



CARIBBEAN COURT OF JUSTICE

**134 HENRY STREET
PORT OF SPAIN
REPUBLIC OF TRINIDAD AND TOBAGO**
Telephone: (868) 612-5CCJ Fax: (868) 624-4710
Website: www.ccj.org

MEDIA RELEASE
(For immediate release)

No. 34:2024
22 October 2024

CCJ RULES THAT TRINIDAD AND TOBAGO DID NOT BREACH ITS OBLIGATIONS UNDER THE RTC IN BAILING OUT CLICO

Port of Spain, Trinidad and Tobago. On Tuesday, 22 October 2024, the Caribbean Court of Justice (CCJ) in its Original Jurisdiction delivered judgment in the originating application of *Ellis Richards, Spencer Thomas, The Medical Benefits Board and Others v The State of Trinidad and Tobago* [AGOJ2021/001]. The claim was dismissed, and the parties were ordered to bear their own costs.

The Claimants were Antigua and Barbuda and Grenada nationals, all policyholders of British American Insurance Company Limited (BAICO), a subsidiary of CL Financial (CLF), the financial conglomerate resident in Trinidad and Tobago (the Defendant). After the collapse of CLF in early 2009, the Defendant decided to rescue or ‘bail out’ CLF and its Trinidad and Tobago subsidiaries, CLICO Investment Bank (CIB), Colonial Life Insurance Company (Trinidad) Limited (CLICO), and British American Insurance Company (Trinidad) Limited (BAT). The Defendant engaged in a series of measures including assumption of control of CLICO and BAT, provision of liquidity support, injection of funds, and the purchase of the rights of some policyholders of CLICO and BAT. These actions were implemented to mitigate the effects of the collapse on policyholders and the wider Trinidad and Tobago economy. The claim in these proceedings arose out of these actions taken by the Defendant.

In *Richards v The State of Trinidad and Tobago* [2023] CCJ 1 OJ, the Court concluded that on the facts Trinidad and Tobago's intervention in and bailout of CLF and its Trinidadian subsidiaries were properly within the exception provided in Article 30(2), that is ‘Activities in a Member State involving the exercise of governmental authority...’. This meant that the claims alleging breaches of Articles 36, 37 and 38 at the instance of BAICO policyholders were not justiciable by the Court. Two broad issues were examined in the present judgment under the headings: i. Whether the Defendant’s actions in bailing out CLICO and BAT constituted a breach of Article 184(1)(j) of the Revised Treaty of Chaguaramas (‘RTC’) and ii. Whether the Defendant’s actions in bailing out CLICO and BAT constituted a breach of Article 7 of the RTC?

The Court interpreted in good faith and applied the ordinary meaning of the articles of the RTC which fall under Chapter Eight, titled: ‘Competition Policy and Consumer Protection’. In so doing, the Court found that Chapter Eight of the RTC is concerned with encouraging a strong and vibrant Community market by Member States’ enactment of legislation and regulations prohibiting anti-competitive conduct, promoting fair competition, promoting the interests of consumers, protecting consumers, and achieving harmonization of competition policies throughout the Community. It did not create liability for individual Member States of the Community.

Further, the allegations of breaches of Article 7 and Article 184(1)(j) both depended on whether the Claimants were consumers. The Court considered three preliminary issues to determine whether the Claimants qualified as consumers to pursue the alleged breaches of the provisions of the RTC, not all of which were fully argued by the parties. These issues concerned: (1) whether the definition of consumers is restricted to natural persons or whether it includes legal persons, (2) whether the Claimants qualify as recipients of goods and services within the meaning of the RTC and (3) whether the Claimants have satisfied the two limbs of Article 184(2) to be considered consumers. As the matters were not fully argued by the parties, the Court discussed but did not decide definitively on those matters.

The Court found that Article 184(1)(j) which required Member States to provide “adequate and effective redress for consumers” could not be read in isolation from its broader legal context. In determining the legal character of Article 184(1)(j), an important first step was to appreciate that the provision must be placed in the broader context of competition policy and consumer protection law. It was also significant to consider the institutional arrangements that have been established as well as the nature of the language used in the provision.

The Court noted that the language used in Chapter Eight of the RTC in general and specifically in Article 184 is not always conducive to allocating state liability for breach. Member States are then requested to “promote the interests of consumers in the Community by appropriate measures”. Taken by themselves or in isolation, the Court considered that it was difficult to ascribe an intention to impose state liability in respect of any specific provision contained in the Article. It was not permissible to single out a specific provision from the list, for example, Article 184(1)(j), and give it a special legal status which the other provisions in Article 184 (1) cannot bear. The Court stated that it was not the intention of the framers of the RTC to ascribe national liability in respect of a particular action by a state outside of any agreed regional framework.

And, as noted by CARICOM, the RTC does not contain language which obliges Member States to provide mechanisms to facilitate the extraterritorial reach of its legislative/political/judicial decisions to other Member States. The Court agreed with Counsel that the State of Trinidad and Tobago could not have assumed control of BAICO by way of amendments to the Central Bank Act to guarantee that BAICO policyholders and/or depositors were afforded remedies in the aftermath of CLF’s collapse. To do so would have been, in the absence of regional agreement, contrary to the spirit of cooperation among CARICOM Member States.

The Court then considered whether there was a breach of Article 7 of the Treaty. The Court stated that Article 7 is not a free-standing provision whose breach may give rise to a claim at large. Any allegation of a breach of Article 7 must be accompanied by and must point to a Treaty right in respect of which the Claimant must prove discrimination in the enjoyment of the right, and that

discrimination in question must be based on nationality only. The Court considered there was no obligation to extend any relief to institutions outside of the Defendant Member State and, therefore, no right for the Claimants to obtain the relief they sought.

The matter was heard by the CCJ President, the Honourable Mr Justice Saunders, and Justices Anderson, Rajnauth-Lee, Burgess, and Jamadar. Mr Simon Davenport KC, appeared with Dr Kenny Anthony, Mr Robert Strang, Mr Gregory Pantin, Mr Matthew Happold, Mr George Kirnon, Mr Miguel Vasquez, attorneys-at-Law for Ellis Richards, Spencer Thomas, The Medical Benefits Board, and others. Mrs Deborah Peake SC, appeared with Ms Tamara Toolsie, Mr Brent James, Mr Murvani Ojah Maharaj, attorneys-at-Law for the State of Trinidad and Tobago. Ms Lisa Shoman SC, appeared with Ms Radha Permanand and Mr O'Neil Francis, attorneys-at-Law for the Caribbean Community.

The CCJ's full decision is available via www.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 six 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, Guyana, and Saint Lucia. 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.

For more information please contact:
The Public Education & Protocol Unit
Tel: (868) 612-5225 ext. 2246, 2260
Email: ccjcomm@ccj.org