THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

Claim No: CV 2020-04512

IN THE MATTER OF AN APPLICATION BY ROCK HARD DISTRIBUTORS LIMITED AND ROCK HARD DISTRIBUTION LIMITED FOR LEAVE TO MAKE A CLAIM FOR JUDICIAL REVIEW PURSUANT TO PART 56 OF THE CIVIL PROCEEDINGS RULES, 1998 AND THE JUDICIAL REVIEW ACT, 2000

AND

IN THE MATTER OF THE DECISION DATED 3RD DECEMBER 2020 OF THE MINISTRY OF TRADE AND INDUSTRY TO INTRODUCE A QUOTA, IMPORT LICENSING REGIME AND REGISTRATION SYSTEM FOR CEMENT (BUILDING CEMENT -GREY AND OTHER HYDRAULIC CEMENTS) EFFECTIVE 01ST JANUARY, 2021

AND

IN THE MATTER OF THE DECISION DATED 13TH NOVEMBER, 2020 OF THE MINISTRY OF TRADE AND INDUSTRY SENT TO THE COMMISSION FOR TRADE AND ECONOMIC DEVELOPMENT (COTED) REQUESTING THE FURTHER SUSPENSION OF THE COMMON EXTERNAL TARIFF (CET) ON OTHER HYDRAULIC CEMENTS OF HS 2523.90.00 UNDER ARTICLE 83 (3) D), F) AND (G) OF THE REVISED TREATY OF CHAGUARAMAS (RTC); IN ORDER TO APPLY A 50 % RATE OF DUTY

BETWEEN

ROCK HARD DISTRIBUTORS LIMITED

ROCK HARD DISTRIBUTION LIMITED

Applicants

AND

THE MINISTRY OF TRADE AND INDUSTRY

Defendant

Before the Honourable Mme. Justice Jacqueline Wilson QC

Date of Delivery: July 20, 2021

APPEARANCES:
Mr. Ian Benjamin SC leads Mr. Justin Phelps, Mr. Jagdeo Singh and Ms. Karina Singh instructed by Ms. Nalini Jagnarine Attorneys at law for the Claimant
Ms. Deborah Peake SC leads Ms. Tamara Toolsie instructed by Mr. Brent James and Ms. Radha Sookdeo Attorneys at law for the Defendant

JUDGMENT

INTRODUCTION

1. These judicial review proceedings are brought by Rock Hard Distributors Limited ("RHTT"), a company incorporated under the laws of Trinidad and Tobago, and Rock Hard Distribution Limited ("RHDL"), a company incorporated under the laws of St. Lucia. The Applicants challenge the legality of two decisions taken by the Ministry of Trade:

    i. The imposition of a quota and licensing and registration requirements on the importation of a type of cement classified as "other hydraulic cements" (the First Decision); and

    ii. The proposal made to the Commission for Trade and Economic Development (COTED) seeking the suspension of the Common External Tariff (CET) on other hydraulic cements in order to impose a 50% rate of duty on its importation (the Second Decision).

2. The suspension of the CET and the increased import duty took effect under The Common External Tariff (Suspension) (No. 8) Order, 2020,

and The Common External Tariff (Variation of Duty) (No. 8) Order, 2020, made under sections 8(A)(1) and (2) of the Customs Act and published as Legal Notices Nos. 415 and 416 of 2020, respectively. The licensing requirement was imposed by Legal Notice No. 417 of 2020 made under regulation 3(1) of the Imports and Exports Control Regulations.

3. Under regulation 3(1), the importation and exportation of all goods are prohibited except under a licence granted by the Minister. This general prohibition is subject to such exemptions as the Minister may approve. An exemption was granted by Legal Notice No. 69 of 1999, under which the Minister granted an Open General Licence for the importation of all goods into Trinidad and Tobago except for the goods listed therein. The list of excepted goods is described as the Negative List. On 28 December 2020, the Negative List was amended by Legal Notice No. 417 of 2020 to include building cement (grey) and other hydraulic cements.

4. At the time the proceedings were brought, Legal Notices Nos. 415 and 416 had not been issued. On 8 January 2021, the proceedings were amended to raise a specific challenge to them on the ground that they were issued pursuant to a defective consultation process undertaken by the Respondent.

5. The Applicants challenge the Respondent's decisions on extensive grounds which allege, in summary, that the decisions are unlawful in that they

   (i) conflict with the policy of the Trade Ordinance, the Caribbean Community Act (the CARICOM Act), the Government's obligations under the Revised Treaty of

Chaguaramas (the RTC), the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (the WTO) agreements;

(ii) were made without consultation with the Applicants;

(iii) were made in bad faith or for an improper purpose or on the basis of irrelevant considerations;

(iv) are in breach of the Applicants' legitimate expectation; and

(v) contravene the Applicants' rights under sections 4(a) (not to be deprived of property without due process of law) and 4 (b) (to equality before the law and the protection of the law) of the Constitution.

6. The Applicants seek orders of certiorari to quash the decisions and declarations that the decisions are unlawful, null and void.

7. The Respondent asserts that the First Decision was made in the lawful exercise of the Minister's powers under the Trade Ordinance and that it forms part of a package of fiscal and economic measures taken by the Government to strengthen the economy. The Respondent contends that the propriety of such measures is for the Government to decide and that the courts are slow to intervene in the exercise of such a discretion. Regarding the Second Decision, the Respondent asserts that Legal Notices Nos. 415 and 416 implement a decision made by COTED and that a review of COTED's decisions, including the consultation process that preceded them, lies within the exclusive domain of the Caribbean Court of Justice (the CCJ) and is not justiciable in this court.

