III Annual Caribbean Court of Justice International Law Moot (2011)

Meat Patties Ltd and Better Patties Ltd v George
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George v Meat Patties Ltd and Better Patties Ltd

Meat Patties Ltd (MPL) was incorporated in Jamaica in February 1971, to produce and distribute *Tasty Patties*. Over the past forty years, MPL has gradually increased its share of the Jamaican market to 41% largely because of the steady build-up of a very desirable brand. Better Patties Ltd (BPL) was incorporated in Jamaica in February 2006, to produce *Real Jamaican Patties* and *Genuine Jamaican Coco-Breads,* and has rapidly sky-rocketed to a 23% share of the market mainly because its youthful management team engages in aggressive sourcing of cheap labour and meat inputs, dynamic advertising and marketing strategies and low-pricing that undercuts competitors.

In January 2009, John, the Executive Director of MPL, attended the Annual Meeting of "Jamaican Patties Producers" at which various topics relevant to the Jamaican patty industry were discussed. During the coffee break, and whilst on his way to the men's room, John was approached by David, the Chief Executive Officer of BPL, who said:

> "Captain, don't say anything; just listen. You know you can't beat my prices here in Jamaica. Hell, pretty soon, if I wanted, I could be planting ganja on your grave. But look man, the southern Caribbean is where I'm thinking I can really make a killing, so I'll do you a deal. From now on, I'll let you lead here in Jamaica if you promise not to fight me in the islands."

John was shocked speechless but David merely smiled and extended his arm to let John enter the restroom ahead of him. He then followed him in. A few days later, John referred to the above incident with David in a "confidential" e-mail to the Chairman of BPL's Board of Directors, in which he stated he was appalled by David's conduct. The Chairman ignored the e-mail.

In July 2009, BPL announced plans to make monthly shipments of 100,000 "attractively priced" *Real Jamaican Patties* and *Genuine Jamaican Coco-Breads* to Trinidad and Tobago for sale in that country and onward distribution throughout the CARICOM member states of the southern Caribbean. In these states, the producers of 'meat balls', (a product which many consumers purchase when patties are not available), were horrified at the announcement and expressed fear that their industry would be decimated.

The first shipment of frozen *Real Jamaican Patties* and *Genuine Jamaican Coco-Breads* arrived at the wharf in Port of Spain on 14th February 2010, though the shipment was not cleared until 22nd March 2010, after the Caribbean Agricultural Health and Food Safety Agency ("CAHFSA") had completed a study and given the shipment a clean bill of health. The patties retailed at EC$9 (25% below the equivalent unit price of 'meat balls') and BPL realized a total return of 3.5% on its investment in the venture.

Franklyn George, a 63-year-old sole proprietor, born and bred in St. Vincent, saw his share in 'meat balls' in the Vincentian market plummet and feared that unless something was done quickly, he would be forced out of business. On 20th June 2010, he wrote to the Minister of Trade in St. Vincent urging that "something be done to protect local producers against this dreadful predatory pricing". The Minister's written reply, received a few days later, unhelpfully explained that there was no national Competition Commission to deal with the issue or even to make representations to the regional Competition Commission. On 30th June 2010, George wrote to the Council for Trade and Economic Development (COTED) but did not receive a reply.

The CARICOM Competition Commission

On 29th July 2010, George wrote a long letter of complaint to the Community Competition Commission (CCC) in Suriname. The CCC requested the Jamaica Fair Trading Commission (JFTC) to undertake a preliminary examination of the business conduct of MPL and BPL. The CCC received the JFTC's report on 17th September 2010, but was not satisfied with it and so initiated its own preliminary examination under the supervision of its Chief Executive Officer. Having considered George's letter and conducted interviews with consumers, distributors, and the general public, the CCC decided that the matter required investigation.

Pursuant to a search warrant obtained from a Jamaican magistrate and accompanied by Jamaican law enforcement personnel and officials from the JFTC, CCC officers under their CEO's supervision swooped down on the offices of MPL and BPL in Kingston and took away stacks of papers and recordings. The papers from BPL showed that the company had resolved to bolster the sale of its Genuine Jamaican Coco-Breads by insisting on a term in the agreements with its distributors in the southern Caribbean requiring them to retail both the Real Jamaican Patties and Genuine Jamaican Coco-Breads as "a complete and indivisible meal".

