

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. DMOJ2016/001

Between

CABRAL DOUGLAS

Applicant

And

THE COMMONWEALTH OF DOMINICA

**Respondent /
Proposed Defendant**

JUDGMENT SUMMARY

- [1] On 23rd February, 2014, Jamaican recording artist and entertainer, Mr Leroy Russell (also known as “Tommy Lee Sparta”), along with three other Jamaican support staff, were denied entry into the Respondent State of the Commonwealth of Dominica by immigration officials. The four men were travelling to Dominica for an international concert to be headlined by Mr Russell in observance of the annual carnival in Portsmouth. They were detained by officials at a nearby police station and deported the following day.
- [2] On 24th August 2016, the Applicant, Mr Cabral Douglas, sought special leave to commence proceedings against the Respondent. The proceedings were brought in his capacity as proprietor of his privately-owned business and organizer of the ill-fated concert. The Applicant alleged that his 25th November, 2013 contract with a Jamaican artist management firm for Mr Russell’s appearance at the concert was breached by the Respondent denying the four Jamaicans entry in violation of Articles 7, 8, 45, and 46 of the Revised Treaty of Chaguaramas (RTC). The Applicant contended that these provisions contained rights or benefits that were intended for his benefit as a proprietor in the entertainment business seeking to directly contract with skilled nationals; and that these infringements caused him consequential financial, reputational and other loss. The Applicant sought and was subsequently granted an amendment to his Originating

Application abandoning Articles 8 and 46; and ultimately relied upon breaches of Articles 7, 36, 37 and 45 only of the Treaty, coupled with the 2007 Conference Decision of the Conference of Heads of Government of the Caribbean Community.

- [3] The Court considered whether the Applicant had made out his case for special leave under Article 222 (a) and (b) as these were the provisions on which the parties had argued the case. It highlighted jurisprudence from *Myrie v State of Barbados*¹ and *Tomlinson v Belize and Tomlinson v Trinidad and Tobago*,² that the Applicant necessarily bore the burden of establishing the requirements of Article 222 (a) and (b). It also noted that the Article 222 conditions are established to differing standards of definitiveness. In relation to Article 222 (a), relating to the devolvement of Treaty rights, and Article 222 (b), regarding the prejudice in the enjoyment of these rights, the Applicant need only prove an ‘arguable case’, whereas the Applicant had to prove that the other conditions of Article 222 were established to the Court’s complete satisfaction.³ The Court also emphasized that the conditions of Article 222 must be established by an Applicant in relation to the Applicant’s own rights and benefits inuring to him under the Treaty.
- [4] The Court acknowledged that the Applicant was a national of the Respondent Contracting party and, as such, that the chapeau of Article 222 condition was satisfied. The Court then considered the Article 222 (a) condition requiring the Applicant to make out an arguable case that the RTC conferred a right that was intended to enure to his benefit directly; and, in turn, examined Articles 7, 36, 37 and 45 of the Treaty. The Court viewed that Article 7 could not be relied upon by the Applicant. Article 7 is intended to be applicable where one Contracting Party discriminates against a person of another Contracting Party based on the nationality of that person. Article 7 does not confer an inherent substantive right but rather provides the basis by which the Treaty ensures that rights granted, whether expressly or impliedly, were not breached by discriminatory actions by one Contracting Party against the nationals of another Contracting Party.

¹ [2013] CCJ 3 (OJ), (2013) 83 WIR 104 [25].

² [2016] CCJ 1 (OJ), (2016) 88 WIR 273 [28].

³ *Trinidad Cement Limited & TCL Guyana Incorporated v The State of the Co-operative Republic of Guyana* [2008] CCJ 1 (OJ), (2008) 72 WIR 137 [22].

- [5] The Applicant argued that Mr Russell's inability to provide his services as an entertainer pursuant to the 2013 contract resulted in an infringement of the freedom to provide services accorded by Article 36. The Court explained that 'new restrictions' typically constitutes measures imposing new or additional age, licensing, qualification, etc. and, as such, the enforcement of previously existing immigration regulations regarding persons entering Dominica could hardly be considered as imposing a 'new restriction' within the meaning of Article 36 (1). Further, enforcing Article 36 rights required the Applicant to satisfy the Court that the conditions-*precedent* in Article 36 have been fulfilled, i.e., the service must fall within the list of 'approved activities' in one of the 'approved sectors'; must be provided cross-border; service activities must be temporary; and the service must be 'provided against remuneration other than wages'.
- [6] The Court found that the Applicant was not a supplier of entertainment services within the meaning of Article 36. The Court acknowledged confirmation to the Bench from the Caribbean Community's CSME Unit that "entertainment services" is an approved sector, but noted that no facts were alleged that the Plymouth concert was an approved activity. The Court also noted that the RTC specified in Article 36 (4) the four modes of provision of cross-border services and expressed doubts that a service supplier of the host Member State could fall under the scope of these provisions. Article 36 (2) requires cross-border services to be provided under the same conditions enjoyed by nationals of the host Member State; and, as such, this obligation would make no sense if it were applicable to nationals of the host Member State.
- [7] The Court found it unnecessary to decide whether the Applicant could be properly regarded as a recipient of services as to be accorded a corollary right under Article 36. Whatever right the Applicant may have had did not accrue to him directly. In the circumstances of this case, any such right was contingent on the lawful entry into Dominica of Mr Russell and his entourage. It followed that the Applicant had not established an arguable case that the rights or benefits conferred by Article 36 were intended to enure to his benefit directly.
- [8] In dealing with the Applicant's allegation that by denying entry to the four men the Respondent imposed 'discriminatory restrictions' on the Jamaican service providers in breach of Article 37, the Court concluded that the Applicant failed to allege any facts that

could support an arguable case of the alleged discrimination or that any such infraction impinged a right intended to enure to his benefit directly.

- [9] The Court found the Applicant's reliance on Article 45 and the 2007 Conference Decision to be misconceived. Article 45 is largely aspirational with the dispositive rights appearing in Article 46 which concerned the movement of skilled nationals to seek employment, and the 2007 Conference Decision permitted movement for non-economic purposes. Neither of these provisions conferred rights which were intended to enure to the Jamaicans to provide services, far less so to the Applicant.
- [10] The Court ultimately concluded that the Applicant failed to satisfy the requirement under Article 222 (a) to show an arguable case that the Treaty intended that a right or benefit conferred on a Contracting Party to enure to his benefit directly. As such, the Article 222 (b) requirement to demonstrate an arguable case of prejudice in the enjoyment of those rights necessarily could not be made out. The Court also reaffirmed its jurisprudence⁴ that it is best practice to give particulars of claimed categories of damages and noted the importance of sufficient particulars being provided in a proposed Originating Application.
- [11] The Applicant had argued that the CCJ was the proper forum for the substantive hearing of this case since it involved a question of the interpretation and application of the Treaty. The Respondent on the other hand asserted that the proper forum was the Appellant's "national courts" since his claims are grounded in common law principles of freedom of contract and frustration of contract. The Court declined to decide the issue of the proper forum pointing out that its relevant function was to decide whether the requirements of Article 222 have been satisfied so as to grant special leave to commence substantive proceedings.
- [12] The Court dismissed the Application and ordered each party to bear its own costs.

This summary is not intended to be a substitute for the judgment of the Caribbean Court of Justice or to be used in any later consideration of the Court's judgment.

⁴ *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community* [2012] CCJ 2 (OJ).