

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

AND

PETROLEUM COMPANY OF TRINIDAD AND TOBAGO LIMITED

Respondent

WRITTEN CASE FOR THE RESPONDENT

*(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)*

I. INTRODUCTION

1. Section 40 [ROP 1976] of the Industrial Relations Act 1972 (**the Act**) makes it a criminal offence for an employer or a recognised majority union (**RMU**) to fail to “*in good faith, treat and enter into negotiations with each other for the purposes of collective bargaining*”. “*Collective bargaining*” is defined in s 2(1) [ROP 1963] as treating and negotiating with a view to: (i) the conclusion of a collective agreement; (ii) the revision or renewal of a collective agreement; or (iii) the resolution of disputes.
2. In proceedings brought by the Appellant (**the Union**), the Industrial Court (**FI**) convicted the Respondent (**the Company**) of a contravention of s 40 [ROP 1976] on the basis that it had failed to consult the Union before deciding to shut down its business. The Court of

Appeal (CA) overturned the decision. The Union now appeals to the Board.

3. The Union's case is that the Company contravened s 40 [ROP 1976] by failing to consult the Union. It accepts that the Company did not require the Union's agreement to shut down its business and expressly disavows any case that the Company contravened s 40 by failing to negotiate with the Union [ROP 68/48]. It also accepts that only the third of the three purposes in the definition of "*collective bargaining*" is relevant: the resolution of disputes [ROP 68-69/40].
4. A number of issues arise, but the key question of principle is whether s 40 [ROP 1976] includes a free-standing duty to consult, divorced from any attempt to reach agreement. In particular, does it impose a duty on an employer to consult the RMU before exercising its managerial prerogative to decide to shut down its business?¹ [ROP 62/28(iv)]
5. The Court of Appeal was right to set aside the Industrial Court's decision and the appeal to the Board should be dismissed. In summary:
 - (a) The **first** issue is whether a "*dispute*" within the meaning of the Act arose. The Company accepts that a dispute within the meaning of the Act arose insofar as there was a dispute between the Company and the Union about the consequences for the workers of the Company's intention to close down its business. That was the dispute that related to the workers' employment and the terms and conditions of their employment. The dispute within the meaning of the Act was not, as the Union submits, the broader dispute about whether the Company should shut down its business. That was a dispute about whether the Company should exercise its managerial prerogative to close down its business, which was a commercial decision for it. As both the Industrial Court and the Court of Appeal held, that is not properly the subject of collective bargaining.
 - (b) The **second** issue is whether the obligation to treat and enter into negotiations in s 40 of the Act includes a freestanding duty on an employer to consult the RMU, divorced from any attempt to reach agreement, before deciding to close down its

¹ ("a duty to engage in consultation with the [RMU] prior to the making of a decision to close down its business').

business. It does not. An essential element of the s 40 offence—a failure to negotiate—is therefore not alleged or made out. As to this:

- (i) The Union can point to no authority that recognises a duty of an employer to consult the RMU before deciding to close down its business.
- (ii) The Union rests its case that s 40 [ROP 1976] includes such an obligation almost entirely on the word “*treat*”. But s 40 [ROP 1976] imposes a single, composite obligation on employers and RMUs to, in good faith, “*treat and enter into negotiations with each other*” for the purposes of collective bargaining. That is a single obligation to negotiate, rather than an obligation to treat and a separate obligation to negotiate. The word “*treat*” is no more than a (somewhat archaic) term for “*negotiate*”.
- (iii) In any event, s 40 [ROP 1976] does not impose any freestanding obligation to consult, divorced from any attempt to reach agreement. The s 40 [ROP 1976] obligation is to treat and enter into negotiations “*for the purposes of collective bargaining*”, which involves attempting to reach agreement. Had Parliament intended to impose a freestanding duty to consult, it would have said so.
- (iv) Reading a freestanding duty to consult into s 40 [ROP 1976] would cut across the Retrenchment and Severance Benefits Act 1985 (RSBA), where Parliament has expressly dealt with consultation in this context in a very narrow and limited way.
- (v) It would also cut across the Retrenchment and Severance Benefits (Amendment) Bill, 2026 [ROP 1996], which has already been passed by the Senate. That Bill proposes introducing a detailed and carefully defined duty of consultation that would apply in the circumstances of this case (and beyond). That is the proper vehicle for introducing such a duty, rather than reading it into s 40 [ROP 1976].
- (vi) Section 40 [ROP 1976] creates a criminal offence. It is therefore important that there be certainty about whether conduct is criminal or not.

The broad and undefined duty advanced by the Union has no clear limits. In any event, any doubts about the construction of the offence should be resolved in the Company's favour. The Company should not be criminally punished on a doubtful construction of s 40 [ROP 1976].

(c) The **third** issue is whether there was a failure in good faith to consult the Union before deciding to close down its business. There was not:

- (i) The evidence was that the Company did consult the Union on whether or not it should close down its business. That emerges from the judgments of both the Industrial Court and the Court of Appeal.
- (ii) In any event, the Industrial Court's finding that there was a lack of good faith rested primarily on a failure by the Company to comply with a Memorandum of Agreement executed by the parties on 3 April 2018 (**MOA**). But the Court of Appeal was right to hold that the MOA was premised on the continuation of the Company's business and ceased to apply once the Company decided to close down its business.

