

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE COURT OF APPEAL OF THE
REPUBLIC OF TRINIDAD AND TOBAGO

JCPC/2025/0087

BETWEEN:

OILFIELDS WORKERS' TRADE UNION

Appellant

- v -

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Respondent

AND

THE ATTORNEY GENERAL

Interested Party

CASE FOR THE APPELLANT

*(References to the Record of Proceedings are in the format [ROP XX/YY]
in which XX corresponds to the page number of the Record of Proceedings – Main Hearing Bundle
and YY is the line or paragraph where applicable)*

Introduction

1. This is an appeal against the decision of the Court of Appeal of Trinidad and Tobago reversing the finding of the Industrial Court that the Respondent had committed an industrial relations offence contrary to section 40(1) of the Industrial Relations Act (IRA) [ROP 1976/40].
2. The essential agreed facts and issues are set out in some detail in the Statement of Facts and Issues [ROP 31 – 44]. As such, the Appellant is enabled to present in summary form the events which gave rise to the complaint of an industrial

relations offence lodged by the Appellant with the Industrial Court and likewise the findings and reasoning of the Industrial Court and the Court of Appeal.

3. The Respondent was, at all material times, a wholly owned State company engaged in two petroleum-related operations: upstream exploration and production (**E&P**) and downstream refinery and marketing (**R&M**) [**ROP 147/1**]. In September 2017, having considered the Respondent's sustained losses, its extraordinary operational costs and its severe debt load, the Respondent's newly appointed Board concluded that the Respondent was uncompetitive due to ageing plant, the fact that 50% of its labour force was surplus to the requirements of companies of a similar nature and its practices and skill levels which were not consistent with international benchmarks or best practices in the industry. Substantial change was accordingly needed including a reduction in the number of employees, an increase in shifts from 8 hours to 12 hours and the cutting back on overtime [**ROP 441 – 442/7**].
4. Representatives of the Appellant and the Respondent met in January 2018 and agreed that a restructuring of the Respondent was required. After a series of meetings held between January and April 2018, they executed a Memorandum of Agreement on 3 April 2018 (**the MOA**) [**ROP 319 - 321**]. The MOA was subsequently entered as an order or award of the Industrial Court on 20 July 2018 pursuant to section 58 of the IRA [**ROP 1977/58**].
5. Under the MOA, the parties agreed, inter alia, "to meet and resolve the organizational structures, work processes and skills/competencies and manpower requirements to ensure the survival, sustainability, profitability of the Company" [**ROP 320/d**] and to that end agreed to meet at an executive level on a monthly basis to "progress the implementation of the organizational structures, skills/competencies, work processes, customs and practice and the manpower requirements in all areas of the Company's operations which will ensure the Company's survival, sustainability and profitability" and to "review, monitor and ensure progress of the Working Committee" [**ROP 320/1(a),(b)**] to be established under the MOA. It was the parties' further agreement that the Working Committee would work "to address, resolve and agree on the four (4) organizational

structures, work processes and skills/competencies and manpower requirements which will make the Company internationally competitive thus ensuring its survival, sustainability and profitability." **[ROP 320/2]** Importantly, the parties declared that the MOA was intended to reflect "the principles of their working relationship to take effect from 3 April 2018." **[ROP 321]**

6. No meetings were scheduled between May and August 2018 because during that period the Respondent had busied itself with collating information on every single activity within the organisation, defining the duties of each position, and determining the relative costing. The Respondent thought it neither practical nor realistic to meet with the Appellant during this period because the Respondent was dealing with a mass of information which was being updated or corrected on a regular basis and had to be analysed before discussions could take place **[ROP 151/17]**.
7. It transpired that as a result of the Respondent's investigations, it came to realise that its financial situation was far worse than anticipated and that the only recourse available to become profitable and to be able to refinance its debts was to close down its operations and to create a new entity focused entirely on E&P in accordance with international benchmarks **[ROP 444/15]**.
8. The Appellant first got wind of the Respondent's position when the Honourable Prime Minister informed the Appellant on 21 August 2018 that the Respondent would be going out of the refinery business **[ROP 224/18]**. Then, at a meeting on 28 August 2018, the Respondent informed the Appellant that there were three options available, two of which involved the continuation of the Respondent's operations, but that the Respondent had selected the third option, with the approval of Cabinet, namely, to close the refinery and terminate the employment of all its employees with effect from the end of November 2018. The Appellant proffered engagement under the MOA as another option and made representations to the Respondent to reverse its decision but the Respondent refused to do so **[ROP 224 – 225/20-22]**.

9. The termination letters issued to the Respondent's workers provided 45 days' notice of termination and advised of termination payouts utilising the formula for severance pay provided for in the Collective Agreements **[ROP 446/21]**.
10. On 1 October 2018, the Appellant referred to the Industrial Court a complaint that the Respondent had committed an Industrial Relations Offence against section 40(1) of the IRA by failing, in good faith, to treat and enter into negotiations with the Appellant for the purpose of collective bargaining **[ROP217]**. More particularly, the Appellant complained that the Respondent had "*acted in bad faith in arriving at its decision to terminate all employees by 30 November 2018 without first consulting with the [Appellant] in accordance with the [MOA], or at all*" **[ROP 219]**.

The Industrial Court's decision

11. In its judgment delivered on 19 November 2018 **[ROP 146 – 167]**, the Industrial Court upheld the Appellant's complaint. In coming to its decision, the Court:
 - i) Found that although the Respondent's decision to shut down its operations raised "critical issues of surplus labor, the alteration of the employment contract, the termination of all workers, separation packages and the rehiring of some of the workers," there were no meetings between the Respondent and the Appellant to discuss any of these issues **[ROP 153/21; 154/24]**.
 - ii) Held that, as an order of the Court registered under section 58 of the IRA, the MOA was not merely and "*an incidental matter but the law between the parties: the framework for consultation, treating and/or negotiations between the parties.*" **[ROP 151/16]** It "laid the framework for the parties to treat and negotiate in good faith regarding the future of the Company in relation to the terms and conditions of employment of the 5,500 Workers' covered by the 'extant Collective Agreement... It effectively became an addendum to the Collective Agreement that regulated the relationship

between the parties and could not be ignored by either party.” **[ROP 160/45(b)]** It contained, in accordance with section 43(1) of the IRA, "effective provisions concerning appropriate proceedings for avoiding and settling disputes between the parties" relating to the future of the employees under the contemplated restructuring by the Company.” **[ROP 160 – 161/45(b)]**

- iii) Rejected the Respondent’s argument that section 40 was inapplicable because the Appellant’s complaint was that the Respondent had failed to ‘consult’ with the Appellant before deciding to shut down, whereas section 40 requires the Respondent to ‘negotiate’ with the Appellant. According to the Court, the IRA intended the term “treating and negotiating” to encompass “a broad scope of activity” in which ““consulting” is a synonym of the words “negotiate” and “treat” in the industrial relations context.” Treating and negotiating in the industrial relations context contemplates “meetings, consultation and discussions. This is the key to the principle of collective bargaining as the Act itself has defined it.” **[ROP 159/43]**
- iv) Followed its previous decision in Complaint No. GSD-IRO 31 of 2015 SWUTT and ArcelorMittal Point Lisas Limited in which it held that an employer is obliged to consult with the recognised majority union where redundancy or lay-off is contemplated **[ROP 159/42,44]**.
- v) Rejected the Respondent’s argument that there was no need to treat and negotiate with the Appellant once there was a change from a decision to restructure to a decision to close operations. This was rejected, inter alia, because i) “the termination of employment of workers whether (the) cause be closure of the company or for any other reason is fundamental to the terms and conditions of employment of workers emphatically included in the registered collective agreement to which the Company is legally bound”; **[ROP 160/45(a)]** and ii) the MOA had laid the framework for the parties to meet and treat in good faith regarding the future of the company **[ROP 160/45(b)]**.

