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EVIDENCE 26

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
GROUP B.

1971 R. No.3670

Royal Courts of Justice,
Friday, 2nd April, 1976.

Before:

THE VICE-CHANCELLOR

ROTAN TITO

and

THE COUNCIL OF LEADERS

v.

HER MAJESTY'S ATTORNEY GENERAL

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(Transcript of the Shorthand Notes of The Association of Official
Shorthandwriters, Limited, Room 392, Royal Courts of Justice,
and 2, New Square, Lincoln's Inn, London, W.C.2.)

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MR W.J MOWBRAY, Q.C. MR J.R MACDONALD, MR L.A TUCKER and
MR C.L FURLE (instructed by Messrs Davies, Brown and Co.)
appeared on behalf of the Plaintiffs.

MR J.E VINELOTT, Q.C., MR P.L GIBSON and MR D.C UNWIN
(instructed by The Treasury Solicitor) appeared on behalf
of the Defendants.

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EVIDENCE

DAY TWENTY-SIX

MR MOWBRAY: I must confess I have not done my homework today, my Lord, could we defer this until Monday?

THE VICE-CHANCELLOR: Yes.

A MR VINELOTT: We have only got half a day yesterday so I think it might, perhaps, be as well if we made the corrections when we have the other half.

THE VICE-CHANCELLOR: When we get half a day at a time we can amalgamate the two into one, so there is no need to talk about AM and PM as far as I am concerned.

B MR MACDONALD: I think my learned friend wished to ask Professor Maude some more question.

MR VINELOTT: I was going to ask Professor Maude some more questions but I was going to wait until my friend had completed his cross-examination. I do not mind which we do.

C THE VICE-CHANCELLOR: Counsel can agree which course you wish to adopt.

MR VINELOTT: I understand my friend would like me to do it now.

PROFESSOR H.E MAUDE, Recalled
Further examined by MR. VINELOTT

D Q Would you have P.7 and P.7A, Professor Maude. You were handed yesterday two documents, one called the Relationship between the Banabans and Gilbertese, P.7, and the other called Pre-administration contacts between Banaba and the Gilbert Islands. Do you remember that? A. Yes.

Q Can you tell my Lord how P.7 came into existence?

E A. P.7 was written at the request of Professor J.W Davidson, who was then Professor of Pacific History in the Research School of Pacific Studies at the Institute of Advanced Studies of the Australian National University, and he was contemplating the writing of a work on Ocean Island in conjunction with Dr. Derek Starr, and he asked me if I would make some notes on the ethnic historical side which would form an introduction or a chapter 1 to this work. I prepared this very roughly and the draft had many pencilled annotations at the side with queries as to what he thought. It was only a rough draft which I drew up at the time and I sent it to Professor Davidson who, owing to his preoccupation with other duties perhaps, was not getting on with his side of the work and he suggested that I should send this rough draft criticism and comment to Mr Tabuke Rotan, which I did so.

F G Q Did you write a letter with it, accompanying it? A. There was a covering letter to it explaining that it was only a rough draft.

Q What state was the draft in - a typed draft? A. Typed by myself, yes.

H Q Was it a clean draft, or were there any manuscript alterations? A. My conception is - and this is only from recollection I could not be absolutely certain - that it was a photo-copy of the draft which I gave to Professor Davidson.

A THE VICE-CHANCELLOR: A photo-copy of a typed draft ? A. Of a typed draft which I handed to Professor Davidson.

A MR VINELOTT: Was it all in typescript ? A. Except for the marginal annotations.

B Q Did that document, P.7, represent your final considered view on the matters contained in it ? A. Oh no, definitely not. At that time the question of any litigation had not arisen at all. To my mind this was academic; the subject of an academic study. I should not have liked it to have been thought of as in any sense a final draft or for purposes of other than comment by various other experts on the subject, people like Martin Silverman and other people who are experts on Gilbertese and Banaban custom.

C Q What about P.7A. Does that represent your final considered view, or not ? A. So far as my knowledge goes at the present moment, it represents my views on this subject. I prepared because it seemed to me that, as I had seen one or two excerpts from this draft P.7 appearing in a magazine called The Pacific Islands Monthly, I felt I should spend a few weeks on preparing what I really considered to be as good as I could do on the subject, and that it would be only fair to send it to anybody who wished to have a copy. I sent one to Mr Tabuke Rotan, I sent another to the Chief Minister of the Gilbert and Ellice Islands Colony, at his request.

D Q You say after this article or publication Pacific Island Monthly when excerpts appeared. What was that ? A. They were just little bits and pieces out of it.

E Q Out of P.7 ? A. Out of P.7.

THE VICE-CHANCELLOR: Did they appear with your consent ?
A. No, i was not asked for my consent.

MR VINELOTT: What was the context, or what was their setting in the Pacific Islands Monthly ? A. The general tenor of the article itself ?

F Q They were in an article, were they ? A. It was an article, yes.

Q By whom ? A. I have forgotten his name, but I think his name, subject to correction, is Bertram Jones.

MR VINELOTT: I have no further questions, my Lord.

G MR MOWBRAY: I think that was re-examination, was it not ?

THE VICE-CHANCELLOR: Have you any questions you wish to ask on that ?

MR MOWBRAY: No, my Lord.

H THE VICE-CHANCELLOR: Then, Professor Maude, you can be finally released. Thank you for coming to give your evidence, you are now released.

(The witness withdrew)

MR P.D MACDONALD, Recalled
Cross-examination continued by Mr MACDONALD:

A Q Mr Macdonald, I want you to assume two things. First of all, that you were acting as Banaban Adviser at the beginning of 1947; and, secondly, that as such Adviser you had made up your mind that it was your duty to make sure the Banabans did not do themselves down. Making those assumptions, you would have wanted to be in full possession of the facts, would you not, so that you could see that they did not do themselves down?

B A. I have given very long consideration to this issue, my Lord, and this is an issue on which I do not think it is possible to give a simplistic answer "Yes" or "No" as to the question of providing advice. What I would like to do, if I may, would be to summarise my views on various aspects of this very complex problem and then put forward my conclusions as to what I would have done. This might take ten minutes, I do not know whether that is permissible to expand on those lines?

C MR MACDONALD: I am anxious that you should have an opportunity of saying anything you want to say. If I feel that you are straying from the ambit of the questions I am going to ask you I will say so. If you would like to start? A. I think all I have to say is relevant to your questions.

D I think it was Sir Robert Macnamara of the World Bank who, taking about management problems, said in examining any particular problem what one should do is collect the facts, analyse the facts, and reach conclusions, which all sounds very simple. The first two stages are simple enough, the third is not so easy.

E I think Cohnsel asked me yesterday what advice I would have given as regards providing an Adviser for the Banaban community if I had been in a position of authority to do so. The first part of my answer to that is I would first of all have endeavoured to collect and record the factors which I would regard as having to be taken into consideration in this case. Now Mr Macdonald has made three. I think they were that the Banabans should be given, or should obtain, a square deal in their negotiations; the second, I think, was that this was most important as they were selling the whole of the rest of their land; and the third was that it was important because they required funds for the rehabilitation of Rabi. Those are three considerations on what one might call one side of the coin, but there are other considerations which I think have to be taken into account and I named some of them yesterday, but I would like to run through them again because there are one or two additional ones.

G The first factor I would say is the fact that the Banabans and the BPC managed to reach agreement amicably in 1940.

(Continued on next page)

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A The second factor is that when Mr Maynard visited Rabi in 1946 he did not himself raise the question whether the 1940 offer was open, it was raised by the Banabans.

The third factor is that there was a telegram from Capt. Holland (who was Banaban adviser then) on the 4th February, I think, saying that the Banabans had decided very reasonably in his opinion ----

B Q The Banabans had agreed? A. Oh, agreed, I beg your pardon -- had agreed that the matter of land negotiation was for independent settlement. The fourth factor - it is not a very important one, but it is a factor, I think - is that the Banabans had twice gone on the record as saying that they would prefer to settle the land issue before dealing with the question of future policy, so there was a certain urgency about it.

THE VICE-CHANCELLOR: Before dealing with future policy in the sense of where to live? A. Yes, in terms of the statement of intentions.

C MR MACDONALD: Where is that? You say they have gone on record as to that twice. Where is that? A. One is in Kennedy's letter of 28th January, I think.

D Q Kennedy or Holland? A. 28th January, 1946, I think. The other I have seen. I cannot remember the context just at the moment. The next factor, which I only learnt of yesterday, was that Rotan had as early as 1932 begun to think about obtaining legal advice. The next factor, I would say, is that Major Kennedy in 1950 advised the Banabans to go to Fiji and seek legal advice.

E Q 1940? You said 1950. A. 1940, yes, I beg your pardon. The next factor is that the Banabans at no time, as far as I am aware, ever asked for any advice, the services of any lawyer or professional or technical expert. The next factor, I would say, is the self-confidence of Rotan in being able to conduct negotiations. And the final factor, I think, is what I tried to explain yesterday, that it is our duty in the Colonial Service to try and bring native peoples forward at all deliberate speed in their activities so that one day they would reach the goal of self-government and independence.

F Q Now, if we could just pause there, you have set out the factors you are putting on both sides. A. Yes. I do not say they are all-inclusive, but they are all I can think of at this stage.

