of investigation and of adjudicating. Miss Phillips, Q.C. sought support from the cases of ***Arthur Sharpe v. The Jamaica Racing Commission*** [1974] 12 JLR 1319 in which the applicant in the Full Court having moved for certiorari on the basis that the rules of natural justice had been breached, it was held that:

> "The Jamaica Racing Commission Act 1972 invested the Commission with authority to hold the investigation into the charge against the applicant and in that circumstance the applicant could not be heard to say that there had been a breach of the rules of natural justice; further even assuming that a complaint by a member of the Commission, heard by the Commission itself, suggested a prima facie case of bias it was the fact that the Commission was empowered to hear it by virtue of the Act under which it operated."

To put this case (supra) into factual context it is only necessary to state that the complaint made to the Jamaica Racing Commission against the applicant, was made by an officer of the Commission, who had been delegated to perform certain functions out of which the complaint arose.

There is however one cardinal difference between that case and the instant case. It appears that a breach of Section 20(2) of the Constitution was never alleged, which may have resulted in a different

conclusion. In those circumstances, it would not only be the action of the Commission that would be questioned but also the constitutionality of an Act which gave it the powers. The Court arrived at its decision under the shelter of the enactment, without giving consideration as to whether its provision purported to empower the Commission with power which would be in breach of Section 20(2). If it did, it is my judgment that the Court could not for the stated reason have upheld the conduct of the Commission. The legislature, however was careful to enact provisions which would protect against such a breach as paragraph 15 of the First Schedule states:

> "A member of the Commission who is directly or indirectly interested in any matter which is being dealt with by the Commission:
>
> (a) shall disclose the nature of his interest at a meeting of the Commission; and
> (b) shall mot take part in any deliberation or decision of the Commission with respect tot the matter."

Paragraph 15(b) of the Schedule is an attempt to ensure that an independent and impartial tribunal could be found to hear a complaint arising from on of its members.

In the instant case, the appellant attacks the provisions of the FCA which it contends allows the Commission to investigate and then to adjudicate on the very matters which it has investigated. It contends that those provisions are in breach of the common law rule as well as Section 20(2) of the Constitution. There is no similar provision in the Fair Competition Act as there is in the Schedule of the Jamaica Racing Commission Act, and consequently there is no guarantee that the Commissioner who directed the investigation or might have undertaken the investigation, would not sit and hear the complaint.

Indeed, the enthusiasm of the Commission to advance the policy of the legislation was exhibited in the case, where an officer of the FTC summoned the Manager of the JSE under threats of penalty, and herself subjected him to a thorough interview which smacked of a cross-examination, purportedly acting under the powers given to the Commission under Section 7 of the FCA. This despite the fact that the Fair Competition Act provides no power of delegation by the Commission of that function. There was also evidence of constant communication in the case between the Commission and the Executive Director as to the state of the investigation, and the conduct of the investigation which also demonstrates the cloudiness of the function of investigation and adjudication, the latter we are now asked to sanction. Without examining all of the authorities on the subject of the rules of natural justice, and without any apologies, it is my view that the evidence has revealed sufficient conduct in the officer of the FTC who consulted with the Commission throughout the "investigation" to establish that there is a real danger of the JSE being the subject of bias, in a determination of the complaints.

In conclusion, I would find firstly that the Fair Competition Act does not apply to the Jamaica Stock Exchange and on that basis alone I would allow the appeal. However, in deference to the interesting arguments advanced by counsel, I have sought to examine some of the other complaints made, conclusions on which appear earlier in the judgement. I would reiterate however, that in my view the Commission in issuing direction under Section 21 and 33 would not be exercising judicial powers. In so far as the complaint in respect to a breach of the doctrine of the separation of powers is concerned, that complaint must fail but the provisions of Section 5 and 7 clearly disclose a merger of the investigative and adjudicating functions, which though not offending that doctrine, is likely to lead to a breach of the rules of natural justice. That problem can however be remedied for the future if

the Legislature would place those functions in two separate bodies i.e. the investigative function in the Commission and the adjudicating function in the Courts or in some other appropriate body.

In the event, I would allow the appeal, revoke the order of the Court below, and make the following orders:

(1) A declaration that upon its proper construction, the Fair Competition Act is not applicable to the Plaintiff as the Plaintiff is expressly governed by the provisions of the Securities Act.

(2) A declaration that the action and proceedings being taken and pursued by the Defendant against the Plaintiff whereby the Defendant is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and void.

(3) An injunction is hereby granted restraining the Respondent from continuing the proceedings.

The appellant must have its costs both here and below, to be taxed if not agreed.

WALKER, J.A:

I have had the advantage of reading in draft the judgments of Forte P. and Panton J.A. I, too, have concluded that this appeal should succeed. The relevant facts surrounding the controversy between the parties are sufficiently rehearsed in these judgements as not to require further repetition by me. Suffice it to say that Mr. Henriques Q. C. for the appellant took this court painstakingly through various provisions of the Fair Competition Act and the Securities Act, both of which were, quite significantly, passed by Parliament on the same day. Counsel's endeavour was to demonstrate the comprehensiveness of the Securities Act, and also to show that the Fair Competition Act

expressly excludes matters pertaining to dealings in the securities market with, which the Securities Act is, itself, exclusively concerned. In my opinion the submission of Mr. Henriques that the respondent acted without jurisdiction in seeking to impose its authority upon the appellant is correct, and it seems to me that such a finding effectively determines this appeal in favour of the appellant.

In the result, I agree that this matter should be disposed of in the terms proposed by my learned brethren.

PANTON, J.A.

This action was heard by Theobalds J. over a period of thirteen months, commencing on June 3, 1996, and ending on July 4, 1997, when he dismissed the suit and found favour of the respondent.

The appellant, a private company incorporated on the 14th August, 1968, under the Companies Act, sought (as plaintiff):

> (a) **a declaration** that, upon its proper construction, the Fair Competition Act is not applicable to the appellant as the appellant is expressly governed by the provisions of the Securities Act; and
>
> (b) **an injuction** to restrain the respondent its officers and/or agents from continuing the proceedings and action taken against the appellant and interrogating any of the directors or Council members of the appellant until the trial of the action herein or further order.

