IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

COMMERCIAL DIVISION

CLAIM NO. 2007 CD 003

BETWEEN THE FAIR TRADING COMMSSION CLAIMANT

AND ERROL BAILEY, (TRADING AS FOUNDATION MUSIC SHOWCASE) DEFENDANT

Dr. Delroy Beckford and Ms. Wendy Duncan for the Claimant: Mr. Kevin Williams instructed by Grant Stewart Phillips & Co for the Defendant.

Liability under Section 37 of the Fair Competition Act. Effect of sections 47 and 46 of the Act. Meaning of "False or Misleading for the purposes of the Act. Factors that may be considered in determining appropriate size of penalty under section 47 Possibility of disclaimer for purposes of the Act.

Heard on March 12 and July 4, 2008.

CORAM: ANDERSON J.

This is an action brought by way of a Fixed Date Claim Form by the Claimant, The Fair Trading Commission, an agency of the Jamaican State, (hereinafter "FTC" or the "Claimant") against Errol Bailey, an individual trading as Foundation Music Showcase, (Hereinafter, "the Defendant") The action which is brought under section 37 of the Fair Competition Act, 1993, ("the Act") as that section has been amended, seeks a declaration under the relevant provision of the statute, and the imposition of the maximum penalty allowable against the Defendant. For the purposes of this action I shall set out the relevant terms of the Claimant's claim and the relief sought. I shall also set out the terms of the relevant section of the Act.

In its Amended Fixed Date Claim Form filed on August 23, 2007 in the Commercial Division of this honourable court, the Claimant sought the following reliefs:

1. "A declaration that Defendant has contravened the prohibitions and/or the obligations (or any part of the said obligations and/or prohibitions) imposed in Part VII of the Fair Competition Act and/or in particular that the Defendant has, in the course of business, engaged in the following conduct:
    a. Misleading Advertising in breach of section 37.

2. An Order that the Defendant pay the Crown such pecuniary penalty, not exceeding One Million Dollars ($1,000,000.00) for each breach so declared or as this Honourable Court thinks fit.
3. Costs of this Application.
4. Further and/or other relief as may be just.

Section 37 of the Fair competition Act, ("the Act") provides that:

> " (1) a person shall not, in the pursuance of trade and for the purpose of promoting, directly or indirectly, the supply or use of goods or services or for the purpose of promoting, directly or indirectly, any business interest, by any means-
>
> a) make a representation to the public that is false or misleading or is likely to be misleading in a material respect;
> b) make a materially misleading representation to the public concerning the price at which any goods or services or like goods or services have been, are or will be ordinarily supplied."

Counsel for the Claimant submitted that in drafting the relevant section of the Jamaican statute, considerable reliance was placed and the section based upon, section 52 of the Australian Trade Practices Act 1974. That section reads:

> "(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive"

Let me set out the facts giving rise to these proceedings. They are extensively recited in the affidavit of Barbara Lee, Executive Director of the FTC, filed on the 23rd of August, 2007. There is no little essential dispute between the Claimant and the Defendant as to those facts.

On December 31, 2006 and on divers other dates, the Defendant advertised in the national newspaper, the Daily Gleaner, and in other sections of the print and electronic media, that it would be staging a concert on January 6, 2007 under the caption "Foundation Music Showcase".

The advertisements stated that several well-known artistes would perform at the concert including popular Jamaican artistes, Freddie McGregor, Alton Ellis, the Mighty Diamonds, and Chakademus and Pliers. Also advertised as appearing at the concert was internationally renowned singing star, Peabo Bryson. The show was to be held at the Constant Spring Golf Club and, according to the ads, "VIP tickets" were being sold for three thousand dollars, ($3,000.00) and "general admission tickets" for one thousand five hundred dollars ($1,500.00). It is common ground that the artistes named above did not perform at the concert on the night it was staged, and no explanation was given, at that time, for their failure so to do.

A number of complaints were made to the FTC about the failure of the artistes to appear at the concert. At least thirty five (35) persons ("informants") registered complaints with the FTC, and of these, seven (7) provided sworn statements. The statements all indicated that in deciding to attend the concert, the makers had been ***induced by and relied specifically upon***, the terms of the advertisement which they had read. It was accordingly the view of the learned Executive Director of the Claimant, Mrs. Barbara Lee, that, in the circumstances outlined, the Defendant had breached the terms of section 37(1) of the Act. Mrs. Lee's affidavit had, appended as an exhibit, the names and addresses of several of the informants as well as the sworn statements of seven informants together with copies of the offending advertisement.