8. Against that background, the following issues arise for determination:

(1) Whether the Second Decision is justiciable in this court; and, if so

(2) Whether the decisions

  (i) conflict with the policy of the Trade Ordinance, the CARICOM Act and the Government's international obligations;
  (ii) were made in breach of a duty to consult the Applicants;
  (iii) were made in bad faith, for an improper purpose or based on irrelevant considerations;
  (iv) are in breach of the Applicants' legitimate expectation;
  (v) contravene the Applicants' rights under sections 4(a) and 4 (b) of the Constitution; and

9. Mr. Ryan Ramhit, Director, Mootilal Ramhit and Sons Contracting Ltd. (MRSCL) and RHTT and Mr. Mark Maloney, Executive Chairman and Director of RHDL swore affidavits on behalf of the Applicants. Mr. Randall Karim, Chief Technical and Operations Advisor of the Ministry of Trade and Industry and Ms. Rowena Maitland-Jack of the Customs and Excise Division, swore affidavits on behalf of the Respondent.

THE APPLICANTS' EVIDENCE

10. The Applicants' evidence is that RHDL imports cement from Turkey and distributes it in the Caribbean using its trade name and mark "Rock Hard Cement." In 2019, RHDL imported approximately 250,000 metric tonnes of cement into the Caribbean.

11. Between 2016 and 2020, MRSCL was the local distributor of Rock Hard Cement, after which it is said to have assigned its rights to RHTT, a wholly owned subsidiary. The Applicants state that between 2016 and 2020, they imported, on average, an annual volume of 150,000 tonnes of cement into Trinidad and Tobago and that their entry into the local market has resulted in a 35% to 40% decrease in the price of cement, cement products and the costs of construction. The cement that is distributed locally is packaged at RHTT's plant in Mausica, Arima. RHTT states that it has made a substantial investment in its plant and equipment and in setting up a distribution network. It employs eighty-nine (89) persons and exports cement to St. Maarten, St. Kitts and Grenada. It does not rely on the local banks for foreign exchange but generates its own supply through exports and overseas business activity.

12. The Applicants state that MRSCL's business has been subject to unfair treatment by the Government for a number of years and they cite the following events as evidence:

    a. In 2016, notwithstanding that Rock Hard Cement was classified by independent experts as "other hydraulic cements," and subject to a 0% rate of duty, the Customs and Excise Division classified it as "building cement (grey)," which is subject to a 15% rate of duty. MRSCL/RHTT challenged the imposition of the 15% rate of duty to the Tax Appeal Board.

    b. In 2018, the Government made an unsuccessful approach to the World Trade Organization's Council for Trade in Goods (CTG) to modify the bound rate on other hydraulic cements.

c. By judgment dated 6 August 2019[1] the CCJ declared that Rock Hard Cement was classified as "other hydraulic cements" on which a 0-5% CET was payable. Notwithstanding the CCJ's decision, in November 2019, the Government sought to alter the bound rate of duty on Rock Hard Cement from 5% to 70% without prior notice to MRSCL or RHDL.

d. In or around April 2020, the Minister requested MRSCL and RHTT to cease operations, stating that the manufacture and distribution of cement was not an essential business under the Covid-19 Public Health Regulations. However, Trinidad Cement Limited (TCL) was allowed to continue its operations.

e. In November 2020, the Government approached COTED to suspend the CET on other hydraulic cements in order to impose a 50% rate of duty.

f. In December 2020, the Respondent imposed a quota and licensing and registration regime on the importation of other hydraulic cements without prior notice to, or consultation with, the Applicants.

13. The Applicants state that in its letter of 16 December 2020, the Ministry explains the rationale for introducing the quota system as being (i) to reduce the leakage of foreign exchange; (ii) to strengthen the local cement manufacturing industry; (iii) to maintain employment; and (iv) to build on exports. They state that none of those objectives applies to them and that the Respondent's decisions, if implemented, would

[1] [2019] CCJ 4 (OJ)

destroy their business, secure a monopoly for TCL and result in an increase in the cost of cement and construction.

14. The Applicants state that the Trinidad and Tobago market is critical to the profitability of their business; that their business is built on a 0% - 5% CET rate; that they cannot perform profitably at a higher rate; and that they have made substantial investments based on the existing legal and regulatory framework. They state that the large volumes of cement that MRSCL purchases allows it to negotiate competitive prices on supply and shipment, without which the Applicants would not be able to operate in the region.

15. The Applicants state that upon their entry into the cement market, the price of TCL's cement in Trinidad and Tobago dropped from $52.49 TTD to $40.50 TTD per sack and that there was a similar reduction in all CSME territories where Rock Hard Cement is sold. Between 2016 and 2020 they imported increasing volumes of Rock Hard Cement into Trinidad and Tobago with a total volume of 130,000 tonnes being imported in 2020. In order for their business to remain viable, a minimum of 300,000 tonnes must be imported into the Caribbean region.

16. The Applicants state that in August 2020, RHDL entered into a contract with Sonmez Cimento for the supply of cement over a five-year period, of which 1,750,000 tonnes are earmarked for shipment to Trinidad and Tobago. They were expected to receive a local shipment of 17,800 tonnes in January 2021 and 20,000 tonnes each in the following months.

THE RESPONDENT'S EVIDENCE

17. Ms. Maitland-Jack states in her affidavit that the Applicants have not imported or exported building cement (grey) or other hydraulic cements into or from Trinidad and Tobago for the period 2016 to 2020. During that time, there were nineteen importers of cement – of which MRSCL was the largest, importing on average 64,322 tonnes of cement a year, and fifteen exporters – of which TCL was the largest, exporting on average 179,000 tonnes of cement annually.