- vi) Found that acting in good faith in this case meant that “any departure from the terms of the MOA or reconsideration of the goal of restructuring to closure must be discussed with the union beforehand.” **[ROP 161/45(d)]**
 - vii) Held that the Respondent “violated the MOA when it went on its own to work out and decide on the future of the company and then presented it to the union as a *fait accompli* and indeed began issuing letters of termination.” **[ROP 161 – 162/45(d)]**
12. In all of the circumstances, the Court found that the Respondent was under a duty to discuss a number of issues with the Appellant, including the criteria to be used in the rehiring process, the proposed structure of the company, pension and medical plans of the workers, the workers’ savings plan and other benefits, the computation of termination packages and outstanding loans **[ROP 166 – 167/3]**. The Court ordered the Appellant and the Respondent to meet in good faith to address these issues before the termination of the workers’ employment, such meetings to take place on a daily basis between the 20 and the 26 November 2018. The Court also ordered the company to pay the maximum fine of \$4000 **[ROP 167/4]**.

The Court of Appeal’s decision [ROP 106 – 145]

13. The unanimous judgment of the Court of Appeal was delivered by Kokaram JA **[ROP 115 – 145]**. Pemberton JA provided additional reasons **[ROP 107 – 115]**.
14. Kokaram JA was of the view that the Industrial Court erred in its finding that a breach of the MOA constituted a violation of section 40, for two reasons. Firstly, he endorsed the general principle established by the Industrial Court in prior decisions that a mere breach of a memorandum of agreement did not constitute a violation of section 40 **[ROP 130/68(f)]**.

15. Secondly, he held that the MOA applied only to circumstances where the Respondent continued in operation and not where, as it turned out, it had decided to cease operations altogether **[ROP 135 – 136/74, 75; 137/79]**. As he said:

... the MOA was premised upon the continuation of the business of the Company. It articulated a mechanism by which the parties would collaborate to pursue the common interest with respect to the survival, sustainability and profitability of the Company. It was not contemplated by this agreement that any obligations were to be created where the Company ceases its operations. In other words, the MOA addressed the question of what should the parties devise to keep the Company afloat. It did not contemplate what should be the items for discussion after the closure of its business. Having made a decision to cease its operations, a decision which the Company accepts (in oral submissions) requires no consultation with the Union, there is a significant change in circumstances making the MOA a historic fact than a present reality with binding obligations.” **[ROP 135 – 136/74, 75]**

16. Further, Kokaram JA found that the Industrial Court fell into error in finding that the Respondent was under a general duty under section 40 to consult with the Appellant before it decided to cease its business and terminate its workforce **[ROP 117/37]**. This was because the “question of the closure of the company or its intended impact on the terms and conditions of employment did not constitute ‘collective bargaining’ within the meaning of section 40(1)” **[ROP 125/ 58(b)]** and “there is no roving obligation to consult created by section 40.” **[ROP 126/ 58(c)]** In so finding, Kokaram JA held further as follows:

- i. Firstly, there is no specific duty expressed in section 40 or in any provision of the IRA for an employer to consult with the recognised majority union prior to issuing notices of dismissal **[ROP 129/67]**.
- ii. Secondly, there could only be a breach of section 40 if the Respondent had failed to treat or negotiate with the Appellant in good faith for the purpose of resolving a dispute, since there was no complaint of a failure to treat and enter into negotiations to conclude a collective agreement **[ROP 140/88]**. But the decision to close the Respondent did not constitute a trade dispute even though it would inevitably give rise to one after it had decided to terminate its workforce **[ROP 140/89]**. Further, no authority was advanced

by the Appellant to show that there is a duty to meet and enter into negotiations before a decision to terminate **[ROP 140/89]** and in the Court's opinion there was "no roving duty by the employer to consult the RMU before it decides to terminate its workforce for the purposes of section 40 (1) of the IRA." **[ROP 141/89]**

- iii. Thirdly, there is a marked difference between negotiation and consultation as expressed in the following passage in Roberts' Dictionary of Industrial Relations. 'Consultation' is defined as:

"A procedure instituted to provide greater participation by employees and employer organisations in the formulation and implementation of policies which are likely to affect their working conditions. Consultation is aimed at getting individuals or groups to suggest or respond to proposals for policy formulation and implementation without at the same time giving up 'management's rights' to make the final decision in these matters. It provides an opportunity to present a point of view or state an objection, but it is not in the nature of a 'negotiating' session of two equal parties to arrive at a mutually acceptable decision." **[ROP 141 – 142/92]**

- iv. Fourthly, although the obligation under section 40 is conjunctive, that is to say, there is an obligation to carry out two activities, that is to say, "to meet one another and to enter into negotiations, all in good faith for the specific purpose of collective bargaining ... it would hardly make sense to merely consult without a view to arriving at an agreement" **[ROP 143/95]**.

17. The Appellant respectfully submits that the Court of Appeal wrongly rejected the findings of the Industrial Court, for reasons which will be developed below. However, there are some criticisms of the Industrial Court's judgment which are better dealt with at the outset.
18. In her concurring judgment, Pemberton JA criticized the Industrial Court for relying on sections 9(1) **[ROP 1971]** and 10(3)(a) **[ROP 1972]** of the IRA in its interpretation of section 40(1) **[ROP 1976]**. She found that the court was plainly wrong to do so **[ROP 113/23]**. Kokaram JA appears to have joined in this criticism at least in relation to the use of section 9(1) **[ROP 126/60]**. Pemberton JA also

criticized what she thought were findings by the Court that the Respondent had acted in violation of section 5 of the Retrenchment and Severance Benefits Act (the RSBA) **[ROP 1995/5]** and the use she thought the Court made of section 5 “as a backdrop or as a mechanism to stretch the meaning of section 40.” **[ROP 114 – 115/27-29]** Kokaram JA also appears to have assumed that the Court had relied on section 5 to come to its conclusion that section 40 required consultation in the circumstances of this case **[ROP 129 – 130/66,67]**. These criticisms may be disposed of shortly.

19. Firstly, while the Court did say that it would be guided by the section 10(3)(a) mandate to consider “the interests of the persons immediately concerned and the community as a whole”, the Court was careful to emphasise that its “analysis and conclusions ... are ultimately based on the evidence we have before us and on the law.” **[ROP 148 – 149/7]**
20. Further, while the Court did say that section 10(3)(a) & (b) set out “overarching principles which guide this court in its deliberations” and which the court is “legislatively constrained to apply” **[ROP 156/32,33]**, there is in fact only one instance in the Court's judgment that section 10(3) was relied on to interpret section 40. This is where the Court held, uncontroversially, that the “good faith” requirement in section 40 is “an essential element of “good industrial relations practice” which we are compelled (by section 10(3)(b)) to uphold.” **[ROP 161/45(d)]**
21. Secondly, the Court also made reference to its mandate under section 9(1) to “act without regard to technicalities and legal form” in its rejection of the Respondent's submission that there was a distinction to be made between ‘negotiating’ and ‘consulting’ **[ROP 159/43]**. But it provided detailed reasons for its conclusion that section 40 created an obligation to consult in the circumstances of the case, and as a result, its passing reference to section 9(1) in this context is an insufficient basis to overturn its findings.
22. Thirdly, with regard to Pemberton JA's criticism of the Court in relation to section 5 of the RSBA, suffice it to say that the Court in fact made no finding that the Respondent acted in breach of section 5 of the RSBA. Neither did the court

“implicate what they found as this clear violation (of section 5) in its treatment of section 40(1) and (2) of the Act”, as Pemberton JA erroneously assumed **[ROP 114/27]**.

23. Neither is there any indication that the Court used section 5 as a backdrop or mechanism to stretch the meaning of section 40. The only reference made by the Court (and even so, obliquely) to section 5 of the RSBA is in a passage from its previous judgment in *SWUTT and ArcelorMittal Point Lisas Limited* which the Court reproduced in its judgment **[ROP 159 – 160/44]**. In that passage, the Court said that “the level of consultation which is required with the union (under section 40) can be no less than the type of consultation which is contemplated in redundancy and retrenchment cases as provided by the RSBA.” Section 5 was referenced by implication, not as an aid in determining whether section 40 was to be interpreted as requiring consultation before deciding to shut down operations, but as a reference point for the quality of consultation which section 40 was found to require.

