



[2022] JMSC Civ 218

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**

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 instructed by the Director of State Proceedings for the 4th Defendant

Heard: October 26, 27 and 28, 2022

Constitutional law – Fundamental rights – Redress – 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

Civil Procedure – Striking out – Application to strike out claimants’ statement of case – Whether the claimants’ statement of case ought properly to be struck out – The approach of the court in dealing with an application to strike out a party’s statement of case in a constitutional claim – Whether the claimants

have sufficiently particularized the claim – Whether the claimants’ statement of case discloses a cause of action – Whether the claimants’ statement of case demonstrates reasonable grounds for bringing the action

Expert evidence – Preliminary objection challenging the evidence of a medical practitioner – Medical practitioner not appointed as an expert witness – Whether medical practitioner is permitted to give fact evidence

Consolidation – Application for consolidation – Whether claims ought properly to be consolidated – Whether in the alternative the court should make an order that the claims be tried together

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011, sections 13(1)(b), 13(2), 13(2)(b), 13(3)(a), 13(3)(d), 13(3)(f)(ii), 13(3)(l), 13(3)(o), 13(5), 13(6) and 19, Civil Procedure Rules, 2002, rules 26.1(2)(b), 26.1(2)(h), 32.6(1), 32.6(2) and 56.9(3)

A. NEMBARD 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 Claimants' following guaranteed constitutional rights 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 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.
9. Compensatory damages.
10. Constitutional/vindictory 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 km² (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 km² (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 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 km² (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 generates environmental information by conducting health impact studies, monitoring health hazards and monitoring public water catchments, the Government has not taken any action on these requests. Instead, the Government 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' home becoming inhabitable, 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/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 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

The factual substratum

- [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 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 that they live and or farm in or very near to the Proposed Mining Area. The Claimants assert further that the homes of the

First, and Ninth 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 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 rural way of life and or other financial and personal loss.

- [8] The First and Second Defendant Companies, Noranda Jamaica Bauxite Partners and Noranda Jamaica Bauxite Partners II are partnerships between the Third Defendant, New Day Aluminium (Jamaica) Limited (“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 that were issued by the Government of Jamaica to the First, Second and Third Defendants. These Special Mining Leases authorized the Defendant Companies to mine bauxite and carry out other mining related activities in identified geographical areas in 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 177.33km², (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 in the identified geographical parameters as well as to enable the company to perform other mining activities.²

¹ The Third Defendant, New Day Aluminium (Jamaica) Limited, was previously St Ann Bauxite Limited. At the time of the granting of the 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 approximated 11.79km², (1,179 hectares) of land 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 carry out other mining activities in the Proposed Mining Area.
- [12] The Claimants contend that the mining activities that 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 conduct related mining activities in, under or upon approximate 120 km², (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 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 APPLICATIONS

- [15] It is against that background that the Court is asked to treat with the following applications: -
- (i) The 1st, 2nd and 3rd Defendants' Further Amended Application to Strike Out Claim, which was filed on Application, which was filed on 23 August 2022; and

- (ii) The Application for Consolidation, which was filed on 29 July 2022.

THE PRELIMINARY OBJECTION

- [16] In respect of those applications, the Defendant Companies have raised a preliminary objection to the reception of and reliance on the evidence of Dr Alford Jones. That preliminary objection is contained in a Notice of Preliminary Objection, which was filed on 22 August 2022.
- [17] This judgment is intended to treat with the Court's consideration of the issues raised, firstly, by the Defendant Companies' preliminary objection, secondly, the Defendant Companies' application to strike out the Claimants' statement of case and thirdly, the Claimants' application for consolidation.

The preliminary objection

- [18] By way of a Notice of Preliminary Objection, which was filed on 22 August 2022, it is indicated that the Defendant Companies will take the following points by way of a preliminary objection to the Affidavit of Alford Jones, which was sworn to and filed on 12 August 2022: -
1. The deponent, Dr Alford Jones, is not an expert duly appointed by the court and purports to express expert opinions in his affidavit, which was sworn to on 12 August 2022;
 2. The material contained in the said affidavit is prejudicial to the Defendant Companies, is oppressive and the prejudicial value of same outweighs the probative value;
 3. Dr Alford Jones, if acting as an ordinary witness, should not be permitted to express expert opinion on medical issues and issues of the alleged impact of bauxite mining; and
 4. Dr Alford Jones, in any event, does not depose to any expertise as a Pulmonologist, in Community Health, nor an expertise which would permit him to make any connection on which any court could

properly rely to draw any conclusions adverse to the Defendant Companies.

ISSUES

[19] The issues which arise from these objections and the submissions advanced are: -

- (i) Whether Dr Alford Jones may be considered an expert witness, for the purpose of this matter, pursuant to Part 32 of the Civil Procedure Rules, 2002;
- (ii) Whether Dr Alford Jones may be treated as a witness of fact.

SUBMISSIONS

The submissions advanced on behalf of the Defendant Companies

[20] Learned King's Counsel, Ms Carlene Larmond, in her comprehensive written and oral submissions, asserts that Dr Alford Jones is not an expert of the court, though he purports to express expert opinions in his affidavit evidence and also in the medical reports which are exhibited to the Affidavits of Victoria Grant and Boblet Campbell, respectively.³ Ms Larmond KC contends that the material sought to be adduced by Dr Alford Jones, both directly and indirectly, on a plain reading, would properly be viewed as evidence of an expert. In order to substantiate these submissions, Ms Larmond KC relies on the authority of **Cable & Wireless Jamaica Limited v Digicel Jamaica Limited**.⁴

[21] Ms Larmond KC further submits that, even if Dr Alford Jones were duly appointed an expert, any document prepared by him ought to have properly been subjected to the Defendants' right to put questions to any expert witness appointed in the proceedings. Ms Larmond KC maintains that any failure to recognise this right and the implications of it, would be oppressive and prejudicial to the Defendant Companies.

³ See – Report of Dr Alford Jones, dated 7 April 2022 and 16 December 2022, respectively.

⁴ Claim No. 2009 HCV 05568, unreported, judgment delivered on 2 September 2010

- [22] It is submitted that Dr Alford Jones, if acting as an ordinary witness, should not be permitted to express expert opinion on medical issues and issues of the alleged impact of bauxite mining. In any event, Ms Larmond KC submits, Dr Alford Jones does not depose to any expertise which would permit him to make any causal connection between the alleged bauxite mining activities, on the part of the Defendant Companies and the complaints made by the Claimants.
- [23] Finally, Ms Larmond KC maintains that all affidavits, save for those subject to the exception expressed in rule 30.3(2) of the Civil Procedure Rules, 2002 (“the CPR”), are subject to the general rule that an affidavit may contain only such facts as the deponent is able to prove, from his or her own knowledge. She contends that there is no provision in the CPR which would permit a claimant who has filed an affidavit in support of a fixed date claim form, which is intended for trial and not for an interlocutory proceeding, to contain statements of information and belief and to rely on the content of documents which are prepared by a third party.
- [24] These submissions advanced on behalf of the Defendant Companies echo the submissions which were made by the 4th Defendant.

The submissions advanced on behalf of the Claimants

- [25] For his part, Learned King’s Counsel, Mr Michael Hylton, readily accepts that Dr Alford Jones has not been appointed as an expert witness, in the present instance. Mr Hylton KC submits that the Claimants do not purport to rely on Dr Jones as an expert witness nor do they purport to rely on his evidence as expert evidence. It is further submitted that Dr Alford Jones has treated the Claimants and their relatives, along with many other persons within the communities in which the Claimants reside. Accordingly, Mr Hylton KC contends, Dr Alford Jones has given fact evidence as to the developments which he has observed, which coincide with the onset of bauxite mining in these communities.

- [26] To buttress these submissions, Mr Hylton KC referred the Court to the authorities of **Kirkman v Euro Exide Corporation (CMP Batteries Ltd)**,⁵ **Shawn Baboolal v Maraj Woodworking Est. & Company Limited**,⁶ **Rhonda Taylor v Priest Titre & Ors**⁷ and **Monica Gutierrez et al v Jose Luis Vargas, M.D. et al**.⁸
- [27] These authorities make it clear that the fact that one is a medical professional does not automatically render one's evidence expert evidence. Mr Hylton KC maintains that a medical professional, who has treated a patient, is giving evidence as a fact witness when he speaks to his observations; the course of treatment he prescribed; and the bases for his conclusions and observations.
- [28] It is also submitted that a fact witness is someone who is knowledgeable about pertinent information, relative to the case, based on direct participation or observation of the matters involved and gives evidence in that regard. It is further submitted that Dr Alford is the "treating physician" for those persons mentioned in his evidence.
- [29] Mr Hylton KC maintains that Dr Alford Jones is in a unique position, as the treating physician, to observe the increased prevalence of respiratory diseases, which coincided with the onset of the bauxite mining activities on the part of the Defendant Companies.
- [30] For this reason, Mr Hylton KC submits, Dr Alford Jones is in no way purporting to be an expert witness, although he holds expertise in the medical field, rather, he is attesting to facts which are within his personal knowledge.
- [31] It is further submitted that Dr Alford Jones has not concluded that bauxite mining generally causes respiratory illnesses, for the reason that, as he points out, there is an absence of health impact studies which have been conducted in the community. Instead, Dr Alford Jones has concluded that, in his own practice, his patients have been suffering more frequently from respiratory diseases since bauxite mining began. This, Mr Hylton KC asserts, is a fact

⁵ [2007] EWCA Civ 66 (25 January 2007)

⁶ Claim No. CV2017-02082, unreported, judgment delivered on 13 January 2020

⁷ Claim No. CV2009-00226, Civ App No P216 of 2011 (2011.11.16) (TT High Court)

⁸ 239 So. 3d 615 (Fla 2018)

that Dr Alford Jones is entitled to place before the court, by way of his evidence.

