[2014] JMCA Civ 48

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 75/2012

BEFORE: THE HON MRS JUSTICE HARRIS JA
THE HON MR JUSTICE MORRISON JA
THE HON MR JUSTICE DUKHARAN JA

BETWEEN	**DIGICEL JAMAICA LIMITED**	**1st APPELLANT**
AND	**OCEANIC DIGITAL JAMAICA**	**2nd APPELLANT**
AND	**FAIR TRADING COMMISSION**	**RESPONDENT**
AND	**CABLE & WIRELESS JAMAICA LTD**	**INTERESTED PARTY**

Michael Hylton QC and Mrs Georgia Gibson Henlin instructed by Henlin Gibson Henlin for the appellants

Dr Delroy Beckford and Miss Wendy Duncan instructed by Fair Trading Commission for the respondent

Mrs Denise Kitson QC and Mrs Trudy-Ann Dixon-Frith instructed by Grant Stewart Phillips and Co for the interested party

13, 14 and 15 May 2013 and 19 December 2014

HARRIS JA

[1] On 31 January 2012, the appellants made an application in the court below concerning the issue of the applicability of the Fair Competition Act ('FCA') to a stock purchase agreement between them. It was ordered that there be a separate trial of

the following 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 [Fair Trading Commission] has jurisdiction in relation to the agreement or the transactions effected by the agreement which is the subject of these proceedings."

[2] The trial on these preliminary issues was heard by Sinclair-Haynes J. On 15 May 2012, she made the following orders:

> " 1. The FTC has jurisdiction over the Telecommunications Industry.
>
> 2. Section 17 of the FCA applies in relation to agreements or transactions that fall under Section 17 of the TCA.
>
> 3. Section 17 of the TCA applies to mergers and acquisitions such as the transaction between Digicel and Claro."

The appellants now challenge these orders.

Background

[3] The 1st appellant is a limited liability company, which was at all material times carrying on the business of, among other things, providing voice telephony and data services in Jamaica. The 2nd appellant is also a limited liability company trading as "Claro" and was at all material times also engaged in the business of voice telephony and data services in Jamaica. The respondent is a body corporate established under section 4 of the FCA which, among other things, carries out investigative procedures into the conduct of business practices in Jamaica.

[4] On 11 March 2011, the media reported that the 1st appellant had announced that it had entered into an agreement with America Movil to acquire its Claro business in Jamaica and that it would sell to America Movil its business in El Salvador and Honduras ('the agreement'). On 15 March 2011, the managing director of Cable and Wireless, trading as LIME, wrote to Mr David Miller, the executive director of the respondent, in relation to the agreement expressing the view that "although the exact commercial structure of the transaction had not been made public", it was "clear that the parties intend to enter into an agreement or arrangement that will have the effect of substantially lessening competition to the detriment of consumers" and requesting "the [respondent's] confirmation that it will be undertaking an urgent and thorough review of the proposed transaction as it is authorized to do pursuant to the Fair Competition Act". On the same date, LIME also wrote a letter to the Office of Utilities Regulation ('OUR') in which it advanced similar complaints about the agreement. Subsequently, on 23 March 2011, the head of the Legal and Regulatory Department of LIME again wrote to Mr Miller reinforcing that it was LIME's view that the transaction would result in a lessening of competition and that it should therefore not be permitted to proceed or should only be allowed to proceed subject to the imposition of certain conditions designed to safeguard and develop competition. On 25 March 2011, Mr Miller responded to LIME's letter of 15 March indicating that "independent of your formal complaint, we have begun an investigation into the proposed acquisition agreement with a view to deciding whether the effect of same will result in a substantial lessening of competition".

[5] Pursuant to section 17(3) of the Telecommunications Act (TCA), an application was made to the relevant Minister, being the Minister with Responsibility for Information, Telecommunications and Special Projects for approval of the agreement and this approval was subsequently granted with the condition that the 1st appellant "maintain a separate network and complete a separate build-out of 90% penetration of the island as required under the original Claro licences".

[6] In September 2011, LIME commenced proceedings in claim no HCV 2011/05659 seeking judicial review of the Minister's decision. It sought an order quashing the Minister's approval and a declaration that the Minister's approval was unlawful. LIME also sought an order compelling the respondent to investigate the matter. The application for judicial review was refused.

[7] On 8 December 2011, the respondent prepared a report in which it documented the results of its investigation "undertaken pursuant to section 17 of the Fair Competition Act", and on 9 December 2011, it commenced proceedings by fixed date claim form seeking several declarations against the appellants, the most significant of which, being:

> "A Declaration that the 1st and 2nd Defendants have contravened the prohibitions and/or the obligations (or any part of the said prohibitions and or obligations) imposed in Part III of the Fair Competition Act 1993 and/or in particular that the 1st and 2nd Defendants have in the course of trade or business, attempted to give effect or [sic] given effect to provisions of an agreements which provisions have as their purpose, effect, or likely effect, the substantial lessening of competition in a market in breach of

Section 17 of the said Act."

The other declarations sought were that certain provisions of the agreement were of no effect and unenforceable. The respondent also sought an injunction restraining the appellants from giving effect to these provisions and an order that the appellants pay to the Crown such pecuniary penalty not exceeding $5,000,000.00 for each breach.

[8] In its particulars of claim, the respondent stated that, pursuant to section 5 of the FCA, it has jurisdiction to investigate the conduct of businesses in Jamaica on its own initiative or at the request of any person to determine whether any enterprise is engaging in business practices in contravention of the FCA. Paragraphs 6, 7, 15, 16, 25, 34 and 41-43, which are of particular significance, are set out below:

> "6. In March of 2011 the Claimant became aware through media reports that the 1st and 2nd Defendants had interests in or were parties to an agreement whereby among other things, the 2nd Defendant's parent company América Móvil would acquire the 1st Defendant's company in Honduras in exchange for which the 1st Defendant would acquire the 2nd Defendant, Oceanic Digital Jamaica Limited, which trades as Claro.
>
> 7. Pursuant to section 5 of the Act, the Claimant's staff commenced investigations on its own initiative into the media reports regarding the agreement and its likely effect on competition in the market in Jamaica for voice and text messaging services....
>
> ...
>
> 15. Further, article 7 of the agreement allows the 2nd Defendant to transfer its telecommunications licence and spectrum to the 1st Defendant.

16. If the 2nd Defendant transfers its telecommunications licence and spectrum to the 1st Defendant this action would in effect amount to the 1st Defendant not only facilitating the 2nd Defendant's exit from the relevant market, but also the likely or actual barring of the entry of a 3rd party from the relevant market as, among other things, there would not be enough spectrum remaining to facilitate the cost-effective entry of a new competitor in the relevant market or the cost-effective expansion of an existing competitor in the relevant market. Attached ... is a copy of a letter from the Spectrum Management Authority dated August 24, 2011, indicating impediments to a new entrant for cost-effective build out of infrastructure to provide services in the relevant market were the 1st Defendant to acquire the spectrum of the 2nd Defendant as contemplated by the agreement referred to herein.

...

25 It is also unlikely that LIME will be able to exert competitive restraints on the 1st Defendant in the short run or within two years because, among other things it is not an equally efficient, or is a less efficient competitor.

...

34. Therefore, throughout the period of the 2nd Defendant's operations in the voice and text messaging services market, the 2nd Defendant was an effective competitive restraint on the 1st Defendant's behavior in the market

...

41. Consequently, as a result of the foregoing, the 1st and 2nd Defendants' actions by signing, attempting and/or taking steps to give effect to the agreement that contains provisions that have as their purpose, effect, or likely effect of the substantial lessening of competition in the relevant market is in breach of section 17 of the Act.

42. The Defendants intend to and have taken steps to consummate the subject agreement in breach of section 17 of the Act including but not limited to the application by the 1st Defendant to the relevant Minister under the Telecommunications Act, 2000 for the transfer of the 2nd Defendant's telecommunications licence.

43. The 1st Defendant has since said application for transfer of the 2nd Defendant's telecommunications licence obtained approval for the transfer of same including the 2nd Defendant's allocable spectrum related to the licence for which approval for transfer has been obtained."

[9] Each appellant filed a defence, which, in substance, raised the same issues. By paragraph 2 of their respective defences, the appellants challenged the averment that the jurisdiction of the respondent is defined by section 5 of the FCA. They also averred that in determining the extent of the respondent's jurisdiction the FCA must be considered within the context of the entire legislative scheme. The 1st appellant admitted that the agreement would effectively allow it to acquire the 2nd appellant's assets, but denied that the agreement would have the effect that the 2nd appellant would exit the market. It averred that the 2nd appellant would have exited the market if the acquisition were not approved. It denied that the agreement or the transactions contemplated by the agreement could amount to or facilitate the barring of the entry of a 3rd party into the relevant market and that the agreement had the effect of reducing the amount of spectrum available for allocation to third parties. It also averred that the provisions of the agreement did not have the purpose or effect or likely effect of lessening competition in the market.

[10] On 30 January 2012, LIME was granted leave to intervene in the proceedings as an interested party, it, having on 27 January 2012, filed an application seeking leave to do so. The main ground of the application was that its "financial rights would be plainly and directly affected by the conclusion of the agreement". Among the other grounds

relied on were that the Minister with Responsibility for Information, Telecommunications and Special Projects had granted formal approval of the transfer of the 2nd appellant's telecommunications licence to the 1st appellant and the 2nd appellant's allocated spectrum related to the said licence. It was further stated that the granting of the approval and the fact that the respondent had not then acted in relation to the agreement compelled LIME to institute judicial review proceedings and the application for judicial review and leave to appeal had been refused with the result that an application for leave to appeal is pending in this court. The grounds also stated that at all material times throughout the judicial review proceedings, it had advanced the position that the agreement would significantly strengthen the 1st appellant's already dominant position in the market.

[11] In arriving at the conclusions stated in paragraph [2], several findings were made by the learned judge. Details of her findings will be disclosed later but it would be appropriate to make brief reference to them at this stage. They are as follows:

i. The Telecommunications Act (TCA) is replete with provisions showing the manifest intention of the legislature that the respondent has a regulatory function regarding telecommunications matters and that the FCA applies.

ii. Section 5 of the TCA mandates the OUR to refer certain matters to the respondent, after it consults with it, which it determines as falling within the remit of the respondent. Section 73(2) confers on any person the right to refer matters to the respondent and the respondent is not precluded from instituting legal proceedings independently of the OUR.

iii. The respondent's jurisdiction is preserved unless it is excluded by the FCA or some other Act.

iv. Sections 3 and 17(4) of the FCA state the circumstances in which the FCA is inapplicable and contracts relating to mergers and acquisitions are not included in any of the sections.

v. The agreements were affected by section 17 of the TCA as the acquisition or merger occurred as a result of the transference of a licence pursuant to section 17. Section 17 of the TCA does not regulate or solely govern acquisitions or mergers.

vi. There is nothing in the TCA which expressly excludes the applicability of the FCA. The agreements which are exempted are stated in section 3 of the FCA and section 73(1) of the TCA.

vii. Although the transfer of licences are specifically governed by the TCA if the agreement is tainted by or results in any form of anti-competitiveness, then, in the absence of any expressed exemption, section 17 of the FCA becomes applicable.

[12] It is now necessary to make reference to such sections of the TCA and the FCA, which are determinative of this appeal. Sections 5, 17, 35 and 73 of the TCA are as follows:

> "**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 -
>
> (a) is of substantial competitive significance to the provision of specified services; and
>
> (b) falls within the functions of the Fair Trading Commission under the Fair Competition Act,

the Office shall refer the matter to the Fair Trading Commission.

...

17. (1) ...

(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.

(4) ..."

35. (1) The Office may, after consultation with the Fair Trading Commission and such participants in the telecommunications industry as it thinks fit and subject to subsection (3), make rules subject to affirmative resolution (hereinafter referred to as 'competitive safe-guard rules') prescribing the following matters in relation to dominant public voice carriers-

(a) separation of accounts;

(b) keeping of records;

(c) provision to ensure that information supplied by other carriers for the purpose of facilitating interconnection is not used for any uncompetitive purpose;

(d) such other provisions as the Office considers reasonable and necessary for the purposes of the competitive safeguard rules.

(2) The Office may in consultation with the Fair Trading Commission, develop guidelines as to-

(a) the types of uncompetitive practices to which the competitive safeguard rules apply; and

(b) the procedure for determining whether to impose a competitive safeguard in relation to that practice.

(3) the Office shall make competitive safeguard rules only if it is satisfied that-

(a) such rules are necessary for the identification or prevention of abuse of a dominant practice by a dominant public voice carrier or any other uncompetitive practice by that carrier; and

(b) no other means are available to the Office for the provision of an adequate remedy in relation to such abuse or practice;

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."

[13] Sections 3 and 17 of the FCA are listed hereunder. Section 3 of the FCA reads:

"3 "Nothing in this Act shall apply to-

(a) ...

(b) ...

(c) the entering into of an agreement in so far as it contains a provision relating to the use, licence, or assignment of rights under or existing by virtue of any copyright, patent or trademark;

(d) the entering or carrying out of such an agreement or the engagement in such business practice, as is authorized by the Commissioner under Part V;

(e) any act done to give effect to a provision of an

arrangement referred to in paragraph (c);

(f)...(h)."

