IN THE CARIBBEAN COURT OF JUSTICE
Original Jurisdiction

CCJ Application No TTOJ2018/002

Between

Trinidad Cement Limited & Arawak Cement Limited	**Applicants**
And	
The State of Barbados	**Respondent**
And	
Rock Hard Cement Limited	**Intervener**

THE COURT

Composed of A Saunders, President, and J Wit, W Anderson, M Rajnauth-Lee, and D Barrow, Judges

Having regard to the application for interim measures and its affidavit in support filed on behalf of the Applicants on July 6, 2018, and the affidavit opposing the application for interim measures filed on behalf of the Intervener on July 10, 2018, and the skeleton arguments of the Intervener filed on July 11, 2018 and the reply on points of law filed on behalf of the Applicants on July 11, 2018 and to the hearing held via videoconference on July 11, 2018

And after considering the oral submissions made on behalf of:

- **The Applicants,** by Mr Reginald T. A. Armour SC and Raphael Ajodhia, Attorneys-at-Law
- **The Respondent,** by Ms. Jennifer Edwards, QC, Solicitor General and Ms. Anika Jackson, Attorneys-at-Law
- **The Intervener,** by Mr Allan Wood QC and Ms. Symone Mayhew, Attorneys-at-Law

Delivered on the 17th day of July 2018, the following:

RULING

Introduction

[1] By Order of this Court dated the 22nd day of June, 2018, the Applicants Trinidad Cement Limited (TCL), a company based in Trinidad and Tobago, and its subsidiary, Arawak Cement Company Limited (ACCL), a company based in the State of Barbados, together manufacturers and distributors of cement in the State of Barbados, were granted Special Leave pursuant to Article 222 of the Revised Treaty of Chaguaramas, (RTC) to bring an Originating Application against the State of Barbados claiming wrongful lowering of the Common External Tariff (CET) from 60% on the importation of extra-regional cement and the misclassification of that cement contrary to Articles 9, 26, 79, 82 and 83 of the RTC. An Application to Intervene filed on the 6th day of June 2018 on behalf of Rock Hard Cement Limited ("RHCL" or "the Intervener"), a company incorporated in St. Lucia and engaged in the importation of extra-regional cement, was also granted. The hearing of the Originating Application has been set down for Thursday the 29th day of November 2018.

[2] By Notice of Application for Interim Measures filed on the 6th day of July 2018 ("the Application"), the Applicants sought urgent interim relief against the State of Barbados pursuant to Article 218 of the Revised Treaty of Chaguaramas and Part 12 of the Caribbean Court of Justice (Original Jurisdiction) Rules 2017 ("the Rules") in respect of a shipment of cement classified as "other hydraulic cement" imported by the Intervener from the State of Turkey and which arrived in the Port of Bridgetown, Barbados on 9th July 2018 on board the *M/V Sarita Naree*. The Intervener had submitted the requisite documents and paid a 5% tariff on 6th July 2018 and was, as at the time of the hearing of the Application on July 11, 2018, engaged in the process of offloading the cement. The Applicants sought an order to mandate that the State of Barbados "restore and enforce" a "60% Common External Tariff (CET)" on the importation of

all extra-regional cement classified as "other hydraulic cement*"* and further, an order requiring that Barbados impose an additional 55% tariff on the shipment of cement which arrived on 9th July 2018 on board the *M/V Sarita Naree*.

[3] Pursuant to Articles 82 and 83 of the Revised Treaty, the Council for Trade and Economic Development (COTED) has the responsibility for deciding the applicable CET on goods originating outside the Community. The applicable CET depends on the classification category into which the goods fall. COTED has approved and requires Member States to apply (i) a CET of 15% on *building cement (grey)* and (ii) a CET of 0 - 5% on *other hydraulic cement*. In 2001, the State of Barbados approached the 11th Meeting of COTED and sought an increase in these rates on the basis that the State needed to "protect its local manufacturing sector from the severe pressures of liberalisation and globalisation." COTED approved the request and Barbados increased the tariff to 60% for both building cement (grey) and other hydraulic cement. The increased tariff has been applied in Barbados since 2001. In 2009 the State of Barbados enacted this altered tariff as part of the laws of Barbados by the Customs Tariff (Amendment)(No.9) Order.

