[2017] UKPC 28
Privy Council Appeal No 0059 of 2016

JUDGMENT

Fair Trading Commission (Appellant) *v* Digicel Jamaica Limited and another (Respondents) (Jamaica)

From the Court of Appeal of Jamaica

before

Lord Mance
Lord Clarke
Lord Sumption
Lord Hodge
Lord Carloway (Scotland)

JUDGMENT GIVEN ON

24 August 2017

Heard on 3 and 4 May 2017

Appellant	*Respondents*
Dr Delroy S Beckford Wendy M Duncan Marc S Jones Kabir Bhalla (Instructed by Axiom Stone)	B St Michael Hylton QC Kevin O Powell (Instructed by Jones Day)

LORD SUMPTION:

Background

1. The Fair Trading Commission ("the Commission") is the Jamaican statutory competition authority, established under the Fair Competition Act 1993. The question at issue on this appeal is whether it has power to intervene in a merger in the market for voice communications and text messaging services in Jamaica, which for convenience I shall call the "telecommunications market".

2. Before 2000, Cable & Wireless Jamaica Ltd, a subsidiary of the Cable & Wireless group, was the sole provider of telecommunications services in Jamaica. The Telecommunications Act of that year provided for the liberalisation of the market, and the issue to qualified persons of licences to supply such services. As a result, by March 2011 there were three licensed suppliers of telecommunications services: Digicel Jamaica Ltd, trading as "Digicel"; Oceanic Digital Jamaica Ltd, trading as "Claro", an indirect subsidiary of the Mexican América Móvil group; and Cable & Wireless Jamaica Ltd, trading as "LIME". The transaction at issue on this appeal occurred on 11 March 2011, when Digicel entered into an agreement with América Móvil by which it acquired the entire issued share capital of Claro's immediate parent.

3. Under section 17 of the Telecommunications Act, a transfer of a telecommunications licence or associated business required the consent of the Minister. The Prime Minister (who was the relevant Minister for this purpose) gave his consent on the same day.

4. LIME immediately protested to the Commission that the merger would lessen competition in the market and contravene the Fair Competition Act. Shortly afterwards, the Commission opened an investigation. On 8 December 2011, it reported. It found that Digicel was the market leader and that Claro was its only economically significant competitor. In those circumstances, the merger would substantially lessen competition in the telecommunications market, with the result that prices would be likely to rise, that consumer choice would be diminished, and technological advance would be impeded. The Commission acknowledged that the transaction would be likely to bring some economic benefits, but it considered that these would not sufficiently offset the anti-competitive effects. A number of recommendations were made for mitigating those effects.

The proceedings

5. Immediately after publishing its report, the Commission began the present proceedings against Digicel and Claro in the Supreme Court of Jamaica. The principal relief claimed was (i) a declaration that Digicel and Claro had contravened Part III of the Fair Competition Act, and in particular section 17; (ii) an injunction restraining them from giving effect to the principal provisions of the merger agreement; and (iii) the imposition of a financial penalty.

6. Digicel and Claro responded by challenging the Commission's regulatory jurisdiction. Shortly before the trial, Sinclair-Haynes J directed the trial of two preliminary issues:

> "(a) Whether the Fair Competition Act applies to the agreement or the transactions effected by the agreement which is the subject of these proceedings.
>
> (b) Whether the claimant has jurisdiction in relation to the agreement or the transactions effected by the agreement which is the subject of these proceedings."

7. Behind the issues thus formulated, there are really three questions:

(1) Does the Commission have jurisdiction to intervene in the market for telecommunications services?

The argument is that there is a distinct statutory scheme for the telecommunications market, which implicitly excludes the operation of the Fair Competition Act 1993 and the jurisdiction of the Commission. Sinclair-Haynes J held that the two statutory schemes operated in parallel, except where some part of the Fair Competition Act was specifically excluded by other enactments. On this point, the Court of Appeal agreed.

(2) Does section 17 of the Fair Competition Act apply to mergers at all?

The argument is that it applies only to anti-competitive conduct concerted between two or more independent actors, and not to structural alterations in the market arising from the elimination of a participating firm. Sinclair-Haynes J rejected this argument, but the Court of Appeal accepted it.

(3) Does section 17 of the Fair Competition Act apply to transactions approved by the Minister under section 17 of the Telecommunications Act?

The Court of Appeal held, overruling Sinclair-Haynes J, that it did not.