ANALYSIS AND FINDINGS

- [32] Part 32 of the CPR governs the appointment of an expert witness and the reception of expert reports by the court. Rule 32.6(1) of the CPR provides that no party may call an expert witness or put in an expert witness's report without the court's permission. The general rule is that the court's permission is to be given at a case management conference.⁹
- [33] The Court accepts that Dr Alford Jones is not an expert witness for present purposes, there being no Order of the court which appoints him as such, having regard to the fact that the matter has not as yet progressed to a case management conference hearing.
- [34] The question then to be determined is whether Dr Alford Jones can properly be treated as a witness of fact. To this end, the authorities of **Shawn Baboolal** and **Rhonda Taylor** and the approach adopted by the court therein, are instructive.
- [35] The authority of **Shawn Baboolal** concerned one Mr Baboolal, who was an employee of the defendant company. While on duty at work one day, an incident occurred, which resulted in Mr Baboolal being injured. Mr Baboolal initiated a claim against the defendant company. Witness statements were filed in the matter, one of which was a witness statement of Dr David Santana. Dr Santana's witness statement indicated that he saw Mr Baboolal just over a year after the incident occurred and gave an assessment of the likelihood that he would improve.
- [36] The defendant company objected to several paragraphs of Dr Santana's witness statement, on the basis that he was not an expert witness. As a consequence, he could not provide opinion evidence on matters relative to Mr Baboolal's purported injury. It was submitted that Dr Santana could only provide fact evidence.

⁹ See – Rule 32.6(2) of the CPR

[37] Ramcharan J opined that the first issue for determination was whether Dr Santana was a witness of fact or an expert witness. The learned judge cited with approval the dicta of Archie CJ in **Vanessa Garcia v North Central Regional Health Authority**.¹⁰ At paragraph 6, Ramcharan J had the following to say: -

“6. ... The learning on this point in this jurisdiction is to be found in the transcript of Vanessa Garcia v North Central Regional Health Authority, particularly at p.6 lines 42-48 where Archie, CJ stated: “If you are not a doctor involved in the treatment of the patient, then you are not a witness of fact. Anything you say has to be hearsay and is therefore an interpretation of the note, which places you in the category of expert, otherwise it is hearsay and inadmissible. If you were the doctor treating the patient, then you can come out and say ‘I did this because’.”
[Emphasis added]

[38] Ramcharan J, having examined the requirements to be met by a party wishing to adduce and rely on expert evidence, determined that Dr Santana was not a witness of fact and that the proposed evidence was inadmissible in its entirety.

[39] Similarly, in **Rhonda Taylor**, the court divined two issues with respect to the admissibility of evidence to be given by a medical practitioner. The first issue being whether a doctor, Dr Bedaysie, would be an expert under Part 33 of the Civil Procedure Rules. In the alternative, if he is not an expert witness, whether he can properly be treated as a witness of fact.

[40] Master Mohammed determined that Dr Bedaysie was not an expert witness, within the meaning of Part 33, for the reason that no permission had been granted for him to be called as one.

[41] In the present instance, this Court is of the view that a careful examination of the content of the affidavit evidence of Dr Alford Jones is important.

¹⁰ Civil Appeal No. 116 of 2011

The affidavit evidence

The Affidavit of Alford Jones, which was filed on 12 August 2022

Paragraphs 1-8

[42] Paragraph 1 to paragraph 8 of the Affidavit of Alford Jones, which was filed on 12 August 2022, are set out as follows: -

“1. I am a practicing physician residing at Lot 8, Minard Heights, Brown’s Town PO, PO Box 436, St Ann.”

“2. I received my Bachelor of Medicine, Bachelor of Surgery from the University of the West Indies. My office is located in Brown’s Town, St Ann, where I’ve practiced medicine for the past 17 years.”

“3. The facts and matters I state in this affidavit are true to the best of my knowledge, information and belief. Where the facts have been sourced by me from documents and records or provided by other parties, I identify those sources.”

“4. I swear this affidavit in support of the Fixed Date Claim Form filed on July 29, 2022 on behalf of Victoria Grant, Linsford Hamilton, Cyril Anderson, Merlina Rowe, Beverly Levermore, Alty Currie, Boblet Campbell, Lawford Fletcher and Edlin Walton.”

“5. I am aware of Noranda Jamaica Bauxite Partners’ and Noranda Jamaica Bauxite Partners II’s mining operations in Special Mining Lease (SML) 165 and 172, and of plans to commence mining in communities under SML 173.”

“6. Brown’s Town is where residents of mining-affected communities in St. Ann, such as Gibraltar, Madras and surrounding areas, come to seek medical attention and find pharmacies.”

“7. In my practice in Brown’s Town, I have examined and treated many patients from these communities, including the 1st Claimant’s husband, Alfred Grant (deceased), and the 7th Claimant’s children, J.H. and T.H. I have also written several letters to Noranda on behalf of such patients.”

“8. Based on my training and the above-described experience, I am in a unique position to observe the effects of bauxite mining on overall community health and on the health of individuals in St. Ann.”

- [43] The statements contained in paragraph 1 and paragraph 2 of the affidavit evidence of Dr Alford Jones serve to identify him as the affiant. Paragraph 3 sets out the oath made by Dr Alford Jones and indicates that the statements made in the affidavit are true to the best of his knowledge, information and belief. By virtue of paragraph 4 of his affidavit evidence, Dr Alford Jones connects his affidavit evidence to these proceedings and indicates that his affidavit evidence is filed in support of the Claimants' Claim.
- [44] At paragraphs 5 to 8, inclusive, of his affidavit evidence, Dr Alford Jones purports to give evidence of that which is within his personal knowledge, as a physician who has been and is currently practising in the Brown's Town area, in the parish of St. Ann, for in excess of seventeen (17) years.

Paragraphs 9 and 10

- [45] Paragraphs 9 and 10 of the affidavit evidence of Dr Alford Jones refer to medical reports which were prepared by Dr Jones and which are dated 16 December 2021 and 7 April 2022, respectively. These medical reports are exhibited to the affidavit of Victoria Grant. The medical reports purport to provide the conclusions at which Dr Alford Jones has arrived, in respect of the impact of bauxite mining on the residents of Gibraltar and the surrounding communities, in the parish of St. Ann, as a result of his years of practice in the Brown's Town area.
- [46] The Court finds that the statements contained in paragraphs 9 and 10 of the affidavit evidence of Dr Alford Jones properly fall within the remit of expert evidence. In the result, the Claimants are not permitted to rely on the statements contained in these paragraphs, for present purposes. Nor are the Claimants permitted to rely on the medical reports of Dr Alford Jones, dated 16 December 2021 and 7 April 2022, respectively.

Paragraph 11

- [47] Mr Hylton KC has conceded in respect of paragraph 11 of the affidavit evidence of Dr Alford Jones. However, for the reason that the evidence contained therein is within the knowledge of Dr Jones, the Claimants are permitted to rely on the following statement: -

“11. In the early years of bauxite mining, all who lived in proximity to mining areas were relocated.”

Paragraphs 12-14

[48] Paragraphs 12 to 14, inclusive, of the affidavit evidence of Dr Alford Jones are set out below: -

“12. Alfred Grant, the 1st Claimant’s husband, was a 75 year old crop farmer from the small rural community of Gibraltar. I treated Mr. Grant during the last couple years of his life.”

“13. Mr. Grant suffered from COPD and was a chronic smoker.”

“14. When mining started beside the Gibraltar All Age School in around 2020, Mr Grant would have exacerbations of his respiratory symptoms, resulting in recurring visits to my office.”

[49] The Court finds that there is nothing objectionable about the statements contained in paragraphs 12 to 14 of the affidavit evidence of Dr Alford Jones, for the reason that Dr Jones purports to give this evidence, as a doctor involved in the treatment of Mr Alfred Grant.

Paragraph 15

[50] The Claimants are permitted to rely on the following statements contained in paragraph 15 of the affidavit evidence of Dr Alford Jones, for the reason that the statements made therein are within his knowledge. That evidence reads as follows: -

“15. On April 22, 2020, Mr Grant visited my office complaining of coughing and shortness of breath. He returned to my office with similar complaints on December 30, 2020, February 12, 2021 and May 5, 2021.”

Paragraphs 16 and 17

[51] Paragraphs 16 and 17 of the affidavit evidence of Dr Alford Jones read as follows: -

“16. In around July 2021, when mining started literally in Mr Grant’s backyard, his health went into a downward spiral.”

