IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2015 CD 000140

BETWEEN	**ALGIX JAMAICA LTD.**	**CLAIMANT**
AND	**J. WRAY AND NEPHEW LTD.**	**DEFENDANT**

Interlocutory Injunction – Nuisance – Ryland's v Fletcher – Riparian Rights- Natural Resources Conservation (Wastewater & Sludge) Regulations 2013- Whether Defendants breach of Regulations entitle Claimant to Injunctive Relief – Whether damages an adequate remedy – Balance of convenience

IN CHAMBERS

Paul Beswick, Gillian Mullings and Georgia Buckley instructed by Naylor & Mullings for Claimant

Patrick Foster QC, Tavia Dunn and Stephanie Forte instructed by Nunes Scholefield Deleon & Co. for Defendant.

In Chambers

Heard: 7th, 8th, 11th, 14th, 19th, 20th, 21st and 25th January, 2016.

CORAM: BATTS, J.

[1] This judgment was delivered orally on the 25th January, 2016. I now reproduce it in permanent form.

"In Xanadu did Kubla Khan
A stately pleasure-dome decree:
Where Alph, the sacred river, ran
Through caverns measureless to Man
Down to a sunless sea.
So twice five miles of fertile ground
With walls and towers were girdled round
And there were gardens bright with sinuous rills,

Where blossomed many an incense-
bearing tree;
And here were forests ancient as the hills,
Enfolding sunny spots of greenery."

\- *Samuel Taylor Coleridge "Kubla Khan"*

[2] It is not the river Alph of Xanadu but the Black River of Jamaica, originally called Xaymaca (the land of wood and water), which concerns me today. Nor is it a dome of pleasure but rather fishponds and a factory which have been constructed along its banks. The Claimant contends that the Defendant's factory spewed effluent into the river, which then flowed downstream into its fishponds and did serious damage. They say that the Defendant is likely to repeat that action and they seek the protection of this court. The Defendant denies these assertions and says the Claimant is not entitled to injunctive relief. It is for me a matter of some regret, that the respective arguments were not presented in anything like the rhythmic tone of Samuel Coleridge's poem, but in a manner which at times seemed more akin to the clanging of cymbals.

[3] At this Interlocutory stage, the court will not embark on a trial of the matter. I make no factual findings as it relates to the ultimate issues for determination. The trial is still to come. My duty is to consider the evidence and determine:

Firstly,

a) Whether the Claimant has a cause of action that is, is there a serious issue to be tried and

Secondly,

b) Whether damages at the end of the day would be an adequate remedy, on one hand and whether the Defendant would be adequately compensated by the undertaking as to damages on the other,

Thirdly,

c) If there is doubt as to the respective adequacy of damages whether the balance of convenience favours the grant of an injunction.

[4] It bears repeating, as their Lordships reminded us in the case of ***National Commercial Bank v Olint [2009] UK PC16*** (28 April 2009) that a box-ticking approach is unhelpful. The purpose at this interlocutory stage is to improve the chance of the court being able to do justice after a determination of the merits at trial, the court must assess whether granting or withholding an injunction is more likely to produce a just result. Per Lord Hoffman,

> ***"17. In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396 , 408: 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them."***
>
> ***18. Among the matters which the court may take into account are the prejudice which the plaintiff may suffer if no injunction is granted or the Defendant may suffer it if is; the likelihood of such prejudice actually occurring, the extent to which it may be compensated by an award of damages or enforcement of the cross-undertaking; the likelihood of either party being able to satisfy such an award; and the likelihood that the injunction will turn out to have been wrongly granted or withheld, that is to say, the court's opinion of the relative strength of the parties case."***

[5] I believe also that Lord Diplock's caution in ***American Cyanamid*** adverted to above, is worthy of repetition in full:

"p. 510 - It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or to both, that the question of balance of convenience arises. It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them. These will vary from case to case.

Where other factors appear to be evenly balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo. If the Defendant is enjoined temporarily from doing something that he has not done before, the only effect of the interlocutory injunction in the event of his succeeding at the trial is to postpone the date at which he is able to embark upon a course of action which he has not previously found it necessary to undertake; whereas to interrupt him in the conduct of an established enterprise would cause much greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial.

