



[2025] JMCC Comm 36

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO.SU2024CD00154

| | | |
|----------------|---|---------------------------------|
| BETWEEN | VERTICAST MEDIA GROUP LTD | CLAIMANT |
| AND | DIGICEL (JAMAICA) LIMITED | 1st DEFENDANT |
| AND | COLUMBUS COMMUNICATIONS | |
| | JAMAICA LIMITED | 2nd DEFENDANT |
| AND | CABLE AND WIRELESS JAMAICA LIMITED | 3rd DEFENDANT |

Mr Douglas Leys KC, Dr Delroy Beckford and Miss Jacqueline Cummings, instructed by Samuel Beckford for the claimant

Mr Maurice Manning KC and Ms Dionne Samuels, instructed by Nunes Scholefield Deleon & Co for the 1st Defendant

Mrs Denise Kitson KC, Mr Kevin Williams and Miss Rachel Kitson instructed by Grant Stewart Phillips for the 2nd and 3rd Defendants

Heard: June 4, 2025, June 25, 2025, November 21, 2025

Costs - Security for Costs – CPR 24.3(a) - Application for relief from Sanctions- CPR 26.8 - Application to amend statement of case – CPR 20 – Request for Information – CPR 34.2

CORAM: JARRETT, J

Introduction

1. These proceedings have had a very robust procedural history, including, an appeal of the court's refusal to grant interim relief, (ultimately withdrawn by the claimant), an urgent application for injunctive relief (also ultimately withdrawn by the claimant), and an application by the 1st defendant to stay proceedings and to extend time to file defence. There have been multiple hearings in chambers, of which one was a case management conference held on February 19, 2025, before Batts J in which the trial dates of February 2 to 17, 2026, were set. Currently before me, are the following three applications:
 - a) The 1st defendant's application for security for costs and request for information filed on March 28, 2025.
 - b) The claimant's application for relief from sanctions filed on June 3, 2025.
 - c) The claimant's application to amend the claim form and particulars of claim filed on June 18, 2025.
2. I will address the claimant's application for relief from sanctions, by which it seeks the court's forbearance and permission to rely on an affidavit filed out of time in response to the 1st defendant's application for security for costs. I then will turn my attention to the 1st defendant's application for security for costs, and thereafter, to the claimant's application to amend its pleadings. Lastly, I will consider the 1st defendant's request for information. As the pleadings will give context to these applications, I will first summarise them.
3. I should say at the very outset, that I have carefully considered all the submissions (both oral and written), made by the parties and am grateful for the invaluable assistance these submissions have provided.

Summary of the pleadings

4. I quote below from a summary of the claimant's pleadings made in paras 2 and 3 of my decision in **Verticast Media Group Ltd. v Digicel (Jamaica) Limited**,

Columbus Communications Jamaica Limited and Cable and Wireless Jamaica Limited [2024] JMCC Comm 38, which dealt with the 1st defendant's application for a stay of the proceedings and for an extension of time to file defence:

"2. The claimant is a company registered in St Lucia and conducts business in Jamaica. It states in its claim filed on April 2, 2024, that it is in the business of creating and providing cable television channels for distribution on multi subscriber cable television networks in Jamaica, to multi subscriber cable television operators. It alleges that the defendants have breached the FCA. More particularly, it contends that the defendants are interconnected companies within the meaning of the FCA; hold a dominant position in the multi subscriber cable television market; have abused that dominance; and are in breach of section 35(1) of the FCA which prohibits persons from conspiring, combining, agreeing or arranging with another to limit unduly the facilities for transporting, producing, manufacturing, storing or dealing in any goods or supplying any service. For these alleged breaches, the claimants seek declarations, interim injunctive relief and damages.

3. The remedies being sought capture the substance of the allegations being made against the defendants. Set out below, are how they appear in the claim form: -

1. A declaration that the Defendants have directly and/or indirectly conspired and/or colluded or have engaged in a concerted practice with each other which has had and is having the effect of substantially lessening competition or an exclusionary effect in a relevant market, namely ***the market for providing live***

broadcast of elite sports competitions, on multi-subscriber cable television platforms.

2. A declaration that each Defendant holds a position of dominance and/or economic strength in the multi-subscriber cable television operator market without effective constraints from each other or from other third-party multi-subscriber cable television operators.
3. A declaration that the Defendants jointly or severally have abused their position of dominance in the multi-subscriber cable television operator market by:
 - (a) restricting the entry of Claimant in the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***
 - (b) preventing or deterring the Claimant from engaging in competitive conduct in the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***
 - (c) limiting the production of ***providing cable television channels for distribution on***

multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions to the prejudice of cable subscriber television consumers of significant live elite sports competition cable television channels.

4. A declaration that the Defendants by their respective dominance in respect of their separate multi-subscriber cable television networks have in effect created an essential facility.
5. A declaration that the Defendants jointly or severally have refused to deal or engaged in a constructive refusal to deal regarding their essential facility individually or jointly.
6. A declaration that the Defendants jointly or severally have engaged in anti-competitive conduct by abusing their position of dominance in the multi-subscriber cable television market by refusing to deal or engaging in a constructive refusal to deal regarding its or their essential facility which has had is having or is likely to have the effect of substantially lessening competition in the market for live broadcast of elite sports competitions, on multi-subscriber cable television platforms and/or has had or is having or likely to have an exclusionary effect in a relevant market, that is, the market for ***providing cable television channels for distribution on multi-subscriber cable television***

networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.

