[2023] JMSC Civ 6

**IN THE SUPREME COURT OF JUDICATURE OF JAMAICA**

**IN CIVIL DIVISION**

**CLAIM NO. SU 2022 CV 02353**

**IN THE MATTER OF THE CONSTITUTION OF JAMAICA**

**A N D**

**IN THE MATTER OF SPECIAL MINING LEASES PERMITTING BAUXITE MINING IN AREAS WHERE THE CLAIMANTS LIVE AND FARM**

**A N D**

**IN THE MATTER OF AN APPLICATION FOR CONSTITUTIONAL REDRESS PURSUANT TO SECTION 19 OF THE CONSTITUTION**

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| **BETWEEN** | **VICTORIA GRANT** | **1ST CLAIMANT** |
| **AND** | **LINSFORD HAMILTON** | **2ND CLAIMANT** |
| **AND** | **CYRIL ANDERSON** | **3RD CLAIMANT** |
| **AND** | **MERLINA ROWE** | **4TH CLAIMANT** |
| **AND** | **BEVERLY LEVERMORE** | **5TH CLAIMANT** |

| | | |
|---|---|---|
| **AND** | **ALTY CURRIE** | **6TH CLAIMANT** |
| **AND** | **BOBLET CAMPBELL** | **7TH CLAIMANT** |
| **AND** | **LAWFORD FLETCHER** | **8TH CLAIMANT** |
| **AND** | **EDLIN WALTON** | **9TH CLAIMANT** |
| **AND** | **NORANDA JAMAICA BAUXITE PARTNERS** | **1ST DEFENDANT** |
| **AND** | **NORANDA JAMAICA BAUXITE PARTNERS II** | **2ND DEFENDANT** |
| **AND** | **NEW DAY ALUMINIUM (JAMAICA) LIMITED** | **3RD DEFENDANT** |
| **AND** | **THE ATTORNEY GENERAL OF JAMAICA** | **4TH DEFENDANT** |

**IN CHAMBERS**

**Mr B. St. Michael Hylton KC and Mesdames Malene Alleyne, Melissa McLeod and Daynia Allen instructed by Messrs. Hylton Powell for the Claimants**

**Mr Ransford Braham KC instructed by Mr Glenford Watson for the 1st and 2nd Defendants**

**Mesdames Carlene Larmond KC and Giselle Campbell instructed by Patterson Mair Hamilton for the 3rd Defendant**

**Ms Lisa White, Mrs Taniesha Rowe-Coke and Mr Robert Clarke instructed by the Director of State Proceedings for the 4th Defendant**

**Heard: December 2 and 19, 2022 and January 20, 2023**

**Injunction – Application for the grant of an injunction – Threshold test – Whether there is a serious issue to be tried – Balance of convenience – Whether the balance of convenience lies in favour of the grant of injunctive relief – Irreparable harm – Whether the applicants would suffer irreparable harm should the application for the grant of an injunction be refused – Whether the respondents would suffer irreparable harm should the application for the grant of an injunction be allowed – Application for the grant of an injunction made against the background of a constitutional claim challenging the lawfulness of bauxite mining activities on the part of the defendants –**

**Breach of fundamental rights – Right to life – Right to receive information – Right to reside in any part of Jamaica – Right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage – Right to protection from degrading treatment**

**Damages – Whether damages are an adequate remedy**

**Undertaking as to damages – Waiver of requirement for undertaking as to damages – Whether the application for an injunction should properly be granted in circumstances where the applicants are unable to give an undertaking as to damages**

**Remedies – Whether grant of injunctive relief – Whether award of damages – The Judicature (Supreme Court) Act, section 49(h), Civil Procedure Rules, 2002, rules 17.1(1)(a) and 17.4**

**A. NEMBHARD J**

**INTRODUCTION**

**[1]** This matter raises important issues surrounding the constitutional rights of the Claimants. The Claimants assert that the bauxite mining activities, on the part of the 1st Defendant, Noranda Jamaica Bauxite Partners ("Noranda I"), the 2nd Defendant, Noranda Jamaica Bauxite Partners II ("Noranda II), the 3rd Defendant, New Day Aluminium (Jamaica) Limited ("New Day"), (collectively referred to as "the Defendant Companies") and the 4th Defendant, the Attorney General of Jamaica, have breached or are likely to breach certain of their fundamental rights.

**[2]** The Claimants specifically assert that the bauxite mining activities on the part of the Defendants have breached or are likely to breach their fundamental right to life; the right to receive information; the right to reside in any part of Jamaica; the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage; and the right to protection from degrading treatment.

**[3]** The Claimants' assertions are encapsulated in a Fixed Date Claim Form, which was filed on 29 July 2022, by virtue of which the Claimants seek the following relief: -

1. A Declaration that the Defendants and/or each of them have breached the following guaranteed constitutional rights of the Claimants, by the bauxite mining which the First and/or Second and/or Third Defendants have carried on and the Government of Jamaica has permitted them to carry on, pursuant to Special Mining Leases 165 and 172:

    (a) the right to life, acknowledged by section 13(3)(a) and guaranteed by section 13(2) of the Constitution;

    (b) the right to receive information, acknowledged by section 13(3)(d) and guaranteed by section 13(2) of the Constitution;

    (c) the right to reside in any part of Jamaica, acknowledged by section 13(3)(f)(ii) and guaranteed by section 13(2) of the Constitution;

    (d) the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage, acknowledged by section 13(3)(l) and guaranteed by section 13(2) of the Constitution;

    (e) the right to protection from degrading treatment, acknowledged by sections 13(3)(o) and (6), and guaranteed by section 13(2), of the Constitution.

2. A Declaration that Special Mining Lease 173 breaches or is likely to breach the said guaranteed constitutional rights.

3. A Declaration that the bauxite mining activities which the Second and/or Third Defendants intend to carry on pursuant to Special Mining Lease 173 are likely to breach the said guaranteed constitutional rights.

4. A Declaration that neither the manner nor the extent of the said breaches and/or likely breaches is demonstrably justified in a free or democratic society.

5. Consequently, an order that Special Mining Lease 173 is void and of no effect and/or should be struck down.

6. An injunction restraining the First, Second and Third Defendants whether by themselves or by their employees, servants or agents or howsoever, from continuing any mining or other activity pursuant to or in reliance on Special Mining Leases 165 and 172.

7. Alternatively, an injunction restraining the First, Second and Third Defendants, whether by themselves or by their employees, servants or agents or howsoever, from continuing any mining or other activity pursuant to or in reliance on Special Mining Leases 165 and 172, without taking reasonable steps and precautions as directed by the court to mitigate injury and damage to the Claimants and other residents of the affected communities.

8. An injunction restraining the Second and Third Defendants, whether by themselves or by their employees, servants or agents or howsoever, from starting or continuing any exploring, mining or other activity pursuant to or in reliance on Special Mining Lease 173.

9. Compensatory damages.

10. Constitutional/Vindicatory damages.

11. Aggravated damages.

12. Interest on damages at the statutory rate of interest.

13. Such further and other relief as this Honourable Court deems appropriate or which may be necessary to give effect to the Declarations sought.

14. Costs.

**[4]** The Claim is brought on the bases that: -

1. The Claimants all live or farm in or very near to areas in which Noranda I and/or Noranda II and/or New Day, have carried out bauxite mining activities pursuant to Special Mining Leases 165 and 172;

2. Noranda I and Noranda II are partnerships between New Day and Jamaica Bauxite Mining Limited, a company wholly owned by the Government of Jamaica;

3. New Day, formerly Noranda Bauxite Limited and, before that, St. Ann Bauxite Limited, is a company incorporated under the Companies Act and is owned by New Day LLC and Jamaica Bauxite Mining Limited;

4. The Fourth Defendant, the Attorney General of Jamaica, is joined as the representative of the Crown, pursuant to the Crown Proceedings Act;

5. On 30 September 2004, the Government of Jamaica granted Special Mining Lease 165 to New Day (which was then called St. Ann Bauxite Limited) for the purposes of mining bauxite in, under or upon approximately 177.33 $km^2$ (17,733 hectares) of land in the parish of St. Ann;

6. Special Mining Lease 165 provided that New Day would appoint Noranda I as its agent to mine the bauxite and to perform other mining activities. (At that time Noranda I was named St. Ann Jamaica Bauxite Partners. It was subsequently renamed Noranda Jamaica Bauxite Partners);

7. On 16 May 2017, the Government of Jamaica granted Special Mining Lease 172 to New Day for the purposes of mining bauxite in, under or upon approximately 11.79 $km^2$ (1,179 hectares) of lands in the parish of St. Ann. Special Mining Lease 172 provided that New Day would appoint Noranda II as its agent to mine the bauxite and to perform other mining activities;

8. As a result of the mining activities carried out by Noranda I and/or Noranda II and/or New Day, pursuant to Special Mining Lease 165 and Special Mining Lease 172, the Claimants have suffered significant injury to their health, damage to their homes, farms and subsistence crops, contamination of their drinking water sources, loss of their livelihood and the rural way of life and/or other financial and personal loss and, in the case of the First Claimant, the loss of her spouse;

9. The loss and injury suffered by the Claimants and the likelihood of further loss and injury are compounded by the fact that there are no adequate medical facilities in the Claimants' communities where they can receive comprehensive medical treatment for mining-related illnesses. Furthermore, there is no water quality monitoring or decontamination of public water catchments in these communities;

10. On 28 August 2018, the Government of Jamaica granted Special Mining Lease 173 to New Day for the purposes of mining bauxite in, under or upon approximately 120 $km^2$ (12,000 hectares) of lands in the parishes of St. Ann and Trelawny ("the Proposed Mining Area"). Special Mining Lease 173 provides that New Day will appoint Noranda as its agent to mine the bauxite and to perform other mining activities;