Save in the simplest cases, the decision to grant or to refuse an interlocutory injunction will cause to whichever party is unsuccessful on the application some disadvantages which his ultimate success at the trial may show he ought to have been spared and the disadvantages may be such that the recovery of damages to which he would then be entitled either in the action or under the plaintiff's undertaking would not be sufficient to compensate him fully for all of them. The extent to which the disadvantages to each party would be incapable of being compensated in damages in the event of his succeeding at the trial is always a significant factor in assessing where the balance of convenience lies, and if the extent of the uncompensatable disadvantage to each party would not differ widely, it may not be improper to take into account in tipping the balance the relative strength of each party's case as revealed by the affidavit evidence adduced on the hearing of the application. This, however,

> ***should be done only where it is apparent upon the facts disclosed by evidence as to which there is no credible dispute that the strength of one party's case is disproportionate to that of the other party. The court is not justified in embarking upon anything resembling a trial of the action upon conflicting affidavits in order to evaluate the strength of either party's case.***
>
> ***I would reiterate that, in addition to those to which I have referred, there may be many other special factors to be taken into consideration in the particular circumstances of individual cases."***

[6] I do not propose in the course of this judgment to restate all the evidence or the legal submissions. The parties are to rest assured that I have read and in some cases reread them all. In the interest of time and economy I will treat with only so much as is necessary to explain the reasons for my decision.

[7] In this regard let me say at the outset that there has clearly been demonstrated a triable issue, it cannot be said that the Claimant has no real prospect of success. The Claimant has put before the court evidence that:

a) It operates a commercial fish and algae farm, which receives water from the Black River. The operation uses flow through and settling ponds (Affidavit Maurice Reynolds filed 8.12.15);

b) On 27th February 2015 water in the ponds turned dark green, smelled like rotten eggs, dissolved oxygen levels fell and fish died. (Affidavit of Maurice Reynolds 8th December, 2015);

c) On March 28, 2015 a second wave of contamination occurred and again fish died, this time "the remaining brood stock was completely wiped out" Maurice Reynolds 8th December, 2015);

d) On May 8th 2015 fish were again impacted due to an escape of effluent. On this occasion, one Ian Maxwell of Appleton Estate called to advise the Claimant of the escape of effluent. (Maurice Reynolds Affidavit 8th December, 2015)

e) Dr. Andre Jones a research scientist with a doctorate in Chemistry specialising in synthetic organic chemistry and formulation chemistry, conducted water quality testing and inspections. He did this on the 1st March, 2015. His affidavit filed on the 8th December, 2015 details his examinations and conclusions. He also attended the Appleton Estate at which samples were also collected for testing. His report concluded that the waste water effluent that was discharged in the Black River from Appleton Estate is the same water that flows downstream and becomes the feeding water for Algix fish ponds. He concludes also that the water sample taken did not met National Environment and Planning Agency (NEPA) trade effluent standards. It was rapid depletion in oxygen which caused fish death. The fish kill he opined was caused from contaminants which originated from trade effluent discharged by Appleton upstream. (Affidavit of Dr. Andre Jones filed on the 8th December 2015)

f) By a further Affidavit filed on the 29th December, 2015 Dr. Andre Jones carefully responded to the Affidavit of Kwesi Falconer filed on the 15th December 2015. Dr. Jones does not resile from his conclusion and indeed appears to garner support in places from the Falconer affidavit: See paras 7,8,12 and 22. He also explains that it is likely that caustic wash is being discharged as the substance used to clean the boilers is undisclosed.

g) Documentation originating from the Pollution Monitoring and Assessment Branch of NEPA contains a report on samples taken from the Black River on 30th March 2015 states:

> **"Discussion**
>
> **Results of the effluent from Appleton Sugar Factory collected on 30th March 2015 reveal that the effluent is not in compliance with the Trade Effluent Standards for biochemical oxygen demand (BOD), chemical oxygen demand (COD), total suspended solids (TSS) faecal coliform (FC) AND Ph (SEE Table 3). Another sample of the**

effluent taken on 31st March 2015 showed that the same parameters were not in compliance with the trade effluent standards in addition to phosphate and faecal coliform. Appleton Sugar Factory treats its discharges by the use of a series of eight ponds. These discharges include Cane wash water, floor washings, diverted condenser water from vacuum pans, storm water and caustic rinse water from evaporator cleaning. It must be noted that they also discharge condenser cooling water which is returned directly to the river.