That was the main thrust of the action. However, **alternative declarations** were sought.

These were:

1. that the action and proceedings being taken and pursued by the respondent against the appellant whereby the respondent is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and void;

2. that the respondent has acted in abuse of its statutory powers and/or has sought to exercise its powers for an improper purpose and consequently the respondent's actions are ultra vires and void;

3. that the Fair Competition Act and or the action or proceedings instituted by the respondent against the appellant whereby the respondent performs the function of interrogator, complainant and adjudicator is in breach of, and an abrogation of the appellant's constitutional right pursuant to section 20(2) of the Jamaica Constitution and also infringes the principle of separation of powers enshrined by the Constitution; and,

4. that the action and proceedings taken by the respondent against the appellant concerning the conduct of the appellant's business is in breach of and an abrogation of the appellant's constitutional right of the freedom of association provided for by section 23 of the Jamaica Constitution.

It is not inaccurate to say that this suit has resulted from sharp differences between the appellant and the respondent as to their respective roles, and as to the applicability of the Fair Competition Act, as opposed to the Securities Act, to the operations of the appellant.

The events that highlighted the differences and led to the suit took place over the period October, 1992, to June 1994.

The appellant has as its principal objectives the establishment and operation of a stock exchange while ensuring that those who are engaged in the buying and selling of shares and stocks thereon maintain proper standards of professional conduct and etiquette. In order to trade on the stock exchange, a broker has to become a

member of the appellant company by acquiring a share therein, which acquisition is at the discretion of the appellant's Council. The appellant does not trade in the stocks and shares listed on its exchange. However, it provides the facilities and regulatory framework for member brokers to trade with and compete against each other. The appellant charges a cess and fees for the provision of the facilities but cannot distribute such cess or fees by way of dividend or profit to its members.

By virtue of the Securities Act, a Securities Commission was established with one of its main functions being the regulation of the securities industry in accordance with the Securities Act to ensure the maintenance of appropriate standards of conduct and performance in the industry [see section 5(1)]. The appellant as of the 6th December, 1993, was deemed a licensed exchange and given six months from that date (or such longer period as allowed by the Commission) to satisfy the requirements of the Act and to inform the Commission thereof in writing (see section 18).

By the Fair Competition Act, the respondent was established with its main functions being to carry out investigations in relation to the conduct of business in Jamaica to determine whether any enterprise is engaging in business practices in contravention of the Act, and to investigate and take action as necessary with respect to the abuse of a dominant position by any enterprise [see section 5 (1) (a) and (d)]. In carrying out its functions, the respondent is empowered to summon and examine witnesses, to call for and examine documents and to administer oaths [see section 7(1)(a),(b) and (c)]. The respondent may also hear orally any person who in its opinion will be affected by an investigation under the Act [see section 7(2)], and such hearings shall normally take place in public (see section 8).

THE FACTS

An appropriate starting point in order to get a proper appreciation of the facts and the issues is a letter dated October 26, 1992, from Dehring, Bunting and Golding to the General Manager of the appellant seeking corporate membership for DB&G Securities Limited. The letters reads in part:

> "Attached please find our application to the Jamaica Stock Exchange for Corporate Membership for the above company. DB&G Securities Limited will be a 100% owned subsidiary of Dehring Bunting & Golding Limited and will be incorporated should our application be approved.
>
> We believe that the natural relationship between an investment banking firm and a stock brokerage will benefit the Jamaican capital market by way of new offerings and services.
>
> We would be happy to meet the exchange at its convenience to discuss any aspect of our application."

On November 5, 1992, the appellant acknowledged receipt of the application and promised that the matter would be brought to the attention of the appellant's Council and that there would be "further communication in the future". On February 1, 1993, Dehring Bunting & Golding Limited made a similar application on behalf of Lexington Securities Limited. Apparently, the appellant did not consider it courteous to reply to this application. As a result of the failure of the appellant to process this application, Dehring, Bounting & Golding wrote to the respondent on December 13, 1993, complaining of the non-response. The letter went further. It purported to analyse the Fair Competition Act and the Securities Act, and expressed the view that the appellant "as presently operated and structured, violates several provisions in the Act designed to facilitate fair competition". It urges

the respondent to “treat this as a watershed case, making a clear statement as to the effectiveness and dynamism of the FTC – failure to take a strong and purposeful approach to interpreting and applying the Act will only engender cynicism in the public’s mind and get the FTC off to a disastrous start”. The letter which was signed by the President and CEO of Dehring Bunting & Golding Limited continued, “We have every confidence that you will not allow this to happen. We look forward to your levelling this important playing field”.

On January 5, 1994, Dehring Bunting & Golding made a formal application for the appellant to answer allegations contained in an affidavit of the same date. The affidavit referred to the letter of December 13, 1994, as containing the facts complained of.

Meanwhile, the appellant had decided to review all applications for membership in it, and so advised Mr. Christopher Dehring of Dehring Bunting & Golding Limited as well as Mr. Delroy Lindsay of Linpat Consultants Ltd. This, in part, is what was written on January 20, 1998, to both men:

> “I am pleased to inform you that the Council will be reviewing all applications for membership in the Jamaica Stock Exchange shortly. You are required to have a complete application (including questionnaires) lodged at the Exchange by Monday 28th February, 1994.
>
> Listed below are the financial requirements of membership:
>
> (a) a minimum paid up capital of $10,000,000;
>
> (b) acquire a share in the JSE which will cost approximately $8.4 million based on the net book value of a JSE share as at December 31, 1993;
>
> (c) an initial contribution to the compensation fund of approximately $3.8 million, based on the total value of the fund as at December 31, 1993.”