The sworn statements of the informants were all in substantially the same terms and spoke of their having been made aware of the impending stage show by way of the defendant's advertisement in the print and electronic media. In each case, the advertisement from a newspaper was attached. Each affiant averred that based upon the contents of the advertisement, they were "induced to buy" tickets to the stage show based upon the artistes who had been named as being among the performers. They each indicated that the artistes named above, failed to perform and that no explanation was given by the Defendant as to the reason why they had not performed. Each affiant concluded that he had been "misled to believe that I would have had the opportunity to be entertained by performances by Freddie McGregor, Alton Ellis, the Mighty Diamonds, Chakademus and Pliers and international artiste Peabo Bryson at the Respondent's concert as advertised". Having come to the view that they had been "misled" the affiants wrote to the FTC lodging formal complaints against the Defendant. As a consequence of the several complaints, Claimant pursuant to its powers under section 5 of the Act investigated the allegations and applied to the Court under section 46 thereof. The defendant, for his part, asserted that he had

issued explanations for the failure of the specific artistes to appear at his show and denied that he had breached section 37 as alleged by the Claimant or at all.

Counsel for the Claimant, Dr. Beckford, submitted that, given the relative novelty of fair competition to this jurisdiction, this court could properly be guided in deciding the issues, by looking at the approach of the courts in Australia, New Zealand and Canada, from which jurisdictions Jamaica had copied provisions now found in our own Act. He submitted that based upon section 37 (1) of the Act, there were four main elements which had to be satisfied to establish that a breach of the section had occurred. These elements were as follows:

a) There had to be a person (acting) in pursuance of a trade;
b) That person must be acting for the purpose of promoting, directly or indirectly, the supply or use of goods and services;
c) The person must "make a representation to the public";
d) The representation is false or misleading or is likely to be misleading in a material particular.

"Trade" is defined in section 2 of the Act as '…any trade, business, industry, profession or occupation, relating to the supply or acquisition of goods or services'. He further submitted that since the Defendant was a sole proprietor, trading as Foundation Music, he was involved in the business of providing entertainment services and also promoted the supply of such services. It was also submitted that he was a "person" for the purposes of the section and there is no dispute as to this submission.

The third element which, it was submitted, was necessary was that there had to be a 'representation to the public'. Counsel cited the unreported Canadian decision, **R v Canadian fur Shop of Saitoh Limited April 28, 1980, Ontario County Court**. He also cited the Australian case of **Taco Company of Australia Inc. v Taco Bell Pty. Ltd., (1982) 42ALR 177**. I pause to state here that in this latter case, the court delivered itself of dicta to the following effect. "The question of whether conduct is misleading or deceptive or likely to mislead or deceive is one for the court, (See **Snoid v Handley**)". In the Taco Bell case which was a passing off action, one judge stated:

> First, it is necessary to identify the relevant section (or sections) of the public, (which may be the public at large) by reference to whom, the question of whether conduct is, or is likely to be misleading, or deceptive falls to be tested (Weitmann v Katies Ltd. [1977] 29 F.L.R. 336 per Frankl

> J. at pp 339-340, cited with approval by Bowen C.J. and Frankl J. in Paula Brock v The Terrace Times Pty., Ltd. [1982] A.T.P.R. 40-267 at p 43, 412. Second, once the relevant section of the public is established, the matter is to be considered by reference to all who come within it "including the astute and the gullible, the intelligent and the not so intelligent, the well-educated as well as the poorly educated, men and women of various ages pursuing a variety of vocations".

There can be little doubt that the advertisement in the instant case was one meant for the "general public" in order to attract the widest possible audience attendance. Therefore, we now turn to what is the very heart of the case, i.e. whether the advertisement was a representation which was a "representation to the public that is false or misleading or is likely to be misleading in a material respect". In this regard, counsel for the Claimant relied upon the affidavit of the learned Executive Director of the FTC and the exhibits which included the affidavits of some of the informants, together with the copy of the advertisement in the print medium. It is however instructive to observe that in the Taco Bell case from Australia mentioned above, one judge did opine that:

> "Evidence that some person has in fact formed an erroneous conclusion is admissible and may be persuasive, but is not essential. Such evidence does not conclusively establish that conduct is misleading or deceptive or is likely to mislead or deceive. The court must determine that question for itself. *The test is objective*". (My emphasis)

Claimant's counsel urges this court, in considering the meaning of the phrase "false or misleading", to rely upon the dicta of Karl Harrison J.A. (Ag), (as he then was), in the unreported case, **Fair Trading Commission vs. SBH Holdings & Forrest Hills Joint Venture Limited (Supreme Court Civil Appeal No. 92/2002**). In that case which preceded the amendment to enlarge the scope of section 37, by adding the words, "or is likely to be misleading", the learned judge stated at page 27, as follows:

> "What are the meanings of the words 'false and misleading' within the context of the Act? These words are not defined in the Act so one has to consider them literally. The word 'false' to my mind, means any representation that is inconsistent with facts, and where the deviation would be unacceptable to a significant number of the general public and would lead to *misunderstanding or incorrect decisions*. (My emphasis) The word misleading also means a misrepresentation that would cause the general public to misunderstand or to make incorrect decisions, regardless of whether such representations is inconsistent with facts."

