[2023] JMCA Civ 34

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MR JUSTICE BROOKS P
THE HON MRS JUSTICE V HARRIS JA
THE HON MRS JUSTICE DUNBAR-GREEN JA

SUPREME COURT CIVIL APPEAL NO COA2023CV00009

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

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

AND

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

BETWEEN	**NORANDA JAMAICA BAUXITE PARTNERS**	**1ST APPELLANT**
AND	**NORANDA JAMAICA BAUXITE PARTNERS II**	**2ND APPELLANT**
AND	**NEW DAY ALUMINIUM (JAMAICA) LIMITED**	**3RD APPELLANT**
AND	**VICTORIA GRANT**	**1ST RESPONDENT**
AND	**LINSFORD HAMILTON**	**2ND RESPONDENT**
AND	**CYRIL ANDERSON**	**3RD RESPONDENT**
AND	**MERLINA ROWE**	**4TH RESPONDENT**

AND	**BEVERLY LEVERMORE**	**5TH RESPONDENT**
AND	**ALTY CURRIE**	**6TH RESPONDENT**
AND	**BOBLET CAMPBELL**	**7TH RESPONDENT**
AND	**LAWFORD FLETCHER**	**8TH RESPONDENT**
AND	**EDLIN WALTON**	**9TH RESPONDENT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**10TH RESPONDENT**

Ransford Braham KC, Glenford Watson and Ms Christina Thompson instructed by Glenford Watson for the 1st and 2nd appellants

Miss Carlene Larmond KC and Ms Giselle Campbell instructed by Patterson Mair Hamilton for the 3rd appellant

B St Michael Hylton KC, Ms Malene Alleyne, Ms Melissa McLeod and Ms Daynia Allen instructed by Hylton Powell for the 1st to 9th respondents

Miss Lisa White instructed by the Director of State Proceedings for the 10th respondent

21, 24, 30 March and 9 June 2023

Civil Procedure - Application for interim injunction in constitutional matters - Findings of fact - Whether there is a serious issue to be tried - Whether the applicants will suffer irreparable harm - Balance of convenience - Public interest - Waiver of the requirement of the undertaking as to damages

BROOKS P

The parties

[1] Noranda Jamaica Bauxite Partners ('Noranda I'), Noranda Jamaica Bauxite Partners II ('Noranda II') and New Day Aluminium (Jamaica) Limited ('New Day') (together, 'the appellants') appeal from the decision of a judge of the Supreme Court ('the learned judge'), made on 20 January 2023. The learned judge granted an interim injunction restraining Noranda II and New Day from mining bauxite on lands that the

Government of Jamaica ('the Government'), through its respective agencies, had leased to New Day. Those leases are called Special Mining Leases ('SMLs'). New Day had appointed Noranda II to act as its agent for carrying out the mining and Noranda II got the required environmental permits from the Natural Resources Conservation Authority ('NRCA') to carry out the activity in a section ('the permitted area') of the leased area.

[2] Mrs Victoria Grant, Mr Linsford Hamilton, Mr Cyril Anderson, Ms Merlina Rowe, Ms Beverly Levermore, Mr Alty Currie, Ms Boblet Campbell, Mr Lawford Fletcher, and Mr Edlin Walton ('the 1st to 9th respondents') are the parties who sued the appellants and sought that injunction from the Supreme Court. They live in or near the permitted area. Not only do these respondents resist the appeal, but they have filed a counter-notice of appeal asking this court to reverse the learned judge's refusal of an interim injunction in respect of two other areas, in which they say the appellants' mining of bauxite also adversely affects their lives and livelihood.

[3] The 1st to 9th respondents have also sued the Attorney General of Jamaica ('the Attorney-General'), as the representative of the Government. The Attorney-General appears as the 10th respondent to the appeal.

The application for the interim injunction

[4] The interim injunction, which the 1st to 9th respondents sought, was to restrain the appellants until the determination of their claim, the trial of which is scheduled to start in November 2023. It sought restraints that were almost identical to the permanent injunction that the claim seeks.

[5] The 1st to 9th respondents sought the injunctions on the basis that the appellants and the Government had breached their constitutional rights in several respects.

The evidence before the learned judge

[6] The parties placed extensive affidavit evidence before the learned judge. That evidence is condensed for these purposes, but the court assures the parties that all the evidence has been considered.

[7] The appellants say that they and their predecessor companies have been conducting bauxite mining in Jamaica for close to 60 years. They aver that they export the bauxite to New Day's parent company's factory in Gramercy, Louisiana, in the United States of America. That factory is specially tooled to process bauxite from Jamaica.

[8] There are three SML areas relevant to this case. The three are in rural parts of the parishes of Saint Ann and Trelawny. They are numbered respectively, SML 165, SML 172 and SML 173. Most of the land in those SML areas is owned by the Commissioner of Lands. The bauxite is vested in the Crown by the Minerals (Vesting) Act.

[9] The SML areas are relatively near to some communities in those two parishes. The 1st to 9th respondents are mostly small farmers who live and farm in those communities. Those respondents complain that bauxite mining adversely affects their lives and livelihood. The dust from the mining, they say, affects their health, in that it gets into their airways and causes illness. It is, they aver, especially harmful to residents with respiratory illnesses, exacerbating their conditions and even causing death. In addition, they say, the dust settles on the roofs of their houses and other structures that are used to harvest water for drinking and other domestic purposes. They say that the dust pollutes the water and renders it unfit for its intended uses. This is important, they say, because there is no public piped water in those areas. Further, the 1st to 9th respondents say the dust adversely affects their crops. They allege that mining also creates a physical danger to residents, especially schoolchildren, when the pits are dug very close to homes and schools. They contend that the mining also results in excessive noise daily, from morning until night. There has also been noise from blasting, they assert, and that activity also causes cracks in houses and other structures.

[10] Those matters, the 1st to 9th respondents assert, constitute breaches of their constitutional rights. They contend that the mining activities have breached and/or are likely to breach their rights to life, to reside in any part of Jamaica, to enjoy a healthy and productive environment, and to protection from degrading treatment. In addition, they say that the appellants have breached their constitutional right to receive information.

[11] The appellants have countered most of those assertions by the 1st to 9th respondents. They contend, through their representatives, Messrs Delroy Dell, Evon Williams, and Kent Skyers that:

a. the majority of the residents in the communities in the vicinity of the mining support the appellants because they assist the community by generating economic activity and increasing access to the communities by providing roadways;

b. although the levels of dust (termed 'fugitive dust') from the mining and transportation of the bauxite are below the prescribed standards, the appellants are proactive in liaising with the residents of the communities in the vicinity of the mining; they try to minimise the dust by wetting the mining area and also make monthly payments to residents to compensate for the dust nuisance;

c. the nature of the soil in those areas is such that ordinary tilling and farming practices create fugitive dust, and the farmers do not wear protective gear, such as masks;

d. the appellants assist residents with money for medication and assist with medical treatment, even for illnesses which are not said to be connected to the effects of mining;

e. the residents who are near the mining area are given the option to temporarily or permanently relocate if they wish, and the appellants assist them in that regard by one or more of the following methods:

    i. purchasing their property;

    ii. providing land in a scheme managed by the appellants;

    iii. paying a relocation allowance, whether or not the resident actually relocates;

f. the appellants do not use blasting any more in mining and have not done so for over 12 years;

g. the environmental licences compel the appellants to not only provide domestic water storage facilities but to truck water to the relevant areas in times of water shortage;

h. the only mining pit that was near a school was dug during the COVID-19 pandemic when there was no in-person attendance at school, and the pit has since been filled in and the area reclaimed;

i. no mining is done within 300 feet of any dwelling unless with the owner's consent, for which compensation is paid;

j. the appellants reject the assertion that the fugitive dust damages crops and say that they have never received any complaint from residents in this regard;

k. residents, including the 1st to 9th respondents, are in frequent contact with the appellants' representatives but have never made some of the complaints that are being asserted in the court action;

l. none of these respondents live in Industry Pen, the part of SML 173, which is destined for mining in the first two years of the appellants' Five-Year Mining Plan; the closest respondent resides 981 feet away from an orebody (scheduled for mining in 2024);

m. at least one respondent has her house on lands belonging to the Commissioner of Lands and has no authority to occupy that land; some of the farms are also unlawfully on lands owned by the Commissioner of Lands; all these lands have been leased to the appellants; and

n. the appellants are prohibited from mining in forest reserves and are mandated to protect caves, sinkholes, rivers, springs, wells, and other water resources; they take all reasonable and practicable measures to ensure that the impact on the environment "is no more than is reasonably

> necessary for the lawful, skilled and efficient performance of" their activities (page 576 of the record of appeal).

