[2011] CCJ 1 (OJ)

IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No AR 1 of 2011

Between

Hummingbird Rice Mills Limited **Applicant**

And

Suriname **First Respondent**
and
The Caribbean Community **Second Respondent**

THE COURT,

composed of R Nelson, A Saunders, J Wit, D Hayton and W Anderson, Judges

Having regard to the application for special leave to commence proceedings filed at the Court on February 24, 2011, together with the annexures thereto, the written submissions of the Applicant filed on April 28, 2011, the written submissions filed on behalf of the First Respondent on May 20, 2011, the written submissions filed on behalf of the Second Respondent on May 20, 2011 and to the public hearing held on June 3, 2011.

and after considering the oral submissions made on behalf of:

- **the Applicant,** by Mr Elvis Connor, Attorney-at-Law appearing in association with Ms. Linda Greene, Attorney-at-law
- **the First Respondent,** by Mr Hans Lim A Po, Attorney-at-Law
- **the Second Respondent,** by Ms Gladys Young, Attorney-at-Law appearing in association with Ms. Safiya Ali, Attorney-at-law

issues on the 27th day of June, 2011 the following

JUDGMENT

Summary of facts

[1] By a notice of application dated and filed on February 24, 2011 Hummingbird Rice Mills Limited (hereinafter referred to as "the Applicant") applied to this Court pursuant to Article 222 of the Revised Treaty of Chaguaramas ("the Revised Treaty") and Part 10 of the Caribbean Court of Justice (Original Jurisdiction) Rules 2006 ("the Rules") for special leave to commence proceedings as a private entity against the State of Suriname and the Caribbean Community.

[2] The dispute between the parties arises out of the importation into Suriname over the period January 2006 to June 14, 2010 ("the relevant period") of wheat or meslin flour other than durum flour (hereinafter referred to as "wheat or meslin flour") from the Kingdom of the Netherlands at a 0-5% rate of customs duty instead of the rate of 25% fixed by the Common External Tariff ("the CET") of the Caribbean Community issued by the CARICOM Secretariat.

[3] The Ministry of Trade and Industry of Trinidad and Tobago in February 2006 notified the CARICOM Secretariat of the non-imposition by Suriname of the CET on wheat or meslin flour. The Secretariat wrote to the government of Suriname in March 2006 concerning that intimation. The CARICOM Secretariat reported the matter to the Twenty-First Meeting of the Council for Trade and Economic Development ("COTED") whose functions are spelled out at Article 15 of the Revised Treaty as including overseeing the operation of the Caribbean Single Market and Economy. At that meeting held on May 12-13, 2006, COTED gave Suriname time to investigate the matter and report to the Secretariat.

[4] At the Twenty-Second meeting of COTED held from November 16-17, 2006 the CARICOM Secretariat reported that Suriname admitted importing flour from the Netherlands at a 0% tariff but that the flour so imported was classified under Tariff heading 1101.00.10 and that under that heading, based on the Harmonised

System, the CET was 0-5%. Delegates queried whether the imported flour should have been classified as wheat or meslin flour which attracted a CET of 25%. Durum flour bore a CET of 0-5%. Suriname promised to investigate the matter further and report by November 25, 2006.

[5] On or about December 29, 2006 Suriname requested from the Secretary-General authority to suspend the CET on wheat or meslin flour citing concerns about the quality of the flour supplied regionally, the fact that the price of bread was controlled and sustained by long-term arrangements with Dutch suppliers, and issues relating to the cost of living. By letter dated January 24, 2007 the Secretary-General denied Suriname's request. The Secretary-General's decision not to authorize the suspension requested was reported to the Twenty-Third Meeting of COTED held from May 16-18, 2007. The Twenty-Fourth Meeting of COTED in 2007 did not consider the non-imposition of the CET on wheat or meslin flour imported into Suriname.

