[2020] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

RESIDENT MAGISTRATE'S CIVIL APPEAL NO 6/2016

BEFORE: THE HON MR JUSTICE BROOKS JA
THE HON MISS JUSTICE P WILLIAMS JA
THE HON MRS JUSTICE FOSTER-PUSEY JA

BETWEEN	**NORANDA JAMAICA BAUXITE PARTNERS**	**APPELLANT**
AND	**MANNASSEH THOMAS (ADMINISTRATOR OF THE ESTATE OF GERALD THOMAS)**	**1ST RESPONDENT**
AND	**GERALD THOMAS (ADMINISTRATOR OF THE ESTATE OF GERALD THOMAS)**	**2ND RESPONDENT**

Miss Carlene Larmond instructed by Rattray Patterson Rattray for the appellant

Mrs Denise Senior-Smith instructed by Oswest Senior-Smith and Company for the respondents

14, 15, 27 March, 8 April 2019 and 17 January 2020

BROOKS JA

[1] In June 2005, Noranda Jamaica Bauxite Partners (Noranda), mined property (the property) belonging to the estate of Gerald Thomas Sr, deceased. Over the course of the next six and a half years, Noranda was engaged in discussions with Mr Thomas' adult offspring (the Thomases) about compensation for the mining, and the purchase of

the property. In January 2012, they eventually arrived at a meeting of the minds and signed documents in relation to that consensus. Within a short time, Noranda changed its mind, and sought to have the Thomases agree to a different compensation package. The Thomases, however, refused to entertain any further discussions.

[2] One of the Thomases, who was a signatory to the documentation, is Mr Gerald Thomas Jr. His position, in April or May 2012, in response to Noranda's latter proposals, was that he was not interested in re-negotiating with Noranda. He said that, at that time, he told Noranda's representative, "we had come to an agreement and we had been waiting so long and if you giving us more I don't want it and if you [are] giving us less I don't want it".

[3] Thereafter, Noranda wrote indicating that it would not be exercising an option, which it said Mr Gerald Thomas Jr and his brother, Mr Manasseh Thomas (the respondents), had given to it, for the purchase of the property.

[4] Noranda, unable to arrive at a compensation agreement with the Thomases, filed a plaint in the, then, Resident Magistrate's Court for the parish of Saint Ann, for a determination of a fair and reasonable compensation for the disturbance of the surface rights. It filed the claim pursuant to section 12(2) of the Mining Act.

[5] The respondents, thereafter (on 16 May 2012), obtained letters of administration for their father's estate, and defended the claim. They also filed a counter-claim.

[6] The main issue, both in the claim and the counter-claim, is that, while Noranda asserted that all it had was an option to purchase the property, which it had decided not to exercise, the respondents insisted that they and Noranda had a valid signed agreement for the purchase of the property.

[7] The learned Resident Magistrate, who tried the case, found that there was a binding agreement. She handed down her decision on 30 September 2015.

[8] Noranda has appealed from that decision. The critical issues that are raised by the appeal are, firstly, the respondents' capacity to have entered into an agreement to sell the property, when letters of administration had not yet been issued for their father's estate, and secondly, the significance of the option document that the respondents had signed. Other issues, including the limit to the jurisdiction of the Resident Magistrates' Court to try the counter-claim, also arise.

[9] This case was decided before the Resident Magistrates' Courts were renamed "Parish Courts". For this reason, the older nomenclature will be used in this judgment.

Factual background

[10] There are several Thomas siblings. They will hereafter be referred to individually by their respective first names. This is purely for convenience and no disrespect is intended.

[11] Noranda, without prior notice or agreement, entered the property on 13 June 2005 and conducted mining operations on a portion thereof. Noranda readily

acknowledged its trespass, and, on the same day, sought to rectify the entry by entering into an agreement with one of the Thomases, Mr Arthur Thomas, who lived on the property and was engaged in farming a portion of it. Noranda paid Arthur $40,000.00 for crop damage and for its use of the land. It thereafter engaged the Thomases, first Arthur, and later the respondents, in negotiations to purchase the property.

[12] In the six and a half years that the negotiations dragged on for, Noranda was aware that the property formed part of Gerald Thomas Sr's estate. Noranda's representatives asked that Gerald Jr and Manasseh secure powers of attorney from their siblings. It is not contested that during that time Noranda had informed the Thomases that it intended to purchase the property. The negotiations were in respect of the price, in cash and in kind, that Noranda should pay. At one stage, according to Gerald Jr, Noranda's then legal representative had indicated, in order to save the Thomases costs, that she would take the responsibility of the administration of the property. She however, either in late 2010 or in 2011, said that she could no longer assist in that regard.

[13] On 20 January 2012, the negotiations were finally concluded. An agreement, which was made between Noranda's representatives and the respondents, was reduced to writing and signed. It was actually handwritten by Noranda's representatives and was signed by one of those representatives as well as the respondents. By that document, Noranda was to have acquired the entire property (less two acres housing

the gravesites of Thomas family members). In exchange, it would have provided the Thomases with lands in three separate locations (the resettlement lands), and made a cash payment. The document also provided for a payment for the destruction of some trees. Attached to that document, the respondents said, were the building plans for two houses that Noranda had agreed to build as part of the compensation. One house was to have been built on each of two of the three locations.

[14] At the same time that that handwritten document was inked, Noranda's representatives also had the respondents sign a document that is entitled "Property Option" (the option document). The option document spoke to the respondents giving Noranda an option to purchase their property and stipulated the method by which payment would be made. The payment contemplated the provision of the resettlement lands and the building of the two houses. Noranda paid $200.00 for the option and was given six months in which to exercise it.

[15] At that time the respondents had not yet received a grant of letters of administration in their deceased father's estate. This fact was known to all parties and it was anticipated that the grant would have been made to them in due course.