6. The Company accepts that consultation of the RMU by an employer before deciding to shut down its business may be productive and should be encouraged. Indeed, as Karam JA said, “[t]his might well be a well deserving instance for urgent legislative action to articulate a specific duty to consult into the [Act] on such matters” [ROP 144/99]. That may be why Parliament is now considering just such a duty in the Retrenchment and Severance Benefits (Amendment) Bill, 2026 [ROP 1996]. But the question in this appeal is whether such consultation is required—under pain of criminal punishment²—by s 40 [ROP 1976] of the Act [ROP 116/36; 144/99]. For the reasons set out in this written case it is not.

² This also has consequences for the officeholders of corporate employers. Under s 70 of the Act, the effect of a corporate employer committing the offence is that a range of officeholders are deemed to be guilty of the offence unless they prove that the contravention was committed without their consent or connivance and that they exercised all such diligence to prevent the commission of the offence as they ought to have exercised having regard to their position.

II. BACKGROUND

7. The factual background is summarised in the Statement of Facts and Issues (SFI) at **[ROP 31-34/1-12]**. The procedural history, including the decisions of the Industrial Court and Court of Appeal, is summarised in the SFI at **[ROP 36-43/18-25]**.
8. One point can conveniently be dealt with at the outset. In the Appellant's Written Case at **[ROP 57-59/17-23]**, the Union takes issue with the Court of Appeal's conclusions that (i) the Industrial Court erred in relying on ss 9(1) **[ROP 1971]** and 10(3)(a) **[ROP 1972]** in interpreting s 40(1) **[ROP 1976]** and (ii) the Industrial Court erred in relying on s 5 of the RSBA **[ROP 1995]** and finding that the Company had acted in breach of it. While the Company does not accept the Union's submissions, it is unnecessary for the Company (or the Board) to address them because the Union does not now rely on s 9(1) **[ROP 1971]** or s 10(3)(a) **[ROP 1972]** of the Act or s 5 **[ROP 1995]** of the RSBA in support of its case that the Company breached s 40 **[ROP 1976]**.

III. STATUTORY FRAMEWORK

9. The relevant statutory provisions are set out in the SFI at **[ROP 34-36/13-17]**. The key provision is s 40 **[ROP 1976]** of the Act:
 - (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.
10. The obligation relevant in this case is the obligation to treat and enter into negotiations for the purposes of collective bargaining. The obligation to recognise the trade union as the RMU is not relevant, and nothing more is said about it.
11. The seminal authority on this provision is the decision of the Industrial Court in *Oilfields Workers' Trade Union v Trinidad and Tobago National Petroleum Marketing Co Ltd* **[ROP 2165-2167/2-4]**. The Court outlined the following principles **[ROP 130/68]**, which

are not in dispute:

- (a) An industrial relations offence is a criminal offence.
 - (b) The party that alleges the offence must prove it, and the applicable standard of proof is the balance of probabilities.
 - (c) Where a union alleges that an employer has contravened s 40 [ROP 1976], it must prove that: (i) it is a RMU; (ii) the employer is an employer within the meaning of s 2(1) [ROP 1963] of the Act; and (iii) the employer has failed in good faith to treat and enter into negotiations with the RMU for the purposes of collective bargaining.
 - (d) Collective bargaining is defined in s 2(1) [ROP 1963] to mean “*treating and negotiating with a view to the conclusion of a collective agreement or the revision or renewal thereof or the resolution of disputes*”.
 - (e) If the case is based on a refusal to bargain, the union must additionally prove that it made a demand on the employer for bargaining and that the employer failed to bargain with it on that demand.
12. Section 40 [ROP 1976] creates a criminal offence. The court should therefore “*strive to avoid adopting a construction which penalises someone where the legislator’s intention to do so is doubtful, or penalises him in a way which is not made clear*” [ROP 2218/30].

IV. ISSUE 1: DID A “DISPUTE” ARISE?

13. “Trade dispute” and “dispute” are defined in s 2(1) [ROP 1963] of the Act to mean (relevantly):
- ... 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 ...
14. The Union says that that dispute existed as early as January 2018 when the parties met [ROP 62/28(iv)]. It characterises that dispute as “*a difference of opinion ... about the*

[Company's] restructuring plans" [ROP 70/54] and a dispute "*over the [Company's] decision to shut down operations*" [ROP 77/74(i)].

15. The Company accepts that there was a dispute within the meaning of s 2(1) [ROP 1963] between the Union and the Company by 28 August 2018. But the dispute that fell within that definition was the dispute about the consequences for the workers of the Company's intention to close down its business. That was the dispute that related to the workers' employment and the terms and conditions of their employment and thus fell within the statutory definition.
16. The broader dispute between the Company and the Union about whether the Company should shut down its business did not fall within the statutory definition. That was a dispute about the exercise of the Company's managerial prerogative to close down its business, which was a commercial decision for the Company. That dispute was connected with the Company's business rather than connected with the "*dismissal, employment, non-employment, suspension from employment, refusal to employ, re-employment or reinstatement of any ... workers*".
17. The Union submits that a decision to shut down operations is connected with the terms and conditions of employment of the workers "*to the extent that they will cease to enjoy the benefits to which they had been hitherto entitled*" [ROP 71/55]. That is not so. A decision to shut down operations simply brings that employment to an end in accordance with those terms and conditions (as set out in the collective agreement).
18. That Parliament cannot have intended for a dispute about whether an employer should shut down its business to fall within the statutory definition is demonstrated by the consequences that would follow if it did. For example:
 - (a) It would mean that the Industrial Court, which has jurisdiction under s 7(1)(a) [ROP 1970] to "*hear and determine trade disputes*", would have jurisdiction to decide whether or not the employer should shut down its business. That cannot be correct (at least in the absence of clear language demonstrating that that was Parliament's intention).
 - (b) It would mean that the RMU would be entitled under s 60(1) [ROP 1979] to take

action by way of strike to compel the employer to remain in business. Again, at least in the absence of clear language that cannot be correct.