On January 27, 1994, the respondent's senior counsel wrote to the managing director of the appellant, enclosing a copy for the affidavit filed by Dehring Bunting & Golding and requesting a response thereto within seven days. The appellant replied by letter dated February 10, 1994, requesting an extension of twenty-one days to respond, but at the same time denying the complaint that had been made. In its letter, the appellant brought to the respondent's "immediate attention the following facts":

1. The Jamaica Stock Exchange is a private company formed under the Companies Act. The right to membership in the Jamaica Stock Exchange is dependent upon the allotment or acquisition of a share in accordance with the constitution and rules of the Jamaica Stock Exchange, as well as, the provisions of the Companies Act.

2. The complaint substantially relates to a period when the Fair Competition Act was not in force.

3. The Jamaica Stock Exchange falls under the supervision of the Securities Commission formed under the Securities Act. The Jamaica Stock Exchange is one of several enterprises operating in the securities market and its stock exchange is merely a part of the securities market.

4. The Jamaica Stock Exchange, as an operator in the securities market, does not prohibit or prevent non-members from establishing and operating a rival stock exchange in that market as the Securities Act permits any person to establish and conduct a stock market upon obtaining a licence from the Securities Commission: (see sections 7 and 8 of the Securities Act.)

Upon receipt of this letter, the respondent on February 14, 1994, wrote to the appellant enclosing "the official complaint of the Fair Trading Commission" against the appellant. The letter advised compliance with the terms of the complaint by filing an answer within fifteen days.

The complaint asserted that the respondent had investigated the operations and rules of the appellant. It stated that the respondent had information that the appellant by its membership requirements and actions had created barriers to entry into the market for brokerage services; had failed to respond to an application for membership within a reasonable time, had given itself the ability to fix brokers commissions without restraint, and was in a dominant position in the securities market.

The complaint further stated that the respondent wished to determine whether the appellant had acted in abuse of a dominant position by its procedure and rules. The respondent claimed jurisdiction (to the specific exclusion of the Securities Commission) over the issues raised by the information it said it had received above. In the exercise of its general functions under section 5(1)(d), and its powers under section 21(1) of the Fair Competition Act, the respondent fixed the 17th March, 1994, for the hearing of evidence and submissions.

This most recent exchange of letters between the parties made it quite clear that they were on a collision course. As a result, it seems, they met to seek a resolution of the issues. The meeting took place on the morning of February 25, 1994. In a letter of that date to Mr. Phillip Paulwell, who was then the Executive Director of the respondent, the appellant set out what it regarded as the positions agreed between the parties at that meeting. The letter is important enough to be quoted in full:

> "Dear Mr. Paulwell:
>
> We wish to confirm the positions agreed at our meeting this morning.
>
> 1. <u>Fixed Commissions</u>

The subject of a review of the fixed commission structure of the Jamaica Stock Exchange (JSE) was tabled at the February Council meeting. The General Manager is to make a formal submission on th subject to the Council meeting in March and we are committed to a decision on the matter at latest by April 12, 1994 when we would formally report to you.

2. Membership

The Council of the Exchange at its meeting on November 24, 1993, committed to admitting three (3) new members by March 31, 1994. I am publicly on record with this comment.

We have communicated with all applicants informing them of the requirements for membership, which are:

(a) minimum “paid up” capital of $10,000,000;

(b) acquire a share in the JSE which will cost approximately $8.4 million based on net book value of a JSE share at December 31, 1993. We enclose copy of our 1992 audited accounts together with management accounts for the period ending December 31, 1993. (As soon as the audited statement is complete, it will be forwarded to you);

(c) an initial contribution to the Compensation Fund of approximately $3.8 million based on the total value of the fund as at December 31, 1993 and divided by the number of shareholders;

(d) satisfy the Exchange’s “Fit and Proper” test and membership qualifications, as per Rule 201 (JSE Rule Book).

Applicants at their option were given to February 28, 1994 to amend or update their applications. It is noted that as at this time three applicants have re-submitted their applications.

I repeat my commitment given this morning that after our determination of three new members by March 31, 1994, the subject of membership would be continually under review.

The size of the market excepted, there are a number of structural problems which mitigate against a very rapid increase in the number of new brokers, chief among which is the antiquated legal framework for effecting the transfer of

ownership of securities. Recognizing this limitation, the JSE has contracted Citibank N.A. of London to develop a strategic plan for the modernization of the industry. Nothing can happen without a change in the legal framework (see attached document – "Modernization of the Clearance and Settlement System for the Jamaica Stock Exchange and Terms of Reference of the Citibank study). We do appreciate the constructive dialogue which characterized our meeting this morning and would endeavour to ensure that between yourselves, the new securities commission and ourselves, we can resolve matters in the best interests of the investing public.

Yours truly,
THE JAMAICA STOCK EXCHANGE

BRIAN POND
CHAIRMAN"

Soon after this letter, the respondent sent another letter dated March 14, 1994, to the appellant in respect of a formal hearing. That letter stated the issues for adjudication as being:

(1) the matter of the compensation fund; and

(2) the number of brokers to be admitted.

The respondent took the opportunity in this letter to express its belief that all ten (10) remaining seats should be immediately made available to those qualified on a first-com first-serve basis.

The letter specifically stated that there would be no contest so far as the minimum paid-up capital and the acquisition price of a share in the appellant were concerned. An amended complaint was enclosed; it required a response within seven (7) days. It is amusing to note that although the letter is dated March 14, the "first amended complaint" is dated 15th March, 1994.

The main features of the first amended complaint which distinguish it from the original complaint are that it specifically refers to the membership requirement of a contribution of $3.8 million to the compensation fund, and it stated that the hearing would be on a date to be announced and at a place to be designated.

Following swiftly on the heels of this complaint was a letter from the respondent to Mr. Christopher Berry, a member of the Council of the appellant, summoning him before the respondent's counsel on March 30, 1994, and threatening the imposition of a $20,000 and/or two (2) years' imprisonment for failure at attend. Mr. Berry did not put the threat to the test. He duly attended as summoned. He was questioned by the respondent's counsel after there had been strong objection to the proceedings by Mr. Berry's counsel. The questioning concerned mainly how the Council dealt with applications for membership. The questioning of Mr. Berry and the insistence of the respondent on a reply by the appellant to the first amended complaint by April 18, 1994, were cited in a letter dated April 18, 1994, from the appellant's attorneys-at-law to the respondent as the reasons for the filing of this action. The letter enclosed a copy of the writ and requested the respondent to give an undertaking that it would not take any steps against the appellant pending the determination of the action.