7. An interim and interlocutory injunction restraining the Defendants from breaching the Fair Competition Act, 1993, whether by themselves, their servants or their agents or employees or otherwise by directly and/or indirectly conspiring and/or colluding or engaging in a concerted practice with each other which has had and is having the effect of substantially lessening competition or an exclusionary effect in a relevant market, namely the market for ***providing cable television channels for distribution on multi-subscriber cable television networks in Jamaica to multi-subscriber cable television operators in respect of live elite sport competitions.***

8. An interim and interlocutory injunction restraining the Defendants from breaching the Fair Competition Act, 1993, whether by themselves, their servants or their agents or employees or otherwise by abusing or continuing to abuse their position of dominance or economic strength in the multi-subscriber cable television operator market by virtue of leveraging said dominance in the market for live broadcast of elite sports competitions, on multi-subscriber cable television platforms and in effect restricting the entry of the Claimant in said market, preventing or deterring the Claimant from engaging in competitive conduct in said market and/or limiting the production of goods or

services to the prejudice of cable subscriber television consumers of significant live elite sports competition cable television channels.

9. An order that the Defendants do provide access to the Claimant to their essential facility being their respective multi-subscriber cable television operator network.

10. An Order that the defendants do provide access to the Claimant to their multi-subscriber cable television facility in accordance with section 35(1) of the Fair Competition Act.

11. Additionally, and/or alternatively, an interlocutory injunction mandating the Defendants whether by themselves, their servants or their agents or otherwise to grant access of their multi-subscriber cable television operator network to the Claimant to enable Claimant to provide live broadcasts of elite sporting competitions through the television channels it has created for that purpose.

12. Damages;

13. Costs;

14. Such further or other relief as this Honourable Court deems necessary or appropriate.”

5. For present purposes it is sufficient to say, in relation to the defences, that the defendants deny the claimant’s allegations. Specifically, they deny that they hold

dominant positions, whether individually or jointly in the markets alleged by the claimant, and they deny that they are in breach of any of provisions of the Fair Competition Act (FCA).

The claimant's application for relief from sanctions

6. At the case management conference held by Batts J on February 19, 2025, the learned judge made several orders with a view to moving this matter towards trial. Included in those orders was an order for all applications to be filed and served on or before March 28, 2025, and for affidavits in answer to be filed and served on or by April 25, 2025. The case management conference was adjourned to June 4, 2025, at which time, the applications would be heard. I presided over the adjourned case management conference, and recognised at the start of that hearing, that the claimant had filed an affidavit in response of Oliver McIntosh on June 3, 2025, a day before the adjourned hearing, and outside of the time ordered by Batts J. Present in court at the start of the hearing at 11:00 am, representing the claimant was Kings Counsel, Mr Douglas Leys (its lead counsel), and Ms Jacqueline Cummings. Party representative for the claimant present was its legal officer Ms Sushilla Jadoonanan. When I enquired about the late filing of the affidavit of Oliver McIntosh, the response from Mr Leys, KC was that he cannot speak to the delay in the filing of the document and cannot help the court as to why it was filed late.

7. There was no intervention by Ms Cummings or for that matter, by the claimant's party representative, Ms Jadoonanan, who is herself an attorney-at-law. No effort was made to assist the court with an explanation for the delay or to seek the court's forbearance. With that type of response, or better put, lack of response from King's Counsel, I ordered that the court would have no regard to the affidavit of Oliver McIntosh. I then invited Mr Manning KC, to begin making his submissions in support of the 1st defendant's application. Dr Delroy Beckford joined the platform while Mr Manning was making his submissions. Mr Manning yielded to Dr Beckford, who apologised for his late arrival. He advised that he was at the court's registry filing documents for this matter, has been having some health challenges

and for the record, would file an affidavit indicating why he was late and why the claimant's affidavit in response was filed and served out of time.

- 8.** After hearing from Mr Manning, Mr Leys began his response in opposition to the 1st defendant's application dealing with security for costs. He advised that the request for information, would be dealt with by Dr Delory Beckford. Mr Leys did not conclude his submissions at the end of the sitting, and I adjourned the matter to June 25, 2025, at 10:00am. I indicated to counsel that Mr Leys would have 20 minutes to complete his submissions, Mr Beckford would have 20 minutes for his submissions and Mr Manning would have 15 minutes to respond. There was no opposition from counsel to the adjourned hearing schedule or any indication from the claimant's counsel that an application would be filed for relief from sanctions.
- 9.** At the start of the hearing on June 25, 2025, the claimant's application for relief from sanctions was brought to my attention by Mr Leys, who sought to have that application interposed before he continued to make his submissions on the 1st defendant's application for security for costs. I did not accede to his request. I was frankly aghast, that, given Mr Leys' response on June 4, 2025 to my question as to why the affidavit in response of the claimant was filed out of time, he was now seeking to interrupt the flow of the hearing, to interpose the claimant's application for relief from sanctions, at a time when the 1st defendant had completed its submissions in support of its application. I indicated that I would not interpose the application but would hear it after the conclusion of submissions on the 1st defendant's application.
- 10.** At the conclusion of the hearing, I reserved my decision on the 1st defendant's applications, and I made orders allowing the parties to file submissions in relation to the applications that had not yet been reached. I further indicated that I would hear these on paper.
- 11.** The claimant's application is supported by an affidavit of Dr Delroy Beckford also filed on June 18, 2025. The following are the orders sought in the application:

“1. The Claimant be granted relief from sanctions for failing to file and serve in the time required Affidavit opposing application for security for costs and request for information, whereby the Court ordered that the Affidavit opposing the application for security for costs and for request for information not be relied on in the Court’s scheduled hearing held on June 4, 2025.

2. Alternatively, an order pursuant to **CPR 26.9(3)** to put matters right.

3. Additionally, and alternatively, pursuant to **CPR 26.1(2)(c)**, **that is, to extend or shorten time for compliance with any rule, practice direction or order or direction of the court even if the application for an extension is made after the time for compliance has passed.**

4. Additionally, pursuant to **CPR 25.1(d)**, that is, deciding the order in which issues are to be resolved whereby the application under **CPR 26.8** or **CPR 26.9** may proceed before conclusion of the hearing already begun in respect of the application for security for costs and request for information.

5. Costs of the application to be costs in the claim.

6. Such further and /or other relief as this Honourable Court shall deem fit.”

12.The affidavit in support of the application is that of Dr Delroy Beckford. His evidence in summary is that: a) he is one of the attorneys-at-law with conduct of this matter, tasked with preparing , filing and serving the affidavit in opposition to the 1st defendant’s application for security for costs and request for information; b) at the start of the hearing on June 4, 2025, no explanation was given for the non-

compliance; c) the non-explanation was due to him being in the court's registry filing a document in this matter, and this was a prior engagement he had with the registry; d) on arriving on the court's zoom platform, he informed the court of his ongoing medical emergency which affected his ability to comply with the court's order, and he exhibits a copy of a medical report; e) the application for relief from sanctions was made promptly given that the medical report which grounds it was received on June 16, 2025 ; f) the relief is necessary for the court to have a full appreciation of the matter and this would be consistent with the administration of justice principles; g) the failure can be remedied within a reasonable time since the affidavit in opposition has already been filed and served on the 1st defendant; h) the trial dates will not be disturbed and i) not granting the relief will deny the claimant an opportunity to be fully heard on the 1st defendant's application.

Discussion and analysis

13. CPR 26.8 provides as follows: -

"26.8 (1) An application for relief from any sanction imposed for a failure to comply with any rule, order or direction must be-

(a) made promptly; and

(b) supported by evidence on affidavit.

(2) The court may grant relief only if it is satisfied that-

(a) the failure to comply was not intentional;

(b) there is a good explanation for the failure; and

(c) the party in default has generally complied with all other relevant rules, practice directions orders and directions.

(3) In considering whether to grant relief, the court must have regard to-

(a) the interests of the administration of justice;

(b) whether the failure to comply was due to the party or that party's attorney-at-law;

(c) whether the failure to comply has been or can be remedied within a reasonable time;

(d) whether the trial date or any likely trial date can still be met if relief is granted; and

(e) the effect which the granting of relief or not would have on each party.

(4) The court may not order the respondent to pay the applicant's costs in relation to any application for relief unless exceptional circumstances are shown."

14. There is no lack of authority on the interpretation and application of CPR 26.8, by the court. The primary consideration is that the application for relief is to be made promptly. If the court finds that it has been made promptly, then all the provisions of CPR 26.8(2) must be satisfied. If any one element of that rule is not satisfied, then the inquiry ends. (See for example, **University Hospital Board of Management v Hyacinth Matthews [2015] JMCA Civ 49**, and **H.B Ramsay & Associates & Ors v Jamaica Redevelopment Foundation Inc. [2013] JMCA Civ 1**)

15. The sanction in issue was imposed on June 4, 2025, when I determined that the claimant could not rely on the affidavit of Oliver McIntosh filed in opposition to the 1st defendant's application for security for costs. That decision was made on the basis of lead counsel for the claimant's indication at the hearing on June 4, 2025, that he could not assist the court with an explanation for the claimant's failure to comply with the order of Batts J made on February 19, 2025, for affidavits in answer to the 1st defendant's application for security for costs to be filed on or before **April 25, 2025**.