18. Mr. Randall Karim states in his affidavit that beginning in 2014, Trinidad and Tobago has experienced a shortage of foreign exchange as a result of the global decline in oil prices and the reduced export of oil and gas. In 2016, the Government introduced fiscal and other policy measures to reduce the demand for foreign exchange and to encourage the purchase of locally produced goods. Between January and September 2020, there was a 40% reduction in exports due to the COVID-19 pandemic, giving rise to an increased focus on policies to increase revenue and foreign exchange. Some of the measures that were introduced in the Government's 2021 budget include the removal of tax concessions on the importation of private motor cars, a 30% reduction in the quota on the importation of used cars, the imposition of a quota on the importation of new cars and the re-instatement of VAT on imported luxury food items.

19. Mr. Karim provides insight into the cement industry. TCL is the domestic manufacturer of cement and is a publicly traded company owned by a multinational cement manufacturer, Cemex A.B. TCL has one cement plant in Trinidad and Tobago. In 2019, the local demand for cement was

486,700 tonnes. The comparative figure for October 2020 was 343,000 tonnes, which was projected to increase to 550,000 tonnes in 2021.

20. Mr. Karim states that MRSCL's entry into the local market has led to a significant increase in the importation of other hydraulic cement and has had a negative impact on TCL's market share and profitability. Between 2016 and 2018, there was a 303% increase in the importation of other hydraulic cements into Trinidad and Tobago resulting in a 54% loss in TCL's domestic market share. The reduced demand for TCL's product led to a decline in its production from 656,000 tonnes in 2015 to 303,000 tonnes in 2020, which volumes are well below TCL's 800,000-tonne capacity.

21. Mr. Karim states that when Rock Hard Cement first entered the Trinidad and Tobago and Barbados markets, it was classified as building cement grey, on which a 15% rate of duty was payable. No import duty was payable on other hydraulic cement. Its importer, MRSCL, challenged the classification before the Tax Appeal Board and RHDL challenged the classification before the CCJ, contending that the proper classification was "other hydraulic cement." In its decision of 6 August 2019, the CCJ determined that Rock Hard Cement was classified as "other hydraulic cement."

22. On 12 November 2019, Trinidad and Tobago requested COTED's approval to suspend the CET on other hydraulic cements in order to impose a 35% rate of duty from 1 January 2020 to 31 December 2020. On 19 November 2019, COTED approved the request and the suspension of the CET and imposition of a 35% rate of duty were implemented by Legal Notices Nos. 393 and 394 of 2019. On 19

February 2020, MRSCL filed proceedings before the CCJ challenging COTED's decision. The CCJ held that the State had failed to consult the claimant before applying to COTED for suspension of the CET.

23. In or around September 2020, the Ministry engaged with stakeholders to assess the impact of the 35% rate of duty imposed on other hydraulic cement in January 2020. In response to the Ministry's request for information, RHTT sought confirmation whether the Ministry had obtained the WTO's approval to increase the bound rate of duty on other hydraulic cements in 2020. RHTT also sought the disclosure of information upon which the Ministry relied.

24. At a stakeholder meeting convened by the Ministry on 15 October 2020, TCL expressed concern regarding the effect of the importation of other hydraulic cement on its market share. TCL sought further protection to maintain its position in the domestic market. Thereafter, the Ministry recommended to Cabinet that a request should be made to COTED for a further suspension of the CET from 1 January to 31 December 2021 in order to impose a 50% rate of import duty. Cabinet approved the Ministry's request and on 13 November 2020, the Government sought COTED's approval for the further suspension. COTED approved the request and the suspension of the CET and imposition of increased duty were implemented by Legal Notices Nos. 415 and 416 of 2020.

25. Mr. Karim states that an annual quota of 75,000 tonnes was fixed on building cement (grey) and other hydraulic cements for 2021, having regard to the historic volume of imports. The Ministry proposes to conduct an ongoing review of market conditions to ensure that there is

an adequate supply of cement in the market and to monitor price increases.

THE LEGISLATIVE PROVISIONS

The Trade Ordinance

26. Section 3(1) of the Trade Ordinance gives power to the Minister to make regulations for specified purposes. It provides that:

> 3. (1) The Minister may make regulations for all or any of the following purposes, that is to say, for maintaining, controlling or regulating supplies or services so as to-
>
> (a) secure a sufficiency of those essential to the well being of the community, their equitable distribution and their availability at fair prices;
>
> (b) regulate exports and imports in a manner calculated to serve the interest of the community; and
>
> (c) ensure generally that the resources available to the community are used in a manner calculated to serve the interest of the community,
>
> (2) Without prejudice to the generality of subsection (1) any regulations made under this section may provide –
>
> (a) for prohibiting absolutely the importation or exportation of goods, or of any class or description of goods, from or to any country;
>
> (b) for prohibiting the importation or exportation of goods, or of any class or description of goods, from or to any country except under the authority of a

licence granted by the Commission or a public officer authorised in that behalf;

(c) for regulating the distribution, purchase or sale of goods or any class or description of goods;

(d) for controlling the prices at which goods, or any class or description of goods, may be sold, whether by wholesale or retail;

(e) that persons carrying on or employed in connection with any trade or business or with the supply of services shall produce to the Commission or a public officer authorised in that behalf such books, accounts or other documents relating to their trade, business or the supply of services as the Commission or a public officer authorised in that behalf may require and that such person shall furnish to the Commission or a public officer authorised in that behalf such estimates, returns or information as the Commission or a public officer authorised in that behalf may from time to time require;

(f) for the entering and inspection of premises to which the regulations relate by such persons as may be specified in the regulations with a view to securing compliance therewith;

(g) for controlling the prices to be charged for such services as may be prescribed by the Minister by Order;

(h) that any person who commits a breach of any regulation made under this section shall be guilty of

an offence, and that upon summary conviction for such an offence shall be liable to-

(i) a fine not exceeding five thousand dollars; or

(ii) a term of imprisonment not exceeding twelve months; or

(iii) both such fine and such imprisonment; and

(i) for such supplementary and incidental matters as may be necessary or expedient for any of the purposes set out in this section."