The Appellant’s case

Relevant statutory provisions

24. Section 2(1) **[ROP 1962 – 1963]** of the IRA contains the following relevant definitions:

“bargaining agent” means a trade union certified as such by the Board with respect to a bargaining unit for the purpose of collective bargaining;

“bargaining unit” means that unit of workers determined by the Board as an appropriate bargaining unit;

“collective agreement” means an agreement in writing between an employer and the recognised majority union on behalf of workers employed by the employer in a bargaining unit for which the union is certified, containing provisions respecting terms and conditions of employment of the workers and the rights, privileges or duties of the employer or of the recognised majority union or of the workers, and for

the regulation of the mutual relationship between an employer and the recognised majority union;

“collective bargaining” means treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal thereof or the resolution of disputes;

“trade dispute” or “dispute”, subject to subsection (2), means any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification of recognition under Part III);

“recognised majority union” means a trade union certified under Part III as the bargaining agent for workers comprised in a bargaining unit.”

25. Part III of the IRA provides for the certification of trade unions as recognised majority unions of bargaining units. Section 35(a) **[ROP 1975/35(a)]** provides that:

“**35.** Where a trade union is certified under this Part as the recognised majority union—

(a) such trade union shall immediately replace any other trade union that immediately before the certification was the recognised majority union for the workers comprised in the bargaining unit and, subject to paragraph (c), shall have exclusive authority to bargain collectively on behalf of workers in the bargaining unit and to bind them by a collective agreement registered under Part IV so long as the certification remains in force.”

26. Section 40 **[ROP 1976/40]** provides:

“(1) Where a trade union obtains certification of recognition for workers comprised in a bargaining unit in accordance with this Part, the employer shall recognise that trade union as the recognised majority union; and the recognised majority union and employer shall, subject to this Act, in good faith, treat and enter into negotiations with each other for the purposes of collective bargaining.

(2) A recognised majority union or an employer that fails to comply with this section is guilty of an industrial relations offence and liable to a fine of four thousand dollars.”

The issues on this appeal

27. The principal issue on this appeal is whether the Court of Appeal erred in law in holding that section 40 of the IRA does not apply to the facts and circumstances of this case **[ROP 9/1]**. In summary, the Appellant says that the Court of Appeal was wrong to so hold.

28. Having regard to the Court of Appeal’s reasons, the subsidiary issues which arise are:

- i) Did the Industrial Court impermissibly equate a breach of the MOA with a violation of section 40(1).

The Appellant says that the Court made no such finding but rather relied on the MOA as fleshing out the requirements of good faith under section 40(1) in the circumstances of this case.

- ii) Was the MOA premised on the continuation of the Respondent’s business and/or did not continue to apply once the Respondent had decided to close down its business?

The Appellant says that the Court of Appeal was wrong to so hold. The evidence established that the MOA was made against the backdrop of an intention on the part of the Respondent to hive off its E&P and R&M operations to separate legal entities which would have involved, as it eventually did, the shutting down of the Respondent’s essential operations. Further, the factual findings of the Industrial Court were to the effect that the MOA was meant to address the restructuring of the Respondent’s operations. What occurred was in fact a restructuring, of a type – that is, the creation of new legal entities to conduct aspects of the Respondent’s business – that had been put forward as a possibility when the parties

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Introduction

1. This is an appeal against the decision of the Court of Appeal of Trinidad and Tobago reversing the finding of the Industrial Court that the Respondent had committed an industrial relations offence contrary to section 40(1) of the Industrial Relations Act (IRA) [ROP 1976/40].
2. The essential agreed facts and issues are set out in some detail in the Statement of Facts and Issues [ROP 31 – 44]. As such, the Appellant is enabled to present in summary form the events which gave rise to the complaint of an industrial

relations offence lodged by the Appellant with the Industrial Court and likewise the findings and reasoning of the Industrial Court and the Court of Appeal.

3. The Respondent was, at all material times, a wholly owned State company engaged in two petroleum-related operations: upstream exploration and production (**E&P**) and downstream refinery and marketing (**R&M**) [**ROP 147/1**]. In September 2017, having considered the Respondent's sustained losses, its extraordinary operational costs and its severe debt load, the Respondent's newly appointed Board concluded that the Respondent was uncompetitive due to ageing plant, the fact that 50% of its labour force was surplus to the requirements of companies of a similar nature and its practices and skill levels which were not consistent with international benchmarks or best practices in the industry. Substantial change was accordingly needed including a reduction in the number of employees, an increase in shifts from 8 hours to 12 hours and the cutting back on overtime [**ROP 441 – 442/7**].
4. Representatives of the Appellant and the Respondent met in January 2018 and agreed that a restructuring of the Respondent was required. After a series of meetings held between January and April 2018, they executed a Memorandum of Agreement on 3 April 2018 (**the MOA**) [**ROP 319 - 321**]. The MOA was subsequently entered as an order or award of the Industrial Court on 20 July 2018 pursuant to section 58 of the IRA [**ROP 1977/58**].
5. Under the MOA, the parties agreed, inter alia, "to meet and resolve the organizational structures, work processes and skills/competencies and manpower requirements to ensure the survival, sustainability, profitability of the Company" [**ROP 320/d**] and to that end agreed to meet at an executive level on a monthly basis to "progress the implementation of the organizational structures, skills/competencies, work processes, customs and practice and the manpower requirements in all areas of the Company's operations which will ensure the Company's survival, sustainability and profitability" and to "review, monitor and ensure progress of the Working Committee" [**ROP 320/1(a),(b)**] to be established under the MOA. It was the parties' further agreement that the Working Committee would work "to address, resolve and agree on the four (4) organizational

structures, work processes and skills/competencies and manpower requirements which will make the Company internationally competitive thus ensuring its survival, sustainability and profitability." **[ROP 320/2]** Importantly, the parties declared that the MOA was intended to reflect "the principles of their working relationship to take effect from 3 April 2018." **[ROP 321]**

6. No meetings were scheduled between May and August 2018 because during that period the Respondent had busied itself with collating information on every single activity within the organisation, defining the duties of each position, and determining the relative costing. The Respondent thought it neither practical nor realistic to meet with the Appellant during this period because the Respondent was dealing with a mass of information which was being updated or corrected on a regular basis and had to be analysed before discussions could take place **[ROP 151/17]**.
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8. The Appellant first got wind of the Respondent's position when the Honourable Prime Minister informed the Appellant on 21 August 2018 that the Respondent would be going out of the refinery business **[ROP 224/18]**. Then, at a meeting on 28 August 2018, the Respondent informed the Appellant that there were three options available, two of which involved the continuation of the Respondent's operations, but that the Respondent had selected the third option, with the approval of Cabinet, namely, to close the refinery and terminate the employment of all its employees with effect from the end of November 2018. The Appellant proffered engagement under the MOA as another option and made representations to the Respondent to reverse its decision but the Respondent refused to do so **[ROP 224 – 225/20-22]**.

9. The termination letters issued to the Respondent's workers provided 45 days' notice of termination and advised of termination payouts utilising the formula for severance pay provided for in the Collective Agreements **[ROP 446/21]**.
10. On 1 October 2018, the Appellant referred to the Industrial Court a complaint that the Respondent had committed an Industrial Relations Offence against section 40(1) of the IRA by failing, in good faith, to treat and enter into negotiations with the Appellant for the purpose of collective bargaining **[ROP217]**. More particularly, the Appellant complained that the Respondent had "*acted in bad faith in arriving at its decision to terminate all employees by 30 November 2018 without first consulting with the [Appellant] in accordance with the [MOA], or at all*" **[ROP 219]**.

