



[2023] JMSC Civ 39

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. SU2021CV00187

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

AND

**IN THE MATTER OF SPECIAL MINING LEASE 173
PERMITTING BAUXITE MINING IN THE AREA
HISTORICALLY KNOWN AS THE COCKPIT COUNTRY**

AND

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

BETWEEN	SOUTHERN TRELAWNY ENVIRONMENTAL AGENCY	1ST CLAIMANT
AND	CLIFTON BARRETT	2ND CLAIMANT
AND	THE ATTORNEY GENERAL OF JAMAICA	1ST DEFENDANT
AND	NORANDA JAMAICA BAUXITE PARTNERS II	2ND DEFENDANT
AND	NEW DAY ALUMINUM (JAMAICA) LIMITED	3RD DEFENDANT

IN CHAMBERS

Mr B. St. Michael Hylton KC and Mesdemoiselles Malene Alleyne, Melissa S. McLeod & Daynia Allen instructed by Hylton Powell for the Claimants.

Ms Lisa White, Deputy Solicitor General & Mrs Taniesha Rowe-Coke instructed by the Director of State Proceedings for the 1st Defendant.

Messrs Ransford Braham KC & Glenford Watson instructed by Glenford Watson, Attorneys-at-Law for the 2nd Defendant.

Ms Carlene Larmond KC & Ms Giselle Campbell instructed by Patterson Mair Hamilton for the 3rd Defendant.

Ms Michelle Lee Legal Officer in the Ministry of Transport and Mining

Heard: December 12, 2022, January 24 & March 14, 2023

Constitutional law – Standing to commence constitutional claim – Whether company has locus standi to commence a claim for constitutional redress under section 19(1) of the Charter of Fundamental Rights and Freedoms in its own right - Whether a company can claim environmental rights under the Charter of Fundamental Rights and Freedoms - Right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage - Right to protection from degrading treatment

Civil Procedure – Striking out - Application to strike out first claimant’s statement of case and to remove the first claimant from the claim

The Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011, section 13(1)(b), 13(1)(c), 13(2), 13(2)(b), 13(3)(1), section 13(3)(f)(ii), 13(3)(q), 13(3)(o), 13(5), 13(6), 19(1) and 19(2)

Jamaica Constitution (Order in Council), 1962

The Interpretation Act, sections 3, 4

Civil Procedure Rules, 2002, Rules 17.1, 17.4(2), 21.2, 22.4 26.3(1), 30.3(1), 30.3(3), 56.8

WINT-BLAIR, J

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The Application

[1] The Court has been tasked with the determination of an application brought by the Attorney General to remove the first claimant and to strike out its statement of case, in that the first claimant has no standing to commence a constitutional claim. The application seeks to:

1. Remove the Southern Trelawny Environmental Agency as a party to this matter.

2. Strike out the evidence filed by the Southern Trelawny Environmental Agency or its representative, Hugh Dixon.
3. Grant such further orders that this Honourable Court may think just.

[2] The application is based on the ground that the Southern Trelawny Environmental Agency does not have the requisite standing to initiate an application to the Supreme Court under section 19(1) of the Charter of Fundamental Rights and Freedoms in the instant matter. Granting these orders is in keeping with the overriding objective and the Constitution of Jamaica, the supreme law of the land.

The Claim

[3] The Claimants by way of a Fixed Date Claim Form filed on 20 January 2021 seek the following relief: -

- (1) *Declarations that Special Mining Lease 173 abrogates, abridges or infringes (“breaches”) or is likely to breach the following guaranteed constitutional rights:*
 - (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 neither the manner nor the extent of the abrogation, abridgement or infringement of the aforementioned constitutional rights is demonstrably justified in a free and democratic society.*

- (3) *Alternatively, a Declaration that the aforesaid provisions of Chapter III of the Constitution are likely to be contravened in relation to the Claimants and other residents of and owners of property in the areas covered by Special Mining Lease 173.*
- (4) *Consequently, an order that Special Mining Lease 173 is void and of no effect and/or should be struck down.*
- (5) *An injunction restraining the Second Defendant and the Third Defendant whether by themselves or by their employees, servants or agents or howsoever, from starting or continuing any exploring, mining or other activity pursuant to or in reliance on Special Mining Lease 173.*
- (6) *Constitutional/vindictory damages.*
- (7) *Interest on damages at the statutory rate of interest.*
- (8) *Such further and other relief as this Honourable Court deems appropriate or which may be necessary to give effect to the Declarations sought.*
- (9) *Costs.*

[4] The Claim is brought on the following grounds: -

- (1) The first claimant is [a] company incorporated under the Companies Act, and is a civil organization. Its objects include promoting public awareness of the importance of the maintenance of environmental quality, facilitating the development of the Cockpit Country as a protected and managed park area and the encouragement of ecologically sound planning practices, environmental research and eco-tourism and agriculture.
- (2) The second claimant is a farmer and a citizen of Jamaica, and has resided in Alps District in the parish of Trelawny for more than 60 years.

- (3) The first defendant, the Attorney General of Jamaica, is joined as the representative of the Crown pursuant to the Crown Proceedings Act.
- (4) The second defendant (“Noranda”) is a partnership between the third defendant and Jamaica Bauxite Mining Limited, a company wholly owned by the Government of Jamaica.
- (5) The third defendant (“New Day”), formerly Noranda Bauxite Limited, is a company incorporated under the Companies Act, and is owned by New Day LLC and Jamaica Bauxite Mining Limited.
- (6) In 2016 the Government of Jamaica entered into an agreement with New Day (“the New Day Agreement”) for among other things, the mining of bauxite.
- (7) On August 28, 2018 pursuant to the New Day Agreement, the Government of Jamaica granted Special Mining Lease 173 to New Day for the purposes of mining bauxite in, under or upon approximate 120 km² (120,000 hectares) of lands in the parishes of St. Ann and Trelawny (“the Proposed Mining Area”). Special Mining Lease 173 provides that New Day will appoint Noranda as its agent to mine the bauxite and perform other mining activities.
- (8) The Proposed Mining Area falls within the area of approximately 1,099 sq. km (271,000 acres) that has traditionally been known and described as the Cockpit Country, based on factors including the forest cover, rich biodiversity, significant hydrological features and cultural and heritage sites, all inter-connected to the landscape’s unique geomorphology (“the Cockpit Country”). The Cockpit Country includes Madras, Barnstaple, Gibraltar, Stewart Town, Jackson Town, Sawyers, Alps, Ulster and Freemans Hall. These communities are on the periphery of Special Mining Lease Area 173.

- 9) Section 13(1)(b) of the Constitution provides that all persons in Jamaica are entitled to preserve for themselves and future generations certain fundamentals rights and freedoms.
- 10) Section 13(2)(b) of the Constitution provides that no organ of the State shall take any action which abrogates, abridges or infringes any of the rights guaranteed by Chapter III of the Constitution.
- 11) Section 13(5) of the Constitution provides that Chapter III also binds natural or juristic persons.
- 12) Section 19(1) of the Constitution provides that any person alleging that any of the provisions of Chapter III of the Constitution has been, is being or is likely to be contravened in relation to him, may apply to the Supreme Court for redress.
- 13) Special Mining Lease 173 has contravened or is likely to contravene the constitutional rights guaranteed under Chapter III of the Constitution.
- 14) The mining activities that New Day and Noranda threaten and intend to carry out are likely to contravene the constitutional rights guaranteed under Chapter III of the Constitution.
- 15) There is no other means of adequate redress for the above-mentioned contraventions of the Constitution.

BACKGROUND

[5] The claim concerns the decision of the National Environment and Planning Agency (“NEPA”), to issue Permit No. 2018-06017-EP00196 and Permit No. 2018-06017-EP00197 (“the Permits”) to the second defendants, Noranda Jamaica Bauxite Partners II (“Noranda II”) in or about February 2022. The Permits authorize Noranda II and or New Day as part of its intended mining activities, “*to Undertake Enterprise, Construction or Development in a Prescribed Area*” in part of

the Proposed Mining Area, which is geographically located in the parishes of St. Ann and Trelawny.

[6] Noranda II (now known as Discovery Bauxite Partners), is a partnership between Jamaica Bauxite Mining Limited (“JBML”) which is a company wholly owned by the Government of Jamaica (“the GOJ”). The third defendants, New Day Aluminium (Jamaica) Limited (“New Day”), is a limited liability company duly incorporated under the Laws of Jamaica.

[7] JBML owns 51% of the partnership and New Day, the remaining 49%. New Day serves as the managing partner of the partnership, while Noranda II performs all mining operations on behalf of New Day.

Special Mining Lease 173

[8] Prior to the grant of the permits, New Day and the Minister of Transport and Mining (on behalf of the GOJ) executed a special mining lease agreement dated August 28, 2018 (“SML-173”) for the lease to New Day of approximately 120km (120,000 hectares) of land for mining in St. Ann and Trelawny as outlined in the SML-173. SML-173 provides that New Day will appoint the Noranda II as its agent to mine the bauxite and perform other mining activities.

[9] On or around March 3 and March 4, 2022, at sensitization meetings, New Day and Noranda II announced that they would start mining in SML 173 in 2022. New Day and Noranda II have stated their intention to start mining in the Industry Pen community.

[10] The claimants maintain that SML-173 and the proposed mining activities of New Day and Noranda II are likely to contravene their constitutional rights under Chapter III of the Constitution of Jamaica. It is further maintained by the claimant that SML-173 abrogates, abridges or infringes or is likely to breach the guaranteed

constitutional rights to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of the ecological heritage under section 13(3)(1) and guaranteed by section 13(2) of the Constitution.

ISSUES

[11] On this application, the following issues arise for the court's determination:

- (a) Whether STEA as a legal but not natural person can seek redress for alleged likely contraventions of the Charter in relation to itself under the specified provisions of Chapter III of Charter of Fundamental Rights and Freedoms (Constitutional Amendment Act), 2011 ("the Charter") which protect fundamental rights and freedoms.
- (b) Whether STEA can invoke the procedure to enforce those protective provisions by application to the Supreme Court, which section 19(1) of the Constitution provides.
- (c) The interpretation to be given to the relevant constitutional provisions.
- (d) Whether the first claimant should be removed from the claim and its statement of case should be struck out.

Submissions of the First Defendant

[12] Ms. White, on behalf of the Attorney General, submitted that the STEA does not have the requisite standing to initiate an application to the Supreme Court under section 19(1) of the Charter of Fundamental Rights and Freedoms ("the Charter") in this matter. In both written and oral submissions, counsel contended that the requirement to commence a constitutional claim in section 19(1) of the Charter does not contemplate claims by legal persons. She cited section 3 of the

Interpretation Act which sets out the definition of “*person*” and also section 4(a) thereof which provides that words importing the masculine gender includes females.

[13] The learned Deputy Solicitor General contends that the word “*person*” includes both natural and legal person, accepting that it is reasonable that legal persons may be able to assert certain human rights, for example to own property and the freedom of speech. However, section 19(1) of the Charter contemplates that only natural persons may commence a claim under the Constitution. Section 19(1) uses the word “*him*” which imports the masculine gender and includes females but not inanimate legal persons. Legal persons are not shut out entirely, they may commence constitutional claims in restricted circumstances such as being authorised by law or being a civic or public organisation with leave of the Court under section 19(2) of the Charter.

[14] In relation to the Interpretation Act, despite the definition of ‘*person*’ including juristic persons, the Constitution of Jamaica affords enforceable human rights for natural persons only. As the STEA is not clothed with constitutional rights it cannot enforce these rights as a juristic person. Therefore, it cannot obtain an order on the premise that its constitutional rights have been, are being or are likely to be infringed.

[15] The STEA is a juristic and not a natural person which means that the STEA has legal personality but not personhood. Legal personality permits the STEA certain legal and corporate rights to do certain things that humans can do, for example to be sued and to sue in its own name and to enter contracts. However, it is not human.

[16] Human rights are ascribed to human beings and denoted as inherent to human beings. In addition, constitutional rights are rights for the individual human being. The scheme of the Charter reduces certain international human rights into Jamaica legislation, thereby making them enforceable in Jamaica, and transforms them into constitutional rights only for natural persons and not juristic persons as alleged or at all.

[17] It is submitted that section 13(5) of the Charter of Fundamental Rights and Freedoms binds the STEA as a legal fiction (concerning legal personality) but does not confer constitutional rights. This means that the Constitution regulates the conduct of juristic persons and regulates the laws that regulate the conduct of juristic persons. The STEA is bound to observe this provision of the Constitution as concerns the Constitution of Jamaica.

[18] It is submitted that the STEA is not a *person* contemplated by section 19 of the Charter. It is natural persons who are entitled to apply under section 19(1) for constitutional redress. Section 19(2) of the Charter enables circumscribed parameters for public or civic organizations to initiate an application to the Supreme Court on behalf of persons entitled to apply under section 19(1). The criteria to be satisfied are:

- a. It is a public or civic organization
- b. The organization obtained leave from the court

[19] In order to be appointed, the STEA needed to identify the persons being represented and to make an application under part 21 of the Supreme Court Civil Procedures Rules, in order to be appointed as a representative claimant. It is submitted that without an order from the Supreme Court granting this permission, the STEA is consequently not a proper party to these proceedings generally and specifically has no standing on which to request the injunctive relief sought.

[20] The first claimant unlike the Children's Advocate, is not authorised in law to commence a constitutional claim. It cannot commence a claim as of right under section 19(1) of the Charter and it is not authorised to commence a claim under section 19(2). The first claimant therefore falls into the category of public and/or civic organisations which can only commence a constitutional claim with leave. Any claim otherwise commenced would not be initiated in accordance with the Constitution of Jamaica. It is only upon the grant of leave by the Court that the first claimant would have standing in a constitutional claim. The punctuation is important in construing section 19(2) of the Charter.

[21] The first claimant has by evidence in the affidavits of Hugh Dixon, demonstrated that it is a representative claimant representing different individuals and that it has commenced this claim on behalf of these stakeholders. Having not been granted leave by the Court, the Attorney General submits that the claim as commenced for and on behalf of the first claimant is a nullity. The first claimant has not satisfied the provisions of section 19(2) of the Charter and thereby has no standing to bring the claim.

[22] Further, this is not a mere procedural irregularity. The court cannot exercise its case management powers to set matters right pursuant to the Civil Procedure Rules, Rule 26.9. This issue goes to the root of the claim and is fundamental to the proper initiation of a constitutional claim by a civic organisation that is a legal person. Having not obtained leave before commencing the instant claim, the claim is void ab initio and should be struck out. The first claimant has no standing in the instant claim as a result. Accordingly, the court would have no jurisdiction to hear and determine any issues in the matter as it concerns the first claimant. Any evidence given for and on behalf of the first claimant in the claim is also a nullity and should be struck entirely from the record. The first claimant ought to be removed from the proceedings.

[23] Ms White contends that commencing matters on the Crown side of the Supreme Court is different from commencing matters on the civil side of the Supreme Court. Matters on the Crown side include judicial review and constitutional matters. In matters on the Crown side, persons cannot commence claims as of right and must do so only in accordance with the stipulated procedure. She cites **Scott Davidson v The Scottish Ministers**¹ in support of this proposition.

[24] She argues that the procedure is stipulated at common law and reduced to Part 56 of the Civil Procedure Rules (“CPR”) for judicial review.

¹ [2005] UKHL 74, (2006) SCLR 249

[25] Further, the requirement to commence a constitutional claim pursuant to section 19 of the Charter as framed, prescribes that:

- a. Natural persons may commence their own claims pursuant to section 19(1).
- b. Only natural persons are entitled to commence constitutional claims pursuant to section 19(1).
- c. Under section 19(2), persons authorized by law may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) only for a declaration that any legislative or executive act is unconstitutional.
- d. A public or civic organisation can only, with leave of the court, initiate an application to the Supreme Court on behalf of persons who are entitled to apply under section 19(1) only for a declaration that any legislative or executive act is unconstitutional.
- e. Natural and or legal persons may commence constitutional claims for an aggrieved person, other than themselves if authorised by law.
- f. Otherwise, a public or civic organisation (whether) or not that organisation is a legal person) may only commence a constitutional claim with the leave of the court.
- g. A legal person therefore cannot commence a constitutional claim as of right.