“17. On September 10, 2021, about two months after the mining in his backyard started, Mr. Grant visited my office complaining of persistent shortness of breath and wheezing.”

- [52] The Court finds that the statements contained in paragraphs 16 and 17 of the affidavit evidence of Dr Alford Jones provide information that is within the personal knowledge of Dr Jones.

Paragraph 18

- [53] The Court finds that the Claimants are permitted to rely on the following portion of paragraph 18 of the affidavit evidence of Dr Alford Jones: -

“18. A couple weeks later, on September 26 2021, I had to visit Mr Grant at his home because he was too weak to leave his bed.”

The Court so finds for the reason that the statement which is made is within the knowledge of Dr Jones.

Paragraphs 19 and 20

- [54] Paragraphs 19 and 20 of the affidavit evidence of Dr Alford Jones read: -

“19. There are no medical facilities in Mr. Grant’s community or surrounding communities that are capable of responding to such an emergency. I therefore sent Mr. Grant to St. Ann’s Bay Hospital, almost two hours away, for further management. He spent about one month in hospital.”

“20. Mr Grant subsequently died on January 3, 2022 from Acute Coronary Syndrome, Congested Cardiac Failure and Hypertension Chronic Obstructive Pulmonary Disease. A copy of Mr Grant’s death certificate is exhibited at VG-1 of the 1st Claimant’s affidavit at page 6.”

- [55] The Court finds that the statements contained in paragraphs 19 and 20 of the affidavit evidence of Dr Alford Jones are within his knowledge.

Paragraphs 21, 22 and 23

- [56] Mr Hylton KC concedes in relation to paragraph 21 of the affidavit evidence of Dr Alford Jones, in its entirety.

- [57] Paragraph 22 refers to and relies on the content of the medical report prepared by Dr Alford Jones, dated 16 December 2021. This report was

prepared in relation to the children of the 7th Claimant Boblet Campbell. The Court finds that the purported evidence contained in this report falls within the realm of expert evidence.

Paragraphs 24-30

[58] Paragraphs 24 to 30 of the affidavit evidence of Dr Alford Jones are set out below: -

“24. The deterioration of community health described above is exacerbated by the absence of adequate medical facilities in Gibraltar and surrounding communities to deal with the adverse health effects of bauxite mining.”

“25. There was a health centre in Gibraltar a long time ago, but that facility is now closed. The nearest health centre is located in Watt Town. This is a rudimentary facility that is not adequately equipped to provide basic medical care, much less deal with respiratory illnesses. The facility mostly deals with maternity cases. A doctor comes to that facility at most once per week. The facility does not have nebulizers and is not equipped to deal with an emergency such as severe exacerbation of Bronchial Asthma or COPD.”

“26. Another major issue is the lack of adequate compensation for the adverse health effects of bauxite mining. Noranda provides some of my patients with “dust money” of \$8,500 every three months for the entire household, regardless of the number of persons in the household. This amount is not enough to cover medical care for a family suffering from mining- related illnesses or compensate them for any long-term health effects. The cost of a doctor’s visit for one person, for example, is \$2,500-\$3,000. The cost of medicine for one person with asthma ranges from \$5,000- \$10,000.”

“27. Importantly, I am not aware of any health impact studies commissioned by the Government of Jamaica to examine the health impacts of bauxite mining in St. Ann.”

“28. I am concerned that, in the absence of such studies or medical diagnoses, residents will not have the information they need to understand the health risks posed by bauxite dust exposure and seek appropriate medical care to protect their health. Moreover, they will not have information about the financial costs of short or long-term health effects.”

“29. Additionally, without health impact studies, neither the Government nor Noranda will have a full appreciation of the measures necessary to safeguard community health in mining areas.”

“30. I am concerned that plans to commence mining in SML 173 will cause community health to further deteriorate, especially if interventions to safeguard health are not implemented.”

[59] The Court accepts the submissions advanced by Mr Hylton KC, in respect of the statements contained in paragraphs 24 to 30 of the affidavit evidence of Dr Alford Jones. The Court finds that the statements contained therein are within the knowledge of Dr Jones.

DISPOSITION

[60] In the result, the Court is prepared to make the following Orders, in respect of the Preliminary Objection in relation to the affidavit evidence of Dr Alford Jones: -

1. The Preliminary Objection to the Affidavit evidence of Dr Alford Jones, as contained in the Notice of Preliminary Objection, which was filed on 22 August 2022, is overruled, in part;
2. The Claimants are permitted to rely on the following paragraphs of the Affidavit of Alford Jones, which was filed on 12 August 2022, in respect of the 1st, 2nd and 3rd Defendants' Further Amended Application to Strike out Claim, which was filed on 23 August 2022: -
 - a. Paragraphs 1-8, inclusive;
 - b. Paragraph 11 “In the early...relocated.”
 - c. Paragraphs 12-14, inclusive;
 - d. Paragraph 15 “On April 22, 2020, Mr Grant...and May 5, 2021.”
 - e. Paragraphs 16 and 17;
 - f. Paragraph 18 “A couple weeks later, ... bed.”

- g. Paragraphs 19 and 20;
 - h. Paragraphs 24-30, inclusive.
3. The Claimants are not permitted to rely on the Reports of Dr Alford Jones, dated 7 April 2022 and December 16, 2021, respectively, in respect of the 1st, 2nd and 3rd Defendants' Further Amended Application to Strike out Claim, which was filed on 23 August 2022.

THE DEFENDANT COMPANIES' APPLICATION TO STRIKE OUT THE CLAIMANTS' STATEMENT OF CASE

[61] By virtue of the 1st, 2nd, and 3rd Defendants' Further Amended Application to Strike Out Claim, which was filed on 23 August 2022, the Applicants, Noranda Jamaica Bauxite Partners and Noranda Jamaica Bauxite Partners II and New Day Aluminium (Jamaica) Limited, of Port Rhodes, Discovery Bay, in the parish of St, Ann, seek Orders that: -

1. The Court declines to exercise its powers pursuant to section 19(4) of The Charter of Fundamental Rights and Freedoms (Constitutional Amendments) Act, 2011 ("The Charter");
2. The Declarations sought in the Fixed Date Claim Form, which was filed on 29 July 2022, for constitutional redress pursuant to The Charter and the consequential relief in the form of an order, injunction and constitutional/vindictory, compensatory and aggravated damages are struck out;
3. The Fixed Date Claim Form, which was filed on 29 July 2022, is struck out;
4. Costs of this application to the 1st, 2nd and 3rd Defendants; and
5. Such further or other relief as this Honourable Court deems just in the circumstances.

[62] The application to strike out the Claim is made on the following bases: -

1. Pursuant to section 19(4) of The Charter, where any application is made for redress under that Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law;
2. There are adequate alternative remedies available to the Claimants in common law. The Claimants' claims for an injunction to restrain mining and/or damages are grounded in causes of action for nuisance and/or negligence, both of which are particularized by each Claimant in their affidavits supporting the claim;
3. With regard to Special Mining Lease 165 and Special Mining Lease 172 ("SML 165" and "SML 172", respectively), the bauxite mining activities that are subject of the claim have been completed and the gravamen of the complaints, if proven, sound in damages for nuisance and/or negligence rather than Constitutional relief;
4. The statutory framework and regulatory measures set out in the Permit for Special Mining Lease 173 ("SML 173"), provide adequate protection against environmental breaches or damage and, in the unlikely event of any such breach, adequate means of redress to any person, including the Claimants, who may be adversely impacted by mining in the limited area of 1333 hectares permitted under the mining under SML 173. These measures are in addition to the ordinary remedies in nuisance and negligence available to the Claimants at common law;
5. Pursuant to Rule 26.3(1)(a) and Rule 26.3(1)(c) of the Civil Procedure Rules, 2002, respectively, the Court may strike out a statement of case if it appears to the court that:
 - (i) there has been a failure to comply with a rule or practice direction or with an order or

direction given by the court in the proceedings;

- (ii) the statement of case discloses no reasonable grounds for bringing the claim.

6. Rule 56.9(3)(c) and Rule 56.9(3)(d) of the Civil Procedure Rules, 2002, stipulate that the affidavit in support of the fixed date claim form for relief under the Constitution must set out the provisions of the Constitution which the claimant alleges has been, is being or is likely to be breached and that the affidavit must state the grounds on which the relief is sought;
7. The nine Affidavits filed herein in support of the Fixed Date Claim Form do not comply with Rule 56.9(3)(c) and Rule 56.9(3)(d). The affidavit evidence is not presented, in form or substance, to enable the court and Defendants to identify the Constitutional provisions allegedly engaged or the grounds upon which the relief is sought;
8. The Fixed Date Claim Form discloses no reasonable grounds for claiming that 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, are engaged or that they have been, are being or are likely to be contravened by the 1st, 2nd and 3rd Defendants; and
9. The resort to the procedure by way of section 19(1) of The Charter is in all the circumstances inappropriate and an abuse of the process of the Court.

THE ISSUES

- [63]** The application to strike out raises the following issues for the Court's determination: -

- i. Whether the Claimants have sufficiently particularized the Claim;
- ii. Whether the Claimants' statement of case discloses a cause of action; and
- iii. Whether the Claimants' statement of case demonstrates reasonable grounds for bringing the action.