Q Now I want to ask you some further questions and then you can come back and if there is anything more you want to say after I have asked you, you may do so. A. May I interpolate at this stage that I have not finished? I wish to continue my argument, if I may.

G Q Yes, I appreciate that. I want to assume, as I said at the beginning, that in the beginning of 1947 you were the Banaban adviser and that you had decided that it was your duty to make sure that they did not do themselves down. That was your last answer to my Lord last night. If you were going to make sure that they did not do themselves down, you would need to have been in full possession of the facts, would you not? A. The first thing I would have done would have been to have discussed it with the Banabans.

H Q I think we shall get on more quickly if you can try to answer my questions, Mr Macdonald. If you were going to make sure that the Banabans did not do themselves down, it would have been necessary for you to have been in full possession of the facts? A. What facts?

Q Did you know yourself anything about the phosphate industry?
A. I am not sure that that would necessarily have been relative.

A Q Could you try and answer my questions? I think we shall get on a bit quicker if you do. A. Well, I am endeavouring to.

Q The question I asked you was, did you in 1947 know anything about the phosphate industry? A. I had served at Ocean Island; I knew a bit about it.

Q Did you know anything about the costs of production? A. No.

B Q Did you know anything about the sale price in Australia and New Zealand?
A. No.

Q Did you know anything about the prices for phosphate being fetched by other suppliers in other parts of the world? A. No.

C Q Those are all things which would have been relevant to the decision the Banabans were going to take, are they not? A. I do not think so.

Q Why not? A. Well, if I had been allowed to continue what I was going to say it would have been rather easier to explain. May I continue where I left off before, my Lord?

D Q I think if you would just try to answer my questions you will have an opportunity of saying anything more you wish. A. Very well. Would you repeat it then?

Q My question was, why did you think that the selling price of phosphate, the BPC's costs, the world price of phosphate were not things that the Banabans were concerned with in reaching their decision?
A. Because in the way that I envisaged the negotiations would probably go I do not think those facts would have been relevant.

E THE VICE-CHANCELLOR: You are being asked why you do not think they would be relevant. A. Because I think the negotiations would have taken place, in my view, on a different basis.

Q So that --- ? A. This is what I was coming up to explain.

F Q You thought the negotiations would be on a basis which would make irrelevant any question of the cost of producing phosphate or the sale price or anything like that? A. That is my opinion.

MR MACDONALD: Perhaps you had better finish what you were going to say and then I will ask you some more questions.

G A. Having assembled the factors, or some of them, which would require consideration, I was then faced with a number of imponderables. The first imponderable is Major Holland's telegram of the 4th February. Now, Major Holland was, as you know, the Banaban adviser. He was a very senior officer, he was an officer of long experience, he was an officer who had acted as Resident Commissioner, he was an officer who was well known to the Banabans through his service on Ocean Island, he was an officer whose advice I had always found to be very valuable. The other factor in the telegram is that I would mention that Major Holland was a very meticulous drafter of letters, of correspondence. He was very particular over the use of the English language and did not normally use surplus words or words which did not usually have a precise meaning. That telegram that he sent said that the Banabans had agreed, and I submit that, by sending that, it means that he must have discussed the coming land negotiations with them - I can't put any other interpretation on it. He was not estopped by the

A Western Pacific High Commission from discussing these matters until a letter of 25th March, I think, which would have reached him about the end of March. He then goes on to say "very reasonably in my opinion" - I think those are the words. Holland would not choose words like that lightly. If he said that, he must have had very good reasons for saying it. So that telegram is, to me, an imponderable; I just don't know what went on. We don't know whether he had had discussions, we don't know whether he had advised the Banabans, we don't know, if so, what his advice was.

B Q I think my Lord perhaps does know the answer to that, because he has heard some evidence about it. But do carry on. A. I do not think I know. So, so far as I am concerned, I simply do not know what had been going on, what had happened. So it is an imponderable.

C The second imponderable, of course, is that we have no minutes of the meeting of the 10th April. at which the land negotiations took place. There is a record of what happened, but no record of whether there was any debate and how the negotiations were conducted.

C The third imponderable is why, when Rotan was thinking of the engagement of a lawyer in 1932, he did not follow this matter up. It seems rather odd to me that he did not.

D And especially - the fourth imponderable - that when he was advised by Major Kennedy to go to Fiji and seek legal advice, he did not follow that up either.

E The last imponderable is this. Yesterday I was very happy when you, Mr Macdonald, were able to tell me that we could draw down the blinds, shall I say, on this somewhat unfortunate matter that arose which cast a shadow over my relations with the Banabans, whom I have known now for some 40 odd years, and I think you said that Rotan was good enough to say that the relations between himself and myself had always been amicable and that that happy position could now be restored. The imponderable in this is that I cannot understand why, if that is the case, Rotan did not come to see me in Suva and say, "Look, we have to conduct these negotiations; I am not sure what would be the best way of tackling the situation." He would probably have said, "I have discussed this with Major Holland, but I would welcome your advice." From Rabi to Suva, my Lord - I am not sure if you know - is only an over night journey in the ship; it is quite close.

F Although I was an officer of the Fiji Government at the time, there could have been no objection whatsoever to his coming and seeing me and seeking my advice on this. So all those are what I call imponderables, I simply do not know why in each case these things did or did not happen.

G Then I come on to what I call the conclusions I reached, and my first conclusion was that no useful purpose would have been served by the presence of a lawyer and/or an expert adviser at the negotiations on the 10th April, 1947. I say that because I have some knowledge of the workings of the British Phosphate Commissioners. As you know, Mr Maynard was conducting the negotiations on their behalf. The British Phosphate Commissioners were a highly centralised undertaking. Mr Harold Gaze was the General Manager in Melbourne and the managers - certainly the manager in Ocean Island, and I think it is also true in Nauru as well - were kept under very tight - a tight rein - and they did not, I think, have much freedom of action. This was certainly true, I think, of any of their negotiators at any time. Of course, it would have been necessary first for the Banabans to have agreed to accept the services of a lawyer or an

A expert adviser and it would probably have been necessary to suggest to them that they should have recruited those people themselves to avoid any possible suspicion that the Government was, if I can use a slang phrase, getting into the act again, as happened in 1930/31. However, assuming that the Banabans thought it wise to avail themselves of the services of a lawyer and/or an expert adviser and they obtained them, as I say, I do not think any useful purpose would have been served by their presence at those negotiations in the somewhat unsophisticated environment of Rabi on 10th April, 1947.

B They would, of course, have been able to present facts and figures about the subjects that you mentioned - production costs, shipping costs, freight costs and everything - to Mr Maynard, but from what I know of the BPC I am perfectly certain that the result would have been that Mr Maynard would have sent a signal to his Melbourne office saying that the Banabans were being represented in this matter by these people and that presumably they were seeking a higher royalty and asking for further instructions. I am quite sure equally that the answer would have come back, "You should return to Melbourne for further discussions," and I think the negotiations would have broken off at that stage.

C This, of course, would not have precluded them using the services of a lawyer or an expert adviser at a later stage, but at that stage I do not think it would have served any purpose other than to have the negotiations postponed.

D My second conclusion, my Lord, is that if I had been in charge, I would have therefore suggested that Rotan - No, I will not use the word "therefore" - I would have suggested that Rotan should conduct the negotiations, as head of his team, with Mr Maynard. This is why I say that I do not think that knowledge of the matters that you raised was necessary, because I think Rotan should have conducted it and should have been advised to conduct it, if he did not suggest it himself, on various bases.

E First, it has got to be remembered that Mr Maynard was a very good friend of the Banabans, he liked them immensely and I know he would have done as much as he reasonably could for them. Most of the time I served on Ocean Island Mr Maynard was manager there and he was a pleasure to work with. I admired him, he was a very pleasant character. I think that is an important point, that you had two negotiators who knew each other well and could talk to each other frankly.

F Rotan should, I feel, have adopted the line that 1s.3d. was not a sufficient increase on the 1s. that had been agreed upon in 1940 and he should have bid for a higher figure. What that higher figure should have been, of course, is very difficult to know, but at that time, at the end of the war, the BPC had suffered grievous damage and loss on Ocean Island and would undoubtedly, I imagine, have countered any request for a higher royalty by the initial argument that their losses and damage on Ocean Island required vast sums of expenditure. However that may be, I think Rotan should have bid for a higher royalty rate.

G He should have based his argument, I think, not at that stage, only some 18th months after the war - he should have based his argument for a higher royalty rate, I think, primarily on the fact that the Banabans had lost everything they had in Ocean Island; that they suffered grievously under the Japanese; that they required money for the development of Rabi; and that this was the final land sales to the BPC.

A Whether Rotan would have succeeded in getting a higher royalty rate
or not, of course, one does not know. One does not know how the
negotiations were conducted. That is half the trouble. But if he did
B not succeed in getting a higher royalty rate, then it should have been
suggested to him, if he had not thought of it already, that he should
C then break off the negotiations.

D It may be objected there that if he broke off the negotiations
they might have to go through the same process that happened in 1930/31,
but I do not think the circumstances would have been at all the same.
E I think on this occasion when the Resident Commissioner had to set
a royalty rate that Tarawa would have been visited by a large number of
experts on both sides instead of the Resident Commissioner deciding in
F comparative isolation on Ocean Island/^{as}in 1930/31.