Section 17 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.

(2) Without prejudice to the generality of subsection (1) agreements referred to in that subsection include agreements which contain provisions that -

(a) directly or indirectly fix purchase or selling prices or any other trading conditions;

(b) limit or control production, markets, technical development or investment;

(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 indispensible to the attainment of the objectives mentioned in paragraph (a); at

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

[14] The appellants filed the following six grounds of appeal:

"a. The learned judge erred as a matter of law in finding that in the absence of specific referral or consultation by the Office of Utilities Regulation the Fair Competition Act applies generally to telecommunications matters.

b. The learned judge erred as a matter of law in finding that Section 17 of the FCA applies to transactions that fall under Section 17 of the TCA.

c. The learned judge erred as a matter of law in treating the right of a person to refer a matter to the FTC under section 73(2) of the TCA as conferring on the FTC a regulatory function independent of the Office of Utilities Regulation (the 'OUR') in telecommunications matters such as to enable the FTC to institute legal proceedings independently of the OUR.

d. The learned judge fell into further error in that having found:

1. '*[n]othing contained in section 17 of the FCA captures what has transpired between Digicel and Claro'* and

2. '*There is no allegation of collusive behaviour between Digicel and Claro.'*

She failed to consider submissions made on behalf of the Appellants that:

i. This merger and acquisition is regulated by section 17 of the sector specific regulation, the TCA.

ii. If this lawful merger and acquisition also falls under section 17 of the general provisions of the Fair Competition Act it would be unenforceable and void ex post by virtue of the provisions of section 17(3) of the said FCA.

iii. Parliament would not have provided in the sector specific TCA that a licensee can agree to transfer control of its operations with the consent of the Minister, and intended that the same agreement could nonetheless be unenforceable because of the general provisions of the FCA.

e. The learned judge erred as a matter of fact when she found as she did that the FTC instituted these legal proceedings against the Defendants as a result of receiving a complaint about the transaction from Cable and Wireless (LIME).

f. The learned judge erred as a matter of fact in finding that Mr. Hylton QC submitted that LIME's application is res judicata."

[15] A counter notice of appeal was filed on 12 June 2012, in which the respondent sought to have the order of the learned judge affirmed on the following grounds:

" 1. As a matter of law, and of the construction of section 17 of the FCA, the said section being in *pari materia* to Article 101 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 85 and ex Article 81 of the EC Treaty), section 17 of the Fair Competition Act 1993 (FCA) applies to acquisitions of one company or competitor by another.

2. As a matter of law, and of the proper construction of section 17 of the FCA, the said section being in *pari materia* to Article 101 of the Treaty on the Functioning of the European Union (TFEU) (ex Article 85 and ex Article 81 of the EC Treaty), section 17 of the CA applies to transactions including acquisitions of one company or competitor by another **referred to** in an agreement **or effected** pursuant to such an agreement between companies or undertakings operating in a relevant market.

3. As a matter of law, the subject Stock Purchase Agreement and the transactions **referred to** therein **or effected** thereby are not required by section 17 of the Fair Competition Act, or the Telecommunications Act (TCA) 2000.

4. As a matter of law, section 17 of the TCA, being in the main concerned with the transfer of a telecommunications licence and the criteria for transfer of the same, does not apply to or relate to the approval of agreements whose purpose or effect or likely effect is to substantially lessen competition in a market or the **legal validity** of any such agreement with said purpose, effect or likely effect.

5. Section 17 of the FCA combines a *per se* and *rule of reason* prohibition with respect to agreements whose purpose or effect or likely effect is to substantially lessen competition in a market without a requirement for proof of collusion.

6. As a matter of law, section 5 of the FCA confers jurisdiction on the Fair Trading Commission to initiate investigations and/or to institute legal proceedings in relation to anti-competitive conduct in the Telecommunications industry and in particular with respect to any agreement or transactions to be effected by such agreements between Telecommunications providers, there being no exemption and/or exclusions within the FCA applicable to such agreements or transactions, and there being no express reference in the TCA for any other legislation to specifically govern such agreements or transactions."

Submissions

Ground a

> **"The learned judge erred as a matter of law in finding that in the absence of specific referral or consultation by the Office of Utilities Regulation the Fair Competition Act applies generally to telecommunications matters."**

[16] In response to a preliminary issue raised by the intervener, Mr Hylton QC, submitted that contrary to what was submitted by counsel for LIME, this is not an appeal from the exercise of a discretion by a judge. The appeal, he argued, is almost

exclusively on a question of law. There are two factual findings, he submitted, which are raised on documentary evidence but are subsidiary issues that are not dispositive of the appeal. The appeal is therefore by way of a rehearing.

[17] Turning to the appeal, learned Queen's Counsel, on behalf of the appellants, argued that the OUR is the regulator for the purposes of the telecommunications sector. The respondent, it was submitted, enjoys limited jurisdiction over telecommunications matters under the TCA. The discretion to consult with the respondent is conferred on the OUR; therefore the TCA does not confer on the respondent an independent discretion under the TCA. It was submitted that a review of the sections referred to by the judge as a basis for her conclusion that the respondent has a general regulatory function, does not disclose that any jurisdiction was conferred on the respondent. These sections do no more than make reference to the FCA, learned Queen's Counsel argued. The words used in the preamble to the TCA, for example, "telephony", do not appear in the FCA, and referring to section 5 of the TCA, he submitted that the circumstances under which the OUR may refer a matter to the respondent are conjunctive and not disjunctive.

[18] Relying on ***Jamaica Stock Exchange v Fair Trading Commission*** SCCA No 92/1997, delivered 29 January 2001, Mr Hylton submitted that the principle of statutory interpretation that the specific will take precedence over the general (*lex specialis derogat legi generali)* should apply. The FCA, he argued, contains general provisions relating to the prohibition of anti-competitive behaviour and is not specific to any

particular industry, while the TCA provides specifically for the telecommunications industry and transactions such as that which is the subject of these proceedings. Relying on the dictum of Panton JA (as he then was) in the ***Jamaica Stock Exchange*** case, it was argued that the TCA was enacted later in time to the FCA, with the knowledge that the FCA had been enacted and was in force. It was submitted further that there are extensive provisions in the TCA that deal with the lessening of competition. In particular, the very first object of the Act is "to promote and protect the interest of the public by promoting fair and open competition in the provision of specified services and telecommunications equipment". Learned Queen's Counsel also referred to section 4 of the Act, which requires the OUR to discharge various functions including promoting "competition among carriers and service providers". In these circumstances, based on the statutory scheme of the FCA and the TCA, the judge had erred in finding as she did.

[19] It was Dr Beckford's submission that section 5 of the TCA should be read in conjunction with section 73 as specific referral under section 5 does not deprive the respondent of jurisdiction. Section 5 does not state all the cases in which a matter is to be referred nor does it state all the cases in which the FCA applies to telecommunications providers, he argued. Section 73(2), in particular, it was contended, recognises the application of the FCA to telecommunications matters and the jurisdiction of the respondent in relation to those matters and further, that section does not establish any condition for a person to refer a matter to the respondent. The word "matter" in sections 5 and 73(2) is not defined in the TCA and must be construed

as having its ordinary meaning. Therefore, the TCA provides for either the OUR or a person to refer a "matter" to the respondent and accordingly, it was submitted, section 5 is not to be construed as providing exclusive jurisdiction to the OUR to refer a matter to the respondent. Further, it was argued, by the terms of section 73(2) the right of a person to refer a matter to the respondent is not affected by section 5 of the TCA. The legislature, it was argued, took into consideration that the OUR may not consult with the respondent, hence the purpose of section 73 to provide another avenue for referral to the respondent. He submitted that there are a number of reasons why the OUR may choose not to consult with the respondent, such as human resource constraints. The legislative scheme of the TCA, he argued, gives a person other than the OUR a right to refer a matter to the respondent. He contended that if it were the intention of the legislature that the OUR should have exclusive jurisdiction to refer the matter, section 73 would be redundant or it would be drafted so as to mandate referral of a telecommunications matter to the OUR by a private person. The only limitation to section 73(2) is section 73(1), he argued. If the legislature had intended that section 5 should be a limitation to section 73(2), it would have so mentioned, he argued.

[20] It was also Dr Beckford's submission that the provision for competitive safeguards in the TCA is not meant to be comprehensive as to foreclose the application of the FCA. The interrelatedness between sector specific legislation and competition legislation is not unusual, he argued, as it is not strange for a regulatory body to be given oversight; they have different mandates and cover different areas for the most part.

[21] Counsel for LIME, Mrs Kitson QC, submitted that the fact that section 73(2) of the TCA recognises a person's right to refer a matter to the respondent means that anyone including another competitor in the telecommunications market could refer the agreement to the respondent. By virtue of such a reference, it was argued, the respondent would be clothed with jurisdiction. It was submitted that it would be nonsensical for the TCA to insist that save for the limited circumstances no provision of the statute shall be construed to derogate from the right of a person to approach the respondent pursuant to the provisions of the FCA, but restrict the jurisdiction of the respondent to act. This would be contrary to the manifest intention of Parliament as revealed in the objects, namely, "promoting fair and open competition in the provision of specified services". Throughout the entire TCA, there are sections, it was submitted, such as 5, 27, 35 and 73 which make specific reference to the FCA and the general principles for the promotion of fair competition. Learned Queen's Counsel made reference to the rules of statutory interpretation that a statute must be construed as a whole and that the statute must be construed so as to avoid any repugnancy with other parts of the statute. For this submission, she relied on the **Sussex Peerage** case 8 ER 1034 and Halsbury's Laws of England 4th edn vol 44, paragraph 872. Further, it was submitted, it would be odd for this court to find that Parliament had passed the TCA to initiate the transition of the telecommunications industry from a monopoly to a competitive market and at the same time, had intended to disapply the general legislation, the FCA, which was specifically promulgated to achieve that objective.

[22] It was also submitted by Mrs Kitson that section 5 particularizes the powers of the OUR, and for the avoidance of doubt, grants to the OUR, the specific power to refer a matter to the respondent where the matter is deemed to be of competitive significance. Such recognition by Parliament is important, it was argued, as all parties accept that the TCA was enacted and made operative after the passing of the FCA. Parliament, it was submitted, would therefore have had full knowledge of the provisions of the FCA and their effect. The very language of the provision, she argued, recognises that both the OUR and the respondent have a role to play in overseeing the effective operation of the telecommunications market so as to protect the interests of consumers.

[23] Learned Queen's Counsel also contended that the appellants' reliance on the ***Jamaica Stock Exchange*** case was misplaced. The *ratio decidendi* of the case, which turned on the question of statutory interpretation, was that the FCA, having expressly excluded "securities" from its definitions of goods, the respondent had no jurisdiction to exercise functions pursuant to the FCA in relation to the Stock Exchange, which deals with securities, she argued. In this case, the FCA has not in its express terms excluded the applicability of its provisions to the telecommunications industry. Hence, the principle of *lex specialis derogat legi generali* would not apply, it was submitted. Further, it was found that there was no agreement between the Stock Exchange and another person or entity to which the provisions of the FCA could apply.

Ground b

"The learned judge erred as a matter of law in finding that Section 17 of the FCA applies to transactions that fall under Section 17 of the TCA."

[24] It was submitted by the appellants that there is no dispute that the transaction in question was a merger and acquisition or that there is no provision in the FCA that regulates mergers and acquisitions. However, the judge's finding that section 17 of the FCA applied to transactions under section 17 of the TCA was inconsistent with her correct finding that the transaction in question was not captured by the FCA, it was argued. It is also inconsistent with her correct finding that there was no collusive behaviour between the appellants. Relying on ***BAT and Reynolds v Commission of the European Commission*** Cases 142 & 146/1984 [1987] ECR 4487, it was submitted that even in cases where provisions similar to section 17 of the FCA (article 85 of the EC treaty and article 101 of the Treaty on the Functioning of the European Union (TFEU)) were used as an imperfect tool to regulate mergers or acquisitions, it was only done where both entities remained independent competitors in the market after the acquisition. The authorities, it was argued, emphasise that the provision is meant to capture collusion between independent undertakings that affect market conduct and not behaviour which changes market structure or the concentration of undertakings. In essence, it was submitted, once the agreement amounts to a merger the provision does not apply.

[25] Mr Hylton further submitted that the section is not limited by any regulatory approval except the relevant Ministers. He argued that none of the examples in section

17(2) of the FCA applies to the instant case. It was his contention that the learned judge erred in accepting the respondent's submission that there was a contravention of section 17(2) of the FCA for the reason that following the conclusion of the matter, there would be one less player in the market which would inevitably lead to less competition. If the respondent were correct, he argued, every agreement which involves one licensee acquiring the operations of another would be unenforceable; it would not matter what the provisions of the relevant agreement were and whether these correlated with the examples in section 17(2). It was also submitted that the section does not apply as a result of the respondent taking a position or as a result of some investigation. It would only apply when a provision has this effect, counsel submitted, and further, it would be absurd for the TCA to give the Minister power to do something and then render it unenforceable.