[4] The Intervener has no manufacturing capacity either in Barbados or elsewhere within the Community and imports cement from the extra-regional states such as Turkey and Portugal. In or around January 2015, the Intervener announced its intention to import cement into Barbados. On 8th October 2015, the State of Barbados removed the tariff of 60% and re-imposed the pre-2001 5% CET on cement classified as "other hydraulic" cement, although the tariff of 60% in the Customs Tariff (Amendment) (No. 9) Order remained unaltered. Accordingly, the rate of 5% was charged on cement classified by Barbados as "other hydraulic" cement imported by the Intervener from Turkey and Portugal.

[5] The Applicants contend that 60% tariff was applicable to "other hydraulic cement" and further that the imported cement should be classified as "building cement (grey)". The issues of classification of the imported cement and of the precise tariff payable are matters for the substantive hearing of the Originating Application. The current application is solely concerned with whether the Applicants are entitled to interim measures pending the decision in the substantive hearing, and, if so, the nature and extent of the interim relief.

The Application for Interim Relief

[6] The Applicants note that RHCL has imported shipments of approximately 20,000 tonnes in November 2015; 20,000 tonnes in June 2016; 9,000 tonnes in December 2016; 10,500 tonnes in August 2017; and 12,000 tonnes in February 2018. In June 2018, the Applicants became aware that a further shipment estimated to be approximately 38,000 metric tonnes was headed from Turkey and destined for both Barbados and Trinidad and Tobago. On 20th June 2018, the Applicants wrote to RHCL who confirmed the pending shipment. The Applicants sought an undertaking that RHCL would not distribute the imported cement prior to the determination of the substantive claim in the Originating Application proceedings, but RHCL refused to give such an undertaking. The Applicants renewed their request for an undertaking in open Court at the Case Management Conference held on 22nd June 2018, but RHCL expressly and firmly stated that its position remained unchanged. On the same day, in open Court, the Applicants expressed their intention to seek interim measures under Part 12 of the Court's Rules so as to mandate that Barbados apply a 60% tariff on "other hydraulic" cement pending the determination of the merits of the claim.

[7] The Application was eventually filed on 6th July 2018. In the affidavit in support of the Application, Mr. Jose Seijo Gonzalez, the Managing Director of TCL, said that on or

about 3rd July 2018 the *M/V Sarita Naree* arrived in Trinidad and Tobago with approximately 38,000 metric tonnes of cement from Turkey and was expected to arrive at the Port of Bridgetown on or about 10th July 2018. The deponent believed there was a real possibility that the cement would be imported into Barbados at a tariff of 5% rather than the COTED approved 60% and that this was likely to cause a serious market disruption which could not be compensated in monetary terms. In a supplemental affidavit filed 9th July 2018, Mr. Gonzalez said that the *M/V Sarita Naree* left the Port of Chaguaramas, Trinidad and Tobago at approximately 7:00am on 9th July 2018 and was expected to arrive in Barbados at 6pm on the same day. He therefore requested an urgent hearing of the application. The Court then scheduled a hearing for 11th July 2018.

Applicants' arguments in support of the application

[8] In exercising the jurisdiction to grant interim measures, the Applicants suggest that the Court draw guidance from the European Court of Justice (the ECJ) decision in *246/89R Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland.* In that case, the ECJ said that interim measures "may not be ordered unless there are circumstances giving rise to urgency and factual and legal grounds establishing a prima facie case for the measures applied for" and that the urgency of the application "must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage."

[9] The Applicants also submitted that the Court should have regard to the principles outlined in the common law Jamaica case of *National Commercial Bank of Jamaica v Olint Corporation Limited*[1] which supports the granting of interim relief where (i) the Applicants will be prejudiced if the order is not granted, (ii) the extent of that prejudice may not be compensated by an award of damages or enforcement of an undertaking, or

[1] [2009] 1 WLR 1405.

it is unlikely that the other party could satisfy the award and (iii) it is unlikely that it will turn out that the order was wrongly granted.

[10] The Applicants contend that the Application should be granted as they would suffer irreparable unquantifiable losses including: the business adjustment cost to the plant relative to the entry into the market of such a significant quantity of cement; the loss in technical efficiency to get back to where the plant was before the latest incursion of Turkish cement; the cost to rebuild the market to a pre-60% state; the past and continuous rescheduling of time-tabled capital expansion, inclusive of the shelving of investment opportunities for growth and development; and the loss of human capital as the Applicants currently employ approximately two hundred (200) persons directly and indirectly, and the entry of the cement into the market may result in a decision to reduce labour costs in order to render the business sustainable in the short to medium term.

