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EVIDENCE 23

1971 R. No.3670

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

GROUP B

Royal Courts of Justice,  
Tuesday, 30th March, 1976

Before

THE VICE-CHANCELLOR

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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. PURLE (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-THREE



A MR. MOWBRAY: My Lord, I have some corrections to day 22 of the evidence. May I, before I come to that, just mention what I mentioned on page 2 of Day 22 by F. Your Lordship remembers that I could not find a comment I made about Mr. Silcock's pauses and I said what I thought I had said, and then at G Mr. Vinelott said what he thought Mr. Silcock had said in reply. My Lord, the Shorthandwriters have told me that they have looked at their books and cannot find anything of this, but that one of them has gone back to Manchester and it might be in her book. At any rate, I am content to leave it like this.

B THE VICE-CHANCELLOR: There it is in some form on the transcript. Do you agree with that, Mr. Vinelott?

MR. VINELOTT: Yes, my Lord.

C MR. MOWBRAY: Then on page 9, near the bottom, your Lordship's question, "You might even say especially the loan capital of a company. (A) But I think that the loan capital - it is slightly different when the loan capital is the" it should be "only".

THE VICE-CHANCELLOR: "It is more likely to be lost when it is the only" also.

D MR. MOWBRAY: Yes. Then my next question, the last on the page, "Because there is no cushion of equity investment" that should be. At page 13, does your Lordship see at C, "Let us look at Day 18, page 7. You said between C and D at the break: '(Q) Is that the sort of factor', it should be.

Page 21, I will read from B, "The Ocean Island f.o.b. price would have been inappropriate for this purpose because it was really a cost price. (A) Yes. (Q) And it was partly undertaken" ..... that cannot be right; it must have been something like determined.

E THE VICE-CHANCELLOR: Underwritten I would have thought.

MR. MOWBRAY: I am obliged. Then page 24.

THE VICE-CHANCELLOR: What strikes my eye there is just below E. It should be Ruston-Bucyrus.

F MR. MOWBRAY: Yes; in fact it is right just two lines above. Above there by C, "Let us take what I call your thesis about Christmas Island. It is that if the Banabans had pushed up their royalty demands too high in 1947 the BPC would have said 'Well, we won't improve Ocean Island ever again'", it should be.

THE VICE-CHANCELLOR: Then in the next line "We won't".

G MR. MOWBRAY: I am obliged. I am afraid that is where my researches tailed off. May I reserve further corrections I may have?

THE VICE-CHANCELLOR: Of course.

H MR. VINELOTT: I have quite a few minor amendments. Starting off at page 5, just opposite H, it should start with an answer, "A. I think it would be wrong".

Then page 19, a straightforward typing transposition. In the middle, between E and F, "We did get into another variation which was the sort of ratchet type" --- it is obvious.



Page 31, just below C, "Yes; that is 6th January, 1930 and that is the Rio Derado".

A THE VICE-CHANCELLOR: I must say I never understand how shorthandwriters manage to get down some of the proper names.

MR. VINELOTT: Yes, my Lord. Then page 49, the question just above G, "And the answer you gave was  $5\frac{1}{2}$ d. or  $5\frac{1}{2}$ d; that is at Day 17, page 34. I am going to ask you some more questions about this which I am coming on to in a moment but my friend suggested to you that 6d. a ton would be 11d. and he suggested that 11d. was high". What I think he suggested and what I said was "11d. was higher than the  $10\frac{1}{2}$ d. offered on Ocean Island".

B THE VICE-CHANCELLOR: You change "high" to "higher".

MR. VINELOTT: And then add the words "than  $10\frac{1}{2}$ d. offered on Ocean Island". I think there has been a little left out there.

C Then over the page at F, "and Mr. Collins was talking of land costing \$300 to \$500, that sort of range. If the mineral owner got \$5 an acre that would be equivalent to 1%".

D Then page 51, the last question on the page, "Is it possible to ascertain from the price how much tonnage qualified for that 3s. reduction?" The question in fact was, "Is it possible to ascertain from the accounts how much tonnage qualified for that 2s. reduction". The answer is, "I doubt if it is because the accounts are not calendar years".

Then over the page, page 52, between E and F, I ask the question, "Yes. So it is the BPC calendar year?" it should be, "So it is the calendar year?". That is all.

MR. JOHN PATRICK SILCOCK: Recalled

RE-EXAMINATION BY MR. VINELOTT (Cont'd.)

E Q Mr. Silcock, I was asking you some questions about the Florida comparison yesterday afternoon and you said that you would go back and look at your working papers to give us the exact figure of equivalence of the 3d. royalty. A. Yes.

F Q Have you extracted that now? A. I have indeed.

MR. VINELOTT: My Lord, I think it would be convenient to put it in the form of a document.

THE VICE-CHANCELLOR: This will be D.15.

G MR. VINELOTT: The bottom line you get the exact figure of 5.23p. which in your evidence in chief you gave as  $5\frac{1}{2}$ d. or  $5\frac{1}{2}$ d. A. Yes.

Q At a 6% rate, and for 6d. the equivalent rate would be 10.46. A. Yes.

H THE VICE-CHANCELLOR: I am sorry, I do not understand. You have seen this document and I have not; I have no idea what it says. "Royalty equivalents of down payments for land". For Florida 3p. now is worth 3.85p. spread equally over 20 years at  $2\frac{1}{2}$ % discount rate. I read those words, but could they be explained to me?

MR. VINELOTT: My Lord, in evidence in chief I asked Mr. Silcock whether he could give your Lordship the equivalent in royalty terms of a 3d. down payment, and he said assuming a 6% discount rate, that is assuming you are getting 6%



MR. J.P. SILCOCK:  
Re-examined.

A interest on your money, it is  $5\frac{1}{2}$ d. or  $5\frac{1}{2}$ d., and that was translated by my learned friend Mr. Nowbray into 11d. for a 6d. down payment. In the light of that I thought right to ask Mr. Silcock to give more detailed figures. He is giving a differing discount rate but your Lordship will remember that he said yesterday that 6d. was the top figure, and the discount rate, which is in effect what you get for your money at the bank, would be rather less in earlier years. Taking the last line -----

B THE VICE-CHANCELLOR: I am sorry, I am still sticking to Florida. Is there any difference between Florida and anywhere else for this purpose?

MR. VINELOTT: No, my Lord, but it just happens that the Florida down payment was 3d. for the low value land and 6d., or 10 cents for the high value land. Your Lordship will remember Mr. Collins gave a bracket of 8 cents and 10 cents per acre as the top.

C THE VICE-CHANCELLOR: And then Ocean Island, £100 per acre containing 40,000 tons. That is simply 6d., 0.6d.

MR. VINELOTT: This is a different calculation altogether.

THE VICE-CHANCELLOR: I am trying to understand the figures at the moment. 0.63 is the straight 6d., is it?

D MR. VINELOTT: That is the straight 6d. per ton. A. I am sorry, may I intervene; that is 0.6d. // Q. 0.6, and that should be per ton I think. A. I am sorry, it should be per ton.

THE VICE-CHANCELLOR: So that is .6 of a penny there.

MR. VINELOTT: .6 of a penny.

E THE VICE-CHANCELLOR: That is old pence, is it? A. This is old pennies, yes my Lord.

F MR. VINELOTT: Mr. Silcock in chief made a calculation of the royalty equivalent of £100 per acre on the footing it contained 27,500 tons; and my friend quite rightly pointed out in cross-examination that there was evidence elsewhere that 40,000 tons was the expected yield. So he has done the calculation again taking again a 6% discount rate - that is the last line. Your Lordship sees that .6 of a penny is the equivalent of 1.05d. A. That is correct. If I might just correct one thing I said yesterday, my Lord. I said when we were talking about interest rates that I thought the bank rate had gone up to 7% in 1929/30, 31/32 period. In fact I have checked through again and it only went up to  $6\frac{1}{2}$ %. It went up to 7% in 1920.  $6\frac{1}{2}$ % was the top during that period of the UK bank rate; and for most of the period it was in the  $2\frac{1}{2}$ / $\frac{3}{4}$  range.

G THE VICE-CHANCELLOR: Going back to the top line what that is saying - is this right - is that if you pay 3d. now and you take interest rate at  $2\frac{1}{2}$ % that 3d. paid now is equivalent to 3.85p paid in equal instalments, a tiny fraction of a penny, paid in equal instalments over 20 years for 20 years. A. That is correct, my Lord.

H Q. And that arises in relation to Florida but it has nothing to do with Florida. A. No, my Lord, it arises in relation to a question I was asked in relation to Florida.

Q. Then the next bit, Ocean Island, £100 per acre containing 40,000 tons, has as its equivalent .6d per ton. A. Yes, my Lord.



MR. J.P. SILCOCK:  
Re-examined.

Q When you go on to a new calculation, the .6 of a penny. A. Yes.

A Q Paid now is worth .77p. if you are taking interest rates at 2 $\frac{1}{2}$ % and so on.  
A. That is correct, and the 20 years is worked out down the bottom.

THE VICE-CHANCELLOR: Mr. Vinelott, where does that fit in? This is in amplification and to some extent modification of something in the transcript; have you the transcript reference?

B MR. VINELOTT: I touched on it yesterday, my Lord, in re-examination.

THE VICE-CHANCELLOR: I simply want to note up my transcript so that I will now refer to D.15 instead of taking what was said on evidence 22.

C MR. VINELOTT: Evidence 22, page 49. That is the first reference in the transcript. Just below F, "You were asked by me in examination in chief what 3d. per ton represented in terms of royalty spread over 20 years, assuming an interest rate on capital of 6% (A) Yes. (Q) And the answer you gave was 5 $\frac{1}{2}$ d. or 5 $\frac{1}{2}$ d.; that is at Day 17, page 34. I am going to ask you some more questions about this which I am coming on to in a moment but my friend suggested to you that a ton would be 11d. and he suggested that 11d. was higher than the 10 $\frac{1}{2}$ d. based on Ocean Island. I want to know whether you can give us the exact figure, because you put it at 5 $\frac{1}{2}$ d. or 5 $\frac{1}{2}$ d. a ton. Do you follow? (A) I follow entirely. I cannot give it to you out of my head, I am afraid". Then he goes on to say he has made a calculation.

D THE VICE-CHANCELLOR: Thank you.

MR. VINELOTT: Just summarising the evidence I reminded you of yesterday, Mr. Silcock, Mr. Collins, dealing with the period 1925/40, gave a range of Florida prices of between 5 cents for low grade and 8 to 10 cents for the higher grade. A. Yes.

E Q Mr. Wayne Thomas in his letter, over a period 1930/45, gives a range of between 4 and 12 cents. A. Yes.

Q And your calculation shows that taking the top of Mr. Collins range, 10 cents, and taking a 6% discount range, which you say is the highest for the period, you get a royalty equivalent of 10.46; that is 5.23 times doubled.

F THE VICE-CHANCELLOR: I am sorry, I am lost.

MR. VINELOTT: That is 3d. The equivalent is 5.23. If you take 10 cents, the top of the range, that is 6d., and so 6d. is now worth 10.46.

THE VICE-CHANCELLOR: 10 cents is the same as 6d.

G MR. VINELOTT: 3d. now is worth 5.23; 6d. now is worth 10.46. Is that correct?  
A. That is correct.

THE VICE-CHANCELLOR: That is at the 6% rate.

MR. VINELOTT: Yes.

H THE VICE-CHANCELLOR: So if you add in an extra line in the Florida department, 6d., 10.46 or 6%.

MR. VINELOTT: That is right, my Lord.



A THE VICE-CHANCELLOR: And then we need one other note that 10 cents equals 6d.

MR. VINELOTT: Yes, my Lord. That is the \$5 pound to which Mr. Collins referred. The offer on Ocean Island was 10 $\frac{1}{2}$ d plus, initially, £100 an acre, later £150 an acre; by taking £100 an acre you say that<sup>that</sup> at the same rate of interest is 1.05p. That is the bottom line of the calculation. Is that correct? A. That is correct.

B Q Now in making a comparison between Ocean Island and Florida, would you take £100 an acre into account? A. Yes, I think so, because it is the same sort of payment.

Q So I think arithmetically if you add up 1.05 and 10 $\frac{1}{2}$ d. you get 11.55p.  
A. Yes, that is correct.

C THE VICE-CHANCELLOR: You add 1.05 to the 10.46; is that right?

MR. VINELOTT: No, my Lord, 1.05 to 10 $\frac{1}{2}$ d.; 10 $\frac{1}{2}$ d was the Ocean Island offer, royalty, and you add 1.05 to that, and it is 11.55. So in Florida, taking the top of Mr. Collins range at a 6% discount rate you get 10.46, and on Ocean Island 11.55. Is that correct? A. That is correct.

D Q In that calculation you have disregarded, as you told my Lord yesterday, anything that the Florida owner would have earned on his land? A. Yes.

E Q I am going to ask you to look at the question which was put to you by my learned friend in cross-examination. It is Day 19 of evidence, page 54, starting at B. Mr. Mowbray asked you this question, "I cannot think you would have been using anything about Florida unless you had thought that there were some sales or purchases in the late 20's as well as the early 30's. (A) Yes, I think that the importance which I would have attached to Florida would have been pretty low anyhow. (Q) What would your clients have thought if you had agreed to less - a  $\frac{1}{2}$ d. less, all right, but still less - for 88 grade Ocean Island phosphate than what was being paid for substantially lower grade Florida phosphate". In the light of the calculation you have just made and the evidence we have just reviewed, what do you say about that question now? A. I think that the arithmetic is obviously the other way round now, because the Florida is now slightly less than the Ocean Island.

F Q The question being put to you was that Florida got more or Florida got more than Ocean Island? A. Yes.

Q And that is not in fact correct. A. Correct.

G H Q Turning over the page, just above D, Mr. Mowbray puts the question again, "Now I will ask you that question that I have deferred. Would you have felt happy telling your clients that you had got them less than the equivalent of the Florida amounts for high grade land? (A) As I say, I do not think I would have felt unhappy about that. To put it in perspective, let us take the figure of 10 cents which was talked about, which comes to 11d., and my figure or the figure finally accepted of 10 $\frac{1}{2}$ d. I think that I would find it very easy to explain that land in Florida, in the middle of one of the biggest markets of all, would be more expensive than the royalty value in Ocean Island with all its remoteness and problems. Quite honestly I think I would have put the point the other way round. If I was trying to justify myself, which is what you are asking me to do, I think I would say to them, 'Look, you have got within a  $\frac{1}{2}$ d. of what they get in Florida,' because I think that the differences are very great". In the light of the information you

MR. J.P. SILCOCK:  
Re-examined.

have just refreshed your mind about, would you give the same answer to that?  
A. I would have been able to say in those circumstances, "Look, I have got even better than they get in Florida with all their advantages".

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Q That is all I want to ask you about Florida, Mr. Silcock.

THE VICE-CHANCELLOR: The point about D.15 as I understand it is that if you take a 6% basis there is quite a striking difference between the sum of money, 3d. paid now, and the sum that you would get if there were payments deferred over a period of 20 years. A. That is correct, my Lord, yes.

(Continued on next page)



A Q As I see it what you are now saying is that when you answered these questions in cross-examination earlier on this factor, the difference between the 6d. now and 10.46 pence if it is spread over 20 years, that was not present to your mind when you gave those answers. A. I think it was present in my mind, my Lord. I was talking in terms of 3d. being equal to  $5\frac{1}{4}$ d. or  $5\frac{1}{2}$ d., which made 6d. equal, if you double up the  $5\frac{1}{4}$ d. and the  $5\frac{1}{2}$ d., 10 $\frac{1}{2}$ d. or 11d. I think that what I have now done is refined, if you like, by going back and looking at the actual calculations, instead of saying it is  $5\frac{1}{4}$ d. or  $5\frac{1}{2}$ d., that it is actually 5.23 pence, which makes 10.46 pence.

B Q If this point was present to your mind then it was something you did not include in your answers to these questions. You did not at the time, say "Oh well, this question has been put on the wrong basis, in fact the Ocean Island offer was rather better than the Florida price". A. I think, my Lord, the mathematics of it just tip it the other way.

C Q I know they do, but what I am trying to find out is this. When these questions were put to you in cross-examination if this point of the effect of the deferred payment had been in the forefront of your mind would that not have been a simple answer to these questions. "What your clients have thought if you had agreed to less - a halfpenny less, but still less - for 88 grade Ocean Island phosphate than what was being paid for substantially lower grade Florida phosphate". An answer to that is, "Well, that question is on the wrong basis, in fact the Ocean Island offer was better than the Florida price when you take into account the effect of deferred payments". D A. Yes, my Lord. I think that I had taken into account the effect of deferred payments, but I had not calculated them, or in my mind I did not have an accurate enough figure to show which way it went. The figure which Mr. Mowbray took and put to me, the basis of the  $5\frac{1}{4}$ d. or  $5\frac{1}{2}$ d. that I had given as a range, he took the 11d. as twice  $5\frac{1}{2}$ d. which puts it above the 10 $\frac{1}{2}$ d., whilst the actual figure puts it just below the 10 $\frac{1}{2}$ d. I think perhaps what I did not have in my mind to the same extent was the need to add in the land purchase element.