11. Despite numerous studies and complaints about the health impacts of bauxite dust pollution, the Defendants have failed and or refused to take even basic measures to safeguard life and health before granting Special Mining Leases 165, 172 and 173. It has never

conducted a health impact assessment; it has never done medical diagnoses of mining-affected communities; and it refuses to adopt air quality standards that address the most serious industry-related pollutants associated with morbidity and mortality;

12. The Defendants have breached and/or are likely to breach the Claimants' right to life by permitting and carrying out dangerous mining activities in the middle of their communities – right next to their homes, churches and schools – without taking sufficient measures to reduce the risk to a reasonable minimum;

13. Despite a long history of requests from experts and non-governmental organizations, that the Government of Jamaica generates environmental information by conducting health impact studies, monitoring health hazards and monitoring public water catchments, it has not taken any action on these requests. Instead, the Government of Jamaica has continued to permit mining in the middle of the community settlements without informing the residents of the impacted communities about the risks to their health, the quality of the air they breathe or the quality of their drinking water;

14. The Defendants' said actions and failures have effectively resulted in the Claimants' homes becoming uninhabitable, forcing some of the Claimants to abandon the homes or areas in which they and their families have lived for generations and to seek refuge in other communities and areas;

15. In or around February 2022, the National Environment and Planning Agency (pursuant to the National Resources and Conservation (Permits and Licences) Regulations), issued two (2) permits to Noranda: Permit No. 2018-0617-EP00196 and Permit No. 2018-0617-EP00197. The permits allow Noranda or New Day to commence the intended mining activities in part of the Proposed Mining Area;

16. The Claimants all live or farm in or very near to the Proposed Mining Area. The homes of the First, Fourth and Ninth Claimants

are located at the intersection of all three mining leases. The proposed mining activities are likely to cause the Claimants to suffer further injury to their health, damage to their homes, farms and subsistence crops, contamination of their drinking water sources, loss of their livelihood and the rural way of life and/or other financial and personal loss;

17. Section 13(1)(b) of the Constitution provides that all persons in Jamaica are entitled to preserve for themselves and future generations certain fundamental rights and freedoms;

18. Section 13(2)(b) of the Constitution provides that no organ of the State shall take any action or pass any law which abrogates, abridges or infringes any of the rights guaranteed by Chapter III of the Constitution;

19. Section 13(5) of the Constitution provides that Chapter III also binds natural or juristic persons;

20. Section 19(1) of the Constitution provides that any person alleging that any of the provisions of Chapter III of the Constitution has been, is being or is likely to be contravened in relation to him, may apply to the Supreme Court for redress;

21. The mining activities that Noranda I, Noranda II and New Day are carrying out, pursuant to Special Mining Leases 165 and 172 contravene the aforesaid constitutional rights guaranteed under Chapter III of the Constitution;

22. Special Mining Lease 173 has contravened or is likely to contravene the aforesaid constitutional rights guaranteed under Chapter III of the Constitution;

23. The mining activities that New Day and Noranda II threaten and intend to carry out, pursuant to Special Mining Lease 173, are likely to contravene the constitutional rights guaranteed under Chapter III of the Constitution; and

24. There is no other means of adequate redress for the above-mentioned contraventions of the Constitution.

**BACKGROUND**

**[5]** The Claim is made against the background of the decision of the National Environment and Planning Agency ("NEPA"), to issue Permit No. 2018-0617-EP00196 and Permit No. 2018-06017-EP00197 ("the Permits") to Noranda I, in or around February 2022. The Permits authorize Noranda I and/or New Day to commence their intended mining activities in part of the Proposed Mining Area, which is geographically located in the parishes of St. Ann and Trelawny.

**[6]** The Claimants assert that they live and or farm in or very near to the Proposed Mining Area. The Claimants are identified as follows: -

1. The First Claimant, Victoria Grant, widow of Gibraltar;
2. The Second Claimant, Linsford Hamilton, retired farmer of Madras;
3. The Third Claimant, Cyril Anderson, farmer of Bryan Castle;
4. The Fourth Claimant, Merlina Rowe, shopkeeper of Gibraltar;
5. The Fifth Claimant, Beverly Levermore, farmer of Somerton;
6. The Sixth Claimant, Alty Currie, farmer of Madras;
7. The Seventh Claimant, Boblet Campbell, farmer of Endeavour;
8. The Eighth Claimant, Lawford Fletcher, farmer of Barnstaple; and
9. The Ninth Claimant, Edlin Walton, farmer of Gibraltar.

**[7]** The Claimants assert further that the homes of the 1st, 4th and 9th Claimants (Ms Victoria Grant, Ms Merlina Rowe and Ms Edlin Walton, respectively), are located at the intersection of all three mining leases, which are central to these proceedings. The Claimants contend that the proposed bauxite mining activities are likely to cause them to suffer further injury to their health, damage to their homes, farms and subsistence crops, contamination of their drinking water sources, loss of their livelihood and the rural way of life and/or other financial and personal loss.

**The factual substratum**

**[8]** Noranda I and Noranda II are partnerships between New Day and Jamaica Bauxite Mining Limited, a company wholly owned by the Government of Jamaica. New Day is owned by New Day LLC and Jamaica Bauxite Mining Limited.

**[9]** The Proposed Mining Area was the subject of Special Mining Leases numbered 165, 172 and 173, which were issued by the Government of Jamaica to the Defendant Companies. These Special Mining Leases authorized the Defendant Companies to mine bauxite and carry out other bauxite mining related activities in identified geographical areas within the parishes of St. Ann and Trelawny.

**The special mining leases**

**Special Mining Lease 165**

**[10]** On 30 September 2004, the Government of Jamaica granted Special Mining Lease 165 to St Ann Bauxite Limited.[1] This Mining Lease authorized New Day to carry out the mining of bauxite in, under or upon approximately 177.33km$^2$, (17, 733 hectares) of land in the parish of St. Ann. Under this Special Mining Lease, New Day appointed Noranda I as its agent to mine bauxite located within the identified geographical parameters as well as to enable the company to perform other bauxite mining activities.[2]

[1] The 3rd Defendant, New Day Aluminium (Jamaica) Limited, was previously St. Ann Bauxite Limited. At the time of the granting of Special Mining Lease 165, the company was named St. Ann Bauxite Limited.

[2] At the time, Noranda I was named St. Ann Jamaica Bauxite Partners. It was later renamed Noranda Jamaica Bauxite Partners.

**Special Mining Lease 172**

**[11]** Subsequently, Special Mining Lease 172 was granted by the Government of Jamaica to New Day, on 16 May 2017. Under this Special Mining Lease, New Day is permitted to mine bauxite in, under or upon approximately 11.79km$^2$, (1, 179 hectares) of lands situate in the parish of St. Ann. Similarly, Special Mining Lease 172 allowed New Day to appoint Noranda II as its agent to mine bauxite and to carry out other bauxite mining activities within the proposed mining area.

**[12]** The Claimants contend that the bauxite mining activities which the Defendant Companies are carrying out pursuant to Special Mining Leases 165 and 172 contravene their constitutional rights under sections 13(1)(b), 13(2)(b), 13(5) and 19(1) of the Constitution of Jamaica.

**Special Mining Lease 173**

**[13]** On 28 August 2018, Special Mining Lease 173 was granted by the Government of Jamaica to New Day. In like manner, this Special Mining Lease permitted New Day to appoint Noranda as its agent to mine bauxite and to conduct related bauxite mining activities in, under or upon approximately 120 km$^2$, (12,000 hectares) of land. Geographically, the proposed mining areas under this Special Mining Lease span the parishes of St. Ann and Trelawny.

**[14]** The Claimants maintain that Special Mining Lease 173 and the proposed bauxite mining activities of New Day and Noranda II threaten to contravene or are likely to contravene their constitutional rights under Chapter III of the Constitution of Jamaica.

**THE APPLICATION FOR INJUNCTIVE RELIEF**

**[15]** It is against this background that the Claimants/Applicants make an application for injunctive relief, which is contained in the Application for Injunction, which was filed on 29 July 2022. By virtue of that application, the Claimants/Applicants seek the following Orders: -

1. An injunction restraining the First, Second and Third Defendants, whether by themselves or by their employees, servants or agents or howsoever, from continuing any mining or other activity pursuant to or in reliance on Special Mining Leases 165 and 172, until the trial of this Claim;

2. Alternatively, an injunction restraining the First, Second and Third Defendants, whether by themselves or by their employees, servants or agents or howsoever, from continuing any mining or other activity pursuant to or in reliance on Special Mining Leases 165 and 172, until the trial of this Claim, without taking reasonable steps and precautions as directed by the court to mitigate injury and damage to the Claimants and other residents of the affected communities;

3. An injunction restraining the Second Defendant and the Third Defendant, whether by themselves or by their employees, servants or agents or howsoever, from starting or continuing any exploring, mining or other activity pursuant to or in reliance on Special Mining Lease 173, until the trial of this Claim;

4. That the costs of this application and order be costs in the Claim;

5. That there be such further or other relief as this Honourable Court deems fit.

**[16]** The Claimants/Applicants seek injunctive relief on the following bases: -

a) That the Claimants/Applicants rely on the grounds set out in their Fixed Date Claim Form;

b) That the Second and/or Third Defendants have indicated that they intend to start mining in the SML 173 area, during the course of 2022;

c) That unless restrained by this Honourable Court, the First, Second and Third Defendants threaten and intend to commit and/or to continue the constitutional breaches complained of in the Claim;

d) That an interim injunction is therefore urgent and necessary to protect the Claimants'/Applicants' rights pursuant to the Constitution;

e) That, if the relief sought is not granted and the Defendants are allowed to proceed or to continue as they plan, the injury to the health, property, livelihoods and possibly even the lives of the Claimants/Applicants will be irreparable and the court's judgment at trial may be rendered nugatory, since the damage would have already been done;

f) That there are serious issues to be tried in relation to the Defendants' breaches and threatened breaches of the Constitution;

g) That it is impossible to protect the Claimants'/Applicants' interests unless the injunction is granted and that damages would not be an adequate remedy;

h) That the balance of convenience is therefore in favour of granting the injunctions;

i) That in the circumstances, it is in the interest of justice to grant the injunctions sought;

j) That the Claimants are an unemployed widow and subsistence farmers, respectively, are legally aided persons in this Claim and are unable to give an undertaking in damages.

