The Courts as the Preferred Means of Competition Law Enforcement

by

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The decision in *Jamaica Stock Exchange v Fair Trading Commission* (Supreme Court Civil Appeal No 92/97 Jamaica) has had a deleterious effect on competition law and policy in Jamaica. Although the members of the Court of Appeal were unanimous in allowing the appeal, and for the most part the justices of appeal agreed with each other why they should do so, the critical part of the decision, and the one that has had a fundamental effect on the circumstances of the Fair Trading Commission, is to be found in a statement made almost by the way in the judgment of Forte P.

Recognizing that sections 5 and 7 of the Fair Competition Act merged the investigative and adjudicative functions of the Fair Trading Commission (FTC), Forte P suggested,

> That problem can however be remedied for the future if the legislature would place those functions in two separate bodies i.e. the investigative functions in the Commission and the adjudicating function in the Courts or some other appropriate body.

I doubt very much that Forte P could have foreseen the emasculation that those few words would have inflicted on the administration of the Fair Trading Commission. Nor would anyone have foreseen the divisions that would have developed within the Fair Trading Commission, and between the Commission and its ministry, as to the best way to implement Forte P's recommendation.

We are here considering three possible options for the reform of the Fair Trading Commission. First, that the current administrative functions are retooled by legislation,

regulations, or the Commission's own internal rules and procedures to maintain as much of its present structure as is may be possible while avoiding that problem that Forte P perceived; and more specifically, to keep the adjudication and investigation in the same body. Secondly, to move the adjudication out of the Commission to a specialist competition tribunal, leaving the Commission only with its investigative functions. Third, to retain competition advocacy, policy implementation and investigation functions in the Commission; but to pass on all of the adjudicatory and enforcement functions to the courts.

My preference in the circumstances is to rely on the courts for all competition law enforcement, and my job is convince you why this should be so. To do so, however, it will be necessary to put the question in some historical context. First, I should say that of all the members here associated with the Fair Trading Commission, I suspect that am the person who knows the least about the *JSE v FTC* case; and the reason for this is that I was connected to both sides. I believe, if my memory serves, that at the commencement of the dispute I was first a consultant to the Commission and later a Commissioner. At the same time, however, I had a financial interest in one of the members of the JSE and I was, at least nominally, an alternate director on the JSE board of directors. There could not have been a clearer case of a conflict of interest, and to avoid the effects of that conflict I had no involvement on either side of the dispute. As a consequence, my knowledge of this matter comes principally from report of the Court of Appeal decision. On the other hand, through a series of consultancies I had something to do with the original legislation, which we all agree is less than artful. Part of the chimeric character of the Act reflects the fact that in the early stages of the development of the legislation, the knowledge base on competition law in this country was very shallow. Another explanation is that legislative draftsmen in Jamaica, while very jealous of their discipline, have developed a

distinctive practice of reconstructing legislation from a range of sources, and thus it is not unusual to see, as we now see in the Fair Competition Act, provisions tracing their pedigrees to other examples of legislation reflecting contradictory policy approaches. Third, at the time of the development of the Fair Competition Bill, the policy makers wanted the legislation to have a transformative and tutorial role, which they thought would not be achieved if the legislation was too minimalist. The consequence is that we have an Act which is sometimes difficult to understand and often difficult to administer.

Retooling the Current Commission

I should confess that I have much sympathy for the suggestion that the current administrative structure should be retooled to avoid any breach of natural justice which could arise under the system. Forte P pointed very clearly that the current law does not breach the separation of powers doctrine. He explained that under sections 49 and 50, 'The FCA … does not treat decisions of the Commission as final but gives the aggrieved person the right of appeal to the courts...', and that it is the Court that has the final word in relation to any complaints investigated. He also pointed out that the Commission cannot enforce its own orders, and must go to court to do so. It is understandable that Forte P should have so readily found this deference to the courts in the Fair Competition Act, because the enforcement mechanism of the Jamaica Fair Trading Commission was based on the enforcement mechanism of the Commerce Commission in New Zealand.

The problem with retooling the current arrangement to avoid the complaint that The Fair Commission's operations may be a denial of natural justice, is whether this could be achieved without legislation. Forte P pointed out that merger of the investigating and adjudicating

functions does not by itself mean that there is a breach of the doctrine of the separations of powers, but it does mean in these circumstances that there is a breach of the rules of natural justice. We may disagree with how he arrived at this conclusion. For example, he spoke often of 'hearing' and 'oral hearing' as if the terms convey the same meaning. Thus, he concludes that if the subject of an investigation does not exercise his right under the Fair Competition Act to an oral hearing, he would of necessity have been denied a right any hearing. With the greatest respect, the latter conclusion does not necessarily follow from the first. The better approach may be that the Fair Trading Commission could not act against the interest of someone being investigated without according him a hearing, and whether the hearing is oral or in writing depends on two sets of circumstances: first, on what is fair in the circumstances. The Fair Trading Commission has no power to conduct an investigation that is unfair, and fairness in many circumstances may require that the person being investigated is heard orally. Secondly, under the current provisions of the Fair Competition Act, the Commission will have to afford anyone under investigation an opportunity to be heard orally if he wishes. It is true that we can contemplate circumstances where someone being investigated may consider that his interests would be better advanced in writing than orally. In any event, as Forte P acknowledged, anyone being investigated can assert his right under the existing provision of the Fair Competition Act to an oral hearing.

The rest of Forte P's argument is far more compelling. Under the current structure it is virtually impossible, by a simple change of administrative procedure, to separate the investigative functions of the Fair Commission from the adjudicative one. Under the current regime, the principal administrator, who of necessity is also the principal coordinator of the investigatory functions, is by law also an ex officio member of the Commission, where the

adjudicatory function resides. Even more damning to an attempted administrative reconstruction, is the fact that the Commission has no power under the existing law to delegate any of its functions, investigative or otherwise.

