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IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
GROUP B.

1971 R. No.3670

Royal Courts of Justice
Monday, 15th December, 1975

Before:
MR JUSTICE MEGARRY

ROTAN TITO
and
THE COUNCIL OF ELDERS
v.
SIR ALEXANDER WADDELL KCMG,
STANLEY CHARLES GAINEY
SIR ALBAN BROWN CBE
and
HER MAJESTY'S ATTORNEY GENERAL

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(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., 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 TUCKER, and MR C.L PURLE (instructed by Messrs Davies Brown & 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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SPEECH - DAY ONE

MR MOWBRAY: May it please your Lordship, this action concerns the same small Pacific Island, Ocean Island, as the action in which your Lordship lately reserved judgment. I appear with my learned friends MrMacDonald, Mr Tucker and Mr Purle for the plaintiffs. There are two plaintiffs: the first is Rotan Tito, he was a plaintiff in the former action and he is a native and landowner of Ocean Island now living on Rabi, another Pacific Island; the other plaintiff is the Council of Leaders, which is the elected Council of the Banaban people, former inhabitants of Ocean Island; it is a statutory corporation and we say it is the presentee of the trust funds with which your Lordship will be concerned. My learned friends Mr Vinelott, Mr Gibson and Mr Unwin appear for the defendant, Her Majesty's Attorney General.

Incisentally, my Lord, today is the 30th anniversary of the Banabans' arrival on Rabi; it is their national day, so there could hardly be a more appropriate day for your Lordship to begin the hearing of this action which could have so large an effect on their future.

Ocean Island, as your Lordship knows, originally consisted, to a very large extent, of high class phosphate upon a coral base. It became one of the world's richest sources of phosphate. The phosphate is of unusually high quality and it has been mined over the years since 1920 by the British Phosphate Commission. I believe your Lordship is acustomed to hearing them referred to as BPC.

MR JUSTICE MEGARRY: I think it is the Phosphate Commissioners, is it not ? So "BPC" I take to mean British Phosphate Commissioners.

MR MOWBRAY: Yes, my Lord. The undertaking of the BPC belongs in equity to the Crown: the United Kingdom control 42%, Australia 42% and Newzealand 16%.

In this action the plaintiffs make three claims against the Crown. The first arises in this way: from 1931 to 1947 the BPC mined the phosphate under a lease granted compulsorily by the Crown under compulsory purchase powers; that is the lease of 1931. The royalty payable under those powers was fixed by the Crown. It should have been fixed at a figure representing the commercial return for the phosphate. It was fixed at a gross under-value to the damage of the Banabans and to the benefit of the Crown as owner of B.P.C and to the benefit of the Australian and Newzealand farmers to whom the phosphate was sold cheap after manufacture into super-phosphates. The first claim is for loss of royalties which resulted from the royalty in the 1931 lease being fixed too low.

I expect your Lordship would like to have a glimpse at this stage of the legal grounds on which we put that claim. I will give a full outline in a day or two and argue the law next term, but here is a glimpse: we put the Crown's liability on two grounds, alternative grounds. They both depend on the Crown being in a fiduciary position in 1931 - fiduciary position towards the Banabans. The Crown was in a fiduciary position because it was, as we say, a trustee of certain royalties payable under existing arrangements stemming from 1913 and because the compulsory leasing ordnance of 1928 itself imposed an express trust on the Crown - and for other reasons which I will advance.

MR JUSTICE MEGARRY: Are those two alternative grounds ?

MR MOWBRAY: No, my Lord, those are the reasons for thinking the Crown is in a fiduciary position. The first alternative ground is coming now.

First we say that as the Crown is in a fiduciary position and was using the compulsory powers in its own favour through BPC, it came under a fiduciary duty, an equitable obligation as well as a statutory duty, to fix the royalty right. It broke that duty, and that gives rise to a claim for compensation in equity.

The second way we put the alternative ground is this: we say that as the lease was made by the Crown afiduciary to itself through BPC, the lease was liable to be set aside unless the Crown could show that full value was obtained. Of course, the lease cannot be set aside now, the phosphate the subject-matter of the transaction has been spread over the broad acres of Australia and Newzealand, but, on the authorities, beneficiaries in those circumstances can instead obtain compensation in equity for the under-value, and that is the second claim and we say it is the same answer whicher ground you put it on.

We are seeking accounts and enquiries, but your Lordship may like some idea of the quantum of the claim. We say that the royalty in 1931 should have given the Banabans something between the whole and a half of the benefit which was in fact conferred on Australia and Newzealand by cheap sales of phosphate. That benefit between 1931 and 1947 we put at approximately A$ 2,400,000, which is very roughly, at today's exchange, the equivalent of £1,500,000. So something between the whole and half of that sum is claimed on the first claim.

MR JUSTICE MEGARRY: "Something" between the whole and a half, and we have, somehow, to quantify that "something" ?

