



[2023] JMCC COMM. 24

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2022CD00092

IN THE MATTER OF THE FAIR COMPETITION ACT

AND

**IN THE MATTER OF AN APPEAL PURSUANT TO
SECTION 49 OF THE FAIR COMPETITION ACT AND PART
60 OF THE CIVIL PROCEDURE RULES, 2002 AGAINST
FINDINGS OF THE FAIR TRADING COMMISSION**

BETWEEN	SUPREME VENTURES LIMITED	1ST APPELLANT
AND	PRIME SPORTS (JAMAICA) LIMITED	2ND APPELLANT
AND	FAIR-TRADING COMMISSISON	RESPONDENT

Mr. B. St. Michael Hylton KC and Mr. Kevin Powell instructed by Hylton Powell, Attorneys-at-law for the Appellants and Ms. Katherine Francis, legal counsel for the Appellants

Mr Emile Leiba and Ms Samantha Grant instructed by Dunn Cox, Attorneys-at-law for the Respondent and Mrs Susan Lawrence Simms, legal representative of the Respondent

IN CHAMBERS

Heard: 22nd March, 23rd March and 30th May, 2023

Appeal against the findings of the Fair Trading Commission- Appellate jurisdiction of the Supreme Court- sections 7, 19, 20, 21, 22 and 49 of the Fair Competition Act- Part 60 Civil Procedure Rules, 2002 - anti-competitive practices-whether hearing should have been held- whether sufficient opportunity to be heard afforded- whether an expressed promise or policy establishes a legitimate expectation- whether there is a breach of procedural fairness

STEPHANE JACKSON-HAISLEY J.

[1] Fair Competition is essential to the development of businesses and economic growth. Without it businesses do what they please, prices are higher and there is no incentive to improve standards. With competition, businesses strive to provide customers with better products and services and in doing so maintain higher standards and cultivate growth in the economy. In recognition of the importance of fair competition to the economic development of Jamaica, the Fair Competition Act (“the Act”) was created in 1993.

[2] The objectives of the Act include encouraging competition in the conduct of trade and business and ensuring that all legitimate business enterprises have an equal opportunity to participate in the Jamaican economy. In order to carry out its objectives, section 4 of the Act established the Fair Trading Commission (FTC) which is the administrative body responsible for implementing the Fair Competition Act. The functions of the FTC are set out in section 5 of the Act as follows:

5. (1) The functions of the Commission shall be-

- a) to carry out, on its own initiative or at the request of any person such investigations in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;*
- b) to carry out such other investigations as may be requested by the Minister or as it may consider necessary or desirable in connection with matters falling within the provisions of this Act;*
- c) to advise the Minister on such matters relating to the operation of this Act, as it thinks fit or as may be requested by the Minister;*

- d) *to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise; and*
- e) *to carry out such other duties as may be prescribed by or pursuant to the Act.*

[3] By virtue of section 7(1) of the Act, the FTC has the power to carry out investigations in relation to the conduct of businesses in Jamaica to determine if any enterprise is engaging in practices that are in contravention of the Act and the extent of such practices. Such investigations may be initiated by the FTC itself or following a request by the Minister or any other person. The FTC has the power to obtain any information that it considers necessary in order to conduct the investigation as well as the power to summon and examine witnesses; to call for and examine documents; and to administer oaths. Section 7(2) specifically provides for the Commission to hear orally any person who in its opinion, will be affected by an investigation under the Act or hear a person who has made a written request for a hearing. This person has to show that he is an interested party likely to be affected by the result of the investigation or that there are particular reasons why he should be heard orally. Section 21 of the Act recognises the power of the Commission to arrive at findings and provides as follows:

21. (1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall—

- a) *notify the enterprise of its finding; and*
- b) *direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.*

(2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.

(3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.

[4] Section 49 provides:

- 1) *Any person who is aggrieved by a finding of the Commission may within fifteen days after the date of that finding, appeal to a Judge in Chambers.*
- 2) *The Judge in Chambers may—*
 - a) *confirm, modify or reserve the findings of the Commission or any part thereof; or*
 - b) *direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates.*
- 3) *In giving any direction under this section, the Judge shall—*
 - a) *advise the Commission of his reasons for doing so; and Appeals against finding of Commission.*
 - b) *give to the Commission such directions as he thinks just concerning the reconsideration or otherwise the whole or any part of the matter that is referred back for reconsideration.*
- 4) *In reconsideration of the matter, the Commission shall have regard to the Judge's reasons for giving a direction under subsection (1) and the Judge's direction under subsection (3).*

[5] This matter is an appeal against the findings of the Commission in a report titled “Fair Trading Commission v Supreme Ventures (Jamaica) Limited dated February 17, 2022 (“the Report”). The 1st Appellant Supreme Ventures Limited (SVL) and the 2nd Appellant Prime Sports (Jamaica) Limited (PSL) filed a Fixed Date Claim Form on March 7, 2022 naming the FTC as the Respondent. The Fixed Date Claim Form seeks declarations, directions and orders as follows:

1. The findings of the Respondent, the Fair Trading Commission contained in report in Case No. 8168-21: titled Fair Trading Commission v Supreme

Ventures (Jamaica) Limited dated and issued February 17, 2022 be set aside.

2. The conduct of the Appellants the subject of the Final Report is not likely to and does not breach sections 19-21 of the Fair Competition Act.
3. Costs of the claim to be awarded to the Appellants.
4. Such further or other directions or orders as this court may consider necessary or appropriate.

[6] The orders are sought on several grounds which can be summarized in this way. The Appellants allege that the Respondent has a duty and obligation to allow persons it is investigating an opportunity to be heard before arriving at a decision or in the alternative that they had a legitimate expectation that if the Respondent was investigating them, it would allow them an opportunity to be heard before arriving at a decision. They pointed out that the Report concluded among other things that the 1st Appellant **“being dominant in the market for lotteries in Jamaica, is engaged in abusive conduct which restricts the expansion of competitors and the entry of potential competitors in a manner that has had or is having the effect of lessening competition substantially in the market”**. They go on to articulate that the Respondent breached its duty to them when it arrived at the conclusions in the Report without allowing them an opportunity to be heard. Further, that the conclusions in the Report are contrary to and or are not supported by the evidence or the provisions of the Act. They are now exercising their rights under section 49 of the Act as they are aggrieved by the findings of the Respondent and hereby appeal against the findings in the report.