**THE ISSUES**

**[17]** The following issues are determinative of the application for injunctive relief: -

(i) Whether there is a serious issue to be tried;

(ii) Whether the balance of convenience lies in favour of the grant of the injunctive relief sought;

(iii) Whether the Claimants/Applicants would suffer irreparable harm should the application for injunctive relief be refused;

(iv) Whether the Defendants/Respondents would suffer irreparable harm should the application for injunctive relief be allowed;

(v) Whether damages are an adequate remedy;

(vi) Whether the Court ought to grant the injunctive relief sought in circumstances where the Claimants/Applicants have not and are unable to give an undertaking as to damages.

**THE LAW**

**The court's power to grant an interim injunction**

**[18]** Section 49(h) of the Judicature (Supreme Court) Act governs the granting of an injunction. The section reads as follows: -

> "*49(h) A mandamus or an injunction may be granted or a receiver appointed, by an interlocutory order of the Court, in all cases in which it appears to the Court to be just or convenient that such order should be made; and any such order may be made either unconditionally or upon such terms and conditions as the Court thinks just, and if an injunction is asked for either before or at or after the hearing of any cause or matter, to prevent any threatened or apprehended waste or trespass, such injunction may be granted if the Court thinks fit, whether the person against whom such injunction is sought is or is not in possession under any claim of title or otherwise, or (if out of possession) does or does not claim a right to do the act sought to be*

*restrained under any colour of title, and whether the estates claimed by both or by either of the parties are legal or equitable."*

**[19]** Rules 17.1(1)(a) and 17.4 of the Civil Procedure Rules, 2002, as amended ("the CPR"), also empower the court to grant interim injunctive relief. These rules, in so far as they are relevant, provide as follows: -

*"17.1*

*(1) The court may grant interim remedies including –*

*(a) an interim injunction;*

*(b) …*

*17.4*

*(4) The court may grant an interim order for a period of not more than 28 days (Unless any of these Rules permit a longer period) –."*

**The purpose of the grant of an interim injunction**

**[20]** The purpose of an interlocutory injunction is to preserve the status quo although it is, of course, impossible to stop the world, pending trial. The court may order a defendant to do something or not to do something but such restrictions on the defendant's freedom will have consequences, for him as well as for others, which a court must take into consideration.

**[21]** The grant of such an injunction serves the additional purpose of improving the court's ability to do justice after a determination of the merits at trial. At the interlocutory stage, the court is required to assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in **American Cyanamid Co v Ethicon Ltd**,[3] that means that, if damages will be an adequate remedy for the claimant, then there are no grounds for interference with the defendant's freedom of action, by the grant of an injunction.

**[22]** Likewise, if there is a serious issue to be tried and the claimant could be prejudiced by the acts or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate

[3] [1975] AC 396

remedy, if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.

**The threshold test for the grant of an interim injunction**

**[23]** In **American Cyanamid Co v Ethicon Ltd**,[4] the court developed a set of guidelines to be followed in seeking to determine whether an applicant's case warrants the granting of an interlocutory injunction. The main guidelines are: -

(i) Whether there is a serious question to be tried (whether the claim has a reasonable prospect of succeeding);

(ii) What would be the balance of convenience of each party should the order be granted, in other words, where does that balance lie?

(iii) Whether there are any special factors to be considered; and what Lord Diplock referred to as the governing principle;

(iv) Whether an award of damages would be an adequate remedy.

**[24]** The basis for these guidelines was explained by Lord Diplock as follows: -

> *"…the governing principle is that the court should first consider whether, if the plaintiff were to succeed at trial in establishing his right to a permanent injunction, he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial.* ***If damages in the measure recoverable would be an adequate remedy*** *and the defendant would be in a financial position to pay them,* ***no interim injunction should normally be granted****, however strong the plaintiff's case appeared to be at that stage."*
>
> ***[Emphasis added]***

[4] supra

**Whether there is a serious issue to be tried**

**[25]** The law set out by Slade J in **Re Lord Cable (deceased) Garratt and others v Walters and others**,[5] is, respectfully, accepted as being correct. At page 431, Slade J is quoted as follows: -

> *"…Nevertheless, in my judgment it is still necessary for any plaintiff who is seeking interlocutory relief to adduce sufficiently precise factual evidence to satisfy the court that he has a real prospect of succeeding in his claim for a permanent injunction at trial. If the facts adduced by him in support of his motion do not by themselves suffice to satisfy the court as to this, he cannot in my judgment expect it to assist him by inventing hypotheses of fact on which he might have a real prospect of success…"*

**[26]** This reasoning was accepted by the Jamaican Court of Appeal in **Reliance Group of Companies Limited v Ken's Sales and Marketing and another; Christopher Graham v Ken's Sales and Marketing and another**,[6] which is consistent with that of Lord Diplock in **American Cyanamid Co v Ethicon Ltd**.[7] At page 408, Lord Diplock stated: -

> *"…So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief sought…"*

**[27]** The failure to establish that there is a real question to be tried means that the application for the grant of injunctive relief ought properly to be denied. Such a failure also obviates the need to consider the issue of whether damages would be an adequate remedy and the balance of convenience.[8]

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[5] [1976] 3 All ER 417
[6] [2011] JMCA Civ 12
[7] [1975] AC 396
[8] See – **Brian Morgan (Executor of the Estate of Rose I Barrett) v Kirk Holgate** [2022] JMCA Civ 5

**The grant of injunctive relief in constitutional cases**

**The threshold test**

**[28]** The Supreme Court of Canada, in the authority of **Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd.**,[9] identified a three-part test to be applied in respect of an application for either a stay, or, an interlocutory injunction. That three-part test was enunciated as follows: -

> *"First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried. Secondly, it must be determined whether the applicant would suffer irreparable harm if the application were refused. Finally, an assessment must be made as to which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits."*

**[29]** This tripartite test was later adopted and applied in the authority of **RJR-MacDonald Inc v The Attorney General of Canada**.[10] There, the applicants sought to challenge the constitutionality of the Tobacco Products Control Act, on the basis that it violates section 2(b) of the Canadian Charter of Right and Freedoms. The applicants asserted that compliance with the new regulations would require the tobacco industry to redesign all of its packaging and to purchase thousands of rotograve cylinders and embossing dies. It was further asserted that the changes would take close to a year to effect and would incur an approximate cost to the industry in the amount of approximately Thirty Million Canadian Dollars (CAD $30,000,000.00); a substantial, irrecoverable expense.

**[30]** In considering the application, Justices Sopinka and Cory applied the three-part test to the facts of the case. In looking at the first prong of the test, whether there is a serious question to be tried, their Lordships stated that there are no specific requirements which must be met in order to satisfy the test.[11] Importantly, their Lordships stated that the threshold is a low one and

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[9] [1987] 1 SCR 110

[10] [1994] 1 S.C.R.

[11] At page 348, Sopinka and Cory JJ state: "*At the first stage, an applicant for interlocutory relief in a Charter case, must demonstrate a serious question to be tried. Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits... A motions court should only go beyond a preliminary investigation of the merits when the result of*

that, once the judge is satisfied that the application is neither frivolous nor vexatious, he/she ought to proceed to consider the second and third parts of the test, even if of the opinion that the plaintiff is unlikely to succeed at trial.[12]

**[31]** The term "irreparable" was defined in the following way: -

> *"Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other. Examples of the former include instances where one party will be put out of business by the court's decision…where one party will suffer permanent market loss or irrevocable damage to its business reputation… or where a permanent loss of natural resources will be the result when a challenged activity is not enjoined…The fact that one party may be impecunious does not automatically determine the application in favour of the other party who will not ultimately be able to collect damages, although it may be a relevant consideration."*

**[32]** Their Lordships relied on the dicta of Lord Diplock, in the authority of **American Cyanamid**,[13] with respect to determining the factors which must be considered in assessing the "balance of inconvenience".[14] They acknowledged that these factors are numerous and that they will vary in each case.

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*the interlocutory motion will in effect amount to a final determination of the action, or when the constitutionality of a challenged statute can be determined as a pure question of law*."

[12] Justices Sopinka and Cory stated that there are two exceptions that apply to the general rule that a judge should not engage in an extensive review of the merits. These exceptions are: 1) when the result of the interlocutory motion will in effect amount to a final determination of the action (either when the right which the applicant seeks to protect can only be exercised immediately or not at all, or when the result of the application will impose such hardship on one party as to remove any potential benefit from proceeding to trial.)

[13] See – Page 408 of **American Cyanamid**, where Lord Diplock stated: *"…it would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case*."

[14] At page 348, Sopinka and Cory JJ stated: "The third branch of the test, requiring an assessment of the balance of inconvenience, will often determine the result in applications involving Charter rights. In addition to the damage each party alleges it will suffer, the interest of the public must be taken into account. The effect a decision on the application will have upon the public interest may be relied upon by either party. These public interest considerations will carry less weight in exemption cases than in suspension cases.

