[2025] JMCA Civ 9

JAMAICA

IN THE COURT OF APPEAL

BEFORE: THE HON MRS JUSTICE MCDONALD-BISHOP JA
THE HON MISS JUSTICE EDWARDS JA
THE HON MISS JUSTICE SIMMONS JA

SUPREME COURT CIVIL APPEAL NO COA2021CV00038

BETWEEN	**BENGAL DEVELOPMENT COMPANY LIMITED**	**APPELLANT**
AND	**WENDY A LEE**	**1ST RESPONDENT**
AND	**MARTIN HOPWOOD**	**2ND RESPONDENT**
AND	**ANNE HOPWOOD**	**3RD RESPONDENT**
AND	**TRACEY D SHIRLEY**	**4TH RESPONDENT**
AND	**KARLENE MCDONNOUGH**	**5TH RESPONDENT**
AND	**PATRICIA DALE**	**6TH RESPONDENT**
AND	**ALEC HENDERSON**	**7TH RESPONDENT**
AND	**SHERMAIN WOODHOUSE**	**8TH RESPONDENT**
AND	**THE ATTORNEY GENERAL FOR JAMAICA**	**9TH RESPONDENT**
AND	**THE NATURAL RESOURCES CONSERVATION AUTHORITY**	**10TH RESPONDENT**

Abraham Dabdoub instructed by Dabdoub Dabdoub & Co for the appellant

Ms Melissa McLeod and Miss Daynia Allen instructed by Hylton Powell Attorneys at Law for the 1st to 8th respondents

Miss Annaliesa Lindsay and Miss Karressian Gray instructed by the Director of State Proceedings for the 9th respondent

Civil procedure – Environmental permit granted to private company for mining and quarrying activities on land zoned for special protection – Claim for breach of constitutional rights to enjoy a healthy and productive environment free from threat of injury or damage from environmental abuse – Private company joined as defendant to the claim – Application to strike out constitutional claim – Whether the claim is an abuse of process – Whether judicial review is the more appropriate remedy – Whether the claim discloses no reasonable grounds for bringing it against the private company – Whether the claim against the private company is vexatious and frivolous – Civil Procedure Rules, 2002, Rule 26.3 and Part 56 – Constitution of Jamaica, section 19

16, 17 January 2024 and 11 April 2025

MCDONALD-BISHOP JA

[1] This appeal raises questions regarding the exercise of a judge's discretion in the Supreme Court in applications made by defendants to strike out a constitutional claim. The appeal arises from the decision of Carr J (Ag) ('the learned judge') made on 23 April 2021 refusing applications brought by the three named defendants in those proceedings: the Attorney General of Jamaica ('the AG'); the National Resource Conservation Authority ('the NRCA'); and Bengal Development Company Limited ('Bengal'), to strike out a claim. The claim was brought by the 1st to 8th respondents who are the claimants in those proceedings.

[2] The learned judge granted Bengal leave to appeal. Neither the AG nor the NRCA sought leave to appeal, but are named as the 9th and 10th respondents, respectively, in the proceedings. The AG made brief submissions aligning himself with the 1st to 8th respondents in responding to the appeal, while the NRCA remained silent. In actuality, the main parties to the appeal are Bengal, as the sole appellant, and the 1st to 8th respondents.

[3] An appreciation of the relevant factual background and chronology of events leading to the proceedings in the Supreme Court is deemed necessary and will now be provided.

The relevant factual background and chronology of events leading to the proceedings in the Supreme Court

[4] Bengal is registered as an overseas company under the Companies Act of Jamaica to carry on specified business in Jamaica. It engages in the business of mining and quarrying lands and is the registered proprietor of land situated in the Dry Harbour Mountain, Discovery Bay in the parish of Saint Ann ('the Bengal land'). In 2000, an area of land between the Rio Bueno in Trelawny and Discovery Bay in Saint Ann, including the Dry Harbour Mountain, was zoned for special protection by the Town and Country Planning (St Ann Parish) Provisional Development Order, 1998 and confirmed in January 2000 by the St Ann Confirmed Development Order, 2000 ('the zoned area').

[5] The 1st to 8th respondents all claim to have proprietary and other interests in lands within the zoned area and the vicinity of the Bengal land.

[6] The NRCA is a statutory body established under the Natural Resources Conservation Authority Act ('the NRCA Act'). The NRCA's primary function involves the management, protection and conservation of Jamaica's environment, protected areas and natural resources. As part of the exercise of those functions, the NRCA considers applications for permits to carry out designated activities, such as mining and quarrying, on certain lands.

[7] The NRCA Act, and subsequent ministerial orders made pursuant to it, provide the legislative framework for applications to be made to the NRCA for permission to be granted before the undertaking of those designated activities.

[8] The NRCA is given administrative assistance by the National Environment and Planning Agency ('NEPA'), an executive agency.

[9] On 3 March 2014, Bengal submitted an application to the NRCA for a permit to allow mining and quarrying on a part of its lands ('the quarry site'). The NRCA directed Bengal to do an environmental impact assessment ('EIA') in relation to the quarry site. Residents and stakeholders in the area of the site raised concerns about the proposed

mining and quarrying operations and signed letters of objection petitioning against the grant of the permit. The 1st to 8th respondents were among the objectors.

[10] In May 2020, the NRCA refused Bengal's application for a permit after consultations with other regulatory and advisory agencies, including NEPA, and after considering the objections of the stakeholders and other members of the public. In a letter dated 8 May 2020, the NRCA gave its reasons for refusing to issue the permit, which were, in outline:

(1) The proposed development is contrary to and not in keeping with the provisions of the St. Ann Confirmed Development Order, 2000, more specifically, policies UC4 and UC5.

(2) The area is not a designated quarry zone.

(3) A quarry of this nature, size, scale and intensity will have a deleterious effect on the environment in general and the surrounding uses.

(4) The development will exacerbate the air quality impacts on the airshed. Also, the development may have a deleterious impact on public health, particularly from dust and noise generation.

(5) The unprecedented number of objections received from residents who reside in the surrounding areas, as well as stakeholders with particular interests in the area.

(6) The comments from a key partner, the Forestry Department, that while the EIA "explores the impact of the quarrying operations, it does not propose feasible and effective mitigation measures geared towards minimising the overall negative impact of the quarry on the forested areas.

[11] Bengal appealed the NRCA's decision to refuse its application to the Minister of Economic Growth and Job Creation ('the Minister') as it was entitled to do under section

35 of the NRCA Act. The Minister considered the appeal on 23 July 2020 and allowed it in October 2020. Consequent to this decision was the issuance of an environmental permit ('the permit') to Bengal to undertake mining and quarrying on the quarry site. The permit was issued on 5 November 2020, and subsequently amended and re-issued on 17 December 2020. The permit was granted subject to Bengal fulfilling 76 conditions, which are aimed at addressing environmental and public health concerns raised by the NRCA in its earlier refusal. The conditions address matters such as compliance with the EIA, the protection of fauna and flora, air quality assessments and fugitive dust control measures, drainage, construction of access and haulage roads, protection of water resources, solid waste disposal and no burning and sewage treatment and disposal.

[12] The permit is a first step to obtaining a mining licence, which would permit Bengal to carry on full-fledged mining and quarrying operations on the Bengal land.

The proceedings in the Supreme Court

The 1st to 8th respondents' claim

[13] Aggrieved by the NRCA's issuance of the permit to Bengal, the 1st to 8th respondents filed a fixed date claim form in the Supreme Court on 17 December 2021, challenging the Minister's decision to overrule the NRCA's refusal to grant Bengal a permit to conduct mining and quarrying on the quarry site. They did so on purely constitutional grounds, contending, essentially that the Minister's decision to issue Bengal a permit contravenes or is likely to contravene their constitutional rights acknowledged by sections 13(3)(f)(ii), 13(3)(l), 13(3)(o) and 13(6) and guaranteed by section 13(2) of the Charter of Fundamental Rights and Freedoms (Constitutional Amendment) Act, 2011 ('the Charter'). These rights are, respectively: (a) the right to live in any part of Jamaica; (b) 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; and (c) the right to protection from degrading and "other" treatment.

[14] The 1st to 8th respondents' claim contends that the Constitution provides that no organ of the State shall take any action that infringes or is likely to infringe any of the rights guaranteed by the Charter. The organs of the State include the Minister. Therefore, the 1st to 8th respondents are entitled to bring their claim pursuant to section 19(1) of the Constitution, which provides that any person alleging a breach or likely breach of a constitutional right in relation to himself may apply to the Supreme Court for redress.

