IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No OA 1 of 2012

Between

Trinidad Cement Limited **Claimant**

And

The Competition Commission **Defendant**

THE COURT,

composed of D Byron, President and A Saunders, D Bernard, J Wit and W Anderson, Judges

having regard to the order made on the 12th day of November 2012, requesting written submissions as to costs and to the written submissions filed on behalf of the Claimant on the 3rd day of December 2012 and the written submissions and authorities filed on behalf of the Defendant on the 29th day of November 2012

issues on the **29th day of May 2013** the following

SUPPLEMENTARY JUDGMENT AS TO COSTS

[1] On the 12th day of November 2012 this Court dismissed the claim made in the originating application and refused the declarations and orders sought in respect of the actions and decisions of the Defendant and ordered the parties to file and exchange written submissions on the issue of costs within 21 days.

[2] In its written submissions the Claimant argued that the most appropriate order for costs is that the Commission should bear its own costs and a part of the Claimant's costs. In support of this the Claimant contended that 'each party succeeded on some and failed on other heads' and that the circumstances are exceptional within the meaning of Part 30.1(3) and (4) of the Rules. The Claimant also argued that the Defendant's conduct prior to and in the course of the proceedings unreasonably caused the Claimant to incur the costs of commencing the proceedings.

[3] The Defendant submitted that the Claimant should be ordered to pay the Defendant's full costs to be agreed or assessed. It relied on the principle set out in Part 30.1(2)(a) of the Rules that an unsuccessful party should pay the costs of the successful party provided that the successful party had applied for costs in its pleading. The Defendant also argued that there were no exceptional circumstances to warrant the making of an order apportioning costs of the matter.

[4] The Court has already made a number of costs orders and has commenced to develop the principles on which it would act. The governing rule is set out in Part 30.1. Sub-rule 3 permits the Court where each party succeeds on some heads, or the circumstances are exceptional, to order that the costs are shared or that each party bear their own costs. Sub-rule 4 permits the Court in exceptional circumstances to order that the successful party bear the full costs of the proceedings, where the party has vexatiously caused the proceedings to be commenced.

[5] There have been a number of cases in which the Court has exercised the powers in sub-rule 3 and made orders for the sharing of costs. In *TCL v The Caribbean*

Community[1] a case in which the Applicant was successful in obtaining one of the declaratory orders for which it had claimed, the Court considered that it had acted properly in bringing the action. It also considered that the action was important not only to the Applicant but to the entire private sector in the region to obtain the pronouncement of the Court on the matters raised. The costs order was for the Community to bear one half of the costs of the Applicant. In *TCL and TCL Guyana Inc v The Co-operative Republic of Guyana*[2] the Applicants were successful in obtaining declaratory and mandatory orders. Guyana was ordered to pay two thirds of the Applicants' costs. In *TCL and TCL Guyana Inc v The Co-operative Republic of Guyana*[3] the Court granted a declaration in favour of the Applicants but dismissed the application against the Attorney General. The Court ordered Guyana to pay to the Applicants one-half of their taxed costs of the application.

[6] The Court has considered the meaning of exceptional circumstances in this Part. In *Hummingbird Rice Mills Ltd v Suriname and the Caribbean Community*[4] an important principle was elucidated. While making it clear that it did not intend to erode the basic principle that costs would normally follow the event it stated that:

> "At this nursery stage of the development of Caribbean Community law, it is important that the burden of establishing the basic principles underpinning the Single Market should not weigh too heavily and disproportionately on private entities and thus discourage the bringing of important issues of economic integration law before the Court."

The Claimant was successful in obtaining declaratory and mandatory orders against Suriname, but failed to obtain any order for the damages it claimed. Its claims against the Caribbean Community failed in their entirety. The Court ordered Suriname to pay 50% of the Claimant's costs and ordered that as between the Claimant and the Community, each party should bear its own costs.

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[1] [2009] CCJ 4 (OJ)
[2] [2009] CCJ 5 (OJ)
[3] [2010] CCJ 1 (OJ)
[4] [2012] CCJ 2 (OJ)

[7] This case arose out of the first investigation undertaken by the Competition Commission. Although after full consideration the matter was dismissed in its entirety it was clear that there was uncertainty about the procedural requirements for initiating the process, within the Competition Commission and the Caribbean Community itself. It is therefore necessary to concede that there was justification in the commencement of the proceedings. The Court considers that with the assistance of counsel for the parties in this case it has been able to construe the Articles of the Revised Treaty relating to the institution of investigations into suspected anti-competitive conduct.

[8] As a result the Court was able to clarify the issues relevant to this case and to review rules of the Commission. This review revealed weaknesses, in that areas of the rules were not completely consistent with the Treaty provisions and fell short of the requirement of procedural fairness. The Court made some recommendations for redress. The Court encouraged the Commission to review its rules to ensure that they are in concert with the Revised Treaty and reflect the appropriate standards of fairness. To that extent the Commission and the Community have received benefits from the litigation. To require the Claimant, a private entity to bear the full costs of the proceedings in these circumstances would not be warranted. It would be disproportionate to require it to bear the cost of clarifying the rules and procedures on this important aspect to the Single Market and Economy. At this fledgling stage of the Single Market and Economy, it is important that the private litigants are not discouraged from initiating process.

[9] However, the judgment of the Court indicated that there was sufficient evidence to justify the Commission taking the steps it did. In the exceptional circumstances of this case there should be an order for the payment of a portion of the costs incurred by the Commission.

[10] In the circumstances of the case the ends of justice would be met by an order for TCL to pay 30% of the costs of the Competition Commission to be taxed if not agreed.

Order

[11] The Court orders that the Claimant pay 30 % of the costs of the Defendant to be taxed if not agreed.

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The Rt Hon Mr Justice Dennis Byron, President

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The Hon Mr Justice A Saunders The Hon Mme Justice D Bernard

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The Hon Mr Justice J Wit The Hon Mr Justice W Anderson