[12] The appellants' representatives mentioned above, as well as the representatives of various government agencies, also deposed about the importance of the bauxite industry to the appellants, as corporate entities, the factory in Gramercy, and the country. Those witnesses depose that the injunction would have dire consequences for the island's economy, depriving it of approximately 2% of the Gross Domestic Product, but more importantly, for these purposes, would be the "death knell" for the appellants and cause the factory at Gramercy to close completely until it is able to retool to process bauxite from other sources. That process could take more than a year. They further say that preventing the mining would severely compromise the Government's reputation as a contracting entity as it has promised the appellants access to these resources and would not be living up to that promise if an injunction is granted.

The learned judge's findings

[13] In arriving at her decision to grant the application for an interim injunction, the learned judge considered and applied, among others, the principles set out in the timeless case of **American Cyanamid Co v Ethicon Limited** [1975] AC 396; [1975] UKHL 1; [1975] 1 All ER 504 ('**American Cyanamid v Ethicon**'), and the case of **RJR–MacDonald Inc. v The Attorney General of Canada** [1994] 1 RCS 311 ('**RJR–MacDonald Inc**'), the latter of which specifically deals with considering applications for interim injunctions in the context of constitutional claims. She considered:

> a. the merits of the 1st to 9th respondents' case in order to determine whether there was a serious issue to be tried;
> b. whether the 1st to 9th respondents would suffer irreparable harm if the interim injunction were refused (whether damages were an adequate remedy); and

c. which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits (the location of the balance of convenience).

[14] The learned judge granted the interim injunction in respect of SML 173 but refused it in respect of the others. She found as a fact that the appellants had ceased mining activities in SMLs 165 and 172 and that the work being done in those areas was limited to reclamation tasks.

[15] In respect of SML 173, the learned judge found that the 1st to 9th respondents had raised a serious issue to be tried. She held that the appellants intend to use similar mining methods in SML 173 to those which they used in mining the areas in SMLs 165 and 172. The mining methods, she found, will cause the 1st to 9th respondents to lose more than financial resources; they stood to lose their way of life and livelihoods and face deterioration in the quality of their health. She found that the risk of them suffering irreparable harm from the mining was apparent and that the harm they would suffer from a refusal of the interim injunction would be greater than the harm the appellants would suffer from a grant of the interim injunction. Damages, she found, would not be an adequate remedy for the 1st to 9th respondents.

[16] As a result, the learned judge found that the interim injunction should be granted. The learned judge, however, also waived the requirement for the 1st to 9th respondents to provide an undertaking to pay any damages if a court found after a trial that they should not have been granted a pre-trial injunction. She reasoned that although the 1st to 9th respondents did not have the resources to provide the usual undertaking as to damages, the magnitude of the risks that they faced from the appellants' mining activities allowed her to exercise, in favour of the 1st to 9th respondents, the wide discretion that she had to waive the requirement as to the undertaking.

The grounds of appeal

[17] The appellants' grounds of appeal are:

> "1. The Learned Judge erred in attributing to the Appellant Companies an intention to employ the method of blasting, contrary to their evidence that there has not been any blasting in excess of twelve years and that the Appellant Companies do not conduct blasting and do not plan to conduct blasting or use dynamite in any of their operations. In so doing, the Learned Judge arrived at findings adverse to the Appellant Companies without any or any proper evidential basis.
>
> 2. The Learned Judge fell into further error when, on the flawed evidential premise that the Appellant Companies' methods to extract bauxite includes [sic] blasting, she found **'that it is not unreasonable for the [1st to 9th respondents] to suggest that the proposed bauxite mining activities to be carried out by the Appellant Companies would negatively affect these residents**'.
>
> 3. Having regard to the Learned Judge's expressed understanding that the [1st to 9th respondents'] '**individual and collective experiences in relation to mining pursuant to Special Mining Leases 165 and 172**' is the basis on which they assert that mining pursuant to Special Mining Lease 173 is likely to cause them irreparable harm, the Learned Judge:
>
> i. failed to have sufficient regard to evidence of the [1st to 9th respondents'] individual proximity to the orebodies to be mined in SML 173 prior to determination of the claim and erred in granting relief to the [1st to 9th respondents] without any evidence of likely irreparable harm;
> ii. failed to consider that, having regard to the [1st to 9th respondents'] relatively distant proximity to the orebodies in SML 173, which are permitted for mining in accordance with a five-year mining plan, any alleged anticipated irreparable harm to the [1st to 9th respondents] by reason of mining in SML 173 until trial would not likely occur and that there is no reasonable

possibility or likelihood of any harm to the extent or nature of the harm the [1st to 9th respondents] alleged occurred due to mining in SML 165 and SML 172;

iii. arrived at findings adverse to the Appellant Companies without giving, or demonstrating that she gave, any consideration to the Appellant Companies' extensive submissions through King's Counsel on 19 December 2022 on the specific issue as to the likelihood and degree of any alleged irreparable harm to the [1st to 9th respondents], given their relative proximity to areas mined in SML 165/172 on the one hand and to the orebodies in SML 173 on the other.

4. In assessing the evidence and arriving at the conclusion that the [1st to 9th respondents] will suffer irreparable harm, the Learned Judge failed or failed to have sufficient regard to the principle that the evidence must be such as would convince the court that the [1st to 9th respondents] will suffer irreparable harm and that the evidence in the proceedings fell short of that standard as set out in **RJR-McDonald** [sic] **Inc v The Attorney General of Canada and Ors**.

5. The Learned Judge failed to have any regard to the submissions and evidence of the [Appellants] in arriving at the finding that damages would not be an adequate remedy for the [1st to 9th respondents].

6. The Learned Judge, based on the [1st to 9th respondents'] speculation and/or without any evidence at a convincing level of particularity, erred in her finding at Paragraph [106] that the [1st to 9th respondents] '**stand to lose far more than financial resources. They stand to lose their way of life and livelihoods, face deterioration in the quality of their health …losses for which money cannot readily compensate'**.

7. The Learned Judge appeared to give full consideration and acceptance to the [1st to 9th respondents'] untested assertions of harm allegedly caused by mining in SML 165 and 172, without equally considering, or demonstrating that she considered, the Appellant Companies' evidence in response specific to those allegations. In so doing, the Learned Judge failed to fully

assess the material before her which, on a proper review, would lead a reasonable court to conclude that there is no irreparable harm.

8. The Learned Judge failed to sufficiently consider the evidence of the Appellant Companies and the Attorney General that ought to lead to a finding, on any reasonable exercise of judicial discretion, that the balance of convenience rests in favour of the Appellant Companies specifically and the Jamaican economy generally, and against the grant of an interim injunction.

9. The Learned Judge failed to give any consideration to submissions on the balance of convenience, directing her to a prior ruling of the Supreme Court on 22 July 2022 in SU2021CV00187 Southern Trelawny Environmental Agency & Others v Noranda Jamaica Bauxite Partners II and Others which refused the grant of an interim injunction to restrain mining in SML 173.

10. In restricting her findings of suffering by the Appellant Companies to '**financial hardship and financial losses'**, the Learned Judge ignored, and failed to demonstrate that she gave any consideration to, the evidence of the Appellant Companies that included factors such as:

    i. the real prospect of closure of their operations and that their business would be irreparably ruined, if the 2nd and 3rd Appellant Companies were denied the right to access and mine reserves in SML 165, 172 and 173;

    ii. given the depleted levels of reserves in SML 165 and SML 172 and the issue of the high silica content, access to reserves in the Permitted Area of SML 173 is critical to the survival of the Appellant Companies; and

    iii. an interim injunction in circumstances where trial is one year away, would sound the death knell for the Appellant Companies.

11. The Learned Judge misunderstood and/or misapplied the principles in **RJR-McDonald** [sic] relating to the balance of convenience as it relates to a case by a private applicant. In so doing, the Learned Judge erred in

applying the standard relevant to when a public authority is the applicant and did not consider the finding in **RJR-McDonald** [sic] that when a private applicant alleges that the public interest is at risk, that harm must be demonstrated.

12. The Learned Judge failed to appreciate that there was no evidence before her by the [1st to 9th respondents] that demonstrated that there is any harm to the public interest or to anyone that resides in Industry Pen, part of SML 173 where mining is to commence and where the [1st to 9th respondents] admittedly do not even reside, as justifying the grant of the interim injunction to restrain mining in the said area.