[26] Learned Queen's Counsel submitted that when the two statutes are read together, section 17 of the FCA should not be interpreted as extending to the transaction under consideration, specifically a transaction covered by section 17 of the TCA. The transaction may also be covered by the *ejusdem generis* rule in that the examples given in section 17(2) of the FCA are those envisaged by section 17(3), he submitted. The two provisions in the different statutes can be interpreted in a way that does not conflict. However, he submitted in the alternative, if it could be said that the statutes are in conflict, the conflict should be resolved in the way that was applied by Panton JA in ***Jamaica Stock Exchange***.

[27] Dr Beckford submitted that there is no specific provision in the FCA regarding mergers and acquisitions, but there is no exemption of such transactions from the FCA if those transactions can be construed as agreements in accordance with sections 2 and 17 of the FCA. The FCA includes "agreements" in its definition and there is no dispute that the appellants were parties to the stock purchase agreement. In relation to ***BAT and Reynolds v Commission of the European Communities*** it was submitted that the court's decision was not limited to circumstances where entities remain independent or competitors after acquisition. The critical issue for the court to decide, it was argued, was whether the acquisition was tantamount to legal or de facto control. The question of legal or de facto control can arise where entities remain independent after acquisition as well as when they are no longer independent after acquisition because of the legal or de facto control of the operations of the company acquired.

[28] Reliance was placed on article 101 of the TFEU and also on paragraph 32 of the European Commission's Guidelines for the Applicability of Article 101 of the TFEU which notes that horizontal co-operation agreements may limit competition in several ways including where the agreement is exclusive in that it limits, as a result of contractual obligations, the possibility of the parties competing against each other or third parties as independent economic operators or as parties to other competing agreements. It was also submitted that the European Court of Justice (ECJ) in ***Competition Authority v Beef Industry Development Society Ltd and Anor*** [2008] ECR I–8637, [2009] All ER (EC) 367 held that article 101 of TFEU applies to agreements providing for the exit of competitors from a relevant market.

[29] Dr Beckford submitted that the learned judge's finding that no collusion existed was not inconsistent with the finding that section 17 of the FCA was applicable. The learned judge, it was argued, did not find that collusion is necessary or sufficient for the transactions to be governed by section 17 of the FCA. Further, section 2 of the FCA does not define "agreement" in any restrictive sense, and the provisions of the EC Treaty which are similar to section 17 (articles 85 or 81) have not been interpreted to suggest that a specific finding of collusion is necessary for an agreement to be caught by that provision. The concept of collusion as construed in article 81 of the EC treaty is to distinguish between unilateral conduct (conduct of one firm) and multi-lateral conduct (conduct by at least two firms). Therefore, the terms "agreements, decisions and concerted practices" referred to in that article are all forms of collusive conduct. It was submitted that agreements are by definition collusive arrangements, that is, not unilateral conduct; however, not all collusive arrangements are prohibited by article 81 or section 17(3) of the FCA. It was further submitted that the term "purpose or effect" should be read in the disjunctive; hence an agreement or collusive arrangement that does not have as its purpose the substantial lessening of competition can be in breach of section 17 of the FCA if its effect or likely effect is to substantially lessen competition. Consequently, the judge's finding of no collusion was not a finding of unilateral conduct that would not warrant an examination under section 17 of the FCA, but presumably a finding of no collusion in the ordinary sense of the word, which is not required for an agreement to be subject to/caught by section 17.

[30] It was the contention of LIME that article 101 of the TFEU, on which the appellants relied, is not drafted in totally similar terms to section 17 of the FCA and the authorities relied on by the appellants which are based on that article are misplaced as the EC treaty has no bearing on the Jamaican circumstances. It was also submitted, in the alternative, that it would seem, that there is authority that article 101 applies to transactions relating to changes in corporate ownership. To support this submission, Mrs Kitson relied on ***British American Tobacco Co Ltd & Anor v Commission*** Cases 142 and 156/84, delivered on 17 November 1987. It was argued that section 17 is deliberately worded so as to embrace all types of agreements and/or arrangements regardless of their origin and the industry they affect. Further, it was contended, the section does not exclude acquisitions, which is the essence of the agreement in question. It was submitted also that not only does the agreement in question fall within the statutory definition, it also falls within the natural and ordinary meaning of the word, which is the very nature of agreements which section 17 encompasses. Hence, the provisions as contained in section 17 of the FCA can be applied to any agreement whatsoever, including mergers and acquisitions as well as to collusive or coordinated conduct, although there need not be collusion or clandestine behaviour.

Ground c

"The learned judge erred as a matter of law in treating the right of a person to refer a matter to the FTC under section 73(2) of the TCA as conferring on the FTC a regulatory function independent of the Office of Utilities Regulation (the 'OUR') in telecommunications matters such as to enable the FTC to institute legal proceedings independently of the OUR."

[31] It was the appellants' submission that the FCA does not include any provision that grants to any person a right to refer a matter to the respondent. The right to "refer a matter" to the respondent is intended to refer to the provisions of section 5(1)(a) and (d), which provide that the respondent can carry out an investigation "at the request of any person" or "any person adversely affected". Section 73(2) of the TCA, it was argued, reserves the right of citizens to request the respondent to investigate matters that fall under the FCA. It does not purport to give the respondent jurisdiction that it would not otherwise enjoy. Members of the public may make requests and the respondent is required to consider them and to determine whether it has the jurisdiction to investigate the matter or whether the matter falls within the jurisdiction of the OUR.

[32] Dr Beckford argued that the TCA neither circumscribes the jurisdiction of the respondent nor the application of the FCA by way of a distinction between telecommunications and competition matters. The right of a person to refer a matter in terms of a request for an investigation to be conducted is only circumscribed by section 73(2) of the TCA. No agreement other than an agreement between the Minister and a universal service provider in respect of a universal service obligation is exempted.

[33] It was submitted that the implication of the appellants' submission is that the respondent can decide if it has jurisdiction in a matter referred to it by a person and need not consult the OUR or obtain a referral from the OUR to investigate the matter or to initiate proceedings where the result of the investigation suggests a breach of the

FCA. This, it was argued, confers an additional and independent basis for jurisdiction in respect of the proceedings and is consistent with the respondent's submission and the learned judge's finding.

[34] It was submitted further that if the appellants were correct in their contention on the basis of *lex specialis derogat legi generali* it would mean that the OUR cannot determine that a matter is to be referred to the respondent pursuant to section 5 of the TCA because it is a transaction addressed in section 17 of the TCA, there being no express mention of the OUR's referral authority in section 17 of the TCA. In effect, it was submitted, section 17 of the TCA would be a stand-alone provision conferring complete autonomy on the relevant Minister to approve any transaction which satisfies the relevant criteria without regard to, or foreclosing, any referral authority by the OUR.

[35] On behalf of LIME, it was submitted that the judge's conclusion was correct because of the nature of the agreement in question, it does not fall within the designation of universal service obligation nor has the agreement been approved. On a strict application of section 73 of the TCA, it is only agreements falling within the latter defined circumstances which are exempt from the FCA. The TCA itself indicates when the FCA and the respondent ought to have no jurisdiction. Therefore, all other agreements are subject to the respondent's jurisdiction. In any event, LIME having referred its complaint to the respondent, the respondent by virtue of section 73(2) of the TCA was undoubtedly clothed with jurisdiction.

[36] It was also submitted that it would be nonsensical for the TCA to insist that save for limited circumstances, no provision of the statute shall be construed to derogate from the right of a person to approach the respondent pursuant to the provisions of the FCA but restrict the jurisdiction of the respondent to act pursuant to the provisions of the FCA. This would be contrary to the object of the statute to promote fair and open competition, it was argued.

Ground d

> **The learned judge fell into further error in that having found:**
>
> 1. ***"[n]othing contained in section 17 of the FCA captures what has transpired between Digicel and Claro"*** **and**
>
> 2. ***"There is no allegation of collusive behaviour between Digicel and Claro."***
>
> **She failed to consider submissions made on behalf of the Appellants that:**
>
> i. **This merger and acquisition is regulated by section 17 of the sector specific regulation, the TCA.**
>
> ii. **If this lawful merger and acquisition also falls under section 17 of the general provisions of the Fair Competition Act it would be unenforceable and void ex post by virtue of the provisions of section 17(3) of the said FCA.**
>
> iii. **Parliament would not have provided in the sector specific TCA that a licensee can agree to transfer control of its operations with the consent of the Minister, and intended that the same agreement could nonetheless be unenforceable because of the general provisions of the FCA."**

[37] Counsel for the appellant submitted that having fully complied with the specific provisions of the TCA and acted on the express approval of the Minister as provided for in the TCA, it could not have been intended that an investor would then be faced with the "double jeopardy" of being told that the respondent can then challenge the transaction. This anomaly, it was submitted, must be resolved in favour of the appellants and a purposive approach to interpretation should be applied. The result would be that the law would be giving with one hand and taking with the other, which would render the law uncertain for commercial interests leading to business inconvenience. Relying on Halsbury's Laws of England, Vol 44 para 1479 and ***Cutler v Wandsworth Stadium bd*** [1949] AC 398, counsel submitted that a presumption in statutory interpretation is that Parliament would not have intended "unjustifiable business inconvenience" in a statute that affects business persons. Therefore, it was submitted, it is difficult and inappropriate to apply the nullity provision at section 17(3) of the FCA post-transaction to mergers and acquisitions that are not easily undone or 'unscrambled'.

[38] Learned Queen's Counsel further argued that the position contended for by the respondent and LIME would mean that an investor in the telecommunications industry could fully comply with the requirements of the TCA and of the OUR seeks and obtains the approval of the Minister as required by the TCA, acts on that approval effects a transaction as the TCA states that it can, and then subsequently, be faced with a challenge by the respondent pursuant to the FCA. That is a commercial absurdity that Parliament could not have intended, it was argued.

[39] It was submitted by the respondent that ***Cutler v Wandsworth*** is not authority for the proposition that "the 'business inconvenience' principle is to be the decisive criterion in construing statutes nor is it authority for the principle that the 'business inconvenience' principle must trump the principle against the enforcement of agreements that are potentially illegal or that the principle should prevail over a court's inherent jurisdiction to determine whether an agreement is illegal if to do so would result in business inconvenience". Relying on ***National Transport Co-operative Society v Attorney General of Jamaica***, SCCA No 117/2004, delivered 6 June 2008 it was submitted that a finding of illegality after performance of an agreement is not foreclosed even if the parties to the agreement were not cognisant of the illegality at the time of entry into the agreement or business inconvenience may result from such a declaration. It was also submitted that giving controlling importance to the 'business inconvenience' principle of construction would have the effect of reading all sections of the TCA, in particular section 73(2), contrary to the rule of construction that Parliament is not deemed to waste words or say anything in vain. To support this submission, reliance was placed on Halsbury's Laws of England 4th edn, page 525.

[40] It was further submitted that the law would be "giving with one hand and [taking] with another" only if the agreement sought to be approved under section 17 of the TCA is of the same type or category of agreements contemplated under section 17 of the FCA, that is, agreements that are illegal per se or illegal by virtue of a rule of reason standard. Section 17 of the TCA is not concerned with the type or category of agreements that are illegal or could be deemed illegal by the court, it was contended.

Counsel submitted that this was in contrast to section 17 of the FCA, which is concerned with agreements of the type or category that are illegal or could be deemed to be illegal. If the latter agreements were contemplated under section 17 of the TCA, it would lead to the absurd result that the Minister could approve an agreement that was found prior to the approval to be illegal by a court. It would also lead to the absurd result that an agreement approved by the Minister could not be challenged in the court subsequent to the approval, thereby resulting in an ousting of the court's jurisdiction.

[41] Dr Beckford also submitted that under section 17 of the TCA the discretion to be exercised by the Minister is not one regarding the legal validity of an agreement; it is to be distinguished from the discretion to approve. Counsel contended that none of the conditions referred to in section 11(1)(a), (b), (c) and (d) of the TCA refer to provisions of an agreement and the legal validity of such provisions as a basis for granting a licence. A reading of section 17 of the TCA does not indicate that Parliament intended that the usual bases in contract law for challenging an agreement are foreclosed or preempted by the relevant Minister's approval of the transaction referred to in the relevant agreement, it was argued.

[42] Mrs Kitson argued on behalf of LIME that, in construing an Act, the court must first take into account the literal approach. To support this submission reference was made to Halsbury's Laws of England Vol 44, 4th edn (Re-issue) para 1479 and ***Thompson & Thompson v Goblin Hill Hotels Ltd*** [2011] UKPC 8. It was further submitted that the purposive approach does not ignore the literal meaning of the text,

but complements it by ensuring that the purpose and intent of the statutory text itself are achieved so that any strained and absurd result is avoided. Referring again to the extract in Halsbury's, it was submitted that the court is unlikely to reach a strained construction merely to avoid inconvenience. ***Goblin Hill Hotels*** demonstrates that a mere allegation of 'business inconvenience' is not sufficient to displace the plain and ordinary meaning of the instrument. It is only when the plain and ordinary meaning leads to a proven commercial absurdity that the plain and ordinary meaning can be displaced, and the appellants had failed to produce any such evidence, it was argued.