It should be noted that after this letter was written, a meeting was arranged for April 22, 1994, between the Executive Committee of the appellant's Council, Mr. Delroy Lindsay, and representatives from Alpha Financial Services and DB&G Securities. The intention was to discuss matters raised by these applicants for membership in a letter dated April 15, 1994, to the appellant. The letter reads thus:

"Dear Mr. Iton,

We refer to your letter dated March 24, 1994, advising of the Council's approval of the undersigned applicants' applications for membership of the Jamaica Stock Exchange (JSE).

We wish to express our appreciation to the Council for its decision, and we reiterate our commitment to the furtherance of the objectives of the JSE in a spirit of cooperation with our fellow brokers.

With regard to the details of your letter, we agree with the capital requirement stipulated at item (4), namely $10 million paid-up. We accept that there are presently brokers who have not yet achieved this level of capitalisation and who will be allowed some time to do so, a privilege only to be enjoyed by the existing members. We would ask that we be given until two weeks before we commence business to arrive at the required level of capitalisation and to make the payments envisaged by your letter.

The other pre-conditions to be satisfied before we can conduct business on the Exchange, however, appear to be (sic) put us at some disadvantage relative to existing brokers. We would ask that we be given the opportunity to meet with the Council to discuss them. We would make the following points-

(1) (a) It should be recognized that what we are seeking to participate in is the brokerage industry, in which the JSE is the established medium for all transactions. I making our investment in this industry, we must look to the potential earnings and returns that the business can be expected to generate – this has little relationship to the present book value of the JSE.

The focus on the book value of the JSE's share capital to determine the cost of a seat at the Exchange divorces the cost of the investment from its earning potential. We do not think that this is the correct approach to the matter.

It would be different if brokers looked to their shareholdings in the JSE for the returns on their business activities, through distributions of JSE profits or capital. But brokers look to their respective brokerage businesses for the returns on their investment, as will we, and not to the JSE as a company. The share in the JSE is really

incidental to this business. The book value approach, if applied, would become an ever increasing hurdle which no new player could afford to overcome.

(b) We believe that the use of the book value of the JSE to determine the cost of a seat in inconsistent with the approach used in admitting new brokers in recent times. Previous entrants were allowed entry at a manageable cost which allowed their investment to be made on normal commercial principles. We would ask that the same method be used in our case, with an appropriate adjustment for inflation.

(c) We note that the recent deregulation of commissions and the present soft state of the equities market are likely to dampen returns on the investment in a brokerage business. One would expect this to be factored into the pricing of a seat.

(2) (a) We feel that the specified contribution to the compensation fund is anomalous. The present amount of the fund correspond to the totality of transactions which have taken place since the fund was established, and covers the potential liabilities of the brokers who were involved in those transactions. We were not in the business during that time. We need to protect our client going forward, but to ask us to buy a pro rata share of the fund as presently suggested appears unfair. One is forced to wonder what would be expected of a new broker in twenty years time when the fund is $3 billion!

(b) The amount of the proposed contribution exceeds the limit on total claims against a fund referable to any single broker which is set by section 30 (2) of the Securities Act ($1 million). As such it seems out of line with the standards set by this recent enactment.

(c) From the point of view of protecting the investment public, it would seem that professional indemnity insurance, a standby letter of credit or some other external arrangement would be less expensive and could provide more complete protection to members of the public in respect of liabilities which are over and above the limit set by law for claims against the fund.

We would ask that you be so kind as to arrange a meeting with the Council to address these points and any other relevant matters, as we are anxious to move ahead with our fellow brokers in this exciting industry. We thank you and the Council once again for your cooperation herein."

On April 25, 1994, the General Manager of the appellant wrote to one of the participants at the said meeting of the 22nd April confirming what was agreed at the meeting. These are what were agreed between the parties:

> "1. The purchase price of $7.9m for your share in the JSE must be paid in full by May 31, 1994,
>
> 2. Your paid in capital of $10m and your up front contribution of $3.9m to the Compensation Fund may both be paid a couple days before you intend to commence business,
>
> 3. Your Compensation Fund monies would be held in escrow for a period to give you time to find appropriate insurance cover, if possible."

After more exchange of letters between the appellant and applicants for membership in the appellant company, there came from the respondent a "second amended complaint" dated 2nd June, 1994. Like the first amended complaint, the second did not name a date or place for the hearing but indicated that such details would be provided in due course. There was just one area of this complaint which differed from the first amended complaint. It was in respect of the information which the respondent claimed that it had. This is how the second amended complaint was framed:

> "WHEREAS the Fair Trading Commission has investigated the operations and rules of the (JSE) and has before it information relating to the (JSE's) procedure for admission of new members and its rules relating to

the requirements for new members and to the number of new brokers to be admitted.

AND WHEREAS there is information before the Fair Trading Commission to the effect that the (JSE):

(i) has by its membership requirements, specifically,

(a) that relating to the purchase of a share in the Jamaica Stock Exchange and the amount being demanded for that share, and
(b) that relating to the contribution of $3.8 million to the compensation fund, created barriers to entry into the market for brokerage services and

(ii) has failed to respond to applications for admission within a reasonable time, and

(iii) has by its rules given itself the ability to limit the number of brokers without restraint, and whereas there is information also to the effect that the (JSE) is in a dominant position in the market for publicly traded stocks.

AND WHEREAS the Fair Trading Commission wishes to make a determination as to whether the (JSE) has acted in abuse of a dominant position by its aforementioned procedure and rules.

AND WHEREAS the FAIR TRADING COMMISSION has jurisdiction over issues concerning abuse of dominant position in the (JSE's) requirements for the admission of new members and its policy of limiting the number of new brokers which are not within the jurisdiction of the Securities Commission.