19. The Company accepts that the authorities³ relied on by the Union give “*industrial dispute*” and “*trade dispute*” a broad meaning. But those authorities must be read in light of the different statutory contexts in which they were decided (primarily statutory immunity for liability in tort for industrial action, where a broad definition of “*industrial dispute*” and “*trade dispute*” furthers the statutory purpose).
20. The duty to consult alleged by the Union in this case is a duty to consult about whether the Company should shut down its business. It is not a duty to consult about the effect of that decision on the Company’s workers. This much is clear from the Appellant’s Written Case at [ROP 76-77/73] (emphasis added):⁴

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.

21. Indeed, that appears to have been the Union’s position from the outset. In a 9 October 2018 letter to the Company, for example, the Union invited the Company “*to engage in meaningful discussions ... with a view to arriving at mutually acceptable solutions to [the Company’s] financial difficulties*” [ROP 419; 139/87]. It went on:

We invite urgent discussions on the assumption that shutting down the refinery is only one of the possible alternatives, or even [the Company’s] preferred alternative, but on the basis that a final decision has not been made. This will necessarily require [the Company] to rescind its decision to terminate [the Company’s] entire workforce with effect from November 30th 2018.

22. As both the Industrial Court and the Court of Appeal held, these matters are not properly the subject of collective bargaining [ROP 153/23; 144/98]. The certification of a union as the RMU does not make it a partner in the business or a manager (or owner) of the

³ *General Aviation Services (UK) Ltd v Transport and General Workers’ Union* [1975] ICR 276 [ROP 2086]; *Hadmor Productions v Hamilton* [1983] 1 AC 191 [ROP 2111]; *Health Computing Ltd v Meek* [1980] IRLR 437 [ROP 2126].

⁴ See also Appellant’s Written Case at [ROP 74/64] (“*whether the obligation to treat with the [RMU] includes an obligation to consult with that union in the exercise of the managerial prerogative of shutting down operations*”).

company. An employer's right to close down its business is part of the managerial prerogative. A dispute over whether it should exercise that prerogative is not a "*dispute*" within the meaning of the Act.

V. ISSUE 2: DOES S 40 IMPOSE A DUTY TO CONSULT BEFORE SHUTTING DOWN?

23. The Union's case is that s 40 [ROP 1976] of the Act imposes an obligation on employers to "*engage in consultation with the [RMU] prior to the making of a decision to close down its business*"⁵. That case has **two** limbs:

- (a) **First**, s 40 [ROP 1976] imposes (relevantly) two separate obligations on RMUs and employers: (i) an obligation to treat with each other; and (ii) an obligation to enter into negotiations with each other. It is said that 'treating' is a wider concept than, but encompasses, 'negotiating'.
- (b) **Second**, the employer's obligation to treat with the RMU includes an obligation to consult the RMU before making a decision to close down its business. The Union accepts that the employer does not require the RMU's agreement to shut down its business, and so what it contends for is a freestanding duty of consultation, divorced from any attempt to reach agreement.

24. For the reasons given below, neither limb withstands scrutiny.

Section 40 imposes a single obligation to negotiate, not an obligation to treat and an obligation to negotiate

25. Section 40 [ROP 1976] imposes a single, composite obligation on employers and RMUs to, in good faith, "*treat and enter into negotiations with each other*" for the purposes of collective bargaining. It imposes a single obligation to negotiate, rather than two separate

⁵ Appellant's Written Case at [ROP 62/28(iv)]. See also [ROP 74/64] ("*an obligation to consult with [the RMU] in the exercise of the managerial prerogative of shutting down operations*"), [ROP 76/71] ("*a duty to consult where ... an employer proposes to exercise a managerial prerogative*"), [ROP 77/74(iii)] ("*the duty to consult with the [Union] on the decision to close down and terminate the employment of the workers*").

obligations. The word “*treat*” is no more than a (somewhat archaic) term for “*negotiate*”.

26. The key meanings of the verb “*treat*” are helpfully captured in *Black’s Law Dictionary* [ROP 2279-2280]⁶:

1. To negotiate; to consider and discuss terms <invitation to treat> <notice to treat>.
2. To handle a subject in speech or writing; to give an exposition (followed by *of*) <how Cicero treats of rhetoric>.
3. To deal with (a subject, topic, theme, etc); to handle in discourse <to treat a difficult point with finesse and sophistication>.
4. To pay someone else’s expenses for a meal, drink, entertainment, etc. <my turn to treat>.
5. To entertain, fête, or show hospitality to <to treat my friends to a meal>.
6. To behave toward (someone or something) in a particular way <to treat coworkers as genuine colleagues>.
7. To care for (a medical patient); to try to cure the illness or injury of (a person) by using medicine, hospital care, surgery, etc.
8. To subject (a disease, debility, etc.) to a regimen of medicine, exercise, etc.
9. To put a special substance on (something) in order to protect, clean, or preserve <to treat old bookbindings with leather conditioner>.

27. The Company’s case is that, in s 40 [ROP 1976], “*treat*” bears meaning no. 1: to negotiate; to consider and discuss terms. The Union’s case appears to be that it bears meaning no. 6: to behave toward (someone or something) in a particular way [ROP 76/71].