[6] At the Twenty-Fifth meeting of COTED on January 25, 2008 Suriname declared that it had charged no duty on flour from extra-regional sources, and requested that flour be placed on a list of items which were to be exempt from the CET. COTED denied this request but accepted an undertaking from Suriname to update the Secretariat within 14 days of the meeting (February 8, 2008) concerning the application of the CET on flour in Suriname.

[7] In June 2008, the CARICOM Secretariat reminded Suriname of the February 2008 deadline, and in October 2008 Suriname advised the Secretariat that consultations were taking place in Suriname with a view to rescinding the Ministerial Decree of 1997 that allowed for duty-free imports of flour.

[8] At the Twenty-Sixth Meeting of COTED held from November 24-25, 2008 Suriname announced that it would adopt a two–track approach to the problem of non-compliance, which would involve a change of policy that would have to be

effected in Parliament. It would at the same time tackle the issue of quality with the assistance of CROSQ (the CARICOM Regional Organization for Standards and Quality) and of Trinidad and Tobago. COTED urged Suriname to reinstate the CET on imports of flour from third countries.

[9] At the Twenty-Seventh Meeting of COTED held from May 11-12, 2009 COTED accepted the indication by Suriname that it would be in full compliance by December 31, 2009 following the budget debate in that country. At the Twenty-Eighth meeting of COTED held from October 5-8, 2009 Suriname repeated its undertaking of full compliance by December 31, 2009. Suriname did not meet that deadline. At the Twenty-Ninth meeting of COTED held from February 8-9, 2010, Suriname explained that the budget debate was still ongoing but that it anticipated the CET would be reinstated by June 15, 2010, a commitment which COTED accepted.

[10] A Ministerial Decree dated February 21, 2010 imposed a tariff of 25% on "flour of wheat or mixed seeds" other than durum flour. A second Ministerial Decree dated June 8, 2010 revoked a Ministerial Decree of April 10, 1997 suspending the levying of import duties on "flour of wheat or mixed seeds" other than durum flour from June 15, 2010. Suriname was in full compliance with the CET on flour at the date of this application and has been so compliant from June 15, 2010 to the present time.

[11] The Applicant intends, if special leave is granted, to contend that the non-implementation of the CET by Suriname over the relevant period constituted a breach of Article 82 and that it unlawfully failed to incorporate the CET into the laws of Suriname contrary to Article 83. The Applicant will further contend that the Secretary-General through COTED unlawfully accepted Suriname's undertakings and acquiesced in COTED's extensions of time granted for compliance with the CET. The Applicant will also contend that the Secretary-General illegally and irrationally made an implied decision to authorize the

suspension of the CET over the relevant period. The Applicant intends to invite the Court to grant judicial review of the alleged unreasonable delay and failure of the Caribbean Community to impose sanctions against Suriname for its non-compliance over the relevant period. Further, the Applicant claims to have suffered substantial financial losses through the acts and/or omissions of Suriname and the Caribbean Community through the Secretary-General and COTED. It is on this basis that the Applicant intends to claim from both Respondents damages in the amount of US$3,003,000 with interest.

[12] The oral and written submissions of the Respondents were designed to show that the case proposed by the Applicant and outlined above was not viable or admissible, and therefore special leave to commence proceedings should be refused.

The contention of the Respondents

[13] Counsel for Suriname contended that Suriname had incorrectly classified wheat or meslin flour under the tariff heading for durum wheat flour which had a prescribed rate of 0-5%. Once the error was discovered, Suriname embarked on a process of establishing and maintaining the CET on flour from non-regional sources. That process was complicated by reason of the fact that bread, the end-product of flour, was designated as a basic food item to be kept at a price affordable to the people. There were pricing, finance, supply and quality problems. Suriname in good faith reported regularly to COTED and ultimately restored the CET to its full effectiveness. Indeed, the Applicant and Suriname worked with COTED in the process of restoring the CET. COTED ultimately accepted June 15, 2010 as the date for restoring the CET, and Suriname complied. In essence COTED accepted Suriname's undertakings and the explanations it provided. In effect COTED accepted the time-frame proposed by Suriname for the transition over the relevant period to full restoration of the CET. Indeed the

Applicant indicated its consent to that time-frame in a letter dated December 23, 2009.