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A But I also think Rotan should at those negotiations too, if he had been wise, if he had been advised or if he thought of it himself, to have also taken the line "Well, all right, I conceded perhaps that you may not be able to afford more than 1/3, but I want written into the agreement that there will be a revision, a review, after a certain period", 3 years, or 5 years, whatever it may be, because they were selling the rest of the land for a period of 30 years.

B So those are the conclusions that I think I would have come to and that is why I said - which may not have seemed very helpful to Counsel - that I do not think the knowledge of rates of phosphate prices and shipping, and so on, would have been very helpful if the negotiations had gone the way that I thought and would have thought best to be done.

C Q I do not think there is really much difference between us. You are envisaging that Rotan would have asked for a higher price; if he did not get it the negotiations would have been broken off, and at that stage the experts on both sides would have come in? A. Well, presumably, yes.

D Q You are approaching the matter on a more realistic time-scale starting in April, 1947? A. Well, this is the situation I was confronted with by your questions, you see. But I do not think the expert advice helped at that stage, that is the point.

E Q The expert advice would have come because what you said you did not really know was what figure Rotan should have asked for? A. No. He obviously could not have pitched it too high, I think, because the higher he or his advisers pitched it, the quicker I think that particular negotiation would have concluded.

Q On your basis that would be the right stand for the Banabans to adopt? A. That I would have thought, yes.

F Q Let me ask you a question on a rather different basis. What you have told my Lord has been most helpful. If you as Colonial Secretary in Fiji had had to take a decision of this importance, you would have wished to have the fullest possible information and the best available advice? A. Yes. Well, one would have consulted one's departmental advisers, of course, and ultimately taken the matter to the Executive Council.

G Q And if you had wanted practical information on phosphate prices, or something, you would have consulted the Colonial Office, or the Board of Trade, and got the information from them? A. Well, one would have consulted the Secretary of State probably, naturally that would be the normal channel, and left it to him to obtain the information.

Q You would have wanted to get the information so that you had all the facts before you, all the factors before you reached your decision? A. Yes.

H Q As I understand what you say, you say that in April, or the beginning part of 1947, really, it would have been open to the

- A Banaban adviser, if he had had room to manoeuvre, to do all that and, therefore, it would have been better for the Banabans to have gone in and asked for a substantial sum and for the negotiations to have broken down? A. Well, it would have been open to the Banaban Adviser, of course, to take any of these points up with the Chief Secretary of the Western Pacific High Commission, who could have taken it on from there.
- B Q It would have been quite possible for the Banaban Adviser to have asked the Colonial Secretary to obtain the information ---
A. Excuse me, not the Colonial Secretary.
- Q The Secretary to the High Commissioner -- to have asked the Secretary to the High Commissioner to obtain information about the prices of phosphate? A. Yes.
- C Q And if that was not readily available in Suva, the Secretary to the High Commission could ask London? A. The High Commission would probably have asked London, yes, the Secretary of State.
- Q I suppose another possibility would have been to have asked the Banabans' bankers. Who held their trust funds at that time, do you know? A. At which time.
- D Q 1947. A. They were held by the Gilbert and Ellice Islands Colony Government, I think, in 1947. They were not transferred to Fiji until 1949, the 1st January, 1949.
- Q But who was providing the banking facilities? A. I am not sure. I think the Bank of New Zealand, but I am just not quite sure on that point. I had left the High Commission then, you see.
- E Q Let us assume the Bank of New Zealand. It would have been perfectly possible for the Banaban adviser or the Secretary to the High Commission to have approached them and asked them what information they had? A. Yes, they were not stopped from going anywhere for information.
- F Q It has been most helpful of you to have given this assistance, but, of course, as I think you said yesterday, you being the Assistant Colonial Secretary for Fiji, it was not in fact your responsibility? A. No. On some points I was consulted, on others I was not. I mean, over this question of assistance I was not consulted.
- G Q And Mr Maude has told my Lord that as he was Resident Commissioner at Tarawa, it did not come in his province either. The Banabans were directly under the High Commissioner, were they? A. Yes, in 1947 -- well, they were in a peculiar position, because they were in Fiji but not sort of of it quite.
- Q Would I be right in thinking that the chain of command went something like this: Major Holland on the island. A. Yes.
- H Q Mr Vaskess, who was Secretary of the Western Pacific High Commission? A. Yes.
- Q Then the High Commissioner above him? A. Yes.

- A Q Could I just ask you for some facts about the personalities.. Mr Vaskiss was the Secretary to the Western Pacific High Commission at the beginning of 1947 ? A. He retired towards the end of 1948.
- Q Was he replaced by Mr Chamberlaine ? A. Yes.
- Q Was the High Commissioner Sir Alexander Grantham at the beginning of 1947 ? A. Yes.
- B Q And then he retired on the 25th March to go as Governor of Hong Kong ? A. He went as Governor of Hong Kong, I cannot tell you the date, I am afraid.
- Q You cantake it from me it was the 25th March, because we have got that in the bundles. He was succeeded on the 25th March by Nicholl, who was sworn -- A. Yes, he was merely for an interim period, he was succeeded by Sir Brian Freestone.
- C Q He was there until Sir Brian Freestone arrived later. A. Yes, he was Officer Administering the Government and, of course, as such Acting High Commissioner too.
- Q Would you have Bundle 42. (Same handed to the witness) Can you tell me when you came back to Fiji, was it 1957 ?
- D A. Yes, the 27th September, 1957.
- Q You then became the Colonial Secretary. A. That is right.
- Q And as such, of course, the Banabans were part of your responsibility ? A. They were part of Fiji, yes.
- E Q And you were never afraid to stand up on their behalf when you thought it proper to do so ? A. No, I have always helped them whenever I have been able.
- Q There are a number of letters you wrote in the bundle. Could we have a look at page 133. This is a letter of the 30th June, 1959. A. I am sorry, 132 is a letter from the Secretariat to Mr Grant the Banaban Adviser.
- F Q No, 133. A. That is to the Phosphate Commissioners, page 133.
- Q I am very sorry, yes, it is to the Phosphate Commissioner but it is from you. A. That is quite true.
- Q Have you had a chance of looking at that letter recently ? A. No.
- G Q There are one or two passages I want to remind you of. You see it starts by saying: "I am directed to inform you that representations have recently been made by the Banaban community on Rabi Island, requesting that serious consideration should be given by the British Phosphate Commissioners to the grant to the Banabans of financial assistance on the lines of that given by the Commissioners to the Nauruans during the years subsequent to the ending of World War II".
- H

Then in paragraphs 2, 3 and 4 you go through the Nauruan

A reports and I think we can pick it up at paragraph 5. I do not think I am leaving out anything, but if I am you cansay so. You say: "If the contents of the foregoing paragraphs are correct, then it would certainly appear that the Banabans have been much less generously treated than the Nauruans have been. In this connection, the Banabans argue, not without force, that, had they decided to return to Ocean Island, they would have been much more generously treated. I think that argument is rrefutable and it can be argued that it would be unreasonable that the Banabans should suffer by virtue of their deciding not to return to Ocean Island butto stay in their new homeland, particularly in view of the fact that they were in some degree persuaded so to do by Mr H.E Maude, M.B.E and myself. I think it could also be validly argued that the absence of the Banabans from Ocean Island has probably to some extent facilitated the operations of the Commission by the elimination of some degree of administrative inconvenience and expense".

C Then you go on about Nauru, and if we can go on to page 135, paragraph 10: "On the face of it, it is difficult to avoid the conclusion that the Banabans have a reasonable case for requesting some degree of assistance from the Commissioners in the same manner that such generous treatment has been accorded to the Nauruans. I should like to suggest, therefore, that the British Phosphate Commissioners should favourably consider giving sympathetic consideration to the following proposals" and then you give them.

D "11. It would certainly seem that, on moral grounds, the Banabans can reasonably expect to receive some measure of assistance on the lines accorded to the Nauruans and, if that is not forthcoming, I shall be glad to learn why it is felt that the Nauruans are more eligible for favourable treatment than the Banabans".

E There you were taking up the Banabans' cause oh their behalf as a responsible Colonial servant would be expected to do? A. Yes. What I was-hoping to get actually - now I have a look at this letter, I remember it - was mention has already been made of the somewhat flimsy type of housing on Rabi and the fact that the weather there was rather different from Ocean Island, and I was hoping it might be possible, as I think did happen in the end, to obtain funds for them so we could start a proper housing scheme for them, which might have been very helpful to them from the health point of view. This was not the only consideration, but it was the principal one if I remember.

G Q I wonder if we could go on to page 155. I am not going to weary you with looking at many of these letters, I just want to get your general approach to the Banabans' problems. This you are writing to Mr Hall at the Colonial Office, and you say: "... on the subject of the representations made by the Banaban community that the British Phosphate Commissioners should grant it financial assistance on the lines of that given by the Commissioners to the Nauruans during the years subsequent to the ending of World War II.

H "I have not yet received any comments on these representations from either the Resident Commissioner of the Gilbert and Ellice Islands Colony or the Chief Secretary" and you

A say you are sorrying it is causing embarrassment and I think we can go to paragraph 4. Have you got that? A. Yes, I was just trying to follow the trend of the correspondence.