[7] In support of the Fixed Date Claim Form there are four affidavits of Katherine Francis. In the first affidavit, Ms. Katherine Francis sets out the chronology of events leading up to the point of filing this claim commencing with a letter dated August 3, 2021 from the Respondent informing the Appellants that it was conducting an investigation into their conduct in relation to the provision of lottery games. This first letter was followed by a series of letters between the parties

leading to a meeting in relation to the investigation. Thereafter followed the findings made in the Report which were adverse to the Appellants including that their conduct is likely to breach sections 19 to 21 of the Act which prohibit an enterprise from abusing its dominant position in the market. She is of the belief that the Respondent has a duty and obligation to allow persons it is investigating an opportunity to be heard before arriving at a decision and that the Appellants had a legitimate expectation that the Respondent would allow them an opportunity to be heard on all aspects of any investigation before it arrived at a decision. She further averred that the Respondent did not allow them to be heard or to comment on the draft report before arriving at its conclusions, issuing and publishing a final report. Further that there are findings in the Report which are contrary to and or are not supported by evidence.

[8] The letters referred to are exhibits in the matter. They are as follows:

- (i) Letter dated August 3, 2021 from FTC to SVL informing them that the FTC is investigating an alleged breach and requesting certain information regarding termination of contracts including how many agents' contracts were terminated between January 2015 and December 2019 and between January 2020 and June 2021 and the basis upon which the contracts were terminated.
- (ii) Letter dated September 24, 2021 from SVL to FTC providing the requested information regarding termination of contracts including that between January 2015 and December 2019 a total of 555 contracts were terminated and that between January 2020 and June 2021 a total of 206 contracts.
- (iii) Letter dated November 21, 2021 from FTC to SVL attempting to ascertain whether the categories of contracts terminated were terminated by agents, or by SVL and whether termination emanated from a breach of contract or as a result of an inability to satisfy regulations. Further that additional

information be provided as to the name of the agent, the date the contract was entered into and the date of termination.

- (iv) Letter from SVL to FTC dated December 31, 2021 providing a list of contracts which were terminated as well as the dates of termination.
- (v) Letter dated February 18, 2022 from FTC to SVL enclosing the Final Investigation Report of the investigation.

[9] In the second affidavit, Ms Francis pointed out that on February 15, 2022 before the publication of the Report, the Appellants became aware, through a query from the media, that the Respondent published a draft version of the Report on its website following which on February 16, 2022 the Jamaica Observer published an article titled “Take the appropriate measures” which commented extensively on the draft version of the Report. By way of letter dated February 16, 2022, the Appellants’ attorneys demanded a withdrawal of the draft report and its removal from the Respondent’s website and the Respondent responded by letter dated February 24, 2022 indicating that it was inadvertently uploaded to its website and had been subsequently removed. She pointed out that the Respondent made a materially incorrect finding in the Report when it concluded that the Appellants had secured approval to offer odds of up to 50:1 as whereas the Appellants had applied to the Betting Gaming and Lotteries Commission for this approval it was not granted.

[10] The third affidavit was primarily a response to the affidavit filed on behalf of the Respondent. It indicated *inter alia* that several of the documents exhibited by Mr Harriot which formed a part of their investigations were not shared with the Appellants and that the Appellants were not given an opportunity to respond to them. Further, that at no point in time did the FTC inform the Appellants that they were investigating whether the 1st Appellant’s seeking and obtaining permission to offer pay-outs of up to 50:1 for its Cash Pot game was an abuse of its dominant

position and the Appellants were never aware that this issue was a subject of the investigation. They were therefore deprived of an opportunity to respond to this aspect of the investigation. In Ms. Francis' fourth and final affidavit she reiterated much of what was said in the first affidavit.

- [11] Mr. Xesus Johnston, the Chief Executive Officer of the 2nd Appellant swore to an affidavit filed on February 20, 2023. He outlined the nature of the operations carried out by Prime Sports and spoke to the 50:1 odds. He disagreed with the conclusion of the FTC regarding the 50:1 odds pricing strategy and pointed out that it would not necessarily be unprofitable or irrational for the Appellants to offer 50:1 odds as this would depend on the payout percentage. He observed that the BGLC report relied on only two weeks' worth of data in arriving at their conclusion and pointed out that this is very limited. He concluded by saying that higher odds usually generate higher sales.

THE RESPONDENT'S CASE

- [12] The Respondent also relied on four Affidavits in response to the Appellants claim, two of which came from Mr. David Miller, the Executive Director of the Respondent. The remaining affidavits were sworn to by Mr. Kevin Harriott, the Respondent's Competition Bureau Chief. In the first Affidavit of David Miller in response to the Fixed Date Claim Form filed June 29 2022, he stated that the FTC received a complaint from one of the 1st Appellant's agent after which a letter was received from one of SVL's competitors requesting that an investigation be carried out for anti-competitive conduct. Another three complaints were received from the 1st Appellant's agents and thereafter, an investigation was conducted of all complaints. During the course of its investigations, certain information was requested from the 1st Appellant however, the response was generic. Mr. Miller also stated that a virtual meeting was held with the officers of the 1st Appellant on November 2, 2021 and at no point was a request made for a formal hearing to give

further information in relation to the investigation. He stated further that after the investigation a draft report was inadvertently posted on the FTC's website. Upon discovering the error, the report was removed and a publication posted in the media advising of the premature upload of the draft Report.

- [13]** In the first Affidavit of Kevin Harriott also filed June 29, 2022, he stated that the FTC Report sought to challenge the actions of the 1st Appellant which were likely to be in breach of the Act. He outlined the process through which the Final Report was conducted and stated that an assessment was done which determined that the 1st Appellant had a 97% dominance in the market. The second Affidavit of David Miller filed March 13, 2023 was in response to Katherine Francis' fourth affidavit and indicated that the investigation was not conducted in accordance with the FTC's Guideline to Reviewing Mergers, Acquisitions and Joint Ventures as indicated by Ms. Francis. The second Affidavit of Kevin Harriott also filed March 13, 2023 was in response to the third Affidavit of Katherine Francis where he disagreed with her allegations of the timing at which the approved odds became public.

THE REPORT

- [14]** The Final Report dated February 17, 2022 revealed that the 1st Appellant abused its dominance in the market which deterred competitors from engaging in competitive conduct in the lottery market. It showed that during the period 2020-2021, the 1st Appellant consistently requested approvals for unprofitable odds just after lottery operator licences were granted to competitors to the market. The last request made on April 12, 2021 to offer payouts in the range of \$26:1- \$50:1 for its Cash Pot game was denied on the basis that rates higher than \$36:1 would be unprofitable and Cash Pot would no longer be considered a game of chance since there exists a risk-free winning strategy. It revealed that SVL would pay out 38.89% more in prizes than it collected in wagers if players employed the risk-free strategy

and if that strategy is employed, it would restrict competition and therefore lower the payouts offered to players.

