

IN THE CARIBBEAN COURT OF JUSTICE

Original Jurisdiction

CCJ Application No. OA 2 of 2009

Between

Trinidad Cement Limited

TCL Guyana Incorporated

Claimants

And

**The State of the Co-Operative
Republic Of Guyana**

Defendant

Executive Summary

- [1] Trinidad Cement Limited, (“TCL”) is a company incorporated in Trinidad and Tobago. TCL has an 80% shareholding stake in TCL Guyana Incorporated (“TGI”), a company incorporated in Guyana. TCL manufactures cement at its plant in Trinidad and Tobago. TGI bags and sells in Guyana cement produced by TCL in Trinidad.
- [2] TCL and TGI brought proceedings against the State of Guyana seeking various forms of relief. These included:
- (a) Declarations that Guyana was in breach of the Revised Treaty of Chaguaramas (the “RTC”) by failing to maintain and implement the Common External Tariff (“CET”) on cement;
 - (b) An order directing Guyana to reinstate the CET, and
 - (c) Damages for lost profits suffered by the companies together with exemplary damages.
- [3] The CET is a fundamental pillar in the establishment of a Caribbean Single Market and Economy. Its primary purpose is to encourage and promote the production of goods within CARICOM. The CET on cement not qualifying for Community treatment was fixed at 15%.

- [4] In its defence and written submissions Guyana originally relied on Article 179 (abuse of dominant position) and Article 184 (promotion of consumer interests in the Community) of the RTC as a defence to the claim. These Defences were struck out by the Court on the ground that such issues would be more appropriately and effectively investigated by a national Fair Trading Board or the regional Competition Commission. The allegations as to abuse of dominant position were irrelevant in this case as they could not excuse a breach of any obligation undertaken by Guyana under the RTC or relieve Guyana of liability for such a breach.
- [5] Guyana conceded that it was in breach of the RTC by suspending the CET without first obtaining the approval either of the Council for Trade and Economic Development (“COTED”) or of the Secretary-General as required by Article 83 of the RTC. But Guyana denied that the Claimants had suffered any loss, or if they had, that there was a direct causal link between such loss and the unauthorised suspension of the CET by Guyana.
- [6] The following emerged as the core issues in the case:
- (1) Could Guyana be liable in damages for its breach of the RTC?
 - (2) Was TGI entitled to damages for such economic loss as it had suffered as a result of Guyana’s unauthorised suspension of the CET? If so, what was the quantum of that loss?
 - (3) Was the remedy of exemplary damages available to the Claimants?
 - (4) Was declaratory relief sufficient to vindicate the Claimants’ Treaty rights? Did this Court have the power to make a mandatory order against Guyana? If so, should it make such an order?

Damages

- [7] The Court held that Article 9 of the RTC and the principle of full effectiveness of Community law implied that the remedy of compensation was available to individuals and private entities where rights which enure to them under the RTC were infringed by a Member State. But State liability in damages is not automatic. A party will have to demonstrate that the provision alleged to be breached was intended to benefit that person, that such breach is serious, that there is substantial loss and that there is a causal link between the breach by the State and the loss or damage to that person.
- [8] The breach committed by Guyana was a serious one since: Guyana had put forward no good reason for failing to seek authorisation to suspend the CET when waivers were being granted frequently to a number of CARICOM States; none of the witnesses called by Guyana could explain the continued unwillingness or refusal by Guyana to honour its treaty obligations by seeking prior approval before unilaterally suspending the CET; Guyana was fully aware that it had not followed the proper procedures; Guyana's suspension has been extended from year to year without a break and Guyana had repeatedly ignored the intimations of COTED and specific requests by the Claimants' representatives to regularise its position and implement the CET.
- [9] During the trial TCL abandoned its claim for compensatory damages. It emerged that, despite Guyana's serious breach, TCL had still managed to sell all the cement it could produce without making a loss on the cement that might otherwise have been shipped to Guyana. As to TGI's claim for damages, that company had first to demonstrate that its losses were incurred in circumstances that rendered those losses sufficiently proximate to the precise breach in question. A reduced flow of TCL cement into Guyana might result in financial loss to various enterprises concerned in one way or another with the importation, marketing, sale and delivery of TCL cement in Guyana, but such enterprises would not necessarily be able to sustain a claim for damages against the Government of Guyana if the reduction in the flow was due to an unauthorised suspension of the CET on cement.

- [10] On the facts in this case no special circumstances had been proved which established the requisite degree of proximity between Guyana's breach of the treaty and such loss as TGI claimed to have suffered as a result. Accordingly, the Court declined to award TGI any compensatory damages.
- [11] As to exemplary damages, the weight of academic and judicial opinion is that international law has not accepted as one of its principles the concept of punitive damages. The Court was not persuaded that such damages could be awarded by it and in this case did not award any such damages.

Remedies for the breach other than damages

- [12] The Court accepted that the waiver by Guyana of the CET in 2006 may have been prompted by a fitful, unreliable supply of cement by TCL but there was no explanation for the persistent refusal of Guyana thereafter to seek the sanction of COTED or the Secretary-General in suspending the CET. In some cases the pronouncement of a declaration may be enough to vindicate the inherent value of the Treaty rights contravened. But in others a simple declaration would not be enough in light of the nature and gravity of the breach.
- [13] Counsel for the Claimants invited the Court to make a mandatory order that Guyana re-impose and maintain the CET. Counsel appearing for Guyana had no instructions to undertake that Guyana's breach would be brought to an end. In those circumstances there would be grave consequences for the rule of law in the CARICOM Single Market if a coercive order were not made.
- [14] Taking into account all the matters referred to in [7] above the Court issued a declaration that Guyana is in breach of the provisions of Article 82 of the RTC by failing to implement and maintain the CET. The Court made an order requiring Guyana within 28 days to re-impose the CET and thereafter to maintain it until and unless a suspension is authorised by COTED or the

Secretary-General pursuant to Article 83. Guyana was further ordered to pay two-thirds of the Claimants' costs, to be taxed if not agreed.