THE LAW

[64] It is well established that the court will only strike out a claim in plain and obvious cases. Those which require prolonged and serious argument are unsuitable for striking out.¹¹

[65] Striking out, as a mechanism, is aimed at weakness in the manner in which the issues are set out in the statements of case.¹² The traditional approach to striking out is appropriate only in plain and obvious cases and that those cases which require prolonged and serious argument are unsuitable for striking out.¹³

[66] The striking out of a claim is a severe measure. The discretionary power to strike out must be exercised with extreme caution. A court, when considering an application to strike out, is obliged to take into consideration the probable implications of striking out and balance them carefully against the principles as prescribed by the particular cause of action which is sought to be struck out.¹⁴

The general rules in relation to striking out

[67] Part 26 of the CPR vests the court with extensive case management powers. Rule 26.3(1) of the CPR provides as follows: -

¹¹ See – **Sadie Vaughan v National Water Commission**, Claim No. 2007 HCV 03034, unreported, judgment delivered on 14 November 2008

¹² Commonwealth Caribbean Civil Procedure, 3rd Edition, Gilbert Kodilinye and Vanessa Kodilinye, Routledge Cavendish, 2009

¹³ See – **Williams & Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368, HL, per Lord Templeman and confirmed in **Three Rivers District Council v Bank of England (No 3)** [2001] 2 All ER 513, HL and **S & T Distributors Ltd v CIBC Jamaica Ltd et al** SCCA No. 112/2004, unreported, judgment delivered on 31 July 2007. This position was reiterated in the case of **Herbert A. Hamilton v Minister of National Security and Attorney General of Jamaica** [2015] JMSC Civ 39.

¹⁴ See – **S & T Distributors Limited v CIBC Jamaica Limited**

“26.3(1) In addition to any other powers under these Rules, the court may strike out a statement of case or part of a statement of case if it appears to the court -

(a) that there has been a failure to comply with a rule or practice direction or with an order or direction given by the court in the proceedings;

(b) that the statement of case or the part to be struck out is an abuse of process of the court or is likely to obstruct the just disposal of the proceedings;

(c) that the statement of case or the part to be struck out discloses no reasonable grounds for bringing or defending a claim; or

(d) that the statement of case or the part to be struck out is prolix or does not comply with the requirements of Parts 8 or 10.”

[68] In **Gordon Stewart v John Issa**,¹⁵ the Court of Appeal explained that appellant’s attack on the judgment of Sykes J was that he took into account irrelevant considerations when determining whether to strike out the claim. It was submitted that, in exercising his discretion, the learned judge’s function was limited to a review of the claimant’s pleadings to ascertain whether a cause of action was made out and whether they disclosed any reasonable ground for bringing the claim.

[69] Cooke JA opined, at paragraph 14, that, at this stage, the genesis of the proceedings, the consideration under rule 26.3(1)(c) of the CPR is whether or not the claim as pleaded satisfies the legal requirements for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what the outcome of a properly filed claim will be.

[70] Similarly, in **City Properties Limited v New Era Finance Limited**,¹⁶ Batts J held that, on an application to strike out a party’s statement of case, there must be reasonable grounds for bringing or defending a claim. These reasonable grounds must be evident on a reading of the statement of case. It is well established and a matter for which no authority need be cited, that, on

¹⁵ SCCA No. 16/2009, unreported, judgment delivered on 25 September 2009, per Cooke JA

¹⁶ [2013] JMSC Civ 23

an application to strike out pleadings, no affidavit evidence need be filed. The issue is determined by reference to the pleadings. A claimant must disclose on the face of the pleadings that he has a reasonable cause of action against the defendant. He does this by pleading facts which are supportive of the existence of a cause of action.¹⁷

- [71] As litigants are not to be driven from the judgment seat without a hearing on the merits, it ought to be an extremely rare case indeed where a court will find a cause of action or defence in existence but that it is “unreasonable” for the claimant or defendant to be allowed to rely on it and to do so at an interlocutory stage in the proceedings.¹⁸

The approach of the court on an application to strike out in a constitutional claim

- [72] The proper approach to be adopted by the court, on an application to strike out in a constitutional claim, was explained by the learned Chief Justice in the authority of **Julian J Robinson v The Attorney General of Jamaica**.¹⁹

- [73] The learned Chief Justice explained that: -

“[203] The proper approach is as follows:

(a) Section 13 (2) of the Jamaican Charter of Fundamental Rights and Freedoms guarantees the fundamental rights and freedom[s] set out in the Charter subject to the specific limitations as well as a general limitation. Where the statute in question does not fall within the specified limitations, the sole test is the general limitation of whether the law is demonstrably justified in a free and democratic society.

(b) In order for section 13 (2) to be invoked by way of a claim under section 19 of the Constitution of Jamaica, the claimant must show that his or her right has been violated, or, is likely to be violated. The burden of proof is on a balance of probabilities but at the lower end since this would enable any claimant to have the full and best possible protection guaranteed by the fundamental rights and freedoms. If the claimant fails to do this then

¹⁷ See – **City Properties Limited v New Era Finance Limited**, supra, per Batts J, at paragraphs [9], [10] and [12]

¹⁸ See – **City Properties Limited v New Era Finance Limited**, supra, per Batts J, at paragraph [11]

¹⁹ [2019] JMFC Full 04

no claim for redress can possibly arise under the Charter for the reason that no Charter violation has occurred, is occurring, or, is likely to occur.

- (c) The court must determine the scope of the right or freedom in order to have an appreciation of the right or aspects of the right or freedom that are protected by the Charter.*
- (d) The starting point for the court is always that the fundamental rights and freedoms are not to be restricted and are to be given their fullest meaning having regard to the words used.*
- (e) ...*
- (f) ...*
- (g) ...*
- (h) Since the rights and freedoms guaranteed by the Charter are at the core of the Jamaican society's foundation as a free and democratic society it necessarily means that a high standard of justification must be established before the rights and freedoms are abrogated, modified or trespassed on, once the claimant shows, prima facie, that there has been a violation of his or her rights or freedoms.*
- (i) Once the claimant establishes that a right or freedom has been violated, the burden shifts to the violator and unless the violator can bring the law within the specific or general limitation, then the claimant will succeed. The standard of proof on the claimant is a balance of probabilities but at the lower end. ...*
- (j) The standard of proof on the violator is on a balance of probabilities but at the higher end, closer to the fraud end of the spectrum of proof. The justification for this approach is that what is being dealt with are fundamental rights and freedoms which are to be enjoyed to their fullest extent, subject only to necessary limitations. These rights and freedoms must never be lightly curtailed, or, infringed, or, abrogated. This way of looking at the matter guards against the tyranny of the majority.*
- (k) ...*
- (l) ...*
- (m) ...*

(n) ...

(o) ...

(p) ...

(q) ...

(r) ...

(s) ...

(t) *If the claimant discharges the burden of proof that a right or freedom has been, is being, or, is likely to be violated, then the burden, legal and evidential, shifts to the violator to establish that the statute can be saved by specific limitations found sections 13 (9), (12), 18 or 49, or, the general limitation, namely, the law is demonstrably justified in a free and democratic society. In the event that the court is left in a state of uncertainty of whether the violator has satisfied his burden then the claimant must succeed. In the event that the court is of the view that there is a tie then the claimant must prevail for the reason that in constitutional litigation the attitude of the court must be that the right or freedom prevails unless the violation is clearly justified. This approach ensures that the guarantee given by the Charter is maintained....”*

[74] The effect of the articulated approach, for present purposes, is that the Defendant Companies must persuade the court that, having regard to the burden and standard of proof, the matters alleged in the Claimants’ statement of case cannot establish and infringement or a likely infringement of any constitutionally protected right.

ANALYSIS AND FINDINGS

The failure to comply with the requirements of Part 56 of the CPR

[75] The Defendant Companies urge the Court to strike out the Claimants’ Statement of Case on the basis that it fails to comply with the procedural rules contained in Part 56 of the CPR, in respect of affidavit evidence.

The affidavit evidence

The requirements of Part 56 of the CPR

[76] Rule 56.9 of the CPR governs the making of an application for an administrative order. Applications for an administrative order for relief under the Constitution must be made by a way of fixed date claim in form 2 and must identify the nature of any relief sought.

[77] The application is to be supported by evidence on affidavit.²⁰ Rule 56.9(3) of the CPR provides as follows: -

“56.9(3) The affidavit must state –

(a) the name, address and description of the claimant and the defendant;

(b) the nature of the relief sought identifying –

(i) any interim relief sought; and

(ii) whether the claimant seeks damages, restitution, recovery of any sum due or alleged to be due or an order for the return of property, setting out the facts on which such claim is based and, where practicable, specifying the amount of any money claimed;

(c) in the case of a claim under the Constitution, setting out the provision of the Constitution which the claimant alleges has been, is being or is likely to be breached;

(d) the grounds on which such relief is sought;

(e) the facts on which the claim is based;

(f) the claimant’s address for service; and

(g) giving the names and addresses of all defendants to the claim.”

