JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 3/95

COR: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J A
THE HON. MR. JUSTICE BINGHAM, J A (AG)

BETWEEN	CHARLES ROBIN HUGH McKENZIE STUART	PLAINTIFF/ APPELLANT
AND	NATIONAL WATER COMMISSION	DEFENDANT/ RESPONDENT

Richard Mahfood Q. C. and Charles Piper instructed by Hart, Muirhead & Fatta for the appellant.

Dennis Morrison Q. C. and Ingrid Mangatal instructed by Dunn, Cox, Orrett & Ashenheim for the Respondent

May 6, 7, 8, 9 & July 31, 1996

RATTRAY, P

On the 20th of December, 1994 Patterson J as he then was entered judgment for the defendant and ordered a declaration in its favour in respect of the use of water from a water supply source in Ocho Rios, St. Ann. From this judgment the plaintiff has appealed.

The history of the matter is of some importance. The plaintiff was at all material times the registered owner of property known as Shaw Park Estate, situated in Ocho Rios in the parish of St. Ann. On the 30th of December, 1970 the plaintiff entered into an agreement with the St. Ann Parish Council whereby he sold to the Parish Council

three parcels of land identified as lots A B & C part of the aforementioned Shaw Park Estate. The identification was made on a plan. The agreement also conferred on the Saint Ann Parish Council the right to lay and maintain pipelines along specifically identified routes under and across the said Shaw Park Estate for the purposes of conveying water between the lots A and B to a reservoir on lot C. At that time the Parish Council was the legal water authority supplying water to the general public in that area. The purpose of the agreement was to allow the Council to abstract water from streams on the property which said water would be stored in a reservoir built by the Council on lot C. The water would be piped for distribution to the general public. Entombments were built on Lot A and Lot B and the water emerged from the underground into those entombments and was piped by the Parish Council into the reservoir for the purpose stated. Under the agreement the Council covenanted inter alia, that it would not at any time abstract more than a total of 750,000 gallons of water per day of 24 hours from the streams, measured at an intake point identified on the lots sold. It covenanted further not to do anything which might in any way alter or interfere with the course of the streams or reduce or diminish the flow of water in the streams to an amount less than 600,000 gallons per day of 24 hours when measured at a specified location marked on the plan. The water was to be used exclusively for the purposes of a public water supply. The Council also agreed to supply the plaintiff through specified pipelines with water from its installation to a dairy shed on the plaintiff's land and to other parts of Shaw Park free of cost.

The three parcels of land were duly transferred to the Council and the transfers were made subject to the agreement in the following terms:

> "The rights granted by the said LIEUTENANT 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 LIEUTENANT 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."

The arrangements seemed to have proceeded smoothly until 1981, when by letter dated 6th November, 1981 from the plaintiff's attorney-at-law to the Council, complaint was made that the plaintiff had recently learnt that the Council had installed new pipelines -

> "whereby the draw off is likely to exceed 750,000 gallons of water per day of 24 hours and to leave our clients with less than 600,000 gallons per day of 24 hours."

The Council assured the plaintiff that it had no intention of exceeding the agreed draw off except with the consent of the plaintiff.

In the meantime the National Water Commission, the defendant had by statutory authority acquired the waterworks of the Council together with the rights and subject to the restrictions and liabilities of the Council. The plaintiff through his attorneys-at-law and probably, alerted by a news report on the increasing demand for water supply in the Ocho Rios area which was rapidly developing in population terms requested a meeting with the Council as he feared that additional draw off from the source would increase extraction beyond the amount stipulated in the agreement and indeed diminish the amount of water left for the plaintiff's purposes.

The fact of the statutory obligation of the defendant to provide a satisfactory public water supply for the town and its environs of more than the agreed 750,000

gallons per day led to much correspondence and discussion between the parties and a claim by the plaintiff for payment to him by the defendant for water extracted in excess of the daily agreed quantity. Eventually by Heads of Agreement arrived at on the 25th of August, 1987 the account submitted by the plaintiff to the defendant for excess water already extracted was settled by payment of $705,318.50 by the National Water Commission to the plaintiff and agreement made for further payment with respect to excess water extracted in the future at a rate of $5.00 per 1000 gallons per day of 24 hours, after the expiry of a moratorium of five months from the 17th of August, 1987. The Heads of Agreement further recorded the willingness of the plaintiff to negotiate:

> "For the sale to NWC of their land and water rights, one 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."

In pursuance of this Heads of Agreement, and in furtherance of negotiation, correspondence continued between the parties, interrupted by letter from the Chairman of the National Water Commission to the plaintiff's representatives dated June 10, 1988 stating inter alia:

> "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."

The plaintiff in March 1989 lodged a caveat against the parcels of land registered in the name of the St. Ann Parish Council to protect his interest under the agreement of 1970 by which the parcels of land had been transferred by him to the Parish Council. In that month the plaintiff's attorney-at-law wrote to the succeeding Chairman of the

National Water Commission, in an attempt to settle the issue amicably and discussions recommenced, but all this came to naught as the Board of the Water Commission decided that the issue should be resolved in the Courts. The Water Commission had received legal advice that the water was not private water, but public water and the plaintiff was not entitled to charge for its extraction.

Consequently, the plaintiff brought action in the Supreme Court claiming:

> (a) damages for breach of contract in an agreement between the plaintiff and the St. Ann Parish Council of the 30th of December, 1970, alternatively
>
> (b) damages for breach of the Heads of Agreement in respect of payment for excess water extracted at the rate of $5.00 per 1000 gallons per day of 24 hours;
>
> (c) a declaration of the entitlement of the plaintiff, his heirs successors and assigns to enforce the covenants against the defendant;
>
> (d) an injunction restraining the defendant from extracting more than 750,000 gallons per day of 24 hours from the streams.

There was also the usual consequential claim to interest and costs.

To this claim the defendant averred that:

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

The defendant further averred 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."

and:

> "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 be void and/or invalid and/or ineffective and is not binding on the defendant.

The defendant in his defence, stated that if, which is denied, there is an underground stream, it did not flow in a known and defined channel.

The main issue therefore which arose for determination by the Court was whether the water was public water or private water.