[43] It was also submitted that where the court uses inconvenience as a test, it has to balance the effect of each construction and determine which inconvenience is greater. If the Acts are to be construed applying the 'business inconvenience' test, then the court must take into account the greater inconvenience suffered by the consumer who would see a major telecommunications service provider exiting the Jamaican market to their detriment. It was also submitted that the appellants' interpretation would mean that any person who makes an agreement which may be anti-competitive may simply aver that it is inconvenient for there to be an application of the FCA and therefore advance the position that the respondent has no jurisdiction over him and that to apply the latter Act would not lend itself to business efficacy.

[44] Mrs Kitson submitted that the only agreement that is exempt from the provisions of the FCA with ministerial intervention is that which is in relation to universal service obligations. It followed that, she submitted, should the Minister grant approval for any

other type of agreement under the TCA, then it would be subject to the provisions of the FCA. Parliament must be taken to have knowledge of the previous laws passed and in the absence of specific provisions indicating that section 17 of the FCA does not apply to section 17(2) and (3) of the TCA, it must be taken that Parliament intended for the FCA to apply, it was argued.

[45] In dealing with the appellants' argument that the nullity provisions of section 17(3) of the FCA ought not to be applied to mergers and transactions which are not easily undone or unscrambled as this does not lend itself to business efficacy, it was submitted that the appellants proceeded to effect the transaction in full knowledge of the existence of the FCA and the respondent's ability to enforce it. Further, it was argued, section 29 of the FCA allows for the possibility of an application being made to the respondent for authorisation to enter into an agreement which is prohibited by the FCA. In proceeding without making such an application, the appellants had voluntarily assumed the risk of being required to unscramble their merger after the event. Further, it was argued that there is nothing in the FCA that excludes its applicability to the telecommunications industry, nor is there any provision in the TCA, save as stated, that excludes the jurisdiction of the respondent.

Ground e

> **"The learned judge erred as a matter of fact when she found as she did that the FTC instituted these legal proceedings against the Defendants as a result of receiving a complaint about the transaction from Cable and Wireless (LIME)."**

[46] It was submitted by the appellants that the judge had erred in making a finding that the proceedings brought by the respondent against them arose out of the receipt of a complaint from LIME, despite the evidence that was before the court, the respondent's pleadings in the instant case and the findings of the court in claim no HCV2011/05659. Counsel referred, in particular, to the pleadings of the respondent that it had become aware of the agreement through the media and that its staff pursuant to section 5 of the FCA commenced investigations. Reference was also made to an affidavit of Mr Miller on which LIME had sought to rely in claim no HCV 2011/05659 and the letter dated 25 March 2011 from Mr Miller to LIME, which had been exhibited to the affidavit. It was submitted that in the face of all this evidence and on the pleadings the learned judge had erred and in the circumstances, the respondent had no jurisdiction concerning the transaction in issue. Further, it was submitted, even if the respondent had jurisdiction pursuant to section 73(2) of the TCA, LIME's complaint did not ground the proceedings or the investigation.

[47] On behalf of the respondent it was submitted that no issue arose in the court below as to whether legal proceedings by the respondent were taken as a result of a referral from LIME to the respondent. The respondent had contended in the court below that jurisdiction is conferred by section 73(2) of the TCA and section 5 of the FCA and the jurisdiction conferred by the former section arises when a matter is referred to the respondent in accordance with that section. It was submitted that the relevant issue in the court below for the purpose of the appellants' challenge was therefore whether a matter was referred to the respondent by a person pursuant to section 73(2). There

had been no challenge to the affidavit of Mr Miller. As a consequence, the important factual finding which is not challenged is that LIME referred the matter to the respondent and not whether legal proceedings had been instituted as a result of the referral of the matter by LIME to the respondent.

[48] It was also submitted that the court below did not hold that the jurisdiction of the respondent arises only when legal proceedings are instituted or when legal proceedings are instituted at the instance of a private party. Counsel argued that in the court below, the appellants had argued that the issue of whether the respondent could invoke section 73(2) as a basis for its jurisdiction when that basis was not pleaded was one of fact. However, counsel submitted, the issue was one of fact and of law, that is, whether there was an independent jurisdiction under section 73(2) of the TCA, and whether there had in fact been a referral to the respondent under that section. A point of law, counsel argued, could be raised at any time. Counsel submitted that the appellant's challenge was misconceived. Even if the appellants' characterisation of the issue is tenable, counsel argued, the factual finding that would be in issue is whether the respondent's investigation resulted from a complaint by LIME and not whether legal proceedings were instituted as a result of LIME's complaint. It was also argued that reliance on Mr Miller's affidavit was misconceived as the affidavit merely establishes that a matter was referred to the respondent, which is the relevant factual and legal issue. Regarding the submission that the report that had been prepared by the respondent had failed to mention LIME's complaint, it was submitted that the critical issue was whether the matter was referred to the respondent and that that referral had been

done before the respondent concluded its investigation.

[49] In the alternative, it was submitted, there was sufficient material placed before the court below for it to find that legal proceedings were instituted by the respondent consequent on or after a referral by LIME to the respondent. The fixed date claim form was filed after the matter was referred to the respondent. It was submitted also that the finding in claim no HCV 2011/05659 has no bearing on the issue of whether legal proceedings had resulted from a referral of the matter by LIME as this was never an issue in the case. No conclusive inference could be drawn from that decision as to the basis on which the respondent instituted legal proceedings in the instant case. It was submitted that even if any inference is to be drawn that the respondent did not institute proceedings as a result of the referral from LIME, there was sufficient dicta in the case to support a compelling alternative inference that the respondent must carry out its statutory duty, which is not limited to investigating but would also include instituting legal proceedings where appropriate, whether on its own initiative or by virtue of a referral of the matter.

[50] It was submitted on behalf of LIME that the respondent has jurisdiction over the agreement in question by virtue of the TCA and the FCA and may act on its own initiative. Hence, whether the respondent acted on its own initiative or at the instigation of LIME, it would be clothed with the requisite jurisdiction. In the alternative, it was submitted that if this court were to find that the judge had erred in finding as she did, this would not nullify the remaining portions of her judgment.

Ground f

"The learned judge erred as a matter of fact in finding that Mr. Hylton QC submitted that LIME's application is res judicata."

[51] It was submitted that in the court below, LIME had contended that a breach of section 17 of the FCA was a "legal impediment" for the purposes of section 11 of the TCA and that the Minister had erred in approving the transaction. The appellants, it was submitted, had argued that this issue was res judicata, since LIME had raised it in its claim against the respondent in claim no HCV 2011/05659 and the learned judge had therefore erred in finding as she did.

[52] It was submitted on behalf of LIME that the issue of whether a breach of the FCA (which it was contended gives rise to a legal impediment) has been recognised by the regulator on competition matters is now beyond question by virtue of the actions of the respondent in commencing this claim. Further, it was argued, the current stance taken by the respondent appears to be different from its stance in claim no HCV 2011/05659 which was that the court could not compel it to conduct any investigation as the process is complex and includes economic analysis among other things. The commencement of the instant proceedings showed that the respondent had completed its investigation of the agreement and had determined that there was a prima facie breach of section 17 of the FCA and had, in so doing, done the very act which LIME had been seeking to compel it to do in claim no HCV 2011/05659. Hence, it could not be maintained that this issue was one of res judicata. This is especially since the appellants had not been parties to the other proceedings between LIME and the respondent. It was submitted also that the learned judge had been correct in her

treatment of this issue and no complaint had been raised by the appellants against the findings of the learned judge in this respect.

Submissions on counter-notice

[53] On ground one, counsel for the respondent relied on ***BAT*** and ***Reynolds v Commission of the European Communities*** in which it was considered in what circumstances the acquisition of a minority shareholding in a company may constitute an infringement of articles 81 and 82 of the EC treaty. The court in that case stated that though the acquisition may not of itself constitute conduct restricting competition, such acquisition may serve as an instrument for influencing the commercial conduct of the companies in question so as to restrict competition in the market in which they carry on business.

[54] On ground two, it was submitted that section 17 of the FCA covers agreements the purpose or effect of which is to substantially lessen competition in a market. The purpose can be gathered from the terms of the agreement (as in the case where the agreement provides for the exit of a competitor); and if effect is given to such terms the transactions referred to in such agreements can be examined as satisfying the purpose element or the transaction may be evaluated under the rule of reason standard to determine anti-competitive effect.

[55] In support of ground three, it was submitted that where the transactions referred to in an agreement are not required by legislation, section 17 of the FCA applies to such transactions even if approval is given for such transactions to take

effect. For this submission, reliance was placed on ***SSI and Others v Commission*** of ***the European Communities*** [1985] ECR 3831. Counsel also relied on ***ENI/Montedison v Commission of the European Communities*** [1989] 4 CMLR 444, in which it was held that the fact that the impugned agreements in that case were in accordance with directives under the Italian Government's chemical plan did not preclude the application of article 81 of the EC Treaty. Counsel referred to the dicta of the court that "agreements between competitors designed to close plants and limit capacity, by their very nature, have a direct effect on competition". It was argued that in the instant case there was no dispute that the appellants were competitors in a relevant market as the appellants had admitted to the allegations in the particulars of claim to the effect that the appellants provide voice telephony and data services and that voice and text messaging services is a relevant market. There was also no dispute, it was submitted, that the 2nd appellant had reduced or eliminated its capacity in that the 2nd appellant had stated in its defence that "its continued participation in the market would not now be possible" and reasons had been given. It was submitted further that neither the agreement nor any transaction referred to in the agreement is required by legislation. For example, it was argued, the transfer of a telecommunications licence is not required by section 17 or any other provision of the TCA. Further, section 17 of the TCA does not eliminate the possibility of competitive activity between the appellants since the approval under that section does not stipulate a bar to the transferor re-entering or remaining in the relevant market.

[56] The respondent's arguments on ground four were, in substance, similar to those raised in response to the appellants' ground (d). Counsel for the respondent reiterated that there is no provision in section 17 or any other section of the TCA permitting the approval of an agreement that falls under section 17 of the FCA by or after competition matters are taken into account. It was also submitted that there is no provision in the TCA providing for the exemption of an agreement that falls under section 17 of the FCA. By contrast, section 17 of the FCA sets out the circumstances when agreements under section 17 of the TCA are to be exempted from the application of the FCA. It was submitted that the entire legislative scheme of the TCA therefore suggests that it is not concerned with agreements, the purpose or effect of which, is to substantially lessen competition or is likely to do so. Section 17 of the TCA, therefore, does not permit the approval of an agreement, by a side-wind that is otherwise in breach of section 17 of the FCA, without reference to applicable principles of competition law to temper the likely effect of any such agreement.

[57] On ground five, Dr Beckford referred to article 101 of the TFEU and submitted that it was necessary to appreciate the interpretation of this article to determine if the agreement in question falls within section 17 of the FCA. Article 101, he submitted, differentiates between agreements which are *per se* illegal and require no economic analysis regarding effects in a market, and agreements which are not *per se* illegal but whereby a rule of reason standard is applied to determine if the agreement is void or illegal by using economic analysis to assess the effect of the agreement in a market. In the former category, anti-competitive effect is presumed without proof while in the

latter, anti-competitive effect must be proved. He referred to Competition Law 4th edn in which the learned author, Professor Richard Whish, states that as a matter of law, where an agreement has as its object the lessening of competition, it is not necessary for the party opposing the agreement to prove this; it is for the party to the agreement to show that it is to be exempted under article 81(3) of the TFEU.

[58] Counsel for the respondent argued that the agreement in question requires a rule of reason assessment to determine the effect or likely effect of a substantial lessening of competition in a relevant market with respect to the 1st appellant's acquisition of the 2nd appellant and/or the 2nd appellant's exit from a relevant market. It was also argued that there is no requirement for proof of collusion in the ordinary meaning of the term for conduct to be caught by section 17 of the FCA.

[59] On ground six, it was submitted that there is no express reference to another legislation to be applied to the agreement or the transactions to be effected by the agreement. Relying on the ***Jamaica Stock Exchange*** case, counsel argued that in that case the reference to legislation in the Securities Act and not the FCA to govern the operations of the stock exchange confirms that the FCA does not apply to the Jamaica Stock Exchange. In contrast, it was submitted, in the instant case, neither the FCA nor the TCA provides for another specific legislation to apply to the agreement or the transactions effected by the agreement.

[60] For the appellants, it was argued in relation to ground one that ***BAT*** and ***Reynolds v Commission of the European Communities*** is distinguishable as, in that case, the companies had entered into the agreement and remained independent after the entry into force of the agreements, whereas in the instant case, as was averred in the defence, for all intents and purposes, the 2nd appellant ceased to have an independent existence or exist at all.

[61] Counsel argued that the cases relied on by the respondent in support of ground three were irrelevant or could be distinguished on the basis that they did not consider issues under the equivalent of section 17 of the FCA. They considered issues dealing with abuse of a dominant position under article 82 of the EC treaty, which is not under consideration in this appeal.

[62] In response to ground six, counsel for the appellants argued that when one looks at the legislative structure of the FCA and the TCA, the general language of the FCA ought not to be read as applying to the specific language of the TCA in light of the specific powers given to the OUR in relation to competition.

Issues

(1) Whether the FCA has jurisdiction over telecommunication matters;

(2) Whether section 17 of the FCA applies to agreements or transactions falling within the purview of section 17 of the TCA.

(3) Whether the respondent's claim emerged by way of reference by LIME.

(4) Whether LIME's application to intervene was res judicata.