TAKE NOTICE that in the exercise of its general functions as set out at Section 5 (1)(d) of the Fair Competition Act as well as its powers to make findings and issue directions in relation to abuse of dominant position under Section 21(1) of the Fair Competition Act, The Fair Trading Commission will on a date to be announced and a place to be designated publicly hear and decide on all evidence and submissions relating to te following issues:

Whether the conduct, operations and rules of the (JSE) as regards membership amount to:

(a) an abuse of a dominant position in the market for publicly traded stocks by restricting entry into the market or by preventing or deterring persons from engaging in competitive conduct in the market or by directly or indirectly imposing unfair purchase prices in breach of Section 20;

(b) an agreement which contains provisions that there have as their purpose the substantial lessening of competition or has or is likely to have the effect of substantially lessening competition in a market, as defined by section 17;

(c) an agreement containing exclusionary provisions as defined by Section 18.

TAKE FURTHER NOTICE that the Commission will thereafter issue such directions as it deems fit.

[The (JSE) may file an Answer to this complaint within seven (7) days after service of this complaint.]"

The complaint is dated the 2nd June, 1994, and is signed by the Senior Counsel of the Fair Trading Commission.

The record of the evidence taken at the trial was poorly reproduced for these proceedings. It is unnecessary to state that it is the duty of the Registrar of the Supreme Court to ensure that a Judge's record of the evidence is accurately and intelligibly reproduced for appellate proceedings. From what I was able to glean of that which was produced, the evidence heard by Theobalds, J. dealt with the operations of the appellant and the respondent as well as the qualifications for membership in the appellant.

THE FINDINGS

Theobalds, J. found the following:

1. **The Securities Act and the Fair Competition Act operate concurrently;**

2. **The Jamaica Stock Exchange, although not trading in goods, provides services to the general public. It provides a facility for profit under which its members also for Profit provide services to the general public;**

3. **Members of the Jamaica Stock Exchange, namely brokers, are in the market, providing a service, and are in competition with one another;**

4. **The Fair Competition Act empowers the Fair Trading Commission to proceed in the manner in which it has proceeded; and**

5. **There has been no breach of either the constitutional right of freedom of association or of the rules of natural justice.**

Having made these findings, the learned judge held that the declarations and the injunction sought could not be justified. Accordingly the action failed.

Mr. Henriques was very caustic in his description of the judgement of the learned judge. He said that the judgement was not reasoned. There were no findings of fact, nor was there any analysis of the evidence, he said. There was a total dereliction of duty by the judge who, Mr. Henriques said, had failed to deal with elementary findings related to the interpretation of statutes. In his view, the judge had abdicated his functions as an adjudicator.

In my view, the findings at 2 and 3 above are findings of fact. It is therefore not accurate to say that the judge made no findings of fact. Those at 1, 4 and 5 are matters of law. It is also incorrect to say that the learned judge abdicated his functions. The findings above, rightly or wrongly, do indicate that the learned judge was of the view that the Fair Competition Act applied to the appellant, as the appellant was a

provider of services for profit; and its members were in the market providing a service, in competition with one another. As a result of his opinion that the Fair Competition Act applied to the appellant, the Fair Trading Commission had the power to proceed in the manner it was proceeding, there being in his view no breach of either the Constitution or the rules of natural justice.

THE GROUNDS OF APPEAL

The appellant filed eleven grounds of appeal:

Ground 1 challenges the finding that the Fair Competition Act governs the appellant concurrently with the Securities Act.

Ground 2 relates to what is termed the failure of the learned judge to appreciate that shares in a company are securities which were exempted from the application of the Fair Competition Act which defines goods to exclude securities, and that the subject of the respondent's complaints against the appellant related to acquisition of its shares

Ground 3 deals with what the appellant regards as the failure of the learned judge to appreciate that the Fair Competition Act was intended to regulate business activities of companies in a market, and did not confer jurisdiction upon the respondent to regulate the internal structure of a company.

Ground 4,5,6,9 and 11 relate to the findings in respect of the Constitution and the rules of natural justice.

Ground 7 deals with the rule making power of the respondent.

Ground 8 challenges the legitimacy of sections 21 and 33 of the Fair Competition Act, in that the respondent has what the appellant regards as powers to issue injunctions, contrary to the principle of separation of powers enshrined in the Constitution.

Ground 10 deals with the delegation of powers by the respondent to its officers who were not commissioners.

It is appropriate at this stage to mention that the Securities Act and the Fair Competition Act were both passed in Parliament on the same day, 9th March, 1993. However, they came into force on different dates. The Fair Competition Act became operative on the 9th March, 1993, whereas the Securities Act came into force on the 6th December, 1993. These dates, it will be seen later, are of some significance so far as the interpretation and effectiveness of both pieces of legislation are concerned.

In considering how these Acts are to be interpreted, it is important to be reminded of the words of Lord Atkinson in ***Victoria City v. Bishop of Vancouver Island*** [1921] A.C. 384 at 387:

> " In the construction of statutes their words must be interpreted in their ordinary grammatical sense, unless there be something in the context, or in the object of the statute in which they occur, or in the circumstances with reference to which they are used, to show that they were used in a special sense different from their ordinary grammatical sense."

There has been no submission, as far as I noted, that the ordinary grammatical sense does not apply in this case except for those words that have been specially defined.

DOES THE FAIR COMPETITION ACT APPLY

TO THE JAMAICA STOCK EXCHANGE?

As said earlier, the main thrust of the action brought by the appellant was a determination as to the applicability to itself of the Securities Act alone, as opposed to the contention of the respondent that both Acts, that is, the Fair Competition Act and the Securities Act, apply to the appellant. It seems to me that in order to make this determination, it is necessary for consideration to be given first of all to the nature and purpose of the appellant. Thereafter, one needs to examine the legislation to see what it applies to, and thereby determine whether the appellant is an object of its applicability.