[14] Suriname submitted that the precedents established by this Court in *Trinidad Cement Limited and TCL Guyana Incorporated v The Co-operative Republic of Guyana* (No. 1)[1] and *Trinidad Cement Limited v The Caribbean Community (No. 1)*[2] did not apply to the instant case since at the date of filing the present proceedings the CET had been restored to full effectiveness, and 9 months had elapsed between the reinstatement of the CET and the filing of this application. The Applicant could not invoke a right or benefit conferred by the Revised Treaty on the Applicant directly.

[15] Counsel for Suriname further submitted that the remedies sought (including damages) did not promote the goals of the Revised Treaty or the functioning of the CSME and the CET. None of the remedies sought conferred a right or benefit on the Applicant directly. The proper forum for a claim by private entities against a Member State was the national court, which might refer an issue to this Court pursuant to Article 214 of the Revised Treaty.

[16] Suriname urged a construction of the CET provisions of the Revised Treaty that was flexible and capable of accommodating, *inter alia*, critical government needs and cost of living issues. Counsel referred to a Protocol to amend Article 82 of the Revised Treaty now signed by 10 States but which is not yet in force.

[17] Counsel for the Caribbean Community submitted that the Applicant's claim was based on actions by Suriname and not by the Community and therefore special leave should not be granted to bring an action against the Community.

[18] The Community contended that the Secretary-General could not make decisions through an Organ of the Community, to which the Secretary-General had to

[1] [2009] CCJ 1 (OJ); (2009) 74 WIR 302
[2] [2009] CCJ 2 (OJ); (2009) 74 WIR 319

report. The Secretary-General had made no decisions as to Suriname's non-application of the CET. Further the Secretary-General could not make a decision to authorize a suspension pursuant to Article 83 by implication.

[19] The Community submitted that COTED acted fairly, reasonably and justly in 2006 in giving Suriname sufficient time to investigate the allegation that it had not implemented the CET in relation to flour imported from third countries. COTED neither authorized a suspension of the CET nor acquiesced in the non-application of the CET on flour. COTED properly sought a resolution of the matter in the first place. COTED's acceptance of Suriname's undertakings to investigate and to reinstate the CET on flour imports within the time-frame proposed by Suriname was rational, reasonable and within the parameters of the Revised Treaty. The time taken by COTED to consider the matter and have the CET on flour imports reinstated in Suriname was not unreasonable in the circumstances. Mainly on the basis of the arguments outlined above, Suriname and the Community invited this Court not to grant the Applicant special leave to commence proceedings in this Court.

GROUNDS

Applications pursuant to Article 222 of the Revised Treaty

[20] The range of the submissions advanced by the Respondents was very wide and, as is clear from the preceding narrative, often entered upon substantive issues, such as considerations that COTED might properly entertain in deciding to grant authorization to suspend the CET. The Court stresses, as it did in *TCL and TGI v Guyana* (No. 1)[3] that "... at this stage, it is sufficient for the applicant merely to make out an arguable case...". Nor does the Court seek to make definitive findings of fact, especially since ultimately other Member States may wish to join the proceedings, if leave is given, and to adduce facts not before the Court at this

[3] [2009] CCJ 1 (OJ); (2009) 74 WIR 302 at [33]

stage. Accordingly, applications pursuant to Article 222 should focus on satisfying the conditions contained therein.

A person, natural or juridical of a Contracting Party

[21] The Applicant is a limited liability company incorporated in Trinidad and Tobago in 1995 as Hummingbird Grains Limited under the Companies Ordinance, Ch. 31 No. 1. The company was continued under the Companies Act Ch. 81:01 and after several name changes reverted to its present name. It is common ground that the Applicant has satisfied this requirement in the chapeau of Article 222.

