IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 1991/S060

BETWEEN	CHARLES ROBIN HUGH McKENZIE STUART	PLAINTIFF
A N D	NATIONAL WATER COMMISSION	DEFENDANT

Richard Mahfood Q.C. & Charles Piper for the Plaintiff

D. K. Chin See Q.C. & Ingrid Mangatal for the Defendant.

19th, 20th, 22nd April, 11th, 13th 14th, 15th, 18th, 19th July & December 20, 1994.

PATTERSON, J.

In this action, the plaintiff claims damages from the defendant for breach of a covenant in an agreement between the parties dated 30th December, 1970. Alternatively, the plaintiff claims special damages for breach of an agreement contained in a document referred to as "Heads of Agreement", reached between the parties on the 25th August, 1987. The plaintiff also seeks a declaration relating to the enforcement of restrictive covenants in a conveyance of land dated the 31st December, 1970, an injunction to restrain the defendant from further breaches of the covenant, interest on such sums as may be awarded, costs and any further or other relief. By way of counter-claim, the defendant seeks a declaration that the purported restriction placed on its use of water from a stream is "void and/or ineffective and/or invalid". The statement of claim sets out the facts on which the plaintiff relies, and since those facts are for the most part admitted by the defendant, I shall set out the statement of claim in full and then refer to the defence.

AMENDED

STATEMENT OF CLAIM

1. The Plaintiff is the registered proprietor of the lands comprised in Certificate of Title registered at Volume 1066 Folio 779 of the Register Book of Titles, being the Shaw Park Lands, and which said lands were formerly comprised in Certificate of Title registered at Volume 153 Folio 49 of the Register Book of Titles.

2. The Defendant is a statutory corporation established and existing under and by virtue of the National Water Commission Act, and pursuant to Section 4(2)(c) of the said Act, acquired the waterworks of the St. Ann Parish Council together with the rights and subject to the restrictions and the liabilities of the said St. Ann Parish Council in respect thereof.

3. By an agreement made the 30th day of December, 1970 (hereinafter called "the said Agreement") and made between the Plaintiff of the one part and the St. Ann Parish Council of the other part in consideration of the mutual convenants therein contained, and other good and valuable consideration, the Plaintiff covenanted and agreed inter alia:-

(a) to sell to the St. Ann Parish Council all those three parcels of land part of Shaw Park Estate in the parish of St. Ann being the lots lettered A,B, and C respectively on the Plan of Michael E, Marsh Commissioned Land Surveyor prepared from a survey made on the 30th day of December, 1967 of the respective shapes and dimensions and butting and bounding as appears by the said Plan a copy whereof is attached to the said Agreement and being parts of the land comprised and described in the said Certificate of Title registered at Volume 1066 Folio 779 of the Register Book of Titles (hereinafter called "the said lands")

(b) to transfer the said lands to the St. Ann Parish Council to be used "solely and exclusively" for the purposes contained in the said Agreement

(c) to grant to the St. Ann Parish Council the right to lay

and maintain a pipeline 8 inches in diameter along the course shown on the said Plan for the purpose of conveying water from the said Lot A to Lot C, parts of the said lands

(d) to grant to the St. Ann Parish Council the right to lay and maintain a pipeline 4 inches in diameter along the course shown on the said Plan for the like purpose of conveying water from the said Lot B to the said Lot C parts of the said lands

(e) to grant to the St. Ann Parish Council the right to lay and maintain a pipeline 12 inches in diameter along the course shown on the aforesaid Plan from the said Lot C to the point marked G on the said Plan for the purpose of an overflow and/or clean out pipe to convey surplus and/or drained water from the St. Ann Parish Council's Reservoir on the said Lot C, and to replace same in the river or stream below the point marked E on the said Plan.

4. The water in the streams referred to in paragraph 5 hereof is, and was, at the date of the said Agreement and at the date of the transfer of the aforesaid lots A, B, and C to the Defendant, private water as defined in the Water Act of 1922 in that it was not capable of being applied to the common use of riparian proprietors.

5. In pursuance to the premises, and in consideration of the Plaintiff's Convenants recited in the said Agreement, the St. Ann Parish Council by the said Agreement covenanted and agreed that it would not "at any time abstract more than a total of 750,000 gallons of water per day of twenty-four hours from the streams shown on the said Plan" at the intake points on the said Lots A & B parts of the said lands. It further covenanted and agreed that it would not "in any way and at any time do any act or thing which might in any way whatsoever alter or interfere with the course of the said streams", nor would it "in any way other than by the said abstraction of water therefrom, permit or do any act or thing which might reduce or diminish the flow of water in the said streams to an amount less

than 600,000 gallons per day of twenty-four hours when measured at point E on the said Plan".