[11] The Applicants also relied on a Report, particularly an addendum to the Report dated 25th June 2018, prepared by the Business Facilitation Studies Limited (BFSL) which assessed the impact of reduction of the CET on *other hydraulic cement* on ACCL. In the main Report the BFSL found that a "[conservative] estimated loss in revenue on the Gross Financial Operations of ACCL to be $15,702,784 US over the period November 2015 to January 2018." In the addendum, the BFSL estimated the losses to be suffered by ACCL on the assumption that varying percentages of the incoming shipment of cement would be distributed in Barbados. It was found that if 33% of the cement on board the *M/V Sarita Naree* were to be distributed in Barbados ACCL would lose approximately US $4.5 million over the next seven months. If 50% is distributed that loss would increase to approximately US $7.4 million. If distribution amounted to 66% losses would be approximately US $10.4 million.

Opposition to the Application by Rock Hard Cement Limited

[12] An affidavit in opposition to the Application was filed on 10th July 2018, by the Managing Director of RHCL, Mr Mark Maloney. The deponent stated the *M/V Sarita Naree* arrived in Barbados on 9th July 2018 and that the volume of the cement on the ship was 12,734 metric tonnes and not 38,000 tonnes as stated by the Applicants. 75% of this shipment would be allocated for use by local manufacturers and the remaining 25% or 3,183.50 tonnes would enter the general market. The deponent stated that the relevant customs declarations have been made, duties have been paid and the offloading of the cement has commenced. He said that it would be a great prejudice to the company if the interim measures were granted at this late stage.

[13] Mr Maloney stated that the Application was yet another attempt by the Applicants to eliminate RHCL's competition. Prior to RHCL entering the market, the Applicants enjoyed a monopoly and the costs of cement in Barbados was far in excess of world market prices. Since RHCL entered the market the Applicants have had to reduce their prices. The Applicants' officers and representatives made various statements in the public indicating that they would be adopting measures to address the competition from RHCL. He said that to counter the competition, the Applicants employed various anti-competitive measures. For example, in early 2016 TCL embarked on a region wide campaign to register the trademark "Rock Hard Cement" in Jamaica, St. Lucia, Grenada, Barbados and Trinidad and Tobago. The applications for registration were withdrawn upon the objection of RHCL.

[14] Mr Maloney also deposed that RHCL's business was established on the basis that it would pay a 5% CET and its prices were based on that assumption. If a rate of 60% duty was to be suddenly imposed, this would spell disaster for the business as it would be forced to pass the cost on to its consumers with the resultant effect that the price of its cement would increase significantly and would now be significantly more expensive

than the Applicants' cement. He therefore asked that the application be refused with costs to RHCL.

Further legal objections by RHCL

[15] On 11th July 2018, the day of the hearing of the Application, RHCL filed written submissions. RHCL asserted that as an intervening party its position must be considered in weighing the balance of convenience as to whether interim measures ought to be granted. It was submitted that the imposition of a 60% rather than a 5% tariff rate would give the Applicants the very relief they seek in their claim prior to the trial of merits of the case. Additionally, it was significant that the Applicants did not mention a willingness to give an undertaking as to damages not only to the State of Barbados but also to RHCL, who was the "party" that would suffer loss if the measure was granted. Nor did the Applicants address their financial ability to pay damages. Reliance was placed on the domestic law decisions of *Belize Alliance of Conservation Non-Government Organisations v Department of the Environment of Belize*,[2] *TPL Ltd v Thermo-Plastic AW*[3] and *American Cyanamid v Ethicon*[4] to support the position that without the undertaking and the evidence of its financial ability to honour same the Court is prevented from making a proper assessment of the balance of convenience.

[16] The Intervener also submitted that the Applicants failed to disclose a real prospect of succeeding in the claim. What Barbados sought and obtained was the supposedly temporary suspension of the CET and the imposition of a higher rate in keeping with its rights under the World Trade Organization (WTO). Where the State decides that the reason for continuation of a derogation has ceased and the State determines that it will bring the CET back into operation, the RTC contains no provision imposing an

[2] [2003] UKPC 63.
[3] [2014] JMCA Civ 50.
[4] [1975] AC 396.

obligation on the State to obtain the approval of COTED. The Applicants' contention to the contrary was therefore misconceived.