Counsel submitted that the effect of the amendment had actually been to reduce the threshold for breaching the section by adopting the proposition that even where there was merely a "likelihood" of being misled, the offence against section 37 would have been made out. In this

regard, Dr. Beckford cited another Australian case which considered the meaning of the word "likely". In **Tillmans Butcheries Pty Ltd. vs. the Australian Meat Industry Employees Union** (1979) 42 F.L.R. 331 at 339 Bowen C.J. considered the meaning of the word. He said:

> "…the word 'likely' is one which has various shades of meaning. It may mean 'probable' in the sense of 'more probable than not' more than a fifty percent chance. It may mean 'material risk' as seen by a reasonable man 'such as might happen'. It may mean 'some possibility'-more than a remote or bare chance. Or it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified."

The learned judge also, in the same part of his judgment, referred to the decision of Bray, C. J. in another Australian case, **Australian Telecommunications Commission v Kreig Enterprises Pty. Ltd (1976) 27 F.L.R. 400**... He said:

> "In **Australian Telecommunications Commission v Kreig Enterprises Pty. Ltd (1976) 27 F.L.R. 400** Bray C.J. had to consider the meaning of the word likely in section 139B of the Post and Telegraph Act 1903-1973. The context, of course, was different. However, Bray C. J. concluded that it meant "more probable than not" in that context. His Honour expressed the view that that was the natural and ordinary meaning of "likely"

Dr. Beckford conceded that the context here was indeed different, but argued that the dictum of the learned Chief Justice was still useful. He submitted that, based upon the affidavit evidence, there was sufficient evidence to allow this court to come to the view that members of the public had been "misled" by the representations contained in the advertisements. That evidence he said, is contained in the affidavit of the Executive Director, the several complaints received by the Commission and the copies of the offending advertisement. If this view of the word "likely" is correct, counsel suggested it could clearly be inferred that the words in the offending advertisement must be construed as being "likely to mislead" since it did in fact mislead persons as stated in their respective affidavits.

But, as counsel agreed, the Claimant must also prove that the representations were "material" before it can succeed. He therefore turned his attention to establishing that the issue of materiality had also been satisfied. Essentially, he argued that the representation was indeed "material" because, according to the undisputed evidence, it was the representation as to the fact of the intended performance by the particular artistes that caused the affiants to purchase their tickets for the stage show. It was submitted that Defendant's representation was not only material but was likely to mislead and did, in fact, mislead members of the public. It is further submitted that

Defendant's representation was false because it was "inconsistent with the facts", that is, the performers that were advertised to have performed did not in fact perform at the concert, and the representation induced members of the public to purchase tickets for said concert. It was also submitted that defendant's representation caused members of the public to 'make incorrect decisions' that is, purchasing tickets for the event on the basis that the artistes advertised to perform would in fact perform at the concert.

If I may get ahead of myself a little bit and advert briefly to the submission of the counsel for the Defendant Mr. Williams, on this point, he responded that on the issue of materiality:

> "……not every false or misleading representation contravenes section 37(1)(a) of the FCA. To contravene the section, the representation (advertisement) must not only be false or misleading but must be false or misleading "*in a material respect"*. In this regard, we submit that when the entire context of the representation/advertisement in question is considered the portion deemed or alleged to be false or misleading must *either be the dominant aspect of the representation/advertisement or the portion in question was such that without further information from the advertiser to the public, that portion of the representation/advertisement changed the entire tone of the representation.* (My emphasis)

It may well be argued that the portion of the representation which is being characterized as false or misleading (that the specific artistes including an internationally acclaimed artiste would be performing) was, in fact, "the dominant aspect" or "the portion in question (was) such that without further information from the advertiser to the public, that portion of the representation/advertisement changed the entire tone of the representation." While it may be going too far to say that if this is so the Defendant is hung on his own petard, there is a certain "Spanish machete" quality about this submission. It does indeed cut both ways for the central premise of the advertisement was that the named artistes would appear. Defendant's counsel suggested that insofar far as the advertisement (the "representation") was concerned, the only conclusions which could reasonably be drawn by the public were that:

a) a stage show was to take place on January 6, 2007;
b) that the artistes advertised as performers would in fact perform; and
c) that the promoter had contracted those artistes to so perform.

