



[2022] JMSC Civ.62

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. SU2021CV02773

BETWEEN	DCP SUCCESSORS LIMITED	CLAIMANT
AND	THE TRADE ADMINISTRATOR	1ST RESPONDENT
AND	THE TRADE BOARD LIMITED	2ND RESPONDENT
AND	COMMISSIONER OF CUSTOMS AND EXCISE	3RD RESPONDENT
AND	JAMAICA CUSTOMS AGENCY	4TH RESPONDENT
AND	BLUE POWER GROUP LIMITED	5TH RESPONDENT

IN CHAMBERS

Mr. Sundiata Gibbs instructed by Messrs Hylton Powell Attorneys-at-Law for the Claimant/Applicant

Ms. Lisa Whyte, Deputy Solicitor General (Ag), instructed by the Director of State Proceedings for the 1st – 4th Respondents

Ms. Symone Mayhew Q.C. with Ms. Lesley-Ann Stewart instructed by Mayhew Law for the 5th Respondent

Heard: May 11 and 19, 2022

Treaties – Article 214 Of The Revised Treaty Of Chaguaramas – Application To Refer Questions Arising Out Of Issues To The Caribbean Court Of Justice To Enable National Court To Enter Judgment – Factors For Court To Consider Before Making Referral – Whether the referral is necessary for the Court to deliver judgment – Stage at which decision on whether to refer questions to the CCJ under Article 214 should be made.

DALE STAPLE, J (AG)

BACKGROUND

- [1] This matter raises a rarely argued area of the jurisprudence surrounding the application of the Revised Treaty of Chaguaramas, the Caribbean Court of Justice and the operations of the Caribbean Community (CARICOM) single market and economy.
- [2] Here we have the Claimant, a limited liability company out of the island of Dominica, challenging the decisions of the 1st to 4th Respondents, agencies or bodies or actors (as the case may be) of the Government of Jamaica, to, as the Claimant puts it, facilitate the production and export of a “soap product” (as I am putting it to avoid one of the main areas of factual dispute in the litigation in this case) by the 5th Respondent to other states in CARICOM by certifying those products as products of origin in CARICOM and, exempting the 5th Respondent from paying the requisite 40% Common External Tariff (CET).
- [3] The Claimant has filed a Fixed Date Claim Form seeking redress against all the Respondents under various headings. Among the remedies prayed are damages against the 1st – 4th Respondents for breach of statutory duty.
- [4] The only remedy sought against the 5th Respondent is an order for them to cease classifying the soap noodles it imports from non-CARICOM countries as fatty acid pellets bearing the tariff heading 38.23 instead of the correct tariff heading of 34.01.

- [5] The remedies sought in Orders 4 and 5 may, in my view, affect other soap producers in Jamaica, but these parties are not before the Court and so their positions have not been canvassed or obtained in the form of Affidavit evidence.
- [6] The Claimant contends in this present Application before the Court that this case involves questions involving the interpretation or application of the Revised Treaty of Chaguaramas (RTC) that are necessary for the Court in Jamaica to deliver judgment in this matter and so this Court ought to refer the questions to the CCJ, in its original jurisdiction, in accordance with Article 214 of the RTC.
- [7] It is supported by the Affidavit of Timera Mason. There has been no Affidavit in Response to this Application filed by any of the Respondents. The Application was opposed by the Respondents.
- [8] The Court is grateful to counsel who appeared for their thoughtful submissions on what is still an evolving area of law in the region. Ms. Whyte and Ms. Mayhew both pointed out that in the history of the CCJ, no local court of a Member State has ever referred a matter to the CCJ pursuant to Article 214 of the RTC.

THE LAW

- [9] The RTC sets out the basis upon which a Court of a Member State of CARICOM that is a party to the RTC may refer an issue in a case before it to the Caribbean Court of Justice (CCJ) for the determination of the CCJ.
- [10] This is governed by Article 214 of the RTC. It is set out below for completeness.

“Where a national court or tribunal of a Member State is seised of an issue whose resolution involves a question concerning the interpretation or application of this Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.”

- [11] Relevant to this discussion as well is Article XIV of the Agreement Establishing the Caribbean Court of Justice (the Agreement). That article states as follows:

“Where a national court or tribunal of a Contracting Party is seised of an issue whose resolution involves a question concerning the interpretation or application of the Treaty, the court or tribunal concerned shall, if it considers that a decision on the question is necessary to enable it to deliver judgment, refer the question to the Court for determination before delivering judgment.”

[12] The above is materially similar to the wording of Article 214 of the RTC.