6. The parties of the said Agreement mutually agreed that the terms of the said Agreement should be endorsed on the Plaintiff's Certificate of Title registered at Volume 1066 Folio 779 of the Register Book of Titles in substitution for entry number 32544 of Transfers and that the transfer of the said lands to the St. Ann Parish Council as well as further transfers of lands part of Shaw Park affected by the said Agreement should be expressed as being subject to the terms of the said Agreement.

7. The Plaintiff duly executed a transfer of the said land in consequence of which Certificate of Title registered at Volume 1080 Folio 814 of the Register Book of Titles was issued by the Registrar of Titles in the name of Four Rivers Development Company Limited (the "Company"), a company incorporated under the laws of Jamaica and having its registered office in Ocho Rios in the parish of St. Ann.

8. The Company by Transfer dated the 31st day of December, 1970 transferred the said lands comprised in Certificate of Title registered at Volume 1080 Folio 814 of the Register Book of Titles to the St. Ann Parish Council and such Transfer was specifically made subject to the said Agreement in terms set out in the Second Schedule to the said Transfer, namely:-

> "The rights granted by the said LIEUTENANT COLONEL CHARLES ROBIN HUGH MCKENZIE STUART to the SAINT ANN PARISH COUNCIL in terms of the said Agreement shall run with the said lands and enure to the benefit of the SAINT ANN PARISH COUNCIL its Assigns and Transferees BUT SUBJECT NEVERTHELESS to the reservations covenants and obligations in favour of the said LIEUTANANT COLONEL CHARLES ROBIN HUGH MCKENZIE STUART his heirs successors assigns and transferees contained in the said Agreement deposited herewith as Miscellaneous No.271638 of Transfers."

9. By virtue of the foregoing, the Plaintiff avers that the covenants contained in the said Agreement and on the part of the Defendant to be performed and observed are:

(i) negative in nature

(ii) intended to be for the benefit of the remainder of the Shaw Park lands registered at Volume 1066 Folio 779 of the Register Book of Titles, which lands have remained and continue to be in the ownership and possession of the Plaintiff.

10. On the 6th November, 1981, the Plaintiff's Attorneys-at-Law wrote to the Secretary of the St. Ann Parish Council stating that they had recently learnt that the said Parish Council had installed new pipelines "whereby the draw-off is likely to exceed 750,000 gallons of water per day of twenty-four hours, and to leave our client with less than 600,000 gallons per day of twenty-four hours" as provided in Clause 2(a) of the said Agreement. The said Attorneys-at-Law further stated in that letter that the matter was most serious and requested that the draw-off "be immediately restricted to not exceeding 750,000 gallons per day of twenty-four hours".

11. By reply dated 26th November, 1981, the Secretary of the St. Ann Parish Council stated, inter alia, "I wish to assure you that the Council has no intention to do in terms of the Agreement, without seeking the necessary permission from your client".

12. As a result of an article appearing in the issue of the Sunday Gleaner of 17th January, 1982, the Plaintiff's Attorneys-at-Law again wrote to the Secretary of the St. Ann Parish Council on 26th January 1982, the Plaintiff's Attorneys-at-Law again wrote to the Secretary of the St. Ann Parish Council on 26th January 1982 regarding the abstraction of more than 750,000 gallons of water per day and thereafter continued to press the St. Ann Parish Council and the Defendant to desist from their wrongful abstraction of water.

13. On 11th August, 1987, a letter was written to the Attorneys-at-Law for the Plaintiff by the Managing Director of the Defendant

repeating earlier apologies and requesting "a final on the spot meeting in order to settle this long outstanding matter". Resulting from this letter a meeting was held on 25th August 1987, and an agreement entitled "Heads of Agreement" was reached and recorded in writing and signed by the Plaintiff and the Chairman of the Defendant acting on behalf of the Defendant.

14. By the Heads of Agreement arrived at on 25th August 1987 the then Chairman of the Defendant agreed on behalf of the Defendant agreed on behalf of the Defendant:

(a) to recommend that the Plaintiff and the Company "be paid 50% of the claim of One Million Four Hundred and Ten Thousand Six Hundred and Seventy Three Dollars ($1,410,673.00) for excess water used up to the 16th August 1987". The Heads of Agreement stated that this would be acceptable to the Plaintiff and the Company if offered. The offer was duly made and accepted and the amount of Seven Hundred and Five Thousand Three Hundred and Eighteen Dollars and Fifty Cents ($705,318.50) was paid by the Defendant to the Plaintiff.

15. The parties to the aforesaid Heads of Agreement of 25th August 1987 further agreed inter alia -

a) "that for a period not exceeding six months from 17th August 1987, no charges would be made for excess water used whilst the above two (2) negotiations are proceeding. However if said negotiations are not completed at the end of said period, then excess water used will be charged to NWC at $5.00 per one thousand (1000) gallons"

b) that "excess water" means the quantity used over 750,000 gallons per day of twenty-four hours

c) "that the parties hereto agree to proceed with the implementation of these Heads with due expedition".

