



CARIBBEAN COURT OF JUSTICE

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MEDIA RELEASE
(For immediate release)

No. 05 :2023
03 March 2023

CCJ DISMISSES CLAIMS BY BRITISH AMERICAN POLICYHOLDERS

Port of Spain, Trinidad and Tobago. Yesterday, the Caribbean Court of Justice delivered its judgment in *Ellis Richards & Ors. v The State of Trinidad and Tobago AGOJ2021/001*, a case in its Original Jurisdiction. Deciding a preliminary point raised at the case management stage, the CCJ dismissed the majority of the claims brought by policyholders of British American Insurance Company Limited who alleged that Trinidad and Tobago had breached various articles of the Revised Treaty of Chaguaramas in the aftermath of the collapse of Trinidad and Tobago conglomerate, CL Financial.

The Claimants, who were nationals of and institutions established in Antigua and Barbuda and Grenada, argued that the measures taken by the Government of Trinidad and Tobago by its intervention in and assistance to CL Financial and its subsidiaries, CLICO Investment Bank Limited, Colonial Life Insurance Company (Trinidad) Limited and British American Insurance Company (Trinidad) Limited were discriminatory and breached Articles 7, 36, 37 and 38 of the Revised Treaty. The Claimants alleged that the bailout measures were taken to rescue CLF and CLICO, CIB and BAT, all subsidiaries registered in Trinidad and Tobago. This same protection was not offered to them as policyholders of British American Insurance Company Limited. Further, the Central Bank of Trinidad and Tobago took active steps to exclude them from the rescue package. They also argued that the measures imposed restrictions on the provision of cross-border insurance services in contravention of Articles 36, 37 and 38 of the Revised Treaty.

When Trinidad and Tobago filed its defence before the Court, it contended that the actions complained about by the Claimants fell outside the scope of the Revised Treaty. In their view, the actions were ‘Activities in a Member State involving the exercise of governmental authority’ under Articles 30(2) and (3) and such activities were excluded from the scope of operation of Chapter Three of the Revised Treaty. When this issue was raised at the case management stage, the Court directed the parties to make submissions on two preliminary issues. First, assuming, for the sake of argument, the truth of the matters pleaded by the Claimants in their Originating Application, do the actions of the State of Trinidad and Tobago, fall outside the scope of Chapter Three of the Revised Treaty because they fall within the meaning of Article 30(2) and Article 30(3)? And, if the answer was yes, what are the consequences of these proceedings?

Article 30(2) of the Revised Treaty states that activities in a Member State involving the exercise of governmental authority shall be excluded from the operation Chapter of the Treaty. Article 30(3) further provides that ‘activities involving the exercise of governmental authority’ means

‘activities conducted neither on a commercial basis nor in competition with one or more economic enterprises.’

Explaining the purpose and objectives of Chapter Three of the Revised Treaty, the Court observed that the Chapter addresses four fundamental freedoms or rights that help to form the core of the CARICOM Single Market Economy, namely the right of establishment; the right to provide services; the freedom to move capital and the freedom of movement of Community nationals. Among those critical elements that advance the object and purpose of the Revised Treaty are the obligations imposed by Chapter Three on Member States and the correlative rights accrued therefrom. The Court stated that by carrying out these obligations, the Member States agreed to yield aspects of their sovereignty for the collective good. However, the inclusion of Article 30 in the Treaty made it clear that Member States are still permitted to conduct certain activities which are excluded from the operation of Chapter Three. If a Member State engages in these excluded activities, its actions are exempted from the restraints and constraints imposed by the Chapter and the Court can and must so declare.

From an examination of the Claimant’s pleadings, it appeared that Trinidad and Tobago’s actions were not commercial in nature. There was no suggestion that the intervention by the Government of Trinidad and Tobago, the Ministry of Finance and the Central Bank, was done on a profit-making basis or for the purpose of competing with economic enterprises within Trinidad and Tobago or within the Member States. The activities involved, among other things, legal, accounting, and managerial intervention by the Central Bank and the direct use of financial resources of Trinidad and Tobago to mitigate the effects of the financial collapse of CLF, a private entity.

In these circumstances, the Court dismissed the claims in relation to the following Articles of the Revised Treaty, namely, Article 36 (alleged breach of duty not to impose new restrictions on the provision of services), Article 37 (alleged breach of duty not to impose discriminatory restrictions on the provision of services) and Article 38 (alleged breach of duty not to impose discriminatory restrictions on banking, insurance and other financial services) and Article 7 (discriminatory treatment) as far as it relates to Chapter Three of the RTC. The Claimants’ claim with respect to an alleged breach of Article 184(1)(j) (failure to promote the interests of consumers in the Community) and Article 7 (in so far as it is applicable to that claim) was not dismissed. The Court reserved the issue of costs to the conclusion of the matter.

The matter was heard by the Honourable Mr Justice Adrian Saunders, President and the Honourable Justices Winston Anderson, Maureen Rajnauth-Lee, Andrew Burgess and Peter Jamadar.

Mr Simon Davenport KC, Dr. Kenny Anthony, Mr Robert Strang, Mr Gregory Pantin, Mr Matthew Happold, Mr George Kirnon and Mr Miguel Vasquez appeared for the Claimants. Mrs Deborah Peake SC, Ms Tamara Toolsie, Mr Brent James, Mr Murvani Ojah Maharaj and Ms Karissa Singh appeared for the State of Trinidad and Tobago.

The full judgment of the Court and judgment summary are available on the CCJ’s website at ccj.org.

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About the Caribbean Court of Justice:

The Caribbean Court of Justice (CCJ) was inaugurated in Port of Spain, Republic of Trinidad and Tobago

on 16 April 2005 and presently has a Bench of seven judges presided over by CCJ President, the Honourable Mr Justice Adrian Saunders. The CCJ has an Original and an Appellate Jurisdiction and is effectively, therefore, two courts in one. In its Original Jurisdiction, it is an international court with exclusive jurisdiction to interpret and apply the rules set out in the Revised Treaty of Chaguaramas (RTC) and to decide disputes arising under it. The RTC established the Caribbean Community (CARICOM) and the CARICOM Single Market and Economy (CSME). In its Original Jurisdiction, the CCJ is critical to the CSME and all 12 Member States which belong to the CSME (including their citizens, businesses, and governments) can access the Court's Original Jurisdiction to protect their rights under the RTC. In its Appellate Jurisdiction, the CCJ is the final court of appeal for criminal and civil matters for those countries in the Caribbean that alter their national Constitutions to enable the CCJ to perform that role. At present, four states access the Court in its Appellate Jurisdiction, these being Barbados, Belize, Dominica and Guyana. However, by signing and ratifying the Agreement Establishing the Caribbean Court of Justice, Member States of the Community have demonstrated a commitment to making the CCJ their final court of appeal. The Court is the realisation of a vision of our ancestors, an expression of independence and a signal of the region's coming of age.

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