[16] By letter dated 5 April 2012, Noranda wrote to the respondents' attorney-at-law, informing her that it would not exercise the option. This meant that there would be no acquisition of the property, no resettlement lands, and no construction of any houses. This was a complete about-turn of its position. Noranda offered a sum of $1,250,000.00

as compensation for the disturbance of surface rights in the property. It said that the area that it had disturbed, and that it would pay compensation for, was five acres.

[17] The explanation Noranda gave in the Resident Magistrate's Court for having carried out that about-face, was in part, that, based on the amount of bauxite remaining on the property, there was no sufficient economic justification to continue mining the property (page 32 of the record of proceedings).

[18] The respondents rejected Noranda's offer and the parties were at a stalemate.

The claim and counter-claim

[19] In its claim that it filed herein, Noranda asserted that it was unable to agree with the respondents as to the amount for compensation for damage that it had done to the respondents' surface rights in respect of the property. It contended that the handwritten document was not an agreement to purchase the property, but was only an understanding upon which the option document was based. Noranda wished the Resident Magistrate's Court, pursuant to section 12(2) of the Mining Act, to fix fair and reasonable compensation for the damage to the surface rights in the property.

[20] The respondents, in their counter-claim, asserted that:

a. the parties had negotiated an agreement;

b. the respondents, at the time of concluding the agreement, were representing all the other beneficiaries of their father's estate;

c. the agreement was that as payment for the property, Noranda would transfer lands in three different locations, build two houses and pay some cash;

d. the agreement was final; and

e. the option agreement, which all persons from whom Noranda purchases property are to sign, was given to them to sign as merely a formality, on the basis that "that is how [Noranda] does business".

Based on those assertions, the respondents counter-claimed, on behalf of the estate,

a. specific performance of the agreement for compensation under section 12(2A) of the Mining Act; and/or

b. damages in lieu of specific performance; and

c. damages for trespass.

[21] The learned Resident Magistrate gave judgment for the respondents on the counter-claim and made the following award:

"a) Re-settlement of Lands

1. Orange Valley subdivision [-] 10 acres;

2. Tobolski subdivision [-] 5.55 acres;

3. Hawkhurst subdivision [-] 1.20 acres

(b) Cash payment for 27.23 acres [@] per acre = $4,084,500.00 $150,000.00

(c) Reservation for family graves – two acres

(d) Construction of two [type-C], two bedroom, houses to replace [the] family home and existing structures on the [property]." (See pages 100-101 of the record of proceedings)

The appeal

[22] Noranda filed several grounds of appeal. The amended grounds of appeal are listed below for completeness. The underlining has been removed for convenience.

> "(a) The Learned Resident Magistrate erred in law when she determined that she had the jurisdiction to adjudicate on the Counterclaim in circumstances where the contract and land in question exceeded the limit set by the Judicature (Resident Magistrate's [sic]) Act and there was no consent of the parties for the Resident Magistrate to try the matter.
>
> (b) The learned Resident Magistrate erred when she proceeded to award the sum of $4,084,500 in respect of 27.23 acres on the counterclaim in circumstances where her jurisdiction under the [(]Judicature Resident Magistrate's [sic]) Act only allows her to award up to $1,000,000.00 and her jurisdiction to award compensation under the Mining Act was limited to the affected surface rights and damage to the surface of land which was restricted to at most 5 acres of land.
>
> (c) The learned Resident Magistrate erred when she awarded the resettlement, lands and houses pursuant to a contract in circumstances where she had no such jurisdiction to make an award.
>
> (d) The learned Resident Magistrate erred when she held that the Appellant was not [sic] was not the holder of any prospecting or mining rights. The learned Resident Magistrate failed to appreciate that the

Appellant was the holder of Special Mining Lease No. 165 issued on 1st October 2004 which granted it rights to prospect and mine the Bluefields area.

(e) The learned Resident Magistrate erred in holding that it was the lack of a mining lease which gave rise to the trespass and not the lack of a title to the said lands.

(f) The learned Resident Magistrate erred in finding that at all times negotiations took place between Mannaseh and Gerald Thomas in circumstances where it is admitted that Arthur Thomas held himself out as the representative of the estate in 2005 and the permission to mine letter dated 13th June 2005 was signed by Mr. Arthur Thomas.

(g) The learned Resident Magistrate erred in finding that from as far back as 2008 the Appellant was aware that Mannaseh Thomas was the representative of the estate. In fact, the Defence filed on 5 November 2012 states that it was not until 2011 that the Appellant was advised by the Attorneys-at-Law acting on behalf of the estate that an application had been made for the Respondents to obtain Letters of Administration.

(h) The learned Resident Magistrate erred in fact when she found that at all times the Appellant stated it would purchase the 45.98 acres of land from the Thomas' [sic]. The permission to mine document stated solely that negotiations to purchase would continue. The learned Resident Magistrate failed to consider that as there was an error in respect of the ownership of the land, there may also be an error in respect of the bauxite reserves present on the land. In fact, the learned Resident Magistrate failed to pay any or any due regard to the letter from the Ministry of Energy and Mining dated 19 May 2011 which stated that the bauxite portion on the land was less than 20% of the entire property.

(i) The learned Resident Magistrate erred in law and in fact when she determined that the handwritten note dated 20th January 2012 was the contract between the parties and that the option was a mere formality.

The learned Resident Magistrate elevated the handwritten note which at its best could be no more than a memorandum of understanding and failed to appreciate or failed to adequately appreciate that the agreement reached between the parties was in fact contained in the Option Agreement dated 20th January 2012 signed by Gerald Anderson Thomas

(j) Further the learned Resident Magistrate failed to have any or any due regard to the terms of the property option and its effect on any other previous agreement entered into between the parties. Further the learned Resident Magistrate failed to have due regard to the letter dated 5th April 2012 in which the Appellant communicated that it would not be exercising the option to purchase.