[13] There is also section 6 of the Caribbean Community Act, 2004 (Jamaica) (hereinafter the CCA). It will also be set out in full below:

“6. Where in any legal proceedings, the court or tribunal considers that a decision on any question concerning-

(a) the interpretation or application of the Treaty; or

(b) the validity, meaning or application of instruments made under the Treaty,

is necessary for it to deliver judgment, the question shall be referred to the Caribbean Court of Justice.”

[14] As is plain to see, the CCA expands the subject matter of the questions that can be referred to the CCJ for decision. It also includes questions on the validity, meaning or application of **instruments** (emphasis mine) made under the treaty whereas Article 214 confines the referrals only to questions concerning the application or interpretation of the RTC.

[15] Jamaica clearly intended to increase the scope for referrals to the CCJ. Whether Jamaica could have expanded the scope of the questions that could be referred to the CCJ outside the area delineated by the Treaty is one that is ripe for discussion. But not here.

[16] The criteria under s. 6 of the CCA are different from those under Article 214 of the RTC and Article XIV of the Agreement. Section 6 does not concern itself with a distinction between issues and questions, but the overall effect seems, in my view, to be the same. The criteria under s. 6 are that:

- (i) **There are legal proceedings before a court or tribunal; and**
- (ii) **There is a question or questions concerning either**
 - a. **The interpretation or application of the Treaty; or**
 - b. **The validity, meaning or application of instruments made under the Treaty; and**
- (iii) **A decision on the questions in (ii) above is necessary for the court or tribunal to deliver judgment.**

[17] However, the Court considers that it must look at the combined effect of Article 214 of the RTC, Article XIV of the Agreement as well as s. 6 of the CCA. In my view, it must be that if there is no issue seised by the Court, then there can be no referral of any question to the CCJ regardless of what s. 6 of the CCA says. I say this because the Treaty is what would take precedence in this regard.

Factors for the Court to Determine Before Deciding to Refer a Question to the CCJ for Decision

[18] In my view, to decide whether or not to refer a question on an issue to the CCJ for determination, the Court/Tribunal in Jamaica must first determine the following two factors:

- 1 Whether the Court is seised of the issue; and**
- 2 Whether the resolution of the issue involves a question on the interpretation/application of the RTC or the validity, meaning or application of instruments made under the Treaty.**

[19] Once the Court/Tribunal determines that the issue (emphasis mine), meets the tests in 18 above, it must then go on to consider and determine the third factor – whether a **decision on the question** in (2) is necessary to enable it to deliver judgment. All three factors must be satisfied before the Court can make the referral.

Necessary to Deliver Judgment

[20] But what does necessary to deliver judgment mean?

[21] Counsel for the 5th Respondent, in her written submissions at paragraph 13, suggested for the Court's guidance what the phrase "as necessary to deliver judgment" would mean. They commended to the Court the authority of ***HP Bulmer et al v J Bollinger S.A. et al***¹.

[22] Mr. Gibbs submitted that these authorities are not helpful to the Court as the language used in the European treaties tend to be more permissive whilst the RTC and the CCA and the other statutes speak in more mandatory language. He referred the Court to Article 211 of the RTC and the relevant provisions of the CCA and other legislation.

[23] Mr. Gibbs cited the case of ***Hummingbird Rice Mills Ltd v Suriname et al***² where the CCJ reminded the Member States of their obligation to refer matters under Article 214 of the RTC. The court stated³

"Per curiam. The court reminds national courts and tribunals of their obligations under art 214 of the Revised Treaty which states that where resolution of an issue involves a question concerning the interpretation or application of the Treaty, that court or tribunal hearing the matter must refer the question to the Caribbean Court of Justice for determination before delivering judgment, if such a court or tribunal 'considers that a decision on the question is necessary to enable it to deliver judgment'. A national court or tribunal has, of course, a measure of discretion in considering the necessity of a referral but that discretion is a limited one."

[24] Both Ms. Whyte and Ms. Mayhew disagreed. Ms. Mayhew relied on ***Bulmer***.

¹ [1974] Ch 401

² (2012) 79 WIR 448

³ Id at p. 450

[25] In the **Bulmer** decision the facts were (as taken from the headnotes to the case) that in 1970 two English companies which had manufactured beverages described over many years as "champagne cider" and "champagne perry" began an action against two representative French champagne houses, asking for declarations that they were entitled to use those expressions in relation to their products. The French producers delivered a defence and counterclaim within the scope of an English passing off action; but after the United Kingdom became a member state of the European Economic Community on January 1, 1973, and the Treaty of Rome became part of English law, they amended their defence and counterclaim to add a claim and ask for a declaration that the use of the word "champagne" in connection with any beverage other than the wine produced in the Champagne district of France would contravene community law. They also applied to Whitford J. asking that he should refer to the European Court of Justice under article 177 of the Treaty two questions for preliminary rulings:

(A) whether on the true interpretation of specified community regulations relating to wine and other relevant provisions of community law the use of the word "champagne" for beverages other than their champagne would contravene community law; and

(B) whether on the true interpretation of article 177 a national court of a member state should, where there was no earlier decision of the Court of Justice on such a question as A, refer such a question to that court, even though article 177 did not compel the national court to do so. Whitford J. held that at that stage of the English proceedings it was not "necessary" for him to obtain a ruling on question A and that it was not "necessary" to refer question B at all.