- 16.** I accept, that whether the claimant acted promptly involves a consideration of the reasons given for the time the application was made. In this case, the application was made on June 18, 2025. Counsel, Dr Beckford's evidence is that the application could not be made before he obtained the medical report from Dr. Clement Williams, which he received on June 16, 2025. On this evidence, I am prepared to find that the claimant acted promptly.
- 17.** I am, however, not satisfied that there is a good explanation for the failure to file the affidavit on time.
- 18.** Dr Williams' letter which is also dated June 16, 2025, says Dr Beckford presented on April 18, 2025, with a relapse of a chronic condition which required urgent treatment, and, based on the severity of that condition, he has been unable to attend to his regular duties for the past 6 weeks, he is currently improving, and should be fit to return to his normal duties by June 30, 2025. There, however, is no evidence of any efforts made by Dr Beckford to inform lead counsel, Mr Leys, Ms Cummings or the claimant, of his ill health and any difficulties he had, performing his duties which included ensuring that the claimant met the deadline given by Batts J. Dr Beckford is a senior member of the bar, part of a team of other senior members of the bar, led by King's Counsel who are all on record in this matter as attorneys-at-law for the claimant. One or more members of this team ought to have been advised by Dr Beckford of his ill-health, should have recognised the non-compliance, and every effort made to comply with the court's order or at the very least, an urgent application made (before June 3, 2025) , for an extension of time within which to do so. To say in this case, that one member of this team was unwell, and so the order of the court could not be complied with, is undoubtedly a poor explanation for the failure.
- 19.** Furthermore, there is no evidence of the position of the claimant, on this state of affairs. The claimant was present at the case management conference, through its legal officer. Did it, for example express to lead counsel or any of its counsel, any concerns that an affidavit in response, had not been filed within Batts J's timeline?

Did it take any other steps at all, including reaching out to Dr Beckford himself, having recognised its non-compliance? The court has no answers to any of these pertinent questions.

- 20.** I must also express my dissatisfaction with the response to my query on June 4, 2025. To say, to the court, in the face of the claimant's non-compliance with its order, that no assistance with an explanation can be given for that noncompliance is, in my view, presumptuous and discourteous. It suggests either that no explanation need be given, or that it did not matter whether the affidavit was filed out of time or not. This type of answer to the court in response to noncompliance with its orders ought never to be made.
- 21.** Having regard to the foregoing, the application for relief from sanctions will be refused, as no good explanation has been advanced for the failure to comply with the order of Batts J made on February 19, 2025.
- 22.** No submissions were made in relation to CPR 26.9(3) or 26.1(2) (c), by the claimant. I will therefore not address these aspects of the application.

The 1st defendant's application for security for costs

- 23.** CPR 24.3 sets out the conditions to be satisfied on an application for security for costs. The rule reads as follows: -

“The court may make an order for security for costs under rule 24.2 against a claimant only if it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order, and that-

- (a) the claimant is ordinarily resident out of the jurisdiction;
- (b) the claimant is a company incorporated outside the jurisdiction;
- (c) the claimant-

(i) failed to give his or her address in the claim form;

(ii) gave an incorrect address in the claim form; or

(iii) has changed his or her address since the claim was commenced, with a view to evading the consequence of the litigation;

(d) the claimant is acting as a nominal claimant, other than as a representative claimant under Part 21, and there is reason to believe that the claimant will be unable to pay the defendant's costs if ordered to do so;

(e) the claimant is an assignee of the right to claim and the assignment has been made with a view to avoiding the possibility of a costs order against the assignor;

(f) some person other than the claimant has contributed or agreed to contribute to the claimant's costs in return for a share of any money or property which the claimant may recover; or

(g) the claimant has taken steps with a view to placing the claimant's assets beyond the jurisdiction of the court.

24. It is common ground that the court has a discretion whether it makes an order for security for costs and will only make such an order where it is just to do so based on the circumstances of the case. The claimant is a St Lucian company, and therefore one element of CPR 24.3 is satisfied.

25. There is no provision in our CPR similar to CPR 25.13(2)(c) in the rules of court of England and Wales, which provides that where the claimant is a company or other body, the applicant for security for costs may rely on the fact that it has reason to believe that the claimant will be unable to pay its costs if ordered to do so. Arden

LJ in **Jirehouse Capital v Beller [2008] EWCA Civ 908**, held the view that with respect to that rule, there is no need for a formal conclusion or finding by the court, that the claimant will not be able to pay its costs. Although we have no similar provision in our CPR, I am of the view that if an applicant depones that it has reason to believe that the claimant will not be able to pay the defendant's costs if ordered to do so, the burden of proof is on the applicant to show the basis of this belief. In reliance on the dicta of Arden LJ, I also accept that the court should not seek to make a finding on a balance of probabilities that the claimant will not be able to pay its costs, but instead must be satisfied that there is reason to believe that the claimant will not be able to do so.

26. Colin Alcott, the 1st defendant's Legal and Regulatory Director, in his affidavit in support of the application says he has reason to believe that the claimant will not be able to pay the costs of the 1st defendant, if ordered to do so, and gives as the basis of this belief, the unsatisfied judgment of Brown Beckford J in **AIC (Barbados) Limited v Verticast Media Group Limited [2025] JMCC Comm 07**. Mr Leys argues however, that based on this judgment, there is a pool of funds valued at US\$18,000,000.00, which represents the value of shares in CVM TV, which were purchased by the claimant.

