[2026] JMCA Civ 32

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO COA2023CV00047

BEFORE: THE HON MR JUSTICE F WILLIAMS JA
THE HON MR JUSTICE LAING JA
THE HON MRS JUSTICE TIE POWELL JA (AG)

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

Kevin Powell KC and Miss Annay Wheatle instructed by Hylton Powell for the appellants

Emile Leiba and Miss Samantha Grant instructed by DunnCox for the respondent

27, 28 January and 31 July 2026

Competition law – Appeal from findings of the Fair Trading Commission – Preliminary point – Whether appeal lies to the Court of Appeal from decision of judge in chambers in Supreme Court in relation to findings of Fair Trading Commission – Whether decision of judge in chambers is final – Fair Competition Act, section 49 – Judicature (Appellate Jurisdiction) Act, sections 10 and 11

Natural Justice – Investigation by Fair Trading Commission – Failure to explicitly notify appellants that they were the subject of the investigation – Failure to disclose the full scope of the investigation – Final Report prepared and issued – Whether appellants had a right to be heard

Procedural fairness – Whether appellants had a right to be heard – Legitimate expectation – Whether a single prior investigation by the Fair Trading Commission is sufficient to establish a legitimate expectation that future investigations will be conducted in the same manner

Challenge to final report – Whether learned judge properly engaged with the appellants' evidence – Whether the final report was consistent with the evidence and the Fair Competition Act

F WILLIAMS JA

[1] I have read, in draft, the judgment of Tie Powell JA (Ag). I agree with her reasoning and conclusion and have nothing further to add.

LAING JA

[2] I, too, have read the draft judgment of Tie Powell JA (Ag) and agree with her reasoning and conclusion.

TIE POWELL JA (AG)

Introduction

[3] The appellants are companies incorporated under the laws of Jamaica. The 1st appellant, Supreme Ventures Limited ('SVL'), offers various gaming and entertainment services in Jamaica, including lottery games through its subsidiaries. The 2nd appellant, Prime Sports (Jamaica) Limited ('PSJ'), is a subsidiary of SVL and is an operator of lotteries in Jamaica under a licence issued by the Betting, Gaming and Lotteries Commission ('BGLC'), a commission established by the Betting, Gaming and Lotteries Act.

[4] The respondent, the Fair Trading Commission ('FTC'), is a statutory body established under the Fair Competition Act ('FCA') and is vested with the power to conduct investigations to determine whether any enterprise has contravened its provisions.

[5] Following a complaint directed at SVL and concerns raised by the BGLC, the FTC investigated the appellants for alleged breaches of the FCA and issued a Final Report. Pursuant to section 49(1) of the FCA, the appellants challenged both the investigative process and the Final Report's conclusions before a judge in chambers at the Supreme Court. Dissatisfied with that decision, the appellants now bring this appeal.

The background

[6] As noted in the Final Report, revised and reissued on 8 June 2022, SVL operated as Jamaica's sole lottery provider for over two decades. This position changed when the BGLC approved two additional operators, Mahoe Gaming Enterprises Limited ('Mahoe') and Goodwill Gaming Enterprises Limited ('Goodwill'). These entities entered the market in February 2021, following public announcements in July and August 2020. The entry of those competitors raised two concerns about SVL's conduct, prompting an investigation. The first related to the termination of contracts with retailers who had entered into agreements with the new entrants, while the second concerned the issue of gaming odds.

[7] Regarding the odds issue, following the announcement of the entry of the two new operators into the market, SVL had requested and obtained BGLC's approval in November 2020 to offer payouts for its Cash Pot game in the range of $26:1 to $35:1. Thereafter, SVL submitted another application seeking approval to offer odds of up to $50:1, which raised concerns on the part of the BGLC.

[8] Before and during the investigation, there were a number of communications among the FTC, the appellants, and other entities. It is necessary to summarise them to place this appeal in its proper context.

[9] On 19 February 2021, the executive director of BGLC wrote to his counterpart at the FTC, requesting a meeting to address this issue. He expressed concerns about the likelihood of the operators "engaging in practices which may be considered unfair or anti-competition [sic] in their attempt to obtain and maintain a competitive advantage". He stated, "Whilst the offer of higher payouts is not necessarily bad, our fear however is that, based on the strength of resources, one operator could offer payouts at a level which makes the game itself unprofitable and would want to sustain that level of payout for a considerable time in an attempt to push the other operator out of the market".

[10] As regards the issue of the termination of contracts with retailers that engaged with the new entrants, in March 2021, the FTC's executive director received a complaint on behalf of Moneypost Enterprise Limited ('Moneypost'), a lottery retailer, regarding SVL's termination of its contract. The complaint alleged that SVL, "… terminate[s] contracts of its agents who dare to sign a contract with a new entrant in the Lottery/Gaming industry…".

[11] It is in this context that the FTC launched its investigation. By letter dated 3 August 2021, the FTC wrote to the Supreme Venture Group regarding "Request for information regarding the provision of Lottery Gaming Services Market in Jamaica". Given that this letter constitutes the foundation upon which the FTC commenced its investigation into SVL's conduct, and considering the issues arising for determination in this appeal, it is necessary to reproduce extensive portions of the letter. The letter indicated that:

> "The Fair Trading Commission (FTC) is investigating an alleged breach of the Fair Competition Act ('FCA') in the market in which lottery gaming services are offered in Jamaica. The investigation is being carried out pursuant to section 19-21 of the FCA which prohibits an enterprise in a position of dominance in a market from engaging in conduct which has had, is having or is likely to have the effect of substantially lessening competition.
>
> Please note that Section 5(1)(a) of the FCA mandates that FTC '*to carry out, on its own initiative or at the request of any person such investigations or inquiries 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 the this* [sic] *Act and the extent of such practices.'*"

[12] The letter then requested information regarding the termination of agents' contracts. Specifically, "How many agent contracts did you terminate between January 2015 and December 2019?" The same query was also posed for the period January 2020

to June 2021. SVL was asked to indicate the basis for terminating the agent contracts and the corresponding numbers from a list of categories. The stated categories were:

a. Breach of contract

b. Rescission

c. Void contract

d. Discharge by agreement

e. Force majeure

f. Frustration, and finally

g. Other, specify

[13] A response to the FTC's correspondence was tendered by way of a letter dated 24 September 2021, by the Senior Vice President, Legal, Regulatory & Compliance for PSJ, the details of which will be set out later in this judgment. In brief, the number of agreements terminated was stated, with reasons all falling under the category of "other." Specificity was given, along with the corresponding numerical breakdown. The letter ended with an invitation to indicate if additional information was required.

[14] On 3 November 2021, the FTC wrote to the BGLC advising that

> "…the information requested from SVL was not as specific as we had expected, and therefore we are reverting to other means to obtain the much-needed information that will allow us to conclude our investigation."

[15] Among other things, the FTC queried whether BGLC had information regarding the termination of retailer agreements, including the reasons for those terminations. It also requested information on the timelines for Mahoe's and Goodwill's licence applications and approvals. Additionally, the FTC aimed to identify retailers who operated for both SVL and the new market entrants, as well as those who now operate exclusively for the

new entrants. The FTC also inquired about the "fit and proper" test for retailers and whether any agents were terminated for failing it.

[16] On 8 December 2021, the BGLC provided the FTC with the information available to it. However, it did not contain any information on retailer terminations for the period January 2015 to December 2019.

[17] On 12 November 2021, the FTC wrote to SVL following a Zoom meeting between the two entities on 2 November 2021 to confirm the matters discussed and the reasons for termination. The reasons identified comprised the following categories: termination by agents and by SVL (reflecting terminations at will rather than for breach), termination for breach of contract, inability to satisfy regulatory requirements, and "other". The FTC also requested further information in respect of each contract terminated under the category of "lottery termination - SVL", including the name of the agent, the date of entry into the contract, and the date of termination.

[18] In response, by letter dated 31 December 2021, the Senior Vice President of PSJ provided the names of the affected retailers, along with their respective termination dates. The list included a "Moneypost OTB". The letter also stated, "By way of reminder and for clarity, your reference to contracts terminated at will by SVL relates to the channel realignment detailed in my letter to you and in keeping with my discussions with your Mr. Desroy Reid and Ms. Vanesa Hall". It also stated, "Further to your request, the term 'lottery terminations' denotes terminations initiated by SVL as part of our channel realignment exercise".

[19] On 15 February 2022, the FTC uploaded a draft of its Final Report to its website. SVL became aware of this publication after a media outlet inquired about it and, by letter dated 16 February 2022, demanded its immediate removal. The FTC subsequently

explained that the upload had occurred in error and indicated that the document had already been removed before receiving SVL's letter.