28. The Union’s meaning does not work as a matter of English grammar. Meaning no. 6 refers to behaving towards someone or something in a particular way (e.g. “*A treats B nicely*” or “*C treats B as a valued colleague*”). One cannot use the word in that sense without specifying the particular way—yet that is precisely what s 40 does if the Union is correct. On the Union’s construction, the obligation is simply to “*treat ... with each other*”. That makes no sense if meaning no. 6 is adopted; it is unremarkable if meaning no. 1 is adopted.

29. The meaning of “*treat*” advanced by the Company is by no means unusual (at least at the time the Act was introduced). By way of example, one sees it in s 18 [ROP 1990] of the

⁶ Garner (ed), *Black’s Law Dictionary* (Thomson Reuters, 10th ed, 2014)

Lands Clauses Consolidation Act 1845 (UK), which requires a notice of an intended compulsory purchase of land to state that the promoters of the undertaking “*are willing to treat for the purchase thereof*”. It appears in s 5(2)(c) [ROP 1988] of the Compulsory Purchase Act 1965 (UK), which provides that the notice must state that the acquiring authority “*are willing to treat for the purchase of the land*”. And it survives to this day in contract law in the concept of an “*invitation to treat*” (an invitation to make an offer, i.e. negotiate).

30. There are other contextual indications that s 40 [ROP 1976] only imposes a single obligation to negotiate:
 - (a) That Parliament used “*treat*” and “*enter into negotiations*” in a similar way can also be seen from the definition of “*collective bargaining*” in s 2(1) [ROP 1963], which refers to “*treating and negotiating*”.
 - (b) Section 40(2) [ROP 1976] creates a single offence, defined by reference to non-compliance with “*this section*”. It does not create offences by reference to a failure to treat and a failure to negotiate.
 - (c) It is consistent with the marginal note to s 40 [ROP 1976] (“*Compulsory recognition and duty to treat*”), which treats treating and negotiating as the same concept.
 - (d) When Guyana adopted an almost-identical provision in s 23(1) [ROP 2017] of the Trade Union Recognition Act 1997⁷ [ROP 2017/23(1)], “*in good faith, treat and enter into negotiations with each other*” was replaced with “*bargain in good faith and enter into negotiations with each other*”. Clearly no substantive difference was intended (the marginal note still reads “*Compulsory recognition and duty to treat*”); the draftsman simply read “*treat*” in the sense contended for here.
31. The Union invokes the presumption against surplusage to suggest that “*treat*” cannot mean the same as “*enter into negotiations*” [ROP 74-75/65-66]. That is a weak presumption, easily displaced by other considerations. Lord Hoffmann said that he “*seldom*

⁷ “Where a trade union obtains a certificate of recognition for workers comprised in a bargaining unit in accordance with this Part, the employer shall recognise the union, and the union and the employer shall bargain in good faith and enter into negotiations with each other for the purpose of collective bargaining.”

[thought] that an argument from redundancy carries great weight”⁸ [ROP 2268/j]. And just last year the Board said that “[r]edundancy is not a strong tool in statutory interpretation”⁹ [ROP 2050/47]. It is outweighed by the considerations set out above and below. In any event, the point cuts both ways. On the Union’s construction, the words “*enter into negotiations*” would be otiose, since the Union accepts that its concept of ‘treating’ encompasses ‘negotiating’ [ROP 68/47; 74/65; 75/69].

32. The Union then says that the decision of the Industrial Court in *Steel Workers’ Union of Trinidad and Tobago v ArcelorMittal Point Lisas Ltd* [ROP 2219] “*treated section 40(1) as creating a separate obligation to treat with the recognised majority union*” [ROP 75/68]. That is not a fair reading of the decision, as is explained below.
33. In the end, s 40 [ROP 1976] is nothing more than an illustration of the once-common legal doublet: a conventional pairing of near-synonyms used for completeness (e.g. “*goods and chattels*”; “*cease and desist*”; “*null and void*”; “*terms and conditions*”; “*give, devise, and bequeath*”). Section 40 [ROP 1976] imposes a single obligation to negotiate, and it is a mistake to conclude from the words “*treat and enter into negotiations*” that Parliament intended to impose multiple obligations.¹⁰
34. If (contrary to the above submissions) s 40 [ROP 1976] is to be separated into two obligations, the better view is that it contains (i) an obligation to negotiate (“*treat*”) and (ii) an obligation to come to the negotiating table (“*enter into negotiations*”). (The reason why the words appear in the order they do is likely because of the predecessor of s 40 [ROP 1976], s 3(1) [ROP 1984] of the Industrial Stabilisation Act 1965, which obliged an employer to “*treat and enter into such negotiations with any such trade union*” (emphasis added).)

Section 40 does not impose a freestanding obligation to consult

35. The Union accepts that there is a difference between negotiation and consultation [ROP 73-74/62-63]. So did the Court of Appeal [ROP 141-143/98-94]. The distinction was

⁸ *Walker (Inspector of Taxes) v Centaur Clothes Group Ltd* [2000] 2 All ER 589 at 595(j)

⁹ *Anglin v Governor of the Cayman Islands* [2025] UKPC 30 at [47]

¹⁰ See also *Hill v William Hill (Park Lane) Ltd* [1949] 2 All ER 452 at 458G (“*it would certainly not be the first time in which the legislature had indulged in tautology*”) [ROP 2138/G].

neatly captured by the Industrial Court in *Trinidad Cement Ltd v Oilfield Workers' Trade Union* [ROP 2260-2261/6-7]:

Consultation in industrial relations has a special meaning. It is used in contradistinction to “negotiation”. Negotiation requires mutual agreement but consultation differs from negotiation in that it is intended to be an advisory rather than a decision-making process. Negotiation requires the consent of both sides but under consultation the power to make the final decision is retained by management.