[17] It was also argued that the Intervener would be irreparably prejudiced by the re-imposition of the 60% rate three years after it was lowered. RHCL established its business based on the lowered rate and it would be wholly unjust for the Court to grant an order to in effect alter the status quo back to a position that long ceased to exist. If the Applicants had a genuine grievance they would have acted three years ago when the rate was lowered. Additionally, the CET did not exist solely for the benefit of the Applicants. The Intervener was also entitled to enjoy its benefit. The Intervener was entitled to the benefit of the 5% CET on its goods imported from third states and this must also be weighed in the balance.

Barbados non-opposition of the Application

[18] At the hearing of the Application on 11th July 2018, the Solicitor General, on behalf of the State of Barbados, did not oppose the Application. The State had been considering the reimplementation of the 60% tariff but at the time RHCL submitted the necessary declarations and paid the duties on the shipment, the 5% tariff had not been changed. When asked if Barbados would be willing to give an undertaking to implement the 60% tariff until the determination of the merits, the Solicitor General indicated that she did not have instructions to give such an undertaking. The State was content simply to await the Court's decision on the Application.

The Competence of the CCJ to Grant Interim Relief

[19] The competence of the Caribbean Court of Justice to grant interim relief is sourced in treaties and the rules of Court. Article 218 of the RTC gives the Court the power to prescribe interim measures: "The Court shall have the power to prescribe, if it considers the circumstances so require, any interim measures that ought to be taken to preserve

the rights of either party." An essentially identical provision is to be found in Article XIX of the Agreement Establishing the Caribbean Court of Justice. Part 12 of the Court's Rules sets out the procedure for application for interim measures.

[20] These provisions in the treaties and rules of court do not specify what "circumstances" would warrant intervention by the Court to "preserve the rights" of the parties. Article 218 of the RTC and Article XIX of the CCJ Agreement are, however, similar to Article 41(1) of the Statute of the International Court of Justice which gives that court the power "to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party."[5] In that court, the generally accepted practice in relation to Article 41(1) is best summed up in the court's reasoning for the prescription of interim measures in the *Fisheries Jurisdiction* case,[6] where it was said that "Article 41 of the Statute has as its object to preserve the respective rights of the Parties pending the decision of the Court, and presupposes that irreparable prejudice should not be caused to rights which are the subject of dispute in judicial proceedings…" Accordingly, the court ought to be satisfied that as a matter of urgency the provisional measure ought to be taken as "the harm to the right is so great that, without provisional measures, it is going to disappear, or that the right would not have any genuine value when the judgment in favour of the applicant is rendered."[7]

[21] The jurisprudence of the European Court of Justice (ECJ) is also helpful. According to Article 279 of the Treaty of the Functioning of the European Union, "the Court of Justice of the European Union may in any cases before it prescribe any necessary interim measures." ECJ case-law reveals that the court may order interim

[5] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ), [34].
[6] [1974] ICJ 3.
[7] Bernhard Kempen and Zan He, The Practice of the International Court of Justice on Provisional Measures: The Recent Developments, 69 Heidelberg Journal of International Law 919 (2009) at p. 920-921.

measures in instances where it is urgent (the order is needed in order to avoid serious and irreparable harm to the applicant's interests) and there is a likelihood of success on the merit of the case. In *Commission v Pilkington Group,*[8] and *Commission v Bilbaina de Alquitranes and Others,*[9] the court stated that "the purpose of interim proceedings is to guarantee the full effectiveness of the final future decision in order to ensure that there is no lacuna in the legal protection provided by the court."[10] It was for that "objective that urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief." The burden was on that party "to prove that it cannot wait for the outcome of the main proceedings without suffering harm of that nature."[11] In *European Medicines Agency (EMA) v MSD Animal Health Innovation Gmbh and Intervet International BV,*[12] it was said that in order to establish the existence of serious and irreparable damage it is not necessary for the occurrence of the damage to be demonstrated with absolute certainty, as it was sufficient to show that damage was foreseeable with a sufficient degree of probability.[13] The party seeking interim measures is nevertheless required to prove the facts forming the basis of its claim that serious and irreparable damage is likely**.**[14]

