SAINT LUCIA:

IN THE HIGH COURT OF JUSTICE
(Civil)

SUIT No. 29 of 1999

BETWEEN :

(1) MALCOLM CAPLAN
(2) IRENE CAPLAN both of Soufriere , but presently Residing at Baker & McKenzie, Caracas, Venezuela.

Plaintiffs

and

(1) MICHAEL DU BOULAY;
(2) MICHELLE DU BOULAY;
(3) DAVID DuBOULAY;
(4) DuBOULAY ESTATES COMPANY LIMITED all of Soufriere;
(5) THE ATTORNEY-GENERAL OF SAINT LUCIA

Defendants

Appearances:

Mr Peter Foster with Mrs Claire Malaykan for the Plaintiffs
Mr. Shawn Innocent for Defendants Nos 1 to 4
Mr. Paul Thompson for Defendant No.5

2001: May 31
June 1.

JUDGMENT

Introductory

[1] BARROW, J. (Ag.) Almost three hundred years ago the King of France gave a decision in a legal dispute between two inhabitants of Guadeloupe on the subject of the King's Chain that has significant implications for the present dispute. The Queen's Chain is that expanse of land running 186.5 feet inland from the high water mark.

[2] In the settlement of St. Lucia there was always reserved a strip of land around the island to enable the establishment of towns, parishes, forts, entrenchments, batteries and other public and necessary works, as much for decoration as for defence. In the areas where towns, fortresses and batteries were established, it served for that use. In the rest of the island the owners of the land above it obtained from the Lords, Governors and Stewards of the King, permission to clear the lands, which enabled them to procure facilities for the exploitation of their plantations. It was always the understanding that those lands, which came to be called the King's or Queen's Chain, according to the gender of the reigning monarch, could be reclaimed when needed for the service of the King or the public. That

statement of the law appears as part of the Ancient French Law contained in Appendix II to volume VI of the Laws of St. Lucia and is the subject of a Ministerial Dispatch from the King's Court at Versailles, dated 3rd December 1757.

The lay of the land

[3] In the present dispute a portion of the Queen's Chain that lies between the sea and the adjoining lands of the plaintiffs was leased to the fourth defendant. The plaintiffs are the proprietors of Block 0031B Parcel 15 comprising 17 acres. Until they were interrupted by the actions that gave rise to this suit the plaintiffs enjoyed what they claim is a right of way over the adjoining Parcel 12, which is registered in the name of the first defendant. Until similarly interrupted the plaintiffs enjoyed what they claim are the customary and proprietary rights in the Queen's Chain designated as Parcels 28, 29 and 30 and claim to have been in actual occupation and possession of the same.

[4] The first defendant's Parcel 12 consists of 0.05 hectares and may include what was originally a portion of the Queen's Chain. In front of that parcel, facing the sea and apparently running down to the sea, lies Parcel 13, which is therefore also a portion of the Queen's Chain. That parcel, consisting of 0.14 hectares, was leased by the Government to the fourth defendant in 1995. Beside Parcel 13 as opposed to in front of it lies Parcel 29. In fact Parcel 29 lies in front of the plaintiffs' lands. This is the beachfront portion of the Queen's Chain that the Government leased to the fourth defendant on the 18th December 1998. It consists of 39,154 square feet. Parcel 28 is a buffer portion of the Queen's Chain that lies between the plaintiffs' Parcel 15 and the last mentioned Parcel 29.

[5] The fourth defendant plans to expand the hotel that it operates on Parcel 13 by building a number of hotel units on Parcel 29. This will have the effect of possibly destroying the excellent view from the plaintiffs' residence of Soufriere Bay and the two peaks known as The Pitons that are St. Lucia's national landmarks, according to the unchallenged evidence. There was also no challenge to the evidence that such a result would reduce the value of the plaintiffs' property by sixty percent. The plaintiffs' property, on which sits a house designed by a famous New York architect, is said to value $2.85 million.

The alleged trespass

[6] What gave rise to the present suit were the actions of the defendants in December 1998 and January 1999. For convenience I will call the first four named defendants "the defendants" and I will call the fifth named defendant "the Government". According to the Statement of Agreed Facts filed in this suit and the evidence of Cynthia James, the plaintiffs' caretaker, on or about the 15th December the defendants or some of them entered the area of the Queen's Chain in the actual occupation of the plaintiffs and cut down fruit trees and 21 coconut trees. On that day the first defendant brought onto the lands occupied by the plaintiffs some old tyres, placed them some 20 feet away from the plaintiffs' house and set them afire. The smoke went into the plaintiffs' house and caused a tremendous nuisance and the fire department had to be called to extinguish the blaze. Around that same period the defendants began excavating and digging on Parcel 29 and Parcel 28. The steps from the plaintiffs' house leading down to the beach ended on Parcel

28 and the plaintiffs also had erected on the Queen's Chain a shed made of pine, a soak away and a water tank. I understand that these things were demolished.

[7] On 12th January the defendants continued the excavation with backhoe, excavator and dump trucks. At about this same time the defendants demolished the motorable driveway that led from the plaintiffs' property where it passed across the first defendant's Parcel 12. The defendants excavated the driveway to a depth of 20 feet and for a distance of 50 feet. On 18th January the defendants ripped out electrical wiring and garden lights appurtenant to the plaintiffs' property.

[8] There were fears that the excavation by the defendants, because of the proximity to the plaintiffs' house, would undermine the structural integrity of the house. Cynthia James, who resides in the house, said that she felt like a prisoner in the house and felt unsafe and frightened in the house while all the heavy equipment was working. The first plaintiff, a 68 year old lawyer, who works and lives in Venezuela and would visit about three or four times a year, testified that he has not been back to the home since 1998. He and his wife bought the property because they fell in love with the peacefulness and tranquility of the Soufriere area. He has not been back because as a result of the defendants' actions he felt "raped", he testified.