Analysis

[63] Before embarking on the substantial issues raised in this appeal, it is necessary to make reference to a preliminary point, raised by the intervener, touching the nature of the appeal. On the one hand, Mrs Kitson, for the intervener, submitted that although this is an appeal from the summary trial of a preliminary issue it amounts to a review of the discretion of the learned judge and is therefore not a rehearing. On the other hand, Mr Hylton, for the appellants, contended that the appeal is one for the rehearing of the case.

[64] Mrs Kitson cited, among others, the case of ***Dufour and Others v Helenair Corporation*** (1996) 52 WIR 188, which, she said, is similar to the present case and supports the principle that an appellate court will not lightly interfere with the decision of a judge in the exercise of his or her discretion. That case is clearly distinguishable from the present case. Significantly, in ***Dufour and Others v Helenair Corporation***, the appellants had sought, by a summons, an order that an issue raised in a paragraph of a statement of claim be tried as a preliminary issue prior to the trial of the action. The summons was dismissed. In that case, the hearing of the appeal proceeded by way of the exercise of judicial discretion. Undoubtedly, that was the appropriate procedure in the circumstances of that case.

[65] This is an appeal from the judge's order for a separate and summary trial. The fundamental issue in the appeal revolves around the jurisdiction of the respondent, the

resolution of which is grounded in the matter of statutory interpretation and is dependent on the construction of certain provisions of the FCA and the TCA. Obviously, the hearing would not attract a resolution by means of the exercise of judicial discretion. For the most part, the factual circumstances of the case are not in dispute. There are, however, two peripheral factual issues which would not, by themselves, resolve the outstanding issue. As rightly submitted by Mr Hylton, in light of the law and the facts, this court has the right to make a determination by way of a re-hearing and is competent so to do by virtue of rule 1.16(1) of the Court of Appeal Rules. Undoubtedly, the findings and conclusions of the learned judge are subject to review *de novo*.

[66] Before proceeding with a review of this appeal, it would be useful to make brief reference to the general principles of statutory interpretation. In construing a statute, the object is to ascertain the intention of Parliament as expressed in the statutory instrument. The legislative intent is primarily to be found in the statute itself. A statute must be construed as a whole and must be interpreted to avoid any repugnancy or inconsistency with any part thereof.

[67] If the words of the statute are plain and unambiguous they must be taken to indicate the legislator's intent. Where the statute is challenged, the court must take into account the purpose of the statute and the particular provision or provisions which are challenged. Although words should be given their natural and ordinary meaning, they must be construed within the ambit of the scheme devised by the Act. At all times, the question for the court is whether the words are apt to cover or describe the

circumstances in any particular case - see ***Bath v British Transport Commission*** [1954] 2 All ER 542 and ***Kimpton v Steel Co of Wales Ltd*** [1960] 2 All ER 274.

[68] The principles relating to the interpretation of a document are no different from those in relation to a statute. In ***Investors Compensation Scheme Ltd v West Bromwich Building Society*** [1998] 1 WLR 896 Lord Hoffmann, speaking to the principles of interpretation of a document, pronounced that, in interpretation, adopting a contextual approach achieves greater meaning of a word than just simply finding the natural and ordinary meaning of the word in the document.

Issue (1)-The jurisdictional applicability of FCA to the telecommunications industry

[69] The appellants' principal contention is that the telecommunications industry falls exclusively within the TCA and therefore the respondent, through the FCA, has no jurisdiction in telecommunications issues. It has been otherwise contended for by the respondent and the intervening party which have indicated that the FCA is generally applicable to the telecommunications sector, and as a consequence the respondent has jurisdiction over telecommunications matters. In addressing the jurisdictional issue, the learned judge said at paragraph [7] of her judgment:

> "An examination of both the Telecommunications Act (TCA) and the FCA reveals the general applicability of the FCA to the Telecommunications industry."

[70] Thereafter, she alluded to the provisions of section 17(1) of the FCA. She then made reference to section 2 of the FCA which defines "agreement". In paragraphs [8]

and [9] she referred to section 2 of the TCA which outlines the object of the TCA and then went on to state that sections 5 and 73 of the TCA expressly confer jurisdiction upon the respondent. At paragraphs [10] and [11] she continued by stating as follows:

> "[10] Indeed, the TCA abounds with sections which undoubtedly make manifest the intention of the legislature that the FTC has a regulatory function regarding telecommunications matters and of the applicability of the FCA. For example, Section 27 defines 'dominant voice carrier' as 'one that falls within the meaning of section 19 of the FCA'. Section 35 of the TCA specifically mandates the OUR to consult with the FTC before it makes the 'competitive safeguard rules', that is, certain rules in relation to the dominant public voice carriers. The telecommunications industry, indisputably, falls within the purview of the FTC.
>
> [11] Michael Hylton QC submits, that by virtue of Section 5 of the TCA, the FTC has no jurisdiction in the absence of a referral by the OUR although the matter falls within its functions. This court however is of the view that that submission is misconceived. Section 5 of the TCA mandates the Office to refer certain matters to the FTC, after it consults with it, which it determines as falling within the remit of the FTC. It is the OUR, that has the responsibility of consulting with the FTC. The FTC is not precluded from instituting legal proceedings independently of the OUR. Indeed Section 73(2) confers on any person the right to refer matters to the FTC. Section 73(2) therefore reserves the right of the FTC to act in accordance with the FCA."

At paragraph [18] she went on to state:

> "[18] It is remarkable that subsection 2 of Section 73 of the TCA confers the right on any person to refer a matter to the FTC. Subsection 2 of Section 73 only exempts the circumstances provided by subsection 1. Axiomatically therefore, the TCA expressly provides for the applicability of the FTC to other telecommunication matters. The fact that the TCA has expressly excluded the circumstances in which the FTC has no jurisdiction, compels the conclusion that in all other circumstances the FTC's jurisdiction is preserved unless it is excluded by the FCA or some other Act."

[71] Mr Hylton, primarily, anchored his submissions on the fact that the preamble to the TCA excludes the FCA and that although sections 5, 27, 35 and 73 of the TCA make specific reference to the FCA these sections do not confer jurisdiction on the respondent. It was also proposed by him, in the alternative, that even if a matter falls within the scope of the FCA, it is subject to the reference of specific matters by the OUR to the respondent, after consultation and in this case, the respondent would be devoid of jurisdiction in the absence of such specific referral. The appellants' further argument is that the respondent enjoys only a limited jurisdiction. The appellants' arguments are postulated on the conjecture that the TCA does not accord jurisdiction to the respondents to initiate investigations into telecommunications matters without specific referral by the OUR. Does this mean that the TCA exclusively dominates telecommunication matters and therefore the respondent is powerless to initiate investigative process in the absence of the OUR's expressed referral? The answer to this question compels an exploration of the FCA and the TCA, in order to ascertain the legislative intent.

[72] The respondent is a creature of the FCA. Section 5 of that Act bestows on the respondent the authority to investigate matters either on its own initiative or at the request of a person. The TCA contains several provisions in which express reference is made to the FCA, namely, sections 5, 27, 35 and 73. Although the preamble of the TCA is silent as to the application of the FCA, this would not, in itself, carry an inference that the FCA is excluded from the scope of the TCA. All relevant sections of the TCA and the FCA must be examined in order to determine the role of the respondent in the

telecommunications industry.

[73] Under section 5 of the TCA, the OUR, subsequent to consultation with the respondent, is required to refer to the respondent any matter, or such aspect of the matter, which is of substantial competitive significance relating to the provision of specified services, falling within the purview of the FCA. Although the OUR's consultation with the respondent and referral of a matter to the respondent, is central to section 5 of the TCA, does this mean that the respondent's investigative mandate is at all times subject to the OUR's referral? I think not. Despite the fact that section 5 of the TCA requires the OUR's consultation with and referral to the respondent in relation to certain telecommunications matters, the critical question is whether the respondent could proceed independently with the investigation of a matter, it having not been engaged in previous consultation with the OUR and having not obtained a referral from that body. Although the OUR enjoys colossal control over the telecommunications industry and the OUR is required to refer matters to the respondent prior to the respondent pursuing investigations into a matter, this could not be taken to mean that the respondent's mandate only comes into operation by virtue of a referral by the OUR. Section 5 of the TCA cannot be interpreted to portray the meaning that, in the absence of the OUR's referral, the respondent is powerless to act, for want of jurisdiction. It could not be that Parliament, having bestowed wide investigative powers on the respondent under section 5 of the FCA to determine any question relevant to the contravention of the FCA, would, at the same time, restrict its performance of its mandate. Clearly, it would not have been the intention of Parliament that the

respondent should be deprived of the authority to engage in investigations or an inquiry into a matter of sufficiently important competitive nature which has come to its attention, due to the lack of a referral by the OUR.

[74] It could not be that the respondent's investigative mandate should be fettered by the absence of the OUR's referral. To make such a deduction, would surely defeat the spirit and intent of section 5 of the FCA. On a true construction of section 5 of the TCA, the respondent is not bound by an obligation to be consulted by the OUR and to receive a referral of a matter from the OUR, in order to implement its mandate under section 5 of the FCA.

[75] By section 27 of the TCA, "a dominant voice carrier" is defined as a public voice carrier, holding a dominant position in the telecommunications market within the meaning of section 19 of the FCA. Section 19 of the FCA defines a "dominant position" as one in which an entity holds a position of economic strength, operating unrestrained against competitors. If one reads the definition of section 19 of the FCA into section 27 of the TCA one finds that both are interrelated. Consequently, both must be read conjunctively when dealing with matters touching the telecommunications industry in giving effect to section 27 of the TCA.

[76] Section 35 of the TCA assigns to the OUR the power to make rules relating to dominant voice carriers and develop guidelines after consultation with the respondent, in the interest of identifying or preventing abuse of dominance. Mr Hylton urged that the section governs competition issues in the telecommunications industry by making

provision for competitive safeguards as it speaks to telecommunications matters as opposed to matters relating to competition. Although the section provides a means of protecting competition issues, if learned Queen's Counsel's proposition were to be accepted, it would mean that all telecommunications matters of a competitive nature would fall exclusively within the remit of the TCA. With due respect, his proposition cannot be accepted.

[77] It is perfectly true that the FCA contains provisions in respect of industries generally and the TCA has provisions relating to the telecommunications industry. It is also true that the FCA does not make specific mention of the telecommunications industry. However, it could not be that Parliament would have intentionally excluded the telecommunications industry from all industries falling within the scope of the FCA. Due regard must be paid to the provisions of the FCA in relation to competition issues and the respondent's right to oversee and supervise industries generally. It cannot be taken that the respondent is without the authority to investigate competition issues arising from telecommunications matters, despite the powers given to it to carry out its investigative functions relating to matters of a competitive nature regardless of the industry to which it relates. Clearly, it would not have been the intention of the legislature to arm the respondent with the prerogative to deal with industries generally, yet deprive it of a right to attend to telecommunications competition issues.

[78] Section 73(1) of the TCA expressly exempts certain matters from the applicability of the provisions of the FCA. In doing so, it prohibits the respondent from interfering in

agreements between the Minister and a universal service provider, in respect of universal service obligations or agreements which meet the OUR's approval, upon consultation with the respondent. However, importantly, section 73(2) of the TCA grants to a person a right to refer a matter to the respondent.

[79] The appellants' contention is that section 73(2) of the TCA simply permits a person to refer to the respondent matters relating to competition and not telecommunications matters and therefore, does not grant fresh powers to the respondent. This submission is clearly misconceived. If that was what Parliament had intended, it would have so promulgated. Section 73(2), in granting to a person the right to refer a matter to the respondent, is directed at permitting the respondent to entertain a referral of a matter independent of that which comes to the respondent by way of a referral from the OUR. It is of manifest significance that, although the exclusory provisions of section 73(1) of the TCA are acknowledged, section 73(2) of that Act expressly dictates that except for section 73(1) "nothing in [the] Act shall be construed as affecting the right of any person to refer a matter to the [respondent]". It is clear that section 73(2) of the TCA in expressly empowering the respondent to entertain a matter which has been referred to it, authorises the respondent to perform its investigative functions whether the matter relates to competition issues or telecommunications matters. Section 73(2) must be taken to have been the result of a deliberate and purposeful decision of Parliament. It could not be that the OUR is the only avenue by which the respondent's power to act, can be brought into operation. If the legislature had intended that the respondent should enjoy a limited as distinct from

a general jurisdiction, it would have so prescribed.

[80] Section 73(2) of the TCA is abundantly clear. Except for agreements between the Minister and a universal service provider in relation to universal service obligations and agreements approved by the OUR after consultation with the respondent, the respondent would be entitled to entertain a complaint about an agreement referred to it by anyone and proceed with an investigation into the matter. It could not be that Parliament would have intended to restrain the respondent from implementing its investigative mandate under section 5 of the FCA. There can be little doubt that, from the language of section 73(2), what was intended by the legislature was that there should be a procedure in place to meet circumstances where the respondent is informed of a matter of substantial competitive significance, requiring it to act, allowing it to respond, notwithstanding the absence of a referral from the OUR.