[20] The FTC, thereafter, issued its Final Report titled "Fair Trading Commission v Supreme Ventures (Jamaica) Limited" "Final Report" "Public Version", dated 17 February 2022, and furnished SVL with a copy. Therein, the FTC identified conduct that, in its view, constituted breaches of the FCA arising after the BGLC signalled the imminent entry of two new operators into the lotteries market. The first conduct identified involved SVL securing approval to offer odds of up to $50:1 for its Pick 1 lottery game (Cash Pot), which the FTC regarded as likely to be unprofitable and therefore irrational for a profit-maximising enterprise. The second concerned SVL's termination of retailer agreements with retailers who also distributed games for the recent entrants, in particular, the termination of 48 retailers' agreements within two weeks of the first new entrant, Mahoe, commencing operations.

[21] The "Summary and Overall Conclusion" of the Final Report was as follows:

> "144. The conduct challenged was the proposed payout structure of Supreme Ventures' lottery game as well as the implementation of a channel and business realignment strategy.
>
> 145. The challenged conduct was investigated under sections 19-21 of the Fair Competition Act which prohibit any action of an enterprise occupying a dominant position in a market from abusing its dominance to the detriment of effective competition.
>
> 146. The FTC concluded that the challenged conduct could potentially compromise competition in the market for lottery games sold in Jamaica, in which Supreme Ventures occupied a dominant position.
>
> 147. The FTC determined that Supreme Ventures abused its dominant position in the lottery market by limiting the expansion of entrants through the restriction of competitors' access of a critical input (retailers). Supreme Ventures restricted the access to its

> competitors to a crucial input (i.e. retailers) by strategically terminating and/or threatening to terminate agreements with some retailers which also engage the services of competing lottery operators.
>
> 148. The FTC determined that the abusive conduct had the effect of lessening competition substantially by harming competitors (discouraging expansion by increasing the cost of distributing games and discouraging entry by seeking approval to offer unprofitably high payouts) and harming players (reducing the variety of games accessible to players at a given retailer location.)
>
> 149. The FTC is not satisfied that the conduct met the standards to be exempted from being treated as a breach of the Fair Competition Act.
>
> 150. The overall conclusion is that the challenged conduct is likely to breach sections 19-21 of the Fair Competition Act.
>
> 151. Accordingly, the case is being pursued as a possible breach of sections 19-21 of the Fair Competition Act."

[22] The appellants appealed the findings in the Final Report to a judge in chambers in the Supreme Court, by way of a fixed date claim form filed on 7 March 2022, primarily seeking (i) an order to set aside the findings of the FTC contained in the report dated 17 February 2022, and (ii) a declaration that the conduct of the appellants, the subject of the Final Report, is not likely to, and does not, breach sections 19-21 of the FCA.

[23] After the appeal was filed in the Supreme Court, it became apparent to the FTC that the report contained an error. Although SVL had applied to the BGLC for approval to offer odds of up to $50:1 on its Pick 1 lottery game (Cash Pot), it had not obtained such approval, contrary to what the report stated. The Final Report was then amended to reflect that the BGLC had denied SVL's application, and a Revised Final Report, dated 8 June 2022, issued. According to the FTC, this revision did not alter its conclusion regarding the likely effect of the appellants' actions on competition. The summary and overall conclusions of the revised Final Report were identical to those in the initial Final

Report, save for the numbering and minor adjustments to two paragraphs that did not alter the substance. Paras. 146 and 148 of the initial Final Report became paras. 157 and 159 of the revised report and read:

> "157. The FTC concluded that the challenged conduct is likely to impede the development of competition in the market for lottery games sold in Jamaica in which Supreme Ventures occupied a dominant position."
>
> "159. The FTC determined that the abusive conduct had the effect of lessening competition substantially by (i) discouraging expansion of competitors by increasing the cost of distributing games (ii) discouraging entry of potential competitors by seeking approval to offer unprofitably high payouts rates; and (iii) harming players by causing the reduction the [sic] variety of games accessible to players at numerous retailer locations."

[24] The following grounds of appeal, as contained in the fixed date claim form, reflect the substance of the complaint that was placed before the Supreme Court:

> "5. In the exercise of its functions under the Act, the Respondent has a duty and obligation to allow persons it is investigating an opportunity to be heard before arriving at a decision.
>
> 6. Further or in the alternative, the Appellants had a legitimate expectation that if the Respondent was investigating them, it would allow them an opportunity to be heard before it arrived at a decision.
>
> 7. On February 18, 2022 the Respondent issued a report dated February 17, 2022 titled '**Fair Trading Commission v. Supreme Ventures Jamaica Limited [sic]…Final Report** ('the Report'). In the Report the Defendant concluded among other things, that the 1st Appellant '**being dominant in the market for lotteries in Jamaica, is engaged in abusive conduct which restricts the expansion of competitors and the entry of potential competitors in**

> **a manner that has had or is having the effect of lessening competition substantially in the market.'**
>
> …
>
> 9. The conclusions in the Report are contrary to and / or not supported by the evidence or the Act."

[25] The appellants were unsuccessful in those proceedings and now seek to invoke the jurisdiction of this court.

The grounds of the appeal

[26] The appellants challenge the learned judge's orders dated 30 May 2023. The grounds of appeal are as follows:

> "(a) The Learned Judge erred in failing to find that the Respondent did not give the Appellants a proper or sufficient opportunity to be heard before arriving at the findings in the Final Report.
>
> (b) The Learned Judge erred in failing to find that the Appellants had a legitimate expectation that if the Respondent was investigating them, it would allow them an opportunity to be heard before it arrived at a decision.
>
> (c) The Learned Judge erred in concluding that the Respondent's decision to amend the Final Report during the course of the proceedings in the court below meant that the Appellants were given an opportunity to be heard.
>
> (d) The Learned Judge erred in failing to consider or to sufficiently consider the Appellants' evidence in deciding whether the conclusions in the Final Report were contrary to and/or not supported by the evidence or the Act."

[27] The appellants now seek the following orders:

> "a The orders made on May 30, 2023 which are the subject of this appeal be set aside.

> b The findings of the Respondent, the Fair Trading Commission, contained in report in case No 8168-21 titled Fair Trading Commission v Supreme Ventures (Jamaica) Limited dated and issued February 17, 2022 be set aside.
>
> c. The conduct of the Appellants the subject of the Final Report is not likely to and does not breach sections 19-21 of the Fair Competition Act.
>
> d. Costs of this appeal and in the court below be awarded to the Appellants."

Preliminary point

[28] As a preliminary matter, the FTC raised the issue of this court's jurisdiction.

<u>Submissions</u>

For the FTC

[29] Mr Leiba contended that no further right of appeal lies from the decision of a judge in chambers of the Supreme Court on an appeal brought by a person aggrieved by a finding of the FTC, under section 49(1) of the FCA. He argued that this section creates a distinct statutory appellate process, by which a person aggrieved by a finding of the FTC may appeal to a judge in chambers, but does not confer any further right of appeal to this court.

[30] Counsel submitted that the statutory scheme draws a distinction between the Supreme Court's original jurisdiction and the appellate jurisdiction conferred on a judge in chambers. In this regard, he contrasted section 46 of the FCA, which permits the FTC to apply to "the Court" for enforcement relief, with section 49(1), which provides for an appeal to "a Judge in Chambers". It was submitted that the former concerns the Supreme Court's original civil jurisdiction, whereas the latter concerns a special statutory appeal from the FTC's investigative findings.

[31] On that basis, counsel argued that a decision made by a judge in chambers under section 49(1) is not a "judgment or order of the Supreme Court" within the meaning of section 10 of the Judicature (Appellate Jurisdiction) Act ('JAJA'). He contended that section 10, therefore, does not confer jurisdiction on this court to entertain a further appeal from such a decision.

[32] In support of that submission, counsel referred to previous decisions of this court under the FCA, including **Jamaica Stock Exchange v Fair Trading Commission** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 92/1997, judgment delivered 29 January 2001 ('**Jamaica Stock Exchange**'), **Crichton Automotive Ltd v Fair Trading Commission** [2017] JMCA Civ 6 and **Digicel Jamaica Ltd et al v Fair Trading Commission** [2014] JMCA Civ 48. He submitted that those cases concerned matters arising from the Supreme Court's original jurisdiction and did not recognise any further right of appeal from a decision made under section 49(1).

[33] Counsel also relied on **Canadian Pacific Ltd v Canada (Director of Investigation and Research)** [1997] OJ No 3762, 103 OAC ('**Canadian Pacific**'), as supporting the proposition that appeals should not be permitted at the investigative stage unless expressly provided for by statute. He submitted that allowing further appeals at that stage would risk delay and would undermine the expeditious conduct of investigations under the FCA. The FTC sought aid from the structure and wording of foreign competition legislation in comparable jurisdictions, citing the Singapore Competition Act 2004 at section 74(4), which states:

> "There is such further right of appeal from decisions of the General Division of the High Court under this section as exists in the case of decisions made by the General Division of the High Court in the exercise of its original civil jurisdiction."