An agreed bundle of documents including letters, transfers, agreements and titles was exhibited as evidence, and makes clear the history of the matter. These lands with which we are concerned were originally registered at Volume 153 Folio 49 of the Register Book of Titles. There is an instrument under the Registration of Titles Law made on the 24th of November 1934 between Flora Julia McKenzie Stuart, grantor, wife of Herbert Cramer Stuart and the grantee, the Parochial Board of St. Ann (the predecessor to the St. Ann Parish Council) with the mortgagees as parties, whereby Mrs. Stuart, the then owner of the said lands granted to the Parochial Board the right to extract for a term of 99 years from the said stream at an intake point a quantity of water not exceeding 6,000 gallons per hour. The grantor agreed that she would not object to any application by the grantee (i.e. the Parochial Board) to the Governor in Privy Council, for the right to take water from the said stream as aforesaid up to an amount not exceeding 6000 gallons per hour or require any such application to be referred to a Water Court or require any compensation other than as set out in

the agreement. The consideration was a nominal One Shilling per annum. She also thereby granted to the Board for the term of 99 years from the date of the instrument subject to the payment to her by the grantee of an annual rent of One Shilling per annum a temporary servitude of passage of water and a temporary servitude of abutment under and by virtue of the Water Law 1922 upon the terms and conditions contained in the instrument for the purpose of taking, diverting and using the said water from the said stream and conveying the same across the said lands.

It is further instructive that this instrument recites:

> "and whereas the grantees entered into agreement with the grantor to facilitate the acquisition by the grantees of a supply of water from a public spring or stream on the said lands known as Milford Stream or Shaw Park Spring and for the grant of certain rights and servitude in respect of the said lands." [Emphasis added]

It is of note that within the earliest document exhibited, the registered owner of this said land referred to the supply of water as being from a public spring or stream. Further as to the history of the matter, by letter dated February 28, 1984 that history is recognized and the plaintiff wrote to the St. Ann Parish Council as follows inter alia:

> "The extent of the co-operation between my father and mother and subsequently myself and your Council since 1923, when the first 3" pipe was installed in the entombment, is on record and for my part remains in full measure as also my understanding of the problems resulting from current shortages of water for this developing community."

The reference to his father and his mother no doubt relates to Flora Lillian McKenzie Stuart and her husband Herbert Cramer Stuart.

In the determination of whether the water extracted is from a public stream or is private water, the evidence given by the plaintiff and his witnesses at the trial as to the course of the stream and the manner in which it emerges to the surface of the ground is also relevant. Describing the water which comes up into the entombment, the plaintiff stated in respect of Entombment A:

> "Water passes from the bottom of the entombment into the stream. The channel of the stream is in the earth's crust at a point below the concrete of the encasement."

He continued:

> "Entombment B has water oozing out of the earth's crust and like entombment A it is supplied by an underground stream."

And further :

> "I know one Frank Wilmot, now dead. He owned land above the church on the Parry Town Road and above that is Thomas Wilmot's, land. I know that the Milford Stream runs through those lands, through the church land under the road through Mrs. Browns/St. Johns School and onward to the sea."

And in reference to the plan:

> "On the plan there is a blue line running from entombment A to point B - and it represents the channel of the water in Milford Stream between these two points and it continues from point E as already described. That stream has been there from as long as I recall from my boyhood days. "

And further:

> "I consider myself a man of honour, I would not attempt to sell water unless I honestly believe the water was my property. That belief goes beyond the

> agreement of December 1970. I honestly believe that the water oozing from the ground was owned by me and that belief has continued."

In cross-examination he was asked:

> "Was the reason for entering into the contract in the specific terms therein due to your belief that the water belong to you?
>
> Answer: Yes sir."

The hydrogeologist, Mr. Michael Norman Whyte, called by the plaintiff gave evidence that:

> "Springs have a watershed. Milford stream is one of the many streams that flow to the sea around Ocho Rios."

Plaintiff's witness Mr. Simeon Stuart, stated:

> "Looking at the Plan of the Shaw Park Water supply system in Exhibit 1, water overflows at times from that entombment into the stream, but the stream is always there and it commences at the Entombment A. Water from Entombment B goes in a collection chamber which overflows at all times and that overflow runs to the stream."

He further gave evidence:

> "I am familiar with the Turtle River, the Milford Stream and where the Milford Stream runs. The Milford Stream commences at entombment A and runs through Coyaba, through River House, (a property belonging to Mr. Summerfield), through the district of Milford and through a stone gutter in Ocho Rios and ends adjacent the Jamaica Grand Hotel in the sea, and that has been its traditional course from before Ocho Rios was re-developed."

And further:

> "From the stream leaves the entombment, it maintains a defined channel down to the storm gutter which takes it to the sea by the Jamaica Grande Hotel." [Emphasis added]

The instrument made on the 13th of June 1951 between the plaintiff and the Parochial Board of St. Ann which is the St. Ann Parish Council refers to the instrument of the 28th November, 1934 as the principal instrument and recites the right of the defendant:

> "to take an amount not exceeding 6000 gallons per hour from a public stream or spring on the lands of the grantor known as Milford Stream or Shaw Park Spring."

The main remedy sought by the plaintiff is for the payment of certain sums for excess water extracted. The second remedy for a declaration rests upon the restrictive covenant referred to in the Second Schedule to the transfer to the Parish Council dated the 31st day of December, 1970. That Second Schedule reads as follows:

> "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 LIEUTENANT 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."

Miscellaneous 271638 is noted on the title to the property at Volume 1080 Folio 814 in the name of Four Rivers Development Company Limited of which the plaintiff is chairman and which was formerly in the ownership of the plaintiff and formerly registered at Volume 153 Folio 46 and reads as follows:

> "No. 271638 of transfers registered on the 10th of February, 1971 from the abovenamed Lieutenant Colonel Charles Robin Hugh McKenzie Stuart to the Saint Ann Parish Council of the rights to lay and maintain pipe lines more fully set out in the instrument together with the covenants and obligations set out therein."

This restriction therefore is a restriction on the title of the property formerly owned by the plaintiff and the relevant lands in this case. An encumbrance on the said title of the plaintiff is No. 32544 of Transfers -

> "grant dated 28th November 1934 from Flora Julia McKenzie Stuart to the Parish Council for the parish of Saint Ann of certain rights of water and also a temporary servitude of passage of water and a temporary servitude of abutment of the terms and conditions set out in the grant and as appears by the plan annexed thereto for a term of 99 years."

What are the restrictive covenants which run with the land purchased by the Parish Council from the plaintiff? There was no evidence before the Court setting out the restrictive covenants in respect to which the plaintiff was complaining of the breach or threatened breach by the defendant. Nor indeed were the acts identified which either threatened or carried out would constitute the breach. The plaintiff is given the right to enter Lot A, the defendant's property for maintaining, repairing and replacing both or either of a 2" or 3" pipe which is placed on the defendant's property for the purpose of supplying water to the plaintiff's property. But there is no allegation that the defendant had sought to prevent the plaintiff from doing this. We can find therefore no evidence of any attempted breach by the defendant of the plaintiff's rights

with respect to the covenant. It would therefore be completely unnecessary to give a declaration in this regard.