[22] In relation to pecuniary losses and the test requiring proof of irreparable harm in *BASF Grenzach GmbH v European Chemicals Agency (ECHA)*[15] the court said that,

> "otherwise than in exceptional circumstances, pecuniary harm cannot be regarded as irreparable since, as a general rule, pecuniary compensation is capable of restoring the aggrieved person to the previous situation. Where the harm alleged is of a financial nature, the interim measures sought are justified only if, in the absence of those measures, the applicant would be in a position likely to imperil its financial viability before the final judgment is given in the

[8] Order of the President of 10 September 2013, Case C-278/13 P(R).
[9] Order of the Vice President 7 July 2016, Case *C-691/15 P-R.*
[10] ibid, [36].
[11] ibid.
[12] Order of the Vice-President of the Court 1 March 2017, Case C-512/16 P(R).
[13] ibid, [95].
[14] ibid.
[15] Order of the President 13 July 2017, Case T-125/17 R.

> main action or if its market share would be affected substantially in the light, inter alia, of the size and turnover of its undertaking and, where appropriate, the characteristics of the group to which it belongs."[16]

[23] It is necessary to consider the place of the Intervener in a request for interim measures. By granting an applicant the status of Intervener, this Court accepts that that entity has a substantial interest of a legal nature which may be affected by a decision of the Court in the primary proceedings.[17] It is the case that the Intervener must accept the case as he finds it. Further, as this Court said in *Shanique Myrie v Barbados*[18], the Intervener's position is an ancillary one in that, "if the original case is discontinued or withdrawn or where the Originating Application is declared inadmissible, the intervention is spent."[19]

[24] Nevertheless, recognition of the Intervener's substantial interest which could be affected by a decision in the primary proceedings necessitates consideration of that interest in deciding upon interim measures. Jerry Sztucki[20] notes that an Intervener[21],

> "should be regarded as entitled to make *jure suo* a request for interim protection on general grounds and that, consequently, he should also be regarded as a possible separate addressee of interim measures. For if an Intervener claims certain rights to the exclusion of the corresponding rights of the other parties, judgment will most probably affect its legal position. Consequently, his rights may require interim protection; and also his adversaries may have reasons to seek such protection against his possible prejudicial action *pendente lite."*[22]

An Intervener, then, has the power to seek interim measures and conversely has the power to oppose an application for interim measures that may affect its international law rights. It may also be possible to seek interim measures against an Intervener.

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[16] ibid.
[17] CCJ Rules (OJ), Part 14.2 (2).
[18] *Shanique Myrie v Barbados* [2012] CCJ 3 (OJ).
[19] ibid., at [34].
[20] Jerry Sztucki, *Interim Measures in The Hague Court: An Attempt at a Scrutiny* (Kluwer Law and Taxation Publishers 1983).
[21] Note that the author distinguishes an intervener who simply seeks the interpretation of a Convention under Article 63 of the Statute of the International Court of Justice. ibid., at p. 215.
[22] Ibid., at p. 217.

Application to the RTC

[25] As this is the first case in which an application for interim measures is being fully considered and decided by this Court, it becomes necessary to indicate the extent to which the general law on interim measures/provisional measures is applicable to the RTC. Two general preliminary points may be stated. In the first place, the principles on which national or domestic law grant interim relief are not generally admissible or relevant unless they are reflective of "general principles of law recognized by" the Member States of the Community. As explained by this Court in *Trinidad Cement Limited v The Community*[23], it is not necessary for the principles to be expressed identically in all Member States; it is sufficient if they are widely accepted.[24] However, neither the written nor oral submissions before the Court suggested, far less proved, that the principles of domestic law referenced on interim relief were widely accepted within the Member States of the Community that do not all share the same legal system.

[26] In the second place, whilst Public International Law on interim/provisional measures is relevant under the treaty mandate for this Court to apply "such rules of international law as may be applicable", it is to be appreciated that the situation under the RTC is fundamentally and dramatically different in several relevant respects from that under general International Law.

[27] Firstly, the RTC establishes and regulates a cohesive regional trade agreement in the form of the CARICOM Single Market and Economy ("CSME"). Members States agree to recognize as compulsory, ipso facto and without special agreement, the original jurisdiction of the Court[25] and they pledge as part of their treaty obligations and in their national legislation, to comply promptly with applicable judgments of the Court.[26] The

[23] [2009] CCJ 2 (OJ).
[24] Ibid., at [41]
[25] See Article 216.
[26] See Article 215.

issue of national sovereignty therefore does not come into as sharp relief in CARICOM as it does in general International Law relationships.

