[2026] JMFC Full 03

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE FULL COURT

CLAIM NO. SU2020CV04966

BEFORE: **THE HONOURABLE MS. JUSTICE S. WINT-BLAIR**

THE HONOURABLE MISS JUSTICE A. THOMAS

THE HONOURABLE MRS. T. HUTCHINSON SHELLY

IN THE MATTER OF THE CONSTITUTION OF JAMAICA

AND

IN THE MATTER OF A DECISION BY THE RELEVANT MINISTER TO APPROVE THE GRANT OF A LICENCE PERMITTING MINING AND QUARRYING OF BAUXITE, PEAT, SAND AND MINERALS AT RIO BUENO, DRY HARBOUR MOUNTAIN, DISCOVERY BAY, ST ANN

AND

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

BETWEEN	**WENDY A. LEE**	**FIRST CLAIMANT**
AND	**MARTIN HOPWOOD**	**SECOND CLAIMANT**
AND	**ANNE HOPWOOD**	**THIRD CLAIMANT**
AND	**TRACEY D. SHIRLEY**	**FOURTH CLAIMANT**
AND	**KARLENE McDONNOUGH**	**FIFTH CLAIMANT**

AND	**PATRICIA DALE**	**SIXTH CLAIMANT**
AND	**ALEC HENDERSON**	**SEVENTH CLAIMANT**
AND	**SHERMIAN WOODHOUSE**	**EIGHTH CLAIMANT**
AND	**THE ATTORNEY GENERAL OF JAMAICA**	**FIRST DEFENDANT**
AND	**THE NATIONAL RESOURCES CONSERVATION AUTHORITY**	**SECOND DEFENDANT**
AND	**BENGAL DEVELOPMENT LIMITED**	**THIRD DEFENDANT**

FULL COURT

Mr B. St. Michael Hylton, KC, Mrs Melissa McLeod and Ms Daynia Allen instructed by Hylton Powell for the Claimants

Ms Annaliesa Lindsay, Ms Karessiann Gray and Mr Jeffrey Foreman instructed by the Director of State Proceedings for the First Defendant

Ms Kimberly Myrie-Essor for the Second Defendant

Mr Abraham Dabdoub, KC instructed by Dabdoub, Dabdoub & Co. for the Third Defendant

Heard: July 14th, and November 13th, 2026

Constitutional Law – Costs – Indemnity Costs – Standard Costs – Requirements to justify award of indemnity costs– Costs awarded for more than two Attorneys-at-Law

WINT-BLAIR J, THOMAS J, HUTCHINSON SHELLY, J

INTRODUCTION

[1] On the 30th of April 2026, the Full Court delivered judgment in the substantive claim and made the following orders:

1. Judgment for the Claimants against each Defendant.

2. The decision of the Minister of Economic Growth and Job Creation and the Environmental Permit No. 2014-06017-EP00040 granted on November 5, 2020, as amended on December 15, 2020, by the Second Defendant to the Third Defendant to permit mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St Ann are struck down as unconstitutional, void and of no effect.

3. The Court grants an injunction restraining the Third Defendant, whether by itself, its employees, servants and/or agents, from starting or continuing to carry out any mining, quarrying or other activities on the Bengal lands pursuant to or in reliance on Environmental Permit No. 2014-06017-EP00040 granted on November 5, 2020, as amended on December 15, 2020.

4. The Claimants shall have their costs, such costs to be agreed or taxed, with liberty to apply on the question of whether those costs should be awarded on an indemnity basis.

5. Any application on the issue of costs shall be filed and served within 14 days of the delivery of this judgment. Failing which, the Defendants are ordered to pay the Claimants' costs of and incidental to this trial.

[2] On the 14th of July 2026, Counsel for the Claimants and Defendants made oral submissions amplifying the written submissions filed by them on the issue of standard and indemnity costs. The question of whether costs should be payable for more than two Attorneys was also analysed. These submissions have been carefully considered by the Court and have been summarised below.

SUBMISSIONS

Claimants' Submissions on Costs

[3] Mrs McLeod appeared for the purposes of the hearing and highlighted key elements of the Claimants' written submission to justify the Claimants' request for an award of

indemnity costs. She acknowledged that costs payable by one party to another are in the discretion of the court per Rule 64.3. Mrs McLeod highlighted Rule 64.6(1) of the Civil Procedure Rules, 2002 ("the CPR") which provides that: "*If the Court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party*."

[4] On the question of who is the unsuccessful party, Counsel submitted that although the Judgment states that it is against each Defendant, given the actions and positions taken by the Defendants before and during the litigation, the unsuccessful parties for the purpose of Rule 64.3 are the Attorney General (1st Defendant) and the 3rd Defendant ("Bengal").

[5] In respect of the declarations which had been sought in regard to the right to live in any part of Jamaica and the right to protection from degrading and “other” treatment, Counsel submitted that these had not been the focus of closing submissions and were not the subject of any declaration. She contended that in spite of the absence of a declaration of these rights, the Claimant was no less deserving of their costs as a successful party, as consideration of these rights did not increase the length and costs of the trial and the Court in its judgment had acknowledged that they had not been pursued.