The Industrial Court's decision

11. In its judgment delivered on 19 November 2018 **[ROP 146 – 167]**, the Industrial Court upheld the Appellant's complaint. In coming to its decision, the Court:
 - i) Found that although the Respondent's decision to shut down its operations raised "critical issues of surplus labor, the alteration of the employment contract, the termination of all workers, separation packages and the rehiring of some of the workers," there were no meetings between the Respondent and the Appellant to discuss any of these issues **[ROP 153/21; 154/24]**.
 - ii) Held that, as an order of the Court registered under section 58 of the IRA, the MOA was not merely and "*an incidental matter but the law between the parties: the framework for consultation, treating and/or negotiations between the parties.*" **[ROP 151/16]** It "laid the framework for the parties to treat and negotiate in good faith regarding the future of the Company in relation to the terms and conditions of employment of the 5,500 Workers' covered by the 'extant Collective Agreement... It effectively became an addendum to the Collective Agreement that regulated the relationship

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- iii) Rejected the Respondent’s argument that section 40 was inapplicable because the Appellant’s complaint was that the Respondent had failed to ‘consult’ with the Appellant before deciding to shut down, whereas section 40 requires the Respondent to ‘negotiate’ with the Appellant. According to the Court, the IRA intended the term “treating and negotiating” to encompass “a broad scope of activity” in which ““consulting” is a synonym of the words “negotiate” and “treat” in the industrial relations context.” Treating and negotiating in the industrial relations context contemplates “meetings, consultation and discussions. This is the key to the principle of collective bargaining as the Act itself has defined it.” **[ROP 159/43]**
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- vi) Found that acting in good faith in this case meant that “any departure from the terms of the MOA or reconsideration of the goal of restructuring to closure must be discussed with the union beforehand.” **[ROP 161/45(d)]**
 - vii) Held that the Respondent “violated the MOA when it went on its own to work out and decide on the future of the company and then presented it to the union as a *fait accompli* and indeed began issuing letters of termination.” **[ROP 161 – 162/45(d)]**
12. In all of the circumstances, the Court found that the Respondent was under a duty to discuss a number of issues with the Appellant, including the criteria to be used in the rehiring process, the proposed structure of the company, pension and medical plans of the workers, the workers’ savings plan and other benefits, the computation of termination packages and outstanding loans **[ROP 166 – 167/3]**. The Court ordered the Appellant and the Respondent to meet in good faith to address these issues before the termination of the workers’ employment, such meetings to take place on a daily basis between the 20 and the 26 November 2018. The Court also ordered the company to pay the maximum fine of \$4000 **[ROP 167/4]**.

The Court of Appeal’s decision [ROP 106 – 145]

13. The unanimous judgment of the Court of Appeal was delivered by Kokaram JA **[ROP 115 – 145]**. Pemberton JA provided additional reasons **[ROP 107 – 115]**.
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15. Secondly, he held that the MOA applied only to circumstances where the Respondent continued in operation and not where, as it turned out, it had decided to cease operations altogether **[ROP 135 – 136/74, 75; 137/79]**. As he said:

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16. Further, Kokaram JA found that the Industrial Court fell into error in finding that the Respondent was under a general duty under section 40 to consult with the Appellant before it decided to cease its business and terminate its workforce **[ROP 117/37]**. This was because the “question of the closure of the company or its intended impact on the terms and conditions of employment did not constitute ‘collective bargaining’ within the meaning of section 40(1)” **[ROP 125/ 58(b)]** and “there is no roving obligation to consult created by section 40.” **[ROP 126/ 58(c)]** In so finding, Kokaram JA held further as follows:

- i. Firstly, there is no specific duty expressed in section 40 or in any provision of the IRA for an employer to consult with the recognised majority union prior to issuing notices of dismissal **[ROP 129/67]**.
- ii. Secondly, there could only be a breach of section 40 if the Respondent had failed to treat or negotiate with the Appellant in good faith for the purpose of resolving a dispute, since there was no complaint of a failure to treat and enter into negotiations to conclude a collective agreement **[ROP 140/88]**. But the decision to close the Respondent did not constitute a trade dispute even though it would inevitably give rise to one after it had decided to terminate its workforce **[ROP 140/89]**. Further, no authority was advanced

by the Appellant to show that there is a duty to meet and enter into negotiations before a decision to terminate **[ROP 140/89]** and in the Court's opinion there was "no roving duty by the employer to consult the RMU before it decides to terminate its workforce for the purposes of section 40 (1) of the IRA." **[ROP 141/89]**

- iii. Thirdly, there is a marked difference between negotiation and consultation as expressed in the following passage in Roberts' Dictionary of Industrial Relations. 'Consultation' is defined as:

"A procedure instituted to provide greater participation by employees and employer organisations in the formulation and implementation of policies which are likely to affect their working conditions. Consultation is aimed at getting individuals or groups to suggest or respond to proposals for policy formulation and implementation without at the same time giving up 'management's rights' to make the final decision in these matters. It provides an opportunity to present a point of view or state an objection, but it is not in the nature of a 'negotiating' session of two equal parties to arrive at a mutually acceptable decision." **[ROP 141 – 142/92]**

- iv. Fourthly, although the obligation under section 40 is conjunctive, that is to say, there is an obligation to carry out two activities, that is to say, "to meet one another and to enter into negotiations, all in good faith for the specific purpose of collective bargaining ... it would hardly make sense to merely consult without a view to arriving at an agreement" **[ROP 143/95]**.

17. The Appellant respectfully submits that the Court of Appeal wrongly rejected the findings of the Industrial Court, for reasons which will be developed below. However, there are some criticisms of the Industrial Court's judgment which are better dealt with at the outset.
18. In her concurring judgment, Pemberton JA criticized the Industrial Court for relying on sections 9(1) **[ROP 1971]** and 10(3)(a) **[ROP 1972]** of the IRA in its interpretation of section 40(1) **[ROP 1976]**. She found that the court was plainly wrong to do so **[ROP 113/23]**. Kokaram JA appears to have joined in this criticism at least in relation to the use of section 9(1) **[ROP 126/60]**. Pemberton JA also

criticized what she thought were findings by the Court that the Respondent had acted in violation of section 5 of the Retrenchment and Severance Benefits Act (the RSBA) **[ROP 1995/5]** and the use she thought the Court made of section 5 “as a backdrop or as a mechanism to stretch the meaning of section 40.” **[ROP 114 – 115/27-29]** Kokaram JA also appears to have assumed that the Court had relied on section 5 to come to its conclusion that section 40 required consultation in the circumstances of this case **[ROP 129 – 130/66,67]**. These criticisms may be disposed of shortly.

19. Firstly, while the Court did say that it would be guided by the section 10(3)(a) mandate to consider “the interests of the persons immediately concerned and the community as a whole”, the Court was careful to emphasise that its “analysis and conclusions ... are ultimately based on the evidence we have before us and on the law.” **[ROP 148 – 149/7]**
20. Further, while the Court did say that section 10(3)(a) & (b) set out “overarching principles which guide this court in its deliberations” and which the court is “legislatively constrained to apply” **[ROP 156/32,33]**, there is in fact only one instance in the Court's judgment that section 10(3) was relied on to interpret section 40. This is where the Court held, uncontroversially, that the “good faith” requirement in section 40 is “an essential element of “good industrial relations practice” which we are compelled (by section 10(3)(b)) to uphold.” **[ROP 161/45(d)]**
21. Secondly, the Court also made reference to its mandate under section 9(1) to “act without regard to technicalities and legal form” in its rejection of the Respondent's submission that there was a distinction to be made between ‘negotiating’ and ‘consulting’ **[ROP 159/43]**. But it provided detailed reasons for its conclusion that section 40 created an obligation to consult in the circumstances of the case, and as a result, its passing reference to section 9(1) in this context is an insufficient basis to overturn its findings.
22. Thirdly, with regard to Pemberton JA's criticism of the Court in relation to section 5 of the RSBA, suffice it to say that the Court in fact made no finding that the Respondent acted in breach of section 5 of the RSBA. Neither did the court

“implicate what they found as this clear violation (of section 5) in its treatment of section 40(1) and (2) of the Act”, as Pemberton JA erroneously assumed **[ROP 114/27]**.