[81] In empowering the respondent to entertain referrals to it by persons, section 73(2) unequivocally bestows upon the respondent the jurisdiction to investigate or inquire into a matter. On a true construction of section 73(2), the respondent is at liberty to proceed with its investigative mandate, which would obviously include its inquiry into a matter of appreciable importance, outside of a referral from the OUR.

[82] The appellants contended that their agreement is not subject to section 17 of the FCA. This issue will now be addressed briefly but will be fully considered later. Section 17(3) of the FCA speaks to the unenforceability of any agreement which effectively, substantially lessens competition. Does this conclusively demonstrate that all

agreements which contain provisions which may point to a lessening or likely lessening of competition in the telecommunications market are subject to the respondent's scrutiny and are rendered unenforceable? The determination of this issue requires a brief examination of certain other relevant provisions of the FCA and the TCA.

[83] Section 13 of the TCA empowers the Minister to grant a license to an applicant, empowering the applicant as a licensee to provide specified services. Under section 2 of the TCA, specified service is defined as "telecommunications service or such other service as may be prescribed". Section 2 of the FCA defines service as "a service of any description whether industrial, trade, professional or otherwise". The fact that section 2 of the FCA speaks to service of any description or otherwise, clearly shows that telecommunications service falls within the scope of "or otherwise" in that section. The TCA does not define the word "agreement". However, by section 2 of the FCA, "agreement" is defined as including "any agreement, arrangement or understanding, whether oral or in writing or whether or not it is or is intended to be legally enforceable".

[84] There is no dispute that there is an agreement in place between the appellants. It is also recognised that certain agreements, falling within the scope of section 17(1) of the FCA, are rendered illegal by section 17(3). Further, as earlier stated, under section 73(1) of the TCA, agreements with the Minister in respect of universal service obligations and those approved by the OUR in consultation with the respondent are excluded. It is also conceded that the agreement between the appellants relates to specified service as opposed to universal service obligations. The question now arising

is whether that agreement falls within the purview of section 17(3) of the FCA. It cannot be denied that some telecommunications agreements could fall within the scope of section 17(3) of the FCA. Despite this, the real issue is whether the appellants' agreement is ensnared by that subsection of the Act. Under section 11 of the TCA, a procedure is designed to ensure that a particular process is adhered to by the Minister prior to granting a licence. It could not be that Parliament would have intended that if the Minister faithfully abides by the provisions of section 11, and in this case, there is no evidence that he did not, any agreement arising from his approval would become subject to section 17(3) of the FCA.

[85] In referring to the ***Jamaica Stock Exchange*** case the appellants, sought to bolster their contention, that the respondent lacks jurisdiction outside of the OUR's referral, by adverting to the principle of *lex specialis derogate legi generali* and proposed that the principle applies in this case. The respondent and the intervener urged that the ***Jamaica Stock Exchange*** case is distinguishable, as the decision was based on different considerations from those of the present case and therefore the principle of lex *specialis derogat legi generali* is therefore inapplicable. It was contended for by the appellants that the case was cited, not for its ratio but for bringing to the court's attention certain principles in respect of the interpretation of statutes, which are applicable in the instant case, namely, that: the specific takes priority over the general and that where a conflict exists in statutes, the earlier is deemed to have been impliedly repealed by the later.

[86] At paragraphs [25], [26] and [27], the learned judge had this to say about the Jamaica ***Stock Exchange*** case:

> "[25] There is nothing in the TCA that expressly excludes the applicability of the FCA. The agreements which are exempted are stated in section 3 of the FCA and section 73 (1) of the TCA as stated above. The circumstances or facts of the **Jamaica Stock Exchange** case are distinguishable from the instant case.
>
> [26] In the case of the Jamaica Stock Exchange, securities were expressly excluded from the FCA by the Securities Act. Forte P (as he then was) recognizing the deliberate exclusion of securities from the FCA by the Jamaica Stock Exchange at page 17 said:
>
> > '*This passage is particularly applicable* to *the JSE's Memorandum of Association which has, as one of its objects, the entering into partnership or arrangements for limiting competition relative to any of its objects. This provision is repulsive given the modern trend to encourage competition in the market place, and the Legislature's obvious intention expressed through the enactment of the FCA to discourage the limitation and restriction of competition. If the legislature, as in my view it did, intended to exclude the JSE or any other dealer in securities from the provisions of the FCA, then some legislation ought to be enacted either by amendment to the Securities Act or otherwise to encourage competition in the securities market.*
> >
> > *In my view the express exclusion of securities from the definition of 'goods' carries with it a clear and unambiguous inference that the FCA excludes securities generally from the ambit of its provisions. This view is supported by the fact that there are exhaustive provisions in the Securities Act, dealing with the Stock Exchange and its obligation and responsibility to answer to the Securities Commission set up under that statute for, inter alia, the purpose of supervising and regulating stock exchanges to the extent that it has powers of inflicting penalties for any breaches of the rules.'*

> [27] Regarding the instant case however, both the TCA and the FCA are replete with provisions for the applicability of the FCA. It is true that the TCA was enacted subsequent to the FCA. However there in no conflict between the Acts which would result in the TCA (the more recent legislation) impliedly repealing the FCA (the earlier legislation). Although the TCA specifically governs the transfer of licences and has sole responsibility for the procedure and requirements attendant upon such transfers, if the agreement is tainted by or result [sic] in any form of anti-competitiveness, then section 17 of the FCA kicks in, in the absence of any express exemption."

[87] In the ***Jamaica Stock Exchange*** case this court gave consideration to two essential questions: (1) whether the FCA was applicable to the operations of the Jamaica Stock Exchange and (2) whether the operations of the Stock Exchange are governed by the Securities Act. The fundamental issue in the **Jamaica Stock Exchange** case was whether the respondent had jurisdiction over the stock exchange. By section 2 of the FCA securities were expressly excluded from that Act in its definition of "goods". The word "goods" was defined as meaning all kinds of property other than real property, money, securities or choses in action. The Securities Act contained a plethora of provisions for the purpose of supervising the Stock Exchange. As a result, the stock exchange was subject to the extensive regulatory and supervisory dictates of the Securities Commission. The court found that publicly traded stocks are securities and are expressly excluded as goods in the FCA and that the trading in securities is not a service facilitating the trading in securities. It was held that the respondent was not empowered to regulate the stock exchange, the FCA being inapplicable to that entity.

[88] The Stock Exchange Act preceded the Securities Act. By reason of the express exclusion of securities by the FCA, the respondent was not empowered to exercise jurisdiction over the stock exchange. In the present case the TCA, although later in time to the FCA, makes express reference to the FCA as well as to the occasions on which the FCA would operate within the context of the TCA. In the ***Jamaica Stock Exchange*** case securities were expressly excluded by the FCA. Therefore, it could not be that a conflict exists between Securities Act and the FCA which would be supportive of the principle of *legi specialis derogat lex generali* assisting the court in arriving at a conclusion that the principle applies in the case under review.

[89] The appellants also sought assistance from the ***Jamaica Stock Exchange*** case to bolster the principle that where inconsistencies arise in statutes, the later is presumed to overrule the earlier. The statement of Panton JA (as he then was) on which the appellants relied is of no assistance to them. Panton JA was speaking obiter, he having said that even if a concession were to be made that a conflict existed between certain provisions of the Securities Act and the FCA, the Securities Act, being later in time, would prevail as it would have impliedly repealed the earlier Act.

[90] The ***Jamaica Stock Exchange*** case was also used by the appellants to support the argument that there is in place an adequate regulatory scheme provided for by the TCA to eliminate the likelihood of the TCA and the FCA enjoying concurrent jurisdiction, as Parliament did not intend that the respondent and the OUR should have concurrent jurisdiction over competition issues in the telecommunications sector. The intervener's argument is that the regulatory purpose of the TCA is not the same as the

competition issues provided for by the FCA and the jurisdictions of the TCA and FCA are for the purpose of maintaining and developing effective competition in the market place and are complementary and not concurrent.

[91] The intervener rightly rejected the notion that these Acts would run concurrently. If it was contemplated that the TCA and FCA were to possess concurrent jurisdiction, this would have been done by specific enactment. Therefore, if Parliament had intended that these statutes should run concurrently, it would have so prescribed in the TCA.

[92] As can be observed from sections 5, 35 and 73 of the TCA, provision is made, within the framework of the TCA for the conferment of jurisdiction on the respondent generally. Therefore, it cannot be said that the learned judge was wrong in holding that the respondent is seized of jurisdiction over telecommunications matters, save and except in those circumstances where its jurisdiction is specifically excluded. Her conclusion that the respondent enjoys general jurisdiction over telecommunications matters ought not to be disturbed.

Issue (2) - Whether section 17 of the FCA applies to agreements or transactions under section 17 of the TCA

[93] The appellants' complaint in this issue is that the FCA is inapplicable to an agreement or a transaction of the kind entered into between them. As such it would not have been the legislative intent that an agreement falling within the scope of section 17 of the TCA would be captured by section 17 of the FCA if the licensee meets the requirements in obtaining the Minister's consent. The respondent and the intervener

contend that the agreement falls within the scope of section 17(1) and 17(3) of the FCA as it is not captured by the exception provided for in section 17(4) of that Act. The respondent further urged that section 17 of the TCA relates to the transfer of a licence and is not concerned with the merger or acquisition of telecommunications companies.

[94] The learned judge found that section 17 of the FCA, unless expressly excluded, applies to transactions falling within the purview of section 17 of the TCA. She had this to say at paragraph [14]:

> "[14] This court is of the view that unless specifically excluded, the FCA applies to agreements which substantially lessen competition in a market. Is there a specific provision which excludes the operation of the FCA from Agreements or Transactions envisaged by section 17 of the TCA? Section 73 of the TCA states the circumstances under which the FCA is excluded and in which it is applicable. The section specifically excluded an agreement between the Minister and the universal service provider in matters which relate to the universal service obligations. Sub-section 2 of the section, however, confers the right on any person to complain to the FTC."

After quoting section 73 (1) of the TCA she went on to say:

> "There was no consultation by the Office with the FTC, regarding this agreement; the FTC is therefore not exempt as a consequence."

At paragraphs [15] to [17] she said:

> "[15] The next question is whether the Agreement by Claro to transfer its shares to Digicel is an agreement in relation to the universal service obligation? If the answer is in the affirmative, the Agreement is governed exclusively by the TCA. Section 2 of [sic] TCA defines 'service provider' as 'a person who is the holder of a service provider licence issued under section 13. Section 13 deals with the application to the Minister for the licence to

operate and the conditions under which the licence is granted, while sections 38 to 42 speak to the principles governing the provision of universal service, the obligations to provide universal service, the designation of universal service provider inter alia.

[16] This is an agreement between competitors providing for the exit of a competitor from the market by way of transferral of licence by the exiting party, Claro, to Digicel. The result is that Digicel has acquired Claro. It is not an agreement between the Minister and the defendants regarding their universal service obligation. The agreement does not affect the terms of the defendants' universal service obligations. It concerns the transferral of Claro's licence to operate in Jamaica to Digicel. The claimant and LIME are not seeking to impugn any universal service agreement between either of the defendants and the Minister. The answer must therefore be in the negative.

"17 There is no stipulation by Section 73 of the TCA regarding its exclusive application to all agreements between telecommunications providers. The section has expressly excluded universal service providers only in relation to its [sic] universal service obligations and agreements which have been approved by the Office after consultation with the FTC. Inasmuch as both defendants are universal service providers, the objection does not concern their universal service obligations. The objection by the FTC and Cable and Wireless is to an agreement which amalgamates Digicel and Claro. The complaint is that if the Agreement is given effect, it is likely to have an adverse effect on competition in a relevant market."

[95] Section 17(1) of the TCA provides for the assignment of licences and the control of a licensee's operation of its policies, facilities or services and outlines the process involved therein. Under section 17(2) of that Act, subject to the Minister's approval, a licensee is given a right to assign its licence or to transfer control of its operations. Section 13 of the Act permits the Minister to sanction an agreement. Section 17(1) of the FCA speaks to the invalidity of agreements which substantially lessen competition or

are likely to do so. Section 17(3) of the FCA renders unenforceable any agreement which offends section 17(1) of the FCA. Section 17(4) of the FCA does not apply to agreements in which authorisation under Part V has been granted or in which certain conditions are met to the satisfaction of the respondent (which is not relevant to the issue before us).

[96] The appellants argue that a conflict subsists between section 17 of the TCA and section 17 of the FCA and that where an inconsistency between two statutes exists the later is deemed to have repealed the earlier. The language of section 17(1) and 17(3) of the FCA appears to be in conflict with section 17 of the TCA. It is a well settled principle that, in construing a statute which, on the face of it, is inconsistent with another statute, the court should consider whether the inconsistency is of such a nature that a repeal of the inconsistent statute should be invoked, or the inconsistency should be construed in such a way which would not offend any other part of the statute.

[97] The authorities show that the court is slow to imply that a statute has been repealed. Buxton LJ, in ***O'Byrne v Secretary of State for the Environment Transport and the Regions and Anor*** [2001] EWCA Civ 499, speaking to the question of the implied repeal of a statute, pronounced the test to be exceedingly high. At paragraphs 22 to 24 he said:

> "22. The court will not lightly find a case of implied repeal, and the test for it is a high one. Mr Craig properly took us to two well-known statements of principle to that effect. In *Seward v 'Vera Cruz'*

(owner) (1884) 10 App Cas 59 the Earl of Selbourne LC said, at p 68:

> 'Now, if anything be certain it is this, that where there are general words in a later Act capable of reasonable and sensible application without extending them to subjects specially dealt with by earlier legislation, you are not to hold that earlier and special legislation indirectly repealed, altered or derogated from merely by force of such general words, without any indication of a particular intent to do so.'