13. The Learned Judge erred when she made a finding adverse to the Appellant Companies that the specific conditions in the Permit issued for the Permitted Area in SML 173 **'are similar to those…in respect of Special Mining Leases 165 and 172, in the face of which the [1st to 9th respondents'] complaints are made'** without considering or demonstrating that she considered the Appellant Companies' evidence and submission specifically on that issue, namely:

    i. the evidence to which the Court was specifically directed on 19 December 2022 detailing the vastly more expansive and germane specific conditions contained in the Permit for the Permitted Area in SML 173, as opposed to those in the Permits for SML 165 and 172, and that these expansive specific conditions were sufficient to address the threat of harm the [1st to 9th respondents] said they feared if mining were permitted in SML 173;

    ii. the submissions of the Appellant Companies on 19 December 2022 as to the differences in the specific conditions between the respective Permit conditions, which submissions also specifically addressed queries by the Court regarding a comparison of the specific conditions in the SML 173 Permit vis-à-vis those in the Permits for SML 165 and 172.

14. In weighing the balance of convenience, the Learned Judge erred in failing to consider the evidence that a

lobby group called Freedom Imaginaries publicly claims responsibility for the claim as part of its Strategic Litigation and Advocacy Project against 'extractivism' and whether the dominant purpose of the claim is the said project.

15. The Learned Judge misunderstood and/or misapplied the law and principles in The Belize Alliance of Conservation Non-Governmental Organizations v The Department of the Environment and Belize Electricity Company Limited [2003] UKPC 63 when she exercised her discretion to waive the requirement of the [1st to 9th respondents] to give an undertaking as to damages." (Bold and underlining as in original)

The counter-notice of appeal

[18] The grounds set out in the 1st to 9th respondents' counter-notice of appeal are:

"a. The learned judge failed to have proper regard to the evidence that mining activities other than reclamation continued in the areas of Special Mining Leases 165 and 172, including some of the [Appellants'] own evidence.

b. The learned judge failed to have sufficient regard to the fact that even if mining activities had ceased in the areas of Special Mining Leases 165 and 172, given that the Appellants are permitted to mine in those areas, this still poses a real and imminent threat that they can resume mining at any time and cause harm to the 1st to 9th Respondents who live in those areas.

c. The learned judge failed to have any or any sufficient regard to the Appellants' own evidence that they were accessing and blending the bauxite in the areas of Special Mining Leases 165 and 172 until they could access reserves in the area of Special Mining Lease 173, so that, in granting an injunction to prevent mining in Special Mining Lease 173, the judge should have found that mining would likely continue/ resume in the areas of Special Mining Leases 165 and 172, and therefore the judge erred in not also granting an injunction in respect of Special Mining Leases 165 and 172 to adequately protect the 1st to 9th Respondents.

d. The learned judge erred when she refused to grant an injunction to restrain mining and mining activities in the areas of Special Mining Leases 165 and 172, in light of the 1st to 9th Respondents' evidence of their experience of serious negative impacts of bauxite mining on their health, contamination of their drinking water and destruction of their crops (among other impacts) under these mining leases in particular;

e. The learned judge, in refusing an injunction to restrain mining and mining activities in the areas of Special Mining Leases 165 and 172, erred and acted inconsistently with her own findings that the 1st to 9th Respondents stand to lose their way of life and livelihoods and face the deterioration in the quality of their health, in circumstances where there are no comprehensive medical health facilities in the affected communities."

The issues to be analysed

[19] It is to be noted that there is no complaint about the learned judge's finding that there are serious issues to be tried. As a result, there will be no analysis of that factor, which is normally a critical element of any consideration of an application for an interim injunction. The stress will be on the issues that usually follow the consideration of that factor.

[20] Learned counsel for the respective parties assisted the court by helpfully reducing the respective grounds into issues by which the grounds could be analysed and determined. From those issues, the court has settled the ones by which it will carry out its analysis. The issues are whether the learned judge erred in:

a. her findings of fact;

b. finding that the 1st to 9th respondents had proved that they would suffer irreparable harm;

c. determining where the balance of convenience lies; and

d. waiving the requirement of the undertaking as to damages.

After those issues are considered, the counter-notice of appeal will be assessed.

[21] Before doing so, however, it is necessary to consider:

a. the overarching issue of the approach to appeals from an exercise of discretion; and
b. the question of the motivation behind the claim.

An important overarching principle

[22] In considering appeals from the exercise of discretion by judges at first instance, an appellate court is restricted in its approach. It is not entitled to set aside the decision of the first instance judge merely because it disagrees with it or would have decided the matter differently. For it to overturn that decision, the appellate court must find that the judge at first instance:

a. misunderstood or misapplied the evidence or the law;
b. arrived at an inference of fact that was demonstrably wrong; or
c. decided the issues in a manner that no judge mindful of his or her duty to act judicially would.

These principles are set out in **The Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 in para. [20] ('**AG v MacKay**').

[23] The issues will be evaluated bearing that guidance in mind.

The motivation behind the claim

[24] The appellants complained, in ground of appeal number 14, that the learned judge failed to consider that a lobby group called "Freedom Imaginaries" is responsible for the claim that the 1st to 9th respondents filed. They pointed to the fact that Freedom

Imaginaries, on its website, publicly claimed responsibility for the claim as part of its strategic litigation and advocacy project against "extractivism". The appellants say that that is the dominant purpose of the litigation, and the learned judge should have taken that evidence into account when considering the balance of convenience.

[25] Learned counsel for the appellants, Miss Larmond KC, pointed out, that in addition to the claim not being a genuine complaint by the 1st to 9th respondents, there was no urgency to the matter, as Freedom Imaginaries stated on its website that the claim came after months of fieldwork. Those factors, learned King's Counsel submitted, were ignored by the learned judge.

[26] Learned counsel for the 1st to 9th respondents, Mr Hylton KC, acknowledged the contents of the Freedom Imaginaries' website but submitted that the appellants' complaint is a distraction from the real issues before the learned judge. Learned King's Counsel pointed out that the 1st to 9th respondents are real people with real concerns, which they have brought to the court to be resolved. He pointed to the evidence of the illnesses and death that the 1st to 9th respondents attribute to the dust generated by the appellants' mining activities. He also pointed to the fact that SML 173 was granted in January 2022, Mrs Grant's husband died in February 2022 and the claim was filed in July 2022.

[27] The appellants are not on good ground with this complaint. The fact that the 1st to 9th respondents may have been organised and galvanised into filing and pursuing this claim, does not reduce the validity of their allegations. It was for the trial judge to determine whether those allegations permitted the grant of a permanent injunction. This ground fails.

Issue a: Whether the learned judge erred in her findings of fact (grounds 1, 2 and 13)

[28] The appellants assert that this court can overturn the learned judge's decision because she failed to properly consider two important issues of fact and consequently

arrived at a skewed view of the case. The first, they say, in grounds 1 and 2, is that the learned judge erred in finding that the appellants would be using blasting as part of their mining activity and that that finding led the learned judge into holding that there would be irreparable harm to the 1st to 9th respondents. The second, the appellants say, in ground 13, is that the learned judge failed to consider that there were real differences between the specific conditions stipulated by the environmental permit to mine in the SML 173 area and the previous environmental permits, particularly as it relates to the prevention or minimising of pollution, and, in particular, fugitive dust.

[29] The 1st to 9th respondents contend that a close examination of the learned judge's comments will show that she did not err, as the appellants have asserted, but that, in any event, those issues do not go to the core of the judgment or the case. They argue that the learned judge did not emphasise the blasting but said it was one of the methods the appellants used in mining. The 1st to 9th respondents argue that the fact that the environmental permit for SML 173 has a greater number of conditions does not affect the substance of the conditions, which is essentially identical to the earlier permits.

The analysis

The blasting

[30] At least two witnesses for the 1st to 9th respondents deposed about blasting being previously used as a mining technique and the deleterious effect that it had on their health and the structural soundness of their houses. The appellants' evidence in respect of the blasting was that the 1st to 9th respondents had no reason to be apprehensive that there would be noise or vibrations from blasting as the appellants had not used blasting as a mining method for 12 years and did not plan to use it when mining in the SML 173 area.