The fourth relief claimed is for an injunction restraining the defendant from further breach of the covenant not to abstract more than 750,000 gallon of water per day for 24 hours from the streams shown on the plan attached to the agreement of 30th December 1970. The efficacy of the aforesaid covenant depends upon the establishment of the right of the plaintiff to charge the defendant in relation to the abstraction of more than 750,000 gallons per day of 24 hours or indeed to make such a restriction at all. The determination of this must depend upon whether the water is private water or public water.

The crux of this case therefore lies in that determination. The first instrument dated 28th November 1934 between Flora Julia McKenzie Stuart and the Parochial Board of St. Ann identifies the water supply as from a public spring or stream on the said lands known as Milford Stream or Shaw Park Spring."

The analysis of the evidence given in Court which I have already made shows that the water ran in a well defined channel or stream from where it issues into the surface of the earth on Lot A which is one of the lots transferred by the plaintiff to the Saint Ann Parish Council.

The principal instrument referred to above which grants a term of 99 years, has the grantor agreeing -

> "That she will not object to any application by the grantee to the Governor in Privy Council for the right to take water from the said stream as aforesaid to an amount not exceeding 6000 gallons per hour or require any such application to be referred to a Water Court or require any compensation other than as herein set out ..."

The instrument was clearly referring to the provisions of the Water Law 1922 which then read:

> "4 - 'All water other than private water is vested forever in the Crown in the right of the island of Jamaica and the Governor in Council may authorise its use, diversion and apportionment subjected to in terms of this law and in conformity with any regulation hereunder'."

The existing Water Act presently substitutes 'Minister' for 'Governor in Council'. Since the Governor in Council and the Water Court had no authority or jurisdiction in relation to private water, it is clear that the grantor under the principal instrument did not consider the water to be private water and in fact considered it to be public water.

The Water Court is established under The Water Law 1922 and by section 25 as it then stood -

> "The Governor in Council may appoint one or more Water Courts which shall have jurisdiction to hear and determine disputes in connection with the use, diversion and appropriation of water and such other jurisdiction falls in authority and assigns to such Courts by the law."

Except for slight amendments reflecting our constitutional development replacing the terminology of "Governor in Council" by "Minister" and in some cases "Governor-General" and other slight amendments of no relevance for the present purposes, the Water Law is now on our statute books as The Water Act.

The Water Act defines:

> "public stream" as a natural stream of water -
>
> (a) which in ordinary season 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;
>
> "private water" is defined as -
>
> "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;"

Section 3 of the Act reads:

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

And section 4:

> "4. All water, other than private water, is vested for ever in the Crown in the right of the Island of Jamaica, and the Minister may authorize its use, diversion and apportionment, subject to the terms of this Act and in conformity with any regulations framed thereunder."

Mr. Mahfood Q. C., has urged reliance upon **Chasemore v. Richards** [1843-60] All E R Rep. 77 for his proposition that the water in this particular case is water which oozes through the ground, that it has no defined channel under ground, that it does not flow in a stream at all and that therefore it is percolating underground water which is private water. **Chasemore v. Richards** did recognize per Lord Chelmsford at page 82 that:

> "The distinction between water flowing in a definite channel, and water, whether above or under ground, not flowing in a stream at all, but either draining off the surface of the land or oozing through the underground soil

> in varying quantities and in uncertain directions depending upon the variations of the atmosphere, appears to be well settled by the cases cited in argument."

and that the principles applicable to:

> "... flowing water in streams or rivers, the right to the flow of which in the natural state is incident to the property through which it passes, are wholly inapplicable to water percolating through underground strata, which has no certain course and no defined limit, but oozes through the soil in every direction in which the rain penetrates. There is no difficulty in determining the rights of the different proprietors to the usufruct of the water in a running stream - whether it has been increased by floods or diminished by drought it flows on in the same ascertained course, and the use which every owner may claim is only of the water which has entered into and become a part of the stream. But the right to percolating underground water is necessarily of a very uncertain description."

It is on this basis in our view that water oozing in the manner thus described is private water, but water which springs naturally to the surface of the ground and runs in a defined channel is public water as defined under the Water Act. I do not find myself particularly assisted for the purposes of our determination by the line of cases like **Mostyn v Atherton** [1899] 2 Ch. D. 360 in which the issue is the right of a riparian owner to have his accustomed flow of water not diminished by the activity of the extraction by someone else of water from the upper reaches of the stream, since that is not the issue here but rather the right, if any, in the land owner over whose land the water flows to contract for the sale of the water. No complaint is made of diminution of the water available to lower riparian owners for the legitimate purposes for which they require its use. **Dudden v The Guardians of the Poor of the Clutton** [1857] E.R.

1353 shows that the waters of a natural spring acquire a natural channel from its source to the river, as the evidence establishes in this case. **McCartney v Londonderry and Lough Swilly Railway** [1904] L.R. H.L. 301 is authority for the proposition that a person whose land intersects or is bounded by a running stream does not have a right to sell the water in the stream even if the result of the water being sold does not diminish the supply to lower riparian owners. [Lord Macnaghten at 307-308] . As was said by Parke B in **Embrey and Another v Owen** [1853] 6 ER 353 at page 369:

> " ... but flowing water is publici juris, not in this sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in the sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only."

Patterson J in a careful judgment found that the water which the plaintiff purported to sell to the defendant was public water. He is supported in this finding by the documentary evidence in the instruments exhibited, the viva voce evidence of the plaintiff and his witnesses to which I have referred, by the fact that the water flowed in a known and defined channel, by the provisions of the Water Act and by the several authorities well established upon which he relied and which I have already examined. In addition he had the benefit of a visual assessment on a visit to the locus in quo. He concluded therefore:

> (i) That the covenant by the plaintiff to use only 750,000 gallons per day of 24 hours

> and to leave not less that 600,000 gallons available was not binding on the defendant.
>
> (ii) That with respect to the charge under the heads of agreement that excess water above the 750,000 gallons per day of 24 hours should be paid for by the Water Commission at $5.00 per 1000 gallons, the agreement was predicated on the wrongful assumption that the water was private water.

I agree with his conclusions. The subject matter of the agreement was never at any time the property of the plaintiff but the property of the Crown. He therefore had nothing to sell to the defendant and the foundation upon which the agreement was entered into disappears since the agreement was concluded on a wrongful assumption by both plaintiff and defendant that the defendant had property in the water which he could sell to the plaintiff and which the plaintiff could buy.