[15] The Report also revealed that lottery games are sold as a secondary line of business at bars, corner shops or petrol stations and is not a standalone income for retailers. Although denied, SVL terminated contracts with some of its retailers on the basis that they were also distributors for competitors. The Report found that SVL engaged in conduct with the objective and/or of limiting the entry and expansion of competitors in the market and that the reason for implementing rates above \$36:1 would make no business sense as it would be unprofitable. The only reason to secure such approval would mean there is no intention to implement the unprofitable rates.

[16] The Report concluded that SVL abused its dominant position through the restriction of competitors' access by strategically terminating and/or threatening to terminate agreements with retailers who also engaged in services of competing lottery operators. The abusive power had the effect of lessening competition by discouraging expansion and entry into the market by seeking approval for unprofitably high payouts. It was determined that the challenged conduct is likely to breach sections 19-21 of the Act and accordingly the case was being pursued as a possible breach of sections 19-21 of the Act.

SUBMISSIONS ON BEHALF OF THE APPELLANTS

[17] Kings Counsel Mr. Michael Hylton advanced the submissions, on behalf of the Appellants identifying two grounds, firstly that the FTC did not give the Appellants a proper or sufficient opportunity to be heard before arriving at its findings in the Report, in breach of the FTC's statutory duty and/or the Appellants' legitimate expectation that it would have been allowed that opportunity. Further, that the

conclusions in the Report are contrary to and/or are not supported by the material available of the provisions of the Act.

- [18] With respect to the alleged breach of the right to be heard, he relied on Halsbury's Laws of England Volume 61A (2018) at paragraph 42 to ground his position and also placed reliance on authorities which recognise that "a party must not be precluded from putting his case adequately through being misled as to the basis on which the tribunal found its decision." Kings Counsel submitted that the evidence before the court indicates that the FTC failed to act with procedural fairness towards the Appellants.
- [19] He contended that the Appellants did not have the opportunity to be heard since the FTC did not tell them what it was investigating. They were investigating specific allegations which they did not disclose to the Appellants, in particular the 50:1 odds was ever mentioned to them. The fact that they were receiving information from a third party was all the more reason why they should share the information because competitors may have a motive.
- [20] Counsel argued that the actions of the FTC are similar in conduct to conduct criticised by the House of Lords in **Secretary of State for the Environment v Fairmount Investments Ltd and Southwark London Borough Council** [1976] 1 WLR 1255 where the local authority exercised statutory powers to compulsorily acquire certain houses in order to demolish them on the basis that they were unfit for human habitation. An inspector was appointed to conduct a public inquiry and at the conclusion, his report stated that the settlement seems to be due to the foundations having not been dug deep enough in clay subject to expansion and contraction. The House of Lords dismissed the Secretary of State's appeal on the basis that it would be contrary to natural justice to uphold the order because the company did not have an opportunity of dealing with the grounds on which the order for compulsory acquisition had been upheld. King Counsel submitted that for the same reason the House of Lords set aside the decision in **Fairmount Investment Ltd**, this Court should also set aside the FTC Report.

- [21] He contended that the FTC's actions were unfair as the Appellants had a legitimate expectation that the FTC would have proceeded in the same way it had in the past and it failed to do so. Reliance was placed on the doctrine of legitimate expectation as explained in the Halsbury's Laws of England and the authority of **R v Secretary of State for the Home Department, ex p Ruddock and others** [1987] 1 WLR 1482, the essence of which is that the doctrine imposes a duty to act fairly. Having taken the approach in a previous matter of sharing a preliminary report with them and giving them an opportunity to respond before finalizing it, they had a legitimate expectation that that approach would have been followed here. In response to the Respondent's submission that one previous investigation could not establish a practice, he contended that every practice starts with one act and this is not one involving another party. They had previously set a precedent in one other matter which was similar in that the same powers were being called upon, and there was in this previous matter, an implied representation which is sufficient for legitimate expectation.
- [22] Kings Counsel also articulated that the FTC's findings are flawed as it is not supported by the material it had and in fact they arrived at erroneous conclusions regarding the distribution channels and the 50:1 odds. Further that they relied on the BGLC Report which is questionable.
- [23] He took issue with the Respondent's submission that they did not arrive at a decision that the Appellants had breached the provisions of the Act and argued instead that it is clear from the Respondent's findings and decision that they were saying that the Appellants were in breach of the Act. He also took issue with the submission that the directions are not enforceable under the Act and only the Court's directions will be. He contended that section 47 of the Act sets out the powers of the Court and the consequences and effects of findings by the Commission and the consequences are not just theoretical as they can have adverse findings and this hinges on the duty to be heard.

[24] He took issue with the Respondent's submissions that the Court has no power to set aside the findings of the FTC. He asked the Court to find that the word "reserve" used in section 49 (2) is an error on the part of the legislators and should instead be "reverse". This was the way in which the Court dealt with it in the Court of Appeal decision of **Jamaica Stock Exchange v Fair Trading Commission**, SCCA No. 92/97. It is clear therefore that the Court has the power to set aside the findings of the FTC.

[25] Kings Counsel also drew a distinction between matters such as the instant matter which is an appeal and judicial review claims as the instant claim is one grounded in statute. He pointed out that in judicial review claims the grounds and reliefs are limited unlike the instant case and he relied on the case of **The Northern Jamaica Conservation Association & Ors v The Natural Resources Conservation Authority & Anor**, HCV 3022 of 2005 to strengthen his point that Wednesbury's unreasonableness is not relevant here. Kings Counsel in his response contended that the Court has no power on an appeal to make a declaration.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[26] Counsel Mr. Emile Leiba on behalf of the Respondent submitted that the findings of the FTC ought not to be disturbed but instead they should be confirmed. Counsel examined the word used in section 49(2) which on the face of it is "reserve" and suggested that where there is some ambiguity in the legislation it is open to read it in a way that makes sense. The meaning of "reserve" is not to move forward and he agreed that there would be very limited benefit to making such an order but cautioned that that is not a reason to re-write the section 49(2) provisions. Despite amendments to the Act in 2001 there was no amendment to this provision.