Q "I fully appreciate the point that any assistance given to the Banabans must come from the Commissioners, and as an act of grace, and, indeed, that was precisely what I had in mind. In my view, however, the Banabans have a strong case on moral grounds and it is not their fault that they have not put it up previously. If, of course, the Banabans had returned to Ocean Island after the war, instead of purchasing Rabi from their own funds, and settling there, it would have posed considerable problems, not only for the British Phosphate Commissioners, but also for the Government of the Gilbert and Ellice Islands Colony. It was only after lengthy discussions with them in Rabi that Maude and I were able to persuade them to abandon the idea. If, however, they got the idea that they might be better treated on Ocean Island than in Rabi, it is by no means impossible that some of the older and middle generations might wish to return.

"However, it is to be hoped that nothing like that will eventuate and that this matter will in fact be amicably settled between the British Phosphate Commissioners and the Banabans".

D As a result of this you did get your housing, did you not?
A. I think so. I am not sure it was as a direct result of this, but certainly we did get housing. Whether it was a result of this correspondence I cannot remember.

Q And, of course, at that stage you were having to put this forward as a moral claim because they had entered into an agreement in 1947 and that was the only basis which could be put forward? A. Yes.

11.30

Q Now I just want to ask you a few questions on another topic, and I hope I shall not keep you very much longer. I appreciate these may be difficult questions for you to answer and if you do not know the answers you must say so, but what I want to consider with you is what evidence is there that any consideration was given to the BPC's terms by the High Commissioner and by people in Suva generally. A. By people in Suva generally?

Q Yes. What I am going to ask you to do is to look at two telegrams, which is the only direct reference to this matter in the bundles, and then I am going to ask you to look at Mr Maynard's report of his 1947 meeting. A. The April meeting.

Q The April meeting, and I am going to ask you some questions about that and about the discussions he had with you and Mr Nicholl and Mr Vaskiss. If you do not know the answers you must say so. For this purpose, my Lord, I think all your Lordship will require is Bundles 49 and 39. Have you got Bundle 39? A. I have not got either yet.

H Q Would you look at page 16. I will help you with this because it is very difficult to read, but before we come to that let us clear up one matter. At the end of January, 1947, Sir Alexander Grantham had gone to attend the South West Pacific

Conference at Canberra ? A. The South Pacific Conference, yes.

A

Q That is right, is it ? A. I am assuming it is.

Q We have got a reference to it in the bundle at page 5, but I do not think we need turn it up: "Following telegram has been rederived from Sir Alexander Grantham in Canberra" and that is at page 5 in the bundle; you need not bother to turn it up, just take it on trust. "Please telegram Gaze approximate date (for example end of March, middle of April) when Maude or Macdonald will be going to Rabi so that Gaze may make arrangements regarding Maynard."

B

"(2) British Phosphate Commission propose to offer Banabans royalty of ls. 3d per ton and £200 per acre (less good land proportionately less)* This seems reasonable. Have you any comments. If the Banabans refuse Commissioners will go to arbitration".

C

May I just pause there, "Commissioners will go to arbitration" rather supports the view you were putting forward earlier, does it not, that if Rotan had pulled out of the negotiation Maynard would have been called back to Canberra and there would have been arbitration of a very different kind from the one in 1930 ? A. That is if the negotiations were not resumed, yes.

D

Q Then you get the reply from Mr Vaskiss: "I am as yet unable to give even approximate date for visit of Officer to Rabi that would be of any value for purpose for which required", and he deals with a Holland representation. "Your paragraph 2. I regard proposed offer as reasonable basis of negotiation with Banabans not unduly liberal as it represents increases of only 25 and 15 per cent respectively on 1940 terms whereas currency depreciation in the interval has been much greater". Did Mr Vaskiss have any conversation with you about that telegram ? A. I think I have seen the telegram but certainly I had no hand in drafting it or discussing it, to the best of my recollection.

E

F

Q May I ask you to turn to Bundle 49, page 46. Have you got that ? A. Yes. I am just checking the origin.

Q This report goes on down to page 60, and then on page 61 he attaches an appendix, the minutes of the meetings which were held on the 9th April, which perhaps you have not seen ? A. No, I have never seen them. This is where, page 51 ?

G

Q Page 61. I am sorry, my voice is not very clear, I have got a bit of a throat. A. Well, I had an operation on this ear towards the end of last year and I am afraid the hearing aid has not been produced yet, that is causing a bit of trouble.

H

Q Can we start on page 46. There are just a few passages in this report I want you to look at. The second paragraph on page 46: "In 1946 the Bananabs were worried because their

A children had no knowledge of the boundaries of the lands on Ocean Island, and wished to send a Boundary Marking Party to Ocean Island." Pausing there, do you agree that Mr Maude that when you went in 1947 it was the boundary marking party the Banababs wer most excited about ? A. Yes, they were, they were most anxious to use it if only as a mwans of getting back to Ocean, I think.

B Q Then going on: "At the same time they raised the matter of the 230 acres of mining land discussed in 1940 when they were willing to sell provided they got more from their funds held by the Government; they still wished to sell the 230 acres but wanted a higher price. Major Kennedy and Mr Vaskess favoured an agreement for the sale of the remaining mining land. We were willing to take a Boundary Marking Party to Ocean Island and told the High Commissioner that we could arrange for a ship leaving Australia about the end of August to call at Rabi, but C the matter eas deferred on advice from the High Commissioner that he was seeking the Secretary of State's approval for commencing negotiations with the Banabans for permanent settlement on Rabi and that he preferred that the visit of the Banababs should take place after the completion of his negotiations, probably late in 1946.

D "We heard later that in view of disquieting news about affairs at Rabi the District Commissioner, Northern, visited the island with an Assistant Superintendent of Police on the 13th and 17th June, 1946, and held meetings with the Banabans. On his advice Mr H.E Maude, who was at that time Chief Lands Commissioner of the Gilbert and Ellice Islands Colony, and Mr P.D Macdonald ... visited Rabi on a joint Fiji/High Commission Mission. After the Commission's visit to Rabi Major Kennedy E relinquished his appointment on Rabi and Major Holland succeeded him as Administrative Officer.

"Mr Maude submitted a report and recommendations on the Futube of the Banababs, with special relation to the question of their lands, both on Ocean Island and their proposed new home on Rabi, and the use and control of the 'Banaban Funds'"

F "Early in January this year, we telegraphed the High Commissioner that we had not replied to the letter from the Banabans dated 22nd March, 1946 ... pending discussions with him, and that we were ready to negotiate with the Banabans. The High Commissioner replied that the Secretary of State had approved the re ommendations in Mr Maude's memorandum of 2nd September, 1946, but that some weeks must elapse before Govern- G ment could commence their negotiations with the Banabans and that the best course was for me to accompany the Government Officer proceeding to Rabi for negotiations.

H "Mr Maude's recommendations regarding lands on Ocean Island were that the Commissioners should, if possible, effect a single and final settlement with the Banabans covering all the lands, mining and non-mining, which they will require either immediately or in the future. It was not feasible to effect a single and final settlement for non-mining (leasehold) lands but the recommendation was accepted as regards mining lands".

MR P.D MACDONALD
Cross-examined:

A Then he says coloured drawings which my Lord saw on the last action were prepared "showing the remaining phosphate lands, of which 291 acres are above the surveyed line ... Copies were made for the Secretary of the Western Pacific High Commission: the Assistant Colonial Secretary, Fiji Government" - that is you, is it not ? A. At that time, yes.

Q "... Mr Maude" and Major Holland.

B Then he says he left Melbourne on Tuesday 18th March for Auckland, and if you go to the top of page 48 he arrived at Suva and stayed, as all the best people do, at "the Grand Pacific Hotel where Mr and Mrs Chamberlain and their two children were staying", and the second paragraph on that page: "Mr P.D Macdonald, Assistant Colonial Secretary Fiji called and took me to his home where we had a long talk about affairs at Rabi".
C Do you have any recollection of him calling on you ? A. I did meet him and have discussions with him, but as far as I remember, the discussions centred mostly on the relinquishment of office of Kennedy and the reasons for Kennedy's relinquishment of office and Maynard's taking over.

Q I do not want to pursue the matter, but do you think the Banabans were justified in some of their complaints about Kennedy ? A. Yes.

D Q Let us read on and see what Mr Maynard says about the meeting. Do you remember him coming to your house ? A. I remember meeting him. I cannot honestly say I remember him coming to my house.

E Q It is a long time ago. A. Yes it is 37 years ago. We were old friends from the days on Ocean Island, so it is very likely he did come to my house.

F Q "I gave him two copies" - that is Mr Maynard gave you two copies - "of Drawing No. 776 M.O one copy for his use and one copy for Mr Maude on his arrival from the G & E.I.C." So that looks, and we are now at the 22nd March, as though Mr Maude had not then arrived, does it not ? A. He was delayed. He had trouble in getting the Royal New Zealand Air Force to provide an aeroplane from Suva to go and collect him from Tarawa.

G Q "I showed him the various papers relative to the 291 and 380 acre areas of remaining phosphate mining land also the calculation in connection with the prices for the two areas and the royalty payment for the phosphate delivered". Do you remember that ? A. I remember the plans, I do not remember the calculations. I mean, I do not deny that Maynard did it and gave them to me, but I do not honestly remember it now. The plans I do remember.

Q Let me just ask you this: who was it who instructed you to take no part in Mr Maynard's negotiation ? A. To take no part ?

