



## FAIR TRADING COMMISSION

### CASE REPORT

Case No. 8197-22 – Misleading Advertising Claim against the Sunny Isle Brand of Castor Oil

Date: November 6, 2023

Investigating Team: Mrs. Susan Lawrence-Simms, Senior Legal Counsel  
Ms. Venessa Hall, Legal Officer

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#### **Background**

1. The Fair Trading Commission was advised by the National Compliance and Regulatory Authority (NCRA) that some products under the Sunny Isle Brand that contain castor oil have been advertised as “the only Jamaican black castor oil approved by the Jamaican Government”. This phrase is false as a list provided by Jamaica Promotions Corporations (JAMPRO), as of September 20, 2022, indicated that there were 42 registered exporters of Jamaican Black Castor Oil on JAMPRO’s exporter register list. In this regard, there is no single exclusive approved exporter of Jamaican black castor oil.
2. Further, the FTC was informed that the Bureau of Standards Jamaica (BSJ) wrote to Sunny Isle to remove the statement from their labels. Nonetheless, JAMPRO indicated that it continues to receive complaints from other legitimate Jamaican castor oil producers regarding Sunny Isle’s brand advertisement. An advertisement of concern was one located at Sangster International Airport from the Sunny Isle brand.
3. Sunny Isle is a registered trademark regarding hair oils, castor oil for cosmetic purposes, and body oils. The trademark is owned by JBC Distributors Inc., a company registered in the state of Florida, United States of America. The director and the Company’s secretary are both located in Florida.
4. On November 17, 2022, the FTC wrote to JBC Distributors outlining the allegations against them and the likelihood that the conduct may fall within the purview of the Fair Competition Act (“FCA”) specifically section 37 which speaks to misleading advertising.

5. In response, by a letter dated November 21, 2022, JBC Distributors indicated that at the beginning, they were the first to start exporting castor oil. However, they intended to update their labels and remove the phrase. Further, they denied the allegations regarding an advertisement at Sangster International Airport. It was also stated that as it related to its website the phrase had been removed.
6. However, checks by the FTC up to July 2023, the Sunny Isle Brand's labels continue to have the false claim, and these products were seen in stores in Jamaica. A visit to the website also showed the labels with the quote "the only Jamaican black castor oil approved by the Jamaican Government" appearing on the products.

### **Issues**

7. In industries like castor oil, where quality and origin are paramount, labels take on even more increasing importance, guiding consumers towards informed decisions while fostering fair competition and preserving the integrity of the market.
8. Misleading labeling poses a significant threat to both local and international castor oil markets. In the context of this investigation, the repercussions are (a) consumers may be deceived; and (b) a distortion in market dynamics. The products of other distributors of Jamaican black castor oil may be viewed as being inferior because of the false claim made by JBC Distributors Inc. Addressing misleading labeling is crucial for maintaining competition and safeguarding consumer welfare.
9. The FTC investigated whether the alleged conduct infringed any provision of the FCA. As a result, the Staff considered the following issues:
  - a. Whether the alleged conduct gives rise to an infringement of the FCA?
  - b. Whether the FTC has the jurisdiction to bring any action and for the hearing of the claim?

### **Analysis**

#### ***a. Whether the alleged conduct gives rise to an infringement of the FCA?***

10. The authority of the FTC is applicable in circumstances where an entity operating in the Jamaican market makes anticompetitive agreements or engages with others, whether inside or outside of Jamaica, to engage in conduct that breaches the FCA. The FTC may determine, regarding the entity operating in Jamaica, whether their conduct is in breach of the FCA. This is so as the FCA provides a comprehensive definition of what constitutes a market. Section 2 (5) states:

*"For the purposes of this Act, the effect on 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.”*

11. It is noteworthy that as a foreign company, JBC Distributors can only be considered to be present in Jamaica if it is carrying on business at a place within the jurisdiction.
12. JBC Distributors’ tagline displayed on their product labels is the centre of the complaint and raises the question of whether it may contravene section 37(1)(a) of the FCA which speaks to misleading advertising and states that:

*“A person shall not, in pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means –*

*(a) make a representation to the public that is false or misleading or is likely to be misleading in a material respect”*
13. In **The Fair Trading Commission v SBH Holdings Ltd and another**<sup>1</sup>, the learned judge K Harrison JA (Ag) reasoned that the following four things must be established to establish a breach of section 37(1)(a):
  - a. The person was in pursuance of a trade;
  - b. The person made a representation to the public;
  - c. The representation is false or misleading;
  - d. The representation was made for the purpose of promoting directly or indirectly the supply of goods and services.
14. The tagline of “the only Jamaican black castor oil approved by the Jamaican Government” is endorsed on several of JBC Distributors’ products and is evidence of the representation in contention. Arguably, the representation is false, as JAMPRO has indicated that they have not issued an exclusive license to any supplier regarding castor oil. Also, the products (with the labels) are available in multiple stores in Jamaica, and it is contended that a false representation has been made to the public.
15. Arguably, JBC Distributors’ conduct is likely to satisfy the test that the Court has established regarding whether section 37(1)(a) has been contravened.

