



[2023] JMSC Civ. 46

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

**CIVIL DIVISION**

**CLAIM NO. SU2021CV00187**

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

**AND**

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

**AND**

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

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

**IN CHAMBERS**

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

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

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

**Ms Carlene Larmond KC & Ms Giselle Campbell instructed by Patterson Mair Hamilton for the 3<sup>rd</sup> Defendant.**

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

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

**- Application to strike out portions of first claimant's affidavit -**

**WINT- BLAIR, J**

*Submissions of the Second and Third Defendant*

[1] This is a joint application by the second and third defendants to strike portions of the second affidavit of Hugh Dixon referred to as the second Dixon affidavit.

[2] Mr Braham, KC and Ms. Larmond, KC in a joint written submission posited that the application before the court is based on Rule 30.3(3) of the Civil Procedure Rules ("the CPR") which provides:

*"The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."*

[3] Kings Counsel argue that rule 30.3(1) provides that as a general rule, an affidavit is to contain only such facts as the deponent is able to prove from his or her own knowledge. They argue that the court may strike out the paragraphs of the second Dixon affidavit identified in their application as offending the rules.

[4] These submissions are based on grounds seven to nine of their application which states that paragraphs 10 to 13, 14 (1<sup>st</sup> two sentences), 16, 22, 31 and 76 of the

second Dixon affidavit do not contain facts that the affiant is able to prove from his own knowledge and he does not state the source of the information he gives therein.<sup>1</sup>

[5] Mr. Dixon, is the Executive Director of the STEA. It is submitted that as a general rule, an affidavit is to contain only such facts as the deponent is able to prove from his or her own knowledge. The second Affidavit of Mr. Hugh Dixon (“the second Dixon affidavit”), in particular, paragraphs 10 to 13, 14 (1<sup>st</sup> sentences), 16, 22, 31 and 76, do not contain facts that Mr. Dixon is able to prove from his own knowledge and do not state the source of his information.

[6] Paragraphs 10 to 13, 14 (1<sup>st</sup> sentence), 16 and 31 under the heading ‘*The Alleged “Benefits” of Mining in Jamaica*’:

- i) speak to historical matters relating to the benefits of mining to the people of Jamaica and the absence of evidence of broad-based well-being improvements attributed to mining after the period 1952 to 1968; and
- ii) draws conclusions and expresses opinions about job-creation potential of bauxite mining and the reason for implementation of a bauxite levy in the 1970s;
- iii) draws inferences which are without any factual basis, and which in any event are inferences and/or opinions that Mr. Dixon is not in any position to make not having been appointed an expert witness;
- iv) embarks on a process of measuring and weighing macro-economic benefits of mining as against Gross Domestic Product, highlighting certain specific matters without any factual basis. Even if Mr. Dixon were an expert, which he is not, he would have been expected to state the source of his information.

[7] Mr. Ransford Braham KC, counsel for the second defendants submitted that paragraphs 25, 27 to 33, 38, 53, 77, 78 and 92 to 96, of the second affidavit of

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<sup>1</sup> Ground 7

Mr. Hugh Dixon<sup>2</sup>, should be struck out. A plain reading of these paragraphs demonstrate that they are statements of opinion, inclusive of opinion of a specialized nature.

**[8]** In respect of paragraph 76, it is submitted that Mr. Dixon contents there is non-compliance with standards for rehabilitation of mined out pits, without providing any objective verification of the lack of compliance. He further contends that the lack of compliance had been “downplayed, denied and misrepresented”. He fails to state by whom, in what matter, in what matter, to what extent and there is an absence of particulars of this alleged non-compliance. It is submitted that this evidence is of no value to the court and is oppressive, if not scandalous.

**[9]** Kings Counsel submitted that paragraphs 25, 27 to 33, 38, 53, 77, 78 and 92 to 96 contain statements of opinion, inclusive of opinion of a specialized nature, that Mr. Dixon ought not to be permitted to express by way of evidence. Mr. Dixon does not state the source of his information in these paragraphs, and merely expresses opinions which in some cases are also speculative. For example, he concludes and expresses the opinion that if mining results in the pollution of the ground water emanating from the Rio Bueno, it will contaminate the supply to the tourism industry. It is submitted that this is a quantum leap, from an affiant who is not an expert equipped and appointed to supply the court with conclusions on this issue.