MR MOWBRAY: It is a figure which would have been reached by bargaining between the Banabans if they had been bargaining on a commercial basis with BPC, and it is a sum to be assessed and your Lordship will hear our evidence about it. We shall be arguing for the full amount in the light of subsequent events.

MR JUSTICE MEGARRY: You are saying "We should have it all, but at any rate we should have not less than half.

MR MOWBRAY: Yes.

MR JUSTICE MEGARRY: So it is all or, in the alternative, something less, and not less than half.

MR MOWBRAY: Yes, my Lord. I am only trying to give your Lordship an idea of the figure involved.

MR JUSTICE MEGARRY: And I am trying to understand the idea.

MR MOWBRAY: Then the second claim arises in this way; In 1947 BPC required further land. The Crown was still in its fiduciary position, more so than ever if anything because it

was now the trustee of the royalties under the 1931 lease as well as the 1913 arrangements, and what happened was this: the Crown left the Banaban landowners to negotiate direct with the management of BPC for the grant of further mining rights. The Banaban landowners agreed a royalty that was much below the commercial royalty and was fixed without any provision for reviews over a long period of years.

Now we say that as this was a transaction by the Crown, which was in a fiduciary position, acting through the B.P.C on the one side and the Crown's beneficiaries on the other, the 1947 agreement was liable to be set aside in equity unless the Crown could show that it, through the BPC, gave full value and made full disdosure. I should have said unless it gave full disclosure and gave full value or, at any rate, ensured that the Banabans had proper independent advice. The Banabans had no advice. There was an under-value and there were two matters at least of disclosure which the Corwn failed to make. One was the large benefit which was being conferred on the Australian and Newzealand farmers, and the other was an increased royalty which the Crown had just obtained on every ton of phosphate shipped from Ocean Island. The Crown royalty had just been agreed for a short time and we say that if the Banabans had known those facts they -------

MR JUSTICE MEGARRY: Is that the royalty that in fact goes to the Government ?

MR MOWBRAY: Yes, my Lord. We say that if the Banabans had known those facts they would not have agreed the royalty they did and they would not have agreed it for the term they did; they would have insisted on a commercial royalty and frequent reviews. And the second claim is for the loss of a better royalty which would have resulted. We put that on a claim similar to the second ground of 1931: we say the 1947 agreement could have been set aside, instead we can have compensation.

Again we are seeking accounts and enquiries, but we put the difference between the royalty we got and the royalty we should have had at ten times the other one, A$24,000,000. At least, we say that the benefit, in effect, conferred on Australia and Newzealand was some $A 24,000,000, which is about £15,000,000 at today's exchange, and again we say we should have taken the whole of that or, failing that, not less than half.

The third claim arises in this way: various other royalties were paid by the BPC to the Crown by agreement between the BPC and the Crown. We say that these Crown royalties were caught by the trust declared by certain ordnances of the Gilbert & Ellice Island Colony. TheCrown denies that. They say it is part of the ordinary revenue of the Gilbert & Ellice Island Colony. We claim the Crown royalties as trust money held for the Banabans.

Again we seek accounts and enquiries, but the total claim is about $A 8,000,000 or about £5,000,000.

MR JUSTICE MEGARRY: That is £21.5m, working backwards: 5m, 15m and 1.5m.

MR MOWBRAY: Yes, my Lord.

The course I propose to adopt, subject to your Lordship's approval, is this: we will give your Lordship a brief outline of the facts on which we rely; that will take a day or two. We will show your Lordship the formal documents, but only half a dozen or so of the evidential documents at that stage. We will try to avoid reading the evidential documents more than once. Then after the brief outline of the facts we will give your Lordship a brief outline of the conclusions we seek to draw from the facts in the light of the ordnances and of the authorities, but we will not read your Lordship any authorities at that stage; that I think will take an hour or two. Then we will take your Lordship to the pleadings, and at that stage we have an application for the discovery of some documents which have recently been revealed by the Crown - and it isno fault of theirs they come late - and we seek to re-open an application for discovery which we made previously if your Lordship allows us to do so. Then having disposed of those matters we will embark on the documents and we will go through them in some detail commenting as we go. In any ordinary case one would read the documents in a flat tone of voice and not comment on them, but your Lordship will see that that will not be a convenient course in this case. Our outline contentions are designed to enable your Lordship to see what we are trying to find from the documents. Then after we have gone through the documents we will argue the law and call our evidence.

MR JUSTICE MEGARRY: So first you will outline the facts; secondly, you will outline your conclusions from the facts and at that stage you will not be going into detail; thirdly, you will deal with the pleadings; fourthly, with the question of discovery; then fifthly you will take the documents in detail and comment on them; sixthly the law in detail, and seventh your evidence.

MR MOWBRAY: That is right, my Lord. If that is acceptable to your Lordship, that is the course we propose to adopt.

MR JUSTICE MEGARRY: There are one or two tidying up operations on the pleadings. Would it be convenient to leave that until we come to the pleadings ?

MR MOWBRAY: Yes, my Lord, it would. We have two or three amendments which we seek to make to the pleadings, and I gather your Lordship has some ?