### **Enforcement of the FCA**

16. Section 46 of the FCA stipulates that where the Court is satisfied based on an application by the Commission that a person has contravened a prohibition imposed in (this particular case) Part

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<sup>1</sup> SCCA No 92/2002

VII - Offences against Competition, the Court may exercise any of the powers in section 47. These powers include levying a penalty not exceeding \$5,000,000 or an injunction restraining the offending person from engaging in the conduct.

***b. Whether the FTC has the jurisdiction to bring any action and keep hearing of the claim?***

17. Notably, enforcement of the FCA requires filing a claim to be made in the Supreme Court of Jamaica. As JBC Distributors is in Florida, USA, it would require the FTC to ascertain whether the enterprise is present in Jamaica. This is important to determine whether the Supreme Court could exercise jurisdiction over the matter and is the proper forum for the hearing of the legal proceedings.
18. Notably, Courts usually assert jurisdiction over a defendant in one of three ways:
  - a. if the defendant is present in the jurisdiction (i.e., the country);
  - b. if the defendant voluntarily submits to the jurisdiction of the court; or
  - c. where the court allows service of court documents on the defendant outside of the jurisdiction<sup>2</sup>.
19. The Court of Appeal in **DYC Fishing v Perla del Caribe Inc**<sup>3</sup> affirmed the relevant test for whether a company is carrying on business in the country as follows<sup>4</sup>:

[46] There is a line of older cases speaking to residence as a requirement as opposed to the presence of a defendant in the foreign country at the time of the commencement of the proceedings as sufficient to ground jurisdiction. So far as a corporation is concerned, there are recent cases which speak to the “presence” of the corporation in ascertaining whether it is subject to the foreign court's jurisdiction. In some cases, in dealing with the question whether a foreign corporation is amenable to a domestic court, the words “reside” or “carrying on business” are used interchangeably. In **South India Shipping Corporation Ltd v Export-Import Bank of Korea [1985] WLR 585** at 589 Ackner LJ referring to these words, said:

*“Those expressions were used as convenient tests to ascertain whether a corporation had sufficient presence within the jurisdiction since generally courts exercise jurisdiction over the persons who are within the territorial limits of their jurisdiction.”*

[47] In **Adams v Cape Industries Plc**, the Court of Appeal, in addressing the question of jurisdiction of a foreign court, in respect of corporations, stated the test to be whether the corporation: is carrying on its own business at a definite and fixed place in the foreign country,

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<sup>2</sup> (2003) Winston Anderson, Elements of Private International Law, Chapter 4, page 121

<sup>3</sup> 2014 JMCA Civ 26

<sup>4</sup> At paragraphs 46 - 47

or is conducting its own business through an agent who has been carrying on the corporation's business at or from some fixed place of business and the business has been in operation in excess of a minimum period of time. The court further stated that if the representative of the corporation has the authority to bind its principal, this is exceedingly strong evidence supporting the corporation's presence in the foreign country, but where the parties shook hands, signed the relevant document, or gave other indication of consent, notwithstanding that one or both parties are foreigners. Contracts made by post are concluded in the country where the letter of acceptance is posted. By contrast, in the case of a contract made by 'instantaneous communication' the contract is made in the country in which the acceptance of the offer is received.

20. JBC Distributors carry on business in Jamaica, in the sense that the enterprise's products are sold in various stores across the island. However, there is no evidence to indicate that the enterprise has established a place of business in the jurisdiction or is carrying on business through an agent (and this agent would have to have the authority to enter contracts that bind JBC Distributors to constitute presence as required by case law). Checks at the Companies Office of Jamaica indicate the company is not registered in Jamaica. Also, without evidence of an agent, it would be a challenge for the FTC to undertake enforcement against JBC Distributors unless JBC Distributors voluntarily submit to Jamaica's jurisdiction. Otherwise, the FTC would have to persuade the Jamaican courts to grant permission for the service of the court documents on JBC Distributors in Florida, USA.
21. Rule 7.2 of the Civil Procedure Rules ("CPR") provides that a claim form may be served out of the jurisdiction only if Rule 7.3 or 7.4 allows and the court gives permission.
22. To obtain service outside of the jurisdiction, FTC would have to seek to rely on Rule 7.3(b), which states: "a claim is made for an injunction to do or refrain from doing some act within the jurisdiction." The other Rules about service outside the jurisdiction are not applicable in the circumstances. It is noteworthy that section 47 of the FCA enables the Court to grant an injunction where it finds that there has been a contravention of the FCA.

### **Steps Taken**

23. The FTC communicated with JAMPRO and NCRA about its position and jurisdiction to address the complaint. Also, the FTC suggested that the agencies explore whether they are empowered to take any steps to remedy the concerns raised by the complaint.
24. The FTC intervened in the matter through dialogue with JBC Distributors, who indicated that it had taken the following steps to amend its labels:

- (i) Within Jamaica, it had initiated the exchange of products with labels of concern for products with labels without the tagline;
- (ii) Its website had been updated with new images that do not include the tagline.

### **Conclusion**

- 25. JBC Distributors' conduct may likely be in contravention of section 37(1)(a) of the FCA, as there is evidence that the advertisement and labels falsely represent that it is the sole exporter of castor oil products from Jamaica. A finding/ruling of whether an enterprise is in contravention of the FCA is solely within the remit of the Court.
  
- 26. JBC Distributors remedied the concerns raised by the complaint by removing the statement from its labels and its website.
  
- 27. The FTC closed the matter.