[6] Mrs McLeod submitted that in determining what is reasonable, the court has a discretion as to whether costs should be awarded on the indemnity basis. She commended the decision of Sykes J (as he then was) in **RBTT Bank Limited v YP Seaton** *[2014] JMSC Civ. 139* (B9/Tab F) wherein he observed as follows:

> *“What, then, leads a court to make either a standard or an indemnity assessment? It is this court's view that the case of Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd [20111 EWHC 653 captures the principle quite well.*
>
> *Akenhead J held the following at paragraphs 3 and 4:*
>
> > [3*] ...<u>the court, in deciding what order to make about the costs, should have regard to the conduct of the parties (both before and during the proceedings)</u>, success, any admissible offer to settle, whether it was reasonable for a party*

> *to raise or pursue particular claims and the manner in which the party has pursued its case or particular allegations or issues.*
>
> *[4] The following are unexceptionable propositions:*
>
> > *(a) an award of costs on an indemnity basis is not intended to be penal and regard must be had to what in the circumstances is fair and reasonable: Reid Minty v Taylor [2002] 1 WLR 2800, paragraph 20.*
> >
> > *(b) indemnity costs are not limited to cases in which the court wishes to express disapproval of the wav(y) in which litigation has been conducted. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: Reid Minty, paragraph 28.*
> >
> > *(c) the court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson** (A Firm) [2002] Cr App Rep 67, paragraphs 12, 19 & 32*
> >
> > *(d) the conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: Kiam v MGN Ltd (No 2) [200211 WLR 2810, para 12.*
> >
> > *(e) the pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order:*
>
> *'to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs'."*

[7] Mrs McLeod asked the Court to note that in this decision, the Court concluded that the Jamaican CPR even without using the words 'indemnity basis' and 'standard basis' has incorporated both principles in the assessment of costs and it is not necessary for a party to specifically apply for costs to be assessed on an indemnity basis.

[8] Counsel argued that there are multiple reasons why this case falls within the category of cases described by Sykes J. and why an award of costs on the indemnity basis would be appropriate as both the actions and decisions of the Defendants before the

trial and the way in which one of their Counsel conducted the trial support that submission.

[9] In addressing the factors which support this assertion, Mrs McLeod highlighted the fact that the Claimants were able to rely on the correspondence and other documents issued by government departments and Bengal's own Environmental Impact Assessment. She also adopted the analysis of Wint-Blair J between paragraphs 147 and 166 of the substantive judgment, where my Learned Sister identified 10 difficulties the Defendants faced in discharging their obligation to prove a rational connection between the impugned decision and the purported objective. She contended that the defences would have failed (and the claim would have succeeded) based on any of them.

[10] Mrs McLeod further submitted that the following 'undisputed facts' are also relevant in terms of the conduct being relied on:

a. Bengal's Land is in an area that is zoned as a no quarry zone. It is subject to a Development Order which states "Only those forms of development which will not result in any significant alteration to the existing topography or any reduction in significant stands of vegetation will be permitted" and "no development of land within the area to which this Order applies, shall take place except in accordance with this Order".

b. In the course of processing Bengal's application for a permit, and in accordance with the NRCA Act, the NRCA held public consultations to obtain the views of the persons who would be most directly affected by the proposed mining, the residents of the immediate area.

c. At one of those public consultations, the NRCA's representative, Miguel Nelson, said: "*Participants should note that this public meeting is deemed important, and the outcome of the meeting will be submitted to the Natural Resources Conservation Authority to guide the decision-making process".*

d. The NRCA rejected Bengal's application for a permit, based on, among other things, "The unprecedented number of objections received from residents who reside in the surrounding areas"

e. When Bengal appealed, the Claimants and the other residents to whom the NRCA referred were not notified, neither were they provided with a copy of the grounds of appeal. Additionally, they were not permitted to attend the hearing of the appeal or make submissions in response to same.

f. As observed by Wint-Blair J at paragraph 149 of the Judgment, the NRCA's position was before the Minister in two separate documents and *"He was therefore not dealing with a neutral or incomplete record. He was dealing with a record in which the statutory regulator had decisively concluded that the permit ought not to be granted."*

g. The Minister allowed the appeal, despite the fact that the proposed mining activity contravened the Development Order.

h. At paragraph 154 of the judgment, her Ladyship confirmed that the decision was inconsistent with the planning and zoning law and that the NRCA "*plainly said that the proposed quarry was not in a quarry zone and would conflict with the development policies for the area. This was specifically pointed out to the Minister by the NRCA.*"

i. The Minister's decision to allow the appeal was not made public and the Claimants did not become aware of it until the NRCA informed them 4 months later. They were not given any reasons for the decision.

j. At the trial, no reasons were provided and the court criticised the Minister's treatment of the environmental evidence and found that it was his responsibility to give the court the opportunity to examine the reasons for his decision.

k. A few days before the trial (more than 4 years after the claim was filed), the NRCA and Bengal disclosed some of the documents relating to the appeal after

the Claimants filed an application for specific disclosure. No documents relating to the appeal have been disclosed by The Ministry.

