

Trinidad Cement Limited and Arawak Cement Limited v The State of Barbados and Rock Hard Cement Limited

Citation: [\[2018\] CCJ 1 \(OJ\)](#)
Date of Judgment: 17 July 2018
Nature of Judgment: Judgment on Interim Measures
Composition of the Court: President: A Saunders
Judges: J Wit, W Anderson, M Rajnauth-Lee, and D Barrow

CCJ Application No	Parties
TTOJ2018/002	Claimants Trinidad Cement Limited and Arawak Cement Limited
	Respondent The State of Barbados
	Interveners Rock Hard Cement Limited

Counsel

- Claimant:
Mr Reginald T A Armour SC and Raphael Ajodhia, Attorneys-at-Law
- Defendant:
Ms Jennifer Edwards QC, Solicitor General and Ms Anika Jackson, Attorneys-at-Law
- Intervener:
Mr Allan Wood QC and Ms Symone Mayhew, Attorneys-at-Law

Nature of Dispute

The dispute concerned a claim by Trinidad Cement Limited (TCL) and its Barbadian subsidiary Arawak Cement Company Limited (ACCL) against the State of Barbados for the wrongful lowering of the Common External Tariff from the Council of Trade and Economic Development (COTED) agreed tariff of 60% on the importation of extra-regional “other hydraulic cement” and the misclassification of that cement contrary to Articles 9, 26, 32, 79, and 83 of the Revised Treaty of Chaguaramas (RTC). The Claimants sought interim measures to mandate that Barbados apply a 60% tariff to the Intervener’s, Rock Hard Cement Limited’s (RHCL’s), extra-regional “other hydraulic” cement under Article 218 of the RTC.

Summary of Legal Conclusions and Orders

- The Court ordered Barbados to restore and enforce the 60% rate approved by COTED at the request of the State of Barbados as a rate higher than the current CET on “other hydraulic”

cements imported extra-regionally, and that forthwith all shipments of general-purpose building cement imported into Barbados from outside the Caribbean Community and classified under heading would attract an import rate of 60%.

- The Court ordered that interim order be prospective only and therefore shall have no effect on the most recent shipment.
- The Court also ordered that the Claimants indemnify the Defendant and the Intervener for any loss or damage sustained by them if it proved at the trial of the Originating Application that such loss or damage was incurred by the unjustified imposition of these interim measures.
- The Court reserved costs of the Application for interim measures.

Legal Provision/s at Issue

- Article 218 of the RTC

Other Relevant Community Law/Material Relied on

- Part 14.2(2) of the CCJ Original Jurisdiction Rules 2017
- Article XIX of the Agreement Establishing the CCJ

Past CCJ Case Law

- *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ)
- *Trinidad Cement Limited v The Caribbean Community* [2009] CCJ 2 (OJ)

Other Sources of International Law

- *Case C-246/89R Commission of the European Communities v United Kingdom and Great Britain and Northern Ireland*
- *Fisheries Jurisdiction Case* [1974] ICJ 3
- *Case C-278/13 P(R) Commission v Pilkington Group*
- *Case C-691/15 P-R Commission v Bilbaina de Aquitranes and Others*
- *Case C-512/16 P (R) European Medicines Agency (EMA) v MSD Animal Health Innovation Gmbh and Intervet International BV*
- *Case T-125/17 R BASF Grenzach GmbH v European Chemicals Agency (ECHA)*

Facts

The Claimants, Trinidad Cement Limited (TCL) and its Barbados subsidiary Arawak Cement Company Limited (ACL) commenced proceedings against Barbados and Rock Hard Cement Limited (RHCL), over the government reducing the Common External Tariff (CET) on extra regional “other hydraulic” cement as well as the misclassification of extra-regional cement imported by RHCL as “other hydraulic cement. The Claimants obtained an order for interim measures in response to RHCL’s importation of cement from Turkey into Barbados during the

relevant period and Barbados' classification of it as "other hydraulic cement" and levying a tariff of 5%. The Claimants maintained that Barbados is obliged to levy tariff of 60% as was agreed to by The Council for Trade and Economic Development (COTED). The Claimants were made aware of numerous imported shipments by RHCL and had initially demanded that RHCL not distribute the imported cement prior to the determination of the substantive claim. Following RHCL's refusal to discontinue distribution, the Claimants applied for interim relief under Part 12 of the Court's Rules to mandate that Barbados apply a 60% tariff on "other hydraulic" cement pending the determination of the merits of the claim to avoid serious market disruption.

