



[2024] JMCC Comm 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE COMMERCIAL DIVISION

CLAIM NO. SU2024CD00100

IN THE MATTER OF The Fair
Competition Act

AND

IN THE MATTER OF an
Application Pursuant to
Part VII of the Fair
Competition Act

BETWEEN	FAIR TRADING COMMISSION	CLAIMANT
AND	SUPREME VENTURES LIMITED	1 ST DEFENDANT
	SUPREME VENTURES GAMING LIMITED	2 ND DEFENDANT

Civil Procedure - Application to strike out claim – Application to stay proceedings – CPR Rule 26.1(2) – CPR Rule 26.3(1) – Fair Competition Act - Whether fact that 1st Defendant is unlicensed is fatal to the claim - Whether Defendants interrelated parties within the meaning of the Act - Appeal in other proceedings challenging report - Whether report integral to claim - Whether claim should be stayed pending appeal.

Emile Leiba & Samantha Grant instructed by DunnCox, Attorneys-at-Law for the Claimant

Kevin Powell & Annay Wheatle instructed by Hylton Powell, Attorneys-at-Law for the 1st and 2nd Defendants

Heard: 24th October and 15th November 2024.

IN CHAMBERS (VIA VIDEOCONFERENCE)

Cor: Batts, J.

[1] By Fixed Date Claim Form filed on the 4th March 2024 the Claimant commenced proceedings against the 1st Defendant and, an entity known as Prime Sports (Jamaica) Limited being, the 2nd Defendant. The Amended Fixed Date Claim Form, filed on the 27th September 2024, reflected the 2nd Defendant's change of name to Supreme Ventures Gaming Limited. It also amended paragraphs 2-5 to allege interconnection consistently with paragraph 1. The remedies sought in the claim as amended are as follows:

- "1. A Declaration that the 1st and 2nd Defendants, whether by themselves or as part of an interconnected group of companies, occupy a dominant position in the Lottery Market.*
- 2. A Declaration that the 1st and 2nd Defendants' conduct, whether by themselves or as part of an interconnected group of companies, have the effect of restricting the entry of potential competitors in the lottery market, and/or preventing or deterring any person from engaging in competitive conduct in the lottery market, and/or eliminating or removing any person from the lottery market, and/or directly or indirectly by imposing unfair purchase or selling prices or other uncompetitive practices, and/or limiting the production of services to the prejudice of consumers, and/or making 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, thereby lessening competition substantially in the lottery market.

3. *A Declaration that the 1st and 2nd Defendants, whether by themselves or as part of an interconnected group of companies, have contravened the obligations or prohibitions, or any part thereof imposed in Part III of the Fair Competition Act, and/or in particular, that their conduct impedes the maintenance or development of effective competition in a market.*
4. *An Order that the 1st and 2nd Defendants pay the Crown a pecuniary fee not exceeding Five Million Dollars (\$5,000,000) in respect of each contravention of the provisions of the Fair Competition Act as may be found by the Court.*
5. *Consequent on Orders 2 and 3 above, an order that the 1st and 2nd Defendants be restrained, whether by themselves or by their employees, contractors, servants, or agents or otherwise howsoever, from continuing to engage in any conduct that is in breach of the Fair Competition Act, as may be found by the Court.*
6. *Costs of the claim be awarded to the Claimant.*
7. *Liberty to apply.*
8. *Such further and other relief as this Honourable Court may deem just."*

[2] By Notice of Application for Court Orders filed 14th May 2024, the 1st Defendant pursuant to CPR Rule 26.3(1)(b) seeks to strike out the claim as an abuse of process and/or as disclosing no reasonable grounds for bringing the claim. The 2nd Defendant, by a Notice of Application for Court Orders filed 14th May 2024, seeks an order pursuant to CPR Rule 26.1(2)(e) to stay the proceedings pending the determination of another matter now before the Court of Appeal. On the 24th October 2024 both applications came on for hearing. Written submissions having been filed I allowed each Counsel one hour for oral submissions.