[27] Counsel also contended that the duty rests with the Appellants to satisfy the Court on a balance of probabilities that there exists an expressed promise or a policy,

practice or conduct to a class of persons to which the Appellants are apart, and that the Appellants are entitled to rely on the continuation of the policy. For this proposition Counsel relied on **Northern Conservation Association v The Natural Resources Conservation Authority and Anor** Claim No. HCV 3022 of 2005 at paragraph 28 where Sykes J (as he then was) analysed the Court's role where in issue is a promise as to how a public body would behave in the future when exercising its statutory function. Citing Regina v North and East Devon Health Authority, Ex parte Coughlan [2001] QB 213 he states at paragraph 29:

“55 In considering the correctness of this part of the judge’s decision it is necessary to begin by examining the court’s role where what is in issue is a promise as to how it would behave in the future made by a public body when exercising a statutory function. In the past it would have been argued that the promise was to be ignored since it could not have any effect on how the public body exercised its judgment in what it thought was the public interest. Today such an argument would have no prospect of success, as Mr Goudie and Mr Gordon accepts.”

[28] Counsel further relied on the authority of **Dale Austin v The Public Service Commission et al** [2022] JMSC Civ 55 where the Court examined the law governing the legitimate expectation. Paragraph 73 states:

*“[73] Mr. Wood addressed the question of legitimate expectation. He referenced paragraphs 71 to 73 of the case of **Salada Foods Jamaica Limited v Jamaica Agricultural Commodities Regulatory Authority** [2020] JMSC Civ 198 where Nemhard J summarized the relevant principles as here produced:*

*The concept of a legitimate expectation arose in the case of **Council of Civil Service Union and Ors v Minister of the Civil Service**. Lord Fraser opined that a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which a claimant can reasonably expect to continue.*

[72] In the broadest terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts. The principle cannot be invoked if, or to the

extent that, it would interfere with the public body's statutory duty. Neither can there be a legitimate expectation which is contrary to law and which the authority has no power to grant.

[73] The Court accepts that, in order to make out a case for legitimate expectation, there must be a clear and unambiguous promise or representation made which is within the power of the Authority to grant. In the instant case, there is no power stated in the Act or in the Regulations which enables the Authority to waive the requirements of Regulation 19(1) of the Regulations.

[74] This ground too may be briefly addressed. Mr Wood submitted that the applicant has not presented before this court any evidence of any representation made to him, whether by word or by conduct regarding any prospect of promotion."

[29] Mr. Leiba drew the Court's attention to **Regina v Secretary of State for the Home Department, ex parte Doody** [1994] 1 AC 531 which outlines that:

"(1) an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.....(5) Fairness will require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification or both. Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interest fairness will very often require that he is informed of the gist of what he has to answer."

[30] Counsel articulated that during the investigatory stage, the aim is to conclude whether there is in fact a case for the Appellants to answer and this is what was answered in the Final Report. It is only after the notification of this finding that the Appellants' right to be heard could be invoked.

[31] The Report at its lowest contains a significant degree of analysis of facts and the conclusions based on expert analysis.

[32] He submitted that there was no breach of natural justice principles and insufficient evidence for the Court to find that the Report was so flawed that its conclusions should be reversed and the Court make a contrary finding. In order to succeed in

this, the Appellants would have to establish that the Report was so flawed so that its conclusions could not be maintained.

ISSUES

[33] Taking into account the material before me, the submissions advanced along with the prevailing legal principles, I am of the view that the issues to be decided are as follows:

- i. Whether the Court has the power to grant the reliefs requested?
- ii. Whether the Respondent gave the Appellants a proper or sufficient opportunity to be heard? If not, was this in breach of its statutory duty or the Appellants' legitimate expectation that they would be allowed the opportunity to be heard?
- iii. Whether the conclusions in the Report are contrary to the Act and/or are not supported by the evidence or are they flawed?
- iv. What orders should the Court make?

DISCUSSION

Whether the Court has the power to grant the reliefs requested?

[34] Before proceeding to address the reliefs requested, it is necessary to set the stage under which these proceedings are brought and to examine the ambit of the Court. Part 60 of the Civil Procedure Rules, 2002 (CPR) governs appeals to the Court from any tribunal or person other than by way of case stated and sets out the procedure to be followed where there is an appeal to the Supreme Court. CPR Part 60.2 provides that the appeal is commenced by issuing a Fixed Date Claim

Form setting out the grounds of appeal and including the decision against which the appeal is made as well as the finding of fact or law which the Claimant seeks to challenge. The filing of the appeal does not operate as stay of proceedings unless the Court or tribunal whose decision is being appealed so orders pursuant to CPR Part 60.3. Under Part 60.8(4) the Court may give any decision or make any order which ought to have been given or made by the tribunal or person whose decision is appealed. These are general provisions and so must be read in conjunction with the provisions of the Fair Competition Act which makes specific provisions in relation to appeals from the Fair Trading Commission.

[35] Under the Act, the Court is empowered to hear appeals by virtue of section 49 of the Act which provides that any person who is aggrieved by a finding of the Commission may, within fifteen days after the date of that finding, appeal to a Judge in Chambers who may:

(a) Confirm, modify or reserve the findings of the Commission or any part thereof, or

(b) Direct the Commission to reconsider, either generally or in respect of any specified matter, the whole or any specified part of the matter to which the appeal relates.

[36] The reliefs requested are described in the Fixed Date Claim Form as declarations, directions and orders. The request that the findings be set aside could be subsumed under orders and the request that “the conduct of the Appellants the subject of the Final Report is not likely to and does not breach sections 19 to 21 of the FTC” could fall under a declaration. The orders sought are consistent with the section 49 provision which gives the Court the power to confirm, modify, reserve or to direct a reconsideration.

[37] It has been argued on behalf of the Appellants that the reference in section 49(2) to “reserve’ is an error and should in fact read ‘reverse’ and that that is consistent

with the wording used in the **Jamaica Stock Exchange** case where in referring to this provision at page 27 of the judgment the word “reverse’ as opposed to ‘reserve” was used. This is in fact so however, this was done without the Court making any comments on this change of word and so could not be regarded as binding on any subsequent court. Although the use of the word ‘reserve’ does not seem to fit within the context, I would not venture to say that its use results in an absurdity. It is not for this Court to substitute that word for another. That would be seeking to introduce an aspect to the law that is absent from it. That is a matter for legislators and not for the Court.