[31] The learned judge made her comments about the issue of blasting in para. [104] of her written judgment. She said:

> "**The [Appellants] aver an intention to employ similar methods to those which were utilized as part of Special Mining Leases 165 and 172, in respect of the extraction of the bauxite ore. This includes the method of blasting**. In the face of this evidence, this Court is unable to accept the submission of the [Appellants] that Ms Grant and Mr Anderson, at a distance of 2,395ft or 0.5 miles, are sufficiently removed from the proposed bauxite mining activities which are to be carried out in Industry Pen, so as to render the concerns of the [1st to 9th respondents] nugatory. **Conversely, the Court finds that Ms Grant and Mr Anderson are sufficiently proximate to the geographical area in which the bauxite mining activities are to be carried out in Industry Pen.** This Court is of the view that **it is not unreasonable for the [1st to 9th respondents] to suggest that the proposed bauxite mining activities which are to be carried out by the [Appellants] would negatively affect these residents**." (Emphasis supplied)

[32] A fair reading of the learned judge's comment in this area not only shows that she was of the view that blasting would be a method of mining that the appellants would use going forward, but that she viewed it as an important consideration in bolstering the assertions of the 1st to 9th respondents that mining would have a negative effect on their lives. The reference to blasting was an important illustration of the negative effect that mining had on the 1st to 9th respondents.

[33] In doing so the learned judge ignored evidence adduced on behalf of the appellants, which was not directly refuted by the 1st to 9th respondents. Mr Kent Skyers, in para. 44 of his affidavit, filed on 22 August 2022, deposed:

> "I say in response to Paragraphs 14 and 15 of Linsford Hamilton's affidavit that the [appellants] have not used dynamite or conducted any blasting activities in any aspect of their operations in excess of twelve years. The said [appellants] **do not plan to conduct blasting or use dynamite in their operations**. Further, blasting could only be done with the express prior approval of the NRCA/NEPA and after applying for and obtaining relevant blasting permits and licences prescribing specific and strict conditions for any

> such activity." (Emphasis supplied) (See pages 390-391 of the record of appeal)

[34] It is true that Mr Skyers did not specifically rule out the use of blasting (although he did say, in para. 55 of that affidavit, that "the [appellants] do not conduct blasting or use dynamite in any aspect of their operations"), but the learned judge also had evidence before her that blasting was prohibited unless specific authorisation was given. Specific condition 50 of the environmental permit for SML 173 states:

> "The Permittee [Noranda II] and/or its agents is prohibited from undertaking blasting activities or use of explosives on site save and except with the expressed written approval of the MGD [Mines and Geology Division]. A copy of the approval shall be submitted to the Manager of the Enforcement Branch of the National Environment and Planning Agency…prior to the conduct of any blasting/use of explosives." (see page 526 of the record of appeal)

[35] Mr Hylton submitted that that condition would have provided no comfort for the 1st to 9th respondents. He reasoned that this is so because there is no requirement to inform them of any intention to carry out blasting. Learned King's Counsel's submission does not consider specific conditions 8, 11 and 12 (pages 522 and 523 of the record of appeal) of the NRCA permit, relevant to SML 173 ('the SML 173 mining permit'), which require Noranda II to effect sensitisation programmes for the surrounding communities, conduct quarterly meetings at a minimum with those communities and maintain a complaints' register that is accessible to the public.

[36] Despite Mr Hylton's submission, the issue is, however, still important in the context of the judgment, and if the learned judge was not satisfied with the structure in place for having blasting done, she should have said so. This would, therefore, be a basis for deciding that the learned judge ignored a material fact in arriving at her decision.

The SML 173 mining permit's structure for the control of pollution

[37] The learned judge addressed the structure for the protection of the environment in para. [132] of her judgment. She said, in part,

> "In the present instance, [SML 173 mining permit] contains seventy-five (75) conditions which are imposed on Noranda II. These conditions are to allow for the proper management, conservation and protection of the environment and the health and safety of the residents who reside in and around the proposed mining areas contained within [SML 173]. The Permit details specific conditions for the protection of water resources or the water supply, air quality and fugitive dust control, as well as restoration. **These specific conditions are similar to those prescribed by the NRCA, in respect of [SMLs 165 and 172], in the face of which the [1st to 9th respondents'] complaints are made**." (Emphasis supplied)

[38] The appellants complain, in ground 13, that the learned judge did not recognise that the conditions imposed in the SML 173 mining permit were more stringent than those for SMLs 165 and 172. The 1st to 9th respondents assert that whereas the conditions for SML 173 appear more extensive, there are no material differences in the areas that affect the quality of life of the 1st to 9th respondents, which could undermine the learned judge's finding that they were similar to the previous conditions.

[39] A perusal of the three relevant SML mining permits shows that they have evolved in stringency. The SML 173 mining permit is the most stringent of the three. As was mentioned in the discussion of the blasting, there are requirements for special monitoring and stakeholder engagement, which did not appear in the permits for SML 165 or SML 172. With respect to dust control, however, instead of specific requirements such as covering material being transported, wetting roads and stockpiles of stored material, and removing extraneous material from the wheels of haulage trucks before they leave the mining site, the SML 173 mining permit relies more on a general requirement that Noranda II "shall implement mitigative measures to prevent the generation of fugitive dust in the event that [it] operates close to any residential areas and/or on the public thoroughfare" (specific condition 30). There is a requirement that Noranda II submits an Air Quality Management Plan for approval, but there is nothing in the specific conditions dealing with dust control that would undermine the learned judge's assessment of them.

The 1st to 9th respondents are correct in their assertions regarding these comments by the learned judge.

[40] The arrangement for controlling the pollution of drinking water is also differently treated in the SML 173 mining permit. The major difference is that, whereas the SML 172 mining permit treats the issue of potable water by itself, the SML 173 mining permit treats it as part of the wider issue of water resources and water supply. The SML 172 mining permit simply requires Noranda II to "ensure that water tanks are available for the storage of potable water" (specific condition 27). The SML 173 mining permit, at specific condition 26, more extensively requires Noranda II to:

> "…ensure that, where individual/public water supplies (such as tanks and catchments) may be affected by the operations, measures are implemented to protect same and if disturbed or damaged be responsible for replacing the (sources or facilities). In instances of damage or disturbance [Noranda II] shall truck potable water to the affected areas in order to ensure water supply is maintained until normal water supply is restored."

[41] The complaint that there is a significant difference in this regard is well-placed.

[42] Both the SML 172 mining permit and the SML 173 mining permit are similar in their terms in respect of noise abatement. They both require Noranda II to limit noise levels when operating within 300 feet of any building or occupied premises. The times for operation are also identical. In fact, the SML 172 mining permit has a restriction that the SML 173 mining permit does not contain. The former requires "where applicable, noise suppression devices (such as mufflers)" to be used "on equipment to reduce the impact of noise" (specific condition 26).

[43] There can be no valid complaint about the learned judge's assessment that the SML 173 mining permit has resulted in insignificant improvement with regard to noise pollution. Overall, it cannot be said that the learned judge was plainly wrong in her comparison of the SML mining permits.

[44] On the analysis of the learned judge's finding of fact on these two issues, she erred in respect of the issue of the blasting but not in respect of the matter of pollution control. However, the error is sufficient to allow this court to set aside the decision and determine the matter anew.

Issue b: Whether the learned judge erred in finding that the 1st to 9th respondents had proved that they would suffer irreparable harm (grounds 1-7 and 13)

[45] In para. [110] of her judgment, the learned judge found that "the risk of irreparable harm to the [1st to 9th respondents] is apparent and that the balance of convenience lies in favour of the granting of the injunctive relief sought, in respect of [SML 173]". The appellants, in grounds of appeal one to seven and ground 13, have taken issue with that finding. The overlap with the grounds covered under issue a is noted, but they cannot be ignored in considering the overall picture of irreparable harm.

[46] The appellants submit that the 1st to 9th respondents' evidence regarding irreparable harm is speculative. They contend that, as a result, the learned judge erred when she found that the evidence was sufficient to satisfy her that the 1st to 9th respondents would suffer irreparable harm if the interim injunction, in relation to SML 173, was not granted. Their complaints in this regard span a wide gamut of areas.

[47] The appellants argue that the learned judge speculated that they would utilise blasting during their mining activities (notwithstanding the contrary evidence) to arrive at her finding that two of the respondents, Mrs Grant and Mr Anderson, would suffer irreparable harm if the interim injunction was not granted.

[48] The appellants contend that the learned judge granted the interim injunction to the 1st to 9th respondents, although she found that only two of the nine respondents would be occasioned irreparable harm because of the mining activities.