The nature and purpose of the appellant

The Memorandum of Association is a good guide in determining the nature and purpose of any company. The appellant company is no exception. Its objects are stated to include:

> "(a) The promotion of the orderly development of the stock market;
>
> (b) Ensuring that the stock market operates at all times in accordance with the highest standards practicable
>
> (c) Ensuring that persons engaged in the buying and selling of stocks, shares and other securities establish and maintain acceptable standards of professional etiquette and conduct as stockbrokers or dealers in securities;
>
> (d) The provision and maintenance of a suitable building, room or rooms for a Stock Exchange, Stockbrokers Association, the transaction of stock market business, and for meetings etc. of members of the company;
>
> (e) Adjusting controversies between its members, acquiring, preserving and disseminating useful information connected with the stock market,

stocks, shares and securities, and Stock Exchanges throughout the world; and

(f) Taking or otherwise acquiring and holding shares, stocks, debentures, or other securities of any other company having objects altogether or in part similar to those of the company or carrying on any business capable of being conducted so as to directly or indirectly benefit the company and assist it in the carrying out of its objects;
…"

The income and property of the company, according to the Memorandum of Association, shall be applied solely towards the promotion of the objects of the company, and no portion of it shall be paid or transferred, directly or indirectly, by way of dividend, bonus or otherwise by way of profit, to the members.

From the foregoing, it seems clear that the appellant is engaged in the operation of a stock exchange, with its major concern being the maintenance of high professional standards among its members while they deal in securities generally. It is also quite clear that members cannot properly be paid any of the profits of the company, as such profits are to be applied solely towards the promotion of the objects of the appellant.

In this case, apart from the Memorandum of Association, there was evidence given in respect of the role of the appellant but it may well be that such evidence was really superfluous as the objects clause in the Memorandum of Association is the guiding light in relation to what the company may properly do. If the company does something that is nor expressly or impliedly provided for in the objects clause, it would be acting in excess of its powers. So far as the main declaration is concerned, therefore, I am of the view that the objects clause is of

great importance in assisting in the determination of which piece of legislation is applicable to the appellant.

The Fair Competition Act

This Act came into operation on the 9th March, 1993. It establishes a Fair Trading Commission, the primary functions of which are:

> 1. to carry out such investigations in relation to the conduct of business as will enable it to determine whether any enterprise is engaging in business practices in contravention of the Act; and
> 2. to investigate and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise
> **(See section 5 of the Act)**

It will be observed that the word "enterprise" is very important in this Act. In section 2(1), it is defined as:

> "any person who carries on business in Jamaica but does not include a person who-
>
> (a) works under a contract of employment; or
> (b) holds office as director or secretary of a company and in either case is acting in that capacity."

The said section defines "business" as "any activity that is carried on for gain or reward or in the course of which goods or services are manufactured, produced or supplied, including the export of goods from Jamaica".

Further, the section defines "goods" as "all kinds of property other than real property, money, securities or choses in action".

In order that the Fair Competition Act may be regarded as being applicable to the appellant, it has to be shown that the activities of the

appellant falls within the definition of "business". The question therefore is whether the appellant is carrying on **an activity for gain or reward, or in the course of which goods or services are manufactured produced or supplied.** It is clearly stated that securities do not fall within the definition of goods. That exclusion has therefore narrowed the definition. "Services" is not defined. However, "service " is defined as " a service of any description whether industrial, trade, professional or otherwise". "Supply" is defined in relation to "goods" and "services". As pointed out earlier, securities are specifically excluded from the definition of goods. However, in relation to services, supply is defined as including "the rendering or services to order, and the provision of services by making them available to potential users". In view of the services provided by the appellant to brokers and the share-trading public, it was argued that this latter portion of the definition covers the appellant. However, that is untenable in my view given the specific exclusion of securities from the definition of goods. It would be most illogical and out of context for "goods" to exclude securities, but for "services" to include them.

It cannot be doubted that the appellant is carrying on some form of "activity". There is also no doubt that the activity is for gain or reward. The appellant's objects, as stated earlier, includes the promotion of the orderly development of the stock market, and the maintenance of high standards among those who are engaged in the buying and selling of securities. It cannot be said that the buying or selling of securities is for any other purpose but the reaping of gain or reward. True enough, the appellant itself may not be actually doing the buying or selling, but it is a participant in the process in that it provides the facility and comfort for those who are so engaged, and there is indirect gain to the appellant in the achievement of its objects when the operations of the brokers are conducted in an orderly, professional, and profitable

manner. It bears repetition that one of the objects of the appellant is to:

> "take, or otherwise acquire, and hold shares, stocks, debentures, or other securities of any other company having objects altogether or in part similar to those of the Company or carrying on any business capable of being conducted so as to **directly or indirectly benefit the company** and assist it in the carrying out of its objects."

The objects clause, it would seem therefore, contemplates the appellant being engaged in activity resulting in benefits to the appellant. Accordingly, it is my opinion that the appellant is an "enterprise" within the meaning of that word as given in section 2 of the Fair Competition Act. That, however, is not the end of the matter, as I see it. There now has to be consideration of the matter of "abuse of a dominant position" by the enterprise.

DOES THE APPELLANT HOLD A DOMINANT POSITION IN A MARKET?

At this point, it is appropriate to be reminded that section 5(1) of the Fair Competition Act, in setting out the functions of the Fair Trading Commission, states in paragraph (d) that the Commission has the power "to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to **the abuse of a dominant position by any enterprise."** As stated earlier, it is my view that the appellant is an enterprise as defined in section 2 of this Act. The next matter for determination is whether it is abusing a dominant position. In that regard, attention should be focussed on section 19 and 20 of the Fair Competition Act. **Section19** reads:

> "For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with

> an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors."

In section 2 (3) of the Act, it is stated that:

> "every reference in the Act to the term "market" is a reference to a market in Jamaica for goods or services as well as other goods or services that, as a matter of fact and commercial common sense, are substitutable for them".

It will be recalled that earlier it was shown that "goods" as well as "services" do not relate to securities. It follows therefore that the term in the market has no relationship or relevance to the appellant, as the appellant does not "operate in the market" as defined.