The Fair Competition Act

8. The functions and powers of the Commission are defined by Part II of the Fair Competition Act. Section 5(1) provides that the Commission is:

> "(a) to carry out, on its own initiative or at the request of any person such investigations or inquires 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."

9. The "contraventions" which are relevant for present purposes are alleged breaches of Part III, which is headed "Control of Uncompetitive Practice". The relevant provision in this case is section 17, which provides:

> "17.(1) This section applies to agreements which contain provisions that have as their purpose the substantial lessening of competition, or have or are likely to have the effect of substantially lessening competition in a market.
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> (2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that -
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> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
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> (b) limit or control production, markets, technical development or investment;
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> (c) share markets or sources of supply;

(d) affect tenders to be submitted in response to a request for bids;

(e) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(f) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts,

being provisions which have or are likely to have the effect referred to in subsection (1).

(3) Subject to subsection (4), no person shall give effect to any provision of an agreement which has the purpose or effect referred to in subsection (1); and no such provision is enforceable.

(4) Subsection (3) does not apply to any agreement or category of agreements the entry into which has been authorized under Part V or which the Commission is satisfied -

(a) contributes to -

(i) the improvement of production or distribution of goods and services; or

(ii) the promotion of technical or economic progress,

while allowing consumers a fair share of the resulting benefit;

(b) imposes on the enterprises concerned only such restrictions as are indispensable to the attainment of the objectives mentioned in paragraph (a); or

(c) does not afford such enterprises the possibility of eliminating competition in respect of a substantial part of the goods or services concerned."

10. In addition to the control of anti-competitive agreements under section 17, sections 18-20 of the Act deal with other forms of anti-competitive conduct. Section 18 prohibits exclusionary agreements between competitors, whose effect is to prevent, restrict or limit the supply of goods or services to or by third parties, for example cartel agreements. Sections 19-20 are concerned with the abuse of a dominant position. Section 19 defines a dominant position in "a market" as a state of affairs in which an enterprise is able to operate in that market "without effective constraints from its competitors or potential competitors"; and section 20 defines an abuse of a dominant position as conduct which "impedes the maintenance or development of effective competition in a market", in particular (but without limitation) in certain specified respects.

11. It will be apparent that the dichotomy in Part III of the Fair Competition Act between anti-competitive agreements (sections 17-18) and anti-competitive conduct independent of agreement pursued by an economically dominant firm (sections 19-20) is derived from the system of competition control operated by the European Union under articles 101 and 102 TFEU.

Question (1): Jurisdiction over the telecommunications market

12. The provisions of Part III of the Fair Competition Act are in wholly general terms. The Commission is empowered to investigate whether "any enterprise" is engaging in business practices contravening the Act. The contraventions in question include giving effect to any agreement with an anti-competitive purpose or effect in "a market". And sections 19 and 20 apply to firms operating or distorting competition in any market. There is no provision of the Fair Competition Act excluding any particular sectoral market from the Commission's powers of intervention, and it has not been suggested that any such provision can be implied from the Act itself. During the period before 2000, when Cable & Wireless was the monopoly provider of telecommunications services, it is difficult to envisage that section 17 could have any practical application to the telecommunications market because there was no competition in that market to be "lessened". The same is true of section 18, because there were not two or more competitors between whom an exclusionary agreement could be made. But the Commission would, for example, have had power to intervene to address an abuse by Cable & Wireless of the dominant position which it then held in the telecommunications market.

13. Digicel contends that this changed in 2000, because the Telecommunications Act implicitly excluded the Commission's powers of intervention in the telecommunications market by providing a distinct regulatory regime for that market, whose operation was the responsibility of other bodies.

14. It would be unusual for a later statute to revoke or effect significant modifications to the powers of an existing statutory body established under an earlier Act, without any express reference to it. But it is in principle possible if it is sufficiently clear that that was the legislature's intention. As a general rule, where two statutory provisions or schemes are inconsistent, the particular will prevail over the general. The Telecommunications Act may fairly be said to deal particularly with the telecommunications market, whereas the Fair Competition Act applies generally to economic actors. Before the particular can be said to displace the general, it is necessary to show some inconsistency between them. In this case, Digicel would have to demonstrate that after 2000 the continued application of the Fair Competition Act to the telecommunications market according to its terms would interfere in some significant respect with the statutory scheme specifically created to regulate the telecommunications market. It is therefore necessary to examine the terms of the Telecommunications Act.

