IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2011 CD 00090

BETWEEN	FAIR TRADING COMMISSION	CLAIMANT
AND	CABLE AND WIRELESS JA. LTD. (LIME)	INTERVENER
AND	DIGICEL JAMAICA LIMITED	1ST DEFENDANT
AND	OCEANIC DIGITAL JAMAICA LIMITED	2ND DEFENDANT

Dr. Delroy Beckford and Miss Wendy Duncan and Mrs. Sashawah Newby instructed by the Fair Trading Commission for the Claimant.

Mrs. Denise Kitson and Mrs. Susan Risden-Foster and Mrs. Trudy Ann Dixon-Frith instructed by Grant Stewart Phillips & Co. for the Intervener, Cable and Wireless Jamaica Ltd (LIME).

Mr. Michael Hylton QC, Mrs. M. Georgia Gibson-Henlin and Taneisha Brown instructed by Henlin Gibson Henlin for the Defendants.

WHETHER THE FAIR COMPETITION ACT APPLIES TO GENERALLY TO THE TELECOMMUNICATIONS INDUSTRY AND SPECIFICALLY TO MERGERS AND ACQUISITIONS– WHETHER THE FAIR TRADING COMMISSION HAS JURISDICTION IN RELATION TO THE AGREEMENT FOR THE ACQUISITION OF CLARO BY DIGICEL OR TRANSACTIONS EFFECTED BY THE AGREEMENT

Heard: January 31, February 28, March 1, 21, 22, 23 April 24 & May 15, 2012

SINCLAIR-HAYNES, J

[1] On the 11 March 2011, Oceanic Digital Jamaica Limited (Claro), the second defendant, entered into an agreement which is referred to as the Stock Purchase

Agreement (The Agreement) with Digicel, the first defendant, which provided among other things, for the acquisition of the entire portion of the second defendant's shares and assets. The result is that the 2nd defendant would exit the Jamaican telecommunications market and cease business and operations within Jamaica. Additionally, the Agreement allowed for the transfer of the second defendant's telecommunications licence and allocable spectrum, which it obtained during the existence of its business in Jamaica, to the first defendant. The Minister, upon application by the defendants, approved the transaction.

[2] Consequently, Cable and Wireless referred the matter to the Fair Trading Commission (FTC) (claimant). It contends that the provisions of the Agreement are offensive as the effect of the 1st defendant obtaining the licence and additional portion of the spectrum is to substantially lessen competition in the market and or make the entry of a third party to the local telecommunications market more difficult. The existence of such circumstances will provide the 1st defendant with increased market power to operate in the local telecommunications market without competitive restraint by existing or potential competitors. Consequently, the FTC has instituted legal proceedings against the defendants by way of an Amended Fixed Date Claim Form.

[3] The FTC seeks a declaration that the defendants have contravened Part III of the Fair Competition Act (FCA) by attempting, in the course of trade or business, to give effect or have given effect to the provisions of an agreement the effect or likely effect of which, is to substantially lessen competition in the market in breach of Section 17 of the Act. It also seeks declarations that various articles of the Stock Purchase Agreement are of no effect and are unenforceable. Further, it seeks an order that the defendants be made to pay to the Crown a pecuniary penalty not exceeding five million dollars.

[4] The defendants have however urged the Court to determine preliminarily, the following issues:

(a) Whether the provisions of the Fair Competition Act (FCA) apply to the Agreement or transactions effected by the Agreement, and;

(b) Whether the Fair Trading Commission (FTC) has jurisdiction in relation to the Agreement or the transaction effected by the Agreement.

LIME sought and obtained leave to intervene in the matter as an interested party. Indeed LIME's application to intervene was unopposed by the defendants. However Michael Hylton QC, during his submissions on the preliminary issue has now submitted that LIME's application is *res judicata,* it having applied previously to the court for judicial review.

