

**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**

**THE COURT,**

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

having regard to the application and the statement in support thereof filed on behalf of the Defendant at the Court on the 23<sup>rd</sup> day of September 2009, the reply by the Claimants filed on the 12<sup>th</sup> day of October 2009 with annexures and to the hearing held on the 14<sup>th</sup> day of October 2009 by teleconference

after considering the application of the Defendant and the reply of the Claimants

and taking into account the oral submissions made on behalf of:

- the Claimants by Dr C Denbow, SC Attorney-at-law
- the State of Guyana, by Mr. Nareshwar Harnanan, Attorney-at-law

and having dismissed the Defendant's application with costs and undertaken to deliver its reasons later

on the **27<sup>th</sup> day of October 2009** delivers the following

**REASONS FOR DECISION**

- [1] On August 20, 2009 this Court declared that since October 2006 the Defendant, the Co-operative Republic of Guyana, had been in breach of the provisions of Article 82 of the Revised Treaty of Chaguaramas (“the RTC”) by failing to implement and maintain the Common External Tariff (“CET”). The Court ordered that within 28 days of the date of its order Guyana must implement and thereafter maintain the CET in respect of cement from non-CARICOM sources. This Court recognized that, notwithstanding a re-imposition of the CET, Guyana had the right under the RTC to seek approval for a suspension of the CET by application to the Council for Trade and Economic Development (“COTED”) or, during the interval between COTED meetings, to the Secretary-General, pursuant to Article 83(2) and (3) of the RTC. Thus the order was made “without prejudice” to that right. Both parties were given liberty to apply to the Court in respect of matters arising out of the mandatory order to implement and maintain the CET within 28 days.
- [2] The Defendant by an application dated September 22, 2009 sought the following orders: (a) a stay of execution of the order of August 20, 2009 (b) alternatively, an extension of time for compliance with that order and/or a variation thereof.
- [3] In response the Claimants, Trinidad Cement Limited and TCL Guyana Incorporated, filed a Reply which invited the Court to refuse to hear the Defendant’s application or to dismiss it on the ground that the Defendant was in contempt of the Court’s order. In the alternative, the Claimants sought an order postponing the hearing of the Defendant’s application of September 22, 2009 until the hearing and determination of the Claimants’ application dated and filed on October 6, 2009 for orders declaring that the Honourable Attorney-General of Guyana was in contempt of court in failing “to implement and give effect” to the order of August 20, 2009 (hereinafter referred to as “the Order”).
- [4] The Court invited counsel for Guyana to respond to the objections of the Claimants. Counsel for Guyana pointed out that Guyana had approached the Court on September 16, 2009, a day before the time for compliance had expired, by way of a motion. Upon being informed that the procedure adopted was not in accordance with the Caribbean Court of Justice (Original Jurisdiction) Rules 2006

the application was withdrawn and replaced by the present application filed on September 23, 2009. The application was made pursuant to the “liberty to apply” clause.

- [5] Counsel for the Claimants objected that Guyana had consistently defied all requests to re-impose the CET in accordance with its obligations under the RTC and followed that up with refusal to obey the Order.
- [6] While there is great force in the submission of counsel for the Claimants, refusal to hear a party – even a party in contempt – or dismissal of a party’s application without a hearing is a draconian remedy and a recourse of last resort. The Court always has a discretion to hear even a party in contempt. In the instant case the Defendant approached the Court before the time for compliance expired under the “liberty to apply” clause. Again, a court should not countenance an absolute denial of access to it, as contended for by counsel for the Claimants. The Court therefore heard counsel for Guyana on its application.
- [7] Although Guyana claimed a stay of execution, execution is not a matter for this Court. Guyana’s intention must have been to seek a stay of proceedings or an extension of the time for compliance with the Order to re-impose the CET.
- [8] The basis of Guyana’s application was that it had applied for a waiver of the CET since June 30, 2009 in accordance with Article 83 of the RTC. It was alleged that if the CET were re-imposed within the time fixed by the Order, severe financial hardship would befall “importers of cement” who had placed orders before the date of the Court’s Order but had not yet received their goods. Further, the Defendant averred that the macro-economic stability of Guyana would be adversely affected if the CET were re-imposed in accordance with the Court’s Order.
- [9] The nature of the relief sought suggests that the Defendant failed to appreciate that this Court made a peremptory order for reinstatement of the CET. The Court was forced to make such an order in a situation where counsel for Guyana admitted that his client had breached the provisions of the RTC, but nonetheless had no

