JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 40/95

COR: THE HON MR JUSTICE FORTE, J A
THE HON MR JUSTICE DOWNER, J A
THE HON MR JUSTICE PATTERSON, J A

BETWEEN	INFOCHANNEL LIMITED	APPELLANT
AND	TELECOMMUNICATIONS OF JAMAICA LIMITED	RESPONDENT

Dr. Lloyd Barnett & Howard Malcolm instructed by Henry Malcolm for Appellant

Dennis Goffe Q C & Mrs. Sandra Minott-Phillips instructed by Myers, Fletcher & Gordon for Respondent

5th & 6th June & July 5, 1995

FORTE J A

The appellant by writ dated 29th March 1995, brought an action against the respondent claiming, as per its endorsement, the following:

> "1. Damages under the Fair Competition Act caused by the Defendant's abuse of a dominant position in the telecommunication's market.
>
> 2. Damages for conversion and/or appropriation.
>
> 3. An injunction to restrain the Defendant by itself, its servants or agents, or otherwise howsoever from:

(a) Launching, offering or instituting any INTERNET SERVICES;

(b) Taking any steps whatsoever to solicit customers for, market or advertise any INTERNET services; and

(c) Suspending, terminating or compromising the facilities which the Defendant agreed to provide to the Plaintiff pursuant to a written agreement entered into between the Plaintiff and the Jamaica Telephone Company Limited on February 3, 1995.

4. Further and other relief."

On the 30th March 1995, the appellant filed a Summons for Interlocutory Injunction, praying for an Order that:

"1. The Defendant be restrained until the trial of the action or further order, by itself, its servants or agents, or otherwise howsoever from:

(a) Launching, offering or instituting any INTERNET services;

(b) Taking any steps whatsoever to solicit customers for, market or advertise any INTERNET services; and

(c) Suspending, terminating or compromising the facilities which the Defendant agreed to provide to the Plaintiff pursuant to a written agreement entered into between the Plaintiff and The Jamaica Telephone Company Limited on February 3, 1995.

In his affidavit in support of the summons, Patrick Aldous Terrelonge, the Executive Chairman of the appellant company allege inter alia the following:

> "2. The plaintiff is a company duly incorporated in Jamaica under the Companies Act on the 5th day of December 1989. The Plaintiff was established to offer value-added information services based upon telecommunications and computer networking technology. These services include access to INTERNET which is an international federation of computer based information networks which will allow the Plaintiff's clients (a) to obtain any and all information stored in these computers, and (b) the opportunity to project information on their goods and services into the international market place by storing such information in the Plaintiff's computers, which in turn can be accessed by international subscribers to INTERNET services.
>
> ...
>
> 4. In order to offer the foregoing services to the Jamaican public it is necessary for the Plaintiff to obtain certain facilities from the Defendant. By letter dated June 20, 1994 the Plaintiff requested of the Defendant the following:
>
> a. The provision of an initial quantity of sixteen (16) local access lines to the public telephone network at the Plaintiff offices, to allow inward access to the Plaintiff's local value-added information services, via 'dial-up' data communication modems.
>
> b. The provision of eight (8) voice grade local lines to the public telephone network to be used for standard voice communication in the Plaintiff's business, together with a suitable PABX system.
>
> c. The provision of a leased international digital data communication

> circuit, interlinking the Plaintiff's offices in Jamaica and its offices in Florida, United States of America.
>
> 5. The Defendant is the only entity in Jamaica which can provide the said facilities sought by the Plaintiff. The said facilities requested by the Plaintiff required no new technology, and are not unprecedented or unusual as similar facilities have been provided to a number of other organizations in Jamaica from the 1970's.

Then after, swearing to certain historical factors of the case including complaints made to the Executive Director of the Fair Trading Commission, Mr. Terrelonge attests:

> "I verily believe that the Defendant has taken steps which have caused irreparable harm to the Plaintiff by: (a) deliberately keeping the Plaintiff out of the telecommunications value-added services market, including the INTERNET services segment thereof, so as to enable itself to acquire the technical expertise to offer these INTERNET services to the Jamaican market before the Plaintiff, and (b) its announcements to the Jamaican business community of its planned entry into this segment of the market has had a chilling effect on the Plaintiff's financial backers and potential investors.
>
> In the event that it is established at the trial of this suit and/or the Fair Trading Commission concludes that the Defendant has abused its dominant position in the telecommunications market, then if the Defendant is not prohibited now from offering its INTERNET services it will have obtained an irreversible advantage over the Plaintiff and the Plaintiff's financial prospects and market position wll have been permanently and substantially undermined, and accordingly, damages would not be an adequate remedy. Moreover, the Plaintiff has entered into a

> contractual arrangements with international and local organizations such as MCI Inc., Gleaner Company Ltd. and Market Research Services Ltd., to utilise the Plaintiff's services in their respective businesses. The benefits of these arrangements and indeed the agreements themselves, would be lost and/or terminated if the Plaintiff was not in a position to promptly perform under these agreements."

At the hearing of the Summons, the respondents took a preliminary objection on the following grounds, as is recorded in the 'note' taken of the judgment of Pitter J:

> "(a) lack of jurisdiction to grant interlocutory injunction,
>
> (b) no locus standi."

The learned judge ruled inter alia:

> "The Act confers on the court power to grant injunctions only on application of Commission with reference to S5(d).
>
> Any application for injunction under this Act, can only be made by the Commission on complaint of aggrieved party or on its own behalf.
>
> If he does not seek assistance of the Commission, he is limited to action for damages.
>
> If Plaintiff cannot get final injunction, how can he get an interlocutory injunction?
>
> I do not subscribe to the view that the Court's inherent power overrides the provisions in any statute which seeks to limit those powers.
>
> I am of the view that common law inherent jurisdiction of the court is subordinate.

> S46 is a complete and comprehensive statement of circumstances in which injunctions can be granted under this Act.
>
> The authorities are more in favour of my conclusion. Thompson's case is most persuasive. The court does not have the power to entertain this application.
>
> The Defendant succeeds in preliminary application on both limbs.
>
> Summons dismissed with costs to the Defendant to be agreed or taxed."

The appellant, having been granted leave to appeal by the learned judge, now appeals from that order.

The Fair Competition Act 1993, (hereinafter referred to as the Act) which gives rise to the appellant's complaint was enacted, as is stated in its preamble:

> "To provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing Consumers with competitive prices and product choices."

In keeping with this purpose, are the following sections which are relevant to the issue in this appeal:

> "4-(1) There is hereby established for the purposes of this Act, a body to be called the Fair Trading Commission which shall be a body corporate to which section 28 of the Interpretation Act shall apply.
> ...
>
> 5-(1) The functions of the Commission shall be:
>
> (d) to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the

abuse of a dominant position by any enterprise;

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."

...

"19. For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors.

20.-(1) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it -

(a) restricts the entry of any person into that or any other market;

(b) prevents or deters any person from engaging in competitive conduct in that or any other market;

(c) eliminates or removes any person from that or any other market;

(d) directly or indirectly imposes unfair purchase or selling prices or other uncompetitive practices;

(e) limits production of goods or services to the prejudice of consumers;

(f) makes the conclusion of agreements subject to acceptance by other parties of supplementary obligations which by their nature, or

according to commercial usage, have no connection with the subject of such agreements.

(2) An enterprise shall not be treated as abusing a dominant position -

(a) If it is shown that -

(i) its behaviour was exclusively directed to improving the production or distribution of goods or to promoting technical or economic progress; and

(ii) consumers were allowed a fair share of the resulting benefit;

(b) by reason only that the enterprise enforces or seeks to enforce any right under or existing by virtue of any copyright, patent, registered design or trade mark.