MR JUSTICE MEGARRY: Mainly I wanted, if possible, to get rid of all the little a's. Take page 6 of the pleadings. A certain amount of tidying up must be done so that we all have the same sort of copies to work on. If you look towards the bottom of page 6 you see paragraph 7 and then a, b, c, d, and so on. The more orthodox way of doing that would be to put it without any full-stops. It is only a tidying up operation. Oneother matter thatperhaps I might just mention: there have, I think, been six sets of further and better particulars delivered by you and I have marked mine with "A", then "B" and then "C" the whole way through and if we all mark them the same way one can refer to the right further and better particulars.

11.00

MR MOWBRAY: We will have a look at those points before we come to the pleadings. I am very much obliged to your Lordship.

The history of this matter is long, but we can take the first part shortly.

MR JUSTICE MEGARRY: Before you start with that, of course this is a separate case from the last case; equally there is a good deal of background knowledge which I acquired in the last case which will be relevant to this case. I take it there is no objection on either side , even though the cases are technically distinct, to my using that background knowledge of the last case in this present case ?

MR MOWBRAY: There is no objection on this side so long as, from my own personal point of view, your Lordship lets me know what knowledge your Lordship is using if it is more than just background, because I was not in the first case.

MR JUSTICE MEGARRY: I am not thinking of the detailed evidence, simply general background knowledge. I have been to Ocean Island and Rabi, and that sort of thing, and one has one's general knowledge of the history. This is not to discourage you from opening the matter fully but merely to help.

MR MOWBRAY: I feel sure it will, my Lord.

MR JUSTICE MEGARRY: There are bound to be matters here and there which get mentioned of which I have knowledge fromthe previous case, and I gather there is no objection to my using them ?

MR MOWBRAY: Not on this side, my Lord.

MR VINELOTT: Not at all, my Lord.

MR MOWBRAY: I am glad your Lordship raised that point. I am not ignoring the fact that your Lordship does know a lot about it, but your Lordship must have, it seemed to us, a proper note of what we rely on in this case.

MR JUSTICE MEGARRY: I also bear very much in mind that although the other Counsel engaged in the case have survived the previous case, you were not there and it is important that you should present your case as a coherent case.

MR MOWBRAY: I am very much obliged. As I said, and it is reinforced by what your Lordship has just mentioned, we can take the earlier part of the history fairly shortly. We start just before the turn of the century in 1900 when phosphate was discovered on Ocean Island by Mr Albert Ellice, an employee of the Pacific Islands' Company Limited.

MR JUSTICE MEGARRY: I see there is a Shorthand Writer here and he seems to be taking notes. What is the position about the shorthand note ?

MR VINELOTT: We have arranged for a shorthand note to be taken of the first part certainly because one is anxious to know how the case is put by my friend.

MR JUSTICE MEGARRY: This means you are having it for yourown purposes. I take it when we come to the evidence there will

be a shorthand transcript for my use ?

MR VINELOTT: Yes, my Lord.

MR JUSTICE MEGARRY: I do not think I need put the parties to the expense of providing me with a transcript of speeches.

MR MOWBRAY: We had got as far as the discovery of phosphate. On the 5th May, 1900, Ocean Island became a British Settlement within the British Settlements Act, 1887. On the 28th November, 1900, by a proclamation of the High Commissioner for the Western Pacific, the provisions of the Pacific Order in Council 1893 were extended to all living on Ocean Island and Ocean Island was included in the jurisdiction of the Western Commissioner and Deputy Governor of the Gilbert & Ellice Islands Protectorate.

If I might just comment for a moment on that: one does get a slightly curious position of a British Colony by settlement coming under the jurisdiction of the Western Commissioner of a protectorate, but that apparently is the way it was. My friend says it is not unique.

The company sought to obtain phosphate mining rights from the Banabans. That was necessary bedause the land on Ocean Island was owned by individual Banabans, usually in fairly small plots. Every adult, or almost every adult Banaban, owned a piece of land and they had strictly limited rights of alienation outside their own families.

The first agreement with the Banabans was dated 3rd May, 1900, and was expressed to be made between the company and the King and Natives of Ocean Island, though in fact it was only signed by four Banabans. At most it gave the company a general and exclusive licence or franchise to raise and remove phosphate from land on which no coconut or other fruit trees were growing. It did not extinguish or affect the rights of individual landowners and agreements were then made with individual landowners so as to enable the phosphate lying under their land to be removed.

Between 1900 and 1903 there were a number of freehold and leasehold purchases from landowners. Also landowners took loose phosphate from their land and sold it to the company. The company also obtained exclusive licences from the Crown to remove phosphate from Ocean Island. The first is dated the 2nd October, 1900. It was soon replaced by another on the 13th August, 1901, and in turn that was replaced by a licence of the 31st December, 1902, and that is the extant licence, 31st December, 1902.

