

ALTERNATIVE AVENUES FOR ADJUDICATION:
AN INDEPENDENT TRIBUNAL

Introduction

1. The increasing complexity and diversity of commercial activities has resulted in the creation of a number of specialist statutory or administrative bodies. Very often, the subject area is fairly technical with a limited number of persons having the necessary expertise. Fair competition is one of those areas and the Fair Trading Commission is one of those bodies.
2. In determining the appropriate organizational structure for such a body, one must consider a number of factors. These include:
 - (a) Efficiency and expertise;
 - (b) Cost; and
 - (c) Procedural fairness.
3. Whether such a body is established by statute or by executive action, its decisions and indeed its very structure may be subject to Judicial Review. It is important to note at the outset that if a challenge is made, the court will only concern itself with the third factor referred to above, that is, whether the structure and the decisions are procedurally fair to the persons affected by them.
4. In my view therefore, this factor trumps all the others and one should only consider the other factors after being satisfied that a particular proposed structure would be treated by the court as being procedurally fair.

5. In 2001 the Jamaican Court of Appeal held that the structure of the Fair Trading Commission and the way in which it conducted and decided complaints were in breach of the principles of natural justice¹. That decision was based on a conclusion that the structure resulted in the same entity being both investigator/prosecutor and judge in the same matter which breached one of the well established principles of natural justice.
6. I would observe that it has been argued that the comments made by Justice Forte on this issue were obiter, in that he had already based his decision to allow the appeal on a finding that the Fair Competition Act did not apply to the securities industry. In addition, the other judges did not comment on this issue. The fact is however, that the orders made by the Court of Appeal (with the agreement of all three judges) included a declaration that the Commission was **“performing the functions of complainant and adjudicator...in breach of the rules of natural justice”**.²
7. It is also worth noting that the claimant in Olint Corp Limited v the Financial Services Commission³ sought to rely on the Stock Exchange case in support of a submission that the FSC was in a similar position and was also acting in breach of the rules of natural justice. Norma McIntosh J observed that **“it does not appear that consideration was given to the effect of the appeal mechanism in the Act which provided for the court to be the final arbiter and therefore with the wide powers given to the court in the Act there was fairness when the entire scheme was looked at as a whole...had this been urged**

¹ Jamaica Stock Exchange v Fair Trading Commission: SCCA 92/97 decided 29/1/01

² At page 72

³ 2006 HCV 01365, decided December 24, 2007

upon Forte P he would have concluded that there was not likely to be a breach of the principle of natural justice...”⁴

8. That decision is under appeal, and is in any event, the conclusion of a judge at first instance. The decision of the Court of Appeal, if the appeal is pursued and heard, may impact on the present discussion. As things now stand, however, there was no appeal from the decision in the Jamaica Stock Exchange case, and there should therefore be a change in the structure of the Commission and the way in which it operates.

The Alternatives

9. In the years since the Jamaica Stock Exchange decision, there has been an ongoing debate in Jamaica and elsewhere in the region as to the structure which would best equip such a body to discharge its statutory mandate, while not breaching the relevant rules.
10. This symposium is to discuss “alternative avenues for adjudication”. Three alternatives have been proposed:
 - (a) The adjudication of all matters in the courts;
 - (b) The creation of an independent tribunal to hear all matters; and
 - (c) The Commissioners sitting as an adjudicating body.

In my opinion, an independent tribunal is the preferable alternative.

11. There are effectively three stages in a fair competition complaint. The investigation and institution of a complaint, the hearing and determination of the complaint and any appeal from the decision made at the hearing. There is presently a right of appeal to a judge in chambers

⁴ Page 71

from a decision made by the Commission after hearing a complaint and as far as I am aware, there is no suggestion that this be changed. This discussion is really concerned with the second stage which is the hearing and deciding of complaints.