27.In **Longstaff International v McKenzie [2004] EWHC 1852 (Ch)**, Park J, acknowledged that one of the factors the court may consider in determining whether it is just to grant an order for security of costs, is whether the claimant company will be able to meet the cost order at the time when the order is made and is to be met. In other words, the court may look at the liquidity of the claimant company. As I understand it, even if the claimant company has assets sufficient to discharge a cost order against it, an order may still be made for security for costs where the assets are illiquid and, to borrow a phrase used by Mr Leys in his submissions, the defendant may have to go through "some hoops" to get it. There is no evidence of any other assets owned by the claimant. I take into consideration therefore, the fact that the CVM TV shares owned by the claimant are illiquid and

there may well be difficulties faced by the defendant in getting these assets realised. Therefore, if reliance is being placed on these shares (which seems to be the case based on Mr Leys' submissions), it does seem to me to be evident, that there is reason to believe that should an order for costs be made against the claimant, it would not be able to meet it at the time the order is made.

28. I also take into consideration the evidence of Mr Alcott, that a letter written by the 1st defendant's counsel to counsel for the claimant, enquiring as to the claimant's ability to pay costs was ignored. Sales LJ in **SARPD Oil International Limited v Addax Energy SA [2016] EWCA Civ 120**, was of the view, that if a claimant is given the opportunity to provide evidence that it can pay costs and it deliberately refuses to do so, there is every good reason to believe that if costs are awarded against that claimant, it would not be able to pay them.

29. No explanation has been given by or on behalf of the claimant for its failure to respond to counsel's letter.

30. I do not accept that the application for security for costs was made late. CPR 24.2(2) provides that the application can be made at the pretrial review or the case management conference. In this case the application was made at the adjourned case management conference and the intention to do so, telegraphed at the first case management conference. The trial is scheduled for February 2026, I do not believe, and there is no evidence, that the claimant was prejudiced by the timing of the application.

31. I remind myself that the court must not make an order for security for costs that will possibly stifle a genuine claim and operate as an act of oppression. A balancing exercise must be conducted, which involves weighing the injustice to the claimant were it prevented from bringing its claim, against the injustice to the defendant if no security is ordered and at trial, a cost order is made in its favour, which it is unable to recover. If this ground is being relied on by a claimant to resist an order

for security for costs, the burden is the claimant's, to prove this assertion. There is no evidence from the claimant before me in this regard.

32. I am not prepared to say, that the claimant's claim is not genuine, but I will have regard to its prospects of success, being mindful that the court is not to go into the merits of the case, unless satisfied that it has been demonstrated that there is a high degree of probability that it will succeed or fail. (See **Porzelack KG v Porzelack (UK) Ltd [1987] 1 All ER 1074**.)

33. I recognise, that competition law is an intersection of law and economics and that, in this case, there will be evidence to come at trial of ordinary and expert witnesses. With that said, I express the cautious view that, based on the material currently before the court, it is questionable whether the claimant will be able to establish at trial, that the defendants hold dominant positions, and that they abused that dominance in the relevant markets which it is alleged exist. The claimant predicates the allegation of refusal to deal, for example, on the premise that the defendants are an essential facility based on their dominance. The defendants' alleged dominance significantly undergirds the claim. Defining the market is important in determining dominance. It has been submitted in arguments before the court on behalf of the claimant, that it is permissible under the FCA to use the commercial common-sense criterion, in market definition, and that this is what the claimant has relied on. However, the use of this criterion by the claimant is not reflected on the pleadings.

34. In its pleadings, the claimant refers to several alleged markets, but does not say or foreshadow in those pleadings, the inquiry or methodology used to define those markets. There is no indication of how these markets were delineated. The claimant pleads that the defendants jointly hold 62% of the market share of the multi subscriber cable television operator customer base in Jamaica. But it does not give the basis for this allegation. In this regard, even if the pleadings are amended to include the information contained in the affidavits of Oliver McIntosh

filed in support of the aborted interlocutory application, those affidavits rely on data out of Trinidad and Tobago, the reliability of which is, to my mind, uncertain. Pie charts in that Trinidad and Tobago report are used by the claimant as the basis for determining the defendants' respective market share. But the provenance of the data relied on in those pie charts have not been disclosed, and furthermore, the data in the charts do not match up with Oliver McIntosh's evidence.

35. Reliance is placed in the pleadings on the **Herfindahl - Hirshman Index (HHI)** to support the allegation that the market in Jamaica for multi subscriber cable television operators is concentrated, and so there are few, if any competitive constraints on the defendants, hence their dominance. As I understand it, the **HHI** is a measure of market concentration, which utilises the market shares of all suppliers in a relevant market. It seems to me, that if the claimant's assessment of the defendants' market share is based on applying the **HHI**, to data from Trinidad and Tobago (the accuracy or reliability of which is questionable); the claimant's assessment of market concentration based on the **HHI** is also likely to be unreliable and doubtful.

36. The claimant pleads that the defendants' refusal to enter into carriage service agreements with it, amounts to them colluding or engaging in a concerted practice to exclude it from a relevant market in breach of section 17 of the FCA. The further allegation is, that evidence of the colluded conduct, is a joint venture the defendants had entered into, to provide elite live sporting competitions. The 1st defendant has denied in its defence, that it operates in the market for the provision of cable television channels for distribution on multi subscriber television networks in Jamaica to multi subscriber cable television operators in respect of live elite sports competitions. It says further that the joint venture which the claimant references, was in 2019, at a time when the claimant did not exist, and did not include any of the defendants. While replies are not necessary pleadings, it is noteworthy that this latter allegation has not been refuted by the claimant. If the claimant did not exist in 2019, in my view, there is little prospect of success in

arguing, without more, that that joint venture, is a basis to conclude that the 1st and 2nd defendants have colluded and conspired to lessen competition in breach of the FCA.