The 1902 licence was granted to the Pacific Phosphate Company Limited, a subsidiary of the Pacific Islands Company, which had been formed in August, 1902. The 1902 licence gave the Pacific Phosphate Company a 98-year concession and reserved, with effect from 1907, a royalty to the Crown of 6d (that is 6 old pence) a ton on phosphate exported from Ocean Island. That royalty continued to be paid until 1952, as your Lordship will hear.

In 1904 the company's method of acquiring phosphate rights from landowners changed. The system of freehold and

leasehold purchases ran into difficulties with legislation of the Protectorate restricting sales and leases of land tonon-natives, and a a result of those difficulties and on the suggestion of the then Acting Resident Commissioner, a new system was devised with which your Lordship has become very familiar, the phosphate free purchase system. Under it the company purchased from Banaban landowners the phosphate lying on their land with a right to remove the phosphate within a prescribed period. More than 300 deeds recording P and T purchases of phosphate were registered by the Western Pacific High Commissioner.

After 1909, though, the new Resident Commissioner, Capt. Quaile Dickson, did not allow the phosphate free purchases to continue. He thought that the phosphate free purchases were caught by the legislative restriction on sales and leases by natives. If your Lordship would refer to the relevant provision, it is in the bundle of copies of documents referred to in the pleadings in this action. I believe your Lordship is accustomed to calling that the PD Bundle. This is the PD bundle in this action and would your Lordship turn to page 6.

I refer your Lordship briefly to this. It is Regulation 3 of the 1908 ordnance of the Western Pacific, and your Lordship sees under "interpretation" the term "Protectorate" shall mean and include all islands" and so on "and Ocean Island". Then if your Lordship would turn to page 11 of the bundle, section 24 of the Regulations: "If any non-native person enter into a lease of land owned by a native" etc: (reading to the words): "to a greater extent than 5 acres".

An insertion was made after the word "nor" in the last but one line by a subsequent ordnance, and the words inserted were "without the approval of the High Commissioner".

MR JUSTICE MEGARRY: That change was made when ?

MR MOWBRAY: It was madein 1911 and it is on page 23 of this bundle. It was made by the Gilbert and Ellice Lease Extent Regulation 1911, and your Lordship sees section 2 of that says that the 1908 ordnance is hereby amended "by the insertion after the word 'nor' of the words 'without the approval of the High Commissioner'". So that was the regulation extant in 1909 which Capt. Dickson thought was being contravened by the phosphate free arrangements. The regulation is in 1908 but it was 1909 that Capt. Dickson refused to register further documents.

Lengthy negotiations followed between the Crown and the company for a new form of arrangement. The Resident Commissioner proposed in that connection that a royalty trust fund should be set up for the Banabans. On the 10th December, 1909, he wrote to the High Commissioner proposing that the company should pay an annual sum to be held in trust for the general benefit of the natives, and then on the11th August, 1911, when the proposal had progressed further and changed somewhat, he wrote to the High Commissioner that if his trust fund was not approved, the natives should be paid an adequate sum per acre. So he re-raised the question of the trust fund. The High Commissioner rather disagreed with that, that there should be a trust fund, but on the 26th October, 1911, the Secretary of State for the Colonies agreed with the idea and

the Colonial Office wrote to the company that there must either be a larger lump sum for the land acquired that was then being proposed, or an annual contribution to a trust fund for the benefit of the natives. Under the arrangement finally made a yearly sum was paid, and we say it was therefore a trust fund because there had been a preceding declaration of trust on it.

After that exchange there were letters passing between the Colonial Office and the company in 1913 which may themselves have constituted an agreement but I need not draw your Lordship's attention to that at this stage, but there were also in November 1913 meetings of the Western Commissioner and Mr Ellice of the company with the Banabans. On the 19th November, 1913, the Resident Commissioner told the Banabans that the company would pay them - that was the Banabans - a royalty of 6d a ton for 145 acres of new mining land. He said it would be invested by the Government and the interest from it would make the Banabans the richest natives in the Pacific. At the same meeting Mr Ellice said, in the Resident Commissioner's presence, that the Government would see that the company did not buy any land outside the mining area.

The mining area referred to was an area which was going to be marked off, or as they said "coned off", as the subject of the existing and the new 1913 mining arrangements.

As a result of those meetings, on the 28th November, 1913, the first signatures were put on an agreement between the Banaban landowners and the company in the presence of the Resident Commissioner. I call that the 1913 agreement, and Mr Ellice for the company handed the Resident Commissioner a cheque for the first royalties. Many other signatures were added in November and December, 1913; they were all Banaban landowners' signatures.

The 1913 agreement is at page 32 of the pleadings bundle: "An agreement entered into on the under-mentioned days of November and December, 1913, by us the under-signed landowners" etc; (reading to the words): "embodied in the deeds hereafter to be signed". Your Lordship is familiar with this document. There is then provision about the size of each plot and the time for payment. 6 is a penalty clause or forfeiture clause. Then 7 : "On the above conditions the company hereby undertakes " etc; (reading to the words) to hold the first year's contributions to the Banabans' fund".