[3] Counsel for the Defendants commenced his submissions by drawing attention to paragraph 7 of the Affidavit of Stefan Miller filed on the 14th May 2024. Mr Miller indicated that a report, prepared by the Claimant and dated February 17, 2022 under the name “Fair Trading Commission v Supreme Ventures (Jamaica)Limited Final Report Public Version” (which hereinafter I will refer to as “the report”), findings at page 29 paragraph 154 that, among other things, the Defendants were:

“...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.” [see exhibit FTC 15 to the affidavit of Dr. Kevin Harriott filed on the 27th September 2024].

That report was the subject of an appeal by the Defendants, pursuant to section 49 of the Fair Competition Act, in which it is urged that the findings in the report be set aside and that there is no breach of sections 19-21 of that Act. The Claimant, during those proceedings, purported to amend and reissue the report. That appeal was dismissed on the 20th May 2023. The Defendants filed a further appeal to the Court of Appeal and, an Amended Notice of Appeal, on the 6th November 2023. Counsel argues that, if the report is found to be null and void, these proceedings automatically fail as the report is integral in order to prove the claim.

[4] Counsel for the Defendants also drew attention to paragraph 20 of the affidavit of David Miller, filed on the 4th March 2024 in support of the Fixed Date Claim Form, which reads as follows:

“20. The FTC relies on the contents of the Final Report to support the grounds of this claim. For reasons set out in the said Final Report, the Claimant now seeks declarations of this Honourable Court that the 1st and 2nd Defendants’ conduct are in breach of the Fair Competition Act, and other consequential relief.”

He also referred to the 2nd Affidavit of David Miller, filed on the 27th September 2024 in Support of the Fixed Date Claim Form and In Response to the Notice of Application for Court Orders filed on the 27th September 2024, where at paragraph 6 it is stated:

*“6. Following the Judgment of this Honourable Court delivered on the 30th of May 2023 contained in reasons for judgment reported at **Supreme Ventures Limited and Prime Sports (Jamaica) Limited v Fair Trading Commission** [2023] JMCC COMM. 24, exhibited at 'FTC-16' in my previous Affidavit, the Claimant has now applied to this Honourable Court to enforce its findings contained in the said Final Report, by declarations and orders pursuant to the Fair Competition Act, including a declaration that the 1st and 2nd Defendants, whether by themselves or as part of an interconnected company, occupy a dominant position in the Lottery Market, and further declarations that the Defendants have breached Part III of the Fair*

Competition Act by abusing their dominant position in the Lottery Market.”

- [5] Counsel mentioned the affidavit of Dr. Kevin Harriott filed on the 27th September 2024 in Response to the Notice of Application for Court Orders and in Support of the Fixed Date Claim Form, which at paragraphs 21, 22, 24 and 25 refers directly to sections of the report on which the Claimant is relying. Counsel for the Defendant then went on to point out that there are paragraphs in the said affidavit quoting verbatim from the report, see paragraphs 26 – 32, (page 41, Judge’s Bundle Volume I) and paragraphs 70 – 78 (page 88, Judge’s Bundle Volume II). Finally, my attention was brought to paragraph 93 of the said affidavit, where it states,

“93. Paragraphs 93 to 98 of this affidavit refer to and rely on paragraphs 127 to 134 of the Final Report.”

It is against that background counsel for the Defendant argued that an appeal, which sets aside the report, would be determinative of these proceedings.

- [6] The Claimant alleges that it will be prejudiced by any delay caused by a stay of proceedings. On the other hand, defense counsel asserts that the alleged breach is a continuing one but the relief being sought is in very vague terms. Furthermore, the Claimant will not be prejudiced as the issue, it seeks to have determined in the instant case, will be determined on the pending appeal which is already before the Court of Appeal. If the appeal is successful, the report on which the Claimant is relying to bring these proceedings, will be set aside.
- [7] On the application to strike out counsel stated that the principal ground, on which the 1st Defendant relies, is that the 1st Defendant did not hold a license and does

not operate in the market. The letter dated 8th February 2021 (page 133, Judge's Bundle Volume II) suggests otherwise but counsel submitted that it was signed through inadvertence, see paragraph 13 of the affidavit of Gary Peart filed 14th May 2024. It is not in dispute that the 1st Defendant has ceased to hold any license or operate in the lottery market since 2013.