36. The Company agrees, subject to one qualification. The qualification is that negotiation may sometimes involve consultation. A party may consult the other party on whether they would be open to a particular proposal, for example. Or parties may consult each other on how they might be able to reach agreement to move forward. The important point is that what is different to negotiation is a freestanding duty to consult divorced from any attempt to reach agreement. That is what the Union contends for here.
37. If the Company is correct in its submissions above that the words “*treat and enter into negotiations*” impose a single obligation to negotiate, there is no room for any freestanding obligation to consult. The only obligation is to negotiate. But even if the Company is incorrect, and s 40 imposes an obligation to treat separate from an obligation to enter into negotiations, that obligation still does not include any freestanding obligation to consult.
38. **First**, the obligation in s 40 [ROP 1976] is to treat and enter into negotiations “*for the purposes of collective bargaining*”. “*Collective bargaining*” is then defined in s 2(1) [ROP 1963] to mean three purposes, each of which involves reaching or attempting to reach agreement: (i) the conclusion of a collective agreement; (ii) the revision or renewal of a collective agreement; and (iii) the resolution of disputes. A freestanding duty to consult divorced from any attempt to reach agreement is therefore not “*for the purposes of collective bargaining*”.¹¹
39. **Second**, when Parliament intended to refer to consultation in the Act, it used that word. Sections 4(3)(a) [ROP 1969] and 21(3)(a) [ROP 1974] of the Act refer to appointments made by the President “*after consultation with*” the Chief Justice or representative organisations. Had Parliament intended s 40 to impose a separate obligation to consult –

¹¹ See also CA [ROP 143/95] (“*It would hardly make sense to merely consult without a view to arriving at an agreement.*”).

under threat of criminal punishment – it would have said so expressly.

40. **Third**, Parliament has turned its mind to consultation in this context, and it did so expressly and within a narrow compass. Section 4 [ROP 1994] of the RSBA requires an employer proposing to terminate the services of five or more workers for the reason of redundancy to give formal notice of termination in writing to each involved worker, to the RMU, and to the Minister. But s 5 [ROP 1995] goes on to provide that, notwithstanding s 4, “*an employer may, prior to the giving of formal notice in writing of retrenchment, enter into consultation with the recognised majority union with a view to exploring the possibility of averting, reducing or mitigating the effects of the proposed retrenchment*”.
41. Section 5 [ROP 1995] is narrowly circumscribed. Unlike the Union’s case, it does not impose a duty to consult. It provides only that the employer may consult. Unlike the Union’s case, it applies only in cases of retrenchment and not more broadly. And unlike the Union’s case, it extends only to consultation with the RMU “*with a view to exploring the possibility of averting, reducing or mitigating the effects of the proposed retrenchment*”. Parliament has expressly and narrowly dealt with the topic of consultation in this context, and the Union’s construction would impermissibly cut across that choice.
42. There is a further and more fundamental point. The RSBA does not apply to a closure at all. Section 2 [ROP 1993] defines “retrenchment” as “*the termination of employment of a worker at the initiative of an employer for the reason of redundancy*”, and “redundancy” as “*the existence of surplus labour in an undertaking for whatever cause*”. Construing those definitions in *Commercial Finance Co Ltd v Ramsingh-Mahabir* [ROP 2082-C], Lord Slynn held:
- [R]etrenchment means termination for the reason of redundancy and redundancy means the existence of surplus labour in an undertaking for whatever cause. It does not apply to the termination of employment simply because the business has ceased to exist. Retrenchment contemplates that the business will continue in existence but that there are too many workers for the purposes of the business so that some have to be made redundant.
43. Thus Parliament’s only treatment of consultation about the loss of employment is permissive (“*may*”) and is confined to retrenchment – that is, to the rightsizing of a continuing business. Moreover, it does not extend to the closure of a business at all. On the Union’s construction, s 40 [ROP 1976] would impose a mandatory duty to consult, enforceable by criminal punishment, in the very situation Parliament left outside the RSBA.

That cannot be right.

44. **Fourth**, the Board can take judicial notice of the fact that the Retrenchment and Severance Benefits (Amendment) Bill, 2026 **[ROP 1996-2014]** is currently before the Parliament, having already been passed by the Senate. Among other things, the Bill would amend the RSBA to introduce a detailed and carefully defined duty of consultation that would apply in the circumstances of this case (and beyond):
- (a) The definition of “redundancy” would be widened to include termination as a result of a reduction in the work force as a result of the employer modernising or automating the business, the employer discontinuing to carry on all or part of the business, the sale by the employer of the business, the re-organisation of the business by the employer to improve efficiency, it becoming impossible for the employer to carry on the business for various reasons, and reduced operation in the employer’s business made necessary by economic conditions.
 - (b) Section 5 would be replaced with an obligation on the employer to “*enter into consultation with the recognised majority union*” (new s 5(1) **[ROP 2002]**). The replacement section would specify that consultation must include discussions on: the reasons for the proposed redundancy; measures to avert or reduce the number of workers to be terminated on account of redundancy; measures to mitigate the adverse effects of the redundancy on the involved workers; the criteria used in the selection of workers whose services are to be terminated; what constitutes reasonable time off for involved workers to explore the possibility of obtaining alternative employment; and possible alternatives to the proposed redundancy, including re-deployment, reduced hours or temporary lay-off (new s 5(1)). The replacement section would oblige the employer to disclose certain information (new s 5(2) **[ROP 2003]**), would specify when the consultation must commence and how long it must last (new s 5(3)(a), (b) **[ROP 2003]**), and would specify that it must consist of genuine and meaningful engagement, including such meetings as are reasonably necessary in the circumstances (new s 5(3)(c) **[ROP 2003]**).
 - (c) “Consultation” would be defined to mean a process of meaningful engagement conducted in good faith between the employer and the recognised majority union,

or where there is no recognised majority union, the involved workers, with a view to exchanging relevant information, considering representations, and exploring possible alternatives to the proposed redundancy.