The language of Sir G. J. Turner LJ in **Cochrane vs. Willis** [1865-1866] 1 LR Ch. App 58 at page 64 is appropriate when he said:

> "...I have no idea that the Court will enforce such an agreement by which a man, not knowing his rights, gives up property for no other consideration than that a person who in the result had no right to it, should agree not to exercise rights which he assumed that he had."

It is clear that where the contract is entered into by the parties on the basis of an existing state of facts which turns out to be incorrect in terms of ownership of property sold, that contract cannot be further enforced against the party, who on discovery that the vendor had no title or interest in the property which he purported to sell, refuses to honour the contract.

In the words of Sir J L Knight Bruce LJ in **Cochrane Willis** (supra) at page 62:

> It would be contrary to all the rules of equity and common law to give effect to such an agreement."

If a final citation is needed we may leave it in the words of Lord Westbury in **Cooper v Phibbs** [1866] 1 L R H L page 149 at page 170:

> "Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake and misapprehension as to their relative and respective rights, the result is that the agreement is liable to be set aside as having proceeded upon a common mistake."

The allegation of the defendant in paragraph 3 of the Defence and Counterclaim that the agreements and covenants relied upon by the plaintiff as the foundation of its claim is ineffective and invalid in law has been well established.

Patterson J not only dismissed the plaintiff's claim but entered judgment for the defendant on its counterclaim for a declaration that any purported restriction of the defendant's use of the water at its entombments A and B to 750,000 gallons per day is null and void.

I agree with the judgment of the trial judge. Consequently the appeal is dismissed. The order of the court below that:

> "... there be judgment for the Defendant on the claim and on the Counterclaim ad there be a declaration that any purported restriction of the Defendant's use of the water at its entombments A and B to 750,000 gallons per day is null and void, with costs to be agreed or taxed"

is affirmed. Costs of the appeal be the defendant's/respondent's to be taxed if not agreed.

DOWNER, J A

The issue to be decided on appeal is whether Patterson J as he was then, was correct in granting a declaration to the respondent National Water Commission (NWC) which was embodied in its counterclaim in the court below. The terms of the counter-claim were as follows:

COUNTERCLAIM

> "13. By way of counterclaim the Defendant repeats its Defence and 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."

The remedy of a declaration was appropriate as the critical facts were agreed. What was in issue was the consequential legal effect. Also the declaration granted, effectively disposes of all the issues in dispute. So it is appropriate to advert to findings of fact in the court below. Patterson J found:

> "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."

Although the Court visited the locus, it is appropriate to examine the pleadings to ascertain if these findings accord with the averments and to pinpoint how the issue of law was delineated. These pleadings set out the history of the transfers of three plots from the appellant Stuart and his predecessor in Title to the St. Ann Parish Council and its successor the respondent NWC. The construction of the Water Act arose thus in the Statement of Claim:

> "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."

Then the appellant averred thus:

> "5. In pursuance to the premises, and in consideration of the Plaintiff's Covenants 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'."

The respondent NWC traversed paragraph 4 of the Statement of Claim in its Amended Defence and Counterclaim thus:

> "2. Paragraph 4 of the Statement of Claim is denied. The Defendant says that the water in the streams referred to therein is public water flowing in a public stream from the watershed, running underground to Entombments A and B where it springs to the surface and continues in a defined channel to the sea. This water vests in the Crown, pursuant to the provisions of the Water Act."

Be it noted that the original instrument between Flora Stuart and the St. Ann Parish Council recognized that the matter in issue was a public spring or stream thus:

> "AND WHEREAS the Grantees are desirous of constructing certain works and obtaining and securing a necessary supply of water for the district of Ocho Rios and surrounding Districts in the Parish of Saint Ann in pursuance of the provisions of the Public Water Supply Law 1889 and the Water Law 1922 and for that purpose have obtained or will obtain the authority of the Governor of Jamaica pursuant to the above-mentioned Laws AND WHEREAS the Grantees entered into an Agreement with the Grantor to facilitate the acquisition by the Grantees of a supply of water from a public spring or stream on the said lands known as Milford Stream or Shaw Park Spring and for the grant to them of certain rights and servitudes in respect of the said lands and the water in the said stream NOW THIS INSTRUMENT WITNESSETH as follows: [Emphasis added]

The respondent NWC continues from paragraph 2 of its Amended Defence and Counterclaim thus:

> "3. Paragraphs 5, 6, 7, and 8 of the Statement of Claim are admitted. The Defendant will say however, 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.
>
> 4. 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."

Then to demonstrate that the critical facts were agreed between the parties and that it was the construction of the Water Act and the interpretation of the relevant authorities which were in issue, it is instructive to advert to the request for further and better particulars sought by the appellant Stuart. It reads:

> "Under Paragraph 3
>
> Request: 1. State the facts relied on to support your allegation that the agreements, 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.
>
> 2. State the reason and basis for your allegation that the agreements, covenants and transfer therein referred to are 'ineffective and invalid in law' as aforesaid."

The respondent NWC replied thus:

> "UNDER PARAGRAPH 3
>
> 1. The facts relied on by the Defendant are those pleaded in the Statement of Claim and which are admitted. The Defendant will rely on no other facts.
>
> 2. On the basis of those facts, the Defendant says the issue turns on the construction of the provisions of the Water Act and the common law relating to water generally."

The dispute has arisen because the appellant Stuart has made claims for money on the respondent NWC for compensation based on a purported agreement between the parties that NWC would pay the appellant for water extracted from the stream. Stuart owns the land through which the stream runs and transferred three small plots to the St. Ann Parish Council. The successor is the respondent NWC. A further reference to the original instrument is relevant. It continued thus:

> "In pursuance of the said Agreement and in consideration of the Covenants and Agreements on the part of the Grantees herein set forth the Grantor with the approval and consent of the First Mortgagee and the Second Mortgagee testified by the execution by them of this instrument and in pursuance of all powers (if any) thereunto her enabling DOTH HEREBY GRANT to the Grantees for the term of ninety-nine years from the date hereof the right to take from the said stream at the point marked 'Intake' on the plan hereunto annexed and marked 'X' and amount of water not exceeding six thousand gallons per hour AND DOTH ALSO HEREBY AGREE that she will not object to any application by the Grantees to the Governor in Privy Council for the right to take water from the said stream as aforesaid up to an amount not exceeding six thousand gallons per hour or require any such application to be referred to a Water Court or require any compensation other than as herein set out AND for the said consideration DOTH ALSO HEREBY GRANT to the Grantees for the term of ninety-nine years from the date hereof SUBJECT to the payment to her by the grantees of an annual rental of One Shilling per annum a temporary Servitude of passage of water and a Temporary Servitude of abutment under and by virtue of the Water Law 1922 and upon the terms and conditions hereinafter contained for the purpose of taking diverting and using the said water from the said stream as aforesaid and conveying the same across the said lands."