(k) The learned Resident Magistrate erred in law when she failed to consider that the term occupier referred to in section 12 of the Mining Act was qualified by the definition of occupier in the Interpretation Act and the provisions of the Intestates' Estates and Property Charges Act.

(l) The learned Resident Magistrate erred in law when she failed to consider that there was no grant of Administration in the estate of Gerald Thomas Snr., and therefore there was no person with the legal authority to bind the estate, which said estate was yet to be ascertained.

(m) The learned Resident Magistrate erred when she determined that by using an approximation of the area affected by mining that the Appellant was not aware of the area mined. The Appellant had Commissioned Survey to be conducted on ... [sic] and 18 October 2013. In the interim and, for the purposes of negotiation an approximation favourable to the Defendant was utilized.

(n) The learned Resident Magistrate failed to appreciate the fact that Mr. Arthur Rodgers did have regard to the fact that the access (i.e. the roads) to the affected area of land was very poor."

The grounds will not be assessed individually but will be grouped according to the issues raised. The grouping used by learned counsel for Noranda, Miss Larmond, is convenient for this purpose. She set them out as follows:

> "i. Lack of Jurisdiction (Grounds A, B and C)
>
> ii. Consideration of irrelevant material, in particular, the basis for [Noranda's] entry on the land (Grounds D and E)
>
> iii. Failure to consider or sufficiently to consider lack of capacity of [the] Respondents to bind the estate (Grounds F, G, K and L)
>
> iv. Finding as to the existence of an agreement as alleged by the Respondents and in any event misconstruing the terms and effect of the Option Agreement (Grounds H, I and J)
>
> v. Failure to consider or sufficiently consider the terms and effect of the Commissioned Survey conducted in 2013 as to the area of land mined; and the Valuation Report of Mr. Arthur Rogers [Grounds M and N]."

[23] After consideration of the various submissions and the evidence that was available to the learned Resident Magistrate, issue iii, as identified by Miss Larmond, will be dealt with first.

iii. Failure to consider or sufficiently to consider lack of capacity of [the] Respondents to bind the estate (Grounds F, G, K and L)

[24] The learned Resident Magistrate, in dealing with the issue of the capacity to enter into an agreement, held that Arthur and the respondents were entitled to do so. She said in her reasons for judgment, as recorded at page 97 of the record of proceedings:

> "The Court is of the view that the very provisions of Section 12 of the Mining Act which enables the occupier or owner to demand and be paid compensation has given the [respondents] the legal capacity vis a vis (a) the authorization given by Arthur Thomas in his position as occupier of the property and (b) the [respondents'] status as beneficial equitable owners."

[25] The representation of the estate of Gerald Thomas Sr, deceased, only officially commenced on 16 May 2012, when letters of administration were granted to the respondents. Prior to that date, including the date on which the respondents signed the handwritten agreement and the option, they purported to act as representatives of the beneficiaries of the estate of their deceased father. They, however, had no authority to represent the estate and they and their siblings had no legal interest in that estate, for which the respondents could have properly acted as "representatives".

[26] It is undisputed that no person can represent the estate of a person who dies intestate, until letters of administration have been granted in respect of that estate (see **Chetty v Chetty** [1916] 1 AC 603, at page 609, which was cited in **Delroy Officer v Corbeck White** [2016] JMCA Civ 45). It is also well established that the persons who may anticipate benefitting from the estate of a person, who dies intestate, have no legal or equitable interest in such an estate. Their interest is only to have the estate properly administered (see **Commissioner of Stamp Duties v Livingston** [1965] AC 694; [1964] 3 All ER 692).

[27] In **Commissioner of Stamp Duties v Livingston**, Viscount Radcliffe explained that the interests in estate property lay in the personal representatives and not in the potential beneficiaries. He said, in part, at page 696 of the latter report:

> "**What equity did not do was to recognise or create for residuary legatees a beneficial interest in the assets in the executor's hands during the course of administration.** Conceivably, this could have been done, in the sense that the assets, whatever they might be from time to time, could have been treated as a present, though fluctuating, trust fund held for the benefit of all those interested in the estate according to the measure of their respective interests; but it never was done. It would have been a clumsy and unsatisfactory device, from a practical point of view; and, indeed, it would have been in plain conflict with the basic conception of equity that to impose the fetters of a trust on property, with the resulting creation of equitable interests in that property, there had to be specific subjects identifiable as the trust fund. An unadministered estate was incapable of satisfying this requirement. **The assets as a whole were in the hands of the executor, his property; and, until administration was complete, no one was in a position to say what items of property would need to be realised for the purposes of that administration or of what the residue, when ascertained, would consist or what its value would be**." (Emphasis supplied)

Although Viscount Radcliffe spoke to the position of a residuary legatee, a person expecting to benefit from an intestate's estate would be in the identical position of having no beneficial interest in any of the property forming part of the estate. At pages 699-700 of the latter report, he said, in part:

> "There is the remark of Jordan CJ in *McCaughey v Comr of Stamp Duties* ((1945), 46 NSWR at p 204):
>
> > 'The idea that beneficiaries in an unadministered or partially administered estate have no beneficial interest in the items which go to make up the estate

> is repugnant to elementary and fundamental principles in equity.'
>
> **If by 'beneficial interest in the items' it is intended to suggest that such beneficiaries have any property right at all in any of those items, the proposition cannot be accepted as either elementary or fundamental**. It is, as has been shown, contrary to the principles of equity. **On the other hand, however, if the meaning is only that such beneficiaries are not without legal remedy during the course of administration to secure that the assets are properly dealt with and the rights that they hope will accrue to them in the future are safeguarded, the proposition is no doubt correct**. They can be said, therefore, to have an interest in respect of the assets, or even a beneficial interest in the assets, so long as it is understood in what sense the word 'interest' is used in such a context." (Emphasis supplied)

[28] Based on those principles also, Mrs Senior-Smith's submissions, that Noranda is estopped from denying that the respondents were acting on behalf of the estate, or of the beneficiaries, are without merit. Noranda's actions cannot create a right in the respondents that they cannot otherwise possess.