[34] Counsel observed that the Singapore legislation expressly provides for a further right of appeal from decisions of the General Division of the High Court in relation to

cases arising from its original civil jurisdiction and surmised that the omission by Jamaica's parliament to expressly provide for a further right of appeal from a decision under section 49(1) of the FTA should be treated as deliberate.

[35] Counsel relied on **Beverley Sinclair Senior v Commissioner of Customs and Excise and Attorney General of Jamaica** [2016] JMSC Civ 31 ('**Beverley Sinclair Senior**'), submitting that the interpretation adopted by Sykes J (as he then was) in his construction of the Customs Act, supports the view that where Parliament has established a specific statutory process, the court should be slow to imply additional appellate rights not expressly provided for in the legislation.

[36] Finally, it was observed that permitting appeals at the investigative stage would be impractical, as it would introduce delay and thereby undermine the expeditious conduct of investigations.

For the appellants

[37] Mr Powell KC submitted that, under section 49 of the FCA, decisions of a Supreme Court judge in chambers are not final, as the provision imposes no prohibition or limitation on an aggrieved party's right to pursue a further appeal to the Court of Appeal. He pointed out that the jurisdiction to appeal to the Court of Appeal is conferred by section 10 of the JAJA, which vests the Court of Appeal with broad civil appellate jurisdiction. He reasoned that a decision of a judge in chambers under section 49(1) of the FCA falls squarely within the phrase a "judgment or order of the Supreme Court in all civil proceedings" as used in section 10 of the JAJA. Accordingly, in this context, a judge in chambers is properly regarded as a Supreme Court judge exercising statutory appellate jurisdiction under the authority of the Supreme Court.

[38] Finally, he submitted that section 11 of the JAJA excludes the Court of Appeal's jurisdiction to hear certain matters. These include decisions of the Supreme Court, or any

judge thereof, where the law provides that the decision is final. He contended that the FCA does not specify that the decision of the judge sitting in chambers is final, and therefore the Court of Appeal's jurisdiction remains, unlike in other legislation such as the Defamation Act (section 12), the Travel Agencies Regulation Act (section 18(1)), the Tourist Board Act (section 21(5)), and the Town and Country Planning Act, all of which state that the decision of the judge in chambers is final.

[39] As regards the authorities relied upon by the FTC, King's Counsel submitted that they were distinguishable and, accordingly, of no assistance.

<u>Analysis</u>

[40] Before turning to the issues raised on the appeal, it is useful to outline the relevant statutory framework. In broad terms, the FCA is directed to the promotion of fair competition and the restraint of business practices inimical to that objective. To that end, it proscribes certain business practices and establishes the FTC to advance those statutory purposes.

[41] The FTC's investigative functions are outlined in section 5(1) of the FCA. Of particular relevance to the present analysis are its functions:

> "(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."

and

> "(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."

[42] The FTC is vested with wide powers to facilitate the effective discharge of its investigative mandate. Section 7 of the FCA confers on it broad investigatory powers for the discharge of its statutory functions. These include the authority to summon and examine witnesses, require the production of documents, administer oaths, and otherwise conduct inquiries and hearings necessary to determine whether the FCA has been contravened.

[43] Upon completing an investigation, the FTC may pursue enforcement proceedings under section 46 of the FCA by applying to the Supreme Court, which is empowered to impose sanctions if it is satisfied that there has been a contravention of the FCA. Additionally, section 49(1) of the FCA provides that any party aggrieved by the FTC's findings may appeal to a judge in chambers. The appellants in this matter pursued that course.

[44] The FTC's first contention on the preliminary objection is that, on a proper construction of the FCA, decisions rendered in the exercise of the Supreme Court's statutory appellate jurisdiction fall outside the ambit of this Court's jurisdiction. That submission turns principally on the statutory references to "the Court" and to "a Judge in Chambers". It, therefore, requires close examination of the relevant provisions.

[45] Under section 2 of the FCA, "the Court" is defined as the Supreme Court. A review of the FCA shows that the expressions "the Court" and "Judge in Chambers" are used throughout Part VIII, which is entitled "Enforcement, Remedies and Appeals".

[46] Section 46 is a central component of the FCA's enforcement machinery, empowering the FTC, on the basis of its investigative findings, to invoke the court's jurisdiction to determine a breach and grant appropriate relief. The section states:

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

(a) 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 specified in section 47."

[47] Section 47 outlines the court's powers to grant remedies. It states:

"47.—(1) Pursuant to section ***45*** the Court may —

(a) order the offending person to pay to the Crown such pecuniary penalty not exceeding one million dollars in the case of an individual and 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." (Emphasis supplied)

[48] The remainder of section 47 need not be reproduced in full here. Essentially, it identifies the factors "the Court" shall consider in exercising its powers and prescribes the applicable standard of proof for these proceedings. It is apparent, as was observed in this court's decision in **Jamaica Stock Exchange**, that the reference in the first line of section 47 to section 45 is erroneous. Having regard to the concluding language of section 46, which expressly refers to section 47, that reference must properly be read as a reference to section 46.

[49] Section 49 of the FCA deals with appeals against the FTC's findings. It confers a right on any person who is dissatisfied with such a finding to challenge that decision before a judge in chambers of the Supreme Court. Section 49 of the FCA states in part:

"(1) Any person who is aggrieved by a finding of the Commission may, within fifteen days after the date of that finding, appeal to a Judge in Chambers.

(2) The Judge in Chambers may —

> (a) confirm, modify or reserve the findings of the Commission or any part thereof; or
>
> (b) direct the Commission to reconsider, either generally or in respect of any specified matters, the whole or any specified part of the matter to which the appeal relates."

[50] The remaining parts of section 49 concern the directions that a judge may give to the FTC and the reconsideration of matters referred back to it. They do not directly affect this aspect of the analysis and are, therefore, not reproduced here.

[51] Any discussion of the Court of Appeal's jurisdiction must include an examination of the provisions of the JAJA. Section 10 of that Act appears in Part III, under the rubric "Appellate Civil Jurisdiction" and provides as follows:

> "10. Subject to the provisions of this Act and to rules of court, the Court shall have jurisdiction to hear and determine appeals from any judgment or order of the **Supreme Court** in all civil proceedings, and for all purposes of and incidental to the hearing and determination of any appeal, and the amendment, execution and enforcement of any judgment or order made thereon, the Court shall subject as aforesaid have all the power, authority and jurisdiction of the former Supreme Court prior to the commencement of the Federal Supreme Court Regulations, 1958." (Emphasis supplied)

[52] The FTC contended that section 49(1) of the FCA, read with section 10 of the JAJA, confers no further right of appeal, as it refers to a "judge in chambers," rather than "the Court", while section 10 applies only to judgments or orders of the Supreme Court.

[53] A careful examination of these provisions reveals no basis for concluding that the legislature's use of the terms "the Court" and "Judge in Chambers" was intended to confine appellate recourse under section 49(1) to a judge of the Supreme Court sitting in chambers. In my respectful view, the limitation proposed by the FTC cannot properly be derived from that difference in terminology.

[54] The fact that the FCA directs that appeals from the FTC's findings are to be heard by a "Judge in Chambers", as opposed to the "Court" or the "Supreme Court", cannot be construed as excluding the jurisdiction of the Court of Appeal. Section 10 of the JAJA is expressed in sufficiently broad terms to encompass decisions of judges of the Supreme Court sitting in chambers. This view is reinforced by the structure of the legislation itself, which, in section 11, identifies the limited categories of decisions excluded from the Court of Appeal's jurisdiction. The relevant provision, in the present context, is section 11(1)(c) of the said Act, which states that:

> "11(1) No appeal shall lie –
>
> …
>
> (c) from the decision of the Supreme Court or of any Judge thereof where it is provided by any law that the decision is to be final;"

[55] The FCA, and in particular section 49, does not state that the decision of the "Judge in Chambers" is final. It is, therefore, evident that the phrase "Judge in Chambers" merely identifies the forum and procedural setting in which the hearing is to occur. It does not operate to oust this court's jurisdiction. I am, accordingly, satisfied that neither the provisions of the FCA nor the JAJA support the FTC's contention that the Court of Appeal lacks jurisdiction in this matter. Consequently, this aspect of the FTC's preliminary objection is rejected.

[56] The FTC's second contention, as it relates to the preliminary point, is that appellate decisions under the FCA have, to date, been confined to appeals arising from the Supreme Court's exercise of its original jurisdiction. The absence of appellate review of decisions rendered by a judge in chambers pursuant to section 49 cannot, of itself, reasonably be relied upon to support the conclusion that no further right of appeal exists in this case. The absence of express authority on the point does not, without more, lend support to the proposition advanced. In any event, the fact that a statutory right of appeal does not

appear previously to have been invoked does not mean that it is unavailable or incapable of being exercised.

[57] In support of this contention, the FTC seeks to rely on the words of Forte P in **Jamaica Stock Exchange** regarding sections 49 and 50 of the FCA. Therein, referring to the Supreme Court, the learned President stated that, "[t]he Court, therefore, is empowered to have the final word in relation to any complaints investigated and subsequent directions or orders made by the Commission". Mr Leiba argued that this means there is no further right of appeal beyond the judge of the Supreme Court against the FTC's findings.