<u>Section 20</u> reads:

> "(1) 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 person into that or any other market;
>
> (b) prevents or deters any person from engaging in competitive conduct in that or any other market;
>
> (c) eliminates or removes any person from that or any other market;
>
> (d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;
>
> (e) limits production of goods or services to the prejudice or 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."

Section 20, it will be observed, also refers and relates to “market”. Bearing in mind the definition of that term, the position with section 20 is the same as section 19 so far as appellant is concerned. Therefore, the references to dominant position in the market in these two sections do not concern the appellant.

There is another aspect of the situation that needs only to be mentioned for it to be obvious that the respondent is labouring under a misconception, brought about by the peeved behaviour of Messrs. Lindsay and Dehring, Bunting and Golding because they were not able to have their way so far as the terms of membership of the appellant were concerned. Now, the appellant is the only entity that is a stock exchange in Jamaica. That being so, it is illogical for the respondent to be maintaining that the appellant is limiting competition when there is no evidence of the appellant being in competition with anyone else. The facts indicate that the field is wide open for the development of another stock exchange. However, there is no evidence of any such entity being even on the horizon. In the absence of such evidence, it is at least unfortunate that the respondent is alleging that the appellant is impeding that maintenance or development of effective competition to itself. The question of competition can only arise if there is another entity, real, or potential, that can offer competition.

THE SECURITIES ACT

In the written as well as the oral submissions, both parties have stressed that both the Fair Competition Act and the Securities Act were enacted on the same day. The appellant is of the view that the canons of construction support its claim that the special Act (The Securities Act) being earlier in time on the date of passage, it being Act no. 8/93,

takes precedence over the general Act (The Fair Competition Act), which is no. 9/93. The maxim "generalia specialibus non derogant" applies, according to the appellant. On the other hand, the respondent is asserting that both Acts having been passed on the same date, and there being no provision in the Securities Act ousting the Fair Competition Act, it is to be taken that Parliament intended that both Acts should apply to the appellant.

It is my respectful view that both parties have missed a significant point. Although the Acts were enacted on the same day, they did not become part of the general body of law on the same date. Whereas the Fair Competition Act became effective on the 9th March, 1993, the Securities Act did not have legal force and effect until the 6th December, 1993. The significance of this is that prior to 6th December, 1993, the Securities Act was not in force; of the pieces of legislation, only the Fair Competition Act was in force. That Act and that Act alone would have applied to the appellant up to then if, indeed, the provisions showed that there was room for its application. However, I have already shown that although the appellant fits the definition of "enterprise" under the Fair Competition Act, that is as far as applicability goes as the appellant does not hold a dominant position in a market, in that it is not in a market and there is no evidence of the appellant impeding the maintenance of development of effective competition in a market.

As of the 6th day of December, 1993, there has been a change in the situation. Up to then, there had been no specific legislation dealing with a stock exchange. The Securities Act remedied the situation. That Act contains seventy-seven (77) sections, divided into seven (7) Parts, followed by two (2) Schedules. Parts III and IV of this Act, comprising eighteen (18) sections as well as the Second Schedule are devoted to stock exchange and a compensation fund. There are also

at least four (4) other sections which contain references to a recognized stock exchange. Therefore, the situation leaves no doubt whatsoever that the activities and operations of the appellant have been specifically provided for by the Securities Act. By this Act, a Securities Commission is established and it is to that body that applications are to be made for a licence to establish and operate a stock exchange. The Act also compels the appellant to take such steps as are necessary to ensure it satisfies the requirements of the Second Schedule, and to notify the Securities Commission of the steps taken. The Second Schedule, it should be noted, sets out the requirements/8/ to be met by applicants for a licence to establish a stock exchange. For the purposes of section 18, the requirements may be summarized thus:

> 1. At least five of the applicant's members will carry on the securities business independently of and in competition with each other.
>
> 2. The applicant's rules make provisions considered satisfactory by the Commission relating to:
>
> (a) qualifications for membership;
>
> (b) the exclusion from its membership of persons who are not of good character and for suspension or disciplining of members for conduct inconsistent with just and equitable principles in the transaction of business or for contravention or failure to comply with the rules of the stock exchange or the provisions of this Act;
>
> (c) preventing a member from carrying on as principal business, any business other than a securities business;
>
> (d) conditions for listing of securities for trading on the stock exchange;

(e) the conditions governing dealings in securities by members, and the classes of securities that may be dealt with by members; and

(f) the carrying on of the business of the stock exchange with sue regard to the interests of the public.

3. The applicant has made such provision as the Commission considers satisfactory for:

(a) clearing house facilities or arrangements for ensuring performance and settlement and recording of transactions effected on the exchange;

(b) effective monitoring and enforcement of compliance with its rules and regulations; and

(c) investigating complaints against any of its members.

4. The financial resources of the applicant are sufficient for the proper performance of its functions.

It will be recalled that the second amended complaint focussed on the "conduct, operations and rules" of the appellant "as regards membership". Whereas the Fair Competition Act does not specifically make any provisions in respect of the qualifications for membership of an entity such as a stock exchange, the Securities Act expressly deals with the situation. In my view, there is no good reason for looking at the Fair Competition Act for inferences when there are specific provisions in the Securities Act that cover the aspects of the appellant's operations and rules that attracted the attention of the complainants and the Fair Trading Commission. As pointed out earlier, the Securities Act came into operation after the Fair Competition Act. It is unlikely that Parliament would have regarded the Fair Competition Act as being applicable to the situation complained of,

yet proceed to bring into force the Securities Act to cover that which had already been provided for. I hasten to add that this is not being advanced as a reason for the conclusion that I have arrived at. My conclusion is based simply on a construction of the words used in both Acts. In the case of the Fair Competition Act, the interpretation of the relevant words, when matched with the objects clause of the Memorandum of Association of the appellant, has resulted in the inapplicability of that Act to the appellant. On the other hand, the Securities Act clearly applies. That the Securities Act applies to the appellant has been conceded by the respondent. In her submissions to this Court, learned Queen's Counsel on behalf of the respondent has said that the respondent's position is that the appellant is governed by both Acts. She contended that the Fair Trading Commission and the Securities Commission have concurrent jurisdiction over the appellant. It is not new, she said, for there to be two Commissions having concurrent jurisdiction over one entity. There is no reason to assume that the appellant, because it is subject to the Securities Commission, is not subject to the Fair Trading Commission. Different enterprises, business and issues can, she said, be governed by various regulatory agencies.