21-(1) Where the Commission finds that an enterprise had abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall -

(a) notify the enterprise of its finding; and

(b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned.

(2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.

(3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property."

Then Part VIII - headed "Enforcement, Remedies and Appeals:

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

(a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI or VII; or

(b) has failed to comply with any direction of the Commission,

the Court may exercise any of the powers referred to in section 47.

47.-(1) Pursuant to section 45 (sic) the Court may -

(a) order the offending person to pay to the Crown such pecuniary penalty not exceeding 1 million dollars in the case of an individual and not exceeding 5 million dollars in the case of a person other than an individual;

(b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 45, (sic)

in respect of each contravention or failure referred to in section 45 (sic)

(2) In exercising its powers under this section the Court shall have regard to -

(a) the nature and extent of the default;

> (b) the nature and extent of any loss suffered by any person as a result of the default;
>
> (c) the circumstances of the default;
>
> (d) any previous determination against the offending person.
>
> (3) The standard of proof in proceedings under this section and section 47 shall be the standard of proof applicable in civil proceedings."

Then of most relevance to the issue in this appeal is section 48 which states:

> "48 - (1) Every person who engages in conduct which constitutes -
>
> (a) a contravention of any of the obligations or prohibitions imposed in Parts III, IV,VI, or VII;
>
> (b) aiding, abetting, counselling or procuring the contravention of any provision;
>
> (c) inducing by threats, promises, or otherwise the contravention of any such provision;
>
> (d) being knowingly conceived in or party to any such contravention; or
>
> (e) conspiring with any other person to contravene any such provision,
>
> is liable in damage for any loss caused to any other person by such conduct.
>
> (2) An action under subsection (1) may be commenced at any time within three years from the time when the cause of action arose."

In summary, the Act gives to the Commission the power to make investigation either on its own volition, or on the complaint of an allegedly aggrieved party, as to whether the enterprise has abused or is abusing its dominant position. If it so finds

then it has a duty to inform the enterprise of its finding and direct the enterprise to take necessary and reasonable steps to overcome the effects of abuse in the market. However, if its directions are disobeyed the Commission cannot inflict any sanction of its own, but must resort to section 46, and apply to the Court to apply the sanctions provided for in section 47 i.e. either a pecuniary sanction, or the granting of an injunction restraining the enterprise from engaging in the conduct of which there is a complaint.

There has been no dispute that the Commission does have the power to seek an injunction before the court. The real and only issue in this Appeal is whether, an individual who has suffered damage, as a result of an abuse of dominant power by the enterprise can seek an interlocutory injunction directly in the Court.

The respondent answers the question in the negative on the basis that given the purpose of the Act as stated in the preamble, it is the Commission to whom the power and responsibility is given to administer the provisions of the Act, so as to accomplish that stated purpose.

Though conceding that by virtue of section 48 the appellant has a right to bring an action for damages, the respondent maintains that that is the sole remedy open to the appellant, as the Commission is the only person entitled to apply for an injunction, by virtue of section 47. How valid are these submissions? Mr. Goffe Q C for the respondent relied on the case of ***The Wolverhampton New Water Works Co v. Hawkesford*** 107 E.R. 486 and in particular the following passage in the judgment of Willes J at page 495:

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy

> different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it." [Emphasis added]

He contended that the circumstances of this case brings it within the third class of cases described by Willes J. However I find difficulty in accepting this contention as the Act with which we are concerned, though giving a right to an individual to sue for damages, gives no "special and particular remedy for enforcing it." In my view the matter with which we are concerned falls into the second class (as underlined above) as no particular form of remedy has been provided. It follows, as Willes J says that the "party can only proceed by action at common-law."

The individual has always had the right where he has an action in Court, to seek an immediate cessation of an act, which if continued until the action is determined, would cause irreparable, and inestimable damage to him.

At least as far back as 1901, it was recognized in the case of ***Stevens v. Chown/Stevens v. Clark*** [1901] Ch. Div 894, that the Courts (in Chancery) had the right to grant an injunction to restrain an infringement of a newly created statutory right. In delivering his judgment Farwell J stated at page 904:

> "In my opinion, there was nothing to prevent the old Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating

> the right provided a remedy which it enacted should be the only remedy."

And again at page 905:

> "Now I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless the Act in terms says so."

The Courts have always followed the principle that where a new right is created by statute, unless it creates a particular form of remedy, and excludes specifically other remedies, then both forms of remedy are open to the injured party.

In the case of ***Pyx Granite Co. Ltd v. Ministry of Housing and Local Government and others*** [1959] 3 All E R 346, the question of whether a remedy given by a statute, which required a particular procedure, was exclusive of other remedies Viscount Simonds answered thus:

> "The question is whether the statutory remedy is the only remedy and the right of the subject to have recourse to the courts of law is excluded. Obviously it cannot altogether be excluded; for, as Lord Denning has pointed out, if the subject does what he has not permission to do and so-called enforcement proceedings are taken against him, he can apply to the court of summary jurisdiction under section 23 of the Act and ask for the enforcement notice to be quashed, and he can thence go to the High Court upon case stated. But I agree with Lord Denning and Morris LJ in thinking that this circuity is not necessary. <u>It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words</u>. That is, as McNair J called it

> in ***Francis v. Yiewsley and West Drayton Urban District Council*** a 'fundamental rule' from which I would not for my part sanction any departure." [Emphasis added]

Viscount Simonds then went on to distinguish the case of ***Barroclough v. Brown*** [1897] A C 615, which dealt with a statute which gave to an aggrieved person the right in certain circumstances to recover certain costs and the expenses for a third party who was not otherwise liable, in a Court of summary jurisdiction. It was held in that case that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court. In coming to his conclusion Lord Herschell was of the opinion that "the appellant cannot claim to recover by virtue of the statute and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right."

In my view this case is also distinguishable and even more so, than the ***Pyx Granite*** case (supra) , as the Act does not provide any specific procedure for the recovery of damages. Though it clearly gives the Commission the right which it would not normally have since it would not be an aggrieved party, there is no provision either in clear terms or otherwise, nor by implication which takes away the aggrieved person's right to apply for an interlocutory injunction to prevent further damage to him while the trial of his action is pending.

That the two remedies i.e. in the Commission, and the aggrieved individual may co-exist and that the aggrieved individual may pursue his remedy without awaiting action by the Commission is supported by the case of ***Daily Mirror Ltd v. Gardner & Others*** (1968) 2 WLR 1239, which was followed in the case of ***Brekkes Ltd v. Another v Cattel and Others*** [1971] 2 WLR 647. The former case concerned an application for an injunction to prevent certain retailers of the Daily Mirror

Newspapers from boycotting the newspaper for one week. The plaintiff's evidence included a submission that the boycott instructions was a restrictive agreement registerable under the Restrictive Trade Practices Act 1906 and prima facie unlawful as "deemed to be contrary to the "public interest" under section 21, and that the defendants knew that and therefore knew that their course of action was unlawful. The defendant's evidence in reply was that they could in any reference to the Restrictive Practices Court, contend with a reasonable prospect of success that as the plaintiff's parent company controlled a preponderant part of the trade or business of supplying newspapers and periodicals the restriction was justifiable under paragraph (d) of section 21(1).

