

Rock Hard Cement Limited v The State of Barbados, The Caribbean Community and Arawak Cement Company Limited

Citation: [\[2020\] CCJ 2 \(OJ\)](#)
Date of Judgment: 10 June 2020
Nature of Judgment: Judgment on merits
Composition of the Court: President: A Saunders
Judges: J Wit, W Anderson, M Rajnauth-Lee, D Barrow,
A Burgess and P Jamadar

CCJ Application No	Parties
BBOJ2019/001	Claimant Rock Hard Cement Limited
	Defendants The State of Barbados The Caribbean Community
	Intervener Arawak Cement Company Limited

Counsel

- Rock Hard Cement Limited:
Mr Allan Wood QC, Ms Symone Mayhew, Attorneys-at-Law
- The State of Barbados:
Ms Gayl Scott, Mr Jared Richards, Attorneys-at-Law
- The Caribbean Community:
Dr Corlita Babb-Schaefer, Mr O’Neil Francis, Attorneys-at-Law
- Arawak Cement Company Limited:
Mr Eamon Courtenay SC, Mr Raphael Ajodhia, Attorneys-at-law

Nature of Dispute

The dispute involved a number of claims by the Barbados-incorporated company, Rock Hard Cement Limited (RHCL) against the State of Barbados (Barbados) and the Caribbean Community (CARICOM) with respect to the application of the Common External Tariff (CET)

applied to its product cement. Specifically, the Claimant argued that (i) contrary to Articles 26 and 83 of the Revised Treaty of Chaguaramas (RTC), the alteration of the CET in respect of “other hydraulic cement” imported into the region and distributed by the Claimant exceeded the applicable tariff; (ii) Barbados and CARICOM breached their obligations to consult with the Claimant under Articles 26 and 83 of the RTC before altering the CET and (iii) the Claimant had a substantive legitimate expectation that the CET would be maintained.

Summary of Legal Conclusions and Orders

- The Court found that the Defendants had breached their obligations to consult.
- The Court granted a hearing on costs.

Legal Provisions at Issue

- Articles 26, 83(1), (3)(d), (f), (g), 221 of the RTC

Other Relevant Community Law / Material Relied on

- Decision of the Eightieth Special Meeting of COTED (held on 17 June 2019) concerning the application of Barbados to suspend the CET (The COTED Decision)
- Part 31.1(3) of the CCJ Original Jurisdiction Rules 2015

Past CCJ Case Law

- *Doreen Johnson v Caribbean Centre for Development Administration* [2009] CCJ 3 (OJ)
- *Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening; Rock Hard Cement Limited v The State of Barbados and The Caribbean Community* [2019] CCJ 1 (OJ)
- *Trinidad Cement Limited v The State of Trinidad and Tobago, Rock Hard Distribution Limited and Mootilal Ramhit and Sons Contracting Limited Intervening; Trinidad Cement Limited and Arawak Cement Company Limited v The State of Barbados, Rock Hard Cement Limited Intervening; Rock Hard Distribution Limited v The State of Trinidad and Tobago and The Caribbean Community; Rock Hard Cement Limited v The State of Barbados and The Caribbean Community* [2019] CCJ 4 (OJ)

Other Sources of International Law

- ECJ Case T-347/03 *Branco v Commission of the European Communities*
- *Infinis Energy Holdings Limited v Her Majesty’s Treasury and HM Revenue & Customs* [2016] EWCA Civ 1030
- *Johann Luhrs v Hauptzollamt Hamburg-Jonas*, Case 78/77 of 1978
- *Joined Cases C-37/02 and C-38/02 Di Lenardo and Dilexport v Ministera del Commercio con l’Estero* [2004] ECR I-6911
- WTO Panel Report, *Japan - Measures Affecting Consumer Photographic Film and Paper*, 1050, WT/DS44/R (31 March 1998)

- ECJ *Parliament v Council*, C-48/14, EU:C:2015:91
- *The Vienna Convention on the Law of Treaties*

Facts

The Claimant company, incorporated and operating in Barbados, specialises in the importation and distribution of a product described as “other hydraulic grey cement”. This product is in competition with cement produced by the intervener, Arawak Cement Company Limited, operating out of Barbados. On establishment of the Claimant company, the Claimant negotiated with Barbados to operate under a CET of 0% to 5%. Barbados subsequently applied to the Council of Trade and Economic Development (COTED) to suspend the tariff and increase it to 35%.