THE CARICOM ACT

27. By its long title, the CARICOM Act states that it is an Act to give effect to the RTC and the CARICOM Single Market and Economy (the CSME). The RTC establishes CARICOM and the CSME, the latter of which is defined in the CARICOM Act as "the regime established by the (RTC) for the deeper integration of the national markets and economies of all Member States of (CARICOM).[2] The CARICOM Act gives the RTC the force of law in Trinidad and Tobago[3] and confers "full juridical personality" upon CARICOM.[4]

28. Section 5(1) of the CARICOM Act provides for the referral of all matters concerning the interpretation or application of the RTC to the CCJ:

5. (1) For the purposes of all legal proceedings, any question concerning the interpretation or application of the Treaty or

[2] Section 2 of the CARICOM Act
[3] Section 3(1)
[4] Section 3(2)

concerning the validity, meaning or application of instruments made under the Treaty shall be treated as a question of law to be referred to the Caribbean Court of Justice where a Court or tribunal seised of an issue considers that a decision on the question is necessary for it to deliver judgment.

29. Section 8 provides that:

> "In the event of any inconsistencies between the provisions of this Act and the operation of any other law, the provisions of this Act shall prevail to the extent of the inconsistency."

30. The preamble to the RTC sets out in significant detail the principles and policies upon which the RTC is founded. The RTC prescribes the membership of CARICOM,[5] and states CARICOM's objectives as follows:[6]

> The Community shall have the following objectives:
> (a) improved standards of living and work;
> (b) full employment of labour and other factors of production;
> (c) accelerated, co-ordinated and sustained economic development and convergence;
> (d) expansion of trade and economic relations with Third States;
> (e) enhanced levels of international competitiveness;
> (f) organisation for increased production and productivity;

[5] Article 3
[6] Article 6

(g) the achievement of a greater measure of economic leverage and effectiveness of Member States in dealing with Third States, groups of States and entities of any description;

(h) enhanced co-ordination of Member States' foreign and [foreign] economic policies; and

(i) enhanced functional co-operation, including—

(i) more efficient operation of common services and activities for the benefit of its peoples;

(ii) accelerated promotion of greater understanding among its peoples and the advancement of their social, cultural and technological development;

(iii) intensified activities in areas such as health, education, transportation, telecommunications.

31. The RTC sets out the institutional arrangements that govern CARICOM's operations. It provides for the establishment of CARICOM's principal organs and of other organs that are to assist them, with COTED being included among the latter.[7] COTED's general function is to promote CARICOM's trade and economic development.

32. The RTC sets out a detailed framework of CARICOM's trade policy[8] and general provisions on trade liberalization.[9] It requires Member States to co-ordinate their trade policies with Third States or groups of Third States; to pursue the joint negotiation of trade and economic agreements; and to obtain COTED's prior approval for trade agreements involving tariff concessions.[10] Member States must establish and

[7] Article 10
[8] Article 78
[9] Article 79
[10] Article 80

maintain a common external tariff (CET) for all goods that do not qualify for Community treatment as determined by COTED.[11] Decisions on the alteration or suspension of the CET must be made by COTED.[12] COTED must also conduct an ongoing review of the CET to assess its impact on production and trade and to secure its uniform implementation in the Community.[13] Chapter 8 of the RTC bears the rubric "Competition Policy And Consumer Protection." The objective of its provisions is "to ensure that the benefits expected from the establishment of the CSME are not frustrated by anti-competitive business conduct.[14]"

THE SUBMISSIONS

Whether the Second Decision is justiciable in this court

33. This question raises no difficulty. As stated earlier, the Applicants have brought proceedings before the CCJ challenging COTED's decision to approve the suspension of the CET on other hydraulic cements to allow for the imposition of a 50% rate of duty. The Applicants do not dispute that the CCJ has exclusive jurisdiction to review COTED's decisions. They allege that in these proceedings they do not seek to challenge COTED's decisions but the flawed consultation process leading to them.

34. Counsel for the Respondent rightly rejects this argument. She submits that the CCJ's decisions establish conclusively that the CCJ is entitled to consider the consultation exercise about which the Applicants complain: ***Rock Hard Cement Limited v The State of Barbados and The Caribbean Community and Arawak Cement Company Limited,***

[11] Article 82
[12] Article 83(1)
[13] Article 83(5)
[14] Article 169(1)

Intervening [2020] CCJ 2 (OJ) and ***Mootilal Ramhit and Sons Contracting Limited v The State of Trinidad and Tobago and CARICOM*** [2020] CCJ 3 (OJ).

35. I reject the Applicants' argument that the propriety of the consultation process that led to COTED's decisions is a matter for determination by this court. The very fine distinction on which the Applicants rely in seeking to bring the matter within the remit of this court's jurisdiction is inconsistent with the CARICOM Act.

Whether the First Decision is inconsistent with the CARICOM Act, the RTC, the GATT and WTO Obligations

36. Counsel for the Applicants submits that, in giving the force of law to the RTC, the CARICOM Act gives legal effect to the economic and trade policies outlined in its preamble and its general provisions. He submits that section 3 of the Trade Ordinance is inconsistent with the policy of the CARICOM Act and the RTC and that, pursuant to section 8 of the CARICOM Act, the CARICOM Act shall prevail. He submits that Article 6 of the RTC, which lists CARICOM's objectives, is an important guide to its interpretation and that the objectives include the expansion of trade and economic relations with Third States but do not include protecting the production of goods by Member States or any form of protectionism.

37. Counsel argues that the Trade Ordinance must be construed in the legal, social and political context that prevailed at the time of its enactment in 1959 and that it predates the CARICOM Act, which came into force in 2005.