H Q Yes. Was that directly from the High Commissioner ?
A. Yes. Well, Sir Alexander Grantham briefed us the day before we left for Rabi and he said that our brief was to review the whole question of the future of the Banabans and the use of

their funds and that if any question was raised in regard to the land negotiations with Maynard we were not to consider them.

A

Q That was an oral instruction, was it ? A. Yes.

Q From Sir Alexander Grantham ? A. A meeting in Sir Alexander's office.

B

Q I do not wish to trick you in any way. You said it was the day before you left for Rabi and I do not think that can be quite right. A. It may have been the 5th May. We went to Rabi on the 7th and it was either the 5th or the 6th I am pretty sure. It may have been the 5th.

C

Q Do not be too emphatic about it, Mr Macdonald, because I think we shall see that Sir Alexander Grantham in fact left Fiji on the 23rd March. Perhaps it was Nicholls who gave this briefing ? A. No.

Q It was probably a week or two earlier than you recollect. A. But did Sir Alexander come back to Fiji ? I think he did. I am almost positive it was two days before we went to Rabi. I can see his minute in red ink before me now.

D

Q I expect that is one of the privileged documents. A. Well, it is nothing very important. But I think Professor Maude can bear me out on this if necessary. I see he is nodding his head.

Q Well, he should not be nodding his head. A. I realise that. He must have come back, I think, after the meeting of the Commission.

E

Q Let us read on and find out what Mr Maynard said, it is a very long time ago. "He hoped" - that is you - "that an agreement with the Banaban landowners would be signed before he arrived with Mr Maude at Rabi to discuss the intentions of Government regarding the future of the Banaban Community on Rabi. He said that the date of their arrival at Rabi was somewhat uncertain but that he hoped I could remain at Rabi after our agreement was signed. Holland was giving the Banabans an outline of matters dealt with in Mr Maude's memorandum of 2nd September, 1946 ... so that I could go ahead on arrival at Rabi". Is there anything you want to quarrel about in that paragraph ? I do not think there is any difference there. A. No, it seems to me to be perfectly all right.

F

G

Q Then if we go on: "I did not have an interview with the retiring Governor (Sir Alexander Grantham) before he left. There was a short ceremony at the Government Buildings at 8 a.m on Monday, 24th March. The guard of honour was provided by about 100 Fiji Police and the Band of the Fiji Military Forces headed the parade. Sir Alexander later left by road for Rabi Airport. The Colonial Secretary (Mr J.F Nicoll) went by plane to Nadi to say good-bye to Sir Alexander. Mr Nicoll was worn in as Officer Administering the Government on Tuesday, 25th March. Sir Alexander Grantham said good-bye

H

A to Fiji in the evening of Sunday, 23rd March in a broadcast from ZJV Suva". I expect you remember all that, the parade and the broadcast? A. Yes, I would have been present at that probably.

Q We do not need to worry about the special message for Rabi, I do not think anything turns on that. If we can go to the last paragraph on this page: "During the week, I had several interviews with Mr Vaskess at his office and laid before him the various papers in connection with the terms we were offering for the 291 and 380 acres of mining land and the royalty payment. After studying them, he said that he thought we should be able to conclude an agreement with the landowners in about a week. I had an interview with the Acting High Commissioner on Thursday, 27th March at which Mr Vaskess was present. After I had explained our proposals regarding prices and royalty payment, he asked Vaskess what he thought of the chances of an early agreement. Vaskess said that the chances were very good. Mr Nicoll said it was important that our agreement should be signed first because it would make it much easier for Mr Maude and Mr Macdonald when they arrived to obtain an agreement from the Banaban Community to make Rabi their headquarters and home. I said that I was glad that Major Holland had been asked to use Maude's memorandum as a basis for instructing the Banabans regarding Government intentions, because it was important that the Banabans should know about these proposals when I came to negotiate with them for the remaining phosphate lands. I had lunch with Mr Nicoll at Government House on Friday when he again expressed the hope that matters would go smoothly." Does that paragraph represent the Government's policy at this time? A. I see nothing wrong in that.

Q I do not think there is anything very important on the rest of that page, there is a description of Major Holland at the bottom of page 49. At the top of 50: "Copies of Drawing No. 776 were given to Major Holland for distribution. I gave Major Holland the various statements and papers referring to lands on Ocean Island which included the prices we were offering for the two areas and the royalty payment. I asked him to use them - if he agreed - when the Banabans approached him - as I was sure they would - for advice. The only things I asked him not to disclose were the prices for the two areas and the royalty payment, as I wished to announce these when I called the general meeting of landowners". Does anything strike you as odd about that? A. No.

Q I think perhaps we had better go on to get the full picture. "The landowners held several meetings at which I was not present. I discussed points which several of them brought to me. On the day before the meeting Rewi - who represented a group of landowners - came to see me to put their views.

"On Tuesday, Major Holland said that the landowners were ready for the official meeting, so it was called for Wednesday, 9th April. The meeting opened at 9 a.m and closed at 1.30 p.m. The notes of the meeting were taken by two Banabans: one took his notes in English and one in Gilbertese. After the meeting they typed the notes in English and gave a copy to Major Holland. We made a few alterations, and Major Holland submitted our

A alterations to the two Banabans who accepted them. The official notes of the meeting were then typed by the Banabans and copies handed to us. It will be apparent on reading the notes that they do not pretend to be more than the gist of what was said. They are complete in that nothing of importance has been omitted, and we are all satisfied that they can stand as a true record of the meeting".

B Then Mr Maynard recalls a negotiation by Sir Harry Luke, a previous High Commissioner, who said that the Banabans were a "shrewd and hard-headed lot" and I do not suppose you would disagree with that.

C Then on page 51 there is Mr Maynard's telegram after the deal had been concluded, and at the bottom of the page there is the signing of the agreement. At the bottom of page 52: "The Agreement concluded and the celebrations over, we settled down to the organisation of the Boundary Marking Party". Then on page 53 there is a bit about you, Mr Macdonald, arriving at 6.30 p.m on Wednesday 7th May and how you were stuck on a reef for six hours? A. We were, in the boiling sun too on the Banaban launch.

D Q Then on page 55 we see the two ballot boxes were marked in Gilbertese one saying "I shall stay at Rabi" and the other "I shall not stay at Rabi". Is that a correct translation. A. Yes.

Q That is what was on the boxes? A. On the boxes "I cannot remember at this length of time. I have a ballot paper at home, but even that I cannot remember what it says on it.

E Q Would you now turn to page 59, the last paragraph before the row of noughts: "I took this opportunity to express my appreciation of the many kindnesses I had received at Suva and on Rabi from Officers of the Fiji Government and Western Pacific High Commission. I said that Major Holland had worked very hard preparing the Banabans for the visit of Mr Maude and Mr Macdonald, and I was very grateful to Major and Mrs Holland, and Miss Holland for all the kindness I had received".

F Mr Macdonald, having looking through that bundle I just want to ask you this: would it be fair to conclude that Mr Maynard came to explain the terms he was proposing to offer and the basis of the calculation to you and to Mr Nicoll and Mr Vaskess? A. I could not say about Mr Nicoll and Mr Vaskess. As far as I am concerned, I do remember the plans and from the fact that Mr Maynard has written that he explained certain calculations I am sure that he did, I accept that but I do not remember it. Again, may I add this is the first time I have ever seen this?

G Q I am sorry about that. A. It is perfectly all right, but I said earlier on that one of the imponderables was I have never seen notes of the minutes of the meetings.

H Q I do not think I am going to take up time taking you through the minutes of the actual meeting. Nothing very surprising happened and Major Holland took no part. A. No.

A Q Would this be fair, that you were all very anxious that the Banabans should decide to live on Rabi because you thought that was much the best thing for them? A. Certainly that was the view of Professor Maude and myself, yes.

B Q Do you think it is a fair comment on Mr Maynard's report that the people in Suva were anxious to get the agreement disposed of quickly so the Banabans could be settled down? A. Well, yes, because the Banabans had said they would not make up their mind about making Rabi their homeland until they had settled all their land negotiations. I think I mentioned that earlier.

C Q It is right, is it not, that since your retirement one of the things you have done is to help out the Western Pacific archive when the archivist has been away? A. Yes. I have been working on a book about Pacific history like Professor Maude.

Q And you have had some opportunity of looking through the relevant files? A. Some of them, yes. I have not seen everything, of course.

D Q Do you know of any other reference in any of the files to the High Commissioner, or Mr Vaskess, or yourself, or Mr Maude giving any consideration to whether the terms which were being offered by the BPC were fair? A. Well, I was never asked to consider whether they were or not, and I know from conversations I have had with Professor Maude that he was never asked.

E Q You have not come across any document which throws any light on that? I do not know of any, I was wondering if you did. A. I cannot recall any at the moment, no.

Q Would you take Bundle 39, page 87. This is a letter from Mr Gaze, General Manager of the BPC, to Mr Amery, the United Kingdom Commissioner. Do you see that? A. Yes, indeed.

F Q At the bottom of page 87 he is commenting on the terms: "I agree that the Colonial Office should be informed regarding the terms agreed for the acquisition of land at Nauru and Ocean Island".