It was held inter alia:

> "...(2) That the plaintiffs had also made out a prima facie case that the instruction to members was a restriction 'deemed to be contrary to public interest' and therefore unlawful under section 21 of the Restrictive Trade Practices Act 1956, and that the defendants could not bring themselves within the exception in subsection (1) (d) because they obtained their goods from the wholesalers and not from either the plaintiffs or the parent company which controlled a preponderant part of the trade or business of supplying those goods."

In coming to his conclusion Denning M R had this to say:

> "Suffice it that this restriction is deemed to be contrary to the public interest unless the contrary is shown. Prima Facie, therefore, the recommendation is unlawful. No doubt the final decision will rest with the Restrictive Practices Court. But I think that it comes within the purview of this court also. If the federation make a recommendation which is unlawful as being prohibited by the Restrictive Trade Practices Act [1956], I think it ranks as 'unlawful means'. As such, this court can

> intervene to stop it. I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough."

There Lord Denning, though recognizing that the decision would rest with the Restrictive Practices Court, nevertheless recognizes, that the matter could come within the purview of the ordinary court as well. (***Brekkes v. Cattel*** [1971] (supra) at page 657.

Some support also comes from the case of ***Gouriet and Others and H.M. Attorney-General Gouriet and Post Office Engineering Union Gouriet and Union of Post Office Workers [Consolidated Appeals] Gouriet and Union of Post Office Workers and Others*** [1977] 3 W L R 300, where it was held by the House of Lords that:

> "Only the Attorney-General could sue on behalf of the public for the purpose of preventing public wrongs and that a private individual could not do so on behalf of the public though he might be able to do so if he would sustain injury as a result of a public wrong, for the courts had no jurisdiction to entertain such claims by a private individual who had not suffered and would not suffer damage."

To put that positively, the House of Lords there held that an individual who suffered as a result of or would sustain injury, as a result of a public wrong, may apply to the Courts for an injunction to prevent such a wrong. In delivering his speech Lord Diplock had this to say:

> "In modern statutes whose object is to protect the health or welfare of a section of the public by prohibiting conduct of a particular kind, it is not infrequently the

> case that the prohibited conduct is made both a criminal offence and a civil wrong for which a remedy in private law is available to any individual member of that section of the public who has suffered damage as a result of it. So it creates a private right to be protected from loss or damage caused by the prohibited conduct.
> For the protection of the private right created by such a statute a court of civil jurisdiction has jurisdiction to grant to the person entitled to the private right, but to none other, an injunction to restrain a threatened breach of it by the defendant."

So too, in the instant case would the appellant, for whom a private right has been created under the Act, have an entitlement for that right to be protected by recourse to the court, for damage caused by the action of the respondent.

In conclusion therefore I would hold that the appellant has a right to seek the assistance of the Court by way of application for an interlocutory injunction to prohibit the conduct of the respondent, which he alleges in his action is and is likely to continue causing him damage, until his case is tried in the Courts.

The preliminary objection ought to have failed. The appeal should be allowed, and the order of the Court below set aside. The matter should be returned to the Court below to be heard on its merits.

The respondent should pay the costs both here and below to be taxed if not agreed.

DOWNER JA

Before Pitter J in the Supreme Court, Telecommunications of Jamaica Limited (Telecom) sought and secured a ruling on a preliminary point of law that the learned judge had no jurisdiction to grant an interlocutory injunction in terms of the summons which instituted proceedings on behalf of the appellant Infochannel Ltd (the appellant). That summons requested that:

> "1. The Defendant be restrained until the trial of this action or further order, by itself, its servants or agents, or otherwise howsoever from:
>
> (a) Launching, offering or instituting any INTERNET services;
>
> (b) Taking any steps whatsoever to solicit customers for, market or advertise any INTERNET services; and
>
> (c) Suspending, terminating or compromising the facilities which the Defendant agreed to provide to the Plaintiff pursuant to a written agreement entered into between the Plaintiff and the Jamaica Telephone Company Limited on February 3 1995."

If this appeal is successful, the matter must be remitted to the Supreme Court to hear and determine whether on the facts and circumstances adduced, the appellant ought to be awarded the interlocutory injunction sought.

The cause of action when proceedings are instituted by the Commission and the criminal sanctions.

Part III of the Fair Competition Act (the Act) stipulates how the law controls uncompetitive practice. The provisions relevant to the action brought in this case are sections 19 and 20. Firstly, the Act recognises that the existence of a dominant position in certain cases militates against fair competition. Section 19 reads:

> "19. For the purposes of this Act an enterprise holds a dominant position in a market if by itself or together with an interconnected company, it occupies such a position of economic strength as will enable it to operate in the market without effective constraints from its competitors or potential competitors."

Then it creates a new tort of abuse of dominant position and sets out its scope and limits in section 20 thus:

> 20.-(1) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it-
>
> (a) restricts the entry of any person into that or any other market;
>
> (b) prevents or deters any person from engaging in competitive conduct in that or any other market;
>
> (c) eliminates or removes any person from that or any other market;

There are other specific provisions in section 20 (d) (e) and (f) and the exceptions are set out in section 20 (2) (a) and (b).

As regards this new tort, the Fair Trading Commission is given specific regulatory powers in Part III of the Act to promote fair competition. Those powers have an important bearing on the range of remedies available to the appellant. It is necessary to detail them. Section 21 (1) reads:

> "21.-(1) Where the Commission finds that an enterprise has abused or is abusing a dominant position and that such abuse has had or is having the effect of lessening competition substantially in a market, the Commission shall-
>
> (a) notify the enterprise of its finding; and
>
> (b) direct the enterprise to take such steps as are necessary and reasonable to overcome the effects of abuse in the market concerned."

Then in recognising that superior performance ought not to be penalised, section 21 (2) guides the Commission along the following lines:

> " (2) In determining, for the purposes of subsection (1) whether a practice has had, is having or is likely to have the effect of lessening competition substantially in a market, the Commission shall consider whether the practice is a result of superior competitive performance.
>
> (3) For the purposes of this section, an act is not an uncompetitive practice if it is engaged in pursuant only to the exercise of any right or enjoyment of an interest derived under any Act pertaining to intellectual or industrial property."

These specific powers of the Commission are in addition to its general powers in Part II of the Act. Some of these general functions ought to be noted. For example section 5 (1) states:

> "5.-(1) The functions of the Commission shall be-
>
> (a) to carry out, on its own initiative or at the request of any person such investigations in relation to the conduct of business in Jamaica as will enable it to determine whether any enterprise is engaging in business practices in contravention of this Act and the extent of such practices;"
>
> (b) to carry out such other investigations as may be requested by the Minister or as it may consider necessary or desirable in connection with matters falling within the provisions of this Act;

With regards to (b) it must be borne in mind that in exercising his powers, legal issues will arise and the Minister on those issues will seek the advice of the Attorney-General. Then as regards the tort of abuse of dominant position section 5(2) (a) provides that:

> "(2) It shall be the duty of the Commission-
>
> (a) to make available-
>
> (i) to persons engaged in business, general information with respect to their rights and obligations under this Act;
>
> (ii) for the guidance of consumers, general information with respect to the rights and obligations of

> persons under this Act affecting the interests of consumers;
>
> (b) to undertake studies and publish reports and information regarding matters affecting the interests of consumers;
>
> (c) to co-operate with and assist any association or body of persons in developing and promoting the observance of standards of conduct for the purpose of ensuring compliance with the provisions of this Act."

These sections are highlighted to emphasise the responsibilities of the Commission to persons engaged in business and to consumers generally and their orgainsations. Part of the importance of this case is that its outcome is not only of interest to the appellant but to the Commission and consumers as well.