APPLICABILITY OF THE FCA TO THE TELECOMMUNICATIONS INDUSTRY

[5] Michael Hylton QC submits that the Fair Competition Act does not apply to transactions or agreements effected by the Agreement. As a consequence, the FTC has no jurisdiction in relation to the Agreement. He relies on the following as reasons for his submission: The FCA does not apply generally to telecommunications matters. According to him, the Telecommunications Act provides specifically for the FTC to have jurisdiction in certain cases. He cites Section 5 as an example and submits that by virtue of Section 5, the Office of Utilities Regulations (OUR) (the Office), should refer certain matters to the FTC. It is his submission that none of the specific cases applies.

[6] The claimant and the interested party submit that the FTC has jurisdiction. Dr. Beckford submits that the instant matter is brought consequent on investigation conducted by the FTC concerning the conduct of business in Jamaica and concerns enterprises engaged in business practices. The matter therefore falls within the mandate conferred on it by virtue of Section 5 of the FCA which also authorizes it to take enforcement proceedings pursuant to Section 46 of the FCA.

RULING

WHETHER THE FCA APPLIES GENERALLY TO THE TELECOMMUNICATIONS INDUSTRY

[7] An examination of both the Telecommunications Act (TCA) and the FCA reveals the general applicability of the FCA to the Telecommunications industry.

Section 17 (1) of the Fair Competition Act states:

"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.

'Agreement' is defined by Section 2 of the FCA as including "any agreement, arrangement or understanding whether oral or in writing or whether or not it is intended to be legally enforceable."

[8] Section 2 of the TCA states the object of the TCA as:

(a) To promote and protect the interest of the public by-

(1) Promoting fair and open competition in the provision of specified services and telecommunications equipment:

[9] Sections 5 and 73 of the TCA explicitly confer jurisdiction upon the FTC. Section 5 provides:

"Where after consultation with the Fair Trading Commission, the Office determines that a matter or any aspect thereof relating to the provision of specified services-

(a) Is of substantial competitive significance to the provision of specified services; and

(b) Falls within the functions of the Fair Trading Commission under the Fair Competition Act,

The Office shall refer the matter to the Fair Trading Commission."

Section 73(2) of the Act provides:

"Except as provided in subsection (1) nothing in this Act shall be construed as affecting the right of any person to refer a matter to the FTC in accordance with the Fair Trading Act."

[10] Indeed the TCA abounds with sections which undoubtedly make manifest the intention of the legislature that the FTC has a regulatory function regarding telecommunications matters and of the applicability of the FCA. For example, Section 27 defines 'dominant voice carrier' as 'one that falls within the meaning of Section 19 of the FCA'. Section 35 of the TCA specifically mandates the OUR to consult with the

FTC before it makes the 'competitive safeguard rules', that is, certain rules in relation to dominant public voice carriers. The telecommunications industry, indisputably, falls within the purview of the FTC.

[11] Michael Hylton QC submits, that by virtue of section 5 of the TCA, the FTC has no jurisdiction in the absence of a referral by the OUR although the matter falls within its functions. This court however is of the view that that submission is misconceived. Section 5 of the TCA mandates the Office to refer certain matters to the FTC, after it consults with it, which it determines as falling within the remit of the FTC. It is the OUR, that has the responsibility of consulting with the FTC. The FTC is not precluded from instituting legal proceedings independently of the OUR. Indeed section 73 (2) confers on any person the right to refer matters to the FTC. Section 73(2) therefore reserves the right of the FTC to act in accordance with the FCA.

WHETHER THE FCA APPLIES TO THE TRANSACTIONS EFFECTED BY THE AGREEMENT WHEREBY THE 1ST DEFENDANT IS TO ACQUIRE THE 2ND DEFENDANT'S SHARES

[12] Michael Hylton QC also submits that:

(a) Section 17 of the FCA does not apply in relation to agreements or transactions that fall under Section 17 of the TCA; and alternatively;

(b) Section 17 of the FCA does not apply to mergers and acquisitions such as the Transaction

[13] The claimant however contends that the FCA is applicable to the Agreement. Dr. Beckford submits that Section 17 of the TCA is not concerned with acquisitions or mergers of one telecommunications provider with or by another. It is concerned with the transfer of a licence. Section 17 of the TCA contemplates that a licence can be transferred in the absence of a merger or acquisition if the statutory criteria are met.