12. As the Court of Appeal noted in the Jamaica Stock Exchange case, the statute authorizes the Commission to investigate fair competition complaints and concerns, decide whether a case should be brought and then hear and rule on the case. I understand that in practice, these roles were actually carried out by different persons. The investigation and presentation of a case were carried out by senior members of staff without any involvement of the Commissioners, and the Commissioners themselves heard and decided whether the case was made out.
13. The court felt however, that the Commissioners and staff were all part of the same body, and that body was therefore effectively both prosecutor and judge. As a result, the structure was held to be procedurally unfair and in breach of the rules of natural justice. Any amended structure must first address those concerns.

Commissioners to sit as Adjudicating Body

14. It has been proposed that the Commissioners should continue to carry out the adjudicating function and that the concerns which the court expressed in the Jamaica Stock Exchange Case would be addressed by making it clear that the Commissioners play no role in the investigating/prosecuting functions. It is my understanding that this would be achieved by giving those functions to specific employees or officers of the Commission, perhaps including a Commissioner who is not among those deciding the case.
15. There could also be express restrictions on “*ex parte*” communications between the investigators and the Commissioners who are hearing the

complaint. “*Ex parte*” in this context refers to a communication which does not take place in the presence of the persons who are the subject of the investigation or complaint.

16. In theory, such an arrangement might be acceptable and similar arrangements have in fact been implemented in other jurisdictions. In the United States of America, a similar role is carried out by the United States Federal Trade Commission (“the USFTC”). As I understand it, the staff of the USFTC investigate matters and decide whether to initiate complaints, and the complaints are heard by an Administrative Judge. Appeals from decisions of the Administrative Judge are heard by the Commission and there is a further right of appeal to the Court of Appeal.
17. The rule against *ex parte* communications between the members of the USFTC who decide to initiate a complaint and those who hear an appeal is strictly enforced and the same person will never take part in the decision to initiate a complaint and in the hearing of an appeal. I understand that that structure has been upheld by the courts in the United States as being procedurally fair.
18. It is quite possible however, that the Jamaican court faced with the identical structure and rules would come to the opposite conclusion and conclude that a structure along these lines would still be procedurally unfair. The courts might do so for any or all of the following reasons.
19. Firstly, the USFTC has been operating with the present structure and rules for an extended period and the public and the courts appear to be satisfied that it works. Obviously, this was not the situation when the USFTC was first established. None of the cases which I have seen in which a challenge was considered were decided within the first 20 years of the USFTC’s existence. By the time those cases were heard, there was therefore already a track record to rely on.

20. In Jamaica on the other hand, it is likely that a challenge would be brought much sooner and before the new structure has had an opportunity to establish a track record. Unlike the US courts, our courts would have to decide whether the system is likely to work fairly with no history of it having done so.
21. The second distinction which the court may draw relates to the relative size of the Jamaican Commission as against its US counterpart. The smaller an organization and the fewer the number of staff, the more difficult it will be to successfully implement a rule against *ex parte* communication. It would be easier to convince a court that the Commissioners will be insulated from a particular investigating team when there are dozens or hundreds of other members of staff with whom to interact. When all or most of the investigating staff of the Commission may be involved in a particular case, the court would be much less likely to accept that there will be no private contact.
22. The same observation applies to the number of complaints heard by the Commission. If a regulator is considering a great number of complaints at any one time, it may not be difficult to persuade a court that Commissioners or staff members who are concerned with a particular complaint will have no involvement with or perhaps even knowledge of others. If only one or two complaints at a time are being considered, however, a court would be much more concerned about the risk of all Commissioners and staff having some *ex parte* knowledge or involvement in all complaints.
23. There is also in my view, a significant cultural difference between Jamaican (and I think Caribbean) society on the one hand, and larger more developed societies. Jamaicans (including Jamaican judges) are more cynical and suspicious when it comes to public officials. A Jamaican Judge may be much less likely than his American or New

Zealand counterpart to accept that a rule against *ex parte* communication has been or is likely to be scrupulously followed.