[11] In respect of the failure to provide disclosure and reasons, Mrs McLeod referred to the decision of Julian Robinson and the dicta of Sykes CJ at paragraph 32(j) as follows:

> *"...there is a duty of candour on the violator, especially if the violator is the state, to place all relevant information before the court. Charter rights and freedoms are too important to be left to the usual position in civil litigation that the claimant is to adduce all relevant facts...". The Court of Appeal made the same point in Dale Virgo*
>
> *The State was a party to both of those claims and nonetheless failed to disclose these critical documents or any of the documents relating to the appeal. We submit that these edicts from the court are meaningless if they can be ignored with impunity."*

[12] Mrs McLeod submitted that the Court should also take note of the suggestion to one of the Claimants by Counsel for the 3rd Defendant that the Claimants were driven by racial bias. She argued that this offensive and baseless allegation falls squarely within the type of conduct that should justify an order of indemnity costs.

Claimants' Submissions on Number of Counsel

[13] In asking the Court to award costs for three (3) Attorneys, Mrs. McLeod submitted that throughout most of the proceedings, the Claimants were represented by 3 Attorneys-at-Law and although she did not attend the trial, she worked on several aspects of the claim before and after the trial, including these submissions.

[14] She highlighted the provisions of Rule 64.12(3) where it is noted that having regard to the factors set out in rule 65.17(3), the court may allow the costs of more than two Attorneys-at-Law if certain factors are present, which include, the importance of the matter to the parties, the time reasonably spent on the matter, whether the matter is appropriate for a senior Attorney-at-Law and the novelty, weight and complexity of the matter.

[15] Mrs McLeod submitted that the court should exercise its discretion to allow the Claimants costs for 3 Attorneys-at-Law for the following reasons:

a. It is evident from the court's judgment that this claim was of extreme importance to the Claimants and to the country generally.

b. It is also evident from the judgment that the issues were numerous, and to some extent, novel and complex. The documentation was extensive, and there were multiple clients and witnesses.

c. The Claimants retained one King's Counsel, one junior counsel and one instructing attorney. She submitted that in all the circumstances their decision to do so was entirely justified.

First Defendant'sSubmissions on costs

[16] In written and oral submissions on behalf of the 1st Defendant, Ms Lindsay submitted that the 1 st Defendant has no objection to the application of the principle that the successful party is entitled to its costs. She agreed that the CPR does not mention standard or indemnity costs, but it does provide a guideline for what factors are to be taken into consideration in quantifying the costs payable by a paying party to a receiving party.

[17] Counsel made reference to Rule 65.17 (1) of the CPR which states that:

> *"Where the court has a discretion as to the amount of costs to be allowed to a party, the sum to be allowed is the amount —*
>
> *(a) That the court deems to be reasonable; and*
>
> *(b) Which appears to the court to be fair both to the person paying and the person receiving such costs".*

[18] Ms Lindsay submitted that the factual context of **RBTT Bank Limited v YP** Seaton *supra* in which indemnity costs were partially awarded is completely distinguishable from the facts in this case. She acknowledged however that the principles of law applicable to the consideration for the award of costs outlined in that case are relevant and adopted and relied on paragraph 49 of that judgment which quoted paragraphs 2

and 3 of the decision of Langley J in **Amoco (UK) Exploration Company v British American Offshore Limited** [2002] BLR 135.

[19] Ms Lindsay submitted that in the **Amoco** Case, Langley J emphasised a number of factors to include the following:

> *a) The general rule is that costs are to be awarded on a standard basis.*
>
> *b) It is not helpful to seek to define the circumstances in which indemnity costs may be appropriate.*
>
> *c) It is important to keep in mind that costs, even if awarded on an indemnity basis, do not amount to a full recovery of costs unless all the costs have been reasonably incurred and are reasonable in amount.*
>
> *d) There has to be some additional factor that justifies the departure from the general rule of costs being awarded on a standard basis.*
>
> *e) The additional factors are often found in some conduct of the paying party which the court considers merit sufficient criticism beyond that which may ordinarily apply in the case of a party which has fought and lost.*

[20] Ms Lindsay asked the Court to note the remarks of Sykes J, as he then was, at paragraph 52 of the **RBTT** Case, where he observed that if in the manner in which the case was conducted, "*the court finds that the litigation was conducted in manner that was so highly unreasonable so as to fall outside of the normal conduct of litigation then there has to be some practical consequence. If it were otherwise, it would encourage litigants to be profligate with time and resources as they be* [sic] *sure in the knowledge that costs orders will be benign".* She also highlighted his remarks at paragraph 55 where he stated that *"if indemnity costs are sought, the court must decide whether there is something in the conduct of the action, or the circumstances of the case in question, which takes it out of the norm in a way which justifies an order for indemnity costs*".

[21] Ms Lindsay also relied on **Excalibur Ventures LLC v Texas Keystone Inc & Ors** [2016] EWCA Civ 1144, wherein Tomlinson LJ noted at paragraph 21 that the discretion to award costs on an indemnity basis should "*be exercised in the light of all the circumstances of the case"*. She also commended the decision in **Nestec SA v**

Dualit Ltd [2013] EWHC 1577 (Pat), as instructive, as in that case, standard costs were awarded in circumstances where although the court found that the paying party's conduct in the matter was unreasonable, the receiving party had not been successful on all counts in the litigation. Ms Lindsay asked the Court to note that the legal position accepted by Sykes J in the **RBTT** Case at paragraph 46 was adopted from the case of **Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd** [2011] EWHC 653 which was also relevant to the issue.