[14] This court is of the view that unless specifically excluded, the FCA applies to agreements which substantially lessen competition in a market. Is there a specific provision which excludes the operation of the FCA from Agreements or Transactions envisaged by Section 17 of the TCA? Section 73 of the TCA states the circumstances under which the FCA is excluded and in which it is applicable. The section specifically

excludes an agreement between the Minister and the universal service provider in matters which relate to their service obligations. Sub-section 2 of the section, however, confers the right on any person to complain to the FTC.

Section 73 reads:-

> *73-(1) "The provisions of the Fair Competition Act shall not affect an agreement between the Minister and a universal service provider in relation to the universal service obligation or any agreement approved by the Office after consultation with the Fair Trading Commission.*

There was no consultation by the Office with the FTC, regarding this agreement; the FTC is therefore not exempted as a consequence.

[15] The next question is whether the Agreement by Claro to transfer its shares to Digicel is an agreement in relation to the universal service obligation? If the answer is in the affirmative, the Agreement is governed exclusively by the TCA. Section 2 of TCA defines 'service provider' as 'a person who is the holder of a service provider licence issued under section 13'. Section 13 deals with the application to the Minister for the licence to operate and the conditions under which the licence is granted, while sections 38 to 42 speak to the principles governing the provision of universal service, the obligations to provide universal service, the designation of universal service provider *inter alia*.

[16] This is an agreement between competitors providing for the exit of a competitor from the market by way of transferral of licence by the exiting party, Claro, to Digicel. The result is that Digicel has acquired Claro. It is not an agreement between the Minister and the defendants regarding their universal service obligation. The agreement does not affect the terms of the defendants' universal service obligations. It concerns the transferral of Claro's licence to operate in Jamaica to Digicel. The claimant and LIME are not seeking to impugn any universal service agreement between either of the defendants and the Minister. The answer must therefore be in the negative.

[17] There is no stipulation by Section 73 of the TCA regarding its exclusive application to all agreements between telecommunications providers. The section has expressly excluded universal service providers only in relation to its universal service obligation and agreements which have been approved by the Office after consultation with the FTC. Inasmuch as both defendants are universal service providers, the objection does not concern their universal service obligations. The objection by the FTC and Cable and Wireless is to an agreement which amalgamates Digicel and Claro. The complaint is that if the Agreement is given effect, it is likely to have an adverse effect on competition in a relevant market.

[18] It is remarkable that subsection 2 of Section 73 of the TCA confers the right on any person to refer a matter to the FTC. Subsection 2 of Section 73 only exempts the circumstances provided by subsection 1. Axiomatically therefore, the TCA expressly provides for the applicability of the FTC to other telecommunication matters. The fact that the TCA has expressly excluded the circumstances in which the FTC has no jurisdiction, compels the conclusion that in all other circumstances, the FTC's jurisdiction is preserved unless it is excluded by the FCA or some other Act.

ARE MERGERS OR ACQUISITIONS EXCLUDED FROM THE FTC BY THE FCA?

[19] Sections 3 and 17(4) of the FCA state the circumstances in which the FCA is not applicable and contracts relating to mergers and acquisitions are not included in any of the sections. It is necessary to set out section 3. It provides:-

> *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 insofar as it contains a provision relating to the use, licence or assignment of rights 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 done 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.

Section 17(4) reads:

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied --

(a) contributes to –

(i) the improvement of production or distribution of goods and services; or

(ii) the promotion of technical or economic progress,

While allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensible to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned.

DO MERGERS AND ACQUISITIONS FALL WITHIN THE REMIT OF THE SECTION 17 OF THE FCA OR IS IT THAT SECTION 17 OF THE TCA HAS SOLE APPLICATION?

[20] Dr. Beckford argues that Section 17 of the TCA does not refer to agreements between telecommunications providers for the acquisition of one by the other, rather it concerns the transfer of licences. It is the view of this court however, that the agreements are affected by Section 17 as the acquisition or merger occurs as a result of the transference of a licence or licences pursuant to Section 17. Essentially the agreement between the parties is that Claro will transfer its licence to Digicel resulting in its acquisition of Claro. It is, however, recognized that not all assignments of licences or transferrals of control result in a merger or acquisition. The section therefore does not only regulate or solely govern acquisitions or mergers. Mergers and acquisitions however, are captured by the section.