Findings

The issue was whether the Claimants were entitled to interim measures pending the decision in the substantive hearing, and, if so, the nature and extent of the interim relief. Under Article 218 of the RTC and/or Article XIX of the CCJ Agreement, the Claimant must satisfy the following cumulative test provided that a Party or Intervener is not able to persuade the Court that such measures would be unjust.

The Court found that the competence of the Court to grant interim relief emanates from treaties and the Rules of the Court. Article 218 gives the Court the power to prescribe interim measures if the circumstances require such to preserve the rights of parties. Part 12 of the Court's Rules set out the procedure for an interim application. It is understood that such circumstances ought to satisfy the Court that as a matter of urgency the provisional measure ought to be taken as a failure to act would subject the Claimant to serious and irreparable damage or harm. In relation to pecuniary losses, only in exceptional circumstances where the Claimant can prove the likelihood of this irreparable, pecuniary loss will pecuniary compensation be applicable as it is a general rule that such loss is usually irreparable since the main function of pecuniary compensation is to restore the aggrieved person to the previous situation.

Moreover, the Court held that it is possible to seek interim measures against an Intervener since it is recognised as having a substantial interest which could be affected by a decision in the primary proceedings necessitates consideration of that interest in deciding upon interim measures.

The Court also found it necessary to consider the extent to which the general law on interim measures/ provisional measures was applicable to the RTC as this was the first case for which an application for interim measures was being fully considered. Generally, two preliminary points may be stated. First, the principles on which national or domestic law grant interim relief are generally inadmissible or irrelevant unless they reflect the "general principles of law recognised by" the Member States of the Community. The expression of these principles need not be uniform as it is sufficient if they are widely accepted within the Community. Submissions before the Court did not evidence such in the Community. Second, whilst public international law on the matter is relevant under the treaty mandate for this Court to apply

“such rules of international law as may be applicable; it is to be appreciated that the situation under the RTC is fundamentally and dramatically different.

The RTC establishes and regulates a cohesive regional trade agreement in the form of the CARICOM Single Market and Economy (CSME) where Member States agree to *ipso facto* the exclusive and compulsory jurisdiction of the CCJ. Therefore, the issue of national sovereignty does not come into as sharp a relief in CARICOM. Also, Article 222 of the RTC confers directly to private entities the right to appear as parties in proceedings before the Court. This allows persons to claim interim measures in asymmetrical litigation against member States. This is impossible before the ICJ. Third, where an application is made for interim measures by one non-governmental entity effectively against another non-governmental entity it is appropriate for the threshold for granting relief to be reflective of the essentially private sector of the litigation. This necessitates an evaluation of the nature and extent of the likely harm considering the relative interests between the private entities directly affected. Last, the Agreement does not hold a Claimant for interim relief to the standard of demonstrating serious and irreparable harm but rather the Article gives the Court the discretion to prescribe any relief measures necessary to preserve the rights of parties.

The Court therefore found that the Claimant must satisfy the following cumulative test provided that the Intervener is not able to persuade the Court that such measures would be unjust. The first ground proving that the factual and legal grounds establish a prima facie case of success on the trial of the Originating Application. The Claimants provided evidence that the tariff imposable on both “building cement” (grey) and on “other hydraulic” cement, at the request of Barbados and with the approval of COTED, increased to 60% as embodied by the CET. The Defendant and the Intervener were unable to indicate any consent from COTED nor a statutory basis for the deduction. Therefore, there was a prima facie case of breach of the COTED sanctioned tariff on importation of relevant cement types.

Second, it must be proven that the case is one of great urgency such that serious or irreparable harm will be caused to the rights of the Claimant under the RTC if the matter was to await adjudication of the merits of the dispute and that further it is willing and able to give an appropriate undertaking to indemnify against any loss or damages suffered by such persons as the Court may consider appropriate that may result because of the grant of the interim measures. It was undisputed that the current case was one of great urgency as the cumulative effect of both present and future extra-regional imports by the Intervener posed a substantial threat to the Claimants. Without the imposition of these measures the Claimants would suffer unquantifiable losses and stand to lose a significant market share and be driven out of business. Moreover, the Claimant’s having undertaken the obligation to reimburse the Intervener (along with the Defendant) for losses sustained if it is proven during the determination of merits that the granting of interim relief was unjustified.

The Court ordered Barbados to restore and enforce the 60% rate approved by COTED at the request of the State of Barbados at a rate higher than the current CET on “other hydraulic” cements imported extra-regionally, and that forthwith all shipments of general-purpose building cement imported into Barbados from outside the Caribbean Community and classified under that heading would attract an import rate of 60%. It also ordered that interim orders would be prospective only and therefore shall have no effect on the most recent shipment.

The costs of the Application for Interim Measures were reserved.

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