**[33]** The pronouncements of Sopinka and Cory JJ, at page 344, are set out as follows: -

> *"Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought. "Public interest" includes both the concerns of society generally and the particular interests of identifiable groups.*
>
> *We would therefore reject an approach which excludes consideration of any harm not directly suffered by a party to the application."*

**[34]** Their Lordships formed the view that the concept of inconvenience should be widely construed in Charter cases. Sopinka and Cory JJ are quoted as follows: -

> *"In the case of a public authority, the onus of demonstrating irreparable harm to the public interest is less than that of a private applicant. This is partly a function of the nature of the public authority and partly a function of the action sought to be enjoined. The test will nearly always be satisfied simply upon proof that the authority is charged with the duty of promoting or protecting the public interest and upon some indication that the impugned legislation, regulation, or activity was undertaken pursuant to the responsibility. Once these minimal requirements have been met, the court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action."*

**[35]** Their Lordships further stated: -

> *"A court should not, as a general rule, attempt to ascertain whether actual harm would result from the restraint sought. To do so would in effect require judicial inquiry into whether the government is governing well, since it implies the possibility that the government action does not have the effect of promoting the public interest and that the restraint of the action would therefore not harm the public interest."*

**[36]** The applications for injunctive relief were subsequently dismissed.

**[37]** Similarly, in the more recent authority of **Spencer v The Attorney General of Canada**,[15] the Federal Court of Canada dismissed an application for interlocutory injunctive relief. The applicants sought an interlocutory injunction to prohibit the Government of Canada from enforcing the mandatory quarantine of travellers arriving by air at designated facilities while they await the results of their COVID-19 tests. The applicants argued that the measures implemented by the Canadian government infringed their rights under sections 6, 7, 9, 10(b), 11(d) and (e), as well as section 12, of the Canadian Charter of Rights and Freedoms.

**[38]** Pentney J articulated the central issue as being whether the applicants had met their burden of establishing that it is just and equitable to issue an interlocutory injunction, pending a full hearing of the merits of their challenge, under the Charter.

**[39]** In his analysis, Pentney J, with reference to **Monsanto v Canada (Health)**[16] posited that the three (3) elements of the test for the grant of an interlocutory injunction are cumulative but that strength in one factor may overcome weakness in another. He opined that, for the reason that an interlocutory injunction constitutes equitable relief, a degree of flexibility must be preserved, in order to ensure that the remedy can be effective, when it is required to prevent a risk of imminent harm, pending a ruling on the merits of the dispute.[17]

## ANALYSIS AND FINDINGS

### Special Mining Leases 165 and 172

**[40]** The Claimants/Applicants contend that the bauxite mining activities on the part of the Defendant Companies, pursuant to Special Mining Leases 165 and 172, continue.

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[15] 2021 FC 361
[16] 2020 FC 1053, at paragraph 50
[17] See – **Spencer v The Attorney General of Canada**, supra, at paragraph 51

**[41]** Conversely, the Defendant Companies aver that bauxite mining pursuant to Special Mining Leases 165 and 172, in the ore bodies which are proximate to any of the residences of the Claimants/Applicants, has ceased. The Defendant Companies further aver that the only bauxite mining-related activity which is on-going, in respect of Special Mining Leases 165 and 172, is limited to reclamation work, in an effort to restore the land, as close as possible, to its pastoral or vegetative state.

**[42]** In his second affidavit, which was filed on 23 November 2022, Mr Delroy Dell, the Vice President/Country Manager for Noranda II, avers that most of the remaining orebodies in Special Mining Lease 165 and Special Mining Lease 172 are considered inaccessible and will not be mined. Mr Dell further avers that the remaining small pockets of accessible orebodies do not allow for any extensive mining.[18]

**[43]** Further, the Defendant Companies maintain that reclamation activities of mined lands and sustainable development initiatives which are being carried out by Noranda II and New Day are currently taking place in the geographical areas which span Special Mining Leases 165 and 172.[19]

**[44]** Specifically, Mr Dell avers as follows: -

> *"6. The 2nd and 3rd Defendants consider most of the remaining orebodies in SML 165 and SML 172 as being inaccessible because of their proximity to residences or settled areas and these orebodies will not be mined. Further, the remaining small pockets of accessible orebodies in SML 165 and SML 172 do not allow for any extensive mining and much of the mining activities remaining in the said SMLs are related to reclamation works and sustainable development initiatives by the 2nd and 3rd Defendants.*
>
> *7. By way of reclamation, the mined-out parcels of land will be rehabilitated, as near as possible, to the pastoral or vegetative state and returned or put into agricultural production where required. Where appropriate and agreed with the authorities, mined-out parcels of land*

[18] See – Second Affidavit of Delroy Dell in Opposition to Application for Injunction, which was filed on 23 November 2022, at paragraph 6.

[19] See – Paragraphs 4-7, inclusive, of the Second Affidavit of Delroy Dell in Opposition to Application for Injunction, which was filed on 23 November 2022.

*will also benefit from further sustainable development initiatives after reclamation."* [20]

**[45]** In this regard, the Court accepts the evidence of the Defendant Companies as being both credible and reliable. The Court observes that this evidence has neither been challenged nor contradicted by the Claimants/Applicants. The Claimants/Applicants make the general assertion that the bauxite mining activities carried out by the Defendant Companies pursuant to Special Mining Leases 165 and 172, continue. The Claimants/Applicants do not purport to give evidence in respect of the nature and or scope of the continued bauxite mining activities which they allege. In those circumstances, the Court accepts the evidence of the Defendant Companies over that of the Claimants/Applicants, that bauxite mining activities pursuant to Special Mining Leases 165 and 172 have ceased, save and except for on-going reclamation work.

**[46]** In the result, the application for an injunction to restrain the Defendant Companies, whether by themselves or by their employees, servants or agents or howsoever, from continuing any mining or other activity pursuant to or in reliance on Special Mining Leases 165 and 172, until the final determination of the Claim, is refused.

**Special Mining Lease 173**

**Whether there is a serious issue to be tried**

**Submissions advanced on behalf of the Claimants/Applicants**

**[47]** Learned King's Counsel, Mr Michael Hylton, in his comprehensive written and oral submissions on behalf of the Claimants/Applicants, maintained that, in its consideration of the application for the grant of an interlocutory injunction, the Court ought properly to apply the three-part test which was formulated and applied by the Supreme Court of Canada in the authority of **RJR McDonald Inc v The Attorney General of Canada**. To buttress this submission, Mr

[20] See – Paragraphs 6 and 7 of the Second Affidavit of Delroy Dell in Opposition to Application for Injunction, which was filed on 23 November 2022.

Hylton KC relied on the decision of the Jamaican Court of Appeal in the authority of **The Attorney General v The Jamaican Bar Association**.[21]

**[48]** Mr Hylton KC outlined the three-part test as including a consideration of whether there is a serious issue to be tried; whether there will be irreparable harm to the applicant, should the application be refused; and a consideration of where the balance of convenience lies.

**[49]** Mr Hylton KC submitted that, in order to establish that there is a serious issue to be tried, an applicant need only demonstrate that the claim is not frivolous and that, in accordance with the dicta of Lord Diplock, in **American Cyanamid**, on the hearing of such an application, the court ought not to embark on a mini-trial. Owing to the complex nature of most constitutional matters, the courts will rarely engage in an extensive analysis of the merits of a claim, on an interlocutory application.

**[50]** Additionally, Mr Hylton KC submitted that the test for determining whether there is a serious issue to be tried is a low one.

**[51]** In the present instance, Mr Hylton KC submitted, there are serious issues to be tried, in relation to whether Special Mining Leases 165, 172 and 173 and the bauxite mining activities which have been and are being carried out pursuant to them, breach the Claimants'/Applicants' constitutional rights.

**[52]** It was submitted that the Jamaican courts are still defining the scope and effect of alleged breaches of the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage. Mr Hylton KC asserted that the Jamaican courts are yet to thoroughly examine the issue of whether bauxite mining in close proximity to and within communities where people live and make their livelihood, breaches the constitutional right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.

[21] [2020] JMCA Civ 31

**[53]** It was further submitted that the Claimants'/Applicants' evidence in relation to the impact of bauxite mining on their health is sufficient to demonstrate that there is a serious issue to be tried.

**[54]** Mr Hylton KC asserted that the Claim also involves a breach of the right to life. This, in circumstances where the Claimants/Applicants allege that the bauxite mining activities on the part of the Defendants/Respondents have led to the death of the husband of the 1st Claimant/Applicant, Ms Victoria Grant. This, Mr Hylton KC asserted, demonstrates that the Claim is neither frivolous nor vexatious.

**[55]** Mr Hylton KC further asserted that there are several serious issues to be tried in relation to whether the Claimants'/Applicants' constitutional rights have been breached by the bauxite mining activities on the part of the Defendants/Respondents and whether those rights may be further breached by future bauxite mining activities. Mr Hylton KC sought to substantiate these submissions by the decision of this Court to dismiss the Defendant Companies' application to strike out the Claim.

**[56]** In any event, Mr Hylton KC submitted, the first affidavit of Mr Kent Skyers, in response to those of the Claimants/Applicants, which was filed on 22 August 2022, demonstrates that there are disputes as to fact among the parties which cannot be resolved by the Court at the hearing of an application for an interim injunction. To support this submission, Mr Hylton KC relied on the dicta of Lindo J in the authority of **Errol Trowers v Noranda Jamaica Bauxite Partners Limited**.[22]

**Submissions advanced on behalf of the Defendant Companies**

**[57]** The Defendant Companies contended that, in its consideration of the nature and scope of each right and the Claimants'/Applicants' respective allegations, the Court must have regard to the framework in which bauxite mining takes place. The Defendant Companies maintained that, by virtue of The Minerals (Vesting) Act, all bauxite belongs to the Crown.