[28] Secondly, Article 222 of the RTC confers directly on persons, natural and juridical of a Contracting Party, with the special leave of the Court, the right to appear as parties in proceedings before the Court. Such persons may, as in the instant proceedings, claim interim measures in the asymmetrical litigation between themselves and a Member State of the Community, possibly the Contracting Party of that person, again as illustrated in this Application. Such litigation is not possible before the ICJ.

[29] Thirdly, whilst the Respondent will necessarily be a Member State of the Community, or the Community itself, the entity that is most directly affected may well be a private sector entity which at best is an intervener. Where an application is made for interim measures by one non-governmental entity effectively against another non-governmental entity it is appropriate for the threshold for granting relief to be reflective of the essentially private sector nature of the litigation. Any evaluation of the nature and extent of the likely harm must consider the relative interests between the private entities directly affected.

[30] Fourthly, the language of Article 218 of the RTC and Article XIX of the CCJ Agreement does not hold an applicant for interim relief to the high standard of demonstrating serious and irreparable harm interpreted in the traditional manner of purely inter-state litigation. Instead, the Articles give the Court a wide power to prescribe, if it thinks fit, any interim measures necessary to preserve the rights of parties. The need to show serious and irreparable harm or likely aggravation of the dispute is within the discretion of the Court and the precise conditions that must be met for award of interim measures will no doubt draw colour from the objective of the CSME and will vary with the facts of each case. Where Article 222 proceedings are initiated the Court will, where it considers it appropriate, grant interim relief only after

considering all relevant circumstances including the balancing of the interests (both legal and factual) of all persons directly affected by any order for interim measures.

[31] The Court finds that to satisfy the requirements for the grant of interim measures pursuant to Article 218 of the RTC and/or Article XIX of the CCJ Agreement, the applicant must prove to the satisfaction of the Court:

1. That the factual and legal grounds establish a *prima facie* case of success on the trial of the Originating Application; and
2. That the case is one of great urgency such that serious or irreparable harm will be caused to the rights of the applicant under the RTC if the matter was to await adjudication of the merits of the dispute; and that further
3. It is willing and able to give an appropriate undertaking to indemnify against any loss or damages suffered by such persons as the Court may consider appropriate that may result because of the grant of the interim measures.

[32] Where the applicant satisfies these conditions, the Court will normally indicate such interim measures as it considers appropriate, unless a party or intervener to the litigation persuades the Court that it would be unjust to grant such measures.

Application of Requirements to this Case

[33] The Applicants have provided evidence that the tariff imposable on both *building cement (grey)* and on *other hydraulic cement* was, at the request of Barbados and with the approval of COTED, increased to 60%, and embodied in the Customs Tariff (Amendment) (No.9) Order, 2009. They have further provided evidence that, although this rate remained unaltered in the Order, it was reduced in 2015 by the Government of Barbados to 5%. Despite direct questioning from the Bench, neither Barbados nor the Intervener was able to indicate any consent from COTED or any statutory basis for the reduction. It is entirely possible that the evidence of Community or legislative approval

for the reduction will be forthcoming at the trial or alternatively that either Barbados and/or the Intervener could satisfy the Court that such evidence is unnecessary. However, in the current circumstances, the Court is satisfied that the Applicants have established a prima facie case of breach of the COTED sanctioned tariff on importation of the types of extra-regional cement involved in this dispute.

[34] The Applicants contend that without interim relief they would suffer irreparable unquantifiable losses in the manner described earlier at [10]. Specific projected losses include (i) unquantifiable business adjustment costs; (ii) loss in technical efficiency; (iii) losses in investment and growth opportunities; and (iv) the potential loss of human capital. They say that there is a serious risk that they will lose significant market share and be driven out of business.

[35] The lone shipment of 12,734 metric tonnes of cement, imported into Barbados on 9th July 2018 could not by itself produce the effects argued by the Applicants. However, the Applicants' case is that the cumulative effect of the extra-regional imports as chronicled at [6] totalling over 84,000 tons, together with the threat of further shipments before trial of the Originating Application (the Intervener not being able to indicate the date of the next shipment) is likely to result in the losses described. On a balance of probabilities, the Court agrees that this aspect of the case has been made out by the Applicants, particularly as the Respondent did not dispute their assertions.