[22] In respect of the difference between standard costs and costs awarded on an indemnity basis, Counsel submitted that the authorities make it clear that for standard costs, the burden is on the receiving party to prove the reasonableness of the costs claimed; whereas for costs on an indemnity basis, the burden is on the paying party to show that the costs claimed are not reasonable in the circumstances.

[23] Ms Lindsay contended that any costs awarded to the Claimants should be recovered on a standard costs basis, as the conduct of the proceedings by the 1st Defendant was reasonable in the circumstances and cannot be faulted to the extent that an award of costs on an indemnity basis is required.

[24] Ms Lindsay asked the Court to consider the fact that although the Claimants were successful in terms set out in the judgment, they did not seriously pursue the alleged breaches of the other rights pleaded and to that extent the Court did not entertain them. Therefore, they were not successful on all grounds on which they approached the Full Court, and this is a factor to be taken into consideration in deciding on whether indemnity costs are appropriate, per the decision in the **Nestec SA** Case.

[25] She argued that the Court expressly found that there was no basis on which the Claimants were entitled to constitutional or vindicatory damages, as there was in fact no breach of their constitutional rights to justify same, and this should be considered in deciding whether there should be a departure from the general rule to award standard costs.

[26] Ms Lindsay contended that this case involved a novel area of the law, as the Claimants' challenge arose out of an appeal process, which was not being challenged, and which was permitted under the NRCA Act. The subject matter could not easily or readily be settled, but deserved litigation to distil the issues. She submitted that the conduct of the 1st Defendant, in defending its case, does not admit of unreasonable conduct which would necessitate a departure from the general rule.

[27] Counsel sought to distinguish the **RBTT** Case and posited that in that case, the Court found that the bank knew that it had a difficult case from the outset as it could not locate a witness for a very long time. She argued that the situation was made worse when the said witness could not speak to the details of the particular contract but could only speak generally from his experience. The bank's defence was further impacted by the striking out of large parts of that witness's witness statement. Ms Lindsay contended that it was in these circumstances that the court found that the bank was essentially not in a position to prove its case and made an award that costs be assessed on an indemnity basis.

[28] Ms Lindsay sought to contrast the circumstances in the RBTT Case to the instant claim and asserted that no similar comparison can be made as the 1st Defendant was entitled to rely on the actions of the relevant Minister in his conduct of the appeal, because that process had not been impugned and was not being challenged in this Claim. The determinative factor in this claim was in fact the impact of the environmental permit that was ultimately issued, as a result of that appeal process. Ms Lindsay further submitted that it cannot be said that it was a forgone conclusion that the Constitutional Court was bound to find that the environmental permit as issued is likely to breach the Charter Rights protected in section 13(3)(1) of the Constitution.

[29] She contended that it was not a forgone conclusion that the 1st Defendant's defence in relying on sustainable development and the 76 conditions that attached to the environmental permit were bound to be found insufficient in being demonstrably justified in a free and democratic society. To this extent, the 1st Defendant's conduct

in defending the claim should not be adjudged unreasonable by this Court or form the basis for an award of costs to be recovered on an indemnity basis.

[30] When pressed by the Court on the 1st Defendant's response to the 3rd Defendant's request that the 1st Defendant should be responsible for all costs payable to the Claimants and should also bear the costs of the 3rd Defendant, Ms Lindsay resisted that request. She submitted that on the appeal the procedure was clear as to what should occur and it did. She also highlighted the fact that during the course of the trial one of the 3rd Defendant's witnesses said (for the first time) that they no longer intended to pursue the basis for which the permit was granted. Ms Lindsay argued that had this information been known to the 1st Defendant they would not have gone to trial and this should be borne in mind by the Court when it comes to consider the 3rd Defendant's request.

First Defendant's submissions on number of Counsel

[31] In her oral amplification of written submissions, Ms Lindsay submitted that in respect of Claimant's request for costs for three counsel, the Court should find that only two had appeared before it in this matter and on this basis limit any award of costs to two.

NRCA's Submissions on costs

[32] In addressing the issue of costs, Mrs Myrie-Essor highlighted the comment of the Court, at paragraph 32 of the substantive Judgment, that 'The NRCA *submitted that the claimants' affidavits and other evidence presented to the Court do not challenge the NRCA's process nor its refusal. Under section 35 of the NRCA Act, the permit must be granted once an appeal is allowed in accordance with the Minister's decision. There is no evidence that the NRCA acted unlawfully in issuing the permit.*'

[33] She also highlighted the duty of the 2nd Defendant under Section 35 of the NRCA Act and its role during the appeal process, where it maintained its opposition to the grant of the permit and subsequently attached 76 conditions to the Environmental Permit it

was directed to issue. Counsel argued that in attaching the conditions, the 2nd Defendant tried to mitigate the situation, bearing in mind its initial reasons for refusal.