He suggested that none of these conclusions had been shown to be false, let alone "false in a material particular". I regret I cannot agree. In my view, on this aspect of the case, it is difficult to escape the conclusion that the relevant part of the advertisement was "material" for the purposes of the Act

Claimant's counsel also urged the court to the view that it was quite immaterial whether there was any intent on the part of the person making the representation to mislead or to deceive. The section, he argued, created absolute liability on the part of anyone who breaches the provisions in the section of the Act. It was therefore not a factor in determining liability under the section that there was no intent to mislead. Counsel further stated that there was authority to found liability even where the conduct related to an unfulfilled promise relating to future conduct> In this regard in relation to proceedings under section 52 of the Australian legislation, counsel cited the Federal Court in Australia (per Lee J.) in **Wheeler Grace & Pierucci Pty Ltd v. Wright ATPR 40-940 at 50, 251** :

> In respect of unfulfilled promises …there may be conduct which may be shown to be in contravention of s 52 of the Act without it being established that there was an implied representation by the maker of the prediction or promise that there were reasonable grounds for the belief that the prediction or promise would be fulfilled… A positive unqualified prediction by a corporation may be misleading conduct in trade or commerce if relevant circumstances show the need for some qualification to be attached that statement or the possibility of its non-fulfillment to be disclosed as a requirement of fair trading…The misleading or deceptive conduct may be found in the failure to qualify the statement or disclose the risk of non-fulfillment"

This view of the law, counsel said, was adopted by Heerey J in **Bowler v. Hilder Pty Ltd (1998) ATPR 41-625, at 40-857**. In that case the learned judge said:

> "I respectfully agree with Lee J's statement of the law, which is consistent with two basic principles that have emerged from the jurisprudence of s 52: first, it is the objective nature of the alleged contravener's conduct that is ultimately determinative of liability and not his or her state of mind…"

Counsel therefore respectfully submitted that the state of mind of the Defendant and whether he genuinely intended to have the artistes on the show was irrelevant to the question of his liability.

Finally, with respect to the issue of penalty, Counsel submitted that once the Court is satisfied under section 46 that an offence has been contravened, it has power to impose the penalty ordered under section 47. Section 47 (1) provides:

"Pursuant to section 45 the Court may-

(a) order the offending person to pay to the Crown such pecuniary penalty not exceeding five million dollars in the case of a person other than an individual;

(b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 45 in respect of each contravention or failure referred to in section 45"

It was submitted that the reference to section 45 in section 47 was really an error in the legislation and should properly have been a reference to section 46. It was pointed out that it was so treated in the local Court of Appeal case of **Jamaica Stock Exchange vs. Fair Trading Commission, Civil Appeal No. 92/97**. There Forte P., at page 28 stated:

> "Section 47 must be read, however, replacing a reference to section 45 with a reference to section 46, the former being an obvious error in the legislation…As it is section 46, which refers to the exercise of the powers of the Court under section 47, the reference to section 45 must be incorrect."

This view was also reinforced by the Court of Appeal in **SBH Holdings** where the court did in fact impose a penalty on the Respondents.

The Defendant's case was that there had been no false or misleading advertising. He had contracted with all the artistes to perform at the show which it had advertised to take place on January 6, 2007. In his affidavit he stated that all the artistes in question, except Peabo Bryson, were in fact at the venue on the night in question but that they refused to perform unless they were paid substantial sums over and above the amounts contracted for. When their demands were not met they refused to perform. With respect to the overseas artiste, Peabo Bryson, he had failed to show up for the concert despite having been contracted through his booking agent, his fees paid and all his travel and hotel arrangements concluded. According to his affidavit, the Defendant said that it was not until January 3, 3007 that he became aware of "difficulties" that Bryson was having with putting his backing band together.

I had noted above that the Defendant had argued that "false or misleading in a material particular" was to be construed to mean that that characterization was intended to refer to the dominant portion of the representation or the "portion that changed the entire tone of the representation". In support of this submission, Mr. Williams for the Defendant cited **Apotex Inc. v Hoffmann LaRoche Limited (2000) CANLII 15984** and **Bell Mobility Inc. v Tekus Communications Company 2000 BCCA 578**. It is interesting that the paragraph from the **Apotex** case cited as support of this proposition reads as follows:

> It is also necessary to consider whether the representation is false or misleading in a "material" respect. A representation is material for the

> purposes of section 52(1) if it is so pertinent, germane or essential that it could affect the decision to purchase".