G Then at the top of page 88 he writes this: "In regard to the last paragraph, although there was unofficial cooperation with Mr Maynard, in particular on the part of Major Holland, it was made very clear that officially none of the Western Pacific High Commission people took any part in the land negotiations, in fact Major Holland received an official letter from Mr Vaskess directing him on those lines. Mr Maynard thinks that in these circumstances it would not be desirable for official thanks to be given, and I agree". Would you wish to make any comment on that? A. No, I do not think so. It is quite true that Major Holland received such a letter, of course. No, no comment on that.

H Q There is just one last document I should ask you to look at and it is in Bundle 31. This is on a completely different matter. Would you turn to page 134. Have you got that? A. Yes.

Q This is your memorandum, is it not ? A. Yes.

A Q Your signature is on page 143. A. Yes. This was prepared at the request of Sir Arthur Richards in 1937.

Q Have you had a chance of looking at this recently ? A. No.

B Q It is a very long memorandum, I just want to direct your attention to one or two passages in it. If you wish to refer to others please say so. Starting at the bottom of page 134: "It cannot be denied that the natives are restive and are becoming increasingly so with the delay in decisions regarding various matters affecting them. Not only are they restive on account of the delay, but in outspoken comments in the 'Maneaba' they have also referred to the fact that they have had a 'raw' deal in such matters as education. I cannot help feeling that they think 'they are being kept in the dark'.

C "I am rather uncertain but I do not think they have had detailed statements regarding their funds made available to them, although on one occasion in 1935 I discussed their funds with them in considerable detail when trying to effect a settlement. The action appeared to be much appreciated". That, no doubt, would be the occasion you were referring to yesterday afternoon. A. When I got the blackboard out, yes.

D THE VICE-CHANCELLOR: This memorandum was prepared where? A. In Suva; when I was on my way back from Australia I spent two months in the Western Pacific High Commission in Suva before returning to the Gilbert Islands.

E Q Is it a 1937 document ? A. I think it is May, 1937. I am not quite sure of the day.

Q I think it is the 18th May. A. Yes, I think so.

F MR MACDONALD: Then turning to page 137 you have some notes on proposed settlement. "There are at present four various Banaban Turst Funds: (1) The Old Banaban Royalty Trust Fund, (2) The New Banaban Royalty Trust Fund, (3) The Banaban Provident Fund, (4) The Banaban Landownerrs Fund" and then you go on to deal with them in separate paragraphs.

G Then on page 139, where you are dealing with the Old Banaban Royalty Trust fund, in paragraph 3(b) you say: "Interest is payable annually to the landowners under the 1913 agreement", and in paragraph 5 you say: "By the continued payment to the landowners under the 1913 agreement of their interest from the Old Banaban Royalty Trust Fund, it would appear that their rights are fairly firmly established, and that in any new settlement these rights should be recognised. 6. It would also appear necessary in any new settlement that some preferential treatment should be accorded to landowners as opposed to non-landowners". Did that accurately represent your view in 1937? A. As at that time, yes.

H MR MACDONALD: Thank you, Mr Macdonald.

Re-examined by MR VINELOTT:

- A Q I want to go back to some questions which were put to you earlier this morning and your answers. You gave a list of the factors you would have taken into account in deciding what course you would have taken in relation to the Banabans in 1947 when Mr Maynard visited them. A. That is correct.
- B Q You were also referred by my learned friend to some memoranda and telegrams which passed between the High Commissioner and Mr Faskess in 1947, which are in Bundle 39. Would you turn to page 16. I am just going to read to you paragraph 2 again: "British Phosphate Commission propose to offer Banabans royalty of 1s. 3d per ton and £200 pce acre (less good land proportionately less). This seems reasonable. Have you any comments. If the Banabans refuse Commissioners will go to arbitration". You see that? A. Yes.
- C Q It was suggested to you by my learned friend that that reference to arbitration showed that the High Commissioner envisaged something which you said you might envisage, that everyone would go off and argue about this on Tarawa? A. Well, I think there might be further negotiations, yes.
- Q Would you turn to page 20.
- D MR MACDONALD: That was not what I intended to say. What I intended to say was that BPC envisaged arbitration and this was in accordance with the sort of developments the witness thought would be likely.
- THE VICE-CHANCELLOR: We will see what BPC say.
- E MR VINELOTT: Have you got page 20? A. Yes.
- Q It starts on the preceding page, page 19, and this is a letter from Mr Gaze to Sir Albert Ellis in February, 1947. The telegram which I have just read to you is the 7th February, 1947. You see at the bottom of page 19: "Whilst in Canberra I had the opportunity of talking with Sir Alexander Grantham on several occasions. I told him the terms which the Commissioners agreed to offer for Ocean Island land and asked if he considered them satisfactory. He enquired if they represented the limit to which we were prepared to go voluntarily and I said that they did, explaining that they were half way between our 1940 offer and the figures asked by the Banabans from Mr Maynard in March last. He then said that he considered them reasonable. He told me that he thought his representative would go to Rabi early in April. Mr Maude would go if practicable, otherwise Mr Macdonald. He cabled to Mr Vaskess asking him to let me know definite dates as soon as possible". Do you see that? A. Yes.
- F
- G
- Q What Mr Gaze seems to be saying is that the offer of 1/3 and the £200 is the limit to which BPC are prepared to go voluntarily. Do you see that? A. Yes.
- H Q What I am going to ask you to assume is that that reference on page 16 to going to arbitration is a reference in that context to operating a compulsory purchase procedure. Do

you follow ? A. Yes.

A Q After those telegrams had been sent I think Sir Alexander Grantham came back to Suva, did he not ? Look at Bundle 49 again, page 49. These, as you know, are minutes or notes by Mr Maynard and he arrives in Suva in March, 1947. A. Yes.

B Q On page 48 Mr Maynard says "I did not have an interview with the retiring Governor before he left", so it does seem as though Sir Alexander Grantham had gone back to Suva after those telegrams had been sent ? A. Yes.

Q When Mr Vaskess was the Secretary to the High Commission. A. Yes.

Q We know that subsequently Mr Vaskess wrote a letter to Mauor Holland. A. Yes.

C Q When you gave your answer to my friend, a very long answer giving your factors, did you know or have it in mind that the High Commissioner had considered the offer of 1/3 as being reasonable and that BPC had said that that was the furthest they would go voluntarily ? A. Did I know that ?

D Q Did you know that when you gave that answer this morning ? A. No, I had not seen this at all.

Q You have not seen this at all ? A. I have not seen this document at all.

Q Then there has been a misunderstanding or mistake on our part, Mr Macdonald, I thought you had seen all the correspondence. A. I have not seen this one.

E Q Well, you have seen it now.

MR MACDONALD: Perhaps there is a misunderstanding between the witness and my friend because he thought the witness had seen all the correspondence, but the witness is saying he had not seen the report. I do not know about the telegram.

F THE VICE-CHANCELLOR: Perhaps you can clear that up.

MR VINELOTT: When you gave your long answer, did you know and had you in mind the telegram from Sir Alexander Grantham saying he considered the offer reasonable ? A. No.

G Q And did you know or have in mind the statement by Gaze to Ellis that he told Grantham that the 1/3 and £200 offer was the highest they were prepared to go voluntarily ? A. No.

H MR VINELOTT: Then I must apologise, my Lord. By an oversight it seems he has not had an opportunity of considering quite a lot of this relevant correspondence. (To the witness): Having seen that telegram and the letter and the extract from Mr Maynard's report, does it alter your view as to what ought to have happened when Maynard went to see the Banabans ? A. I find myself in some difficulty here over the use of the word "arbitration" because arbitration would, I would have

A thought, only apply to the surface sales of the land and I would have thought it would not apply to the royalty, because that would be settled -----

Q It would not apply to the royalty, Mr Macdonald, but if the ordinance is operated and you have a compulsory acquisition what happens is that the surface payment is settled by arbitration and the royalty is prescribed by the Resident Commissioner. A. Right.

B Q You understand that ? A. Yes, I understand that. It was only the word arbitration is used.

Q Certainly. What I am suggesting to you is that if you read that together with Gaze's letter to Sir Albert Ellis it is apparent that when Sir Alexander Grantham talks of arbitration, he is using it as a shorthand for the compulsory acquisition under which the surface payment is to go to arbitration and the royalty will be fixed by prescription. Do you follow ?
C A. Yes.

Q I ask you to assume that is the right interpretation. If that is right, does this telegram and letter affect your answer to the question ? A. Which particular answer.

D Q The very long answer.

THE VICE-CHANCELLOR: It was not so much an answer to Mr Macdonald's question as your long statement.

MR VINELOTT: Yes. A. Does it affect any particular point in the statement ? Which particular point.

E THE VICE-CHANCELLOR: Any of them. What you are being asked generally is this: you made this long statement this morning of the factors you would consider, and so on. At that time you had not seen this statement that the High Commissioner considered the offer reasonable and it was the highest figure BPC would go to voluntarily. You are being asked now to go back and say whether your statement would have been any different had you know those facts you have just recently
F heard. A. I have seen the telegram that has been referred to a long time ago. I think I said I had no hand in the drafting of it or anything, but I have seen that; but I have not seen this document of Mr Maynard's.

MR VINELOTT: How long ago did you see the telegram from the High Commissioner to Mr Vaskess ? A. It is impossible to
G say; I just recognise it, that is all.

Q Would that be at about the time it was sent ? A. I could have seen it at any time. I am sorry, I cannot be definite about that.