[36] The Applicants have given the undertaking to reimburse the Intervener (along with the Respondent) for losses sustained if it is proven at trial that the grant of the interim relief was unjustified.

[37] The State of Barbados does not oppose the Application and it must therefore be taken that the interests of that party will not, to any intolerable extent, be adversely affected by the grant of the requested interim relief. However, for the reasons indicated, the interest of other persons directly affected must also be considered. In this case it is

evident that the interests of RHCL, as Intervener, would be adversely affected by the grant of the interim measures. The Intervener avers that its business was established on the basis that it would pay a 5% CET and its prices are derived from this baseline. If a rate of 60% duty was to be suddenly imposed, this would spell disaster as it would be forced to pass the cost on to its consumers with the resultant effect that the price of its cement would increase significantly and would now be significantly more expensive than the Applicants' cement.

[38] Trends suggest that RHCL imports cement every 6 months or so. There is no evidence of any impending shipments and the Intervener was unable to indicate in the 11th July hearing whether further shipments were imminent; it is therefore probable that there might well be no further shipments before the merits of the claim have been determined. In these circumstances, the requested interim imposition of the 60% tariff until final decision ought not to have any effect, or any seriously detrimental effect, on RHCL.

Conclusion

[39] In relation to the cement imported on 9th July 2018 on board the *M/V Sarita Naree*, the Court considers that it would be unfair and oppressive for the Court to order retroactively a 60% tariff. The 5% tariff paid by RHCL was consistent with the demand by the Government of Barbados and was, presumably, paid in the manner prescribed. In relation to any future shipment into the State of Barbados the Court finds that as an interim measure the 60% rate should be imposed until the determination of the merits of the case. Further, the Court notes that if eventually it is found that the 5% tariff was appropriately applied whereas the 60% tariff was charged on shipments during the period pending the substantive decision the Intervener can be reimbursed the overpaid 55% duties. In short, the Intervener has not persuaded the Court that it would be unjust to grant the interim measures requested.

[40] The Court considers that the provision in Rule 12.2(4), that it may require the Applicants to give an undertaking "to indemnify the opposite party" against any loss or damage suffered as a result of the interim measures ordered, is apposite in this case. The Court notes that the Applicants have given the cross-undertaking that, if it is proven at trial that the interim relief was unjustified, they will reimburse the Intervener (along with the Respondent) for certain losses sustained and decides to incorporate this undertaking into its orders.

ORDERS

[41] Barbados not objecting, the Orders of the Court are that:

1. From the date of this Order and continuing until either Judgment is rendered on the Originating Application in this matter or the Court varies or terminates this Order as the case may be, the Respondent shall restore and enforce the 60% rate which the Council for Trade and Economic Development of the Caribbean Community approved in 2001 at the request of the State of Barbados as a rate higher than the current Common External Tariff on "Other hydraulic cements" imported from outside the Caribbean Community.
2. The Respondent shall forthwith cause all shipments of general purpose building cement imported into the State of Barbados from outside the Caribbean Community and which are classified by the Customs Department of Barbados under Tariff Heading 2523.90.00, to attract the specified import duty rate of 60%, consistent with *Customs Tariff (Amendment) (No.9) Order, 2009* which enacted the COTED-approved 60% rate into law.
3. For the avoidance of doubt, these Interim Measures are prospective only and shall have no effect on the shipment of cement from the State of Turkey which

arrived in the Port of Bridgetown, Barbados on 9th July 2018 on board the *M/V Sarita Naree*.

4. The Applicants shall indemnify the Respondent and the Intervener for any loss or damage sustained by them if it be proved at the trial of the Originating Application that such loss or damage was incurred by the unjustified imposition of these Interim Measures.
5. Costs of the Application for Interim Measures are reserved.

/s/ A. Saunders

The Hon Mr Justice A. Saunders (President)

/s/ J. Wit

The Hon Mr Justice J Wit

/s/ D. Hayton

The Hon Mr Justice D Hayton

/s/ W. Anderson

The Hon Mr Justice W Anderson

/s/ M. Rajnauth-Lee

The Mme Justice M Rajnauth-Lee