E Q The £100 per acre.. A. Yes, my Lord.

Q I see, you had the spread effect in mind but you did not have in mind the conversion of £100 an acre into so much per ton, and then the spread effect on that. A. And then add the two together, yes my Lord.

F MR. VINELOTT: I want to pass on, Mr. Silcock, to Makatea; also evidence 19. Page 41. Looking at the question beginning at A Mr. Mowbray asks you to look at a passage which he cited. He says, "I read that to Mr. Collins. Just back on page 6 F, the beginning of the last paragraph there, it says something about how this arose". Then he reads a passage from the 1911 Report on the Makatea, and it says, the fourth line, "For example, Messrs. Touze and Albert Goupil receive a royalty of 1.50 francs per ton, with a minimum of 50,000 francs for the first year, 75,000 francs for the second year and 100,000 francs for the succeeding years, whether there are any shipments or not, and we now have to pay these gentlemen 100,000 francs per annum besides their salaries". You say "Yes". Then you are asked, "So it looks as though they may have been employees, or had some position in the operating company, does it not? (A) Yes, that is a thought, is it not? (Q) Since it speaks of salaries? (A) I do not know why, but I had the impression that Mr. Touze was an advocate, but I may be utterly wrong. (Q) He could have been that too. (A) He could have been. He could have kept the books, or something like this, because I do not suppose that they had an operation on the Island. (Q) At any rate, they were getting a



royalty. (A) According to this, yes, definitely at that time. (Q) The total royalties there would be 2.68 $\frac{3}{4}$  francs, if I have got my arithmetic correct. (A) Because we take off the 13, do we not?" and then you do a calculation and make it the equivalent of 2s.1 $\frac{1}{2}$ d. A. Yes.

A Q Then the question at G, "You would have wanted, would you not, to get as much for your Banaban clients as the landowners, Touze, Goupil and Salmon, got on Makatea". Assuming, Mr. Silcock, that Touze and Goupil and Salmon were being paid a royalty for some sort of service which they rendered to the Makatea company do you think that that royalty is something you would take into account if you were trying to get a comparison between Makatea and the landowners' royalty on Ocean Island? A. I do not really know. B It is difficult in the sense that we do not know what the royalty was for, but it certainly was not a landowners' royalty.

Q I asked you to assume that the royalty is paid for some kind of services, what services we do not know. A. Then I do not think it is comparable with a landowners' royalty.

C Q We know that in 1911 the Makatea landowners' royalty was one gold franc. A. Yes.

Q What happened to the gold franc, can you tell me? A. The gold franc remained as it was until I think 1935 or 1936 when the franc's gold value was changed and depreciated in terms of sterling, whilst the commercial franc had during the periods between the wars depreciated by about five times compared to the gold franc.

D Q It went off the gold standard, is that right? A. The franc went off the gold standard, yes.

Q You were referred to a post war announcement which I think is at page 210 A in Bundle 53. Do you have it in English? A. Yes, I have it in English.

E Q "The Compagnie Francaise has the honour to inform landowners of Makatea that with effect from 1st January, 1947 and without this new arrangement constituting" - and then an alternative translation - "~~The~~ <sup>by renewal</sup> innovation of earlier agreements the sums payable for landowners in respect of phosphate exported and trees cut down and multiplied by 5 will become 5 francs per metric tonne of phosphate exported". Looking at that announcement do you infer that the five francs is as a result of a new negotiation or an ex gratia increase taking account of the collapse of the gold franc, or is there some other explanation? A. I think it is the latter, I think it is an ex gratia payment.

F Q You were asked some questions about the original 6d. royalty; do you remember the 1913 royalty? A. Yes.

G Q Would you look at Evidence 19, page 32 at C. You were asked this question: "I follow. Now, starting again at the top of the list, the one I thought of first, the existing 6d. landowners' royalty: you are the London banker, you put on your pith helmet and go out to advise the Banabans on Ocean Island in 1930 or something, and your starting point, you told us, was the 6d. royalty. (A) Yes. (Q) Would you not want to know what advice the Banabans had had when they negotiated that royalty? (A) I would be interested, yes, but I mean, it is there. (Q) It is your starting point. (A) Yes. (Q) Do you not want to know whether it is a safe, sound, solid base to start negotiating with or whether it is something that was agreed by people who did not know what they were agreeing. (A) Well, I do not think you can get away from the fact that it has been negotiated and this is what has been accepted and it is there. It is a fact, it is the sort of



opening fact of the case, is it not. (Q) It is a fact, but what are you building on it? (A) What you are building on it is that for, whatever it is, 17 years or 14 years this has been the ruling royalty. I mean, whether it has been negotiated on the right basis or the wrong basis, you cannot do anything about it at that stage, you have got to take it as a fact that for 13 years you have been paying that royalty. (Q) Is that all the weight you are putting on it? (A) Yes, that is why I am saying it is the starting point." Then the questioning goes on to Nauru, and my Lord says, "Just one moment, let us deal with this a little further. You are starting with this 6d. Would you regard that 6d. in precisely the same light, having just the same weight, in these two different cases: case 1, it was simply negotiated by the Banabans without any outside professional advice at all, just between them and the authorities; case 2, supposing it had been negotiated by the Banabans having legal advisers and mining experts to help them and then after long negotiations with the authorities finally they settled down on the 6d. Would you attach just the same weight to the 6d. in those two cases? (A) I think I would, in this sense, that why I say it is the base is that you must know what has gone before, what is the status quo. (Q) In either case the 6d. is the status quo, certainly. (A) Yes, but to judge whatever offer is going to be made by BPC you have got to compare it with what is the present state of affairs and I do not honestly think that I would be looking at the then current royalty in any other way than that. (Q) You see, if it had been fully thrashed out - to use that as a shorthand expression for full advice from experts and so on - then in your negotiations with the BPC the BPC could say, 'After full and exhaustive consideration the 6d. was settled on,' and so that is the starting point of what was then the properly arrived at figure. On the other hand, if that has not been done at all, the BPC could not properly use that argument, they could not say, 'The 6d. is something that is a firm foundation, thrashed out between technical experts and so on.' All they could say was 'This is what the Banabans have agreed'. (A) That is true. I think if I can perhaps take one step towards this, I would certainly have felt very different if I had negotiated the 6d. I do not know necessarily that is the way you are putting it, but clearly if I had myself been in the earlier negotiation then obviously what happened in those negotiations carries more weight, because you may have made --- (Q) If the early negotiations had been carried out not by you but by someone in whose skill and assiduity you had great confidence, would not that have affected you - I mean negotiated by some people for whom you had considerable respect. (A) Yes, it would have undoubtedly have had an influence on one. One would always be prepared to use the argument, 'I do not mind what they say: I say something different.' (Q) It is just how firm a foundation or platform or starting point for the new negotiations the existing 6d. provides, whether it is a fully thrashed out 6d. or whether it is very far short of that. That you regard as being of some relevance, do you? (A) I would regard it as being of some relevance but not a great deal, unless it had been myself who had been doing the thrashing out, because then obviously some hostage to fortune may have been held."

My Lord came back to this on page 35, immediately after the short adjournment. I do not want to read the whole passage to you, Mr. Silcock, but summarising it what was put to you was that negotiating a sale of a house, if there had been a sale of an exactly similar house you would pay some weight to the question of whether the sale of the similar house had been at arm's length. Then over the page, just at D my Lord puts the question "But the principle of a properly advised negotiation on the one hand, as against a negotiation made without advice, would that apply equally to mining as to the sale of a house? (A) I think that the principle is there. I think that the variation from the principle is much

A greater. I think that is what I would feel, and the weight which one would attach to it, I think, is much less for that reason, particularly if one comes back to the question of the original 6d. and the new 9d. You know, 13 years have passed, or 14 years, and in many ways the Great War had been a turning point in so many things, added to which the original negotiation, of course, was between the Pacific Phosphate Company, which had nothing like the negotiating strength or the market of BPC. So I think that the circumstances are very, very different".

B What was put to you by my learned friend Mr. Mowbray when he started this point of cross-examination is that this was a royalty negotiated with the Banabans without the Banabans having any advice. A. Yes.

(Continued on next page)

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- A Q In assessing the weight of that 6d royalty, would you pay regard to the basis on which the royalty was negotiated, the mechanics of it and the factors taken into account?  
A. Yes I think I would, because an established pattern had been made which was understood by both parties.
- B Q Would it affect your mind if you knew that the royalty had been negotiated, not between the Banabans and the BPC, but between the Colonial Office and the BPC? A. Yes. I think the Colonial Office obviously had better, or certainly had available to them better, advice than the Banabans.
- Q You told my Lord you did a lot of homework relevant to the two periods you were asked about. A. Yes.
- C Q Did you have any documents relating to the 19<sup>13</sup>~~28~~ negotiation?  
A. No, I did not.
- D Q Can the witness have Bundle 8, and would you turn to page 157. These are Colonial Office minutes and on page 157 you see: "As regards the question of price, the company point out that the royalty per acre at 6d per ton would be £340. That means a total output of 13,600 tons per acre. The Company say that on the terms suggested by Captain Dickson the remaining 1160 acres would cost £510,400 - but this payment would be spread over a period of nearly 100 years, as only 12 acres are worked out per annum and the total payment of £510,400 would be made in respect of 1162 x 13600 tons = 15,803,200 tons. Further when the Pacific Islands Company agreed to the royalty of 6d per ton" - that is the original Crown royalty. A. Yes.
- E Q "... they represented that the value of phosphate on the Island was 10/- per ton. It would be safe to say that it is now over £1. In the 4 years 1908-11 the value of Christmas Island phosphate on the spot has been 30/- 36/- 28/- and 25/- (cf. also the figures given by the local representative of the Pacific Phosphate Company to Mr Mahaffy in April 1909 page 85 of Australian No.202)
- F "On the basis of a value on the spot of 10/- per ton, a 6d per ton royalty is equivalent to an advalorem duty of 5%. The extra 6d now proposed would bring the total royalty payable by the Company up to 1/- per ton, which is less than a 5 per cent advalorem royalty in proportion as the value on the spot exceeds £1 per ton.
- G "Again, the Pacific Islands Company stated at the same time that their German concessions were without rent or royalty. The Pacific Phosphate Company now tell us that they pay 6d a ton to the German Government and ½d a ton to the natives.
- H "There can I think be no question that a royalty of 1/- per ton is not excessive and that a royalty of 6d per ton is too low. The extra expenditure involved in the acceptance of Captain Dickson's proposals should not impose an intolerable burden on a company which paid last year 40 per cent on a paid up capital of £500,000 and 7 per cent on £125,000 worth of preference shares", and then they go on to the dividend. So you see the 6d royalty was an additional



- A 6d on the 6d agreed in 1902, bringing up the total royalty to 5% on the assumed value of £1 a ton. A. Yes.
- Q Does that affect your attitude to the 6d a ton royalty for Ocean Island in 1928, to the Banabans that is? A. It makes it clear that it was not negotiated with the Banabans.
- B Q What was the basis of the negotiation? A. I think the basis of the negotiation is still that the fixed sum is right, although it was justified at that time by using a comparable of a percentage.
- Q The 5% comparable? A. Yes.
- Q Including the Government royalty of 6d? A. Including the Government royalty, yes.
- C Q Applying the same principles in 1928, what sort of royalty would you arrive at for the Banabans? A. Applying the 5% to the value of the phosphate on Ocean Island, it comes, I think, to a total of - 5% on 24/- is 1/2, so with 6d already going to the Government it would be about 8d.
- D Q You were also asked some questions about Christmas Island as a comparable, Day 20 of the Evidence, and would you look at page 13. Just above E you were asked about the Christmas royalty and your answer was: "I think I would put a low importance to that, because Christmas had not restarted and I knew that BPC were thinking of new arrangements there, and if they had in fact consummated those arrangements for a large tonnage then 5% would probably come down if they applied the same regime, as one assumes they would have done, to the BPC then the price would have come down upon which the royalty was payable. (Q) Come down from what? (A) From what it had been pre-war. The royalty price would have been a function of the sales. (Q) As in Nauru? (A) As in Nauru and Ocean, yes", and then it goes on to Makatea and we come back to Christmas on pge 29, just below A: "Now I would like to turn to the Christmas Island royalty. You said you took that as 5% on the last full pre-war year and got 1/7? (A) Yes.
- F (Q) You were prepared to settle for less than 1/3, Why was that? (A) Because, as I think I explained a little earlier, I attach relatively little importance to the Christmas Island royalty because I believe that BPC, if they moved into Christmas Island, would have expanded the production very considerably and the 1/7 would have come down much lower. What I have not done - I suppose it is roughly the same level as it would have been pre-war - is applied again the same 5% formula to the Ocean Island figure. (Q) As a negotiating gactor you could certainly have taken a pre-war Christmas royalty that was actually paid and used that as something to use in argument with the BPC, could you not? (A) Yes. (Q) There is one thing that puzzles me. Would you look at D.3, Table J? Do you see 1940? You do not seem to have used 1940, but 1939. (A) Yes. (Q) I wonder why that was? (A) I think that I have taken 1939 because the 1940 prices were probably reflecting wartime shortages, but I think that is the only reason.
- H (Q) You would not have gone to the negotiating table with 1/7 if you had got 1/10? (A) No, I agree with that.



A (Q) Someone might have said, 'Ph well..i' (A) I agree.  
(Q) How much of a discount on the Christmas rlyalty do you  
think you could justify in accepting? (A) I would have thought  
that the history of the comparison between Christmas Island  
and Ocean was that there had always been a higher royalty at  
Christmas Island. I doubt whether I would have given very  
much weight to having to justify it. (Q) Well, you know  
npw- perhaps you would not have known then - that your, do  
B you call them customers or clients? (A) Both. (Q) Your  
customers or clients were inclined to look at the royalties that  
were being got in other places and they are quite justified in  
doing that, are they not? (A) Yes. I do not know whether they  
could have known it was 1/10. They would have known it was 5%".

C Then the last question on the page: "(Q) The BPC were  
actually negotiating with the same people, were they not, at  
the time we are talking about? (A) Yes. (Q) So there could  
not have been any great difficulty in finding it? (A) No, but  
this is why I think, whilst I agree with you, if I had been  
able to find the price I could have said 'You were paying 1/10  
to Christmas before the war' I think they would have come back  
and said, 'Look what has happened to Christmas. This is no  
D comparable'. That is why I am saying that I think I would have  
felt that it was not one of the major factors that I would be  
wanting to justify my attitude".

E Then my Lord said: "I am a little puzzled about this,  
Mr Mowbray. You have been talking about 1/7 in 1939 and 1/10  
in 1940 for Christmas. You have been asking how those compare  
with Ocean Island. I think if you are going to make the com-  
parison you have to translate the 1/10 and the 1/7 into  
Australian currency. (Mr Mowbray): I was going to leave that  
until a little later. (The Vice-Chancellor): I am sorry.  
But you do get the transcript scattered with 1/7s and 1/10s  
and it is not the right standard of comparison, is it?  
(MR Mowbray) No, it is not. (The Vice-Chancellor): One must  
try to compare like with like, and one is not doing that here.  
(Mr Mowbray): 1/10 is really 2/4 in Australian money, is it  
not? (A) Yes. (The Vice-Chancellor): And what is 1/7 in  
F Australian money? (A) 2s. (Mr Mowbray): You said yesterday,  
I think, - indeed long before that - that you looked at these  
comparable royalties for two purposes: one from the competition  
point of view? (A) Yes. (Q) And the other because you  
would like to get as much in the negotiations - you did not say  
you had to get it, but you said you would like to get it - as  
much as possible. (A) Yes. But I mean, as of those two factors  
the competition one is of course by far the most important because  
G you have got to negotiate it. (Q) You are taking a very  
substantial decrease below 2/4 when you take 1/3. (A) It is  
substantially below, yes. (Q) Can you really justify accepting  
asbig a reduction or as big a difference? (A) I think so.  
I mean, if you are asking me to justify myself now that I  
have agreed to or I have advised my clients that they should  
accept a certain ffigure, and they turn round on me and say 'How  
H can you suggest we should take that?'. I think I would have  
pointed back to the person I was talking to and said: '1940  
was not a representative year' - and I am now in the situation  
of half arguing BPC's case, because you are asking me to justify



A myself - I would have said 'Well, 1940 was not a representative year,' and it quite clearly is not; most of the period it was sort of 1/5, 1/6, which in Australian terms I suppose is about 1/10 (we said 1/7 was 2s, so say 1/10<sup>1</sup>/<sub>2</sub>d) and I would have said that I had recommended that they should argue for 1/6, and we had seen we could not get 1/6 but we had done the best we could".