[26] The first claimant is not a proper party to these proceedings and is not entitled to constitutional redress. A court ought not to grant the orders sought for the following reasons:

- (a) As a juristic and not a natural person, the first claimant has legal personality but not personhood.
- (b) Legal personality permits the first claimant certain legal and corporate rights to do certain things that humans can do, for example to be sued and to sue in its own name and to enter into contracts. However, it cannot be human.
- (c) Human rights are ascribed to human beings and denoted as inherent to human beings.
- (d) Constitutional rights are rights for the individual human being.
- (e) As Jamaica is a dualist country, the scheme of the Charter of Fundamental Rights and Freedoms reduces certain international human rights into Jamaican legislation thereby making them enforceable in Jamaica and transforms them into constitutional rights only for natural persons in Jamaica and not juristic persons as alleged or at all, for example:
 - i. The right to life, liberty and security of the person in section 13(3)(a) of the Charter reduces Article 3 of the *Universal Declaration of Human Rights* into Jamaican law.
 - ii. The right to freedom of thought, conscience, belief and observance of political doctrines in section 13(3)(b) of the Charter reduces Article 18 of the *Universal Declaration of Human Rights* and Article 18 of the *International Covenant on Civil and Political Rights* into Jamaican law.
 - iii. The right to freedom of expression in section 13(3)(c) of the Charter reduces Article 19 of the *Universal Declaration of Human Rights* into Jamaican law.

- iv. The right to freedom of movement in section 13(3)(f) of the Charter reduces Article 13 of the *Universal Declaration of Human Rights* into Jamaican law.
- b. Section 13(5) of the Charter binds the first claimant as a legal fiction concerning legal personality but does not afford it constitutional rights. This means that the Constitution regulates the conduct of juristic persons and regulates the laws that regulate the conduct of juristic persons.

[27] The Constitution of Jamaica (“the Constitution”) restrains the state in how it conducts itself and the types of laws it promulgates; governing the relationship between the state and the individual human being. Despite the definition of *person* including juristic persons, under the Interpretation Act, the Constitution does not afford enforceable human rights for legal persons as of right.

[28] Section 19(2) of the Charter enables circumscribed parameters for public or civic organisations to initiate an application to the Supreme Court on behalf of persons entitled to apply under section 19(1) thereof. The criteria to be satisfied have been indicated above.

[29] To be appointed a representative, the first claimant needed to have identified the persons being represented and to make an application under Part 21 of the CPR. Without an order from the Supreme Court granting this permission, the first claimant is consequently not a proper party to these proceedings generally and specifically has no standing on which to request constitutional redress.

[30] It was submitted that both claimants have identified specifically the right to enjoy a healthy and productive environment free from the threat of injury or damage from environmental abuse and degradation of ecological heritage acknowledged by section 13(3)(l) and guaranteed by section 13(2) of the Charter.

[31] Should the court not find favour with the arguments previously stated, Ms. White argued in the alternative that the first claimant as a legal person is not entitled

to pray in aid the rights identified in the claim which are inextricably linked with human beings and are a function of human rights. Therefore, even if the court were to be of the view that this deficiency in initiating the claim in accordance with section 19(2) could be redeemed, (which the Attorney General submits it is not) then it is submitted that the first claimant is not entitled to the rights said to have been engaged.

Submissions in response

[32] It is submitted in response that the case of **Attorney General and another v Antiguan Times Limited** [1975] 3 All ER 81 ('the Antiguan Times Case'), is persuasive and is not binding on this Honourable Court. It is not an appeal from Jamaica and the constitutional provisions of the Antiguan constitution differ from that of the Constitution of Jamaica. Further, the case dealt with the interpretation of a 'person' in the context of property rights and property ownership, it is therefore not relevant. It is submitted that the case outlines that the nature of the rights to be enjoyed as against the nature of the duties which arises from those rights are what must be examined by the court. The instant case does not deal with property rights and the definition of person is not relevant to the instant case. The Privy Council said, look at the nature of the right and the nature of the duty. In section 13, the context and nature of the right refers to a right which can only be prayed in aid by a legal or natural person.

[33] Finally, The STEA, as a public or civic organization, has not satisfied the criteria under section 19 necessary to have standing in this matter and is not entitled to the rights identified. They should therefore not be allowed to continue in this claim as a named claimant and should not be allowed to put evidence before this court, either by themselves or their representatives.

The preliminary point

[34] In response to the submissions of the claimants, on the preliminary point, the matter does not concern the liberty of the subject, the rules provide that the matter can be heard by a single judge. (See Rule 56.8.)

[35] Ms White argued that there is a distinction in the European jurisprudence as they are more liberal in their interpretation, equating business rights and constitutional rights. The example given to the court of the state compulsorily acquiring property whether or not the legal person would have redress the allegation of expropriation would be remedied by compensation. A legal entity may have business rights, they may not fall under the constitutional rights which exist, some rights can be prayed in aid by a legal person, the rights being claimed in this case are not among those business rights.

[36] Section 13(5) in binding natural or juristic persons is demonstrating how the Constitution is to be observed. The vertical relationship between state and person and the horizontal relationship between different entities in the nation. There has to be a consideration of the different rights and the nature and duty imposed by the rights. The claimants have included the AG in respect of any actions or omissions ascribed to the Government of Jamaica. In none of the cases cited were these specific rights mentioned.

[37] The rights cited in this claim are rights enjoyed by humans and not corporations, in section 13(3)(l) – the use of the words “*the right to enjoy*” and the use of the words “*threat of injury*” or “*damage from environmental abuse*” are words which demonstrate how the rights are to be construed.

[38] In section 13(3)(f) – the right to freedom of movement particularized in sub-paragraphs (i) and (ii) is a right to a freedom of movement which is a right enjoyed by humans and not corporations.

[39] Sections 13(3)(o) and 13(6), use the word “*other*” the meaning of the word other is taken from context, the ejusdem generis rule means other kinds of treatment applies in both sections for example, issues of torture. The word “*other*” means “like” and could not apply to a corporation.

[40] Regarding the case of **Times Newspaper v the Sunday Times** and freedom of expression, the question as to whether a non-legal person could make an

application was otiose, this is not a right being considered here, there is no corresponding provision in our Constitution, the case is unhelpful to the court.

[41] In **Capital Bank v Bulgaria**, the regarding the solvency of the bank in a business context, the court was looking at Article 6, the fair trial provision as well as Article 34. There is no corresponding provision in our Constitution. In that case, the government asked for claim to be struck on basis that bank no longer existed not that it had no legal personality.

[42] In **X and Church of Scientology v Sweden** and other cases the rights under consideration do not arise here, the interpretation cannot be technical or legal.

[43] Ms. White cited no authorities in support of these submissions, nor upon the invitation of the court for supplemental submissions.

Submissions of the Second and Third Defendants

[44] Kings Counsel for the second and third defendants' adopted the submissions advanced by the learned Deputy Solicitor General in support of the application for the reasons advanced herein.

The Claimants' submissions in response

The preliminary point

[45] Counsel for the claimants, Mr. Hylton KC, commenced with a preliminary submission in relation to the Attorney General's application and the circumstances in which it was being made. The application, he argues, does not allege that there is no cause of action or that STEA has breached any rule or order, neither has it been argued that there is a procedural defect in the proceedings. The contention of the Attorney General ("the AG",) is that STEA has no standing to bring the claim.

[46] This claim was filed in January of 2021. The parties to include the have all filed multiple affidavits, none of which have raised a challenge to STEA's status. The court has made various case management orders with which the parties have complied. The trial date has now been fixed before the Full Court. The parties have

filed submissions for the trial and in her submissions, Miss has raised this very issue of the standing of STEA to bring the claim. The Full Court is therefore seised with this issue at the AG's invitation. At this the 11th hour, for reasons that the application does not disclose, the AG has asked that a single judge remove the issue from the Full Court and decide it in chambers on an interlocutory application.

[47] This application raises important and novel points of law as to whether a company in its own right can claim the rights outlined here. The Full Court has never determined whether a company can claim those rights. In particular, the environmental rights were recognized for the first time by the Charter and this is the first time as far as counsel was aware that a company is seeking to enforce them.

The substantive application

[48] Mr Hylton, KC argued that, STEA is a company incorporated under the Companies Act of Jamaica and is therefore a legal person. Section 19(1) of the Charter provides that any "*person*" alleging that any of the provisions of Chapter III of the Constitution has been, is being or is likely to be contravened in relation to him, may apply to the Supreme Court for redress.

[49] The claim is commenced pursuant to section 19(1) and the issue in this application before the court is whether the STEA has the standing to bring this claim under that section. The claimants' rely on section 19(1) which allows STEA to bring the claim in its own right, in that, the Fixed Date Claim Form² does not make reference to section 19(2).

[50] It is submitted that the arguments advanced by counsel for the AG, that the STEA, as a legal person, cannot claim any rights in the Charter of Fundamental

² Filed on January 20, 2021

Rights in its own right and alternatively, if that argument fails, the STEA cannot enforce the rights asserted in this case.

[51] It is submitted that these arguments must fail on three grounds:

(i) The Interpretation Act

(ii) Decided Cases /Judicial Authority

(iii) The Court's approach to the interpretation and protection of Constitutional rights.

The Interpretation Act

[52] Section 3 of the Interpretation Act provides that:

"In all Acts, regulations and other instruments of a public character relating to the island, now in force or hereafter to be made, the following words and expressions shall have the meaning hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided."

[53] The section then goes on to state that "*person*" includes any corporation, either aggregate or sole..."

[54] Mr Hylton further submitted that unlike the Constitution of 1962 which is a schedule to an Order in Council. The Charter was created by a statute, the Charter of Fundamental Rights and Freedoms Constitutional Amendment Act, 2011. The Interpretation Act applies to this statute. The Charter refers to a "*person*" and does not expressly provide that the meaning is other than the meaning prescribed in the Interpretation Act.

[55] It is accepted that there are some rights which can only be enjoyed by natural persons such as the right to freedom from discrimination on the grounds of being male or female or on the grounds of race (section 13(3)(i)) and the right to be granted a passport (section 13(3)(n)). However, this does not apply to all rights, as

some rights can similarly be enjoyed by a corporate body such as the right to own property.

[56] Therefore, it cannot be said that the context of all the rights excludes them from being enjoyed and applied by a corporate body. There are no express contrary provisions in the Interpretation Act or in section 19 of the Charter, stating that the rights being claimed cannot be enjoyed by a corporate body and limiting them to natural persons, and as such section 19(1) ought to be interpreted to include a corporate body. There are therefore no reasons why only natural persons can enforce the rights STEA asserts in this claim. The interpretation of the rights should be such that they are applicable to both natural and legal/juristic persons.

[57] Section 19(2) provides that any person authorized by law, or with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under sub-section (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter. STEA has not applied for leave pursuant to section 19(2) of the Charter. The first claimant's position is that STEA need not have sought leave on behalf of other persons because STEA itself, is entitled to claim pursuant to section 19(1).

[58] The fact that section 19(2) enables a company to claim in a representative capacity does not mean that section 19(1) precludes a company from claiming the fundamental rights in the Charter if it alleges that its rights have been, are being or are likely to be breached.

[59] Section 19 should not be interpreted to mean that the only way that a civic organization such as STEA can make an application is if it is representing a natural person who is entitled to claim. This type of restrictive interpretation runs counter to the authorities.

[60] It is submitted that while it is acknowledged in the second Dixon affidavit that STEA may initiate a claim on behalf of residents in Trelawny who are also entitled to various rights pursuant to section 13 of the Charter, STEA has not brought

such a claim. A reading of the affidavit and the Fixed Date Claim Form as a whole make it clear that STEA is claiming in its own right.

[61] The claimant's grounds for seeking constitutional relief in the Fixed Date Claim Form are based on section 19(1) and does not refer to nor rely on section 19(2). Paragraph (8) of the second Dixon affidavit also says that STEA is entitled to the relief claimed in its own right.

[62] In this context, when paragraph (9) of the second Dixon affidavit (which the AG quotes and relies on in its affidavit) says that STEA is a civic organization which **may** initiate a claim on behalf of the residents who are **also** entitled to various rights, it is evident that STEA is really claiming in its own right and only mentions that it could also have brought an application on behalf of those residents. A consideration of section 19(2) therefore does not arise in this case.

[63] The issue for the court is whether a company can claim the abovementioned rights and bring an action in its own right pursuant to section 19(1). In this context, the court will also note STEA's objects and the nature of its business. Its objects include promoting public awareness of the importance of the maintenance of environmental quality, facilitating the development of the Cockpit Country as a protected and managed park area and the encouragement of ecologically sound planning practices, environmental research and eco-tourism. STEA is therefore directly concerned with protecting the Jamaican environment, including the SML – 173 Area as a part of its course of dealings as an organization. STEA's business also involves giving eco-tourism tours in the area traditionally known as the Cockpit Country.

[64] It is the claimants' case that SML – 173 is a part of the area traditionally known as the Cockpit Country and therefore STEA is also directly affected by mining in SML – 173. Although STEA is a juristic person, it can claim the various rights engaged in the current claim pursuant to section 19(1).

Decided Cases

[65] In the Privy Council decision of **Attorney General and another v Antigua Times Limited**,³ the Board made it plain that a company could claim its constitutional rights were breached. The question was not whether a company's rights may be breached generally, but whether the particular right is capable of being enjoyed by a company so that a company could bring a claim in respect of that right.

[66] This has long been the approach of the European Commission on Human Rights and the European Court of Human Rights in applying the rights enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the ECHR".) The Jamaica Charter was greatly influenced by the ECHR. *"There is a close textual affinity between the relevant articles in the ECHR and the Constitution which makes it appropriate to pay heed to authority on the one when considering the meaning and effect of the other."*⁴

[67] It is submitted that relevant provisions, in particular section 17 of the Antiguan Constitution are substantively the same as that of section 19(1) of the Jamaica Constitution. The Attorney General of Antigua advanced the same arguments as that advanced in this case by the Attorney General in relation to natural persons and the Board unanimously rejected those arguments.⁵

[68] The Board further considered the preamble, which doesn't appear to be restricted to human rights. The arrangements of the Charter mirror the ECHR, which provides no indication that the rights contained therein are to be enjoyed solely by natural persons. Further, the title of the Charter of Jamaican Constitution is entitled 'the Charter of Fundamental Rights and Freedoms' and not the Charter of Human Rights.

³ [1975] 3 All ER 81

⁴ Grant v R [2006] UKPC 2 at paragraph 17

⁵ See paragraph 51

[69] The rights are conferred by section 13(1)(b) and the obligations by section 13(1)(c) of the Charter, both sections use the word “*persons*”. If the AG is correct, then the word “*persons*” in (b) has a different meaning than the word “*persons*” in (c). Section 13(5) binds the non-juristic person, therefore companies have to observe the legal rights of others yet they do not have the same rights, this would be the conclusion to be drawn from the AG’s submissions.

[70] In the **Times Newspaper Ltd. et al v United Kingdom**,⁶ the European Commission considered applications lodged by both legal persons and a natural person. Each claimed to be a proper party as well as that a breach of their right to freedom of expression under Article 10 of the ECHR was admissible. The Commission found that all the applicants were proper parties and could claim a right to freedom of expression.

[71] The European Court of Human Rights found that a company can enjoy the right to a fair trial under Article 6 of the ECHR in the case of **Capital Bank AD v Bulgaria**.⁷ In that case, the government had argued that there was no need to consider Article 6 in respect of bankruptcy proceedings for a bank. The government had argued before the court that no civic rights were engaged. The court rejected the government’s view holding that the right to a fair trial section 1 of Article 6, applied to bankruptcy proceedings.⁸

[72] In **X v Church of Scientology v Sweden**,⁹ the Commission had to consider whether a church could claim a right, in its own right, to freedom of thought,

⁶ Application no. 6538/74

⁷ Application no. 49429/99

⁸ Paragraphs 86 and 88.