[58] It is necessary to consider the context in which that statement was made. Forte P did not address the availability of appellate review of a Supreme Court decision. Rather, he was addressing the constitutionality of sections 21 and 33 of the FCA, in particular whether the FTC had been vested with powers amounting to the exercise of judicial authority, contrary to the doctrine of separation of powers. In that connection, it was observed that, although the FTC is required to determine whether breaches of the FCA have occurred, those determinations are administrative in nature. Emphasis was placed on the fact that the FTC's decisions are not final, since sections 49 and 50 provide for recourse to the courts. The significance of the observation that "the court has the final word" was, therefore, limited to demonstrating that the FTC's determinations do not possess the character of final and binding judicial adjudications. It does not signify that the particular court first reviewing the FTC's decision is itself beyond further appellate review.

[59] It does not support the further proposition that a decision of a judge in chambers of the Supreme Court is immune from appeal. Accordingly, the second limb of the FTC's preliminary objection is rejected.

[60] The third aspect of the argument was founded on competition legislation and jurisprudence from other jurisdictions. However, caution must be exercised when drawing parallels, as the comparative value of those authorities is limited. The terms of foreign legislation cannot be used to infer a deliberate exclusion of a right of appeal under the Jamaican Act, since each statutory scheme must be construed on its own language, context and purpose. Differences in legislative drafting across jurisdictions may be attributable to a myriad of factors. Consequently, the fact that another statute expressly provides for a further right of appeal does not justify the conclusion that such a right was intentionally excluded from the Jamaican Act, especially in the absence of evidence that the Jamaican Act is modelled after that Act.

[61] The FTC's reliance on the **Canadian Pacific** case to support the view that there is no further appeal from the decision in question is unpersuasive. In that case, the question was whether there was a right to appeal from orders made by a judge at the investigatory stage where the statute was silent. It was found that parliament had deliberately excluded such appeals, a conclusion materially informed by the presence of expressed rights of appeal elsewhere in the legislation, leading to the conclusion that parliament intentionally excluded the right in investigatory matters. This is not the case in the Jamaican Act. A provision in the FCA permitting a person aggrieved by the findings of the FTC to appeal to a judge in chambers of the Supreme Court cannot, without more, be treated as limiting any further appeal.

[62] The FTC's assertions that appellate intervention would impede the investigatory process and compromise confidentiality at the investigatory stage are considerations which do not arise in the present case. Under the Jamaican statutory framework, investigative hearings may be held, and when so held, are normally to be public. In any event, the investigatory process in the present case had been concluded, and the report had entered the public domain. The circumstances in **Canadian Pacific** are therefore

clearly different from those arising under the Jamaican legislative scheme, and, as a result, the authority offers little guidance to this court on the issue.

[63] Finally, the reliance on **Beverley Sinclair Senior** to contend that parliament deliberately excluded a further right of appeal is misplaced. That case concerned a two-stage customs assessment process and the impermissibility of revisiting an assessment after review to preserve the integrity of that process. It is, therefore, materially distinguishable and does not address whether a further right of appeal to the Court of Appeal was curtailed by the legislative framework.

Conclusion

[64] Having considered the various submissions on the preliminary objection, I am satisfied that the Court of Appeal has jurisdiction to entertain this appeal.

Grounds (a) and (c)

[65] For convenience, grounds (a) and (c) were argued jointly and will be considered together.

> "Ground (a): The Learned Judge erred in failing to find that the Respondent did not give the Appellants a proper or sufficient opportunity to be heard before arriving at the findings in the Final Report."
>
> "Ground (c): The Learned Judge erred in concluding that the Respondent's decision to amend the Final Report during the course of the proceedings in the court below meant that the Appellants were given an opportunity to be heard."

<u>Submissions</u>

For the appellants

[66] The appellants contended that the FTC failed to disclose material information concerning the investigation of which they were the subjects, thereby depriving them of a meaningful opportunity to be heard before the findings in the Final Report were reached. It was submitted that the learned judge erred in concluding otherwise.

[67] According to the appellants, they were first notified of the investigation by letter dated 3 August 2021, in which the FTC requested information concerning an alleged breach arising from the termination of agents' contracts. This letter, they said, failed to make clear that they themselves were the subjects of the investigation and did not adequately identify the basis of the allegation or provide sufficient particulars of the case they were required to answer. Further, the FTC obtained and relied upon information from other sources, including the BGLC, without disclosing that material to them.

[68] The appellants further contended that the Final Report contained adverse findings on a matter that was never identified as falling within the scope of the investigation. Further, neither the source of the complaint nor the substance of the allegations was disclosed, despite reliance on them in reaching those findings. They asserted that they became aware, only upon receiving the Final Report dated 17 February 2022, that their payout scheme was under scrutiny. According to the appellants, the FTC's conclusions on that issue were based on a mistaken assumption, namely, that SVL had obtained approval to offer odds of 50:1. This misunderstanding could readily have been corrected had they been given prior notice that the payout scheme was in issue and afforded an opportunity to address the point.

[69] The appellants further submitted that the FTC's subsequent amendment of the Final Report and the issuance of a Revised Final Report, which reflected that SVL had applied for but not obtained approval to offer $50:1 odds, did not cure the procedural unfairness, as this correction was made only after a challenge to the Final Report had

been filed in the Supreme Court and, moreover, was effected without affording the appellants any opportunity to comment or be heard.

[70] The appellants relied on Halsbury's Laws of England, **Secretary of State for the Environment v Fairmount Investments Ltd and Southwark London Borough Council** [1976] 1 WLR 1255 ('**Fairmount**'), and **R v Secretary of State for the Home Department, ex p Doody** [1993] UKHL 8; [1994] 1 AC 531 ('**Doody**'), which articulate established principles of procedural fairness and natural justice. They argued that the learned judge erred in concluding that there was no breach of the right to be heard, on the basis that no oral hearing was required by the FTC and that none had been requested by the appellants.

For the FTC

[71] The FTC, while referring to sections 5 and 7 of the FCA, which respectively outline its functions and powers, submitted that there is no statutory obligation to afford the appellants an opportunity to be heard during the investigative phase, which was the stage then engaged. Although the FCA provides that the FTC may hear orally from any person who, in its opinion, will be affected by an investigation and who has made a written request for a hearing, it was noted that no such request was made in this case by the appellants.

[72] It was further contended that the learned judge correctly identified the central issue to be whether the FTC had acted in breach of any statutory duty and, for the reasons set out in the judgment, properly concluded that no such breach had been established. The learned judge found that a breach of procedural fairness arises only where a decision adversely affects a person's rights. On that basis, it was concluded that no such breach had occurred, since the FTC had merely undertaken an investigation and had not made any adverse decision.

[73] Furthermore, the FTC argued that, although the learned judge found that the FTC should have notified the appellants earlier of the $50:1 odds issue, she correctly concluded that they were nonetheless afforded an opportunity to make representations on the matter. The FTC's subsequent amendment of the Final Report demonstrated that this opportunity persisted despite the Report's publication and the commencement of litigation.

[74] Relying on the dicta of Forte P in the **Jamaica Stock Exchange** case, and the discussion therein as regards the investigative and adjudicatory function of the FTC in the context of the doctrine of separation of powers and principles of natural justice, the FTC asserted that it refrained from exercising any acts that could be regarded as adjudicatory, such as holding hearings, for fear of running afoul of the aforementioned principles. Accordingly, it was argued that, because the FTC held no hearings, there had been no breach of the right to a fair hearing.

[75] The FTC contended that it made no binding determinations, as its recommendations have no legal effect unless and until a court makes a corresponding finding. Rather, the reports reflected its assessment that the material before it disclosed a likely breach and warranted pursuing the conduct under investigation as a suspected breach of sections 19–21 of the FCA.

[76] It further contended that, by section 7(4) of the FCA, it may make findings on the material before it, and that rule 60.8 of the Civil Procedure Rules ('CPR') permits additional evidence at the adjudicative stage, whether on an application by the FTC or by the subject of the investigation, as in the present case. It was submitted that the right to be heard arises only at that stage, so amendments to the Final Report during the investigative phase do not affect the appellants' adjudicatory rights.

Analysis

[77] The consideration of grounds (a) and (c) of this appeal begins with determining whether the appellants were entitled to be heard at the investigative stage. The resolution of the issues arising under these grounds requires careful consideration of the FCA's investigative framework.

[78] Section 5 of the FCA confers on the FTC the power to investigate alleged contraventions of its provisions. In particular, section 5(1)(a) mandates that the FTC conduct such investigations "…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". Pursuant to section 6, it is required to obtain such information as it considers necessary to assist in its investigation and, where appropriate, to examine and verify documents submitted to it.