[34] Mrs Myrie-Essor referred to the fact that during the 3rd Defendant's application process for the relevant Environmental Permit, the 2nd Defendant requested that they procure an Environmental Impact Assessment Study. She submitted that the 2nd Defendant by its actions did not breach any of the rights of the Claimants and is therefore unaffected by the determination of any of the said issues.

[35] Mrs Myrie-Essor argued that the true claim is against the decision of the relevant Minister and not the fact that the 2nd Defendant in compliance with Section 35 of the NRCA Act, followed the lawful process after the successful appeal pursuant to Section 35 of the NRCA Act.

[36] Mrs Myrie-Essor highlighted paragraphs 147 to 164 of the substantive Judgment, wherein Wint-Blair J examined the difficulties faced by the Defendants in respect of the permits and submitted that, based on the Court’s review, it is clear that the 2nd Defendant carried out its statutory function as empowered by the NRCA Act. She asserted that the documentary evidence prepared by the 2nd Defendant assisted the Court in determining the matter and provided a crucial foundation for the Claimants in establishing their claim and, in the circumstances, the 2nd Defendant ought to be declared to have properly executed its statutory functions and not be ordered to pay costs to the Claimants.

[37] Mrs Myrie-Essor asked the Court to note that the Claimants made no assertions that the 2nd Defendant or the relevant Minister acted ultra vires under the NRCA Act. Neither did they submit that the 2nd Defendant’s actions by issuing the permit after the successful appeal was illegal and/or likely to breach the rights of the Claimants. She asserted that in those circumstances the Claimants ought not to be awarded costs from the 2nd Defendant. The inclusion in the claim of the 2nd Defendant was unnecessary as the permit was issued prior to the commencement of the proceedings

and the Court by striking down/deeming the said Environmental Permit unlawful, would have provided all the necessary relief to the Claimants.

[38] In examining the intention of costs orders and how they should be applied, Mrs Myrie-Essor cited and relied on a number of authorities to include **Gordon Stewart v Goblin Hill Hotels Limited (2016) JMCC Comm 39 and Harold v Smith** (1860) 5 H & N 381,385 wherein (Bramwell B) stated:

> *Costs as between party and party are given by the law as an indemnity to the person entitled to them:* they are not imposed as a punishment *on the party who pays them,* nor given as a bonus to the party who receives them*. Therefore, if the extend of the indemnification can be found out, the extent to which costs ought to be allowed is also ascertained.*

[39] Counsel argued that costs are not intended to be a source of profit for either party. It is not payment for the lawyers as legal fees should have been dealt with by the retainer. Costs are those expenses incurred by one litigant which may be recovered from the other litigant. She referred to Rule 64.6(1), and the general rule previously alluded to above. Counsel also made reference to the dicta of Waller LJ **in Straker v Tudor Rose (a firm)** [2007] EWCA Civ 368 as to the methodology which should be followed in awarding costs. His Lordship said at paragraphs 11-12:

> *"The Court must first decide whether it is a case where it should make an order as to costs and have at the forefront of its mind that the general rule is that the unsuccessful party will pay the costs of the successful party. In deciding what order to make it must taking* [sic] *into account all the circumstances including*
>
> *(a) the parties' conduct.*
>
> *(b) whether a party has succeeded on part even if not the whole and*
>
> *(c) any payment into court.*
>
> *12. Having regard to the general rule, the first task must be to decide who is the successful party. The Court should then apply the general rule unless there are circumstances which lead to a different result. The circumstances which may lead to a different result include*
>
> > *(a) a failure to follow a pre-action protocol;*
> >
> > *(b) whether a party has unreasonably pursued or contested an allegation or an issue*

(c) the manner in which someone has pursued an allegation or an issue and

(d) whether a successful has exaggerated his claim in whole or in part".

[40] Mrs Myrie-Essor reiterated that the inclusion of the 2nd Defendant in the claim was not necessary as based on the statements of case, the evidence presented in court, the Claimants' submissions of both law and fact and the findings of the Court, the Claimants' contention is with the decision of the relevant Minister whose defence was undertaken by the Attorney General of Jamaica (1st Defendant). The 2nd Defendant objected at all times to the issuing of the permit as it was statutorily capable of so doing, but by virtue of the wording of Section 35 of the NRCA Act it was forced to issue same and ought not to be punished by virtue of a cost order for carrying out its statutory duty. The 2nd Defendant's conduct throughout the case was not prejudicial to the Claimants' case and did not significantly prolong the proceedings, and the Court should find that the Claimants have not proved such out of the ordinary circumstances as to warrant indemnity costs.

Third Defendant's Submissions on costs

[41] In submissions made on behalf of the 3rd Defendant, it was acknowledged that rules 64 and 65 of the Civil Procedure Rules speak to the issue of costs. Mr Dabdoub agreed that the general rule is that the unsuccessful party pays the costs of the successful party; however, the court has a discretion in relation to the award of costs. He also agreed that although the CPR does not mention costs on a standard or indemnity basis, a number of decisions have indicated that such costs are allowed.

[42] Mr Dabdoub endorsed the submissions of the Claimants and Defendants that rule 64.6(3) and 64.6(4) provide that in deciding who should pay cost the court must have regard to all the circumstances including: the conduct of the parties both before and during the proceedings, whether a party has succeeded on particular issues, even if that party has not been successful in all of the proceedings.