⁹ Application no. 7805/77

conscience and religion pursuant to Article 9 of the ECHR without needing to rely on its members to bring a claim for these rights.¹⁰

[73] In the case of **Verein Netzwerk v Austria**,¹¹ the European Court of Human rights found that in answering the question whether the applicant association could claim to be a victim of an alleged violation of its right to respect for its home within the meaning of Article 34 of the ECHR; to interpret the words “private life” and “home” as including certain professional or business activities or premises was consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities.¹²

[74] Mr Hylton, KC submitted that the European jurisprudence is therefore replete with examples where companies have been permitted to claim diverse human rights in their own right and not on behalf of named persons who are entitled to claim rights. These rights have been extended to those which one might conclude only humans can enjoy such as privacy and freedom of thought or conscience.

[75] The issue to be decided on the application before this court turns on an interpretation of the particular right, what that right is aimed at protecting and its application to the particular facts.

[76] The decision of the Privy Council in **AG v Antigua Times** is particularly relevant in that, in respect of Commonwealth Caribbean Constitutions a similar approach to that taken in Europe should be adopted and there should be a broad interpretation of the provisions on standing. Although in that case, the Board was examining the Constitution of Antigua, the relevant provisions examined in that case are substantively the same as those in the Jamaican Charter and therefore the dicta and approach of the Board are useful.

¹⁰ Paragraph 2

¹¹ Application no. 32549/96

¹² Paragraph 1

[77] The Board considered the preamble to the Constitution of Antigua and noted that although it appeared to refer to human beings, it did not preclude its provisions from being applicable to companies. The Board took the view that such a restrictive approach to constitutional interpretation and particularly civic rights should not be taken.

[78] The preamble to the Jamaican Charter does not refer to persons being entitled to rights regardless of race, place of origin etc. as does the Antiguan Constitution, save for the right to discrimination in section 13(3)(i). It is even more evident that in the case of Jamaica, the rights should not be limited to natural persons but should also apply to legal/juridical persons.

[79] Some of the cases spoke to the court's approach to enforcing constitutional rights, the court should take a look at the consequences of taking the approach AG suggests which is that a company can never enforce rights on its own behalf. The submission of the AG is that a company could only do so under 19(2). If it were not an authorised body, a company would have to be a public or civic organization claiming on behalf of others not on its own behalf.

[80] Further, it could only seek a declaration and no substantive relief. If this proposition is correct then, the government could take all the property of a company with no compensation leaving the company with no means of redress. That conclusion runs contrary to the intent of the Constitution and the Charter which created these rights. This is not a conclusion a court would likely embrace and the AG has cited no authority to support this proposition.

Environmental rights

[81] The rights under examination are environmental rights. The issue is whether they can be claimed by a company. In assessing whether a company can claim environmental rights on the facts of this case it is important to have regard to what they seek to protect. There is no reason that a company could not enjoy a productive environment. Productivity being the key element of any company.

[82] Further, while we accept that a company cannot be physically “injured”, the business carried on by a company can be injured or damaged from environmental abuse. For example, a company engaged in farming, fishing or eco-tourism (as is STEA) which depends on the natural environment could certainly have its business injured or damaged by environmental abuse such as pollution.

[83] There is no reason why a company whose objects and work are rooted in environmental protection and eco-tourism, such as STEA, could not have a direct interest and claim in respect of degradation of the ecological heritage. Indeed, its eco-tourism business depends on the quality of the ecological heritage. To find otherwise would yield an anomalous result as the logical conclusion of the arguments of the AG would mean that the second claimant can file a claim, but a company which owns and operates an adjoining farm cannot.

[84] In **Verein Netzwerk** the right to a home and family life was interpreted to include business activities or business premises. A similar approach should be employed in relation to the right to reside in any part of Jamaica, so that the right would include the right to do business or have a place of business in any part of Jamaica. The natural environment is where STEA carries on its business and the areas traditionally known as the Cockpit Country should be regarded as the residence of STEA.

[85] In the **Antigua Times** case, the Privy Council acknowledged that the right to discrimination was applicable to a company. To bolster, this submission, Kings Counsel made reference to the authors of *Fundamentals of Caribbean Constitutional Law*¹³ at paragraph 3-018 who spoke to the liberal interpretation courts should give to the Bill of Rights provision in the Constitution.

Public interest litigation

¹³ By Tracy Robinson, Arif Bulkan & Adrian Saunders

[86] Further and in the alternative, it was submitted that the court should look beyond the question of whether STEA can claim in its own right, and view standing from the perspective of the public interest. In so doing, it should not take too restrictive an approach to the question of standing.

[87] The interests of the claimants align with the broader public interest in preserving the SML – 173 area for present and future generations. In cases aimed at protecting the broader public interest, to protect the environment, courts across various jurisdictions have interpreted the concept of “person aggrieved” or standing in broad terms rather than in a strict narrow way.

[88] In the **State of Uttaranchal v Balwant Singh Chaufal and Others**,¹⁴ the Supreme Court of India recognized that public interest litigation was necessary to provide representation of previously unrepresented issues, such as claims brought by environmentalists. The court said it expanded the meaning of right to life and liberty guaranteed under article 21 of the Constitution to provide access to justice to a very large section of the society which would not otherwise benefit from the judicial system.

[89] That court opened the door by pronouncing that public interest litigation would be by way of writ in the High Court under Article 226 and in the case of a breach of a fundamental right, to the Supreme Court by way of Article 32 of the Constitution. Gross violations of fundamental rights, the invasion of basic human rights or complaints which would shock the judicial conscience should encourage the courts to leave procedural shackles and hear petitions which seek to remedy the hardship.

[90] The same approach is being commended in the instant case as it similarly involves gross violations of fundamental rights which impact largely on the poor and marginalized communities. This case does not just affect those in the SML – 173 Area, but those in wider Jamaica. It has a far-reaching impact, particularly

¹⁴ [2010] 4 LRC 54

considering that Jamaica is a small island with persons relying on resources not only from their own parish. There is an interconnectedness from living on an island. It is submitted that STEA should be able to represent the broader interests of Jamaica generally under the concept of public interest litigation.

[91] Section 13(1)(b) of the Charter provides that “*all persons*” not *all humans* in Jamaica are entitled to preserve for themselves and for “*future generations*” certain fundamental rights and freedoms. This indicates that the Charter itself implicitly acknowledges that a broader approach be taken in respect of standing and it is submitted that section 19 should be read in light of this. This provision is particularly relevant because the breach of the rights not only impacts the claimants directly, but also future generations. The claim engages issues of sustainable development in light of potential damage to the environment.

[92] It is submitted that in the present case, there are risks to both the environment itself as well as a risk of impact to the claimants and the wider Jamaican society that requires this court’s intervention.

The Court’s Interpretation and Protection of Constitutional Rights

[93] It is submitted that the submissions of the first defendant, that a company cannot assert rights in their own regard is one of fiction. The Attorney General submitted that a company could only seek redress under section 19(2) if it is a public or civic organization, asserting said rights on other’s behalf and can only seek a declaration and not any substantive relief. This is contrary to the intention of the constitution and the Charter of Fundamental Rights in creating these rights and it is not a conclusion for the court to embrace especially where there is a lack of authority to support it.

[94] Section 13(1) commences with the preamble to the Charter of Fundamental Rights. In particular, section 13(1)(b) gives the right to fundamental rights and freedoms by virtue of their inherent dignity as persons and as citizens of a free and democratic society and section 13(1)(c) outlines the responsibilities in respect of those rights. Both use the word ‘*persons*’. If the submissions of the

Attorney General are to be accepted as correct, the word ‘persons’ would have different meaning under 13(1)(b), than it would have under section 13(1)(c), since under section 13(5) both natural and juristic persons are bound by the obligation. However, the ‘persons’ under section 13(1)(b) would exclude companies while the word “persons” under section 13(1)(c) would include them. The result of which is that companies would be bound by the enforcement of these rights but only to the extent that these rights may be enforced by others against them and unenforceable by a company against others.

Individual Rights

[95] It is submitted by the Attorney General, that a company cannot claim individual rights. There is no reason why a company cannot enjoy the rights claimed in this matter. The business conducted by a company can certainly be damaged by environmental abuse. The STEA, an environmental company can certainly suffer damage from environmental abuse and pollution. There is no reason that a company whose objects and works are routed in the environmental protection and ecological heritage such as the STEA, could not have an interest and claim in the protection of ecological heritage. To find otherwise, it is submitted would result in the anomalies which the Board denounced in the **Antigua Times** case.

[96] By way of an analogy, the submissions advanced by the Attorney General, suggest that a body corporate is not entitled to use the protection of section 15. A farmer could claim protection but a company who owns and operates an adjoining farm could not. In the public interest, the court should not take such a restrictive approach.

[97] The application of the Attorney General seeks additionally, to strike out the evidence of the STEA in this matter. It is submitted that even if the STEA’s evidence is struck out, the affidavit of Mr. Clifton Barrett¹⁵, refers and relies on the

¹⁵ Filed on January 20, 2021

affidavit of Mr. Hugh Dixon, it would remain even if the STEA's evidence is struck out. It is submitted that the application should fail.

[98] The application to strike out should be refused with costs to the claimants, as striking out STEA as a claimant would not be in the interests of justice.

Supplemental submissions

[99] The court invited and extended time for counsel to make submissions on the following:

- a. Aids to interpretation of the relevant provisions
 - i. The history of the Charter
 - ii. Extraneous materials
 - iii. Any other Constitution which is *pari materia* in relation to section 19(1) and (2) of our Charter.
- b. The cases of: **-Shah Vershi Devshi & Co Ltd v Transport Licensing Board** [1971] EA 289 (Kenya HC)
- c. **Great Northern Rly Co. v Great Central Rly Co** (1889) 10 RY & *Can Tr Cas* 266
- d.
- e. **Smith et Al v L.J. Williams Ltd** (1982) 32 WIR 395

[100] The supplemental submissions of the Attorney General were not received.

[101] Mr. Hylton, KC submitted that the case of **Smith et al v L.J. Williams Ltd** is a very important and instructive judgment. First, it is a decision of an appellate court and therefore of greater persuasive value. Second, the relevant facts are very similar to those of the present case. A company filed an action against the Attorney General seeking a declaration that a government official had breached its rights

under section 1 of the 1962 constitution of Trinidad and Tobago (or section 4 of the 1976 constitution).

[102] Like the Attorney General in the present case, Trinidad’s Attorney General argued that since the company was not a natural person, it could not assert or seek to enforce those rights. Finally, and very importantly, the relevant constitutional provisions in both Jamaica and Trinidad and Tobago are in almost identical terms.

[103] Section 6(1) of the Trinidad Constitution provides: ...

“If any person alleges that any of the provisions of the foregoing sections or section 7 of this Constitution has been, is being, or is likely to be contravened in relation him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress.”

[104] Save for the reference to “High Court” instead of “Supreme Court” that language is the same as that in section 19(1) of Jamaica’s constitution.

[105] A unanimous Court of Appeal held that the Constitution guarantees the rights for artificial as well as natural persons, and therefore a company has standing to complain about alleged breaches of those rights. The learned Justices of Appeal did so on various grounds. They relied on the 1889 Interpretation Act, which was in similar terms to Jamaica’s statute.

[106] Kelsick JA said:

“The company being a “person” as defined in section 19 of the Act of 1889, was entitled to seek redress under section 6 of the 1962 Constitution”.

[107] The learned justice of appeal concluded:

“I hold that the rights of the individual under section 1 of the 1962 Constitution, as well as under section 4 of the 1976 Constitution, are the rights not only of a natural person but also of non-natural persons, which include the company.

Consequently, the company may exercise any of the rights in section 1, and in its offshoot section 2, that by its nature it is capable of enjoying.”

[108] Hassanali, JA commented on the courts’ approach when considering a written constitution:

“...it is I think desirable that I set out briefly what I consider are the well-established principles and guidelines applicable in the interpretation of a written Constitution: (a) a liberal approach to the construction of the word is preferred to the restrictive literalist approach; (b) the Constitution should be given a generous or liberal rather than a pedantic or narrow interpretation and its interpretation should certainly not be characterised by the strictures associated with construction of an ordinary statute...”

[109] He concluded that:

“It is manifest that the company will fall within the definition of “person” in section 6 unless “the contrary intention appears”. The contrary intention does not appear in any one of sections 1, 2 and 6.

If section 1 were construed to exclude artificial persons, the anomalies would be considerable. See in this connection the opinion of the Privy Council in Attorney-General and Minister of Home Affairs v Antigua Times Ltd (1975) 21 WIR 560 at page 570. Indeed, such a construction would result in absurdities.”

[110] Cross JA relied heavily on the Privy Council’s decision in **AG v Antigua Times** to support his conclusion:

“I have come to the conclusion that the framers of our Constitution could not have intended to and did not exclude corporations from the protection afforded by the Constitution. To hold otherwise would be not only to admit to a “scandalous defect in the law” which would permit Parliament by a bare majority to pass confiscatory legislation against

corporate property but would also make a mockery of constitutional guarantees with respect to the right to the enjoyment of property and to equality of treatment.”

[111] **Shah Vershi Devshi & Co Ltd v Transport Licensing Board** is a decision of the High Court of Kenya. The Transport Licensing Board refused to renew the applicant company’s licence in order to “remove imbalances between Kenyan citizens”. The company filed this action alleging, among other things, that its constitutional rights had been infringed.

[112] As Chanan Singh J pointed out at page 298, section 70 of the Kenyan constitution sets out certain “fundamental rights and freedoms of the individual” to which “every person in Kenya is entitled”. This language is very similar to that used in section 13(1)(b) of the Jamaican constitution.

[113] The learned judge said:

The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is, I think, clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it, although it is included in the list of “rights and freedoms of the individual”. The word “individual” like the word “person”, does where the context so requires, include a corporation.

[114] The High Court of Kenya therefore held that a company is a person for the purposes of the Constitution and that the licensing board’s decision breached the applicant’s right to not be discriminated against.

[115] In the case of **Great Northern Railway v Great Central Railway**, the court was not considering a constitutional claim or provision. The case involved the interpretation of an Act which gave certain rights to “individuals”. The issue was whether a company was an individual for that purpose. The court applied reasoning similar to the constitutional cases in ruling in favour of the claimant company.

[116] Wright J pointed out the absurd results of a contrary conclusion:

“I think we have jurisdiction as regards the warehouse, under the third subsection, which refers to rights given to the public or to any individual. It seems to me the word “individual” must be construed as extending, not merely to what is commonly called an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems to me impossible that they would not be within the word “individual”. “Individual” seems to me to be any legal person who is not the general public. Supposing a trader has a right given him for a siding or anything else, and he converts his business into a limited company, it would be a strange thing to hold that because of that this court lost its jurisdiction to enforce the rights which were given.”

[117] Mr Hylton, KC contends essentially that if the Attorney General’s arguments are followed to their logical conclusion, as a farmer carrying out his business in the SML -173 area, the 2nd Claimant can commence a claim, but a company which owns and operates an adjoining farm could not. To apply the Attorney General’s interpretation to section 19(1) would lead to an absurdity. Mr Hylton reiterates that the supplemental submissions and cases therein are in keeping with the claimants’ main submissions on this point, which is that the court should take a broad approach to construction of section 19(1).

Preliminary Point

[118] By order of the Full Court on the 31ST day of October, 2022, the instant application was remitted for hearing to the single judge. It has not been argued that the order of the Full Court was without jurisdiction. The question of the application returning to the Full Court was not argued, though obliquely raised by Mr Hylton, KC. Therefore, the matter is properly before this court, currently constituted as a single judge, pursuant to rule 56.8(2)(a).

