



VINCEMENT LTD v. ST VINCENT AND THE GRENADINES

Facts

Vincement Ltd is a Vincentian company. Its main business is the importation of cement from Turkey. It started importing this cement in 2016 as “other hydraulic cement” carrying a tariff of 5%. However, on 15 March 2016, the Comptroller of Customs and Excise of St Vincent and the Grenadines (“SVG”) decided that this cement should be classified as “building cement grey” which carries a tariff of 15% and Vincement Ltd brought proceedings for judicial review in the High Court against the Comptroller. The Court heard expert evidence and ruled in favour of the Comptroller declaring that the imported cement was properly classified as “building cement grey.” Vincement Ltd appealed but both the Court of Appeal and the Privy Council, SVG’s apex court, affirmed the decision of the High Court. At no stage in the litigation was reference of the issue of classification to the CCJ considered.

A few months after the Privy Council had given its judgment, on 28 April 2018, TCL filed case no. TTOJ2018/001 at the CCJ against Trinidad and Tobago, in which Hard Rock Distribution Ltd and Mootilal Ramhit and Sons Ltd intervened. Rock Hard is also an importer of cement from Turkey similar to the cement imported by Vincement Ltd.

On 6 August 2019 the CCJ delivered its final judgment, deciding, *inter alia*, that the cement imported by Rock Hard from Turkey must be classified as “other hydraulic cement”.

Vincement Ltd immediately demanded that as a CARICOM Member State, SVG (a) adopts the CCJ classification of its imported cement and (b) reimburses Vincement Ltd the difference of 10% of the import duties it had paid as of 15 March 2016. The Government reacted by saying it would immediately adopt the classification but that it would not reimburse Vincement Ltd because the classification, now considered wrong, had been approved by all its courts including the Privy Council.

On 1 October 2019 Vincement Ltd filed Article 222 proceedings against SVG in the CCJ asking the Court to declare that the State of SVG was liable for wrongly classifying its cement imported from Turkey as even the apex court, the Privy Council, had not referred the issue of classification to the CCJ as it was bound to do under Article 214 of the RTC. Had the Privy Council referred the case it would clearly have led to a different outcome as shown by the *TCL v Trinidad and Tobago* case.

In its defence, SVG stated that it could not be held liable for what its independent courts decide and certainly not for decisions of the Privy Council which is not “a court of a Member State”. Under its Constitution, the State was bound by the decision of the Privy Council which was final, and which could not be retroactively overruled by the CCJ. Also, it argued, Vincement Ltd had never applied at any stage of the court proceedings for a referral so the courts could not be faulted for not referring the classification issue to the CCJ, and in any event, the issue of referral was a matter of discretion for the domestic courts.

Instructions:

On 1 December 2019, the CCJ granted leave Vincement Ltd leave to proceed under Article 222 to claim that St Vincent and the Grenadines violated Article 214. At a subsequent Case Management Conference, the matter was set down for hearing at the Seat of the Court on 19 and 20 March 2020 (because of the pandemic, adjourned to 17 and 18 March 2022, when the matter will be heard by videoconferencing). It was agreed that Senior Counsel for the Claimant would argue that the Defendant is liable for the failure of its courts to refer the classification issue while Junior Counsel will contend that there was no discretion in the courts to not refer. Senior Counsel for the Defendant will contend that there can be no state liability for the actions of its independent courts generally and certainly not for the actions of the Privy Council while Junior counsel will argue that the domestic courts have a discretion whether to refer and that the Claimant ought to have assisted the courts by raising the issue (which it had not done).