Water samples were collected from the Black River, upstream of the effluent discharge at Windsor Bridge Crossing and downstream at Coker Bridge and ALGIX Aquaculture Inlet. The results show that the Black River is being negatively impacted by the Appleton Sugar Factory effluent as marked increase were observed in the concentrations of BOD, COD, and Phosphate (PO_4) downstream of the discharge.

Recommendation

Appleton Estate Limited must be served an Enforcement Notice for them to submit a Compliance Plan to the Agency to bring its effluent into compliance with the Trade Effluent Standards. They should also ensure that they come into compliance by December 2015."

[8] The Defendant's evidence has been to the following effect:

a) They received information from NEPA on the 27th February 2015 and from the Claimant on 28th February 2015 of a reported fish kill (Kwesi Falconer filed 15th December 2015).

b) Samples were collected and tested at that time (Kwesi Falconer)

c) Appleton's records showed a 4 minute spike in emission of cane wash on or round 24th February, 2015 (Kwesi Falconer)

d) Cane wash is the only trade effluent discharged into the Black River by the Defendant (Kwesi Falconer). This includes water used to wash cane, to remove dirt fertilisers and other items from harvested cane and water used to wash the boilers. (Kwesi Falconer) caustic wash is used to wash the boilers every 2 weeks. (Kwesi Falconer).

e) The company's 2016 budget includes the cost of improving its process which "will result" in the Defendant company being in full compliance with NEPA's standards for biological oxygen demand and chemical oxygen demand.

f) The Defendant is required to conduct tests at various points for dissolved oxygen among other things, and to keep logs of those tests.

g) The dunder generated from the Defendant's distillery is not released into the Black River. The dunder is used as fertiliser at New Yarmouth in Clarendon for cane (Kwesi Falconer Para 33 & 34).

h) There are other activities along the river that might have impacted the Claimant's operations such as a sausage factory and farm holdings.

i) The growth of algae in the fishponds could also adversely affect the Claimant's fish.

j) If the source was the Black River then all the Claimant's fish ponds ought to have been impacted not just a few of them.

k) The spill from the Defendant's operations was only for four minutes and the alarm system ensures that water is routed into the dunder ponds when that occurs. This spill occurred on the 25th February, 2015.

l) On the 28th March, 2015 a pump malfunctioned causing dunder to escape and eventually entered the

Elim River. This did not affect the Claimant because the Elim enters the Black river below the Claimant site (Kwesi Falconer Para. 49)

m) A warning Notice was received from NEPA in relation to this incident of the 28th March and no other for 2015. The Defendant was eventually summoned to court.

n) Dr. David Lee an aquatic Ecologist with 25 years experience in Environmental and Wastewater Treatment and Management states that he consulted with the Defendant on its wastewater treatment and management. (See affidavit field 29th December, 2015). Sugar factory wastewater if left untreated would have the effect of removing oxygen from receiving water bodies. He explains the treatment system at Appleton.

o) The wastewater treatment system has been approved by NEPA by the issuing of environmental Permit No. 2012 – 11017 – EP00100 issued on 12th August, 2013 "which allowed for an upgrade and improvement and operation of the pond system."

p) Dr. Lee analysed the data for February and March 2015 and concluded that the plant is working effectively.

q) Dr. Lee concludes that the BOD level reported in February at the Claimant's inlet could only occur as a result of the presence of other sources of organic loading. These he identifies as possibly the town of Maggoty and the operation of Apple Valley Farm.

r) Dr. Lee points out that no tests were done on the dead fish to ascertain the presence of toxins or other elements.

s) Dr. Lee said fish food and fish faeces could also lower the levels of dissolved oxygen. He says this can explain the high odour reported at the Claimant's fish ponds.

t) Dr. Lee ended by acknowledging that the Black river is under stress from various organic pollutant sources but he believes that "having regard to the assimilative capacity of the Black River it is unlikely that the

> discharge from the Appleton Estate would have the deleterious complained of by the Claimant."