Q Did you have it in mind when you made your statement to my Lord ? A. That the High Commissioner had said that the
H offer was reasonable ?

Q Yes. A. No, I cannot honestly say that I did.

A Q If you thought that there was a risk that if the Banabans did not accept the offer that Mr Maynard was coming out to make the compulsory procedure which was operated in 1931 would have been operated again, would that affect your attitude to the way in which these negotiations should be conducted ? A. No.

Q Would it affect the sort of advice which you would be giving the Banabans ? A. I am sorry, I did not catch that.

B Q Let me put the question differently. If you had known or believed that if the Banabans did not accept the 1/3 offer that Mr Maynard was coming out to make there would be compulsory resumption as had happened in 1931, would that have affected your view as to whether the Banabans should have independent advice ? A. No, I still think the negotiations should have been conducted as I envisaged.

C Q Perhaps you could just describe it again so that I can see.

MR MACDONALD: My Lord, this is re-examination. My friend has had an answer on this and he must accept it.

D THE VICE-CHANCELLOR: You are asking him to go through his statement again. He has said his statement would have been the same and taking him through it point by point flavours much more of cross-examination than examination in chief and even less of re-examination.

MR VINELOTT: I accept that, my Lord. The difficulty is it was a very long statement.

E THE VICE-CHANCELLOR: We will see this in the transcript and it is just possible, when we see it in the transcript, there may be some ground for saying you ought to be allowed to investigate it further. I do not make up my mind finally at the moment. It is very difficult for Counsel when he is on his feet and probably not making a note of what is said.

F MR VINELOTT: Yesterday afternoon, Mr Macdonald, a question was put to you which I am going to read - because I have had an opportunity of seeing an advance note of part of the transcript. You were asked this question: "I have asked you to assume that you are the Banaban Adviser on Rabi in April, 1947. The Banabans are going to take this important decision which will affect their future. It is fourteen or sixteen months after the war. They have no commercial experience. You would have been concerned, as a responsible Colonial Officer, to see that they had good advice, would you not ? (A) Yes, but the thing is that they had the advice of Holland, of course. I am not discussing his ability in Gilbertese now. Holland was an officer of very long experience. He had acted as Resident Commissioner on Ocean Island and other posts and they had his advice. That is one point I would have to take into account". Which do you think was the most important decision the Banabans had to make in 1947 ? A. I find a bit of difficulty in answering that. It lies between the sale of their land and the decision to settle on Rabi. They had said they did not wish to make a

A decision over their lands or over the settlement on Rabi until they had sold their lands, so they obviously regarded the land negotiations as more important. I think we, the Government, on the other hand had a feeling that the decision over the homeland was probably more important, to get these people settled into a new home and begin a new life after their harrowing experiences.

B THE VICE-CHANCELLOR: Would you follow that a little further. Once the decision had been made about the sale of their land, that was a decision which would, to a considerable extent, affect their decision on where to live, would it not?
A. I do not think so, my Lord.

Q You do not think so. A. No.

C Q If they decided to sell their land a large part of Ocean Island was going to disappear, but you say that would not have affected whether they were going to live on Rabi? A. Yes. I do not think they had any option really, my Lord.

D Q They did not have any option? A. I think they had to settle on Rabi even if they returned to Ocean Island temporarily or voluntarily. I mean, I just do not think, speaking from my several years living on Ocean Island, that conditions there would really have been suitable for their advancement and their enjoyment and all that.

Q In other words, the decision on their land you do not think would really have any affect on their decision where to live? A. No. I think that probably what it was was that a lot of the Banabans, particularly the old men, wanted to revisit Ocean Island on account of their home sickness.

E Q But, you see, if they decided to sell their land, then Ocean Island became an even more impossible proposition as a home?
A. I agree, yes.

Q And that could be seen by any Banaban and would be understood by any Banaban? A. Yes.

F Q Whereas if they did not sell their land might not some of them think "Oh well, it is still all right to go back to Ocean Island"? A. I doubt it, my Lord. I mean, the attractions of Fiji were such that certainly all the younger people wanted to stay there in terms of attractions in the way of education, social benefits, medical benefits, all those sort of facilities which they could have in Fiji but they would not have had on Ocean.

G MR VINELOTT: Suppose they might have thought "Well the mining will come to an end at some time". A. On the old mining land, yes.

H Q The mining would come to an end when they ran out of land. Do you think Banabans living on Ocean Island in those circumstances would have been possible? A. No.

MR MACDONALD: I fail to see how this arises out of any question I asked.

A THE VICE-CHANCELLOR: No, I do not think it does, Mr Macdonald, but it does arise out of a question that I asked and I think Mr Vinelott must be entitled to pursue it. If you think you ought to be allowed to ask anything further on that I will hear any application from you.

B MR VINELOTT: One of the questions which was put to you yesterday afternoon was this: "Would it be right that you would have thought that they" - that is the Banabans - "must have had misgivings about pitting their commercial and legal ignorance against the competence of a negotiator from an organisation like the BPC?" Do you remember that? A. Yes.

12.30

C THE VICE-CHANCELLOR: That was a question put by Mr Macdonald yesterday afternoon, Mr Macdonald. A. Yes, my Lord.

D MR VINELOTT: And your answer was: "They do not seem to have had misgivings, that is the strange part, because they were the people who raised the question of finalising the sales of land on Rabi at the meeting with Mr Maynard in March, 1946, and later said that they wished to negotiate on their own. That was their own decision, they said it should be treated as an independent settlement".

E MR MACDONALD: Perhaps the witness would have the whole context if my friend would read the next question.

F MR VINELOTT: The next question is: "If you had been advising them you would have had certain misgivings about letting the Banabans pit their skill against the BPC, would you not? (A) This is in 1947? (Q) Yes. (A) Yes, I would have had misgivings. I would have had to have thought about it very carefully". You remember that? A. Yes.

G Q Now that you know that the High Commissioner had considered the BPC and thought it reasonable and that BPC were saying they would go to compulsory purchase if the offer was not accepted -----

H MR MACDONALD: Is my friend inviting the witness to assume that?

I MR VINELOTT: Yes, I am. In the light of that, would your answer to those questions have been different? A. Yes. I would not have had the same misgivings if I had known that. I have already made that quite clear, I think, in the second conclusion I came to where I suggested that the Banabans should have negotiated on their own.

J Q Do you think, from your knowledge of the Banabans, that a varying royalty, one which may vary up or down in accordance with a formula, is something which could be explained to them.

K MR MACDONALD: How does this arise out of any question in cross-examination?

L THE VICE-CHANCELLOR: It arises out of an answer which the witness gave to one of your questions.

A MR MACDONALD: The witness said there should be a review after three or four years.

THE VICE-CHANCELLORE He said there should be a revision clause after three or four years, I think.

MR MACDONALD: This is re-examination, my Lord.

B THE VICE-CHANCELLOR: You are entitled to ask about a revision clause, Mr Vinelott.

MR VINELOTT: I wanted to know what the witness understands by a revision clause. What do you understand? A. A revision of the royalty rate.

C Q In what way? A. In any way that might be discussed and agreed upon, including variable royalties. Not necessarily a review fixing a single figure, it might have been anything.

Q But how is this review to operate; how would it be effected? A. Well, that would be a matter for the negotiators to decide.

D Q When you gave that answer did you have in mind any particular machinery? A. No.

Q Can you instance some kind of machinery? A. Well, I mean there are a variety of ways it could have been fixed. It could have been a flat rate, it could have been variable rates, it could have been variable rates with floors and ceilings. There are various ways.

E Q That is the sort of machinery you had in mind? A. Yes, but I mean it would have to be decided by the negotiators when they reviewed it, what was most suitable.

Q From your knowledge of the Banabans, do you think you could have explained a clause of that kind, or the operation of it, to the Banabans? A. At that time, 1947?

F Q Yes. A. I think some of them would have understood it, but not all certainly. Whether they would have accepted it, of course, is something quite different.

G Q Perhaps you would consider that. Would they have accepted it, do you think? A. It is a question of a bird in the hand and two in the bush. I think Professor Maude referred to the Stabilisation Fund in the Gilberts: it is all right as long as the royalty rate, or whatever it is, goes on rising, but the moment it falls there are difficulties about explaining it

MR MACDONALD: This is a matter which is not really within this witness's competence but would have been very much within Mr Rotan's competence, but he was not asked about it.

H THE VICE-CHANCELLOR: I shall not stop you, Mr Vinelott, you can pursue this within reasonable limits, but when you have done so I shall listen to any application Mr Macdonald wishes to make about recalling Mr Rotan.