[43] Mr Dabdoub submitted that indemnity costs are only awarded for unreasonable conduct, which is outside the norm, such as acting in bad faith or pursuing a hopeless or abusive claim. Reliance was placed on the decision of **Michael Distant et al v Noorja Jamaica et al** 2000HCV1271, which he argued set the standard on which courts should approach the award of costs to a successful party on an indemnity basis. He argued that on an indemnity basis all costs that are reasonably incurred and reasonable in amount are allowable and any doubt is resolved in favour of the receiving party, but on a standard basis the court will only allow costs which are proportionate to the matters in issue and resolve any doubt in favour of the paying party.

[44] Mr Dabdoub further submitted that, on the face of the Judgment, the conduct of the 3rd defendant, both before and during the proceedings, is not such as can reasonably be determined as conduct out of the norm. He highlighted that nowhere in the Judgment did the court find that the 3rd defendant breached or was in a position where it could likely breach the constitutional rights of the Claimant.

[45] Mr Dabdoub asserted that contrary to the submissions of the Claimant, there was no evidence in support of racial bias, as the cross-examination of the 2nd Claimant was never done in that light and discrimination was not part of the defence. He contended that the evidence showed that the 3rd defendant was entitled to apply for the grant of an environmental permit for mining and quarrying on its own property and it complied with the requirement of the NRCA to prepare an environmental impact assessment. He asked the Court to note that the Claimants never asserted that the 3rd defendant had no right to apply for the environmental permit, or to appeal its refusal by the NRCA.

[46] He pointed out that the Claimants had, in essence, failed to prove the right to live in any part of Jamaica and the right to protection from degrading and other treatment, and that should be considered in deciding whether to award them costs or a portion of their costs.

[47] Mr Dabdoub also asked the court to note that it was the Claimants who elected to include the 3rd Defendant as a defendant instead of an interested party. Counsel further contended that while the claim against the Minister's decision, if successful, would have impacted the constitutional rights of the third defendant, the Claimants were not justified in adding it as a defendant to the claim. The proper course should have been to join the 3rd Defendant as an interested party, thereby recognising its right to oppose the declaration and orders being sought.

[48] Mr Dabdoub asserted that taking the overriding objective into consideration, no order as to costs should be made against the 3rd Defendant, as it was entitled to defend the claim. The case is a complex one involving competing constitutional rights, and to award costs against it would have a negative impact on its own constitutional rights. Reliance was placed on **Tomlinson v Television Jamaica Ltd** [2013] JMFC FULL 1, where the court established that because the claim raised a novel constitutional issue of public importance, the usual cost follows the event rule was not applied.

[49] Mr Dabdoub implored the Court to consider that the 3rd Defendant was entitled to costs. In expanding on this point, he argued that, since the Court found that the Minister's decision to allow the 3rd Defendant's appeal breached the Claimants' constitutional rights, such costs should be paid by the 1st Defendant and no finding should be made against the 3rd Defendant. It was also argued that, in exercising its discretion in this regard, the Court should also consider making an order that the 1st Defendant pays the 3rd Defendant's costs as well.

[50] In respect of indemnity costs, Mr Dabdoub asserted that an award of indemnity costs is not intended to penalise a party and the question of the conduct of the parties has to be closely examined. He contended that the conduct of the 3rd Defendant was not outside of the norm, and there was no finding that its conduct had breached any of the Claimants' rights. The case **of KIAM V MGN LTD** (No.2) [2002] 1 WLR 2810 was commended to the Court on this point, wherein the Learned Judge made reference to the conduct required to justify such an award. In that case it was observed that the

conduct in question, albeit falling short of misconduct deserving of moral condemnation, was sufficiently unreasonable to justify such an award.

ISSUES

[51] In respect of the issues which arise for the Court's consideration, these can be described as twofold, namely:

1. Have the Claimants established a proper basis for an award of indemnity costs against the 1st and 3rd Defendants?

2. Should an award be made for three (3) Counsel for the Claimants instead of two (2)?

DISCUSSION/ANALYSIS

[52] The general rule, as it relates to costs in a claim is found at Rule 64.6 of the CPR and states as follows:

> *"64.6 (1) If the court decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.*
>
> *(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.*
>
> *(3) In deciding who should be liable to pay costs the court must have regard to all the circumstances.*
>
> *(4) In particular it must have regard to -*
>
> *(a) the conduct of the parties both before and during the proceedings;*
>
> *(b) whether a party has succeeded on particular issues, even if that party has not been successful in the whole of the proceedings;*
>
> *(c) any payment into court or offer to settle made by a party which is drawn to the court's attention (whether or not made in accordance with Parts 35 and 36);*
>
> *(d) whether it was reasonable for a party –*
>
> *(i) to pursue a particular allegation; and/or*

(ii) to raise a particular issue;

(e) the manner in which a party has pursued –

(i) that party's case;

(ii) a particular allegation; or

(iii) a particular issue;

(f) whether a claimant who has succeeded in his claim, in whole or in part, exaggerated his or her claim; and

(g) whether the claimant gave reasonable notice of intention to issue a claim."