As noted above, it seems clear based upon the affidavit evidence, that it was the very clear prospect of seeing *the particular artistes* that the informants said had led them to purchase tickets for the show. The representation clearly seemed to have "affected the decision to purchase". In the **Bell Mobility Inc** case adverted to by the Defendant's counsel, the court had to consider whether certain advertising was "false or misleading", Ryan J.A. in discussing the concept stated:

> The case law tracks the legislation in setting out the test to apply. In his factum, Mr. Deane summarized the approach required of a trial judge in deciding whether an advertisement can be said to be false or misleading. First, the trial judge must determine the general impression conveyed to consumers, based only on the representations actually made in the advertisements. This is the impression formed by consumers upon seeing the advertising in its intended form. Once assessed in light of the information presented to the consumer in the body of the advertisement, the impression is fixed as the impression of the average consumer
>
> I agree with Mr. Deane. I would only add that section 52(4) requires that the trial judge also examine the literal meaning of the representation in determining whether the advertisement is false or misleading".

It is not clear to me that this case supports the basic proposition being put forward by the Defendant that the representation in the advertisement was not "false or misleading" in that it was "true in all respects".

Counsel also sought to pray in aid of his submission, Article 2.2 of the Council Directive 84/450/EEC which was recited in English case, **The Office of Fair Trading v The Officers Club Ltd. (2005) EWHC 1080 (Ch**) as well as Regulation 2(2) of the United Kingdom Control of Misleading Advertisement Regulations 1988, which is in similar terms to the directive. He conceded that neither the directive nor the Regulation was binding on this court but nevertheless suggested that considering it could be helpful. It seems to me that since the regulation merely defines what "for the purposes of these regulations" is the meaning to be ascribed to the word "misleading", it cannot avail the Defendant and provides little, if any, help for this Court.

Mr. Williams properly submitted that it was the "overall impression" created by the representation or advertising that ought to determine whether it qualifies as "misleading". He cited the following passage from **Trade Practices Commission v Optus Communications Pty. Ltd and Another, No NG 459 of 1995 Fed No 116/96 Trade Practices**, a decision of the

Federal Court of Australia. It is to be noted that the Claimant had referred to the same section of the judgment to support its case. There, Tamberlin J. said:

> 56. In order to determine whether a statement is misleading, regard must be had to the sense in which a reasonable person would understand it on a fair viewing. cf **Typing Centre of NSW Pty Ltd v Northern Business College Ltd (1989) 11 ATPR 50, at 50,287**.
>
> 57. The Court will have regard to the overall impression generated by the advertisement and will examine it to see whether it conveys a false impression.

The learned judge then referred to the **Taco Company of Australia Inc v Taco Bell Pty Ltd (1982) 42 ALR 177 at 202-203,** and the passage cited above from the judgment of Deane and Fitzgerald JJ which is quoted, *in extensu*, above at page 8 of this judgment.

Counsel for the defendant further submitted that it was necessary for the Claimant to show that the advertisement was "false or misleading" *at the time of its publication*. In support of this proposition he cited **SINGTEL OPTUS v TELSTRA [2004] FCA 859** and in particular, the judgment of Jacobson J. I understand him to adopt the propositions advanced by the learned judge in paragraphs 38 to 41. These were in the following terms:

> In assessing whether an advertisement is misleading the whole context must be taken into account.
>
> Even if every sentence, considered separately, is true the advertisement may create a misleading impression because factors are omitted which should be mentioned or because the message is composed to highlight the appealing aspects;
>
> Where a false dominant impression is conveyed, it will be a question of fact as to whether this is ameliorated by an accurate qualification contained elsewhere in the advertisement;
>
> The use of small print or a brief subscript to an advertisement may be inadequate to alert a reasonable person to all relevant conditions.

With respect, I take the view that none of these propositions is exceptional as they are not incompatible with the propositions being advanced by the Claimant. Defendant's counsel placed particular reliance upon paragraph 42 of the judgment which is in the following terms:

> *The question of whether the advertisements are misleading is to be determined at the time of publication of the advertisements. The fact that*

> *the full terms may be explained when a reader or viewer contacts the publisher of the advertisement is not relevant to the question of whether the advertisement is misleading; see St Luke's Health Insurance v Medical Benefits Fund of Australia Ltd (1995) 17 ATPR 41-428 at page 40,823 (Northrop J); see also MBF v Cassidy at [43]. However, it will be relevant to the question of whether injunctive relief is to be granted if the advertisement is found to be misleading."* [EMPHASIS SUPPLIED]

At first blush this proposition seems attractive as it appears to limit the Court to taking a snapshot of the representation as at the day it is published and seeking to determine whether on the facts ***as known at that time***, it can be considered false or misleading. However, as noted by the judge in the very next paragraph, the determination of whether the advertisement is false or misleading may require the court to look at an earlier and related advertisement... Thus at paragraph 43 the judge continued:

> An impression created by an earlier but related advertisement may need to be taken into account in determining whether a later advertisement is misleading: See **Duracell Australia Pty Limited v Union Carbide Australia Limited (1988-89) IPR 293 at 299 (Burchett J.**)

The Defendant summarizes his submission in the words set out herewith:

> We submit that once the content of the advertisement is true and accurate at the date of its publication and there is no emphasizing or highlighting of any particular section of the advertisement which may misleadingly distort the meaning of the rest of the advertisement, the advertisement itself is not misleading within the context of section 37 of the FCA.