16. Notwithstanding the covenants on the part of the St. Ann Parish Council set out in paragraph 3 above and the other covenants of the said Council and the benefits granted to it by the Plaintiff, all of which were contained in the said Agreement and Transfer respectively

(which said obligations and benefits were acquired by the Defendant pursuant to the National Water Commission Act), the Defendant knowingly and in reckless and deliberate breach of its covenant not to abstract more than 750,000 gallons of water per day of twenty-four hours, abstracted not only the said 750,000 gallons per day, but an additional 1,302,350 gallons of water per day of twenty-four hours from the 17th day of February 1988 (the end of the aforesaid period not exceeding six months from the 17th August, 1987) until the 28th day of December 1990.

17. The Plaintiff avers that:-

a) the agreed value as at the 17th August 1987, of the "excess water" used by the Defendant was $5.00 per 1000 gallons per day of twenty-four hours;

b) the Defendant owes the Plaintiff for "excess water" used by the Defendant for the period from:

(i) 17th February 1988 to the 28th day of December 1990 at the rate of 1,302,350 gallons per day of twenty-four hours at an agreed value of $5.00 per 1000 gallons.

(ii) 29th December 1990 to the 17th March 1994 at the rate of 128,230 gallons per day of Twenty-Four hours at an agreed value of $5,00 per 1000 gallons and continuing

18. Correspondence between the parties or the Attorneys-at-Law for the Plaintiff and the Company and the Defendant continued through to the end of 1990, and a number of meetings were held with the Chairman of the Defendant in an effort to arrive at an amicable settlement of the matter.

19. The last meeting with the Defendant was held at the offices of the Defendant on or about the 14th September 1990 at which were present the Chairman of the Defendant, an officer of the Defendant and the Attorney-at-Law for the Plaintiff. At that meeting certain proposals were made to settle the matter which were agreed to by the Chairman of the Defendant and the Plaintiff's Attorney-at-Law,

subject, however, to the Chairman receiving the approval of his Board and the Attorney-at-Law receiving the agreement of the Plaintiff.

20. On 19th September 1990, the said Attorney-at-Law wrote to the Chairman of the Defendant informing him that the proposals had been accepted by the Plaintiff, but on the 29th October 1990, the Chairman of the Defendant wrote to say that "the matter was discussed at length by the Board at its meeting on Monday 22nd October 1990, and the decision was taken that it should be resolved in the courts as there are a number of areas which require precise legal decisions".

21. By reasons of the foregoing, the Plaintiff claims:

1. Damages for breach of the covenant in the Agreement of 30th December 1970 and referred to in paragraphs 3, 4 and 5 hereof.

2. Alternatively, damages for breach of the Heads of Agreement referred to in paragraphs 14, 15, 16 and 17 hereof on the following basis:

(i) From 17th February 1988 to 28th December, 1990
1045 days x 1,302,350 gallons per day
of 24 hours x $5.00 per 1000 gallons = $6,804,778,70

(ii) From 29th December, 1990 to 17th March, 1994
1174 days x 128,230 gallons per day
of 24 hours x $5.00 per 1000 gallons = $752,710.10

Total $7,557,488,80

AND CONTINUING

3. A declaration that the Plaintiff, his heirs, successors, assigns and transferees are entitled to enforce against the Defendant the restrictive covenants referred to in the Second Schedule to the Transfer dated the 31st day of December 1970.

4. An injunction restraining the Defendant from further breaches of the covenant not to abstract more than 750,000 gallons of water per day of twenty-four hours from the streams shown on the Plan attached to the

Agreement of 30th December 1970, which said Agreement contains the aforesaid covenant.

5. Interest on such sum as may be awarded to the Plaintiff by this Honourable Court for such period as this Honourable Court may deem fit.

6. Costs.

7. Such further or other relief as is just."

The defendant denies para.4 of the statement of claim and says:-

> "That the water in the stream referred to therein is public water flowing in a public stream from the watershed, running underground to entombment A & B where it springs to the surface and continue in a defined channel to the sea. This water vests in the Crown, pursuant to the provisions of the Water Act."

The defendant, while admitting paras. 5, 6, 7, & 8 of the statement of claim, nevertheless avers that:-

> "the agreement, covenants, and transfer therein referred to are ineffective and invalid in law in so far as they purport to limit the defendant's predecessor in title in its abstraction of water from its own property to 750,000 gallons per day."

The defendant avers further that:

> "the land and water percolating therein belongs to it and will contend that the purported limitation of its use of the water by the plaintiff set out in the said agreement is void and/or invalid and/or ineffective and is not binding on the defendant."

The defendant denies that it acted knowingly or recklessly as alleged in para.16 of the statement of claim, and makes no admission as to the amount of water abstracted. It admits paras. 17, 18, 19, & 20 of the statement of claim but nevertheless pleads that:

> "the sum of $5.00 per 1,000 gallons in respect of water used by the defendant over and above the 750,000 gallons is not a reasonable pre-estimate of any loss suffered by the plaintiff."