[78] In the authority of **Hillaire Sears v Parole Board, Minister of National Security and The Attorney General**,²¹ the appellant, Hillaire Sears, commenced a constitutional claim alleging that his detention, while on parole

²⁰ See – Rules 56.9(1) and 56.9(2) of the CPR

²¹ [2022] CCJ 13 (AJ) BZ

and the subsequent revocation of his parole by the Parole Board, breached his fundamental rights under the Constitution of Belize. The respondents, namely the Parole Board, the Minister of National Security and the Attorney General, resisted the claim and argued that the appellant should have brought a claim for judicial review. It was also argued that he had utilized the wrong procedure. It was accepted, at both the Supreme Court as well as the Court of Appeal of Belize, that the appellant's claim for constitutional relief had not complied with various procedural rules and dismissed the claim.

- [79] On appeal, the Caribbean Court of Justice unanimously allowed the appeal and declared that the appellant's reincarceration breached his constitutional right to personal liberty and that the revocation of his parole by the Parole Board breached his constitutional right to personal liberty and equal protection of the law, as guaranteed by sections 5 and 6, respectively, of the Constitution of Belize.
- [80] The Caribbean Court of Justice cautioned against the unnecessary reliance on strict rules of procedure to shut out citizens from seeking constitutional relief, especially in the face of serious allegations of constitutional violations. The focus of the court, as is the clear intention of the Constitution, is to provide flexible and effective access to justice for the peoples of Belize so that they can seek full vindication of their constitutional rights.
- [81] This principle of access to justice was also articulated in the authority of **Buguzzi v Rank Leisure plc**,²² Lord Woolf MR had the following to say: -

"There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts

²² [1999] 4 All ER 934

to show by their conduct that they will not tolerate the parties not complying with dates for the reasons I have indicated.”

- [82]** The authority recognizes that judges are to be trusted to exercise their wide discretions under the CPR fairly and justly in all the circumstances.²³
- [83]** The Court recognizes that the power to terminate proceedings without any hearing on the merits is one which should be exercised with considerable caution and in a proportionate way. The Court equally recognizes that, in its armoury of powers, it has other less draconian ways of dealing with matters of this nature.
- [84]** In the present instance, the Defendant Companies contend that the Claimants’ statement of case ought properly to be struck out for the reason that the affidavit evidence which has been filed for and on their behalf, does not comply with the requirement of rule 56.9(3)(c) of the CPR. Rule 56.9(3)(c) of the CPR requires that, in the case of a claim under the Constitution, the affidavit evidence is to set out the provision of the Constitution which the Claimants allege has been, is being or is likely to be breached by the Defendants. The Defendant Companies further contend that the failure on the part of the Claimants to set out which rights have allegedly been breached and the facts underlying the alleged breach buttresses their submission that the Claimants’ statement of case discloses no reasonable grounds for bringing the action.
- [85]** It is indisputable that the Claimants’ affidavit evidence does not disclose the various provisions of the Charter which they allege have been, is being or is likely to be breached by the Defendants.
- [86]** On 29 July 2022, the Claimants filed a Fixed Date Claim Form, which sets out in careful detail the various sections of the Charter which they allege have been, is being or is likely to be breached by the Defendants. Each Claimant has signed the Fixed Date Claim Form and has certified that the statements made therein are true. The affidavit evidence of each of the Claimants expressly refers to the Fixed Date Claim Form and to the declarations sought

²³ The principle of access to justice has been affirmed by our local courts in several authorities, such as, **Jamaica Defence Force Co-operative Credit Union v Georgette Smith** [2019] JMCA Civ 7.

therein. It is clear from a reading of the submissions filed on the Defendants' behalf that they are in no doubt as to which rights the Claimants contend have been, are being or are likely to be, breached.

- [87] In those circumstances, the Court finds that the failure to comply with the requirements of rule 56.9(3)(c) of the CPR, does not warrant the Court's exercise of its power to strike out the Claimants' statement of case. The effect of such an order would be to deprive the Claimants of access to justice, for the purpose of seeking redress from an alleged violation of their Constitutional rights.
- [88] The Court notes that Part 56 of the CPR does not prescribe a sanction for, or, any specific consequence of, a failure to comply with the requirements contained therein. In those circumstances, the Court finds that it can properly exercise its general powers of case management, by virtue of rule 26.9 of the CPR, to rectify the procedural error in the Claimants' affidavit evidence. That procedural error is one which may be rectified simply by an Order of the Court compelling the Claimants to file and serve supplemental affidavits which comply with rule 56.9(3)(c) of the CPR.
- [89] In the result, the Court declines to strike out the Claimants' statement of case on this basis.

The right to life

The Defendant Companies' assertions

- [90] The Defendant Companies contend that, in its consideration of the nature and scope of each right and the Claimants' respective allegations, the Court must have regard to the framework in which bauxite mining takes place. The Defendant Companies submit that, by virtue of The Minerals (Vesting) Act, all bauxite belongs to the Crown.
- [91] 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."

[92] 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.”

[93] 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 issues under the Natural Resources Conservation Act.

[94] The Defendant Companies assert that the right to life has not been engaged for the reason that none of the Claimants have died. Nor has any evidence been presented that they face the threat of death or an increased risk of death.

[95] To buttress this submission, the Defendant Companies rely on the authority of **Lee Carter & Ors v The Attorney General of Canada**.²⁴ There, the Supreme Court of Canada opined that the right to life is engaged where the law or State action imposes death or an increased risk of death on a person, either directly or indirectly.

[96] The Defendant Companies complain that none of the Claimants have presented any evidence that they face the threat of death, nor have they

²⁴ [2015] 1 R.C.S. 331

demonstrated that any action on the part of the Defendants imposes death or an increased risk of death, in respect of any of them.

[97] Additionally, the Defendant Companies contend that it is the personal representatives of Mr Alfred Grant, the deceased husband of the 1st Claimant, Victoria Grant, who may make a claim, in respect of his death. In any event, the cause of death of Mr Grant was attributable to three (3) contributing factors, namely: -

- I.
 - i). Acute Coronary Syndrome;
 - ii). Congested Cardiac Failure; and
 - iii). Hypertension Chronic Obstructive Pulmonary Disease.
- II. (Contributory)
 - i). Prostate Cancer.²⁵

The Claimants' assertions

[98] Conversely, the Claimants assert that, as a result of the bauxite mining activities of the Defendant Companies, pursuant to Special Mining Leases 165 and 172, they have suffered significant injury to their health, contamination of their drinking water sources and, in the case of Mrs Victoria Grant, the loss of her husband. In other words, the Claimants contend that the bauxite mining activities on the part of the Defendant Companies pose an increased risk of death, as evidenced by that of Mr Alfred Grant.

[99] The Claimants rely on section 13(1)(b) of the Charter which 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 citizens of a free and democratic society.

[100] The Claimants further assert that the loss and injury which they have suffered and the likelihood of additional loss and of further injury are exacerbated by the fact that there are no adequate medical facilities in their communities nor

²⁵ See – Affidavit of Victoria Grant, which was filed on 29 July 2022, which exhibits as exhibit “**VG-1**”, the Death Certificate of Alfred Grant.

is there any monitoring of the water quality or decontamination of public water catchments.

[101] The Claimants maintain that, despite numerous complaints in relation to the health impact of bauxite dust pollution, the Defendants, in particular the 4th Defendant, have failed to take even basic measures to safeguard the life and health of the citizenry before granting Special Mining Leases 165, 172 and 173. It is asserted that the Defendants have never conducted a health impact assessment, in respect of areas which have previously been mined for bauxite; that the Defendants have never carried out any medical diagnoses of persons in the communities which have been affected by bauxite mining activities; and that they refuse to adopt air quality standards which address the most serious of the industry related pollutants.

[102] In an attempt to buttress that submission, Mr Hylton KC referred the Court to the European Court of Human Rights, "Guide on Article 2 of the European Convention on Human Rights. Right to Life, which warns that: -

"Whenever a State undertakes organizes dangerous activities, or, authorizes them, it must ensure, through a system of rules and through sufficient control, that the risk is reduced to a reasonable minimum. If nevertheless damage arises, it will only amount to a breach of the State's positive obligations if it was due to insufficient regulations or insufficient control but not if the damage was caused through the negligent conduct of an individual or a concatenation of unfortunate events."

[103] Additionally, Mr Hylton KC submits that the United Nations Human Rights Committee, in its interpretive guidance on the right to life contained in the International Covenant on Civil and Political Rights (ICCPR), warns that: -

"Environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability to present and future generations to enjoy the right to life. Implementation of the obligation to respect and ensure the right to life, and in particular life with dignity, depends, inter alia, on measures taken by States parties to preserve the environment and protect it against harm, pollution and climate change caused by public and private actors. States parties should therefore ensure

*sustainable use of natural resources, develop and implement substantive environmental standards, conduct environmental impact assessments...*²⁶

[104] Further, the Inter-American Court of Human Rights, in its guidance on State obligations, in relation to the environment in the context of the protection of the right to life in the American Convention on Human Rights (which has been ratified by Jamaica) states that: -

*“...Among the conditions required for a decent life, the Court has referred to access to, and the quality of, water, food and health...”*²⁷

Findings

[105] In the present instance, the Claimants contend that the Defendants have carried out dangerous bauxite mining activities in their communities and have failed to take sufficient measures to reduce the resultant risk to a minimum.