[49] The appellants further say the learned judge failed to have regard to the submissions made regarding the likelihood and degree of any alleged irreparable harm

to the 1st to 9th respondents, considering the distance between their homes and the identified pockets of bauxite ('the orebodies') in SML 173, compared to their proximity to the orebodies in SMLs 165 and 172. In this regard, the appellants contend that Mr Fletcher is the only respondent who lives within SML 173. His grouses, they say, are that his family has health issues, which, although unrelated to mining, may be aggravated by bauxite mining. He also says that the mining will ruin his rural way of life. The appellants further contend that the other respondents, who live near SMLs 165 or 172 but not SML 173, are fearful based on their assumption that whatever injury or damage was caused to them during the mining of the areas in SMLs 165 and 172 will also occur during the mining of the SML 173 area. That fear is unfounded, the appellants assert, because those respondents are not near the SML 173 area.

[50] The appellants argue that the learned judge erred in relation to her findings that the 1st to 9th respondents' loss was more than that of the appellants' financial losses. That is, the 1st to 9th respondents' health and livelihood were at risk, and money could not readily compensate them, especially since the medical facilities in the community are inadequate. The appellants say, however, that the 1st to 9th respondents have only placed bald assertions before the court as to injury to health. Additionally, the appellants say further that the 1st to 9th respondents have claimed and given evidence of monetary loss, and thus their claimed loss cannot be stated to be irreparable.

[51] The appellants also submit that the learned judge erred when she ruled on irreparable harm based on her determination that the 1st to 9th respondents' constitutional rights would likely be breached. The appellants argue that that ruling is improper as it decides substantive constitutional issues during an interim remedy application. The appellants submit that the 1st to 9th respondents' proximity to the proposed mining sites and the timing of the Mine Plans up to 2024 illustrate that in relation to SML 173, there is no likelihood of harm, prior to the trial of the claim, like that which occurred on SMLs 165 or 172.

[52] The appellants also opine that the learned judge, in determining irreparable harm, ought to have considered the environmental regulator's directives to ascertain if the permit had the relevant mechanism to prevent or reduce any irreparable harm. The appellants argue that the SML 173 mining permit had greater protection than that of the previous SML 165 and 172. For this argument, the appellants rely on the authority of **Ashton Evelyn Pitt v The Attorney General of Jamaica & Others** [2018] JMFC Full 7, which they contend the learned judge wrongly rejected as guidance for this case because, she said, it was a judgment after a Full Court hearing.

[53] In support of these arguments, the appellants rely on a pronouncement in **RJR–MacDonald Inc** for their position that the 1st to 9th respondents ought to prove that they will suffer irreparable harm if an interim injunction is not granted. The appellants also rely on **Spencer and others v The Attorney General of Canada** 2021 FC 361 for their argument that irreparable harm must be proven with specificity and not be based on speculation. Further, the appellants assert that such harm must be more than a possibility, it must be highly likely to occur, and this determination depends on the circumstances of each case. In other words, there must be a sound evidentiary foundation.

[54] The 1st to 9th respondents support the learned judge's reasoning and conclusion on the issue of irreparable harm. They argue that several of the 1st to 9th respondents live in or near the area earmarked for SML 173. They say that Mrs Grant, Mr Anderson, Ms Levermore and Mr Currie all live near or on the border of the SML 173 area, which is close enough to be affected by the mining activities. Additionally, the 1st to 9th respondents contend that an interim injunction may be granted even if only one respondent will suffer harm, and it is not imperative that it be shown that all the respondents will suffer harm.

[55] The 1st to 9th respondents also contend that their grouses regarding mining in the SML 173 area are not solely based on past experiences with SMLs 165 and 172, but also based on how close they are located to SML 173.

[56] These respondents rely on the authority of **Beacon Insurance Company Limited v Maharaj Bookstore Limited** [2014] UKPC 21 for their position that if a judge erred on a factual conclusion, it is not sufficient to cause the setting aside of said judge's decision. The error must be "sufficiently material" to affect the judge's decision. Therefore, assessing the case as a whole, they say, there was sufficient evidence upon which the learned judge could have granted the interim injunction. That is, the learned judge's alleged error in finding that the appellants intended to utilise blasting as a mining methodology and that the SML 173 mining permit was similar to the mining permits for SMLs 165 and 172 regarding water quality, air quality, noise and fugitive dust, were not so significant to render it incorrect. This is so because, notwithstanding provisions being present in SMLs 165 and 172 which are similar to that of SML 173, the 1st to 9th respondents suffered harm. The only major difference is that in the SML 173 mining permit, there is a clause for the provision of potable water where tanks and catchments are affected by the mining, whilst in mining permits for SMLs 165 and 172, there was only a requirement to provide water tanks for the storage of potable water.

[57] The 1st to 9th respondents also rely on **RJR–MacDonald Inc** in support of their arguments that irreparable harm has been proven.

[58] The 10th respondent supports the appellants' position in respect of this appeal. It argues that the learned judge, in determining irreparable harm, did not give due consideration to the economic implications of granting the interim injunction. Those implications, Ms White submitted, on behalf of the Attorney-General, were set out in Mr Cebert Mitchell's affidavit evidence.

The analysis

[59] The issue of irreparable harm that is to be considered at this stage is the irreparable harm that the applicant for the interim injunction asserts that he or she will suffer if the interim injunction is not granted. As a result, the harm that the appellants assert that they or the government will suffer if the interim injunction is granted is not relevant at this stage.

[60] The recent case of **Spencer and others v The Attorney General of Canada** confirmed the definition and scope of irreparable harm in the context of constitutional breach cases, as adumbrated in **RJR–MacDonald Inc**. The learning is that irreparable harm relates to the nature of the harm and not the magnitude. It is harm that damages cannot adequately compensate for, or cure. It must be based on a convincing level of evidence and not mere speculation. It must be highly likely, not merely possible. Further, allegations of breaches of constitutional rights are not sufficient to prove this harm because it must be established independently and not inferred based on the possibility of a constitutional breach that is yet to be determined. The court, in **RJR–MacDonald Inc**, said, in part, on page 348:

> "At the second stage [of applications for injunctions in Canadian Charter cases] the applicant must convince the court that it will suffer irreparable harm if the relief is not granted. `Irreparable' refers to the nature of the harm rather than its magnitude. In *Charter* cases, even quantifiable financial loss relied upon by an applicant may be considered irreparable harm so long as it is unclear that such loss could be recovered at the time of a decision on the merits." (Italics as in original)

[61] Having assessed the evidence, which was before the learned judge, it cannot be said that the evidence provided by the 1st to 9th respondents could convince a court that they would suffer irreparable harm. The appellants are correct in asserting that the harm to which the 1st to 9th respondents point, as to effect on their health and livelihood, is speculative. This is because it is largely based on past experiences when the present circumstances, particularly the issues of the blasting and the provision of potable water have been shown to differ significantly.

[62] Further, it cannot be said that the evidence at this stage, as to the effect on health is convincing. Those effects cannot be said to be "highly likely". There is no medical report before this court which states unequivocally (and does not merely infer) that mining within the Industry Pen area will cause any health risks, moreover detrimental health risks to the 1st to 9th respondents. It is noted that even in relation to the past occurrences,

which are relied on as precedent to determine what may occur in the present instance, there was no medical report or other scientific evidence to state definitively that the mining activities caused health issues. The 1st to 9th respondents (or some of them) make several bald assertions as to the deleterious effect of the mining but have not supported those assertions with convincing medical evidence.

[63] Dr Alford Jones, a medical doctor, in his affidavit, filed 12 August 2022, deposed on behalf of the 1st to 9th respondents. He pointed out that, in the early days of bauxite mining, "all who lived in proximity to mining areas were relocated". He lamented that he was not aware of any study on "the health impacts [sic] of bauxite mining in St. Ann" that the Government has commissioned. Nonetheless, he pointed to the case of Mrs Grant's husband, Mr Alfred Grant, whom he treated. Dr Jones reported that Mr Grant's respiratory condition worsened "when mining started literally in Mr. Grant's backyard".

[64] The evidence regarding the Grants, however, is that they are squatting on the land where they have established their dwelling. Despite that, Noranda II gave them money to relocate, but they did not do so. The learned judge made a curious comment on this situation at para. [108] of her judgment. She said:

> "The Court notes however, that section 13 of The Charter specifically provides that all persons in Jamaica are entitled to preserve for themselves and future generations the fundamental rights and freedoms to which they are entitled by virtue of their inherent dignity as persons and as citizens of a free and democratic society. Furthermore, the evidence adduced on behalf of the [Appellants] discloses that Ms Grant has been allowed to remain in possession of the land and that she, along with her late husband, was [sic] paid relocation compensation and dust allowance compensation, quarterly, during the bauxite mining and reclamation activities, which were carried out by the [Appellants] pursuant to Special Mining Lease 172."