Against this background Patterson J identified the issue to be decided with clarity thus:

> "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."

He could have added that the appellant had acknowledged that the original instrument in the agreed bundle referred to the issue now in dispute as a "public spring or stream" and that ought to have concluded the matter against the appellant Stuart. The respondent NWC could have pleaded estoppel by deed.

Does the construction of the Water Act
resolve the principal grounds of appeal?

The principal grounds of appeal recognized that the issue of law to be resolved depended on the true construction of the Water Act. The grounds contended that:

> "1. The finding of the Learned Judge that the water 'at' entombments A and B is public water is unreasonable and not supported by evidence.
>
> 2. The conclusions and findings of the Learned Judge are inconsistent with the pleadings, the evidence, the common law and the provisions of the Water Act."

Since it was being contended that the findings were unreasonable it is necessary to examine extracts from the evidence of the appellant Col. Charles Stuart under cross-examination:

> "On the plan of Shaw Park Water Supply System at page 162 of Exhibit 1, the area noted as Shaw Park Estate is also called 'Coyaba'. On the plan there is a blue line running from 'Entombment A' to point 'E' - and it represents the channel of the water in Milford Stream between those two (2) points, and it

> continues beyond point E as already described. That stream has been there for as long as I recall - from my boyhood days.
>
> "Entombment A. Above Entombment A is a valley from which underground streams feed Entombment A. The lands above Entombment A are all part of a natural watershed area. At one time I was of the view that if one authority would take over the entire works depicted on the plan, it would enure to the benefit of the community."

Then at another point the appellant Stuart stated:

> "Entombment A is a concrete encasement. The sides go down to ground level as far as I can see. The top is reasonably flat with areas where the concrete has lifted - it is roughly rectangular in shape at the bottom and triangular on top. It is one structure but not all on the same level. The long sides are roughly parallel. The western side is at a slightly acute angle and the bottom is approximately 90 degree. On the surface, there are two (2) openings through which one can see how the pipes are placed and the level of the water. Facing west and looking through the opening, there is a cluster of pipes and slightly to the left is the Four Rivers Development Company pipe. The entombment is about one foot high above ground level. Don't know if there are four (4) pipes in the cluster. Could be that the National Water Commission pipes are to the top of the cluster and near to the top of the entombment. Water passes from the bottom of the entombment into the stream. The channel of the stream is in the earth's crust at a point below the concrete of the encasement. The water in the entombment has to be at a certain level above the earth for it to get in the National Water Commission pipes. Our pipe is above the level of the National Water Commission pipe. Very little water would be in the stream if the level in the entombment is so low that no water would flow into the pipes."

The evidence from Michael White an Hydro-geologist under cross-examination on entombment A coincides with that of the appellant Stuart. So far as is relevant he said:

> " The entombment(s) are so constructed to maintain a constant head on the outlet pipe from the spring. Excess pressure being desiccate as water over-flowing the entombment into the river. Entombment A had an overflow at all times that I visited the area. Don't know if it goes to the sea - it sometimes sinks into the ground if the flow is low. Springs have a watershed. Milford Stream is one of the many streams that flow to the sea around Ocho Rios."

Simon Stuart the son of the appellant gives a similar account. He said:

> "Looking at the plan of the Shaw Park Water Supply System in Exhibit 1, water overflows at times from that entombment into the stream, but the stream is always there and it commences at the Entombment A. Water from Entombment B goes into a collection chamber which overflows at all times and that overflow runs to the stream."

He continues thus:

> "I am familiar with the Turtle River, the Milford Stream and where the Milford stream runs. The Milford Stream commences at entombment A and runs through Coyaba, through River House, (a property belonging to Mr. Summerfield), through the district of Milford and through a Stone gutter in Ocho Rios and ends adjacent the Jamaica Grand Hotel in the sea, and that has been its traditional course from before Ocho Rios was re-developed. It does not join the Turtle River."

On entombment B he is instructive. This is what he said:

> "We have no pipes running from entombment B. Seasonally, I see leaks from entombment B - when it rains heavily - it takes the gradient. From the stream leaves the entombment, it maintains a defined channel down to the storm

> gutter which takes it to the sea by the Jamaica Grand Hotel."

In the light of these extracts from the evidence the contention by the appellant that the learned judge findings were unreasonable and cannot be supported is untenable.

Additionally I reiterate that I find it puzzling that the judge's finding was challenged as being unreasonable when the deed which the appellant put in evidence as part of an agreed bundle speaks of:

> "...entered into an Agreement with the Grantor to facilitate the acquisition by the Grantees of a supply of water from a public spring or stream on the said lands known as Milford Stream or Shaw Park Spring ...". [Emphasis added]

To my mind this admission ought to have disposed of the case either in the court below or in this Court. However having regard to how the case was argued, the authorities, the construction of the Water Act, the learned judge's reasoning ought now to be examined. Section 2 of the Water Act reads:

> "2. In this Act unless the context otherwise requires the following expressions shall have the following meanings -

The first relevant meaning is:

> " 'Public water' - all water other than storm water flowing in a public stream."

Then it is necessary to advert to the definition of public stream which is as follows:

> "'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 fulfills these conditions as to part of its course only shall be deemed to be a public stream only as regards such part;."

In contrast "private water" which the appellant Stuart relies on is defined as:

> " '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;".

To my mind by applying the definitions in the Water Act to the findings of Patterson J they are consistent with NWC pleadings, the admission by deed in the agreed bundle and the evidence as well as the common law. As for the common law it is instructive to refer to **Dudden v. The Guardians of the Poor of the Clutton Union** Jan. 22, 1857 CL VI E.R. 1353. The headnote reads:

> "The water from a spring flowed in a gully or natural channel to a stream on which was a mill. The spring having been cut off at its source and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose: Held, that an action lay by the mill owner against the person so abstracting the water."

Then the judgments at p. 1354 are as follows:

> "Pollock, C.B. I am of opinion that this rule must be discharged. The law of the case is clear and undoubted. This was a natural spring, the waters of which had acquired a natural channel from its source to the river. It is absurd to say that a man might take the water of such a stream four feet from the surface.
>
> Martin, B. I am of the same opinion. 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 the lands of other proprietors lower down.
>
> Watson, B. There was ample evidence to go to the jury. This was an ancient spring with which the defendants had no right to interfere. It is clear that they could not have diverted it at ten yards from the source, and the stoppage at the spring head is just as much a diversion as if the water had been taken lower down."