[29] The learned Resident Magistrate was therefore in error in finding that the respondents were properly able to enter into an agreement, "as beneficial equitable owners" of the estate, with Noranda. The fact that Noranda negotiated with the respondents, despite knowing that letters of administration had not yet been issued, does not enhance the respondents' position in any way.

[30] Mrs Senior-Smith supported the learned Resident Magistrate's finding that Arthur, as occupier of the land, was entitled to benefit from the operation of section 12

of the Mining Act. Learned counsel submitted that, even if the respondents could not have properly represented the estate, Arthur could be considered the occupier of the land for the purposes of section 12 of the Mining Act.

[31] The relevant part of section 12 of the Mining Act states:

> "(1) The holder of prospecting or mining rights shall, on demand being made by the owner or occupier of the land upon or under which prospecting or mining operations are being or have been carried on by him, pay such owner or occupier fair and reasonable compensation for any disturbance of his surface rights and for any damage done to the surface of the land or to any live or dead stock, crops, trees, buildings or works, as a result of such operations.
>
> (2) The amount of compensation payable under subsection (1) shall be determined by agreement between the parties or, if the parties are unable to reach agreement, any of them may take proceedings in the Resident Magistrate's Court without limit of amount.
>
> (2A) If the compensation determined by agreement in accordance with subsection (2) is not paid, the owner or occupier may take proceedings in the Resident Magistrate's Court for an order for payment without limit of amount."

[32] The difficulty with Mrs Senior-Smith's submission is that the negotiations were neither conducted nor concluded on the basis of Arthur being the party involved.

[33] Arthur, like the other siblings, authorised the respondents to represent him in the context of the property belonging to the estate of Gerald Thomas Sr. It is true that in that document he also asserts, as does each of the other siblings, that "I am the owner". It cannot be properly said, however, that any of these negotiations was done for Arthur's benefit, as occupier of the property.

[34] The documentation also shows that the respondents were purporting to act either as representatives for the estate, or as beneficiaries of the estate. The handwritten agreement with Noranda recognised the property as belonging to the estate of Gerald Thomas Sr. It recognised the respondents as "sons of the deceased".

[35] It is true that the option was given by the respondents, without any mention of the estate. The respondents, however, gain nothing from relying on the option. The option is Noranda's trump-card. It does not assist the respondents' cause.

[36] Finally, the learned Resident Magistrate was also in error in giving a judgment to the respondents on the basis that Arthur was an occupier and entitled to compensation under section 12(2A) of the Act. The litigation was not conducted on that basis. Noranda sued the estate of Gerald Thomas Sr, deceased. The respondents were subsequently substituted as the defendants to the claim, as the personal representatives of the estate of Gerald Thomas, deceased. Nowhere was Arthur recognised as a party to the litigation.

[37] Based on the above reasoning and conclusion, that the respondents had no capacity to enter into a binding agreement with Noranda, or indeed to give it an option to purchase the property, it follows that section 12(2A) of the Mining Act could not be invoked in this case. Noranda, therefore, must succeed in its appeal, and the award that the learned Resident Magistrate made, must therefore, be set aside.

i. The issue of jurisdiction (grounds A, B and C)

[38] In the three grounds covered by this issue, Noranda contends, in essence, that the counter-claim filed by the respondents invoked the jurisdiction of the learned Resident Magistrate provided by the Judicature (Resident Magistrates) Act (the JRMA). That jurisdiction, Noranda asserts, is limited to awards of $1,000,000.00 and therefore, the learned Resident Magistrate, in making the award that she did, exceeded her jurisdiction.

[39] In addition, Noranda contends that section 12 of the Mining Act is inapplicable to the relief sought by the counter-claim. Firstly, it contends that section 12(2A) does not contemplate an inquiry by the court as to whether the parties had arrived at an agreement. Secondly, it asserts that section 12 only contemplates the payment of a sum of money as compensation. The section does not allow, Noranda asserts, for an order for a delivery up of resettlement land and the building of houses as methods of compensation. Noranda contends that the learned Resident Magistrate, therefore, had no jurisdiction under the Mining Act, to make the order under appeal.

[40] On the other hand, the respondents assert that it is the Mining Act, and not the JRMA, that is the relevant legislation in this case. They contend the Mining Act allows the learned Resident Magistrate to make her order. Section 12(2A) of the Mining Act, they assert, allows a Resident Magistrate to enforce the payment of compensation, which parties have agreed. The term "compensation", as used in section 12, the respondents contend, is wide enough to include the agreement that the parties made.

[41] In assessing these contending submissions, it is first necessary to identify the relevant provisions of the legislation. The JRMA is the older Act of the two. Section 71 of the JRMA states the upper limit of awards within the jurisdiction of the Resident Magistrates' Courts in matters of contract and tort:

> "71. Each Court shall, within the parish for which the Court is appointed, have jurisdiction in all actions at law, whether such actions arise from tort or from contract, or from both, if–
>
> (a) the amount claimed does not exceed one million dollars, whether on balance of account or otherwise; and
>
> (b) either–
>
> (i) the cause of action arose wholly or in part within the local jurisdiction of the Court; or
>
> (ii) the defendant or one of the defendants, lives or carries on business, or, at some time within six calendar months next before the date on which the action is brought, lived or carried on business, within that jurisdiction."

[42] Section 72 allows for the parties, by agreement in writing, to avoid the statutory limit. It states:

> 72.- (1) All common law actions, whatever be the amount of debt or damage claimed, wherein both parties shall agree by memorandum, signed by them, or their respective solicitors, that any Court named in such memorandum shall have power to try the action, may be heard and determined in like manner by the Court so named.
>
> (2) A judgment delivered pursuant to such hearing shall have the same effect and be enforceable in all respects as a judgment for an amount within the jurisdiction as to amount or coming within the local jurisdiction of the Court before which the same was so tried."