B Then on page 32 Mr Mowbray recommences just below G:  
"At any rate, Mr Silcock, the figure in your mind for the Christmas Island royalty when you were forming your opinion about this was 1/7. (A) Yes. The figure in my mind was 5 per cent which I was construing with 1/7 on a pre-war basis. (Q) It was not 2s., or 2/1, or whatever it is, the Australian equivalent? (A) No. I think that if I had taken my arithmetic through to the conclusions, I would have had to have borne in mind the 2s., or whatever the equivalent is - I think you said it was 2s. (Q) It is fair to say that you did not attach much importance to this? (A) No, I did not attach much importance to it and even then, I suppose, 1/6 plus the 6d to the Gilbert and Ellice Island Colony was again 2s. (Q) How does that 6d to the Gilbert and Ellice Islands ---- (A) I think we came into this before, when I said that the 2s., if we take the 2s., after all was a payment to the Strait Settlements", and then my friend goes on to the question whether you should take the Government 6d into account.

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D You referred to some Christmas Island sales prices in Bundle 51 and you were asked, I think, about page 240. Do you see: "The British Phosphate Commissioners contracted with the Christmas Island Phosphate Company to take the whole of their output for 1947, 1948 and 1949 at an f.o.b price of £ 50/- Sterling per ton subject to adjustment in the light of costs when full production had been resumed". How do you understand the term there "subject to adjustment in the light of costs"? A. Well, I think that BPC were reserving their position to go over to the same sort of pricing system as they had on Ocean/Nauru.

F Q And the price would be adjusted in that sense. A. Yes.

Q Then it goes on: "This price appears not unreasonable in the light of prices of phosphate from other sources etc; (reading to the words): "5%". That was the passage that was read to you and I would ask you to go back to look at one passage on page 239. This is a savingram from the Governor of Singapore to the Secretary of State in December, 1950:

G "I regret that no information is available here with regard to actual costs of production in Christmas Island. It would, however, appear that the total cost, including all overheads, depreciation etc., allowed as deductible from income under the Income Tax Ordinance, incurred by the Christmas Island Phosphate Co. Ltd in the year 1948 was 33 shillings per ton. The Christmas Island Phosphate Commission will be able to reduce costs by increasing the output". Then he refers to the terms of the lease, "I agree that it would not be possible to effect any increase in royalty or equitable to levy an export duty in addition. The Christmas Island Phosphate

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A Commission claims that it supplies the Australian and New Zealand Governments on a non-profit basis. As a result the f.o.b price has already been reduced and further progressive reductions can be expected. Thus, while the 5% paid by the Christmas Island Phosphate Company was equal to about 2/6 per ton, the rate paid by the British Phosphate Commissioners on behalf of the two Governments for January/ June 1949 was 2/3.34d per ton and for the year 1st July 1949/30th June 1950 works out at 2/1.23d per ton".

B Then he goes on - and this is the important paragraph:  
 "To counteract the effect of this price policy, Mr Harold Gaze the General Manager of the British Phosphate Commission who recently visited Singapore and who was authorised to act for the Australian and New Zealand Governments suggested that, contingent on agreement being reached on another financial question to which I shall refer later, a fixed royalty of 2 shillings per ton be substituted for 5% on the f.o.b price as from 1st July 1950 for the remainder of the lease. This suggestion has been considered by my advisers and I agree with them that it is acceptable in principle. The average royalty for the years 1937 to 1941 was 1/7.2d per ton and although the royalty rose to 2/6 in 1948 it would appear that the company was making unduly high profits and thus inflated the selling price. The point on which I am doubtful is whether such an arrangement should be accepted for the remainder of the lease which expires in 1960 and I should be grateful for your observations on this point". You see that? A. Yes.

Q How does that accord with your approach? A. I think it makes it look as though the price did exactly as I thought; the adjustment clause in the contract was going to bring down the price, the increase in output, rather in a way in which I thought it would do.

Q What about the suggestion that there should be a fixed royalty of 2/-? A. That is coming back to a similar scheme as on Ocean. Of course this is earlier, but it is a similar scheme as on Ocean. *later*

F Q Bearing in mind the differences between Ocean and Christmas Island, how do you think that 2/- Australian compares with the aggregate of the royalties paid? A. I do not think that it is too far out of line at all. The royalties on Ocean are a bit lower.

G THE VICE-CHANCELLOR: The question is not so much whether Christmas is out of line with Ocean as whether Ocean is out of line with Christmas. A. Yes, my Lord, but I took it that way round because Ocean we have already fixed and this is fixing Christmas.

H MR VINELOTT: Put it the other way round, Mr Silcock. In the light of this paragraph, do you think that Ocean Island was out of line, the aggregate royalty on Ocean Island was out of line? A. The aggregate royalty on Ocean Island at that time was 1/3 plus 6d, I think, 1/9 Australian, which was about 1/4 Sterling. Given that this was fixed five years after Ocean, or four years after the Ocean Island one, and that there



A had been a devaluation of Sterling in, I think 1949, so people were thinking much more of the likelihood of currency losing its value in the future, I think they were roughly in line.

THE VICE-CHANCELLOR: They were roughly in line with an 8d difference? A. There was a 7d-8d difference, yes.

B Q You are taking Ocean Island at 1/4 Sterling and Christmas Island as 2/-, so that makes an 8d difference, does it not?  
A. Yes, my Lord.

Q Of course, as far as the Banabans were concerned it was a difference between 1/3 and 2/-. It was a difference between 1/3 Australian, which would be what Sterling?

C MR VINELOTT: Do you have D.1? If you look at the royalty on Ocean Island, in 1946/47 it is 2/9. That is 1/3 plus 6d plus another 1/4, which was in fact imposed in 1947. A. Yes.

Q How did that aggregate compare with Christmas Island?  
A. 2/9 Australian is 2/2 Sterling, which is slightly higher than 2/-, and the 2/- on Christmas Island is the total financial benefit to the Straits Settlement, both as landowners and as taxing authority, as I understand.

D Q Looking at it simply from the point of view of landowners: in Christmas Island the Crown is both sovereign and landowner, on Ocean Island it is sovereign not landowner, but imagine Christmas Island negotiating as a landowner and Ocean Island negotiating as a landowner, would you expect to have the same rate of royalty on Christmas Island, or something larger, or something smaller? How would you expect that to have gone?  
E A. I would have thought that the landowner on Christmas Island --- well, on the one hand he had more phosphate in the land, but because it is per ton that really does not make too much difference; on the other hand, it was not going to take the whole island, which it was on Ocean Island. I would have thought if there was any difference the Ocean Islander, the Banaban, would expect slightly more.

F THE VICE-CHANCELLOR: The quality of the phosphate? A. The quality of the phosphate was 85 as opposed to 88.

Q Not much in it? A. Not enough to make a difference.

G MR VINELOTT: What about comparing the costs between Ocean and Christmas? A. The cost of mining on Ocean Island was greater than the cost of mining on Christmas Island, which would imply, I think, that the landowner in that factor would expect less than at Christmas Island. So we have a balance.

H Q Christmas is a lower cost. What about the selling price, if it was more valuable phosphate? A. I can only go on what I have heard in evidence so far. I would have thought the grade would make very little difference to the value. I have heard some comment about the Ocean Island hardness, the CO.2 content being right at the bottom end of the acceptable range.



- A Q What about shipping ? A. From the shipping point of view, Christmas Island was in a much more advantageous position.
- B Q How would that affect the sort of royalty that you would hope to get for a landowner on Christmas as against Ocean ?  
A. I would have thought with the easier shipping, I suppose, if the freight for a given market is less than the producer ought to be able to afford a little more royalty. So the producer should be able to afford to pay a little more royalty and, therefore, this would put the royalty that was paid to the landowner on Christmas Island slightly higher than on Ocean Island.
- Q So those two factors, the lower cost on Christmas Island and the lower freight charge, you say would argue a higher royalty for the landowner on Christmas against Ocean ? A. Yes.
- C Q What other factors would enter into the comparison ? A. I think this comes back to the shipping point, really, because the geographical location of Christmas Island is certainly such that it does have the alternative of moving into India and into the European market.
- D Q Would that factor favour the Christmas Island landowner or the Ocean Island landowner ? A. I think that would favour the Christmas Island landowner.
- Q So that is three factors in favour of the Christmas Island landowner ? A. Yes.
- E Q Are you sure ? A moment ago you said at the end of the day you would expect a higher royalty at Ocean to the landowner.  
A. I think that was by virtue of the first factor, which is that it was practically the whole of the island on Ocean Island. Perhaps that factor does not balance the advantages which we have just listed.
- F Q Can you perform a balance at the end of this ? A. I think it is terribly difficult, because you are assessing essentially a commercial criteria on one hand with a social criteria on the other. But on the commercial criteria I think I would have expected a higher royalty on Christmas Island than on Ocean Island.
- G THE VICE-CHANCELLOR: The three Christmas factors favouring a higher royalty are: first, easier loading ? A. The lower costs, my Lord, for both loading and raising, I think. Then the geographical location, and the easier shipping. Perhaps I ought to say the greater shipping opportunities.
- MR VINELOTT: Why are there greater opportunities for shipping; just explain that ? A. This is because Christmas Island is much closer to the main shipping routes between Japan, Europe and Australia.
- MR VINELOTT: The possibility of back-loading. A. Yes.
- H THE VICE-CHANCELLOR: Those are all factors that would affect the operator making him rather more able or rather more willing to pay a higher royalty. A. Correct.



A Q As far as Ocean Island is concerned, you have got slightly better quality phosphate, to which you do not attach much weight? A. No, and which is probably counter-balanced anyhow by the hardness, and then I put the social factor.

Q That is really the whole argument. That, of course, is a factor unlike all the other factors you mentioned, that would primarily operate on the minds of the Banabans, the landowners. A. Yes.

B Q The other factors would really operate on the mind of the operator? A. Yes.

Q Of course, that makes the equating of those factors all the more difficult? A. Yes, my Lord.

C MR VINELOTT: I am going to leave Christmas Island and come to Nauru. Would you look at Day 19, page 33: "(Q) Now let us go on to Nauru. There is no reason to suppose, is there, that the Nauruans had any advice or proper advice when they negotiated that 7½d royalty? (A) No. (Q) Can you base any reliance on it as a comparable? Let me just explain what I mean. I can see that there are questions of competition here. (A) Yes. (Q) And what the BPC might do. But now let us try to separate the two ways you can use the Nauru royalty. Let us leave those questions on one side and treat it just like the Australian coal royalty, only much closer to home. Treat it just as a comparable. Do you see what I mean? (A) Yes.

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F "(Q) Is it any use as a comparable? (A) By 'comparable' in this you mean a yardstick to gauge one's success as a negotiator? (Q) Yes, something to measure the offer against. (Q) Can you do that in vacuo without competitors? (The Vice-Chancellor): Without taking about what? (A) About competition. (Mr Mowbray): I should have thought you could, because you are looking at the Australian coal, for instance. (A) Yes. (Q) And I know this is where you have to cut off your brains again, but will you try and think of it just as a measure and forgetting for the moment questions of competition and BPC withdrawing to fortress Nauru. (A) One is putting oneself in the position of saying, 'How far do I think I can get?' and that is really what you must be doing in that situation.

G "(Q) What do you mean, Mr Silcock? (A) I mean, if I am using it as a comparable - can I put it round another way? (Q) Yes, please do. (A) Because I think it is a very difficult subject to understand on its own, cut off from everything else. What one is using a comparable yardstick for, in trying to cut the competitors off in effect, is to say, 'Are they doing (I think) markedly worse than anybody else?' Now I suppose one flows from that to saying, 'Is there a way that I can get them markedly better?', but I think one perhaps is starting off by saying, 'Are they doing markedly worse?'. I think that is the only way I can really define that as just a comparable on its own.

H "(Q) I wonder if a better way of approaching the question is like this. You have already concluded that you have got to do a deal with the BPC. (A) Yes. (Q) So you, with your pith helmet on are negotiating with someone from the BPC. (A) Yes. (Q) Really it is he who is going to be using the Nauru com-



parable, is it not ? (A) Yes. (Q) He is going to be saying 'The Nauruans took 7½d ---' (A) ' -- You take it'.

(Q) Yes, 'You take it'. (A) 'I have offered you 9d and that must be ---' (Q) Yes, '9d is a lot more than that'.

Would not you be able to laugh that away and say 'There was no one helping the Nauruans, they did not know what they were doing'? (A) I think it is very difficult to laugh that away, because whether they had anybody helping them or not does not matter, we have got a contract. That is the worry I have.

(Q) Are you talking about competition now? (A) This, you see, is exactly it, yes. (Q) You are. (A) Yes". You see there there are these two things the comparison as a comparison and competition. A. Yes.

Q It was put to you that in looking at Nauru purely as a comparable - assuming you can accomplish that difficult exercise - it was not any use as a comparable because it was negotiated by the ~~Banabans~~ <sup>Nauruans</sup>. Do you see that ? A. I do see that.

Q You, I believe, had Bundle 54 when you prepared your evidence. A. Yes.

Q Did you read this bundle in the course of preparing your evidence ? A. I did indeed read bits of it.

Q It starts with a report which I need not trouble you with, and then on page 5 you get the mandate for Nauru. Do you see that ? A. Yes.

Q Would you look at Article 2. It sets out the powers of the Mandatory: "The Mandatory shall have full power of administration and legislation over the territory subject to the present Mandate as an integral portion of his territory. The Mandatory shall promote to the utmost the material and moral well-being and the social progress of the inhabitants of the territory subject to the present Mandate". A. Yes.

Q That defines the powers and the duties of the Mandatory. It is apparent from this bundle that reports were made by the Administrator appointed by the Australian Government ? A. Yes, I have seen those.

Q Going on to the years 1928-31, we know that an agreement was entered into in July, 1927, governing Nauru. A. Yes.

Q If you would turn to page 43, you will see that the royalties are in fact prescribed in the ordinance. A. Yes.

Q So the source of the royalty is the ordinance. If you go back to page 20 you will see a report to the League of Nations which sets out the proposals submitted by the landowners, "proposed new conditions". Do you see that ? A. Yes.

Q Then over the page, half-way down: "The landowners have further stated that they will agree to an extension of the proposed period of agreement provided that at the end of the first and each succeeding five years, the rates of payment for leases, trees destroyed, and royalty be fixed by arbitrators, one to be appointed by the landowners, one by the BPC and one to be mutually agreed upon". So what has transpired



has been discussed between the Administrator and the landowners and was submitted in the Administrator's report to the League of Nations. A. Yes.

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Q If you had been advising the Banabans in 1928 would you have looked to see what the royalty payments were? A. I would have done, yes.

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Q Would you have looked at the report to the League of Nations? A. Yes, because that is where they were set out.

Q In 1947 the League of Nations, of course, has disappeared and Nauru became a trustee territory of the United Nations. A. Yes.

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Q Before we go to that, can I just take you to one paragraph at page 78 dealing with the situation in 1939. This comes from the minutes of the thirty-sixth session of the Permanent Mandates Commission. You see that? A. Yes.

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Q On page 78 you get a comment by Mr Halligan. He is for Nauru, the Officer in charge of the Territories Branch of the Prime Minister's Department of the Commonwealth of Australia, and he explains the new arrangements as being more generous than the old ones. Then Mr Rappard comes in. He is Vice-Chairman of the Commission and he says: "Mr Rappard concluded from the facts stated in the report and the accredited representative's explanations that the Nauruan landowners had had a perfectly fair deal. He assumed that the price mentioned by Mr Halligan was less than the world market price; in that case how was the product distributed? There was, doubtless, a keen demand for Nauruan phosphates if the price were below the normal world cost". Then Mr Halligan explained how the system worked. Two-thirds of the way down: "Mr Rappard noted that part of the royalty earned was spent for the benefit of the natives part was invested in a fund, and the largest part was distributed in the form of individual payments. Could fuller details of the latter be supplied in later annual reports?" Mr Halligan agreed to arrange for this information to be furnished", and then they go off on another topic.

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Then turning to post 1946, we get in 1948 page 88 first, the draft trusteeship agreement for Nauru, and in Article 5: "The Administering Authority undertakes that in the discharge of its obligations under Article 3 of this Agreement: 1. It will co-operate with the Trusteeship Council in the discharge of all the Council's functions under Articles 87 and 88 of the Charter; 2. It will, in accordance with its established policy: (a) take into consideration the customs and usages of the inhabitants of Nauru and respect the rights and safeguard the interests both present and future of the indigenous inhabitants of the Territory", and I need not read the rest of that. "(b) promote, as may be appropriate to the circumstances of the Territory, the economic, social, educational and cultural advancement of the inhabitants; (c) assure to the inhabitants of the Territory, as may be appropriate to the particular circumstances of the Territory and its peoples a progressively increasing share in the

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administrative and other services of the Territory", and so on. Rather more detailed than the previous one.