[22] [2016] JMSC Civ 48

**[58]** Section 3 of The Minerals (Vesting) Act provides as follows: -

> *"It is hereby declared that all minerals being in, on, or under any land or water, whether territorial waters, river, or inland sea, are vested in and are subject to the control of the Crown."*

**[59]** Additionally, section 15(3) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ("the Charter"), reads as follows: -

> *"Nothing in this section shall be construed as affecting the making or operation of any law so far as it –*
>
> *(a) Makes such provisions as are reasonably required for the protection of the environment; or*
>
> *(b) Provides for the orderly marketing or production or growth or extraction of any agricultural product or mineral or any article or thing prepared for the market or manufactured therefor or for the reasonable restriction of the use of any property in the interests of safeguarding the interest of others or the protection of tenants, licensees or others having rights in or over such property."*

**[60]** The Defendant Companies are in the business of mining and exporting the mineral of bauxite. Bauxite mining is carried out pursuant to special mining leases which are issued pursuant to the Mining Act, the Mining Regulations and environmental permits which are issued under the Natural Resources Conservation Authority Act.

**[61]** Learned King's Counsel, Mr Ransford Braham, in his succinct and equally comprehensive written and oral submissions also relied on the tripartite test, as enunciated in the Canadian Supreme Court authorities of **RJR-MacDonald Inc v The Attorney General of Canada and Ors** and **Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd**.[23] Mr Braham KC also referred the Court to the more recent Privy Council decision in **Seepersad (a minor) v Ayers-Caesar and Ors**,[24] where the Board of the Privy Council adopted the tripartite test in **RJR-MacDonald**. Additionally, Mr Braham KC relied on the

[23] [1987] 1 SCR 110
[24] [2019] UKPC 7

dicta of F Williams JA, in the authority of **The Attorney General v The Jamaican Bar Association and Anor**.[25]

**[62]** It was on the basis of these submissions, the gist of which has been summarized above, that Mr Braham KC submitted that the Claimants/Applicants have not demonstrated that the Claim is neither frivolous nor vexatious.

**Submissions advanced on behalf of the 4th Defendant/Respondent**

**[63]** For her part, Learned Counsel, Ms Lisa White, in her written submissions which were advanced on behalf of the Attorney General of Jamaica, accepted that, for an applicant to succeed on this ground, he is required only to show that the claim is not a frivolous one and that it has some prospect of succeeding. Ms White also relied on the often cited dicta of Lord Diplock in the authority of **American Cyanamid Co. v Ethicon**.[26] She maintained that, where an applicant fails on any limb of the threshold test, for the grant of an interlocutory injunction, there is no need to proceed to the next. It was further submitted that there should be no attempt to resolve the final issues in the matter, at this stage.

**[64]** In any event, Ms White submitted, the Claimants'/Applicants' application for the grant of injunctive relief has not established a nexus between their complaints and bauxite mining; fails to disclose that there is a serious question to be tried and, as such, it would not be just and convenient for the Court, in the exercise of its discretion, to grant the interim injunction sought.

**[65]** Ms White submitted further that, where the Claimants'/Applicants' case is not discernible, the Court is not in a position to determine what, if any, issues are joined among the parties; what, if any, question is to be tried, let alone to determine whether there is a serious issue to be tried.

**Findings**

**[66]** In its judgment, which was delivered on 28 October 2022, in respect of the 1st, 2nd and 3rd Defendants' Further Amended Application to Strike Out Claim,

[25] [2020] JMCA Civ 31
[26] [1975] 1 All ER 504

which was filed on 23 August 2022, this Court found that the Claimants'/Applicants' statement of case raises important and complex questions in relation to the nature and scope of the right to life; the right to receive information; the right to reside in any part of Jamaica; the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage; and the right to protection from degrading treatment.

**[67]** This Court also found that the Claim raises the issue of the extent of the Defendants' obligations, in the context of the bauxite mining activities of the Defendant Companies in and around the Claimants'/Applicants' communities.[27]

**[68]** As a consequence, this Court is of the view that the Claimants/Applicants have demonstrated that there are serious issues to be tried, for the reasons that their statement of case demonstrates a cause of action; that their statement of case demonstrates reasonable grounds for bringing the action; and that their statement of case demonstrates that the Claim, as brought, is neither frivolous nor vexatious.

**Whether the balance of convenience lies in favour of the grant of the injunctive relief sought**

**Submissions advanced on behalf of the Claimants/Applicants**

**[69]** In this regard, Mr Hylton KC submitted that the balance of convenience lies in favour of the grant of the injunctive relief which is sought. Mr Hylton KC asserted that the likely injury to the Claimants/Applicants justifies the grant of an injunction to restrain the Defendant Companies. It was further submitted that the bauxite mining activities which have been carried out by the Defendant Companies have already caused injury to the Claimants'/Applicants' health and damage to their homes and livelihood. It is likely that the continued bauxite mining activities near the homes of the Claimants/Applicants will cause further irreparable harm.

[27] See – **Victoria Grant & Ors vs Noranda Jamaica Bauxite Partners & Ors** [2022] JMSC Civ 218

**[70]** Mr Hylton KC further submitted that the Court should also consider the likely injury to third parties, including other persons in the communities that comprise the geographical areas which are covered by Special Mining Leases 165, 172 and 173, who are not parties to the Claim but who, like the Claimants/Applicants, would also be negatively affected.

**[71]** Mr Hylton KC maintained that the potential damage to the Defendant Companies would be temporary, for the reason that the commencement of the bauxite mining activities would merely be delayed, should they ultimately succeed at trial.

**[72]** With respect to Special Mining Leases 165 and 172, the injunction would require the Defendant Companies to cease bauxite mining activities which have already begun. In the alternative, the grant of an injunction would be to restrain the Defendant Companies from carrying out bauxite mining or other related activities, unless certain safeguards are put in place. These safeguards, Mr Hylton KC submitted, could include providing the Claimants/Applicants with adequate medical care to address their bauxite mining-related respiratory symptoms and engaging in decontamination of the Claimants'/Applicants' and community water resources and/or the provision of fresh water supplies.

**[73]** Mr Hylton KC submitted that, in the circumstances, the Defendant Companies would not necessarily have to halt their bauxite mining activities. Rather, they would be required to carry out their bauxite mining activities in such a way as to minimize harm to the Claimants/Applicants. When the negative economic impact alleged by the Defendants is balanced against the impact on the health of the Claimants/Applicants (with the possibility even of death), the balance of convenience lies in favour of the Claimants/Applicants. Mr Hylton KC maintained that economic considerations do not outweigh the threat of irreparable harm as alleged by the Claimants/Applicants, including deteriorating health, premature death, loss of livelihood and of the rural way of life.

**[74]** With respect to Special Mining Lease 173, Mr Hylton KC submitted that it is his understanding that no bauxite mining has taken place and that if any

bauxite mining or other related activities have been carried out, those activities would be in a state of infancy.

**Submissions advanced on behalf of the Defendant Companies**

**[75]** For his part, Mr Braham KC submitted that the material placed before the Court by the Claimants/Applicants does not meet the standard of evidence required to persuade a court that irreparable harm will result to them, should the application for an interim injunction be refused. Mr Braham KC maintained that the evidence in this regard must be such as to convince the Court that the Claimants/Applicants will suffer irreparable harm.

**[76]** To substantiate his submissions in this regard, Mr Braham KC relied on the authority of **Spencer v The Attorney General of Canada**.[28] The Court was specifically referred to the dicta of Pentney J, who opined that harm cannot be based on mere speculation and that the evidence must demonstrate a high degree of likelihood that the harm would occur. Mr Braham KC maintained that there should be a strong evidentiary basis for the assertions made, as mere assertion or speculation is not enough. Mr Braham KC asserted that the Claimants'/Applicants' evidence in this regard is speculative and amounts to mere assertions and that there is no evidence to demonstrate a high degree of likelihood that any harm will occur.

**[77]** It was further submitted that the Court should, as a starting point, consider the fact that regulatory processes have been engaged and that bauxite mining is authorized pursuant to a strict set of conditionalities as set out in the Permits. These conditions are designed to minimize any adverse effect that may flow from bauxite mining.

**[78]** Mr Braham KC maintained that section 15(3) of the Constitution as well as the Natural Resources Conservation Authority Act, become relevant to an understanding of the role of the regulator. The approach of the court is to have regard to the mandate of the environmental regulator to ensure that the permit conditions provide safeguards to prevent or mitigate against irreparable harm or loss. The Court is to accept that there are appropriate and sufficient

[28] [2021] FC 361, Ottawa, Ontario, 23 April 2021

safeguards put in place by the regulators. Mr Braham KC asserted that the decision-making process of the Natural Resources Conservation Authority ("the NRCA") and the exercise of its statutory mandate are not being challenged in these proceedings. Even if they were, Mr Braham KC submitted, the approach of the Court must be to defer to the responsible authorities in the manner and to the extent that, the legislation provides. To buttress this submission, Mr Braham KC relied on the pronouncements of Straw J (as she then was), in the authority of **Ashton Pitt v The Attorney General of Jamaica & Ors**.[29]

**[79]** Mr Braham KC submitted that, by virtue of Specific Condition 4 of the Permits, Noranda II is required to submit an Environmental Performance Bond, in the sum of Seven Hundred and Seventy-Seven Thousand Nine Hundred and Forty-One ($777,941.00).

**[80]** Specific Condition 4 of the Permits provides as follows: -

> *"The bond may be applied by the Authority to, amongst (sic) other things, remedy any breaches of the said Permit(s), mitigate any environmental damages or restore natural resources impacted by the Permitted Activities."*

**[81]** Further, Mr Braham KC submitted that were the Defendant Companies to be restrained from commencing their bauxite mining activities and from accessing the bauxite reserves in Special Mining Leases 165, 172 and 173, prior to the trial of the Claim, the refinery of the parent company for New Day would be subjected to extreme hardship, losses and closure. This, in circumstances where that refinery was specifically designed to process Jamaican bauxite of the type and quality located in the parishes of St. Ann and Trelawny.