[9] It is clear there are factual issues and that the expert's conclusions are at variance. These are matters for resolution at trial. It cannot be said that at this interlocutory stage the Claimant has no cause of action or one with no prospect of success. The claim is after all for Damages for Negligence, Nuisance, Breach of Statutory Duty and under ***Rylands v Fletcher*** arising out of an incident on the 27th February 2015 (Claim form filed on the 4th December, 2015). By paragraph 38 of the Particulars of Claim filed on the 4th December 2015, the Claimant also seeks an injunction, See: ***78 (2010) Hal para 101, 105,107*** and ***Jones v Llanrwst Urban District Council [1908-10] All ER 922.***

[10] I therefore move on to consider the question of the adequacy of damages. There is no doubt that as it relates to the incident of the 27th February, 2015 damages is the only remedy now possible. Compensation will, if liability is established, take the form of an assessment of the value of the fish lost, cost of any remedial measures taken and possibly some economic losses e.g. Injury to reputation. The Claimant contends however that when regard is had to the evidence adduced, the very real possibility of the incident being repeated is cause for concern. Maurice Reynolds at Para 23 of his affidavit field on the 8th December 2015:

> "We have been importing entirely new brood stock and fish fingerlings at a cost presently of US$300,000. As a result of these efforts, we now have over one million market ready fish, fry and fingerlings in our facility. The fish stock has been sold and we are the risk of violating our supply contracts for 2016 and 2017 if our animals are harmed and production levels lowered. The facilities operated by Algix are the largest in the English speaking Caribbean. If the fish in our facility are wiped out this will be a lethal and fatal blow to fish

> farming in this region, as there are no other functional industrial scale fish farming operations in the jurisdiction. This would also mean that Jamaicans would be forced to import additional fish using hard currency to satisfy local demand."
>
> In other words, according to the Claimant much more than just the dollar value of fish lost is at stake here.

[11] The Defendant contends otherwise. They say also that the Claimant has failed to demonstrate an ability to given an effective undertaking as to damages. The Defendant says with a net profit for year ending 31st December 2014 of $1,563,951,000.00 after taxation it can pay any damages to which the Claimant may be entitled. (Yvonne Samuels affidavit filed 7th January 2016). Furthermore, if the Defendant is forced to close in consequence of an Injunction a lot more than earnings are at stake. Its factory at Appleton and cane farming related to it are the main sources of economic activity in that region. The Defendant itself employs 650 employees. Cane cutters are also employed through contractors. There are haulage contractors to haul cane. Appleton Estate contributes 22% of the quota for the national target for the export of sugar. Molasses a by-product is used in the production of rum. The Appleton brand of rum, enjoys a high level of goodwill internationally and there is a great demand for its product. An injunction it is said, would adversely affect the company and the surrounding communities.

[12] In its effort to demonstrate an ability to honour its undertaking the Claimant relies on the affidavit of Maurice Reynolds filed on the 14th January 2016. He there says that the Claimant has assets of over $34,000,000 which encompasses, plant and machinery, cash, stock in trade, fingerlings, broodstock, and motor vehicles. He references contracts with Caribbean Products and Rainforest Seafoods. He opines that the Claimant is on target to produce 25,000,000

fingerlings valued at US$15,000,000 in 2016. The Affidavit is unsupported by documentation.

[13] Mr. Foster Q.C. was scathing in his criticism of that affidavit because it lacked particularly and is unsupported by documentation. He relied on the authorities of ***Intercontex v Schimdt 1988 FSR 575*** (a judgment of Peter Gibson J) and ***TPL Limited v Thermo-Plastics (Jamaica) Ltd.*** SCCA 91/2012 [2014] JMCA Civ 50. In the latter case, the applicant had not expressed a willingness to give an undertaking nor given any evidence of its ability to fulfil such an undertaking. The court stated the following as a general principle:

> ***"Counsel for the respondent is correct that there is no rule "Writ in stone" that the court must require evidence as to a party's ability to give a cross-undertaking as to damages before an interlocutory injunction will be granted ... The proper usual practice and law is, and has been, to require evidence both of a willingness and an ability to provide a proper undertaking as to damages ... some authorities even go so far as to suggest that where a company is concerned, financial statements, records or accounts should be placed before the court in order that the court can properly assess the adequacy of the remedy of damages to the Defendant and the Claimant's financial ability to pay them. It is trite law that courts act on evidence and not bare assertions of course in this case the respondent did not even express a willingness to give an undertaking as to damages, much less assert or elucidate upon its financial ability to fulfil such a commitment."*** Per Mangatal JA

[14] In this case the Claimant has gone on affidavit and particularised the value of its assets and explained how it anticipates to make profit and how much profits it anticipates. Supporting documentation may have been advisable but is not a necessary prerequisite. Furthermore, by its Amended Notice of Application the Claimant seeks not an injunction to prevent the Defendant's factory operating but

rather to prohibit the Defendant discharging trade effluent which is in excess of the NEPA "trade effluent standards."