The Law

[119] Sections 19(1) and (2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act 2011 provides as follows:

“19 (1) If any person alleges that any of the provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) Any person authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of persons who are entitled to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of this Chapter.

[120] Rule 26.3(1) of the Civil Procedure Rules 2002 (“CPR”), provides for the powers of the court to strike out a statement of case and outlines as follows:

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

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

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

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

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

[121] The Interpretation Act

3. In this Act and in all Acts, regulations and other instruments of a public character relating to the Island, now in force or hereafter to be made: the following words and expressions shall have the meanings hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction or unless it is therein otherwise expressly provided-

4. In this Act and in all Acts, regulations and other instruments of a public character relating to the Island now in force or hereafter to be made, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided –

(a) words importing the masculine gender include females; and

(b) words in the singular include the plural, and words in the plural include the singular.

The approach to interpreting the Charter

[122] I will adopt the words of the Chief Justice set out below as the correct approach to this very important task:

*36. In relation to the interpretation of the Constitution of the Cayman Islands, the Board agrees with the approach stated by the Chief Justice in *Hewitt v Rivers* [2013] (2) CILR 262, para 37, as cited by the Court of Appeal: “In summary, I consider that my approach to the interpretation of the Constitutional provisions at issue on this petition must seek to give effect to the real meaning of the provisions and, where that meaning is not plain, to*

*apply a purposive interpretation. In that sense, the context will be most important as it also reflects the aspirations of the Caymanian society which the Constitution embodies.”*¹⁶

The European Convention for the Protection of Human Rights and Fundamental Freedoms (“the ECHR”) and International Human Rights Instruments

[123] It is accepted that Jamaica is not a party to the ECHR and bears no treaty obligations. Signed in 1950 by the Council of Europe, the ECHR is an international treaty to protect human rights and fundamental freedoms in Europe. All countries forming the Council of Europe are party to the Convention. In the United Kingdom, it is well settled that, in construing any ambiguous provision in their domestic legislation, the courts will presume the legislative intent was to act in conformity with the Convention and its prescribed limits. It is noted that in the pre-1998 era the Convention did not have the force of law in the United Kingdom.¹⁷

[124] In the very recently delivered decision of the Privy Council in **The Attorney General v The Jamaican Bar Association and The General Legal Council v The Jamaican Bar Association**¹⁸, the Board in discussing the Charter said that it was loosely based on the ECHR.¹⁹ This is the most recent pronouncement of the Board on the Charter since its promulgation.

¹⁶ Day v Governor of the Cayman Islands [2022] UKPC 6

¹⁷ *R (on the application of SG and Others (previously JS and Others)) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449

¹⁸ [2023] UKPC 6

¹⁹ At Paragraph 6

[125] In **Patrick Reyes v R**²⁰, a decision of the Privy Council, the Board discusses the promulgation of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which came into force on 25 October 1953. The Board said that the European Convention applied to Belize as a dependent territory of the crown from 25 October 1953 when it came into force until 21 September 1981 when Belize became independent. This position would have been the same for Jamaica until August 6, 1962. The Board stated that:

*“The second important development has been the advance to independent statehood of many former colonies under entrenched constitutions expressed to be the supreme law of the state. In the majority of such countries, as in Belize, the practice was adopted of setting out in the constitution a series of fundamental rights and freedoms which were to be protected under the constitution. It is well-established that in drafting the chapters containing these statements of rights heavy reliance was placed on the European Convention, first in drafting the constitution of Nigeria and then in **drafting those of Jamaica** and many other states around the world: see Minister of Home Affairs v Fisher [1980] AC 319 at 328; Simpson, Human Rights and the End of Empire (Oxford, 2001), pp. 863-872; Demerieux, Fundamental Rights in Commonwealth Caribbean Constitutions (University of West Indies, 1992), p. 23.”²¹*

[126] The Convention therefore applied to Jamaica until she attained her independence on August 6, 1962. The Board went on to state:

“28. In interpreting the constitution of Belize it is also relevant to recall that for 28 years preceding independence the country was covered by the European Convention, the provisions of which were in large

²⁰ [2000] UKPC 11

²¹ Para 23

measure incorporated into Part II of the constitution: it could scarcely be thought that it was intended, in adopting and giving primacy to these rights in the new constitution, to diminish rights which the people had previously been entitled to enjoy. This does not mean that in interpreting the constitution of Belize effect need be given to treaties not incorporated into the domestic law of Belize or non-binding recommendations or opinions made or given by foreign courts or human rights bodies. It is open to the people of any country to lay down the rules by which they wish their state to be governed and they are not bound to give effect in their constitution to norms and standards accepted elsewhere, perhaps in very different societies. But the courts will not be astute to find that a constitution fails to conform with international standards of humanity and individual right, unless it is clear, on a proper interpretation of the constitution, that it does.”²²

[127] The Court of Appeal in the case of **Symbiote Investments Limited v Minister of Science and Technology and another** said:

“Section 2(1)(a) of the Human Rights Act, 1998 stipulates that in considering rights which flow from the Convention, English courts should take into account the judgments, decisions, declarations and advisory opinions of the European Court of Human Rights. The Act further states, in section 3(1), that “[s]o far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights”. Those provisions do not have an equivalent in Jamaican law.”²³

[128] I bear in mind that there is as Ms White pointed out a presumption of conformity as a well-established interpretive principle, in that, the Charter is

²² Para 28

²³ *Symbiote Investments v Minister of Science and Technology* [2019] JMCA App 8, per Brooks, P at paragraph 92 discussing the issue of proportionality, makes this statement on the approach the court should take.

presumed to provide the same protection which is afforded by similar provisions in international human rights documents which Jamaica has ratified. Binding international instruments carry more weight in the interpretive analysis than non-binding instruments. The latter should be treated as relevant and persuasive but not determinative interpretive tools. This court in drawing from the latter should be careful to explain why it has done so explaining the particular source and how it is being used.

[129] Ms White identified the instruments which are part of our law, thus triggering the presumption of conformity. International instruments that pre-date the Charter can also clearly form part of the historical context of a Charter right regardless of whether Jamaica is a party to such instruments, such as the ECHR. Finally, decisions of foreign and international courts are included among those non-binding sources that are relevant and may be persuasive. However, particular caution should be exercised as the measures in effect in other countries in some instances, do not govern the scope of the rights enshrined in the Jamaican Charter.

Aids to Interpretation

[130] In the treatise, *Fundamentals of Caribbean Constitutional Law*,²⁴ the learned authors state:

“The conventional bill of rights found in the majority of Caribbean constitutions can be traced to the European Convention on Human Rights (ECHR). Trinidad and Tobago’s current constitutional bill of rights has its origins in the 1960 Canadian Bill of Rights. Jamaica’s new chapter devoted to fundamental rights and freedoms borrows the principle of direct horizontal application of the Charter from the South African Constitution. Such antecedents influence the interpretation of constitutional bill of rights.”

²⁴ By Tracy Robinson, Arif Bulkan & Adrian Saunders, 2015, Sweet & Maxwell at p. 159, para 3-024

In Grant v R,²⁵ the Privy Council on an appeal from Jamaica accepted the relevance of the Strasbourg jurisprudence because “the Convention applied to Jamaica before it became independent” and there was a “close textual affinity between the provisions in the European Convention on Human Rights” and the constitutional provision. It was therefore appropriate to pay heed to authority on the one when considering the meaning and effect of the other.”

The Strasbourg Jurisprudence

[131] I remind myself in determining the effect of the Strasbourg jurisprudence of the Privy Council’s most recent pronouncement on the ECHR and its influence on the Charter. In the case of **Times Newspaper Ltd**, the applicants complained to the Strasbourg Court about a decision of the House of Lords, granting an injunction against the Times Newspapers Ltd. The injunction restrained the publication of any articles dealing with the drug thalidomide, which had allegedly led to severe deformities in children whose mothers, when expectant, had taken it as a tranquiliser. The applicants asked the Court to bring the interpretation of the laws of contempt in England into line with other European countries and in line with the ECHR.

[132] The respondent government conceded that the **Times Newspaper Ltd** was a proper party under Article 25(1) of the Convention. However, the second applicant had no natural or legal personality, was a corporate entity and was therefore not entitled to make an application under Article 25, by reason of locus standi.

[133] Article 25(1) provides as follows:

“The Commission may receive petitions addressed to the Secretary General of the Council of Europe from any person, non-governmental

²⁵ [2006] UKPC 2

*organization or group of individuals claiming to be the victim of a violation of one of the High Contracting Parties of the rights set forth in this Convention...*²⁶

[134] It was held by the Commission that two conditions must be satisfied to fall within the Article, the first, is that the claimant must fall within any of the categories of petitioners mentioned in Article 25, and the second is that the claimant must establish a prima facie case as a victim of a breach of the Convention. The first applicant satisfied both conditions as **Times Newspaper Ltd.** is a legal person under English law, a company with corporate capacity and limited liability created by registration under the relevant statute. It fell within the category of a non-governmental organization, it was a party in the domestic proceedings concerned in the present case and the injunction directly affected it. The **Times Newspaper Ltd** was a victim of a breach of Article 10 of the Convention notwithstanding that it possessed legal and not natural personality.

[135] The second applicant, the Sunday Times as a printed product owned and published by the Times Newspaper Ltd. did not fall within any of the categories of petitioners set out in Article 25 of the Convention nor could it claim to be a victim of a breach of Article 10. The Commission went on to qualify its holding that the second applicant was not a victim, but finding that the name "Sunday Times" described a group of journalists who were victims of a breach of Article 10. In those circumstances, the individual members of the group having been identified, the second applicant fell within one of the categories of petitioners mentioned in Article 25 of the Convention.

²⁶ In *Antigua Times*, this is what the Privy Council said about Article 25: "*The European Convention was itself largely based on the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. The Universal Declaration, as its title suggests, is concerned mainly, if not exclusively, with human rights, that is with rights of individual human beings, but the European Convention appears to apply also to artificial persons, at least in some of its articles. For example, art 25 provides that the Commission may receive petitions 'from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention', and art 1 of the first protocol to the Convention refers to 'every natural or legal person.'*"

[136] Further, that the group of journalists had put forward a reasonable claim having alleged that the injunction prevented them from continuing their investigative journalism concerning the drug thalidomide, including their plans to publish a book on the matter. The first and second applicants were held to be proper parties under Article 25.

[137] In case of **Capital Bank Ltd. v Bulgaria**,²⁷ the applicant was a company in liquidation registered in Sofia, Bulgaria which operated as a bank. The application was filed by the Chairman and Vice-Chairman of its board of directors and three of its shareholders who were companies. The applicant bank acquired a banking licence in 1993. The bank was ruled insolvent by the Central Bank of Bulgaria which is the Bulgarian National Bank (“BNB”) on March 27, 1997. On May 5, 1997, the BNB lodged a petition with the Sofia City Court to wind up Capital Bank. The BNB revoked its licence on November 20, 1997. The Sofia City Court in a judgment delivered on January 6, 1998 granted the BNB’s petition, declared the bank insolvent, made an order for it to be wound up, divested its decision-making bodies of their powers and the bank of the right to administer its property. ordered the sale of its assets and appointed liquidators. The judgment was appealed. The decision was upheld on appeal and the bank was wound up and struck of the register of companies on April 20, 2005.

[138] The applicant bank complained to the Strasbourg court that BNB’s decision to revoke its licence on the ground of insolvency had not been made in accordance with law. In response, the Government requested the Court to strike the application out of its list pursuant to Article 37 § 1 of the Convention, on the ground that the applicant bank no longer existed as a legal person, it having been struck off the register of companies after being liquidated.

[139] The Government submitted that the application had not been validly commenced on behalf of Capital Bank as it breached Article 34 of the Convention.

²⁷ Application no 49429/99

The application had been lodged by persons who no longer represented the bank, their powers having been terminated and vested in the trustees in bankruptcy. When invited to lodge an application on the bank's behalf, the trustees had declined to do so, as they had deemed that there had been no infringement of its Convention rights. The Government therefore invited the Court to declare the application inadmissible.

[140] The applicant bank replied that it was agreed that after the Sofia City Court's judgment of 6 January 1998 the powers of the bank's bodies had been vested in the trustees. Nevertheless, these bodies had not ceased to exist and those powers which had not been vested in the trustees could be exercised by them.

[141] The Court found that "the Convention and its Protocols must be interpreted as *"guaranteeing rights which are practical and effective as opposed to theoretical and illusory."* This principle was also applicable to Article 34 of the Convention, which conferred upon individuals and non-governmental organisations a right of a procedural nature (see *Cruz Varas and Others v. Sweden*, judgment of 20 March 1991, Series A no. 201, p. 36, § 99). The Government's objection must thus be rejected. The court held that the application was admissible and proceeded to hear the application on its merits finding that there were violations of Articles 6 and 1 of the ECHR.

[142] In **X v Church of Scientology v/Sweden**,²⁸ the application was brought by the Church of Scientology in Sweden by X and one of its ministers. In 1973 the applicant church placed an advertisement in its membership periodical which read as follows:

"Scientology technology of today demands that you have your own E-meter. The E-meter (Hebbard Electrometer) is an electronic instrument for measuring the mental state of an individual and changes of the state. There exists no way to clear without an E-meter. Price: 850 CR. For international members 20% discount: 780 CR."

²⁸ Application no 7805/77

[143] The applicants define the E-meter as follows:

“A religious artifact used to measure the state of electrical characteristics of the ‘static field’ surrounding the body and believed to reflect or indicate whether or not the confessing person has been relieved of the spiritual impediment of his sins.”

[144] An injunction was granted by the lower court and upheld on appeal by the Supreme Court prohibiting the use of certain passages in the advertisement. The church and Pastor X claimed in an application that the injunction violated their freedom of religion and expression contrary to Articles 9, 10 and 14 of the Convention. The Commission began with the question of the proper applicant. Under Article 25(1) of the ECHR, Pastor X was considered to be a victim.

[145] In respect of the Church, the Commission reversed its previous collection of decisions in which it had applied a rule that a corporation being a legal and not a natural person was incapable of having or exercising the rights in Article 9(1) of the ECHR.²⁹ The Commission said:

“The Commission, however, would take this opportunity to revise its view as expressed in Application No. 3798/68. It is now of the opinion that the above distinction between the Church and its members under Article 9(1) is essentially artificial. When a church lodges an application under the Convention, it does so in reality on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in its own capacity as a representative of its members. This interpretation is in part supported from the first paragraph of Article 10 which, through its reference to “enterprises”, foresees that a non-governmental organisation like the applicant Church is capable of having and

²⁹ Article 9(1): 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

exercising the right to freedom of expression. Accordingly, the Church of Scientology, as a non-governmental organisation, can be properly be considered to be an applicant within the meaning of Article 25(1) of the Convention³⁰.”

[146] In the case of **Verein Netzwerk v Austria**,³¹ the application was brought by an association which had the aims of inter alia creating accommodation for socially disadvantaged persons, refugees and foreign workers. It runs a house in Hirtenberg which offers housing and in which the Chairman of the applicant association also lives. The house was subject to a police control under the Residence (Registration) Act on October 7, 1992 after complaints from neighbours about illegally resident foreigners. The association lodged a complaint with the Lower Austria Independent Administrative Panel alleging violations of Articles 8, 9 and 11 of the Convention and of the Protection of the Home Act.

[147] The Panel found after an oral hearing with witnesses, that the applicant association, being a legal person could not have a private and family life. Thus it could not rely on Article 8 of the ECHR. As a legal person it could not rely on Article 9 and in respect of Article 11, the control at issue was not aimed at the association but at the inhabitants, who were not necessarily members of the association. The control did not interfere with freedom of association and it had to be regarded as necessary in the interests of public safety and was proportionate.