**[82]** It was further submitted that New Day is the sole supplier of bauxite to this refinery. Retrofitting and retooling the refinery to use any other bauxite would take, at the very least, one (1) year and would incur substantial cost and expenses, at a time when New Day and its parent company would not be

[29] [2018] JMFC Full 7

earning any revenue. Should the Constitutional Court determine that the injunction should not have been granted, Noranda I and Noranda II, as well as the parent company for New Day, would have already suffered substantial economic losses, hardship and financial ruin. Mr Braham KC submitted further that the Claimants/Applicants, have, by their own admission, indicated that they would be unable to pay damages in an effort to mitigate such economic losses and financial devastation. This, Mr Braham KC maintained, would mean that the Defendant Companies, the State and other third parties would have suffered irremediable and irreparable losses.

**[83]** Additionally, Mr Braham KC asserted that the public interest is a matter that should also be considered. The Court was provided with a breakdown of the annual direct spending within the Jamaican economy from the earnings of the Defendant Companies, during the period 2017 to 2021. Mr Braham KC asserted that there are numerous benefits which are provided by the Defendant Companies, at the community level and in other areas, in the parish of St. Ann. The grant of an injunction would have a deleterious effect on the public interest, as there would no longer be a steady inflow of foreign exchange into the Jamaican economy.

**[84]** Mr Braham KC maintained that the Defendant Companies are not seeking to carry out any activity that they have not carried out in the parish of St. Ann for in excess of fifty-five (55) years, without there being the kind of loss and damage which are being alleged by the Claimants/Applicants.

**[85]** To support these submissions, Mr Braham KC relied on the authority of **Belize Alliance of Conservation Non-Governmental Organisation v The Department of the Environment and Ors**.[30]

**Submissions advanced on behalf of the 4th Defendant/Respondent**

**[86]** In her submissions advanced on behalf of the 4th Defendant/Respondent, Ms White submitted that the balance of convenience does not favour the granting of the injunctive relief sought. She maintained that this is not a path that is likely to cause the least prejudice to the 4th Defendant/Respondent. Ms White

[30] [2003] UKPC 63

submitted further that the prejudice to the 4th Defendant/Respondent far outweighs any prejudice which the Claimants/Applicants may experience (if any at all), while awaiting the final determination of the Claim.

**Findings**

**[87]** The Claimants/Applicants contend that the exposure to bauxite dust, as a direct consequence of the bauxite mining activities on the part of the Defendant Companies, pursuant to Special Mining Leases 165 and 172, has caused serious, negative impacts to the overall health, reported medical conditions and illnesses of the residents of the affected communities. These residents, the Claimants/Applicants further contend, are in a serious situation which poses a risk of irreparable harm to their constitutional rights.

**[88]** The Claimants/Applicants further contend that the bauxite mining activities on the part of the Defendant Companies have had a negative impact on their health and on that of the members of their respective families. They contend that the bauxite dust contaminates the rainwater catchment on which they rely for drinking water; that the dust settles on rooves; that the rainwater washes the dust down into water storage drums; that the bauxite dust also contaminates the community tank on which they rely for water on “dry days”; that the water assumes the brown colour of the bauxite dust; and that they have no option but to drink the dirty water for the reason that there is no running water in the affected communities.

**[89]** The Claimants/Applicants assert that the bauxite mining activities on the part of the Defendant Companies have destroyed their families’ subsistence crops, on which they rely for food.

**[90]** This situation is compounded by the fact that there is no running water in the affected communities and that the residents are primarily dependent on their water catchments; that the bauxite dust exacerbates the pre-existing respiratory health challenges experienced by some of the Claimants/Applicants and their families and that there are no comprehensive medical health facilities in the affected communities.

**[91]** It is on the basis of their individual and collective experiences, in relation to the bauxite mining activities which were carried out by the Defendant Companies, pursuant to Special Mining Leases 165 and 172, respectively, that the Claimants/Applicants assert that the proposed bauxite mining, which is to take place pursuant to Special Mining Lease 173, is likely to cause them irreparable harm.

**[92]** Conversely, the Defendants/Respondents urge the Court to consider that: -

i. Were the Defendant Companies to be restrained from commencing their bauxite mining activities and from accessing the bauxite reserves in Special Mining Lease 173, prior to the trial of the Claim, the refinery of the parent company for New Day would be subjected to extreme hardship, losses and closure. This, in circumstances where that refinery was specifically designed to process Jamaican bauxite of the type and quality located in the parishes of St. Ann and Trelawny;

ii. Retrofitting and retooling the refinery to use any other bauxite would take, at the very least, one (1) year and would incur substantial cost and expenses, at a time when New Day and its parent company would not be earning any revenue. The Defendant Companies and third parties would suffer substantial economic losses, hardship, financial ruin, irremediable and irreparable losses;

iii. The potential earnings from the export of crude bauxite exceeds that of other raw products;

iv. Projected tax collection from Noranda I and Noranda II, inclusive of bauxite production levy and royalties for the financial year 2022-2023, is approximately Thirty-Five Million United States Dollars (USD$35,000,000.00);

v. The figure projected for tax collection for the period 2023-2027, is approximately One Hundred and Thirty-Nine Million United States Dollars (USD$139,000,000.00);

vi. The Government of Jamaica executed Agreements and Binding Letter of Intent to supply Noranda I and Noranda II with bauxite for a period of Twenty-Five (25) years and the Gramercey Refinery, in the United States of America, has been specifically reconfigured to process bauxite of the quality found in Jamaica. A breach of the Agreements and Binding Letter of Intent would have negative implications for the Government of Jamaica;

vii. If bauxite mining does not proceed in respect of Special Mining Lease 173, it could precipitate the closure of the operations of Noranda I and Noranda II. In relation to the Gross Domestic Product (GDP) for Jamaica, this would cause a detraction of 13.5 percentage points and 0.1 percentage point for the Real Value Added and the Total Real Value Added, respectively, of the mining and quarry industry;

viii. The Jamaican economy would be negatively affected;

ix. The Jamaican economy would suffer from the loss of domestically generated income and, at the macro level, it would also suffer from the loss of export earnings from the bauxite sector;

x. This might mean the imposition of tax measures of at least 0.2 percentage of GDP, which approximates to JMD$6 Billion;

xi. Bauxite mining pursuant to Special Mining Lease 173 would mean an additional growth of 5.8 percentage points for the Real Value Added of the mining and

quarrying industry and an additional growth of 0.1 percentage point for the Total Real Value Added;

xii. Revenue for the Government of Jamaica would increase to an estimate of approximately USD$24.5 Million. Estimates of royalties of approximately USD$1.7 Million as well as the asset usage fees of approximately USD$1.7 Million, would also become due to the Government of Jamaica;

xiii. Income earned by Jamaican employees would be spent on goods and services within the communities, which would further create income non-bauxite workers and businesses;

xiv. The budget of the Government of Jamaica would benefit from bauxite levy inflows which approximate to 0.2-0.3 percentage of annual GDP, which means bauxite levy projections as follows: -

a. JMD$4,908,300,000.00 for the financial year 2022-2023;

b. JMD$7,966,500,000.00 for the financial year 2023-2024;

c. JMD$5,615,100,000.00 for the financial year 2024-2025;

d. JMD$5,782,700,000.00 for the financial year 2025-2026.

xv. The improvement of or addition to the housing stock for resettled persons and employees, respectively;

xvi. Direct and indirect employment of over Fifteen Thousand (15,000) Jamaicans;

xvii. The participation of bauxite companies in agriculture; the building of roads and ports; the establishment of several

wells which supply water; the provision of scholarships for students to access tertiary level education; the provision of skills training; the creation of green houses and catchment ponds with solar pumps.[31]

**Proximity**

**The proximity of the proposed bauxite mining activities to the Claimants/Applicants**

**[93]** The Claimants/Applicants contend that the 2nd Claimant/Applicant, Mr Linsford Hamilton and his family reside in Madras, in the parish of St. Ann. The Claimants/Applicants assert that Madras is one of the communities within the Cockpit Country which falls within Special Mining Lease 173. [32] [33]

**[94]** The Claimants/Applicants assert that the 3rd Claimant/Applicant, Mr Cyril Anderson, resides in Bryan Castle,[34] on the border of Caledonia and farms on nearby family land, in the parish of St. Ann. The Claimants/Applicants assert that Bryan Castle and Caledonia are communities which fall within Special Mining Lease 173.[35] [36] [37]

**[95]** The 6th Claimant/Applicant, Mr Alty Currie, avers that he has a house in the geographical area designated as Special Mining Lease 173, which is approximately Five Hundred yards (500yds) from the border with the geographical area which is covered by Special Mining Lease 165.

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[31] See – Affidavit of Cebert Mitchell, which was filed on 25 October 2022.

[32] See – Paragraphs 1, 5, 6, 7, 18, 19, 20, 23, 25 and 30 of the Affidavit of Linsford Hamilton, which was filed on 29 July 2022.

[33] At paragraph 41 of his Affidavit, Mr Skyers avers that the community of Madras is outside of the boundaries of the Cockpit Country Protected Area. He also states that it is not within the area of 1,333 hectares of land permitted for mining by the environmental permits issued by the NRCA. Consequently, Mr Skyers contends that the Defendant Companies cannot conduct any mining operations or activities in Madras.

[34] At paragraph 56 of the Affidavit of Kent Skyers, Mr Skyers states the closest mining site was 377 feet away from Mr Anderson's home.

[35] See – Paragraphs 1 and 5 of the Affidavit of Cyril Anderson, which was filed on 29 July 2022.

