[2008] CCJ 1 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No. AR 1 of 2008

Between

Trinidad Cement Limited
TCL Guyana Incorporated Applicants

And

The Co-operative Republic of Guyana Respondent

THE COURT

composed of M de la Bastide, President and R Nelson, D Pollard, A Saunders, D Bernard, J Wit and D Hayton, Judges

having regard to the application with annexures, written submissions of the parties and to the public hearing held on 30th June, 2008

after considering the oral submissions made on behalf of:

- the Applicants, by Dr C Denbow SC, Attorney-at-law
- the Respondent, by Mr D Singh SC, Attorney General

on the **22nd day of July, 2008** makes the following

INTERIM ORDER

Background

[1] These proceedings are historic as this is the first matter in which the Caribbean Court of Justice ("the Court") has been called upon to exercise its original jurisdiction. The Court accordingly has no precedents to follow in its interpretation and application of the Revised Treaty of Chaguaramas Establishing the Caribbean Community including the CARICOM Single

Market and Economy ("the Treaty") although over time, the decisions of the Court will generate a body of precedent upon which it shall rely.

[2] In the exercise of this jurisdiction, the Court is mandated by Article XVII of the Agreement Establishing the Court ("the Agreement") and Article 217 of the Treaty to apply such rules of international law as may be applicable. This requires an expertise from counsel that is entirely different from that to which one is accustomed in municipal law proceedings.

[3] The matter before the Court is an application by Trinidad Cement Limited ("TCL") and TCL Guyana Incorporated ("TGI") for special leave to appear as parties before the Court in proceedings filed by those two entities against the State of Guyana. For the reasons that follow the Court has decided that the Court should adjourn the application for special leave to 10th November, 2008 and that an order should be made in the terms set out herein.

The Parties

[4] TCL is a limited liability company incorporated under the Companies Ordinance Chapter 31 No. 1 of the Revised Laws of Trinidad and Tobago 1950 and continued under the Companies Act 1995 (now Chapter 81:01). It has its registered office situated at Southern Main Road, Claxton Bay in the State of Trinidad and Tobago. TCL is also registered as an external company under the Companies Act No. 29 of 1991 of the Laws of Guyana with its registered office in that State situated at Lot 2-9 Lombard Street, GNIC Compound, Georgetown. The primary activity of TCL is the manufacture and sale of cement qualifying for Community area treatment.

[5] TGI is a limited liability company incorporated under the Companies Act No. 29 of 1991 of the Laws of Guyana. Its registered office is situated at the same location in Guyana as TCL's Guyana office. TGI's primary activity is the

packaging of bulk cement produced by TCL for sale on the Guyanese market. TCL holds 80% of the issued share capital of TGI. The two companies are referred to throughout this judgment collectively as "the Applicants".

[6] The State of Guyana is the Respondent in these proceedings. It was represented before the Court by its Attorney General. The State of Trinidad and Tobago was entitled to appear and was served with a copy of the proceedings. It appeared by counsel but at the case management conference preceding the hearing it had indicated that it merely wished to observe the proceedings.

The Nature of the Applicants' claims

[7] The Applicants seek special leave to appear as parties for the purpose of filing an originating application claiming compensation from and/or injunctive relief against the State of Guyana. Their proposed originating application which was annexed to the application for special leave was filed on 3rd April, 2008. At the hearing of the application for special leave the Applicants sought amendments to the proposed originating application. The State of Guyana did not object to the making of these amendments and the Court accordingly granted the same.

[8] The Applicants allege a breach by Guyana of the provisions of Article 82 of the Treaty which oblige Guyana to establish and maintain a Common External Tariff ("CET") on cement imported into that State from third States i.e. countries outside the Caribbean Community. The CET has been incorporated into the laws of Guyana by section 7 of the Customs Act, Chapter 82:01 of the Laws of Guyana together with the First Schedule thereto.