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Then if you would go on to page 89 you will see the report to the General Assembly of the United Nations for 1948 from the period 1st July, 1947, to 30th June, 1948.

A. Yes.

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Q Just below the table on page 90 you see: "The new phosphate royalty agreement (see section 84) which was signed on 23rd May, 1947, became operative from the 1st July, 1947, raising the total royalty payable on each ton of phosphate shipped from eightpence to thirteen pence, exclusive of the sixpence per ton paid to the Administration to cover the ordinary expenses of Administration. The new royalty rates have greatly enhanced the economic status of the indigenous inhabitants". Do you see that? A. Yes.

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Q Turning to page 94, I think I can pass over quite a bit of that because we have looked at that. A. Yes, I have.

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Q That is the new rates. Page 102, we get questions asked about the report by members of the Trusteeship Council which start, in fact, on page 96 where it gives the persons attending. It is the official record of the Fifth Session from the 15th June, 1949, to the 22nd July, 1949. On page 102, in the left-hand column: "Mr Soldatov (Union of Soviet Socialist Republics) noted from the reply to question 15 that the Council of Chiefs had requested that the royalty for the mining of phosphates should be increased to the sum of one shilling and tenpence halfpenny per ton, and that the sum of one shilling and a penny had been agreed upon. He would like to know if the indigenous population of Nauru had the opportunity to make an agreement with another company which might offer them more advantageous terms".

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Then if you turn to page 105, the third paragraph: "Mr J. R Halligan, Secretary of the Department of External Territories, who had been appointed as special representative of the Administering Authority, submitted written answers/2 to written questions addressed to him by members of the Council on the report" --- A. I am sorry, I am lost.

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Q My friend asks me to read Mr Halligan's reply to Mr Soldatov: "Mr Halligan ... replied that the British Phosphate Commissioners had the monopoly of phosphate deposits in Nauru. In such circumstances the population could not conclude such an agreement as that mentioned by the Soviet Union representative".

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THE VICE-CHANCELLOR: Are you coming to a question soon, Mr Vinelott?

MR VINELOTT: Yes, my Lord. Having looked at these reports and the dates and having seen how the royalty had been actually fixed, does this affect in any way your view of the Nauruan royalty purely as a comparable? A. Yes, I think it does. I think it would strengthen very much the BPC's case, or argument, that it had been negotiated in such a way that it was going to be

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MR J.P SILCOCK  
Re-examined:

A acceptable at least with the United Nations or the League of Nations in an advisory position during the negotiations, and that the whole time the negotiators were having to look over their shoulders at a sort of post-audit procedure from the United Nations or the League of Nations, which obviously gives it a mark of acceptability and means that somebody whose job it is to judge these things had looked at it and had judged it.

(Continued on next page)

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Q You were asked by my friend to look at Nauru purely as a comparable, if you could, and put out of your mind the competitive situation. Can you tell my Lord which of those two ~~aspects~~ <sup>aspects</sup> accidents of Nauru, this comparability on the one hand, its position as a competitor on the other hand, is, in your view, most important in considering royalty levels of Ocean Island?  
A. I find this question so difficult to divide between the two because the comparability makes so much difference to the competitiveness. I think that this adds a lot to the strength of Nauru on a comparable basis.

B

Q What does? A. The fact that there is -- no, perhaps I should start again. I think that the competitiveness angle is the most important on Nauru, because BPC could, in the last resort, make do with Nauru on its own, but could never make do with Ocean Island on its own. But, as I was trying to say yesterday, this is why I find this such a difficult question, and I don't make a lot of sense of it sometimes: in the BPC's eyes the comparability was probably the most important thing, because if they gave more away at Ocean Island it was going to affect their situation on Nauru; so that they were looking at it on the basis of perhaps comparison as the much more important item. From the point of view of the future of Ocean Island, I think probably the competitive situation was most important because they were their biggest competitor. I am afraid it is not a very helpful answer.

C

D

Q It is a difficult division to do. It is one my friend asked you to do and that is why I asked. Going back over the whole period which you covered, 1928-47, which year or other period - if you want to talk about another period, do so - during that stretch of time do you think was the best period from the point of view of the Banabans for negotiating a royalty arrangement with BPC? A. I would have thought 1928, before the slump started, or the stock exchange crash started, -- probably 1928. The runner-up would be 1938, I think, when the market really was beginning to recover again.

E

Q 1928 your top favourite; 1938 next? A. Yes.

F

Q How do 1940 and 1947 compare as between the two? A. I would have put them roughly on a par, because in 1940, whilst conditions were fairly buoyant, at least until November when the Germans started to shell things, the war was a very depressing thought, whilst in 1947 there was a different form of uncertainty and what was going to happen after the war, but probably more optimism. The present, in 1940, was better than the present in 1947; but the future in 1940 probably looked blacker than the future in 1947.

G

Q How do you rank them one against the other? A. I put them on a level

H

Q You told my Lord that, in 1928, you would have started at 9d, you would have made a counteroffer, and you would have hoped, in 1928, you thought, a possibility of ending up with 1/-d? A. Yes.



MR J.P. SILCOX:  
Re-examined.

Q In 1940 we know that there was an agreement - not binding, but an agreement - at 1/-d? A. Yes.

Q The agreement in 1928 was 10½d? A. Yes.

Q In 1940 it was 1/-d? A. Yes.

Q And in 1947 the offer is 1/-d, 1/6d counteroffer, ending up at 1/3d? A. Yes.

Q Can you explain to my Lord why it is that in the year, when the bargaining position is strongest, you get the lowest royalty, and in subsequent years, when you say that the bargaining position is less strong, you get higher royalties?

A. I think that the exchange rate comes into it here. The Australian pound had depreciated and I would have thought that one of the factors which BPC probably took into account when still agreeing, if you like, the 10½d which had been offered in 1928, when it was finally fixed in the late 1930, early 1931, was that there had already been a partial devaluation of the Australian pound, and they could probably see a bit more coming, and they felt that that devaluation, and the fact that they were going for 10½d - which, in sterling, was over-generous - they probably saw that the value of that offer was going to go down during the '30s, so that one really is not seeing the offer effectively going up in the difficult years, it is really trying to keep roughly in line with what is going on.

THE VICE-CHANCELLOR: Mr Vinelott, I am not sure what the basis of your question is. If you compare, in 1928, an offer of Australian money with an offer of Australian money in 1947, you cannot just say 1/6d or 1/3d is better than 1/-d, because you have to turn them into terms of real money and real value.

MR VINELOTT: Quite so. I did not want to put that to the witness because I thought my friend might say I was leading; but I think the witness has given, at any rate partly, that answer.

Q To make a comparison between your 10½d or 1/-d in 1928, 10½d actually offered and 1/-d that you might have squeezed out in the circumstances, and the 1/-d which was provisionally agreed in 1940, the comparison there is as between parity in sterling and Australian in 1940, a devalued Australian pound? A. Correct.

Q But in 1947 there has been further inflation? A. Yes, inflation.

THE VICE-CHANCELLOR: If you turn them all into equivalents of the value of money at those three dates, 1928, 1940 and 1947, it looks as if the offer, instead of getting better, is getting worse? A. I have not done the numbers on the basis of the table which your Lordship produced.

Q Certainly, of the 1928 1/-d (which is what you hoped to receive) and the 1940 1/-d (when the agreement was reached)



MR J.P.SILCOCK:

Re-examined.

A

the 1940 1/-d is a good deal worse than the 1928 1/-d on any view? A. Yes, indeed; but what I was trying to bring out in my answer to Mr Vinelott was that we talk about the 1928 1/-d, by the time it was accepted, or the 10½d by the time it was accepted, in early 1931, probably -

Q You talk about acceptance. A. No.

B

THE VICE-CHANCELLOR: It was very far from acceptance.

MR VINELOTT: The 10½d when it was fixed on the spot in January 1931, that was in a devalued Australian currency? A. I don't think it was ever said what it was in; but the Australian currency had devalued to 108½, something like that.

C

Q But going back to 1928 you have parity between the Australian pound and sterling? A. Yes.

Q If you take the 1/-d, which you said you thought you might conceivably have got, or the equivalent, and you compare that with the 1/-d offered and accepted, subject to contract, in 1940, I think the point my Lord has made is that you have got, interms at any rate of sterling, a low <sup>er</sup> royalty? A. Yes, you have.

D

Q And in 1947 there had been inflation affecting both currencies? A. Yes.

Q Going on to 1946-47, the 1/-d Australian is on the table, as it were, something which was put forward in 1940? A. Yes.

Q We know that the Banabans asked for 1/6d? A. Yes.

E

Q And 1/3d was the figure <sup>agreed</sup> provided? A. Yes.

F

Q Putting aside entirely any sentimental considerations, any tenderness towards the Banabans, any feeling for the hardships they had suffered, fellow feelings by the Commission's own employees for what they had suffered, putting all that aside, assuming that BPC is a hard-headed concern concerned only with maximum - I will not say profit, but benefit: where would you, looking at it in 1946, expect to finish up? A. Having started with their offer of 1/-d?

MR VINELOTT: Yes.

G

THE VICE-CHANCELLOR: Mr Vinelott, is this assuming that the witness comes in to negotiate ~~on Banaba?~~ <sup>for the Banabans</sup>

MR VINELOTT: Yes. Could I elaborate this a little further, because in cross-examination there was some confusion about this?

Q Let me ask you to assume that you are negotiating on behalf of the Banabans and you are given a carte blanche, They just trust you to get the best you can for them, they do not put any pressure on you one way or the other. A. Yes.

H

Q Mr Maynard comes out in 1946 on a goodwill visit and you open the bidding with him. Do you understand? A. Yes.



5  
Q The first question is: Where would you start the bidding?

A THE VICE-CHANCELLOR: Mr Maynard is offering 1/-d?

MR VINELOTT: 1/-d is on the table. Mr Maynard comes out.

THE VICE-CHANCELLOR: The witness's hands are not tied by any 1/6d counter-demand; he is left a completely free hand to do the best he can for the Banabans?

B MR VINELOTT: Yes. Mr Maynard has come, he comes out of goodwill, not to offer 1/-d, but Mr Silcock opens the bidding. (To the witness): What bid do you put in? Where do you start? A. I think I would have started in the 1/6d, possibly 1/9d range, but that range.

C Q That is the bidding. If Mr Maynard then went away and said: "I must consult with BPC", because he is only a manager, not a senior man, "I have to consult with the board, the Commissioners, and then I will come back", and if he then came back and said, "Now your 1/3d. is as high as we are prepared to go", what would your attitude be to that? A. I think I would try to have another round and say: "Surely you can go 1/6d". I would try to find something to get some little bit out somewhere; but in the last resort I think I would have taken 1/3d.

THE VICE-CHANCELLOR: What was the 1947 equivalent of the 1931 10½d?

D MR VINELOTT: Taking the 10½d in Australian currency first of all.

THE VICE-CHANCELLOR: The imposed 10½d in Australian currency? A. Let us take 10½d; in 1931, 108½ it went to in October.

E Q It might be easier for you to answer my question after the adjournment, unless the matter lies readily to hand; but at some stage I would like to know. A. I would prefer to do that rather than calculate it in the witness box.

MR VINELOTT: Yes. There are quite a number of factors to be taken into account. I will come back to that.

THE VICE-CHANCELLOR: I appreciate it is quite unfair to ask the witness to do that sort of thing at pistol point in the witness box. Tell me at 2 o'clock. Very well.

F MR VINELOTT: Put the situation slightly differently. You are brought in at a later stage when there have been discussions between Mr Maynard and the Banabans, and 1/3d has been mentioned by Mr Maynard, and accepted, subject to contract, with some little grace, by the Banabans? A. Yes.

G Q They then hear of your skill as a negotiator and say: "Come out here and negotiate for us, see if you can do any better". What do you think is the result then? Is it going to be the same? A. Can I make one point on the earlier one, because I think I should have made it in answer to the previous question. You set the scene by saying it was just a goodwill visit, and the Banabans had to make an offer. Obviously one would have preferred he said: "You come with an offer first". I think that if, in this situation, we are saying 1/3d has been offered by BPC and semi-accepted by the Banabans, one probably would have gone for 1/6d, possibly. It is very difficult answering it. You are starting on a higher floor, but you are starting from a floor which has partly been accepted. That is the difficulty, of knowing to what extent that was acceptance.

H Q At that stage you think you might have squeezed a bit more out of them? A. Yes.



12.30  
A

Q I asked you these questions because I wanted to try to explain a passage in your evidence, Day 21, page 13-F/G. This is Mr Mowbray's rather ingenious idea of taking a bracket of from 1/-d to 5/-d and then dividing it down the middle? A. Yes.

Q Mr Mowbray asked:

B

"The Banabans got 1/3d without any help from anyone? (A) Yes. (Q) We are assuming that someone like you went to help them. Is not this right, that you would not think you had done your job - looking back on it, you would not really think you had done your job - unless you had got them more than they could have got for themselves, would you? (A) I do not know. It depends really how much there was there to get. I take the implied flattery behind your comment, but obviously one would have liked to have got more than that, but one does not always get what one likes.

C

"(Q) But you could have got 3/-d, or something close to it, could not you? (A) I do not think so, no. I do not think so.

D

"(Q) Would you care to put a figure on - we have got a bracket now and perhaps it is not fair to press you any further, but would you care to narrow the bracket or put a figure on what you think you might have got, negotiating for the Banabans now?

E

"(A) Well, I think, perhaps, let us fix the lower end of the bracket first, because I think, as you say, the lower end, once you enter negotiations, presumably is 1/3d which was got without advice - not necessarily without advice. It may be in the circumstances that the best way of approaching it was not in the hard-heated businessman way, it was the Banabans saying, 'Can't you come and help us?'. But I would like to feel that I was going to get the same, so let us say the lower end of the bracket is 1/3d. I think if I had got 1/6d I should have been reasonably pleased, if I had got 1/9d I should have been very pleased. 1/9d was twice the existing royalty.

F

"(Q) And that is as much as you could have got? (A) It is as much as I would have expected to get, yes".

Looking at that passage again, when you gave that answer which situation were you envisaging: going out with plenipotentiary powers to negotiate with the Banabans, there being no history of negotiations, or going out after 1/3d has been been on the table by BPC? A. I think it's clear from the context that I was expected to go out after the 1/3d was already on the table.

G

MR VINELOTT: I want to go through some slightly more detailed points. First of all would you go back to Day 20, page 18? My Lord, I think, looking at this, it really rather ties up with the question your Lordship asked the witness to look at and come back after the adjournment, so that I will come back to it. It is the inflation point.

H



MR J.P. SILCOCK:  
Re-examined.

A Going on at page 20-A [of Day 20], you are dealing here with a suggestion by Mr Mowbray in 1930 that it might have been better, from the point of view of the Banabans, if BPC had been asked to leave the matter for a few years until it had settled down. The question was put to you:

B "(Q) Do you think it might have suited both parties, really, in 1930 for the BPC to have withdrawn its offer for two or three years until things settled down? (A) I think it is a course. I would not like to say whether it would have suited them better because I do not know to what extent, once the basic decision had been made to go the compulsory purchase route, they had started to order equipment and that sort of thing.

C "(Q) Alternatively they could have taken a smaller area. (A) I do not know the answer to that. I would have thought - and this is pure surmise, like most of it - that they had designed the plant for a certain production output and therefore they would want the land to support the plant output over the years. That is the way I would have thought they would have looked at it.

D "(Q) No doubt they would, but what I am suggesting is that they could keep compulsory purchase in reserve and agree on - I do not know how many, 20 acres or 50 acres for the time being until one could see how prices settled down or how the market settled down? (A) I imagine that they might have been able to. I do not know how compulsory purchase works. The company has to make the application in the first instance, so they could have done, yes".

E Going back to this time, 1930, when things were beginning to look rather bad, do you think if BPC had abandoned their quite elaborate plan - which you remember they had in 1930 - for putting in new plant and equipment, enlarging output, which required the additional 150 acres, and had taken just a little bite to keep things going in 1930 -

F MR MOWBRAY: Is my learned friend saying that the new plant required 150 acres? I do not know how he knows that -- 150 acres for 20 years, they might have required it for something else for a number of years, one just does not know.

THE VICE-CHANCELLOR: It is a very elaborate question. One cannot say the plant requires 150 acres, you get a highly complicated question of economics.

G MR VINELOTT: I can put this in a different way. It will take longer, of course.

THE VICE-CHANCELLOR: I think you had better take a little longer.

H MR VINELOTT (to the witness): You have looked, I believe, at the plans that BPC had in 1930, so far as it is dealt with by correspondence? A. Yes.