[43] As has been mentioned above, the relevant section of the Mining Act, at this stage, is section 12. It stipulates that there shall be no limit to the level of compensation awards that a Resident Magistrate may make for the disturbance of surface rights. The whole section is set out below for convenience:

> "(1) The holder of prospecting or mining rights shall, on demand being made by the owner or occupier of the land upon or under which prospecting or mining operations are being or have been carried on by him, pay such owner or occupier fair and reasonable compensation for any disturbance of his surface rights and for any damage done to the surface of the land or to any live or dead stock, crops, trees, buildings or works, as a result of such operations.
>
> (2) The amount of compensation payable under subsection (1) shall be determined by agreement between the parties or, **if the parties are unable to reach agreement, any of them may take proceedings in the Resident Magistrate's Court without limit of amount**.
>
> (2A) **If the compensation determined by agreement in accordance with subsection (2) is not paid, the owner or occupier may take proceedings in the Resident Magistrate's Court for an order for payment without limit of amount**.
>
> (3) **The sum awarded by the Resident Magistrate**, or when there has been an appeal, by the Court of Appeal, as the case may be, shall be paid by such holder to the person entitled thereto, within fourteen days of the date of the decision.
>
> (4) Without prejudice to any other means of recovery, if **the sum awarded** is not paid within the time specified in subsection (3) such sum may, on application to the Commissioner, be paid out of the amount lodged under section 11.
>
> (5) The Commissioner may, by notice to the holder of prospecting or mining rights who has failed to pay **the sum**

> **awarded**, suspend his mining or prospecting rights until the sum awarded has been paid and until such holder has lodged with the Commissioner such further sum as the Commissioner may demand as security for any future compensation payable and if such payment and lodgment is not made within such time as the Minister, or in the case of a prospecting right, the Commissioner, may consider reasonable the Minister or the Commissioner (as the case may be) may revoke the prospecting or mining rights of the holder in default.
>
> (6) Where it is not practicable after reasonable enquiry to ascertain the name or address of the owner or occupier of any land upon or under which the holder of prospecting or mining rights is carrying on or has carried on prospecting or mining operations, that holder shall apply to the Resident Magistrate's Court for determination of the amount of compensation payable to that owner or occupier without limit of amount." (Emphasis supplied)

(a) Which Act applies, the Mining Act or the JRMA?

[44] Mrs Senior-Smith, for the respondents, submitted that the Mining Act expanded the jurisdiction of the Resident Magistrates' Courts for the purposes of awards generally, but that submission cannot be accepted. Learned counsel suggested that the expansion was by way of an implied repeal of the monetary limit contained in section 71 of the JRMA. Section 12 does not allow such an interpretation; it deals with specific fact situations. Repeal by implication will only be applicable if the later enactment is so inconsistent with or repugnant to the earlier one that they cannot stand together. That is not the case here.

[45] There can be no real dispute in this case that if it is the JRMA that is applicable, then the learned Resident Magistrate would have exceeded the monetary limit of her jurisdiction, both in tort and in contract. In this case, there was no agreement in writing

by the parties allowing the Resident Magistrate's Court to make an award in excess of the statutory limit of $1,000,000.00.

[46] Likewise, there can be no real dispute that the JRMA cannot curtail the amount of compensation that the Resident Magistrate may make under the Mining Act. The Mining Act provides that the parties may take proceedings in the Resident Magistrates' Court for payment of compensation "without limit of amount". That Act is the younger of the two Acts and Parliament is deemed to have borne the provisions of the JRMA in mind when it passed the Mining Act.

[47] Although the respondents did counter-claim for trespass, it was as an alternative to the claim for specific performance of the contract for compensation. The primary claim was made pursuant to section 12(2A) of the Mining Act and the learned Resident Magistrate, although erroneously, because of the absence of an agreement, made an award pursuant to that section.

[48] If there had been an agreement she would have been entitled to give judgment pursuant to the Mining Act regardless of whether the limit under the JRMA had been exceeded. That Mining Act (in particular section 12) was the legislation on which both parties had approached the Resident Magistrate's Court for a resolution of their dispute.

(b) Is the Resident Magistrate empowered to inquire if the parties had arrived at an agreement?

[49] Miss Larmond submitted that section 12(2A) does not contemplate an inquiry as to the existence of an agreement. That submission cannot be accepted. The provision

requires the Resident Magistrate to determine if an agreement had been reached as to the compensation to be paid, and if there had been a failure to pay it. Those questions of fact are inherent to the jurisdiction granted by the provision. It is untenable that a party could avoid the operation of the subsection by merely denying either the existence of an agreement or the payment of compensation.

(c) Is the Resident Magistrate empowered to award compensation other than by the payment of money?

[50] The issue of whether the Resident Magistrate, whose jurisdiction is invoked by virtue of section 12 of the Mining Act, has the power to make awards of compensation by means, other than the payment of money, depends on the interpretation of the word "compensation" as used in the Mining Act, and in particular, in section 12.

[51] It is accepted, as Mrs Senior-Smith submitted, that the term "compensation", as used generally, may, in certain circumstances, include providing satisfaction by means other than the payment of money. She cited Black's Law Dictionary, Ninth Edition, as authority for that definition. It is also accepted that the term "payment" can embrace the delivery of something other than money as discharge of an obligation.

[52] In this case, however, those terms must be interpreted according to the context in which they are used in the Mining Act, and in particular, in section 12. A fair interpretation of those terms, in that context, is that section 12(2) does not contemplate any form of satisfaction other than the payment of money.

[53] The term "compensation' is mentioned 17 times in the Mining Act. In almost every case, it is mentioned in the context of a "payment", "an amount", or "a sum".