[26] On appeal the Court of Appeal held that the learned judge had rightly refused to refer question A at the stage at which the request was made if he felt, as he did, that the decision was not needed to enable him to make a final determination of the matter. The Court of Appeal went on to say that such referrals were wholly discretionary and that if a national court felt itself capable of resolving the dispute

itself without a ruling or felt that itself could determine the question of law, it need not and should not trouble the European Court.

[27] I do agree with Mr. Gibbs that the position taken by the English Court of Appeal on the question of whether or not a national court of the UK may deal with the issue itself, if it felt itself in a position so to do, rather than refer the question to the ECJ, may well be applicable only to the UK trial courts based on the wording on their statute and their Treaty.

[28] However, the import of the other principles surrounding the meaning of “necessary to deliver judgment”, I believe to be applicable in our jurisdiction.

[29] Lord Denning, in the decision itself at page 442, suggested that the appropriate test to determine if the referral of the question is necessary to deliver it’s judgment, is whether or not the answer to the question on the meaning or application of the Treaty would result in judgment for one party or the other. Denning said, “In short, the point must be such that, whichever way the point is decided, it is conclusive of the case. Nothing more remains but to give judgment.”

At What Stage Should the Decision on the Referral be Made and Who Should Make it?

[30] The stage at which the proceedings have reached is critical to a determination of the question of necessity. As Denning said in the *Bulmer* case, “As a rule, you cannot tell whether it is necessary to decide a point, until all the facts are ascertained. So in general, it is best to decide the facts first.”⁴ This position was also part of the dicta by the CCJ in the *Hummingbird* case when the Judges of

⁴ N1 at 432

the CCJ gave their admonition to national courts concerning referrals to the CCJ under Article 214 (see above).

[31] I am minded to agree with the submissions of Ms. Mayhew and Ms. Whyte that the appropriate tribunal to make this decision on whether the referral of the question is necessary to deliver judgment on the issue, is the tribunal that is to deliver the judgment on the issue and not any that is dealing with an interlocutory step. It may be that on an application for summary judgment or strike out, that such a position may arise before such a court. So it may not always be the trial judge. Rather it is the judge/tribunal that is to determine the issue.

[32] In ***Prudential Assurance Co Ltd v Prudential Insurance Co of America***⁵ Chadwick LJ recognised that the test of necessity was met in relation to the jurisdictional issues which arose on appeal from a decision on a strike out application, but declined to make a reference as the matter would proceed to trial in any event, explaining as follows:

“50.... But in exercising the power to refer the national court must observe some measure of self-restraint; lest the Court of Justice become overwhelmed. In particular, the national court should be cautious when asked to make a reference for a preliminary ruling in a case where it may turn out, after the facts have been established, that the point does not, in the event, arise.

51. In my view we should decline to direct a reference at this stage in the present case. My reasons are as these. Whatever the decision on the jurisdictional points raised on this appeal, the action will proceed to trial on the 1974 contract issue. If Prudential (UK) succeeds on that issue, the question whether it could succeed on the claim for infringement of its trade marks will become moot...”

⁵ [\[2003\] EWCA Civ 327](#)

[33] I am also of the view, in accordance with the cases⁶, that the stage of the proceedings has to be one where the Court/Tribunal is about to make the decision on the issue and not before.

ANALYSIS

Is the Court Properly Seised of the Issues?

[34] The short answer to that question is: not at this stage. I find that the Claimant and the 1st to 4th Respondents have joined issue with each other on several areas of fact and law.

[35] I find that some of those issues have been joined between the Claimant and the 1st and/or 2nd Respondents (together as the Trade Board) as well as the Claimant and the 3rd and 4th Respondent (Jamaica Customs). However, the issues have not been fully distilled and crystallised at this point.

[36] I am not certain whether the Claimant still has an issue with the 5th Respondent in light of the Affidavits of Mrs. Kong-Lee and the remedy sought against them in the Fixed Date Claim Form.

[37] Concerning the 1st and 2nd Respondents, the issue currently is, essentially, whether or not they had been issuing certificates of origin to the 5th Respondent contrary to Article 84 (7) of the RTC and whether they continue so to do and are permitted so to do.