45. In circumstances where Parliament is actively considering introducing a detailed and carefully defined duty of consultation (that would apply in the circumstances of this case and beyond), the Board should not accede to the Union's invitation to introduce an un-particularised duty of consultation into s 40 **[ROP 1976]** by construction.¹² Indeed, it would be anomalous for the Board retrospectively to discover in s 40 **[ROP 1976]** an undefined criminal duty covering the same ground which Parliament is now considering regulating in detail.
46. New legislation is the proper vehicle for introducing such a duty, rather than reading it into s 40. In particular, it will be able to supply the machinery absent from s 40: the subject matter, commencement, content and duration of consultation, the information to be disclosed, and the requirement for meaningful engagement.
47. **Fifth**, s 40 **[ROP 1976]** is a penal provision—it creates a criminal offence. It is therefore important, as the Board has before said in this context,¹³ that there be certainty about whether conduct is criminal or not. The broad and undefined duty advanced by the Union has no clear limits. Given the broad meaning of “*treat*” advanced by the Union, does s 40 require more than consultation? Does the obligation to consult only apply to the employer, or must the RMU also consult on decisions it is considering taking? In its application to the employer, to what does the obligation to consult attach? The duty of consultation proposed by the Union would apply (it seems) to all management decisions **[ROP 76/71]**.
48. It is important to bear in mind that the question here is not whether consultation would have represented good industrial relations practice, but whether the Company committed a criminal offence. Any doubts about the construction of s 40 **[ROP 1976]** should be

¹² See, e.g., *Bellinger v Bellinger* [2003] 2 AC 467 at **[ROP 2064-2065/37-38]** (fact that the government had announced its intention to introduce comprehensive primary legislation on difficult and sensitive subject meant that intervention by the courts would be peculiarly inappropriate).

¹³ *Public Services Association of Trinidad and Tobago v Trinidad and Tobago Civil Aviation Authority* [2025] UKPC 40 at **[ROP 2206/47]**.

resolved in the Company's favour. The Company should not be criminally punished on a doubtful construction of s 40 [ROP 1976].

49. **Sixth**, the Union has been unable to point to any authority recognising the freestanding duty of consultation it advances.¹⁴ The only decision it relies on is the decision of the Industrial Court in *ArcelorMittal* [ROP 2219] but that decision in fact provides no support for the Union's contention.

50. In that case, the company proposed to the union (as a way of addressing the company's financial difficulties) that employees who had accumulated vacation leave take that leave. This was inconsistent with the relevant collective agreement and so required the workers' consent. The parties met and discussed that proposal. At a meeting on 7 December 2015, the company repeated its vacation leave proposal and said (for the first time) that if it was not accepted, it would lay off all workers with immediate effect. Then:

The Union rejected the Company's proposal but requested to have the opportunity to speak to its members. In response, the Company reiterated its intention to implement its layoff proposal that same day. The Company told the Union that it can "go ahead and meet with the workers but they were going to do what they have to do". [ROP 2225-2226/17]

51. The company sent out letters to workers that same day, immediately after the meeting ended, laying off the workers with immediate effect. The company sent a letter the next day saying it was open to discussing suggestions. But when two days later the union requested a meeting, the company refused unless the union considered the vacation leave proposal (which the Court noted the union already had).

52. The Industrial Court held that the company had committed the s 40 offence because it did not give the union an opportunity to consider and respond to its 7 December 2015 layoff proposal, and then later refused even to meet.¹⁵ 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. [ROP 2242/55]

¹⁴ See also CA at [ROP 140/89].

¹⁵ It also committed the offence by failing to recognise the union as the RMU and dealing directly with the workers. That is not relevant here.

53. Although the Court discussed the importance of consultation, the conduct that contravened s 40 was putting forward a proposal without notice, demanding acceptance that day, and being unwilling to discuss it. That is the opposite of negotiating in good faith. As the Court said (emphasis added):

The Company did not discuss or even mention the issue of layoff in any of the meetings in the month [of] November nor did it discuss it at the meeting on the 4th December, 2015. When the issue of layoff was presented to the Union on the 7th December it was presented together with the vacation leave proposal and the approach of the Company was take it (vacation leave) or leave it (layoff). In other words, negotiations, as far as the Company was concerned, were at an end. There was no prior warning about the layoff or proper consultation and indeed no opportunity for the Union to discuss such a serious issue with its membership. Instead, immediately after the meeting with the Union ended, the Company served each affected worker with a layoff letter which was prepared the weekend prior. The workers were laid off summarily and without notice. [ROP 2242/56]

54. In any event, *ArcelorMittal* is distinguishable on the ground identified by Kokaram JA [ROP 143/96]. A critical feature of that case was that the parties treated the state of affairs as akin to a redundancy situation. It was in that context that what the RSBA had to say about consultation was treated as relevant. As the Industrial Court said in that case: “[S]ince this was akin to a redundancy situation, and we note that the Company has put its case to us on this footing, using layoff almost synonymously with retrenchment, the guidance provided both by the RSBA, and the decisions of this Court, give general directions on how the parties ought to conduct themselves in arriving at the standards which governs good industrial relations practice.” [ROP 2238/46]
55. That reasoning does not apply here. This was not a case of retrenchment. The Company ceased its refining business; it did not reduce a workforce that had become surplus to the needs of a continuing one. The RSBA guidance on which the Industrial Court relied in *ArcelorMittal*, and which it carried across to the present case [ROP 159/44], therefore had no application. As Kokaram JA said: “It is wrong ... to expand the scope of section 40 ... to import a concept of consultation deliberately devised for redundancies under the RSBA.” [ROP 143/97]
56. The *ArcelorMittal* case thus provides no support for the freestanding duty of consultation, divorced from any attempt to reach agreement, advanced by the Union.
57. For those reasons, s 40 (relevantly) imposes only one obligation: to negotiate in good faith. It imposes no freestanding duty to consult divorced from any attempt to reach

agreement.