Q Were they geared to any particular level of production, can you remember? A. They were geared to, as I understand it, a production level of 300,000 tons per annum; although certain



3  
A other levels were discussed, I think they came down, certainly in the discussions, on what sort of royalty was going to be paid, they came down on to an aim of 300,000 tons per annum.

Q From what you have been able to get from these very numerous documents, in 1930 would the implementation of BPC's plans in that way have necessitated the acquisition of a large area or a small area, or what area? A. I think of a large area, because I would have thought they would have wanted to depreciate the new plant over 15-20 years, so that I would have thought that they needed to know that they had land which they could work for that period.

B  
C  
D Q If they had taken a small bite, which my friend suggested in that question, 20 or 50 acres, do you think that would have been enough, in the BPC's mind, to justify this added capital expenditure? A. No, I do not. Thinking a little more about it, the logistics of it, as I see it, are that you have point A, where the drying plant is going to be, and which will be near the loading. What you have to do is to start at point B, which is the furthest point away from A, and then gradually work backwards towards A, because otherwise you are going to be laying all your cableways and things over land you have already worked out; so that you start at the far end and you come back towards A. That is the way I, as a layman, would imagine you do this.

E Q Assuming that your deductions or inferences you have just explained are right, that BPC would not be able or would not want to launch into this scheme of capital expenditure if it could only take a 20 or 50 acre bite in 1930, assume that BPC does take a 20 or 50 acre bite what do you think is the probability that in the 1930s BPC would want to come back and take another bite? Do you think it is certain, or less than certain? A. It is less than certain, because in the 1930s they have proceeded with the Nauru plans of cantilver and heavy expansion in the output, and they have said, towards the end of that period, that they are likely to run down their output on Ocean Island.

F Q Judging from the documentary evidence and your investigations, how would you place that probability? I am not asking you to give it percentagewise? A. I would have thought it was less than 50%.

THE VICE-CHANCELLOR: Less than 50% of what? A. Of the probability that they would go back and -

G Q Less than a 50: 50 chance that BPC would come back and try to get more land at Ocean Island for mining? A. During the '30s.

MR VINELOTT: Assuming they had only been restricted to a 20 to 50 acre bite, and they had not put in these schemes of capital expenditure? A. Yes.

H Q Advising the Banabans in 1930, is that a risk, that they would not come back, that you would have wanted to take on their behalf?



MR J.P. SILCOCK:  
Re-examined.

- A. I think it is not a risk one wanted to take, and I think that the extent that was a risk which was in the forefront of one's mind would have depended on the period in 1930 under discussion.
- Q I was thinking at the end of 1930, rather than at the beginning of 1930. A. Then I think it is a risk I would not have wanted to take.
- Q Going to 1947 - I am sorry to have to dodge from one to another, but my friend did it - you have told my Lord what sort of offer you would have made if you had met Mr Maynard of the BPC. Can you answer this general question: Do you think, in the situation of the Banabans as it was in 1946-47, that they were better served taking a tough line with BPC and bringing in an outsider like this, or negotiating on their own? If you feel you cannot answer that question, do say so.
- THE VICE-CHANCELLOR: I feel a little bit of difficulty about that, because I think you started off by saying, "By taking a tough line and bringing in an outsider".
- MR VINELOTT: Yes.
- THE VICE-CHANCELLOR: Do outside negotiators necessarily have to be tough?
- MR VINELOTT: No; but the Banabans to a certain extent are taking a tough line if they bring somebody in from outside.
- THE VICE-CHANCELLOR: To bring anyone in at all is to be tough, is it?
- MR VINELOTT: It is showing an inclination of being tough, if you look at it in a purely commercial way.
- THE VICE-CHANCELLOR: If you leave out the toughness and formulate your question without any toughness, if the choice is simply between bringing and not bringing in an outside negotiator then some of my difficulties disappear, and possibly some of the witness's, I do not know.
- MR VINELOTT (to the witness): I will put this question in a slightly different way: in 1946-47, if you disregard altogether any sentimental considerations, any consideration of welfare, friendship, and so forth, looking at it purely as an economist and businessman, would you say that the Banabans, vis-a-vis the BPC, were in a strong or a weak bargaining position? A. I think they were in a weak bargaining position.
- Q From a purely commercial, economic standpoint? A. Yes. They had only one real card at all, which was that they did have phosphate which could be shipped in the very near future; but so far as the longer term prospects are concerned, I thought they had a weak bargaining position.
- Q But when you speak of the immediate future, I think you told my Lord yesterday that there must still have been at least 3½



million tons unmined on Ocean Island? A. Yes, I did say that.

A THE VICE-CHANCELLOR:  $3\frac{1}{2}$  million tons unmined in the areas BPC already had?

MR VINELOTT: That is so.

Q Would you look at Evidence, Day 22, page 47-D. I asked the question:

B "(Q) So assuming the estimate of tonnage in the 150 acres is accurate at 1930 - I think it was in fact later - you have  $3\frac{1}{2}$  million tons in 1947. Is that right? (A) Yes, plus some, I think, of the 1913 land.

C "(Q) When you were asked the question about Sir Albert Ellis's statement, did you make any assumption as to whether the increased production from Ocean Island, if you took the maximum production from Ocean Island, would necessitate the acquisition of further land or whether you could get it from the 150 acres? (A) No, I think that it could certainly be obtained from the 150 acres. I rather took Sir Albert Ellis's letter on this review as the sort of letter which is written after the conclusion of the negotiation, saying: 'Of course, we want everything you have got. We need you badly' - you know, I think that is the style of letter I thought it was".

D Do you see that? A. Yes.

Q In the light of that what do you think is the immediate future? A. I think that the immediate future could have been settled out of the land they already had unmined, and that that would carry them through the period when they were of greater importance to BPC, on a strictly commercial basis.

E THE VICE-CHANCELLOR: But, on the other hand, BPC would have the difficulty that they would have to spend a lot of money to get back into operation on Ocean Island anyway, and if they had only got the  $3\frac{1}{2}$  million tons and no more, there is a question of what sort of return they would have been getting for their expenditure and rehabilitation production? A. Yes, but I think they had put people back, and very quickly, and obviously were trying to stick the bits together again.

F Q You do not think that the cost of restarting, as it were, if they had only got their existing land and no certainty of any more land, would have been a serious discouraging factor? A. I do not think so, no. I think they were paying very high prices for phosphate from outside during this period, and I think they were keen to put their people there and get what they could off the island.

G MR VINELOTT: I am obliged to your Lordship.

H Q If I can pursue it further: you have  $3\frac{1}{2}$  million tons on Ocean Island in 1947 at least? A. Yes.



- A Q But that disregards the balance of the 1913 land, which they still had in 1930? A. Yes.
- B Q Working simply, repairing what their installations were on Ocean Island in 1942, when the Japanese came, just making do and mend, no elaborate schemes, supposing somebody had said, the Crown had said, "You aren't going to have any land on Ocean Island, <sup>we want to hear</sup> keep it for some other purpose", how long would that  $3\frac{1}{2}$  million tons take to mine, looking back to the pre-war figures of production? A. They were talking about a level of going down to 250,000 tons roughly. Would not it be fairer to look at the rates they achieved after the war?
- C Q Immediately after the war? In the three years we have it is 170, 205, 177. A. At 250,000 tons per annum it would have lasted 14 years.
- D Q We have seen from the accounts - you may have it in mind - how far they wrote their investment down on Ocean Island? A. Yes.
- E Q And what work they carried out up to 1947. If they had been told: "No more land at all", do you think they would have gone back and done the same work? A. In 1946?
- F Q 1946-47? A. I think they would, yes, because it must have been worth spending £100, -150,000 to mine that 14 years production.
- G Q Going back to pre-1946-47, to take the bracket, I asked you before how you would describe the Banabans' bargaining position. Perhaps you would answer the question again? A. I said I thought it was a weak bargaining position, a very weak bargaining position.
- H Q What was their best card? A. Their best card, as I say I think it was that they could help in the immediate post-war period.
- THE VICE-CHANCELLOR: How could they help? A. I am sorry, that they had phosphate which BPC needed in the immediate post-war period.
- F Q But BPC had already got, on your calculation, 14 years work of phosphate available under their existing rights. A. Yes. I am sorry. I must be at cross purposes.
- G MR VINELOTT: I think you must have misunderstood my question. BPC have got  $3\frac{1}{2}$  million tons at least? A. Yes.
- H Q 14 years production at 250,000 tons? A. Yes.
- Q They are going back to repair the damage, you told my Lord a moment ago? A. Yes.
- Q In that passage I read you from yesterday afternoon you said you thought that the immediate future needs would not require the acquisition of further land? A. Correct.
- Q May I put the question again: Bearing all this in mind, what is the Banabans' trump card, their best card. I will not say "trump card", but what is their best card?



A THE VICE-CHANCELLOR: In negotiating any new contracts for any new land? A. I am sorry, any new contracts; that is the bit I had not taken aboard. They have got very few trump cards. I suppose the only card they have got - and this, again, might not be required immediately if they have already got the existing land - is that it is near Nauru, and therefore the ability to take ships diverted from Nauru. I think for the new land they had very few cards indeed.

B MR VINELOTT: Putting aside purely commercial considerations, what do you think is their best card there? A. I think their best card there is the fact that they have been moved off their island, that certainly Sir Albert Ellis, among the Commissioners, had a strong history of attachment to the Banabans, and I suppose the other card possibly is that they were the principal providers - the phosphate workings - both of money and of employment for the Gilbert & Ellis Islands Colony.

C Q The Colony were going to welcome the <sup>not-</sup> ~~association~~ <sup>cessation</sup> of phosphate mining? A. Yes.  
Q Would that affect the Banabans' bargaining position looking for a higher royalty? A. No, not really.

D THE VICE-CHANCELLOR: You negotiating for the Banabans, would you say you could not regard that as a card you could play? I suppose you might hope for some support or help from the Gilbert & Ellice Islands Colony Government if there became a serious possibility of BFC pulling out? A. Yes, but I think that you get that help 12 years down the line, when they were more likely to pull out. That is the problem, setting the question in terms you have done.

E Q In other words, that would be the headache of a later government of the Gilbert & Ellice Islands Colony in 12 years time, rather than the present one? A. Correct.

F MR VINELOTT: If there had been a possibility of mining ceasing on Ocean Island because the BFC thought the Banabans were asking for too much, what do you think the Colony Government would have been likely to do - support the Banabans?  
A. No, I think they would try and push both sides together again. I do not think they would openly support one side necessarily more than the other; but I am sure they would try to push both sides to other.

G Q How far do you think what happened in 1930 would be a guide? A. I think it is quite a good guide, because in all this we have left on one side the compulsory purchase provisions, which presumably were still extant.

H Q I want to come back to the question I asked a few moments ago: Bearing all this in mind, the bargaining position was on a



MR J.P.SILCOCK:  
Re-exam ned.

A           by commercial basis, not what you have described as a sentimental consideration affecting the Banabans, what advantage was there? Was there any advantage to the Banabans, do you think, in having an expert adviser? Do you think they would have done better with an expert, or the same, more or less? Or do not you know?

B           A. I think it is quite possible that they would not have done better. I think I made this point myself, that I thought it might well be that the best approach was the one that they took.

C           MR VINELOTT: You have some work to do, I am afraid, during the period otherwise set aside for lunch. Would this be convenient, my Lord?

D           THE VICE-CHANCELLOR: Yes. I was just wondering. The fewer cards you have in your hand the greater the need there is for an adviser? Would not you agree with that? A. Yes, unless the value of the strongest card you have got could be like your <sup>are innocent</sup> ~~innocent~~

E           Q   Except perhaps when your position is so desperately bad that there is not even a card in sight, then you turn pathetic? A. That was really the point we were getting to.

F           G           H           (Adjourned for a short time)



A MR. VINELOTT: Mr. Silcock, during the short adjournment have you managed to make a calculation showing in real terms purchasing power, the value of royalties in 1928, 1930/31, 1940, 1946 and 1947? A. I have made an estimate, yes.

Q Is this the document? A. Yes, it is.

(Same marked Exhibit D.16)

B MR. VINELOTT: Explain this to us, Mr. Silcock. The first line gives various headings, date, royalty level, conversion rate, Australian to sterling, royalty level in sterling, sterling purchasing power index, and adjusted royalty level in "1914 pence". A. Yes.

Q And then there is an asterisk by the sterling purchasing power index and there you set out in accordance with the table produced on Day 20 of the evidence ...

C THE VICE-CHANCELLOR: Well, yes, that was the internal purchasing power of sterling.

MR. VINELOTT: That is so, my Lord, yes. It is all we have at the moment, my Lord.

D Q That is the best you could get? A. Yes, certainly in the time available. I think even then it would have been very difficult to have got --- I think one could only have done it via the Australian pound, if there was an index of purchasing power of Australian pound it might have been a bit more accurate.

Q You have not been able to find one in the time available? A. No.

E Q Under the date you give four dates, 1928, 1930/31, 1940, 1946/47. A. Yes.

Q 1930/31, is the end of 1930 and beginning of 1931, is it? A. Yes, I have taken it just on the first days of 1931. In fact the exchange rate is the one that moved on the 6th January.

Q There was an 8 per cent devaluation. A. An 8 per cent devaluation in October, 1930, and it moved to 115 on the 6th January.

F Q You get the royalty level set out, 10½d.; what is the shilling in brackets? A. The shilling in brackets was because we had been talking about a shilling --- the figures in brackets are because we talked about what you would have got if we had got a shilling.

Q Then 1930/31, 10½d. or 1s.; and then 1s. in 1940 and 1s.3d. in 1946/47. A. Yes.

G Q Then you apply the conversion rate which is just a matter of putting on one side the Australian sterling rate. A. Yes.

Q 115 on January 1931, and 125 thereafter. That gives you a royalty level of 10.5 pence; in 1928, 12d. After applying the devaluation in January 1931 that becomes 9.1 pence (10.4 pence). In 1940 it is 9.6 pence, and in 1946 1s. A. Yes.

H THE VICE-CHANCELLOR: The 1s.3d. is the shilling.

MR. VINELOTT: The 1s.3d. is the shilling.



A THE VICE-CHANCELLOR: One of the simple points of this is that a shilling royalty in 1928 was the same in sterling as a 1s.3d. royalty in 1946/47.  
A. That is correct, my Lord.

MR. VINELOTT: Then the next column, which is a more doubtful one, is the internal sterling purchasing power. 59 in 1928, and it goes up in 1930/31, marginally down in 1940 and substantially down in 1946/47. A. I should perhaps add that I have had to make some interpolations myself.

B THE VICE-CHANCELLOR: Yes, because the table is only given at approximately five year intervals, so you have to take a straight line. A. I have not always taken a straight line, my Lord, because I thought for example, between 1938 and 1946 it certainly got much worse during the war years. I thought there was probably very little change between 1924 and 1927. So the change to 1924, 1929 was not quite a straight line again.

C Q Of course there is a difference now between column 4, the royalty level in sterling, and column 5, the sterling purchasing power index. Column 4 is expressing the equivalent of column 2, the royalty level. A. Correct.

Q When you get to column 5 that has nothing to do with the royalty level stated in column 2. Is that right? A. Column 5 is just the index. Column 6 is column 4 times column 5 divided by 100.

D Q Column 4, that is the sterling equivalent of the royalty. Yes, I see. So column 6 then does give you a comparison of the royalty levels after allowing for first of all the change in the rate of exchange between sterling and Australian, and secondly the element of inflation shown by the internal purchasing power index. A. Exactly, my Lord.

THE VICE-CHANCELLOR: Yes, that is very helpful.

E MR. VINELOTT: Column 6 is doing the same operation but starting with your 100 in 1914. Is that right? I am sorry, no, it is converted into pence.  
A. Yes.

THE VICE-CHANCELLOR: So in purchasing power of the pound sterling your 10½d. royalty at 1928 was worth something like 50 per cent more than your 1s.3d. royalty in 1946/47, is that right? A. It is about 35 per cent less. It depends ...

F Q On which you take as your starting point. A. Yes, exactly, my Lord.

Q Because if you start with 4.6 and add 50 per cent to that it comes to 6.9?  
A. Yes.

Q Which would be rather more than the 6.2. A. Yes, my Lord.

G THE VICE-CHANCELLOR: Mr. Mowbray, when Mr. Vinelott has finished, this being a new document at any rate largely at my instigation you should be given the opportunity, if you wish it, to apply to be allowed further cross-examination.

MR. MOWBRAY: Thank you, my Lord.