Defendant's counsel further submitted that:

> The fact that events subsequent to the publication of the advertisement made facts, hitherto true in their entirety, false, does not, we submit, render the advertisement false or misleading at the date of publication. As such, on the 31st December 2006, when the Defendant caused the advertisement to be published the evidence in this case clearly shows that the content of the advertisement was true in its entirety; was not misleading in any manner and did not therefore breached section 37 of the FCA.

The Law

I have found the decision of the Court of Appeal of Jamaica and in particular the well-reasoned judgment of Karl Harrison J.A. (Ag) (as he then was) in the **SBH Holdings case** previously referred to, very instructive. I adopt the words of the learned judge of Appeal as he opened his discourse on "the law" in relation to section 37. In that case at page 25, his lordship stated:

> "This appeal turns on the construction to be put on certain words in section 37(1)(a) of the Act. Put very briefly the basic issue between the parties is whether, on its proper construction, section 37(1)(a) of the Act creates an

> offence of absolute liability, or is it one requiring the existence of mens rea……..The point is really a short one. How ought the words of a statute passed to protect the public to be construed in a way that the public can understand.

I also adopt the reasoning of the learned Justice of Appeal, from whom it will be apparent I have quoted extensively in this judgment, in his view that it is necessary to "construe the words of this statute in the context of the legislative purpose for which it was passed". As he noted, the essential elements to constitute a breach of Section 37 are

(a) that a person acts in pursuance of a trade;

(b) that person makes a representation to the public;

(c) that representation is false or misleading;

(d) it is made for the purpose of promoting directly or indirectly the supply or use of goods and services.

The evidence which the court has accepted in the instant case as contained in the affidavit of the Executive Director of the Claimant and the sworn statements of the various informants attached thereto as exhibits, is that the complaining patrons bought tickets to the concert in question *because they were persuaded by the advertisement that the specific artistes would appear*. This seems to me to fulfill the criterion as being a representation which affected an economic decision. This was similar to the position of the purchasers in the **SBH Holdings** case. At page 26, His Lordship also opined in terms which may be regarded as equally applicable herein.

> "In the instant case, business, as between the Respondents and the general public was done on the basis of oral and written representations. The articles, brochures and pamphlets, were the means by which the proprietors (sic) of the development were invited to make their choices and it was on the faith of the representations contained in them that they placed reliance upon them and made their purchases. The undisputed fact at the end of the day is that none of the facilities or services advertised, that is the provision of tennis court, swimming pool and clubhouse, have been constructed by the Respondents.
>
> To my mind, the subject matter and structure of the Act make plain that the Act belongs to that class of legislation which prohibit some acts that "are not criminal in any real sense but are acts which in the public interest are prohibited under a penalty" as Wright J. put it in **Sherras v DeRutzen (1895) 1 QB 918 at 922(1895-9) All ER 1167 at 1169**"

Karl Harrison J.A. (Ag) also referred in his judgment to the Australian case of **Hornsby Building Information Centre Pty, Ltd v Sydney Building Information Centre Limited (1978) 140**

CLR 216, a case involving passing off. The learned judge cited section 52(1) of the Australian Trade Practices Act which is in my view *in pari materia* with our section 37 and which has been previously set out at page 2 of this judgment. He then cited with approval the following passage from the judgment of Stephen J in the following terms:

> As I read s. 52(1) the same may be said of it. It is concerned with consequences as giving to particular conduct a particular colour. If the consequence is deception, that suffices to make the conduct deceptive. Section 52(1) creates no offence; it only prescribes a course of conduct deviation from which may result in an Order of the Court, made under section 80 of the Act forbidding further deviation in the future. The section should be understood as meaning precisely what it says and as involving no questions of intent upon the part of the corporation whose conduct is in question.

His Lordship also referred to another Australian case cited by Mr. Foster, **Yorke v Lucas (1985) 158 CLR 661**. There it was held that, in construing section 52 of the Australian Trade Practices Act, a breach of that section may be committed *although a corporation acts honestly and reasonably and without any intent to mislead or deceive*. (Emphasis Mine) The following quote by His Lordship (at e page 23 of the SBH judgment) from the judgment of Mason J in **Yorke v Lucas** is also instructive.