The Commission has also been accorded statutory powers to summon witnesses, call for and examine documents, administer oaths etc, pursuant to section 7 of the Act. It can hold hearings pursuant to section 7(2) and section 10 gives the Commission police powers of search and entry. Section 9 empowers the Minister to give general directions to the Commission in the public interest and the Commission is bound to give effect to those directions. A significant feature to note is that since the Commission is a body corporate, it can exercise all the powers attendant on its corporate personality - see section 4 of the Act which reads:

> "4.-(1) There is hereby established for the purposes of this Act, a body to be called the Fair Trading Commission which shall be a body corporate to which section 28 of the Interpretation Act shall apply."

To appreciate the full range of civil remedies accorded to the Commission in the statute, it is necessary to examine Part VIII which deals with enforcement remedies and appeals. Section 46 reads:

> "46. If the Court is satisfied on an application by the Commission that any person-
>
> (a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI or VII; or
>
> (b) has failed to comply with any direction of the Commission,
>
> the Court may exercise any of the powers referred to in section 47."

It is appropriate to indicate that Part IV deals with the lawfulness of Retail Price Maintenance while Part VI empowers the Commission to prohibit exclusive dealing, tied selling and market restriction and Part VII provides the criminal sanctions for various contraventions of the Act.

Turning to the powers of the Court in Part VIII dealing with enforcement remedies and appeals, section 47 states:

> "47.-(1) Pursuant to section 46 the Court may-
>
> (a) order the offending person to pay to the Crown such pecuniary penalty not exceeding 1 million dollars in the case of an individual and not exceeding 5 million dollars in the case of a person other than an individual;
>
> (b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 46."

Bearing in mind that the powers of the court stipulated in this section are in response to an application by the Commission, there are important constitutional implications which if ignored, distorts the true construction of the Act. The general rule is that only the Attorney -General can enforce public rights on the civil side as provided for in section 47(1)(a) and (b). The rule is preserved by giving the Minister power to give directions to the Commission in the public interest. In addition to this general power of the Attorney-General to institute proceedings to vindicate public rights, the Commission is specifically given power to sue for penalties and injunctions. Lord Wilberforce put this position with clarity in **Gouriet v the Attorney-General** [1977] 3 WLR 300 at p. 310:

> "... It can properly be said to be a fundamental principle of English law that private rights can be asserted by individuals, but that public rights can only be asserted by the Attorney-General as representing the public. In terms of constitutional law, the rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown. And just as the Attorney-General has in general no power to interfere with the assertion of private rights, so in general no private person has the right of representing the public in the assertion of public rights. If he tries to do so his action can be struck out."

The position is reiterated by Viscount Dilhorne at p. 326 thus:

> " The conclusion to which I have come in the light of the many authorities to which we were referred is that it is the law, and long established law, that save and in so far as the Local Government Act 1972, section 222, gives local

> authorities a limited power so to do, only the Attorney-General can sue on behalf of the public for the purpose of preventing public wrongs and that a private individual cannot do so on behalf of the public though he may be able to so so if he will sustain injury as a result of a public wrong. In my opinion the cases establish that the courts have no jurisdiction to entertain such claims by a private individual who has not suffered and will not suffer damage."

Then the statute gives guidance to the court as to how its powers ought to be exercised. These guidelines state:

> 47.-(2) In exercising its powers under this section the Court shall have regard to-
>
> (a) the nature and extent of the default;
>
> (b) the nature and extent of any loss suffered by any person as a result of the default;
>
> (c) the circumstances of the default;
>
> (d) any previous determination against the offending person."

Finally, on this aspect of the matter the standard of proof is set out in 47 (3) and it provides that:

> "(3) the standard of proof in proceedings under this section and section 47 shall be the standard of proof applicable in civil proceedings."

The cause of action when instituted by a party who suffers damage.

It is now pertinent to deal with the central issue in this case namely, whether the remedy of injunctive relief is available to a party who has a claim

for damages against a party who is liable for abuse of dominant position. Section 48 of the Act is relevant and it provides as follows:

> "48.-(1) Every person who engages in conduct which constitutes-
>
> (a) a contravention of any of the obligations or prohibitions imposed in Parts III, IV, VI or VII;
>
> (b) aiding, abetting, counselling or procuring the contravention of any such provision;
>
> (c) inducing by threats, promises, or otherwise the contravention of any such provision;
>
> (d) being knowingly conceived in or party to any such contravention; or
>
> (e) conspiring with any other person to contravene any such provision,
>
> is liable in damages for any loss caused to any other person by such conduct."

Be it noted that in the light of this section contraventions or prohibitions of the provisions of Part VII can be enforced by both criminal and civil proceedings. It is convenient to refer to the endorsement on the writ to see how the claim is framed. It reads:

> "The Plaintiff's claim is against the Defendant for:
>
> 1. Damages under the Fair Competition Act caused by the Defendant's abuse of a dominant position in the telecommunication's market.
>
> 2. Damages for conversion and/or appropriation.

> 3. An injunction to restrain the Defendant by itself, its servants or agents, or otherwise howsoever from:
>
> (a) Launching, offering or instituting any INTERNET services;
>
> (b) Taking any steps whatsoever to solicit customers for, market or advertise any INTERNET services; and
>
> (c) suspending, terminating or compromising the facilities which the Defendant agreed to provide to the Plaintiff pursuant to a written agreement entered into between the Plaintiff and the Jamaica Telephone Company Limited on February 3, 1995."

Mr Goffe in his able submission said 47 (1) (b) of the Act specifically gives the remedy of an injunction to the Commission while section 48 (1) (c) of the Act expressly gives the remedy of damages and makes no express mention of any other remedy. On this basis it was submitted that only the Commission was entitled to injunctive relief under the Act. That submission found favour with Pitter J in the court below. In support he cited **The Wolverhampton New Waterworks Company v Hawkesford** Vol CXLI English Reports at 486. The relevant passage is to be found in Maxwell on **The Interpretation of Statutes** eleventh edition 1962 at 123. Here it is:

> ...The matter is summarised by Willes J in **Wolverhampton New Waterworks Co. v. Hawkesford [1859] 6 C.B. (n.s.) 336 at p. 356.** 'There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and

> peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common law remedy, the party suing has his election to pursue either that or the statutory remedy. The second class of case is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz., where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. ... The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class.' " (Emphasis supplied)

In interpreting the sage words of Willes J, it is important to ascertain the facts which gave rise to them.

The case was on a demurrer and when the full report is examined the headnote shows that the statute gave a special remedy for a company to recover sums from shareholders and it seems the declaration in issue was that the defendant, although an original subscriber was not on the register of shareholders at the time of the action.

The relevant section of the headnote in Volume CXLI of English Reports 486 at p. 487 reads as follows:

> "... A count alleged that the defendant subscribed a certain sum to the undertaking, and that certain portions thereof were called for, and places and times appointed for the payment thereof, and that the defendant had due notice of the premises, and that the plaintiffs (the company) did all things necessary to entitle them to have the calls paid, but that the defendant made default:- Held, that the count disclosed no cause of action,- inasmuch

> as it did not shew that the defendant was a 'shareholder' within the act."

