



[2021] JMSC Civ.88

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

**CIVIL DIVISION**

**CLAIM NO. SU2020CV04966**

In the matter of a decision by the relevant Minister to approve the grant of a licence permitting mining and quarrying of Bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St. Ann

And

In the Matter of an Application for Constitutional redress pursuant to Section 19 of the Constitution

<b>BETWEEN</b>	<b>WENDY A LEE</b>	<b>1<sup>ST</sup> CLAIMANT</b>
<b>AND</b>	<b>MARTIN HOPWOOD</b>	<b>2<sup>ND</sup> CLAIMANT</b>
<b>AND</b>	<b>ANNE HOPWOOD</b>	<b>3<sup>RD</sup> CLAIMANT</b>
<b>AND</b>	<b>TRACEY D. SHIRLEY</b>	<b>4<sup>TH</sup> CLAIMANT</b>
<b>AND</b>	<b>KARLENE MCDONNOUGH</b>	<b>5<sup>TH</sup> CLAIMANT</b>
<b>AND</b>	<b>PATRICIA DALE</b>	<b>6<sup>TH</sup> CLAIMANT</b>
<b>AND</b>	<b>ALEC HENDERSON</b>	<b>7<sup>TH</sup> CLAIMANT</b>

<b>AND</b>	<b>SHERMAIN WOODHUOSE</b>	<b>8<sup>TH</sup> CLAIMANT</b>
<b>AND</b>	<b>THE ATTORNEY GENERAL OF JAMAICA</b>	<b>1<sup>ST</sup> DEFENDANT</b>
<b>AND</b>	<b>NATURAL RESOURCE CONSERVATION AUTHORITY</b>	<b>2<sup>ND</sup> DEFENDANT</b>
<b>AND</b>	<b>BENGAL DEVELOPMENT LTD</b>	<b>3<sup>RD</sup> DEFENDANT</b>

IN CHAMBERS

B. St. Michael Hylton, Q.C. and Kerri-Anne Mayne instructed by Hylton Powell Attorneys-at-Law for the Claimants

Althea Jarrett and Carla Thomas instructed by the Director of State Proceedings, Attorney-at-Law for the 1<sup>st</sup> Defendant

Deborah Lee Shung, Morjourn Wallock, Stewart Panton and Matthew Ricketts instructed by Deborah Lee Shung, Attorney-at-law for the 2<sup>nd</sup> Defendant

Abraham Dabdoub instructed by Dabdoub, Dabdoub & Co, Attorneys-at-Law for the 3<sup>rd</sup> Defendant

Heard: March 23, 2021 and April 23, 2021

## **Oral Judgment**

**Carr, J (Ag.)**

## **Background**

[1] By way of Notices of Application for court orders the Defendants sought to have the fixed date claim form filed on behalf of the Claimants

struck out. The Claimants seek redress under the Constitution and have set out their claim as follows:

1. A Declaration that the decision by the Minister of Economic Growth and Job Creation to overrule the Second Defendant's decision to refuse the Third Defendant's application to permit mining and quarrying at Rio Bueno Dry Harbour Mountain, Discovery Bay, St. Ann abrogates, abridges or infringes ("breaches") or is likely to breach the following guaranteed constitutional rights of the Claimants:
  - a. the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage, acknowledged by section 13 (3) (1) and guaranteed by section 13 (2) of the Constitution;
  - b. the right to reside in any part of Jamaica, acknowledged by section 13 (3) (f) (ii) and guaranteed by section 13 (2) of the Constitution; and
  - c. the right to protection from degrading "other treatment", acknowledged by sections 13 (3) (o) and (6), and guaranteed by section 13 (2), of the Constitution.

2. A Declaration that permit No. 2014-06017-EP00040 granted on November 5, 2020 by the Second Defendant to the Third Defendant to permit mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno Dry Harbour Mountain, Discovery Bay, St. Ann breaches or is likely to breach their constitutional rights.
3. A Declaration that the mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno Dry Harbour Mountain, Discovery Bay, St. Ann by the Third Defendant is likely to breach their constitutional rights.
4. A Declaration that neither the manner nor the extent of the breaches or likely breaches of the said constitutional rights is demonstrably justified in a free and democratic society.
5. Consequently, an order that the Minister's decision, and permit No. 2014-06017-EP00040 granted by the Second Defendant on November 5, 2020 are void and of no effect and/or should be struck down.
6. An injunction restraining the Third Defendant whether by itself or by its employees, servants or agents or howsoever, from starting or continuing any mining, quarrying or other activity pursuant to or in reliance on permit No. 2014-006017-EP00040.
7. Constitutional/vindictory damages.
8. Interest on damages at the statutory rate of interest.