The relief sought

[9] On the 23rd January 1999 the plaintiffs obtained an ex parte injunction before suit was filed. That injunction was continued until trial after an inter partes hearing. When the writ was issued on 28th January 1999 the Government was not then a party. The action was then principally for a declaration that the plaintiffs were entitled to a right of way along the existing driveway over Parcel 12, an injunction to restrain the defendants from trespassing on land in the actual occupation of the plaintiffs being Parcels 28, 29 and 30, a mandatory injunction to restore the driveway and restore the excavation on the Queen's Chain, and damages for trespass. These remain the substance of the plaintiffs' claim as against the defendants.

[10] The Defence denies the plaintiffs' entitlement to any right of way and pleads that by a lease dated 18th December 1998 and registered on 4th January 1999 the Government let Parcel 29 to the fourth defendant for a term of 22 years from the 22nd March 1995. This drove the plaintiffs to challenge the lease.

[11] The plaintiffs obtained leave to add the Government and to amend the writ by order made on the 12th July 2000. As against the Government the plaintiffs claim that the grant of the lease was wrongful and ought to be revoked on the grounds that the action of the Government was illegal, irrational and in violation of proper procedure. The plaintiffs ask for various declarations and orders which would really amount to quashing the decision of Cabinet to grant the lease to the fourth defendant and declaring the said lease to be invalid.

Indirect judicial review

[12] At the beginning of the hearing the Government raised an objection in limine on which I will now rule. The objection is that the plaintiffs are indirectly seeking judicial review and must not be allowed to bypass the procedural requirements set out in Order 44 of the Rules of the Supreme Court including the necessity to apply for leave. The Government relied on the words of Lord Diplock in *O'Reilly and others v. Mackman* [1982] 3 All ER 1124 at 1134 that:

> " …it would in my view as a general rule be contrary to public policy, and as such an abuse of the process of the court, to permit a person seeking to establish that a decision of a public authority infringed rights to which he was entitled to protection under public law to proceed by way of an ordinary action and by this means to evade the provisions of Ord 53 for the protection of such authorities."

The earlier decision in *Heywood v. Hull prison Board of Visitors* [1980] 3 All ER 594 at 598 had set out in detail the considerations that justified the opinion that where a plaintiff was in fact indirectly seeking judicial review it was undesirable that he should seek relief by ordinary action begun by writ rather than by application for judicial review. In that case the plaintiff was a prisoner and sought to challenge the findings against him and the penalties imposed on him arising from charges brought against him for breaches of discipline. In *Cocks v. Thanet District Co* [1982] 3 All ER 1135 the House of Lords comprising the very same Lords who gave the decision in *O'Reilly* applied the general rule stated in that last mentioned decision and also reiterated the exception – that the validity of a public law decision may come into question collaterally in an ordinary action. The issue in *Cocks* was between a homeless person and the District Council that decided that he became homeless intentionally and involved the question whether the homeless person could proceed by ordinary action or was required to proceed by way of judicial review.

[13] The Government conceded the proposition advanced by the plaintiffs that a person may challenge the decision of a public authority if it is for the purpose of vindicating his private law rights, as is established by *Gillick v. West Norfolk Health Authority* [1985] 3 All ER 402. That was a case in which a parent proceeded by ordinary action to claim a declaration that the actions of the Department of Health and Social Security and an area health authority in providing advice on contraceptive care to girls below 16 years were unlawful. Lord Scarman identified Mrs. Gillick's action as being essentially to protect what she alleged to be her rights as a parent under private law. Her rights of custody and guardianship as a parent were threatened by the advice given by the authorities, she contended. At page 416 Lord Scarman said:

> "This is a very different case from *O'Reilly v. Mackman,* where it could not be contended that there was any infringement or threat of infringement of any right derived from private law. … They [the appellants in *O'Reilly*] had, therefore, no private rights in the matter, and could rely only on the public law doctrine of legitimate expectation.
> " … I do not see Mrs. Gillick's claim as falling under the embargo imposed by *O'Reilly's* case. If I should be wrong in this view, I would nevertheless think that

the private law content of her claim was so great as to make her case an exception to the general rule."

[14] The private law content was also determinative in *Roy v. Kensington and Chelsea and Westminster Family Practitioner Committee* [1992] 1 All ER 705. The House of Lords held that the court had jurisdiction to entertain the proceedings that had been commenced by writ because the general rule that issues dependent on a public law right were to be determined in judicial review proceedings did not apply when private law rights were at stake. Alternatively, it was held, the plaintiff's claim was an exception to the general rule because his private law rights dominated the proceedings, the order that he sought for the payment of money could not be granted on judicial review and his action ought not to depend on the need for leave or relief which was discretionary.

[15] The Government submitted that the plaintiffs in the instant case have no claim in private law against the Government arising out of the decision of the Government not to grant a lease of the Queen's Chain to them. The plaintiffs are claiming that they had a legitimate expectation that a lease would have been granted to them, argues the Government, and such an expectation is not a private right but purely a public law right and therefore can only be vindicated by judicial review.

[16] It is obvious that the plaintiffs' initial and principal cause of action is in private law. Right of way, injunction, damages for trespass are all private law remedies. These reliefs are claimed against private persons. The claims against the Government were added afterwards and are incidental or collateral to the private law rights that the plaintiffs are asserting.

[17] Arguing in support of the Government's objection counsel for the defendants suggested that what the plaintiffs ought to have done was to have brought judicial review proceedings against the Government separate from the action by writ that they brought against the defendants. Counsel seemed not in the least bit embarrassed by the fact that, before the plaintiffs joined the Government, he had himself issued third party proceedings to join the Government. On the application to issue a third party notice counsel had identified a number of issues that his clients deposed needed to be determined between all the parties including " … whether the grant of a lease by the Crown to the Defendants was lawful or a lawful exercise by the Crown of its rights and powers over the Queen's Chain". That recognition by counsel for the defendants that there were issues that needed a common decision shows an appreciation of just how much the public law issue is tied up with the private law issues and how much they need to be tried together.