38. Counsel submits that Under Article II of the GATT, Trinidad and Tobago is obligated to impose a 5% bound rate of duty on other hydraulic cements unless the rate is modified in keeping with GATT's provisions; that no such modification has been made; and that, in seeking to depart from the applicable bound rate of duty the Government is in breach of its obligations under the GATT.

39. Counsel submits that the imposition of a quota is not "calculated to serve the interest of the community" as it constitutes a trade barrier that is in violation of the CARICOM Act, the Government's Trade Policy and Article XI of the GATT, which prohibits the imposition of a quota, subject to an exception for safeguarding balance of payments. Counsel submits further that in failing to consider the objectives of the Trade Policy, the RTC, the CARICOM Act and the GATT the Government has failed to take a material consideration into account and that the decision to impose a quota was thereby unlawful.

40. Counsel relies on a line of cases which state that where there is ambiguity in domestic legislation, the courts will in the absence of clear statutory words to the contrary presume that Parliament intended to legislate in conformity with the international law obligations on the same subject: ***R v Secretary of State for the Home Department Ex p. Brind*** **[1991] 1 AC 696**.

41. Counsel for the Respondent submits that the Trade Ordinance and the Imports and Exports Control Regulations were the subject of judicial consideration by the Court of Appeal in the well-known decision of ***Attorney-General v K.C. Confectionery Ltd*** (1985) 34 WIR 387. There,

Kelsick CJ and Bernard and Persaud JJA, explained the object and intent of the Negative List: Per Persaud JA at page 397e-g:

> "…it is not inopportune at this stage to indicate…that in considering the desirability of certain goods being placed on the Negative List, the Minister must have foremost in his mind, and must give due consideration to, the interest of the community. In doing so, there are many matters that he might feel disposed to take into account, viz. the quality of the goods, the price to the consumer (whether it is competitive or not), the ebb and flow of trade, the social and economic situation of the country, and many more of which he and his advisers would be aware."

42. And at page 399e:

> "Even a casual reading of the Trade Ordinance would reveal that the protection of locally manufactured goods from foreign competition is one of the objectives that can be achieved by its implementation."

43. Per Bernard JA at page 417b-c:

> "The functions of the Minister under the legislation are executive in nature and no more; and it is, in my view, for him and him alone, to determine, taking into account all of the factors enumerated in the legislation, what goods should or should not be placed on the Negative List. In

matters of the kind, the Minister would be expected to act in consultation with the Cabinet."

44. Counsel submits that, having regard to the decision in ***K.C. Confectionery***, the First Decision falls squarely within the four corners of the Trade Ordinance and the Minister was lawfully empowered to act as she did.

45. Counsel submits that, by virtue of the Minister's power to grant a licence, the Minister indisputably has the power to limit the annual volume of imports out of which allocations to importers are made. She submits that, under the quota regime, an importer is given advance notice of its annual allocation and there is no uncertainty whether a licence would be granted to import the allocated amount.

46. Counsel for the Respondent submits further that in interpreting the RTC's provisions the CCJ recognises the importance of domestic policy and the need to afford Member States adequate policy space to take such measures as they consider appropriate. Counsel relies on the decision of the CCJ in ***Rock Hard Cement Limited v The State of Barbados and ors*** [2020] CCJ 2 (OJ) stating that:

> "[73] The inescapable fact is that Rock Hard cement is in competition with cement locally produced by the Intervener. It is ultimately a matter of domestic economic policy whether, consistent with its development strategy, the State of Barbados wishes to promote the importation of Rock Hard cement or encourage the Intervener's local cement production. And, if one or the other, what measures it should take. In this regard, successive

administrations must be permitted the policy space to take such measures as they may consider appropriate. But any such measures taken, whether by Barbados or ultimately COTED, must comply with the rule of law and should not evince any abuse of discretionary power."

47. Counsel argues that, to the extent that the Applicants refer to obligations under agreements notified to the WTO, the GATT and the Agreement on Import Licensing Procedures as a basis to impugn the First Decision, these international agreements have not been incorporated into, and do not form part of, domestic law. She submits that, in keeping with a long line of common law authority, the Court of Appeal in ***Chandresh Sharma v The Attorney General of Trinidad and Tobago*** C.A. No. 115 of 2003 has determined, that until a treaty becomes incorporated into local law persons do not derive rights and are not subject to obligations conferred by it. Therefore, the State's alleged noncompliance with WTO obligations cannot be invoked by the Applicants. Counsel argues further that there are dispute resolution procedures under the WTO with which Contracting Parties must abide where a violation of the WTO is alleged. It is a breach of the exclusive procedure provided by the WTO for a private citizen to seek redress for such a violation in the local courts.

48. Counsel submits that there is a low intensity of review by the courts of decisions taken in the macro-economic and fiscal sphere; that such decisions attract the lowest levels of scrutiny available on grounds of rationality; and that in exercising its supervisory jurisdiction a court will not trespass into the province of the decision-maker and substitute its own judgment for that of the decision maker: ***R (on the application of***

Mabanaft Ltd) v Secretary of State for Energy and Climate Change [2009] EWCA Civ 224; ***The Attorney General of Trinidad and Tobago v United Policy Holders Group & Ors.*** Civil Appeal No. 82 of 2013.

49. In response to the Respondent's strong reliance on the decision in ***KC Confectionery,*** Counsel for the Applicants argues that ***KC Confectionery*** is an unreliable authority for construing the Trade Ordinance in a contemporary context. He reiterates that the Trade Ordinance must be construed in accordance with the contemporary obligations of the State under the CARICOM Act and international agreements, which are critical to its proper construction.