[21] Section 17 of the TCA falls under Part III of the TCA which deals with the licensing of telecommunications services.

Section 17 (3) states: -

> *"An application for approval of an assignment or transfer under this section shall be made in writing to the Minister who shall grant such approval if he is satisfied that the assignee satisfies the requirements of section 11 (1) (a) to (d) as regards the obligations imposed on a licensee."*

[22] The application for the transferral must first be made to the OUR (the Office). Section 11 requires that the application for the licence must first be made to the OUR. Section 11 lists the requirements for the grant of the licences and the circumstances which will disqualify an applicant. Nothing in Section 11 prevents mergers. In fact Section 17(2) specifically provides for it.

Section 17(2) states:-

> *"A licensee may, with the prior approval of the Minister, assign its license or any rights thereunder or transfer of control of its operations."*

[23] The FCA does not speak to the procedure and requirements regarding the grant of licenses for transfers, and by extension, acquisitions and mergers. The TCA, on the other hand, provides specifically for the grant of licences for transfers and governs the

approval of transfers and grant of licences. The grant of licences for transfers falls solely within the ambit of TCA. It is worthy of note that the TCA was enacted in 2000, approximately five years after the FCA. The question therefore is whether in the circumstances the Legislature has intentionally excluded the FCA from applying to agreements regarding mergers and acquisitions. Was it the intention that such agreements should fall solely under the regime of the TCA or should solely govern this area?

[24] The defendants contend that in the circumstances the principle of *'lex specialis derogat lex generali'* (the specific will take precedence over the general) must apply. They rely on the decision of The Court of Appeal in the case of **Jamaica Stock Exchange v Fair Trading Commission** Supreme Court Civil Appeal No: 92/97 delivered on 29 January 2001, (unreported).

[25] There is nothing in the TCA that expressly excludes the applicability of the FCA. The agreements which are exempted are stated in section 3 of the FCA and section 73(1) of the TCA as stated above. The circumstances or facts of the Jamaica Stock Exchange case are distinguishable from the instant case.

[26] In the case of **Jamaica Stock Exchange,** securities were expressly excluded from the FCA by the Securities Act. Forte P, (as he then was) recognizing the deliberate exclusion of securities from the FCA by the Jamaica Stock Exchange at page 17 said:

> "*This passage is particularly applicable to the JSE's Memorandum of Association which has, as one of its objects, the entering into partnership or 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 statute for, inter alia, the purpose of supervising and regulating stock exchanges to the extent that it has powers of inflicting penalties for any breaches of the rules."

[27] Regarding the instant case however, both the TCA and the FCA are replete with provisions for the applicability of the FCA. It is true that the TCA was enacted subsequent to the FCA. However, there is no conflict between the Acts which would result in the TCA (the more recent legislation) impliedly repealing the FCA (the earlier legislation). Although the TCA specifically governs the transfer of licences and has sole responsibility for the procedure and requirements attendant upon such transfers, if the agreement is tainted by or result in any form of anti-competitiveness, then Section 17 of the FCA kicks in, in the absence of any expressed exemption.

[28] Forte P. (as he then was) in the **Jamaica Stock Exchange** case cited with approval, the following opinion of the US Court of Appeal in **Harold Silver v New York Stock Exchange** 373 US 341, 83 S. Ct 1246 (1963). Goldberg J, said:

"*Since the anti-trust laws serve, among other things, to protect competitive freedom, that is, the freedom of individual business units to compete unhindered by the group action of others, it follows that the anti-trust laws are peculiarly appropriate as a check upon anti-competitive acts of exchanges which conflict with their duty to keep their operations and those of their members honest and viable. Applicability of the anti-trust laws, therefore, rest 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 anti-trust laws without serving the policy of the Securities Exchange Act. Should review of exchange self-regulation be provided through a vehicle other than the anti-trust laws, a different case as to anti-trust exemption would be presented."*

"The Securities Exchange Act contains no express exemption from the antitrust laws or, for that matter, from any other statute. 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 favoured."