[65] It is not clear whether the learned judge was saying, in that context, that Mrs Grant and her family were entitled to squat on the land for their benefit and for "future generations" of Grants and prevent the lessees from carrying out the activities for which

they had been given the lease. She, however, did not expand on the point and perhaps happily so.

[66] In addition, there is no conclusive connection between the bauxite mining and Mr Grant's illness and death. Dr Jones described Mr Grant as a chronic smoker, who also suffered from non-respiratory issues. A contributing cause of Mr Grant's death was prostate cancer.

[67] In a similar manner, one of the respondents, Mr Anderson, at paras. 29, 30 and 31 of his affidavit in support of the claim, asserts that mining will have a deleterious effect on his life and community but does not explain how it is that the mining will have that effect. He states:

> "29. Mining in the middle of my community will once again damage my home that I had to repair with no help from Noranda. It will destroy my crops, deprive me of the ability to feed and support my family, and ruin my connection to the land.
>
> 30. Mining will ruin the rural character of my community, preserved over generations, including historical houses, farm lands and graves where our ancestors rest.
>
> 31. I worry about the long-term health impacts of exposure to bauxite dust, especially since I have a history of asthma caused by previous mining."

The absence of specificity is patent.

[68] The evidence from Mr Skyers, on behalf of the appellants, is also that Mr Anderson's home and farm are not within Industry Pen, where the mining is scheduled to take place in 2023.

[69] Mr Hylton submitted that the court should not be restricted to the view that people are only affected where they live or have their farms, but that they have lives outside of

those locations. Learned King's Counsel submitted that their moving about in the community also must be considered.

[70] The difficulty with the submission is that the evidence of the 1st to 9th respondents, in this regard, speaks to their homes, schools and farms. They do not speak about their going about in the community, and the evidence is that mining does not take place within communities. Specific condition 47 of the SML 173 mining permit requires Noranda II to "maintain a minimum setback of 91.44 m (300 ft) of the mining activities from any building, save and except where prior permission is granted by the occupant(s) and/or the Commissioner of Mines".

[71] On the above analysis, the 1st to 9th respondents have failed to provide any convincing evidence to prove any high likelihood of irreparable harm prior to the hearing of the substantive matter. The evidence proffered by the 1st to 9th respondent falls short of being certain. The learned judge erred in finding that they had satisfied that requirement.

Issue c: Whether the learned judge erred in determining where the balance of convenience lies (grounds 8-12)

[72] In relation to SML 173, the learned judge found that the balance of convenience lay in favour of granting the interim injunction. She determined that, based on the evidence, the appellants would suffer financial hardship and losses, but the 1st to 9th respondents would lose far more. She outlined that those respondents would "lose their way of life and livelihoods, face the deterioration in the quality of their health, in circumstances where there are no comprehensive medical health facilities in the affected communities". Those, she opined, "are losses for which money cannot readily compensate" (see para. [106] of the learned judge's judgment).

[73] The appellants say that the learned judge erred in her finding that the balance of convenience favoured the 1st to 9th respondents. They argue that the learned judge fell into error because she failed to adequately consider the degree of inconvenience they

would suffer because of the interim injunction. The appellants accept that the learned judge, at para. [92], mentioned the closure of the 3rd appellant's parent company's refinery. They contend, however, that that did not mean that the learned judge appreciated that the granting of the interim injunction would result in the closure and irreparable ruin of their business. This, they assert, was because mining in the permitted area of SML 173 is essential to the sustenance of their business since mining is the sole business of the 2nd and 3rd appellants. The learned judge's reference only to the closure of the refinery, the appellants argue, grossly undervalues the magnitude of their loss and the absence of options for survival. This, they contend, should be considered in the light of the fact that the trial being some time away would result in the death of their business; that is, it would no longer exist.

[74] The learned judge's emphasis, the appellants argue, was on the Jamaican economy, and not the appellants. They insist that the learned judge's balancing exercise was insufficient. Miss Larmond submitted that the learned judge failed to consider the previous decision of **Southern Trelawny Environmental Agency and others v Noranda Bauxite Partners II and others** (unreported), Supreme Court, Jamaica, SU2021CV00187, judgment delivered 22 July 2022, where there were similar issues raised and the judge, in that case, refused to grant the interim injunction sought.

[75] Miss Larmond invited this court to balance the factors affecting the appellants against those affecting the 1st to 9th respondents. She urged the court to note that only a few respondents live and/or farm in the SML 173 area. She specified that Mr Fletcher, the 8th respondent, lives in the permitted area but he does not live in Industry Pen, which is where the mining will occur prior to the trial date. She added that the mining near Mr Fletcher's residence is only provided for in the Mine Plan for 2024.

[76] Learned King's Counsel submitted that any damage the 1st to 9th respondents may potentially suffer because of the interim injunction being discharged can be compensated in damages. Therefore, the court's ultimate decision at trial would not be nugatory. She juxtaposed that with the appellants' position, noting that if the interim injunction stands,

the appellants' operations in Jamaica may close. She argued that, even if the appellants succeed at the trial, it would be fruitless. By way of illustration, she submitted that if the 3rd appellant's parent company, because of the present interim injunction, retrofits and retools to utilise bauxite from another jurisdiction, that would result in it incurring considerable expense when it is receiving no revenue. She pointed out that it would take time to make those changes. Learned King's Counsel argued that this level of loss, hardship and financial ruin would all occur in the context where, if at trial the permanent injunction is refused, the appellants would not recover the losses.

[77] The 1st to 9th respondents, in their written submissions, asserted that the learned judge was correct in her finding that the balance of convenience was in their favour. They noted that the learned judge arrived at her finding after considering all the evidence before her.

[78] Mr Hylton submitted that the learned judge's findings on the balance of convenience are the result of the exercise of the learned judge's discretion. He cautioned that this court should not lightly disturb the exercise of a judge's discretion. Mr Hylton argued that the appellants have not presented any evidence which suggested that the learned judge incorrectly exercised her discretion in balancing the scales of convenience to merit this court's intervention.

[79] Mr Hylton advanced that the learned judge properly had regard to the fact that the granting of the interim injunction could result in the closure of the appellants' business. He argued that although the appellants assert that the temporary stoppage of the mining activity due to the interim injunction would close their business, the appellants did not provide evidence that the closure would be "inevitable or permanent". Mr Hylton contended that the possible closure of the appellants' business due to the grant of the interim injunction is not a compelling reason that the appellants' business cannot resume after the trial on the merits, especially since there was already a four-year delay to mining in the SML 173 area due to the process of obtaining the Environmental Impact Assessment. In the round, Mr Hylton reasoned that the alleged inconvenience to the

appellants does not outweigh the inconvenience to the 1st to 9th respondents, which largely relates to their lives and health.

[80] Learned King's Counsel highlighted that the factual matrix in **Southern Trelawny Environmental Agency and others v Noranda Bauxite and others** was different from the present case. Accordingly, he submitted, it was correct for the learned judge to independently assess the present case. Additionally, he noted that there are no written reasons in the matter of **Southern Trelawny Environmental Agency and others v Noranda Bauxite and others** to guide the learned judge.

[81] Miss White submitted that the learned judge erred when she failed to appreciate the evidence before her in relation to the impact the granting of the interim injunction would have on the nation. She argued that the learned judge erred in her balancing of the inconvenience to the parties and fell into error when she granted the interim injunction. She submitted that the evidence, notably that of Mr Mitchell, clearly highlights that the balance of convenience favoured the appellants.

Public interest

[82] Miss Larmond submitted that the learned judge misunderstood the principles in **RJR–MacDonald Inc** that addressed public interest. She argued that the guidance from that case suggests that a private applicant, who alleges that the public interest is threatened, must adduce evidence to support the assertion. Learned King's Counsel submitted that the learned judge failed to appreciate that the 1st to 9th respondents advanced no evidence that the public interest is at risk or that anyone residing in the SML 173 area will suffer harm. On the contrary, Miss Larmond submitted that the appellants gave evidence of public interest considerations, both financially and socially, tipping the balance in their favour. She said the closure of the appellants' business in Jamaica will adversely impact the Jamaican economy as it stands to lose millions of United States dollars each year. She also advanced that the communities in the vicinity of the SML 165, 172 and 173 areas would also lose, as the appellants provide salaries for workers, purchase goods and services, and the multiplier effect would also be lost.