- 37.** In its investigative report, the staff of the FTC has concluded that they have unearthed no evidence of an agreement to support a breach of section 17 of the FCA, as alleged by the claimant. I observe, nevertheless, from the affidavits latterly filed by the claimant, that this report has been challenged by it, and the FTC invited to reopen its investigation.
- 38.** Having regard to the foregoing considerations, it is my view, albeit preliminarily held, that the claimant's prospects of success at trial are not particularly good.
- 39.** The claimant has argued that any award of costs against the claimant can be enforced in St Lucia, as under St Lucian law, Jamaica is a scheduled territory under that country's Reciprocal Enforcement of Judgment Act. Furthermore, the argument goes, under our own legislation, St Lucia is a scheduled territory. The 1st defendant has, on the other hand, argued that the reciprocal enforcement of a judgment is not a condition under the CPR which would bar the granting of an order for security for costs. As with the illiquidity of the claimant's assets, I also consider in the context of this case, the potential for additional delays and the cost burden that may likely be visited upon the 1st defendant, were it to seek to enforce an order for costs in St. Lucia.
- 40.** There is no denying that litigating competition law claims is a costly venture. In the end, the claimant's failure or refusal to advise of its ability to pay security for costs when the 1st defendant enquired, and the fact that its known assets are illiquid, lead me to believe that it may indeed not be able to pay costs, if it is unsuccessful in the claim. Seeking reciprocal enforcement in St. Lucia may be costly and involve delay. I also do not consider that the prospects of success for the claimant in the claim are particularly good. With all these factors firmly in mind, the scales of justice

in my view weigh in favour of granting the order as I consider that it is just in the circumstances of this case to do so.

41. The 1st defendant has put in evidence, a draft Bill of Costs in the sum of \$77,771,125.00. Mr Leys argues that this figure is excessive and, in response to a query from the court, said in his view, any award should be at least one half or a third of that being claimed by the 1st defendant. I agree with him. Security for costs must be sufficient and must meet the requirement of being just.

42. Of the amount being claimed, \$14,257,500.00 are for legal fees, and \$61,000,000.00 for experts. I accept that the 1st defendant will need to call expert witnesses and that this will be at a significant cost. However, while I also accept that at this stage it would be difficult to provide granular details as to who these potential witnesses are, and their costs, I find that the 1st defendant has essentially provided figures without the specificity which would be reasonably expected at this juncture in the proceedings. Therefore, doing the best that I can, recognising that arriving at the appropriate figure is not an exact science, I believe that allotting the same amount for the experts, as the amount claimed for legal fees, is reasonable and just. When GCT and the amount claimed for cash fees are added to that figure, the amount for which security is to be given is \$31,028,625.00.

The application to amend the pleadings

43. The law in relation to amending pleadings is well established. The following is a summary of those principles, adopted with gratitude, from the decision of McDonald Bishop JA (as she then was) in **Jamaica Redevelopment Foundation Inc v Clive Banton and Sadie Banton [2019] JMCA Civ 12:-**

- i. The primary consideration is whether the proposed amendment is needed to determine the real issues in dispute between the parties, having regard to all the relevant circumstances.

- ii. The court must avoid prejudice to the other parties and be concerned with avoiding wasting its resources and those of the parties.
- iii. The court's approach to late amendments must closely align with its approach to enforcing compliance with its orders and the rules of court generally. To tolerate late amendments may result in the court weakening its ability to manage the proceedings effectively.
- iv. The jurisdiction is now governed by the overriding objective. This means that the approach in older authorities to allow amendments, once the other side is not prejudiced and could be compensated in costs, has given way to the overriding objective.
- v. Applications for permission to amend must necessarily turn on the particular facts and no hard and fast rules are possible.
- vi. The court will allow amendments only if they have a reasonable prospect of success.

44. I must first make the observation that Batts J, at the case management conference on February 19, 2025, had ordered all applications to be made by March 28, 2025. The claimant's application to amend its pleadings was made on June 3, 2025, without any explanation as to why it was made late. In fact, in the affidavit of Oliver McIntosh filed in support of the application, he says that the amendments were being made to clarify the pleadings given the withdrawal of the claimant's application for injunctive relief. This is startling, as that withdrawal was made on September 16, 2024, nearly 8 months prior to the current application.

45. The grounds on which the claimant relies for its application are : a) CPR 20.4, which allows statements of case to be amended after a case management conference with the court's permission , b) the amendments are necessary to ensure that the real question in controversy between the parties is determined, c) the defendants will not be prejudiced because the amendments seek to clarify

issues related to market definition which are already in evidence before the court, d) the amendments relating to damages quantifies those damages already referred to in the claim, and e) the orders sought are in keeping with the overriding objective to deal with cases justly.