[79] As indicated earlier, under section 7 of the FCA, the FTC is endowed with a broad range of powers to facilitate the discharge of its investigative function. Significantly, under section 7(2), "[t]he Commission may hear orally any person who, in its opinion, will be affected by an investigation under this Act, and shall so hear the person if the person has made a written request for a hearing, showing that he is an interested party likely to be affected by the result of that investigation or that there are particular reasons why he should be heard orally".

[80] Section 7(3) further empowers the FTC to require persons engaged in business or trade, or such other persons as it considers appropriate, to furnish such information as it deems necessary to determine whether the conduct in question constitutes an uncompetitive practice. In this regard, section 7(4) provides that, where the information requested is not supplied to the satisfaction of the FTC, it may proceed to make findings on the basis of the information available to it.

[81] Upon concluding an investigation, the FTC may apply to the court under section 46 of the FCA to impose sanctions in respect of alleged contraventions of any obligations or prohibitions set out in Parts III, IV, VI, or VII of the FCA. Also, a person aggrieved by the FTC's findings may apply to a judge in chambers of the Supreme Court pursuant to section 49 of the FCA.

[82] Against that statutory background, the central question is whether SVL was entitled, as a matter of procedural fairness, to be informed of and to have an opportunity to respond to the allegations during the investigative process, before the Final Report was issued.

[83] The FTC's investigation into SVL's conduct was sparked by two events, namely complaints from SVL retailers and concerns raised by the BGLC regarding potentially anti-competitive conduct.

[84] As regards the former, Mr David Miller, the Executive Director of the FTC, in his affidavit filed on 29 June 2021, explained that the FTC initially received a complaint from an SVL agent and thereafter three additional complaints. The nature of the complaints is not stated in his affidavit, but an email from Moneypost was exhibited, in which the head of that company asserted that his contract was terminated by SVL because he signed a contract with a new entrant in the lottery market. Also exhibited were two letters of termination addressed to Everton Morgan T/a MoneyPost OTB, from Supreme Ventures Racing & Entertainment Limited and SVL.

[85] As regards the second trigger, Mr Miller deposed to having received a letter from the BGLC which expressed concerns about the possible anti-competitive use of higher payouts by an entity with resource strength.

[86] The FTC's investigation was initiated by its letter to SVL dated 3 August 2021, referred to at paras. 9 and 10 above. Although Mr Miller asserted that the letter indicated

that the FTC was investigating "the possible breach of sections 19 to 21 of the Act by the 1st Appellant", a careful reading of the correspondence does not entirely support that characterisation. The letter did not expressly identify SVL as the subject of the investigation. However, when read in context, it was sufficiently clear that the inquiry concerned SVL, as the information sought related to retailer agreements that it had terminated. That understanding is reinforced by the affidavit of Katherine P C Francis, Senior Vice President, Legal, Regulatory and Compliance for the appellants, filed on 7 March 2022, in which she stated that the FTC had informed the appellants by that letter that it was investigating their conduct.

[87] Although the letter of 3 August 2021 made it sufficiently clear that SVL was under investigation, it did not disclose the substance of the allegations on which the FTC ultimately relied. In particular, it did not allege that SVL had strategically terminated or threatened to terminate retailer agreements because of their dealings with competitors, nor did it identify the $50:1 odds issue as a matter under investigation.

[88] Nevertheless, both the Final Report dated 17 February 2022, and the subsequently issued Revised Final Report contained conclusions on both aspects of the alleged impugned conduct by SVL. In substance, it concluded that SVL abused its dominant position in the lottery market and that the conduct substantially lessened competition by harming competitors and potential competitors.

[89] The learned judge held that any entitlement to a hearing would arise only under section 7(2) of the FCA, where the FTC hears oral representations from a person affected, or at the adjudicative stage, neither of which was engaged. The learned judge further held that no procedural unfairness arose, as no adverse decision had been made against the appellants, since the Final Report merely referred to conduct "likely to breach" sections 19–21 of the FCA and, therefore, contained no adverse determination with legal consequences. On that footing, in the absence of either an adverse finding of a breach

of the FCA or an express statutory right to be heard, the learned judge concluded that there had been no breach of procedural fairness.

[90] Several considerations support the appellants' contention that the principles of natural justice were breached. Under section 5(1) of the FCA, the FTC is mandated to investigate in order to "determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices". Although the Act does not expressly require engagement with the subject of an investigation, that requirement is implicit in the investigative function itself. A determination can scarcely be regarded as informed, balanced, or reliable if the subject of the investigation is denied a meaningful opportunity to provide input.

[91] Moreover, in the circumstances of this case, the need for procedural fairness was particularly acute. The Final Report was intended to support an application to the Supreme Court under section 46 of the FCA and was, therefore, capable of significant consequences. The fact that the appellants would ultimately have an opportunity to be heard before the court did not diminish the FTC's obligation to conduct a thorough and fair investigation. Indeed, given the nature of the FTC's statutory mandate under section 5 of the FCA, such rigour is imperative.

[92] Perhaps more significantly, the Final Report was made public. In those circumstances, the requirements of natural justice assumed particular importance. It must be understood that the demands of fairness are contextual and shaped by the particular circumstances of each case. It must also be appreciated that the right to be heard is not to be construed narrowly or confined to a formal oral hearing. Rather, it encompasses the broader obligation to afford a person a fair and meaningful opportunity to address matters before adverse conclusions are reached and publicly disseminated in a manner capable of affecting that person's rights or interests. Such an opportunity necessarily requires disclosure of the substance of the case.

[93] This reflects the essence of the hearing rule, namely, adequate notice coupled with a reasonable opportunity to respond. In the present context, the relevant "rights or interests" cannot be confined to the legal consequences of a finding of a breach of the FCA. Rather, in the present case, it extends to the broader impact on a person's rights and interests arising from the publication of adverse determinations in the report. Importantly, the rule is not confined to formal adjudicative proceedings but applies also to administrative processes where the outcome may have a sufficiently direct and potentially adverse impact on the individual (see **Ridge v Baldwin** [1964] AC 40).

[94] Further, the principles of natural justice must inform the interpretation and application of legislation. As Lord Russell stated in **Fairmount**, at page 1263

> "…it is to be implied, unless the contrary appears, that Parliament does not authorise by the Act the exercise of powers in breach of the principles of natural justice, and that Parliament does by the Act require, in the particular procedures, compliance with those principles."

[95] The principles of natural justice are synonymous with the concept of fairness, which is not universal but shaped by the particular circumstances of each case. In this regard, Lord Mustill in **Doody**, stated at page 560:

> "What does fairness require in the present case? My Lords, I think it unnecessary to refer by name or to quote from, any of the often-cited authorities in which the courts have explained what is essentially, an intuitive judgment. They are far too well known. From them, I derive that:
>
> (a) where an Act of Parliament confers an administrative power there is a presumption that it will be exercised in a manner which is fair in all the circumstances.
>
> (b) The standards of fairness are not immutable. They may change with the passage of time, both in the general and in their application to decisions of a particular type.

(c) The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects.

(d) An essential feature of the context is the statute which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken.

(e) Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both.

(f) Since the person affected usually cannot make worthwhile representations without knowing what factors may weigh against his interests fairness will very often require that he is informed of the gist of the case which he has to answer."

[96] In assessing what fairness required in the present case, the starting point is that both the original and Revised Final Reports contained definitive findings by the FTC that were adverse to the appellants. That remains so notwithstanding that no formal determination of a breach of the FCA had been made, such a determination being reserved to the court, and no application for enforcement having yet been filed.

[97] The absence of a finding of a breach of the FCA itself, which is within the purview of the court, does not negate the presence in the report of conclusions that are adverse in character or effect. Both Reports articulated clear and authoritative adverse findings concerning SVL's conduct, as set out in paras. [21] and [23] above. The FTC, for instance, determined that SVL abused its dominant position in the market by restricting competitors' access to retailers and by strategically terminating or threatening to terminate agreements with retailers who engaged with competitors. It also determined that the abusive conduct had the effect of substantially lessening competition.

[98] Further, the Final Report was expressly designated as the "Public Version". Statements published in a document bearing such indicia of authority are plainly capable of causing significant reputational and other prejudice. Yet SVL was never informed that the investigation into the termination of retailer agreements included an allegation that those terminations were motivated by the retailers' dealings with competitors, nor was it notified of the $50:1 odds issue. In those circumstances, SVL was deprived of any meaningful opportunity to address these matters before determinations were formulated and publicly disseminated.

[99] As observed by Lord Mustill in **Doody**, at page 563F

> "It has frequently been said that the right to make representations is of little value unless the maker has knowledge in advance of the considerations which, unless effectively challenged, will or may lead to an adverse decision. The opinion of the Privy Council in Kanda v Government of Malaysia [1962] AC 322, 337 is often quoted to this effect. This proposition of common sense will, in many instances, require an explicit disclosure of the substance of the matters on which the decision-maker intends to proceed."