[15] They are seeking the following reliefs:

> "1. A Declaration that the decision by [the Minister] to overrule the [NRCA's] decision to refuse [Bengal's] application to permit mining and quarrying at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St. Ann abrogates, abridges or infringes ('breaches') or is likely to breach the following constitutional rights of the [1st to 8th respondents]:
>
> (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)(l) and guaranteed by section 13(2) of the Constitution;
>
> (b) the right to reside in any part of Jamaica, acknowledged by section 13(3)(f)(ii) and guaranteed by section 13(2) of the Constitution; and
>
> (c) the right to protection from degrading 'other treatment', acknowledged by sections 13(3)(o) and (6), and guaranteed by section 13(2), of the Constitution.
>
> 2. A Declaration that permit No. 2014-06017-EP00040 granted on November 5, 2020, by [the NRCA] to [Bengal] to permit mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St. Ann breaches or is likely to breach the [1st to 8th respondents'] said guaranteed constitutional rights.
>
> 3. A Declaration that the mining and quarrying of bauxite, peat, sand and minerals at Rio Bueno, Dry Harbour Mountain, Discovery Bay, St. Ann by [Bengal] is likely to breach the [1st to 8th respondents'] said guaranteed constitutional rights.

4. A Declaration that neither the manner nor the extent of the breaches or likely breaches of the said constitutional rights is demonstrably justified in a free and democratic society.

5. Consequently, an order that the Minister's said decision, and permit No. 2014-06017-EP00040 granted by the [NRCA] on No 5, 2020 are void and of no effect and/or should be struck down.

6. An injunction restraining [Bengal] whether by itself or by its employees, servants or agents or howsoever, from starting or continuing any mining, quarrying or other activity pursuant to or in reliance on permit No. 2014-06017-EP00040.

7. Constitutional/vindicatory damages.

8. Interest on damages at the statutory rate of interest.

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

10. Costs."

Proceedings in the Supreme Court - the applications to strike out the claim

[16] Neither Bengal, the AG, nor the NRCA filed affidavits in response to the claim. Instead, by way of notices of application for court orders filed on different dates, they applied for the claim to be struck out.

[17] The bases of Bengal and the AG's applications are gleaned from the notices of application, the affidavit evidence filed in support of the application and the contents of the written memorandum of the oral reasons for the learned judge's decision ('the judgment'), which is not in dispute regarding the submissions recorded therein.

[18] The AG's core contention was that the claim should be struck out as an abuse of process, pursuant to rule 26.3(1)(b) of the Civil Procedure Rules 2006 ('the CPR'). In this regard, the AG complained that the "crux of the challenge of the entire claim" is to the exercise of the Minister's statutory powers under the NRCA Act "for which adequate means of redress are available under normal administrative procedures for invoking

judicial control of administrative actions, such as judicial review". The AG maintained that the 1st to 8th respondents did not advance any reasons for the court to exercise its discretion to hear their claim as one for constitutional relief where adequate means of redress exist by way of judicial review. Furthermore, that despite the discretion given to the court under section 19(4) of the Charter, it has always been recognised that a party seeking constitutional redress must do so as a last resort.

[19] The AG also argued that the decision of the Minister and the appeal process leading to it were in accordance with the NRCA Act and, therefore, in accordance with the law. Accordingly, the claim is a misuse of section 19(1) of the Constitution and, as such, should be struck out as an abuse of the process of the court.

[20] The foregoing contentions were adopted by Bengal in pursuing its application, although Bengal did not initially base its application on those particular grounds.

[21] Bengal's application for the claim to be struck out was rooted in the following averments, that: (i) the claim discloses no reasonable ground for bringing it; (ii) the claim brought against Bengal is vexatious and frivolous and an abuse of the process of the court; and (iii) the 1st to 8th respondents have failed to establish "a realistic prospect of establishing the commission of a real and substantial breach of the Charter Rights". Bengal's position, as expressed in the grounds of the application, was, in outline, as follows:

(1) There was no breach of the 1st to 8th respondents' constitutional rights.

(2) Bengal had complied with all the legal requirements to obtain the permit as well as the guidance and directions of the various authorities, including NEPA.

(3) The decision of the Minister was in keeping with the lawful regime for appeals.

(4) The permit was issued with 76 conditions, which were imposed to ensure the protection of the environment and public health.

(5) None of the relevant pieces of legislation under which the permit was issued is in breach of the Constitution, in general, or the Charter, in particular.

(6) The 1st to 8th respondents have launched a collateral attack against the decision of the Minister to allow Bengal's appeal.

[22] In response, the 1st to 8th respondents contended that the applications should be dismissed and the matter be permitted to proceed to trial. Their position is gleaned from the affidavit evidence and the arguments recorded by the learned judge in her judgment. In opposing the application to strike out, the 1st to 8th respondents highlighted, by way of affidavit evidence, that, among other things, their concern is that the environmental consequences of mining and quarrying within the vicinity of their properties would result in environmental degradation, dust, traffic and noise that will impact their properties and health. They maintained that the conditions imposed under the permit, including the requirements for monitoring or using certain equipment, would not prevent the harm posed to the environment and their health. The challenge, the 1st to 8th respondents contended, was not only to the decision of the Minister but also to obtain a declaration that there is a breach or likely breach of their constitutional rights. Therefore, judicial review was unavailable in the circumstances and would not be an adequate remedy for these reasons. The 1st to 8th respondents made the following arguments on this point:

(1) In a judicial review application, the court considers procedural and jurisdictional issues, while in a constitutional claim, the court considers the merits of the decision.

(2) With respect to the claim against Bengal, judicial review remedies are not available as Bengal is not a public authority. However, it is a juristic person

under the Charter against whom a constitutional claim may properly be brought as a private citizen.

(3) The remedies available under judicial review proceedings are limited because if the application for judicial review were successful, the court could direct that the matter be reconsidered by the Minister, who could reconsider the matter, follow the correct procedural steps, but make the same decision. However, a constitutional court can direct that mining in the area should not take place.

(4) Section 19(4) of the Constitution does not make striking out of the claim mandatory where there is an alternative remedy. The court has a discretion under the Charter to adjudicate on the constitutional claim even if there is an alternate means of redress.

The learned judge's decision

[23] The learned judge accepted the 1st to 8th respondents' arguments that the claim was not an abuse of process and refused the applications to strike out the claim, with costs to the 1st to 8th respondents. The reasons for her decision were:

(1) It is plain from the pleadings that this is not a claim in which judicial review proceedings would be appropriate as the 1st to 8th respondents are not seeking a review of the Minister's decision but rather are seeking declarations that the decision is likely to infringe their constitutional rights. The fact that the NRCA had made a decision that was reversed by the Minister, whose decision is final, is only part of the background to the claim. The 1st to 8th respondents are seeking the court's protection of their constitutional rights under the Charter. They have set out the actions that they are suggesting will result in or are likely to result in a breach of those rights (para. [9] of the judgment).

(2) The claim is far more expansive than one for judicial review, which is limited in terms of the application as well as the remedies that are available to the 1st to 8th respondents (para. [10] of the judgment).

(3) The claim is brought against a company which cannot be brought before the court in judicial review proceedings. Therefore, the action is not an abuse of process (para. [10] of the judgment).

(4) The Privy Council has moved away from the principles of **O'Reilly v Mackman** [1983] 2 AC 237 in jurisdictions such as ours, where the CPR provide that persons can bring public law claims in private law actions. However, this is not a private law claim but a claim grounded in constitutional law. The principles of **O'Reilly v Mackman** are, therefore, not relevant to these proceedings (para. [11] of the judgment).

[24] The learned judge did not explicitly address Bengal's complaints that the claim is vexatious, frivolous and disclosed no reasonable grounds for bringing it. Regarding the complaint that Bengal has no real prospect of succeeding in establishing a breach of the 1st to 8th respondents' constitutional rights, the learned judge merely noted the 1st to 8th respondents' contention that the application was not for summary judgment, and so the contention regarding the claim's prospect of success had no relevance to the application. It may reasonably be inferred, however, that by refusing to strike out the claim, the learned judge rejected all of Bengal's arguments and application grounds as unmeritorious.

The appeal

The grounds of appeal

[25] On 6 May 2021, Bengal filed its notice and grounds of appeal, amended on 8 June 2021, challenging the learned judge's decision on 15 grounds. The grounds of appeal are substantially overlapping, repetitive and prolix and are set out in full in the appendix to this judgment.

[26] At the commencement of the hearing, counsel for Bengal, Mr Dabdoub, indicated that grounds (9) and (10) would not be pursued. Therefore, 13 grounds remain to be considered by the court. The main reliefs being sought on appeal are for the setting aside of the order of the learned judge refusing its application and that the fixed date claim form be struck out with costs to Bengal.