46. I accept that some of the amendments sought amount to deletions of those pleadings which relate to the aborted interlocutory application for injunctive relief. The others are those at the proposed paragraphs 8(1) to (13) and are taken from the affidavit of Oliver McIntosh filed on April 3, 2024, in support of the application for injunctive relief. The proposed paragraph 8(1) identifies a different market in which the claimant alleges it is engaged, but as with the extant pleadings, it does not indicate the inquiry or methodology used in the definition of the market. I therefore, cannot see how this amendment is necessary to resolve the real dispute between the parties. Subparagraphs (2) and (3) give the reasons it is important for the claimant to have access to the defendants' network, but this is already part of the extant pleadings in paragraph 30 and so, is also an unnecessary amendment. In my view, subparagraphs (4) and (5), are more appropriate as evidence, and in any event, not necessary to resolve the real dispute between the parties. As is the case with subparagraphs (2) and (3), subparagraphs (6) and (7) are unnecessary amendments. They speak to substitutability which are allegations already contained generally, in the extant paragraphs 15 and 16.

47. The proposed subparagraph (8) introduces a new market which the claimant alleges the defendants are engaged in, but the basis for the definition is not given. No indication is given of the inquiry made or the methodology use to delineate this market. There is nothing here which clarifies the extant pleadings or is necessary to resolve the dispute between the parties. The proposed subparagraphs (9) to (12) refer to the defendants' market share in the market described at subparagraph 8 and alleges that the 1st defendant's customer base is 24% and the 2nd defendant's 38%. It is said that this information was obtained by using the estimated cable television customer count in a Jamaica Public Service's annual

report on the number of households with cable television services, which was extracted from a report generated in Trinidad and Tobago by that country's telecommunications authority. As stated earlier, the use of this foreign data to make these allegations about the defendants' market share, raise questions of its reliability and accuracy and therefore, its prospects of success. I therefore cannot agree that the proposed amendments in subparagraphs 1 to 13 clarify the extant pleadings or are necessary to resolve the real dispute between the parties, as they fail to clarify any aspect of the extant pleadings.

48. As to damages, I see no amendments which quantify that which is claimed in the prayer for relief.

49. For the foregoing reasons, save for the deletions, the claimant's application to amend the pleadings will be refused.

The 1st defendant's request for information

50. Due to the claimant's failure to respond to a letter dated February 14, 2025, from the 1st defendant's attorneys-at-law, requesting information, the 1st defendant's application under CPR 34 was made on March 28, 2025. On June 24, 2025, the claimant filed its answer to the 1st defendant's request. This was after Mr Manning made his submissions on the application. He was therefore left to respond to the answers provided, which, incidentally, were filed the day before the adjourned hearing on June 25, 2025. Mr Manning argued that the answers are for the most part non-responsive. Fifteen questions were asked, and of those questions, Mr Manning, argues that the answers given to questions 5,6,9, and 10 to 15 are nonresponsive. It is therefore to these questions and their answers, that I will focus my attention.

51. CPR 34.2(2) provides that an order under this rule may not be made unless it is necessary for the fair disposal of the claim or save costs. CPR 34(2)(3) provides that in considering whether to make an information order under the rule, the court must have regard to a) the likely benefit which will result if the information is

provided, b) the likely cost of giving the information, and c) whether the party against whom the order is sought has the financial resources to comply.

52. Question 5 asks that the claimant identify any report, economic analysis or case law relied on in providing its answers to questions 2,3 and 4. The latter 3 questions asked that the markets the claimant is active in be identified and in each case, that the claimant provide the products, geographic scope, service, suppliers and customer groups. This question is clearly targeted towards having the claimant define the relevant markets it alleges it operates in. The response given is that the claimant has relied on its own agreements to provide the information and the commercial common-sense criterion for market definition, which, it says, does not require rigorous economic analysis for market delineation before trial. In doing so, it cites as its authority, the decision of **Auckland Regional Authority v Mutual Rental Cars (Auckland Airport Limited)**. But as observed earlier, the claimant has not pleaded the commercial common-sense criterion as the basis for its definition of the relevant markets nor how that criterion was used in this case. I find, therefore, that the answer to this question is inadequate, and the claimant will be ordered to provide a more detailed response.

53. Question 6 asks that the markets in which the 1st defendant is said to be solely dominant be identified. The answer provided is that this is demonstrated in the particulars of claim. It is not. The answer to this question is inadequate and the claimant will be ordered to provide a more detailed response.

54. Question 9 asks for the identification of any report, economic analysis or other document used to support the answers to questions 6,7 and 8. To simply identify, as the claimant has done, quarterly reports from Trinidad and Tobago Telecommunications Authority, and Liberty Latin America Quarterly Reports, for example, without proper citations so that these documents can be found, is in my view, an inadequate response. The claimant will, therefore, be required to provide a more detailed response.

55. Question 10, asks the claimant what is its estimated market share in the relevant markets, which it alleges it is involve in. The answer sends the 1st defendant to the pleadings and the affidavits filed in support of the claimant's application for interlocutory relief. This is clearly non-responsive. The claimant will, therefore, be required to provide the requested information.