The Contentions of the Parties

Submissions of the Applicants

[9] The Applicants allege that by Article 82 of the Treaty, Guyana, in common with other Member States of the Caribbean Community, is required to establish and maintain a CET in respect of all goods which do not qualify for Community treatment in accordance with plans and schedules set out in the relevant determinations of CARICOM's Council on Trade and Economic Development ("COTED").

[10] A product which qualifies for Community Treatment is one which has been accorded Community origin status under Article 84 of the Treaty and which is entitled to enter the customs jurisdictions of Member States without the application of import duties or quantitative restrictions. The CET on cement is imposed at the rate of 15% on imports of cement from third States as reflected in the First Schedule to the Guyana Customs Act Chap. 82:01.

[11] The imposition of the CET on imports of cement into Guyana from third States is of great commercial benefit to the Applicants because of the protection thereby afforded to their products. When the CET is imposed by Guyana both TCL and TGI enjoy a competitive advantage over imports of cement from third States which do not qualify for Community treatment in accordance with the Treaty.

[12] At the present time TCL and TGI are not enjoying such a competitive advantage because of a decision of the Government of Guyana to suspend the implementation of the CET on imports of cement into Guyana from third States. The complaint of the Applicants is confined to the period of suspension from January 2007 and continuing ("the relevant period") although the suspension commenced some years before January 2007.

[13] Article 83 of the Treaty provides for COTED to authorise an alteration or suspension of the CET by a Member State. The Government of Guyana has neither sought nor been granted permission from COTED to alter or suspend the implementation of the CET on cement. Nonetheless Guyana is allowing cement from third States to enter Guyana without paying the CET at the rate of 15% as mandated by the relevant provisions of the Treaty.

[14] The Applicants claim that they have fulfilled all the relevant criteria for obtaining special leave as Guyana has breached a provision of the Treaty intended to enure to their benefit directly and that they are prejudiced by the breach. By virtue of the matters set out at [4] and [5] they claim to be "nationals" of Trinidad and Tobago and Guyana respectively and they allege that the Governments of both States have declined or refused to espouse their claim. Accordingly, they seek special leave to appear as parties so that they may seek redress from the Court.

Submissions of the Respondent

[15] The Attorney General of Guyana admitted that Guyana had suspended implementation of the CET on cement and that COTED had not authorised any suspension in respect of the relevant period. The suspension was justified by the critical shortage of the commodity faced by that State in light of its urgent developmental needs as a "disadvantaged country" pursuant to Article 1 of the Treaty.

[16] The Applicants have been guilty of abusing their dominant position in the market and the Court should consider the need to protect consumers within the Community. Throughout the Community there were complaints about the inability of TCL to supply the Caribbean market and in the period between 2001 – 2007 CET waivers on cement were sought and obtained from COTED by Suriname, Trinidad and Tobago, Jamaica and the entire grouping of States comprising the Organisation of Eastern Caribbean States (OECS).

[17] The right to institute proceedings before the Court is a right peculiarly vested in States Parties. Judicial review in municipal proceedings would have been the more appropriate course for the Applicants to take. The bringing of proceedings by one State against another under the Treaty may have serious political implications for the continuation and future of the Community because the Revised Treaty intends that Contracting Parties operate as joint partners in the Caribbean Community and Caribbean Single Market and Economy. Only in the event of a breach of Community obligations of the greatest magnitude is it foreseeable that such proceedings would be contemplated by one State against another.

[18] The Applicants must prove that they are "nationals" in terms of the Treaty and the definition of a "national" in Article 1 of the Treaty is "a national within the meaning of paragraph 5(a) of Article 32 of the Treaty. That definition requires eight different conditions to be met and the Applicants have not met them. Further, because of the seriousness of the nature of the matter here, the standard of proof in an application for special leave must be higher than in an ordinary civil action in a domestic court.