23. In *Kutner v Phillips* [1891] 2 QB 267 at p 271 AL Smith J said:

> 'a repeal by implication is only effected when the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one that the two cannot stand together.... Unless two Acts are so plainly repugnant to each other that effect cannot be given to both at the same time a repeal will not be implied and special Acts are not repealed by general Acts unless there is some express reference to the previous legislation, or unless there is a necessary inconsistency in the two Acts standing together.'

24. AL Smith J repeated that test in the following year in *West Ham Wardens v Fourth City* [1892] 1 QB 654 at p658:

> 'The test of whether there as [sic] been a repeal by implication by subsequent legislation is this: are the provisions of a later Act so inconsistent or repugnant with the provisions of an earlier Act that the two cannot stand together?' "

[98] The question now arising is whether the provisions of section 17 of the FCA are so repugnant with section 17 of the TCA that they cannot co-exist. Can section 17 of the TCA be read in a manner which is compatible with section 17 of the FCA? It must always be borne in mind that the object of construing a statute is to give true meaning to it. In doing so, the court may, in certain circumstances, read in words or limit

provisions, provided that this is done by the process of interpretation, without disturbing the cardinal principles of construction.

[99] The agreement or the transaction entered into by the appellants is one between two telecommunications companies which had the approval of the Minister. This brings into question the issue as to whether the agreement in respect of the 1st appellant's acquisition of the 2nd appellant's stocks is caught within the ambit of section 17(3) of the FCA.

[100] Learned Queen's Counsel drew to the court's attention article 101(1) and (2) of the TFEU, (formerly article 81), the provisions of which bear substantial similarity to section 17 of the FCA and which could provide a useful guide in construing section 17(1) and (3) of the FCA. The Article provides as follows:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a

competitive disadvantage;

(e) 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.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically be void."

[101] Mrs Kitson submitted that the provisions of section 17 of the FCA are not entirely in accord with article 101(1) as section 17 relates to agreements which lessen competition or are likely to lessen competition in a market. Although article 101 (1) and (2) does not recite verbatim the provisions of section 17 of the FCA, the contents effectively convey the same principles as those outlined in section 17 of the FCA. In principle and due to the nature and specific circumstances of the instant case and in view of the objectives of the legislation, no violence would be done, if consideration is given to the article in order to ascertain if the terms thereof could be imported into section 17 of the FCA.

[102] In EU Competition Law, Text, Cases and Materials by Jones and Sufrin, 4th edn page 169 para. (iii) (a), the learned authors place article 101 in the following context:

> "Article 101 (1) is aimed at explicit collusion whatever form it takes, whether a formal agreement between undertakings to coordinate their behaviour and reduce effective competition between them or through more informal arrangements. The term concerted practice is thus designed to provide a safety-net catching looser forms of collusion. It aims to forestall the possibility of undertaking evading the application of Article 101 by colluding in a manner falling short of an agreement."

[103] In Competition Law at page 76 (2), the learned author speaks to article 101 in this way:

> "The policy of Article 81 [now Article 101] is to prohibit co-operation between independent undertakings which prevents, restricts or distorts competition: in particular it is concerned with the eradication of cartels and hard-core restrictions of competition."

[104] Dr Beckford urged that, like article 101, section 17 of the FCA encompasses agreements, the purpose or effect of which is to substantially lessen competition in the market and such purposes may be discovered from the terms of the agreement or by way of the rule of reason standard. It was also his argument that article 101 makes a distinction between agreements which are illegal per se and those which are not and in the former class of cases, an anti-competitive effect is assumed, while, in the latter the anti-competitive effect must be proved. He went on to say that Professor Whish, indicates that where the lessening of competition is the object of an agreement, it is for the party to the agreement to demonstrate that it is exempted under article 81 (3) and it is not for the opposing party to prove it. These submissions are unpersuasive. It is clear that Dr Beckford has not fully appreciated the purpose and intent of article 101.

[105] The learning to be distilled from the extracts from the EU Competition Law, Text, Cases and Material and Professor Whish's remarks is that article 101 (1) is directed at collusive and non-collusive practices or conduct between entities. Notably, the true intention of the article is to provide a safeguard against agreements which

seek to deter or restrain competition by way of conspiratorial conduct or practice. It is clear that article 101 is designed to bar collusion between entities and in particular independent organisations or undertakings. In this case, it would not be unreasonable to import the purpose and effect of article 101 (1) into the provisions of section 17 of the FCA and find that the aim and objective of that section is to restrict conspiratorial conduct by parties. Interestingly, the learned judge rightly found that there was no collusion on the part of the appellants. There is nothing, on the face of it, to show that the purpose or effect of the agreement was collusive. Further, there is nothing from which an inference could be drawn which is demonstrative of collusive conduct on the appellants' part, by virtue of which the rule of reason standard could be invoked. Moreover, the respondent did not, in its particulars of claim, plead collusion.

[106] There are authorities which reinforce the conclusion that collusion is the focal point in dealing with agreements of which the aim or intention is to substantially lessen competition or is likely to do so. In **BAT** and ***Reynolds v Commission of the European Communities***, the European Court of Justice gave consideration to the fundamental issue as to "whether and in what circumstances the acquisition of a minority shareholding in a competing company may constitute an infringement of Articles 85 and 86 of the Treaty". The issue concerned agreements entered into in 1984 by several companies, Phillip Morris Incorporated, Rembrant Group Limited and Stellenbosch, Republic of South Africa and whether they infringed articles 85 and 86 of the EC Treaty. The acquisition of shares in Rothman International, a competing company, formed the subject matter of the agreements entered into by the companies.

The companies remained independent subsequent to the agreements coming into force. The court ruled that the issue must be first considered within the context of article 85 of the Treaty. Agreements which, by their object or which, in effect, prevent, distort or restrict competition within the common market are prohibited by article 85. Under article 86 the acquisition of shareholding in a competing company can amount to an abuse of dominance of a shareholding results in effective control of the other company or somewhat influences its commercial policy. The court found that the commission, in its examination of the 1984 agreements, was correct in finding that there was no proof of anti-competitive object or effect under article 85. It was also found that the agreements did not fall within the scope of article 86.

[107] In placing reliance on **BAT**, and ***Reynolds v Commission of the European Communities*** Dr Beckford sought to bolster his view that legal or de facto control can arise in circumstances in which entities remain independent or competitors after acquisition or even where they cease to be independent or competitors and that this proposition applies to the 1st appellant's acquisition of the 2nd appellant's equity, its competitor. It is clear from the foregoing authority that in dealing with the question of anti-competitive object or its effect the matter of legal control would only arise in circumstances where the companies continue to be independent or remain in competition subsequent to acquisition. The agreement between the appellants was not one in respect of the acquisition of the 2nd appellant's equity but rather an agreement relating to the purchase by the 1st appellant of the 2nd appellant's entire stock.

[108] It is perfectly true, as contended for by Dr Beckford, that as stated in **BAT** and ***Reynolds v Commission of the European Communities*** the acquisition of an equity interest by a company as a competitor, does not necessarily amount to conduct restricting competition but it may nonetheless influence the commercial conduct of the companies to restrain or distort competition in the market in which they operate. A distinction must be drawn between that case and the case under review. In **BAT** and ***Reynolds v Commission of the European Communities*** the companies remained independent despite the acquisition of the shareholding. By stark contrast, in this case, the 1st appellant acquired all the shares in the 2nd appellant, not an equity interest, and therefore, the 2nd appellant's existence as an entity, would have been terminated at the time of the transfer of the licence and obviously could not have remained independent. Importantly, there is nothing to show that the acquisition of the 2nd appellant's interest would in fact influence the 1st appellant's commercial conduct in order to restrict or distort competition in the market even after they no longer remained competitors. There is no ground for concluding that the acquisition of the 2nd appellant by the 1st appellant would amount to an abuse of dominance as the question of an abuse of dominance is not one for consideration before the court.

[109] Mrs Kitson, in citing the case of ***Apple Fields Ltd & Anor v New Zealand Apple and Pear Marketing Board & Anor***, [1991] 1 AC 344 proposed that the case reveals that, in determining whether an agreement lessens or is likely to lessen competition, it is not necessary that an element of collusion must be present. That case is distinguishable from the present case. In that case, the issue was whether an

agreement was in place within the meaning of the word "arrangement" and whether a levy imposed under section 31 of the Apple and Pear Marketing Act 1971 contravened sections 27, 29 and 36 of the Commerce Act. In this case, no issue arises as to the meaning of the words "arrangement" or "agreement" as there is no dispute that the acquisition of the 2nd appellant's stocks emanated from an arrangement or an agreement. The issue in this case is whether section 17 of the FCA regulates the normal business practice of entities in circumstances where one entity acquires another. Remarkably, in the ***Apple Fields*** case the extent of the applicability of the regulatory power of section 27(1) of the Commerce Act was never an issue.

[110] In the case of ***Competition Authority***, the critical issue concerned the collusive conduct of certain beef farmers. Ten principal beef processors agreed to reduce the capacity of the beef industry by 25% within a year in Ireland. The object of this arrangement was to reduce the number of operators in the market. The contract provided for the persons who remained in the group to compensate those who left and the compensation should be decided on by the parties. Those who remained were required to repay a levy to the Beef Industry Development Society. Those who left entered into the following undertaking:

> "[T]o decommission or put beyond use their processing plants or sell them only to persons established outside the island of Ireland, or if necessary to the stayers on condition that they be used as back-up equipment or spare parts:
>
> not to use the land on which these plants were situated for the purposes of beef or veal processing for a period of five years;
>
> not to compete with the stayers in the beef and veal processing

market in Ireland for two years."

The Competition Authority objected to this proposal as being contrary to article 81(1) of the Treaty establishing the European Community and applied for a restraining order against the Beef Industry. The court dismissed the application. The Competition Authority appealed the ruling. The appellate court referred the matter to the ECJ, essentially, for a ruling on a preliminary point as to whether the agreement was in breach of article 81 (article 101). The ECJ held that the proposed agreement constituted restraint of competition within the meaning of article 101 (1). The critical issue in that case surrounds collusive conduct of the parties. It is obvious that there was collusion among the beef processors. By comparison, in this case, it cannot be said that there was any evidence of collusion by the appellants either overtly or by implication.

[111] The case of ***British Airways v The Commission*** 2004 CMLR 1008 is of no assistance to the respondent or the intervener. The issues in that case essentially surrounded an abuse of dominance. In the instant case the question of an abuse of dominance was not an issue before the court below, or this court. Further, in ***British Airways*** the issues raised and considered were mainly in respect of articles 3 and 82 of the EC treaty, neither of which is comparable to section 17 of the FCA or article 101 (1) of the TFEU.

[112] The respondent incorrectly placed reliance on the cases of ***SSI v Commission, ENI/Montedison and Commission and Anor v Ladbroke Racing*** [1997] EUECJC -

359/95. The issues raised in those cases are vastly different from the issues before this court. ***The Queen v Inhabitants of Watford*** [1846] 9OB 524; 115 ER is also irrelevant. The Draft Guidelines on Horizontal Co-operation Agreements which has also been cited by the respondent cannot be acted upon. It is a document in draft. The contents carry no force.

[113] Dr Beckford's reliance on ***National Transport Co-operative Society v Attorney General of Jamaica*** to buttress his contention that the Minister's approval should not be interpreted to mean that the agreement could not be declared unenforceable if found to be illegal, lacks merit. So too is his argument that it could not have been contemplated by section 17 of the TCA that the Minister could approve an agreement which is illegal or could be found to be illegal, since this would produce an absurd result, as the discretion of the Minister is not one relating to the validity of the agreement. In the case under review, the legality or illegality of the appellants' transaction was not an issue for the learned judge's consideration. As Mr Hylton rightly submitted in **National Transport Co-operative Society v Attorney *General of Jamaica,*** the issue was with reference to the question as to the legality of the contract, which was in fact illegal; while, in the present case, the issue is whether the FCA is applicable to transactions and agreements falling within the purview of the TCA.

[114] Dr Beckford's further argument is that although the Minister approves an agreement under section 17 of the TCA, this cannot be interpreted to mean that such

an agreement could not be declared invalid by this court. The case of ***National Transport Co-operative Society v Attorney General of Jamaica*** cited in support of the submission does not assist the respondent. In the ***National Transport Co-operative Society v Attorney General of Jamaica*** case the appellants sought to enforce an illegal agreement and the issue as to the illegality of the agreement was a point of law raised at the appellate stage to which an objection was taken. The court ruled that it was perfectly permissible for the court to entertain the point. There is nothing in the instant case which purports to relate to the enforcement of an illegal agreement. As Mr Hylton rightly submitted, the case under review raises a question of fact and not a question of law dealing with the illegality of the agreement.

[115] The critical question is whether, in light of the provisions of section 17 of the TCA, section 17 of the FCA is applicable to the appellants' agreement.

