IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No TTOJ2018/002

	Between	
	Trinidad Cement Limited **Arawak Cement Limited**	**Claimants**
	And	
	The State of Barbados	**Respondent**
	And	
	Rock Hard Cement Limited	**Intervener**

THE COURT

Composed of A Saunders, President, and J Wit, W Anderson, M Rajnauth-Lee, and D Barrow,
Judges

having regard to the Application to Discharge order for interim measures filed on behalf of the Intervener together with the Affidavit in Support of Mark Maloney on the 19th day of November 2018, the Affidavit in Support of Symone Mayhew filed on behalf of the Intervener on the 22nd day of November 2018, the Affidavit of Jose Sejio Gonzalez opposing the Application to Discharge the order for Interim measures together with skeleton submissions filed on behalf of the Claimants on the 27th day of November 2018, the Supplemental Affidavit of Mark Maloney filed on behalf of the Intervener on the 27th day of November 2018, the skeleton submissions of the Intervener filed on the 28th day of November 2018, the Supplemental Affidavit of Jose Sejio Gonzalez opposing the Application to Discharge the order for Interim measures filed on the 29th day of November 2018 and to the Case Management Conference held at the seat of the Court and by videoconference on November 29, 2018

And after considering the written and oral submissions made on behalf of:

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

issues on the 11th day of December 2018, the following:

RULING

[1] The Intervener, Rock Hard Cement Limited (Rock Hard), applies to discharge the interim measures, ordered by this Court in its Ruling of 17th July 2018, directing the Respondent, the State of Barbados ("Barbados") "to restore and enforce the 60% rate which the Council for Trade and Economic Development of the Caribbean Community approved in 2001 at the request of the State of Barbados as a rate higher than the current Common External Tariff on 'other hydraulic cements' imported from outside the Caribbean Community."

A brief sketch

[2] Full details of the underlying Application to this Court by the Claimants, Trinidad Cement Ltd and Arawak Cement Company Ltd, their Application for the interim measures, and the Court's reasons for deciding to grant the interim measures may be found in the Ruling, reported at [2018] CCJ 1 (OJ). In brief, the Claimants have brought an Originating Application against Barbados claiming "a declaration that Barbados contravened Articles 82 and 83 of the Revised Treaty of Chaguaramas by unilaterally reducing and/or altering the Common External Tariff ("CET") on HS 2523.90.00 'other hydraulic cements' from the rate approved by the Council of Trade and Economic Development ("COTED") for application in Barbados of 60% downward to 5%." They also claim that Barbados misclassified extra-regional cement imported by Rock Hard as 'other hydraulic cement.' Rock Hard, which stood to be directly affected by this claim, became an Intervener.

[3] The Claimants obtained the Order for interim measures in reaction to Rock Hard's importation of cement from Turkey into Barbados in July 2018 and Barbados' classification of it as "other hydraulic cement" and levying a tariff of 5%. The

Claimants' underlying claim (in their Originating Application) is that Barbados was obliged to levy a tariff of 60%. The Council for Trade and Economic Development (COTED), which is the organ of the Caribbean Community created by the Revised Treaty of Chaguaramas (RTC) that sets the CET on goods originating outside the Community, has set (i) a tariff of 15% on *building cement (grey)* and (ii) a tariff of 0 – 5% on *other hydraulic cement.* The Claimants' case is that in 2001, at the request of Barbados, COTED increased the tariff which Barbados may levy on cements to 60%.

[4] At the time when the Ruling was made there was no objection to the Claimants' proposition that the tariff had been increased on both classes of cement specified above. The Defence that Barbados subsequently filed in the underlying claim has asserted that the tariff on other hydraulic cement was not increased. The Claimants dispute this and the position will be addressed below. It is undisputed that at various times Barbados passed subsidiary legislation imposing a tariff of 60% on other hydraulic cement and the last instance was in 2009 in the Customs Tariff (Amendment) (No. 9) Order. It was on the basis that the COTED approved tariff on other hydraulic cement was 60% that the Court made the Order for interim measures against Barbados.