> It should be observed at the outset that the facts as found by the trial judge raise the question whether the Lucas company itself was guilty of any contravention of section 52. It is, of course, established that contravention of that section does not require an intent to mislead or deceive and even though a corporation acts honestly and reasonably, it may nonetheless engage in conduct that is misleading or deceptive or is likely to mislead or deceive. **Hornsby Building Information Centre Pty. Ltd. v Sydney Building Information Centre Ltd. (1978) 140 CLR 216 at page 228.** (**Parkdale Custom Built Furniture Party Limited v Puxu Pty. Ltd. (1982) 149 CLR 191 at page 197.**

At paragraph 12, Mason J. continued:

> The nature of the prohibition imposed by section 52 is, however, governed by the terms in which it is created and the context in which it is found. Section 75B on the other hand in speaking of aiding or abetting, counselling or procuring, makes use of an existing concept drawn from the Criminal Law and unless the context requires otherwise, there is every reason to suppose that it was intended to carry with it the settled meaning which it already bore. Nor is there any reason to suppose that because the application of section 75B may occur in conjunction with a provision such as section 52, which requires no intent, it may also be construed so as to dispense with intent as an element of aiding, abetting, counselling or procuring,

With respect to the issue of absolute or strict liability and the absence of any need to show "intent to mislead", I adopt again, the reasoning of Harrison JA (Ag) in the **SBH Holdings** case. In the course of his judgment, His Lordship referred to the case of **Parkdale Custom Built Furniture Party Limited 1999 FCA 752** an Australian case in which the judgment was delivered in June 1999, cited to that court by counsel for the Fair Trading Commission, Mr. Foster. At page 22 he said:

> "The High Court of Australia in deciding the issues whether the conduct was misleading or deceptive or that it was likely to mislead or deceive, agreed with the reasoning of **Hornsby** (Supra) regarding the irrelevance of intention when determining whether Section 52 (1) has been contravened".

Another judge in the SBH case, Paul Harrison J.A. was of a similar view as he showed in relation to counsel's submission that intent was relevant in that case:

> "I also disagree with Mr. Ramsay for the Respondents that lack of intention to provide the amenities must be proven. I am persuaded to follow the Australian line of cases commencing with the Hornsby case and hold that, liability under section 37 of the Fair Competition Act should be strictly construed.
>
> The presence of evidence of an attempt to provide the facilities, even if it was subsequently made impossible by "the downturn in the Jamaican economy," although not a defence to liability, could serve as a mitigating factor in the Respondent's favour when a court is exercising its powers in respect of the imposition of any penalty under Section 47 of the Act".

It seems clear to me from the evidence that the elements which are set out above have been made out and I accordingly rule that the claimant must succeed in its application for the declaration as sought in their Fixed Date Claim Form.I accordingly make an Order in terms of the declaration sought in the Fixed Date Claim Form. I am of the view, and also hold, that this court is bound by this previous decision of the local Court of Appeal in holding that the legislation is directed at protecting the public, "even the gullible" ones among it. I further hold that the liability is strict or absolute requiring no *mens rea* for a positive finding of :"false or misleading" and that that the words "false" or "misleading" are not synonymous with each other. So that even if the word "false" did convey the need to import some intent into the conduct being called into question, (as to which I do not believe that it does) it is, in my view, clear that "misleading" is directed to the effect it has on the mind of the person to whom the representation is made and not the thoughts in the mind of the person making the representation.

I think it is relevant to note that based upon the evidence presented before me, there was no disclaimer in the advertisement as to the prospect of any artistes not performing. I hold in line with the principles set out in the Australian case, **Butcher v Lachlan Elder Realty Pty Limited (2004) HCA 60; 79 ALJR 308 (December 2, 2004)** that it would have been open to the Defendant to include an appropriate disclaimer which would have protected him from the consequences which have now arisen. For example, if the advertisement had contained a rider to the effect that all artistes had been contracted but no warranty that they would in fact appear was intended to be inferred from the advertisement, then that may have been sufficient to put patrons on notice and be enough to absolve the promoter of liability for a breach of section 37. While it is not necessary to the decision which I have reached in this case, I would nevertheless say the following: I believe that it is also a proper inference to be drawn from the dicta in the Butcher case, that if the impugned representation was merely a repetition in good faith, by an agent, of a representation made by hid principal, the agent ought not to be treated, without more, as contravening a provision about the making of a false or misleading statement.

In **Butcher** the court delivered itself of the following:

> In ***Yorke v Lucas*** Mason ACJ, Wilson, Deane and Dawson JJ said that a corporation could contravene s 52 even though it acted honestly and reasonably:
>
> > "That does not, however, mean that a corporation which purports to do no more than pass on information supplied by another must nevertheless be engaging in misleading or deceptive conduct if the information turns out to be false. If the circumstances are such as to make it apparent that the corporation is not the source of the information and that it expressly or impliedly disclaims any belief in its truth or falsity, merely passing it on for what it is worth, we very much doubt that the corporation can properly be said to be itself engaging in conduct that is misleading or deceptive."