One of the question is what is meant by "the Banabans' fund" in that document. It goes on: "... namely from the 1st July, 1912, to the 13 June, 1913" etc; (reading to the words): "equitable". Then it says the sum of £5,000 is approximate only and subject to increase or decrease according to tonnage. "As soon as the 16 acres of land referred to in paragraph 5 hereof have been leased to the company" etc; (reading to the words): "should be paid to the Government by the company for the Banaban fund as from 1st July, 1912, which includes the first year payment of " £4,000-odd, and I do not think I need read any more of that. Your Lordship sees it was signed by Mr Ellice and 258 natives and then "All the above signatures were afixed in my presence", the Resident Commissioner.

We say that when in 12(b) the document says 6d a ton shall be paid "to the Government by the company for the Banaban fund", that was in pursuance of the preceding declaration of trust and it is parallel to clause 10, the reference to payment "by the company to the Banabans through the Government" in the middle ------

MR JUSTICE MEGARRY: This set up two separate arrangements: first the Banaban fund, and, secondly, the annuity scheme. The Banaban fund was for the benefit of the Banabans generally, and the annuity scheme was for the benefit of the landowners. Is that not right ?

MR MOWBRAY: I am not sure that is quite the way we read it, my Lord, but we will come back to that in more detail later. We say that the Banaban fund into which the royalties were to be paid was a trust fund of which the Crown was trustee. That is controversial. The Crown say there is no trust. That controversy is not at the centre of this action, though we do rely to some extent on the trust of the 1913 royalties in helping to establish the fiduciary position of the Crown in 1931.

MR JUSTICE MEGARRY: Both as to the Banaban fund and the annuity scheme ?

MR MOWBRAY: Yes, my Lord.

The next date to give your Lordship is the 10th November, 1915. That was the date of the Gilbert & Ellice Islands Order in Council 1915. It is at page 34 of the PD bundle. It was extant in 1931 and in 1947. I had better read some parts of it to your Lordship. It is the document under which the Gilbert & Ellice Island Protectorate became a Colony. It recites: "Whereas the islands in the Pacific Ocean specified" etc; (reading to the words): "set out in the manner hereinafter appearing".

Pausing there, I read those recitals to show that the Gilbert & Ellice Island was a colony by cession - not by settlement or anything else but by cession from its native Government. On that depends, to a certain extent, the law which was imported into the colony - the source of the law which your Lordship has to apply.

Reading on: "Now therefore His Majesty" (etc; reading to the words): "islands specified in the schedule to this order" - Ocean Island is not among them. Then there are some definitions which I do notthink would be so helpful to your Lordship. Then 4: "From and after the coming into operation of this Order" etc; (reading to the words): "from His Majesty or through his Secretary of State".

Then 6 provides for the Pacific Order in Council to continue to apply with one or two irrelevant exceptions. 7 is about the appointment of Commissioners and Officers and their powers. 8: "In exercise of the powers and authorities hereby conferred upon him" etc; (reading to the words): "provided as follows". The firstpreserves treaty rights. The second continues the existing laws and regulations, and so on. The third I had better read: "The High Commissioner in making ordnances shall" etc (reading to the words):

"the welfare of the said natives". Then 9 is the provision about the form of ordnances and 10 is a power for His Majesty to disallow ordnances, signifying his disallowance through the Secretary of State. I do not think I need read any more of that, unless my friend wishes.

So that is the 10th November, 1915. On the 27th January, 1916, there was an Order in Council extending the colonies set up by that Order in Council to include Ocean Island.

Then the last formal document of the early history to which I need refer your Lordship is dated the 31st December, 1920, and it is the document under which the undertakings of the company came to the BPC. It is on page 40 of the PD bundle. I believe your Lordship is familiar with this document and as I see your Lordship smile that must be right. I do not want to read more of it than I need with this small print. Your Lordship sees that the Ocean Island undertaking was transferred to the BPC; a total purchase price of £3,500,000 was paid by the three Governments to the company, and that was paid in the percentages which I have mentioned to your Lordship, 42%, 42% and 16%, and there is a trust declared on page 42 of the bundle: "To hold all the said " etc; (reading to the words): "subject also to the agreements", and so forth.

The Phosphate Deposits Agreement is at page 43. The agreement is applied to both Islands, as your Lordship see, and it is article 9 on page 44: "The deposits shall be worked and sold" etc; (reading to the words): "for export", and then there is provision for adjustment.

If I might turn back to Article 8, the amount of the compensation that was to be paid, "should be contributed by the Government of the United Kingdom, Commonwealth of Australia and Newzealand in the proportions agreed upon" etc; (reading to the words): "under Article 14". And apparently the three Governments did contribute to the whole purchase money of the Ocean Island undertaking in those proportions, and if one can distinguish between the Crown in one capacity and the Crown in another, then the Crown in the different capacities held the beneficial interest in the undertaking in those proportions.

MR JUSTICE MEGARRY: You emphasised a while ago that there was a trust. Is that a document you rely upon as setting up a trust in relation to the Banabans ?