[83] Mr Hylton submitted that there was evidence before the learned judge to support the existence of a public interest in the grant of the interim injunction. Learned King's Counsel argued that the consideration of the public interest should not be confined to just the residents of Industry Pen since the authorities provide that the public interest involves the society generally as well as identifiable groups. He urged that the interests of the other rural farming communities should also be considered. In any event, Mr Hylton disagreed with Miss Larmond that allowing the appellants to mine in the SML 173 area would benefit the communities in and surrounding that area.

The analysis

[84] The consideration of the balance of convenience is an essential element in determining whether a court should grant an interim injunction in constitutional matters (see **Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd**, **RJR–MacDonald Inc** and the fairly recent case of **Seepersad (a minor) v Ayers-Caesar and others** [2019] UKPC 7).

[85] At this stage, the court has the duty of determining which party will suffer greater harm, whether the interim injunction is granted or refused, pending the outcome of a trial on the merits of the case. Although Lord Diplock, in **American Cyanamid v Ethicon** spoke to the balance of convenience, the court in **RJR–MacDonald Inc** referred to, more accurately, the balance of inconvenience in determining whether to grant an injunction. On page 342, Sopinka and Cory JJ said in part:

> "…The third test to be applied in an application for interlocutory relief was described by Beetz J. in *Metropolitan Stores* at p. 129 as: 'a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits'. In light of the relatively low threshold of the first test and the difficulties in applying the test of irreparable harm in *Charter* cases, many interlocutory proceedings will be determined at this stage.

> The factors which must be considered in assessing the 'balance of inconvenience' are numerous and will vary in each individual case…." (Italics as in original)

[86] As Sopinka and Cory JJ indicated, there are numerous factors to be considered when determining where the balance of inconvenience lies and, in each case, the factors may vary. The appropriate weight to apply to each factor may also vary in each case (see page 408 of **American Cyanamid v Ethicon**). This is undoubtedly an important area in assessing whether to grant or refuse an interim injunction in cases involving the Charter of Fundamental Rights and Freedoms ('the Charter') contained in the Constitution. Sopinka and Cory JJ in **RJR–MacDonald Inc** ruled that many applications for interlocutory relief are settled at this stage. Constitutional cases such as this also include an additional element, that is, the public interest. That interest must also be considered when determining where the balance of inconvenience lies. Both parties are free to advance evidence of the public interest. Sopinka and Cory JJ in **RJR–MacDonald Inc** describe the approach to the public interest in this way on page 344:

> "…It is, we think, appropriate that it be open to both parties in an interlocutory *Charter* proceeding to rely upon considerations of the public interest. Each party is entitled to make the court aware of the damage it might suffer prior to a decision on the merits. In addition, **either the applicant or the respondent may tip the scales of convenience in its favour by demonstrating to the court a compelling public interest in the granting or refusal of the relief sought**. 'Public interest' includes both the concerns of society generally and the particular interests of identifiable groups." (Italic as in original; emphasis supplied)

[87] Accordingly, in assessing the public interest, the evidence of harm, which either party presents, is not restricted to the parties in the application.

The balancing exercise - if the interim injunction remains in place

[88] In support of the appellants' case before the learned judge, Mr Dell, in his affidavit, filed on 22 August 2022, in para. 31, notably para. 31(ix), outlined that the revenue the

mining generates is, in turn, to be used to fund numerous projects and programmes which will benefit the residents in the communities that they mine. These include:

a. financing over 100 small business projects;
b. sponsoring mechanical and welding training courses;
c. constructing cold storage facility for farmers to preserve produce;
d. providing rainwater harvesting systems for irrigation of farms;
e. providing assistance to farmers such as supplying gear, equipment and seedlings among other things;
f. providing water access;
g. providing annual educational assistance programmes for more than 100 secondary and tertiary students;
h. constructing and sponsoring recreational facilities and recreational programmes; and
i. hosting free community health fairs for residents.

[89] Mr Dell also expressed that if the interim injunction remains in place, the appellants' business may be irreparably ruined. This he said in para. 31(xi) as follows:

> "If the 2nd and 3rd [appellants] are denied the right to access and mine the reserves in [SMLs] 165, 172 and 173 **for any period of time, no matter how briefly, the 2nd and 3rd [appellants] would be forced to immediately close their operations, and their business would be irreparably ruined.** The mining and exporting of bauxite from Jamaica is [sic] the sole business of the 2nd and 3rd [appellants]. Except for the bauxite in SMLs 165, 172 and 173, the said [appellants] do not have access to bauxite under any other special mining lease or elsewhere. Given the depleted levels of reserves in SML 165 and SML 172 and the issue of high silica, access to the reserves in SML 173 **is most crucial to the survival of the 2nd and 3rd [appellants]** as well as being consistent with the GOJ's contractual obligations to the 2nd and 3rd [appellants]." (Emphasis supplied)

[90] Mr Mitchell, in his affidavit, filed on 25 October 2022, also outlined the implications if mining is prevented in the SML 173 area. He focused primarily on the Government's contractual obligations and the negative impact of breaching those obligations. There would be, he said, an adverse impact on the Jamaican economy, and he too asserts that if the appellants do not mine in the SML 173 area it could result in the possible closure of the 1st and 2nd appellants' operations.

[91] The learned judge, in determining where the balance of inconvenience lay, considered the potential loss to the appellants. She pointed to the evidence led by the appellants at para. [92] of her judgment:

> "…the [appellants] urge the Court to consider that:-
>
> i. Were the [appellant] Companies to be restrained from commencing their bauxite mining activities and from accessing the bauxite reserves in Special Mining Lease 173, prior to the trial of the Claim, the refinery of the parent company for New Day would be subjected to extreme hardship, losses and closure. This, in circumstances where that refinery was specifically designed to process Jamaican bauxite of the type and quality located in the parishes of St. Ann and Trelawny;
>
> ii. Retrofitting and retooling the refinery to use any other bauxite would take, at the very least, one (1) year and would incur substantial cost and expenses, at a time when New Day and its parent company would not be earning any revenue. The [appellant] Companies and third parties would suffer substantial economic losses, hardship, financial ruin, irremediable and irreparable losses;
>
> iii. The potential earnings from the export of crude bauxite exceeds [sic] that of other raw products;
>
> iv. Projected tax collection from Noranda I and Noranda II, inclusive of bauxite production levy

and royalties for the financial year 2022-2023, is approximately Thirty-Five Million United States Dollars (USD$35,000,000.00);

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

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

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

viii. The Jamaican economy would be negatively affected;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

> water; the provision of scholarships for students to access tertiary level education; the provision of skills training; the creation of green houses and catchment ponds with solar pumps."

[92] The 1st to 9th respondents spoke generally of their and their family's deteriorating respiratory health, which they attributed to the dust from mining, contamination of their water, destruction of crops, loss of their rural livelihood and rural way of life, dust on their furniture and throughout their homes and cracks in their wall. They also added that farmers and farming communities have been displaced. They also highlighted that others in the community would be adversely impacted. The 1st to 9th respondents contended that the appellants' actions amounted to a breach of their rights under the Charter, most notably section 13(3)(l), which guarantees a right to the enjoyment of a healthy and productive environment, free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage.

[93] The learned judge also considered the stance of the 1st to 9th respondents. She did so at paras. [87] – [91] inclusive of her judgment, addressing the issues of the dust, potable water, their health and crops. That was in the context of the experience with SMLs 165 and 172 activities.