The Application to discharge

[5] While the order was not made directly against Rock Hard, its adverse impact was most keenly felt by Rock Hard. Accordingly, Rock Hard applied to discharge the order for interim measures. The application was made pursuant to Rule 12.2(6) of the Caribbean Court of Justice (Original Jurisdiction) Rules 2017, which provides that:

> At any time after the hearing under sub-rule (2), on application by a party, the order may be varied or cancelled on account of a change in circumstances or for other good and sufficient reason.

[6] Rock Hard contends that there has been a material change in the circumstances of the case given the effect of the Defence that Barbados filed after the Order was granted. It says the need to discharge is heightened when combined with the fact that the date of the hearing of the Originating Application, then set for 29th November 2018, was vacated and no further hearing date was set. [1] With the delay in the determination of the claim, Rock Hard submits, it will suffer greater prejudice than any prejudice to the Claimants as:

(a) It is now required to import cement at a rate of 60% when its business was established on the basis that the rate of duty would be 5%; and

(b) It is unable to sustain imports at a rate of 60% and if the order continues then Rock hard and its related companies will have to consider ceasing business which will result in losses such as job cuts.

[7] In an affidavit in support of the Application, Mr Mark Maloney, Executive Chairman of Rock Hard said the interim measures "is spelling disaster" for Rock Hard and its ancillary group of companies by causing irreparable harm. He said that Rock Hard is part of a group of companies operating in Barbados which utilises the bulk of the cement imported into Barbados for carrying on the business of construction and manufacturing of precast concrete for all types of structures such as housing solutions, commercial buildings, hotels and condominium structures and roofing titles for the local export market. The majority of Rock Hard's cement imported into Barbados is not sold on the domestic market but is supplied to the group of companies for carrying on their business in manufacturing and construction. Mr Maloney said that Rock Hard was established on the basis of a 5% rate of duty and its business model and prices are

[1] See [18] (b) below, where the claimants observe that it was in consequence of Rock Hard commencing new, related proceedings that the Court found it appropriate to vacate the hearing date so that it could manage four cases together.

derived on this basis. All contracts entered into by the Group of Companies have been priced on the basis of a maximum 5% tariff.

[8] Mr Maloney said that Rock Hard generally imports cement every four to six months and that at the time the Court made the Order for interim measures it was their expectation that the Originating Application would be heard and determined before the arrival of the next shipment. He said that with the vacation of the 29th November 2018 hearing date and no likely hearing before the end of the calendar year, there was a high probability that Rock Hard's current stock of cement would be exhausted before the matter was heard and determined. Due to their current low inventory of cement and in order to be able to continue to supply its group of companies and retail customers, a further order of cement was recently made. Unless the interim measure order is discharged, Rock Hard will have to pay 60% tariff for the cement on its importation into Barbados which is much higher than they have ever had to pay since establishing the business.

[9] Mr Maloney notes that the companies within the group had entered into fixed contracts with customers and these contracts were priced on the basis of a maximum CET of a 5% tariff rate for cement. He said that the group of companies will have to absorb the increased costs arising directly from the higher tariff rate and this will affect their viability. He submits that purchasing cement from the Claimants is not a viable option for Rock Hard because the cement manufactured by the Claimants is different in quality and composition from that of the cement manufactured in Turkey which is imported by Rock Hard.

[10] Mr Maloney said that the group of companies currently employs approximately 700 CARICOM nationals of which 50 are employed by Rock Hard. All these jobs were at

risk if the business cannot be sustained due to a 60% tariff rate. This was highly likely as the business model never contemplated such a high tariff rate and Rock Hard will lose its market share which, he said, is the desire of the Claimants.

[11] Mr Maloney also says that he has seen the Defence filed by Barbados in which the State contends that they did not obtain approval from COTED to apply a 60% tariff to other hydraulic cement. In view of this contention, Mr Maloney says, there is no basis for the State to be required to maintain a bound rate of 60%. Furthermore, as an importer of non-community goods, Rock Hard will be significantly prejudiced if it is required to pay a higher rate than the established CET and which the State of Barbados deems to be applicable.