Finally, the defendant avers that the plaintiff is not entitled to any of the reliefs or remedies claimed.

The plaintiff, in his reply and defence to counter-claim, joins issue with the defendant on the live issues, and denies that there is an underground stream, but says that if there is, he denies that it flows in a known and defined channel.

Issue was also joined as to the charges for the excess water and the plaintiff denies the defendant's entitlement to the declaration claimed by way of counter-claim, namely, "that the purported restriction of its use of the water aforesaid to 750,000 gallons per day is void and/or ineffective and/or invalid".

In my view, the paramount issue that falls to be determined is whether the water being extracted is public water or private water, and the resolution of all other issues is dependent on the decision arrived at on the paramount issue.

What then is the background to this action? It all commenced in 1934. The district of Ocho Rios and surrounding districts in the parish of St. Ann were desperately in need of a proper public water supply. The Parochial Board for the parish of St. Ann was then the local body responsible to provide such a supply. It entered into an agreement with Flora Julia MacKenzie Stuart to facilitate the acquisition of a "supply of water from a public spring or stream" on the land of the said Mrs. Stuart, known as Milford Stream or Shaw Park Spring, and for the grant to it of certain rights and servitudes in respect of the said land and the water in the said stream. Accordingly certain water works were constructed and the necessary public water system was installed. Sometime around 1951, the plaintiff became the registered proprietor of the land formerly held by Mrs. Stuart, and by an instrument executed on the 13th June, 1951, the terms, covenants and conditions of the original agreement were somewhat altered, but the basic agreement remained intact. Thereafter, from time to time, the parties agreed to variations of the terms of agreement contained in the written document, and eventually, in 1970, a new written agreement was entered into between the plaintiff and the St. Ann Parish Council which consolidated into one instrument all the terms of agreement between the parties.

As a consequence of the 1970 agreement, the plaintiff transferred three lots of land to the St. Ann Parish Council. Two of those lots are those from which water springs, and are those on which entombments have been built, (hereinafter referred to as "A & B"). Pipes lead from both entombments carrying water to a reservoir built on the third lot. From that reservoir, water is supplied to Ocho Rios and its environs. It is common ground that a stream flows from entombment A and was joined at some time by another stream from entombment B; this is borne out by the pleadings, and one stream continues through land retained by the plaintiff and land owned by other proprietors and eventually to the sea. It was agreed and convenanted by the St. Ann Parish Council, its assigns and transferees, "that it will not at any time abstract more than a total of 750,000 gallons of water per day of twenty four hours from the streams shown on the said Plan at the Grantee's intake points on Lots A and B aforesaid, nor will it in anyway and at any time do any act or thing which might in any way whatsoever alter or interfere with the course of the said streams nor will it in any way other than by the said abstraction of water therefrom permit or do any act or thing which might reduce or diminish the flow of water in the said streams to an amount less than 600,000 gallons per day of 24 hours when measured at point "E" on the said Plan".

In effect, the plaintiff transferred to the Parish Council three lots of land and water from two of those lots, which could not exceed, when abstracted, 750,000 gallons per day, and the plaintiff sought to retain the property in the rest of the water which had to be at least 600,000 gallons per day flowing from the said streams. That agreement worked well in 1970, but what was once "the district of Ocho Rios and the surrounding districts" developed into the town of Ocho Rios and its environs. The population increased immensely and with it the necessity for more and more water. The Parish Council, in an effort to satisfy the town's requirements, replaced the pipes from the entombments to the reservoir with larger ones than those

previously agreed on, and consequently by about 1981, it began abstracting more than the agreed 750,000 gallons of water per day from the entombments. This did not find favour with the plaintiff, since he had not been advised of the intended breach of the 1970 agreement, and there was a distinct possibility that he would be left with less than 600,000 gallons of water per day to satisfy his obligations. Discussions between the parties (including the defendant who succeeded the Parish Council in its obligation to supply Ocho Rios with water), continued through the years with a view of their arriving at some agreement. By September, 1986, it was estimated that the abstraction by the defendant was averaging some 1.709 million gallons per day, and so by a letter dated 28th November, 1986, the plaintiff pressed the defendant to resolve between them:-

"(1) Control of the water being abstracted by you which as above, far exceeds that which was agreed between Colonel Stuart and the St. Ann Parish Council

(2) Compensation for the surplus water which you have been drawing off

(3) Compensation for the water which you legitimately and reasonably anticipate you will need to abstract."