[94] At para. [106] of her judgment, the learned judge considered both the effect on the appellants of the grant of an injunction and the effect that the mining activity would have on the 1st to 9th respondents if the injunction were refused. A portion of the paragraph has already been quoted but it is necessary to set it out in full for context:

> "It is made clear, from the evidence adduced on behalf of the [appellants], that they would suffer financial hardship and financial losses, were the Court to restrain the commencement of bauxite mining activities pursuant to [SML] 173, until the final determination of the Claim. The Court finds however, that the [1st to 9th respondents] stand to lose far more than financial resources. They stand to lose their way of life and livelihoods, face the deterioration in the quality of their health, in circumstances where there are no comprehensive medical health facilities in the affected

> communities, losses for which money cannot readily compensate. The Court finds that the [1st to 9th respondents] have demonstrated by their evidence that the potential damage or harm, is unknown and is impossible to ascertain and to quantify." (Emphasis supplied)

The balancing exercise- if the interim injunction is discharged

[95] The 1st to 9th respondents' complaints were primarily based on the consequences they say that they, as well as others in the community, suffered during the mining of the SML 165 and 172 areas. Mrs Grant described the effects in paras. 9 to 13, 21, 32 and 33 of her affidavit filed 29 July 2022:

> "9. The mining carried out by Noranda over the past years have [sic] had negative impacts on my and my family's lives and health.
>
> 10. Bauxite dust contaminates the rainwater catchment that I rely on for drinking water. The dust settles on the roof, then the rainwater washes the dust down into my small water storage drum. The water sometimes has a brownish [colour] because of the dust. Bauxite dust also contaminates the community tank that we rely on for water on dry days.
>
> 11. I have no other option than to drink the dirty water because there is no running water in Gibraltar.
>
> 12. Bauxite mining also destroyed the crops my family and I relied on for food.
>
> 13. Worst of all, I believe bauxite dust triggered the death of my husband, Alfred Grant, who died on January 3, 2022 at the age of seventy-five from acute coronary syndrome, congested cardiac failure, and hypertension chronic obstructive pulmonary disease (COPD)…
>
> 21. I believe that, if it were not for the bauxite dust, my husband would still be alive today….
>
> 32. I fear that the expansion of bauxite mining all around me, coupled with the absence of medical facilities in Gibraltar and the lack of financial assistance to cover medical costs, will further put my family's health at risk.

33. I believe that these mining activities breach my constitutional rights, were negligently carried out and amount to a nuisance."

[96] These are the bases for the retention of the injunction.

[97] If, on the other hand, the interim injunction is discharged and the appellants are permitted to mine in the SML 173 area, it would prevent the possible closure and irreparable harm to the appellants' business. It is, however, noted that, unlike the assertions of the impact on the national economy, the appellants did not provide any additional evidence supporting their contention that they would be obliged to close their operation in the event of this appeal being unsuccessful. These too were bald assertions.

[98] Nonetheless, even if the appellants were not obliged to close, the loss of the opportunity to mine in the SML 173 area would be financially significant. If the appellants were permitted to mine in the SML 173 area, it would provide significant assistance to the Jamaican economy and aid in the social development of the community. The public interest would benefit from the appellants being granted that permission.

[99] The loss of the opportunity would also be exacerbated by the fact that the learned judge waived the usual undertaking in damages. Accordingly, if after a trial on the merits the court determined that the interim injunction should not have been granted, the appellants would be unable to recover any losses they sustained.

[100] It is noted that their Lordships of the Privy Council found in **Belize Alliance of Conservative Non-Governmental Organisation v Department of the Environment and another** [2003] UKPC 63 ('**Belize Alliance**') that it was not an appropriate case to stop the construction of a dam, which was of "real importance to the economy of Belize" in the absence of an undertaking in damages.

[101] A similar reasoning can be applied in the present case. In the absence of an undertaking in damages and the importance of the mining in the SML 173 area to the Jamaican economy, it was not an appropriate case to stop the mining in that area.

[102] In relation to the 1st to 9th respondents, if the interim injunction is discharged, it has already been said that the assertions as to the effect on their health are speculative. Any other losses that they may suffer from mining activities may be compensated in damages. These respondents have admitted that in the past the appellants compensated them for such losses during the mining in the SML 165 and 172 areas, albeit, they allege, insufficiently. This indicates that, if the interim injunction is discharged, the 1st to 9th respondents, unlike the appellants, could be compensated in damages.

[103] In view of the foregoing, it is therefore evident that the learned judge erred in her assessment of the balance of convenience. The justice of this case suggests that the balance of convenience favours the appellants. Accordingly, the interim injunction must be discharged.

[104] For completeness, it is to be noted that there is no written judgment in **Southern Trelawny Environmental Agency and others v Noranda Bauxite and others** but, in any event, each case must be determined on its individual facts. The decision cannot, therefore, be considered.

The counter-notice of appeal

[105] The 1st to 9th respondents' counter-notice of appeal against the learned judge's ruling in respect of SMLs 165 and 172 is primarily based on the fact that the learned judge erred in failing to recognise:

a. that mining had not ceased in the areas covered by those SMLs;

b. that even if mining had ceased in those area, they were likely to resume in light of the grant of the interim injunction in respect of SML 173; and

c. the deleterious effect that mining in those areas had had and was having on the lives and livelihoods of the 1st to 9th respondents.

[106] The learned judge spoke to this issue at paras. [45] - [46] of her judgment. After referring to the evidence of Mr Dell, on behalf of the appellants, she said:

> "[45] In this regard, the Court accepts the evidence of the [appellant] Companies as being both credible and reliable. The Court observes that this evidence has neither been challenged nor contradicted by the [1st to 9th respondents]. [The 1st to 9th respondents] make the general assertion that the bauxite mining activities carried out by the [appellant] Companies pursuant to [SMLs] 165 and 172, continue. The [1st to 9th respondents] do not purport to give evidence in respect of the nature and or scope of the continued bauxite mining activities which they allege. **In those circumstances, the Court accepts the evidence of the [appellant] Companies over that of the [1st to 9th respondents], that bauxite mining activities pursuant to [SMLs] 165 and 172 have ceased, save and except for on-going reclamation work**.
>
> [46] In the result, the application for an injunction to restrain the [appellant] Companies, whether by themselves or by their employees, servants or agents or howsoever, from continuing any mining or other activity pursuant to or in reliance on [SMLs] 165 and 172, until the final determination of the Claim, is refused." (Emphasis supplied)

[107] In written submissions, the appellants sought to suggest that the learned judge appreciated the evidence of Mr Dell when he deposed about the appellants' ongoing mining activities in the areas covered by SMLs 165 and 172. Those submissions cannot be accepted considering the learned judge's statements in the quoted paragraphs.

[108] It is plain that the learned judge was under the misapprehension that mining had ceased in the SML 165 and 172 areas when that was not the case. It is an important

aspect of the case that would ordinarily warrant this court's intervention. However, the reasoning in respect of the balance of inconvenience, in discussing the interim injunction concerning SML 173, although not exactly applicable, is sufficiently so to make intervention unnecessary.

[109] The counter-notice of appeal must therefore fail.

Issue d: Whether the learned judge erred in waiving the requirement of the undertaking as to damages (ground 15)

[110] In light of the finding in this judgment that the interim injunction ought not to have been granted, it is unnecessary to assess whether the learned judge erred in waiving the requirement for the 1st to 9th respondents to have given the usual undertaking as to damages. It will be sufficient to observe that the learned judge approached the exercise of her discretion carefully. Having taken guidance from the decision in **Belize Alliance**, she not only recognised the futility of asking the 1st to 9th respondents to provide an undertaking but considered the waiver appropriate given the view that she took of the case.

[111] In an appropriate case, the waiving of the requirement would be in order despite a respondent's claim that it would suffer substantial financial loss because of the grant of an interim injunction. The losses involved must, however, be considered to ensure that there is a just result.

Summary and conclusion

[112] The learned judge erred in some of her findings of fact. That error allows this court to intervene. The court, in assessing the evidence of the 1st to 9th respondents, does not find that they face irreparable harm in relation to the appellants' mining in the SML 173 area. Their claims of harm are more speculative than based on proof. In addition, looking at the balance of inconvenience, it is plain that the inconvenience to the appellants and the public interest from the granting of an interim injunction is greater than the

inconvenience to the 1st to 9th respondents where the application for the interim injunction is refused.

[113] Based on all the above, the appeal should be allowed, the orders of the learned judge granting the injunction should be set aside, the counter-notice of appeal should be refused and the appellants awarded the costs of the appeal and the counter-notice of appeal. The other orders of the judge, including the order that costs be costs in the claim should be affirmed.

V HARRIS JA

[114] I have read the judgment, in draft, of my learned brother Brooks P. I agree with his reasoning and conclusion.

DUNBAR-GREEN JA

[115] I, too, have read the draft judgment of my learned brother Brooks P. I agree with his reasoning and conclusion.

BROOKS P

ORDER

1. The appeal is allowed in part.

2. The application for an interim injunction is refused and orders 2 and 3 of the orders of the learned judge handed down on 20 January 2023 are set aside.

3. All other orders made by the learned judge are affirmed.

4. The counter-notice of appeal is dismissed.

5. Costs of the appeal and the counter-notice of appeal to the appellants to be agreed or taxed, however, if the respondents consider that some order as to costs should be made, they

may file and serve submissions in writing in that regard on or before 23 June 2023, and the appellants may file and serve submissions in response on or before 30 June 2023. In the absence of any such submissions this order as to costs shall stand.