GOING BACKWARDS IN ABUSE OF DOMINANCE: A COMMENT ON THE PRIVY COUNCIL'S DECISION IN *NATIONAL COMMERICIAL BANK LTD V. OLINT CORP. LIMITED*

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The recent Privy Council ruling in *National Commercial Bank Ltd. v. Olint Corp. Ltd*.[1] signals a backward step in how a claim for breach of an abuse of dominance under the Fair Competition Act may be treated by our local courts in the future. An appeal from the Court of Appeal on, *inter alia*, the question of whether a bank by giving reasonable notice can lawfully close an account that is not in debit where there is no evidence the account is being operated unlawfully, the decision also dealt with sub- issues implicating the interpretation of section 19-20 of the Fair Competition Act, 1993, ('the FCA') and minimally, sections 34(1) (b) and section 35 of the FCA.

The decision doubtless rests on the premise that, by and large, banking law is the basis on which claims such as these should be resolved. Thus, at paragraph 1 of the decision their Lordships noted that absent an agreement to the contrary or statutory impediment, a contract by a bank to provide banking services is terminable upon reasonable notice. Later, at paragraph 6 of the decision, their Lordships noted that the particulars of claim of the Respondent did not disclose that the period of notice given by the Appellant for the closing of the account was unreasonably short.

Absent a claim that reasonable notice was not provided for closing of the account, their Lordships focused on the other claims of the Respondent that might provide the statutory impediment to which their Lordships referred, namely claims under the Banking Act, and claims under the Fair Competition Act, 1993.

The claim under the Banking Act was that a bank's contractual right to terminate an account by reasonable notice is modified by section 4 (3) (c) of the Banking Act; the claims under the Fair Competition Act being that the closing of the account amounts to an abuse of a dominant position contrary to sections 19-20 of the Act, that the closing of the account amounts to a refusal to supply goods or services in breach of section 34(1) (b) of the Act, and that the closing of the account amounts to collusion to injure competition in breach of section 35 of the Act.

The following note provides a brief critique of the decision from the standpoint of the enforcement of competition law, in particular their Lordships treatment of the abuse of dominance claim.

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[1] Privy Council Appeal, No. 61 of 2008, 2009 [UKPC] 16, April 28, 2009.

A convenient starting point may be the decision of *Jamaica Stock Exchange v. Fair Trading Commission*[2]**,** where the Court of Appeal, in its interpretation of sections 19-20 of the Fair Competition Act, 1993, held counter-intuitively (albeit obiter[3]) that the local stock exchange in Jamaica, the only entity offering that service, cannot be said to be limiting competition 'when there is no evidence of the appellant[4] being in competition with anyone else'.[5] The Court of Appeal, per Panton JA, continued:

"The facts indicate that the field is wide open for the development of another stock exchange. However, there is no evidence of any such entity being even on the horizon. In the absence of such evidence, it is at least unfortunate that the respondent is alleging that the appellant is impeding that maintenance or development of effective competition to itself. The question of competition can only arise if there is another entity, real, or potential, that can offer competition".

In other words, the surprising position is taken that when there is only one player in the market an issue of competition does not arise.

A similar misunderstanding arises in respect to the approach to market dominance. In **Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd**.[6] the claimant sought an order to extend an interim injunction to prevent the defendant from closing its accounts, claiming, *inter alia*, that there are serious triable issues with respect to the defendant abusing its dominant position in breach of section 19-20 of the FCA. The Court, however, found no evidence that the defendant bank could be in a dominant position.[7] The court observed further that:

"There is, however, evidence that there are five other commercial banks operating in Jamaica and they compete for business. There is also evidence that the Defendant is the second largest bank with assets of between 34% to 37% of total deposits and 30% to 34% of total loans. The largest bank and competitor to the Defendant is the bank of Nova Scotia with over 40% of total deposits and loans. In my judgment there can be no serious issue that the Defendant firstly, occupies such a position of economic strength as will enable it to operate without effective constraints from its competitors in the market under the Fair Competition Act; and secondly, was abusing it in relation to the Claimant".[8]

Here the court did not consider that the relevant market would have to be determined at trial and that given the market share of the Defendant together with the fact that there are other small players in the market, that a triable issue could therefore arise that the Defendant is dominant in the market.

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[2] Supreme Court Civil Appeal No. 92/97.
[3] The Court of Appeal held that the Fair Competition Act does not apply to the Jamaica Stock Exchange.
[4] The Appellant here being the Jamaica Stock Exchange.
[5] P. 66.
[6] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Claim No. 2008 HCV 00118, April, 2008.
[7] Ibid.,p.18.
[8] Ibid.