The issues for determination

[27] When shorn of the details in which they have been formulated, the grounds of appeal have essentially given rise to the consideration of three broad issues, which manifest a challenge on both procedural and substantive grounds. The issues are:

(i) whether the learned judge erred in refusing to strike out the claim on the basis that the claim was not one suitable for judicial review and, therefore, not an abuse of process of the court (grounds (1) – (4), (6) and (11) – (15));

(ii) whether the learned judge wrongly refused to strike out Bengal as a defendant to the claim (grounds (5) and (8)); and

(iii) whether the claim should be struck out due to the 1st to 8th respondents' failure to establish how the granting of an environmental permit as opposed to the mining licence contravenes or is likely to contravene their constitutional rights (ground 7).

[28] The determination of the appeal, therefore, revolves around an investigation of the procedural correctness of the proceedings being brought as a constitutional claim rather than as one for judicial review; the joining of Bengal as a defendant to the claim and the propriety of bringing the claim on the basis of the grant of the permit in the absence of a mining licence having been obtained.

The 1st to 8th respondents' preliminary objection to the grounds of appeal

Whether Bengal should be permitted on appeal to rely on grounds not advanced by it in its application in the Supreme Court

[29] At the commencement of the hearing of the appeal, the 1st to 8th respondents, through their counsel, Ms McLeod, raised the preliminary point that Bengal ought not to be permitted to argue any matters that relate to the grounds relied on by the AG in making his application in the Supreme Court for the claim to be struck out. The grounds on which the AG's application was based was, essentially, that the claim should have been brought by way of judicial review as it is an attack on the Minister's decision in granting the permit. Ms McLeod submitted that Bengal had not relied on the matters raised in grounds of appeal (1) – (4), (8) and (11) – (15) in its application before the learned judge. These matters relate to the issue of whether the claim was properly brought as a constitutional claim. According to counsel, it was the AG that had advanced those grounds in pursuing its application, and the AG has not appealed the learned judge's decision. She submitted that the AG not having appealed, Bengal should not be allowed to advance those grounds on the AG's behalf and should be limited in its appeal to the decisions made by the judge on its application only, albeit that the learned judge heard both applications together.

[30] Mr Dabdoub did not agree with that objection, arguing that they did rely on the AG's grounds for the application in the court below and should be permitted to raise the same grounds on appeal.

[31] Having considered the submissions of counsel and the undisputed record of the proceedings in the court below, we ruled that the preliminary point was not sustainable and, consequently, could not be upheld. We now reduce to writing our brief reasons for that decision as promised.

[32] It is clear from paras. [4] and [5] of the learned judge's judgment that Bengal had adopted the submissions of the AG, in the Supreme Court, regarding judicial review being the more appropriate remedy and that the constitutional claim should not be allowed to

proceed in the circumstances. Bengal was permitted by the learned judge to adopt the AG's submissions, even though, in Bengal's filed application, it did not advance the same grounds as the AG. The record of the proceedings below, however, showed that by the time the 1st to 8th respondents were to respond to the arguments below, they would have been alerted to the fact that Bengal had adopted the arguments of the AG with permission of the learned judge. There was no recorded objection from the 1st to 8th respondents regarding Bengal's endorsement and adoption of the AG's grounds and arguments regarding judicial review being the more appropriate remedy.

[33] Furthermore, and in any event, Bengal would have had sufficient notice of the grounds of appeal and a reasonable opportunity to make submissions in response to the grounds and arguments of the AG now being relied on by Bengal. The 1st to 8th respondents have made full use of that opportunity as evidenced by their extensive written submissions in response to the same grounds being challenged by them. Accordingly, we concluded that, in all the circumstances, the 1st to 8th respondents would not have been prejudiced, inconvenienced or embarrassed by the grounds of appeal, which are connected to the Bengal's stance that judicial review is the appropriate remedy and the constitutional claim is an abuse of process as a result.

The applicable law – striking out

[34] Rule 26.3 of the CPR expressly confers power on a judge of the Supreme Court to strike out a claim or any part of it. The rule provides in its entirety:

> "(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." (Emphasis supplied)

[35] The learned editors of Blackstone's Civil Practice 2004, from paras. 33.6 to 33.8 of the text, have provided a helpful guide to the court in interrogating the legal questions that arise for consideration of the learned judge's decision against the background of the provisions of rule 26.3. From this invaluable source and the cases cited therein, it is seen to be well-settled on the authorities that under the CPR, as it was under the old rules, the jurisdiction to strike out must be used sparingly and in the clearest of cases. The reason for this is that the exercise of the jurisdiction deprives a party of its right to a trial and, therefore, its ability to strengthen its case through the process of disclosure and other court procedures, such as requests for further information. Also, the cross-examination of witnesses often changes the complexion of a case. Therefore, the accepted rule was and remains that striking out is limited to plain and obvious cases where there is no point in having a trial (see **Three Rivers District Council and Others v Governor and Company of the Bank of England No (3)** ('**Three Rivers No (3)**') [2003] 2 AC 1, 77).

[36] Before using the procedure under rule 26.3 of the CPR (striking out) to dispose of a case, just like using the summary judgment procedure to do so under Part 15, care should be taken to ensure that the party is not deprived of the right to a trial on issues essential to its case. Like summary judgment applications, striking out applications are to be kept within their proper limits and are not meant to dispense with the need for a trial, where there are issues which should be considered at trial (see **Swain v Hillman** [2001] 1 All ER 91, 92 per Lord Woolf MR speaking of summary judgment applications).

[37] In **Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd** [1986] AC 368, the court reaffirmed the principle that striking out is only appropriate in plain and

obvious cases. Lord Templeman, in adding his voice to the development of the common law on this point opined that if an application to strike out involves prolonged and serious argument, the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubt about the soundness of the pleading but is also satisfied that striking out will obviate the necessity for a trial. Generally speaking, it is improper to conduct what is, in effect, a mini-trial involving protracted examination of documents and facts disclosed in the written evidence on a striking out application (see **Wenlock v Maloney** [1965] 1 WLR 1238, 1244).

[38] Regarding striking out a claim as an abuse of process, a judge of the Supreme Court possesses the inherent power to strike out a claim (or part of it) in order to guard the court's procedures against misuse. In **Hunter v Chief Constable of the West Midlands Police and others** [1981] UKHL 13, Lord Diplock gave illuminating expression to this fundamental principle of the general law, when he described the case before the court in these terms:

> "It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people."

[39] In **Barrett v Universal Island Records Ltd** [2003] EWHC 625, it was held that the court needed to have a high degree of confidence that the claim would not succeed before striking it out as an abuse of process. In **McDonald's Corporation v Steel** [1995] 3 All ER 615, it was held that it is an abuse of process where the statement of case is incurably incapable of proof. However, it is said that striking out on this basis will "be fairly unusual as there are few cases which are sufficiently, clearly and obviously hopeless that they deserve the draconian step of being struck out" (see Blackstone's Civil Practice 2004 at para. 33.12).

[40] Bengal also applied to strike out the claim on the basis that there was no reasonable ground for bringing it. On this ground, Bengal must show that the statement of case under attack fails, on its face, to disclose a claim which is sustainable as a matter of law. The court hearing such an application is to assume that the facts alleged in the statement of case are true (see Blackstone's Civil Practice 2004 at para. 33.7 citing **Morgan Crucible Co plc v Hill Samuel & Co Ltd** [1991] Ch 295 per Slade J). In considering this ground for striking out under rule 26.3(1)(c), the court is not required to consider evidence and the likely outcome of the case but only to focus on the pleadings to see whether or not the claim as pleaded satisfies the legal requirements for the prosecution of the alleged case. The consideration for the court is whether the claim as pleaded satisfies the legal requirements for the prosecution of the alleged cause (see **Gordon Stewart v John Issa** (unreported), Court of Appeal, Jamaica, Supreme Court Civil Appeal No 16/2009, judgment delivered 25 September 2009.

[41] As to whether the claim is vexatious and frivolous to warrant striking out as alleged by Bengal, depends, according to the authorities, on all the circumstances of the case. The categories are not closed for a claim to be struck out under this head, and the consideration of public policy and the interests of justice may be very material (see **Ashmore v British Coal Corporation** [1990] 2 QB 338).

[42] The authorities further dictate that when considering an application to strike out a claim under the CPR, the court has to seek to give effect to the overriding objective under rule 1.1 by asking itself whether it is just, in accordance with the overriding objective, to strike out the claim. At para. [92] of **Three Rivers (No 3)** Lord Diplock, citing **Purdy v Cambran** [1999] CPLR 843 at 854, endorsed the statement that "[i]t is not necessary or appropriate to analyse that question by reference to the rigid overloaded structure which a large body of decisions under the former rules had constructed".

[43] The duty of this court is to consider the learned judge's decision, refusing to strike out the claim as against Bengal, within the legal framework created by part 26.3 of the CPR, the inherent power of the court, and the applicable case law governing striking out.