With the benefit of legislation, the Commission could be reconstructed. The Act could be amended to remove the Executive Director as an ex officio Commissioner and empower the Commission to delegate its investigative authority to its staff. Further, in deference to Forte P's interpretation of the requirements of a fair hearing, the Fair Trading Act could be further amended to require an oral hearing for anyone being investigated, as distinct from the current position of merely guaranteeing him that right if he so wishes. Forte P had identified the dominant role of the Supreme Court under the Fair Competition Act in enforcing, if the court wishes, the decisions of the Commission, but he could also have mentioned the supervisory role that Court has over all administrative and inferior tribunals. The very appeal that Forte P addressed arose from an application by the appellant to the Supreme Court to exercise it supervisory power over the Fair Trading Commission.

I had an opportunity recently to meet with senior competition authority officials and judges at Fordham Law School. Officials from over 26 competition authorities were represented at that gathering.[1] It may be significant to note that this scheme of competition advocacy, policy implementation and investigation functions in a competition authority, with the adjudicatory and enforcement functions passed to the courts is the dominant approach, and is almost universally true for small jurisdictions.

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[1] These included competition officials or judges from Chile, Colombia, Belgium, Denmark, Estonia, European Union, France, Germany, Hungary, Italy, Jamaica, Netherlands, New Zealand, Norway, Portugal, South Africa, South Korea, Sweden, Turkey, Tunisia, UK, Ukraine, US, Vietnam, and Zambia.

Send all Disputes to the Courts

It the absence of amendment to the legislation, the Commission can nevertheless achieve an effective scheme of competition law enforcement if it gives up its adjudicatory functions and refers all disputes to the courts. This will mean that we may have to develop some new procedures. The Commission should be willing to tell persons suspected of breaching the law, that they are being invested. It will also mean a greater willingness to go to court for declaratory remedies.

The strongest argument against enforcement through the courts may very well be the *Stock Exchange Case* itself. I do not think that I do them any violence or injustice to say that the two judges who addressed the issues substantively in the Court of Appeal, Forte P and Panton JA, demonstrated a woeful ignorance of competition law. As the other justice of appeal, Walker JA, simply agreed with the first two, we have no basis for assuming that he had any greater expertise in the subject. Even if it were conceded that the Court of Appeal effectively grappled with the concept of the abuse of dominance, it is very clear that the judges were not sensitive to market definition, or the economic determination of dominance in a market. But something similar could have been said then, and can still be said now, of most judges and lawyers in Jamaica. Our knowledge of competition law is still inadequate.

There are three responses that should be made to that complaint. If we leave aside for the time being the issue of natural justice that Forte P identified, and not withstanding that his opinion and that of Panton JA reflected little knowledge of competition law, including the question of the relevant market, what amounts to dominance, and what amounts to abuse, there

are not many lawyers who would disagree with them on the question of whether the Jamaica Stock Exchange was an appropriate object of the operations of the Fair Competition Act. Indeed, I think that most would agree that on that question, Forte P and Panton JA were correct. Secondly, if we consider the question of natural justice, as Forte P had done, many lawyers would agree that current administrative arrangements for enforcing competition policy face some serious hurdles. Finally, the quality of judging depends on the quality of the lawyers that appear before the courts. It is very clear that in the *Stock Exchange Case,* the lawyers were more comfortable with public and administrative law than they were with competition law, and judges responded to the interpretation of the law that was put to them. As more competition matters come before courts, judges will develop greater knowledge and expertise in competition law.

Sending Competition Disputes to a Tribunal

I well understand that my purpose is to argue for enforcement of competition law and policy through the courts, and not against enforcement through a specialist tribunal. However, the harsh reality is that we have not established and effectively supported these tribunals. It is often argued that litigation in the courts is slow and cumbersome, and competition matters brought to the courts would require a long time before they are resolved. It is against this background that specialist tribunals are offered as a speedier alternative. My own experience with these tribunals, and I have now sat on two, is that they do not have the necessary administrative support for them to operate efficiently or even effectively. The absence of effective administrative support almost guarantees that matters are not heard quickly before these tribunals.

A more fundamental problem is the level of knowledge and skill that will be available to these tribunals. Competition law requires specialist knowledge, in the same manner as would be

required for the effective application of, say, constitutional law, administrative law, or commercial law. It is not sufficient to refer competition disputes to a tribunal composed of men and women of affairs, if they do not already possess expertise in competition law. That expertise is in short supply. It will be much easier and quicker to create that expertise in judges than in lay people on a tribunal.

I do not wish to advance any discussion on the separation of powers doctrine, but a tribunal that is too greatly endowed with power to enforce its decisions may well find itself running afoul of that principle. It is quite clear that the Ministry contemplates a tribunal that will have the authority not only to make decisions on competition matters, but will be able to enforce those decisions though the imposition of fines. The concern will not be resolved by the usual practice of appointing retired judges to the tribunal, as the complaint is to the security of tenure and independence from the executive of persons exercising the judicial function.

Conclusion

I conclude by suggesting that the Fair Trading Commission needs to have greater confidence in the courts, and to use the resources of the court even as we await the amendment to the law. The interpretation of the *Stock Exchange Case* puts some restraint on the operations of the Fair Trade Commission, but that case does not completely hamstring the Commission. Even in the absence of amendments to the Act, we can have a workable system of competition advocacy, policy implementation and investigation within the Commission; and adjudication and enforcement in the courts. In is only in this way we will effectively develop the jurisprudence on competition in Jamaica, and I am quite convinced that this will remain a vastly superior solution to that of transferring the adjudication and enforcement to a tribunal.