By contrast, the Court of Appeal in the instant case, per Morrison JA, adopted an enlightened approach in its preliminary appraisal of a section 19-20 claim under the FCA. It opined that it could not conclusively hold that there is no serious issue to be tried, for the purposes of extending the injunction, given the Defendant's market share in excess of 30%,with only one bank similarly circumstanced in a field of six banks, but also because section 19 of the FCA is not a legal term of art, but a provision that involves the intersection of law and economics for which expert evidence would have to be provided to make judgments on concepts such as 'a position of economic strength' and 'effective constraints'.[9]

The decision was again subject to appeal and, like the decision of Mr. Justice Jones in the court below, the Privy Council paid short shrift to the appellant's claim of abuse of dominance. Bearing in mind that this is the first statement of the Privy Council on section 19-20 of the FCA, it is worth quoting in full. The Privy Council held the following:

The claims under the Fair Competition Act appear to their Lordships to be equally unpromising. First, it is said that by closing the account, the bank was abusing a dominant position in the market. There appears to have been no evidence to suggest that the bank occupied a dominant position – defined in section 19 as "such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors" – in the market for banking services in Jamaica. The bank is the second-largest in Jamaica, with 34-37% of total loans and 30-35% of total deposits, but the Bank of Nova Scotia is larger and there are four other commercial banks in Jamaica, to say nothing of foreign banks. They are all in competition with each other. It is not easy to acquire a dominant position in the banking market. However, even if the bank did occupy a dominant position, their Lordships cannot see how a refusal to be the company's banker can be an abuse of that position. Abuse of a dominant position is normally with a view to securing some advantage in the market. Section 20 defines such abuse as impeding the "maintenance or development of effective competition". It does not appear to their Lordships that the bank's action could have any effect on competition between banks. On the contrary, it enabled competitors to pick up another customer if they felt inclined to do so.

On the basis of the foregoing, a bank's closing of a customer's account, in circumstances where there are many banks with none being dominant, does not affect competition if a competitor bank will pick up that account. This, however, amounts to an *a priori* position without any analysis as to what is the relevant market for purposes of determining if an enterprise is dominant in that market. The Privy Council engaged in no analysis of what the relevant market is or should be, and whether market share by itself can establish either (a) the relevant market, and/or (b) whether the claimant is being or likely to be excluded from that market as a circumstance of abuse. Rather, it assumed that the relevant benchmark for whether competition is affected is that of competition between banks, without an appreciation of the likelihood of the claimant being a part of the relevant market from which it could be excluded.

[9] *Olint Corp Ltd. v. National Commercial Bank Jamaica Ltd* , Supreme Court Civil Appeal no. 40/2008, July 2008, p.34.

Importantly, the implication of the decision is that a claimant for an injunction claiming a breach of section 19-20 of the FCA must show evidence of dominance of the enterprise concerned at the stage of requesting the injunction. It is, therefore, not enough to allege dominance by reference to some benchmark of market share that could be taken into account in a preliminary assessment of whether a triable issue exists. This seems contrary to the guiding principles for the granting of an injunction, namely that the claimant must establish that there is a triable issue as against proving the elements of a claim.

If a successful claim for abuse of dominance under the FCA requires that the claimant shows (a) that an enterprise is dominant, and (b) that the enterprise has abused its dominance, evidence to prove the claim of dominance ought properly to be established at trial, unless there is a requirement that proof of abuse of dominance be established at the stage of requesting the injunction since both elements have to be proven at trial for a successful claim under section 19-20 of the FCA. There seems to be no sound reason for requiring one element to be established at the stage of granting the injunction and the other at the stage of the trial.

In addition, since a claim of dominance can be disputed at trial, as much as at the stage of the application for an injunction, it is unclear what threshold of evidence is required at the stage for the application for an injunction. Disputes may arise as to what is the relevant market, or, assuming the parties are agreed on the relevant market, what threshold of market share should establish a presumption of dominance. These are questions that require economic analysis.

Therefore, as the decision stands, claimants for an injunction, for claims made with respect to section 19-20 of the FCA, require some economic analysis to be done to establish (a) the relevant market, and (b) that a particular enterprise is dominant in that market.

For this analysis guidance may be sought from the guidelines adopted by the Fair Trading Commission which represent best practices adopted by many competition authorities. In determining the relevant market under section 19-20 of the FCA, for example, market share and entry barriers are considered in determining whether a firm is dominant. A market share of at least 50 per cent establishes a presumption of dominance.[10] However, the FTC will also consider a market share of 40 per cent to establish presumptive dominance.[11] However, these threshold figures are guidelines that the FTC follows. In some instances, the FTC may consider a market share of between 40 and 50 per cent as establishing a presumption of dominance.[12] The FTC also considers that circumstances may exist in which a market share of below 40 per cent could establish

[10] See, Commission's Decision, case no. 3685, *Grace Kennedy Remittance Services (GKRS),* April 30,2002, p.3.
[11] Ibid.,p.17.
[12] See, for example, Commission's Decision, case no. 3263, *Telstar Cable Limited on Predatory Behaviour*, August, 29, 2001, p.4.

dominance[13], or that a 50 per cent market share may not be sufficient to establish dominance.[14]

In the former case, this could arise when there is one major firm in a market that is shared by a number of relatively smaller firms[15], while in the latter case, this could arise when a market is equally shared between two competitors such that neither is dominant over the other.[16]

Dominance is also established in terms of barriers to entry to a market. Typically, these barriers include licensing and regulatory requirements, patent rights, and sunk costs, that is, the initial investment to be made before the production of a good or service.

It is doubtless desirable that these guidelines be adopted by the courts in resolving issues relating to abuse of dominance, but the relevance of these guidelines seems in doubt if a decision can be taken about the anti-competitive effect of conduct in a market without an appreciation of the relevant market and that an economic analysis of anti-competitive effect is warranted, as the Privy Council has done by upholding the decision of Mr. Justice Jones.

[13] Ibid., p.5.
[14] Ibid., p. 5.
[15] Ibid.
[16] Ibid. See, also, Commission's Decision, Case no. 3794, *Super Plus Food Store on Predatory Behaviour*, August 13,2001,p.5-6.