**[10]** Paragraphs 27 to 33 are, offensive in similar respects as they contain a dissertation on agriculture, its demise as a result of bauxite mining, and Mr. Dixon’s conclusion that mining in the Cockpit Country and its environs will potentially damage and destroy the industries that contribute most to Jamaica’s GDP.

**[11]** At paragraphs 77 and 78, concerns are raised about NEPA’s ability to monitor mining and concludes that [the] entity stretched beyond its seams. This complaint against NEPA is scandalous, particularly where there is no basis stated for it and NEPA is not a party to these proceedings. It is oppressive in that the Claimants are asking this court to comment on the adequacy of the relevant agency to monitor

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<sup>2</sup> Filed on September 30, 2021

mining and irrelevant in that issues as to NEPA's capability and capacity are not before the court.

**[12]** Mr. Dixon has provided no source of information or basis for the statements at paragraphs 92 to 96 which cites with specificity percentages of areas occupied and used for differing purposes and concludes citing what has been done "*over centuries*" that "*the 15% of what the 2<sup>nd</sup> and 3<sup>rd</sup> defendants can mine....is everything that humans can inhabit. It is everything that comprises where the people live, work, raise families, and do business sustainably over centuries.*" The court ought not to permit this evidence from Mr. Dixon.

**[13]** Further, paragraphs 38, 41 to 48, 82 and 86 contain matter that is irrelevant to the issues for determination and that are also scandalous and otherwise oppressive. Paragraphs 38, and 41 to 48 are devoted to expressing opinions as to what should have been included in the Cockpit Country Protected Area, which is, according to counsel's submissions, impermissible. There is no claim before this Honourable Court seeking to challenge the Honourable Prime Minister's declaration of the CCPA. None of the reliefs sought seek to do so, and to attempt by way of affidavit to include issues as to the scope of the CCPA and the perceived inadequacies in the Government's decision to so declare that area can be regarded as a back-door attempt to challenge the CCPA.

**[14]** The prejudicial value of paragraph 82 outweighs its probative effect and does not assist the court in the resolution of the issues and it is irrelevant. Paragraph 86 is devoid of particulars, is an allegation against mining companies, without any specifics as to where this was done, the frequency or any detail that would allow for the court to assess this as a real problem and based on this, its prejudicial effect outweighs the probative value.

**[15]** It is submitted that the court may strike out the paragraphs identified in the application as said paragraphs offend the rules outlined.

*Submissions of the claimants*

**[16]** Kings Counsel for the claimants accepted the general rule as outlined in rule 30.3(1)<sup>3</sup> and that pursuant to rule 30.3(3) the court can exercise its discretion to strike out any scandalous, irrelevant or otherwise oppressive matter from an affidavit. However, it is submitted that the second Dixon affidavit conforms with rule 30.3(1) and that the affidavit does not contain material which is neither irrelevant, scandalous or oppressive and should therefore not be struck out by the court.

**[17]** It is submitted that paragraph 10 has to do with the benefit (or lack thereof) of bauxite mining to the communities in which mining has taken place. Paragraph 22 speaks to the watersheds in the Cockpit Country which serve the tourism industry. Paragraphs 76 relates to the rehabilitation of mined out pits in and around the Cockpit Country and the fact that air and dust pollution from mining has been understated. It is submitted that these matters are within his knowledge for the reasons stated at paragraph 5 of Mr. Dixon's fourth affidavit<sup>4</sup>.

**[18]** In respect of paragraphs 11 to 13, paragraph 14 (first two sentences), paragraph 16 and 31, it is submitted that the information in these paragraphs is generally known. The facts in the paragraphs are from readily available historical data and the sources of the facts were either already cited in the second Dixon affidavit and/or the source for those paragraphs are clarified in the fourth Dixon affidavit.