[12] In the circumstances, Rock Hard requested that the interim measures be discharged and undertook to pay any additional sums that are lawfully due to the State of Barbados consequent on any higher rate of duty, if the Claimants are ultimately successful.

No change, no good and sufficient reason

[13] In oral submissions, junior counsel for the Claimants encapsulated their opposition as being that Rock Hard was, in reality, seeking to re-argue the Application for the grant of interim measures and this was wholly impermissible. The Claimants noted that there are two ways in which the interim measures can be discharged under the rule:

(a) because of a change in circumstances; or
(b) because there is good and sufficient reason to do so.

[14] In respect of what amounts to a change in circumstances, counsel notes that Rule 12.2 (6) is comparable to Article 108 of the Rules of Procedure of the European Court of

First Instance and Article 163 of the Rules of Procedure of the European Court of Justice, which provides that

> On application by a party, the order may at any time be varied or cancelled on account of a change in circumstances.

[15] Counsel notes that in the European Court of First Instance decisions in *Commission of the European Communities v Artegodan GmbH*[2] and *European Medicines Agency (EMA) v Pari Pharm Gmbh and Novartis Europharm Ltd*[3] the court found that a change in circumstances meant the occurrence of any factual or legal matter such as to call into question the assessment by the judge who heard the application, with regard to the conditions which are to be met before the interim measure could be granted. Counsel further notes that in the CCJ's Ruling of 17 July 2018, the Court said that the conditions to be met, and which the Court was satisfied were present in this case, were that:

(a) The Claimants had made out a prima facie case
(b) Further shipments would cause the claimant unquantifiable losses and
(c) The Claimant gave an undertaking for damages.

[16] Counsel submits that these circumstances remain unchanged and unaffected by (a) Barbados' Defence and (b) the vacation of the date for the hearing of the substantive claim. Neither of these is a factual or legal ground which can qualify as a change in circumstances under the first limb of Rule 12.2(6). The interim measures clearly still serve the purpose for which they were granted, which is a relevant consideration having regard to the decision in *European Medicines Agency (EMA) v Pari Pharm Gmbh and Novartis Europharm Ltd.*

[2] ECJ 14.02.2002 C-440/01.
[3] CJEU 18.10.2016 C-406/16.

[17] In relation to Barbados' Defence, counsel submits that not only does it not affect the Court's Ruling on the interim measures, but also it amounts to nothing more than a bare denial. To this end counsel relied on the Claimants' Reply to Barbados' Defence in which they submit that it is erroneous for Barbados to contend that it sought a derogation only in relation to cements specifically mentioned in the relevant Tariff heading and not those mentioned in the subheadings falling under the heading. The Defence was therefore implausible, inherently inconsistent with historical records of the State's actions evidenced from undeniable facts, and inherently illogical.

[18] The Claimants also submitted that Rock Hard cannot show good and sufficient reasons why the order should be discharged because:

(a) Nothing in Barbados' bare denial touches and concerns the basis upon which the Court granted the interim measures. The mere filing of the defence does not affect the Court's ruling that there exists a prima facie case of breach of the RTC and that the Claimants were likely to suffer from the continued importation of cement at 5% as opposed to 60%. Barbados also did not take a position as to whether the cement was properly classified as other hydraulic cement;

(b) The vacating of the original hearing date has been brought about, in a not insignificant part, by the further applications in SLUOJ 2018/001 and BB0J2018/001 commenced by Rock Hard;

(c) It would be manifestly unjust for the interim measures to be cancelled on the basis that the Court decided to exercise its case management powers to deal expeditiously and fairly with the four matters filed before the Court; and

(d) The interim measures did not affect Rock Hard's July 2018 shipment. Rock Hard has not therefore been affected by the interim measures.