[106] The Court accepts the submissions of Mr Hylton KC that it cannot tenably be argued that the Claimants’ pleadings are “obviously unsustainable” or so “unarguable” that they should be struck out.

[107] The Court finds that the Claimants’ statement of case raises important and complex questions in relation to the nature and scope of the right to life; the extent of the Defendants’ obligations in the context of the bauxite mining activities of the Defendant Companies in the Claimants’ communities. The Court accepts the submission that these are triable issues which should be heard by the Full Court.

The right to receive information

The Defendant Companies’ assertions

[108] The Defendant Companies maintain that the right to receive information does not bind them, for the reasons that: -

²⁶ See – United Nations Human Rights Committee, “General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life”, 30 October 2018

²⁷ See – Inter-American Court of Human Rights, “The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity: Interpretation and scope of articles 4(1) and 5(1) in relation to articles 1(1) and 2 of the American Convention on Human Rights)

- i. the complaint relates to an alleged failure by the Government of Jamaica to generate and provide information;
- ii. the complaint points to no request made to the Defendant Companies or any failure on their part to provide information;
- iii. not a single affidavit deponed to by any of the Claimants allege a request made to the Defendants for, or any failure on their part to provide information;
- iv. as a matter of law, the Claimants have ignored the final and qualifying words of that provision “through any media”. None of the Claimants have alleged what media the Defendants have or have failed to use. Nor have they alleged any failure on the part of the Defendants to impart information to them through any media.

[109] To support that submission, the Defendant Companies rely on the authority of **Maurice Arnold Tomlinson v Television Jamaica Limited & Ors.**²⁸ The Defendant Companies rely specifically on the pronouncements of Sykes J (as he then was).²⁹

The Claimants’ assertions

[110] Conversely, the Claimants contend that the circumstances of the present case are different from those which obtained in **Maurice Arnold Tomlinson v Television Jamaica Limited & Ors.**

[111] In the present instance, the issue to be determined is whether the Claimants’ right to receive information imposes a positive obligation on the Defendants, to generate information in relation to the environment, in the public interest, and, whether the failure to generate information on the health impacts of bauxite mining activities, violates the right.

[112] Mr Hylton KC referred the Court to the United Nations Human Rights Committee’s General Comment 34 on the scope of the right to information in Article 19 of the International Covenant on Civil and Political Rights. It emphasizes that this right requires that States proactively disseminate

²⁸ [2013] JMFC Full 5

²⁹ See – paragraphs [267], [269], [270] and [271]

information in the public interest and ensure that access is “easy, prompt, effective and practical.”³⁰

Findings

[113] The Claimants contend that the Defendants have failed to generate, disseminate or provide them with any information in relation to the time(s) at which bauxite mining activities would commence or take place in their respective communities; information on the health impacts of bauxite mining activities; and information in relation to any environmental impact assessment(s) which may have been conducted, in relation to the effect, if any, of the bauxite mining activities of the Defendant Companies on the physical environment of their respective communities.

[114] In this regard, the Court finds that the Claimants’ statement of case raises triable issues relative to environmental democracy which are of public importance and which ought properly to be considered by the Full Court.

The right to reside in any part of Jamaica

The Defendant Companies’ assertions

[115] The Defendant Companies submit that the right to reside in any part of Jamaica is part of the right to freedom of movement, which is recognized by section 13(3)(f) of the Charter. It is further submitted that none of the Claimants have alleged that he or she had to abandon his or her home or the area in which he or she was living, as a result of the bauxite mining activities of the Defendant Companies.

The Claimants’ assertions

[116] The Claimants assert that the Defendants’ actions and failures have effectively resulted in their homes becoming uninhabitable. The Claimants further assert that the proposed expansion of bauxite mining activities on the part of the Defendant Companies is likely to cause them further injury, including damage to their homes, farms, subsistence crops and the loss of their rural way of life. This, it is further submitted, is implicitly acknowledged by

³⁰ See – United Nations Human Rights Committee, General Comment No. 34, Article 19: Freedoms of Opinion and Expression, 12 September 2011

the Defendant Companies, which have found it necessary to offer some residents in affected communities “relocation” or “displacement” money.

Findings

[117] The justiciability of these grounds finds support in the pronouncements of the court in **Errol Trowers v Noranda Jamaica Bauxite Partners Limited**.³¹ At paragraph **[33]**, Lindo J had the following to say: -

“It is my view that to carry out such mining activities in the neighbourhood clearly amounts to a substantial interference with the claimant’s rights and would be injurious to any person living in such a neighbourhood as in all the circumstances the residents should not be expected to put up with it. It is self-evident that heavy vehicles and equipment carrying out excavations will generate dust and noise especially when the proximity of the activities to the claimant’s house is taken into consideration.”

[118] The pronouncements of Lindo J are equally applicable in the present instance. The Claimants’ statement of case alleges that the bauxite mining activities which are being carried out by the Defendant Companies are being conducted in close proximity to the homes, schools and churches of the former. The Claimants further allege that, in certain instances, the bauxite mining activities of the Defendant Companies was conducted and in some instances is being conducted, in the middle of their communities. These activities, the Claimants contend, create conditions which have led to and which may, in the future, lead to displacement, thereby threatening their right to reside in any part of Jamaica. It is for these reasons that they seek Constitutional relief.

[119] The State’s obligation to respect human rights law includes the obligation to prevent and avoid conditions which may lead to the displacement of persons. In the context of the obligation, the Claimants’ statement of case raises a triable issue, which ought properly to be determined by a Full Court.

³¹ [2016] JMSC Civ 48

The right to a healthy and productive environment

The Defendant Companies' assertions

[120] The Defendant Companies assert that the claim relating to dust and noise pollution and environmental degradation are grounded in and can be adequately addressed by, claims in the tort of negligence or nuisance. The Defendant Companies further contend that the right to a healthy environment has not been engaged for the reason that there is no evidence before the court, which challenges the efficacy of the regulating mechanisms that promise environmental protection. To support this submission, the Court was referred to the authority of **Ashton Evelyn Pitt v The Attorney General of Jamaica & Ors.**³²

The Claimants' assertions

[121] Mr Hylton KC submits that section 13(3)(l) of the Charter goes beyond the tort of nuisance and recognizes that a Constitutional remedy may be warranted. Mr Hylton KC further submits that it is difficult to conceive of any circumstance in which this right may be engaged without it involving some element of nuisance.

[122] More substantively, the Claimants contend that the dust pollution of their air and water; the resulting illnesses and premature death; and the unbearable noise; the displacement and disruption of their farming livelihoods are all in violation of the Constitutional right to a healthy and productive environment. Mr Hylton KC maintains that, on the evidence that the Claimants have already provided, they have discharged the burden of proof which is cast on them.

[123] The Claimants also challenge the efficacy of the regulating mechanisms which should provide environmental protection. In this regard, the Claimants contend that the Defendants have never conducted a health impact assessment; have never made any medical diagnoses; and refuse to adopt air quality standards which address the most serious industry-related pollutants associated with morbidity and mortality. Further, the Claimants allege that the 4th Defendant has failed to monitor public water catchments.

³² [2018] JMFC Full 7

[124] It is on these bases that Mr Hylton KC submits that the Claimants have raised triable issues which ought properly to be ventilated before the Full Court. To support this submission, Mr Hylton KC also relies on the authority of **Ashton Pitt**, where at paragraph [130], the court is quoted as follows: -

*“The whole thrust of the **Natural Resources Conservation Authority Act** and the establishment of NEPA is a thrust towards sustainable development and laws that should operate to protect the environment, if the proper procedures and guidelines are adhered to. As mentioned previously, the permits reflect that certain environmental issues were taken into consideration by the authorities to ensure a certain level of protection and safety for the residents. These can be categorized as substantive rights. In relation to procedural rights, the claimant had access to information and the claimant’s presence in the court speaks to access to justice.”*

[125] This type of assessment, Mr Hylton KC asserts, should also be made in the present instance, especially in light of certain inadequacies in Special Mining Lease 173. The conditions in the permit for Special Mining Lease 173 refer to an Environmental Performance Bond (“EPB”), which may be applied to mitigate any environmental damage or restore natural resources.³³

[126] Mr Hylton KC submits that the EPB makes no provision for the social and economic impact on the Claimants nor is the amount of the EPB sufficient to remedy the likely harm to the environment, ecological heritage, the health, lives and livelihoods of the Claimants and other members of the affected communities.³⁴

[127] Nor does the permit for Special Mining Lease 173 require a health impact study nor does it require monitoring of some of the more serious industry-related pollutants.

Findings

[128] In this regard, the Court finds that the Claimants have raised triable issues which ought properly to be ventilated before the Full Court. The issue of

³³ See – The Affidavit of Giselle Campbell in Support of Application to Strike out Claim and of Urgency, which was filed on 9 August 2022, at paragraph 9.