23. Neither is there any indication that the Court used section 5 as a backdrop or mechanism to stretch the meaning of section 40. The only reference made by the Court (and even so, obliquely) to section 5 of the RSBA is in a passage from its previous judgment in *SWUTT and ArcelorMittal Point Lisas Limited* which the Court reproduced in its judgment **[ROP 159 – 160/44]**. In that passage, the Court said that “the level of consultation which is required with the union (under section 40) can be no less than the type of consultation which is contemplated in redundancy and retrenchment cases as provided by the RSBA.” Section 5 was referenced by implication, not as an aid in determining whether section 40 was to be interpreted as requiring consultation before deciding to shut down operations, but as a reference point for the quality of consultation which section 40 was found to require.

The Appellant’s case

Relevant statutory provisions

24. Section 2(1) **[ROP 1962 – 1963]** of the IRA contains the following relevant definitions:

“bargaining agent” means a trade union certified as such by the Board with respect to a bargaining unit for the purpose of collective bargaining;

“bargaining unit” means that unit of workers determined by the Board as an appropriate bargaining unit;

“collective agreement” means an agreement in writing between an employer and the recognised majority union on behalf of workers employed by the employer in a bargaining unit for which the union is certified, containing provisions respecting terms and conditions of employment of the workers and the rights, privileges or duties of the employer or of the recognised majority union or of the workers, and for

the regulation of the mutual relationship between an employer and the recognised majority union;

“collective bargaining” means treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal thereof or the resolution of disputes;

“trade dispute” or “dispute”, subject to subsection (2), means any dispute between an employer and workers of that employer or a trade union on behalf of such workers, connected with the dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any such workers, including a dispute connected with the terms and conditions of the employment or labour of any such workers, and the expression also includes a dispute between workers and workers or trade unions on their behalf as to the representation of a worker (not being a question or difference as to certification of recognition under Part III);

“recognised majority union” means a trade union certified under Part III as the bargaining agent for workers comprised in a bargaining unit.”

25. Part III of the IRA provides for the certification of trade unions as recognised majority unions of bargaining units. Section 35(a) **[ROP 1975/35(a)]** provides that:

“**35.** Where a trade union is certified under this Part as the recognised majority union—

(a) such trade union shall immediately replace any other trade union that immediately before the certification was the recognised majority union for the workers comprised in the bargaining unit and, subject to paragraph (c), shall have exclusive authority to bargain collectively on behalf of workers in the bargaining unit and to bind them by a collective agreement registered under Part IV so long as the certification remains in force.”

26. Section 40 **[ROP 1976/40]** provides:

“(1) Where a trade union obtains certification of recognition for workers comprised in a bargaining unit in accordance with this Part, the employer shall recognise that trade union as the recognised majority union; and the recognised majority union and employer shall, subject to this Act, in good faith, treat and enter into negotiations with each other for the purposes of collective bargaining.

(2) A recognised majority union or an employer that fails to comply with this section is guilty of an industrial relations offence and liable to a fine of four thousand dollars.”

The issues on this appeal

27. The principal issue on this appeal is whether the Court of Appeal erred in law in holding that section 40 of the IRA does not apply to the facts and circumstances of this case **[ROP 9/1]**. In summary, the Appellant says that the Court of Appeal was wrong to so hold.

28. Having regard to the Court of Appeal’s reasons, the subsidiary issues which arise are:

- i) Did the Industrial Court impermissibly equate a breach of the MOA with a violation of section 40(1).

The Appellant says that the Court made no such finding but rather relied on the MOA as fleshing out the requirements of good faith under section 40(1) in the circumstances of this case.

- ii) Was the MOA premised on the continuation of the Respondent’s business and/or did not continue to apply once the Respondent had decided to close down its business?

The Appellant says that the Court of Appeal was wrong to so hold. The evidence established that the MOA was made against the backdrop of an intention on the part of the Respondent to hive off its E&P and R&M operations to separate legal entities which would have involved, as it eventually did, the shutting down of the Respondent’s essential operations. Further, the factual findings of the Industrial Court were to the effect that the MOA was meant to address the restructuring of the Respondent’s operations. What occurred was in fact a restructuring, of a type – that is, the creation of new legal entities to conduct aspects of the Respondent’s business – that had been put forward as a possibility when the parties

entered into the MOA. There was no basis, therefore, to conclude that the MOA had lost relevance.

- iii) Did a “trade dispute” within the meaning of the IRA arise? If so, did it only arise after the Respondent decided to close its operations and terminate its workforce or did it arise before that?

The Appellant says that there was a trade dispute within the meaning of the IRA, and that one was in existence from at least as early as January 2018 when the parties met. The parties were accordingly obliged by section 40(1) to treat and enter into negotiations with each other to resolve that dispute.

- iv) Does the Respondent’s obligation to treat and enter into negotiations pursuant to section 40(1) include a duty to engage in consultation with the recognised majority union prior to the making of a decision to close down its business?

In summary, the Appellant says yes. This is because the decision to close down a business is one which impacts upon terms and conditions of employment, will result in the non-employment and/or dismissal of workers and is therefore a trade dispute in respect of which section 40 imposes a duty to engage, in good faith, in collective bargaining. Further, a decision to close a business may itself be an act of bad faith if taken in the course of ongoing collective bargaining to resolve a trade dispute.

Did the Industrial Court impermissibly equate a breach of the MOA with a violation of section 40(1)?

29. The Appellant’s case, as encapsulated in its complaint to the Industrial Court **[ROP 217 – 219]**, was, and still remains, that the Respondent “acted in bad faith in arriving at its decision to terminate all employees by 30 November 2018 without first consulting with the union in accordance with the memorandum of agreement, or at all.” **[ROP 219]**. The Appellant’s case was, and still is focused, on the failure to consult, but with the recognition that it was necessary to establish

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bad faith on the part of the Respondent in order to satisfy the requirements of section 40(1).

30. The Appellant's application was not for the enforcement of the MOA as an order of the Court or otherwise. This is not to say that such a remedy was not open to the Appellant, pursuant to section 58(2) **[ROP 1978/58(2)]** of the IRA. Rather, the Appellant's application was for the determination of the industrial relations offence of failing to comply with the obligations imposed by section 40(1) **[ROP 1976/40(1)]**. The Appellant's case, as advocated before the Industrial Court, was that the MOA was the factual matrix in which later events unfolded **[ROP 1759/17-19]**. It recorded the parties' agreement as to how they would treat with each other in relation to the proposed restructuring of the Respondent's operations. It was the Appellant's case that the Respondent's non-compliance with the MOA was evidence of a failure to treat and enter into negotiations to resolve the dispute which had arisen "in good faith" **[ROP 230/53]**. It was not the Appellant's case that non-compliance with the MOA, simpliciter, amounted to a contravention of section 40(1).
31. The Industrial Court appreciated, as it was required to do, that the MOA had been registered under section 58(2) of the IRA as an order of the Court by which the Respondent was bound. It did not find the commission of this section 40 offence as having occurred simply by determining that the Respondent had acted in violation of the MOA. It determined that section 40 imposed a duty on the Respondent to consult with the Appellant, referencing its previous decision in *ArcelorMittal* in support **[ROP 159 – 160/44]**. Importantly, the MOA was deployed in answer to the Respondent's submission that there was no need to treat and negotiate with the Appellant once the initial decision to restructure had been transformed into a decision to shut down operations **[ROP 161 – 162/45, 45(b)]**. After noting that the closure of the Respondent would naturally have a fundamental effect on the terms and conditions of employment of the workers **[ROP 160/45(a)]**, a clear reference to the existence of a trade dispute, the Court was at pains to register that the MOA had established a framework for consultation regarding the future of the Respondent which regulated the relationship between the parties **[ROP 160 – 161/45(b)]**. As such, the

Respondent's argument that it was no longer required to treat with the Appellant under section 40 once it had decided to shut down could not be sustained because the decision to shut down obviously impacted upon the Respondent's future.