15. The Telecommunications Act had two main objects which bear on the present issue. One was to establish a new licensing scheme for suppliers of telecommunications services, under the authority of the Minister. The other was to introduce a new scheme of regulation for licensed operators in the sector, administered by the Office of Utilities Regulation ("the Office"). The Office was a statutory body created by the Office of Utilities Regulation Act 1995. The function of the Office was to regulate "prescribed utility services", an expression which included telecommunications services, but also other utility services, such as passenger transport, water and electricity.

16. Section 4 of the Telecommunications Act provided:

> "4.(1) The Office shall regulate telecommunications in accordance with this Act and for that purpose the Office shall -
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> (a) regulate specified services and facilities;
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> (b) receive and process applications for a licence under this Act and make such recommendations to the Minister in relation to the application as the Office considers necessary or desirable;

(c) promote the interests of customers, while having due regard to the interests of carriers and service providers;

(d) carry out, on its own initiative or at the request of any person, investigations in relation to a person's conduct as will enable it to determine whether and to what extent that person is acting in contravention of this Act;

(e) make available to the public, information concerning matters relating to the telecommunications industry;

(f) promote competition among carriers and service providers;

(g) advise the Minister on such matters relating to the provision of telecommunications services as it thinks fit or as may be requested by the Minister;

(h) determine whether a specified service is a voice service for the purposes of this Act;

(i) carry out such other functions as may be prescribed by or pursuant to this Act."

Certain of these provisions are replicated in the Office of Utilities Regulation Act, but the terms of that Act add nothing to the statutory scheme which is relevant to the present issue.

17. For the purpose of performing these functions, the Telecommunications Act conferred wide powers on the Office, including a power to regulate interconnection terms (Part V), to make rules prescribing the quality of service to consumers (section 44(3)), and to impose price caps on consumer charges (section 46).

18. Utilities are generally natural geographical monopolies, because they are dependent on expensive infrastructure entailing high barriers to entry and important first-mover advantages. Any scheme of utilities regulation is therefore likely to require attention to competition issues. This is particularly true in the telecommunications market, where interconnection agreements govern access to networks. It is therefore not particularly surprising to find that both the Telecommunications Act and the Fair Competition Act are concerned with competition issues. The functions of the Office

under the Telecommunications Act include the protection of consumer interests in the broadest sense, including in particular the promotion of competition among suppliers.

19. More particularly, competition considerations feature in the scheme of the Telecommunications Act in the following ways:

(1) Section 5 provides:

> "5. Where after consultation with the Fair Trading Commission the Office determines that a matter or any aspect thereof relating to the provision of specified services -
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> (a) is of substantial competitive significance to the provision of specified services; and
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> (b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,
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> the Office shall refer the matter to the Fair Trading Commission."

Part V provided for interconnection between networks so as to achieve end-to-end connectivity, on terms prescribed or agreed or failing that determined by the Office. Special provision is made for economically dominant carriers, in accordance with a scheme loosely modelled on EU legislation: see in particular the Common Regulatory Framework Directive for Electronic Communications Networks 2002/21/EC. A public voice carrier designated by the Office as holding a dominant position in the Jamaica market within the meaning of section 19 of the Fair Competition Act, is required under the Telecommunications Act to submit to a number of additional obligations. These include (i) obligations of non-discrimination, transparency, and diversity in its services (section 30); (ii) a regime of price control for interconnection, based on costs (section 33); (iii) "competitive safeguard rules" and associated guidelines (section 35); and (iv) rules requiring the provision of specified forms of indirect access to its network (section 36).

(2) Section 73 of the Telecommunications Act provided:

> "73.(1) The provisions of the Fair Competition Act shall not affect an agreement between the Minister and a universal service provider in relation to the universal service obligation or any

agreement approved by the Office after consultation with the Fair Trading Commission.

(2) Except as provided in subsection (1) nothing in this Act shall be construed as affecting the right of any person to refer a matter to the Fair Trading Commission in accordance with the Fair Competition Act."