50. In response to the argument that a low intensity of review should be afforded to the First Decision, Counsel for the Applicants submits that the true principle that applies was authoritatively stated by Lord Bingham in the decision by the House of Lords in ***A (FC) and others v Secretary of State for the Home Department*** [2004] UKHL 56, at paragraph 29:

> "The more purely political (in a broad or narrow sense) a question is, the more appropriate it will be for political resolution and the less likely it is to be appropriate matter for judicial decision. The smaller, therefore, will be the potential role of the court. It is the function of political not judicial bodies to resolve political questions. Conversely, the greater the legal content of any issue, the greater the potential role of the court, because under our constitution and subject to the sovereign power of Parliament it is the function of the courts and not of political bodies to resolve legal questions."

51. There the House of Lords found that it could review important "political" decisions concerning national security as they were the subject of Parliamentary enactment: see paragraph 42.

DISCUSSION

52. As stated earlier, section 8 of the CARICOM Act provides that in the event of any inconsistency between its provisions and the operation of any other law, the provisions of the CARICOM Act shall prevail. Counsel for the Applicants identifies the general principles and policy statements in the preamble to the RTC and the material provisions of Article 6, among others, as provisions of the CARICOM Act that conflict with the Trade Ordinance and the Regulations. He contends that by virtue of section 8 of the CARICOM Act, the Act takes precedence.

53. I have found some difficulty with this argument for a number of reasons. First, the CARICOM Act does not repeal any provision of the Trade Ordinance, either explicitly or impliedly, or otherwise limit the application of its provisions. It provides a mechanism for resolving areas of direct conflict between the Act and "the operation of any other law," the latter of which includes the Trade Ordinance. If it was the Legislature's intention for the CARICOM Act to repeal any provision of the Trade Ordinance, including the regulation-making power conferred by section 3 to restrict imports or exports, it would have said so. In my view, no such intention may be discerned from the general and, in some instances, aspirational language of the preamble to the RTC or from any of its material provisions.

54. Second, if it is the case that tension exists between the CARICOM Act and the operation of the Trade Ordinance, and I do not say this in any

concessionary way, this is a legal issue for the CCJ to decide in the exercise of its exclusive jurisdiction under section 5(1) of the CARICOM Act to determine any question concerning the interpretation or application of the RTC.

55. Third, what lies at the heart of the Applicants' complaint is, in my view, an alleged breach of the RTC by the Respondent. An alleged breach of the RTC cannot be resolved by invoking a rule of statutory interpretation, such as section 8 provides. To this extent, in invoking the application of section 8 of the CARICOM Act to support an alleged breach of the RTC by the Respondent, the Applicants have misconstrued the purpose of the provision and the specific objective that it is intended to achieve.

56. For the above reasons, I reject the Applicants' argument that the First Decision is unlawful by virtue of an alleged inconsistency between the Trade Ordinance and the CARICOM Act, pursuant to which the latter must prevail.

57. In so far as it is suggested that ***KC Confectionery*** should be given cautionary treatment in light of its vintage, the short answer is that the legal principles that underlie the decision have been applied in a long line of cases and are settled law: see dicta of Lord Ackner in ***Brind*** at p 731 et seq, discussed further below. While it is not disputed that the historical context in which an enactment is made may be relevant to its interpretation, what is at issue here is the court's exercise of a supervisory jurisdiction.

58. In determining whether the measures imposed under the First Decision "serve the interest of the community," the approach to be taken was discussed at length by Lord Ackner in ***Brind a***t p. 731 where he stated that:

> "There remains however the potential criticism under the *Wednesbury* grounds expressed by Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corp* [1947] 2 All ER 680 at 685, [1948] 1 KB 223 at 234 that the conclusion was 'so unreasonable that no reasonable authority could ever have come to it'. This standard of unreasonableness, often referred to as 'the irrationality test', has been criticised as being too high. But it has to be expressed in terms that confine the jurisdiction exercised by the judiciary to a supervisory, as opposed to an appellate, jurisdiction. Where Parliament has given to a minister or other person or body a discretion, the court's jurisdiction is limited, in the absence of a statutory right of appeal, to the supervision of the exercise of that discretionary power, so as to ensure that it has been exercised lawfully. It would be a wrongful usurpation of power by the judiciary to substitute its view, the judicial view, on the merits and on that basis to quash the decision. If no reasonable minister properly directing himself would have reached the impugned decision, the minister has exceeded his powers and thus acted unlawfully and the court, in the exercise of its supervisory role, will quash that decision. Such a decision is correctly, though unattractively, described as a 'perverse' decision. To seek the court's intervention on the basis that the correct or objectively reasonable decision is other than the decision which the minister has made, is to invite the court to adjudicate as if Parliament had

provided a right of appeal against the decision, that is to invite an abuse of power by the judiciary.

So far as the facts of this case are concerned it is only necessary to read the speeches in the Houses of Parliament, and in particular those of Mr David Alton, Lord Fitt and Lord Jakobovits, to reach the conclusion, that whether the Secretary of State was right or wrong to decide to issue the directives, there was clearly material which would justify a reasonable minister making the same decision. In the words of Lord Diplock in *Secretary of State for Education and Science v Tameside Metropolitan Borough* [1976] 3 All ER 665 at 695, [1977] AC 1014 at 1064:

> 'The very concept of administrative discretion involves a right to choose between more than one possible course of action on which there is room for reasonable people to hold differing opinions as to which is to be preferred.'"

59. The dicta in ***Brind*** and in a long line of cases that follow its reasoning confirm that in reviewing the exercise of a discretionary power, the court's role is to determine whether the decision is within the scope of the legislation.

60. Using that approach, I am satisfied that the First Decision was made by the Minister on the basis of fiscal and economic considerations, that it was a decision that was open to the Minister to make on the available evidence, that the decision fell within the scope of the power conferred by section 3 of the Trade Ordinance, and that the decision was thereby lawful. Although the quota and registration requirements do not expressly feature in Legal Notice No. 417 of 2020, under which the

licensing requirement was imposed, I consider that they are part and parcel of the licensing requirement and, therefore, that their legitimacy is governed by the same considerations.