Conferment of a right or benefit – Article 222(a)

[22] This Court held in *TCL and TGI v Guyana (No. 1)*[4] that the imposition on the Member State of an obligation pursuant to Article 82 of the Revised Treaty to "establish and maintain a common external tariff ..." was "of potential benefit to all legal or natural persons carrying on business in the Community." Such benefit is conferred on the Member State and enures directly to the private individual or entity. No satisfactory argument has been presented to the Court why this proposition should not apply to a producer or manufacturer of flour, as it applies to a producer or manufacturer of cement.

Prejudice in the enjoyment of a right or benefit – Article 222 (b)

[23] In *TCL v Caribbean Community (No. 1)*[5] this Court referred to its earlier decision in *TCL v Guyana (No. 1)*[6] at [34] (supra) and reiterated that "failure by any particular Member State to fulfil an obligation to establish and maintain the CET was of potential prejudice to beneficiaries of the CET".

[4] [2009] CCJ 1 (OJ); (2009) 74 WIR 302 at [34]
[5] [2009] CCJ 2 (OJ); (2009) 74 WIR 319
[6] [2009] CCJ 1 (OJ); (2009) 74 WIR 302

[24] In this respect counsel for Suriname urged that the proposed claim for damages lacked any particulars and therefore should be dismissed out of hand. The contention was that the proposed claim for damages, as it now stands, was not viable for want of particulars. However, there is arguably potential prejudice as indicated in [23] above, from the admitted failure of Suriname to establish and maintain the CET on flour and from the alleged acceptance of and acquiescence in that state of affairs over the relevant period by the Community. For these reasons there is an arguable case, as counsel for the Applicant contends, that the conditions mandated by Article 222(a) and (b) can or will be conclusively satisfied at the substantive hearing: see *TCL v Caribbean Community (No. 2)*[7]. Whether the alleged breaches will result in damages and, if so, in what sum do not fall to be decided on this application for access to the Court to commence proceedings. Nevertheless, in future it might be better practice for claimants to give sufficient particulars of the damages claimed in the proposed Originating Application.

Espousal of the claim by Trinidad and Tobago – Article 222 (c)

[25] In the light of the letter dated April 6, 2011 from the Attorney General of Trinidad and Tobago, there is no dispute that Trinidad and Tobago has declined to espouse the Applicant's claim and does not object to the Applicant espousing its own claim.

The interests of justice – Article 222 (d)

[26] Where the Contracting Party declines to espouse the claim of its national, it would normally be in the interests of justice that the Applicant national be permitted to advance its own cause before this Court. It is also in the interests of justice that the many key issues raised in this application, which for the most part are of general importance and properly belong to the substantive hearing, be aired at the

[7] [2009] CCJ 4 (OJ); (2009) 75 WIR 194 at [17] and [18]

substantive hearing consequent upon the grant of special leave to bring substantive proceedings.

[27] Counsel for the Community raised the question whether the Applicant properly understood the scope of the powers of the Secretary-General and of COTED. Even if the Applicant did not, the Court had to bear in mind that the Applicant sought in addition redress against the Community for the allegedly unreasonable length of time during which the Community accepted and acquiesced in the failure of Suriname to reinstate the CET. This issue as well as the claim for damages against both Respondents were sufficient to pre-empt summary dismissal of the claim against the Community at this stage.

OPERATIVE PART

[28] In the result, the Court granted the Applicant special leave to commence proceedings against the Respondents before the Court pursuant to Article 222 of the Revised Treaty and to appear as a party to such proceedings. Costs of this application are to abide the outcome of the intended proceedings.

_____/s/_____
The Hon Mr Justice Nelson

_____/s/_____
The Hon Mr Justice Saunders

_____/s/_____
The Hon Mr Justice Wit

_____/s/_____
The Hon Mr Justice Hayton

_____/s/_____
The Hon Mr Justice Anderson