In doing so, the court should ultimately give effect to the overriding objective in interpreting and applying the relevant rules. Accordingly, the issues raised for resolution have been addressed within the context of the foregoing legal framework with consideration given to other specific legal principles where it becomes necessary to do so.

The standard of review

[44] Before examining the issues raised by the grounds of appeal, it is necessary to establish the standard of review that this court should apply to determine whether the learned judge's decision should be disturbed.

[45] The court has been reminded by counsel for the 1st to 8th respondents and the AG of what is now the well-settled rule established in **Hadmor Productions Ltd v Hamilton** [1982] 1 All ER 1042, 1046 ('**Hadmor**') and adopted by this court in several cases. The gravamen of the governing principle from this line of cases is that we ought not to set aside the decision of the learned judge, which resulted from the exercise of her discretion, unless it was based on a misunderstanding of the law, evidence or facts before her or on an inference that particular facts existed or did not exist, which can be shown to be demonstrably wrong, or that the decision is so aberrant that no judge being mindful of his duty to act judiciously would have made it (see **Attorney General of Jamaica v John MacKay** [2012] JMCA App 1 at paras. [19] and [20]).

[46] It is noted, however, that there is also authority for the principle that the **Hadmor** standard of review might not be appropriate in cases involving an application for striking out for abuse of process. In **Aldi Stores Ltd v WSP Group PLC and others** [2007] EWCA Civ 1260 ('**Aldi Stores**'), Thomas LJ persuasively opined that the decision of a judge on an application to strike out a claim for abuse of process is not an exercise of discretion. It is, he said, a decision involving the assessment of a large number of factors to which there can only be one correct answer as to whether there is an abuse of process. At para. 38, Thomas LJ made this profound observation that is attractive in its logic and

referable to a case of this nature involving an allegation of abuse of process on the basis that the wrong procedure is employed in bringing the action:

> "The question of abuse or not is not a matter of the court's discretion in the normal sense of the word. It would be troubling if two different judges could come to a different conclusion on whether the same facts constituted an abuse of process and yet both be right."

[47] According to His Lordship, an appellate court will, nonetheless, be reluctant to interfere with the judge's decision in the judgment he reaches on abuse of process by the balancing of the factors. The appellate court will generally only interfere where the judge has taken into account immaterial factors, omitted to take account of material factors, erred in principle, or come to a conclusion that was impermissible or not open to him (paras. 16, 32, 37 and 38 of the judgment).

[48] Following the persuasive reasoning of Thomas LJ in **Aldi Stores**, I adopt the viewpoint that the duty of this court, in this case, is to ascertain whether the learned judge was right or wrong in concluding that there was no abuse of process to warrant a striking out of the claim. This is a critical question that cannot be resolved simply by reference only to the exercise of her discretion as there can only be one right answer regarding whether the matter should have been brought by way of judicial review and not as a constitutional claim. This is a legal question that must be resolved correctly. Once the learned judge found that the claim is properly brought as a constitutional claim, and she is found by this court to be correct on that, then she would have had no option but to refuse the application to strike out the claim on the ground that it was an abuse of process. To do otherwise in the face of that conclusion would have been not only erroneous in law but inconsistent with the overriding objective to deal with the case justly.

[49] Accordingly, for the appeal to succeed on the ground that the claim is an abuse of process for the reasons contended, it must be shown by the application of the applicable law to the relevant facts that were before the learned judge that she took into account

immaterial factors, omitted to take account of material factors, erred in principle, or come to a conclusion that was impermissible or not open to her.

[50] Ultimately, in considering whether the learned judge was wrong to refuse the application, I have engaged the **Aldi Stores** standard of review in treating with the abuse of process grounds and the **Hadmor** standard of review in treating with the overall exercise of the learned judge's discretion in not striking out the claim.

[51] The foregoing standards of review are deployed in considering the issues raised withing the framework of the general law governing applications for the striking out of a claim.

Analysis and findings

Issue (i): whether the learned judge erred in refusing to strike out the claim on the basis that the claim was not one suitable for judicial review and, therefore, not an abuse of process (grounds (1) – (4), (6) and (11) – (15))

Bengal's submissions

[52] The crux of Bengal's arguments on this issue is that the claim wrongly sought to challenge the decision of the Minister by alleging a likely breach of the 1st to 8th respondents' constitutional rights. Citing the case of **Hunter v Chief Constable of the West Midlands** and **O'Reilly v Mackman**, Mr Dabdoub maintained Bengal's position in the court below that the claim was an abuse of process.

[53] Mr Dabdoub submitted that the 1st to 8th respondents' claim amounted to a "collateral attack" on the Minister's decision to grant the license in circumstances where the NRCA Act provided that the Minister's decision is final. According to Mr Dabdoub, the proper channel to challenge the decision of the Minister, who was performing a function according to the provisions of law, would be by way of judicial review proceedings. Therefore, the 1st to 8th respondents commencing the matter as a constitutional claim, as opposed to an application for judicial review, amounted to an abuse of the court's process, and the judge erred when she failed to so conclude. In support of his arguments,

Mr Dabdoub also commended, for the court's consideration, the cases of **Abraham Dabdoub and Another v The Disciplinary Committee of the General Legal Council (ex parte Dirk Harrison, Contractor General of Jamaica)** [2018] JMCA App 33 ('**Dabdoub v GLC**'), **Stancliffe Stone Company Limited v Peak District National Park Authority** [2005] EWCA Civ 747, **Bahamas Telecommunications Company Limited v Public Utilities Commission** [2002] UKPC 10 and **Cocks v Thanet District Council** [1983] 2 AC 286.

[54] Mr Dabdoub further contended that the claim was an attempt to circumvent the strictures of Part 56 of the CPR, which, he said, provides a measure of protection against the decisions of public authorities. For such proceedings to be brought, leave must first be obtained. Mr Dabdoub noted that rule 56.1 of the CPR made it clear that breaches of constitutional rights were susceptible to judicial review as the rule provided for applications for judicial review by way of "originating summons".

[55] Additionally, he contended that, since the constitutionality of the NRCA Act was not challenged, the learned judge ought to have considered that fact in determining whether to strike out the claim. She erred in law in not doing so.

The 1st to 8th respondents' submissions

[56] In response, Ms McLeod contended that the claim is properly a constitutional claim and not a claim for judicial review, as it does not challenge the legality or reasonableness of the Minister's decision. Instead, the claim concerns the quarrying activities that will be carried out, as well as their potential harmful effects, which may breach the constitutional rights of the 1st to 8th respondents to enjoy a healthy and productive environment, free from the threat of injury or damage resulting from environmental abuse and degradation of the ecological heritage. She contended that even if the grant of the permit was in keeping with the law, the damage to the environment that will result from the permitted activities engages the 1st to 8th respondents' constitutional rights. She submitted that the 1st to 8th respondents' challenge is to the constitutionality of the quarrying or other activities, which the decision of the Minister permits. That issue cannot properly be

resolved by a judicial review claim because that could not offer an adequate means of addressing the 1st to 8th respondents' true concerns.

[57] In response to Mr Dabdoub's reliance on the case of **O'Reilly v Mackman**, Ms McLeod submitted that the case is distinguishable and, therefore, inapplicable because (i) it did not intend to address constitutional claims such as the 1st to 8th respondents' claim; and (ii) the Judicial Committee of the Privy Council ('the Privy Council' or 'the Board') has ruled in **Honourable Attorney General of Antigua v Isaac** [2018] UKPC 11 ('**Attorney General v Isaac**'), an appeal from the Court of Appeal of the Eastern Caribbean Supreme Court ('ECSC'), that **O'Reilly v Mackman** does not apply to an interpretation of the provisions of the Civil Procedure Rules in Antigua and Barbuda (which is almost *verbatim* to the CPR in Jamaica).

[58] Furthermore, counsel submitted that the cases of **Hunter v Chief Constable** and **Dabdoub v GLC**, relied on by Mr Dabdoub in his contention that the claim is an abuse of process, were distinguishable on their facts and, therefore, inapplicable to the instant case. Ms McLeod, therefore, maintained that the learned judge correctly refused Bengal's application to strike out the claim.

The AG's submissions

[59] The AG, through counsel on his behalf, Ms Annaliesa Lindsay, endorsed the submissions of Ms McLeod, that the learned judge was correct to hold that the application was not an abuse of process for the reasons advanced by Bengal. She maintained that it would still be open for the trial court to find there is no breach of the constitutional rights complained of, or, if there is a breach, that it is demonstrably justified. She advanced that those issues are for the judge at trial to determine. Therefore, it could not be said that the learned judge was wrong in refusing to strike out the claim.

[60] Ms Lindsay also relied on the **Hadmor** standard of review in submitting that there is no justifiable basis for this court to disturb the learned judge's decision, which was rightly made.