61. I now turn to the argument that section 3 of the Trade Ordinance conflicts with this jurisdiction's treaty obligations. The use of a convention as an aid to interpretation is well established. As stated by Lord Ackner in ***Brind*** at page 734 -735, a convention may be deployed to resolve an ambiguity in primary or subordinate legislation. However, unless enacted by Parliament, a convention does not have the effect of law and cannot override the plain words of a statute.

62. In applying this well-established principle, an assessment must be made of whether the literal and ordinary meaning of section 3 of the Trade Ordinance is ambiguous or unclear or open to more than one construction. In my view, it is not. As the words of section 3 are neither ambiguous nor unclear, no question arises of recourse to the GATT or WTO agreements as an aid to interpretation, as would be the case if the meaning of the provision was open to more than one construction.

DUTY TO CONSULT/ FAIRNESS

63. Counsel for the Applicants submits that the quota and import licensing and registration requirements were imposed without consultation or notice to the Applicants, notwithstanding that the Respondent had been in communication with them contemporaneously with the imposition. Counsel submits that the Applicants had a right to be heard before the measures were imposed and that the Respondent's procedures were procedurally flawed and thereby unlawful.

64. In support of the argument, Counsel for the Applicants cites the following passage from ***De Smith's Judicial Review*** at para 7-020, p. 393:

> "Because the interest of the claimant, rather than the discretionary power of the decision-maker, now founds a right to a fair hearing , a hearing is required in most situations where licenses or other similar benefits are revoked, varied, suspended or refused; even where the decision making power affords wide discretion to the decision maker. Thus a strong presumption exists that a person whose license is threatened with revocation should receive prior notice of that fact and an opportunity to be heard."

65. In response, Counsel for the Respondent contends that there was no obligation to consult the Applicants on the proposed measures and that to give advance notice of them may compromise their efficacy. Counsel argues that, at common law, there is no general duty to consult those who are liable to be disadvantaged by a decision and that a duty to consult arises only where there is a statutory requirement to do so or where an applicant has a legitimate expectation to be consulted based on a representation previously made or a settled practice of consultation.

66. The Respondent submits that the policy/ reason is stated ***in R (Hillingdon London Borough Council and ors.) v Lord Chancellor and anor (Law Society and anor intervening)*** [2009] PTSR (CS):

> "Decisions made by public authorities in the exercise of their discretion can often yield benefit to some and loss to others. It is not the law that authorities must necessarily consult those who are liable to be disadvantaged by a proposed decision before they can make the decision. Government and Administration would be impossible if that were the case."

67. Counsel submits that there was no representation or past practice of consultation by the Respondent giving rise to such a duty; that public notice of the First Decision was given on 3 December 2020, approximately one month before the regime took effect; and that the First Decision is a matter of domestic regulatory policy in respect of which there is no obligation to consult.

DISCUSSION

68. The facts are that in its letter of 18 September 2020, the Respondent invited RHTT to a stakeholder consultation meeting on 29 September 2020 to discuss the proposed suspension of the CET on other hydraulic cement. The Respondent sought RHTT's feedback on the matter, indicating the particular areas of focus. In its response letter of 23 September 2020, RHTT registered its disappointment that the consultation process had not been engaged earlier and sought "disclosure of the rationale and/ or basis and/or factual underpinning which…caused (the Ministry) to decide that a suspension has become necessary." RHTT did not attend the stakeholders meeting.

69. Therefore, RHTT was given an opportunity to make representations on the impact of a proposed variation to the rate of duty on its business, both in response to the Ministry's letter of 18 September 2020 and at

the stakeholders' meeting that was later convened. It did not avail itself of either opportunity.

70. The very well-known passage of Lord Mustill in House of Lords decision of ***R v Secretary of State for the Home Department, Ex p Doody*** [1994] 1 AC 531 at 560 establishes two important principles: (i) that "what fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects;" and (ii) that the inquiry is directed to whether the procedure adopted was "actually unfair" and not whether some other procedure might have been "better or more fair."

71. On the facts of this case, I do not consider that the procedure adopted by the Respondent was unfair. RHTT would have been fully aware of the effect of the rate of duty on its business and should have welcomed the opportunity to explain any negative impact. For reasons best known to RHTT, it did not consider it expedient to do so, choosing instead to speculate on the Respondent's approach.

72. In all the circumstances, there is no reasonable basis to conclude that there was a failure to consult the Applicants or that the procedure adopted by the Minister was unfair.

BAD FAITH, IMPROPER PURPOSE, IRRELEVANT CONSIDERATIONS

73. The Applicants' allegations of bad faith are, in summary, that the Respondent has imposed punitive measures on them and has afforded preferential treatment to TCL with the objective of protecting TCL's market share. They allege that such protection manipulates the market, distorts competition and is injurious to them.

74. Among other things, the Applicants rely on successful legal challenges brought by MRSCL against the classification of, and rate of duty payable on, Rock Hard Cement. It is noteworthy that no pronouncements of bad faith were made by the courts in the proceedings, nor can any such inference be drawn, otherwise all unsuccessful parties to litigation would be similarly stigmatised.

75. The proposed measures do not affect only the Applicants, but apply to all importers of building cement (grey) and other hydraulic cements. Mr. Karim's evidence demonstrates that in arriving at the decisions the Minister took fiscal and economic considerations into account and made evaluative assessments. I am therefore satisfied that the Minister took relevant matters into account and undertook the weighing of interests that section 3 of the Trade Ordinance contemplates. In the circumstances, the allegations of bad faith are not supported and I dismiss them as such.

LEGITIMATE EXPECTATION

76. The legitimate expectation argument is premised on the assertion that it was the Applicants' expectation that changes to the existing legal and regulatory framework would be made in keeping with local laws and international obligations; that international obligations impose a 0-5% bound rate of duty on other hydraulic cements and prohibit the imposition of quotas except in limited circumstances; and that the Respondent's decisions were thereby made in breach of local laws, international obligations and the Applicants' legitimate expectation.