It will be seen that the plaintiff is not now merely claiming property in the water, but is seeking to be compensated for any amount extracted over and above the agreed quantity of 750,000 gallons per day. By the 27th April, 1987, based on the meter readings from two of three outlet pipes, the defendant was presented with a bill for $761,795 being the amount owing for an overdraw over the period 2nd December, 1986 to 21st April 1987 of 152,359 units of 1000 gallons at $5.00 per unit. Up to then, it does not appear that the parties had reached any definite agreement and it was not until the 25th August, 1987 that they arrived at an agreement which was embodied in a document which reads:-

"Heads of Agreement arrived at on 25th August, 1987 for record and reference.

(1) That Chairman of N.W.C. is prepared to recommend that

Stuart Four Rivers be paid 50% of the claim of, $1,410,673.00 for excess water used up to 16 August, 1987. This would be acceptable to Stuart Four Rivers if offered (Rec'd Sept. 9, 1987)

(2) That Stuart /Four Rivers are prepared to negotiate for the sale to N.W.C. of their land and water rights 1 plant and Four Rivers water supply system at a price to be negotiated based on valuations to be made with expedition by valuators of Government and their nominated valuators.

(3) That for a period not exceeding six MONTHS from 17 August 1987 no charge would be made for excess water used whilst the above (2) negotiations are proceeding. However if said negotiations are not completed at the end of said period then excess water used will be charged to N.W.C at $5.00 per ONE THOUSAND (1000) gallons.

(4) That "excess water" means the quantity used over 750,000 gallons per day of 24 hours.

(5) That the payment referred to in (1) above be made by N.W.C. without delay on acceptance of the offer.

(6) That the parties herein agree to proceed with the implementation of these Heads with due expedition."

Nothing seems to have been done by the defendant pursuant to the agreement of the 25th August, 1987, although the plaintiff was pressing for the implementation of its terms. However, on June 10, 1988, the defendant informed the plaintiff by letter that:-

> "It has now been brought to our attention that you are not in fact the owner of the water rights that you proposed selling us. With this knowledge it would therefore be inappropriate for us to continue discussions towards a purchase in this matter."

On July 8, 1988, in reply to a request for payment of the bills submitted by the plaintiff, the defendant informed the plaintiff that:-

> "Finally, the matter of payment of submitted bills for water abstracted by the Commission does not arise given our position stated above."

Subsequent negotiations with a view to prevent litigation and to arrive at an amicable settlement came to naught; consequently, the parties decided to have their day in Court.

It is agreed that the critical question to be decided is whether or not the water which is being abstracted from entombment A and B is public or private water. The plaintiff's claim is predicated on the ground that it is private water and that its use is governed by S.3 of the Water Act ("the Act) which provides:-

> "3. The sole and exclusive use of private water shall belong to the proprietor of the land on which it is found."

Consequently, the plaintiff is saying that at the time of the 1970 agreement, he was at liberty to enter into a binding contract with respect to the use of his private water, and the covenant by the St. Ann Parish Council that it would not at anytime abstract more than 750,000 gallons of water per day from the entombment is binding on the said Parish Council and its successor, the defendant.

The defendant, on the other hand, is contending that the water is public water flowing in a public stream, and the property in such water does not belong to anyone - it is the use that is important, and the Act, which codifies the common law, vests the water in the Crown and sets out its use. Council for the plaintiff did not join issue with the defendant's contention that the Act is a codifying statute.

In construing the relevant provisions of the Act, it is best to examine firstly its language in order to determine its meaning, without the aid of the learning to be garnered from the vast number of cases cited in arguments. In my view where it is submitted that a statute is a codifying one, it would be wrong to assume that the statute is an embodiment of the previous common law; Parliament may have altered the common law. It is permissible, however, to resort to earlier relevant authorities and to compare the provisions of the statute with the common law decisions, and where there has been no alteration in the provisions of the statute, to pray in aid the common law decisions in order to arrive at the meaning of the statute. If there is an irreconcilable conflict between the common law and the

statute, then the common law decisions will serve no useful purpose. I am guided by the principle of construction stated by Sir John Romilly M.R. in Minet v. Lennan (1855) 20 Beav. 269 that:

> "The general words of the Act are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be applied to those words consistently with the intention of presenting the existing policy untouched."

With these considerations in mind, I turn now to the relevant provisions of the Act with a view of deciding on its construction.

The Act ascribes the following meanings to the following expressions:-

"public stream" - a natural stream of water -

(a) which in ordinary seasons flows in a known and defined channel (whether or not such channel is dry during any period of the year); and

(b) which is capable of being applied to the common use of riparian proprietors.

A stream of water which fulfils these conditions as to part of its course only shall be deemed to be a public stream only as regards such part;"

"riparian land" - land through which, or along the boundary of any portion of which, a public stream flows;

"riparian proprietor" - the proprietor of riparian land;

"normal flow" - the average flow of a public stream other than so much of such flow as may be occasioned or caused by floods due to rainfall;

"private water" - all water, not being water of a public stream, which rises naturally on any land or which falls or naturally drains on to any land, so long as it remains on such land and does not join a public stream;

"storm water" - any water flowing in a public stream in excess of the normal flow;

"public water" - all water, other than storm water, flowing in a public stream;

The meaning of the expression "public water" is quite clear. It is any kind of water, with the exception of storm water, which is flowing in a public stream. The qualifying conditions are:-

(1) It must be water. The ordinary meaning of "water" is intended.