Willes J quoted the relevant section of the act to support his proposition that the defendant was not liable. Here are his words at page 495:

> "But, looking to the general scope of the act, it is obvious that it is intended that the payment should be to the company, and to the parties with whom the contract is made. However, all difficulty on that score is removed by the subsequent words, which shew that the 21st section was intended to form one of a series of enactments which at once create the liability and prescribe the form of remedy; for, it goes on to provide as follows,- 'and, with respect to the provisions herein or in the special act contained for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder.' Then follows a series of enactments, from s. 22 to s. 28, giving the company a remedy for the recovery of calls against shareholders. Reading the 21st section by the aid of the light thrown upon it by the subsequent sections, it appears to me that the remedy was intended to be enforced only in the particular mode prescribed, against persons who are shareholders. And I incline to think, that, under these provisions, the shareholder against whom this remedy is given must be one whose name appears upon the register of shareholders,- though I agree with my Lord in thinking that it is unnecessary to pronounce any positive opinion upon that. It is enough to say that the particular remedy is given against 'shareholders' only; and that a 'subscriber' is not liable under the statutory provisions, unless he is also a 'shareholder'. "

The gist of Mr Goffe's submission is that the instant case is within the ambit of the third class of Willes J formulation. On this interpretation, the appellant would not be able to sue for an injunction as the special remedy of

damages is the only redress. However, a close reading of the passage and section 20 of the Act suggest that abuse of dominant position is a common law tort of breach of statutory duty defined by the Act, and the instant case is an action at common law as emphasised previously. It is governed by the second class in Willes J formulation as the remedy of damages is not a particular form of remedy but a general one affirmed by the statute. In these circumstances, both the common law remedy of damages and the discretionary equitable remedy of an injunction is available. This is how Lord Diplock explained it in **Gouriet** (supra) at 330-331:

> In modern statutes whose object is to protect the health or welfare of a section of the public prohibiting conduct of a particular kind, it is not infrequently the case that the prohibited conduct is made both a criminal offence and a civil wrong for which a remedy in private law is available to any individual member of that section of the public who has suffered damage as a result of it. So it creates a private right to be protected from loss or damage caused by the prohibited conduct.
>
> For the protection of the private right created by such a statute a court of civil jurisdiction has jurisdiction to grant to the person entitled to the private right, *but to none other*, an injunction to restrain a threatened breach of it by the defendant."

Then Lord Diplock continued:

> " The words italicised in the last paragraph are important words for they draw attention to the fact that the jurisdiction of a civil court to grant remedies in private law is confined to the grant of remedies to litigants whose rights in private law have been infringed or are threatened with infringement. To extend that jurisdiction to the

> grant of remedies for unlawful conduct which does not infringe any rights of the plaintiff in private law, is to move out of the field of private into that of public law with which analogies may be deceptive and where different principles apply."

Earlier in **London Passenger Transport Board v Upson** [1948] AC 155 at p. 168 Lord Wright said:

> " I think the authorities such as **Caswell's** case [1940] AC 152 **Lewis v Denye** [1940] AC 921 and **Sparks'** case [1943] KB 223 show clearly that a claim for damages for breach of a statutory duty intended to protect a common law right which is not to be confused in essence with a claim for negligence. The statutory right has its origin in the statute, but the particular remedy of an action for damages is given by the common law in order to make effective, for the benefit of the injured plaintiff, his right to the performance by the defendant of the defendant's statutory duty. It is an effective sanction."

Perhaps the leading authority on this principle relied on by Mr Goffe is **Barraclough v Brown** [1897] AC 6115 and it was explained in **Pyx Granite Co Ltd v Ministry of Housing and Local Government & Ors** [1959] 3 WLR at 346. Lord Simonds treated it thus at p. 356:

> "... It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J called it in **Francis v Yiewsley and West Drayton Urban District Council** [1957] 1 QB 554, 556, 567 'fundamental rule' from which I would not for my part sanction any departure. It must be asked, then, what is there in the Act of 1947 which bars such recourse. The answer is that there is nothing except the fact that the Act provides him with another remedy. Is it, then, an

> alternative or an exclusive remedy? There is nothing in the Act to suggest that, while a new remedy, perhaps cheap and expeditious, is given, the old and, as we like to call it, the inalienable remedy of Her Majesty's subjects to seek redress in her courts is taken away."

All this is introductory as far as the instant case is concerned. It is not being contended that the appellant is barred from the courts, but that the only remedy is damages.

Then Lord Simonds continued thus:

> "... And it appears to me that the case would be unarguable but for the fact that in **Barraclough v Brown** [1897] AC 615, 13 TLR 527 upon a consideration of the statute there under review it was held that the new statutory remedy was exclusive. But that case differs vitally from the present case. There the statute gave to an aggrieved person the right in certain circumstances to recover certain costs and the expenses from a third party who was not otherwise liable in a court of summary jurisdiction. It was held that that was the only remedy open to the aggrieved person and that he could not recover such costs and expenses in the High Court. 'I do not think' said Lord Herschell, [Ibid 620] 'the appellant can claim to recover by virtue of the statute, and at the same time insist upon doing so by means other than those prescribed by the statute which alone confers the right.' Or, as Lord Watson said [Ibid 622] ' The right and the remedy are given uno flatu, and the one cannot be dissociated from the other.' "

Lord Goddard gave a similar analysis at 359 and Lord Jenkins gave the most extensive treatment of the issue at pages 368 to 370.

Can it be said that the principle expounded in this case is applicable to facts and circumstances of the present case. I think not. In enacting section 48 of the Act, Parliament or more accurately, Parliamentary counsel was responding to pleas of the judiciary to state expressly when breach of statutory duty creates a tort. An early plea was made by Lord Du Pareq in **Cutler v Wandsworth Stadium Ltd** [1949] AC 398 at p. 410 thus:

> " To a person unversed in the science or art of Legislation it may well seem strange that Parliament has not by now made it a rule to state explicitly what its intention is in a matter which is often of no little importance, instead of leaving it to the courts to discover, by a careful examination and analysis of what is expressly said, what that intention may be supposed probably to be."

The traditional method of relying on construction of the relevant statute to ascertain if a tort was created, gave rise to much uncertainty. These difficulties were well illustrated from the following passage in the speech of Lord Simonds in **Cutler's case** [1949] 1 All ER 544 at 547-548 and [1949] AC 398 at 407-408 cited with approval in **Boath & Co Ltd v National Enterprise Board** [1978] 3 All ER 624 at p. 633.

> " 'It is I think, true that it is often a difficult question whether where statutory obligation is placed on A., B., who conceives himself to be damnified by A's breaches of it has a right of action against him. But on the present case I cannot entertain any doubt. I do not propose to try to formulate any rules by reference to which such a question can infallibly be answered. The only rule which in all circumstances is valid is that the answer must depend on a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted. But that there are

indications which point with more or less force to the one answer or the other is clear from authorities which, even where they do not bind, will have great weight with the House. For instance, if a statutory duty is prescribed but no remedy by way of penalty or otherwise for its breach is imposed, it can be assumed that a right of civil action accrues to the person who is damnified by the breach. For if it were not so the statute would be a pious aspiration. But, as Lord Tenterden, C.J., said in **Doe d. Rochester (Bp.) v. Bridges [**1831] 1 B& Ad 847 at 859: ... 'where an Act creates an obligation, and enforces the performance in a specified manner, we take it to be a general rule that a performance cannot be enforced in any other manner.' {Then he refers to **Pasmore v. Oswaldtwistle Urban District Council}** [1898] AC 387, [1895-9] All ER Rep 191. But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or, indeed, more favourably to the appellant, than in the words of Lord Kinnear in **Black v Fife Coal Co., Ltd.** [1912] AC 149 at 165: 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in **Atkinson v Newcastle Waterworks Co** [1877] 2 Ex D 441 and by Lord Herschell in **Cowley v Newmarket Local Board** [1892] AC 345 solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises in common law

> a correlative right in those persons who may be injured by its contravention.' "

By expressly stating in section 48(1) of the Act that the contravention of section 20 of the Act defining "abuse of dominant position", gave rise to liability in damages made the position crystal clear. It would be odd if Parliament courteously responded to the request of the judiciary and then the courts ignored its inherent powers conferred by section 49 (h) of the Judicature (Supreme Court) Act. That section in so far as relevant reads:

> "(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made;"...