77. The Applicants rely on the following authorities to support the argument: ***United Policyholders Group and others v Attorney General of Trinidad and Tobago*** [2016] UKPC 17 where Lord Neuberger stated paragraph 38, that:

> "In the broadest terms, the principle of legitimate expectation is based on the proposition that, where a public body states that it will do (or not do) something, a person who has reasonably relied on the statement should, in the absence of good reasons, be entitled to rely on the statement and enforce it through the courts." United Policyholders.

78. ***Thomas v Baptiste*** [1999] UKPC 13, where Lord Browne-Wilkinson said:

> "We accept that treaty obligations assumed by the Executive are capable of giving rise to legitimate expectations which the Executive will not under the municipal law be at liberty to disregard."

See too ***R v North and East Devon Health Authority, Ex p Coughlan*** [2001] QB 213.

79. Counsel for the Respondent submits that there is uncertainty regarding the application of the doctrine of legitimate expectation in the macro-political or macro-economic field and cites the following passage from the decision of Lord Neuberger in ***United Policyholders Group:***

"....Quite apart from these points, like most widely expressed propositions, the broad statement set out at the beginning of para 37 above is subject to exceptions and qualifications. It is, for instance, clear that legitimate expectation can be invoked in relation to most, if not all, statements as to the procedure to be adopted in a particular context (see again Ng Yuen Shiu [1983] 2 AC 629, 636). However, it is unclear quite how far it can be applied in relation to statements as to substantive matters, for instance statements in relation to what Laws LJ called "the macro-political field" (in R v Secretary of State for Education and Employment, Ex p Begbie [2000] 1 WLR 1115, 1131), or indeed the macroeconomic field."

80. Counsel for the Respondent also cites the following dicta in ***R (on the application of Bhatt Murphy (a firm) and Ors) v Independent Assessor v Secretary of State*** [2008] EWCA Civ 755:

"[40] There remain two issues to be confronted. They bear a close similarity. The first relates to substantive legitimate expectation. It is the question I posed at para 36: what are the conditions under which a prior representation, promise or practice by a public decision-maker will give rise to an enforceable expectation of a substantive benefit? The second relates to the secondary case of procedural legitimate expectation: what are the conditions under which a public decision-maker will be required, before effecting a change of policy, to afford potentially affected persons an opportunity to comment on the proposed change and the reasons for it where there has been no previous promise or practice of

notice or consultation? Answers to these questions might give sharper edges to the doctrine of legitimate expectation.

…..

[41] There is first an overall point to be made. It is that both these types of legitimate expectation are concerned with exceptional situations (see Lord Templeman in Preston at 864; compare ABCIFER [2003] EWCA Civ 473, [2003] QB 1397, [2003] 3 WLR 80 per Dyson LJ at para 72). It is because their vindication is a long way distant from the archetype of public decision-making. Thus a public authority will not often be held bound by the law to maintain in being a policy which on reasonable grounds it has chosen to alter or abandon. Nor will the law often require such a body to involve a section of the public in its decision-making process by notice or consultation if there has been no promise or practice to that effect. There is an underlying reason for this. Public authorities typically, and central government par excellence, enjoy wide discretions which it is their duty to exercise in the public interest. They have to decide the content and the pace of change. Often they must balance different, indeed opposing, interests across wide spectrum. Generally they must be the masters of procedure as well as substance; and as such are generally entitled to keep their own counsel."

DISCUSSION

81. ***In United Policyholders,*** the Privy Council provided clear guidance on the requirements that must be satisfied in order for the principles of legitimate expectation to apply: (i) a statement made by a public body must be in terms that are "clear, unambiguous and devoid of relevant qualification;" (ii) compliance with the statement should not interfere

with the public body's statutory duty; and (iii) consideration must be given to whether circumstances have arisen since the statement was made that make it inappropriate to require the public body to comply with the statement.

82. The court reasoned that, where the statement or assurances in question have macro-economic (and therefore also macro-political) implications, these factors are relevant to determining whether it is permissible to allow the public authority to resile from them, moreso than to the question whether the statement or assurances, by virtue of their nature, are capable of giving rise to a legitimate expectation: see paras 39 and 49.

83. On the facts of this case, the Applicants do not satisfy the first requirement. No statement or assurances were made to them, whether as members of the public or importers of cement or otherwise, that the Government would not impose certain requirements on the importation of other hydraulic cements or that it would maintain the status quo that existed at the time of their entry into the cement market. As the Applicants have failed to satisfy the first requirement, it is unnecessary to consider the application of the second and third requirements.

84. For these reasons, the legitimate expectation argument fails.

THE CONSTITUTIONAL CLAIM

85. The constitutional claim may be disposed of very briefly, the Applicants having failed to establish the breach of any proprietary right by the Respondent.

86. I accept the submission by Counsel for the Respondent that the Open General Licence that previously existed on the importation of other hydraulic cements did not confer a proprietary right or entitlement on the Applicants, and that the right to pursue lawful economic activity is subject both to the power of Parliament to make laws for peace, order and good government and to the lawful exercise of Executive power: ***Grape Bay Ltd v A-G of Bermuda*** [2000] 1 WLR 574 at page 582H-583E and 585C-E.

87. The constitutional claim is therefore without merit and is hereby dismissed.

88. For the reasons given above, the Applicants' application fails and is hereby dismissed.

89. Having heard the parties on costs, it is ordered that the Applicants shall pay the Respondent's costs certified fit for Senior and Junior Counsel to be assessed by this court if not agreed. If there is no agreement on costs, the Respondent shall provide a statement of costs to the court on or before 30 September 2021.

Jacqueline Wilson QC
Judge