24. There is finally, the fact that any new structure or arrangement would be considered against the background of the Court of Appeal's decision in the Jamaica Stock Exchange case. The Court of Appeal had expressly recommended that the adjudicatory function should be carried out by a separate body. That recommendation was actually *obiter* and the court did not rule that that is the only structure which would be acceptable. That was the express view of our appellate court however, and a judge in a future case is likely to find that persuasive.
25. I understand that the proposed system may involve one of the Commissioners (perhaps on a rotating basis) being involved in the investigation of a matter and the decision to initiate a complaint, while other Commissioners hear the complaint. In my view, there would be an even greater risk that this structure would be struck down by the court.
26. Anyone who challenges such an arrangement is likely to argue that a Commissioner who has taken part in the investigation and building of a case will have a personal investment in it, and that a rejection of the complaint by his other fellow Commissioners may be seen as a sharp criticism of his or her investigative work and professional judgment. The system of rotating commissioners may therefore be seen as creating a real risk or at least an appearance, of bias in favour of the investigative Commissioner.
27. It has been observed that prior to independence, Jamaica did not have a separate Court of Appeal and that there was a system which was somewhat similar to the proposed structure. Appeals from decisions of judges of the Supreme Court would be heard by other judges of the same court on a rotating basis. In the event of a challenge to the rotating

investigating Commissioner, one could point to that system as a precedent which was accepted for years.

28. I think however, that a court would ultimately not be persuaded by that analogy. Firstly, a court is likely to have more confidence in judges placed in that position than in non-judicial officers, and they may rationalize that preference on the basis that judges by their training and practice are less likely to be subject to conscious or unconscious bias than would lay persons.
29. The second distinction which might be made is that a trial judge does not have the same level of investment in a case that an investigator or prosecutor has. A Commissioner who has been involved in the investigation and presentation of a case would be more affected by an adverse result than a judge by a decision that says he was wrong in law.
30. Finally, although that appellate system was considered acceptable for many years, its flaws and weaknesses were recognized and it was decided in 1962 that there should be a separate appellate court. It would be difficult to persuade a court that a structure which the court abandoned almost half a century ago should be accepted now for a non judicial body.
31. I have considered the reasons why some persons advocate a structure which will retain both the investigative and adjudicating functions. They are valid reasons, particularly the fact that such a structure would be more efficient and cost effective. In my view however, it is likely that a court would treat these advantages as outweighed by the considerations mentioned above and I would therefore advise against the Commissioners continuing to sit as an adjudicating body.

Adjudication of all Matters by the Courts

32. The concerns referred to above would all be addressed if the Commission limited itself to investigating and prosecuting complaints about unfair competition and breaches of the Act and having complaints heard at first instance by the court. There would however, be a number of disadvantages to this alternative. The first is that this is a fairly specialist area and there is an advantage to having a dedicated tribunal which can develop the necessary expertise. This is no doubt why in jurisdictions around the world such bodies have been created to consider competition matters.
33. The second and even more practical reason is that our court system is notoriously overburdened. Claims filed in the Supreme Court now take years to come to trial. It is unlikely that the court would establish a separate division or assign a separate judge to deal with competition complaints and such a matter would probably often come to be heard by a judge who is hearing one for the first time. Having competition matters heard by the courts would be bad for both the court system and for the competition process.

An Independent Specialist Tribunal

34. All of the concerns discussed above would be addressed by the establishment of an independent, specialist tribunal to hear competition complaints. The tribunal would be independent because it would be completely separate from the Commission and would have different staff and offices. It would be specialist because it would only deal with complaints relating to competition issues, and over time it would develop the necessary expertise in that area.
35. It must be conceded that there would be disadvantages to such a tribunal. One would be the cost of establishing two separate bodies to

deal with the competition issues. Another is that such a structure would only be viable if there are sufficient complaints to justify it.

Conclusion

36. In view of the decision of the Court of Appeal in the Jamaica Stock Exchange Case, the present structure of the Fair Trading Commission has to be changed. All the alternative methods of adjudication have disadvantages. Taking all factors into account, it is my view that the establishment of an independent tribunal would be the best option.

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