20. Although both the Office and the Commission have responsibilities in relation to competition, in the Board's opinion, their functions in relation to it are not inconsistent but complementary. The Telecommunications Act imposes a duty on the Office to promote competition in the telecommunications market. It also imposes specific obligations on licensed firms and empowers the Office to make statutory rules which will impose further obligations on them. These are mainly concerned with regulating interconnection terms and with restricting the ability of dominant firms to exploit their market strength. Plainly, compliance with these obligations will reduce the opportunities for anti-competitive conduct by firms operating in the market, especially by dominant firms. But it will not eliminate it. Non-dominant firms are subject to much lighter regulation. Some significant tools of competition regulation, such as merger control, are not available to the Office. The Telecommunications Act imposes no general duties on firms to refrain from anti-competitive conduct, analogous to the general prohibitions of anti-competitive agreements and conduct in sections 17-20 of the Fair Competition Act. So, while the Office has a statutory power to investigate contraventions of the Telecommunications Act, and if necessary to take enforcement proceedings in respect of them, those contraventions do not include anti-competitive agreements or conduct, save insofar as they incidentally constitute breaches of specific rules in or under the Telecommunications Act. Anti-competitive conduct which is not a breach of those rules is governed only by the Fair Competition Act. It represents a significant public policy, and can be controlled only by the Commission by the exercise of powers derived from the Fair Competition Act. Nothing in the Telecommunications Act suggests, and there is no other reason to suppose, that it was intended to relieve firms of the obligation to comply with Part III of the Fair Competition Act, or to deprive the Commission of the power to enforce it against telecommunications firms.

21. This analysis is confirmed by sections 5 and 73 of the Telecommunications Act, both of which assume the continuing application of the Fair Competition Act to the telecommunications market.

22. Section 5 requires the Office to consult the Commission on the question whether "a matter or any aspect thereof" is of substantial competitive significance to the provision of telecommunications services and "falls within the functions of the Fair Trading Commission under the Fair Competition Act." If it does, the Office must refer the matter to the Commission. This necessarily means that the two regimes operate in

parallel. Digicel accepted that this was so, up to a point. But it submitted that the Commission had no jurisdiction over the telecommunications market in the absence of a reference under section 5. The Board does not agree. Part III of the Fair Competition Act is a general legal prohibition. A transaction which contravenes section 17 does so regardless of whether or not the matter is referred to the Commission by the Office. It would therefore be surprising if the principal competition authority of Jamaica were unable to take action. Nor is it. Section 5 of the Telecommunications Act is merely a procedural mechanism by which an examination of the implications of some matter for competition may be initiated. It is not the only one. The Commission remains entitled under section 5(1)(a) and (d) of the Fair Competition Act to deal with any matter "on its own initiative or at the request of any person" adversely affected. Under section 73(2) of the Telecommunications Act nothing in the Act was to affect the right of any person to refer a matter to the Commission.

23. Turning to section 73(1), that provision excludes from the scope of the Fair Competition Act agreements with the Minister relating to the provision of universal services, and agreements approved by the Office in accordance with that Act. This makes little sense unless the Fair Competition Act continues to apply in other respects.

24. The Board concludes that the Commission has jurisdiction to intervene in the telecommunications market in the same way as in any other.

Question (2): merger control

25. Digicel's next challenge to the Commission's right of intervention is that section 17 of the Fair Competition Act is concerned with agreements whose performance involves concertation between two or more distinct firms. Section 2(2)(b) of the Fair Competition Act provides that for the purposes of the Act "a group of interconnected companies shall be treated as a single enterprise." So, it is said, once the merger had been completed, the law would regard Digicel and Claro as a single enterprise, and a single enterprise cannot engage in a course of concerted conduct with itself.

26. The difficulty about this argument is that section 17 is not limited to agreements providing for concerted conduct between the parties after it has been made. It applies to any agreement falling within the definition in subsection (1). That means any agreement containing provisions having as their purpose or likely effect the substantial lessening of competition in the relevant market. Subsection (2) gives examples of such provisions, all of which are indeed concerned with concertation between distinct firms pursuant to the provision in question. But subsection (2) is not exhaustive. It is expressed to be without prejudice to the generality of subsection (1). An agreement by which two competitors merge is an agreement falling within subsection (1), because the reduction in the number of significant competitors in a market is self-evidently likely to have the

effect of lessening competition. It follows that even if this result was not intended, it is subject to the prohibition in subsection (3), unless authorised by the Commission under subsection (4).