³⁴ The size of the EPB is Seventy-Seven Thousand Nine Hundred and Forty-One United States Dollars and Ninety-Nine cents (USD\$77,941.99).

whether the 4th Defendant has carried out the necessary medical diagnoses to define the corresponding medical care; has guaranteed adequate, timely and specialized medical care, according to the medical conditions diagnosed; has guaranteed access to contaminant-free water; and whether the 4th Defendant has adopted air quality standards which address the most serious industry-related pollutants associated with morbidity and mortality, are serious issues of tremendous public import in Jamaica's current landscape and ought properly to be ventilated fully before the Full Court.

The right to protection from degrading treatment

The Defendant Companies' assertions

[129] The Defendant Companies maintain that the right to protection from degrading treatment has not been engaged for the reason that none of the Claimants assert that the activities attributed to the Defendant Companies have aroused in them such fear that is capable of humiliating and debasing them.³⁵

The Claimants' assertions

[130] The Claimants repeat that they have suffered or are likely to suffer serious injuries, including deteriorating health, premature death and loss of livelihood and the rural way of life. They maintain that the question of whether these allegations meet the threshold of severity to constitute degrading treatment is a matter to be considered by the Full Court.

Findings

[131] The Court accepts the submission made on behalf of the Defendant Companies that, critical to any examination of the allegations which the Claimants have made is not only whether the Claimants have developed a fear, as a result of the bauxite mining activities of the Defendant Companies but also whether that fear is capable of humiliating and debasing them.

[132] Notwithstanding, whether these allegations meet that threshold is a matter to be considered by the Full Court.

³⁵ In this regard, the Defendant Companies rely on the authority of **Patrick Whitely v The Attorney General** [2016] JMFC Full 6.

Alternate means of redress

The Defendant Companies' assertions

[133] The Defendant Companies invite the Court to decline to exercise its powers under section 19(4) of the Constitution. The section provides as follows: -

“(4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law.”

[134] The Defendant Companies further rely on the authorities of **The Attorney General of Trinidad and Tobago v Ramanoop**³⁶ and **Jaroo v Attorney General of Trinidad and Tobago**.³⁷

[135] The Defendant Companies also rely on the authority of **Kadian Parkins & Ors v Cari-Med Group Limited & Anor**,³⁸ where the court stated that applicants must make an informed decision prior to initiating proceedings as to whether the rights being infringed are common law or constitutional rights. Applicants must recognize that constitutional remedies are to be sparingly used and only to assert genuine constitutional rights. The court will not permit the cloaking of a common law action in the garb of constitutional redress. It is settled law that frivolous, vexatious or contrived applications for constitutional redress are to be refused.

The Claimants' assertions

[136] In this regard, the Claimants assert that the Defendant Companies' submissions overlook another important point which was made by the court in the authority involving **Cari-Med**. There, the court also stated that section 19(4) of the Constitution applies only where the alternative remedy is an adequate one. The mere existence of an alternative remedy does not automatically justify excluding constitutional proceedings. The power to

³⁶ [2005] UKPC 15

³⁷ [2002] 2 WLR 705

³⁸ [2021] JMISC Civ 183

decline jurisdiction arises after a consideration of whether the alternative means of redress is an adequate one.

Findings

- [137] The Court accepts the submissions of Mr Hylton KC that the true nature of the instant Claim surrounds the violation of the Claimants' constitutional rights, as outlined in the Fixed Date Claim Form. The Claimants contend that the bauxite mining activities on the part of the Defendant Companies, next to their homes and farms, will result in environmental abuse. They also allege significant physical and psychological health risks.
- [138] Essentially, the instant Claim requires the court to determine the scope and meaning of the constitutional right to a healthy environment and to pronounce on the alleged breach of other fundamental rights guaranteed to the Claimants by virtue of the Charter. To that extent, the Court accepts the submission of Mr Hylton KC that the causes of action in negligence and/or in nuisance do not constitute an "adequate" alternative means of redress.
- [139] The pronouncements of Lindo J, in the authority of **Louie Johnson & Ors v National Solid Waste Management Authority**,³⁹ bear repeating: -

*[41] Generally, claims can only be brought for environmental harm where private parties' interests are involved, such as damage to their property. These claims are usually based on the common law and the actions are brought for nuisance or negligence by those who suffered directly. **With the introduction of the Charter, I am of the view that the avenues for redress have been broadened. The provisions on the enforceable right to healthy environment are clear. The Charter provides for 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;" thereby recognizing a substantive right to a healthy environment and also recognizing infringements on human rights through adverse environmental conditions.***

³⁹ [2017] JMSC Civ 130

[42] *This right can be enforced not only for harm that has occurred but also where there is a threat of harm.'*

[Emphasis added]

[140] For all of these reasons, this Court is of the view that the application to strike out the Claimants' statement of case ought properly to be dismissed.

Other considerations

[141] Finally, the Defendant Companies submit that the conduct of the Claimants represents acquiescence and/or consent and cannot properly ground a claim for a breach of their constitutional rights.

[142] This submission is advanced on the basis that four (4) of the Claimants have signed releases which authorize bauxite mining within three hundred (300) feet of the premises which they occupy. Additionally, eight (8) of the Claimants have repeatedly accepted and/or continue to accept monetary payments from the Defendant Companies.

Findings

[143] While the Claimants do not deny that they have accepted monetary payments from the Defendant Companies, they assert that they signed documents which were presented to them by the Defendant Companies, without having read and/or understand the content of those documents and without the benefit of legal advice.⁴⁰

[144] In those circumstances, this Court is of the view that the issue of the Claimants' conduct in this regard is also a matter to be considered by the Full Court.

THE APPLICATION FOR CONSOLIDATION

[145] By way of the Application for Consolidation, which was filed on 29 July 2022, the Claimants seek an Order that: -

⁴⁰ See – Affidavit of Victoria Grant, which was filed on 29 July 2022, at paragraphs 26 and 27; Affidavit of Linsford Hamilton, which was filed on 29 July 2022, at paragraph 28; Affidavit of Cyril Anderson, which was filed on 29 July 2022, at paragraphs 18, 19 and 20; Affidavit of Merlina Rowe, which was filed on 29 July 2022, at paragraphs 16, 18, 19, 20 and 21.

1. This Claim be consolidated with SU2021 CV00187 Southern Trelawny Environmental Agency and another v The Attorney General and others;
2. Alternatively, this claim be tried with SU2021 CV00187 Southern Trelawny Environmental Agency and another v The Attorney General and others;
3. The costs of this application and order be costs in the Claim;
4. There be such further or other relief as this Honourable Court deems fit.

[146] The application for consolidation is made on the bases that: -

1. Rule 26.1(2)(b) of the Civil Procedure Rules, 2002 provides that the court may consolidate proceedings;
2. Rule 26.1(2)(h) of the Civil Procedure Rules, 2002 provides that the court may try two or more claims on the same occasion;
3. Both claims largely involve the same facts and issues and arise out of bauxite mining carried out or permitted by the Defendants in communities historically considered part of the Cockpit Country;
4. Both claims will require the court to interpret and determine the scope 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, acknowledged by section 13(3)(l) of the Constitution;
5. The Defendants in Claim SU2021 CV00187 are also the Defendants in this Claim and the additional Defendant (the 1st Defendant) is a partnership comprised of the same partners as the 2nd Defendant;
6. There is a risk that there could be inconsistent decisions if the two Claims are not consolidated or heard together;

7. There would be a significant saving of judicial time and costs if the two Claims are consolidated or heard together;
8. In the circumstances, it is in the interest of justice to grant the Orders sought.

[147] The Application for consolidation is supported by the Affidavit of Daynia Allen in Support of Application to Consolidate Claims, which was filed on 3 August 2022.

THE ISSUES

[148] The following issues are determinative of the application for consolidation: -

- (i) Whether this Claim ought properly to be consolidated with the claim numbered SU 2021 CV 00187 between Southern Trelawny Environmental Agency & Anor v The Attorney General for Jamaica & Ors;
- (ii) Alternatively, whether this Claim ought properly to be tried together with the claim numbered SU 2021 CV 00187 between Southern Trelawny Environmental Agency and Anor v The Attorney General for Jamaica and Ors.

THE LAW

Consolidation of claims

[149] Closely connected claims may be ordered to be consolidated. This means that they will continue and be tried as though they were a single claim. Consolidation is only likely to be convenient where there is a strong overlap between two claims, or, where there is a risk of irreconcilable judgments.

[150] A consolidation order may only be made if all the claims to be consolidated are before the court at the same time.

The relevant provisions of the CPR

[151] Rule 26.1(2)(b) of the CPR specifically provides that the court may consolidate proceedings. Where the court is of the view that two or more

claims can be conveniently disposed of together, then the court ought properly to make an order for consolidation.⁴¹

[152] Conversely, rule 26.1(2)(h) of the CPR provides that the court may try two or more claims on the same occasion.