[100] I am satisfied that the FTC's approach breached the principles of natural justice. The observations of Lord Russell of Killowen in **Fairmount** are apposite. Emphasising that the concept of fairness depends on the circumstances of the particular case, he opined that an investigator who forms provisional conclusions on matters not ventilated in the investigation must invite representations on them, failing which, the subject has not had a "fair crack of the whip". That analysis applies with equal force here. Although that case concerned a public inquiry, the inquiry into fairness turns not on the procedural form, but on the impact of the decision. The FTC's findings were plainly adverse, and having been made public, were capable of causing prejudice to SVL. The appellants' submissions on this issue, therefore, find favour with me.

[101] Quite apart from the force of the appellants' submissions, the FTC's own reasoning reveals a difficulty with its approach. The FTC contended that the right to be heard arises only at the adjudicative stage, as no hearing was conducted during the investigative phase. Section 7(2) of the FCA provides that, upon written request, the FTC shall hear from a person who is an interested party likely to be affected by the outcome of an investigation. As a matter of elementary fairness, the effective exercise of that right necessarily presupposes that the person concerned has been informed, with sufficient clarity and particularity, of the case to be met.

[102] SVL was never informed that the FTC was investigating whether it had terminated or threatened to terminate retailer agreements because of their relationship with competitors, nor was it notified that the $50:1 odds issue was part of the investigation. The FTC's failure to disclose those matters undermined SVL's ability to exercise its statutory right under section 7(2) to request a hearing. While the FTC has articulated reasons for its practice of not convening such hearings, that does not diminish the significance of the Act's express contemplation and authorisation of them. The opportunity to request a hearing accordingly remained available to the appellants, and the FTC's approach impaired their ability to decide whether to exercise that statutory right.

[103] As regards the issue of contract termination, SVL was merely asked to provide information concerning the termination of retailer agreements. The FTC never informed SVL that it was investigating a specific allegation arising from those terminations, and its failure to do so remains unexplained. This omission persisted throughout the investigation despite the parties' ongoing correspondence. In its response to the FTC's letter of 3 August 2021, SVL expressly invited the FTC to identify any further information it required. Yet, rather than seeking clarification from SVL, Mr Miller wrote to the BGLC on 3 November 2021 requesting additional information and noting that SVL's response "was not as specific as we had expected". In circumstances where SVL had expressly opened

the door to further engagement, the FTC's decision to seek particulars from a third party, without first identifying the perceived deficiencies in SVL's response, bypassed an obvious opportunity to address the matter directly and deprived SVL of a fair opportunity to respond to the substance of the investigation.

[104] The FTC's failure to disclose the substance of the allegations prevented SVL from properly appreciating the case it faced and from deciding how best to respond. Such disclosure was necessary to enable the appellants to make an informed choice whether to request a hearing. Without that information, the statutory entitlement under section 7(2) was rendered illusory. The right can be exercised meaningfully only where the person concerned is sufficiently informed of the allegations under investigation. The FTC's approach therefore amounted to a denial of that right.

[105] The learned judge took the view that the FTC was under no obligation to disclose the full extent of the complaint. While that may be so in certain circumstances, this was not such a case. Here, fairness required that the essential nature of the allegation be disclosed before conclusions became fixed in the Final Report, thereby affording SVL a meaningful opportunity to respond. Given the significance attached to those findings and the fact that they were subsequently published, it was all the more important that SVL be afforded notice of the allegation and a fair opportunity to respond.

[106] As to the $50:1 odds issue, SVL was never notified that this formed part of the investigation and only became aware when the Report was issued. No reason was given for this failure. The learned judge treated what transpired upon the publication of the initial Report as curing this defect. The learned judge at para. [57] queried:

> "This begs the question how could they have had an or a sufficient opportunity to be heard when they were not privy to the full extent of the investigations against them? It is to be noted that on learning of the contents of the report when the report was first published, the Respondent provided

> additional information to the Appellants, and this was later considered, and the final report amended to reflect only that they sought permission to offer 50 to one odds and not that they had obtained permission. This suggests that the Appellants had an opportunity to provide their input and that their input was considered in this final report. It is my view that even at this late stage the Appellants could have requested a hearing on this issue and so in all the circumstances I could not conclude that they had no opportunity or sufficient opportunity to be heard."

[107] The statement that "the [r]espondent provided additional information to the Appellants" appears erroneous. The record shows that after the Final Report was issued, the appellants filed a fixed date claim form on 7 March 2022, seeking to have the report set aside. Thereafter, a Revised Final Report was issued on 8 June 2022, reflecting that the appellants had requested approval to offer odds of up to $50:1. As indicated in the affidavit of Mr Kevin Harriot, the Competition Bureau Chief for the FTC, filed on 29 June 2022, "[t]he FTC, since reviewing the Affidavits of Katherine P.C. Francis and its exhibits, has revised the Final Report that was exhibited to Ms Francis's Affidavit".

[108] The initial Final Report was issued without notifying SVL that the $50:1 odds allegation formed part of the investigation. It nevertheless contained adverse findings intended to support enforcement proceedings and was subsequently made public. In those circumstances, given the attendant risk of reputational and other harm, the requirements of natural justice were plainly not met.

[109] Further, even on the FTC's case that no hearing was held and no right to a hearing arose, its approach effectively undermined SVL's entitlement under section 7(2) of the FCA. As a party liable to be affected by the investigation's outcome, SVL was entitled to request a hearing. That entitlement could only be exercised meaningfully if SVL was informed of the substance of the case against it. Without such notice, the statutory right was rendered nugatory.

[110] The learned judge's conclusion that the appellants "had an opportunity to provide their input and that their input was considered in this Final Report" is, with respect, untenable. The affidavits referenced by Mr Harriot were filed in support of the fixed date claim form challenging the Final Report dated 17 February 2022. They were not submitted during the investigative phase, nor in response to any invitation to address the odds issue before the findings were finalised, whether in the initial or the Revised Final Report. In those circumstances, the affidavits cannot properly be regarded as affording SVL a meaningful opportunity to respond. Procedural fairness requires that such an opportunity be provided before conclusions are reached and publicly disseminated. Material advanced in subsequent litigation cannot retrospectively cure that defect.

[111] Likewise, the learned judge's conclusion that the appellants could have requested a hearing on this issue, even at that late stage, is difficult to sustain. It fails to engage adequately with the surrounding context. The amendment to the Final Report arose only after the appellants had commenced proceedings in the Supreme Court, in which the process leading to the issuance of the Report was itself under challenge. In those circumstances, it cannot fairly be suggested that the appellants should have participated in, or sought to invoke procedures within, a process they had already impugned as procedurally defective.

Conclusion

[112] For these reasons, the FTC failed to afford the appellants a proper and sufficient opportunity to be heard before arriving at the findings in the Final Report, whether in its initial or revised form. The learned judge erred in concluding otherwise. The subsequent amendment of the Report, undertaken during the pendency of the proceedings before the Supreme Court, did not cure that deficiency. It neither afforded a meaningful opportunity to be heard nor remedied the procedural defects attending the original findings. The learned judge, therefore, also erred in treating the amendment as sufficient

compliance with the requirements of procedural fairness. In the circumstances, these grounds of appeal therefore succeed.

Ground (b): The Learned Judge erred in failing to find that the appellants had a legitimate expectation that if the respondent was investigating them, it would allow them an opportunity to be heard before it arrived at a decision.

<u>Submissions</u>

For the appellants

[113] As they had done in the court below, the appellants contended that the FTC was obliged to adopt the same approach it had taken in an earlier investigation into their conduct. In that earlier investigation, the FTC had notified the appellants of the basis for the investigation, furnished them with a preliminary report, and afforded them an opportunity to make representations, which led to a revision of that report. It was submitted that this course of conduct gave rise to a legitimate expectation that a similar approach would be followed in the present investigation.

[114] In support of this contention, counsel relied on para. 50 of Halsbury's Laws of England, Volume 61A (2018), which states:

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

[115] Reliance was also placed on the judgment of Taylor J in **R v Secretary of State for the Home Department, ex p Ruddock and others** [1987] 1 WLR 1482, wherein

he opined that the doctrine of legitimate expectation essentially imposes a duty to act fairly and is not confined only to cases involving a right to be heard. He stated that "…it may be thought the more important to a fair dealing that a promise of undertaking given by a minister as to how he will proceed should be kept".

[116] It was argued that the learned judge, in concluding that the appellants had not "…established an expressed promise or existing policy practice or conduct by the FTC on which legitimate expectation would have arisen", failed to recognise that every policy, practice, or course of conduct has a genesis. The appellants contended that the FTC's approach in its prior investigation constituted a representation regarding how it would proceed in comparable investigations under the FCA. Its departure from that approach in the instant matter was said to have defeated the appellants' legitimate expectation regarding the procedure to be followed. It was further submitted that nothing in the FCA prevented the FTC from adopting a similar approach in the present investigation.