[148] The association lodged a complaint with the constitutional court relying on Articles 8 and 11 of the ECHR and its domestic legislation. That court referred the matter to the administrative court which rejected the association's complaint as being inadmissible.

³⁰ Page 70

³¹ Application No 32549/96

[149] The association petitioned the European Court of Human Rights under Articles 8, 9 and 11 of the ECHR.³² The association alleged a violation of its right to respect for its home under Article 8. The Court interpreted the words “private life” and “home” as including certain professional or business activities or premises as consonant with the essential object and purpose of Article 8, namely to protect the individual against arbitrary interference by the public authorities. The court said that it was arguable that a legal person may rely on the right to respect for its home which is where it carries out its business activities, but did not go on to decide this question.

[150] Having considered the foregoing authorities, decided under the ECHR, despite having the words human rights in its title, the treaty applies to both artificial or legal persons; while the Charter, being the *Charter of Fundamental Rights and Freedoms* did not import the words human rights into its title. This may imply that there is no limitation on the word *person* as used in the Charter.

The Charter as a Bill of Rights

³² ARTICLE 8 Right to respect for private and family life 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 9 Freedom of thought, conscience and religion 1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance. 2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

ARTICLE 11 Freedom of assembly and association 1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests. 2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

[151] The learned authors of *Fundamentals of Caribbean Constitutional Law*,³³ suggest that the constitution is a *sui generis* instrument which is to be interpreted in a broad and generous way. “A *generous interpretation involves an evaluation of different possible ways of interpreting the constitution. It implies making a choice not to adopt an interpretation that is plausible but is deemed to be technical and excessively legalistic and has the effect of undermining the broad intent of the constitutions.*”³⁴

[152] According to the authors, support for a generous interpretation is to be found in the character, form and origin of constitutional instruments. In terms of the character of the Charter, it represents the ‘*high ideals and principles*’ of the Jamaican people. The form of the bill of rights tends to be in abstract terms with the court as interpreter: “*Judges must perform the role of “the mediators between the high generalities of the constitutional text and the messy detail of their application to concrete problems.*”³⁵ The origins of many Caribbean Bills of Rights have their foundation in international human rights instruments.

*“This is relevant to interpreting the bill of rights because regard must be had to the language used in the bill of rights as well as to the traditions and usages which have given meaning to that language.”*³⁶

The Charter as an Act of Parliament

[153] In recognising that the Charter was established by an Act of Parliament, it is most importantly, a constitutional instrument, and is to be accorded the principles

³³ By Tracy Robinson, Arif Bulkan, Adrian Saunders, 2015, Sweet & Maxwell at paragraph 3-017

³⁴ *Minister of Home Affairs v Fisher* (1979) 44 WIR 107 at 112

³⁵ *Boyce v R* [2004] UKPC 32 at para 28

³⁶ *Minister of Home Affairs v Fisher* at page 113

of interpretation suitable to its character, its language, traditions and its usages which have given meaning to its text and context.³⁷

[154] The Privy Council said that all Acts of Parliament could not be placed in a single class or on the same level. A constitutional instrument despite its genesis as an Act of Parliament has special characteristics.

*“When therefore it becomes necessary to interpret “the subsequent provisions of” Chapter 1 – in this case s. 11 – **the question must inevitably be asked whether the appellant’s premise, fundamental to their argument, that these provisions are to be construed in the manner and according to the rules which apply to Acts of Parliament is sound.** In their Lordship’s view there are two possible answers to this. The first would be to say that, recognising the status of the Constitution as, in effect an Act of Parliament, there is room for interpreting it with less rigidity, and greater generosity, than other Acts, such as those which are concerned with property, succession or citizenship.... **The second would be more radical: it would be to treat a constitutional instrument such as this as sui generis, calling for principles of interpretation of its own, suitable to its character as already described, without necessary acceptance of all the presumptions that are relevant to legislation of private law.... their Lordships prefer the second... A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin***

³⁷ Minister of Home Affairs v Fisher

of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences.”

[155] In **Patrick Reyes v R**, the Board added another two factors for the court to consider in constitutional interpretation.

“As in the case of any other instrument, the court must begin its task of constitutional interpretation by carefully considering the language used in the constitution. But it does not treat the language of the constitution as if it were found in a will or a deed or a charterparty. A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but it is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society.”³⁸

[156] The foregoing leads me to the conclusion that the Charter is to be interpreted in a generous and purposive way, using the following aids to construction, – its language, traditions or usages which assist in ascribing meaning to its text, its character, its origin as an Act of Parliament, while recognising and giving full effect to the substance of the rights and ensuring any interpretation does not derogate from the protection of the rights by means of redress.

[157] In the case of **Maurice Tomlinson v Television Jamaica Limited and Others**,³⁹ the Full Court addressed the question of how Charter rights should be interpreted:

³⁸ Patrick Reyes v R

³⁹ [2013] JMFC Full 5 at paragraphs 144 to 149

[144] In Minister of Home Affairs v Fisher (1979) 44 WIR 107, Lord Wilberforce held that a constitution is to be given 'a generous interpretation' because a constitutional instrument is 'sui generis, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law' (pp 112 – 113).

[145] His Lordship added bills of rights 'call for a generous interpretation avoiding what has been called 'the austerity of tabulated legalism' in order that individuals receive the full measure of the fundamental rights and freedoms referred to' (p 112).

[146] His Lordship went on to say that '[r]espect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language' (p 112 – 113). No doubt these words were added in anticipation of the argument that may be made that on this view, namely, '[t]his is in no way to say that there are no rules of law which should apply to the interpretation of a constitution' (pp 112 – 113).

[148] This passage reflects what is called the living document theory of constitutional interpretation as distinct from the originalism or textualist school of thought (Justice Antonin Scalia of the United States Supreme Court being a contemporary proponent of the latter). It is vital to observe that Lord Bingham was insistent that despite the generous interpretation no judge has the licence to read his own personal views into the text. It would seem to me that the prophylactic against that happening is paying attention to the language actually used in its context (immediate and the surrounding context).

[149] In 2004, on appeal from Jamaica, the Judicial Committee of the Privy Council in Watson v R (2004) 64 WIR 241,259 ([42]) (Lord Hope) held, in relation to the interpretation of human rights provisions, that: Guidance as to how this issue should be approached is not to be found in any presumption as to whether the law which was in force immediately before the appointed day secured the fundamental rights of the people of Jamaica. It is to be found in

the principle of interpretation, which is now universally recognised and needs no citation of authority, that full recognition and effect must be given to the fundamental rights and freedoms which a Constitution sets out. The rights and freedoms which are declared in s 13 must receive a generous interpretation. This is needed if every person in Jamaica is to receive the full measure of the rights and freedoms that are referred to.”

Origin

[158] Orders in Council are made by the King acting on the advice of the Privy Council and are approved in person by the monarch. In the exercise of powers vested in the sovereign and pursuant to section 5(1) of the West Indies, Act, 1962 the Constitution of Jamaica came into being on July 23, 1962 at Buckingham Palace.

[159] The Interpretation Act, 1968 of Jamaica provides:

Provisions as to United Kingdom Acts

41. All such laws and Statutes of England as were, prior English to the commencement of 1 George 11 Cap. 1, esteemed, introduced, used, accepted, or received, as laws in the Island shall continue to be laws in the Island save in so far as any such laws or statutes have been, or may be, repealed or amended by any Act of the Island.

[159] There have been several amendments to the Constitution of Jamaica since then. The Charter being that with which this court is now concerned.

The Language used in the Charter

[160] Language in my view, refers to the literal words set out in black letters, the text; the letter, as distinct from the spirit of the instrument. The liberal and more modern approach to constitutional interpretation is to avoid a textual approach which is restrictive and narrow. It is now the accepted position that a generous, purposive approach is to be employed looking at the text in context.

[161] Section 3 of the Interpretation Act, 1968 provides: “*In all Acts, regulations and other instruments of a public character relating to the island, now in force or hereafter to be made, the following words and expressions shall have the meaning hereby assigned to them respectively, unless there is something in the subject or context inconsistent with such construction, or unless it is therein otherwise expressly provided.*”

[162] The section then goes on to state “*person*” includes any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons.” Section 19(1) of the Charter uses the pronoun “*him*” to refer to “*person*” which it has been submitted imports both genders.

[163] The language of section 19(1) based on the provisions of the Interpretation Act includes a legal person unless (1) there is something in the (a) subject; or (b) context; which is inconsistent with this construction; or (c) otherwise expressly provided. There is no inconsistency in the application of the word body corporate or company or corporation to the meaning of the word “*person*” used in section 19(1) and there is no express provision to the contrary.

[164] Sections 19(1) and (2) each use the pronoun “*person*” and there is no express provision which gives the word *person* a meaning that is other than the meaning prescribed in the Interpretation Act.

The meaning of the word “person”

[165] Mr Hylton takes the position that the Charter having been created by statute means the provisions of the Interpretation Act apply to it. The Charter refers to a “*person*” and does not expressly provide that the meaning of the word “*person*” is other than the meaning prescribed in the Interpretation Act. The Interpretation Act provides that “*person*” includes company, and unless there is a contrary express provision or the context excludes it, then s. 19(1) was intended to include companies by the use of the word “*person*.”

[166] Ms White does not take issue with this position, rather, she expands the meaning of the word “*person*” in the Charter to include both natural and legal person

and the word “*him*” to mean both masculine and feminine, citing section 4(a) of the Interpretation Act. Where she does depart from Mr Hylton is that inanimate legal persons are not included in the words “*person*” or “*him*” and restricts the meaning of the word “*him*” to only natural persons.

[167] In the **Antigua Times** case, the Board heard a preliminary objection which had been taken in both courts below on behalf of the appellants. The point repeated before the Board was that the respondent was not entitled to initiate these proceedings under section 15(1) of the Constitution of Antigua on the grounds that it was not a “*person*” within the meaning of that section. The respondent was the publisher of the Antigua Times newspaper. Parliament passed two Acts dealing with newspapers. The respondent complained that the Acts were unconstitutional and applied to the High Court of Antigua for redress under section 15 of the Constitution. Section 15(1) provides:

*“If any **person** alleges that any of the provisions of sections 2 to 14 (inclusive) of this Constitution has been, or is being contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that **person** may apply to the High Court for redress.” (Emphasis mine.)*

[168] The appellant argued that the word “*person*” occurring twice in the subsection referred only to a natural person. The respondent contended that the word person also included an artificial or legal person such as itself. The Interpretation Act of 1889 which is applied to the Constitution of Antigua by section 115(15) of the Constitution, provides in section 19 that:

*“The expression ‘**person**’ shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.” (Emphasis mine.)*

[169] The Board considered the context in which the word person was used:

“Section 15 is in Chapter 1 of the Constitution, which is headed ‘Protection of Fundamental Rights and Freedoms’. The arrangement

and wording of the chapter evidently owe much to the European Convention for the Protection of Human Rights and Fundamental Freedoms signed by certain members of the Council for Europe in 1950. The European Convention was itself largely based on the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948. The Universal Declaration, as its title suggests, is concerned mainly, if not exclusively, with human rights, that is with rights of individual human beings, but the European Convention appears to apply also to artificial persons, at least in some of its articles. For example, art 25 provides that the Commission may receive petitions 'from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in this Convention', and art 1 of the first protocol to the Convention refers to 'every natural or legal person'. With that ancestry it would not be surprising if Chapter 1 of the Constitution of Antigua were to apply to artificial as well as to natural persons, and its heading, already quoted, which refers to 'fundamental' and not to 'human' rights and freedoms, gives no indication that it is limited to natural persons.

*Before turning to the words of Chapter I itself there is one other general matter which their Lordships consider relevant. The Constitution of Antigua was brought into effect by Order in Council in 1967. Having regard to the important place in the economic life of society occupied by corporate bodies, it would seem natural for such a modern constitution, dealing with inter alia rights to property, to use the word 'person' to include corporations. As long ago as 1922 a view to that effect was expressed by Isaacs J in *The Australasian Temperance and General Mutual Life Assurance Society Ltd v Howe* ((1922) 31 CLR 290 at 301), and in 1930 in *Leske v SA Real Estate Investment Company Ltd* ((1930) 45 CLR 22 at 25) Rich and Dixon JJ said:*

'The time has passed for supposing that the legislature would use the word "person" only to signify a natural person in dealing with a class of business in which the utility of the proprietary company has long been made manifest.'

That statement was made with reference to an Act dealing with contracts for the sale of land but it is also applicable, though with rather less force, to a constitution such as that of Antigua which includes provisions safeguarding the ownership of property."

[170] The Board having set out the context, looked at cases decided by the Supreme Court of the United States in which the meaning of the word "person" in the Fourteenth Amendment to the American Constitution was considered, indicating that it was implicit in decisions of the Supreme Court that a corporation has been a *person* within the meaning of the equal protection and due process clauses of that Constitution since 1886.

[171] The Board rejected the argument of counsel for the appellant who argued that section one was the master section of the Chapter of Fundamental Rights and Freedoms and that the subsequent provisions of the chapter were limited to giving effect for protecting the aforesaid rights and freedoms as specified in paragraphs (a), (b) and (c) which belonged only to human persons. Chapter 1 of the Constitution of Antigua is set out below:

"Whereas every person in Antigua is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, to each and all of the following, namely: (a) life, liberty, security of the person, the enjoyment of property and the protection of the law; (b) freedom of conscience, of expression and of peaceful assembly and association; and (c) respect for his private and family life, the subsequent provisions of this Chapter shall have effect for the purpose of affording protection to the aforesaid rights and freedoms,

subject to such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.”

[172] The Board said that the rights and freedoms could not be limited in the way it was being contended and the reference to race, place of origin, opinions, colour, creed or sex did not exclude artificial persons so far as they were capable of enjoying the fundamental rights and freedoms.

“Their Lordships cannot agree that the rights and freedoms are limited in that way. The nature and extent of the rights and freedoms protected must depend on the provisions of the sections respectively protecting them. Some of these sections clearly cannot apply to corporations but others can and, in the opinion of their Lordships, do. On this matter their Lordships cannot do better than to quote the following passage from the judgment of Lewis CJ in the court below: 'It is obvious that there are certain rights and freedoms in Chapter I of the Constitution which from their very nature cannot be enjoyed by a corporation, eg the right to life specified in s. 2, the right to personal liberty specified in s. 3, and the right to be protected from inhuman treatment mentioned in s. 5; but there is nothing in principle which prevents a corporation from enjoying the rights relating to the compulsory acquisition of property (s. 6), the securing of protection of the law (s. 8) and protection from discrimination on various grounds specified in s. 12. It would not be an affront to common sense or reason to contend that if a corporation's property were compulsorily acquired (s. 6) the corporation should, in like manner as a natural person, be entitled to compensation. Nor could it be convincingly maintained that a corporation, like a human being, if charged with a criminal offence would not be entitled to the right of a fair hearing in accordance with the fundamental principles of justice as prescribed in s. 8. As regards to the right to protection from discriminatory treatment on grounds of race, place of origin, political

opinion, colour or creed (s. 12), this Court delivered a judgment on December 13, 1971 which established the principle that a corporation was entitled to enforce the protective provisions of s. 15 of the Constitution in circumstances where it was found to have been treated in a discriminatory manner contrary to s 12(2) and (3) by reason of political opinions of its directors.

The case in question was Camacho & Sons Ltd and Others v. Collector of Customs.' The Chief Justice went on to explain the facts in Camacho's case and he concluded as follows:

'It was contended by counsel for the appellants that the point which is here being discussed did not arise and was not argued in Camacho's case. I agree, but the Court of Appeal assumed (and I consider rightly) that the point could not be successfully contested. It would be a scandalous defect in the law if a company could be treated in the manner in which the company in Camacho's case was treated and the law could not afford it any redress.'