- [8] In his submissions counsel for the Claimant made note of the term "*interconnected group of companies*" in the Fixed Date Claim Form. This is a term which appears in section 2 of the Fair Competition Act which states as follows:

"2. (1) "group", where the reference is to a group of persons fulfilling specified conditions (other than the condition of being interconnected companies), means any two or more persons fulfilling those conditions, whether or not, apart from fulfilling them they would be regarded as constituting a group;

"group of interconnected companies" means a group consisting of two or more companies all of which are interconnected with each other;

"interconnected company" shall be construed in accordance with subsection (2)(a);

...

(2) For the purposes of this Act –

(a) any two companies are to be treated as interconnected companies if one of them is a company of which the other is a subsidiary or if both of them are subsidiaries of the same company; (b) a group of interconnected companies shall be treated as a single enterprise."

Counsel submitted that the Defendants were acting as part of an interconnected group of companies and the averment is entirely consistent with the Fair Competition Act. Enterprises can act together in a way which will establish their dominance in the market whether or not licensed to operate. Furthermore, counsel submits, it is not in dispute that the 2nd Defendant is a wholly owned subsidiary of the 1st Defendant, and as such both companies would fall under the definition of interconnected companies. Counsel for the Claimant referenced the earlier Supreme Court decision which is now being appealed (page 206, Judge's Bundle Volume II). He noted that this issue, of the 1st Defendant not being a licensee and therefore not being a proper party to this matter, was not raised there. He submits that when the court looks at the affidavits, and the correspondence exhibited, the 1st Defendant is squarely within the definition of an interconnected company.

- [9] As regards the application to stay proceedings the Claimant's counsel submitted that, although the report is being relied on, the affidavits in support of the claim go beyond that which is stated in the report. Furthermore, the law does not require a report prior to a claim being brought. The Act only requires the Commission to do an investigation and, based on that investigation, the Commission can go to court for a determination as to whether its preliminary views are correct or not, see section 5(1) and 46:

"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

...

(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.

...

46. If the Court is satisfied on an application by the Commission that any person—

(a) has contravened any of the obligations or prohibitions imposed in

Part III, IV, VI or VII; or

(b) has failed to comply with any direction of the Commission, the Court may exercise any of the powers referred to in section 47.”

[10] I am grateful to counsel for their carefully prepared written and oral submissions. Having perused the evidence, I am satisfied that the claim ought not to be struck out however a stay of proceedings is appropriate.

[11] The act of striking out a claim involves removing a party from the seat of justice without a trial. It is an extreme and final measure which should only be applied in clear cases, see ***Silvera Adjudah v Attorney General of Jamaica et al [2023] JMSC Civ 50*** at paragraph 7. This is not such a case. One important issue is whether the Defendants qualify as “*interconnected*” within the meaning of the statute. This is a question of mixed law and fact and is best resolved at trial. The Defendants, for example, assert that certain letters were executed in error. Only

at a trial can the truth of that assertion be determined and more importantly its legal consequence appropriately assessed.

[12] As regards the application for a stay I agree that setting aside the report could have a profound impact on the Claimant's case. The Claimant has structured its Amended Fixed Date Claim Form and accompanying affidavits around the report's findings and conclusions. The document serves as a cornerstone of the relief sought in the current proceedings. Therefore, should the report be set aside, it may alter the basis of the claim potentially rendering elements of the action untenable.

Consequently, I am of the view that this action ought to be stayed as otherwise the Defendants will be compelled to engage in proceedings which, in whole or in part, are later found to be grounded on an inadmissible foundation. I make no comment either on the merits of the appeal or on the future of this claim, if the appeal is successful, and none is to be implied. A stay will however ensure fairness to all parties, prevent possible unnecessary expenditure of resources and preserve the integrity of the judicial process.

[13] For the reasons outlined above I make the following orders:

1. Claim No. SU 2024 CD 00100 is stayed pending the determination of ***Supreme Court Civil Appeal No. COA2023CV00047: Supreme Ventures Limited and Prime Sports (Jamaica) Limited v Fair Trading Commission*** or until further order.
2. The application to strike out the claim against the 1st Defendant is refused.
3. The time for service of the respective applications is abridged.
4. I will hear submissions on costs.

David Batts
Puisne Judge