For the FTC

[117] It was argued that the appellants failed to establish the existence of an express representation, policy, practice, or conduct on which they could rely and that the learned judge was, therefore, correct to find that no legitimate expectation arose.

[118] Counsel relied on a series of authorities to define the scope of the doctrine of legitimate expectation. In particular, reliance was placed on **Dale Austin v The Public Service Commission et al** [2022] JMSC Civ 55, for the proposition that a legitimate expectation must be grounded in a clear and unambiguous promise or representation made by an authority acting within its powers. It was pointed out that where a claim of legitimate expectation is disputed, such a claim requires careful scrutiny of the precise terms of the alleged promise or representation, the context in which it was made, and the nature and scope of the statutory or other discretion in issue (**The Northern Jamaica Conservation Association et al v The Natural Resources Conservation**

and the National Environment and Planning Agency (unreported), Supreme Court, Jamaica, Claim No HCV 3022 of 2005, judgment delivered 16 April 2006. Counsel also invoked **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374 ('**CCSU**'), to emphasise that where such an expectation is said to arise there must be a practice so well established that departing from it would be unfair or inconsistent with good administration.

[119] On these bases, it was argued that no legitimate expectation arose, as a single instance of prior conduct is insufficient to establish a pattern, policy or settled practice. It was further contended that the earlier investigation concerned mergers and acquisitions under section 17 of the FCA and was conducted pursuant to applicable guidelines, and was therefore not comparable to the instant investigation, which engaged a different statutory context and did not attract the same procedural requirements.

[120] The FTC further submitted that the doctrine could not fetter the statutory discretion conferred on it in an appeal under section 49 of the FCA and, in any event, no such expectation arose given the circumstances of this case.

<u>Analysis</u>

[121] In considering this issue, an appropriate starting point is the statement of Lord Fraser of Tullybelton in **CCSU**, an authority relied on by the FTC and cited with approval in the authority relied on by the appellants. Referring to the observations of Lord Diplock in **O'Reilly v Mackman** [1983] 2 A C 237, Lord Fraser stated:

> "Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

[122] As to the latter, his Lordship explained that not every practice will suffice. Rather, the test is whether the practice was so well established that it would be unfair or inconsistent with good administration for the authority to depart from it.

[123] The appellants' claim to legitimate expectation rests on a single earlier investigation conducted by the FTC, in which they contend that they were notified of the basis of the inquiry, provided with a preliminary report, and given an opportunity to make representations before the Final Report was published. On that foundation, they argue that they had a legitimate expectation that the same approach would be followed in the present investigation.

[124] The FTC's adoption of a particular approach on a single occasion falls well short of establishing, expressly or by implication, that it had committed itself to follow that procedure in future investigations. Conduct of this nature, standing alone and without any indication of an intention to be bound in future cases, does not meet the requisite standard. A single prior investigation cannot, without more, constitute a practice that is sufficiently regular or well established. The concept of regularity necessarily implies a pattern of repeated and consistent conduct capable of supporting an objectively reasonable expectation of continuity, a threshold which a solitary instance cannot meet.

[125] The appellants' argument that every practice must originate at some point fails to engage with the central premise of the doctrine of legitimate expectation, which is concerned not with the genesis of a practice but with its established character at the material time. For such an expectation to arise, the practice must by then have acquired a sufficient degree of regularity. That was plainly not so in this case. Further, the correspondence exchanged between the parties discloses nothing to suggest the existence of a representation that future investigations would adhere to the approach adopted on that occasion.

[126] It is also significant that the earlier investigation concerned allegations of a wholly different nature, further undermining any suggestion that a legitimate expectation could arise. The doctrine is inherently contextual, and where the subject matter and investigative focus materially differ, a single prior approach cannot reasonably be relied on to found an expectation as to the procedure in a subsequent, factually distinct inquiry.

<u>Conclusion</u>

[127] The appellants have failed to establish that any legitimate expectation arose, whether from an express or implied promise or representation or from a settled course of conduct. In those circumstances, they have not demonstrated any basis for the contention that the learned judge erred in failing to find otherwise. This ground of appeal, therefore, fails.

Ground (d): The Learned Judge erred in failing to consider or to sufficiently consider the appellants' evidence in deciding whether the conclusions in the Final Report were contrary to and/or not supported by the evidence or the act.

For the appellants

[128] The appellants contended that, although the learned judge recognised that the FTC's findings were amenable to modification, there was a failure to evaluate material evidence contradicting those findings. In particular, as regards the allegations of terminating retailer agreements, the appellants submitted that their evidence of introducing new distribution channels, including mobile agents, online games, and applications, provided a legitimate commercial basis for terminating certain retailer arrangements, thereby undermining the FTC's finding of anti-competitive conduct.

[129] As regards the $50:1 odds issue, the appellants argued that the learned judge failed to consider their evidence that offering $50:1 odds would not necessarily be irrational, predatory, or unprofitable. They maintained that profitability depends on the overall payout percentage over the medium to long-term, rather than on isolated daily or

monthly outcomes, as reflected in the BGLC Report, which the FTC relied on. The appellants also complained that the learned judge failed to consider evidence regarding the intricacies of number games, which indicates that higher payouts may be a legitimate strategic business tool rather than necessarily evidence of anti-competitive conduct.

[130] The appellants further contended that the learned judge erred in holding that, in the absence of a determination of a breach under sections 19–21 of the FCA, there was no infringement of procedural fairness. They argued that the Report's characterisation of the conduct in parts of the Report as a "likely breach" merely reflected the procedural stage of the investigation under the statutory scheme and did not detract from the FTC's definitive findings. It was submitted that, had the learned judge properly engaged with the evidential record as a whole, the FTC's conclusions would have been found unsustainable and the findings in the Final Report set aside.

For the FTC

[131] The FTC submitted that this ground of appeal was without merit. It argued that the learned judge had reviewed the evidence and properly concluded that the FTC's findings were consistent with it. It was further argued that the learned judge was under no obligation to set out in detail the reasoning process by which those conclusions were reached. Reliance was placed on **Curtello v The University of the West Indies** [2023] JMCA Civ 11 ('**Curtello**'). The FTC also maintained that the learned judge's acceptance of aspects of its evidence necessarily implied the rejection of conflicting evidence advanced by the appellants.

Analysis

[132] In the judgment, the learned judge identified various issues for determination, including "Whether the conclusions in the Report are contrary to the Act and/or are not supported by the evidence, or are they flawed?" Before analysing these issues, the learned judge reviewed the relevant provisions of the FCA, the contents of the Final

Report, the appeal as set out in the fixed date claim form, the supporting affidavits and the parties' submissions.

[133] In addressing the issue regarding the evidence, the learned judge examined the impugned conduct by reference to the evidence in the FTC's possession. As regards the odds issue, the learned judge relied on certain material that had been before it, including:

> (i) SVL's request to the BGLC for approval to offer odds of up to $50:1 on its Pick 1 games, which would have exposed it to significant losses;
>
> (ii) the asserted irrationality of offering odds higher than $36:1 on the basis that the amounts collected on losing bets would be sufficient [sic] to cover even payouts for the winning bets. (This appears to be an error because it is inconsistent with para. 20 of the Revised Final Report, which states that such amounts would be "insufficient"); and
>
> (iii) the observation that, while a payout of $35:1 might cover prize payouts to winners, it would not be sufficient to meet the operator's other expenses.

[134] The learned judge noted that these considerations led the FTC to its conclusions regarding SVL on the odds issue.

[135] As regards the other aspect of the investigation, namely the termination of contracts with retailers who also distributed lottery products for competitors, the learned judge observed that this issue had been brought to SVL's attention and that it had responded in writing. Notwithstanding that response, the FTC formed the view that the terminations were strategic and undertaken with the objective of restricting competitors' access to the relevant market.

[136] The learned judge accordingly concluded that the FTC possessed sufficient information to support its findings and that those findings were consistent with the available evidence and the provisions of the FCA.

[137] A review of the judgment indicates that the learned judge did not engage with the appellants' evidence when determining whether the findings in the Revised Final Report were unsupported by or inconsistent with the evidential record. Although that evidence had been summarised earlier, it was not addressed in this aspect of the analysis. Instead, the reasoning focused exclusively on the material the FTC relied on. This omission suggests that the conclusions were assessed without reference to the totality of the evidence.

[138] It was the FTC's contention that it may be inferred that the learned judge considered and rejected the appellants' evidence. Further, they rely on **Curtello**, which holds that while it is desirable for judges to give reasons for their decisions, a failure to do so is not necessarily fatal. That authority is, however, of limited assistance in the present context. The learned judge herein did give reasons, but those reasons disclose no basis upon which it may be concluded that the appellants' evidence was considered.