Their Lordships agree with the opinion expressed by the Chief Justice and they have no reason to doubt that the decision in Camacho's case was correct. Their Lordships also agree with the opinion of Wooding CJ in Collymore v The Attorney General ((1967) 12 WIR 5 at 20) who said with reference to the Constitution of Trinidad and Tobago that it was intended to protect natural persons primarily but that 'some of the particular prohibitions are undoubtedly apt to protect artificial legal entities also.'

A further consideration is that, if bodies corporate were not entitled to use the machinery of s 15, many anomalies would arise. This is a relevant consideration: National & Grindlays Bank Ltd v Kentiles Ltd. For example, a natural person would lose the protection of the Constitution for his business if he formed a company to take it over. An

example nearer to the present case is that s 10 (freedom of expression) would, on the appellants' construction, draw an unexplained and irrational distinction between newspaper proprietors who were natural persons and those who were bodies corporate. Similarly, s 11 (freedom of assembly and association) which expressly includes the right to 'belong to trade unions or other associations for the protection of his interests' would protect the right of a natural person to join a trade association, but not that of a body corporate.

For these reasons their Lordships are of opinion that the word 'person' in this Constitution includes artificial legal persons and that the appellants' preliminary objection fails."

[173] This court agrees that the **Antigua Times** case contains many important pronouncements and has viewed them against the following distinctions:

- (a) A very clear distinction between the Antiguan Constitution and the Jamaican Charter is the absence of a section similar to section 19(2). That means the Board reviewed the freedom of expression provision in the context of a provision which was similar to our section 19(1) only.
- (b) In terms of approaching the court for constitutional redress under section 19(1) of the Charter and section 15(1) in Antigua, the words used in the relevant sections are similar in approach however not similar in intent, as they require that different evidential burdens be discharged. A claimant in Jamaica might seek to establish in a constitutional claim that a contravention might occur in the future, as section 19(1) of the Charter reads: "*has been, is being or is likely to be contravened*". Whereas in Antigua, under section 15(1), of their Constitution, a claimant had to show that one of the provisions of sections 2 to 14 "*has been or was being contravened*", to establish that it might occur in the future would not avail a claimant any success.

(c) On the facts, of **Antigua Times**, the initial challenge in the High Court of Antigua was to the constitutionality of certain Acts of Parliament. In neither the substantive claim at bar, there is no challenge to the constitutionality of an enactment.

(d) The preliminary point regarding standing was made in all three courts and rejected at all levels.

[174] It was against that backdrop that the Board decided that the word “*person*” included corporation in the **Antigua Times** case.

Subject: Person - natural or legal

[175] The subject of section 19(1) is “*person*” a human being and thus far, also a company. Ms. White argues under this head that there is an absurdity in any such construction as STEA is not a human being. It is a legal and not a natural person and a legal person may not claim human rights under the Constitution as these are rights only afforded to natural persons. Human rights are ascribed to human beings and these rights are the inherent rights of human beings. Constitutional rights are rights for the individual human being.

[176] She added that in terms of context Jamaica is a dualist country, the scheme of the Charter reduces certain international human rights into Jamaican legislation, thereby making them enforceable in Jamaica, and transforms them into constitutional rights only for natural persons and not juristic persons. The Constitution does not afford enforceable human rights for legal persons as of right.

[177] Mr Hylton, KC argues for subject and context in the same submission, in that it cannot be said that the context of all the rights excludes them from being enjoyed and applied by a corporate body. There are no express contrary provisions in the Interpretation Act or in section 19 of the Charter stating that the rights being claimed cannot be enjoyed by a corporate body, thus limiting them to natural persons, and as such section 19(1) ought to be interpreted to include a corporate body.

“In relation to him”

[178] Ms White argues that these words in section 19 exclude artificial persons. They refer to one or more natural persons, an unincorporated body, an association or society who have been, are being or will be affected by a contravention of the Charter.

[179] Mr Hylton argues that Section 13(1) commences with the preamble to the Charter. In particular, section 13(1)(b) confers fundamental rights and freedoms and section 13(1)(c) outlines the responsibilities in respect of those rights. Both sections use the word ‘*persons*’. If the submissions of the Attorney General are to be accepted as correct, then the word ‘*persons*’ would have a different meaning under 13(1)(b), than it would have under section 13(1)(c), since under section 13(5) both natural and juristic persons are bound by the obligation. However, the ‘*persons*’ under section 13(1)(b) would exclude companies while the word “*persons*” under section 13(1)(c) would include them. The result of which is that companies would be bound by the enforcement of these rights but only to the extent that these rights may be enforced by others against them and unenforceable by a company against others.

[180] It would seem to me that the pronoun “*him*” does not exclude a body corporate based on the legal definition of the word “*person*”. Mr Hylton’s submissions find support in that the preamble is a declaration of entitlement and is considered an explanation of the scheme of the provisions which protect fundamental rights and freedoms. Therefore, the word “*person*” cannot exclude companies in the preamble given the horizontal application of the Charter.

[181] However, there is judicial authority which states that the words in a preamble cannot restrict the scope of the enacting words, where the latter are wider or more general than the former. In other words, the preamble is not to influence the meaning to be ascribed to the enacting words of the statute without a compelling reason for so doing as it does not have the same weight.⁴⁰

⁴⁰ A-G v Prince Ernest Augustus of Hanover [1957] AC 436

Context

[182] The framers of the Charter despite this historical and legal definition of “*person*”, found it necessary to add section 19(2) after and not as a part of subsection (1). In looking for clarity of meaning in the surrounding text, it is noted that both sections 19(1) and (2) use the word “*person*”.⁴¹

[183] “*Any person authorized by law, or, with leave of the Court, a public or civic organization, ...*” is how subsection 19(2) begins. The definition of “*person*” being both natural and legal suggests that a person who needs to be authorized by law, faces a legal bar where there is no legal authority to act or no formal assent. The persons who are authorized by law and those who have to obtain leave are in the same category as a public or civic organization. It is beyond doubt that a corporation is an organization.

[184] In Black’s Law Dictionary:⁴²

Organization means: 1. A body of persons (such as a union or **corporation**) formed for a **common purpose** – Also termed *society*.⁴³

“**Public**, adj.” in Black’s Law Dictionary⁴⁴ means 1. Of, relating to, or involving an entire community, state, or country. 2. Open or available for all to use, share or enjoy. 3. (Of a company) having shares that are available on an open market. *Public*, n. 1. The people of a country or community as a whole <a crime against the public>. 2. A place open or visible to the public <in public>.

⁴¹ Subsections 19(1) and 19(2)

⁴² 10th ed.

⁴³ Black’s Law Dictionary

⁴⁴ 10th ed.

Civic, *adj.* means 1. *Of, relating to, or involving citizenship or a particular citizen <civic responsibilities>.* 2. *Of, relating to, or involving a city <civic centre>.*

[185] The word “*person*” also by definition includes a body of persons, (“*person*” includes any corporation, either aggregate or sole, and any club, society, association or other body, of one or more persons).⁴⁵ The words *public*, *civic* and *organization* also refer to a natural or legal person or body of such *persons* and to his/their common purpose. The drafters nevertheless included those additional words along with the word *person* in section 19(2). The additional words “*public*, *civic* and *organization*” suggest categories of persons who are to be considered aggrieved such the categories of victims found in Article 25 of the ECHR.

[186] The categories of applicants referred to in section 19(2) are a (i) a person authorized by law, (ii) a person who needs leave of the court, (iii) a public organization, (iv) a civic organization. In considering the arguments made by Ms White, it would seem that these categories are denoted to give the Supreme Court the jurisdiction in an application for an administrative order to determine whether it is an abuse of process, frivolous or vexatious, whether some parallel legal remedy exists or some other provision under section 19 ought to be applied. Although, this position is the same for applications brought under section 19(1).

[187] A profit making organization or a company, would be under section 19(2) a “*person*” who needs leave of the court, this is the submission of Ms White. As a legal “*person*,” a company is also an “*organization*” therefore, by association, the words *organization*, *public* and *civic* from the context, include company.

[188] Ms White’s submission that there are two distinct doors to entry would be the more attractive on this point, as the context would imply that in section 19(2) an organization for whatever purpose, and howsoever constituted would have to apply to the Supreme Court for leave.

⁴⁵ Interpretation Act

[189] Mr. Hylton, KC submitted that section 19(2) does not apply.

Traditions or Usages

[190] The Constitution of Jamaica which is set out in the Second Schedule to the Jamaica (Constitution) Order in Council, 1962, provides at section 1(12) that:

“The Interpretation Act, 1889 as in force on the appointed day, shall apply with the necessary adaptations, for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting, and in relation to, Acts of Parliament of the United Kingdom.”

The Interpretation Act 1889, as stated above, relates to the Acts of Parliament of the United Kingdom (“UK”) and not to an Act of Parliament in Jamaica. It would appear that as from the commencement of the Constitution of Jamaica in 1962, the UK Interpretation Act applied to the Constitution of Jamaica.

[191] Section 4 of the Interpretation Act, 1889 provides:

4.-(1) All laws which are in force in Jamaica immediately before the appointed day shall (subject to amendment or repeal by the authority having power to amend or repeal any such law) continue in force on and after that day, and all laws which have been made before that day but have not previously been brought into operation may (subject as aforesaid) be brought into force, in accordance with any provision in that behalf, on or after that day, but all such laws shall, subject to the provisions of this section, be construed, in relation to any period beginning on or after the appointed day, with such adaptations and modifications as may be necessary to bring them into conformity with the provisions of this Order.

(2) Without prejudice to the generality of the preceding subsection, in any law which continues in force on and after the appointed day or

which, having been made before that day is brought into force on or after that day, unless the context otherwise requires...

[192] The Interpretation Act, 1968 replaced the Interpretation Act, 1943 and the UK Interpretation Act and governs all statutes enacted by the legislature of Jamaica in force on the appointed day or *“hereafter to be made...”*

[193] The word *person* was defined in section 19 of the UK Act, 1889. The marginal note says “[M]eaning of *“person”* in future Acts.⁴⁶ The section provides:

*“19-- In this Act and in every Act passed after the commencement of this Act the expression *“person”* shall, unless the contrary intention appears, include any body of persons corporate or unincorporate.”*

[195] In early Acts a marginal note was in the nature of a precis of the section, which was often quite lengthy. Sidenotes, marginal notes or headings as to sections are unamendable descriptive components of an Act. Their function is as a short indication of the content of the section. It may be considered in construing the section or any other provision of the Act, provided due account is taken of the fact that its function is to serve as a brief and therefore possibly inaccurate guide to the content of the section.⁴⁷

[196] In Jamaica, Parliament repealed the Bill of Rights and replaced it with the Charter promulgated on April 7, 2011. Sections 26(8) and (9) of the Constitution of Jamaica which were the general savings law clauses have been repealed by the Charter. The drafters replaced them with a more modified savings clause in section 13(12) of the Charter. The special savings clause remains in section 13(7).

[197] The word *“person”* has historically included a company in the law of Jamaica and has been expanded by the provisions of the Interpretation Act, 1968.

⁴⁶ Francis Benion, Benion on Statutory Interpretation, 5th ed., section 256

⁴⁷ *supra*

The traditions and usages of the word “*person*” in the Constitution of Jamaica can therefore be construed as having always included a body corporate.

[198] In my judgment, prior to the commencement of the Independence Constitution in 1962, legal and artificial persons had been enjoying the same status by their inclusion in the word *person*. Artificial persons did not lose their rank or station after 1962, this remains intact today.

Character

[199] The Charter is an instrument of a public character representing high ideals and principles. A Constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Section 2 of the Constitution of Jamaica contains a clause proclaiming it as the supreme law of Jamaica and it sets out the relationship between the rule of law and all who seek shelter under the relief it gives.

[200] Having decided that a company has always been within the contemplation of the constitutional provisions given the origin of the Constitution. This of necessity impacts the interpretation to be given to the Charter. I now apply the key disclosed in **A-G v Prince Ernest Augustus of Hanover**⁴⁸ as the court yet retains doubt about the meaning and construction to be given to the sections under review.

[201] I shall give regard to the legislative history and extraneous materials used by Parliament, in light of the importance of the questions to be answered here and the absence of precedent:

“The key to the opening of every law is the reason and spirit of the law – it is the ‘animus imponentis’, the intention of the law-maker, expressed in the law itself, taken as a whole. Hence, to arrive at the true meaning of any particular phrase in a statute, that particular phrase is not to be viewed, detached from its context in the statute: it is to be viewed in connexion with its whole context

⁴⁸ [1957] AC 436 at 461

– meaning by this as well the title and preamble as the purview or enacting part of the statute.”⁴⁹

Legislative History

[202] In ascertaining the legislative intent, the court will adopt a purposive approach:

*“The courts now adopt a purposive approach which seeks to give effect to the true purpose of legislation and are prepared to look at much extraneous material that bears upon the background against which the legislation was enacted.”*⁵⁰

[203] The enquiry into the legislative history represents an attempt by the court to arrive at a compromise between the requirements of the rule of law and legal certainty on the one hand, and of fidelity to the intention of Parliament on the other.⁵¹

The Final Report of the Constitutional Commission, February 1994

[204] The report of the Commission sought⁵²:

- (1) To make it clear that the genesis of the fundamental rights and freedoms is not confined to English common law but also encompasses universally accepted human rights norms;
- (2) To preserve and strengthen in all respects the power and jurisdiction of the Courts to determine the constitutionality of any

⁴⁹ **A-G v Prince Ernest Augustus of Hanover** [1957] AC 436 at 461

⁵⁰ *Pepper v Hart* [1993] All E.R. 42 at 50

⁵¹ Cross, *Statutory Interpretation*, 3rd ed., p. 153

⁵² The report was unanimously accepted by Parliament.

measure or action which has an impact on the rights and freedoms;

(3) To ensure that any abridgement or infringement of the rights and freedoms will be struck down unless it satisfies a stringent test of demonstrable justifiability; and

(4) To facilitate the individual's access to the Courts for constitutional redress as well as to ensure that the Court's power to grant adequate remedies will not be hindered or curtailed by technicality.

[205] The report contains the following recommended clause:

“a public or civic organization or any person authorized by law may initiate proceedings to challenge an infringement or threatened infringement of the right;”

[206] At paragraph 16 of their report, the Commission said “that it was unnecessary to provide specifically for the award of damages as a remedy for the infringement of constitutional guarantees as the present formulation gives the Court power to grant redress which is sufficiently comprehensive as laid down by the Privy Council in **Maharaj v Attorney General of Trinidad and Tobago (No.2)**.⁵³ They went further to say that the specific mention of one type of remedy may lead to a restrictive interpretation of the existing provision.

[207] I note here that the text of section 19(2) provides for the remedy of a declaration to be granted.

Report of the Joint Select Committee on Constitutional and Electoral Reform, May 1995

⁵³ [1979] A.C. 385

[208] The Joint Select Committee in its final report dated May 20, 1995, wholly adopted the Commission's recommendations (save for one which is not relevant here). The Committee said that the new Chapter on Fundamental Rights and Freedoms prepared by the Constitutional Commission significantly improved the existing Chapter III by:

8. *extending the right to apply to the Court for redress in Constitutional matters to include any member of the public likely to be affected or a public or civic organisation or any person authorised by law. The Court is also given the discretion to entertain an application notwithstanding that there are other adequate means of redress."*

Report of the Joint Select Committee on its Deliberations on the Bill entitled an Act to Amend the Constitution of Jamaica to Provide for a Charter of Rights and for Connected Matters

[209] A Special Select Committee of both Houses of Parliament met to consider and report on the Bill entitled "The Charter of Rights (Constitutional Amendment) Act." In its findings, the Committee based its comments on the redress provisions in the Bill. The version set out below as recommended by the Constitutional Committee is really a re-organized section 19(2), it reads:

*"A public or civic organization may with leave of the Court, or any person authorized by law, initiate an application to the Supreme Court, on behalf of persons who are entitled to apply under paragraph (1) of this article for a declaration that any legislative or executive act contravenes the provisions of this chapter."*⁵⁴

[210] Worded this way, the Special Select Committee took the view that they would not use this version recommended by the Constitutional Committee, rather, it would deal "*with the circumstances in which a public or civic organisation may bring*

⁵⁴ The Constitutional Committee's draft

proceedings for constitutional redress on behalf of any person entitled to do so. This proposed new section 25(2) differs from the comparable provision in the Constitutional Commission's draft in that it imposes a requirement that the public or civic organization must have a sufficient interest to bring the proceedings for constitutional redress, while the Commission's draft leaves that question of locus standi to be determined by the Supreme Court on an application to it for leave to bring such proceedings.