[18] In those cases where a litigant seeks public law remedies by ordinary action instead of by judicial review and he is stopped from continuing by ordinary action, the courts have held it to be an abuse of the process of the court. It is not that the courts have held that they do not have the jurisdiction to grant the relief sought. The substantive jurisdiction reposes fully in the courts; it is that procedurally and as a matter of policy it is undesirable to allow the issue to be determined in proceedings commenced by the wrong procedure. In the instant case I find that the relief sought against the Government is incidental or collateral to private law rights that the plaintiffs are asserting and that it was not only proper but also beneficial

that such relief be sought in the same proceedings as those in which the private law claims against the defendants are to be determined. There was no abuse of process in the plaintiffs choosing to combine in one suit all the relief they seek in relation to their alleged rights in or to the Queen's Chain.

[19] Accordingly, I rule against the point in limine. I now turn to the substance of the plaintiffs' case.

Rights over the Queen's Chain

[20] The case for the plaintiffs is that they enjoyed certain rights over the Queen's Chain, which they accept is part of the crown domain, according to the language of Article 355 of the Civil Code. It is necessary to identify these alleged rights and determine whether they do in fact exist and, if they do, to decide what is the status of these rights. The plaintiffs say that under customary law, acknowledged in Official Statements solemnly reproduced in Appendix II to volume VI of the St. Lucia Revised Ordinances 1957, the owners of the hinterland to the Queen's Chain are granted the right to use and enjoy the Queen's Chain. By virtue of such right, say the plaintiffs, they were in actual possession of the Queen's Chain.

[21] For the defendants it is conceded that occupiers of adjoining or abutting lands have rights to use and enjoy the Queen's Chain but, it is argued, such rights are limited to the extent that the land can be reclaimed at the Crown's pleasure. The occupation, use and enjoyment are only the result of tolerance, submit the defendants; the use is at sufferance.

[22] The Government's position is that the plaintiffs cannot claim a "customary right" since the use of the Queen's Chain was always subject to permission from the Crown, even if gratuitously. The plaintiffs' rights, the Government submits, "may therefore be limited to a mere right of access to the sea". In support of this contention the Government cited a passage from *Coulson & Forbes on the Law of Waters and Land Drainage*, 6th ed.,(1952), at p. 69 which states that there is imposed on the proprietor of the foreshore an obligation of allowing the owner or occupier of lands adjoining the sea the free access and egress to and from the sea to his lands.

[23] As a first observation it is to be noted that the Government treats two different things as if they were the same. The foreshore is that portion of land which is alternately covered and left dry by the ordinary flux and reflux of the tides: *Coulson & Forbes*, op. cit., at p.22. The Queen's Chain, which is not even mentioned in that work, is the portion of land running 186.5 feet inland from the foreshore.

[24] A second observation to be made is that there is an established body of law, in St. Lucia, that deals specifically with the Queen's Chain. That law is rooted in Ancient French Law. This, therefore, means that English common law dealing with the foreshore is not the applicable law. That having been said, it does not gainsay the possibility that the rights which may exist in relation to the foreshore may be similar in nature to those which may exist in relation to the Queen's Chain.

[25] At the beginning of this judgment I referred to a decision that was made almost three hundred years ago. The decision given by the King of France arose from a complaint by Mr. Graissier to the King at Versailles that the Governor-General and the Steward of Guadeloupe made a concession of the lands comprising the King's Chain that lay between the sea and the adjoining plantation of Mr. Graissier to Mr. De la Malmaison which made those lands useless to Mr. Graissier. The impugned action was alleged to be contrary to the custom of the island of allowing adjoining plantation owners to enjoy the King's Chain. The King gave his judgment on the 6th August 1704 in favour of Mr. Graissier and "broke, annulled and revoked" the offending concession and forbade Mr. De la Malmaison "from helping himself to it or troubling … the said Graissier in the possession and enjoyment of the said piece of land …".

[26] The royal and judicial recognition that the complainant possessed the portion of the Queen's Chain which he enjoyed gives great comfort to the plaintiffs. However, it may be that such possession should be treated not as an incident to ownership of the adjoining lands but as flowing from the existence of an earlier concession that had been made to Mr. Graissier's father.

Ancient French law

[27] Dr. N.J.O. Liverpool, in a paper entitled *The History and Development of The Saint Lucia Civil Code* published in Essays on the Civil Codes of Quebec and St. Lucia edited by Landry and Caparros, University of Ottawa Press, at p. 314, has identified ancient French law as forming the basis of the laws of St. Lucia. Included in Appendix II, as part of the Ancient French Law set out therein, is a Ministerial Dispatch of 3rd December 1757 from Versailles concerning the King's Chain. The Dispatch traced the history of the King's Chain, including the reason for its existence, identified where it lies, recounted the practice of giving permission to owners of the hinterland to clear the lands to facilitate the exploitation of their plantations, explained that the lands were granted on the understanding that the lands could be reclaimed when needed for the service of the King or the public and exposed the abuse of the permission by persons treating the lands as their own and purporting to sell or mortgage or leave it by will. The Dispatch went on to affirm that the lands remained at all times the property of the King to do with as he chose but that the king was content "with conserving his law". The Dispatch then directed the recipient, presumably an administrator, to follow the practice of "conceding the lands of which it entails only the enjoyment, and he [the King] doesn't expect that one will worry the actual dealers in this enjoyment, as long as the portion of land involved in their grants will not be necessary to make use of …".

[28] Also included in Appendix II is a Dispatch from the Secretary of State for the Colonies to the Governor in Chief of the Windward Islands relative to the King's Chain gazetted 30th August 1889. The upshot of the dispatch was to state that in the absence of any grant of the Queen's Chain "the Crown can resume possession for the purpose of asserting title or for any public use".