MR MOWBRAY: No, only to show that the Crown was interested in BPC and really was BPC.

So far I have been able to keep the history of the matter largely uncontroversial and I will continue to try to mention nothing but facts that we rely on as appearing in the documents and the witnesses will speak to them, but from this point the emphasis and direction of what I shall be saying will be different. Almost as soon as BPC had been formed in 1920 it began to consider ways of obtaining further mining rights. In September, 1923, the United Kingdom Commissioner in London applied to the Colonial Office by letter for approval by the Secretary of State for the Colonies to the acquisition as soon as it might be necessary by the BPC of about 150 acres of additional mining land. That request was

passed on to the Banabans by the normal Government machinery, from the Secretary of State to the High Commissioner of the Western Pacific and on to the Resident Commissioner in Ocean Island, who spoke to the Banabans. They declined to free any more land for mining. They had been led to believe in 1913 that the land taken under the 1913 arrangement would be the last. Mr McLure, the Resident Commissioner in 1923, described the record of the speech made to the Banabans in 1913 as a definite pledge for perpetual immunity from further encroachment. It was not allowed to stand in the way of the Crown which assumed compulsory purchasing powers to obtain the new land.

Moreover the request for more land raised the question that the islands could not be fully mined without removing the Banabans. Back in 1911 the then Secretary of State had set his face against any removal without full consent, but the question of persuading them to leave now presented itself again to the servants of the Crown. No doubt the Banabans had some idea of this because the land being sought by BPC included the whole of the best food producing area. There were only roughly 500 Banabans at the time but Ocean Island was their home, and they were not willing to leave. Nonetheless, the idea was attractive to the administrators immediately involved. The welfare of the natives clashed with an important consideration of the supply of cheap phosphate to the Empire.

To see what the Resident Commissioner thought we must turn to Bundle 19. We have got the same bundles as last time and it is at page 121. It is part of a despatch by the Western Commissioner which starts at page 115. It is to the High Commissioner dated the 26th November, 1923, and at 12 on page 7 he says "Whatever avenue is explored with the object of arriving at some arrangement" etc; (reading to the words): "only really sound solution to the problem".

I should interject there that that view was not based only on Imperial expendiency. The Resident Commissioner believed that the Banabans present situation, living on an island with a money income from their phosphate and buying European food, was bad for their health. May I read on: "Apart altogether from the question of expediency" (etc; read to the words): "not necessarily beneficial to a native race".

Similar thoughts were in the mind of the High Commissioner. He recognised that the compensation for further phosphate would be substantial and the number of Banabans small, and there is a despatch from him to someone in the Colonial Office at page 140 of that same bundle. Thisis the second page of that despatch - at least, it is not a despatch, it is a personal letter. It is dated 15th December: "While recognising that the Banabans must receive adequate consideration" etc (reading to the words): "condemn him to an existence of ease and idleness".

So there was the imperial interest and there was the desire not to go give the Banabans more money than was thought good for them. Thoughts of those kinds were at first resisted by the Colonial Office itself -----

MR JUSTICE MEGARRY: One has got to remember that at that time, in 1923, it was commonly regarded in this country as very damaging thing for somebody to have too large an income.

MR MOWBREY: Yes, my Lord; and when the High Commissioner said "relatively speaking millionaires" he was scaling everything down to a Pacific standard of living.

MR JUSTICE MEGARRY: The phrase "condemned to an existence of ease and idleness" would not, as it were, be peculiar to that part of the human race but it was a very common idea at the time.

(Coninued on next page)

MR. MOWBRAY: Yes, I would not disagree with that at all. In fact, there are those who hold that view today. Would your Lordship look at page 132, which is a telegram from the Secretary of State dated December 13th, 1923. (reads telegram) That was the Colonial Office position in 1923. In the end the Imperial interest and a desire not to give the Banabans more than was thought good for them did influence the reaction of the Imperial Crown to the events which were unfolding.

At first the BPC and Crown concluded that it was no good pressing the Banabans for further mining until further consideration had been given to the question whether islands suitable for their future occupation could be found. The island of Kuria and the island of Aranuka in the Gilbert and Ellice Islands were considered and so was the possibility of an island in the Fiji group and an option was actually obtained on Wakaya in that group. That was all done in the closest collaboration with the United Kingdom Phosphate Commissioner in London conducted by the Colonial Office direct with him.

Ultimately, though, the Crown proceeded without obtaining any further island. The Banabans were unwilling to contemplate sales of land which might lead to their having to leave Ocean Island. The High Commissioner, even advised the Secretary of State that if the Banabans were to negotiate for the purchase of a new island for them it would prejudice the negotiations for the acquisition of further mining land. So the obtaining of the further 150 acres went forward and the obtaining of another island was left in abeyance.