[19] The obligation to implement the CET pursuant to Article 82 of the Treaty does not yield any benefit to the Applicants nor do they thereby accrue any right. Since no right or benefit accrues to the Applicants they are ineligible for special leave. In any event, no causal link has been established between the Applicants' alleged loss and the failure on the part of the State of Guyana to implement the CET.

The Jurisdiction of the Court

[20] Guyana and Trinidad and Tobago are parties both to the Treaty and to the Agreement. Each of them has ratified and implemented these instruments

which confer on the Court compulsory and exclusive jurisdiction to hear and determine disputes concerning the interpretation and application of the Treaty. By reason of Article 216(1) of the Treaty and Article XVI(1) of the Agreement both States have submitted to the jurisdiction of the Court. Further, Article 216(2) of the Treaty and Article XVI(2) of the Agreement confer on the Court jurisdiction to determine its jurisdiction in the event of a dispute concerning its jurisdiction.

[21] In his submissions, Counsel for the Respondent challenged the jurisdiction of the Court to entertain the application for special leave by suggesting that the Applicants were not nationals within the meaning of Article 32(5) of the Treaty and, as to TGI, that this company was not entitled to institute proceedings against the State of Guyana.

[22] In the opinion of the Court, it is clear that Applicants for special leave are required to bring themselves within the meaning of "persons" set out in the chapeau of Article 222 of the Treaty which provision reads as follows:

> ***"Locus Standi of Private Entities***
> *Persons, natural or juridical, of a Contracting Party may, with the special leave of the Court, be allowed to appear as parties in proceedings before the Court where:*
>
> *(a) the Court has determined in any particular case that this Treaty intended that a right or benefit conferred by or under this Treaty on a Contracting Party shall enure to the benefit of such persons directly; and*
>
> *(b) the persons concerned have established that such persons have been prejudiced in respect of the enjoyment of the right or benefit mentioned in paragraph (a) of this Article; and*
>
> *(c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:*
>
> *(i) omitted or declined to espouse the claim, or*
>
> *(ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and*
>
> *(d) the Court has found that the interest of justice requires that the persons be allowed to espouse the claim."*

[23] Specifically, it must be determined whether for the purposes of Article 222 it is sufficient for a company to be incorporated or registered under the domestic legislation of a Contracting Party. The second question to be determined is whether Article 222 of the Treaty accords to one who is held to be a person, natural or juridical, of a Contracting Party the right to sue that Contracting Party.

[24] The resolution of these issues goes to the jurisdiction of the Court. Given their importance for the determination of the rights and obligations of the Contracting Parties as well as private entities in their jurisdictions, the Court would wish to afford the Community and the Member States parties to the Treaty the opportunity to make written legal submissions on these issues before making a determination on the application for special leave.

[25] The Court therefore reserves its decision on the application for special leave to appear by the Applicants and orders the Registrar, within seven days, to issue a Notice directed to the Contracting Parties other than Guyana and to the Community giving them the opportunity, if they so wish, to make written submissions on the two issues referred to at [23].

[26] The Notice shall be served together with copies of the application of the Applicants, their proposed Originating Application and the annexures to it, the written submissions of the parties to the Court (but not the legal authorities supporting those submissions) and this interim Order.

[27] The Community and the Contracting Parties other than Guyana shall be notified in the Notice that written legal submissions, if any, must be filed on or before 13th October, 2008. A Contracting Party or the Community may together with its written submissions make a request for an opportunity to

make oral submissions as well on the same legal issues. The Court will hear the oral submissions, if any, on 10th November, 2008.

[28] The Court

a. Adjourns this application to 10th November, 2008 for further hearing, if necessary.

b. Reserves the issue of costs.

Mr Justice Michael A de la Bastide (President)

Mr Justice Rolston Nelson

Mr Justice Duke Pollard

Mr Justice Adrian Saunders

Mme Justice Desiree Bernard

Mr Justice Jacob Wit

Mr Justice David Hayton