32. The other reason why the Respondent's argument was not sustainable, the Court found, was that an essential element of the offence under section 40 was the absence of good faith. The Respondent could not be acting in good faith, the Court held, if it departed from the terms of the MOA or reconsidered the restructuring of its operations, without first consulting with the union [**ROP 161 – 162/45(d)**].
33. As such, the mere violation of the MOA did not result in the commission of the offence in full. Rather, it was the bad faith inherent in the departure from the MOA without first discussing such departure with the Appellant which established an absence of good faith.

Was the MOA premised on the continuation of the Respondent's business and/or did not apply once the Respondent had decided to close down its operations?

34. The Court of Appeal found that the MOA was premised on the continuation of the Respondent's business and once a decision was made to cease operations, there was "a significant change in circumstances making the MOA a historic fact rather than a present reality with binding obligations." [**ROP 135 – 136/74**] In other words, the MOA ceased to be applicable. Respectfully, the Court of Appeal's finding does not accord with the Respondent's own evidence or the findings of the Industrial Court itself.
35. Under cross examination, the then chairman of the Respondent, Mr. Wilfred Espinet, testified that when the Respondent met with the Appellant in January 2018, the restructuring plans under consideration included the establishment of two separate legal entities, one of which would carry out the Respondent's E&P operations and the other the Respondent's R&M operations [**ROP 1216/6-69**;

1221/15-29 and 37-42; 1222/7-8; 1223/2-13; 1224/6-15; 1225/15-23]. That necessarily meant that the Respondent would cease those operations itself and since the E&P and R&M operations comprised Respondent's core business activities, as a practical matter the Respondent would necessarily be shutting down its operations. However, when asked whether the shutting down of the Respondent's operations was in contemplation in January 2018, Mr. Espinet insisted that the Respondent would continue in operation, but as a holding company **[ROP 1221/27-42; 1222/2-8; 1224/35-42; 1225/2-6 and 15-19]**.

36. When pressed on the details of the decision made in August 2018, Mr. Espinet revealed that the plan now involved the creation of four new companies: the Respondent's E&P operations were to be handled by a separate legal entity called Heritage **[ROP 1216/31-34]**; the R&M operations were to be split between two companies: one named Paria would handle the Marketing aspect of the R&M operations **[ROP 1216/40; 1218/30-43; 1219/2-5]**, and the other called Guaracara would be responsible for holding the assets of the Refinery with the intention of finding an investor to take over the refinery operations **[ROP 1216/36-42; 1217/2-42; 1218/2-28]**; the fourth company, called Trinidad Petroleum Company Limited, would be a holding company holding the shares in Heritage, Paria, Guaracara and the Respondent **[ROP 1219/7-27]**. The Respondent would continue as a legacy company **[ROP 1219/15-16 and 36-44; 1220/2-16; 1225/8-9]**.
37. In essence, therefore, the operations of the Respondent were to be split up and hived off to four separate legal entities, but the most significant change was that the new legal entity, Guaracara, charged with the refinery aspect of the R&M operations, would be responsible only for holding the assets of the Refinery and finding an investor to take over the refinery operations. In other words, the Respondent had decided to shut down its refinery business altogether. Its E&P operations and the Marketing aspect of its R&M operations, on the other hand, would continue through the new legal entities called Heritage and Paria.
38. This decision meant that the vast majority of the 5,500 workers then employed by the Respondent in its Refinery operations would have their employment

terminated **[ROP 1550/14-20]**, while the less than 1000 workers employed in the E&P and Marketing operations would be eligible for rehiring by Heritage and Paria **[ROP 373; 1370/27-34]**.

39. Mr. Espinet also confirmed that the four companies among which the Respondent's operations and business activities were to be shared would, like the Respondent, be wholly owned by the Government of Trinidad and Tobago **[ROP 1221/11-13]**. As such, apart from the decision to cease Refinery operations altogether, the effect of the new plan was to continue the Respondent's operations but under separate corporate shells.
40. It is against this backdrop that the Industrial Court made the following findings of fact:
- i) Sometime between December 2017 and January 2018, the Board of the Respondent decided to restructure the Company into two separate entities, one to focus on the E&P Operations and the other on R&M Operations; **[ROP 150/12]**
 - ii) The Respondent's Board and the Appellant met in January 2018. The Respondent's Board informed the Appellant of its findings and had discussions on the proposed restructure of the Company. The parties held further meetings in the month of February and March 2018 to discuss the possible restructuring of the Respondent into two entities; **[ROP 150/14]**
 - iii) Despite the Respondent's contention in its Evidence and Arguments that it was no longer viable and that it was closing its operations by the 30th November 2018 and sending all the workers home **[ROP 446/21; 154/25]**, what emerged from the evidence during the hearing of the complaint was that the Respondent was undertaking a restructuring exercise. The Board's Chairman Mr. Espinet testified that the Company "*is restructuring.*" What was contemplated and what would exist after the Respondent closed its operations on the 30th November 2018 was five companies, namely, Trinidad and Tobago Petroleum Company Ltd (a holding company), Paria,

Guaracara, Heritage and the Respondent, as a legacy company **[ROP 154/25]**.

41. The Industrial Court thereafter proceeded on the basis that the MOA continued to be applicable despite the decision to discontinue Refinery operations. As the Court held, the MOA contained provisions for avoiding and settling disputes between the parties “related to the future of the employees under the contemplated restructuring exercise.” **[ROP 160 – 161/45(b)]**.
42. There was no ground of appeal asking the Court of Appeal to find that the MOA ceased to apply after the change of course in August 2018, and no submission was made by the Respondent to the Court that the MOA was not applicable and the Industrial Court was wrong accordingly to consider it. The applicability of the MOA was not a live issue before the Court of Appeal and Kokaram JA was wrong to consider and pronounce on it.
43. In any event, having regard to the evidence referred to above, the finding by the Court of Appeal that the MOA was no longer applicable is insupportable. The MOA was entered into against the backdrop of discussions on the possible restructuring of the Respondent which involved the hiving off of the Respondent’s core operations to two separate legal entities. Necessarily that meant that the Respondent was shutting down. The restructuring which actually took place was the dispersal of the Respondent’s business activities among four legal entities with the same result, that the Respondent was shutting down operations. The main difference was that the Refinery operations would no longer be carried out by any Government owned entity.
44. As a result, the Court of Appeal was plainly wrong to find that the MOA was premised on the continuation of the Respondent’s business.

Did the Court of Appeal err in law when it held that section 40 of the IRA does not apply to the facts and circumstances of this case?

45. Section 40(1) **[ROP 1976/40(1)]** of the IRA imposes three distinct obligations punishable under section 40(2) **[ROP 1976/40(2)]** as industrial relations offences. The first is imposed on employers only. Where a trade union obtains certification of recognition for workers in a bargaining unit, it requires the employer to “recognise” that union as the recognised majority union.
46. The other two obligations are imposed on both employers and recognised majority unions. They are both required, in good faith, to “treat and enter into negotiations with each other for the purposes of collective bargaining.” As the Court of Appeal held, **[ROP 143/95]** the obligation is conjunctive. The parties are required in good faith to treat with each other for the purposes of collective bargaining and in good faith to enter into negotiations with each other for the purposes of collective bargaining.
47. Section 40(1) **[ROP 1976/40(1)]** thus recognises the possibility that parties may be required to treat with each other without entering into negotiations as such, although if they do enter into negotiations they will necessarily be treating with each other. ‘Treating’, in other words, is a wider concept than ‘negotiating’ and indeed encompasses ‘negotiating’.
48. The Appellant’s particularised complaint is that the Respondent acted in bad faith in arriving at its decision to terminate all of its employees, the natural consequence of its decision to shut down its operations, “without first consulting” with the Appellant **[ROP 219]**. The Appellant has not charged the Respondent with a failure to enter into negotiations with it. The Appellant’s complaint therefore is that, in breach of section 40(1) **[ROP 1976/40(1)]**, the Respondent failed in good faith to treat with it for the purposes of collective bargaining.
49. “Collective bargaining” is defined by section 2(1) **[ROP 1963]** as “treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal thereof or the resolution of disputes”. The Appellant’s complaint is not and has never been that the Respondent failed to treat with it with a view to

concluding, revising or renewing a collective agreement. There is no evidence that proposals for a collective agreement were on the table. The Appellant's complaint could therefore only succeed if it established that the Respondent failed to treat with it with a view to resolving a dispute.