The Secretary of State had anticipated continuing reluctance on the part of the Banabans to part with any more land. In 1926 he had authorised the High Commissioner to enact an ordinance empowering the Resident Commissioner to acquire mining land compulsorily and in 1928 the High Commissioner did so. The date of the ordinance is the 18th September, 1928 and it is at page 62 of the PD Bundle. Your Lordship will be much concerned with the interpretation of the ordinance as amended. It is called the Mining Ordinance 1928. It defines minerals to mean all metals, minerals or mineral substances other than precious metals, coal and mineral or crude oil. I need not read the rest of the definition.

Section 3 says: (reads from Ordinance to the words) "direct and appoint."

It was brought into effect by a proclamation. The proclamation was dated 18th December, 1928 and is brought that into effect on the 20th December, 1928. We shall be arguing that in fixing the royalty the Resident Commissioner was under a duty to fix a market royalty or commercial return for the prospects in the ground on the true construction of that ordinance and under a superadded equitable obligation imposed on the Crown by reason of the fact that it was granting the lease to itself through the BPC.

The first step under the mining ordinance was for the Secretary of State to certify that he deemed it expedient in the public interest.

MR. JUSTICE MEGARRY: There are four conditions under Section 4, are there not?

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: You must not possess rights over the surface, you must have been unable to come to an agreement with the owners, the third is the one you have just mentioned, that the Secretary of State deems it expedient

that the land shall be made available, and the fourth is that the Resident Commissioner shall be satisfied that the terms of the offer are reasonable.

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: If those four conditions are satisfied, then it is lawful for the Resident Commissioner to act.

MR. MOWBRAY: Yes. The first one is satisfied by the Secretary of State's certificate that he deemed it expedient in the public interest. He certified that on the 6th May, 1929. The first condition that the BPC had not got the rights they needed to mine was satisfied all along.

MR. JUSTICE MEGARRY: And the second one too, that they had been unable to come to an agreement with the owner.

MR. MOWBRAY: Yes, that was so, but they went through a formal exercise of failing to agree and before they did that they sought from the Crown a formal assurance that the terms proposed were considered reasonable. They did not want to fail to agree on terms which subsequently it turned out the Crown did not think were reasonable. So the next step they took was to seek from the Crown a formal assurance that the terms proposed were reasonable. There was not too much difficulty about that. The Crown servants, from the Secretary of State at the top in Downing Street to the Resident Commissioner at the bottom and the High Commissioner in between were already committed to the terms which were formally offered or about to be formally offered. But I will come back to that.

Let me give your Lordship first a few figures about the royalties in an attempt to put the thing in perspective. In July, 1927, the Resident Commissioner expressed the view that a royalty to the Banabans of 2s.6d. would not cause any practical inconvenience to the average farmer in Australia or New Zealand buying phosphates. Mr. Gaze, the BPC representative at the time, had admitted to the Resident Commissioner that BPC were in complete control of the Australasian market and he was unable to claim that even a very considerable increase in royalties could embarrass the Commissioners in that market.

The next figure is one of 2s. a ton for the Banabans. The Resident Commissioner put it to the BPC representative in 1927 that neither the profits of the consumer of phosphates nor the financial or commercial prospects of the BPC would suffer any serious inconvenience if the royalty were raised to 2s. a ton for the Banabans and he recorded afterwards that Mr. Gaze was "obliged to abstain from negativing my suggestion," in other words, Mr. Gaze was unable to say that was untrue.

The Resident Commissioner in the same letter in which he reported those things suggested a royalty of 1s.9d. for the Banabans as being the royalty which would be fair to both parties. The High Commissioner calculated in 1930 that a benefit of 7s. or 8s. was being conferred on the Australian and New Zealand farmers. Our evidence will be that comparing Ocean Island prices with the free market prices, for instance at Makatea, a French possession where there was a free market, the Australian and New Zealand farmers were in fact obtaining a subsidy of aproximately 8s. a ton, that is 8s. a ton of phosphate exported to New Zealand or Australia. Our evidence will be that if the new lease had been negotiated on a commercial basis with the BPC the Banabans could have obtained either the whole or, second best, not less than half of that benefit.

The BPC was a non-profit making organisation and subsequent events have shown that it did not claim to share any profits which were taken away from

Australia or New Zealand at Ocean Island or at Nauru, and that is why we say that if the Banabans had been negotiating freely on a commercial basis they would have got the whole of that benefit.

MR. JUSTICE MEGARRY: I do not understand that. You say the Commissioners did not claim to share.

MR. MOWBRAY: Your Lordship saw from the 1920 document that the Commissioners were to export phosphate at cost. There is no profit element. Much later than the period we are now talking about the profit element which under that agreement went to Australia and New Zealand was taken away from them and given in effect to the Gilbert and Ellice Islands colony and part of it to the Banabans. In those negotiations the BPC never said "It is said that up to now we were a non-profit making organisation because the profit was going to Australia and New Zealand. If it is going somewhere else we want our slice." They never said that and that is one of the reasons why we say that if the Banabans had been negotiating freely in 1931 with proper advice and so forth ---

MR. JUSTICE MEGARRY: It was simply your use of the word "share". The BPC never claimed any part of that profit element for the BPC.