MR VINELOTT: One possibility, instead of a review clause, would

- A be to take part of the land but not the whole of it -----
- THE VICE-CHANCELLOR: How does this arise out of any answer he gave ?
- MR VINELOTT: I thought I might be reading his mind.
- B THE VICE-CHANCELLOR: You are reading in his mind a possibility which he never mentioned even in re-examination.
- MR VINELOTT: I am insome difficulty about the documentation. When you looked at these bundles did you see the memorandum on page 46 of Bundle 49 ?
- MR MACDONALD: He has already answered that question twice.
- C MR VINELOTT: That is what I thought, yes. Just pass on to page 61. Have you seen that before today ? A. I have seen this telegram before today, yes.
- Q No, I am talking about Bundle 49, page 61. A. I beg your pardon.
- D Q Have you seen that before today ? A. No.
- Q This is ^Nan account of the negotiations conducted by Mr Maynard. It is entirely new, is it ? A. Yes; to the best of my recollection I have never seen it before.
- E MR VINELOTT: I think what must have happened is that 49, which contains additional documents which came inrather later, was not included in the bundles which this witness saw.
- MR MACDONALD: My Lord, this document is in two of the earlier bundles.
- THE VICE-CHANCELLOR: Do you know which of the previous bundles page 61 is in ?
- F MR MACDONALD: It is in the bundles for the year 1946 and in the bundle for the year 1947. I am told it is Bundle 39 page 39.
- MR VINELOTT: Have you got Bundle 39 ? Look at page 39.
- G MR MACDONALD: I was very careful not to ask this witness any questions about this. It is a meeting at which he was not present.
- MR VINELOTT: Have you seen this before ? A. It is the same document, no.
- H Q Have you seen this bundle before ? A. That I could not say, I am afraid, I did not note the bundles I saw or the numbers.
- THE VICE-CHANCELLOR: If the witness was not shown Bundle 39, which is the 1947 bundle it is a highly relevant bundle.

A MR VINELOTT: Yes. I am told that in fact he did have the bundle. A. I wonder whether my colleague Professor Maude had it and I did not? It is a possibility I mention.

MR VINELOTT: I am extremely sorry this has happened.

B THE VICE-CHANCELLOR: Either the witness did not have the bundle through some mistake or if he did have the bundle he did not look at this document. There is no other alternative, is there.

MR VINELOTT: I do not think there is. It looks as though there may have been some over-sight.

C THE VICE-CHANCELLOR: At least we know that Mr Macdonald is right in saying it was not because it was in a supplemental bundle because it is in this bundle as well which is not a supplemental bundle.

MR VINELOTT: Certainly, my Lord. I do not know whether, in the circumstances, your Lordship and my friends would agree to the witness having an opportunity of looking through this bundle.

D MR MACDONALD: I would not be able to agree that course. This witness has clearly had a very good grasp of the relevant 1947 documents with the exception of this meeting at which he was not present. He was able to cite to your Lordship the dates of things, he has been in the archives and told your Lordship about that. My friend has had the opportunity of showing the witness any bundles he wished and asking him any questions about any of the documents.

E THE VICE-CHANCELLOR: Everything you say seems to me perfectly right, Mr Macdonald, but, you say, this is Day 59 of this hearing and I am very reluctant, where a case has been going on for so long and where there has been a slip up or mistake of some kind, that one should not try to get to the bottom of it, always reserving to you the right (a) to comment on the point and (b) to further cross-examine when we have obtained the result of the investigation.

F MR MACDONALD: I fully understand the force of your Lordship's observation. Of course there are other documents apart from this one minute of a meeting at which the witness was not present and I may have decided to take a different course. But this is Day 59, your Lordship says, it is an action in which the costs continue to mount; it is an action where those on this side are most anxious that it should be brought to a speedy conclusion, and I must persist in my objection.

G H THE VICE-CHANCELLOR: Well, speedy justice is desirable, but full justice is better. What I propose to do, subject to anything further you wish to say, is this: as the clock stands, I suggest that I adjourn now and your instructing solicitors, Mr Vinelott, may be able to discover what documents were in fact given to this witness and it may be Mr Macdonald will have no objection to your being present and having words with this witness, in his presence, and trying to find out

A what documents he did have. Then after the adjournment you may be better instruct^d as to what the witness has seen and then I will consider the matter again. At the moment my impression is that he ought to be given this opportunity, subject to any questions Mr MacDonalld may wish to ask.

MR VINELOTT: I am very much obliged, my Lord. May I say how very sorry I am that this should have happened. I will take the course your Lordship has suggested.

B THE VICE-CHANCELLOR: Mr Macdonald, would there be any objection by you to Mr Vinelott having a word with the witness, in your presence or in the presence of your instructing solicitor ?

C MR MACDONALD: No, my Lord. I do not know whether your Lordship envisages an enquiry at large into what documents he may not have seen ?

THE VICE-CHANCELLOR: No, I think it is only 1947, is it not ?

MR VINELOTT: I think so, my Lord, yes.

D THE VICE-CHANCELLOR: Very well. When I come back you can tell me the upshot. It may be Mr Vinelott will have an application to make, it may be you will have an application to make, Mr Macdonald, and if either of you does I will consider it then.

(Adjourned for a short time)

E MR VINELOTT: My Lord, I ask that the witness should have an opportunity of looking at the bundle for 1947 over the week-end in order to ascertain those which he has not seen and that I should resume my re-examination on Monday.

THE VICE-CHANCELLOR: Do you agree, Mr Macdonald ?

F MR MACDONALD: That the witness should ascertain the documents he has not already seen in the 1947 Bundle, yes, and we anticipate that in fact it may well prove that it is only the 1947 minutes that he has not seen and my learned friend will have an opportunity of asking him any permissible questions arising from those.

THE VICE-CHANCELLOR: Do I need to give the witness any instructions other than that he has heard the discussion ?

G MR VINELOTT: He has heard the discussion and I think he understands.

THE VICE-CHANCELLOR: You understand what you are going to do over the week-end, do you, about this bundle ? A. No.

H MR VINELOTT: What you are going to do is look through a bundle of documents which contains all the documents in evidence in this case relating to 1947 and refresh your mind about those documents, some of which you may not have seen at any rate for some time, and then on Monday morning come back

and resume your evidence. Do you understand now ? A. Yes, indeed.

A

THE VICE-CHANCELLOR: You will probably be asked which of the documents you have not seen before, so when you are looking through try to make a note of which you have not seen before. We know there is one, the notes of the meeting with the Banababs which you tell us you have not seen before today, but see if there are any others. A. Yes, my Lord.

B

MR MACDONALD: The witness does not need to note documents he has seen before, it is only documents he has not seen before.

MR VINELOTT: It is only those you have not looked at before in connection with this case that I want you to look at and read particularly carefully. Do you understand that ? A. Yes.

C

THE VICE-CHANCELLOR: Do you wish to withdraw him from the witness box ?

MR VINELOTT: Yes, my Lord.

THE VICE-CHANCELLOR: That concludes your attendance for the moment, Mr Macdonald, but you will be coming back on Monday morning.

D

(The witness withdrew)

MR VINELOTT: One small point. On Wednesday or Thursday we referred to an index produced by Mr Silcock and your Lordship asked whether there was any complementary table about the Pacific. We have done our best to see if we can find anything without success, but what we have discovered is a publication called the Year Book of the Commonwealth of Australia, the 1951 edition, which contains price indices, and from those indices we have derived the rates.

E

THE VICE-CHANCELLOR: The problem is if you sought to produce something like that at this stage without any witness to provide any commentary on it or explanation of it it may meet with objection. Has Mr Macdonald seen this ?

F

MR VINELOTT: No, my Lord, he has not, I only saw it myself last night.

THE VICE-CHANCELLOR: I should have said has Mr Mowbray seen it.

MR MOWBRAY: Neither of us has seen it, my Lord.

G

THE VICE-CHANCELLOR: There does not seem to be any point pursuing it now. It might be better if you let Mr Mowbray have a copy and put any proposals you have to him.

MR VINELOTT: I think the best thing is to hand him the book so that he can see what it is and if I have chosen the right table.

H

THE VICE-CHANCELLOR: Give him a copy of the page you are seeking to introduce as well.

A MR VINELOTT: I have given him both, my Lord. I thought it right to draw your Lordship's attention to that. I do not know whether my friend wishes to say anything about the pleadings? I believe he has a point.

B MR MOWBRAY: Just that there were some final, so far at any rate, amendments to the pray which were discussed a while ago now and the actual final wording of them was left to be agreed between the parties, if possible. I understand they are now agreed, and if that is right, we can give your Lordship the amended copy and perhaps over the weel-end bind it into your Lordship's bundle. (Same handed to his Lordship) This may be premature. I understand the Crown Juniors may have seen this but Mr Vinelott has not.

THE VICE-CHANCELLOR: Then I will hand it back.

C MR VINELOTT: The other question is the course your Lordship now wishes to take. I am in a position, if your Lordship thought it desirable, to start my argument not having effectively concluded my evidence. I think there is something to be said - and I think my friend takes the same view - for seeing the evidence to completion before we start speeches. That would mean, I am afraid, that your Lordship would have to rise.

D THE VICE-CHANCELLOR: What do you say, Mr Mowbray.

MR MOWBRAY: On the whole, I rather agree with what my learned friend says.

E THE VICE-CHANCELLOR: As I said in this case on a previous occasion, I think in a case of this magnitude the pressures on all concerned are very considerable and I think an occasional relaxation is beneficial. If you both prefer to defer the speeches until the evidence is complete I would be agreeable.

MR VINELOTT: I think that is what I would ask for, my Lord.

F THE VICE-CHANCELLOR: Very well.

G MR MOWBRAY: Perhaps this would be a good moment to say that your Lordship has released Mr Rotan. He is still in the country - in fact I think perhaps he is in court at the moment - but he is thinking of going home about the middle of next week. I just tell your Lordship that in case it has any relevance. I do not think it has myself, but he will be coming back.

THE VICE-CHANCELLOR: That is something on which I need not make any observation.

(Adjourned until Monday morning at 12.00p.m)