[211] *The Committee is of the view that the requirement that a **public or civic organization make an application for leave to bring the proceedings for constitutional redress gives the Court sufficient control over the matter and enables it to determine whether, in the particular circumstances, it is appropriate to permit the bringing of the action by such an organization.** In the Committee's view, therefore, it is unnecessary and undesirable to include in section 25(2) an express condition for the bringing of proceedings that the public or civic organization have a sufficient interest in the matter.*

The Lower House

[212] On March 22, 2011, the House of Representatives passed the Bill entitled "An Act to amend the Constitution of Jamaica to provide for a Charter of Fundamental Rights and Freedoms and for connected matters."⁵⁵

The Upper House

[213] The Jamaica Hansard, Parliamentary Proceedings of the Honourable Senate, Session 2011 – 2012 Vol. 37 on March 31, 2011 indicates that the format of the Charter adopted the approach taken in the ECHR and the older nations of the Commonwealth.

⁵⁵ The Jamaica Hansard, Parliamentary Proceedings of the Honourable House of Representatives, Session 2010 – 2011 Vol. 36 #3

[214] At page 302, in respect of section 19(1), the Senate discusses the expanded right to apply for constitutional redress, which will by the addition of section 19(2) [will] “*go further and give to any person authorized by law or with the leave of the Court, a public or civic organization, a right to initiate an application to the Supreme Court on behalf of a person entitled to apply for redress under subsection (1) and so they can make this application for a declaration for any legislative or executive act which contravenes the fundamental rights and freedoms provision.*”

[215] This is section 19(2) as has been promulgated.

The Legislative Intent

[216] In determining the legislative intent, it seems to me that the legislature intended to increase access to constitutional relief and expand the access to constitutional relief under the Charter. The inclusion of section 19(2) was for the intention of ensuring affected groups who wished to enforce their rights under Chapter III could commence a claim for constitutional relief and not just an ordinary civil action. Such a claim could be brought under the Charter against the State or against a person. This word *person* in the horizontal application of the provisions of the Charter means both a legal and a natural person.

The nature of the rights

[217] STEA applies in its own right and not as a representative. The substance of the company’s complaint as I understand it, is that the course of its business will be affected. This will colour its objects, which include promoting public awareness of the importance of the maintenance of environmental quality, facilitating the development of the Cockpit country as a protected, managed park area and environmental research and tourism in addition to its operations as an eco-tourism company, inter alia.

[218] This is a separate consideration from its bringing a claim on behalf of the residents of Trelawny who themselves would be entitled to bring a claim. Mr Hylton, KC submitted that STEA is also a civic organization, however it is not claiming to be bringing this application on behalf of any person. Section 19(2) does not therefore arise in reference to the application sought.

[219] Ms White submits that section 19(1) does not contemplate claims by legal persons and that it is section 19(2) which does so. She argues that matters brought on the Crown side of the Supreme Court are different than those commenced on the civil side of the court. In matters on the Crown side, the stipulated procedure must be followed. Matters on the crown side of the court include constitutional and judicial review matters. She cites **Scott Davidson v The Scottish Ministers**⁵⁶ which states that civil proceedings in the High Court do not include proceedings on the Crown side of the court (Queen’s Bench Division as it then was).

[220] In **Scott Davidson**, the single issue requiring determination on the appeal was whether a petition to the Court of Session by way of judicial review falls within section 21 and were “*civil proceedings*” within the meaning of section 21 of the Crown Proceedings Act 1947 as it applied in Scotland.⁵⁷ The court held that section

⁵⁶ (2006) S.C.L.R. 249

(a) ⁵⁷ the Crown Proceedings Act, 1947 (UK) **21 Nature of relief.**

(1) In any civil proceedings by or against the Crown the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that:—(a)where in any proceedings against the Crown any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(b)in any proceedings against the Crown for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Crown to the land or property or to the possession thereof.

21 did not apply to judicial review proceedings in England and Wales and references in section 21 to civil proceedings were to be read as not including proceedings invoking the supervisory jurisdiction of the Court of Session in respect of acts or omissions of the Crown or its officers, and the appeal succeeded on that basis. At para. 73 per Lord Rodger: *'By concentrating on judicial review, lawyers and judges today may tend to forget the historical importance of the law of tort or delict as a way of vindicating the subject's rights and freedoms.'*

[221] In Jamaica, civil proceedings have been defined. The CPR states "civil proceedings include judicial review proceedings and applications to the court under the Constitution under Part 56." In Jamaica, "civil proceedings" now embrace applications to the supervisory jurisdiction of the court against the Crown as set out in Part 56 of the CPR. The instant application concerns the court as guardian of the Constitution. The Crown Proceedings Act is also not at issue. The claim is correctly commenced under Part 56.

Section 19(2) of the Charter and Representative Actions in Part 21, CPR

[222] Should section 19(2) be construed as having been inserted to represent a "sufficient expression of an intention to the contrary," is there something in the subject or context inconsistent with the construction advanced by Mr Hylton, KC or has it been "*otherwise expressly provided*."?

[223] Ms White submitted that STEA cannot commence a claim as of right under section 19(1) of the Charter and as it is not authorised by law to commence a claim under section 19(2), it falls into the category of a public and/or civic organisation which can only commence a constitutional claim with leave. It is only upon the grant of leave by the Court that the first claimant would have standing in a

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Crown if the effect of granting the injunction or making the order would be to give any relief against the Crown which could not have been obtained in proceedings against the Crown.

constitutional claim. The punctuation is important in construing section 19(2) of the Charter.

[224] She argued that the evidence STEA intends to rely on demonstrates that it is a representative claimant, representing different individuals and that it has commenced this claim on behalf of those stakeholders. Having not been granted leave by the Court, the Attorney General submits that the claim as commenced for and on behalf of STEA is a nullity. In other words, STEA has not satisfied the provisions of section 19(2) of the Charter and thereby has no standing to bring the claim.

[225] Part 21 states:

Representative claimants and defendants - general

*21.1 (1) This rule applies to any proceedings, other than proceedings falling within rule 21.4, where **5 or more persons** have the same or a similar interest in the proceedings.*

(2) The court may appoint –

(a) one or more of those persons; or

(b) a body having a sufficient interest in the proceedings, to represent all or some of the persons with the same or similar interest.

(3) A representative under this rule may be either a claimant or a defendant.

[226] This submission that this is a representative claim under Part 21 casts doubt on the capacity of STEA as a company and another named individual, as in this claim, or claimants less than five in number, to commence a section 19(2) claim under rule 21.1(1).

[227] In the case of **Richard Lloyd v Google LLC**⁵⁸ which concerned a class action suit, Lord Leggatt sets out a lovely history of the representative action. I have reproduced it here in order to gain an understanding of the submission of the AG on this point.⁵⁹

“The representative action has its origins in the procedure of the Court of Chancery before the Judicature Act of 1873. The general rule was that all persons materially interested in the subject-matter of a suit should be made parties to it, either as claimants or defendants, so as to ensure that the rights of all persons interested were settled by a single judgment of the court: see eg Adair v New River Co (1805) 11 Ves Jr 429; 32 ER 1153; Cockburn v Thompson (1809) 16 Ves Jr 321; 33 ER 1005.

35. In the very early cases in the 16th and 17th centuries in which this procedure was adopted, the persons represented were invariably a cohesive communal group, such as parishioners or manorial tenants, whose members had agreed to be represented; and the representatives were often required to show proof of their authority to represent the group. But as the nature of society changed and new, more impersonal institutions such as friendly societies and joint stock companies with multiple investors emerged, this requirement was dropped. The court allowed persons to be represented whether or not they had consented to such representation or even knew of the action, relying on community of interest among the members of the group to ensure that the interests of all were adequately protected: see Yeazell, “From Group Litigation to Class Action, Part I: The Industrialization of Group Litigation” (1980) 27 UCLA Law Review 514.

⁵⁸ [2021] UKSC 50. The UK Supreme Court held that to claim compensation for an infringement of the Data Protection Act 1998, it was necessary to demonstrate material damage or distress suffered by each individual. A representative action was therefore not suitable.

⁵⁹ This case was not argued by counsel and I did not invite them to do so for the limited purpose for which it is being used.

36. *Many of the formative cases involved joint stock companies at a time (before the Joint Stock Companies Acts 1844 to 1858) when such companies were not yet recognised as separate legal entities which could sue or be sued. An action had therefore to be brought by (or against) the members themselves.*

38. *In Duke of Bedford v Ellis [1901] AC 1, 8, Lord Macnaghten summarised the practice of the Court of Chancery in this way: “The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could ‘come at justice’, to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent.”*

[228] By the Supreme Court of Judicature Act, 1873, all the jurisdiction previously exercised by the Court of Chancery and the courts of common law was transferred to and vested in the new High Court of Justice. In Jamaica, section 4 of the Judicature (Supreme Court) Act provided as follows:

“4. On the commencement of this Act, the several Courts of superior this Island hereinafter mentioned, that is to say- Courts. –

The Supreme Court of Judicature,

The High Court of Chancery,

The Incumbered Estates' Court,

The Court of Ordinary,

The Court for Divorce and Matrimonial Causes,

The Chief Court of Bankruptcy, and

The Circuit Courts, shall be consolidated together, and shall constitute one Supreme Court of Judicature in Jamaica, under the name of "the Supreme Court of Judicature of Jamaica", hereinafter called "the Supreme Court".

[229] Section 48 of the same Act prescribed the grant of relief to any party with respect to the concurrent administration of law and equity in civil causes and matters in the Supreme Court which could have been given before the passage of the Act by the Court of Equity and the Court of Chancery.

[230] In the historical cases mentioned in the judgment of Lord Leggatt, where claims were held to come within the scope of the representative rule, the relief claimed on behalf of the represented class was limited to a declaration of legal rights. This is similar to section 19(2) of the Charter.

[231] The Joint Stock Companies Acts 1844 changed the law for companies in the UK. They had formerly operated as unincorporated associations with thousands of members. Litigation was to be commenced in the names of all these many members and was inconvenient and burdensome. The Act conferred separate legal entities upon companies so that they could sue or be sued in their own name. It was no longer necessary that an action had to be brought by (or against) its members.

[232] By 1889, the UK Interpretation Act included bodies corporate or incorporate in its definition of *person* and these laws were saved, becoming part of the law of Jamaica. It was no longer necessary for a representative action to be brought in the old manner in the names of all the members of an association or body. The company, being itself a person, could bring an action on its own or on behalf of others.

[233] In its current form, in the Jamaican CPR rule 21.1(1), imposes a minimum limit of five on the number of people who may be represented. Only one condition must be satisfied before a representative claim may be begun or allowed to continue:

that is, that the representative has “the same interest” in the claim as the person(s) represented. The phrase “the same interest” is capable of bearing a range of meanings and requires interpretation. Ms. White did not expand on her arguments on this issue beyond that which has been set out above. The court need not go further regarding that rule.

[234] While there is no doubt an interplay between section 19(2) and Part 21 of the CPR. In my view, there is no restriction under section 19(2) to matters which involve persons five or less in number. The intention of the legislature was to expand access, the construction suggested by the AG would have the opposite effect of curtailing constitutional claims and denying access to justice. In fact, had STEA applied under section 19(2) as a legal person, and been granted leave, it still could not have brought this claim under Part 21, with just one other claimant even as a legal person.

Public interest litigation

[235] In the case of **AG of Trinidad & Tobago v Dumas**⁶⁰ the Privy Council said at the outset that:

“Mr Dumas is not seeking redress for a contravention in relation to himself of any of the provisions of Chapter 1 of the Constitution, which protect fundamental rights and freedoms. Accordingly, he cannot invoke the procedure to enforce those protective provisions by application to the High Court by originating motion, which section 14 of the Constitution provides.⁶¹ He looks elsewhere in the law for the jurisdiction of the Court.

Support for the existence of this jurisdiction, which extends beyond the proceedings for redress in section 14 of the Constitution, can be found

⁶⁰ [2017] UKPC 12

⁶¹ The equivalent of section 19(1) of the Charter.

in the Constitution itself, which in section 100(2) provides that the High Court is “a superior Court of record” with all the powers of such a court, including all powers that were vested in the Supreme Court of Trinidad and Tobago immediately before the commencement of the Constitution. In section 108 the Constitution includes among the constitutional questions which can be appealed as of right to the Court of Appeal “any order or decision in any civil or criminal proceedings on questions as to the interpretation of this Constitution”.

[236] While it is acknowledged that section 13(2) of the Charter makes it clear that rights are not without limitation in a democracy. Mr Hylton, KC submitted that among the issues which the Court will have to consider is the impact on the wider society of the relief the claimants are seeking.

[237] The claim as currently filed has not been commenced in the public interest, rather it has been brought under section 19(1), alleging enforcement of the protective provisions against both claimants as *persons* within the meaning of the law. It is being alleged that both claimants are parties directly affected. There has been no dispute that the issue of standing is not being challenged on the ground of sufficiency of interest. The submission was that the claim was not being brought in a representative capacity. In light of my conclusion, I will not further advance on this aspect of the submissions.

Discussion

[238] Jamaica as a dualist state must honour its international obligations and seek in its laws to give effect to the international human rights instruments to which Jamaica is a party and the resolutions of international bodies, especially those to which Jamaica was a signatory. The Constitutional Committee took the position that the genesis of constitutional human rights provisions was in the international human rights instruments and, as the provisions of the conventions and the constitutional provisions were akin, it was consistent with Jamaica’s obligations and the creation of a modern Charter it be viewed in that light.

[239] The European Court of Human Rights or the Commission, as demonstrated by the cases cited, have found that either companies have certain human rights in their own right, or were vehicles for the identifiable individuals behind them. When viewed critically, one approach should exclude the other. Yet, in the **Times Newspaper Ltd.** case the Strasbourg Court found both positions to be simultaneously tenable.

[240] A group of persons is included in the definition of “*person*” in the Jamaican Interpretation Act, as is a “*body corporate*”. In both the European cases and the Jamaican statute, the language used to define “*person*” is inclusive, and to my mind, encompasses both positions.

Cases

[241] **Santan Dharma Maha Sabha of Trinidad and Tobago Inc. and others v Attorney General of Trinidad and Tobago**,⁶² is a case concerning religious freedom and the constitutionality of the Letters Patent which established the highest national honour in Trinidad and Tobago.

[242] The three applicants, two of which were artificial persons argued that the Trinity Cross both in name and design, given the particular historical, sociological and religious context of Trinidad and Tobago, was perceived to have unequivocally Christian religious associations. The respondent argued that the applicants were not entitled to constitutional relief under the 1976 Constitution for two reasons:

- a) “The first and third named applicants as corporate entities cannot enjoy the protection of and sue for an alleged breach of 4(h) rights.

⁶² [2009] UKPC 17;

- b) None of the applicants could reasonably be considered as persons with respect to whom the provisions of section 4(b), (d) and (h) have been or are likely to be contravened (see s 14(1) of the 1976 Constitution).⁶³

[243] In the judgment of the Privy Council, both decisions of the lower courts were set out *in extenso*. I note that the issue of locus standi was not appealed to either the Court of Appeal or the Privy Council.

[244] The learned judge at first instance held that in support of the first reason, the argument was that the first and third applicants cannot claim a breach of section 4(h) as they are corporate entities and not natural persons. Jamadar, J (as he then was) said that:

“a religious organization can subscribe to specific religious dogma, practices and observances and therefore arguably may enjoy the protection of rights with respect to same.