**[19]** Paragraph 16 is essentially a summary of the points in paragraphs 17 and 21 and must be read in the context of those paragraphs. The court may also take judicial notice of some of the facts in those paragraphs, such as the importance of food security and the fact that good water is needed for the survival of the tourism and agricultural industries.

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<sup>3</sup> *"The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge."*

<sup>4</sup> Filed on February 7, 2022

[20] Kings Counsel relies on **Blackstone's Civil Practice**<sup>5</sup> and submits that paragraph 16 is self-evident requiring no specific source to be cited and the claimants need not prove to the court that food is important.

[21] Paragraph 31 is corrected by the fourth Dixon affidavit in that the paragraph should read that bauxite ore will be exhausted in 50 years rather than 30 years. It is submitted that this is a well-known fact of which this court can also take judicial notice, without the need for a specific source. Bauxite mining is not a sustainable industry and bauxite ore will one day be exhausted.

[22] In relation to the second and third defendant's contention that paragraphs 25, 27 to 33, 38, 53, 77, 78 and 92 to 96 contain statements of opinion, inclusive of opinion of a specialized nature, it is submitted that these paragraphs are not statements of opinion at all and/or in any event the court has the discretion to and ought to admit the statements.

[23] Paragraph 25 contains a reasonable inference from the facts previously stated in the preceding paragraph of the second Dixon affidavit. The preceding paragraphs describe the water sub-basin on which SML-173 sits, the fact is that this water sub-basin supplies the tourism industry and the fact that studies have shown that some of the water supply runs underground in the mining area of SML-173. These facts are also acknowledged in the Environmental Impact Assessment ("the EIA") upon which the defendants rely. It is to be taken as a fact which follows naturally from scientific data, that if mining pollutes the water source running underground in the SML-173, it will also affect the supply to the tourism which relies on the same water.

[24] Paragraphs 32 to 33, follow an outline of statistics which show the comparison between the bauxite industry and the contributions of other industries to Jamaica's GDP and which highlighted the fact that bauxite is a non-renewable/exhaustible resource. This reiterates the fact that there are greater economic benefits of other industries such as tourism and that, from a sustainability perspective, investing in other industries will be a far greater contributor to the

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<sup>5</sup> (2003) Page 574, paragraph 47.26

economy and national development. Thus, historically these are facts and not an opinion and also does not require specialized knowledge.

**[25]** With regard to paragraph 38 it is submitted that similarly paragraph 38 follows from the preceding paragraphs and states that SML-173 should have been a part of the declared part of the CCPA. Mr. Dixon can make this statement as a member of the CCSG whose boundary was recommended to the Government for adoption as the CCPA.

**[26]** Paragraph 78, alleges that NEPA cannot guarantee that there is not threat to environmental degradation and injury to health from mining activities and is not an opinion and no specialized knowledge is required. It is a reasonable observation that NEPA cannot guarantee there is no threat which is evident from the fact that NEPA itself has enforcement branch which is tasked with the duty to take action where there is non-compliance.

**[27]** Paragraphs 27-28, 30-31 and 95-96 are well known and documented facts which can be personally attested to by those who live in the affected communities. Those who have lived there a long time know what persons have experienced in the past as has Mr. Dixon himself as he is a resident and he can speak to what he has witnessed.

**[28]** Paragraphs 38, 41- 48, 82 and 86 are neither scandalous nor oppressive. It is submitted that Mr. Dixon should be able to show his knowledge of the CCPA especially because of the fact that the defendants seek to rely on the CCPA to downplay the environmental importance of the SML-173 area where mining will take place. Further, paragraph 82 addresses the fact that the EIA has been widely criticized and these criticisms are relevant to a determination of the issues in the claim. This is neither scandalous nor oppressive but rather would aid in the court's understanding of what weight, if any, is to be placed on the EIA.