In asserting that the Fair Competition Act applies to the appellant, learned Queen's Counsel on behalf of the respondent claimed that the Fair Competition Act deals with competition issues which are not dealt with in the Securities Act. The questions raised for determination in the second amended complaint are not about membership, but rather they are about competition issues. Hence, the provisions of the Securities Act dealing with the Securities Commission and its jurisdictional powers in respect of the qualifications for membership are of no moment, to follow her relation to the Securities Act or its regulations governing how to compute the price of a share in the appellant or the amount to be contributed by a broker to the

Compensation Fund or how swiftly one ought to deal with applications for membership in the appellant which are all competition issues, then one must look to the statutory provisions of the Fair Competition Act to see if the Fair Competition Act has jurisdiction and can deal with those issues accordingly. I unreservedly, but with respect, disagree with these submissions. I disagree on two main grounds. Firstly, the Securities Act has clearly given to the Securities Commission jurisdiction to deal with all matters relating to membership, and in respect of the compensation fund the jurisdiction is given to the board of the appellant (a recognized stock exchange) and the Securities Commission. Futhermore, even if it is to be conceded that these provisions of the Securities Act conflict with other provisions of the Fair Competition Act in respect of the same topics, proper interpretation of the legislative effect would reveal that the Securities Act (being later in time so far as its operative date is concerned) takes precedence. There would in such a situation be an implied repeal of the Fair Competition Act in respect of such provisions. Francis Bennion's **"Statutory Interpretation"** (second edition) put it thus:

> "Where a later enactment does not does not expressly amend (whether textually or indirectly) an earlier enactment which it has power to override, but the provisions of the later enactment are inconsistent with those of the earlier, the later by implication amends the earlier so far as is necessary to remove the inconsistency between them."

Secondly, section 73 of the Securities Act put the matter beyond doubt and beyond argument. It reads thus:

> **"In the absence of any specific provision in this Act governing the operations of a recognized stock exchange, the appropriate provision of the Companies Act for the time being in force shall apply."**

In my opinion, this closes any door that the respondent may have felt was opened to it. The simple and plain language of section 73 forbids any consideration of the Fair Competition Act.

I am, for the reasons stated above, of the view that the learned trial judge erred in his decision, and grounds 1,2, and 3 are well founded.

There is one other ground of appeal on which I wish to comment. It is ground ten. It reads thus:

> "The learned trial judge erred when he found that it was permissible under the provisions of the Fair Competition Act to delegate all powers other than the judicial powers of the defendant/respondent to officers of the defendant/ respondent who were not commissioners and in particular, the learned trial judge erred when he found that the power to summon and examine witnesses could be delegated by the defendant/respondent to the defendant/respondent's senior legal officer who was not a commissioner. In any event, the learned trial judge failed to appreciate that the power to summon and examine witness is a judicial power which could not have been delegated by the defendant/respondent to officers who were not duly appointed commissioners."

Mr. Braham, for the appellant, referred to the letter dated March 22, 1994, from the respondent's senior counsel to Mr. Christopher Berry. It purported to summon him "before Commission's counsel" to be "formally examined in (his) capacity as a stockbroker, and a member of the Council of the Jamaica Stock Exchange." The letter stated the time and place of the examination, and informed Mr. Berry that if he failed to appear he would have been liable to a fine of $20,000.00 and/or two (2) years imprisonment.

Mr. Braham submitted that the Commission was in an adjudicative phase, and the summoning ought to have been done by the Commission itself is there is no power to summon anyone to appear before the Commission's counsel. He relied on the cases ***Vine v.***

National Dock Labour Board [1956] 3 All E.R. 939; ***Regina v. College of physicians and Surgeons of British Columbia et al, ex parte abmad*** 18 D.L.R. (3d)197; ***Barnard and Others v. National Dock Labour Board and Another*** [1953] 1 AILE.R. 1113; and ***R.v. Monopolies and Mergers Commission and another, ex parte Argyll Gorup Plc*** [1986] 2 All E.R. 257.

Miss Phillips replied by saying that the letter summoning Mr. Berry had been authorized by the Commission, so the Commission's senior counsel had acted appropriately. She relied on ***Nelins v. Roe*** [1969] 3 All E.R. 1379.

There is no provision in the Fair Competition Act that authorises the action taken by the respondent's senior counsel. It is not now subject to dispute that the power to summon witnesses is judicial in nature. The purpose of the summoning was, as the letter states, for Mr. Berry to be "formally examined". The examination of one who has been summoned is a judicial function. Such a function, having been conferred on the respondent, there is no authority for its delegation. As Lord Somervell of Harrow said in ***Vine v. National Dock Labour Board*** (supa), "Judicial authority normally cannot, of course, be delegated…."

In my view, what the respondent's senior counsel did was nothing short of being presumptuous and therefore cannot be supported. This ground of appeal also succeeds.

For the reasons that I have stated, I agree that the appeal should be allowed, and I agree with the making of the orders set out in the judgement of the President of the Court.

FORTE, P:

Appeal allowed. Order of the court below set aside. An order in the following terms substituted:

(1) A declaration that upon its proper construction, the Fair Competition Act is not applicable to the Plaintiff as the Plaintiff is expressly governed by the provisions of the Securities Act.

(2) A declaration that the action and proceedings being taken and pursued by the Defendant against the Plaintiff whereby the Defendant is performing the functions of complainant and adjudicator is in breach of the rules of natural justice and void.

(3) An injunction is hereby granted restraining the Respondent from continuing the proceedings.

Costs to the appellant both here and below, to be taxed if not agreed.