Discussion and findings on issue (i)

[61] Claims for constitutional relief, like the 1st to 8th respondents' claim, are made pursuant to section 19 of the Constitution, which permits aggrieved persons to apply to the Supreme Court where they believe their constitutional rights are being, have been or are likely to be breached. The section also gives the Supreme Court the discretion to decline to exercise its powers if satisfied that adequate means of redress for the contravention alleged are available to any person concerned. The relevant provisions are subsections 19(1) and (4), which provide:

> "(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.
>
> …
>
> (4) Where any application is made for redress under this Chapter, the Supreme Court may decline to exercise its powers and may remit the matter to the appropriate court, tribunal or authority if it is satisfied that adequate means of redress for the contravention alleged are available to the person concerned under any other law." (Emphasis added)

[62] The justification for constitutional provisions similar in wording to section 19(4) has been explained by the Privy Council in several cases (see **Kemrajh Harrikissoon v Attorney-General of Trinidad and Tobago** [1979] 3 WLR 62; **Attorney General v McLeod** [1984] 1 All ER 694; **Jaroo v Attorney General of Trinidad and Tobago** [2002] 2 WLR 705; and **Attorney General of Trinidad and Tobago v Ramanoop** [2006] 1 AC 328). In summary, the justification is that the jurisdiction of the Supreme Court to adjudicate on allegations of breaches or likely breaches of constitutional rights is a special jurisdiction, the value of which will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial action. Therefore, the Supreme Court's jurisdiction ought not be invoked lightly, or in cases in which there

is no *bona fide* complaint of a constitutional breach. Where a constitutional claim is made in circumstances where it was not required, the claim will be considered an abuse of the court's constitutional jurisdiction.

[63] Two prominent examples of such abuse, which emanate from the case law, were highlighted by Lord Diplock in **Attorney General v McLeod**, namely (i) where the application is made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action, which involves no contravention of any human right or fundamental freedom; and (ii) where the application is used as a means of collateral attack upon a judgment of a court acting within its jurisdiction.

[64] It is these principles which provide the legal foundation for Bengal's position that a constitutional claim is inappropriate and the 1st to 8th respondent's grievance should be pursued by alternative means of redress, like judicial review. Consideration has been given to the foregoing principles.

[65] Against that background, the essential question raised by the grounds considered under issue (i) is whether this is a case that the learned should have struck out on the basis that it should have been brought by way of judicial review, the more appropriate procedure. The grounds of appeal and the arguments advanced by Bengal in support of them can be distilled into three broad areas of discussion in addressing this procedural issue. The areas of specific focus are: (1) whether the claim ought properly to have been for judicial review; (2) the issue of collateral attack and the learned judge's treatment of **O'Reilly v Mackman**; and (3) the fact that the constitutionality of the NRCA Act was not challenged.

A. Whether the claim ought properly to have been for judicial review

[66] A review of the relevant procedural provisions for the making of the applications for relief under the Constitution and for judicial review is deemed the appropriate starting point.

[67] Under the CPR, both applications for judicial review and for relief under the Constitution are termed applications for "an administrative order" and are governed by Part 56. Applications for judicial review include applications for the remedies of (a) certiorari for quashing unlawful acts; (b) prohibition for prohibiting unlawful acts; and (c) mandamus for requiring the performance of a public duty, including a duty to make a decision or to hear and determine a case (rule 56.1(3)).

[68] In addition to or instead of an administrative order, the court may, without requiring the issue of any further proceedings, grant an injunction, restitution or damages, or an order for the return of property (rule 56.1(4)).

[69] Rule 56.9 provides for how applications for an administrative order should be made. A fixed date claim form is required for those applications. Rule 56.16 makes specific provisions for the making of applications for judicial review. This includes first obtaining the leave of the court to file an application for judicial review. The leave of the court is not required for any other application for administrative orders, including for relief under the Constitution.

[70] Rule 56.10 makes provision for the joinder of claims for other reliefs or remedies with an application for an administrative order, provided such relief or remedy arises from or is related to or connected to the subject matter of the application. Such relief or remedy that may be joined in the case of applications for judicial review or constitutional relief include damages, restitution or an order for the return of property. These may be awarded on specified conditions (rule 56.10(2)(i) and (ii)).

[71] The 1st to 8th respondents brought their claim for constitutional redress pursuant to Part 56 and, in doing so, joined an application for a declaration relating to the constitutional relief (another type of administrative order) and for an injunction and damages (as consequential remedies). The 1st to 8th respondents have not brought their claim for any of the remedies available in judicial review proceedings as specified in rule 56.1(3). Although the effect of the orders sought by the 1st to 8th respondents would

mirror, in some respects, the effect of orders sought had the claim been brought by way of judicial review proceedings, this does not mean, by itself, that the claim ought to have been brought by the way of judicial review.

[72] The distinction between applications for constitutional relief and judicial review lies in what is being challenged, that is to say, whether it is the decision-making process or the results of the decision. On an application for judicial review, the court is required to examine the public functionary's decision-making process to determine whether the decision has been impugned by illegality, irrationality, procedural impropriety or procedural unfairness (see **Chief Constable of the North Wales Police v Evans** [1982] 3 All ER 141 and **Council of Civil Service Unions v Minister for the Civil Service** [1985] AC 374).

[73] In contrast, several authorities have made it clear that in proceedings alleging the breach of a person's human rights under the European Convention on Human Rights (on which many of our Charter rights are modelled), the court's focus is on the result of the impugned measure or decision and not on the process. The court must determine whether the measure or decision itself was proportionate and not whether the decision-maker correctly applied the principles of proportionality and reached a rational conclusion on the question (see **R (SB) v Governors of Denbigh High School** [2007] AC 100 at para. 30). Therefore, regarding the question of the constitutionality of the Minister's decision, the court is the primary decision maker. The court would not be the primary decision-maker on a judicial review enquiry because its focus would be on the decision-making process with the Minister remaining the primary decision-maker (see **Belfast City Council v Miss Behavin' Limited** [2007] UKHL 19).

[74] As already established, the 1st to 8th respondents are challenging the potential impact of the Minister's decision to issue the permit, primarily on their rights to enjoy a healthy environment free from the threat of injury or damage from environmental abuse. Their pleadings confirm this fact. The pleadings indisputably demonstrate (consistent with the 1st to 8th respondents' submissions) that they are challenging the result of the decision

on constitutional grounds and not the process by which the Minister arrived at the decision or the legality of the decision vis-à-vis the statutory framework within which it was made.

[75] The Constitution is clear that no organ of the State should contravene the provisions that accord the fundamental rights and freedoms to every individual, which include those alleged to be engaged in this case. The reference to an organ of the State would include the Minister. Therefore, the decision of the Minister is not outside the ambit of a challenge on constitutional grounds and for investigation by the court for alleged constitutional infringements.

[76] Accordingly, the questions that would arise from the pleadings in this case for consideration in the Supreme Court are whether the rights that are engaged have been interfered with or are likely to be interfered with by the result of the Minister's decision and, if so, whether the interference or likely interference is demonstrably justified in a free and democratic society.

[77] Therefore, unlike in judicial review proceedings, the court, in addressing the constitutionality of the Minister's decision to grant the permit, would be required to apply the proportionality test approved by the Privy Council in **The Attorney General v The Jamaican Bar Association** [2023] UKPC 6 at paras. 76 and 77 (derived from the Canadian case of **R v Oakes** [1986] 1 SCR 103) and not the judicial review tests.

[78] The learned judge was, therefore, correct in her conclusion that the challenge, in this case, was not to the decision-making process, but to the results or effect of the grant of the permit to Bengal, which allegedly contravene or are likely to contravene the 1st to 8th respondents' asserted environment-related constitutional rights.

[79] Additionally, the learned judge accepted the 1st to 8th respondents' contention that the remedies that would be available to them in a claim for judicial review would not be adequate to address the alleged breaches. As Ms McLeod argued, and with which I am inclined to agree, judicial review of the process could serve to nullify the Minister's

decision to grant the permit, only for him to recommence the process, follow the correct procedure and re-grant the permit. With a re-grant of the permit, the 1st to 8th respondents' grievance would still remain unresolved because it is the consequence or likely consequence of the decision with which they are aggrieved and not the process leading to the decision.

[80] I conclude that the 1st to 8th respondents' statement of case does not, on its face, reveal facts that would properly engage the judicial review regime under Part 56 of the CPR or any private law mechanisms, as suitable alternative remedies available to the 1st to 8th respondents, given the nature of their grievance. Also, and in any event, section 19(4) of the Charter does not make it mandatory for the court to strike out a claim for constitutional redress where alternative remedies exist. The constitutional claim may be brought, without prejudice, to other available remedies. The law has moved away from the stricture that existed under the repealed section 25(2) of the Constitution, thereby granting the court the discretion to decide whether or not to entertain the constitutional claim.