[38] It has also been argued that the Court has no power to set aside the decisions of the FTC. Although the word used in the Statute is not set aside, the question is whether setting aside could be subsumed under one of the other words used. Perhaps the only word used that could contemplate any setting aside would be to modify. In terms of making a declaration, this is not specifically provided for in the Act but there is in the Act the power to direct reconsideration. If the Court were to form the view that the findings in the Report were inaccurate, instead of making a declaration, the Court could act squarely within the provisions of the Act and direct the Commission to reconsider the matter.

[39] Counsel for the Respondents relied on the decision of **Northern Jamaica Conservation Association** which addressed the approach of the Court in reviewing the actions of public bodies in the exercise of their statutory duties, to support the argument that the findings of the FTC cannot be set aside. At paragraph 16 Sykes J (as he then was) examined how a public body should behave when exercising its statutory function and made reference to the *Wednesbury* unreasonableness which allows the court to consider the issue of whether the Respondent made a decision that was so unreasonable that no reasonable decision maker could have made it. That case however was one of judicial review and so is clearly distinguishable.

[40] The remedies available upon judicial review usually include declarations and mandamus as well as the power to direct a reconsideration and so appear to be similar to the remedies available under section 49(2) hence the fine distinction here in these proceedings but it is a distinction nonetheless worthy of note. Under the judicial review process the Court would not substitute what it thinks is the correct decision. Under the appellate process, the court has the power to substitute the correct decision.

[41] Judicial review is a process by which a court reviews a decision made by a public body to determine the lawfulness of the decision and so is concerned not so much with the decision but rather with the decision-making process and is limited to the examination of the lawfulness of the decision. An appeal allows room for the appellate court or body to stand in the shoe of the original decision maker. The appellate process is concerned with the decision made by the Court or tribunal and whether the body got it right based on the material within their possession and the provision of the law and so the Court has to determine whether there is sufficient evidence to support the decision and whether there was a correct application of the law.

[42] I am of the view that unlike in judicial review cases where the grounds are limited, this is not the case here. The principle of Wednesbury unreasonableness is not applicable to the instant case, it is not a question of whether the decision was unreasonable as the Court has wide powers to determine both procedural and substantive challenges to the finding of the Commission. I agree with the arguments made by Kings Counsel in respect of the considerations for this Court and accept that I am empowered to set aside the findings of the Commission and the power to grant the remedies sought if the circumstances justify it.

Whether the Respondent gave the Appellants a proper or sufficient opportunity to be heard and if not, was this in breach of its statutory duty or the Appellants' legitimate expectation that they would be allowed the opportunity to be heard?

- [43] The fact that there was no hearing is not in dispute. Although the Respondent wrote to the Appellants advising them of the investigation into an alleged breach of the Act and eliciting responses from them to which the Appellant responded by way of letters, they were never given the option of attending a formal hearing into the matter. They were also not made privy to the full extent of the investigations being conducted in that they were not advised of the investigations concerning the 50:1 odds, nor were they provided an opportunity to respond to that aspect of the investigation either in writing or at a hearing.
- [44] Kings Counsel has emphasized that they are not suggesting that they should have been given a hearing but rather that they were not allowed a sufficient opportunity to be heard in that they were not informed of all the allegations against them and all the issues that were the subject of the investigation and so were denied the opportunity to make representations prior to the finalization of the Report as had been done in another matter.
- [45] The question that follows is whether in acting as they did the Respondent acted in breach of their statutory duty. It goes without saying that it is necessary for decisions makers to adhere to procedural fairness in making decisions. They should ensure that fair and proper procedures are used and this is especially so where there is the possibility that a decision adverse to a party can be made. The essence of procedural fairness is captured in the excerpt from the Halsbury's Laws of England, that Kings Counsel referred to, as follows:

“A person or body determining a dispute between parties must give each party a fair opportunity to put his own case and to correct or contradict any relevant statement to the contrary. A corresponding duty may rest upon an authority notwithstanding that its inquiry or decision relates to the affairs of one party only, or that the issue arises only between itself and a single party. Whether a right to an oral hearing, as opposed to a right to make written representations, arises will depend on the circumstances of the case. In some situations, fairness will require a deciding body to take the initiative in inviting the interested parties to submit representations to it.”

[46] It is to be noted that in some cases procedural fairness requires that a hearing is conducted. The Fair Competition Act contemplates this and under section 7 empowers the Commission in the course of their investigations to *inter alia* summon and examine witnesses, call for and examine documents, administer oaths. Section 7(2) gives the Commission the power to hear orally any person who in its opinion will be affected by an investigation, however, by use of the word may in section 7(2) it gives the Commission a discretion to hear orally any person who in its opinion will be affected by an investigation under this Act but mandates the Commission to hear a person where the person makes a written request for a hearing. This is evident in the use of the word “shall” in respect of the person who makes a written request as opposed to may in the former section. Therefore, on a literal interpretation of this provision the Commission is not mandated to hear any person orally who does not make a request.

[47] This section presupposes that it is not in all cases that there will be a hearing and perhaps with good reason, this being the investigative stage. In this case, there was no hearing conducted as the investigations proceeded, it would appear, from written documentation received. The Commission was well within their statutory right to proceed in this fashion. In support of this position is the Court of Appeal decision of **Jamaica Stock Exchange** where the Court at pages 33 to 37 outlined the nature of the investigatory powers of the Commission and determined the extent of the right to be heard during the investigatory process under the Act. Specifically, at page 35 the following was said.

“It appears that the FCA permits the Commission to conduct its investigation without a hearing and may do so without hearing from a person who may be affected unless that person makes a written request to be heard. A possible result could be, if the provisions are strictly adhered to, that the Commission could conduct its investigation, purely on written documents and without hearing from persons who may be affected. Though(sic) it can be inferred from the provisions of Section 7 that a hearing could be held in the complaints, it nevertheless does not make a hearing compulsory except where requested by an affected party and consequently empowers the Commission to arrive at its conclusion without such a hearing. Section 8, would not contradict this inference as it only

speaks to hearings being in public, a provision which would only come into effect if there is a hearing.”

[48] The full extent of the power bestowed on the Commission has not been utilized since the decision of the Court in the **Jamaica Stock Exchange** case and was not utilized in this case because of the Court of Appeal’s decision that to do so would be a merger of investigating powers with adjudicating powers which would be a clear breach of the rules of separation of powers.

[49] In the instant case what was being conducted was not a hearing but rather an investigation. The investigation featured a two pronged component and so will be assessed under the headings The Distribution Channels: Termination of Retail Contracts and Unprofitable Odds: The 50:1 odds.