[54] The context in which the term "compensation" is used in section 12 is unambiguous. Section 11 introduces the context. It requires, in certain cases, the holder of prospecting or mining rights (the miner), who intends to conduct mining on another person's property (the landholder) to pay money or give security, by way of deposit, in order to compensate the landholder for any disturbance, by virtue of prospecting or mining operations, to the surface of the landholder's land and certain items thereon. The "sum" representing the deposit, is paid by way of security. It is "lodged" with the Commissioner of Mines and may be used by the Commissioner to "pay" the compensation, which is ascertained, by virtue of the provisions of section 12. If necessary, the "sum", representing the deposit, or a portion thereof, may be refunded to the miner.

[55] Section 12 follows on from section 11 for that purpose. Its provisions all contemplate a payment of money; thus:

(a) subsection (1) contemplates the payment of "fair and reasonable compensation" to the landholder for any damage done as contemplated by the subsection;

(b) subsection (2) allows the miner and the landholder to agree "the amount of compensation", and failing agreement, for proceedings to be conducted in the

Resident Magistrate's Court, "without limit of amount";

(c) subsection (3) requires the miner to "pay" to the landholder, within 14 days, the "sum awarded" by the court;

(d) subsection (4) allows the Commissioner, where the miner fails to meet the 14 day deadline, to "pay" to the landholder, from the sum or security lodged with the Commissioner, "the sum awarded" by the court;

(e) if the miner fails to "pay the sum awarded", the Commissioner may, by subsection (5), impose sanctions on the miner including suspending the miner's mining rights until "the sum awarded has been paid";

(f) subsection (6) is in a similar vein, allowing for the "determination of the amount of compensation payable to" a landholder, whose surface rights have been disturbed, but who has not been located.

[56] Section 13 speaks to the entitlement of the Commissioner to require a miner to pay a deposit, by way of security for due performance of the miner's obligations under the Act. The section stipulates that that deposit is "in addition to any sum lodged under section 11 or 12" of the Act, with the Commissioner.

[57] Sections 21, 33, 59, 79 and 82 of the Mining Act all address compensation to a landholder. However, they all do so in the context of a "payment". Sections 80 and 83 both stipulate that no compensation shall be paid to a miner in cases where use is made of the miner's property. Those sections are not strictly relevant for these purposes, but they demonstrate that the term "compensation" is restricted to the payment of money, for the purposes of the Act.

[58] That rather expansive analysis demonstrates that the Resident Magistrate is not empowered to make any award of compensation under section 12(2) of the Mining Act, other than for the payment of money.

[59] A consideration of the compensation that may be awarded under section 12(2A) has been deliberately avoided. A Resident Magistrate may well be able, under section 12(2A), to enforce an agreement which is not restricted to money. It is unnecessary to decide that question in this appeal. It may be noted, however, that non-cash compensation was at one time a regular feature of Noranda's negotiations with landholders.

[60] In September and October 2013, Noranda responded to interrogatories in respect of its compensation strategy over the previous 10 and 20 years. Mr David Wong Ken, Director of Noranda's Property and Legal Department, indicated that the compensation strategy of the company evolved over time and continued to change. He said that a partnership, comprising Noranda and Jamaica Bauxite Mining Limited, over the period 2009-2011 strove to compensate landholders by cash payments for 70% of

the bauxite land it purchased, and to compensate for the remaining 30% with resettlement land. Between 2004 and December 2012, he said, Noranda entered 296 land transactions which involved resettlement lands, house replacements, crop compensation, compensations for structures other than houses, cash paid for bauxite land and other compensation.

[61] The question of whether a Resident Magistrate's Court could, pursuant to section 12(2A) of the Mining Act, enforce agreements such as those, must await another case. In this case, it need only be said that the learned Resident Magistrate would have been entitled to make an award for monetary compensation under section 12(2) of the Mining Act.

ii. Consideration of irrelevant material, in particular, the basis for [Noranda's] entry on the land (Grounds D and E)

[62] The learned Resident Magistrate did consider, in her reasons for judgment, that Noranda had committed a trespass when it entered the estate's property. Although she considered the trespass, and considered that there was undisputed evidence that Noranda had disturbed the property, and damaged access roads to the property, those facts did not factor in her award. She made her award in accordance with what, she had found, was the agreement between the parties. Those observations, by themselves, did not result in a miscarriage of justice. They were accurate recitals of the facts concerning the physical entry unto the property.

[63] Noranda did not dispute the finding that it had entered the land without permission from the Thomases, although it disputed the basis on which the learned

Resident Magistrate found that there was a trespass. She found that there was a trespass because, on her finding, Noranda did not have a mining lease which covered that property. That finding is, however, if it is not contrary to the evidence, is not supported by it.

[64] The evidence before her suggested that Noranda had a mining lease, which covered the mining of that property. Mr David Wong Ken, one of Noranda's witnesses, testified that, "Noranda's mine lease area is defined in special lease #165" (page 30 of the record of proceedings). He said that mining lands could either be owned by the Commissioner of Lands, or privately owned and not yet acquired for mining. Mr Wong Ken went on to suggest, although he did not say so specifically, that the property fell within the mine lease area.

[65] The respondents seem to have accepted that assertion as accurate. In one of their interrogatories, they asked Noranda for a "copy of the Mine Plan that covered the mining of the [property]" (page 133 of the record). Mr Wong Ken, who answered the interrogatory, supplied the plan for June 2005. Although the mine plan was not helpful in determining the location of the property in relation to the area covered by the licence, his assertion was not disputed.

[66] Even if the evidence was not definitive that the property fell within the mine lease area, it was not an issue in dispute before the learned Resident Magistrate. In fact, both parties depended on the property being so placed in order for section 12 of the Mining Act to be applicable to their respective claim and counter-claim. The section

is only applicable if the person, who is required to pay compensation, is "the holder of prospecting or mining rights" (section 12(1)).