[53] In addition to the Rules, the Court considered the authorities referenced above and noted the legal principles enunciated in respect of the basis on which a court may award indemnity costs. Useful guidance was provided in **RBTT Bank Limited v YP Seaton** *supra* in which Sykes J, as he then was, examined the decision of Akenhead J in **Mayor and Burgesses of the London Borough of Southwark v IBM UK Ltd** *supra* and extrapolated a number of factors as relevant to the question of when an award should be made for indemnity costs. It is uncontroversial between the parties that these were identified as follows:

1. The conduct of the parties (both before and during the proceedings),

2. whether it was reasonable for a party to raise or pursue particular claims and;

3. the manner in which the party has pursued its case or particular allegations or issues.

[54] It is important to note, however, that there are also unexceptionable propositions which are crucial to this issue and which were identified by the Learned Judge as follows:

a. An award of costs on an indemnity basis is not intended to be penal, and regard must be had to what in the circumstances is fair and reasonable: **Reid Minty v Taylor** [2002] 1 WLR 2800, paragraph 20.

b. An order for indemnity costs can be made even when the conduct could not properly be regarded as lacking in moral probity or deserving of moral condemnation: **Reid Minty**, paragraph 28.

c. The court's discretion is wide and generous but there must be some conduct or some circumstance which takes the case out of the norm: **Excelsior Commercial & Industrial Holdings Ltd v Salisbury Hammer Aspden & Johnson (A Firm)** [2002] Cr App Rep 67, paragraphs 12, 19 & 32.

d. The conduct must be unreasonable to a high degree. 'Unreasonable' in this context does not mean merely wrong or misguided in hindsight: **Kiam v MGN Ltd** (No 2) [2002]1 WLR 2810, para 12.

e. The pursuit of a weak claim will not usually, on its own, justify an order for indemnity costs, but the pursuit of a hopeless claim, or a claim which the party pursuing it should have realised was hopeless, may well lead to such an order:

[55] This Court also takes guidance from the conclusion of Sykes J (as he then was), where he stated, '*to maintain a claim that you know, or ought to know, is doomed to fail on the facts and on the law, is conduct that is so unreasonable as to justify an order for indemnity costs*.'

[56] Considered in tandem, it is clear that the authorities confer a broad discretion on the court to determine whether indemnity costs should be granted. I accept that an award of indemnity costs requires an assessment of the circumstances of each case, to determine if the parties' conduct was highly unreasonable, far-fetched, hopeless, 'out of the norm', or any combination of these factors.

[57] It is the Claimants' position that an award of costs, particularly indemnity costs, should be made against the 1st and 3rd Defendants. No such order has been sought against the 2nd Defendant, who the Claimants seem to accept were bound by statute and were not deliberate participants in the breach. Between paragraphs 10(a) to 10(f) and paragraph 12 of this Judgment, the Claimants outlined the conduct on the part of these

Defendants which they say fell within the parameters of the conduct alluded to in the decisions on the point.

[58] In respect of the 1st Defendant, these are summarised as follows:

a. The failure of the appellate mechanism (the 1st Defendant) to notify them of the appeal of the 3rd Defendant against the refusal of the permit by the 2nd Defendant.

b. The failure to allow them to appear at the appeal or to make submissions.

c. The Minister allowed the appeal, despite the fact that the proposed mining activity contravened the Development Order a fact which was pointed out to him by the 2nd Defendant.

d. The Minister's decision to allow the appeal was not made public and the Claimants only learned of it four months later. They were given no reason for same.

e. That reasons for the decision were still outstanding at the trial and were a subject of criticism by the Court.

f. No documents relating to the appeal have been disclosed by the Ministry.

[59] In respect of the 3rd Defendant, the conduct complained of was:

a. The Claimants were only able to obtain some of the appeal documents from them during the course of the trial, which was four years after the appeal and in response to an application for specific disclosure.

b. The remarks by Defence Counsel during cross examination of the 2nd Claimant that the Claimants were motivated by racism to object to the 3rd Defendants' development of their property.

[60] In examining the examples of unreasonable conduct relied on by the Claimants against the Defendants, we have sought to balance them against the positions as advanced on behalf of the respective Defendants, particularly against an award of indemnity costs.

[61] In our analysis of the conduct identified on the part of the 1st Defendant, we did not believe that the failure to notify the Claimants of the appeal (thereby depriving them of the opportunity to appear or to make submissions) was so unreasonable as to warrant an order for indemnity costs, as although the proceedings may have appeared to be shrouded in secrecy and lacking transparency, the Claimants did not advert the attention of the court to a requirement that they were to be given notice as an element of the unreasonable conduct complained of.

[62] The situation is markedly different however, in respect of the decision of the Minister to allow the appeal; despite the existence of a Development Order which prohibited such activity and in spite of the advice by the regulatory body against adopting this course of action. This action on the part of the Minister falls squarely within the category of actions which were not merely wrong or misguided, but highly unreasonable and ill-conceived, as it showed a total disregard for the legislative framework and guidance from the very institution created to provide information/assistance in matters on appeal under the NRCA Act.