[81] In this case, the learned judge found that no alternative remedy was available by way of judicial review. She cannot be faulted. She was also correct to conclude that the claim is more expansive than a judicial review claim. Therefore, on this basis, the complaint that judicial review proceedings should have been brought is unsustainable. Accordingly, I agree with the 1st to 8th respondents that judicial review is not appropriate for the reasons they advanced. However, there are additional reasons to agree with the learned judge that judicial review proceedings are not appropriate. These reasons have emerged following an examination of the other issues raised by Bengal in its grounds of appeal and submissions.

B. The learned judge's rejection of **O'Reilly v Mackman**

[82] Bengal's sharpest criticism is that the claim is a collateral attack on the decision of the Minister and, as such, is prohibited by **O'Reilly v Mackman**, an argument that the learned judge rightly rejected, for reasons that will now be outlined.

[83] It is accepted that **O'Reilly v Mackman** has decided that it is an abuse of process for a claimant, complaining about a public authority's infringement of his public law rights, to seek redress by way of an ordinary claim rather than by way of judicial review. In considering whether to strike out a claim on this ground, the court will consider whether the claimant has used the ordinary procedure to obtain some advantage not available in judicial review proceedings and generally whether striking out accords with the overriding objective (see Blackstone's Civil Practice 2004 para. 33.12 citing **Clark v University of Lincolnshire and Humberside** [2000] 1 WLR 1988).

[84] In the instant case, the claim is not one in private law, albeit that among the reliefs being sought are remedies that may be sought in private law claims. The complaint is that public functionaries (the Minister and the NRCA) and a private company (Bengal) have infringed or are likely to infringe the public law rights of the parties seeking redress through the grant of the permit for the proposed quarrying and mining activities to take place on Bengal's land. It is a claim seeking constitutional redress pursuant to section 19 of the Charter.

[85] No private law claim is brought by the 1st to 8th respondent as in **O'Reilly v Mackman**. The claim squarely falls within public law, as it is a constitutional claim in which declarations relating to public law rights are applied for. As already established above, rule 59.10 permits applications for constitutional redress and declarations regarding public law rights to be made separate and distinct from applications for judicial review. Furthermore, and equally importantly, the CPR, as already indicated above, also permit the inclusion of private law remedies in public law claims, which this claim is. This case does not involve a private law claim brought for public law remedies, and neither is it brought as a public law claim, when it ought to have been brought by an ordinary private law claim.

[86] The claim in **O'Reilly v Mackman** was neither brought nor decided within a similar procedural framework. The rule engaged in that case was the then RSC Order 53, which permitted judicial review claims to be brought for all public law remedies, which

would include a claim alleging breach of a claimant's human rights. In that case, the appellants were disciplined by the Board of Visitors of Hull Prison. They sought to challenge the decision through ordinary civil proceedings, claiming breaches of natural justice in the way the prison authorities had handled the disciplinary proceedings. The appellants were clearly disgruntled with the Board of Prison's failure to observe the principles of natural justice, which included allegations of bias by a member who presided over a hearing and an allegation that they were not given a fair chance to present their case. The question that arose was whether these claims could be pursued through ordinary civil actions or whether they ought to have been commenced by way of judicial review, the specific legal procedure for challenging the legality of decisions made by public authorities.

[87] In finding the claim an abuse of process, the House of Lords held, as accurately reflected in the head note, that since all the remedies for the infringement of rights protected by public law could be obtained on an application for judicial review, as a general rule, it would be contrary to public policy and an abuse of the process of the court for a claimant, complaining of a public authority's infringement of his public law rights, to seek redress by ordinary action.

[88] The facts of **O'Reilly v Mackman** and the decision of the court based on them inexorably support a conclusion that the learned judge was not wrong to conclude that **O'Reilly v Mackman** was irrelevant to the issues she had to decide. The circumstances prohibited by that case did not arise in this case. Furthermore, Part 56 allows for a constitutional claim to stand on its own, outside of a judicial review claim, and for private law actions to be joined with a constitutional claim or an application for other administrative orders, unlike what was permitted under RSC Order 53 on which **O'Reilly v Mackman** was decided.

[89] The Privy Council, in **Attorney General v Isaac**, has settled the question beyond debate that **O'Reilly v Mackman** is not applicable to the Eastern Caribbean Civil Procedure Rules ('ECSC CPR'). In my view, this would extend with equal force to the

Jamaican CPR, given the largely identical terms of the corresponding provisions relating to claims for administrative orders. A brief review of **Attorney General v Isaac** is considered helpful.

[90] In that case, the claimant, Ms Isaac, brought a claim challenging her suspension from office by the Cabinet and seeking various declarations and damages. The defendants made an application for the claim to be struck out on the basis that the claim was for judicial review and had been filed without the leave required by rules 56.3 and 56.4 of the ECSC CPR. Ms Isaac's response was that while she agreed leave was required for judicial review, her claim was an application for an administrative order other than judicial review and therefore did not require leave. The application for striking out was dismissed at first instance, and the decision was upheld on appeal by the Court of Appeal of the ECSC and the Privy Council. The Court of Appeal of the ECSC declined to be guided by the English authorities, such as **O'Reilly v Mackman**, to which it was referred for guidance.

[91] As the Privy Council observed, Blenman JA, with whom the other members of the court agreed, "examined the issues joined between the parties and had no hesitation in classifying them all as public law issues…, commenting that Ms Isaac was seeking to obtain relief based on alleged public law infractions by Cabinet". In speaking of the authorities available to guide it, the Board stated:

> "[30] There is little decided case law to help determine the issue that is before the Board. Although some cases were cited to the Court of Appeal, that court referred in its discussion and conclusion only to the English case of **O'Reilly v Mackman…and then only to distinguish it because the law has developed differently in England and Wales from the position in Antigua and Barbuda."** (Emphasis added)

[92] The Board then continued:

> "[31] **It may help to remove *O'Reilly v Mackman* from the equation immediately… no doubt in realistic**

> **recognition of the fact that the English position cannot be translated to Antigua and Barbuda because the two systems have travelled different paths, the appellants have not sought to advance an *O'Reilly v Mackman* argument before the Board.** Their focus is rather upon establishing that the claim in this case is in fact an application for judicial review, despite only declarations and damages being sought." (Emphasis added)

The Board opined that it shared the views of the ECSC Court of Appeal that "Ms Isaac's fixed date claim form was, in reality, and in form, merely for declarations and damages, and was not an application for judicial review for which leave was required".

[93] Having examined the claim in this case under the light of the illuminating reasoning and decision of the Board in **Attorney General v Isaac**, I am fortified in my view that Bengal's reliance on **O'Reilly v Mackman** to ground a finding of abuse of process was and continues to be misplaced. The learned judge was correct in her reasoning that the Privy Council has moved away from the application of the principle of **O'Reilly v Mackman** in jurisdictions such as ours, where the CPR have created a different regime for applications for administrative orders. Under this procedural regime of the CPR, applications for administrative orders (as defined) other than for judicial review can be brought without leave, and the joinder of private law claims in public law cases is permitted, subject, of course, to certain strictures.

[94] The cases of **Stancliffe Stone Company Limited v Peak District National Park Authority** [2005] EWCA Civ 747, **Bahamas Telecommunications Company Limited v Public Utilities Commission** [2002] UKPC 10 and **Cocks v Thanet District Council** [1983] 2 AC 286, relied on by Mr Dabdoub, do not further his arguments on the applicability of **O'Reilly v Mackman**. Each of these cases, like **O'Reilly v Mackman**, concerned the failure to bring proceedings for judicial review where such proceedings ought to have been brought.

[95] Accordingly, the learned judge was correct to find that **O'Reilly v Mackman** was of no relevance to the proceedings before her. I would, therefore, hold that the learned

judge did not err in rejecting Bengal's contention that the claim was an abuse of process under the **O'Reilly v Mackman** principle and on the authority of the other cases cited by counsel on its behalf.

C. The fact that the constitutionality of the NRCA Act was not challenged

[96] Also lacking merit is Bengal's complaint that the learned judge erred when she failed to consider that the Minister's decision (and the NRCA's compliance with it) was made pursuant to a law that was in force and which had not been declared unconstitutional. The fact that the NRCA Act, under which the Minister acted, is constitutional does not preclude a challenge to an action or decision made pursuant to it. The constitutionality of the statutory provisions is not impacted by a challenge to the way they are applied by persons who are conferred with power under the Act. In sum, the challenge to the Minister's decision has nothing to do with the constitutional standing of the statute itself. Therefore, the learned judge did not err when she failed to take account of the fact that the statute had not been declared unconstitutional.