50. Two issues therefore arise. The first is whether there was indeed in existence a dispute in need of resolution. The second is whether the obligation to treat with the Appellant includes an obligation to consult.
51. As noted, Kokaram JA held that the Respondent's decision to close the company could not constitute a trade dispute even though it would inevitably give rise to one after it decided to terminate its workforce **[ROP 140/89]**. He also held that section 40(1) **[ROP 1976/40(1)]** imposed no "roving duty" by an employer to consult the recognised majority union before it decides to terminate its workforce **[ROP 140 – 141/89]**.
52. It is the Appellant's case that the Court of Appeal erred when it held that the decision to close the company (on the evidence a decision to cease operations) was not a trade dispute, and that a trade dispute could only arise after the decision to terminate its workforce had been made. In making that finding, His Lordship:
 - i) failed to apply the statutory definition of "trade dispute";
 - ii) failed to apply relevant case law on the meaning of and applicability of the term "trade dispute"; and
 - iii) thereby failed to appreciate and find that a trade dispute concerning the termination of the workers had existed long before the Respondent actually decided to terminate all of the workers and long before notices of termination were issued.

Did a “dispute” within the meaning of the IRA arise? If so, did it only arise once the Respondent decided to close its operations and terminate its workforce or did it arise before that?

53. To constitute a “trade dispute” or “dispute” [ROP 1965] there must be *inter alia* i) a dispute between an employer and a trade union on behalf of workers, ii) “connected with” the dismissal, employment, non-employment or refusal to employ such workers, or iii) “connected with” the terms and conditions of employment or labour of workers. There must first be a ‘dispute’ between an employer and a trade union on behalf of workers to constitute a “trade dispute” or “dispute”. But the ‘dispute’ between an employer and a trade union which is the *sine qua non* of a “trade dispute” or a “dispute” must be a disagreement or difference of opinion between the employer and trade union which, if connected with the matters thereafter listed, would constitute the “trade dispute” or “dispute” which the section is intended to define. It could not have been the intention of the draftsman that the triggering dispute which, if so connected, constitutes a “trade dispute” or “dispute”, is the very “trade dispute” or “dispute” which the section defines. If that were so, there would have been created an infinite, recurring loop with ultimately no meaning at all. There must first be a disagreement or difference of opinion because otherwise there would be nothing to treat with each other or enter into negotiations about.
54. In this case, there was plainly a difference of opinion between the Appellant and the Respondent about the Respondent’s restructuring plans. It has never been suggested otherwise. The question is whether that difference of opinion or disagreement was connected with the dismissal, employment, non-employment or refusal to employ the workers represented by the Appellant or with their terms and conditions of employment or labour of workers.
55. It is the Appellant’s respectful submission that a decision to shut down operations is plainly and obviously connected with the dismissal, non-employment or refusal to employ workers. The discontinuance of operations inexorably results in the termination of employment of workers whose services are no longer needed. Likewise, a decision to shut down is connected with terms and conditions of

employment of those workers to the extent that they will cease to enjoy the benefits to which they had been hitherto entitled.

56. The Industrial Court was alive to the connection between the Respondent's restructuring plans and the workers' employment rights. The Court found that "the decision which the Company informed the Union about in August 2018 raises the very critical issues of surplus labour, the alteration of the employment contract, the termination of all workers, separation packages and the rehiring of some of the workers" **[ROP 153/21]**.
57. The Appellant relies on the following authorities which were either cited to the Court of Appeal or referred to, but which the Court neither analysed nor referred to in their judgments.
58. In ***General Aviation Services (U.K.) Ltd. v. Transport and General Workers' Union*** [1975] ICR 276 **[ROP 2086-2110]**, the British Airports Authority granted GAS, an aircraft handling company, a concession to provide ground-handling services for airlines using London airport. The workers at the airport, who had not been consulted, feared redundancies and took industrial action against GAS. One question which arose was whether the workers were acting in contemplation of an industrial dispute. An industrial dispute was defined by section 167(1) of the Industrial Relations Act as "a dispute between one or more employers ... and one or more workers ..., where the dispute relates wholly or mainly to ... engagement or non-engagement, or termination or suspension of employment, of one or more workers." **[ROP 2096/7]** It was accepted that there was a dispute between workers and the BAA as to whether GAS should operate at the airport. The question was whether that dispute was related wholly or mainly to the termination of employment of workers. The Court of Appeal held unanimously that, because of the fear of redundancy, the dispute was related wholly or mainly to loss of employment. After noting Counsel's agreement that an industrial dispute could arise from a proposal by an employer to introduce new machinery which would have the effect of rendering some workers redundant and that such a dispute could exist before the machinery was actually introduced, Orr LJ said the following:

“In the present case there plainly was on the evidence both a real and an existing dispute although the cause of it was fear of a future event, and in my judgment the only remaining question to be asked is whether such dispute related to any one or more of the matters referred to in the headings (a) to (d) in the definition in section 167; and the answer is that it plainly related to one or more of the matters referred to in heading (b), namely, “termination or suspension of employment, of one or more workers.” ***I agree with Mr. Yorke that it would be an absurdity if it could not be held that there was an industrial dispute about redundancy until redundancy notices had actually been served.***” (emphasis added) [ROP 2100]

59. In ***Hadmor Productions Ltd v Hamilton*** [1982] 1 All ER 1042 [ROP 2111-2125], one of the questions which arose for determination was whether the Appellants in that case were acting in contemplation or in furtherance of a ‘trade dispute’. A ‘trade dispute’ was defined by section 29(1) of the Trade Union and Labour Relations Act 1974 as “a dispute between employers and workers ... *which is connected with* one or more of the following, that is to say -- (a) terms and conditions of employment ...; (b) engagement or non-engagement, or termination or suspension of employment or the duties of employment, of one or more workers.” [ROP 2119/b] The dispute concerned the transmission of material produced by companies not under the control of the television networks, unless such companies were on the union's approved list. The union feared that such transmission would result in redundancies. Lord Diplock was satisfied that this was a “classic instance of a trade dispute arising out of fears for job security in a period of high unemployment.” [ROP 2119/g] A trade dispute as defined was found to be in existence. After referring to the Court of Appeal’s decision in ***General Aviation Services (U.K.) Ltd. v. Transport and General Workers’ Union*** (*supra*) [ROP 2086-2110], he said:

“...The argument, which has also been addressed to your Lordships in the instant case, that fear of future redundancies was not enough and that there could be no dispute about termination or suspension of employment until redundancy notices had actually been issued or threatened by the employer, received short shrift. Lord Denning M.R. brushed it aside without referring to it; Orr L.J. described it as an absurdity.” [ROP 2119/j – 2120/a]

See also *Health Computing Ltd and another v Meek and others* [1980] IRLR 437 [ROP 2126-2131]

60. These authorities plainly contradict the Court of Appeal's finding in this case that a trade dispute could only arise after notices of termination had been issued to the workers.
61. The Industrial Court had made clear factual findings which pointed to the existence of a trade dispute, as defined by the IRA. There was no basis upon which the Court of Appeal could proceed to overturn those findings of fact, and therefore no basis for that Court to find that there was no trade dispute.

Does the obligation to treat under s 40 of the Act include a duty to engage in consultation with the recognised majority union prior to the making of a decision to close down its business?