When the principle of law enunciated in this case is applied to the facts of the instant case the decision must be that the appellant has no right to sell water vested in the Crown to the respondent. Then in **Mostyn v. Atherton** [1899] Ch. 360 The headnote is sufficient to illustrate a further application of the principle. It reads:

> "In an action by a riparian owner and his tenant, the occupier of a mill on the banks of a stream, against a licensee from an urban district council, who were in possession of the land upon which the spring rose, to restrain the defendant from taking water from the spring and from interfering with the accustomed flow of water in the said stream, the defendant contended that he was entitled to abstract the water before it had risen to the surface, or flowed in a defined channel:
>
> Held, following **Dudden v. Clutton Union,** (1857) 1 H. & N 627, that the defendant was not entitled to diminish or interfere with the natural flow of the water at its source, and that the principle of that decision was not affected by the fact that at some remote period the source of the spring had been built round, and formed into a polygonal well in order to improve its mode of issuing from the earth, thus making an artificial channel for a short distance.
>
> A local authority has no power under the Public Health Act, 1875, to license a stranger to take water from a public well for commercial purposes."

In the earlier case of **Embrey and Another v. Owen** 155 E R Parke, B. expounded the law thus at 585 - 586:

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only: see 5 B & Ad. 24 But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

Parke B summed up the legal incident in a single sentence which must be cited. At page 586 he said:

> "He has no property in the water itself, but a simple usufruct while it passes along."

So these cases illustrate the common law position which supports the respondent NWC stance.

What was the status of 1987 Heads of Agreement

At the heart of the dispute between the appellant Stuart and the respondent NWC are claims by Stuart for compensation for water extraction by NWC. The respondent NWC claims that the agreement was invalid and therefore it has no obligation to honour it.

It is to be noted that public water is vested in the Crown so that we are in the area of public rather than private law. Section 4 of the Water Act makes this clear. It states:

> "4. All water, other than private water, is vested for ever in the Crown in the right of the Island of Jamaica, and the Minister may authorize its use, diversion and apportionment, subject to the terms of this Act and in conformity with any regulations framed thereunder."

Part 111 of the Act established the Water Court and Part V1 stipulates Powers of the Minister in regard to Public Streams and Water. In these circumstances it seems odd that covenants and agreements of 30th December 1970 between the appellant Stuart and the Parish Council and the Heads of Agreement of 25th August 1987 between the appellant Stuart and NWC concerning the use of "public water" and "public stream" were made without the advice of the Attorney General who by terms of section 79 of the Constitution is the principal legal adviser to the government. Once legal powers are entrusted to a Minister of Government the Attorney General ought to be made aware of any proposed agreement so that he could intervene in any proceedings if he deems it necessary.

Probably because of the absence of the Attorney General Patterson J treated the formation of the contract as if there was mistake about the subject matter and cases of **Cooper v. Phibbs** Vol. 1 H.L. 149 and **Cochrane v. Willis** 1865-6 Vol 1 L. R. Chancery Appeal Cases 581 were relied on. Mr. Mahfood cited **Precedents of Pleadings Bullen & Leake & Jacobs's** 13th edition p. 1316 which states:

> "Pleading. The fact that a written contract was entered into by mistake and is therefore void or voidable must be specifically pleaded."

This is not the area of law which governs this case. There is an implied statutory prohibition against a private person contracting to sell public water to a statutory authority. Once the Water Act ordained that public water was vested in the Crown, this must be the consequence.

The National Water Commission Act by Section 4 (1) states in part:

> "4. - (1) Subject to the provisions of this Act it shall be the function of the Commission to -
>
> (a) prepare and submit to the Minister from time to time proposals for the establishment of an efficient, co-ordinated and economical water supply system capable of meeting the needs for water throughout the Island;
>
> (b) prepare and submit for the approval of the Minister details of schemes for the development of water resources and the supply of water in particular areas, and to carry out such schemes when they are approved;".

Then as this water works was formerly owned by the Parish Council the following section is relevant:

> "(2) For the purposes of subsection (1) the Commission may -
>
> (c) acquire the water works of any Parish Council upon such terms and conditions as may be agreed with the Parish Council subject to the approval of the Minister or in default of agreement determined by the Minister;".

Then section 18 shows the extent of Ministerial control as public water plays an important role in public policy. Further, we are here dealing with the water supply by means of public water to Ocho Rios. That town with the exception of Montego Bay is the dominant tourist resort in the country.

Once section 4 of the Water Act vests all water other than private water in the Crown, then the Act by necessary implication prohibits a contract by which a private

person as the appellant Stuart could sell public water to the National Water Commission. The relevant Minister and the Attorney General would be obliged to answer to Parliament if public funds were expended thus. We are in the realm of constitutional law and specifically Ministerial responsibility to Parliament. Before adverting to the agreement which by implication Patterson J found was invalid it is convenient to refer to the grounds of appeal pertinent to this part of the case. They are as follows:

> "14. The conclusion of the Learned Judge that the Plaintiff had 'nothing to sell' and that the 'agreement is a nullity' because the parties were mistaken about 'a fundamental fact' is inconsistent with the pleadings, the evidence and the law."
>
> 15. The finding of the Learned Judge that the Heads of Agreement arrived at on the 25th August, 1987 is a nullity because the parties acted under a fundamental mistake of fact was never pleaded and was not a proper issue for adjudication. Furthermore, there is no evidence to support the finding of the Learned Judge that the parties acted under a mistake of fact, nor is there any basis for the conclusion that there was a mistake of fact. The question of whether the water is public or private water is a question of law and the parties entered into the heads of Agreement after negotiation and on the advice of their Attorneys.
>
> 16. The Learned Judge erred in stating that 'the Plaintiff lacked capacity to enter such a covenant, and the covenant is not binding on the Defendant'. There is no proper legal basis for the Learned Judge's conclusion even if, as the Learned Judge found, the water was public water. Covenants between 'riparian proprietors' controlling and regulating their rights to use water create binding contractual obligations.
>
> 17. Even assuming that the water is public water, the Plaintiff had the capacity to enter into the Heads of Agreement with the Parish

> Council and the agreement is binding on the Defendant."

Then turning to the Statement of Claim for the agreement in dispute paragraphs 14 and 15 read:

> "14. By the Heads of Agreement arrived at on 25th August 1987 the then Chairman 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."

Then in further averments the appellant Stuart claims:

> 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 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."

This was a bold and uncompromising claim and I would be very surprised if it were acceded to by the Law Officers of the Crown. Then paragraph 19 and 20 demonstrate why there was a resort to the Courts:

"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."