Conclusion on issue (i)

[97] In my view, the learned judge was correct in her decision to refuse Bengal's application to strike out the 1st to 8th respondents' fixed date claim form on the basis she did that the Minister's decision was properly challenged by way of the constitutional claim and that an application for judicial review was not warranted or appropriate in the circumstances. The appeal fails on the grounds giving rise to issue (i).

Issue (ii) – whether the learned judge wrongly refused to strike out Bengal as a defendant to the claim (grounds (5) and (8))

[98] Grounds (5) and (8), together, raise the issue of whether the learned judge was correct to permit the claim to continue against Bengal as a defendant. The gravamen of the complaints arising from these grounds is twofold: (i) that the learned judge failed to consider that Bengal had complied with all aspects of the law for obtaining the permit as set out in its affidavit evidence in support of the application (ground 5); and (ii) that the learned judge was wrong to conclude that Bengal could not be subject to judicial review

proceedings and did not appreciate that Bengal could be added as an interested party to proceedings brought pursuant to Part 56 (ground 8). Bengal's complaints are addressed seriatim.

A. Bengal's compliance with the law for obtaining a permit

[99] According to Mr Dabdoub, the learned judge did not appreciate that Bengal had a right to apply for an environmental permit within the provisions of the NRCA Act, and the NRCA Act had not been declared unconstitutional by any court. Counsel for the 1st to 8th respondents argued that this was an irrelevant consideration for the learned judge, and I agree. The fact that Bengal, the Minister and the NRCA may have followed the appropriate procedural steps, or acted in keeping with the existing law governing the grant of the permit, cannot be a defence to this constitutional claim. There is no challenge to the legality or otherwise of the process or of the statute under which they acted.

[100] The 1st to 8th respondents have asserted that their constitutional rights have been or are likely to be breached by the activities to be undertaken by Bengal, as a result of the grant of the permit, and that section 19 of the Constitution provides for redress. In light of the ecologically sensitive nature of the quarry site, the proximity of the 1st to 8th respondents to it, the EIA, the NRCA's refusal of the permit and the granting of the permit subject to 76 conditions, it cannot be said that the claim discloses no reasonable basis for bringing it. Therefore, the claim is properly brought under section 19 of the Constitution regardless of the fact that Bengal had acted lawfully in obtaining the permit.

[101] Since the claim, on its face, has disclosed a reasonable cause of action, in accordance with the law, and has raised issues of fact, which ought to be determined on evidence before a judge at a trial, it would not be just for the claim to be struck out against Bengal before the evidence is assessed. It would be more appropriate for the claim to proceed to be determined on its merits, especially given that this is not a summary judgment application where the focus should be on the likely outcome of the case. As Cooke JA helpfully noted in **Gordon Stewart v John Issa**, in speaking of the court's approach under rule 26.3(1)(c) of the CPR:

> "…At this stage, the genesis of the proceedings, the consideration under rule 26.3(1)(c) is whether or not the claim as pleaded satisfies the legal requirement for the prosecution of its alleged cause. A trial judge ought not to attempt to divine what will be the outcome of a properly filed claim. Apparently, [the judge] has not been sufficiently discriminating in recognizing the difference in approach in the application of Rules 26.3(1) (c) and 15(2)."

[102] I conclude that there was no error of law in the approach of the learned judge in determining whether the claim should be struck out because she failed to consider that there had been compliance with the law by Bengal (the NRCA or the Minister) for the issuance of the permit. That consideration was irrelevant to the question of whether the claim should have been struck out for abuse of process or for any other reason advanced by Bengal.

B. The propriety of joining Bengal as an interested party to judicial review proceedings

[103] Bengal's complaint regarding its position as a defendant is that the learned judge should have considered the fact that it could have been added as an interested party to judicial review proceedings, which would have made those proceedings more appropriate. In failing to do so, the learned judge erred in her finding that judicial review proceedings could not be brought against Bengal as a private company.

[104] Counsel on behalf of the 1st to 8th respondents, on the other hand, submitted that being able to add Bengal only as an interested party reinforced their contention that a judicial review claim was insufficient, considering that the 1st to 8th respondents sought remedies with respect to activities that Bengal (and no one else) intends to carry out, such as an injunction. They would not have been able to seek these remedies had Bengal been merely an interested party to the claim.

[105] Bengal's arguments on this point are premised on its view that the claim ought to have been one for judicial review, which has been rejected. Because I believe the claim is properly one for constitutional relief, the learned judge could not have erred in failing

to consider that Bengal could have been added as an interested party in judicial review proceedings.

[106] It is also necessary to state that there is nothing objectionable on procedural grounds regarding the claim being brought against Bengal as a defendant as the Constitution permits constitutional claims to be brought against private citizens or juristic persons by virtue of the horizontal application of the Charter under section 13(2), which has been accepted by this court to be applicable in this jurisdiction (see **Maurice Arnold Tomlinson v Television Jamaica Limited and Others** [2020] JMCA Civ 52). It would be for the trial court to say whether there is a legal and factual basis for Bengal to be bound by the Charter regarding the rights alleged to be breached or likely to be breached.

[107] Secondly, and more importantly, by the very nature of the claim being pursued and the reliefs being sought, which would directly be detrimental to Bengal's interest, it is necessary for Bengal to be an active participant in the matter to the extent that if it desires to adduce evidence in defence of its permit and permitted activities, it would be free to do so. Indeed, the 1st to 8th respondents have asserted that it is through Bengal's actions that their rights are likely to be infringed. Counsel for the AG also submitted, in concurrence with the 1st to 8th respondents, that any actions or activities flowing from the permit, which is what is being challenged, would be carried out by Bengal. Therefore, Bengal is a proper party to the claim and should remain a defendant in the proceedings below.

[108] I accept the submissions of the nine respondents. Having considered the 1st to 8th respondents' statement of case presented before the learned judge, I conclude that Bengal is a central figure in the claim. It applied for the permit, and it is as a result of the activities that it is permitted to undertake by virtue of the permit (including complying with the conditions imposed) that the 1st to 8th respondents are alleging a likely breach of their constitutional rights. Bengal must, therefore, be afforded the opportunity to confront the objectors and to fully and directly defend these allegations to protect its interests. In my view, Bengal's inclusion is necessary for the proper ventilation of the

issues in controversy arising from the grant of the permit and the just disposal of the claim. Therefore, excluding Bengal as a defendant in the constitutional claim as filed would be contrary to the overriding objective that the case must be dealt with justly.

[109] In the premises, Bengal's insistence that it ought not to have been named a defendant in the constitutional claim, but rather as an interested party in a judicial review claim, is untenable in the circumstances of this case.

[110] I conclude that, in light of the nature and contents of the claim, the learned judge did not err in law when she opined that judicial review could not be brought against Bengal because it was a private company. This complaint is without merit, and the appeal also fails on this basis.

Issue (iii) – whether the claim should be struck out due to the 1st to 8th respondents' failure to establish how the granting of an environmental permit as opposed to the mining licence contravenes or is likely to contravene their constitutional rights (ground 7)

[111] Mr Dabdoub further argued that Bengal had only been granted a permit and that the 1st to 8th respondents needed to show how a permit as opposed to a licence was likely to infringe their constitutional rights. Furthermore, Mr Dabdoub said, Bengal had complied with the relevant laws in making its application, and so the court ought not to allow a premature attack on Bengal's lawful activities.

[112] The question regarding the sufficiency of evidence as it relates to the effect of the permit, as distinct from the mining licence, is not for determination at this preliminary stage of the proceedings. That is a question to be investigated in a full-blown hearing of the claim, when evidence regarding the permitted activities under the permit, if any, and their potential impact on the environment, can be adduced and explored.

[113] In addressing this submission of Bengal, Ms McLeod commended to the court's attention the judgment of Sykes CJ in **Julian Robinson v Attorney General**. In that case, the court had to consider whether provisions of the National Identification and Registration Act were likely to breach the rights of the claimant, Mr Robinson. In para.

[203] of the judgment, Sykes CJ considered the proper approach to the adjudication of the constitutionality of legislation under the Charter. He said, in part:

> " …
>
> (b) In order for section 13(2) to be invoked by way of a claim under section 19 of the Constitution of Jamaica, the claimant must show that his or her right has been violated, is being violated, or is likely to be violated…
>
> (i)…Let us be reminded that section 19(1) states that '[i]f any person alleges any of the provisions of this Charter 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'... **This means that the claimant does not have to wait for the violation to occur. If he or she can show that a violation is likely then the Constitution of Jamaica authorises the claimant to seek redress**." (Emphasis supplied)

[114] Although Sykes CJ had to consider the constitutionality of legislation as opposed to specific actions by a public authority, his reasoning that a claimant alleging a "likely breach" of his rights under the Charter need not wait for a breach to occur to seek redress under section 19 is correct. The inclusion of the words "is likely" in the redress clause allows the claimant to bring a claim before any actual harm takes place. It follows, therefore, that there was no provision precluding the 1st to 8th respondents from bringing their claim prior to the commencement of quarrying and mining development by Bengal or prior to any issuance of any licence to Bengal. It should be noted in this regard that one of the Charter rights engaged involves a "threat" of injury or damage to the ecological heritage, which means an aggrieved citizen is permitted to take action based on the existence of merely a threat, not actual damage.