[36] At paragraphs 22 and 23 of her Affidavit, which was filed on 29 July 2022, Boblet Campbell, depones that her house is very near to the area covered by Special Mining Lease 173.

[37] In paragraph 5 of the Affidavit of Beverly Levermore, which was filed on 29 July 2022, Mrs Levermore states that her house is in the area designated as SML 172 and is about 800 yards to the east of the border with SML 173. At paragraph 7, Mrs Levermore states: "*Noranda is about to start another mining site immediately behind my home, perhaps 20-30 yards from my back fence. It has already cleared off the land and will start mining there any moment now. Exhibit BL-1 includes 2 photographs of the area behind my house where the land has been cleared, taken on February 11 and June 27, 2022*."

**[96]** Mr Currie's evidence continues as follows: -

> *"12. Noranda Jamaica Bauxite Partners II recently announced that they will expand mining in other areas near my house, including in Industry which is in SML 173.*
>
> *13. I have been farming in Industry since the 1970s, in the beginning with my father. Like other Industry farmers, my father farmed on the land as part of Michael Manley's land lease project. I took over from my father and continued his legacy until late last year when Noranda told farmers to stop farming in Industry because the land was needed for mining under SML 173. I had to take up my crops and replant some of them at my home. This really put me down and set me back. Farming in Industry was a central part of my identity and livelihood. I am devastated by the loss of my farm.*
>
> *14. I also fear that the proposed expansion of mining will make the health situation even worse. More mining will cause more dust and impact the health of my community. There are no medical facilities in my community. We don't even have proper roads to take us outside the community to receive medical treatment or buy medicine."* [38]

**[97]** On the other hand, the Defendant Companies contend that the proposed bauxite mining activities, pursuant to Special Mining Lease 173, are to take place on a phased basis during the period 2023-2024. The proposed bauxite mining activities which are to commence in 2023 are limited to Industry Pen, in the parish of St. Ann.

**[98]** Mr Evon Williams, in his affidavit evidence, avers: -

> *"24. The Permitted Area is extremely remote and very sparsely populated, with large areas having virtually no residential unit. Industry Pen, which is the area to be mined over a period of two years under the first phase of the 2nd Defendant's Five-Year Mining Plan, does not contain any residential settlements and all parcels of lands are owned by the Commissioner of Lands and under the management of the 2nd Defendant as agent for the said Commissioner of Lands.*

[38] See – Paragraph 89 of the Affidavit of Kent Skyers, which was filed on 22 August 2022. Mr Skyers state that Mr Currie resides outside of the Permitted Area in Special Mining Lease 173 and bauxite mining is therefore prohibited where he lives.

> *25. The 2nd Defendant is aware that a few persons in Industry Pen are practising small-scale farming on parcels of land owned by the Commissioner of Lands and under the exclusive management of the 2nd Defendant. … Nonetheless, where the farm is on an orebody, the farmers will be given sufficient notice to relocate their farms and will be compensated for any crops that the farmers may not have been able to reap from the land prior to the land being required for mining. Mining will be performed on a phased basis and any person farming on an orebody will only be required to vacate when that orebody comes up for mining in accordance with the 2nd Defendant's approved Five-Year Mining Plan.*
>
> *26. To my best knowledge, information and belief, none of the Claimants lives in or occupies any part of Industry Pen and any possible impact to the Claimants from bauxite mining in Industry Pen would be non-existent or extremely remote."* [39]

**[99]** Mr Williams further avers that the Claimants/Applicants, Ms Victoria Grant and Mr Cyril Anderson, are the closest persons to the geographical area which is to be mined over a two (2) year period as part of the first phase of the Five-Year Mining Plan of Noranda II. Mr Williams contends that Ms Grant and Mr Anderson each resides approximately Two Thousand Three Hundred and Ninety-Five feet (2,395ft), from the nearest orebody in Industry Pen.

**[100]** In addressing the concerns raised by the affidavit evidence of the Claimants/Applicants, Mr Kent Skyers, in the Affidavit of Kent Skyers in Opposition to Application for Injunction, which was filed on 22 August 2022, states as follows: -

> *"42. I say further, from information provided by the manager of the 2nd and 3rd Defendants' Property Department and which information I do verily believe, that* ***Linsford Hamilton resides over 2,600ft from the nearest point of the Permitted Area****."*
>
> ***[Emphasis added]***

[39] See – Affidavit of Evon Williams in Response to Application for Injunction, which was filed on 29 November 2022, at paragraphs 24, 25 and 26.

**[101]** The Court accepts the evidence of the Defendant Companies that their bauxite mining activities, pursuant to Special Mining Lease 173, are to take place over a two (2) year period, as part of the first phase of the Five-Year Mining Plan of Noranda II. The Court also accepts the evidence of the Defendant Companies that the majority of those bauxite mining activities are to take place in 2024 and that the bauxite mining activities which are to be carried out in 2023 are limited to Industry Pen, in the parish of St. Ann.

**[102]** In that regard, the Court accepts the affidavit evidence of Mr Williams that Ms Victoria Grant and Mr Cyril Anderson, are the closest persons to the geographical area which is to be mined over this two (2) year period. Mr Williams avers that each resides approximately Two Thousand Three Hundred and Ninety-Five feet (2,395ft), from the nearest orebody in Industry Pen.

**[103]** The significance of this evidence is that both Ms Grant and Mr Anderson reside approximately Two Thousand Three Hundred and Ninety-Five feet (2,395ft) or 0.453 miles (which rounds up to 0.5 miles) or 729.99 metres (which rounds up to 730 metres), from the nearest orebody which is to be mined in the geographical area of Industry Pen.

**[104]** The Defendant Companies aver an intention to employ similar methods to those which were utilized as part of Special Mining Leases 165 and 172, in respect of the extraction of the bauxite ore. This includes the method of blasting. In the face of this evidence, this Court is unable to accept the submission of the Defendant Companies that Ms Grant and Mr Anderson, at a distance of 2,395ft or 0.5 miles, are sufficiently removed from the proposed bauxite mining activities which are to be carried out in Industry Pen, so as to render the concerns of the Claimants/Applicants nugatory. Conversely, the Court finds that Ms Grant and Mr Anderson are sufficiently proximate to the geographical area in which the bauxite mining activities are to be carried out in Industry Pen. This Court is of the view that it is not unreasonable for the Claimants/Applicants to suggest that the proposed bauxite mining activities which are to be carried out by the Defendant Companies would negatively affect these residents.

**[105]** The authorities make it clear that irreparable harm refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured. In the present instance, the balance is between the economics of the Jamaican economy and the lives of some of its citizens or residents.

**[106]** It is made clear, from the evidence adduced on behalf of the Defendants/Respondents, that they would suffer financial hardship and financial losses, were the Court to restrain the commencement of bauxite mining activities pursuant to Special Mining Lease 173, until the final determination of the Claim. The Court finds however, that the Claimants/Applicants stand to lose far more than financial resources. They stand to lose their way of life and livelihoods, face the deterioration in the quality of their health, in circumstances where there are no comprehensive medical health facilities in the affected communities, losses for which money cannot readily compensate. The Court finds that the Claimants/Applicants have demonstrated by their evidence that the potential damage or harm, is unknown and is impossible to ascertain and to quantify.

**[107]** Additionally, the Defendant Companies do not agree with the evidence of Ms Victoria Grant that she has lived at her present home in Gibraltar, in the parish of St. Ann, for approximately forty-eight (48) years.[40] The Defendant Companies contend that Ms Grant currently occupies land which is owned by the Commissioner of Lands and that the structure which she currently occupies was constructed approximately four (4) years ago.[41]

**[108]** The Court notes however, that section 13 of The Charter specifically provides that all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society. Furthermore, the evidence adduced on behalf of the Defendant Companies discloses that Ms Grant has been allowed to remain in possession of the land and that she, along with her late husband, was paid

[40] See – Affidavit of Victoria Grant, which was filed on 29 July 2022, at paragraph 4.
[41] See – Paragraph 18 of the Affidavit of Evon Williams in Response to Application for Injunction, which is exhibited to the Affidavit of Glenford Watson, which was filed on 23 November 2022.

relocation compensation and dust allowance compensation, quarterly, during the bauxite mining and reclamation activities, which were carried out by the Defendant Companies pursuant to Special Mining Lease 172.[42]

**[109]** In any event, the Court is also here concerned with the Claimant/Applicant, Mr Cyril Anderson, to whom these considerations do not apply.

**[110]** In the circumstances, the Court finds that the risk of irreparable harm to the Claimants/Applicants is apparent and that the balance of convenience lies in favour of the granting of the injunctive relief sought, in respect of Special Mining Lease 173.

**Whether damages are an adequate remedy**

**Submissions advanced on behalf of the Claimants/Applicants**

**[111]** Mr Hylton KC submitted that damages would not be an adequate remedy for the Claimants/Applicants, for the reason that the extent of the potential damage or harm, is unknown and is impossible to ascertain and to quantify.

**[112]** It was submitted that the Claimants/Applicants stand to lose far more than financial resources. They stand to lose their way of life and face the deterioration of their health, losses for which money cannot readily compensate.

**[113]** Mr Hylton KC asserted that any further bauxite mining pursuant to Special Mining Lease 165 and Special Mining Lease 172 and the commencement of bauxite mining pursuant to Special Mining Lease 173, are likely to cause damage and to breach the Claimants'/Applicants' right to a healthy environment free from degradation and environmental abuse as well as the right to life.

**[114]** Mr Hylton KC maintained that the diseases and/or illnesses suffered by the Claimants/Applicants are clearly not reversible and, as a consequence, the risk of irreparable harm is apparent.

[42] See – Paragraph 18 of the Affidavit of Evon Williams in Response to Application for Injunction, which is exhibited to the Affidavit of Glenford Watson, which was filed on 23 November 2022.