At a CCC hearing in November 2010, George was given an opportunity to present his complaint in person, and John and David were allowed to explain why the activities of their companies did not constitute anticompetitive business conduct. The CCC Panel considered the matters presented at the preliminary examination, the documents seized in the Kingston raid, and the testimony of John, David, and George.

At the end of the proceedings the CCC made *two* decisions:

> *First Decision*: the conversation between John and David in January 2009 together with the subsequent conduct of the two companies constituted an agreement between enterprises which had the object or effect of distorting competition within the Community; accordingly, MPL and BPL were each fined EC$650,000.
>
> *Second Decision*: the decision by BPL to combine the sale of *Real Jamaican Patties* with *Genuine Jamaican Coco-Breads* did not amount to anti-competitive business conduct because this was a common and accepted practice in the Jamaican market.

MPL and BPL were dissatisfied with the First Decision and George was dissatisfied with the Second Decision and they applied, respectively, to the Caribbean Court of Justice (CCJ) for review of the decisions of the CCC.

Applications to the CCJ

In their application to the CCJ, pursuant to Article 175 (12) Revised Treaty of Chaguaramas ("RTC"), MPL and BPL made the following ***substantive*** submissions:

(a) There had never been an "agreement" between them and that, in any event, the alleged conversation between John and David could not be construed as an agreement within the meaning of Article 177 (1) (a) of the RTC;

(b) In any event, the CCC was wrong to conclude that the conduct of the Applicants amounted to anti-competitive business conduct as defined in article 177 RTC;
(c) Even if the CCC had rightly decided that their business conduct was anti-competitive within the meaning of Article 177 RTC, the fines imposed by the commission were disproportionate to the seriousness of their misconduct and thus violated the rules of natural justice and proportionality.

George, in his application submitted that the commission was wrong to decide that the combined sale of patties with coco-breads did not amount to anticompetitive business conduct.

As to *__jurisdiction__ and __evidence__* the following submissions were advanced:

(**A**) *__Jurisdiction__*

(1) In their application, MPL and BPL submitted that George did not have standing before the CCC and he should therefore never have been entertained as a complainant by the commission; in accordance with Article 175 (1) and (2) of the RTC, only members states and COTED have standing to file a complaint with the Commission. Therefore, the decision of the commission was null and void.

In his response to this application, George submitted that he clearly had standing with the commission given that he had an obvious treaty-relevant interest in complaining about the business conduct of these companies.

(2) In his own application for review, George stated that his application for review was primarily pursuant to Article 187 (d), RTC, in conjunction with Article 211, RTC, and submitted that the interpretation given by the commission in this case of what constitutes anti-competitive business conduct, if left untouched, would frustrate or prejudice the purpose and object of Chapter 8 of the RTC. Article 211 indicates that the Court has jurisdiction to hear applications by "persons" and that provision does not limit the jurisdiction of the Court to categories (a)-(d), "which are merely illustrative rather than exhaustive." Alternatively George submitted that upon a broad construction of Articles 175 (12) and 174 (4), RTC, he can be considered an "aggrieved party" within the meaning of Article 175 (12), RTC.

In its Response to George's application, BPL submitted that Articles 187 and 211, RTC, do not provide the Court with jurisdiction to entertain George's application. Even on a broad construction of Article 174 (4), RTC, the decision of the commission that a certain behaviour does not constitute "anticompetitive business conduct" under Article 177, RTC, is not a determination within the meaning of that provision.

(**B**) *Evidence*

In their application, MPL and BPL further submitted that the search in Jamaica was done pursuant to a search warrant issued by a local magistrate. However, due to certain gaps in the national legislation in Jamaica, the magistrate was not authorized by law to issue the warrant. Thus, none of the alleged evidence, notably the e-mail from John to the BPL Chairman, should have been used by the commission; its usage rendered the resulting decision void.

In his response, George stated that, even conceding that the local magistrate had had no power to issue the search warrant (due to Jamaica's failure to take apt measures to ensure the carrying out of its obligations under the RTC), there is no such thing as an automatic "exclusionary rule" that would prohibit the commission or the CCJ in the public interest from making use of evidence obtained pursuant to that search warrant.

The CCJ is now dealing *only* with points relating to the above (**A**) and (**B**) *jurisdictional and evidential* submissions. The Court will first hear leading counsel for MPL and BPL on the issue of jurisdiction, and then their junior counsel on the evidential issue, before hearing leading counsel and junior counsel for George on these respective points.