[29] In the presentation of the arguments there was a complete lack of reference material on the Queen's Chain. Not one case or textbook or article on the subject was produced to me and I am confident that this reflected the dearth of material on the subject. The only material that the industry of counsel for the plaintiffs yielded were the Three Chains (Tobago) Act, Ch. 57:04 of the Laws of Trinidad and Tobago and the Three Chains Act, Ch. 250 of the Laws of St. Vincent. In the Tobago law, passed in 1865, freehold title to the three chains was thereby vested in the owners of the contiguous lands in recognition of the fact that they had for the better part of a century thitherto treated and been allowed to treat the three chains as their property. Counsel for the plaintiffs argued that the Vincentian legislation also recognized, implicitly, that the adjoining owners, as at 13th October 1887, were already possessed of estates in the Three Chains by enacting that the same "shall be and remain vested in the respective proprietors of lands adjoining thereto, for such estate as they respectively have in such lands and the like tenure therewith …".

[30] From these two pieces of legislation in neighbouring territories the plaintiffs argue that it is unthinkable that the King or the terms of customary law governing the Queen's Chain would discriminate against St. Lucia to the extent of reducing the status of hinterland owners to a mere tenancy at will when His Majesty considered that hinterland owners in St. Vincent and Tobago had a right or interest, so close to ownership, as to justify its conversion into ownership by legislation.

[31] The difference in status of the "rights" of hinterland owners in the respective territories does not necessarily reflect an unthinkable discrimination. It probably reflects the different histories of the respective territories. Certainly there was a difference in the status of the rights of hinterland owners in the respective territories. Thus, a mere two years after the law was passed in St. Vincent (that is, 1887) giving title to the Three Chains to adjoining landowners came the Dispatch from the Secretary of State for the Colonies (that is, 1889) affirming that it was the law in St. Lucia that the Queen's Chain belonged to the crown and that the crown could resume possession for the purpose of asserting title or for any public use.

[32] It may also be noted that a closer reading of the St. Vincent law does not support the argument of counsel for the plaintiffs that before the law was passed adjoining owners already had estates in the Three Chains. What section 2 of the Vincentian Act says is that the Three Chains shall be and remain vested in proprietors of lands adjoining the Three Chains for such estate as the proprietors have "in such lands". I understand the reference to be to the estate that proprietors of adjoining lands have in those adjoining lands. The intention, it seems to me, was to legally attach the Three Chains to the hinterland that it physically adjoined and merge the former with the latter by conferring the same estate and tenure in the one as already existed in the other.

[33] Since an examination of the rights of adjoining owners in the three chains in other territories provides no assistance in determining what are the rights, if any, of adjoining owners in the Queen's Chain in St. Lucia that determination must be made based on the content of our law.

Use and enjoyment

[34] The right to use and enjoy is the right that the plaintiffs claim. As I understand it, the plaintiffs are saying that this right is incident to ownership of the adjoining lands and does not depend for its creation or existence on the grant of any permission or concession. No attempt was made to identify the limits, if any, of the use and enjoyment to which the plaintiffs allegedly had a right and perhaps for the purposes of this case there was no need. It does appear, however, to be part of the plaintiffs' case that such use and enjoyment carried with them the right to occupy, cultivate and to exclude others. The evidence for the plaintiffs is that the plaintiffs, through their housekeeper, did those things. When the plaintiffs bought their property in 1981 the Deed of Sale expressed itself as conveying the said 17 acres "Together with the vendors' customary rights of enjoyment and all other rights, title and interest which the vendors may have in 4 acres 2 roods and 0.3 perches of the Queen's Chain … ". The plaintiff confirmed in his evidence that he understood that he was buying, along with his land, the customary right of use and enjoyment of the Queen's Chain.

[35] There is sufficient material before me to satisfy me that there appears to be a general understanding that the owners of the adjoining hinterlands enjoy customary rights of use and occupation over the Queen's Chain. The evidence of Mr. Ornan Monplaisir O.B.E., a licensed land surveyor of 47 years standing is specific on this point. To the same effect is the conveyancing history of the land including the 1963 Deed by which the plaintiffs' predecessor in title obtained title from the first defendant's forebear. Correspondence from the plaintiffs' lawyers also point to the existence of such an understanding as does a letter dated 20th May 1994 from the lawyers for the fourth defendant ("the company").

[36] The legal justification for that understanding is to be doubted. When I examine the translation by John d'Auvergne, helpfully produced for the assistance of the Court as part of the Government's case, of the historical documents reproduced in Appendix II, I find no clear statement to support the existence of the alleged incidental rights of use and enjoyment. As mentioned above, in the case decided by the King of France in 1704 the possession and enjoyment of the complainant that were vindicated seemed to have derived from a 1664 "concession" of the King's Chain to the complainant's father. In the Ministerial Dispatch of 1757 the recipient was directed to "follow the use of conceding the lands of which it entails only the enjoyment", by which I understand he was to follow the practice of granting limited "concessions" of the King's Chain. Both of these two extracts can be read as supporting the submission of counsel for the Government that the use of the Queen's Chain for the benefit of adjoining land was always subject to permission from the Crown. The particular passage from the last mentioned extract to which counsel for the Government specifically referred, at paragraph 5 of page 38 in Appendix II, follows from a summary in paragraph 2 of the history of land grants or "concessions" in the islands. That summary shows that the King's Chain was excluded from these concessions – "all the concessions granted in the islands circuits did not begin to take root but above the Lord's Chain, then the King, space that should be counted from the edge of the clear cut land, and where the flow and the waves of the sea do not come". The passage at paragraph 5 shows that the practice grew up of adjoining owners obtaining the King's "permission to

clear the lands, which enabled them to procure facilities for the exploitation of their plantations".