It is a procedural section. Here is how Lord Edmund-Davies highlighted it in **Gouriet** (supra) at p. 346:

> "... The provision by section 45(1), replacing section25(8) of the Judicature Act 1873 and enabling the High Court to grant an injunction 'by an interlocutory order in all cases in which it appears to the court to be just and convenient so to do,' dealt only with procedure and had nothing to do with jurisdiction. In **North London Railway Co. v. Great Northern Railway Co. [1883] 11 Q.B.D.30, Cotton L.J. said at p. 39:**
>
> > ' If it was intended to give the enormously increased power which it is contended is given by this section,'-section 25(8) of the Act of 1873-'it is remarkable that it empowers it to be done by interlocutory order. It is said if it can be done by interlocutory order, of course it can be done by a final order at the hearing of the cause or judgment: no doubt that is true; but when the section only refers to interlocutory orders and not to orders for

> injunction to be made at the hearing of the cause, is not the prima facie presumption that it did not intend to give the right to an injunction to parties who before had no legal right whatever, but simply to give to the court, when dealing with legal rights which were under its jurisdiction independently of this section, power, if it should think it just or convenient, to superadd to what would have been previously the remedy ... so that where there is a legal right the court may, without being hampered by its old rules, grant an injunction where it is just or convenient to do so for the purpose of the protection or asserting the legal rights of the parties.' "

There is also a useful passage in **Argyll (Duchess) v Argyll (Duke)** [1965] 2 WLR 790 at p. 821 which further illustrates how the court resorts to its equitable remedies when it is just or convenient. Ungoed-Thomas J quoting Chitty J in **Hayward v East London Waterworks Co** [1884] 28 Ch F 138 said:

> "It was argued by the company that the Plaintiff's right to the supply of water was a statutory right, and that the only remedies open to the plaintiff were those given by the statutes which conferred the right, and that the statutes conferred a special remedy by penalty payable to the person aggrieved when the water was cut off. As at present advised, I should, if it were necessary to decide the question, decline to adopt this argument. I see no reason why the court should refuse to protect a right by injunction merely because it is a statutory right. In **Cooper v Whittingham** [1880] 15 Ch D 501 Sir George Jessel held, that the ancillary remedy by injunction ought to be granted, although the statute had created a new offence and imposed a penalty, and in his judgment he referred to the Judicature Act, 1873, section 25 (8), enabling the court to grant an injunction in all cases in which it shall appear to be just or convenient, and stated his opinion to be that this enactment might be said

> to be a general supplement to all Acts of Parliament."

The construction contended for by Mr Goffe would result in the absurd position of the judiciary abandoning its ancillary equity jurisdiction and powers in giving force and effect to the remedies available under the Fair Competition Act.

The true rule is that where Parliament specifies a tort and confirms the common law remedy of damages, the necessary implication is that the remedy of injunction is available. Perhaps it should be added that in specifying that damages is a necessary ingredient of the tort all Parliemant was doing was to enact that abuse of power was a tort like nuisance where damages must be proved and, unlike trespass where proof of damages is not essential to prove the tort. The contrary construction advanced on behalf of the respondent Telecom which stipulated that the appellant could not be awarded an injunction if his claim succeeds, would tend to emasculate the powers of the Supreme Court.

> **Are there authorities which illustrate the jurisdiction and the power of the court to grant injunctive relief although such a remedy is not expressly mentioned in section affirming or restating civil liability?**

Dr Barnett cited relevant cases which supported his submission that by deciding on a preliminary point of law, that the Supreme Court had no power to grant interlocutory injunctive relief, in this case, Pitter J erred.

In stating the principle which was applied in **Stevens v Chown** [1901] 1 Ch 894 Farwell J said at pp. 903-904:

> " But even if this were not so, it appears to me that the remedy in Chancery, if I am to regard it, as has been argued, as a separate remedy, is wider than the old common law remedy. In my opinion, there was nothing to prevent the old Court of Chancery from granting an injunction to restrain the infringement of a newly created statutory right, unless the Act of Parliament creating the right provided a remedy which it enacted should be the only remedy- subject only to this, that the right so created was such a right as the Court under its original jurisdiction would take cognizance of."

Further on p. 905 His Lordship continued:

> "Now, if I find that the statute enacts, either by way of new creation or by way of restatement of an ancient right, a right of property, that at once gives rise to the jurisdiction of the Court to protect that right. If the Act goes on to provide a particular remedy for the infringement of that right of property so created, that does not exclude the jurisdiction of this Court to protect the right of property, unless the Act in terms says so. There certainly is nothing in this Act to that effect."

Just as an injunction can protect a right, it can also prevent a tort from being committed or continued.

These principles were certainly applied in **Daily Mirror Newspaper Ltd v Gardner & Ors.** [1968] WLR 1239 at 1251. The following passage from the judgment of Lord Denning MR is relevant to the circumstances of this case. At pp. 1251 - 1252 it reads:

> "... Suffice it that this restriction is deemed to be contrary to the public interest unless the contrary

> is shown. Prima facie, therefore, the recommendation is unlawful. No doubt the final decision will rest with the Restrictive Practices Court. But I think that it comes within the purview of this court also. If the federation make a recommendation which is unlawful, as being prohibited by the Restrictive Trade Practices Act, I think it ranks as 'unlawful means.' As such, this court can intervene to stop it. I have always understood that if one person interferes with the trade or business of another, and does so by unlawful means, then he is acting unlawfully, even though he does not procure or induce any actual breach of contract. Interference by unlawful means is enough. On this ground also it seems to me that the plaintiffs have made out a prima facie case of unlawfulness."

Then Lord Denning MR further states at p. 1252:

> " But then the question arises: Should this court intervene by way of interlocutory injunction? Mr. Figgis said that they obtained the ex parte injunction without full disclosure: and they delayed unduly because they held up their application so as to put an article in the newspaper. I do not think that those considerations are enough to debar the plaintiffs of an interlocutory injunction."

Then he answers the question thus on the same page:

> "Weighing the balance on one side and the other, it seems to me it would be only right to preserve the position pending the trial of the action. We should grant an interlocutory injunction rather as the House of Lords did in **J.T. Stratford & Son Ltd v. Lindley** [1965] AC 269."

Davies and Russell LJJ made statements to the same effect. This case was followed in **Brekkes v Cattel & anor**. [1971] 2 WLR 647 and in closing Pennycuick VC said at p. 659:

> " I come back, then, to the present case. There is to my mind no reasonable doubt that this resolution will in due course be declared contrary to the public interest under the Restrictive Trade Practices Act 1956. It follows that it will then represent unlawful means for the purpose of this tort of interference, and it seems to me that, having regard to the decision of the Court of Appeal in the **Daily Mirror** case, I ought in advance of a declaration by the Restrictive Practices Court to act on the footing that it does indeed represent unlawful means. It may well be - and I would certainly welcome it - that in this or some other case a higher tribunal will give further guidance on this very difficult matter of law. As far as I am concerned today, I think I must act on the view which I have expressed. It then becomes a question of what relief should be granted. It is accepted that, having reached this decision, I ought to make injunctions."