Then the precise monetary claim was formulated thus:

"21. By reason of the foregoing, the Plaintiff claims:

1. Damages for breach of the covenant in the Agreement of 30th December 1970 and referred to in paragraph 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"

The private law approach

It is now convenient to refer to the Law of Contract Cheshire Fifoot and Furmston's 11th Edition at page 334 -

> "1. Contracts prohibited by statute
> Where it is alleged that the prohibition is implied, the court is presented with a problem the solution of which depends upon the construction of the statute. What must be ascertained is whether the object of the legislature is to forbid the contract. In pursuing this enquiry a variety of tests have been applied."

The principle is expressed by Atkin L.J in **Anderson v. Daniel** (1924) 1 1 K.B. 138. It is cited in **St. John Shipping Corpn. V J. Rank, Ltd** [1956] 3 All E R 683 at 686-687 by Devlin J thus:

> "The question of illegality in a contract generally arises in connection with its formation, but it may also arise, as it does here, in connection with its performance. In the former case, where the parties have agreed to something which is prohibited by Act of Parliament, it is indisputable that the contract is unenforceable by either party."

Devlin J also cited Parke B in **Cope v. Rowlands** (1836), 2 M. & W. 1149 at 688 thus:

> "It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that contract is void if prohibited by a statute though the statute inflicts a penalty only, because such a penalty implies a prohibition ... And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract."

Another statement of principle cited by Devlin J at 689 comes from **Wetherell v Jones** [1832], 3 B & Ad. where Lord Tenterden, C.J., said:

> "Where a contract which a plaintiff seeks to enforce is expressly, or by implication, forbidden by the statute or common law, no court will lend its assistance to give it effect; and there are numerous cases in the books where an action on the contract has failed, because either the consideration for the promise or the act to be done was illegal, as being against the express provisions of the law, or contrary to justice, morality, and sound policy."

This was the approach of Patterson, J. and it was permissible. There is however an alternative route in public law to which I shall now turn.

The public law concept of ultra vires

The public law implications in this case are fundamental. NWC had no power to enter into a contract to buy public water. Any rate payer in Ocho Rios or elsewhere had a sufficient interest to institute proceedings by way of certiorari or declaration to have the decision to enter the contract quashed or have the contract declared ultra vires. This is so as the original deed describes the stream as a public stream. It was the failure to grasp this principle that led Mr. Mahfood to contend that mistake was in issue and that it had to be pleaded. Even if there were no public law implications where the illegality is in issue pleadings would not be necessary. Here is how the Law of Contract Cheshire and Fifoot 6th edition puts it at page 288:

> "If the contract itself is statutorily forbidden, it is illegal, and it is no answer to say that the parties, or one of them did not know the law on the matter. Moreover, even though the illegality has been neither pleaded nor argued by the defendant, it is the duty of the court to take judicial notice of it if it is disclosed in the course of the evidence."

The cases cited are **J.M. Allen (Merchandising) Ltd v. Clarke** (1963) 2 Q B 340; **Elder v. Averbach** [1950] 1 K B 339 at p 371 & **Snell v Unity Finance Co** [1963] 3 All E R 50. It is pertinent to refer to a passage in the **Snell** case at page 54 from the judgment of Wilmer L.J. citing **Scott v. Brown Doering McNab & Co** [1892] 2 Q.B. at page 728:

> "No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves

> the illegality the court ought not to assist him. If authority is wanted for this proposition, it will be found in the well known judgment of Lord Mansfield in **Holman v Johnson** [1775], 1 Cowp. 341.

So the results are the same in public law as in private law except that the remedy of certiorari is not available in private law and the doctrine of privity of contract would preclude a rate payer from instituting proceedings.

A further illustration that we are in the area of public law is that criminal sanctions are provided under the Water Act regarding the waste of water of a public stream. The principle to note is that a criminal sanction is comparable to a penalty in that it implies that a contract is prohibited. The relevant section reads:

> "66. Any person who, without lawful right or authority (the proof whereof shall lie upon him) -
>
> ...
>
> (d) wastes the water of a public stream;
>
> (e) being the proprietor of an area, after notice from the Minister or other official authorized by him, fails to put an end to waste of water resulting from the act of a tenant or other person deriving rights from such proprietor and no longer present on such area;
>
> (f) aids or abets or knowingly permits any such act or default,'
>
> shall be guilty of an offence, and liable - ..."

To my mind had the respondent raised a preliminary point of law in the court below or filed a respondent notice in this Court on the basis that the 1970 and 1987 agreements were ultra vires, this case could have been disposed of with promptitude instead of lasting nine days in the Court below and four days in this Court.

The only other matter in the Statement of Claim which requires attention is set out in paragraphs 8 and 9 thus:

> "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 LIEUTENANT COLONEL CHARLES ROBIN HUGH MCKENZIE STUART his heirs successors assigns and transferees contained in the said Agreement deposited herewith as Miscellaneous No. 271688 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."

Then the relief sought is expressed thus:

> 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."

In its defence counterclaim the respondent NWC responded thus:

> "5. With regard to paragraph 9 of the Statement of Claim, the Defendant repeats paragraph 3 and 4 above and avers that the covenants referred to were ineffective in law on the ground previously stated."

To reiterate, the respondent raised no issue on the covenants and challenged the appellant in paragraphs 3 and 4 of the defence and counterclaim only in so far that there is a purported claim to restrict it to abstract 750,000 gallons per day. Consequently I think Patterson J was correct to refuse the declaration and injunction sought.

CONCLUSION

In view of the foregoing analysis the order below ought to be affirmed.

Perhaps for easy reference the material part of the order affirmed is cited. It reads:

> "... adjudged that there be Judgment for the Defendant on the Claim and on the counterclaim and there be a declaration that any purported restriction of the Defendant's use of the Water at its entombments A and B to 750,000 gallons per day is null and void, with costs to be agreed or taxed."

The taxed or agreed costs of this appeal must be borne by the appellant Stuart.

BINGHAM, J A (AG.)

I have taken the opportunity to read in draft the judgments of Rattray P., and Downer, J.A. in this matter. I wish to say that I am in agreement with the conclusions they have arrived at that the appeal ought to be dismissed. Having regard to the importance of the issues raised, however, I wish to add a short contribution of my own.

There were two issues which arose for determination before the learned judge below and which were argued before us on appeal namely:

> 1. Whether the water in entombments A and B identified as being part of the Milford Stream or The Shaw Park Spring was Public or Private water?
>
> 2. Dependent upon the determination of this primary issue, what was the legal effect of the covenants entered into between the Plaintiff/Appellant and the Saint Ann Parish Council and the respondent in 1970 and 1987?