(2) Such water must be flowing, that is to say, it must not be stagnant or motionless, but must be moving along in the natural course of things.

(3) Such water must be flowing in a public stream, and I shall examine the meaning of public stream in due course.

But not all water that is flowing in a public stream qualifies as "public water". It is common knowledge that there are times when the average flow of water in a stream is temporarily increased as a result of floods due to heavy rainfall. The Act defines such excess water as "storm water"; and excludes it from the definition of public water. So both "storm water" and "the normal flow of water" may admix in a public stream, but then, only the normal flow will qualify as public water. The clear meaning to be attributed to the expression "normal flow" is set out above, and I need say no more. What then is meant by "a public stream"? In my view, the following conditions must exist:-

(1) There must be "a natural stream of water". This means that the water must flow naturally from a source, and run along naturally to a final destination. Water which flows from some artificial source will not satisfy this condition.

(2) There must be a natural stream of water "which in ordinary seasons flows in a known and defined channel (whether or not such channel is dry during any period of the year." The water must flow between banks that clearly demarcate its course from its source to its final destination. In other words, the stream of water

must flow naturally between confined banks from its source to its mouth during the ordinary seasons. It is plain that the legislators had in mind the excess water that is occasioned or caused by floods due to rainfall and which at times may cause a stream to overflow its banks and flow temporarily along another channel. In my view such a temporary additional part of the stream's course would not fulfill this condition of a public stream. The known and defined channel of the stream may be either along the surface of land or subterranean. It is obvious that water which is not flowing cannot be a part of a public stream. Thus water which is merely percolating through the soil cannot be classified as a public stream, nor will an underground or surface lake or pond or any other collection of water which does not flow in a defined channel. Water which oozes out of the earth and settles on the surface is not a stream within the meaning of the Act. Even if such water is running over the land, so long as it is not in a known and defined channel, it cannot satisfy this condition of a public stream. The fact that the channel may be naturally without water for any given period does not derogate from its classification as a stream when the flow of water returns.

(3) It must be a natural stream of water "which is capable of being applied to the common use of riparian proprietors. This condition is satisfied whenever the defined channel along which the water flows passes through or runs along the boundary of land of at least two riparian proprietors.

The Act sets out clearly the rights of "every riparian proprietor" to the use of public water. Section 6 of the Act provides as follows:-

"6. Every riparian proprietor shall have the right of impounding, diverting, and taking any public water for primary use, that is, for domestic use and the watering of stock necessary for ordinary farm and

pen-keeping requirements.

The Minister shall further authorise in terms of this Act, such proprietor to divert, impound, and take public water -

(a) for secondary use; that is -

(i) for the irrigation by such proprietor of his riparian land;

(ii) for the watering of stock other than that necessary for ordinary farm and pen-keeping purposes by the use of an amount of water equivalent to that which he would as herein-before provided for be entitled wholly to consume by irrigation;

(b) for tertiary use, that is, mechanical and industrial purposes.

The rights of riparian proprietors to the use of public water extends to all proprietors equally, from the source of the stream to its mouth. I adopt what was said in argument in Embrey v. Owen (1851), 6 Exch. 353 at 359:

> "Rivers flow for the benefit of all persons through whose land they pass, and not for the benefit of those persons only whose lands lie at the mouth of the stream."

and I would add "or at the source of the stream."

In that same case, the action of The Magistrates of Linlithgow v. Elphinstone (3 Kames' Discussions, p.331) was mentioned where Lord Kames said:-

> "At advising this cause, much darkness was occassioned by a notion which some of the Judges unwarily adopted, as if a river could be appropriated like a field or horse. A river, which is in perpetual motion, is not naturally susceptible to appropriation; and were it susceptible, it would be greatly against the public interest that it should be suffered to be brought under private property."

I think that both the plaintiff and the defendant are agreed that public water flowing in a stream is not capable of private owner-

ship while it flows along. However, if the stream has its source and mouth within the confines of riparian land of one only proprietor, the stream could not be classified as a public stream and consequently, the water would not be public water.