The term “consolidation” defined

[153] In the authority of **O. Augustus Sherriah v DYC Fishing Limited et aux**,⁴² Sykes J (as he then was) defined “consolidation” in the following way: -

“[7] Rule 26.1(2)(b) of the Civil Procedure Rules (CPR) permits the court to consolidate proceedings. There is no definition of consolidation in the rules and so it is prudent to use the definition that has been used over time. It is an expression that has been used in the law for over one hundred years. The usual meaning is this: different claims or causes of action are joined together and treated as if they were all one claim. One of the primary consequences of consolidation is that all findings of fact bind all the parties to the consolidated claim. The purpose of consolidation is to save time, costs and effort. The application is usually made before a trial of any of the matters has commenced.”

The purpose and effect of consolidation

[154] The purpose of consolidation is to save time, costs and effort and the effect of consolidation is that the findings of fact and law bind all the parties to the consolidated claim.

SUBMISSIONS

The submissions advanced on behalf of the Applicants/Claimants

[155] Mr Hylton KC submits that on 20 January 2021, the Southern Trelawny Environmental Agency and Clifton Barrett filed a claim against Noranda Jamaica Bauxite Partners II, New Day Aluminium (Jamaica) Limited and The Attorney General of Jamaica, in the claim numbered SU2021 CV00187.

⁴¹ Stuart Sime in the text, ‘A Practical Approach to Civil Procedure, 9th ed. 2006 stated that: “Consolidation is likely to be convenient only where there is strong overlap between two claims, or where there is a risk of irreconcilable judgments. Where there is minimal overlap, consolidation is inappropriate.”

⁴² [2015] JMSC Civ 27

- [156]** By virtue of that claim, the claimants seek a declaration that the bauxite mining activities which the defendants propose to permit or to carry out, pursuant to Special Mining Lease 173, is likely to breach certain of their constitutional rights. Additionally, the claimants seek consequential relief.
- [157]** Mr Hylton KC submits further that, in the present Claim, the Claimants seek the same relief against the same Defendants. Additionally, the Claimants also seek a similar declaration and other relief, in relation to the bauxite mining activities which the Defendants propose to permit or to carry out, pursuant to two other Special Mining Leases.
- [158]** Mr Hylton KC contends that both claims raise similar issues of fact and of law which are related to the Defendants' bauxite mining activities and operations in and around the Cockpit Country and the impact of those operations on constitutional rights. For this reason, Mr Hylton KC submits, it would save time, costs and effort, were the claims to be consolidated.
- [159]** It is further submitted that consolidation is particularly important given the inequality of arms that exists between the resources of the Claimants, whom Mr Hylton KC reiterates are mostly farmers of limited means and that of the Defendants. An Order for consolidation would allow the Claimants in both claims to share resources, including that of expert witnesses, thereby fostering a more proportionate handling of the matter.
- [160]** Mr Hylton KC maintains that both claims involve novel points of law that will require the court to interpret and determine, for the first time, the scope 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, which is acknowledged by section 13(3)(l) of the Constitution of Jamaica. He further maintains that, given the common question of law, the risk of the delivering irreconcilable judgments makes an Order for consolidation an appropriate one.
- [161]** In the alternative, Mr Hylton KC urged the Court to make an Order that the two claims be tried together. To substantiate this submission, Mr Hylton KC referred the Court to the dicta of Palmer Hamilton J at paragraph **[39]** of the

authority of **Kevin Simmonds v Ministry of Labour & Social Security et al.**⁴³

[162] In this regard, Mr Hylton KC submits that both claims can conveniently be tried together for the reason that both claims raise common issues of fact and of law and that there is a real risk of inconsistent or irreconcilable judgments, were the matters to be tried separately. Mr Hylton KC asserts that no prejudice would inure to any of the parties nor would there be any inconvenience to them, were the claims to be heard together.

[163] Finally, Mr Hylton KC submitted that, although the claims are currently at different stages, it would still be more convenient to try the matters together as it would prevent the parties from having to attend court on two separate occasions to try the same issues and would result in a significant saving of judicial time and costs.

The submissions advanced on behalf of the Respondents/Defendants

[164] For their part, the Respondents/Defendants contend simply that, it is neither necessary nor appropriate for the Court to exercise its discretion to consolidate the claims or to make an Order that they be tried together. The Defendants so contend for the reason that, it cannot be said that, in the main, the legal issues to be determined in one claim are similar to those to be determined in the other.

ANALYSIS AND FINDINGS

[165] It is clear from a careful examination of the instant Claim as well as that numbered SU2021 CV00187, that, the claims, whilst raising similar issues of fact and of law, are not identical. It is for this reason that the Court will decline to make an Order to consolidate both claims.

[166] Notwithstanding, it is still open to the Court to make an Order that both claims be tried together. In that regard, this Court adopts the pronouncements made by Palmer Hamilton J in the authority of **Kevin Simmonds**. There, Palmer Hamilton J outlined seven factors to be considered in determining an application of this nature. These factors are outlined as follows: -

⁴³ [2020] JMSC Civ 173

1. Is there a common issue of fact or law which makes it desirable to have the matters heard together;
2. Is there a real risk that a trial of the matters together will prejudice, or, cause serious inconvenience to, a party to either or both of the claims, even if there are factual and legal similarities;
3. Will a trial of the matters together result in the saving of judicial time or in the saving of other resources;
4. Will a trial of the matters together add expense or result in savings to a party to either or both of the claims;
5. At what stage in the court process has each of the respective matters reached;
6. Is there a real risk that a trial of the matters together will result in undue or inordinate delay;
7. Is there a real risk of inconsistent or irreconcilable judgments, were the claims to be tried separately?

[167] This Court is of the view that an Order ought properly to be made that both claims be tried together, for the following reasons: -

1. That both claims, although not identical, raise similar issues of fact and of law which can be conveniently heard and determined together;
2. That both claims will require the court to interpret and determine the scope 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, which is acknowledged by section 13(3)(l) of the Constitution of Jamaica;
3. That no prejudice would inure to any party, were the claims to be tried together, nor would there be any serious inconvenience caused to any party were the claims to be tried together;

4. That a trial of the claims together would result in the saving of judicial time and other resources;
5. That a trial of the claims together would result in the saving of expenses, such as the cost of expert witnesses and expert reports and would serve to prevent a party from incurring additional or unnecessary expense(s), in that regard;
6. That both claims are currently at a stage where an Order can conveniently be made that they be tried together;
7. That it cannot tenably be argued that an Order that both claims be tried together will result in undue or inordinate delay; and
8. That, were the claims to be tried separately, there is a real risk of inconsistent or irreconcilable judgments.

DISPOSITION

[168] In the result, the Court is prepared to make an Order in the following terms: -

- (i) The action brought in Claim numbered SU 2022 CV 02353 is to be tried together with that brought in Claim numbered SU 2021 CV 00187 Southern Trelawny Environmental Agency and Clifton Barrett v The Attorney General of Jamaica, Noranda Jamaica Bauxite Partners II and New Day Aluminium (Jamaica) Limited.

COMBINED ORDERS

[169] The combined Orders of the Court are as follows: -

1. The Preliminary Objection to the Affidavit evidence of Dr Alford Jones, as contained in the Notice of Preliminary Objection, which was filed on 22 August 2022, is overruled, in part;
2. The Claimants are permitted to rely on the following paragraphs of the Affidavit of Alford Jones, which was filed on 12 August 2022, in respect of the 1st, 2nd and 3rd Defendants' Further

Amended Application to Strike out Claim, which was filed on 23 August 2022: -

- (i) Paragraphs 1-8, inclusive;
 - (ii) Paragraph 11 "In the early...relocated."
 - a. Paragraphs 12-14, inclusive;
 - b. Paragraph 15 "On April 22, 2020, Mr Grant...and May 5, 2021."
 - c. Paragraphs 16 and 17;
 - d. Paragraph 18 "A couple weeks later, ... bed."
 - e. Paragraphs 19 and 20;
 - f. Paragraphs 24-30, inclusive.
3. The Claimants are not permitted to rely on the Reports of Dr Alford Jones, dated 7 April 2022 and December 16, 2021, respectively, in respect of the 1st, 2nd and 3rd Defendants' Further Amended Application to Strike out Claim, which was filed on 23 August 2022;
 4. The 1st, 2nd and 3rd Defendants' Further Amended Application to Strike out Claim, which was filed on 23 August 2022, is dismissed;
 5. The Claimants are to comply with the requirement of rule 56.9(3)(c) of the Civil Procedure Rules, 2002 on or before 11 November 2022;
 6. The action brought in Claim numbered SU 2022 CV 02353 is to be tried together with that brought in Claim numbered SU 2021 CV 00187 Southern Trelawny Environmental Agency and Clifton Barrett v The Attorney General of Jamaica, Noranda Jamaica Bauxite Partners II and New Day Aluminium (Jamaica) Limited;

7. The First Hearing of the Fixed Date Claim Form, which was filed on 29 July 2022, is fixed for Monday, 31 October 2022 at 10:00 a.m.;
8. The hearing of the Application for Injunction, which was filed on 29 July 2022, is fixed for 2 December 2022 at 11:00 a.m., before A. Nembhard J and will be conducted via video conference;
9. The issue of the costs of these proceedings is reserved to 2 December 2022 at 11:00 a.m.;
10. Messrs. Hylton Powell are to prepare, file and serve these Orders.