[67] The learned Resident Magistrate was, therefore, in error in finding that the property did not fall within the mine lease area. It is worth noting that if she were correct on that point, she would not have had any authority to make the orders that she did.

iv. Finding as to the existence of an agreement as alleged by the Respondents and in any event misconstruing the terms and effect of the Option Agreement (Grounds H, I and J)

[68] Based on the findings made above, that the respondents had no capacity by which to enter into an agreement with Noranda, an analysis of this issue is really unnecessary. The absence of capacity would also nullify the option agreement on which Noranda bases some of its arguments.

v. Failure to consider or sufficiently consider the terms and effect of the Commissioned Survey conducted in 2013 as to the area of land mined; and the Valuation Report of Mr. Arthur Rogers [Grounds M and N].

[69] If the learned Resident Magistrate had considered the case in the context of the absence of an agreement, she would have had regard to the valuation reports and the surveyor's sketch plan that were adduced in evidence before her. Her finding that there had been an agreement obviated the need to conduct an analysis of that evidence for the purposes of section 12. Curiously, however, she did refer to the evidence of the surveyor to find that Noranda was not sure of the area of the property that it had mined.

[70] The finding, herein, that she was in error to have found that there was an agreement, means that she would have been in error to have largely ignored the evidence of the valuators and the surveyor.

The resolution of the appeal

[71] The consequence of the findings made herein is that the appeal must be allowed and the learned Resident Magistrate's judgment must be set aside. For those reasons, also, the respondents' counter-claim, pursuant to section 12(2A) of the Mining Act, also fails.

[72] Noranda's claim may now be considered afresh pursuant to this court's authority to make any order which, in its opinion, should have been made in the court below (see rule 2.15(b)(b)) of the Court of Appeal Rules). Noranda has asked that the respondents be awarded a fair and reasonable compensation:

> a. "…for the disturbance of the surface rights and for damage to the surface of approximately 5 acres of land that has been mined out"; and
>
> b. "…for damage done to any live or dead stock, crops, trees, buildings or works as a result of [Noranda's] mining of approximately 5 acres of land."

The area of five acres will be used for this exercise. This is despite the fact that a commissioned land surveyor, Mr Andre Gordon, surveyed the area that was mined and found it to be 9646.968 square metres or 2.3838 acres (page 20 of the record of proceedings). Noranda has not resiled from using five acres as the basis for computing the compensation figure.

[73] It is to be noted that the compensation to be determined bears no relation to the value of the mineral that was extracted from the land. The mineral is vested in the Crown (see section 3 of the Minerals (Vesting) Act).

[74] The learned Resident Magistrate indicated in her reasons for judgment that the intervention by the court, pursuant to section 12 of the Mining Act was "virgin territory". Indeed the representative of the Mines and Geology Department, which normally mediates settlements between miners and landholders, testified that it was usual for disputing parties to settle the issue of compensation, without resort to litigation. He testified that this case was his "first experience where they disagree".

[75] The previously reported cases do not focus on section 12. The section was mentioned in **Kaiser Bauxite Co v Alice Wishart** (1972) 12 JLR 986; (1972) 20 WIR 270, but only tangentially, in the dissenting judgment of Edun JA. The issue in that case was whether the creation by the miner of a passageway over a landholder's land, constituted a trespass. The majority of the court, based on the evidence that the land fell within the area of the mining lease, held that it was not a trespass.

[76] As in the case of **Kaiser Bauxite Co v Alice Wishart**, the respondents' only recourse for compensation against Noranda, is by way of negotiation and, failing a successful negotiation, litigation by way of section 12 of the Mining Act.

[77] In this case, although the negotiations ultimately failed, the figures used during the discussions may be of assistance for the present exercise. With the mediation of the Mines and Geology Department, the parties arrived at a sale price of $150,000.00 per

acre for the lands that were to have been purchased for cash by Noranda. It is not clear from the evidence whether the building of the two houses and the provision of resettlement lands influenced that price.

[78] When Noranda decided not to exercise the option, it offered to pay the respondents $250,000.00 per acre as "fair and reasonable compensation for the disturbance to surface rights" (page 119 of the record of proceedings). It is important to note that Noranda was not offering to purchase the five acres that it said it had mined. There was no counter-offer, as Gerald Jr was of the view that the parties had already arrived at a deal.

[79] The other evidence before the learned Resident Magistrate was provided by two valuators, who had been commissioned by Noranda to carry out a valuation of the area, which it said that it had been mined. The respondents did not adduce any expert evidence from either a surveyor or a land valuator.

[80] One of the valuators commissioned by Noranda, Mr Donald Hall, ascribed a market value of $2,000,000.00 for the five acres. He said that, although he did not do much of that type of valuation, he would generally give mined out land a lower value than other land, as there may be need to fill and fence it to make it useful. The other valuator, Mr Arthur Rogers, ascribed a value of $1,750,000.00 for the area. These values were ascribed as sale prices for the freehold.

[81] It is not clear how the mining ultimately affected the mined area. Manasseh testified that Noranda had first mined outside the property right up to the boundary

line. Later a shower of rain caused an area inside the property, apparently adjacent to the boundary line, to collapse. Thereafter, Noranda commenced negotiation to compensate for the encroachment and started mining the property.

[82] Another aspect of the damage was to the access to the property. Manasseh said that prior to the mining, access to the property was by way of a parochial road, with a service road through the property, but the mining removed some of the service road. He seemed to suggest that some of the parochial road was also affected by the mining.

[83] The surveyor, Mr Gordon, said that when he conducted his survey, he did not see a road on the property but he accepted that the plan for the property depicted a reserved road, which was in a part of the area in which the mining had taken place. He testified, however, that the existence of a reserved road on a plan did not necessarily mean that one existed on earth. Mr Rogers said "[t]here is no road, access is by tracks that has [sic] never been cleared or cleaned on the surface" (page 103 of the record of proceedings).