[115] The 1st to 8th respondents assert that the proposed quarrying and mining activities that Bengal is permitted to carry out, by the issuance of the permit, are, among other things, likely to breach their rights. Therefore, their case is that it is through Bengal's actions, as authorised by the permit, that their rights are engaged and are infringed or

likely to be infringed. They assert this, they must prove this by evidence. This averment cannot be delved into or resolved on an application for striking out. It is also borne in mind that at the time of the application, Bengal had not filed its statement of case in response to the claim. Only the 1st to 8th respondents' statement of case was available for the court's scrutiny, and as the authorities have established, the pleaded facts (or deposed facts in case of a fixed date claim form) that constitute the claim that is being attacked must be presumed to be true for the purpose of considering a striking out application (see **Morgan Crucible Co plc v Hill Samuel & Co Ltd**, para. [48] above).

[116] It means, therefore, that once the pleadings are regarded as true, and they point to a credible basis for bringing the claim, then the claim cannot be properly struck out as disclosing no reasonable ground for bringing it under rule 26.3(i)(c) of the CPR.

[117] Against this background, it is noted that the permit, which forms a part of the subject matter of this appeal, authorises Bengal to undertake "mining and quarrying (terrestrial, riverine and marine) of bauxite, peat, sand, minerals—including aggregate, construction and industrial materials, metallic and non-metallic ores". The authorised activities allowed by the permit are subject to 76 imposed conditions aimed at ameliorating the effects Bengal's quarrying and mining will have on the environment. On the face of it, the permit does engage (as distinct from infringes) the 1st to 8th respondents' rights to a safe and healthy environment. It is this engagement and potential interference that have led to the imposition of numerous conditions following the Minister's directive that the permit be subject to conditions. As counsel for the 1st to 8th respondents submitted, and which is accepted, the affidavit evidence on which they rely set out the implications and the impact on the environment if the activities permitted by the permit are undertaken. Whether the allegations are true and provable is a matter for the trial court, not for a judge on an application to strike out, especially for the reasons advanced by Bengal.

[118] Therefore, at the hearing of the application before the learned judge, the 1st to 8th respondents were not required to establish or prove how the granting of a permit, as

opposed to a mining licence, contravenes or is likely to contravene their environment-related constitutional rights. To ward off Bengal's challenge to the claim at that stage in the proceedings, they only needed to show, on the pleadings (statement of case), that there were reasonable grounds for bringing the claim, it was not frivolous or vexatious, or an abuse of the process of the court.

[119] For all the preceding reasons, the learned judge cannot be faulted for not embarking on an enquiry to determine whether the 1st to 8th respondents have established how granting a permit as opposed to a mining licence is likely to infringe their constitutional rights. The authorities have warned against the court carrying out a protracted inquiry, as well as making findings on disputed or potentially disputed facts at such an early stage of the proceedings, such as on an application to strike out.

Conclusion

[120] Having assessed the decision of the judge within the ambit of the relevant standards of review, I find it difficult to accept Bengal's complaint that the learned judge erred in law when she refused to accede to the striking out application. She was correct to find that the claim was not an abuse of process. There was also no legitimate reason for the learned judge to find that the claim disclosed no reasonable ground for bringing it or that it was frivolous or vexatious with no real prospect of success as contended by Bengal in its application before her.

[121] For the foregoing reasons, I would dismiss the appeal and affirm the orders of the learned judge, with costs of the appeal to the 1st to 8th respondents, as against Bengal, to be agreed or taxed.

EDWARDS JA

[122] I have read, in draft, the judgment of McDonald-Bishop JA. I agree entirely with her reasoning and conclusion and have nothing further to add.

SIMMONS JA

[123] I, too, have read, in draft, the judgment of McDonald-Bishop JA and agree with her reasoning and conclusion. I have nothing useful to add.

MCDONALD-BISHOP JA

ORDER

1. The appeal is dismissed.

2. The orders of Carr J (Ag) made in the Supreme Court on 23 April 2021, are affirmed.

3. The matter is to proceed to hearing in the Supreme Court with Bengal as 3rd defendant, on a date to be fixed by the Registrar of the Supreme Court, after consultation with the parties.

4. Costs of the appeal to the 1st to 8th respondents, as against Bengal, to be agreed or taxed.

APPENDIX – THE GROUNDS OF APPEAL

"(1) The Learned Judge erred in deciding that the principle of collateral attack is one which the courts have moved away from.

(2) That the Learned Judge further erred in law by failing to identify which Privy Council authority established the rule the Court relied on to determine that these types of matters are not open to the principle set out in O'Reilly v Mackman.

(3) The Learned Judge erred in failing to appreciate that the [respondents'] claim was in fact for a declaration impacting on the decision of the Minister and for the grant of an order that the Minister's decision be declared null and void.

(4) That the Learned Judge erred in law in failing to recognise that under Part 56 of the Civil Procedure Rules, there is a provision for relief under the Constitution and that a claim for the infringement of Constitutional provisions may be brought pursuant to Rule 56.1 of the Civil Procedure Rules.

(5) The Learned Judge erred in law when she failed to consider the position of [Bengal] who had complied with all aspects of the law which guaranteed it a right to make an application to obtain an Environmental Permit by complying with all the provisions of the law as set out in the Affidavits of Kashif Sweet and Carlton Campbell.

(6) The Learned Judge erred in law when she failed to consider that the Minister's decision was made pursuant to a law which was in force and which law had not been declared unconstitutional or that no section of the law had been declared unconstitutional.

(7) That the Learned Judge further erred in law by failing to appreciate that the [the respondents] had failed to establish how the granting of an Environmental Permit as opposed to the establishment of a Mining Licence is or was likely to infringe the constitutional rights of the [respondents].

(8) That the Learned Judge further erred in law by deciding that [Bengal] would not be subject to Judicial Review proceedings and by failing to recognize and appreciate that [Bengal] could be added as an Interested Party to proceedings brought pursuant to Part 56 of the Civil Procedure Rules 2002.

(9) The Learned Judge erred in law by responding to Counsel for the Third Defendant's request for her written reasons for Judgment by stating that when the third Claimant filed its appeal she will prepare the judgment for Counsel.

(10) The Learned Judge further erred when she asked for a date when the reasons for Judgment would be ready proceeded to fix the 14 May 2021 a date when she was made aware was beyond the 14 days from the date of her order made pursuant to her Judgment.

(11) The Learned Judge erred in her decision that the action is not an abuse of process by failing to understand, recognise or appreciate that the issues being raised by the Claimants all emanate from the provisions of a statute and seek declarations and reliefs that are an attack on the decision of the Minister in exercising his powers pursuant to specific powers of appeal which decision the statute provides shall be final.

(12) The decision of the Learned Judge that 'it is plain from the pleadings that this is not a claim in which judicial review proceedings would be appropriate' is flawed. The Learned Judge failed to appreciate or recognize that in law Judicial Review proceedings are the correct legal procedure to seek declarations challenging (a) the decision of a Minister made in compliance with [the NRCA Act], the constitutionality of which Act is not being challenged and (2) the grant of an environmental permit by [the NRCA], a public authority, pursuant to its legal obligations as provided in the said Act.

(13) The decision of the Learned Judge that 'it is plain from the pleadings that this is not a claim in which judicial review proceedings would be appropriate' is flawed as the Learned Judge failed to appreciate or recognize that in law Judicial Review proceedings are the correct legal

procedure to seek declarations challenging (a) the decision of a Minister made in compliance with the [NRCA Act], the constitutionality of which Act is not being challenged and (2) the grant of an environmental permit by [the NRCA], a public authority, pursuant to its legal obligations as provided in the said Act be declared void and of no legal effect and should be struck down.

(14) The learned judge erred by failing to appreciate and recognize that the constitutional rights guaranteed by Chapter III relate to laws that are demonstrably justifiable in a free and democratic society and THAT section 19 deals with the right of any person who alleges that his rights are being infringed or likely to be infringed by such laws to apply to the Supreme Court for redress.

(15) The Learned Trial Judge [sic] decision in stating that the Claim is 'far more expansive that [sic] one for judicial review which is limited in terms of its application as well as the remedies that are available to the respondents is flawed by reason of her failure to fully understand that all the pleadings, including but not limited to claims for constitutional redress and the striking down of [the NRCA Act] as being unconstitutional, as claimed may be included in Judicial Review proceedings."