**[115]** Mr Hylton KC submitted that the loss and injury suffered by the Claimants/Applicants and the likelihood of further loss and injury are compounded by the fact that there are no medical facilities where they are able to seek comprehensive medical treatment. It was further submitted that, despite numerous studies and complaints about health impacts, the Defendants/Respondents have failed to or refused to take basic measures to safeguard life and health.

**[116]** Mr Hylton KC contended that the Defendants/Respondents have not contradicted the Claimants'/Applicants' evidence in relation to the absence of medical facilities and health impact studies, nor do the former indicate any plan(s) to establish any such facilities or to prepare any such studies. By every indication, the harmful practices pursued in relation to Special Mining Leases 165 and 172 and the absence of adequate protective measures will continue in relation to Special Mining Lease 173. This, for the reason that the Defendants/Respondents do not suggest that they will use any different bauxite mining techniques in relation to Special Mining Lease 173.

**Submissions advanced on behalf of the 4th Defendant**

**[117]** Ms White submitted that it is unlikely that the Claimants/Applicants would be able to satisfy an Order as to damages. It was also submitted that the Claimants/Applicants have not placed the Court in a position to say that damages would not be an adequate remedy.

**Findings**

**[118]** The Court accepts the submissions of Mr Hylton KC on this issue and finds that damages would not be an adequate remedy for the Claimants/Applicants, for the reasons which he asserts.

**Undertaking as to Damages**

**Submissions advanced on behalf of the Claimants/Applicants**

**[119]** In this regard, Mr Hylton KC submitted that the Claimants/Applicants are unable to give an undertaking as to damages, for the reason that they are all

persons of limited means. To support this submission, Mr Hylton KC referred the Court to rule 17.4(2) of the CPR.

**[120]** Mr Hylton KC relied on the authority of **Belize Alliance of Conservation Non-Governmental Organizations v Department of Environment**.[43] It was submitted that, in this authority, the Privy Council confirmed that the court has a discretion to waive the usual undertaking as to damages and set out the principles to be applied when a court is exercising that discretion. Lord Walker of Gestingthorpe explained that, in public law cases, the court will grant an injunction to the citizen without any undertaking in damages, where the justice of the case requires that such a course be adopted. Mr Hylton KC submitted that the Jamaican Court of Appeal adopted a similar approach, in different circumstances, in the authority of **First Financial Caribbean Trust Company Limited v Howell et al**.[44]

**[121]** Mr Hylton KC asserted that this Court should not refuse to grant the injunctive relief sought for the reason that the Claimants/Applicants are effectively legally aided and do not have sufficient assets to support an undertaking as to damages.

**Submissions advanced on behalf of the Defendant Companies**

**[122]** For his part, Mr Braham KC submitted that an undertaking as to damages should be required in public law cases which deal with the environment, where the commercial interest of a third party is affected. Mr Braham KC submitted that, although this principle refers to a third party, it should be equally applicable to a party to a claim, as are the Defendant Companies.

**[123]** Mr Braham KC asserted that the Defendant Companies stand in a stronger position to that of third parties, as the Defendant Companies are the beneficiaries of Permits issued pursuant to Special Mining Lease 173. Special Mining Lease 173 was issued after a detailed and comprehensive Environmental Impact Assessment ("EIA"), which was the subject of thorough review and consultation with all agencies and departments of government which are concerned with the protection of the environment. It was submitted

[43] [2003] UKPC 63

[44] Claim No. 2010 CD 00086, unreported, judgment delivered on 1 October 2010

that the EIA itself is not the subject of any legal challenge and further, that the commercial interests of the Defendant Companies and their reliance on the Permits to carry out their bauxite mining activities, are undoubtedly engaged.

**[124]** In the result, Mr Braham KC maintained, the application for injunctive relief should fail, for the reason that the Claimants/Applicants are unable to give an undertaking as to damages.

**Findings**

**[125]** Regrettably, this Court is unable to accept the submissions of Mr Braham KC, in this regard. The decision of the Board of the Privy Council in the authority of **The Belize Alliance of Conservation Non-Governmental Organisations v The Department of the Environment and Belize Electricity Company Limited**,[45] clearly demonstrates that the court has a wide discretion with respect to the usual undertaking in damages.

**[126]** At paragraph 39, the Board pronounced as follows: -

> *"39. Both sides rightly submitted that (because the range of public law cases is so wide) the court has a wide discretion to take the course which seems most likely to produce a just result (or to put the matter less ambitiously, to minimize the risk of an unjust result) …The court is never exempted from the duty to do its best, on interlocutory applications with far-reaching financial implications, to minimise the risk of injustice."*

**[127]** The Court accepts the evidence that the Claimants/Applicants are individually and collectively, unable to provide the undertaking in damages which is usually required on an application for injunctive relief. The Court accepts the evidence that the Claimants/Applicants do not have ready access to nor do they command significant resources such as to support an undertaking as to damages.

**[128]** In light of the magnitude of the issues raised by the Claimants/Applicants, by virtue of their Claim, this Court is of the view that it ought properly to exercise its judicial discretion in favour of waiving the requirement that the

[45] [2003] UKPC 63

Claimants/Applicants give an undertaking as to damages. This course seems more likely to minimize the risk of an unjust result.

**Other considerations**

**[129]** Mr Braham KC submitted that the Court should, as a starting point, consider the fact that regulatory processes have been engaged and that bauxite mining is authorized pursuant to a strict set of conditionalities as set out in the Permits. These conditions were designed to minimize any adverse effect that may flow from bauxite mining.

**[130]** Mr Braham KC maintained that section 15(3) of the Constitution as well as the Natural Resources Conservation Authority Act, become relevant to an understanding of the role of the regulator. It was submitted that the approach of this Court must be to have regard to the mandate of the environmental regulator to ensure that the permit conditions provide safeguards to prevent or mitigate against irreparable harm or loss. It was further submitted that this Court is to accept that there are appropriate and sufficient safeguards put in place by the regulators. Mr Braham KC asserted that the decision-making process of the NRCA and the exercise of its statutory mandate are not being challenged in these proceedings. Even if they were, Mr Braham KC submitted, the approach of the Court must be to defer to the responsible authorities in the manner and to the extent that, the legislation provides. To buttress this submission, Mr Braham KC relied on the pronouncements of Straw J (as she then was), in the authority of **Ashton Pitt v The Attorney General of Jamaica & Ors**.[46]

**[131]** It is to be noted that the decision in the authority of **Ashton Pitt v The Attorney General of Jamaica & Ors**[47] is one of the Full Court, at the conclusion of a trial of the issues raised in the substantive matter. This Court is of the view that the judicial pronouncements of Straw J (as she then was) do not preclude a consideration of the issues raised by the application for injunctive relief nor do they preclude a grant of the relief sought therein.

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[46] supra
[47] supra

**[132]** In the present instance, Permit No. 2018-06017-EP00196, which was issued by the NRCA, contains seventy-five (75) conditions which are imposed on Noranda II. These conditions are to allow for the proper management, conservation and protection of the environment and the health and safety of the residents who reside in and around the proposed mining areas contained within Special Mining Lease 173. The Permit details specific conditions for the protection of water resources or the water supply, air quality and fugitive dust control, as well as restoration. These specific conditions are similar to those prescribed by the NRCA, in respect of Special Mining Leases 165 and 172, in the face of which the Claimants'/Applicants' complaints are made.

**CONCLUSION**

**[133]** In summary, the Court accepts the evidence of the Defendant Companies that the bauxite mining activities which were carried out by them, pursuant to Special Mining Leases 165 and 172, have ceased and that any work which is currently being carried out, pursuant to these Special Mining Leases, is limited to reclamation work. As a consequence, the Court finds that the Orders sought at paragraph 1. and paragraph 2. of the Application for Injunction, which was filed on 29 July 2022, ought properly to be refused.

**[134]** This Court is of the view that the Claimants/Applicants have demonstrated that there are serious issues to be tried, for the reasons that their statement of case demonstrates a cause of action; that their statement of case demonstrates that there are reasonable grounds for bringing the action; and that their statement of case demonstrates that the Claim, as brought, is neither frivolous nor vexatious.

**[135]** Additionally, this Court is of the view that the risk of irreparable harm to the Claimants/Applicants is apparent and that the balance of convenience lies in favour of the granting of the injunctive relief sought, in respect of Special Mining Lease 173.

**[136]** Finally, this Court finds that damages would not be an adequate remedy for the Claimants/Applicants.

**[137]** In light of the magnitude of the issues raised by the Claimants/Applicants, by virtue of their Claim, this Court is of the view that it ought properly to exercise its judicial discretion in favour of waiving the requirement that the Claimants/Applicants give an undertaking as to damages. This course seems more likely to minimize the risk of an unjust result.

**DISPOSITION**

**[138]** It is hereby ordered as follows: -

1. The Orders sought at paragraph 1. and paragraph 2. of the Application for Injunction, which was filed on 29 July 2022, are refused;

2. The requirement that the Claimants/Applicants give an undertaking as to Damages, in respect of the Application for Injunction, which was filed on 29 July 2022, is hereby waived;

3. The 2nd Defendant, Noranda Jamaica Bauxite Partners II and the 3rd Defendant, New Day Aluminium (Jamaica) Limited, are restrained, whether by themselves or by their employees, their servants or their agents or howsoever, from commencing or continuing any exploring, mining or other activity, pursuant to or in reliance on Special Mining Lease 173, until the final determination of this Claim;

4. Subject to the filing and serving of Written Submissions and Authorities, in respect of the issue of costs, within fourteen (14) days of the date hereof, the costs of the Application for Injunction, which was filed on 29 July 2022, are to be costs in the Claim;

5. Messrs. Hylton Powell are to prepare, file and serve these Orders.