The Distribution Channels: Termination of Retail Contracts

[50] This aspect of the investigation emanated primarily from a complainant who operated as an agent and who received a Notice of Termination of his Agreement with Supreme Ventures and observations made of significant change in the terms and conditions under which the Appellants engaged independent retailers. The changes were observed to be linked to the entrance into the market of other lottery operators.

[51] The Respondents wrote to the Appellants advising them of an investigation into an alleged breach of the Act, outlining the possible breaches and made certain queries concerning certain alleged anti-competitive practices and the Appellants responded. The complaint made to the Respondent was in writing, they were under no obligation to disclose the full extent of the complaint made, but they wrote to them and provided them an opportunity to respond to the concerns raised on this issue and to respond to specific questions. The Appellants would therefore have been on equal footing with the complainant or informant as they also were not heard orally but rather it was the contents of their letters and which were taken into account in arriving at a decision.

[52] Apart from writing to the Appellants outlining their investigation and requesting information from them, the Senior Vice President of the Appellants was invited to and attended a meeting with the FTC on November 2, 2021 and so had the opportunity to voice any concerns had. The Respondent was under no obligation to conduct any hearing and the Appellants being well aware of this investigation, if they felt that they needed to respond further, could have requested a hearing. This is precisely what is within the contemplation of section 7(2). In light of that, I do not agree that the Appellants did not have an opportunity or sufficient opportunity to be heard.

Unprofitable Odds: the 50:1 odds

[53] With respect to the allegations concerning the 50:1 odds, the situation is somewhat different so has to be carefully analysed. This investigation emanated from a request from the BGLC for an investigation into potential anti-competitive practices leading to the FTC meeting with the BGLC and obtaining certain documents including a report.

[54] According to the Respondent this aspect of the investigations also stemmed from observed conduct of the Appellants coinciding with the BGLC's public announcement in July and August 2020 of the pending entry of two lottery operators. They observed significant changes in approved pay-out odds of Supreme Ventures' pick 1 lottery games (Cash Pot) and the terms and conditions under which Supreme Ventures engaged independent retailers to distribute its games, relative to the period prior to BGLC's announcement. In addition, the BGLC wrote to them regarding their concerns about higher pay-outs and its impact on the competition in the market. These concerns arose from the letters written by Ms. Katherine Francis to the BGLC seeking the approval to offer higher pay-outs.

[55] The FTC did not advise the Appellants of the full scope of their investigations. It was in the letter dated February 18, 2022 which concerns the Final Investigation Report, that this additional element was introduced to them indicating that the

investigation that was carried out covered two types of conduct being the termination of agents' agreements and seeking and obtaining permission to offer pay-out odds of up to \$50:\$1 for its Cash Pot game. This means that although the Appellants knew they were being investigated they did not know the full extent. Although this aspect of the investigation seemed to have occupied a great deal of their investigations including even writing to two competitors and making enquiries of them, they did not write to the Appellants nor did they alert them to this aspect of the investigation. Representatives of the BGLC were invited to a meeting to discuss this issue however at the time the representatives of the Appellants were invited to a meeting, the Appellants were not made privy to this aspect of the investigations. The Respondent did not provide any adequate reason for the failure to advise the Appellants of the investigation concerning the 50:1 odds.

[56] This impacts the question of whether the Appellants had a sufficient opportunity to be heard if they did not in fact fully appreciate the nature of the complaint. Kings Counsel has contended that the fact that the Respondent was receiving information from third parties was all the more reason they should share it because competitors may have a motive. There is merit in this point however, the extent of what is shared would have to be balanced against the need to maintain confidentiality. However, in the interest of fairness the Appellants should have been advised of the fact that there was an investigation into the issue of the 50:1 odds.

[57] This begs the question how could they have had an or a sufficient opportunity to be heard when they were not privy to the full extent of the investigations against them? It is to be noted that on learning of the contents of the Report when the report was first published, the Respondent provided additional information to the Appellants, and this was later considered, and the Final Report amended to reflect only that they sought permission to offer 50:1 odds and not that they had obtained this permission. This suggests that the Appellants had an opportunity to provide their input and that their input was considered in this Final Report. It is my view that even at this late stage the Appellants could have requested a hearing on this

issue and so in all the circumstances I could not conclude that they had no opportunity or sufficient opportunity to be heard.

[58] In any event, whether or not there was an opportunity to be heard there would still be a need to consider whether in all the circumstances the actions of the Respondents in not disclosing the full extent of their investigations were a breach of procedural fairness. This will turn on the impact of the findings they made. Mr Leiba highlighted that the directions given hold no legal weight enforceable against the Appellants, nor is there a final conclusion that there was in fact a breach, rather the findings demonstrate that there is sufficient information now before the FTC which in its estimation is likely to be a breach of the Act. Kings Counsel argued however, that it was clear from the Report that the Respondent made findings and decisions that the Appellants were in breach of the Act. I do not find favour with the position advanced by Kings Counsel on this point as nowhere in the Final Report or the letter written to the Appellants did the Respondent indicate that there was a breach. The language used was that the matter is being 'pursued as a likely breach' and to support this position the Appellants were not required to do anything nor was any sanction imposed. This signified that the Appellant would have an opportunity to respond before a final decision is made on whether there was in fact a breach.

[59] Although the Respondent has the power to not only notify the enterprise of their finding but also to direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market, they did not take this second step. Could it then be said that there was a decision adverse to them? Kings Counsel has referred to the fact of the widespread dissemination of the report and the subsequent news item in the media which caused the Appellants to suffer and incur substantial loss, damage and expenses which demonstrates the negative impact of the decision on the Appellants. This however does not equate to an adverse finding.

[60] Breach of procedural fairness occurs when the decision maker makes a finding which adversely affects a person's rights. Based on the provisions of the Act the contemplation is that after the investigative process is completed there is yet another stage in the proceedings before a final decision is made. I agree with the submissions of counsel for the Respondent that during this first stage where the investigations took place, the aim of the FTC was to determine whether there is a case for the Appellants to respond to. If directions are given and they fail to comply with the directions given, then the FTC can proceed to lay a complaint with the Court. It is my view that any absolute right to a hearing would arise when the process of adjudication begins. Thereafter, it would be for the Court to determine whether the Appellants have failed to comply with any direction given by the Commission or have contravened the Act. If the Court accepts that there has been an offending conduct, then the Court can impose sanctions such as to order them to pay a pecuniary penalty or grant an injunction.