Other useful cases where these principles were expressed and applied in cases involving the Rent Act were **Luganda v Service Hotels Ltd** [1969] 2 WLR 1056 and **Warder & Anor. v Cooper** [1970] 1Ch 495 at 496. The respective head notes are self explanatory. The first reads at 1057:

> " (2) That as the Act by sections 77 and 78 gave security of tenure to a person in the position of the plaintiff who had referred his contract to a rent tribunal and the defendants had acted unlawfully under section 30 of the Rent Act, 1965 by locking him out, his remedy was not limited to damages but he was entitled to the mandatory injunction granted by the judge reinstating him pending an early trial of the action."

The second states at (2):

> " (2) That, as the damage which the first plaintiff had suffered was caused by the breach of statutory duty of the defendants, the plaintiffs'

> remedy was not limited to damages but they were entitled to the injunctions sought."

Conclusion

I have specifically refrained from dealing with the facts of this case. All that has been decided on a preliminary point of law is that the Supreme Court has jurisdiction and power to grant an interlocutory injunction where the appellant Infochannel Ltd avers that another i.e. Telecommunications of Jamaica Ltd is liable to them in damages for abuse of power pursuant to breaches of sections 20 and 48 of the Fair Competition Act. The matter must therefore be remitted to the court below for an early decision to be taken as to whether in accordance with the law which has been developed since **American Cyanamid Co v Ethicon Ltd** [1975] AC 396 and **Garden Cottege Foods v M M B** [1983] 2 All ER 770 coupled with the facts before the court when the matter is being heard, it is established that the appellant is entitled to be awarded an interlocutory injunction .

The appeal succeeds and the order below is set aside. The appellant Infochannel Ltd is entitled to agreed or taxed costs both here and below.

PATTERSON, J.A.:

On the 29th March, 1995, Infochannel Limited, the appellant, filed an action against Telecommunications of Jamaica Limited, the respondent, for damages under the provision of the Fair Competition Act, 1993, caused by the respondent's abuse of a dominant position in the telecommunication's market, damages for conversion and/or appropriation, and for an injunction to restrain it entering the "Internet" market. The very next day, the appellant filed a summons for interlocutory injunction seeking an order that:

> "1. The Defendant be restrained until the trial of this action or further order, by itself, its servants or agents, or otherwise howsoever from:
>
> (a) Launching, offering or instituting any INTERNET services;
>
> (b) Taking any steps whatsoever to solicit customers for, market or advertise any INTERNET services; and
>
> (c) Suspending, terminating or compromising the facilities which the Defendant agreed to provide to the Plaintiff pursuant to a written agreement entered into between the Plaintiff and The Jamaica Telephone Company Limited on February 3, 1995."

The matter was urgent, and when it came on for hearing before Pitter, J. on the 30th March, Mr. Dennis Goffe, Q.C. took a preliminary point of law on two grounds, namely, that the court had no jurisdiction to grant the interlocutory

injunction sought and that the appellant had no locus standi to apply for it. The learned judge heard arguments lasting for four days, found for the respondent, and ordered that the summons be dismissed with costs to the respondent. It is against that order that the appellant has appealed.

The appellant stated in its statement of claim that it was established to offer value-added information services based upon telecommunications and computer networking technology, which included access to Internet, an international federation of computer-based information networks. In order to offer such services, it was necessary to obtain a number of access lines to the public telephone network which is monopolized by the respondent. An application to the respondent for the necessary facilities was met by failure and/or inordinate delay on its behalf to grant the same. Formal complaints were made to the Fair Trading Commission, established under the provisions of the Fair Competition Act, 1993 ("the Act") alleging abuses of a dominant position in contravention of section 20(1)(a) & (b) of the Act. It was further alleged that the respondent had capitalized on information supplied to it by the appellant and had established Internet services to the detriment of the appellant and that it intended to launch the services on or about the 1st April, 1995, unless restrained by the court. The prayer reads as follows:

> "1. Damages under the Fair Competition Act caused by the Defendant's abuse of a dominant position in the telecommunication's market.
>
> 2. An injunction to restrain the Defendant by itself, its servants or agents, or otherwise howsoever from:

> (a) Launching, offering or instituting any INTERNET services for a period of four (4) months;
>
> (b) Taking any steps whatsoever to solicit customers for, market or advertise any INTERNET services for the said period; and
>
> (c) Suspending, terminating or compromising the facilities which the Defendant agreed to provide to the Plaintiff pursuant to a written agreement entered into between the Plaintiff and the Jamaica Telephone Company Limited on February 3, 1995.

3. Further and other relief.

4. Costs and Attorneys-at-Law costs."

I have noticed that the claim for damages for conversion and/or appropriation endorsed on the writ of summons has been omitted from the statement of claim, and the appellant's claim has proceeded entirely on the provisions of section 48(1)(a) and section 20(1)(a) & (b) of the Act. Section 48(1)(a) reads:

> "48(1) Every person who engages in conduct which constitutes -
>
> > (a) a contravention of any of the obligations or prohibitions imposed in Parts III, IV, VI, or VII;
>
> ...
>
> is liable in damages for any loss caused to any other person by such conduct."

Part III section 20(1)(a) & (b) of the Act provides:

> "20(1) An enterprise abuses a dominant position if it impedes the maintenance or development of effective competition in a market and in particular but without prejudice to the generality of the foregoing, if it -
>
> (a) restricts the entry of any person into that or any other market;
>
> (b) prevents or deters any person from engaging in competitive conduct in that or any other market;"

The real issue joined between the parties was a preliminary point of law relative to the jurisdiction of the court to grant an interlocutory injunction in an action by one person against another under the provisions of section 48(1)(a) of the Act. The Act has created a statutory cause of action which did not exist before at common law. It arises from the abuse of the dominant position held by one person in a market which causes loss to another person in the market, and the statutory remedy provided is damages. The question arises, therefore, whether the statutory provisions have either expressly or by necessary implication, ousted the jurisdiction of the court below to grant injunctive relief to a person whose statutory right has been contravened.

The object of the Act as stated in the preamble is "to provide for the maintenance and encouragement of competition in the conduct of trade, business and in the supply of services in Jamaica with a view to providing consumers with competitive prices and product choices." In short, its general provisions are aimed at the protection of the public at large, and to that end, it

establishes a body corporate called the Fair Trading Commission for the purposes of the Act. One of the functions of the Commission is:

> "...to investigate on its own initiative or at the request of any person adversely affected and take such action as it considers necessary with respect to the abuse of a dominant position by any enterprise." {s. 5(1)(d)}

It is clear that although the Commission has wide powers under the Act to protect not only the general public but also a person against abuse of a dominant position by an enterprise, nevertheless a person may suffer loss over and above the general public as a result of such abuse, and consequently, such a person is given the right to bring an action on his own with or without reference to the Commission. One of the remedies which the Commission is empowered to seek, and which the court may grant is "an injunction restraining the offending person from engaging in conduct" which constitutes an abuse of a dominant position. The relevant sections of Part VIII of the Act, which is headed "Enforcement, Remedies and Appeals", provide as follows:

> "46. If the Court is satisfied on an application by the Commission that any person -
>
> (a) has contravened any of the obligations or prohibitions imposed in Part III, IV, VI or VII; or
>
> (b) has failed to comply with any direction of the Commission,
>
> the Court may exercise any of the powers referred to in section 47.
>
> 47(1) Pursuant to section 45 (sic) the Court may -

> (a) order the offending person to pay to the Crown such pecuniary penalty not exceeding 1 million dollars in the case of an individual and not exceeding 5 million dollars in the case of a person other than an individual;
>
> (b) grant an injunction restraining the offending person from engaging in conduct described in paragraph (a) or (b) of section 45 (sic),
>
> in respect of each contravention or failure referred to in section 45 (sic)."

