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Prepared by Wendy M. Duncan

Overview of Jamaica Stock Exchange¹

The Facts

In our very first year – in December 1993 – we received a complaint from Dehring, Bunting & Golding Securities Limited against the Jamaica Stock Exchange. Dehring, Bunting and Golding had applied for membership to the Jamaica Stock Exchange and, more than one year later, had not received a definitive response. The complaint triggered an investigation and we called them in to respond to the allegations.

The Jamaica Stock Exchange immediately applied to the Supreme Court for several declarations; and an interim injunction restraining the Commission or its agents from continuing the proceedings.

The Jamaica Stock Exchange sought from the Court a declaration that the 'action and proceedings being pursued by the Fair Trading Commission whereby it was performing the functions of complainant and adjudicator, were in breach of the rules of natural justice and void.' It also sought a declaration that the proceedings instituted by the Commission whereby it performed the functions of investigator, interrogator,

¹ Jamaica Stock Exchange v Fair Trading Commission (2001) Supreme Court Civil Appeal No. 92/97

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complainant and adjudicator was in breach of section 20(2) of the Constitution.²

In 1997 the Supreme Court handed down judgement in favour of the Fair Trading Commission. However, the Jamaica Stock Exchange appealed the decision.

In 2001 the Court of Appeal declared that the action being taken and the proceedings being pursued by the Commission could be in breach of natural justice and void; since it was performing the functions of both investigator and adjudicator.

The Findings of the Court

The Court of Appeal found that the current structure of the Fair Trading Commission is 'deficient' because it fuses the investigative function with the adjudicative function. It held that it did so in two major ways.

Firstly, sections 5 and 7 of the Fair Competition Act specifically represent the fusion of these powers. Section 5 sets out the functions of the Commission and allows the Commission to carry out investigations at the

² 20(2) 'Any court or authority prescribed by law for the determination of the existence or the extent of civil rights or obligations shall be independent and impartial; and where proceedings for such a determination are instituted by any person before such a court or other authority, the case shall be given a fair hearing within a reasonable time.'

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request of the Minister, at the request of any person, or on its own initiative, in relation to the conduct of business in Jamaica, to determine whether any enterprise is conducting business practices in breach of the Act. Section 7 of the Fair Competition Act empowers the Commission to summon and examine witnesses, call for and examine documents, administer oaths and invariably make a finding in the matter.

The Court of Appeal concluded that in a hearing with respect to the substantive provisions, the Commission would be mandated to investigate and then decide a matter – particularly as it relates to those sections that specifically mandate a finding.³ The Court was concerned that the fusion of these functions meant that the same government officials could be involved in investigating and deciding on a case. In the words of the Court [on page 32]:

'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.'

The Court also held that the Jamaica Stock Exchange had the right to have the complaint against it heard by an independent and impartial

³ See sections 17, 19-21, and 33 of the FCA 1993

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tribunal. The Court of Appeal noted particular circumstances of the case which raised concerns.

One concern was that there was evidence of constant communication between the Commission and the Executive Director (who is an ex officio Commissioner) as to the state and conduct of the investigation. The Court believed that this demonstrated the cloudiness of the functions of investigation and adjudication.

Secondly, the Court stated that there is no general provision in the Fair Competition Act for the delegation of the investigative functions of the Commission to the staff or to any other agency to be administered independently of the Commission. The Court also stated that the actual office of Executive Director, who conducts the administrative affairs of the Commission and who is also an ex officio Commissioner, actually represents an overlap of the investigatory and adjudicatory functions.

Implications of the Judgement

The Court of Appeal judgement had several implications. Relative to these issues, it is helpful to note that the Court recommended that the problem of a likely breach of the rules of natural justice could be remedied if the Legislature would place those functions in two separate

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bodies. To this end, the investigative function would reside in the Commission and the adjudicative function would be in the Court or in some other appropriate body.

Options and Alternatives

We were left with two options: appeal to the Judicial Committee of the Privy Council or amend the Fair Competition Act. Despite reservations with respect to several aspects of the decision, it was decided that amending the Fair Competition Act was the better option so that the statute would not even *appear* to facilitate a breach of natural justice; and for the removal of any possibility of such allegations in the future.

After the decision to amend was taken, a process of research, consultation and discussion followed during which we looked at the structures of various competition agencies to inform our process. We found three alternatives.

One option is for the Commissioners to continue to exercise an adjudicatory role, but for the Commission to be structured in such a way that a separation between the investigatory and adjudicatory roles would be maintained. The structure of the United States Federal Trade Commission was considered. This structure allows for an independent

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Administrative Law Judge to act as an adjudicator, while the Commissioners would act as investigators and continue their regulatory function. Alternatively, it was proposed that the individual Commissioners be appointed for specific periods on a rotating basis, to supervise the investigative process. After the investigation, the relevant Commissioner would be prohibited from participating in the hearing of the matter. The other Commissioners would preside at hearings and not be involved in the investigative process.

Another option being considered is that the adjudicative function should reside in a separate Tribunal specifically created to hear competition matters.

The third option is that the adjudicative function should reside solely in the Court.