[61] Kings Counsel also relied on the case of **Secretary of State for the Environment v Fairmount Investments Ltd and Southwark London Borough Council** where a decision was made to compulsorily acquire houses belonging to Fairmount for the purpose of demolition. The Court dismissed the Secretary of State's appeal on the basis that it would be contrary to natural justice to uphold the order because the company did not have an opportunity of dealing with the grounds on which the order for compulsory acquisition had been upheld. That case is clearly distinguishable. In this case there was a public inquiry into the issue, the result of which was that there was an order made for compulsory acquisition of certain houses for the purpose of demolition which means that a firm decision was made to do an act detrimental to the company.

[62] This is unlike the instant case where no firm decision was taken and so no sanctions imposed. What is clear from the authorities referenced is that each case must be decided on its particular facts. In these circumstances, I find that no adverse decision was made against the Appellants and in the context of the section

7(2) provision which does require the person to be heard as of right, the actions of the Respondents did not constitute a breach of procedural fairness.

[63] On the issue of legitimate expectation, it is essential to get a grasp of what constitutes legitimate expectation. It is to be noted that in the Halsbury's reference, it is stated *inter alia* that 'the expectation may arise either from representation or promise made by the authority, including an implied representation, or from consistent past practice or policy'. Kings Counsel's argument on this point is that the Respondent should have followed the approach it had taken in relation to the previous investigation it had conducted into the Appellants' conduct.

[64] In Halsbury's Laws of England, Volume 61A (2018) at paragraph 50 the authors explained the doctrine of legitimate expectation as follows:

A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such a treatment. The expectation may arise either from a representation, or from consistent past practice or policy. In all instances the expectation arises by reason of the conduct of the decision-maker, and is protected by the courts on the basis that principles of fairness, predictability and certainty in administration should not be disregarded and that a legitimate expectation should not be disappointed.

[65] The legitimate expectation principle was also examined in **R v Secretary of State for the Home Department, ex p Ruddock and others** [1987] 1 WLR 1482 where Taylor J concluded that the doctrine imposes a duty to act fairly.

[66] Based on what is required under the principles of legitimate expectation, it is the conduct of the decision maker that must be examined in determining whether the expectation arises. The Appellants have cited one previous instance where the Respondent afforded them the opportunity to be heard and even to comment on a draft report before publication. This was in a matter which was distinguishable from the instant matter in that this was only one previous occasion, and it was in respect of a different aspect of the Act. It is noteworthy that this occurred only once.

- [67] In the case relied on **R v Secretary of State for the Home Department, ex p Ruddock and others**, emphasis was placed on the fact of an existing policy. One question that was posed was “Did the publication of the criteria and repeated acknowledgment by successive Home Secretaries of their binding effect give rise to a legitimate expectation enforceable by judicial review that no warrant would issue outside those criteria?”
- [68] There was in that case what could be described as an established policy which is totally absent from the case at bar. The Court found in that case that a strong case for legitimate expectation had been established as the criteria were repeated publicly in similar terms some six times between 1952 and 1982. A legitimate expectation was therefore created from the existence of a regular practice and also from a promise given on behalf of a public authority.
- [69] In the **Northern Jamaica Conservation Association** case Sykes J (as he then was) discussed the effect of a promise or practice which can induce a legitimate expectation of being consulted before a particular decision is taken. In the case of **Regina v North and East Devon Health Authority, ex p Coughlan** at paragraph 57, the court pointed out that

“(a) The Court may decide that the public authority is only required to bear in mind its previous policy or other representations, giving it the weight it thinks right, but no more before deciding whether to change course.....(b) on the other hand the Court may decide that the promise or practice induces a legitimate expectation of, for example being consulted before a particular decision is taken. Here it is uncontroversial that the court itself will require the opportunity for consultation to be given unless there is an overriding reason to resile from it.....(c) where the court considers that a lawful promise or practice has induced a legitimate expectation of a benefit which is substantive, not simply procedural, authority now established that hereto the court will in a proper case decide whether to frustrate the expectation is so unfair that to take a new and different course will amount to an abuse of power. Here the legitimate expectation is established, the court will have the task of weighing the requirements of fairness against any overriding interest relied upon for the change of policy.”

[70] The Court examined the law governing legitimate expectation in **Dale Austin v The Public Service Commission et al** [2022] JMSC Civ 55 where the concept of a legitimate expectation was discussed and reference made to the case of **Council of Civil Service Union and Ors v Minister of the Civil Service**. Lord Fraser opined that a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which a claimant can reasonably expect. The principle was encapsulated at paragraph 72 in these terms:

“In the broadest terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts.”

[71] In this case there is no promise given nor is there any regular practice. One previous occasion could not be equated to regular practice. I agree with the Respondent’s submissions that one investigation cannot disclose a pattern, policy or practice and in any event that previous investigation was conducted pursuant to section 17 of the Act which deals with mergers and acquisitions as opposed to what transpired in the instant case where the investigations were conducted pursuant to the section 19 to 21 provisions. I do not find that the Appellants have established an expressed promise or existing policy practice or conduct by the FTC on which legitimate expectation would have arisen. I do not find that the Appellants have sufficiently established a case of legitimate expectation.

[72] In concluding, I find that no statutory duty was breached in not allowing the Appellants to be heard before the Report was prepared and similarly no legitimate expectation created and therefore procedural justice was not breached.

Whether the conclusions in the Report are contrary to the Act and/or are not supported by the evidence or are they flawed?

- [73] The question is important as the Act gives the Court liberty to modify the findings of the FTC and even direct the Commission. Such steps would arise if the Court were to find that the finding of the Commission was flawed. It is therefore important to determine whether the Commission acted in accordance with the provisions of the Act and consistent with the information with which it was presented.
- [74] The Court would not be conducting the functions of a Judicial Review Court but rather the functions of an appellate court which is to determine whether the decision is supported by the material in the possession of the FTC and to affirm or dismiss the decision.
- [75] The Report set out what was considered by the FTC which reflected that the challenged conduct has two components. The first was that there was on the part of Supreme Ventures a significant change in approved pay-outs prior to and subsequently to the entry of other lottery operators into the market, i.e. Mahoe and Goodwill in February 2021. The second was significant changes in terms and conditions under which retailers were engaged.
- [76] The conduct complained of included the fact that Supreme Ventures implemented two independent but complementary strategies designed to maintain its pre-entry revenue stream by diverting revenue that would otherwise have been appropriated by the entrants. In the first instance there was information before them that Supreme Ventures requested approval from the Betting Gaming and Lotteries Commission to offer odds for its pick 1 games of up to \$50:1 which would have exposed Supreme Ventures to significant losses. They pointed out that it is not rational to offer odds higher than \$36:1 because the amounts they would be collecting on losing bets would be sufficient to cover even the pay-outs for the winning bets. In addition, Supreme Ventures would also have to meet financial obligations of the Government and although a pay-out of 35:1 is sufficient to cover

the prize to winners, it would be unprofitable as it would be unable to cover its direct and operating expenses.