[37] I do not know if a later practice grew up, and if it did when it did, of adjoining owners ceasing to obtain permission and instead treating their use and enjoyment of the Queen's Chain, which I assume must have continued, as a matter of implied permission. Not only would the assumed existence of such a practice be speculative but it would make no difference to the outcome because I certainly could not elevate use and enjoyment based on any such practice of assuming that there was an implied permission to the status of a customary right in relation to the Queen's Chain. Based on the material before me I find that the plaintiffs did not have a customary right of enjoyment of the Queen's Chain.

Possession

[38] However, I find that the plaintiffs were in possession of the Queen's Chain. In their skeleton arguments the defendants accept that a possessor without title, a mere squatter, may maintain an action for trespass. The defendants say, however, that this is not so where, as here they say, the possessor is a bare licensee because the latter has no right to exclusive possession in the same way as a tenant does. I do not think that the right to maintain an action for possession depends for its existence on a grant from the titleholder of exclusive possession to the possessor. A possessor can exclude anyone except someone having a better legal right to possession: see *Megarry & Wade, The Law of Real property,* 3rd ed., at p 997. If even a squatter can maintain an action for possession why should the position of a licensee be any less? It seems to me that the plaintiffs would be entitled to maintain an action for trespass even though their claim to a customary right fails.

[39] The real Defence to the plaintiffs' claim for trespass is that the defendants were lawfully entitled to enter the Queen's Chain by virtue of the lease in favour of the defendants. The lease gave them a better legal right to possession, the defendants would argue. That lease was a nullity, say the plaintiffs, and they ask the Court to declare it invalid. I turn now to deal with this issue.

Illegal, irrational and procedurally improper

[40] The essence of the plaintiffs' challenge to the grant of the lease is that the decision of cabinet to do so is illegal, irrational and procedurally improper. The plaintiffs rely on the exposition by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [1984] 3 ALL ER 935 of these as the grounds upon which administrative action is subject to judicial review.

[41] According to the plaintiffs a decision is Illegal if made or taken in misapprehension or breach of the statutory or other legal duties of the public authority; or in misapprehension or breach of the law governing the decision; or in abuse or beyond the scope of the constitutional, prerogative or statutory powers of the authority. This seems an acceptable summary of the law emerging from the last mentioned decision and from the speech of Lord Scarman in *Preston v. IRC* [1985] 2 All ER 327 at 329.

[42] In the present case the plaintiffs say there was illegality because the executive misapprehended or breached its solemn promise or legal duty under customary law to preserve the plaintiffs' customary rights of enjoyment of the Queen's Chain. I have found that the plaintiffs had no such customary rights and consequently there was no breach of promise or duty to preserve what did not exist. That finding also disposes of the plaintiffs' argument that the executive misapprehended or breached the customary law governing the plaintiffs' customary rights of enjoyment of the Queen's Chain. As to abuse or excess of power I find no evidence of these; the Government could, in a proper case, lease the Queen's Chain. To impugn that decision a challenger would have to show that there was something in how it was done or the reasons for doing so to make it an abuse.

[43] Irrationality, to ground a challenge, applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person would have made such a decision, as Lord Diplock explained in the *CCSU* case. In the present case a sensible person may strongly disagree with the Government's decision and regard it as hard but that would not make the decision outrageously defiant of logic.

[44] Procedural impropriety, which is the plaintiffs' remaining ground of challenge, does not depend for its availability on the alteration of legal rights or obligations enforceable in private law. It distinctly avails where the decision deprives a person of legitimate expectations, as is clearly stated by Lord Diplock in the *CCSU* case at page 943. This feature relieves the plaintiffs of the consequences of their inability to show the existence of customary rights to the Queen's Chain. In the same passage Lord Diplock expressed the view that there was no reason why procedural impropriety should not be a ground for judicial review of a decision made under powers which ultimately derived from the prerogative. Counsel for the Government had argued that the grant of the lease was an exercise of the prerogative and that this factor made the decision non-justiciable. Lord Diplock's view shows that argument to be untenable, at least in those instances where it is not a direct exercise of the prerogative. The ratio of that case may be even less restrictive than that. I believe that the summary in the headnote is accurate in identifying as the gravamen of the *CCSU* decision that what makes a decision justiciable or not is its subject matter and not its source. I am assuming without deciding that the grant of the lease was in exercise of an authority that derived from the prerogative power as opposed to statute. Lord Diplock also stated that procedural impropriety was not limited to a failure to observe the rules of natural justice but also included failure to act with procedural fairness towards the person who will be affected by the decision.

[45] The circumstances affecting the decision to grant the lease to the fourth defendant require close consideration. It was on 20th May 1994 that the fourth defendant ("the company") applied for a lease of the Queen's Chain, parcel 14, as it then was, to develop a scuba diving centre and related activities. Their lawyer's letter recognized "that the owner of the land, to wit Malcolm Caplan, contiguous to the said parcel 14, has certain rights to the Queen's Chain."

[46] An especially interesting letter was written by the Commissioner of Crown Lands to first the plaintiff on 10th June 1994 concerning the matter of rights to or over the Queen's Chain.

Earlier I stated that I could not elevate any (assumed) practice, on the part of adjoining owners, of assuming an implied permission to use and enjoy the Queen's Chain to the status of a customary right. This letter shows that so far as Government policy was concerned there was no such right. It stated that, "while it is generally recognised that certain user rights are associated with the ownership of land contiguous with the Queen's Chain, it is the policy of the Crown that any active use thereof must be sanctioned by the Crown in the form of sale, lease or other arrangement." For present purposes the relevance of the letter is that it invited the first plaintiff to rationalize his occupation of the section of the Queen's Chain abounding his property by making the necessary application. The plaintiff responded by letter dated 23rd September 1994 expressing a desire to purchase or lease.

[47] At some undisclosed point the company's application for a lease was rejected. This appears from a letter by their lawyers, dated 20th April 1995, asking the Minister of Tourism to get Cabinet to review that decision. That letter sets out nine grounds on which it urges that a lease should be granted to the company, including the fact that the plaintiffs were not using the Queen's Chain, the plaintiffs had no plans to develop it, the plaintiffs only visited 2 or 3 times a year and that it was not just and equitable that the plaintiffs should be allowed to stand in the way of its development. That letter indicated that the intended user was to establish a scuba diving business and improve the company's restaurant.