Barbados' Defence

[19] The Barbados Defence, to which Rock Hard ascribes significant effect, is that when Barbados sought and obtained from COTED in the year 2001, a derogation from the CET authorizing Barbados to increase the tariff to 60% on the importation of cement,

it did not seek that increase on *other hydraulic cement*, the classification into which Rock Hard's cement allegedly and disputedly falls. Therefore, Barbados now says, it was a mistake for the State to have thought the derogation applied to such cement, and to have passed in domestic legislation a tariff of 60% on other hydraulic cement in the form of Customs Tariff (Amendment) (No. 9) Order. In the course of the hearing there was some debate about whether, in view of this newly stated position, it would be appropriate to continue the interim measures against Barbados, and require that Barbados levy a 60% tariff, when the position of the State is that the CET rate of 0 – 5% remained applicable to other hydraulic cement.

[20] The Court notes the scepticism of the Claimants about what they no doubt regard as revisionism by Barbados. The Claimants' disposition is reinforced by the failure of Barbados to correct the alleged mistake that remains perpetuated in the 2009 Order, which imposes the 60% tariff. However, the Court also notes that Barbados has never in fact charged 60% on the importation of Rock Hard's cement which they claim is "other hydraulic cement", and that the 5% imposed on that cement is consistent with what Barbados now asserts to be its obligation under the CET. The Court declines to comment, at this stage, on the relative merits of the substantive arguments of the parties and confines itself to observing that Barbados' Defence is, at this stage, argument and not fact. Therefore, it does not amount to the change of circumstances which Rock Hard needs to establish. Moreover, one of the disputes to be resolved remains whether Rock Hard's cement is correctly classified as other hydraulic cement.

Vacation of hearing date

[21] In itself, the vacation of the hearing date does not provide good reason for varying or cancelling the order for interim measures. All that the pushing back of the hearing date

does, is to make it likely that Rock Hard will import a shipment of cement before the substantive dispute is heard, whereas before the date was vacated such importation was not likely. When the Court made its order in July 2018, it was intended to apply to any future importation of cement. It so happened that the frequency of shipments, being approximately every four to six months, meant Rock Hard was not likely to be affected by the order for the interim measures, if the claim was heard and judgment rendered before the next shipment. That was happenstance. It was not the case that the Court made its order on the premise that there would be no shipment that the order would affect and, implicitly, that if the outlook changed and a shipment was expected that would be reason to vary or cancel its order. As the Claimants submitted (see [15] above), the Court's reasons for granting the order are clearly discernible and the likelihood, at that time, that it would not 'bite' the next shipment of cement was no part of the reasons for granting the interim measures.

[22] It should be acknowledged that the vacating of a hearing date, when interim measures are granted with that date in mind, combined with other factors, may amount to a change of circumstances or a good and sufficient reason for varying or cancelling the interim measures. Thus, in a hypothetical case where there are monthly importations, the protraction of proceedings may produce a cumulative effect where, by being repeatedly levied over successive months, the tariff is clearly crippling. That example shows what is missing here.

[23] The Court emphasizes that this decision to retain the ordered interim measures requiring the imposition of a 60% tariff does not at all purport to determine whether the applicable tariff payable on "other hydraulic cement" is 5% as contended by Rock Hard or 60% as argued by Trinidad Cement Limited and Arawak Cement Limited. It is a unique

feature of this case that the importing country, Barbados as the Defendant State, also contends that the applicable tariff is 5%. Accordingly, Rock Hard may rely on this assertion as well as the terms of the Ruling of 17th July 2018 by this Court to recover for the excess payment of tariff if it is finally determined that the applicable tariff is 5%.

Conclusion

[24] The Claimants' resistance to the application is well founded. There is no change of circumstances or good and sufficient reason to vary or cancel this Court's order for interim measures. The application is refused. The costs of this application shall be determined on the resolution of the substantive dispute as to classification.

Orders of the Court

[25] It is hereby ordered that:

(a) The Intervener's application to discharge the interim measures is refused.

(b) Costs to be determined on the resolution of the Originating Application.

/s/ A Saunders

The Hon Mr Justice A Saunders (President)

/s/ J Wit

The Hon Mr Justice J Wit

/s/ W Anderson

The Hon Mr Justice W Anderson

/s/ M Rajnauth-Lee

The Hon Mme Justice M Rajnauth-Lee

/s/ D Barrow

The Hon Mr Justice D Barrow