[15] This means that the relevant potential damage, to which such an undertaking is likely to relate, is any costs incurred in meeting that standard. Mr. Beswick submits that, as that standard reflects the law, there can be no liability for requiring a party to comply with the law. Technically, therefore, the requirement of an undertaking is on the facts of this case unnecessary or irrelevant. I agree.

[16] In these circumstances, therefore I find the evidence of the Claimant's ability to honour the undertaking satisfactory. On the whole the question of damages and the potential consequence to the Claimant and its industry if the Injunction is not granted on the one hand, with the potential injury to the Defendant and the sugar producing community on the other is evenly balanced. Damages in either case may not be an adequate remedy in the event either is ultimately successful at trial.

[17] It therefore means that whether or not an injunction is to be granted has to be determined by reference to the so-called balance of convenience or in the modern parlance by determining what is more likely to produce a just result.

[18] It is in this regard that I regard the evidence from NEPA to be quite helpful. The Claimants complaint of nuisance or negligence which caused injury to their riparian rights was bolstered by a document emanating from the pollution Monitoring and Assessment Branch of NEPA. I adverted to it at paragraph 7 (g) above. Claimant's counsel urged the court to infer that: as the issuance of an enforcement notice was recommended due to the relevant standards not being met, and as there was no evidence that between May 2015 and December 2015, the Defendant had made any changes to its plant, therefore a real danger existed of the breach being repeated. On the other hand, the Defendant maintains that it received no enforcement notice or any other complaint in relation to the matters raised in that document. The only matter they dealt with was an escape of dunder which affected the Elim River and for which they had been summoned to

court. The matter was further compounded by the fact conceded on all sides, that the Defendants factory had been seasonally closed for approximately 6 months prior to December 2015. The fact that no further incident or breach occurred could not be preyed in aid by the Defendant.

[19] It was in that context therefore that I directed that a Summons to Witness be issued to NEPA so as to have the question clarified as to whether an enforcement notice had been issued and if not why. I am of the view that this extraordinary use of the court's powers was merited when regard is had to the potential consequences to either party of either the grant or refusal of an injunction.

[20] The first witness summoned from NEPA, Ms. Keisha Pennant, was not of much assistance and she suggested that the questions were best addressed to the agency's enforcement manager Mr. Richard Nelson. He too was present in court and agreed to return with answers to the questions formulated by the court. It is to be noted that I gave permission, over the objection of Mr. Foster, QC, for cross-examination generally of the witness.

[21] Mr. Nelson returned on the 19th January 2016. He indicated that the first time he saw the report of the 11th May 2015 was whilst he was present in court before me on the 14th January 2016. He said,

> "Unfortunately my technical competence does not allow me to comment on the technical details of that report which is in fact an internal draft report prepared by the agency's pollution monitoring and assessment branch."

[22] He did however provide answers to some of the questions posed by the court (which questions were settled in conjunction with the parties at a hearing in chambers on the 11th January 2016). He also answered questions in cross-examination form the Claimant and Defendant's Counsel.

[23] Mr. Nelson made it clear that in the opinion of NEPA the dunder spill in the Elim River was unlikely to have impacted the Claimant. Further that the agency's investigations did not detect any "deleterious" effect on organisms in the Black River. Mr. Nelson admitted that the report showed that the Defendant's effluent fell below the Trade effluent standards and this was indicated by asterisks. He recognised the names on the report as qualified chemists employed to NEPA. He recognised the documents attached to the report as certificates of Analysis.

[24] Mr. Nelson very helpfully explained that there are gradations of enforcement. There is soft enforcement and hard enforcement. The soft enforcement method was used if the danger was not regarded as serous. In relation to the Defendant he explained that they were already on a Compliance Plan and hence a decision was taken not to take enforcement action. In a nutshell the agency had long been in dialogue with the Defendant about its need to comply with standards. When the Natural Resources Conservation (Wastewater and Sludge) Regulations of 2013 were introduced, the Defendant's licence was no longer in effect. The Defendant in consequence had to reapply. Their first application was not in order. They had until the 31st January 2016 to reapply and Mr. Nelson said they have now done so. The application was accepted but will take approximately 90 days to process.

[25] When asked about whether his agency had reports from and took steps to protect the Claimant, Mr. Nelson stated that the reports received had been referred to another state agency responsible for fisheries because,

> "We [NEPA] only act if there is a deemed threat to the natural resources and public health. Algix is a commercial enterprise and manmade so referred to Fisheries Division for investigation."