[48] Of critical importance is a letter dated 15th May 1995 written by the Commissioner to the company's lawyers. After pointing out that the section of the Queen's Chain that the company wanted to lease was directly adjacent to the freehold lands of the plaintiff it went on to state:

> "The general policy which is applicable in this case is that the prior consent of owners of the land abutting the Queen's Chain would be required if the Crown were to agree to the grant of a lease of the Queen's Chain"

[49] By letter dated 13th January 1998 the Commissioner advised the company's lawyers that Cabinet had approved, on 20th December 1997, a lease of a portion of the Queen's Chain to the company.

[50] It does not appear that the plaintiffs had a clue that this had been done until the plaintiffs' lawyers wrote to the Commissioner on 6th April 1998 seeking a lease of parcels 14 and 18 to enable the plaintiffs to construct cottages thereon for rental to tourists and visitors to the island. The Commissioner wrote back on 16th April telling them that Cabinet had already approved in principle the leasing of a part of parcel 14. The plaintiffs objected, setting out their grounds. They sought a meeting with the Minister of Tourism. Obviously their efforts got them nowhere because the lease was subsequently executed by the Government.

[51] In the Agreed Statement of Facts counsel for all the parties agreed that " It is the policy of the Government of St. Lucia to grant a proprietary or possessory right over a parcel of land of the Queen's Chain only to the person who owns or has a long lease over the hinterland abutting that parcel…". The policy is, to my mind, confirmed by the evidence of

the present Commissioner that he has been able to find only two cases in which the Queen's Chain has been leased to persons other than the owners of the adjoining hinterland.

Legitimate expectation

[51] Counsel for the plaintiffs submits that there were two benefits or advantages of which the plaintiffs were deprived. Firstly, he says, the plaintiffs had a legitimate expectation that they would be granted the benefit, privilege or advantage of a lease of the Queen's Chain in priority or preference over other persons. Secondly, he says, the plaintiffs had a legitimate expectation that a lease would not be granted to any other person before the plaintiffs were given an opportunity to be heard and to make representations in regard to such an extraordinary lease.

[52] I accept the submission that the plaintiffs, as a practical matter, were adversely affected by the Government's decision. The plaintiffs had no right to a lease. But based on settled Government policy, and based also on the Commissioner's letter to them of 10th June 1994 inviting them to apply to purchase or for a lease, they had the expectation that a lease would be given to them. That same letter confirms the existence of the policy and constitutes a direct representation of the terms of the policy to the plaintiffs. I do not take the letter, I wish to make clear, as a promise of anything but I do regard it as containing a statement of policy from which a reasonable person in the position of the first plaintiff would reasonably expect that he would be given a lease. From that same policy it follows that the plaintiffs would have been justified in thinking, if the thought ever crossed their minds, that a lease to the Queen's Chain in front of them would not be given to another before at least allowing them to make representations.

[53] In the CCSU case Lord Diplock stated that, for a legitimate expectation to arise, the decision:

> " must affect [the] other person … by depriving him of some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn."

[54] Fairness dictated that the plaintiffs' expectation that a lease would be given to them should not have been summarily disappointed and the plaintiffs should at least have been permitted to argue for its fulfillment. It may be observed that when the company's first application for a lease of the Queen's Chain was refused it was, apparently, the force of argument in the letter from their lawyers that got them a review of that refusal by Cabinet. It does not matter whether or not the expected lease would in the end have been granted to the plaintiffs. All that was required at the particular stage was that the opportunity should have been given to the plaintiffs to participate in the decision about whether or not it should have been granted to them; see *de Smith, Woolf & Jowell, Judicial Review of*

Administrative Action, 5th ed., 8-047. As a matter of fairness this was even more so given the arguments against them that were being made by the company, completely unbeknownst to them.

[55] In relation to the grant of a lease to persons other than the plaintiffs who owned the adjoining hinterland this was a clear violation of more than any expectation on the part of the plaintiffs, it was a violation of Government's general policy that the consent of owners abutting the Queen's Chain would be required. The characterisation given to this decision by counsel for the plaintiffs is no hyperbole: it was extraordinary. But the scale of the decision does not, of course, make it a case falling within the doctrine of legitimate expectation, as was made clear by Lord Bridge in *Re Westminster City Council* [1986] A.C. 668. For a legitimate expectation to be found it must be based on an express promise or representation or a representation implied from established practice based upon the past actions or the settled conduct of the decision-maker, according *to de Smith, Woolf & Jowell* at 8-053. In this case I am satisfied that there was no express promise or representation on the part of Government to the plaintiffs that it would not lease the Queen's Chain to other than the plaintiffs, as owners of the adjoining hinterland, without giving the plaintiffs a hearing. It may be, however, that there was a representation to be implied from established practice because there was an established practice not to lease the Queen's Chain to a person other than the owner of the hinterland: the fact that it had been done only twice before would tend to confirm the practice. I can see with the argument for the plaintiffs that the plaintiffs would have had a legitimate expectation that a lease of the Queen's Chain in front of them would not have been made to any person other than them. If I am wrong in that view and the plaintiffs should not be regarded as having any such legitimate expectation I would hold that the plaintiffs were nonetheless entitled to be fairly treated.

Procedural fairness

[56] Legitimate expectation is not the only basis upon which a person is entitled to a fair hearing. A person is entitled to a fair hearing as a matter of procedural fairness. Procedural fairness is required whenever the exercise of a power adversely affects an individual's rights. These include rights in property, for instance, as well as more general rights. A hearing is required in most situations where licences or other similar benefits are revoked, varied, suspended or refused; even where the decision-making power affords wide discretion to the decision-maker: see *de Smith, Woolf & Jowell* at 8-022. From that same text it appears that a strong presumption exists that a person whose licence is threatened with revocation should receive prior notice of that fact and an opportunity to be heard. The presumption, I accept, should be especially strong where revocation causes serious pecuniary loss.