[38] Concerning the 3rd and 4th Respondents the issue currently is, essentially, whether or not Jamaica Customs has been wrongfully exempting the 5th Respondent from the 40% CET applicable to soap noodles imported from outside CARICOM contrary to Article 82 of the RTC. This wrongful exemption, if so determined, would,

⁶ See *London Steamship Owners Mutual Insurance Association Limited v The Kingdom of Spain* [2022] EWCA Civ 238 at para 36.

according to the Claimant, have the effect of giving the 5th Respondent an unfair economic advantage over the Claimant and other competitors in CARICOM member states.

[39] A Court/Tribunal is seised of an issue where it is that issue is to be determined by the Court. This is in particular where the issues are joined between the parties.

[40] I am satisfied that it is more likely than not that some issues are properly joined before the Court at this point. Joinder of issue is a point in a lawsuit when the defendant has challenged some or all of the plaintiff's allegations of fact or when it is known which legal questions are in dispute--in other words, when both parties are accepting that the particular issue is in dispute the "issue is joined."

[41] However, at this stage, the evidence is not yet fully before the Court. The trial date has not yet been set. It is set for a date unknown in the Hillary Term of 2023. The Pre-Trial Review is set for later in 2022. Disclosure is still being made between the parties pursuant to the Case Management Orders of the Court. As a result, issues that are currently before the Court may change, others may be added, others dropped. It is only at the stage of trial, when all the evidence is before the Court, that the Court can say what are the issues for its determination. This may be at the stage of Pre-Trial Review at the earliest.

[42] Both sides have averred facts that put these questions squarely in dispute.

[43] I am not therefore satisfied that the Court is seised of the all the issues at this stage.

To Resolve the Issues, would it Involve a Question on Either the Interpretation or Application of the RTC (Article 214 of the Treaty and s. 6(a) of the CCA) and/or the Validity, Meaning or Application of Instruments Made Under the Treaty (as per s. 6(b) of the CCA)?

[44] If I am wrong on the question of whether this Court is seised of the issues, then I will now consider factor 2.

- [45] The short answer to this question is yes in relation to both proposed questions (a) and (b).
- [46] Proposed question (a) involves the interpretation and application of Article 84(3) of the RTC and proposed question (b) involves the interpretation and application of Article 83(2) and Schedule III paragraph 19 of the RTC.

Is it Necessary to Refer the Questions Proposed to the CCJ to Determine the Issues?

- [47] In my view, this is a two stage question. Stage 1 requires me to determine if I am the appropriate tribunal to be making this decision given the stage of the litigation at which we are presently and what is before me.
- [48] If I find that the answer to the first stage is yes, then I must then go on to stage 2 which is to consider whether the answers to the questions referred would be determinative of the issues in the claim.

Stage 1

- [49] We are now at an intermediate stage of the proceedings. The first hearing has gone and case management orders have been made. The Parties are in the process of complying with those orders. The trial will not take place until the Hillary Term of 2023 and the Pre-Trial Review is not until later in the Michaelmas Term of 2022.
- [50] At this stage of the proceedings, there were some factual questions I found still not clarified and that would have to be determined by the tribunal of fact.
- [51] Counsel Ms. Whyte on behalf of the 1st – 4th Respondents and Ms. Mayhew QC on behalf of the 5th Respondents submitted that the “Court” that is to make this determination on necessity is not this Court, but the trial Court.

- [52] Ms. Mayhew relied on the decision in *Bulmer* above as well as the decision in *London Steamship Owners Mutual Insurance Association Limited v The Kingdom of Spain*⁷ in support of her contention.
- [53] In light of where we are in the proceedings and the nature of the application before me presently, I am not satisfied that I am the Court to make this determination. I find that it would be more appropriate for the trial judge to make this determination as it is that judge who will have to decide the issues and deliver judgment.
- [54] Had this been an application either for summary judgment or strike out, then it would have been different. I would then be the Court to make the determination on the issue and deliver judgment to dispose of the issue.
- [55] As I have determined that this does not pass the stage 1 test to determine necessity, then I will not consider the stage 2 test.

CONCLUSION

- [56] I am not satisfied that this Court is seised of the issues in this matter to make a determination on whether to refer the questions proposed to the CCJ for determination.
- [57] Nor am I satisfied that this is the Court or that we are at the stage of the proceedings for the questions proposed to be referred to the CCJ. In my view, the appropriate judge to make the decision on the referral is the trial judge or the judge to make a determination on the issue(s) and the stage would be when the Judge is set to make the decision on the issue(s) to dispose of the issue(s).

⁷ [2022] EWCA Civ 238

[58] In the circumstances therefore, the Applicant's Application filed on the 7th March 2022 is refused.

[59] Costs to the Respondents to be taxed if not agreed.

[60] Leave to appeal is granted.

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Dale Staple
Puisne Judge (Ag)