27. Until the adoption of a comprehensive scheme of merger control under Council Regulation 4064/89 EEC, a similar issue arose under the competition regime of the European Union. The Treaty provided for the control of anti-competitive agreements by what was then article 85 (now article 101) and abuses of a dominant position by article 86 (now article 102). Article 101 prohibits "all agreements between undertakings, decisions by associations of undertakings and concerted practices which … have as their object or effect the prevention, restriction or distortion of competition within the internal market". Article 102 prohibits "Any abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it." These provisions have substantially the same purpose as sections 17 and 20 of the Fair Competition Act, although the language of the Jamaican provisions is not identical and section 17, with its references to "substantial" lessening and "likely" effect, is arguably broader. The essential point, however, for present purposes, is that like the Jamaican provisions, articles 101 and 102 of the EU Treaty contained no explicit reference to mergers, but nonetheless provided the legal basis on which the European Commission controlled mergers before 1989. It is fair to say that this approach was controversial. But in *Europemballage Corporation and Continental Can Co Inc v Commission of the European Communities* (Case C-6/72) [1973] ECR 215 the European Court of Justice held that acquisitions by a dominant company were subject to control under article 102; and in *British American Tobacco and R J Reynolds Industries Inc v Commission of the European Communities* (Joined Cases C-142/84 and C-156/84) [1987] ECR 4487, the Court held that agreements for acquisitions by non-dominant companies were subject to control under article 101. The *British American Tobacco* case involved what amounted to a joint venture agreement, including the acquisition of a 50% shareholding in a competitor which conferred influence but not control. It was therefore a case in which the parties to the agreement did retain their distinct identity after it was carried into effect. Digicel understandably relies on that fact. But it was not the basis on which the Court ruled that the transaction fell within article 101. The Court held (para 38) that article 101 applied "where, by the acquisition of a shareholding or though subsidiary clauses in the agreement, the investing company obtains legal or *de facto* control of the commercial conduct of the other company or where the agreement provides for commercial cooperation between the companies or creates a structure likely to be used for such cooperation." Although the case itself involved influence rather than control, article 101 was held to apply to both.

Question (3): Agreements approved by the Minister

28. The relevant statutory provisions are sections 11 and 17 of the Telecommunications Act.

29. Section 11 defines the qualifications required for the grant of a telecommunications licence. It provides:

> "11.(1) An application for a licence under this Act shall be made to the Office in the prescribed form and shall be accompanied by the prescribed application fee and contain a statement that -
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> (a) the applicant undertakes to comply with the provisions of this Act relating to the type of facility or specified service to which the application relates, including -
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> (i) interconnection obligations;
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> (ii) universal service obligations;
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> (iii) licence limitations; and
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> (iv) network expansion requirements;
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> (b) the applicant is not disqualified from being granted a licence by reason of any legal impediment;
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> (c) the applicant possesses the technical qualifications to fully perform the obligations imposed by the licence; and
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> (d) the applicant satisfies the financial requirements for the construction and operation of the facility or the provision of the services to which the application relates."

30. Section 17 deals with transfers of a licence or the business for whose operation a licence has been granted. Sections 17(2) and (3) provide:

> "(2) A licensee may, with the prior approval of the Minister, assign its licence or any rights thereunder or transfer control of its operations.

> (3) An application for approval of an assignment or transfer under this section shall be made in writing to the Minister who shall grant such approval if he is satisfied that the assignee satisfies the requirements of section 11(1)(a) to (b) as regards the obligations imposed on a licensee by this Act or the licence."

31. Digicel relies on the Prime Minister's approval of the merger agreement under section 17(3) as shielding it from intervention by the Commission. This point found favour with the Court of Appeal on the ground that section 17 of the Telecommunications Act is the only provision of either Act which deals in terms with mergers. It was therefore, they thought, by implication the full extent of statutory control over mergers.

32. In the Board's opinion, this is misconceived. As the Board has pointed out above, section 17 of the Fair Competition Act, although it does not refer in terms to mergers, establishes a regime of control over a class of transactions which includes mergers. It follows that mergers fall for different purposes within both the Fair Competition Act and the Telecommunications Act. The lawfulness of an agreement may depend on its compliance with any number of different statutory requirements, all of which must be satisfied if they are relevant.

33. The merger agreement in this case effected a transfer to Digicel of control over the operations of Claro. The Minister's approval of such a transfer was required in order to ensure that the transferee satisfied the principal qualifications required of a licensee for the original award of the licence under section 11, namely those specified at section 11(1)(a) and (b). Although the Prime Minister, when announcing his decision to approve, said that he had taken competition considerations into account, those considerations had nothing to do with the statutory function which he was performing. The criteria for approval are concerned only with the transferee's ability and willingness to comply with the licence terms. They are not concerned with the transferee's compliance with the licensee's distinct obligation to refrain from anti-competitive conduct prohibited by Part III of the Fair Competition Act. For this reason, the Prime Minister's approval has no effect on the statutory functions of the Commission as the relevant competition authority.

Conclusion

34. The Board will humbly advise Her Majesty that this appeal should be allowed, the order of the Court of Appeal set aside and the order of Sinclair-Haynes J restored. The parties are invited to make written submissions on costs within 21 days of the delivery of this judgment.