[84] The state of the property after mining is also not particularly clear. Mr Gordon testified that he saw grass at the mined area. He said that the grass that he saw is the type of grass, which Noranda uses for land that it reclaims. The valuators gave varying descriptions of the land. In his written report, Mr Rogers described the area as "an already cleared out pit, the bauxite has been already removed" (page 103 of the record of proceedings). In that report he also spoke to the lack of access to the property. In oral evidence, he said that the land was level with grass growing on it. It was fenced,

was not being used for anything and "it grew up with trees" (page 11 of the record of proceedings). The rest of the land on the property, he said, was "very hilly, covered in trees" (page 11 of the record of proceedings). Curiously, however, in cross-examination, Mr Rogers accepted counsel's description of the area as "a pit".

[85] Mr Hall, in his written report, said that it appeared to be a "vast empty land" and the terrain is "above road level with slopes, gullies and hills" (page 115 of the record of proceedings). In oral testimony, he described the area as:

> "an undulating piece of land with an access road through the property. More or less barren land. There was nothing on it. It's empty land and limited access" (page 15 of the record of proceedings).

However, later in cross-examination, he said that grass was growing on the land (page 16 of the record of proceedings).

[86] In summary, therefore, the figures are these:

a. the parties agreed on $150,000.00 per acre as a sale price for a portion of the property, but in the context of the delivery of resettlement lands as exchange for other portions, and the construction of two houses;

b. on Mr Rogers' valuation, the area mined would be calculated at $350,000.00 per acre on a sale;

c. Mr Hall's valuation would work out at $400,000.00 per acre on a sale;

d. Noranda's last offer to the Thomases was $250,000.00 per acre for compensation for the disturbance of the surface rights.

Those figures are the appropriate ones to be considered in this exercise, as they purport to represent values at the time that the damage was done.

[87] The figure that suggests itself from that analysis, as appropriate, is that of $250,000.00 per acre, resulting in a total payment of $1,250,000.00. That total does not, however, seem to take into account the damage to the access to the property, about which Manasseh spoke. At the time of the trial, the house on the property had no roadway leading to it. There is also uncertainty as to whether pits are on the land as a result of the mining. Undoubtedly, the respondents will be required to reconstruct a roadway and fill in any pits left from the mining. Some compensation should be provided for those aspects. There is, however, no evidence as to the cost of those activities. As the actual area mined is not in fact five acres, but 2.3838 acres, it would not be unreasonable to leave the figure of $1,250,000.00 undisturbed. It would allow for some payment for the work that is required to rehabilitate the land.

[88] The appropriate figure, when calculated, will attract interest from the date of the damage (see section 3 of the Law Reform (Miscellaneous Provisions) Act). The circumstances of this case allow for an award of interest equivalent to the rate on judgments. Interest rates on judgments were varied between the time of the incursion on the property and the conclusion of the litigation (see The Jamaica Gazette

Supplement Vol CXXIX No 58 page 213, notice No 127 dated 22 June 2006). That variation has to be taken into account.

[89] The issue of compensation for the economic trees was considered. The parties contemplated that the sum of $161,900.00 would have been sufficient for that purpose. That, however, was in the context of the acquisition of the whole property. The evidence concerning the damage to trees on the mined area was very scant. Manasseh testified that there were some pimento trees on the section that was mined, but it was not a lot "about a half a dozen or so" (page 75 of the record of proceedings). There was, however, no evidence as to the cost of those trees. There is nothing to guide the court as to an appropriate figure. That loss will have to be considered as part of the overall compensation for the damage to the surface rights.

Summary and conclusion

[90] Although Gerald Jr was adamant that he already had an agreement with Noranda, on behalf of his deceased father's estate, he was in error. The respondents had no capacity to act on behalf of the estate, as they had not yet been granted letters of administration for the estate. The learned Resident Magistrate was in error in finding that the parties had arrived at an agreement. She incorrectly assessed the status of the respondents at the time of the negotiation.

[91] Because Gerald Jr refused to negotiate any further with Noranda, even after he had been granted letters of administration, the parties had failed to agree on compensation, and consequently section 12(2) of the Mining Act applied. This court is,

in the circumstances, empowered to assess a figure, which represents fair and reasonable compensation for the breach of the surface rights of the estate of Gerald Thomas Sr, in the property.

[92] An analysis of the evidence suggests that a figure of $250,000.00 per acre would be fair and reasonable compensation to the respondents for the damage to the estate's surface rights in the property. This would be applied to five acres as stated by Noranda, despite the fact that the area actually disturbed was much less.

Costs

[93] The conventional approach is that costs are awarded to the successful party in litigation. In this case, there is justification for departing from that established principle. Firstly, Noranda's approach to the court below was not the usual adversarial type of litigation. In asking the court to fix "fair and reasonable compensation for the disturbance of the surface rights", it was seeking the assistance of the court in a manner more akin to a mediation rather than to secure a victory over the respondents. Secondly, the absence of the evidence concerning economic trees and the value of the damage to the approaches to the land, suggest that the Thomases may be getting less value than they might otherwise have received. Costs being in the discretion of the court, there will be no order of costs against the Thomases.

P WILLIAMS JA

[94] I have read in draft the judgment of my brother Brooks JA. I agree with his reasoning and conclusions and have nothing to add.

FOSTER-PUSEY JA

[95] I too have read the draft judgment of Brooks JA and agree with his analysis and conclusions.

BROOKS JA

ORDER

1. The appeal is allowed.
2. The judgment of the learned Resident Magistrate is set aside.
3. The appellant shall pay to the respondents:
    a. $1,250,000.00 as compensation for damage to surface rights; and
    b. Interest on the sum of $1,250,000.00:
        i. at the rate of 12% per annum from 13 June 2005 to 22 June 2006; and
        ii. at the rate of 6% per annum from 23 June 2006 to today's date;
4. Each party shall bear its own costs in this court and in the court below.