56. Question 11 requests the factual basis for the claimant's calculation of the 1st defendant's market share of the relevant markets as well as the estimated market share of the 1st defendant's competitors. The response given is similar to the answer given in respect to question 9, and I find it similarly inadequate for the same reasons earlier stated in relation to question 9. I recognise that with respect to Jamaica and Barbados, the claimant has added , residential household information which it says is publicly available from an article in the Jamaica Gleaner (which is unidentified in terms of date of publication and authorship), an unidentified market survey, and an article on the Barbados Advocate website which reports on the CEO of Digicel Play in Barbados, surprising its 20,000th customer with a television set. But these hardly make the response more adequate. The claimant will therefore be required to provide the requested information.

57. Question 12 requests clarification on the basis on which the claimant has calculated the market share of the 1st defendant's competitor's market share in each of the relevant markets alleged, including the methodology and data points used. The claimant's response is that this information is unnecessary since the standard approach of an economic expert in anti-competitive claims involving an abuse of dominance is to employ effects-based methodology focusing on the effects of the alleged anti-competitive conduct. I cannot agree that the information is unnecessary. As alluded to earlier, determining whether the defendants are dominant within the relevant markets alleged, will require a proper definition of the market and by extension the market share of the defendants and any competitors who operate in that market. I note, however, that the claimant goes on to say in its response that the requested information is confidential, sensitive and involves

third party proprietary data and cannot be disclosed but is prepared to provide a redacted version of the relevant document. I will order that the latter course be taken.

58. Question 13 asks for an explanation of how total market size was calculated. The response basically refers to the answers given for question 9 and 11. I therefore repeat my findings in relation to those two questions and will order that the claimant provide the requested information.

59. Question 14 asks the basis for denoting the 1st defendant's activities as an essential facility under Jamaican law. The claimant's response is that it is the cable television network from which it is denied access which constitutes an essential facility under the **Oscar Bronner** test. As I understand the claim, the claimant alleges that the defendants are each singularly dominant in the market for the provision of live broadcast of elite sports competition on multi subscriber cable television platforms in Jamaica; there is no effective substitute for their multi subscriber television networks, it is not economically viable to replicate these networks; being granted access to these networks is essential for it to operate in the market for the provision of live broadcast of elite sports competitions, on multi subscriber cable television platforms in Jamaica; and these networks are therefore an essential facility. The **Oscar Bronner** test, set by the Court of Justice of the European Union, for determining essential facility is whether a particular facility could feasibly be replicated and therefore whether granting access to it was essential or "nice to have" for competitors.

60. Given the allegations in the claim and the **Oscar Bronner** test, I find that the answer to question 14 is adequate.

61. Question 15 essentially asks for particulars on the harm alleged and the claim for damages. The response given is that a) the facts relied on are in the pleadings, b) in competition law, harm is characterized by conduct which amounts to an abuse

of dominance, and the pleadings outline the nature of the alleged exclusionary conduct c) the specific monetary loss is to be determined by some contemplated approaches to determining monetary loss which are set out. I accept that in competition law, harm is characterized by harm to competition. But this is a private civil claim under section 48 of the FCA, in which damages are included in the relief sought. In such a claim as this one, the court must obviously first determine whether there is an infringement of the FCA and then determine, if any, a monetary award representing damages. By its response to this question, it is clear that the analyses which the claimant contends are required to determine damages have not yet been undertaken by it. I appreciate however, that witness statements have not yet been filed and experts, particularly economic experts, have not yet been appointed. In these circumstances I will not order the claimant to provide any further information on this question.

62. I note that the certificate of truth that accompanies the claimant's answer is not in the proper form as stipulated by CPR3.12. In its answers to be provided, a certificate of truth in accordance with CPR 3.12 must be affixed thereto.

Disposition

63. In the result I make the following orders: -

- a) The claimant's application for relief from sanctions is refused.
- b) Costs on the application for relief from sanctions to the defendants to be agreed or taxed.
- c) The claimant's application to amend the pleadings is refused in part. The amendment is only allowed in relation to those paragraphs that are to be deleted due to the withdrawal of the application for injunctive relief.
- d) Amended pleadings in terms of order (c), are to be filed and served by the claimant within 7 days of its compliance with order (h) hereof, and

the defendants are at liberty to file consequential amended defences within 7 days of service.

- e) Costs on the application to amend the pleadings to the defendants to be agreed or taxed.
- f) Within 14 days of the claimant's compliance with order (h) hereof, the claimant is to provide answers to the questions 5,6,9,10,11,12 and 13 asked by the 1st defendant in its letter dated February 14, 2025. In relation to question 12, the claimant is to provide redacted versions of the relevant documents.
- g) Costs on the request for information to the 1st defendant to be agreed or taxed.
- h) The 1st defendant's application for security for costs is granted. The claimant is to pay security for costs in favour of the 1st defendant in the sum of \$31, 028, 625.00. This sum is to be paid into an interest-bearing account in the joint names of the attorneys-at-law for the claimant and the 1st defendant, within 30 days of this order. If the security for costs is not paid in accordance with this order, the claim is struck out.
- i) Costs on the application for security for costs to the 1st defendant to be agreed or taxed.
- j) The trial dates of February 2 to 17, 2026 are vacated.
- k) In the event there is compliance by the claimant with order (h), there shall be an adjourned case management conference on February 2, 2026, at 10:00 am for 2 hours.

- l) The 1st defendant's attorneys-at-law to prepare file and serve the formal order.

A Jarrett

Puisne Judge