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

### **Submissions of Counsel**

- [2] Counsel on behalf of the First Defendant commenced her submissions by amending her application to proceed under Rule 26.3 (1) (b) of the Civil Procedure Rules. The claim it was argued was an abuse of the process of the Court as despite the discretion given to the Court by virtue of Section 19 (4) of the Charter of Fundamental Rights and Freedoms there is always a recognition that a party seeking constitutional redress must do so as a last resort.
- [3] Several decisions were cited to establish the point that where there is an alternative remedy of judicial review, it would be an abuse of process to embark upon a constitutional claim. It was argued that the Decision of the Minister was in keeping with the provisions of the National Resources Conservation Act (NRCA) and as such was in accordance with the law. The NRCA gives the Second Defendant the responsibility to protect and preserve the environment. The Second Defendant's decision was appealed and the Minister reversed that decision in accordance with the law.
- [4] The Claimants it was submitted were essentially challenging the decision of the Minister and therefore fell within the ambit of judicial review proceedings. The claim therefore was a misuse of Section 19 of the Constitution as there were no exceptional circumstances that

should cause the court to find that it is outside of the ordinary rule. The matter ought therefore to be struck out as an abuse of the process of the court.

[5] These submissions were adopted by the Second and Third Defendant. However the Third Defendant also argued another point for the court's consideration. It was submitted that the Claimants had launched a collateral attack against the decision of the Minister in allowing the appeal. As a result the Claimant failed to recognize the provisions of the NRCA to protect the environment in accordance with the constitution. The NRCA he argued has never been declared to be unconstitutional or in breach of any constitutional right. He referred to the case of **O'Reilly v. Mackman**<sup>1</sup> and reiterated that this was really a claim to review the decision of the Minister. It was his view that the Claimants had no realistic prospect of succeeding in the matter and as such the claim should be struck out.

[6] Queens Counsel on behalf of the Claimants submitted that this was not a matter for which summary judgment could be obtained. The focus was therefore on the application to strike out pursuant to Rule 26.3 (b) of the CPR. It was argued that there is no need for evidence by way of Affidavit in support of this type of application. What is required is that the court looks at the pleadings.

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<sup>1</sup> (1983) 2 AC 237

[7] On the pleadings the Claimants have asserted that their constitutional rights have been or are likely to be breached. Judicial review it was submitted is not an adequate remedy in this case for the following reasons.

- (1) In a judicial review application, the court considers procedural and jurisdictional issues as against a constitutional claim where the court considers the merits of the decision.
- (2) In judicial review proceedings the state can determine what information to disclose in circumstances where the Claimant would have the burden of proof. In a constitutional claim under the Charter the state has the burden of full disclosure.
- (3) A judicial review application could only be made against the Minister and the Second Defendant, an action could not be brought against the Third Defendant. The challenge in this case is not just to the decision of the Minister it is also a claim seeking a declaration that the mining and quarrying is a breach of the constitutional rights of the Claimants. The Charter now provides that a claim can be made by a citizen against a fellow citizen.
- (4) Judicial review is not now available. Section 25 (2) of the Constitution which was repealed in 2011 and replaced by Section 19 (4) of the Charter says that the court may strike out a claim previously it said shall. The court therefore has a discretion to determine whether or not to remit the matter to the full court.

(5) The remedies available under judicial review are limited. If successful on such an application the court would direct that the decision be quashed and direct the Minister to reconsider the appeal. The Minister could then reconsider the appeal, follow the correct steps and make the same decision. A constitutional court has to the power to direct that mining in this area should not take place.

[8] It was therefore submitted for these reasons that the Claimants should have their constitutional claim heard and the court should make a decision.

## **Discussion**

[9] It is plain from the pleadings that this is not a claim in which judicial review proceedings would be appropriate. The Claimants are not seeking a review of the Minister's decision in so much as they are seeking declarations that the decision is likely to infringe on their constitutional rights. The fact that the Second Defendant in keeping with the NRCA made a decision that was reversed on appeal by the Minister is only a part of the background to the claim. The Claimants in this case are seeking the court's protection of their constitutional rights under the Charter. They have set out the actions which they are suggesting will result in or are likely to result in a breach of those rights.

[10] The claim is therefore far more expansive than one for judicial review which is limited in terms of its application as well as the remedies that are available to the Claimants. Further the claim is also brought against



a company which cannot be brought before the court in judicial review proceedings. I am therefore not of the view that this action is an abuse of process.

[11] Counsel for the Third Defendant rested his submissions on the position that the claim was misguided. It is my considered opinion that the Privy Council has moved away from the principles of **O'Reilly v. Mackman** in jurisdictions such as ours where the Civil Procedure Rules provide that persons can bring public law claims in private law actions. It is also noted that this is not a private law claim but a claim grounded in constitutional law. The principles of **O'Reilly v. Mackman** are therefore not relevant to these proceedings.

[12] The applications to strike out the claim are refused.

[13] The First and Third defendants also sought an extension of time to file affidavits in answer. This application was unopposed and is therefore granted.

**Order:**

1. The Notices of Application to strike out the claim are refused.
2. The Application to extend time to file an affidavit in answer is granted.
3. The Defendants are permitted to file and serve affidavits in answer on or before the 31<sup>st</sup> of May 2021.

4. The First Hearing of the fixed date claim form is adjourned to the 7<sup>th</sup> of December 2021 at 10:00 am for one hour.
5. The matter is set for hearing before the Full Court for five days on the 29<sup>th</sup> of May 2023 to the 1<sup>st</sup> of June 2023 and the 5<sup>th</sup> of June 2023.
6. Leave to appeal is granted.
7. Costs to the Claimants to be agreed or taxed.
8. The Claimant's Attorneys-at-Law are to prepare file and serve this order.