I turn now to the meaning which the Act attributes to the expression "private water". It is clear that water of a public stream is excluded. This means if water, other than storm water, flows naturally in ordinary seasons in a known and defined channel which passes through riparian land of two or more riparian proprietors, it is excluded from the expression "private water". It seems therefore that "private water" includes for the most part water which is confined to the land of one proprietor. It may be a spring, which forms a pond or lake on the land, it may be a collection from rainfall, or it may be water which oozes out of the soil and remains stagnant or flows over the land in no defined or known channel. It may even be water in a stream that remains on the land of a single proprietor, having its source and mouth on that land. Water percolating in the earth in no defined channel, or in a subterranean lake, would qualify as private water. Storm water flowing in a public stream is not public water but nevertheless, it vests in the Crown, and it would not be considered private water unless it overflows the banks of the public stream and comes on the land of a single proprietor and the Minister or the Water Court authorises its storage and use. (S.15 of the Act). In such a case, it would be private water so long as it remains on the land and until it rejoins the public stream. Again, if private water drains naturally from the land of a single proprietor to that of another, without taking any known or defined channel, then so long as it remains on that other proprietor's land and does not join a public stream, it will be private water.

It seems quite clear to me that private water embraces subterranean water which is not flowing in a stream, that is, in any defined natural water course. The question is, when can it be said that it is no longer private water? In my opinion, the answer must be that it is from the place where it acquires a natural channel and flows into a public stream.

The evidence in the instant case clearly establishes that there is a natural channel with water flowing in it from inside entombment A through land owned by the plaintiff and then continuing in the same natural channel through or along lands of a number of riparian proprietors until it finally ends at the sea. The natural channel commences in entombment A, just where the water rises to the surface of the earth. The Court was invited to view the water works, and I do not think there is any doubt that such a view is real evidence in the case. It could be clearly seen that both entombments A and B were built at the point where the water came naturally to the surface of the earth and began flowing in defined channels. Although the channel from entombment B was dry, it could clearly be seen to join the stream from entombment A, which was in constant flow. The abstraction of the water was done by pipes which were placed in close proximity to the area just before the water left the entombment and continued to flow down stream. It was plain to see that both entombments were built to restrain the flow of the water from where it comes to the surface thus building up a volume to facilitate easy abstraction.

Mr. Mahfood submitted that the water in entombment A and B is private water. He referred to the Act (S.2) which provides that "a stream of water which fulfils these conditions "(i.e. conditions (a) and (b) in the meaning of "public stream") "as to part of its course only shall be deemed to be a public stream only as regards such part". Mr. Mahfood contends that the meaning which S.2 of the Act attributes to "public stream" is clear and precise and establishes two things:-

(a) The same stream can be private in part and public in part.

(a) It is a public stream in that part only which fulfils the conditions for becoming a public stream.

It seems to me that Mr. Mahfood's argument is flawed. The Act defines and makes a clear distinction between public water, (which is all water, other than storm water, flowing in a public

stream) and private water (which is all water, not being water of a public stream etc). There is no definition of a private stream and consequently, I do not think that a comparison ought to be made between a private stream and a public stream, and I do not agree that the stream can be said to be private in part and public in another part; Sec.2 of the Act does not, in my view, establish any such thing. What it establishes, in my view, is that a stream of water may be public water as to part of its course only, and private water as to another part of its course. For instance, a natural stream of water may flow in a known and defined channel and is capable of being applied to the common use of riparian proprietors for the greater part of its course from its source. But supposing it reaches a point where it flows from there onwards to its mouth through the land of a single riparian proprietor, in such case, it appears to me that the conditions necessary to constitute that part of the stream of water as a public stream would no longer exist, and the water would therefore be private water.

Mr. Mahfood argued that at the point where the water rises in the entombments, and while it remains on that land and until it flows on land where there are common riparian owners, it cannot possibly be contended that the water in the entombments on lots A and B is public water capable of being applied to the common use of riparian owners. If I understand him correctly, his contention is that the water at source and while it remains on that proprietor's land, is private water and does not become public water until it leaves the proprietor's land and joins a public stream which is a stream which flows in a defined channel and is capable of being applied to the common use of riparian owners. He argued that it is clear from the Act that private water only becomes public water in that part only of the stream which fulfils the conditions of a public stream. I do not agree with Mr. Mahfood's contention that the water at the entombments is private water. As I have stated earlier, it can be plainly seen that the water flows in a defined channel from the point where it gushes from the earth at the entombments. It is the plaintiff's evidence that "the channel of the stream is in the earth's crust at a point below the concrete of the encasement," and

that "water flows within the entombment towards the eastern end". It is a natural spring of flowing water from that point, and it continues in a known and defined channel from entombment A through the land of the plaintiff, and as the evidence discloses, through riparian land of various riparian proprietors to the sea. The plaintiff testified further that "Entombment B has water oozing out of the earth's crust, and like Entombment A, it is supplied by an underground stream. Water from entombment B does not run into the Milford stream today - it flows from an overflow at the collection chamber along the earth in a little stream to the Milford stream ..... Before entombment, I do not know if water from that source ran down a defined channel to the Milford stream".