VI. ISSUE 3: WAS THERE A FAILURE TO CONSULT IN GOOD FAITH?

58. If the Company's submissions on the issues above are accepted, this does not arise. If, on the other hand, the Union's submissions on the issues above are accepted, this issue must be confronted: did the Company fail to consult in good faith with the Union about whether the Company should shut down its business?
59. This involves two subsidiary issues:
- (a) **First**, was there a failure by the Company to consult the Union about whether the Company should shut down its business?
 - (b) **Second**, if so, was there a lack of good faith on the part of the Company? This involves consideration of the MOA, because the primary basis for the suggestion that there was a lack of good faith on the part of the Company is that it did not comply with the MOA.
60. It is necessary to bear in mind that, as the Court of Appeal correctly pointed out [**ROP 130/68(f)**], breach of the MOA would not in and of itself be a contravention of s 40. Any breach of the MOA is only relevant context for the purposes of the Union's good faith argument. The Union appears to accept this.

Was there a failure to consult by the Company?

61. If (contrary to the Company's submissions above) the Company was under a duty to consult the Union about whether the Company should shut down its business, such consultation occurred. That is clear from the judgments of both the Industrial Court and the Court of Appeal.
62. The Industrial Court referred to discussions between the Union and the Company from 28 August 2018 onwards, which had "*mainly centred on the Union offers and proposals to the Company to lease the refinery*" [**ROP 153/21**]. It went on to note:

The Union presented what has been referred to an "Alternative Plan" and other proposals to

the Company as plans to avert the imminent closure of the Company. The Union proposed, among other things, to work along with a consortium to lease the refinery and to pay all of the Company's outstanding debt. The Union however, did not disclose the name of the members of the consortium to the Company when it was requested to do so in September 2018. [ROP 153/22]

63. In similar vein, Kokaram JA in the Court of Appeal explained:

[After 28 August 2018] the parties held a series of meetings in September 2018 at which the Union presented an alternative plan, and the Company requested further information in order to assess the viability of the plan. On 1st October 2018 the Company informed the Union that its alternative plan was not a viable one and that it would be proceeding with the closure of the Company and the termination of all the employees effective 30th November 2018. [ROP 122/50] See also SFI: [ROP 34/10]

64. The evidence cited by Kokaram JA¹⁶ records that meetings between the Company and the Union took place on (at least) 11 September 2018, 19 September 2018, 25 September 2018, 27 September 2018, and 1 October 2018. The “Alternative Plan” that the Union proposed to the Company was a 31-page document entitled “*Saving Petrotrin – OWTU’s Alternative Plan*”.¹⁷ It provided a detailed case for an alternative course of action. As Kokaram JA noted, the Union’s “Alternative Plan” was considered by the Company but not ultimately accepted.
65. In the circumstances, if there was a duty on the Company to consult with the Union about whether the Company should shut down its business, it complied with that duty.

Was there a lack of good faith on the part of the Company?

66. The primary basis for the suggestion that there was a lack of good faith on the part of the Company is that it did not comply with the MOA. Thus, the Industrial Court said:

“Good faith” means, in this case, 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. The fact is indisputable that the Company 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/d]

67. Likewise, the Union’s case before the Board is that the MOA “*flesh[es] out the requirements of good faith under section 40(1) in the circumstances of this case*” [ROP 61/28(i)]

¹⁶ CA at [ROP 122/50], citing R83–R84 and R85–R86 (witness statement of Oswald Warwick at [ROP 296-297/26-29] and [ROP 297-298/36-38]) and R245 (witness statement of Wilfred Espinet at [ROP 458/22-24]).

¹⁷ R142 (witness statement of Oswald Warwick at OW13 [ROP 353]).

and that “*it was the bad faith inherent in the departure from the MOA without first discussing such departure with the [Union] which established an absence of good faith*”. [ROP 64/33]¹⁸

68. The difficulty with hanging the finding of a lack of good faith on breach of the MOA is that, as Kokaram JA concluded, the MOA was “*premised upon the continuation of*” the Company’s business [ROP 135-136/74]. As Kokaram JA said:

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 ... there is a significant change in circumstances making the MOA a historic fact than a present reality with binding obligations.

