

SCF

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2008 HCV 05710

BETWEEN	CARIBBEAN CEMENT COMPANY LIMITED	CLAIMANT
AND	THE ATTORNEY GENERAL	FIRST RESPONDENT
AND	THE MINISTER OF FINANCE AND PLANNING	SECOND RESPONDENT
AND	THE ANTI-DUMPING AND SUBSIDIES COMMISSION	THIRD RESPONDENT

Michael Hylton Q.C. instructed by Michael Hylton & Associates for Claimant.

Lackston Robinson instructed by Director of State Proceedings for First, Second and Third Respondent.

Heard: November 4, 2010 and January 28, 2011

JONES, J.

[1] The key issue for determination, in this case, is whether the Minister of Finance and Planning hereafter "the Minister" has a duty under the Provisional Collection of Tax Act to exercise his discretion to ensure that any duty imposed by the Anti-Dumping and Subsidies Commission hereafter "the Commission" under the Customs Duties (Dumping and Subsidies) Act is collected by the relevant revenue collection agency? As a general proposition, a public authority with a discretionary power must exercise it reasonably and in a way that promotes the object and policy of the statute giving that power. Caribbean Cement Company hereafter "the Claimant" is the sole

producer of cement in Jamaica and therefore constitutes the domestic industry for cement. The Commission is the competent authority in Jamaica to initiate and conduct investigations in respect of anti-dumping matters.

- [2] The Commission carried out an investigation into allegations of harmful dumping into Jamaica of Ordinary Portland Grey Cement originating in, or exported from, China. Arising from the investigations the Commission made a Final Determination under the Customs Duties (Dumping and Subsidies) Act that the Goods had been dumped and had caused, or were likely to cause, material injury to the domestic industry. The Commission met and ordered that duties of 96.27% be imposed on the goods. The Minister failed, however, to make and gazette the relevant order pursuant to the Provisional Collection of Tax Act to enable the Customs Department to collect the duty. The Minister, in response to the order by the Commission, said that "the final determination of the Anti-Dumping & Subsidies Commission that anti-dumping duty is to be imposed on a particular import, does not present an imperative on the Minister to impose such a duty." Arising from this, the Claimant brought an application for judicial review of the decision of the Minister not to implement the final determination of the Anti-Dumping and Subsidies Commission.

The Facts

- [3] On December 16, 2003, the Commission carried out an investigation into the alleged harmful dumping into Jamaica of Ordinary Portland Grey Cement originating, in or exported, from China. Three months later, the Commission made an Affirmative

Preliminary Determination that the cement had been dumped and had caused or were likely to cause material injury to the domestic industry. The Commission instructed that provisional duties of 96.27% be imposed on the cement. Thereafter the Minister made an order entitled "The Customs Duties (Dumping and Subsidies) (Imposition of Provisional Anti-Dumping Duty) (Building Cement (Grey) (People's Republic of China) Order, 2004". This Order was published in the Jamaica Gazette Supplement Vol. CXXVII of Tuesday March 30, 2004.

- [4] The order is administratively necessary in order to put into action any decision made by the Commission to impose duties, for the reason that, the Customs Department is a department of the Ministry of Finance and responds to the instructions of the Minister.
- [5] Six months later, the Commission made a final determination and decided on the imposition of an antidumping duty in the amount of 89.79% on the goods effective July 20, 2004, for a period not exceeding five (5) years. The final determination was published in the Jamaica Gazette Extraordinary Volume CXXVII and also the Daily Gleaner on June 16, 2004. This decision is set out below:

"The Commission has made an affirmative Final Determination pursuant to section 30 of the Customs Duties (Dumping and Subsidies) Act, in respect of the dumping in Jamaica of Ordinary Portland Grey Cement originating in, or exported from China and finds that the goods under consideration have been dumped and the dumping has caused and is likely to cause material injury to the domestic industry.

Pursuant to section 30 of the Customs Duties (Dumping and Subsidies) Act the Commission has decided to impose definitive antidumping duty in the amount of 89.79% on all goods that are of the same description as those to which this Affirmative Final Determination applies. The duties

will take effect from July 20, 2004 and will be terminated five (5) years from the date the duties take effect...

As a consequence of the Commission's determination Jamaica Customs will collect an anti-dumping duty on all goods imported into Jamaica that are of the same description, characteristics and purpose as those to which this Affirmative Final Determination applies, which are released after July 20, 2004, regardless of the Importer of said goods."