The Court, in considering those general principles, continued:

> “In applying those principles, it is important that the agent's conduct be viewed as a whole. It is not right to characterize the problem as one of analyzing the effect of its "conduct" divorced from "disclaimers" about that "conduct" and divorced from other circumstances which might qualify its character”.

It therefore seems inherent that in some circumstances the party at risk is not entirely powerless to protect against the reach of section 37 of the Act. But I also wish to make another observation and that is in relation to the extent to which Jamaican entrepreneurs must now recognize that as an

incident of globalization, they must be aware of both its standards and its risks. In this regard, it clearly was open to the Defendant to have pursued taking out insurance which would have protected him in the event of the failure of any one of the artistes to appear. There is no indication that this has been done.

The Penalty

I turn my attention now to the question of the penalty which is appropriate in the circumstances of this case. I accept as a reasonable point of departure the suggestion by Paul Harrison J.A. in the SBH case that there may be conduct which the court may take into account in mitigation of the penalty even though that conduct does not amount to a defence to liability. But I also accept the dicta of Karl Harrison J.A. (Ag) when he said at page 30 of the judgment:

> The Fair Competition Act is clearly a very important safeguard for members of the public who choose to do business through the medium of advertising. In the circumstances, where representations are false or misleading, a very clear and strong message must be sent to those persons or corporations who are in breach of the law. I am therefore of the firm view that the imposition of a pecuniary penalty……would be appropriate in the circumstances.

The defendant has averred that the contracted parties who failed to perform at the concert had refused to do so when he had denied their requests for additional payments over and above that of which he had contracted them. It was also part of his affidavit that he had become aware on or about January 3, 2007, of the difficulties that Mr. Peabo Bryson was experiencing in re-assembling his band for the event, they having recently returned from a tour of Europe. The Defendant's own affidavit makes it clear that by January 5, he was so convinced that Mr. Bryson would not appear as an artiste on the show, that he made overtures for him to attend and be the M.C. for the show in light of the difficulties with his band. The Defendant has sought to say that the fact that the artistes in breach of their contract refused to appear or did not appear means that there was no "false or misleading" representation. This contention is misconceived. It seems clear to me that, if it could be demonstrated that the Defendant had done all that was in his power to address the difficulties and bring them to the notice of the public, while it does not affect the issue of liability under the provision, this may have an effect on the extent of the penalty to be imposed,. There is no evidence before me that the Defendant has sought to pursue legal action against any of the defaulting artistes. Further, apart from the fact that no explanation was given on the night of the concert to the patrons as to the reasons for the non-appearance of the artistes, no attempt was made between January 3 and January 6 to have alerted prospective patrons of the

prospect that Mr. Bryson would not appear because of difficulties with his band, so as to allow them to decide whether they still wished to attend the concert. The Defendant's affidavit at paragraph 7 states that there have been "several press releases from the Defendant explaining the events which led to the non-appearance of these artistes". However, no exhibit of any such advertisement or press release was exhibited to the affidavit.

Notwithstanding, the fact that the Court has found that the liability under Section 37 is strict, there may be some sympathy for a promoter who is held to ransom by unscrupulous artistes who refuse to carry out the terms of their contract. I believe that an acknowledgement of that difficulty may be reflected in terms of the penalty which this court imposes but I hasten to add that any sympathy for promoter must be tempered with a recognition of the public policy objectives of the statute and the fact that one ought to do what is in his power to protect himself from consequences of unscrupulous behaviour on the part of those with whom he would do business. Given all the circumstances, I believe that the legislative objective of the statute will be properly served by imposing a penalty of two hundred and fifty thousand dollars ($250,000.00) under section 46 of the Act.

Finally, I make two observations with respect to this matter. In the first place, it would also be appropriate that the error in the reference to section 45 in the Act, recognized now for several years, be corrected by the legislature as soon as possible. Secondly, I echo the sentiments of Paul Harrison J.A. on page 9 of the SBH case where he said.

As this Court had intimated during the course of the hearing, it is hoped that some consideration will be given by the authorities to the fact that although the penalty is payable to the Crown, the purchasers in the said development are still deprived of the promised facilities". Here the patrons who have purchased their tickets based on the representations which are in my view a term of their contract with the Defendant, are still out of pocket. No doubt it would be difficult to quantify the damages to which they are entitled, but it may be useful to consider whether some of the penalty paid to the Crown ought not to be used to compensate these victims.

With respect to costs, I order the Respondent to pay the costs of these proceedings to be taxed if not agreed.

ROY K. ANDERSON
PUISNE JUDGE
July 4, 2008