[26] Mr. Nelson was clear that the licence will only be granted if NEPA is

> "satisfied that the system proposed based on design and specifications will allow for applicants to meet the standards."

[27] It is clear having heard the evidence of Mr. Nelson, that the agency had evidence of a failure to conform with the relevant standards. Further the system the Defendant has in place is not such as to meet the standards established by the Regulations of 2013. Furthermore, it is also clear that the Defendant is in breach of its statutory duty pursuant to Section 12, insofar as the Regulations of 2013 established time lines which have not been met. However, NEPA as the responsible agency, had decided not to take any enforcement action because they recognised that the Claimant is taking steps to comply and has now applied for a licence.

[28] Mr. Beswick says that NEPA is acting unlawfully as it has no statutory power to allow an extension of the time stipulated in the Regulation. That is not an issue before me and I make no finding or ruling on that. NEPA is not a party to these proceedings and therefore the extent of their power and authority is not a matter on which I will rule.

[29] It suffices in the consideration at this interlocutory stage, that the relevant environmental agency has confirmed that the relevant standards have not been met by the Defendant. I bear in mind the submission ably made by Miss Dunn, for the Defendant, that the measurement as it relates to oxygen levels has been satisfactory. It is the Defendant's case that this is the most important aspect as it relates to fish husbandry. It is however, the Claimant's case that this is not sufficient. These are of course triable issues.

[30] The question I have to answer is, given the evidence before me and in particular the evidence emanating from the regulatory agency, is the grant of an interlocutory injunction more or less likely to produce a just result.

[31] Mr. Foster Q.C. has argued that the injunction claimed is in the nature of a *quia timet.* Therefore, it is premised on a threatened or apprehended act. It involves interference with conduct of the Defendant, which is otherwise lawful. He relies on a number of authorities to demonstrate the reluctance of the court to so act, unless the Claimant satisfies a fairly high evidential burden. ***London Borough of***

Islington v Margaret Elliott [2012] EWCA Civ 56 per Patten LJ @ para 29; ***University of the West Indies v. Mona Rehabilitation Foundation*** SCCA 17 and 21 of 20011 unreported judgment 31 July 2001 @ page 5 per Forte P; ***Lloyd V Symonds*** 1998 EWCA Civ 511 per Chadwick LJ as quoted in LBC of Islington case (above)***.*** Mr. Foster's point is well made.

[32] Each case however will turn on its peculiar facts and circumstances. In the matter at hand, the Defendant's factory is now idle. The Claimant has invested a great deal in its fish. The fish require water of a wholesome nature from the Black River to survive. It will only take one or at most two incidents of tainted water to kill those fish. The Claimant will then stand to lose not only the fish but its reputation as it will be unable to fulfil contracts already entered into. There is evidence that the Defendant has not, in the recent past, met the standards mandated by law. There is evidence that the relevant environmental agency has in its discretion allowed the Defendant to operate notwithstanding that it does not yet have the requisite licence. There is evidence that other interim measures are available to deal with the trade effluent discharge although these will be very costly. (See affidavit of Yvonne Samuels filed 14th January, 2016.) The Claimant is not asking for an order to prevent discharge of effluent into the Black River nor for an order to close the Defendant's factory. The Order being sought is that the Defendant not discharge effluent except to the extent that it meets the standards mandated by law.

[33] In these circumstances and for the reasons adverted to above the balance of convenience lies with the Claimant. It is only just that the Claimant continue to enjoy wholesome water from the Black River without having to bear the real risk, given the recent history of the Defendant's operations, of hazardous effluent from the Defendant's plant entering the Black River.

[34] I therefore make the following Order:

1. The Defendant by itself its servants and/or agents or otherwise howsoever be and is hereby restrained until the trial of this

action or further Order of this Court from discharging into the Black or Elim Rivers any trade effluent which does not meet the trade effluent standards set out in Table 3 of Schedule III to the Natural Resources Conservation (Wastewater and Sludge) Regulations 2013.

2. The Claimant through its Counsel gives the usual undertaking as to damages.

3. Costs to the Claimant to be taxed if not agreed

4. Case Management Conference fixed for hearing on the 11th March 2016 @ 10:00.

5. Mediation to be completed on or before the 10th March 2016.

6. Liberty to apply

David Batts
Puisne Judge