62. The Appellant accepts that in the context of the resolution of disputes there is a difference between 'negotiation' and 'consultation'. 'Negotiation' is more apt to describe the process which parties engage in to arrive at an agreement where neither party has the legal right to act unilaterally. A contract requires the agreement of both parties: it takes two to tango. An employer is not free to impose terms and conditions of employment. It must negotiate those terms with the recognised majority union. Where the conclusion, revision or renewal of a collective agreement is proposed, the parties are duty bound by section 40(1) [ROP 1976/40(1)] to enter into negotiations with each other for the purpose of collective bargaining.
63. Consultation is more apt to describe the process which is engaged in where one party is entitled in law to act unilaterally but meets with another party to obtain their views before deciding on its course of action. The agreement of the other party may not be required and the views expressed by that other party may be ignored, but only after that party has had the opportunity to put forward its point of view. The Appellant respectfully adopts the definition of 'consultation' set out

in the passage from Roberts' Dictionary of Industrial Relations quoted in paragraph 16 above.

64. The Appellant accepts that the Respondent enjoyed the managerial prerogative to decide whether to continue its operations or not. That is not something which it was obliged to negotiate with the Appellant. It did not need the Appellant's agreement before it proceeded to shut down. This is by no means to suggest that in the course of discussions about an employer's plans to make a part or the whole of its workforce redundant, the parties may not engage in negotiations about changes to terms and conditions of employment which might obviate the need to terminate the employment of workers to the extent initially contemplated, or at all. That notwithstanding, appreciating that the Respondent was entitled in law to shut down its operations even in the face of opposition by the Appellant, the Appellant's case has always been that the Respondent was obliged to consult, not negotiate with the Appellant. The question is whether the obligation to consult is provided for in section 40(1) **[ROP 1976/40(1)]** and, in particular, whether the obligation to treat with the recognised majority union includes an obligation to consult with that union in the exercise of the managerial prerogative of shutting down operations.
65. As submitted above, the word 'treat' is to be construed as encompassing but not limited to the phrase 'enter into negotiations'. It is a principle of statutory construction that Parliament is to be presumed not to use superfluous words. If the act of 'treating' was the same thing as the act of "entering into negotiations," the phrase 'treat and enter into negotiations' would contain redundant language. According to ***Bennion, Bailey and Norbury on Statutory Interpretation***, Chapter 21, para 21.2 **[ROP 2270-2277]** "There is a presumption that every word in an enactment is to be given meaning." **[ROP 2274/21.2]**

"Given the presumption that the legislature does nothing in vain, the court must endeavour to give significance to every word of an enactment... It is presumed that if a word or phrase appears, it was put there for a purpose and must not be disregarded." **[ROP 2274/21.2]**

66. In **AG's Reference (No1 of 1975)** [1975] 1 QB 773 [ROP 2019-2027], in relation to the phrase 'aid, abet, counsel or procure', Lord Widgery CJ said:

"We approach the section on the basis also that if four words are employed here, "aid, abet, counsel or procure," the probability is that there is a difference between each of those four words and the other three, because, if there were no such difference, then Parliament would be wasting time in using four words where two or three would do. Thus, in deciding whether that which is assumed to be done under our reference was a criminal offence we approach the section on the footing that each word must be given its ordinary meaning." [ROP 2025/E]

67. Likewise, it is submitted that the word 'treat' must be given any meaning which it may ordinarily bear such that section 40(1) [ROP 1976/40(1)] is to be construed as imposing an obligation to 'treat' separate and apart from an obligation to 'enter into negotiations'.
68. This in fact is the approach taken by the Industrial Court in **Steel Workers' Union of Trinidad and Tobago and Arcelormittal Point Lisas Limited** (Complaint No. GSD – IRO 031 of 2015, 10th March, 2016) [ROP 2219-2254] where it treated section 40(1) [ROP 1976/40(1)] as creating a separate obligation to treat with the recognised majority union. The Court said:

"It is our finding that the Company **failed to treat with the Union in good faith for the purpose of collective bargaining** when it did not give the Union the opportunity to deliberate and to respond to its proposal which was raised for the very first time at the meeting on 7th December. Even when the Union requested a meeting after the layoff was put into effect, the Company refused to meet with the Union, giving it no option but to resort to the procedures under the IRA and the instant proceedings." (Emphasis added) [ROP 2242/55]

69. It is respectfully submitted that while 'negotiation' refers to an intensive, bilateral attempt to strike a binding contract, treating encompasses the broader, continuous obligation to consult, hear representations, provide information, and engage in good-faith dialogue on all matters affecting the bargaining unit - even where no agreement is required or being negotiated.

70. ***The Oxford Dictionary and Thesaurus* [ROP 2281-2282]** defines the word “treat” as including “to behave towards or deal with in a particular way” and “present or discuss a subject” and identifies the following as synonyms: “deal with”, “discuss” and “consider” [ROP 2282]. The ***Oxford Online Dictionary*** (www.oed.com) [ROP 2283-2286] in turn provides the following meanings: “To deal or carry on negotiations (with another) with a view to settling terms; to discuss terms of settlement; to bargain, negotiate” [ROP 2283/1.a]; “To speak to” [ROP 2284/3.b]; and “To deal with, behave or act towards (a person, animal, etc.) in some specified way” [ROP 2285/7.a].
71. Given i) the broad meanings which can be attributed to the word ‘treat’, including to discuss with and to deal with a person in some specified way; ii) that in its long title the expressed aim of the IRA is to make better provision for the stabilisation, improvement and promotion of industrial relations [ROP 1962]; and iii) that the word treat is to be given a meaning that is not coterminous with ‘negotiate’, it is respectfully submitted that the Industrial Court was correct to construe section 40(1) [ROP 1976/40(1)] as including a duty to consult where, as in this case, an employer proposes to exercise a managerial prerogative.
72. The obligation to treat with the recognised majority union for the purpose of collective bargaining is plainly a wider obligation than the obligation to enter into negotiations with the recognised majority union. While the obligation to enter into negotiations implies that one of the purposes of the exercise is to reach an agreement, the obligation to treat with the union encompasses an obligation short of seeking to arrive at an agreement and includes an obligation to engage with the union for the purpose simply of seeking out its views on matters which impact the bargaining unit which the union represents and keeping itself open to persuasion, which is what consultation entails.
73. The duty under section 40 [ROP 1976/40] is to treat and enter into negotiations with the recognised majority union with a view to resolving disputes. There is no duty to agree. The section does not make it an offence to fail to resolve a dispute. The obligation is procedural in nature. It requires the parties to attempt to resolve their differences. Nothing prevents an employer from shutting down its

operations if the union does not agree. But what the employer must do is to engage with the Union on the question whether it should shut down its business. In the course of that engagement the Union may make representations which have the effect of causing the Company to alter its contemplated course of action, or to abandon it altogether, with the result that the employment of the members of the Union's bargaining unit remains intact. But whether the union persuades the employer to take a different course or not, the very exercise of engagement, the act of 'treating' with the recognised representative of the workers, is more likely than not to promote the objects of the IRA [**ROP 1961-1981**], that is to say, the stabilisation, improvement and promotion of industrial relations. Indeed, it was the Industrial Court's view that the requirement of consultation was in accordance with and indeed mandated by the principles of good industrial relations practice.

Disposal

74. For all of the foregoing reasons, as summarised below, it is respectfully submitted that this appeal be allowed and the finding of the Industrial Court that the Respondent committed an industrial relations offence contrary to section 40(1) be restored because:
- i. A trade dispute existed between the Appellant and the Respondent over the Respondent's decision to shut down operations which was connected with the termination of employment of the workers in the bargaining units and/ or their terms and conditions of employment.
 - ii. The Respondent was under a duty to treat with the Appellant for the purposes of resolving that dispute.

- iii. The duty to treat with the Appellant included the duty to consult with the Appellant on the decision to close down and terminate the employment of the workers.
- iv. As a result, the elements of the offence under section 40(1) of the IRA **[ROP 1976/40(1)]** were established.
- v. The Industrial Court was accordingly right to find that the Respondent had committed an industrial relations offence against section 40(1) **[ROP 1976/40(1)]**.

Respectfully submitted.

Dated this 2nd day of September 2026

Douglas Mendes SC

Anthony Bullock
Counsel for the Appellant

(Instructed by Leah Abdulah)