It is plain from these provisions that the remedies which the Commission may seek against a person who contravenes any of the obligations or prohibitions imposed in Part III, IV, VI or VII of the Act are circumscribed and are aimed at the protection of the public at large, in general; they do not include damages. However, a person who suffers loss caused by conduct of a person which constitutes a contravention of the said Parts of the Act may recover damages. [Section 48(1)(a) (supra)].

The distinction between the remedies available are understandable. The Act has created a statutory corporation and has given it wide powers, but those powers are limited to such acts as are prescribed by its statutes and acts necessarily incidental thereto. Without the express provision in the Act, it would have no power to seek injunctive relief, which is an equitable remedy, to restrain contraventions of the Act or otherwise enforce its provisions. The court has always had jurisdiction to impose a pecuniary penalty and to grant injunctive

relief where applicable, and section 47 of the Act does not create any new or additional jurisdiction in the court; it only sets out the jurisdiction that the Commission is empowered to invoke.

There can be no doubt that the Supreme Court has jurisdiction to grant an injunction to enforce a legal cause of action whenever it appears to be just or convenient to do so. Originally, it was the Court of Chancery alone that had the jurisdiction to grant injunctions, and thereafter, the common law courts also exercised limited jurisdiction granted by statute. By virtue of section 4 of the Judicature (Supreme Court) Act, the various courts were consolidated as of the 1st January, 1880, and thereafter, the Supreme Court of Judicature of Jamaica has and exercises "all the jurisdiction, power and authority" which hitherto was vested in the various courts and judges (section 27). It is provided further that with respect to the law to be administered by the Supreme Court:

> "A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the court, in all cases in which it appears to the court to be just or convenient that such order should be made." (s. 49(h)).

I am quite sure that Queen's Counsel who appeared for the respondent, was in no doubt as to the general power of the court below to grant injunctive relief but he argued that in the instant case, the act has by necessary implication excluded the appellant from invoking that power. While admitting that the Act has created a cause of action where none existed before, and thus has given the appellant access to the court, he nevertheless contended that the Act limits the

remedy available to the appellant to that of damages alone. He did not think such an occurrence to be unusual. He referred to the judgment of Willes, J. in ***The Wolverhampton New Waterworks Company v. Hawkesford*** (1859) 6 C.B. (N.S.) 336 at 356 (English Reports Vol. CXLI - 486 at 495) where he said:

> "There are three classes of cases in which a liability may be established founded upon a statute. One is, where there was a liability existing at common law, and that liability is affirmed by a statute which gives a special and peculiar form of remedy different from the remedy which existed at common law: there, unless the statute contains words which expressly or by necessary implication exclude the common-law remedy, and the party suing has his election to pursue either that or the statutory remedy. The second class of cases is, where the statute gives the right to sue merely, but provides no particular form of remedy: there, the party can only proceed by action at common law. But there is a third class, viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. The present cases falls within this latter class, if any liability at all exists. The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to. The company are bound to follow the form of remedy provided by the statute which gives them the right to sue."

He contended that the instant case falls within the third class of cases mentioned by Willes, J. and that the particular remedy available to the appellant is what the Act prescribes - damages and that alone.

I do not agree with the contention that the instant case falls within the third class of cases mentioned by Willes, J. It is true that the Act has created a liability not existing at common law, but what it has not done is to give "a special and particular remedy for enforcing it." The remedy that is mentioned is damages, which is a common law remedy, and not a "special and particular remedy." The act gives a person who has suffered loss caused by an enterprise which abuses a dominant position held by it, the right to sue; that would bring the instant case within the second class of cases mentioned by Willes, J., and as he puts it, "there the party can only proceed by action at common law."

The right of a person to invoke the jurisdiction of the court cannot be taken away except by an enactment in clear and unequivocal terms, and the fact that an enactment creates a tort and gives damages as a remedy, does not necessarily preclude any or all other reliefs. I am fortified in this view by the judgment of Viscount Simonds in ***Pyx Granite Co. Ltd. v. Ministry of Housing and Local Government and others*** [1959] 3 W.L.R. 346. The appellants, Pyx Granite Co. Ltd., sought declarations concerning certain quarrying activities which they intended to carry out by virtue of a private Act of Parliament, and which they claimed did not require permission under the Town and Country Planning Act, 1947. The respondent objected to the jurisdiction of the court to grant the declarations, contending that the Minister's decision in the matter was final, and that Pyx were disentitled by the provisions of the Town and Country

Planning Act from applying to the court for the declarations sought. This is what Viscount Simonds said (at page 357):

> "It is a principle not by any means to be whittled down that the subject's recourse to Her Majesty's courts for the determination of his rights is not to be excluded except by clear words. That is, as McNair J. called it in ***Francis v. Yiewsley and West Drayton Urban District Council*** [1957] 2 Q.B. 136, 148; [1957] 1 All E.R. 825, a 'fundamental rule' from which I would not for my part sanction any departure."

I agree that, as a general rule, where a statute creates a new duty or imposes a new liability, and prescribes a specific remedy for enforcing its performance, than an aggrieved person is bound by the remedy prescribed in the statute. But as was pointed out by Lord Simonds in ***Cutter v. Wandsworth Stadium Ltd.*** [1949] A.C. 398, there are exceptions. This is what he said (at page 407):

> "But this general rule is subject to exceptions. It may be that, though a specific remedy is provided by the Act, yet the person injured has a personal right of action in addition. I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in ***Black v. Fife Coal Co. Ltd***: If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of a penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in ***Atkinson v. Newcastle Waterworks Co.*** and by Lord Herschell in ***Cowley v. Newmarket Local Board*** solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present

> statute is plain. It was intended to compel mine owners to make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention."

In my judgment, on a true construction of the Act, the appellant's appeal must succeed. Any person who is adversely affected as a result of the abuse of a dominant position, by any enterprise, has the right to request the Commission to investigate the matter and take such action as it considers necessary (section 5(1)(d)). Any such person who has suffered loss as a result of the same abuse may institute civil proceedings. It would make a mockery of the law if the Commission could, whenever it appears just or convenient, obtain the grant of an injunction to restrain the offender from contravening a person's rights while that same person whose right is contravened by the same offender could not. It could well be that the contravention is a continuing one, in which case the loss would also be continuing and would so continue unless restrained by the court. The Act gives a person the right to protect himself against abuse, independent of the Commission, and it is my judgment that nothing is stated in the statute which prevents that person from invoking the court's jurisdiction for the grant of an injunction to protect that right, nor is there anything to that effect. Although the Act creates a new right, it prescribes no special and peculiar remedy for the contravention of that right, different to the common law remedy, and it has not

taken away any other remedy that the court may grant in the circumstances. I am not here concerned with the merits of the instant case, but I am satisfied that the court below has jurisdiction to hear the summons filed by the appellant. What is sought is an interim injunction to preserve the status quo and prevent irreparable damage pending the determination of the action. The jurisdiction to hear such a summons has not been taken away by the Act, and it is my judgment that the learned judge fell in error by holding that he had no jurisdiction to hear the matter and that the appellant had no locus standi to apply. I would allow the appeal, set aside the judgment of the court below, and remit the summons for an early hearing. The appellant shall have his costs both here and below.