

## Trinidad Cement Limited v The Competition Commission

Citation:	<a href="#">[2012] CCJ 4 (OJ)</a>
Date of Judgment:	12 November 2012
Nature of Judgment:	Judgment on the merits
Composition of the Court:	President: D Byron Judges: A Saunders, D Bernard, J Wit and W Anderson

CCJ Application No	Parties
OA 1 of 2012	<b>Claimant</b> Trinidad Cement Limited
	<b>Defendant</b> The Competition Commission

### Counsel

- Claimant:  
Dr Claude Denbow SC, Mr Darrell Allahar, Mr Jerome Rajcoomar and Mrs Donna Denbow, Attorneys-at-law
- Defendant:  
Mr Roger C Forde QC and Ms Nargis Hardy, Attorneys-at-law
- The Caribbean Community:  
Ms Safiya Ali and Mr Bevan Narinesingh, Attorneys-at-law
- The State of Trinidad and Tobago:  
Mr Ronnie Bissessar, Mr Alvin Ramroop, Ms Kamala Mohammed-Carter and Ms Avisha Panchu, Attorneys-at-law

### Nature of Dispute

The dispute concerned a claim by Trinidad Cement Limited (TCL) against the CARICOM Competition Commission (the Commission) that the latter's decision to initiate an investigation of TCL for alleged anti-competitive conduct was void as there had been no proper request for the investigation; and the Commission had failed to respect the rights of TCL as an "interested party" within the meaning of Article 175 of the RTC. At a prior stage, the Court had granted the Claimant special leave to bring proceedings under Article 222 of the RTC.

### Summary of Legal Conclusions and Orders

- The Court dismissed the Claimant's application.
- The Court ordered written submissions as to costs to be filed and exchanged within 21 days of the judgment.

### Legal Provision/s at Issue

- Article 175 of the RTC

### Other Relevant Community Law/Material Relied on

- N/A

### Past CCJ Case Law

- *TCL and TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana* [2009] CCJ 1 (OJ)
- *Doreen Johnson v Caribbean Centre for Development Administration* [2009] CCJ 3 (OJ)
- *TCL v The Caribbean Community* [2009] CCJ 2 (OJ)
- *TCL and TCL Guyana Inc v The Co-operative Republic of Guyana* [2009] CCJ 5 (OJ)

### Other Sources of International Law

- *Al-Jubail Fertilizer Co and Saudi Arabian Fertilizer Co v Council of the European Communities* [1991] ECR 1-3187
- *Dow Benelux NV v EC Commission* [1989] ECR 3137
- *Case T99/04 AC-Treuhand AG v Commission of the European Communities, Judgment of 8 July 2008*

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### Facts

The Claimant, TCL, is a company incorporated in Trinidad and Tobago. The Defendant, the Commission, is created by the RTC and bestowed with powers to *inter alia* investigate suspected anti-competitive conduct within the Community. The dispute arose out of an investigation launched by the Commission regarding alleged anti-competitive behavior by TCL.

### Findings

TCL claimed that the decision by the Commission to initiate the investigation and to hold an Enquiry ensuing from the investigation was void because: (a) there had been no proper request for the investigation; and (b) the Commission had failed to respect TCL's rights of notification and consultation as "an interested party" within the meaning of Article 175 of the RTC.

The Court first considered the Commission's contention that it was not a proper party in these proceedings. The Court noted that the Commission was created by the RTC, invested with important and far-reaching functions and powers, and had been expressly granted juridical personality allowing it to sue and be sued in its own name. On this basis, the Court concluded that original jurisdiction proceedings can properly be brought against the Commission to determine whether, in exercising or purporting to exercise its powers, it has acted in accordance with the provisions of the RTC.

The Court further disagreed with the Commission’s argument that the *initiation and conduct of an investigation* into alleged anti-competitive business conduct of an enterprise do not qualify as “determinations” of the Commission under Article 174(4) of the RTC, which are subject to the Court’s power of review under Article 175(12) of the RTC. The Court considered that, in light of its compulsory and exclusive jurisdiction, and the normative structure of the RTC, no conduct or exercise of power by a treaty-created institution should escape the judicial scrutiny of the Court. In addition, the Court found that a reasonable interpretation of the concept of “determinations” within the meaning of Article 174(4) of the RTC must include not only the relevant substantive determinations but also the procedures and practices, both at the investigation and Enquiry stage, that give rise to them.

The Court next considered, and agreed with, the Commission’s argument to the effect that TCL should first have attended the Enquiry to have the Adjudicating Panel of the Commission decide on procedural complaints TCL wished to make regarding the conduct of the Investigating Panel before seeking a ruling from the Court on such complaints. The Court noted that Rule 74 of the CARICOM Competition Commission Rules of Procedure 2011 appear to provide a proper basis for TCL to have raised with the Adjudicating Panel the issues of law which were now before the Court. The Court further clarified that, while it could admit a claim of a targeted enterprise or “party complained of” it would be manifestly unfair or unreasonable for that party to await the outcome of the proceedings before the Adjudicating Panel, it was not convinced that this was the case here. The Court thus concluded that where no Enquiry of the Commission has yet been held, it would not ordinarily take cognisance of allegations that certain procedural steps taken by the Commission during the investigation stage are unlawful or void. While this conclusion would ordinarily have been sufficient to have disposed of the proceedings, the Court proceeded to pronounce on the substantive claims put forward by TCL regarding the Commission’s investigation considering *inter alia* (a) the role of the Court as the custodian of the RTC; and (b) the fact that this case was the first of its kind.

The Court disagreed with TCL’s contention that it was an “interested party” within the meaning of Article 175 of the RTC – and entitled to the rights of consultation and notification specified in that provision – by virtue of the fact that it was the target of the Commission’s investigation. The Court found that, although it could be said that a targeted enterprise has an interest in being able to convince the Commission that under the terms of Article 175 the proposed investigation was not justified in all the circumstances of the case. Such interest is clearly outweighed by other considerations, including safeguarding the effectiveness of the investigation. In addition, the Court considered that the targeted enterprise suffered no obvious prejudice by not being consulted at least at the early stage, and TCL had not demonstrated that it had suffered any such prejudice in this case. The Court thus concluded that, in principle, a party complaining to the Commission does not fall within the expression “an interested party” within the meaning of Article 175 of the RTC.

As regards TCL's contention that there had not been a proper request for the initiation of the investigation, the Court was satisfied on the evidence before it that, despite defects in the relevant resolution from the meeting of the Council on Trade and Economic Development (COTED), it had been, from inception, the substantive intention of COTED to request that the Commission investigate TCL. Accordingly, despite defects in the drafting of the relevant COTED resolution, the Court found that the Commission was authorised to initiate the investigation in accordance with Article 175 of the RTC.

Considering the above, the Court dismissed TCL's claims and ordered the parties to file and exchange written submissions as to costs within 21 days of the date of its judgment.

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