It is plain that the water from the Milford stream is capable of being applied to the common use of the riparian proprietors from its source to its mouth. If Mr. Mahfood is correct that the water at source is private water, then it would mean that the proprietor at that point could at anytime appropriate all the water to the exclusion of all the lower riparian proprietors. But that cannot be so. The Act is, in my view, in accord with the common law position, which was clearly stated in the case of Dudden v. The Guardians of the Poor of the Cluffon Union (1857) English Reports 66 at p.1353. Martin B. had this to say, and I humbly adopt his words:-

> "The owners of lands adjoining a stream, from its source to the sea, have a natural right to the use of the water of it. A river begins at its source, when it comes to the surface, and the owner of the land on which it rises cannot monopolize all the water at the source so as to prevent its reaching lands of other proprietors lower down.

I am satisfied that the Milford stream, the stream in question, is a public stream within the meaning of the Act, flowing from its source at the entombments. I hold that the water flowing in the said public stream is public water, and as such, it "is vested for ever in the Crown in the right of the Island of Jamaica (S.4 of the Act). I further hold that the water is not private water, neither

at the source nor along its channel to the sea, and accordingly, the plaintiff is not now or at any time in the past entitled to the sole and exclusive use of such water. The right that the plaintiff has to use the water is clearly set out in Part 1 of the Act, and it arises by virtue of his being a riparian proprietor, and by virtue of a common right with all persons who may lawfully use the said water. He has no property in the water. Water is not the subject of property.

What then is the legal effect of the covenant of the defendant's predecessor in title limiting its extraction of water from the entombments to no more than 750,000 gallons per day of twenty-four hours? It is clear from the evidence that this covenant was entered into by the parties with the intention that it would run with the land at Lots A and B which were being conveyed by the plaintiff to the defendant, but as to whether it was for the benefit of the remaining land retained by the plaintiff, is rather doubtful. However, the uncontroverted pleadings were that the covenants contained in the agreement are "intended to be for the benefit of the remainder of Shaw Park lands registered at Volume 1066 Folio 779 of the Register Book of Titles, which lands have remained and continue to be in the ownership and possession of the plaintiff." The covenant seeks to restrict the defendant in its use of the water, but I have found that the water is public water. As such, it "is vested for ever in the Crown in the right of the Island of Jamaica". It is the Minister alone in those circumstances who "may authorize its use, diversion and apportionment, subject to the terms of this Act and in conformity with any regulations framed thereunder" - (S.4 of the Act). It follows, therefore, that the plaintiff lacked the capacity to enter into such a covenant, and the covenant is not binding on the defendant. Perhaps it is for this reason why the plaintiff abandoned his claim for damages for breach of the covenant and relied on the alternative claim under the "Heads of Agreement".

The "Heads of Agreement" were arrived at between the parties on the 25th August, 1987; the relevant clause provides that if certain negotiations were not completed within a six months period,

then "excess water used will be charged to National Water Commission at $5.00 per one thousand (1000) gallons", and that "excess water means the quantity used over 750,000 gallons per day of 24 hours". It seems to me that this agreement was predicated on an assumption that the water was private water, that the sole and exclusive right to the use of any amount over 750,000 gallons of water resided in the plaintiff, and that but for such an assumption, the agreement would not have been entered into. It is obvious that the parties had in mind the covenant contained in the 1970 agreement, and that is why the defendant agreed to pay the plaintiff for the excess water. However, I have found that the water is public water and that the plaintiff could not have any property in it nor was he entitled to the sole and exclusive use of such excess water. The plaintiff had nothing to sell, and I agree with Mr. Chin See that the agreement is a nullity. The subject matter of the agreement was never at any time the property of the plaintiff, a fundamental fact that both parties were mistaken about. The effect of such a common mistake, in my view, renders the agreement null and void.

By reason of the foregoing findings, the plaintiff's claim against the defendant must fail, and I hold that the plaintiff is not entitled to the sum claimed or any part thereof. Mr. Mahfood did not pursue the claim for damages for breach of the covenant in the agreement of the 30th December, 1970 nor the claims for a declaration and an injunction. Looking at the Heads of Agreement, it is plain that the parties did not consider a breach of the covenant which restricted the abstraction of more than 750,000 gallons of water per day as being worthy of injunctive relief. Instead, the breach which the plaintiff allowed and which he apprehended would continue, was treated by the parties as one that should be compensated for by payment of money, and in those circumstances, the Court would not grant relief by way of an injunction.

I turn now to the counter-claim whereby the defendant "claims a declaration that the purported restriction of its use of the water aforesaid to 750,000 gallons per day is void and/or ineffective and/

or invalid." This claim hindges on the resolution as to whether the water at entombments A and B is public or private water, and I have already decided that the water is public water. Accordingly, it vests in the Crown in the right of the Island of Jamaica, and it is only the Minister who has the right to authorise its use or apportionment otherwise than the Act provides. Any purported limitation on its use by the plaintiff is null and void. In my judgment, the defendant is entitled to the declaration claimed.

There will be judgment for the defendant on the claim and on the counter-claim, with costs to be agreed or taxed.