H MR. VINELOTT: That application would not be opposed, my Lord. Going back to 1947, Mr. Silcock, when you were I imagine quite a young man or boy, applying the experience that you have acquired as a merchant banker and financial adviser and from reading economic history and so forth, what sort of expectation would you have had in 1947 about the future value of money. Would you expect it to have gone down, go up or cannot you say? A. I think



A           Q    In 1947 with the heavy inflation during the war, this was the cheap money era - one of the reasons why it was a cheap money era was that everybody was imbued in Keynesian economics and did not wish to make the mistakes of the 1930s and would have done all they could to keep money stable, but I think it was a minor point, or at least regarded as of lesser importance than the level of unemployment. But I think people would have still expected that money was going to remain relatively stable, although of course by 1949 the sterling had been devalued.

B           Q    I am anxious that you should look at this in 1947.    A. In 1947 I would have thought that they would have at least hoped ~~it~~ would have been stable.

C           Q    In your experience in the field of extracting industry generally was it common or uncommon for leases at that time to include a provision for variation by reference to a gold clause or cost of living index or something of that kind?    A. I think certainly not cost of living index. Gold clauses had come into favour during the 1930s and I think we were discussing the other day that there were problems certainly about gold clauses and the legal enforcement of them. I do not think there has been any gold clauses in post war contracts to my knowledge.

D           Q    There was, as you rightly say, a certain amount of litigation about gold clauses in the 1930s. In your experience is a lease which covers the whole of the deposit which is going to be mined over a period of 40 years, or which is for a 40 year term, unusual?    A. No.

E           Q    Going back to 1947 again and taking a lease of that sort of term, is it in your experience usual or unusual to include a review clause?    A. I think it is unusual to include a review clause from the leases I have seen, and particularly in the oil side.

F           Q    Particularly in the --- ?    A. In the petroleum side with the long leases that I have particularly seen.

G           Q    Do they tend to be long leases or did they tend to be long leases?    A. Yes, indeed. The Kuwait lease was until 2025 I think.

H           Q    Did that have a review clause?    A. No. It has just been reviewed.

I           Q    We all know what has happened in recent years, I am talking about the period 1947. Have you got Day 22 of the Evidence there?    A. Yes.

J           Q    You said something about oil concessions on page 20. If you look first below B: "If an arrangement has got to last as long as 40 years, is it not rather important to provide for alterations in the circumstances in that very long time? (A) I can see a case for doing so. I would not say that it was as normal in the mineral royalty. I think at most - I was going to go back to the oil industry where most of the royalties are fixed for the life of the concession. But obviously 40 years is a long time. (Q) Now, just a question about the oil concessions. Is the picture this with an oil concession, that there is a royalty but it is of a rather nominal amount and that the real discussion in negotiating a concession is about the other benefits which will go to the owners? (A) I would agree that the real discussion may well be about profit sharing, the sharing if you like of a profit, and of course these days it is different anyhow because nobody will ever give up the mining rights, the right to the mineral in the ground stays normally with the producing government or the producing government's own private oil company. (Q) Is that the kind of concession you have had experience with? (A) I have had quite a lot of experience of that sort of



concession and experience of" -- and what did you say there? A. I would have thought "experience also of the earlier types".

A Q "And experience also of the earlier types".

THE VICE-CHANCELLOR: Shall we alter the "not" into "also".

B MR. VINELOTT: I think so, my Lord. My learned friend and I agree that that gives the sense of it. "But as you say, the profit participation has moved in over the last 15 or 20 years and the royalties on those concessions have stayed the same." As I understand it, Mr. Silcock, in recent years when you have had the profit sharing participation coming in the mineral owner has had the royalty and profit sharing, is that correct? A. That is true.

C Q What is the sort of level of royalty in 1947? A. I think the standard royalty, fairly standard royalty, I should say the most usual royalty, has been  $12\frac{1}{2}$  per cent.

Q That is in 1947? A. Yes, since the war.

THE VICE-CHANCELLOR:  $12\frac{1}{2}$  per cent of what? A. Of the well head value, my Lord.

D MR. VINELOTT: In your experience when did the profit sharing participation come in? A. The first of profit sharing, which was commonly known as 50-50 deals, was with Saudia Arabia in 1949 or 1950; 1949, I think.

Q Was that Dr. Moussadek? A. No.

THE VICE-CHANCELLOR: He was in Iran. A. Yes. It was followed fairly quickly by the other states in the Gulf.

E MR. VINELOTT: Just one other question on that page; a little later on: "I noticed when you spoke of the transaction you had to do with in Botswana you said you were renegotiating a transaction and that you took account of the royalty. (A) We took account of the royalty, yes. (Q) Which had already been agreed or fixed. (A) Yes. (Q) You referred to that as a small royalty. (A) It was either 5 or 10 per cent - I cannot remember. I could look it up. (Q) You consider 5 or 10 per cent a small royalty? (A) Yes. (Q) Was it copper? (A) Copper and nickel, yes. (Q) That would not actually be used in Botswana? (A) No. (Q) It was for export? (A) Yes." When was that royalty fixed? A. That royalty would have been fixed in the early 1960s I would say.

F G Q Early 1960s? A. It may have been earlier. Certainly the production concession was granted in the early 1960s. I do not know but there may have been a royalty involved in the exploration concession which preceded the production concession.

Q You have referred to that 5 or 10 per cent as a small royalty. How does that relate to the sort of royalty we have been talking about in the phosphate field? A. I think that the 5 per cent is, as we have seen from Christmas Island and Ocean, something which has been in people's minds at any rate for phosphate. The profit potential I think on copper and nickel has been fairly high, certainly on nickel.

H Q This was copper? A. It was a mixture of copper and nickel.

Q I want to come back to the question of a review clause. One possibility which my friend put to you was having a 40 year term, the anticipated life of the deposit, that you might have a review clause. A. Yes.



A Q Another course which might be taken would be to take a lesser area of land which you would expect to mine over a shorter period, let us say 20 years, and then come again for the remainder. You understand? A. Yes.

Q In the first case, the review clause, the Banabans would be bound by the lease for 40 years or life of the concession, but after 20 years the review clause would operate. In the other case they would have half the land and neither side would be bound at the end of the 20 years. A. Yes.

B Q And of course in the first example the Banabans are bound for the term of the lease subject to the review, but the Company of course is not bound to mine. A. Yes.

Q Between those two possibilities, a review clause and a shorter and smaller area, which do you think would have been best from the point of view of the Banabans, if you had to choose between one or the other of them? A. I think I would have gone for the review clause one.

C Q Why is that? A. Because I do not think that the remaining acreage was going to be a great deal of use to the Banabans. I am trying to think of it in terms of perspective bargaining position in the future. I think it is fair to say that this would give them a chance to come again and have a look, but if, as I think would be quite likely, after 20 years, given BPC's other production, there was a chance they would have said no --- I think there was a chance certainly in 1946/47 that they would have said no.

D Q Given this situation of the choice between the 40 year term and the lease of the reserve for 20 years, who do you think would have pressed most strongly for the whole concession as opposed to the small area, the Banabans or BPC? A. I think both sides actually would have had cause to press for the 40 years. If BPC had only had the first bit of the land they might have been not so keen to expand facilities. So I think that any mining company in fact, if it has a deposit, if it is working a deposit, feels it has greater flexibility if it already owns the whole of the deposit or has a hold over the whole of the deposit.

E Q What about the Banabans? A. I think the Banabans from their point of view would really not have known quite what their situation was on the other part of the deposit, which was not under lease. And again I would have thought the uncertainty, particularly when they were no longer living on the Island, was something they would prefer to be without. I think there was a strong recommendation from the Government that they should lease the whole.

F THE VICE-CHANCELLOR: You are really saying that both sides would have really wanted the review clause system lease of the whole to avoid uncertainty. A. Yes, I think so, my Lord; rather than the other system.

G MR. VINELOTT: My Lord, if I did put that question it was not a question I intended. The question I intended to ask was given the choice of taking the whole concession, 40 years without a review clause on the one hand, and taking a smaller bite which would last for 20 years on the other hand.

THE VICE-CHANCELLOR: Without a review clause.

MR. VINELOTT: Yes.

H THE VICE-CHANCELLOR: You started off by putting an alternative to the review clause, taking a smaller area and coming again for the rest.

MR. VINELOTT: I started by asking which of the two, that is the whole concession with a review clause, or the 20 year bite; and the witness said



he would prefer the 40 years with a review clause. So he has given an answer to that. Then I intended to ask whether he would contrast another situation, that is 40 years without a review clause. A. I am sorry, I did not understand that.

A

Q I am sorry. Given that choice, what would the Banabans or BPC want?  
A. I think again the BPC would certainly press for the 40 year concession.

Q What about the Banabans? A. And I would have thought that it would have been again to the advantage of the Banabans.

B

THE VICE-CHANCELLOR: Why? A. I think again the certainty, my Lord.

Obviously to have a review clause would be better than not to have a review clause, or might be better -- again that is not certain, it depends on what form the review clause was in. But I would have thought that not to have known what really was the situation over the remaining land -- they would prefer to have the ability to lease it rather than not to know where they were with it.

C

2.30 p.m.

Q I think you have told my Lord before that at a given rate of royalty, the same rate of royalty, you would prefer to have a review clause with a floor to having a straight cash royalty throughout the term. A. Yes.

Q If you have a floor which is reasonably high. A. Yes.

D

Q And you have told my Lord that given the choice between the flat royalty throughout the term on the one hand and a lower level of royalty to start with, a review clause which might fluctuate either way, up or down, that there was a point in reducing the royalty beyond which you would say you would sooner have the straight royalty. Is that fair? A. Yes, I think that is fair.

E

Q You have been asked a lot of questions about these various assumptions. Having answered a number of questions on this from my learned friend do you take any different view; how would you equate those two? A. The lower end of the scale is the thing which is going to worry me most. Obviously if the lower end - to put a ridiculous point - of the review scale is higher than the flat royalty well then obviously one goes for the review because it cannot get lower. Once the lower end of the review is more than, say, 30 per cent to 40 per cent below the fixed rate I think I would go very much for the flat rate. Of course it depends on what is the starting point within the operation with the review clause as well. If the starting point is [760] two-thirds, 75 per cent above the flat rate, which is available, then it would probably I would have thought be worth the risk of the review clause. But I am afraid it is very nebulous in theoretical terms.

F

Q I have a few small points on a passage in Day 19 of the Evidence, page 31. At G, in cross-examination, you were asked, "Do you treat all the Australian coal royalties the same, on a par? (A) Broadly speaking, yes. I think New South Wales was the most important because I think it was the major coal producer". Do you see that? A. Yes.

G

Q On your list you included Tasmania. A. Yes.

Q When you prepared this list why did you put Tasmania in? A. Basically because I was getting a list of all the States. I got replies from most of them, I did not get replies from Victoria, and so I put them all down.

H

Q You put in what you got? A. It was as simple as that, yes. It showed there was a variation of nil to whatever the top figure was.



THE VICE-CHANCELLOR: The question at letter H, "Then you made this conversion of the \$100 an acre into a tonnage charge" it should be.

A MR. VINELOTT: I am obliged. Then Day 21 of the Evidence, page 22, below E:  
"Would you agree that it" - that was the Makatea 32s. - "was a market price?  
(A) It was a price at which Makatea was selling in a particular market. I  
am sorry, I do not mean to sound not to be answering the question, but it  
was the price at which certain quantities of the Makatea product was selling  
in the Pacific. Why I am so careful and guarded in what I am saying there  
is that I do not think, from the experience which I have gained so far in  
B listening to and reading about this particular case, that I cannot help  
thinking there is not anywhere, except perhaps Morocco where there is a  
surplus which can always come on to the market at any time, a market price  
of phosphate in the way there is a market price of copper quoted on the  
London Metal Exchange. (Q) You are saying this was the price for a  
particular quantity. (A) It is a price for a particular quantity sold at  
a particular time, yes." I do not want to read the whole of this  
C corss-examination on the meaning of market price, but perhaps I ought to go  
to page 24. At D my Lord asked the question:

"A market price that is not open, does that simply mean a commercial  
deal? (A) It is the price at which a deal is done, yes, my Lord. (Q) So  
any commercial deal is in that sense a market price? (A) I think I added  
a further rider to the definition in the sense that it was between a willing  
purchaser and a willing seller. (Q) Any commercial deal not done under  
D constraint is a market price; is that it? (A) Exactly. (Q) And an open  
market price is a price available to any seller anywhere. (A) That is  
correct, my Lord." Then a little later on my Lord says:

"I am sorry. Why do you call a commercial deal not done under  
constraint a market price? What 'market ' is there? (A) Well, my Lord,  
if we take this particular transaction, there was a market there, there was  
a market for Makatea phosphate, and there was a purchaser in the BPC and  
the BPC and Anglo French, or whoever it was, made a deal. Then there was  
E no more phosphate left for the next few years. So I think it is wrong to  
say the price at which that deal was done was the price at which anybody  
else could have dealt, because there was not anything there for them to deal  
in. (Q) If on the open market somebody comes along and takes the whole of  
a product for a couple of years does that cease then to be an open market  
price? (A) I think it certainly ceases to be an open market price for the  
next year". When you use the word market price in this sort of context  
could you just explain as precisely as you can what you mean by it?

F A. It is a price at which certain quantities are sold between an unconnected  
buyer and seller and a willing buyer and seller.

Q But any deal of that nature, the price you are saying is in a sense a market  
price. A. Yes, I think that is right.

Q And an open market price is a price at which anyone can come in and deal?  
G A. Correct; basically in any quantities.

Q Taking your first sense of market price is it a sense which is commonly  
understood in the business world? A. No, I do not think it is, and that  
was one of the main reasons why I was trying to make the distinction between  
them. Certainly in the earlier part of my evidence we were tending to use  
that phrase in both connotations.

H THE VICE-CHANCELLOR: What is the meaning of the word "market" in that context.  
"Price" I think I understand; what market is there about it? A. I think  
there is a market, my Lord, in that one side was in the market to sell and



A the other was in the market to buy. But it was not something which was generally available for once the particular quantity had been dealt with---

Q The word "market" does carry with it some sense of general availability, being generally on offer. A. I think in fairness starting from scratch I would have preferred to call one a price and one a market price.

B MR. VINELOTT: So the sense in which you use market price as opposed to open market price, you could simply substitute "price". A. Yes, exactly.

THE VICE-CHANCELLOR: An ordinary commercial price, a commercial deal, not a deal between friends or anything like that. A. Yes, I agree.

MR. VINELOTT: A genuine price, a commercial price. A. Yes.

C Q You produced I think yesterday at my friend's request a document which has gone in as D.14. Have you got that? A. Yes.

Q The last column or columns is an estimate of current profitability. Do you see that? A. Yes.

Q And it is October and November 1930. A. Yes.

D Q Do you think somebody who had money to invest in October/November 1930 would have been investing money with that sort of estimated return?  
A. No, I do not think this was the time that anybody would have been investing money.

THE VICE-CHANCELLOR: Nobody would have been investing money at all. A. I would have thought in October/November 1930 there were very few firms that were investing money.

E

(Continued on next page)

F

G

H



A Q So irrespective of the estimate of profitability irrespective of the rates, you say you do not think anybody would have been interested at all? A. Yes, my Lord, at least at these levels. I do not think any of these firms would have undertaken new investment if they thought they were going to generate those levels of return.

B Q You do not think anybody would have invested money anyway, but certainly at these rates of return they would not be interested?  
A. Correct.

MR VINELOTT: One of the companies there is <sup>Broken South</sup> Burton Hill & Son. You referred in your comments to the Annual General Meeting of the 6th October 1930? A. Yes.

C Q Is that one of the documents which you produced for my friend?  
A. Yes.

D Q Is that a fairly alarming situation? A. Well, it certainly shows that they were worried about the situation. On the mining venture - which was approximately 50% of their business, the rest being investment holdings - they were not making any profit, or they did not believe at that time they were making any profit and it says the shareholders are advised that the mine produced no profits since the 30th June on which dividend should be paid.

E Q I do not want to ask any more questions on that. Have you got Day 22, page 17. Just above G you were asked about elasticity of demand and my friend said: "So it is not right that the risk to the BPC was very much reduced by the non-elasticity of demand in Australia and New Zealand? (A) I do not think that follows from that premise. I say that the price was non-elastic or non-sensitive, if you like. (Q) Yes. (A) Which meant that when times were bad certainly if the price of phosphate went up they were then likely to feel even worse about it, even less likely to buy, but I think that in those times even if the price went down they may not have come into the market to buy. It is in that sense that I have said it was inelastic.

F  
G "(Q) BPC did manage to put up prices quite substantially in a very bad time, did they not, in 1930/31? (A) Yes, but they did sell a lot less phosphate. (Q) Did they sell less? (A) I am sorry, it was 1931/32 they put the prices up, was it not? (Q) I beg your pardon. They sold more in that year. (A) Yes. (Q) And more still the year after? (A) Actually I think we may be basing ourselves on the wrong numbers here, because this only shows sales from Nauru and Ocean. I am not sure whether the total sales of the BPC would show the same numbers, the same pattern". Then my learned friend referred to P.1 page 24. Have you got D.1 and D.8? A. Yes.