**[29]** Paragraph 86 describes the typical state of pits after bauxite mining is complete and the fact that they are not suitable for productive agriculture after. The claim in this matter is for a right not only to a healthy but a productive environment, free from damage from environmental abuse and degradation. This speaks directly to why the court's intervention is necessary to prevent the possible recurrence of these



problems. Kings Counsel relies on **Blackstone's Civil Procedure**<sup>6</sup> regarding the relevance<sup>7</sup> of evidence in support of these submissions.

### **The Civil Procedure Rules**

[30] The general rule under Rule 30.3(1) states:

*"The general rule is that an affidavit may contain only such facts as the deponent is able to prove from his or her own knowledge."*

### **Striking Out of Contents of an Affidavit**

[31] Rule 30.3(3) states:

*"(3) The court may order that any scandalous, irrelevant or otherwise oppressive matter be struck out of any affidavit."*

### **Blackstone's Civil Practice:**

*"In a civil trial, the facts in issue are those which the claimant must prove in order to succeed in his claim together with those which the defendant must prove in order to succeed in his defence. The facts in issue in a case are therefore determined partly by reference to the substantive law and partly by reference to what the parties allege, admit, do not admit and deny. They should be identifiable by reference to the statements of case, which should set out the issues on which the parties agree and disagree so that it is known in advance what facts have to be proved or disproved at trial."<sup>8</sup>*

*The word 'relevance' means that that any two facts to which it is applied are so related to each other that according to the common course of events one either taken by itself or in connection with other facts proves or renders probable the past, present or future existence or non-existence of the other (Stephen, Digest*

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<sup>6</sup> (2003) page 562, Paragraph 47.2

<sup>7</sup> Paragraph 47.6

<sup>8</sup> 2003, page 562 para 47.2

*of the Law of Evidence, 12th ed., art. 1.) Whether evidence is relevant is often a question of degree and determined not by strict logic but by common sense and experience.”<sup>9</sup>*

## **Discussion**

**[32]** The court has considered the submissions of counsel and the relevant rules. Regarding the admissibility of evidence, the learned authors on Murphy on Evidence<sup>10</sup> state:

*“Evidence is said to be admissible or receivable if it is relevant and if it is not excluded by the rules of evidence. The rules of evidence are rules of law, and it follows that, unlike relevance, which is determined solely by reference to logical relationship between the evidence and a fact in issue, admissibility is a matter of law. To be admissible, evidence must be relevant, but relevance is not enough to result in admissibility. While evidence must be relevant to be admissible, the converse proposition is not true. Not all relevant evidence is admissible.”*

**[33]** The first claimant is seeking to rely on the impugned aspects of the affidavit filed on its behalf by Hugh Dixon as proof of the truth of the contents. I have read the second Dixon affidavit and tend to agree with the submissions of Mr Braham, KC and Ms Larmond, KC in respect of the paragraphs indicated below.

**[34]** Paragraphs 10 – 14 (first and second sentences), 25 to 27, 33, 77 & 78 are expressions of opinion which are impermissible under the hearsay rule.

**[35]** Paragraphs 82 is scandalous, in addition to being bereft of particulars as to the academics referred to, the date and time of the filming of the town hall meeting and whether there was a live or delayed broadcast of that which was filmed.

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<sup>9</sup> Supra para 47.6

<sup>10</sup> Peter Murphy, 9<sup>th</sup> edn, page 25

**[36]** Paragraph 86 does not give particulars of the company/ies involved. The location of the pits or the source of knowledge.

**[37]** Paragraphs 92 – 96 contain no source of information for the data being given in evidence.

**ORDERS:**

**[38]** The following paragraphs are struck out of the affidavit of Hugh Dixon filed on September 30, 2021 and referred to as the second Dixon affidavit throughout these proceedings:

1. **Paragraphs: 10, 11, 12, 13, 14, 25, 26, 27, 33, 77, 78, 82, 86, 92 – 96.**
2. The first claimant shall file and serve an affidavit which shall become known as the revised Dixon affidavit without the paragraphs set out at order number one, no later than fourteen days of the date herein.
3. Costs of the application are awarded to the defendants to be taxed, if not agreed.