[57] The Government argued in relation to the plaintiffs' alleged customary rights that the plaintiffs had no rights at all but were in occupation of the Queen's Chain at the sufferance of the Crown, they were trespassers. I do not accept this argument as valid. The letters to the plaintiffs from the Commissioner, particularly the letter of 10th June 1994 inviting them to rationalize their occupation of the Queen's Chain, confirms that the plaintiffs were licencees. The Government did not object to their occupation; rather, the Government

recognized the fact of their occupation, and impliedly but clearly permitted them to continue to occupy and offered them the opportunity to strengthen the basis of their occupation.

[58] The effect of the lease to the company, as the actions of the company which found this suit for trespass starkly indicate, was to revoke the licence to the plaintiff by virtue of which they had been occupying the Queen's Chain. There has to be a serious pecuniary loss to the plaintiffs as a result. Had the plaintiffs been permitted to do so they would have continued in occupation and would have rationalized that occupation and they would have built cottages, according to their application for a lease or purchase. They would have continued to enjoy ocean frontage and the view of the Pitons from their home. Their $2.85 million asset would have been preserved and possibly enhanced. In contrast, as a direct consequence of the granting of the lease to the company the plaintiffs have lost the benefit of occupying the Queen's Chain, they have lost the opportunity to build cottages, they have lost the ocean frontage and they may well lose, in whole or in part, their view. The plaintiffs' witness, Wayne Brown, says that the loss of ocean frontage and the possible obstruction or interruption of view would devalue the plaintiffs' property by 60 percent. It seems to me that this is a consequence that flows directly from the grant of the lease to the company and the corresponding revocation of the licence to the plaintiffs. Fairness demanded that the plaintiffs should have been heard. In the circumstances they had a right to be heard. There was no excuse for the denial of that right.

[59] The decision of the Government to grant the lease, therefore, involved the summary disappointment of the legitimate expectation of the plaintiffs that a lease would be given to them. That decision also involved the revocation of the plaintiffs' licence to occupy the Queen's Chain without giving them a hearing. On each of these two bases I find that the decision to grant the lease was unlawful. I therefore quash the decision and direct that the appropriate authority consider the applications of both the plaintiffs and the company according to law. I declare the lease to be a nullity.

Damages from the Government

[60] There does not seem to be any legal basis for the plaintiffs' claim for damages from the Government for the diminution in the value of the plaintiffs' property. The failure of a public body to act in accordance with public law principles of itself gives no entitlement at common law to compensation for any loss suffered, as is explained in *de Smith, Woolf & Jowell* at 19-003. Factually, no loss has even been alleged as arising from the procedural impropriety attending the decision, which is all that the plaintiffs can complain of as against the Government. I therefore dismiss this claim for relief. I turn now to the plaintiffs' claim in trespass against the defendants.

Trespass to the Queen's Chain

[61] As regards the plaintiffs' claim for trespass to the portion of the Queen's Chain of which they were in possession, the nature of that possession has been raised as a bar to such a claim. The Government submits that the plaintiffs were tenants at sufferance and that as such they are met with the bar established by Article 763 of the Code of Civil Procedure

which says that a holder at sufferance is one of the two classes of possessors of immovable property who cannot maintain an action for possession. The plaintiffs submit that because the plaintiffs were not obligated to pay rent they were not holders at sufferance. Article 1515 of the Civil Code says that persons holding real property by sufferance of the owner, without lease, are held to be lessees and bound to pay the annual value of the property. I think the facts rather support the plaintiffs' submission – there is no evidence before me that either they or the Government ever regarded the plaintiffs as bound to pay rent. More, a holder at sufferance is in every sense a lessee; he holds an annual lease that " is subject to tacit renewal and to all the rules of law applicable to leases". Such a status would give the plaintiffs the very sort of standing and rights in land that the Government argues they do not have. I hold that the plaintiffs were not tenants at sufferance and they are, therefore, not precluded by Article 763 of the Civil Code from bringing an action for trespass to land.

[62] The defendants pleaded that they did the acts complained of under authority of the lease and were therefore lawfully authorised to do so. The question now arises, given the unlawfulness of the lease, whether actions taken pursuant thereto were ever valid. The law on this question was at one time quite confusing and involved deciding whether the impugned administrative action was void or voidable. In the one instance the impugned action was treated as never having had any legal effect; in the other instance the impugned action was treated as having had and as continuing to have validity up to the point that it was pronounced invalid. There is a very useful discussion of this aspect in *Wade & Forsyth, Administrative Law* 7th ed. (1994) at p. 340. Happily, it is now settled that a decision reached in violation of the right to a fair hearing is an ultra vires decision and is a nullity and is therefore void. Lord Diplock in *Hoffman-La Roche v. Secretary of State for Trade and Industry* [1975] AC 295 at 365 made it clear that an ultra vires action is incapable of ever having had any legal effect. The logic of the consequence that flows from that reality is inescapable: acts performed pursuant to the unlawful administrative action must themselves be unlawful - from the outset. While the logic may be inescapable the consequence is not inevitable. This is because there are instances where the Courts have a discretion to refuse to provide a remedy or to refuse to provide a retrospective as opposed to a prospective remedy and may therefore refuse to quash an unlawful decision: see *de Smith, Woolf & Jowell* at 5-048. However, neither have the defendants nor has the Government made any suggestion that the discretion exists or should be exercised in this case or offered any grounds upon which, on my own, I may consider such an exercise and it would therefore be entirely inappropriate for me to embark on such an endeavour.