Second, the first and third applicants are not corporate citizens of a primarily commercial character; but are corporate citizens with a religious purpose, involved in the society on the basis of certain religious principles.

⁶³ 4. 4. Recognition and declaration of rights and freedoms It is hereby recognised and declared that in Trinidad and Tobago there have existed and shall continue to exist without discrimination by reason of race, origin, colour, religion or sex, the following fundamental human rights and freedoms, namely: —

b. the right of the individual to equality before the law and the protection of the law;

d. the right of the individual to equality of treatment from any public authority in the exercise of any functions;

h. freedom of conscience and religious belief and observance;

14. Enforcement of the protective provisions

1. For the removal of doubts it is hereby declared that if any person alleges that any of the provisions of this Chapter has been, is being, or is likely to be contravened in relation to him, then without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the High Court for redress by way of originating motion.

Third, in Smith v LJ Williams (1982) 32 WIR 395 the Court of Appeal of Trinidad and Tobago determined that corporate citizens are entitled to claim a breach of the s 4 rights in relation to them (see (1982) 32 WIR 395 at 417 and 422-23). Smith v LJ Williams is in fact authority for the general principle that non-natural persons (including corporate entities) are entitled to the protection of such of the provisions of s 4 and 5 of the 1976 Constitution as by their nature they are capable of enjoying – (1982) 32 WIR 395 at 423. (Emphasis in the original.)

In the court's opinion it is quite clear that a 'person' who may apply to the High Court for s 14(1) relief includes both a natural person and also non-natural persons, such as the first and third applicants. The real test, it would appear, is whether it can be shown in relation to the first and third applicants that by their natures, they are capable of enjoying 4(h) rights and are also entitled to protection for breaches of same. In my opinion, the answers to both of these questions are in the affirmative.” (Emphasis in the original.)

[245] Jamadar, J, went on to find that the first applicant was a corporate body considered by the State as 'representative' of Hindus in Trinidad and Tobago. The evidence of intent and purpose and reach of the organization was indicative of its nature. He held that the fact that the organization was not a natural person should not be a bar to locus standi. The third applicant was similarly situated and therefore there was no bar. The holding on the issue of locus standi was not appealed to the Court of Appeal. Neither the Court of Appeal nor the Privy Council commented on the reasoning or holding of the learned trial judge.

[246] In the case of **Smith et al v L.J. Williams Ltd.**⁶⁴ L.J. Williams Ltd. had sought a declaration in the High Court of Trinidad and Tobago that Smith, the Chief Immigration Officer had consistently and repeatedly, treated applications made on behalf of foreign nationals to enter and/or remain in Trinidad and Tobago, made in

⁶⁴ (1982) 32 WIR 395

the course of its business, less favourably than the same or similar applications made by other persons. These actions contravened its constitutional rights under section 4 of the Constitution of the Republic of Trinidad and Tobago to equality of treatment from any public authority in the exercise of any functions and to equality before the law and the protection of the law.

[247] The declaration was granted and an order for assessment of damages made. On appeal, to the Court of Appeal of Trinidad and Tobago, the findings of fact were accepted by both sides. The Court of Appeal considered that the question of law at the heart of the appeal was the appellant's contention that a company being an artificial legal entity and not a natural person was not entitled to the rights declared in the Constitution of Trinidad and Tobago, 1962 and Constitution of the Republic of Trinidad and Tobago Act, 1976.

[248] Hassanali, J.A. cited the opinion of the Privy Council as delivered by Lord Diplock in **Terrence Thornhill v The Attorney General of Trinidad and Tobago**⁶⁵ for the proposition that the Constitution provided legal protection in the future and the terms used to describe the rights and freedoms were of great breadth and generality.

"I think it implicit in "the presumption that human rights and fundamental freedoms were already enjoyed by the people of Trinidad and Tobago under the law in force there at the commencement of the 1962 Constitution" that those rights and freedoms were enjoyed by natural persona as well as by artificial persons so far as the latter were capable of enjoying any of them. And in my opinion the epithet "human" in section 1, neither delimits the class of those who are capable of enjoying or may benefit from the rights recognised and declared nor affects the reasonable meaning of the word individual (therein viz a single member as opposed to society or the general public of Trinidad and Tobago."

⁶⁵ [1981] A.C. 61

[249] The learned judge of appeal held that:

“I would hold that while section 1 refers to natural persons there is nothing in any of the sections 1, 2 and 6 to exclude artificial persons so far as they are capable of enjoying any of the rights and freedoms mentioned in that section; and that an artificial, person may invoke section 6 to complain of contravention of anyone of the rights and freedoms mentioned in section 1 which it is capable of enjoying.”

[250] In respect of section 14 of the Republican Constitution which is similar to section 19(1) in our Charter, Hassanali, JA said that the right of access of an artificial person to the High Court depends on whether it is a person within section 6 and in addition, whether the artificial person was capable of enjoying any of the rights and freedoms recognised and declared in section 1 to have existed at the commencement of the 1962 Constitution. Section 6 gave it the right to redress.

[251] Kelsick, JA identified nine issues and the issue relevant to the instant case was number seven, it was whether the proper applicants for redress were the persons on whose behalf, the unsuccessful applications to Smith had been made by the company. This issue is similarly worded to the submission of Ms White which is that the proper applicants for redress are those in the community of which STEA is a part. STEA is on the evidence acting for them. The learned judge of appeal indicated that section 1(d) was modelled on the provision at section 24(2) and (3) of the Constitution of Jamaica.

[252] On appeal to the Board, it was argued by the appellants that the rights of the individual, including those contained in sections 1(b) and (d) are the rights of natural and not artificial persons such as the appellant. The appellants cited a lack of jurisdiction in the court below.

[253] This submission was answered in the dicta of the Privy Council which stated:

“The protected rights and freedoms described in sections 1 to 2 which were already enjoyed by the people under the laws in force at the commencement

of the Constitution of 1962 continue to exist. (See Maharaj v Attorney General of Trinidad and Tobago (No. 2) [1979] A.C. 385 at 395E to G and Thornhill v Attorney General of Trinidad and Tobago [1981] A.C. 61 at 69F and 70C, D.) Those decisions are in harmony with decisions of the Supreme Court of Canada on the nature of the rights that are protected under the Bill of Rights. (see Robertson v Rosetanni [1963] S.C.R. 651 at 662; Regina v Burnshine [1975] S.C.R. 693 at 702)

“A company being a person as defined in the Interpretation Act of 1889 was entitled to seek redress under section 6 of the 1962 Constitution and prima facie was protected by the rights under section 2. Section 2 did not create rights which exist independently of section 1 (See Defreitas v Benny (1965) 27 W.I.R. 218 at 321(a) and Thornhill (supra) at p.70F and G).”

[254] It is of note that Kelsick, J.A. said:

“I hold that the rights of the individual under s. 1 of the 1962 Constitution, as well as under s. 4 of the 1976 constitution, are the rights not only of a natural person but also of non-natural persons, which include the Company. Consequently, the Company may exercise any of the rights in s. 1, and in its offshoot s.2, that by its nature it is capable of enjoying.”

[255] In **Attorney General v Antigua Times**, the word *person* was held to mean artificial person. This allowed a company to claim constitutional redress for infringement of its fundamental rights.⁶⁶ I note here, that this was the position in the independence Constitution of Jamaica, under the since repealed section 25(1).

[256] In **Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936)**, the Supreme Court of the United States decided that the owners of a minority of the preferred shares, with voting power, in a corporation have standing to sue in order to

⁶⁶ Dr. Lloyd Barnett, Constitutional Law of Jamaica, page 430

exercise its right to prevent the carrying out of a contract executed in its name by the directors with an agency of the United States, upon the grounds that the contract is unconstitutional, and that its performance will cause irreparable injury to the interests of the corporation. The United States Supreme Court did not shut out the company in respect to the constitutional question before it, preferring to expand access rather than curtail it.

The effect of a representative action under Part 21 in this claim

[257] I accept that the rights enjoyed by both artificial and natural persons in Jamaica, prior to 1962 remain in place. In the instant claim, there are only two claimants. Ms White's submission would mean that even to apply under section 19(2), using part 21 of the CPR, STEA would have to enjoin another three persons before it could represent them. STEA would have failed to meet the requirements of the rules and therefore be shut out of making a claim under either section 19(1) or 19(2).

[258] Given that the interpretation of the sections under review should not be narrowly constrained, section 19(2) as it currently stands had to be related somehow to section 19(1) for constitutional redress claimed other than a declaration to be accessible.

[259] The word *person* appears twice again in section 19(2).

*“Any **person** authorized by law, or, with the leave of the Court, a public or civic organization, may initiate an application to the Supreme Court on behalf of **persons** who are **entitled** to apply under subsection (1) for a declaration that any legislative or executive act contravenes the provisions of the Chapter.”*

[260] Viewed this way, what category of person is entitled to apply for a declaration under section 19(1)?

[261] In the treatise entitled *Constitutional Law of Jamaica*, Dr Lloyd Barnett writes:⁶⁷

“Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of a law or an instrument made under a Law, may apply by originating summons for the determination of such questions of construction, and for a declaration as to the right claimed.”

[262] Section 19(2) makes it clear that any legislative or executive act falls within its sights and in so doing, expands the range of matters to be considered by a court and now include a constitutional claim.

[263] Mr Hylton’s submissions have now become more attractive, as to accept that a legal person applying under section 19(2) on its own behalf would be limited to an application for leave means, a company, would need to seek leave on its own behalf first, it would not be able to seek leave with or on behalf of any members of a representative class less than five in number.

[264] This would lead to a narrowing of the field and would exclude for example a small fabric company and two tailors who occupy a building. That group would not be able to access the court in a representative action together under Part 21. Whereas, each tailor could apply separately or they could act together under section 19(1) as of right, that small company could not do so as a legal person.

[265] That fabric company would have to bring a separate application for leave from the tailors. The company would then have to apply afterwards, to join the claims, if granted leave, as it could make no application for joinder before standing was conferred upon it. The claim of the tailors in the meantime would be going ahead towards case management, while the claim of the company would be at the leave stage.

⁶⁷ Oxford University Press, 1977

[266] This construction would increase the cost of litigation for small companies, ensure delay in the constitutional redress process which is typically handled by this court with some dispatch and lead to an uneven application of the provisions of the Charter related to standing.

[267] The fabric company would, having obtained leave, to bring its claim under section 19(1) in order to access constitutional redress. In other words, if that fabric supplier as a legal person is to join with the others in a representative action, because it is a company, it would need to seek leave separately and then be joined with those other claimants to access relief other than a declaration.

[268] This would lead to a multiplicity of applications in constitutional claims, ensure delay and rising costs for litigants and overwhelm the overburdened Supreme Court. These additional steps in civil proceedings are unwelcome and unjustifiable. In my view, it could not have been the intention of Parliament to add these additional steps, given their trammels upon access to justice for any group.

[269] This would also mean that the position in law for any company in Jamaica would be the same as it was before 1844, when a company was given a separate legal identity. The action of incorporation would be a bar to the filing of a constitutional claim in its own right. I do not so hold.

[270] I have previously stated that the identifiable members of a company and a company in its own name are both included in the meaning of the word *person*. The Supreme Court in its management of constitutional claims under section 19 can direct the proceedings with regard to the conduct of a constitutional claim brought by a company in its own right and will apply the overriding objective of dealing with cases justly.⁶⁸

⁶⁸ Rule 1.1

[271] There is nothing limiting the enforcement provisions of the Charter to Jamaican citizens, it is *any person*, this means a non- Jamaican company is also a *person* within the meaning of section 19(1).

[272] Any other interpretation would result in an absurdity, lead to legal and factual anomalies and it would be in my view be asking the court to apply the law in a manner which would lead to the disadvantage of many.

[273] It has been shown that the rights and freedoms enjoyed by legal persons so far as the latter were capable of enjoying any of them is of long-standing. In this court's opinion a '*person*' who may apply to the Supreme Court under section 19(1) includes both a natural person, such as the second claimant and also a non-natural person, such as the first claimant.

[274] This court is not prepared to hold that section 19(2) should be interpreted to mean that a company has to apply under section 19(2) for leave in order to commence a constitutional claim. In my judgment, a company may claim in its own right under section 19(1) as a legal person for the rights which it is capable of enjoying pursuant to section 13 of the Charter.

Conclusion

[275] The question of whether STEA as a legal but not natural person can seek redress for alleged likely contraventions of the Charter in relation to itself under the specified provisions of Chapter III of Charter of Fundamental Rights and Freedoms (Constitutional Amendment Act), 2011 ("the Charter") which protect fundamental rights and freedoms is answered in the affirmative.

[276] The question of whether STEA can invoke the procedure to enforce those protective provisions by application to the Supreme Court, which section 19(1) of the Constitution provides in answered in the affirmative.

Any rights or freedoms given to a "*person*" in Chapter 13 of the Charter which are by their nature capable of being enjoyed by a company, can be claimed by that company, despite its being included in the list of rights and freedoms of the *person*.

[277] The question of whether it has been shown by STEA, that it is capable of enjoying the rights it seeks to enforce is to be determined at the trial of the substantive claim.

[278] Any questions relating to the interpretation to be given to the relevant constitutional provisions, the nature and extent of the rights and freedoms sought to be enforced is for trial. At this stage, which is case management, all that is before the court are allegations, there has been no trial on the merits. Therefore, this decision is confined to the question of standing based only on the allegations before this court.

[279] In summary:

1. The claimant, STEA can therefore commence a claim in its own name in its own right, pursuant to section 19(1) of the Charter as it is a legal person.
2. The word *person* where the context so requires, and where it can be applied, in section 19(1) includes a company. The word *person* does not limit or exclude artificial persons, as such a construction would derogate from the enjoyment of rights by companies in existence since the 1800s.
3. Similarly, the word *person* does not exclude artificial persons so far as they are capable of enjoying any of the rights and freedoms mentioned in the Charter.
4. A legal person may invoke the enforcement provision under section 19(1) of the Charter to seek redress for an alleged contravention of any one of the rights and freedoms which it is capable of enjoying.

Striking out

The Civil Procedure Rules

[280] Rule 2.4 defines *body corporate*: “means a company or other body corporate wherever of however incorporated, other than a corporation sole, and includes a limited company unless a rule otherwise provides.

[281] The Interpretation Act defines the word *person* to mean body corporate.

[282] Rule 22.4 states:

Bodies Corporate 22.4

(1) Subject to any statutory provision to the contrary, a duly authorised director or other officer of a body corporate may conduct proceedings on its behalf.

(2) A body corporate must be represented by an attorney-at-law at any hearing in open court unless the court permits it to be represented by a duly authorised director or other officer.

(3) Permission to represent the body corporate at the trial should wherever practicable be sought at a case management conference or pre-trial review.

(4) In considering whether to give permission the court must take into account all the circumstances including the complexity of the case.

(5) In paragraphs (1) and (2) “duly authorised” means authorised by the body corporate to conduct the proceedings on its behalf.

[283] The representative capacity in which a company can approach the Supreme Court is encompassed by this rule. A legal person is capable of conducting proceedings in open court. This is an available remedy which is open to the court. It is one which does not engage the draconian step of striking out a statement of case and it is preferable in all the circumstances presented in this application. The need to apply this provision has not arisen given the findings of the court. However, it is an available tool at case management for an identifiable member of a company to conduct proceedings on its behalf.

[284] One view not argued by either side is the inevitable endowment of the same rights sought by STEA on the corporations who are defending the substantive claim now that STEA has succeeded, that perhaps, is for another day.

[285] Orders:

1. The application to strike out the statement of case and to remove the first claimant, STEA from the claim is refused.
2. Costs of the application to the first claimant to be agreed or taxed. Subject to the receipt of submissions on the issue of costs within seven days of the date herein, the order as to costs stands. Any consideration of the issue of costs will be on paper.

Wint-Blair, J