

Trinidad Cement Limited v The Caribbean Community

Citation: [\[2009\] CCJ 2 \(OJ\)](#)
Date of Judgment: 5 February 2009
Nature of Judgment: Judgment on special leave
Composition of the Court: President: M de la Bastide
Judges: R Nelson, D Pollard, A Saunders, D Bernard, J Wit and D Hayton

CCJ Application No	Parties
AR 3 of 2008	Applicant Trinidad Cement Limited
	Respondent The Caribbean Community

Counsel

- Applicant:
Dr C Denbow SC, Attorney-at-Law
- Respondent:
Ms Safiya Ali, Attorney-at-Law

Nature of Dispute

The dispute involved claims by Trinidad Cement Limited (TCL), a manufacturer and seller of grey cement in the Common Market, that the Caribbean Community (CARICOM) violated (i) its obligation to maintain the Common External Tariff (CET) in respect of cement under Article 82 of the Revised Treaty of Chaguaramas (RTC) and (ii) its commitment to the operation of the CET under Article 83(2) when respectively, the Secretary-General of CARICOM and the Council of Trade and Economic Development (COTED) authorised the suspension of the CET in response to requests by (i) Jamaica and (ii) Suriname, Antigua and Barbuda, Dominica, Grenada, St Lucia, St Kitts and Nevis and St Vincent and the Grenadines. The Applicant sought special leave to commence proceedings under Article 222 of the RTC.

Summary of Legal Conclusions and Orders

- The Court granted special leave to the Applicant.
- The Court reserved costs for a later stage of the proceedings.

Legal Provisions at Issue

- Article 10(2)(b), 82, 83(3), 187(c), 217(1), 222(a) and (b), 228(1) of the RTC

Other Relevant Community Law / Material Relied on

- N/A

Past CCJ Case Law

- *TCL v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ)

Other Sources of International Law

- *CCSU v Minister for the Civil Service* [1985] AC 374
- Article 38(1)(c) of the Statute of the International Court of Justice
- *AM & S Europe Ltd v Commission* [1983] QB 878

Facts

The Applicant, TCL, is a manufacturer and seller of cement in the CARICOM market, incorporated in Trinidad and Tobago and is a parent company of the TCL Group, comprising of Caribbean Cement Company Limited in Jamaica, Arawak Cement Company Limited in Barbados and TCL itself. Following concerns that TCL could not meet their national demand, (i) Jamaica and (ii) Suriname, Antigua and Barbuda, Dominica, Grenada, St Lucia, St Kitts and Nevis and St Vincent and the Grenadines applied, respectively, to the Secretary-General of CARICOM and to COTED, in 2008, to suspend the CET. In both cases, authorisation was granted for a period of one year.

Notably, the Secretary-General had proceeded with authorising Jamaica's request for suspension after the Competent Authority of Trinidad and Tobago had responded that it had "no objections" to Jamaica's request. With respect to the COTED authorisation, TCL complained that the authorisation to suspend represented an unexplained volte face from refusals by the Secretary-General of CARICOM shortly before the meeting at which it was approved.

Findings

The Court first considered whether TCL was a natural or juridical person of a contracting party of the RTC, within the meaning of the chapeau of Article 222. The Court found that TCL had established satisfactorily that it was a limited liability company incorporated and registered in Trinidad and Tobago. It also accepted that the Community had full juridical personality and could be sued for the acts or omissions of COTED, an organ of the Community, and those of the Secretary-General acting on behalf of COTED.

Next, the Court considered whether the Applicant had made out an “arguable case” that it had been conferred rights and benefits within the meaning of Article 222(a). After noting that Article 82 imposes an obligation on Member States to establish and maintain a CET and that that this obligation is of potential benefit to private entities in the Community who trade in goods, the Court considered arguments by the Respondent that Article 222 only applies to a restricted category of cases, and that claims that the Community was acting ultra vires were not within that category. In dismissing that argument, the Court found that while a benefit flowing from Article 82 can be suspended or altered at the discretion of COTED, there are limitations on the circumstances in which that discretion is exercisable and the way it is conducted, and that such discretion comes into play if the conditions in Article 83(2) are satisfied. Whether that condition was established depends on the material placed before or available to COTED, whether acting by itself or by its delegate, the Secretary-General of CARICOM. The Court rejected an argument that admitting a direct challenge by a private party to the decision and process of the Community would greatly hinder the functioning of the Community and constrain the exercise of stated sovereignty. The Court noted that by signing and ratifying the RTC, and conferring the Court with compulsory and exclusive jurisdiction, the Member States had transformed the erstwhile voluntary arrangements in CARICOM into a rules-based systems, and that a challenge by a private party to the decisions of the Community is not only not precluded, but a manifestation of such a system.

The Court then considered whether there was an arguable case of prejudice to the Applicant in the enjoyment of the right conferred on TCL, within the meaning of Article 222(b). Noting its previous case law, that failure by any particular Member State to fulfill an obligation to establish and maintain the CET was of potential prejudice to the beneficiaries of the CET, the Court concluded that by parity of reasoning the unlawful or improper grant of a waiver of the CET in relation to cement is of potential prejudice to the Applicant. The Court noted arguments by the parties that the Applicant had not established that the suspension had reduced demand for the price of its product, but the Court noted that the CET guidelines established that the trigger for suspension was a shortfall of the CET in excess of 25% of the regional demand and that under an Audit Report, in any event, that the TCL had capacity to satisfy more than 75% of regional demand. Having set out the allegations of TCL for projected loss and the lack of any challenge to these allegations – but without making a final determination of the matter – the Court found that TCL had advanced an arguable case of prejudice.

Next, the Court considered whether TCL had shown that Trinidad and Tobago had declined or failed to espouse a claim on TCL’s behalf under Article 222(c). By letter, TCL had invited Trinidad and Tobago to espouse its claim or give permission to TCL to do so and received a response 6 days later from the Attorney-General acknowledging and noting its content. The Court found that, as there was no suggestion that further time was needed and since the Attorney-General had not manifested a desire to espouse the claim since the commencement of proceedings Article 222(c) had been satisfied.

Finally, the Court considered whether the “interests of justice” under Article 222(d) required a grant of leave. TCL had alleged that it obtained a loan on the assumption that the CET would be maintained, that authorisation of the suspension resulted in lost revenue, and that such losses required TCL to assume additional debt of US\$25 million dollars to restructure the loan. The Court held that in these circumstances and in light of the preliminary conclusions of fulfilment of the conditions under Article 83(2), it was in the interests of justice that TCL should have an opportunity to commence proceedings.

Based on the foregoing, TCL was granted special leave to commence proceedings under Article 222 of the RTC. The Court reserved costs to a later stage of the proceedings.

This case digest should not be used as a substitute for the decision of the Caribbean Court of Justice.