[116] By section 11(1)(a), (b), (c) and (d) of the TCA, a prospective licensee is under an obligation to furnish the OUR with a statement in which it outlines the following things: an undertaking to comply with the provisions of the Act; that there is no legal impediment from it being granted a licence; that it has the requisite qualification to perform its obligations; and that it has the necessary financial means for the operation of the facility or that it can provide the required services. In granting a licence, by section 11(2) of the TCA, the Minister's approval is subject to his consultation with and the support of the OUR. Upon receipt of a recommendation from the OUR, if the Minister is satisfied that the requirements of section 11(1) of the TCA are met, by virtue

of section 13 of the Act, he is at liberty to give his consent to the transaction in question. It could not be that the Minister would not have taken into consideration whether all the demands of section 11(1)(a), (b), (c) and (d) had been complied with, before giving his authorisation.

[117] Mrs Kitson contended that there is no provision in section 17 of the FCA to show that that section is inapplicable to agreements in respect of licences granted under sections 17(2) and 17(3) of the TCA and it must be taken that it was the legislative intent that the FCA applies to agreements made by virtue of section 17(2) of the TCA. With great respect I must disagree. If that were to be accepted, it would be that where a licensee meets the requirements of section 17 of the TCA, and the Minister, after consultation with the OUR, is satisfied that the licensee adheres to the OUR's rules relating to competitive safeguards and grants his approval, any agreement resulting therefrom, would be exposed to a challenge under section 17 of the FCA. This would not have been the intent of Parliament. It follows that, it could not be that the legislature would have intended that any agreement sanctioned by the Minster, after all the statutory requirements are satisfied would be rendered unenforceable or invalid.

[118] Further, there is a presumption that a construction which would result in unjustifiable inconvenience should be avoided. This presumption is expressed, by the learned authors of Halsbury's Laws of England Vol. 44 para. 1475, in the following terms:

> "It is presumed that Parliament intends that the court, when considering in relation to the facts of the instant case, which of the opposing constructions of an enactment corresponds to its legal meaning, should find a construction which furthers every aspect of the legislative purpose (a purposive construction). It may thus be necessary to give the enactment, particularly where it is not grammatically ambiguous, a strained construction. An important category of cases where a purposive and strained construction may be required is that where the potency of a defined term overrides the literal meaning of the definition."

[119] The case of ***Cutler v Wandsworth*** was cited by the appellants in support of the principle that in construing a statute "business inconvenience" is a relevant factor in the avoidance of any unjustifiable inconvenience to business persons. This proposition was frowned upon by Dr Beckford and Mrs Kitson. Dr Beckford's objections were that: ***Cutler v Wandsworth*** related to the enforcement of a private cause of action while the present case is with respect to a regulatory body instituting an action to carry out its statutory duty and the principle of "business inconvenience" cannot gain predominance over the principle against agreements which are potentially illegal. This submission is devoid of merit. An important principle to be extracted from ***Cutler v Wandsworth*** is that business inconvenience is an important element in statutory interpretation. The fact that that case was with reference to a private cause of action as opposed to a regulatory body initiating proceedings with respect to its statutory duty, is inconsequential. What is important is the rule emerging from the ratio of the case and not the basis on which the proceedings were initiated or the facts of the case.

[120] Mrs Kitson contended that the literal and purposive approaches are complementary in statutory construction but the literal approach must first be

considered. She cited ***Goblin Hill Hotels*** to support her contention that the plain and ordinary meaning can only be displaced when it "leads to proven commercial absurdity". It is not for the appellants to produce proof of "commercial absurdity" but for the court to examine all the relevant circumstances of this particular case and determine whether Parliament intended that persons who satisfy the relevant provisions of section 11 of the TCA and obtain the Minister's approval which leads to an agreement being made, could be subject to a contest as to its legality by reason of section 17(2) of the FCA.

[121] Mrs Kitson urged that the case of ***Goblin Hill Hotels*** shows that the purposive approach must yield to the literal meaning of a statute. In ***Globlin Hill Hotels***, the Privy Council ruled that the plain and ordinary meaning of articles of association and a lease could only be displaced if it would lead to commercial absurdity, and that it did not. This of course, does not mean that the literal approach should at all times give way to the purposive approach.

[122] As correctly urged by Mr Hylton, the modern trend is that the purposive approach should yield to the literal in construing a statute, as advanced by the learned authors of Halsbury's Laws of England, Vol 44 at para 1475 in the following terms:

> "It is presumed that Parliament intends that the court, when considering, in relation to the facts of the instant case, which of the opposing construction of an enactment corresponds to its legal meaning, should find a construction which furthers every aspect of the legislative purpose."

[123] As earlier indicated, despite the fact that words may be accorded their natural and ordinary meaning, the court must pay due regard to the purpose of the statute and the particular provision or provisions which are challenged. The construction of a statute should be consistent with, and not merely the literal approach but with the purposive statutory language. In construing a particular statutory provision what is of importance is that the court is bound to look at all the surrounding circumstances to ascertain whether it can be found that the intended result of the statute is accomplished. In the ***Goblin Hill Hotels*** case, the Privy Council adopted the literal meaning of the documents, after conducting an examination of all the circumstances in that case.

[124] Although the literal approach may carry some weight, it does not follow that in the present case, the court ought to be reluctant in embracing the purposive approach. The 1st appellant is an investor in the telecommunications industry. It has met all the relevant statutory requirements. It obtained the requisite approval of the Minister. Acting on the Ministerial approval, it entered into an agreement with the 2nd appellant through which it acquired the 2nd appellant's interest. It could not be that the 1st appellant, having acquired a license to operate, the legality of the agreement with the 2nd appellant could be defeated by respondent's challenge. This would not be in accordance with the enhancement of business efficacy. In these circumstances, to adopt a literal approach would not truly reflect the intention of the legislature but would certainly militate against the efficacy of the purpose of section 17 of the TCA. It could not have been the intention of Parliament that an agreement which meets the

Minister's approval should be subject to section 17(3) of the FCA and that only agreements under section 17(4) are exempt. As Mr Hylton rightly urged, it would have been a commercial absurdity to find otherwise.

[125] On a true construction of section 17 of the TCA, agreements approved by the Minster, upon the Minister's compliance with section 11 of the FCA, do not fall within the purview of section 17(3) of the TCA.

[126] The appellant's argument in the alternative, is that the agreement between the appellants is indisputably a merger and acquisition of the 2nd appellants' stocks. Dr Beckford's argument in response is that a dispute exists as to whether section 17 of the FCA is applicable to mergers and acquisition. At the outset, it must be said that his response is misplaced. Section 17(2) of the TCA provides for mergers. It permits a licensee to assign its licence, subject to the prior approval of the Minister. The FCA is silent as to mergers and acquisitions. It has been earlier found that under section 17(3) of the TCA, the Minister may, subsequent to the application for a licence, grant approval for the transfer of the licence provided certain conditions under section 11 of that Act are met. A stock purchase agreement had been brokered by the appellants. The transfer of the licence resulted in a merger. There are no provisions in the TCA which restrict the right of entities to engage in mergers. There can be little doubt that the agreement between the appellants amounted to a merger and an acquisition. Remarkably, the learned judge correctly acknowledged that an acquisition or merger occurred as a result of the transfer of the licence.

Whether the proceedings against the appellants emanated from LIME's complaints

[127] Dr Beckford's contention is that no issue was taken in the court below as to whether the proceedings were initiated by reason of LIME's referral to the respondent. His submission that the court below did not conclude that the respondent's jurisdiction was established at the commencement of proceedings or when proceedings are initiated under section 73(2) of the TCA, clearly shows a misunderstanding on his part as to the issue on appeal. The issue is whether the learned judge was correct in finding that the commencement of the proceedings by the respondent emanated from LIME's complaint which conferred jurisdiction on the respondent. It was an obvious finding of the learned judge that the initiation of the proceedings by the respondent was as a consequence of a referral by LIME by virtue of section 73(2) of the TCA.

[128] In an affidavit of Mr Miller to which he exhibited a letter of his responding to a letter from LIME, he stated that he informed LIME that the respondent had commenced investigations independent of LIME's complaint. Further, the respondent's pleading in this action discloses that the proceedings were initiated by the respondent of its own volition. Paragraph [6] of the respondent's particulars of claim shows that its commencement of investigations into the matter arose out of reports in the media in March 2011 that the appellants were parties to the agreement or had interests therein. Paragraphs [6] and [7] state as follows:

> "In March of 2011 the Claimant became aware through media reports that the 1st and 2nd Defendants had interest in or were parties to an agreement whereby, among other things, the 2nd

> Defendant's parent company América Móvil would acquire the 1st Defendant's company in Honduras in exchange for which the 1st Defendant would acquire the 2nd Defendant, Oceanic Digital Jamaica Limited, which trades as Claro.
>
> Pursuant to section 5 of the Act, the Claimant's staff commenced investigations on its own initiative into the media reports regarding the agreement and its likely effect on competition in the market in Jamaica for voice and text messaging services. The non confidential version of the Staff Report is attached hereto and marked exhibit 'DM' for identity."

[129] It is abundantly clear that the action was born out of the respondent's act of voluntarily embarking on an investigation by reason of it becoming aware of the agreement between the appellants, through the media reports. Significantly, nowhere in the pleading is there any averment to demonstrate that the institution of the claim by the respondent arose out of a referral by LIME. The learned judge clearly erred when she found that the action was initiated at the instance of LIME's referral.

LIME's application to intervene

[130] In the court below, the appellants did not oppose LIME's application to intervene; however, at the hearing of the application for the trial of the separate issues, Mr Hylton submitted that LIME's application was res judicata, it having applied previously to the court for judicial review. Before this court, he submitted that, in its judicial review proceedings, it was contended for by LIME that "a breach of section 17 of the FCA is "a legal impediment" within the meaning of section 11 (1) (b) of the TCA", which was rejected by Sykes J, yet LIME has raised and relied on the same issue

in this case.

[131] In claim no HVC 2011/05659 LIME sought an order to quash the approval granted by the Minister in respect of the agreement between the appellants and also to compel the respondent to carry out its investigation into the agreement between the appellants. A declaration was also sought that the Minister's approval of the transaction was unlawful and that there had been an improper exercise of his power in granting the approval. The respondent relied on an affidavit of Mr Miller advising LIME that the respondent had commenced investigations into the "proposed acquisition agreement". Sykes J found that the Minister had the authority to grant the licence and was not precluded from doing so by reason of section 11 of the TCA.

[132] In this case, the learned judge, in dealing with this issue, said at paragraph [37] of her judgment:

> "[37] An application for leave to apply for judicial review concerns the legality of the process and not the merit. In any event in the instant case, LIME's challenge is not to the Minister's exercise of power. The essence of this application is that the defendants have contravened the FCA by having as the effect or likely effect of their argument, the substantial lessening of competition in the telecommunications market-place. Assuming it can be successfully argued that the present application is tantamount to the application that was rejected by Sykes J, his rejection of that application was for insufficiency of evidence to ground LIME's application for judicial review."

[133] The doctrine of res judicata applies where a cause of action or an issue has been finally decided on the merits and a question determined is raised in later litigation between the same parties. An authoritative statement of the doctrine is to be found in

the speech of Lord Bridge of Harwich in ***Thrasyvoulou v Secretary of State for the Environment, Oliver v Secretary of State for the Environment*** [1990] 2 AC 273 when at page 289 he said:

> "'The doctrine of res judicata rests on the twin principles which cannot be better expressed than in terms of the two Latin maxims 'interest reipublicae ut sit finis litium' and 'nemo debet bis vexari pro una et eadem causa'. These principles are of such fundamental importance that they cannot be confined in their application to litigation in the private law field. They certainly have their place in criminal law. In principle they must apply equally to adjudications in the field of public law."

[134] The doctrine of res judicata embraces two elements: cause of action estoppel and issue estoppel - see ***Arnold v National Westminister Bank Plc*** [1991] 2 AC 93. In the present case, issue estoppel would be a relevant consideration. Issue estoppel may arise in a case in which a particular issue, forming a important ingredient in a claim, has been raised and specifically determined in the earlier proceedings and one of the parties seeks to re-litigate it.

[135] The main issue in LIME's claim before Sykes J was whether the Minister was endowed with the power to grant the licence. In the instant case, the fundamental issue is whether the respondent is clothed with jurisdiction to embark on an investigation into a matter in the absence of a specific referral from the OUR. The question now arising is whether the issue in this case had already been determined by the previous suit within the meaning of res judicata. Having regard to the subject matter of the disputes in claim HCV 2011/05659 and the present matter, the identification of the issues are separate and distinct and it could not be said that it

would be just to hold that the decision in LIME's claim in HCV 2011/05659 is binding, thus rendering LIME's present application res judicata.

[136] The appeal is allowed in part and the counter notice is allowed in part. There shall be no order as to costs.

MORRISON JA

[137] I have read, with pleasure and admiration, the judgment prepared by Harris JA in this matter. I agree with it and there is nothing that I can usefully add.

DUKHARAN JA

[138] I have read in draft the judgment of Harris JA and agree. There is nothing that I can usefully add.

HARRIS JA

ORDER

The appeal is allowed in part and the counter-notice is allowed in part. There shall be no order as to costs.