Right of way over defendant's land

[63] The plaintiffs also claim a declaration that they are entitled to the right of way along the concrete driveway that connected the plaintiffs' property and the main road and they claim injunctions in support of that right and damages for trespass for the destruction of the driveway. This is a claim to a right of way over the first defendant's parcel 12. The basis of the plaintiffs' claim is a Deed of Sale dated 30th November 1963 from Andre DuBoulay et al to Robert Lawther of the lands that are now the plaintiffs' parcel 15. In the description of the property sold there is included " a Twelve foot right of way from the said Anse Mamin Road across the remaining lands of the vendors running in a North-Westerly direction to

the Eastern boundary of the …[lands sold] at a reasonable location to be agreed upon by the parties."

[64] The evidence of the first plaintiff is that at the time he purchased the property on 16th January 1981 he met the concrete driveway in place. The evidence of the first defendant is that when he and his wife purchased a portion of the remaining lands of Andre DuBoulay et al on 13th October 1981 there was only a footpath in place. Having seen the demeanour of the first plaintiff and the first defendant and observed the way they gave their testimony I have not the slightest hesitation in disbelieving the testimony of the first defendant. I believe the first plaintiff. In addition, the specific testimony on this point of the supporting witnesses, Cynthia James and Wayne Brown, and the probability of the situation are further reasons why I believe that a concrete driveway ran across parcel 12 at the time that the plaintiffs bought parcel 15. It seems fairly obvious to me that this driveway existed by virtue of the right of way granted to the plaintiffs' predecessor in title and was, therefore, lawfully there for the enjoyment of the plaintiffs' land.

[65] On or about the 18th January 1999 the first and third defendants completely destroyed the concrete driveway by excavating it to a depth of twenty feet and for a length of fifty feet. The defendants say they did this as part of their expansion activities and that they had informed the plaintiffs of their intention to do so and had offered to construct at the expense of the first defendant an alternative access just as convenient across parcel 12. The defendants say that the plaintiffs unreasonably refused to accept this offer.

[66] The defendants relied on Article 503 of the Civil Code, which provides:

> "503. The proprietor of the servient land can do nothing which tends to diminish the use of the servitude or to render its exercise more inconvenient.
>
> "Thus, he cannot change the condition of the premises, nor transfer the exercise of the right to a place different from that on which it was originally assigned.
>
> "However if by keeping to the place originally assigned, the servitude should become more onerous to the proprietor of the servient land, or if such proprietor be prevented thereby from making advantageous improvements, he may offer to the proprietor of the land to which it is due another place as convenient for the exercise of his rights, and the latter cannot refuse acceptance."

It seems to me that the defendants are entitled to the benefit of this provision.

[67] When the defendants dug up the existing driveway the plaintiffs proceeded to construct an alternative driveway. This runs across parcel 12. The defendants say it is in the same area where the first defendant had offered to construct the alternative access. The alternative that the plaintiffs have constructed is only a temporary measure that cost $12,500.00. The plaintiffs' contractor, Wayne Brown, who did that job says that a permanent replacement driveway would cost $59,187.60. The defendants did not challenge that figure.

Damages

[68] I would grant the plaintiffs a declaration that the plaintiffs are entitled to a right of way across parcel 12 along the destroyed concrete driveway that connected the plaintiffs' property with the main road. I hold, however, that the first defendant is entitled to change the location of that right of way, so as to enable the first defendant to advantageously improve the first defendant's land, and to provide the plaintiffs with another concrete driveway that is as convenient. In the events which have occurred I hold that the first defendant must pay damages to the plaintiffs in the sum of $12,500.00 to compensate the plaintiffs for the cost to the plaintiffs of establishing the present temporary driveway. I also hold that the first defendant must pay damages to the plaintiffs in the sum of $59,187.60 to defray the cost to the plaintiffs of the construction of the proposed permanent replacement driveway. The plaintiffs are entitled to do the necessary works on parcel 12.

[69] The evidence of Wayne Brown is that as a result of the excavation work that the company did on that portion of the Queen's Chain that was in the occupation of the plaintiffs there is a need for reinstatement. He detailed the cost of doing this work as amounting to $229,500.00. There is a difference in the nature of the injury or damage for which compensation is being claimed in respect of the Right of Way and in respect of the Queen's Chain. In the former the plaintiffs are entitled to compensation for the loss of the use and for them to be restored to that use. In the latter the plaintiffs are seeking damages for injury done to the land.

[70] In the latter case it appears, as a matter of law, that the plaintiffs are entitled to damages based on the amount by which the value of the land has been diminished and not on the cost of restoration: *Lodge Holes Colliery Co. Ltd. v. Wednesbury Corp.* [1908] A.C. 323,326. There will be instances where the diminution in value may be the cost of restoration, but generally, it has been said, it will be less. Allied to the first proposition is the further proposition that to recover substantial damages the plaintiff must show an interest in the land beyond an interest for a day or two, otherwise the damages will usually be nominal; see *Rust v. Victoria Graving Dock* (1887) 36 Ch. D. 113. This points to a requirement that a plaintiff must have a substantial as opposed to a slight interest in the land. In this case the plaintiffs' interest in the land was slight because it was precarious. The plaintiffs were the barest of licencees. There is not much damage of which they can complain; it is the Crown who would be able to complain of the physical damage to the land and the Crown is not complaining.

[71] Apart from the physical damage that they did to the land the defendants did sever and destroy certain plants and fixtures that the plaintiffs had on the land. In the case of this form of trespass, damage to things rather than damage to land, the plaintiffs can recover as damages the value of these things. The evidence of Wayne Brown is that to replace the trees and to rebuild the steps and walkway to the beach would it would cost $21,000.00 total. I award that sum as damages to the plaintiffs.

[72] At an earlier stage I asked counsel for the benefit of their views as to costs. Based on those indications and taking into account the quality of preparation that went into this suit

and the amount of time that it must have taken I consider $35,000.00 a fair award of costs and I award that sum to the plaintiffs to be paid by all of the defendants.

Denys Barrow S.C.
High Court Judge (Ag.)