H Q D.1 is the total production Nauru and Ocean. A. Yes.

Q D.8 is the total imports Nauru ---- A. No, it is exports.

THE VICE-CHANCELLOR: It is sales of phosphate.



A MR VINELOTT: I want the schedule of phosphate imports into Australia and New Zealand, which I think is D.7, and then D.8 is outside sales. So if you take D.7 and add to it the Nauru-Ocean production and you then deduct the outside sales you get the total imports to Australia and New Zealand.  
A. Yes.

THE VICE-CHANCELLOR: Which year are you taking ?

B MR VINELOTT: I am going to take the years 1929 to 1932. From 1927 to 1931 there were no sales; in 1932 there is one sale, and just doing the addition in 1929 we have got the Makatea/Morocco and 499,456 from Ocean/Nauru. Correct ? A. Yes.

THE VICE-CHANCELLOR: I am sorry, would you give the figure again ?

C MR VINELOTT: It is 499,456.

THE VICE-CHANCELLOR: That is taking 1929 to 1930 ? The trouble is that in D.1 the phosphate years run from the end of June, but D.7 is the year ending, so they are calendar years. *No D7 shows 30<sup>th</sup> June*

D MR VINELOTT: Yes. So if we take 1929-30 Ocean/Nauru is 499,456 and you have got to add that to the 1930 figure on D.7. Is that right ? A. Yes.

Q What does that make ? A. I will tell you that in a minute.

E MR VINELOTT: My learned friend has got a schedule which he has kindly handed to me, which will save a lot of time. This is one of the plaintiffs' documents.

THE VICE-CHANCELLOR: Would you object to it being given a "P" number, Mr Mowbray ?

MR MOWBRAY: I do not think so, my Lord; I do not see how I can.

(Schedule put in and marked "P.6")

F MR VINELOTT: That will save a certain amount of time.

THE VICE-CHANCELLOR: Just a moment. Column 1 comes from D.1

MR VINELOTT: That is right.

G THE VICE-CHANCELLOR: You are looking at the year 1929-30 at the moment and that is 499,456. I am a bit puzzled here, because for this year the total imports other than Nauru and Ocean are given as 218,913. Do the three figures given in D.7 for 1930 add up to 218,913 ? A. There is a New Zealand column as well, my Lord.

H THE VICE-CHANCELLOR: I see. So that is 218,913 and if you cut out the countries other than Australia and New Zealand that gives you the entire domestic consumption of Australia and New Zealand. Then column 5 comes from D.1 again ?  
A. The D8 figures do not seem to quite tie in.



MR VINELOTT: No, D.8 is 11,900.

A THE VICE-CHANCELLOR: Look at 1935-36. D.6 is 20,300, D.8 from which it is supposed to be taken comes to 12,970. A. I think my Lord there is one on the far side from Sweden, which gives you 20,000-odd.

B MR VINELOTT: I think they are sufficiently accurate for the purpose of the questions I am going to ask you, Mr Silcock. Take 1928-29 it is 802,453, 1929-30 it is (up to June, 1930) 793,369, 1930-31 540,082, 1931-32 472,844 and in 1932-33 it becomes 669,304. Going back to what you said on Day 22 of the transcript, on page 18: "(Q) Did they sell less? (A) I am sorry, it was 1931/32 they put the prices up, was it not. (Q) I beg your pardon. They sold more in that year. (A) Yes". Now the total consumption is down 472,840. What is the reason for that decline? A. I think that is because of the price rise, or it is a combination of price rise and the economic climate.

C Q In 1932-33 it is up. What is the cause of that? A. I think there are two causes. Firstly, the f.o.b price went down, and secondly, the bounties and subsidies started to make an impact.

D THE VICE-CHANCELLOR: And how much was due to the change in prices and how much was due to the introduction of the bounty is difficult to say? A. I think so, yes.

E MR VINELOTT: How much was the bounty? A. I think it was 15/- in Australia, and taking the manufacturers and the subsidy from the Government together, it was either 17/6 or £1 in New Zealand. I am not absolutely certain.

F Q Still on Day 22, page 23, you were being asked some questions about running Ocean Island as a stand-by compared with Christmas Island. Just above G: "Christmas Island is not a convenient place to run in tandem with Nauru for shipping purposes, is it? (A) In the sense you cannot run the same ship up to the two islands, no. (Q) Also in this sense, am I right, that it is not nearly so easy just to divert a ship from Nauru to Christmas as it would be from Nauru to Ocean? (A) Correct. (Q) So that Ocean Island has got that over Christmas Island as a stand-by island? (A) Yes. The counter-argument on that, the counter-balance on that, is, of course, that if bad weather is happening in both cases then you may be able to divert a ship that is travelling between Singapore or Europe and Australia to somewhere which is in a different weather band altogether".

G 3.00  
Q When you talk of running Ocean Island and Nauru and Christmas Island and Nauru, are you envisaging giving up Ocean Island altogether and running Christmas Island as a stand-by, or running all three together? A. I am thinking in terms of running all three together, using perhaps Ocean Island in those circumstances as more of a stand-by, taking the baseload, if you like, off Nauru and Christmas Island.

H Q If Ocean Island is a stand-by for Nauru, what is the role



A of Christmas Island ? A. Well, the role of Christmas Island is to take part of the baseload, of the base sales, particularly for West Australia.

Q Is it in the same sense a stand-by ? A. No, not at all.

Q Then over the page, between D and G, you were referred to Bundle 50, page 65, the TAG Report, and the question was:  
B "(Q) On page 65 we come to the post-war period. It seems a cableway was added in 1940, and then in 1947 new mining land acquired. In 1951 "further mechanisation entailed the introduction of one cubic yard capacity grabs which replaced the skip thus eliminating the need for manual 'raising' and filling of skips. The first two Ruston-Bucyrus mechanical excavator machines arrived and an 'analytical survey' (pit sampling) of new phosphate area was started. The Ruston-Vuryrus R19 machines, fitted with  $\frac{2}{3}$  cubic yard Blaw-Knox clam-shell buckets, were  
C commissioned and cablesways. I am sorry to ask you to have two things open at once, but you have room to have open as well P.1 Table 20 on page 21. Do you see that in 1951 there -- 1951 is a split year and before then the base royalty to the Gilbert and Ellice was 1/9 a ton plus £24,000 flat rate payment.  
D (A) Yes. (Q) Then 1951 is the year when it is changing, and then by 1952 it is 6/- a ton and £40,000 flat rate. (A) Yes. (Q) That increase did not prevent the BPC from putting in this extra machinery, did it ? (A) No, it did not. I do not know at what time it would come in the year. These are 30th June years, are they not".

E Pausing there, what effect would this mechanisation in 1951 have upon the cost of British Phosphate ? A. I would imagine it would have lowered the cost.

Q What would be the reason for carrying it out ? A. Well, to lower the cost, yes, because I do not think it increased the output very much.

Q Going back to 1947, do you know whether this sort of machinery was available ? A. I do not, I am afraid.

F Q One more passage from this transcript, on page 44 just below B: "What about the benefit side ? (A) I am coming to that now. Equally I think as far as the benefit is concerned, whilst one could have said to the Australians or to the BPC, 'You are landing our phosphate more cheaply than Makatea' - which is what we are saying in terms of benefit - 'We want to have 8s. out of that 10s.' and they say 'So what', I think.  
G Why should they give it to them ? One of their purposes of being in business, as I see it one of their principal purposes of being in business, is to get phosphate as cheaply as possible for Australia and New Zealand". Did you know that the Makatea contract included a 17/- profit margin ? A. Yes.

H Q Did you have that in mind when you gave that answer ? A. No I did not have it in mind when I gave that answer.

Q Does that affect your answer in any way ? A. I think it is perfectly fair for BPC, in those circumstances, to respond "We are paying the miners in Makatea 17/- a ton profit and we are only taking" whatever you say it is, 8/- out of it,



or even 10/- plus I suppose the 6d.

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

THE VICE-CHANCELLOR: Thank you for coming to give your evidence, Mr Silcock, you are now released. A. Thank you, my Lord.

(The witness withdrew)

B PROFESSOR HENRY EDWARD MAUDE, Sworn  
Examined by MR VINELOTT:

Q Professor Maude, you live in Canberra ? A. Yes.

Q And you are Professor of Anthropology? A. No, of Pacific History.

C Q At Canberra National University ? A. Well, to be correct I am Professorial Fellow of the Australian National University, and I am retired on superannuation and I am Honorary Professor of the University of Adelaide.

THE VICE-CHANCELLOR: Honorary Professor of Pacific History of the University of Adelaide ? A. Yes, my Lord.

D MR VINELOTT: I believe, Professor you have, with Mr Macdonalds' assistance, provided a table which shows your movements in the Pacific in the Colonial Service between 1929 and 1939 ? A. Yes.

THE VICE-CHANCELLOR: Are you putting that in ?

E MR VINELOTT: Yes, my Lord.

(Document put in and marked Exhibit D.17)

Q Have you got a copy in front of you ? A. Yes.

F Q I am afraid in copying the left-hand column has been cut off, but I will indicate the year as we go along. Under your name is <sup>against 1929</sup> says? (From 16th November) On Ocean Island undergoing training as an Administrative Officer in the Resident Commissioner's and Treasury, Customs and Postal Departments. Only incidental contacts with Banabans! That is 1929. A. Yes.

Q 1930 to 10th May as above. 1931 "(11th March - 1st July) As Census Officer, Gilbert and Ellice Islands took first detailed census of Banaban population". A. That is true.

G Q "(From 5th October) As Native Lands Commissioner, made lands settlement of Ocean Island, registering 2,479 lands and hearing 97 ownership and boundary disputes". Then 1932 (To 7th March) As above. "(From 11th November) Administrative Officer, Ocean Island, Main contacts were with local Island Government (not with Banaban Committee) on legal and administrative matters. Principal duties were in Secretariat as Acting Secretary to Government. 1933 (To 5th February) As above. (15th March - 14th June) Acting Secretary to Government and Administrative

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A Officer, Ocean Island (duties as above)". Then 1934 is a blank and 1935 and 1936.

Then over the page: 1937: "(In or about November) on Ocean Island in connection with arrangements for the Phoenix Island lands resettlement scheme. 1938: (9th September - 15th November) Administrative Officer.

B "After 15th November, 1938, Professor Maude was, for a time, engaged on duties in the Phoenix and Line Islands; then, from 8th February 1940, was an official of the Western Pacific High Commission in Suva. In 1945 he became Acting Resident Commissioner of the Gilbert and Ellice Islands Colony and remained as Resident Commissioner until after 1947. It will be recalled that he had contacts with the Banabans at Bairiki (Tarawa) in December, 1945, prior to their embarkation for Rabi - and that he visited Rabi with Mr Macdonald from 27th - 29th June 1946 (to investigate Banaban complaints against Major D.G Kennedy, the Banaban Adviser, and to arrange the latter's removal) and 7th - 13th May 1947 (to ascertain the wishes of the Banabans for or against making Rabi their homeland" -- and those last few words should be omitted.

C Over the page: "Professor Maude has contributed to the literature about the Banabans, his main publications in this respect being as follows: (1) (With H.C Maude)" - was that your brother? A. Yes.

D Q "Social Organisation of Banab or Ocean Island, Central Pacific; Memorandum on the Future of the Banaban Population of Ocean Island; with special relation to their lands and funds; The Stalactite Fishhooks of Ocean Island", a journal of the Polynesian Society. Is that a fair record of your service? E A. Yes, I think it is.

Q You are, I understand, something of an expert on Polynesian customs, particularly in regard to land? A. Yes, on Micronesian customs.

F Q You can start by telling me the difference between Polynesian and Micronesian? A. Well, the Pacific Islanders are divided into Melanesian, Polynesian and Micronesian and the boundary between the Polynesians and Micronesians lies between the Ellice Island and the Gilbert Islands. The Gilbertese are a Micronesian people. It is, roughly, a homogeneous racial group, the Micronesians, and so are the Polynesians but not, of course, the Melanesians. It is roughly on a racial basis that these three groups were designated as long ago as 1823, I think.

G Q The Melanesians stand on their own, do they? A. Nauru?

H Q No, the Melanesians. A. The Melanesians are different, yes, and lie to the west of the Solomon Islands and New Guinea and New Hebrides, New Caledonia, and so on; but the Micronesian islanders are the Maryannas, the Carolynes, the Marshall, the Gilberts and Nauru.

Q And Nauru? A. And Nauru.



- A Q What about the Ocean Islanders, the Banabans, in relation to the Gilbertese. Are they the same? A. They are essentially Micronesians and related to the Gilbertese people.
- Q How like the Gilbertese are they? A. At the moment I would say they are rather like the Gilbertese certainly, because they have become increasingly assimilated to the Gilbertese population. I would say the ~~approximate~~ <sup>autochthonous</sup> inhabitants of Banaba were different to the Gilbertese, but that is only a surmise.
- B Q How far back do you go to find the ~~approximate~~ <sup>autochthonous</sup> inhabitants? A. I would say they became very much increasingly Gilbertese with the conquest of Ocean Island by Nei Angi-ni-Naeo and her companions from Beru Island approximately, I would say, in 1650 - plus or minus say 50 on either side.
- C Q It seems remarkable that you can be as close in date as that. A. Well, the dates are somewhat conjectural because we deal entirely in genealogies; but if you have 10 or more genealogies and you can compare them - and we work on a basis of 25 years to a generation, and this has been generally accepted by the Polynesian and Micronesian scholars as a fairly fair average, and working back through the Banaban genealogies themselves, and still more so the genealogies of the Gilbert Islands, we come to the big wars which we are pretty sure resulted in Nei Angi-ni-naeo and the others coming across in their canoes to Ocean Island.
- D Q In 1650. A. Yes.
- Q And from 1650 the ~~approximate~~ <sup>autochthonous</sup> inhabitants have been submerged by the Gilbertese? A. Yes.
- E Q And there has been an advance of the Gilbertese culture. Would that be right? A. That would be so; they were granted a great number of privileges as the real people of Banaba and they became eventually the people who lived in the Kariaka Division of Tabwewa and they had their home sites around the centre of Banab whereas the newcomers from Beru inhabited the peripheral areas around Banaba. We recently had some archeological investigation of that.
- F Q What about language, Professor. A. The language of the Banaban people was, I would again say once upon a time, rather distinct from the language of the Gilbertese, but with the coming from Beru it rather got swamped. Even at the time when I was taking the 1931 lands commission I asked the scribe, as we call him, the secretary to the lands commission, if he would take down the names of any words which he found which were not Gilbertese words and he would write those down in a notebook. But at that time I would say that all you could say was that it was a dialect of Gilbertese by that period, mostly Gilbertese.
- G Q By 1930 did you say? A. I would say by about 1900 really, but in 1931 certainly it would be a dialect. It was basically Gilbertese but with various dialect words which you would find in different parts of England.
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Q Did that swamping by the Gilbertese take place at the same time as the invasion in 1650 ? A. I would conjecture that.

Q How close are these dialects ? Can you give any examples from England and Wales ? A. Oh, Welsh and English would be very different. I would not call Welsh a dialect of English.

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Q No. Just take England ? A. Well, perhaps say the difference in speech between, say, the people of the Isle of Wight and the West Sussex people and people in Oxfordshire.

Q That is the sort of range of difference between Banaban and Gilbertese. A. Yes. They were speaking then basically Gilbertese but there would be the odd word that you could pick up which would be not Gilbertese.

C

Q You have made a study of customary law in the Gilberts relating to land ? A. That is so.

Q One of your early tasks, as we have seen, from 1931 to 1932 was conducting a land settlement investigation. A. On Ocean Island, yes.

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Q Were you specially qualified for that ? A. Well, there was no proper technical training except what you might call in-service training for a lands commissioner, but I qualified to a certain extent by having taken an Honours Degree in Anthropology in Cambridge University and then I came out to Ocean Island and entered the Gilbert Islands where I passed in lower standard Gilbertese language and came back to Ocean Island to undertake this particular work, and during the course of the land settlement I passed in higher standard Gilbertese. But before I arrived on Ocean Island I had done some lands work in the Gilbert Islands in the Southern Gilberts.