[77] This made the FTC come to the view that the pricing strategy is likely to be rational only if Supreme Ventures anticipated that merely securing approval to offer these unprofitably high pay-outs (but not necessarily implementing them) would restrict competition and therefore allow them to lower pay-outs offered to players, relative to the market in which competition was unrestricted. They calculated that the mere threat of this would be sufficient to disrupt the transition of the market to a new competitive environment. The FTC concluded that this strategy would have the effect of limiting the entry or expansion of competitors and potential competitors in the relevant market.

[78] Another aspect of the investigation was the information they had that Supreme Ventures terminated contracts with some of the retailers allegedly because these retailers were also distributors for competing lottery operators. The FTC did bring this aspect of their investigation to the attention of Supreme Ventures and wrote to them about it and the Appellants responded. Despite their response, denying the suggestions made, the FTC formed the view that the termination was strategic and was done with the objective of limiting the access of competitors to retailers and thereby limiting the expansion of competitors.

[79] One of the main findings of the FTC was that the two components comprising the challenged conduct are abusive since individually and collectively they deter competition and potential competitors from engaging in competitive conduct in the lottery market in Jamaica.

[80] The FTC in coming to its decision had regard to the elements required to establish an abuse as set out in section 19 to 21 of the Act which provides as follows:

19. 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 or potential competitors. Existence of dominant position.

20. (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—
Abuse of dominant position.

- (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.

(2) An enterprise shall not be treated as abusing a dominant position—

(a) if it is shown that—

- (i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and
- (ii) consumers were allowed a fair share of the resulting benefit;

(b) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

21. (1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall—

(a) notify the enterprise of its finding; and

(b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.

(2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.

(3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property.

[81] The Report made reference to these provisions at paragraph 44 under the caption Relevant Sections of the FCA. They thereafter proceeded to examine the meaning of dominance found in the Act as well as judicial decisions referring to the principles enunciated in cases such as **Hoffmann-La Roche & Co. Ag v Commission** [1979] ECR 461. They recognized that where dominance was abused the conduct of the enterprise must be assessed to determine if it is anti-competitive.

[82] The FTC concluded that the two components are abusive since either individually or collectively they deter competitors and potential competitors from engaging competitive conduct in the lottery market in Jamaica. In determining whether the actions constituted an abuse they drew from **Hoffmann-LaRoche** and came to the understanding that an examination of the case law reveals that abusive behaviour consists mainly of exclusionary practices such as predatory pricing, exclusive dealing, refusal to supply and tying. They also examined the standard of proof regarding lessening competition substantially referring to authorities from Australia in particular a decision of the **Federal Court of Australia in Stirling Harbour Services Pty Ltd v Bunbury Port Authority** [2000] FC 38 and the **Australian Gas Light Company v ACCC** [No. 3] [2003] FCA 1525.

[83] Among the factors the FTC considered was the timing of their actions consistent with the announcement of the issuance of licences to other lottery operators.

[84] The FTC arrived at the overall conclusion that the challenged conduct is likely to breach sections 19-21 of the Fair Competition Act. At the end of the report just prior to the Summary and Overall Conclusion, the following conclusion was arrived at, at paragraph 154:

154. Accordingly, the FTC concludes that Supreme Ventures, being dominant in the market for lotteries in Jamaica, is engaged in abusive conduct which restricts the expansion of competitors and the entry of potential competitors in a manner that has had or is having the effect of lessening competition substantially”

[85] Under the heading Summary and Overall Conclusion, among the conclusions arrived at were the following:

158. The FTC determined that Supreme Ventures abused its dominant position in the lottery market by limiting the expansion of entrants through the restriction of competitors’ access to a critical input (retailers). Supreme Ventures restricted the access of its competitors to a crucial input (i.e., retailers) by strategically terminating and/or threatening to terminate

agreements with some retailers which also engage the services of competing lottery operators.

159. *The FTC determined that the abusive conduct had the effect of lessening competition substantially by harming competitors and potential competitors (discouraging expansion by increasing the cost of distributing games and discouraging entry by seeking approval to offer unprofitably high approval payouts) and harming players (reducing the variety of games accessible to players at a given retailer location).*
160. *The FTC is not satisfied that the conduct met the standard to be exempted from being treated as a breach of the Fair Competition Act.*
161. *The overall conclusion is that the challenged conduct is likely to breach sections 19-21 of the Fair Competition Act”*
162. *Accordingly, the case is being pursued as a possible breach of sections 19-21 of the Fair Competition Act.*

[86] Nowhere in the conclusions was there any indication that they found that the Appellants breached the provisions of sections 19 to 21. I therefore agree with the arguments of Mr Leiba that although they came to preliminary findings, they had not concluded that there was in fact a breach.

[87] They related the facts to the law and considered the exemptions provided for in the Act. I am of the view that taking into account the relevant provisions of the Fair Competition Act there was sufficient information before the FTC for it to have arrived at the findings and conclusions it made. It has not been established that the decision arrived at was flawed. I therefore accept that the findings of the Commission are consistent with the available evidence and with the provisions of the Fair Competition Act.

What orders should the Court make?

[88] Having found that the Respondent acted within their remit, that they did not breach procedural fairness and that their decision is consistent with the evidence presented, there is no basis to set aside the findings of the Commission. There would also be no basis for me to reverse or modify their findings.

[89] Having found that the findings are consistent with the evidence before them and the law, I am prepared to confirm the findings of the Commission as set out in the Summary and Overall Conclusion at paragraph 161 that the challenged conduct is likely to breach sections 19-21 of the Fair Competition Act.

ORDERS

1. The Appeal against the findings of the Fair Trading Commission set out in the Report is dismissed.
2. The findings of the Fair Trading Commission are upheld.
3. Costs to the Respondent to be agreed or taxed.

.....
Stephane Jackson Haisley
Puisne Judge