It was these two agreements which formed the basis for the reliefs sought in the Statement of Claim.

The case for the appellant as presented both below and before this Court was based on the contention by the appellant that the water in the said stream which rises to the surface in the entombments A and B, was private water. In so far as water of such a class is defined in section 2 of the Water Act as -

> "... 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;". [Emphasis added]

water satisfying this definition would in such circumstances entitle the owner of the land on which the water came to the sole and exclusive use of it. Section 3 of the Water Act enacts that:

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

It is convenient at this stage to set out the definition of "public stream" and 'public water." Section 2 of the Act defines a public stream as:

> "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.
> ...
>
> ' public water' includes - 'all water, other than storm water, flowing in a public stream'."

It was common ground and not in dispute that the water from the Milford Stream flowed underground and then rises to the surface in the entombments A and B then flowed in a defined channel across the appellant's land rejoining the said stream further down. This flow of water continued through the lands of various riparian owners eventually entering the sea by the Jamaica Grande Hotel in Ocho Rios.

For a more proper understanding of the background leading to the present dispute between the parties it may be necessary to refer to the history of the relationship between the original covenantors, the Parochial Board of Saint Ann(now Saint Ann Parish Council) and the predecessor in title of the plaintiff/appellant Flora Julia McKenzie Stuart.

It was the need to provide a public water supply for the town of Ocho Rios and its environs which led to an agreement being drawn up between these parties in 1934, the terms of which wholly acknowledged the fact that the Milford Stream was a "public stream." This agreement having regard to the date that it was entered into with the Water Law, 1922 then in force, it is reasonable to infer must have been drafted with the provisions of this statute in the contemplation of the parties. The agreement recites inter alia that:

> "And whereas the Grantee entered into an agreement with the grantor to facilitate the acquisition by the Grantee of a supply of water from a public spring or stream or the said lands known as the Milford Stream or the Shaw Park Spring and for the grant to them of certain rights and servitudes in respect of the said lands and the water in the said stream."

For learned counsel for the appellant Mr. Mahfood, Q. C., to argue therefore that the water in the said stream is private water given the factual situation as set out in the 1934 agreement is clearly untenable. This contention which is consistent with the pleading in the Statement of Claim could equally have been met by raising in the Defence and Counterclaim the plea of estoppel by deed and relying upon the original agreement of 1934.

The evidence of the appellant Colonel Robin Stuart, his son Simon Stuart and the Hydro-geologist Michael Norman White all support the fact that the water from the Milford Stream which was used over time to supply the appellant and the inhabitants of the town of Ocho Rios was public water. In this regard the account of the plaintiff/appellant was that:

> "Water flows within the entombments towards the eastern end. The flow varies very little depending on the weather. I have observed it over many years and there is not much variation year in year out."

Later on he said:

> "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 chamber along the earth in a little stream to the Milford Stream." [Emphasis added]

The witness Simon Stuart testified that:

> " I am familiar with ... the Milford Stream and where the Milford Stream runs. The Milford Stream commences at entombment A runs through Coyaba, through River House (a property belonging to Mr. Summerfield) through the district of Milford and through a stone gutter in Ocho Rios and end adjacent the Jamaica Grande in the sea."

This account is also supported by Michael Norman White. He said:

> "I am familiar with the Shaw Park Water Supply and sources ... I was employed ... to establish:
>
> 1. The extent of the draw-off from the springs by the National Water Commission that is the Shaw Park Springs otherwise called the Parry Town Springs. These springs are essentially those from which the National Water Commission obtains water for distribution via their Shaw Park reservoir."

Later under cross-examination by Mr. Chin-See Q.C. the witness said:

> "Entombment A had an overflow at all times I visited the area. Dont know if it goes to the sea - it sometimes sinks into the ground if the flow is low. Springs have a watershed. Milford Stream is one of the many streams that flow to the sea around Ocho Rios." [Emphasis added]

As can clearly be seen the evidence emanating from all three witnesses point to a constant flow of water which has its source in the entombments and which follows a defined channel to the Milford Stream. Given the accounts of Simon Stuart and

Michael Norman White the water from this stream eventually entered the sea by the Jamaica Grande in Ocho Rios.

This description of water flowing along a defined path as distinct from water remaining on land is what determines its classification and use. In **Embrey and Another v. Owen** [1861] 6 Ex. 579 at 585 Parke, B., stated the law governing this question with clarity. He expressed himself thus:

> "The right to have the stream to flow in its natural state without diminution or alteration is an incident to the property in the land through which it passes; but flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that all may reasonably use it who have a right of access to it, that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the time of his possession only ... But each proprietor of the adjacent land has the right to the usufruct of the stream which flows through it."

To fall within the classification of private water as Mr. Mahfood, Q.C. contends therefore this water would need to -

> 1. Remain on the appellants property e..g. a lake or a pond.
>
> 2. Be part of a stream where the adjoining lands were owned by a common riparian proprietor.

As neither of the above situations applied the determination by the learned judge on the primary issue of public or private water was in my opinion correct and fully justified on the facts and the law.

In light of the determination that the water was public water the question that naturally followed from this is as to whether the plaintiff/appellant would have been

clothed with the authority to enter into valid and binding covenants with the Saint Ann Parish Council (1970 agreement) and the respondents (the 1987 Heads of Agreement).

In my opinion he could only do so if he had an exclusive license from the Minister responsible for the particular subject matter. His own evidence is that:

> "At no time did I get permission or seek permission from the Minister from time to time to supply water to the persons that I did."

As the appellant's claim to recover special damages for excess water taken off by the respondents and for an injunction is also dependent upon his claim to having the exclusive use to the water in the entombments, once that claim was defeated, it followed that the appellant lacked the necessary capacity to control the use of the water coming from that source. He likewise could not advance a proprietory claim to the water as "water cannot be the subject of ownership." (Re Simeon [1937] 3 All E.R. 149.)

When Patterson J (as he then was) having posed the question "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?" - then found that:

> "The covenants seek 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 forever in the Crown in the right of the Island of Jamaica. It is the Minister alone in those circumstances who may authorise its use, division 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."

in my opinion such a finding was decisive of the issues raised in the matter. The learned judge nevertheless went on to deal with other questions which surfaced in argument during the closing submissions of Counsel. This, however, cannot affect the outcome of this appeal having regard to his clear findings on the two important issues raised in the matter.

In any event such submissions as there were are in relation to matters that did not form part of the issues raised on the pleadings.

It was for these reasons why I joined with my brethren in the dismissal of the said appeal in terms of the order as proposed by the learned President.