INTRODUCTION

Public access to the island’s beaches has always been a controversial issue in Jamaica. Members of the public have from time to time expressed the opinion that they are being denied access to the better beaches in Jamaica. The concern may be summed up in a letter to the Beach Control Authority sometime in 1973:

"It is a matter of concern that hotels, which are supposedly open to the public, are allowed to pursue an undisguised policy of trying to exclude the public from their beaches in such ways as failing to provide changing facilities; placing excessive charges on the use of the beach; and using their staff to intimidate the public. Although hotels are under law open to the public, in practice their beaches really are not."

The controversy is probably steeped in the notion that members of the public enjoy unrestricted access to the beaches, foreshore and the waters surrounding the island. But what is the true legal position as it regards ownership to beaches and rights thereto? The principal piece of legislation governing these issues is the Beach Control Act.

The Beach Control Act
Section 3 of the Beach Control Act vests all ownership in the foreshore and the floor of the sea in the Crown. The only rights to the foreshore and the floor of the sea are preserved in the ensuing subsections which provide:

Section 3 (2) All rights in or over the foreshore of this Island or the floor of the sea derived from, or acquired under or by virtue of the Registration of Titles Act or any express grant or licence from the Crown subsisting immediately before the commencement of this Act are hereby expressly preserved under the Beach Control Act.

Section 3 (3) Except as provided in Section 7, nothing in this Act shall be deemed to affect -

(a) any rights enjoyed by fishermen engaged in fishing as a trade, where such rights existed immediately before the 1st June, 1956, in or over any beach or adjoining land; or

(b) the enjoyment by such fishermen of the use of any part of the foreshore adjoining any beach or land in or over which any rights have been enjoyed by them up to the 1st June, 1956.
Section 3 (4) provides that no person shall be deemed to have any rights in or over the foreshore of this Island or the floor of the sea save such as are derived from or acquired or preserved under or by virtue of this Act.

Section 4 makes provision for owners of beach front property to certain entitlements and specifically provides that any person who is the owner or occupier of any land adjoining any part of the foreshore and any member of his family and any private guest of his shall be entitled to use that part of the foreshore adjoining his land for private domestic purposes, that is to say, for bathing, fishing, and other like forms of recreation and as a means of access to the sea for such purposes. There is a proviso however that where any land as aforesaid is let, the letting of which is in pursuance of a commercial enterprise, the right to the use of the foreshore for private domestic purposes shall only be by virtue of a licence granted to the lessor under this Act.

The provisions of the Beach Control Act it is submitted have served in some respects to codify the common law rule where there is no right for the public to use the foreshore for the purpose of bathing, nor is there any right to bathe in the sea. Neither can the public cross the foreshore for the purpose of bathing whether the foreshore is the property of the crown or a private person.\(^1\)

In essence therefore there is no general right of the Jamaican public to use the foreshore or the floor of the sea save and except those rights preserved.

The Beach Control Act vests in the Beach Control Authority, now the Natural Resources Conservation Authority the right to grant licences for any use of the foreshore and the floor of the sea. Section 5 of the Act makes it an offence for any person to encroach on or use, or permit any encroachment on or use of, the foreshore or the floor of the sea for any public purpose or for or in connection with any trade or business, or commercial enterprise, or in any other manner (whether similar to the foregoing or not) except as provided by Sections 3, 4 and 8, without a licence granted under the Act. The offence is triable summarily, and the accused on conviction before a Resident Magistrate is liable to a sentence of imprisonment with or without hard labour for a term not exceeding twelve months, or to a fine for each day during which the contravention continues not exceeding twenty dollars for each such day and in default of payment of any such fine to imprisonment with or without hard labour for a term not exceeding three months, or to both such imprisonment and fine. The licensing regime is governed by the Beach Control (Licensing Amendment) Regulations (amended in 1999). The Beach Control (Hotel, Commercial and Public Recreational Beaches) Regulations 1978 seek to regulate public behaviour within these licenced area, but presumes that there will be designated entrances for entry to these licenced

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\(^1\) Blundell V Caterall (1821) 5 &Ald 268 at 289, 299 per Holroyd J
areas. Regulation 9 provides that a person shall not enter or leave a beach other than through the gates, passages or openings appointed for this purpose. Regulation 13(a) provides that a person shall not on a beach insult, abuse, threaten assault or threaten the licensee of the beach or any person acting as the servant or agent of the licensee.

**Balancing Public And Private Interests**

Section 11 of the Beach Control Act provides that the Authority in considering an application to encroach on the foreshore or floor of the sea, shall

‘consider what public interests in regard to fishing, bathing or recreation or in regard to any future development of the land adjoining that part of the foreshore in respect of which the application is made, require to be protected and they may provide for the protection of such interests by and in the terms of the licence.’