[139] The confinement of the learned judge's assessment to the material before the FTC is borne out by the judge's own articulation of the scope of review. At para. 73 of the judgment, it was stated that, in determining whether the FTC's findings were flawed:

> "[73] The question is important as the Act gives the Court liberty to modify the findings of the FTC and even direct the Commission. Such steps would arise if the Court were to find that the finding of the Commission was flawed. **It is therefore important to determine whether the Commission acted in accordance with the provisions of the Act and consistent with the information with which it was presented**." (Emphasis added)

[140] The learned judge further articulated what she observed as the appellate function of the judge in chambers of the Supreme Court:

> "[74] The Court would not be conducting the functions of a Judicial Review Court but rather the functions of an appellate court which is **to determine whether the decision is supported by the material in the possession of the FTC and to affirm or dismiss the decision**." (Emphasis added)

[141] The learned judge's formulation reflects a review directed solely to the rationality of the FTC's decision, with reference to the material before it, without evaluating the appellants' evidence to assess whether the conclusions were supported by the evidence as a whole. In these circumstances, given the evident deficiencies in the FTC's investigation, the decision to confirm the Revised Final Report cannot be sustained. Although the FTC's findings were based on the material before it, that material was necessarily incomplete due to the identified investigative shortcomings. This undermines the reliability of the findings and calls into question the soundness of the conclusions reached.

[142] At this juncture, it is worth noting that section 7(4), which permits the FTC to make findings on the basis of the information available to it, is of no assistance in the present circumstances. That provision is engaged only where information requested by the FTC has not been provided. That was not the case here. Accordingly, the FTC cannot rely on section 7(4) to justify making findings on an incomplete factual record resulting from its own failure to disclose the matters under investigation or to seek the necessary information from the appellants.

[143] The significance of the learned judge's omission to consider and analyse the evidence in its entirety is underscored by the appellants' central complaint that they were not afforded full disclosure as regards the allegation concerning the termination of retailer contracts and remained wholly unaware of the allegations relating to the odds until the

Final Report was issued. It was, at least in part, this omission that prompted the application to the Supreme Court, following which the Revised Final Report was issued.

[144] Following the issuance of the Revised Final Report, the appellants filed two affidavits that directly addressed the issue of the odds, which obviously would not have factored into the FTC's consideration. Of particular significance is the affidavit of Mr Xesus Johnson, the Chief Executive Officer of PSJ, who had previously served as Senior Vice President, Gaming Operations. He deposed to having considerable knowledge and experience in operating numbers games, directly challenged the FTC's analysis, and advanced a fundamentally opposing analysis.

[145] The learned judge did not engage with this evidence when assessing whether the conclusions in the Final Report were inconsistent with the FCA or unsupported by the evidential record. This omission is significant, given the nature of the complaint underpinning the appeal and the evidence of Mr Miller. His affidavit exhibited a letter dated 19 February 2021 from the BGLC, which, although expressing concern that new market entrants might seek to outdo each other through higher payouts, expressly acknowledged that "the offer of higher payouts is not in itself necessarily bad". Mr Johnson's evidence was, therefore, plainly relevant to determining the sustainability of the FTC's conclusions.

[146] In my view, given the nature of the complaint, the learned judge was required to consider all the evidence presented, including the material advanced by the appellants, in determining whether to confirm the report. The provisions of section 49(1) of the FCA, upon which the fixed date claim form was grounded, support this approach. That section permits any person aggrieved by a finding of the FTC to appeal. It is evident that the basis of such grievance may not be confined to material relied upon by the FTC. Here, the gravamen of the complaint is that the investigative process itself was fundamentally

flawed and that the FTC's findings were based on an incomplete and initially erroneous factual foundation.

[147] The obligation on the learned judge to consider the evidence in its entirety is consistent with the FTC's own position that the right to be heard arose once the matter came before the court. Mr Leiba argued that the appellants were entitled to adduce additional evidence in those proceedings pursuant to rule 60.8 of the CPR, which provides that "[t]he court may receive further evidence on matters of fact". Notwithstanding this, there is no indication that the learned judge considered the evidence advanced by the appellants. Given the nature of their complaints, that evidence warranted careful evaluation before any decision was taken to confirm the Revised Final Report.

<u>Conclusion</u>

[148] It is evident that the learned judge failed to properly consider, or adequately engage with, the appellants' evidence when determining whether the conclusions in the Final Report were contrary to the Act or unsupported by the evidence, and in confirming the findings of the FTC's Final Report. Ground (d), therefore, succeeds.

Disposition

[149] In light of the foregoing findings, it remains to be determined what the appropriate disposition of this matter is. In addition to seeking orders setting aside the decision of the learned judge and the FTC's findings as set out in the Final Report dated 17 February 2022 (the fixed date claim form having been filed prior to the issuance of the Revised Final Report), the appellants also sought a declaration that their conduct is not likely to and does not breach sections 19–21 of the FCA.

[150] It was contended by the FTC that the judge in chambers lacked authority to set aside those findings, given the absence of such power in section 49(2) of the FCA. This raises the question of the use of the word 'reserve' in that provision. The appellants, for

their part, argued that the word 'reserve' in section 49(2)(a) was a legislative error and should instead be read as 'reverse'. It was submitted that this interpretation was consistent with the approach adopted by the Court of Appeal in the **Jamaica Stock Exchange** case, where the word 'reverse' was employed. The learned judge in the instant case, however, observed that the Court of Appeal had done so without comment, and so that the decision could, therefore, not be regarded as binding. While noting that the word 'reserve' did not readily fit the statutory context, the learned judge concluded that it did not produce an absurdity and took the view that any correction was a matter for the legislature.

[151] Although this court does not rely on section 49(2)(a), the appellants seek to set aside the decision of the judge in chambers, which would, in substance, amount to a reversal. In that context, the use of the word 'reserve' in the provision warrants brief comment. The term is conceptually incongruous with the statutory scheme, which delineates the options available to the judge regarding the report's findings. The purpose or effect of any reservation of the findings of the FTC is unclear, particularly in the absence of any indication of its object or procedural consequence. Moreover, the Act makes no further reference to such a course. The progression in the provision from confirmation to modification suggests that "reverse" would have been the more coherent formulation. Since this court does not rely on that provision and is, therefore, not required to determine its meaning or effect for the purposes of this appeal, it suffices to observe that, given the potential for recurrence, legislative clarification would be desirable.

[152] Given the nature of the complaint, and the evidence adduced on behalf of the appellants after the issuance of both the Final Report and the revised Final Reports, evidence which was neither investigated nor analysed by the FTC, nor incorporated into the Revised Final Report, I am of the view that the learned judge ought to have exercised the power under section 49(2)(b) of the FCA and remitted the matter to the FTC for reconsideration.

[153] In all the circumstances of this case, it would be inappropriate for this court to accede to the appellants' request for a determination that their conduct, as addressed in the Final Report, neither constitutes nor is likely to constitute a breach of sections 19 -21 of the FCA. Such a determination should follow only after a thorough investigation and the preparation of a comprehensive report. The identified investigative deficiencies necessarily impaired the FTC's discharge of its statutory mandate under section 5(1) to determine whether the appellants had engaged in business practices in contravention of the FCA and, by extension, undermined the reliability of both the Final Report and the Revised Final Report.

Conclusion

[154] I am therefore minded to allow the appeal. Further, having concluded that the FTC's investigative approach leading to the issuance of the Final Report was flawed, I propose that this court invoke its powers under rule 2.14(b) of the Court of Appeal Rules, 2002, which permit it to "give any judgment or make any order which, in its opinion, ought to have been made by the court below". Accordingly, I propose that the court direct the FTC to reconsider the matter for the reasons set out in this judgment.

[155] In so directing, the court is mindful of the dictates of section 49(3) of the FCA which stipulates that:

> "In giving any direction under this section, the Judge shall—
>
> (a) advise the Commission of his reasons for doing so; and
>
> (b) give to the Commission such directions as he thinks just concerning the reconsideration or otherwise the whole or any part of the matter that is referred back for reconsideration."

[156] I, therefore, propose that the court direct the FTC to disclose any material on which it relied, or which is in its possession that is exculpatory, not previously disclosed, save where a good reason for non-disclosure is identified and articulated. The appellants

must then be afforded a fair opportunity to respond to the allegations. Thereafter, the FTC shall reconsider the matter and either amend the existing report or prepare a fresh report.

[157] On the matter of costs, I would propose that costs of the appeal and of the proceedings in the court below be awarded to the appellants, to be taxed if not agreed.

[158] As a final matter, at the conclusion of the hearing, this court had invited written submissions on whether SVL's application for approval to offer odds of up to $50:1 could, in itself, constitute a breach of the FCA. However, in light of the manner in which the appeal has been resolved, it has not been necessary to address or determine that issue.

F WILLIAMS JA

ORDER

1. The appeal is allowed.
2. The orders of the learned judge, made on 30 May 2023, are set aside.
3. The matter is remitted to the Fair Trading Commission for reconsideration in accordance with this judgment.
4. Costs of the appeal and of the proceedings in the court below to the appellants, to be agreed or taxed.