69. Kokaram JA’s conclusions cannot be faulted. Both the Recitals and the operative clauses of the MOA [ROP 319-321] make clear that it was directed to ensuring the survival, sustainability, and profitability of the Company—that is, its provisions were directed to a continuing enterprise. Thus:

- (a) Recital A to the MOA recited the Company and the Union’s common interest “*with respect to the survival, sustainability and profitability of the Company*” (emphasis added).
- (b) Recital C recorded that the parties recognised that time was of the essence and that therefore all agreed initiatives “*must be implemented in a timely manner within a time frame of [18 months] ... which is a condition precedent to the receipt of funding and financial concessions from the Company’s financiers*”. The MOA thus presupposed that the Company would continue and that refinancing would be obtained.
- (c) Recital D added that the Union and the Company had agreed “*to meet and resolve the organizational structures, work processes and skills/competencies and man-*

¹⁸ See also [ROP 63/30] (“*It was the [Union’s] case that the [Company’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”.*”).

power requirements to ensure the survival, sustainability, profitability of the Company” (emphasis added). As to the three operative clauses:

- (d) Clause 1 obliged the Company’s Executive to meet monthly with the Union’s Executive for three identified objectives. The key objective was 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*” (emphasis added).
 - (e) Clause 2 obliged the parties to establish a Working Committee that would work over 18 months 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*” (emphasis added).
 - (f) Clause 3 recognised the parties’ common interest in the promotion of the Company’s business and declared that they would use their best endeavours to protect and further the wellbeing of the enterprise. The Union agreed that it would cooperate with the Company and support its efforts to secure a full day’s work on the part of its member workers and that it would actively combat absenteeism and other practices that curtailed production, and would support the Company’s efforts to maintain discipline and eliminate waste and inefficiency to improve the standard of workmanship and to prevent accidents. The Company would ensure that a safe and secure work environment was provided at all times. Each of these obligations again presupposes that the Company would continue in operation.
70. What is more, the MOA said nothing about closure, termination, dismissal, redundancy, retrenchment, severance, pensions, savings or medical plans, or rehiring. It said nothing about what should happen if the Company ceased operations. That is unsurprising because the MOA was premised on the Company continuing in operation.
71. The Union’s answer to this is two-fold. First, it says that the MOA was entered into against the backdrop of discussions on the possible restructuring of the Company which involved the hiving off of the Company’s core operations to two separate legal entities,

which “[n]ecessarily ... meant that the [Company] was shutting down” [ROP 65-68/35-43]. Second, it says that what the Company decided to do in August 2018 was just as much a restructuring as what it was intending to do before that. The Union’s argument appears to be that, taking those things together, there was no real difference between what was contemplated when the MOA was signed and what was decided in August 2018, so that the MOA must have continued to apply [ROP 68/43].

72. There are four answers to this:

- (a) The first is that there is no finding that at the time the MOA was signed the Company was intending to shut down. On the contrary, the Industrial Court’s factual findings refer to the Board’s decision between December 2017 and January 2018 to “*restructure the Company into two separate entities; one entity to focus on the E&P Operations and the other to focus on the R&M Operations*” [ROP 150/12]. They also refer to the discussions with the Union in January 2018 “*on the proposed restructure of the Company*” [ROP 140/14].
- (b) The second is that the Company’s evidence before the Industrial Court was that it would continue in operation as a holding company with operating subsidiaries rather than shutting down [ROP 1221-1222]. The Appellant’s Written Case acknowledges this [ROP 65/35], but does not suggest that the Industrial Court disbelieved that evidence or provide any basis on which the Board can ignore that evidence.
- (c) The third is that there is no finding that what the Company decided to do in August 2018 was a restructuring. On the contrary, the Industrial Court did not decide that issue, saying in a footnote: “*We do not find it at this time to address the issue canvassed before us of whether the proposal is a closure or a restructuring, which has significantly different legal consequences. This should not be interpreted as overlooking its importance or a view one way or the other on the issue.*” [ROP 166] In light of that, the Industrial Court’s discussion at [25], which the Union relies on, cannot be elevated into a finding that what the Company decided to do in August 2018 was a restructuring.
- (d) The fourth is that the Union’s argument is inconsistent with another part of the Industrial Court’s decision. The Company had argued that the Union’s complaint

was out of time (s 84 of the Act requiring a complaint about a s 40 offence to be made within 3 months of the offence). The Court rejected that submission [ROP 163/49]:

There is some uncertainty about the actual date the Company decided to change its stated decision from having two separate entities to the new decision that the closure of the Company was the only viable option. However, the Company agrees that the Union was informed of the new decision on the 28th August, 2018; this is after the Company made its decision. It is only at the point when the Union was informed of the Company's new decision that the Union could contemplate the filing of an [industrial relations offence].

The basis for the Industrial Court's decision on the limitation issue was thus that on or about 28 August 2018, the Company "*decided to change its stated decision from having two separate entities to the new decision that the closure of the Company was the only viable option*". The Union's argument before the Board is inconsistent with that.

73. The Union also says that 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 [ROP 67/42]. There is nothing in this. A large part of the Union's case before the Industrial Court¹⁹ and the Court of Appeal²⁰ relied on the MOA and the allegation that the Company had breached it. The Company's Notice of Appeal in the Court of Appeal also challenged the applicability of the MOA.²¹
74. In the circumstances, even if there was a failure by the Company to consult with the Union about whether the Company should shut down its business, there was no lack of good faith.

¹⁹ See, e.g., (complaint letter to the Industrial Court [ROP 217-219]); (Evidence and Arguments of Party No. 1 [ROP 224/15-16]); (Evidence and Arguments of Party No. 1 [ROP 230-231/53, 55(ii)])

²⁰ See, e.g., (Respondent's submissions dated 17 November 2023 [ROP 1863-1865/40-43])

²¹ Grounds 3(g) and (u).

VII. CONCLUSION

75. For all these reasons, which are summarised in paragraph 5 above, the Company respectfully submits that the Board should dismiss the appeal.

Anand Ramlogan SC

Freedom Law Chambers

Mohammud Jaamae Hafeez-Baig

Brick Court Chambers

Jared Jagroo

Candice Ramkhelawan

Freedom Law Chambers

16 September 2026