It is becoming more and more of a challenge to the Natural Resources Conservation Authority to balance these competing interests when considering licence applications. How does the Authority in a licence provide for the interests of the public when for example the applicant is a hotel that desires exclusive use of the foreshore and the floor of the sea for its own commercial use, or a gated beachfront community that requires the beach for the exclusive use of its lot owners when the same areas are areas over which members of the public are accustomed to use for bathing and recreational activities. How does the Authority provide for public access when the licensee is required by virtue of the licence granted to him to make investments relating to the erection of marker buoys, or the provision of lifeguards in relation to the expected carrying capacity of the licensed area. The licensee is also expected to undertake other incidental obligations for example the provision of third party liability insurance to cover the very members of the public who may enjoy recreational use of the licenced area. What of the Jamaican who just wants to swim in an area in which he is used to habitually resort. The licence arrangements usually provide that the licensee should not deny the public access to the licenced area, that any fee to be
charged should be determined only after agreement with the Authority and that the licencee takes the licence subject to any legal rights of third parties. The balancing game is never simple, and in more recent times the Authority has been considering petitions from members of the public regarding prescriptive rights.

**The Case for Prescriptive Rights**

Section 14 of the Beach Control Act provides:

The Authority may, upon receipt of a petition from not less than five persons concerned in any dispute with respect to the right to use any beach, or any land, road, track or pathway to gain access to such beach, lodge a plaint in the appropriate Court pursuant to section 9 of the Prescription Act with a view to establishing such a right; and the Authority for the purposes of that section be deemed to be a person concerned in the dispute.

(2) Where the public or any class of the public have used any beach, land, road, track or pathway in the manner and for the period specified in subsection (1) of section 4 of the Prescription Act and such user is not disputed, the Authority may, if they think it is expedient to do so, make an application to the Supreme Court by motion for a declaration of the right of the public to use such beach, land, road track or pathway, and the Court, upon being satisfied that the user is not disputed, shall have the power to make such an order as the Court may think fit.

Sections 4 and 9 of the Prescription Act provide:

**Section 4**

When any beach has been used by the public or any class of the public for fishing, or for bathing or recreation, and any road track or pathway passing over any land adjoining or adjacent to such beach has been used by the public or any class of the public as a means of access to such beach, without interruption for a full period of twenty years the public shall subject to the provisos hereinafter contained, have the absolute and indefeasible right to use such beach, land, road track or pathway as aforesaid, unless it shall appear that that the same was
enjoyed by some consent in or agreement expressly made or given for that purpose by deed or writing.

**Section 9**
Where the public or any class of the public have used any beach, land, road, tract or pathway in the manner specified in subsection (1) or section 4 for the period mentioned in the said subsection and such user is disputed, any person concerned in the dispute may lodge a plaint in the Resident Magistrate’s Court for the parish in which such beach, land, road, tract or pathway is situated (hereafter in this Act referred to as “the Court”) under section 99 of the Judicature (Resident Magistrates) Act and the provisions of sections 99 to 104 (inclusive) of the said Act shall apply to the matter in dispute.

**Section 5**
Each of the respective periods hereinbefore mentioned shall be deemed and taken to be the period before some action or suit wherein the claim or matter to which such period may relate shall have been, or shall be brought in question; and no act or other matter shall be deemed to be an interruption within the meaning of this Act unless the same shall have been, or shall be, submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof and of the person making or authorizing the same.

**Whether The Use Was Enjoyed Without Consent In Writing**
Section 3 of The UK Prescription Act 1832 relating to the right to light is instructive as it is somewhat similar to Section 4 of the Prescription Act. The section provides that the actual enjoyment of the access to light of a dwelling house, workshop or other building for twenty years without interruption shall make the right absolute and indefeasible unless enjoyed by written consent or agreement. In fact our statute is more strict in its terms and provides ‘unless expressly made in writing or by deed in writing’. The section goes beyond the
common law principles of prescription as being ‘user as of right’ and it is submitted that on a strict construction of the statute ‘enjoyment’ by itself suffices, even though ‘precarious’ unless the consent is in writing. This is the crux of the matter and a burden, which the defendants are bound to discharge.