- [6] After the final determination, the Minister failed to formulate and Gazette the relevant order pursuant to the Provisional Collection of Tax Act to enable the Customs Department to collect the duty as had been done by the Minister in relation to the provisional anti-dumping duty that was earlier imposed by the Commission.
- [7] In 2008, when the Claimant became aware that the Minister had not made and gazetted an order in relation to the final anti-dumping duty which was imposed by the Commission, it wrote to the Minister, requesting that the order be made. The Claimant also wrote to the Honourable Don Wehby, Minister without portfolio in the same Ministry and to the Commissioner of Customs.
- [8] The Claimant's attorneys wrote to the Commission which responded signifying that it notified the Minister of its Final Determination, but that the Minister has not made the necessary order for the collection of the duties.
- [9] Finally, the Claimant's attorneys wrote to the Minister on November 18, 2008 pointing out that no ministerial order had been made to allow for the collection of the final antidumping duty on the Goods and requesting that it be done immediately to protect the interests of the industry. By letter dated December 17, 2008 the Minister indicated that he was consulting various parties on the issue.

[10] The Minister later wrote on December 19, 2008 indicating that “the final determination of the Anti-Dumping & Subsidies Commission that anti-dumping duty is to be imposed on a particular import, does not present an imperative on the Minister of Finance to impose such a duty.”

[11] The Claimant applied for, and was granted, leave to apply for judicial review of the Minister’s decision. The Minister applied to set aside the grant of leave and on July 16, 2010, this Court dismissed the application. The Court also ordered that this matter be set down as a matter of urgency. The Minister appealed against the decision dismissing his application and to date has not made the relevant order.

[12] The Claimant, Caribbean Cement Company Limited of Rockfort in the parish of St. Andrew, claims against the Respondents for the following relief:

- i) A Declaration that the Minister with responsibility for finance is under a duty to take the necessary steps to ensure that any anti-dumping duty imposed by the Anti-Dumping and Subsidies Commission is collected by the relevant revenue collection agency;
- ii) A Declaration that where an anti-dumping duty is imposed by the Anti-Dumping and Subsidies Commission, the Commission remains under a duty to ensure that all legal steps required for its collection are taken by the appropriate authority;
- iii) An Order of Mandamus directing the 2nd Respondent to consider and make a determination in accordance with the law as to whether an order should be

made pursuant to the Provisional Collection of Tax Act for the Collector of Customs to collect the anti-dumping duties imposed as aforesaid;

- iv) An Order of Mandamus directing the 3rd Respondent to take all steps available to it in order to ensure that the anti-dumping duties as aforesaid are collected by the relevant agencies in Jamaica including notifying importers of the Goods that the said anti-dumping duties are payable. Damages for negligence and breach of statutory duty.

The Issue:

Does the Minister of Finance and Planning have a duty under the Provisional Collection of Tax Act to exercise his discretion to ensure that any duty imposed by the Anti-Dumping and Subsidies Commission under the Customs Duties (Dumping and Subsidies) Act is collected by the relevant revenue collection agency?

[13] It is a well established principle in public law that there is no unfettered discretion. An authority with a discretionary power must exercise it reasonably and in a way that promotes the object and policy of the statute giving that power. The courts are able to examine action taken by an authority in light of the statute and all the circumstances and thereafter determine whether a discretionary power has been exercised to promote the objects and policy of the statute.

[14] Where a statute gives a Minister an unfettered discretion and in a particular case the Minister gives no reasons for a decision in purported exercise of that discretion, the court is not prevented, in a proper case, from, ordering the Minister to reconsider the matter according to the law. In *Padfield v Ministry of Agriculture, Fisheries and Food* [1968] 1 All E.R. 694 on a complaint being made about the functioning of the Milk Marketing Board Scheme, to the effect that south-eastern

producers were paid too little for their milk, the Minister declined to refer the matter to a committee under the relevant statute stating that it raised wide issues; that he had an unfettered discretion; that he owed no duty to producers in any particular region; and that if the committee upheld the complaint the Minister would be expected to make a statutory order to give effect to their recommendations. In delivering the judgment of the court, Lord Reid said that the Minister:

"...contends that his only duty is to consider a complaint fairly and that he is given an unfettered discretion with regard to every complaint either to refer it or not to refer it to the committee as he may think fit... There are a number of reasons which would justify the Minister in refusing to refer a complaint... So he must have at least some measure of discretion. But is it unfettered? It is implicit in the argument for the Minister that there are only two possible interpretations of this provision: either he must refer every complaint or he has unfettered discretion to refuse to refer in any case. I do not think that is right. Parliament must have conferred the discretion with the intention that it should be used to promote the policy and objects of the Act, the policy and objects of the Act must be determined by construing the Act as a whole and construction is always a matter of law for the court. In a matter of this kind it is not possible to draw a hard and fast line, but if the Minister, by reason of his having misconstrued the Act or for any other reason, so uses his discretion as to thwart or run counter to the policy and objects of the Act, then our law would be very defective if persons aggrieved were not entitled to the protection of the court."

- [15] In this case, the Anti-Dumping and Subsidies Commission made a finding and imposed a duty under Section 11 of the Anti-Dumping Act. The section provides that where the Commission has made a finding that the dumping of goods has caused or is likely to cause material injury, "duties shall be imposed" on such goods. In addition Sections 12, 13 and 14 also provide that as a result of decisions by the Commission "duties shall be imposed".

[16] The Claimant contends that the effect of this provision in the Anti-Dumping Act is that the Minister has a duty, not a discretion, under Section 3 of the Provisional Collection of Tax Act, to impose the tax. That section provides that the Minister may make an order varying a tax in force, renewing a tax and imposing a tax. Tax is defined as "any duty, rate, due, fee or other impost". Therefore, when a penalty or rate is imposed by virtue of legislation, the Minister would make an order pursuant to the Provisional Collection of Tax Act in order to facilitate the payment and collection of the tax. This occurred in this case when the provisional anti-dumping duty was imposed. The Minister made an order facilitating the collection of this duty, which allowed the Customs Department to collect the duty imposed

[17] I disagree with the proposition advanced by the Claimant for the reason that the use of the word "may" in the statute imports a discretion. I believe, however, that the discretion must be exercised in a lawful manner, in support of lawful decisions and in support of the guidelines set by Parliament as set out in the relevant legislation. The reason for this is that the Commission is exercising a statutory duty given to it by Parliament to look into and resolve all the issues relative to the dumping of goods.

[18] Section 33 of the Act provides that "a final determination of the Commission under section 30...or any order, finding, ruling or determination of the Commission" may be challenged in judicial review proceedings" in a court. The Minister has no independent powers of review. I agree with Counsel for the Claimant that the Minister's refusal without more does not promote the objects and policy of the

Provisional Collection of Tax Act. The principal objective of the Act is to ensure that the Ministry of Finance makes possible the collection of all fees, levies and imposts of all statutory bodies or departments of government to ensure effective governance.

[19] In my judgment, it is improper for the Minister to refuse to make the necessary order under the Provisional Collection of Tax Act on the basis that “the final determination of the Anti-Dumping & Subsidies Commission that anti-dumping duty is to be imposed on a particular import, does not present an imperative on the Minister of Finance to impose such a duty”, without providing adequate reasons for the “decision in purported exercise of that discretion”. Where this is so, the court can, “in a proper case, order the Minister to reconsider the matter according to the law”.

[20] Section 16(1) of the Act provides that the Commission is required to advise the relevant importers in writing that the anti-dumping duty is payable. The Commission advised the Claimant of its request to the Minister to make the necessary order in accordance with his powers under the Provisional Collection of Tax Act. I do not accept that there are any additional steps to be taken by the Commission to ensure that the imposed duty is in fact collected.

The Conclusion

[21] For all the above reasons this court grants the following orders:

- (i) A Declaration that the Minister with responsibility for finance must exercise his discretion in a lawful manner, in support of lawful decisions and in support of the policy of parliament as expressed in the Customs Duties (Dumping and Subsidies) Act to ensure that any anti-dumping duty imposed by the Anti-Dumping and Subsidies Commission under the Act is collected by the relevant revenue collection agency;
- (ii) An order of mandamus directing the Minister of Finance to consider and make a determination in accordance with the law as to whether an order should be made pursuant to the Provisional Collection of Tax Act for the Collector of Customs to collect the anti-dumping duties imposed as aforesaid;
- (iii) There is no order as to costs.