Judgment of the Lords of the Judicial Committee of the Privy Council on the Appeal of The Kimberley Waterworks Company, Limited, v. De Beers Consolidated Mines, Limited (two Appeals consolidated), from the Supreme Court of the Cape of Good Hope; delivered 31st July 1897.

Present:

LORD HOBHOUSE.
LORD MACNAGHTEN.
LORD MORRIS.
SIR RICHARD COUCH.
MR. WAY.

[*Delivered by Lord Morris.*]

These appeals come from two orders of the Supreme Court of the Cape of Good Hope, dated the 1st of March 1895, whereby the orders of the High Court of Griqualand of December 1894 were reversed. There were two actions in the first of which the Respondents were Plaintiffs and the Appellants were Defendants. In the second action the position of the parties was reversed. Both actions were tried and dealt with together by the High Court of Griqualand who gave judgment in both actions in favour of the Appellants while the Supreme Court of the Cape of Good Hope gave judgment in both actions in favour of the Respondents which judgments are the subject of this appeal.

It appears that before 1888 the Appellants had by agreement with the Kimberley Town

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Council the exclusive right of supplying the municipality with water for a period of twenty-five years to count from the year 1880. In 1888 the Respondents who are the owners of two mining properties the Kimberley and the De Beers obtained an Act of Parliament by which certain rights and privileges were granted to them for the supply of water to the inhabitants of Beaconsfield and to the mining areas of Kimberley, De Beers, Dutoitspan, Bultfontein, and others. The Respondents had also acquired all the concessions and rights of one Thomas Lynch. On the 26th November 1888 the Appellants and Respondents entered into an agreement, the construction of which is the question in these appeals. By Clause 1 the Appellants on or before the 1st of January following agreed to pay the Respondents the sum of ten thousand pounds in cash. Clause 2 of the said agreement was as follows :—

"That the said Kimberley Waterworks Company (Limited) " shall from and after the first day of December eighteen " hundred and eighty-eight, supply and continue to supply the " mining companies and persons engaged in mining the Kim- " berley and De Beers mines with water for their mining " purposes at the price of eightpence per one hundred " gallons and shall also from time to time as any mining com- " panies or mining properties in the Dutoitspan or Bultfontein " mines or mines adjacent thereto are acquired by purchase " hire or otherwise, or become amalgamated with the De " Beers Consolidated Mines (Limited) supply and continue to " supply such companies and properties with water for their " mining purposes at the price of eightpence per one " hundred gallons."

The rates previously charged were one shilling and threepence per one hundred gallons.

Clauses 6 and 7 were as follows :—

"That the said De Beers Consolidated Mines (Limited) " shall at all times for and during the whole and full term of " this Agreement obtain and purchase all the water required " by them for their mining purposes from the said Kimberley " Waterworks Company (Limited) and from no other person " or persons, or company or companies whatsoever : provided " however, that nothing herein contained shall prevent the

" said Company from using any water obtained by it from the " mines or from its wells or reservoirs."

"7. That the said De Beers Consolidated Mines (Limited) " shall not at any time during the term of this Agreement " directly or indirectly establish, promote, or assist in the " establishment or promotion of any water or other Company, " or venture in the district of Kimberley having objects similar " to those of the Kimberley Waterworks Company (Limited) " but that they shall and will at all times whenever called " upon to do so by the said Kimberley Waterworks Company " (Limited) use their utmost means and endeavours to oppose " any company or venture, or attempted venture or under- " taking having for its object or partial object the supply of " water to the mines of Kimberley, De Beers, Dutoitspan, " Bultfontein, and the neighbourhood."

In December 1891 the Respondents purchased a farm upon which there is a mine called the Premier Mine. Large quantities of underground water accumulate in the said mine. The Respondents claimed a right under the proviso of Section 6 of the agreement to use for mining purposes the water made by the Premier Mine. It lies about four miles distant from the De Beers Mine and is outside the municipality of Kimberley. It has not been argued on behalf of the Respondents that the Premier Mine was " adjacent " within the meaning of Clause 2 of the agreement. The Respondents in March 1894 brought an action for a declaration of their right to use the water of the Premier Mine for mining purposes in their other mines and this is the subject of the first action. The subject of the second or cross action by the Appellants against the Respondents was for constructing an artificial drain from the Transvaal road and conducting large quantities of water for the purpose of using in their mines, Kimberley and De Beers, in breach of the said agreement, and claimed damages by reason of such breach and an injunction. At the time of the agreement of 26th November 1888, the Respondents had on their property a reservoir for collecting the surface water thereof called the Kenilworth

dam. Before 1894 the Corporation of Kimberley had carried along the west side of the highway, called the Transvaal road, storm water falling on part of the township. The water was not carried to the Respondents' property, whose dam was on the east side of the road but to a place called the white dam. In January 1894 the Respondents obtained the permission of the Town Council of Kimberley to construct a dish drain across the Transvaal road and thereby bring the water which had accumulated on the property of the Town Council into the Kenilworth dam on the property of the Respondents. The Appellants remonstrated against such permission being given but prior thereto the Town Council had given the permission and refused to withdraw it. The Respondents thereupon constructed the dish drain and brought the water which had been the property of the Town Council into their own land and used it for their mining purposes. In this second or cross action the Appellants obtained a verdict of 100*l.* for damages and also an injunction restraining the Respondents from thereafter committing the breach complained of. The High Court of Griqualand decided that the using of water from the Premier Mine for mining purposes which was the subject of the first action and the using the water obtained by permission of the Town Council of Kimberley, the subject of the second action, were both breaches of the agreement of the 26th of November 1888. The Supreme Court of the Cape of Good Hope on appeal decided that the Respondents had committed no breach of the agreement and were entitled to use the water, the subject matter of both actions as they were doing. They were of opinion that to constitute a breach the Respondents must have used water which they had obtained by means of a purchase

or by means of some transaction equivalent to a purchase. Their Lordships are unable to concur in this view. The prohibition contained in paragraph 6 of the agreement compels the Respondents to obtain and purchase all the water *required* by them for mining purposes from the Appellants and from no other person or persons whatsoever. The Supreme Court do not appear to have sufficiently considered the effect of the word "required" in the paragraph. There is an obligation on the Respondents to get their mining water from, and to pay for it to, the Appellants and it can make no difference whether they get mining water so required for nothing or whether they pay for it to any other person. It would be a curious result if the Appellants should be deprived of the monopoly they had bargained for because the Respondents, although they got the water from another, did not pay for it. The Respondents in obtaining water from the Town Council were acting in contravention of the spirit and of the letter of the agreement entered into by them with the Appellants. Their Lordships are consequently of opinion that the Appellants are entitled to retain their verdict in the second action. As to the first action, dealing with the use of the water made by the Premier Mine, their Lordships are of opinion that the proviso in paragraph 6 protects the Respondents. The Premier Mine and the water made in it are the property of the Respondents. Paragraph 2 contemplated the purchase of mines by the Respondents and although the Premier Mine is not adjacent within the meaning of paragraph 2 and the Appellants consequently are not bound to supply it, by paragraph 6 the Repondents are entitled to obtain all water from the mines and there is no limitation of "the mines" to the mines in existence at the time of the agreement.

Their Lordships are therefore of opinion that the order made on the first action by the Supreme Court of the Cape of Good Hope should be affirmed, and that the order made on the second action should be reversed and the order of the High Court of Griqualand in that second action should be restored and their Lordships will so humbly advise Her Majesty, the Appellants to have the costs of the second action in the High Court of Griqualand and the Supreme Court of the Cape of Good Hope. The parties shall bear their own costs of the appeals.