In Scott V Pape (1886) C.A. 555 at 571 Cotton LJ in seeking to express the effect of the statute in light of the common law said ‘What the statute has done is to create a fresh origin for the right. The origin of the right is to be, not the supposition of any implied covenant, -- that is not necessary, provided you fulfill the requirements of the statute as to enjoyment for a certain period—not enjoyment as of right, but actual enjoyment...Coming to the language of the section, what does it do? It seems to me that it creates an indefeasible right to the access of a specific quantity of light for the use of a house, workshop, or building. The corollary is Section 4 of the Prescription Act (Jamaica) which creates an indefeasible right to the access provided that the statutory requirements are met.

In Mallam V Rose, Sargant J [1915] 2 CH 222 at 281 on the said 1832 Prescription Act, had this to say. ‘It is quite clear that s. 3 contemplates the possible existence of agreements for the purpose which are not expressed to be in writing, and negatives their efficacy. And if I were to hold that the acquisition of the right was prevented by the existence of some agreement or consent which was not expressed to be in writing, I should be disregarding the express terms of s.3 ‘.

With respect to the claim for prescriptive rights, the question for the Authority is whether to use its discretionary power to represent the public in such claims. It is submitted that if an application is before the Authority for the grant of a licence for any specified area, and members of the public have petitioned the Authority claiming prescriptive rights to that area, then the Authority is not in a position to grant that licence if it intends to pursue the matter.
Alternatives to Prescription: Public Bathing Beaches and the role of the Natural Resources Conservation Authority

Section 12 of the Beach Control Act provides that the Authority shall from time to time determine the needs and requirements of the public in relation to the use of:

(a) any portion of land, whether such portion of land adjoins the foreshore or not; and
(b) the foreshore, for or in connection with bathing or any other form of lawful recreation or for the purpose of fishing as a trade or otherwise or for any other purpose in the interest of the economic development of the beaches of the Island.

(2) Where the Authority acting in accordance with their duty under subsection (1) consider it necessary or desirable to acquire any portion of land, or rights of user over the same, whether such portion of land adjoins the foreshore or not, the Authority may, with the approval of the Minister and by agreement with the owner or any other person having power to dispose of such portion of land, acquire for any purpose specified in the said subsection such portion of land by lease or purchase, or rights of user over such portion of land.

Section 52 addresses the establishment of public bathing beaches and applies where any beach is used by the public for fishing, bathing or recreation, upon payment of a fee, that the Authority may, after consulting the owner or any person exercising control over the said beach, or receiving any such fee, and subject to the right of such owner or person to appeal to the Minister as provided by section 55, by order published in the Gazette -

(a) declare such beach to be a public recreational beach; and
(b) after consultation with the Local Authority of the parish in which the beach is situated, fix the fee to be paid for admission to or for use of the beach. The
section further provides that such beach shall continue to be open to the public as a public recreational beach upon payment of the fee fixed from time to time by any such order.

The Authority may, in any order under subsection (1), define the area of any beach declared to be a public recreational beach and may include in such definition, as part of such public recreational beach, so much of the adjoining land as they may think necessary. Any person who -

(a) hinders or obstructs any member of the public using or attempting to use any beach declared by order under subsection (1) to be a public recreational beach, or any adjoining land, and properly conducting himself and observing the regulations made by the Authority in relation to the beach or adjoining land;

(b) demands a fee in excess of the fee fixed under the said subsection, or any other form of consideration whatever, for permitting a member of the public to use any such beach; or

(c) ejects or attempts to eject from any such beach, except for misconduct, any member of the public who has paid the fee for admission to or for the use of the beach; or

(d) wilfully causes any member of the public who has paid the fee for admission to or for the use of the beach to leave any such beach, by doing any act calculated to annoy such member of the public while he is lawfully using the beach,

shall be liable on summary conviction before a Resident Magistrate to a fine not exceeding one hundred dollars or to imprisonment with hard labour for any term not exceeding six months.
The section it is submitted is limited as it regards securing rights for the public to the foreshore and the floor of the sea. Perhaps, apart from the avenue of prescription, there should be legislative changes to provide for public access to the nations foreshore and floor of the sea.

**The Beach Policy**

In order to resolve some of the issues regarding beach access issues in Jamaica, in 1995 the Natural Resources Conservation Authority and the Ministry of Land and the Environment began the formulation of a Beach Policy for Jamaica. The policy now a Green paper in its current form outlines the main strategy as the development and proper maintenance and management of public bathing beaches of a high quality and access ways to the beaches are to be publicized and developed as appropriate.

The right of the public to walk along the foreshore and to bathe in the sea is to be created through amendment of the Beach Control Act. This right will be a qualified right as there will be obligations for both the public and licensees. The right of the public within a licensed area will be subject to the rules governing the area – such rules to be determined by the NRCA and the licensee for example – the number of people using the area, garbage disposal, and the regulation of behaviour.