instructions to give an undertaking to the Court that Guyana would uphold the law and its treaty obligations. In recognizing that the RTC permitted an application for authorization to suspend the CET, the Court was in no way qualifying its Order to reinstate the CET within the jurisdiction of Guyana within 28 days. Guyana clearly was not entitled to do nothing to re-impose the CET in obedience of the Court's Order in the hope that its application to COTED for a suspension would be successful. In any case, no evidence was provided to suggest that COTED was likely to grant a suspension or when it would do so. In the Court's view, the Defendant's reliance on its application or applications for authorization to suspend the CET was misconceived.

[10] In any event, counsel for Guyana seemed to be contending for an open-ended extension of the time for compliance with the Court's Order. Counsel was unable to say definitely what was the outcome of the application to the Secretary-General made on June 30, 2009, although he conceded that a letter dated September 10, 2009, exhibit "E" to the Claimants' Response, appeared to indicate that the Secretary-General had rejected that application. It is true that at paragraph 8 of the Statement in Support of the Defendant's application, the Defendant asserted that "responses from Trinidad and Tobago and Barbados have indicated that they are in a position to meet the demands by consumers in Guyana". However, the Defendant withheld vital information from the Court as to the outcome of the application to the Secretary-General.

[11] The Defendant also mentioned in its Statement in Support that a meeting of COTED in Barbados was scheduled for October 8, 2009. Counsel for Guyana was pressed to indicate to the Court whether an application for authorization to suspend the CET was made at that meeting and what was the outcome. Counsel, although claiming he had no instructions, maintained that COTED had deferred consideration of the application. Counsel for the Claimants, however, asserted positively that no application for authorization to suspend the CET was made at the COTED meeting of October 8, 2009. Whether such an application was made or not, the parties are *ad idem* that no authorization to suspend the CET was granted at that meeting.

- [12] An application under a “liberty to apply” clause requires full disclosure by the applicant. The Defendant’s statement of facts falls far short of the required standard of disclosure. Further, an application of this kind must condescend to particulars. It is not enough to state that nameless third parties understood that the CET was not in effect, when the substantive application for reinstatement of the CET was made as long ago as April 3, 2008 and Guyana admitted in open court on June 15, 2009 that in removing the CET it was in breach of its obligations under the RTC. Such third parties were thus put on notice for some time and might be expected to make commercial arrangements that provided for the possibility of the CET being re-imposed on cement.
- [13] Allegations that the Ministry of Finance had concluded that the macro-economic stability of Guyana would be affected if the *status quo* were not maintained, apart from missing the point of the Order, are bereft of material facts upon which a court can act.
- [14] In the result, the Court held that the Defendant had failed to make full disclosure of material facts or to provide a sufficient evidential basis upon which the Court could act. The Court could not entertain an application to extend the time for compliance that was so open-ended in texture that no time limit therefor was envisaged.
- [15] For these reasons the Court on October 14, 2009 dismissed the application of the Defendant for a stay, and/or a variation of the Court’s Order by an extension of time, and ordered the Defendant to pay the costs of the application to be taxed in default of agreement.

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**The Hon Mr Justice Rolston Nelson**

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**The Hon Mr Justice Adrian Saunders**

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**The Hon Mr Justice Jacob Wit**

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**The Hon Mr Justice David Hayton**