[63] In reaching our conclusion in favour of the Claimants, we found that this conduct significantly weakened the 1st Defendant's defence, in that the Minister deliberately made an order permitting activity that was expressly prohibited. In the absence of reasons or documentary evidence explaining why this course of action was justified, the 1st Defendant provided the Court with no basis to reach any conclusion other than that the Minister had engaged in highly unreasonable conduct.

[64] Moreover, given the NRCA's objection on appeal to the grant of the permit and the clear reasons set out in its report, which are firmly grounded in the provisions of the NRCA Act, particularly Section 9(5)(b), the 1st Defendant would have been—or ought

to have been, had it chosen to accept the advice—well aware that its Defence was not merely weak but hopeless on constitutional grounds. For these reasons, the Court finds that the Claimants are on firm ground in seeking indemnity costs against the 1st Defendant, as the circumstances justify such an order.

[65] In respect of the complaint about the allegations of racism being levied against the Claimants, while the comments by Counsel for the 3rd Defendant were unfortunate, it could not fairly be said that this was conduct which could properly be attributed to the 3rd Defendant in terms of how they had conducted themselves in this matter.

[66] The Court also finds that while the failure by the 3rd Defendant to make disclosure of documents used in the appeal was far from satisfactory, it fell short of being the type of conduct which was deserving of moral condemnation or which was so far outside the norm so as to be viewed as highly unreasonable.

[67] Having determined that there was no basis on which to make an award of indemnity costs against the 3rd Defendant, the question that then falls to be determined is whether the 3rd Defendant should be ordered to pay standard costs to the Claimants as an 'unsuccessful party' in keeping with the general rule.

[68] In examining this question, the Court is mindful of the 3rd Defendant's submission that it had no choice but to present a Defence and contest the matter, as the Claimants had brought the claim against it as a Defendant in circumstances where it could have been named as an Interested Party, given that it was the 1st and 2nd Defendants' actions which were being impugned.

[69] In light of the fact that it was the application of the 3rd Defendant which set things in motion and it was the 3rd Defendant who sought to use its property in a manner that the Claimants assert would contravene their constitutional rights, it is readily perceived why the Claimants named them as Defendants, as the Court would have to determine whether there were competing rights where the 3rd Defendant was concerned.

[70] This is not the end of the matter however, as the 3rd Defendant has also argued that in the event costs are to be awarded in keeping with the general rule, it should be against the 1st Defendant only and the 3rd Defendant should be compensated by them for their costs. Unsurprisingly, this argument was strongly opposed by Ms Lindsay, who raised an interesting counterargument, that the 1st Defendant would not have defended the matter if they had been aware of the proposed change of use of the property by the 3rd Defendant.

[71] In determining the 3rd Defendant's proposal that the 1st Defendant should pay its costs, this Court found it difficult to place any weight on the submissions of the 1st Defendant given the absence of any evidence to suggest that the claim was only being defended for that reason. Additionally, it is not unusual or unheard of for instructions to change during the course of a matter, especially one in which several years had elapsed since the claim had been filed and the trial. This indication by the 3rd Defendant's witness did not bring to an end the Claimants' need to seek declarations and orders as to the likely breach of their rights.

[72] The Court agrees that in pursuing its appeal of the refusal by NRCA the 3rd Defendant was exercising its options as provided for under the NRCA Act. There has been no evidence presented that it acted improperly during the process or sought to influence the outcome. It played no part in the decision to overturn the NRCA's decision, that was the Minister's action and his alone. The 3rd Defendant raised no objection to the addition of conditions to its permit but accepted them and moved on to seek its licence to quarry. Having made this observation however, the fact remains that the 3rd Defendant chose to defend this claim and challenged the rights of the Claimants to the orders sought, thereby putting them to the expense of proving why the permit should not have been granted to them. In those circumstances, their position was no different from that of the 1st Defendant who adopted the same course and it is for this reason that the Court finds that as an unsuccessful party costs should be awarded against them. The sole point of distinction being that these costs would be on a standard basis.

[73] On the question of the number of Counsel which should be considered for the award of costs, the Court takes note of the sole ground of objection raised by the 1st Defendant. While it is true that only two Attorneys appeared before the Court during the trial of the matter, Mrs McLeod has advanced an explanation for her absence from Court and reiterated her involvement in the matter, nonetheless. This explanation has not been challenged. The Court notes that while one King's Counsel and one Junior Counsel appeared, the matter involved a novel area of constitutional law with several Claimants, Defendants, documents and applications and generated a heavy volume of material that had to be reviewed, filed, argued and managed. In the circumstances, it is entirely conceivable that the involvement of three attorneys would have been necessary, and this order is also granted.

CONCLUSION

[74] In light of the foregoing discussion and findings, the Court makes the following orders:

1. The Claimants are awarded costs against the 1st Defendant on an indemnity basis, such costs to be taxed if not agreed.

2. The Claimants are also awarded costs against the 3rd Defendant on a standard basis, such costs to be taxed if not agreed.

3. The 2nd Defendant is not ordered to pay costs.

4. On taxation, the Claimants shall be allowed the costs of three attorneys-at-law.

5. The Claimants' attorneys-at-law shall prepare, file and serve the Formal Order herein.

Wint-Blair, J

Thomas, J

Hutchinson Shelly, J