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Q What was the task which you set about on Ocean Island in this lands investigation ? A. Well, it was really to codify the customs regarding land tenure and inheritance on Ocean Island. This, of course, cannot be done by asking a Banaban what his land customs are because they have not got, or had not in 1931 got, the analytical aptitude to be able to say in the abstract what their customs were. The Lands Commission and the members of the Lands Commission, of which there were 16 on Ocean Island, were very capable of settling specific land disputes and the task of the Lands Commissioner was to listen to the evidence adduced by each side, then the argumentation that went on between the members of the Commission, and finally the judgment which was given and you note these things down, and after having worked through, say, 50, 60, 70 land disputes, listened to how they work, compared one with another, questioned the members on seeming discrepancies and inconsistencies in the judgments, with luck you can make out a provisional lands code which will not be perfect by any means, but it will be 70% perfect. Then you go on adding more and more land cases and for each specific case you may find that you can have to modify your provisional code because you find a certain thing which just does not fit with the code and you discuss that with the members. Finally, by the

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Examined:

A end of the land settlements that I did, provided you have enough cases, you should be able to get - not an impeccable code, but say 90%.

Q You do not ask them? A. No, I have not found in practice that it is really possible to say "What are your customs", or only to a limited extent, because in those days they did not know. I am not referring to people who are Graduates of Universities today who are among the Gilbertese people, but in those days they had not the function in their society to develop a sort of power of going from the concrete case to the abstract principles which lay behind it.

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Q So you have to try and deduce it from what they actually do when they are settling a dispute? A. Yes, that is it. That is what one had to do to try and make up a lands code on Ocean Island. But we really did not have enough land disputes. There were under 100 on Ocean Island and that is not enough to make what I call an impeccable code. I do know now that we missed two customs and one was a fairly important one, that is the adoption of brothers and sisters; but it just so happened that among those 100 cases there had not been a case of that sort which was in dispute.

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Q Before you arrived had any other Banabans outside shown a profound knowledge of Banaban custom? A. Not Banaban custom, no. There had been nobody with the opportunity or the inclination or the training to acquire that. You can only do it through a lands settlement, which takes months of work.

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(Continued on next page)

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- A Q What about Mr Telfer Campbell, for instance? A. No, Mr Telfer Campbell had no knowledge of either Gilbertese, land customs or Banabans for that matter. He came in 1895 and left in 1909; he had been a police officer in Papua and his job was to bring elementary law and order to the Gilbert Islands, and that was a task which required all his attention and all his abilities. He had a knowledge of Gilbertese etiquette such as you would get by observation, but he had no knowledge of Gilbertese customs.
- B Q What about Mr Elliot? A. I would say that Mr Elliot had acquired a little bit more, but chiefly because of Mr Mahaffy, who was a very different stamp of man from Mr Campbell and came from a different class of society altogether and was very receptive towards native custom. He did get some sort of what I call elementary notions of how the customs of the people worked, and he wrote it up.
- C Q When was he there, Mr Mahaffy? A. He was there from January to June 1909 as acting. When Mr Telfer Campbell left he took over from the High Commission office where he used to work and he came up and lasted until I think Mr Quaile Dickson turned up.
- D Q What about Mr Grimble? A. Grimble had a superb knowledge of Gilbertese land customs, but he had never done land work on Ocean Island. He was very generous with his notes on Gilbertese land customs, and they were of very great use to me. But one always had to beware of the fact that Banaban custom is basically very similar to Gilbertese land customs, but there is just that difference that occurs all the time, and you have got to keep on your toes or you will begin to make a big mistake. If you take a thing like aba ni tibu, for instance - that is the adoption of a granddaughter or a grandson - it differs very considerably in the Gilberts from the Banaban custom.
- E Q So that really you were the first person to look at the Banaban custom on its own, apart from the analogous customs of the Gilberts? A. Yes, that is so. I was the first, I think.
- F Q I believe that after this investigation you drafted a native Lands Code Ordinance? A. I drafted a code, yes, a Banaban Land Code, which included the land customs which were still in effect, and also the customs which had fallen into desuetude.
- G Q That ordinance, as I understand it, provides for a change in the customs law by a two-thirds majority. Is that correct? A. It would be correct to say that the native Lands Code Ordinance No. 3 of 1940 provides that you can change any land custom by a two-thirds majority attained through a referendum of the people at the request of 50 members of the Island community expressed in writing. This, of course, is extremely important, because there is a great danger in codifying land customs: it could result in their ossification, and society, as a whole, is always developing and moving forward, it is a living thing. One of the great dangers that I saw from
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A the beginning was that the social, economic and political development of the Islanders could be going ahead all the time, whereas the land customs could, if we went and codified them, be an incubus on development rather than a help towards developing.

Q You told my Lord it was in 1940 you put in this revision?  
A. Yes, in 1940, when I became Resident Commissioner. It was one of my first jobs, acting.

B Q It was not in the original Land Code? A. No, it was not in the original code. I don't think Mr Grimble really perceived this danger of ossification through codification.

THE VICE-CHANCELLOR: When was that? In 1940?

MR VINELOTT: Yes. A. Yes.

C THE VICE-CHANCELLOR: Were you then Resident Commissioner? A. No. I think I was not. But I must have done it as a member of the High Commission staff then.

MR VINELOTT: Was that code applicable to the Gilberts, or just to the Banabans? A. No, that was the entire Gilbert & Ellice Islands Colony, including the Ellice Islands, the Gilberts and Banaba.

D Q I think we have got that among our papers. A. The native Land Code document.

Q Yes. Having done this work, and drawn up a draft code, did you discuss it with the Banabans? A. Yes. The code is first of all discussed in great detail with the members of the Commission.

E Q Who are they? A. They are elected by the people of the Island. In the case of Banaba, four people from each village - that is Tabwewa, Tabiang, Buakonikei and Una. The people from each of those villages elected four members.

Q That is 16 members of the Commission? A. 16 members of the Commission, of which 14 were men and two were old ladies.

F Q What sort of people were elected? A. They were really experts. All of them were elderly people who were experts on knowing whose land would belong to whom, the names of the lands, anything connected with lands. They were sort of virtuosos in lands affairs, and they were recognised as such by the villagers. For that purpose they were elected. I wouldn't think any of them were probably much under 60 years of age.

G Q So that most of them would have been born about 1870, or before? A. Yes; they used to talk a lot about the times before the first coming of the phosphate, of Sir Albert Ellice himself in 1900. They remembered it all very clearly.

H Q And some of them, I suppose, remembered the great drought of 1874? A. The 1874 drought, yes. They would have been children then, I suppose; but that drought really reduced the population



so considerably. The 1883 drought, yes, certainly there would have been people who remembered that very clearly.

A Q When you discussed this with the 16 members of the Commission, did the question of ownership of phosphate come up at all?

A. Yes, although it was not a subject which we had to decide at all, but obviously it was a subject which they discussed very much themselves, and I discussed it with them.

B Q Before we come on to phosphate ownership, can you give some impression of the structure of ownership of property in the Gilberts and on Ocean Island?

THE VICE-CHANCELLOR: Before you ask that, could you tell me when you were having these discussions? At what time were you having these discussions with the Land Commission? A. You mean at what time of day?

C Q No, what year? A. 1931, 1932.

Q Spread over a period of how long? A. It was from November to March the following year.

Q November 1931 to March 1932? A. Yes. Actually 5 October, I see here. I thought it was November, but we were rather doing preliminary work first. 5 October to 7 March.

D Q How often were you seeing these members of the Commission? Every day, once a week, what? A. We met every day except Sundays. We would sit from about 9 o'clock in the morning, I suppose, until 5 or so in the evening; but during the lunch hour and afterwards, when they had finished work, we would still go on talking for a long time. These were the times when I used to try to find out what was happening.

E Q So that apart from Sundays you were seeing them pretty well every day for some six months or so? A. That is so. Sometimes we would be sitting in the Council House in the village, and sometimes we would be settling boundary disputes, and we would have to go all over Ocean Island, tramping about it and marking the new boundaries for them.

F MR VINELOTT: In the course of your experience on Ocean Island and the Gilberts, have you formed any opinion as to the general structure of individual ownership in the Islands? Are most things owned individually, or only a few things, or all things?

G A. So far as lands are concerned, the universal rule is that they are owned individually; and so far as other forms of tangible or intangible property are concerned, the general rule would be that they are not held individually.

H Q Who owned these tangibles and intangibles? A. They were considered to be generally not easily divisible, and if they were of sufficient value they were owned, in the Gilbert Islands, by the Boti, the exogamous, totemic, patrilineal clans. I am sorry to use anthropological jargon. But on Banaba, for historical reasons - because Nei Angi-ni-maeo and her companions only belonged to two clans in the Gilberts the ...



PROF. H.E. MAUDE:  
Examined.

A hanlet groups have taken the place of the clan system in the Gilbert Islands. So that you get forms of property like -- the two most important things, possessions, that the Banabans had were water and the stalactites and stalagmites from which they made their fish hooks, because they could do without the fruits of the land -- in fact they did do without the fruits of the land in the 1870-74 drought, when every single tree on Banaba ceased bearing and died -- and again in 1883; but they could not do without water, and they could not do without fish. Hence the value of those two possessions. They were owned on a hamlet basis. If I am right, there were 87 hamlets on Ocean Island, and 50 bangabangas, which are the caves in which water and the stalactites are found.

Q What other forms of tangible and intangible property were there which were held in this way? A. The very important ones would be the bigger fish ponds, the reef rights (which, of course, were terribly important for the Gilberts, and for the Banabans for that matter), the size of the Gilbert and Ellice Island Colony doubled at low tide, so that you can imagine the importance of that half of the Colony which is below high springs and low water. That is where you get all the crustaceans and things and the women are gathering all day. Those would be owned on a Boti basis.

D Lagoon fishing rights, and deep sea rights, which extended right out as far as the eye could see, into the ocean. And particularly flotsam and jetsam, because of the tremendous importance of the Red Wood logs, which came drifting down from the north-west coast of British Columbia, and from which they could make their canoe timbers. That was of very great importance.

E Then there was the stranded whale and the stranded porpoise.

Then there were various what I would call patent rights to house types and kite types.

F THE VICE-CHANCELLOR: "Patent rights"? They must not copy somebody's invention? A. Not copy somebody's invention. Even down to dance and song routines which had been invented and were considered particularly important to this group: they were not to be copied. We even put that into a Colony Ordinance.

MR VINELOTT: Song and dance routines; kite types was one you mentioned? A. Yes, kites, and canoe types again, the different canoe patterns.

G Q All this very wide variety of forms of property which you listed was not owned individually but by the hamlet or clan? A. Or clans, boti. In most cases you will find they are not easily divisible, not conveniently; and sometimes they are regarded as far too valuable for one person to have the ownership of. On Banaba, you could see, if one person possessed the water rights it is just not conceivable.

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- A Q You told my Lord that, in the course of your discussions with this Commission of 16 people it was not your function to decide who owned the phosphate, but the question came up for discussion. Is that correct? A. The phosphate ownership, that came under frequent discussion among the members, and others used to join in from time to time, mostly in the lunch adjournment and in the evenings. They used to discuss this point. It was a point of considerable interest to me.
- B Q What was the opinion of this Commission on the island? A. The general opinion of the people was that the phosphate deposits definitely belonged to the people of Banaba and to nobody else whatever. I never found a dissentient voice who considered - if you will excuse me - that they did belong to the Crown. They definitely felt that these rights belonged to the people of Banaba.
- C Q What about individuals among the people as opposed to the hamlets, or the people generally? A. Generally they regarded them as the kind of property which is not easily divisible and yet is of great value. As such, in 1931 they would have considered them as appropriately belonging to the community as a whole. This was not a completely unanimous viewpoint because I think Mr Rotan Tito and the what I call very large landowners were formulating views which considered that these rights should belong to the surface landholders; but that was not the generally expressed view of the people at that time.
- D Q You mentioned Mr Rotan Tito. How many others were there who took that view? A. I did not hear any others express the view, except his family; but I imagine it would have been shared by the larger landowners.
- E Q What about the members of the Commission: was that the view taken by any members of the Commission? A. No, not by members of the Commission; I did not hear it expressed by them. They seemed to be quite content that the phosphate land should be the property of the people of Banaba. What they were anxious to fight tooth and nail was that it should not be regarded as belonging to anybody but the people of Banaba.
- F THE VICE-CHANCELLOR: The people of Banaba as a whole, and not simply any hamlet? A. No, not simply any hamlets at all, because this was 1931, and the hamlet system had broken down by 1931. The people had been brought together, really by the Government, into four villages, and these 87 hamlets were no longer functioning units for ownership. Nor were the new villages at all.
- G Q So that it was not the old hamlets, it was not the new villages, it was the entire community of Banabans on Ocean Island? A. Yes, on the ground that they did not seem to think you could easily cut the phosphate from any particular land; and, as one old man expressed it to me, sometimes it might be 2 ft. of phosphate, and suddenly go down to depths and things. So that it did not seem you could really separate one piece of land from another as the contours of the land were rather involved.
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A Q Somebody living in Una village might own land some distance away from Una? A.Yes,indeed,because some land would come from his father and some land would come from his mother.

Q So that he might own some land on the outskirts of Buakonikei? A.Very much so,yes; all over the island.

B Q Dotted all over the place? A.Dotted all over the place. This is one of the troubles of Gilbertese and Banaban land fragmentation. They divide them, as the generations go on, into smaller and smaller pieces,until they are almost uneconomic in many cases.

C MR VINELOTT: You told my Lord that this was the view of the Commission, and I think you said it was the unanimous view? A.No. It was never an official view of the Commission, because the Commission was not required to express an official view on this. The Western Pacific High Commission considered that the phosphate belonged to the Crown, and therefore it would be quite inappropriate for the Lands Commission to decide who were the owners of it. We had to abide by superior authority on that matter. Sir Murchison Fletcher was the High Commissioner.

D Q When you say the Western Pacific High Commission, who do you mean? Everybody there, or anyone in particular? A.I mean Sir Murchison Fletcher really. He was the High Commissioner.

E Q I think I put the question in a misleading way in asking what the view of the Commission was. Do I understand rightly it was the members of the Commission individually? A.Yes, individually, and unofficially, because it would have been a gross discourtesy to the High Commissioner if we had expressed any official views on this subject.

THE VICE-CHANCELLOR: Are you saying that individually, and unofficially, all 16 members of the Commission took the same view? A. I did not hear any contrary expressions to that.

F MR VINELOTT: Was Mr Rotan Tito a member of the Lands Commission? A.No, Mr Rotan was not a member of the Lands Commission, not to my recollection. I don't think he was of an age group. I am not suggesting he was not of my age, but I was regarded as rather a child on the Commission; but I was the Land Commissioner and I would not have been elected a member of the Commission had I been a Banaban.

G Q Was Mr Rotan Tito, in your experience, recognised as an expert on land matters in Banaba at that time? A. I can't recollect ever hearing him express any opinions on lands. No doubt he did on his family lands, and he was possibly one of the participants in some land dispute; but it is a half century ago and I just honestly cannot recollect him coming forward on this matter at all.

H THE VICE-CHANCELLOR: The point really is whether he was generally recognised as being an expert on land matters back in 1930-31? A.No, my Lord.



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A MR VINELOTT: You have described very graphically the fragmentation of land holdings on Ocean Island between the Banabans, getting a little bit from one ancestor and a little bit from someone else. Apart from the presence of phosphate, if land had <sup>no phosphate</sup> and was just used for the traditional purposes of housing and food growing and the like, was there any great economic advantage in being a large landowner?

B A. No, not in the subsistence economy. It is what I call, both the Gilbertese and Banaban subsistence economy was very egalitarian. A person might own 300 lands, or he might own the Banaban average, which was 10 lands, if I remember rightly, back in 1931 - I am pretty sure of my figures there. But he could not utilise 300 lands, he could not utilise more than say 12 lands, because even with the help of his family you really could not gather the produce from more than 12 lands, and the rest of it was just uneconomic. It sprouted coconuts which grew up, and undergrowth all over it, and it just was useless. I think that is one of the great reasons for this custom of adoption, the aban tibu or the aban nati, because people who did own a tremendous lot of lands would adopt grandchildren and adopt children, so that they could then partition lands.

C  
D But the person who owned 300 lands and the person who owned 10 lands were not different. One was not really richer than the other, because beyond a certain number of lands - and I put it somewhere around 12, it depends on the size of the land and the number of trees on it - the rest was superfluous to requirements, and only a liability, if anything, particularly in the Gilberts where you had an annual land tax, which was assessable on the number of your land and payable in kind.

E THE VICE-CHANCELLOR: Did that apply to Ocean Island?  
A. No, I think not.

MR VINELOTT: All that you have just described was, of course, changed when phosphate mining came to Ocean Island? A. Yes.

THE VICE-CHANCELLOR: It all changed?

F MR VINELOTT: What you have described, the situation where there was no economic advantage in owning very much land? A. That would be the position up to 1900, yes.

G MR VINELOTT: I want to go on to ask some questions about the impact of phosphate mining and the view, which you told us was held in 1930, that the proceeds belonged to the community; but as we are leaving Arcadia your Lordship might prefer to adjourn.

THE VICE-CHANCELLOR: Very well.

(The witness withdrew)

(Adjourned to tomorrow morning at 10.30)