Members of the public using the foreshore and the floor of the sea in front of private property must have due regard to the rights of the property owner to peacefully enjoy the use of their property.

The policy however has not had a smooth reception. The principal areas of concern are:

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2 Beach Policy for Jamaica,
• Opening the beaches would hurt tourism, particularly the "all inclusive" hotels

• It has also been suggested that some people might feel that if the Crown owns a beach, they have a right to reach that beach through private property.³

• There are concerns that ‘opening up’ the beaches would provide security risks to tourists as they would be subject to harassment on the beach.

• That the level of investment required to operate a beach within the context of a licence from the Natural Resources Conservation Authority does not necessarily justify the principle of open access

• Liability of the Authority or the Crown where a right has been granted to the public to use the foreshore or the floor of the sea

**Before The Beach Control Act**

Interestingly, the access issues being faced today were identified in 1954 by a Commission of Enquiry appointed to investigate the situation with respect to the use of the foreshore lands throughout Jamaica, taking into account the needs of the public for recreation and other varying purposes and to make recommendations for securing adequate facilities for such purposes.⁴

The main problem that was identified was that of security. The Commission found that to an increasing extent the public was being denied access to beaches which had been freely available over the years for fishing and recreation. The reason at the time was that these beach lands were privately owned, and with the tremendous increase in value and demand, especially on the north coast, it was not unnatural that the needs of the public would receive less consideration than they deserve. It was recognized that this affected fishermen most severely, as they make their living from the use of beaches,

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³ Excerpts from Beach policy
and who have in most cases established themselves for long periods and find it almost impossible to make alternative arrangements.

The main contributory factor to the problem of insecurity identified was the impact of the Tourist industry and the development of private luxury settlements on the limited beach facilities available. This the Commissioners found to be a serious problem and felt that it was important to the Island to preserve a valuable industry, and to encourage new and worthwhile settlers, but at the same time to ensure that the public continued to enjoy natural facilities which hitherto had been freely available.

Another problem identified was the efforts by private interests from time to time to have coastal main roads deviated away from the sea at certain points in order to increase the area of land adjacent to good beaches for private development. If such requests continued to be approved the effect would be to shut off our main roads from a view of the sea, which is one of the most pleasant aspects of coastal road travel.

The use of the cays was also cited and attention was drawn to the recreational opportunities offered by the many Cays lying off Kingston, including Rackham, Lime, Maiden, Gun, and Drunken Man Cays. The recommendation was for these cays to be developed for recreational purposes.

The commission also recommended that:

- No Government-owned beach be disposed of without the consideration of the proposed Beach Control Board.
- That basic facilities on fishing beaches, such as sanitary conveniences and water supply be provided
- That the Local Authorities be encouraged and assisted to provide basic facilities on bathing beaches. These should include changing rooms, showers and sanitary conveniences.
The recommendations of the Commission resulted in the promulgation of the Beach Control Act. Ironically however, the concerns that existed in 1954 still haunt us today. Have we therefore been successful in providing public access to more of the island’s foreshore and bathing waters, or have there been a reduction in such uses?

**What Has the Authority Accomplished**

Shortly after the enactment of the Beach Control Act of 1956, the then Beach Control Authority in its effort to protect existing public rights acquired for the use of the public, the popular Dunns River Beach in St. Ann which the owners desired to develop exclusively for hotel purposes. Over the past five years, the Authority has made concerted efforts to establish rehabilitate and manage beaches adjoining lands that it holds, and in some instances to partner with local authorities in the provision of public recreational bathing areas. The objective is to provide alternatives to areas that are no longer within the public’s reach. Such beaches include:

- Orange Bay Beach in Portland
- The Jacob Taylor Beach located at Silver Sands in the parish of Trelawny
- The Norman Manley Sea Park located in Negril

Other initiatives include the waiver of licence fees for some public recreational facilities operated by other government agencies for example Bluefield Bathing Beach operated by the Urban Development Corporation.

In addition to the above there is a beach rehabilitation programme spearheaded by the Authority with the support of the Ministry of land and the Environment.

**Conclusion**

The pursuit of prescriptive rights is not always an option that the Authority can pursue especially having regard to Section 5 of the Beach Control Act. Neither is it always the most prudent of options. Perhaps the legislative changes envisaged in the Beach policy present the best option advanced so far, even though it is obvious that any rights granted must be qualified. If the Government of Jamaica and Natural Resources Conservation Authority are to look to the long term
sustainable provision of public access to Jamaica’s coastline, then any initiative to
do must be seen to begin now.