[29] Section 2 (4) of the FCA states that 'lessening of competition' includes hindering and preventing competition. Section 2 (5) of the Act states:

> "*the effect of competition in a market, shall be determined by reference to all factors that affect competition in that market, including competition from goods or services supplied or likely to be supplied by persons not resident or carrying on business in Jamaica."*

[30] The FTC and LIME contend that Digicel holds a dominant position in the market and the agreement results in an abuse of that position. If that assertion is justified, in my opinion the FCA becomes applicable.

Section 19 of the FCA states:-

> *"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."

The burden rests on the FTC and LIME to prove that Digicel holds a dominant position.

[31] Section 20 of the FTC provides an inexhaustive list of behavior which amounts to abuse of a dominant position. It 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 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 17(2) of the FCA lists the agreements that are likely or have the effect of lessening competition in a market.

Sub section (2) reads:

Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions 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)."

[32] It is evident from the wording of section 17 of the FCA that whether the lessening of competition is wittingly or unwittingly achieved, is immaterial. The Legislature's intent was to give the FTC jurisdiction in all cases which resulted in the lessening of competition. Section 17 was intended by the legislators to prevent uncompetitive practice. It has particularized, although not exhaustively, behaviour which amounts to a lessening of competition. Nothing contained in Section 17 of the FCA captures what has transpired between Digicel and Claro. Section 18(1) prohibits exclusionary provisions. It has not been alleged that the agreement contains any exclusionary provision. There is no allegation of any collusive behaviour between Claro and Digicel. The issue therefore remains whether the agreement to merge by the defendants in any

manner amounts to an abuse of its dominant position. At this juncture that issue falls outside the remit of this application.

[33] The issue whether the merger is actually offensive to competition is not before me. Therefore the arguments by counsel as to the approach to be taken in interpreting the statute will not be entertained at this juncture as it falls outside of the preliminary issue presented for my determination. I therefore will forbear from making any pronouncement in that regard.

[34] Mr. Hylton contends that LIME's case is *res judicata* as the arguments it has advanced are the same it advanced at the hearing of its application for judicial review, which were rejected by Sykes J and they have not proceeded with an application for leave to appeal therefrom.

LIME'S APPLICATION BEFORE SYKES J

[35] The application before Sykes J was for leave to apply for judicial review of the Minister's decision. LIME sought an order to quash the approval which was given by the Minister for the assignment of the Claro's licence, rights and control to Digicel. It also sought a declaration that the approval of the transaction by the Minister was unlawful and or that the Minister, in granting approval had improperly exercised his power. LIME further sought an order to compel the FTC to investigate the matter.

[36] It was the finding of that court that the Minister was empowered to grant the licence. The learned judge also found that LIME failed to support its contention that Digicel was in a dominant position and that it abused its position of dominance. He rejected LIME's proposition that there was sufficient evidence of the creation of a legal impediment by virtue of Section 11 of the TCA which entitled LIME to challenge the actions of the Minister or the FTC.

[37] An application for leave to apply for judicial review concerns the legality of the process and not the merit. In any event, in the instant case, LIME's challenge is not to

the Minister's exercise of power. The essence of this application is that the defendants have contravened the FCA by having as the effect or likely effect of their agreement, the substantial lessening of competition in the telecommunications marketplace. Assuming it can be successfully argued that the present application is tantamount to the application that was rejected by Sykes J, his rejection of that application was for insufficiency of evidence to ground LIME's application for judicial review.

[38] In the circumstances, the court holds that:

(1) The FTC has jurisdiction over the Telecommunications industry;

(2) Section 17 of the FCA applies in relation to agreements or transactions that fall under Section 17 of the TCA.

(3) Section 17 of the TCA applies to mergers and acquisitions such as the transaction between Digicel and Claro.

(4) Leave to appeal granted, if necessary.

((5) Costs to be costs in the claim.