Findings

The Claimant alleged that the decisions (i) were inimical to its legitimate expectation that the CET of 0% to 5% would be maintained; (ii) contravened the requirement for consultation under Articles 26 and 83 of the RTC and the revised guidelines on the process for the application and suspension of the CET; and (iii) were ultra vires. The Claimant sought (i) judicial review to quash COTED’s decision to authorise Barbados to increase the CET on “other hydraulic cement” to 35%; (ii) an order to restrain Barbados from increasing the CET on the cement to 35%; and (iii) an order to require Barbados to implement the tariff rating of 0% to 5% instead.

In considering whether the Claimant had a substantive legitimate expectation that Barbados would apply the CET of 0% to 5% indefinitely, the Court examined (i) the principles of legitimate expectations under international law generally; and (ii) whether and how legitimate expectations operated under CARICOM and EU Law, respectively. Based on its previous decisions, the Court concluded that the doctrine of legitimate expectations may be applied to cases of Community Law including those in which the CET is at issue. On the authority of EU Law, the Court articulated the cumulative requirements that must be met to prove a substantive legitimate expectation: (i) an assurance originating from or properly made on behalf of the community given to the person concerned; (ii) the assurance must give rise to an expectation on the part of the person to whom it is addressed that they will receive or continue to receive some benefit; (iii) the possibility of the adoption of a change in policy must not have been reasonably foreseeable; and (iv) there must be no overriding public interest consideration that justifies the disappointment of the expectation. The Court reasoned that (i) the burden of proof in respect of the first three requirements was on the Claimant and (ii) if the Claimant met that burden, the burden would shift to the defendant in respect of the fourth requirement. The Court determined, however, that the facts of the case only required it to consider the first condition.

In respect of the first condition, the Court considered separately, the communications between the Claimant and Barbados in 2015 and 2019. With respect to the former, the Court noted that

the Claimant had not grounded its claim on an assurance made by COTED, but rather on an alleged assurance made by Barbados. Based on the finding that the Barbados decision was taken unilaterally, without the notification of COTED, the Court determined that COTED could not be deemed to be a party to the alleged assurance made by Barbados even where the Claimant alleged that COTED acquired subsequent knowledge of that decision. Accordingly, neither COTED nor CARICOM could be deemed to have contributed to the substantive legitimate expectation arising therefrom. With respect to the latter, however, the Court determined that COTED's consideration of Barbados' application would suffice to make COTED a party to the assurance, if in fact, it had been made.

The Court (i) examined the process of consultation under Article 26 of the RTC; (ii) considered its previous decision in which it articulated that the consultative process should be transparent and efficient; and (iii) assessed the level of transparency implied by the amendments to Article 83 of the RTC and the revised guidelines on the process for application of suspension or alteration of the CET. The Court determined that the defendants had a duty to consult with the Claimant before the application to COTED was made and that it failed to do so in a manner consistent with the above. Although, the Court stated that, based on the foregoing conclusion it should make appropriate declarations, it reasoned that the decisions to suspend and increase the CET should not be quashed because (i) the consultation was intended to serve the limited purpose of providing information about the impact of the suspension; and (ii) the policy makers had a wide range of discretion by which they could take decisions concerning the application for suspension or alteration of the CET.

In considering the Claimant's allegation that the Defendants actions were ultra vires on various grounds and therefore subject to judicial review by the Court, the Court concluded, based on common law grounds, the rule of law, and its previous decisions, that it had such jurisdiction to review the decision. The Court, however, noted that the discretionary nature of the decisions in question implied a narrower scope of application for the exercise of judicial review but that such decisions would, nonetheless, be subject to the rule of law and should not manifest any abuse of discretionary power. In the circumstances, the Court found no deviation from the observance of the rule of law, or any abuse of discretionary power in respect of the decisions. Accordingly, the Court did not countenance this claim.

The Court concluded that (i) the Community failed to establish and maintain an efficient system of consultations at the national and regional level and (ii) the Defendants failed to ensure that the Claimant was consulted before the application for the suspension of the CET was made and approved. All other claims were dismissed. The Court granted a hearing on the issue of costs.

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