MR. MOWBRAY: That is right. So if the Banabans had obtained the whole profit they would have got 8s. a ton and if they had got half of it they would have got 4s. a ton. Those are the figures which in the alternative we shall be contending for.

Now, going back to 1930, despite the conviction of the High Commissioner and Resident Commissioner, the royalty was fixed - well, it was previously agreed by the Crown with the BPC - not at 8s. or 4s., not even at 2s.6d. which the Resident Commissioner thought would cause no practical inconvenience, nor at 1s.6d., which Mr. Gaze was unable to deny would cause no detriment to them. I am sorry, I should have said 2s. which Mr. Gaze was unable to deny would cause no detriment. Nor was it agreed at 1s.9d.--- I think I have got that figure wrong. I think it was 1s.6d. for the Banabans that the Resident Commissioner thought and it was 1s.6d. which Mr. Gaze could not deny would not hit the pocket of the consumer of phosphates. These figures are rather confusing because some other royalties are included in them.

MR. JUSTICE MEGARRY: Not 2s.?

MR. MOWBRAY: Not 2s., but 1s.6d. The Resident Commissioner suggested a royalty of 1s.3d. to the Banabans.

MR. JUSTICE MEGARRY: As being fair to both parties?

MR. MOWBRAY: Yes. He did not even fix 1s.3d. which he thought was fair to both parties. The royalty was fixed by the Resident Commissioner at 10½d.

(12.10) The High Commissioner admitted that 10½d. was fixed on a quite arbitrary basis and fell far short of the price which could be got in the open market. He disregarded the rights of the Banabans as owners of the phosphate. I do not say that he admitted that in so many words, but that admission can be extracted from what he wrote. It represented the amount of money the Crown thought it was good for the Banabans to have. That emerges from a passage from a despatch. The passage is at page 67 of the PD Bundle. It is a despatch from the High Commissioner to the Secretary of State dated 29th September, 1930 and page 67 is part of it. Paragraph 10

says: "The payment proposed by way of royalty" - that was the 10½d. royalty - "appears to be assessed" etc. (reading to the words) "for this purpose." So what we say is that they were saying "It is not a commercial return but it is what is good for the Banabans to have just slightly to increase or gradually to improve their standard of living."

The Resident Commissioner considered that the royalty did not approach the limits of the Commissioners' capacity to pay without prejudice to itself or its customers. That is in Bundle 22, page 66. I would like to read a couple of pages from this despatch which is dated 30th July, 1927, from Mr. Arthur Grimble who was the Resident Commissioner throughout this period. Would your Lordship start with Item 4 on page 66. This is his account, or part of his account: "Concerning all above terms" - the terms included the 10½d. royalty - "I desire to state" etc. (reading to the words) " . . . " I read that to your Lordship for two reasons, first to show that the Resident Commissioner did not think the terms approached the limit of the Commissioners' capacity to pay and also to show that the Resident Commissioner was prepared to contemplate a 10½d. royalty but only as an offering figure which the Banabans should be free to accept or reject.

MR. JUSTICE MEGARRY: Where does the 10½d. come from in this document?

MR. MOWBRAY: The previous page at (e) there is a royalty of 2d., then at (f) is a royalty of 4d. and at (g) is a royalty of 4½d. and together that makes 10½d. I have not given your Lordship the split-up of this royalty at this stage because it might be confusing.

MR. JUSTICE MEGARRY: But are they payable to the same persons?

MR. MOWBRAY: They are payable to the same persons but the first 2d. royalty is held on different trusts.

MR. JUSTICE MEGARRY: That is the Banaban Provident Fund. The next 4d. is for the landowner and then the 4½d. is for all the Banabans.

MR. MOWBRAY: The 4d. and the 4½d. were subsequently amalgamated. This is part of a long process.

MR. JUSTICE MEGARRY: Which did it become, all the Banabans or the landowner?

MR. MOWBRAY: Under the 1928 ordinance it was for the landowners.

MR. JUSTICE MEGARRY: So therefore the 10½d. was comprised of 2d. for the Banaban Provident Fund and that is for the benefit of all Banabans generally, and 8½d. for the benefit of the landowner, is that right?

MR. MOWBRAY: I think it would be better if your Lordship did not embark upon dividing it at this stage. Your Lordship will see the lease in a moment and see just what happened.

As I said, the Crown was committed to the 10½d. royalty long before it came to be formally fixed under the mining ordinance. The terms of the formal offer were negotiated principally direct between the United Kingdom Phosphate Commissioner in Northam Street just south of the Strand and the Colonial Office which was then in Downing Street. Out into the Strand, down the Strand, turn left along Whitehall and then the first on the right. Some of the detail was negotiated by the Resident Commissioner of the Ocean Island with the BPC's representative but that was done on instructions from London and ended in no recommendations to London. These points are important or they become important on questions otherwise than in respect of Her Majesty's Government of the United Kingdom and the Crown Proceedings Act, as your Lordship appreciates.

So when the time came to fix the royalty under the ordinance the Resident Commissioner, though he had considered the 10½d. as an offering figure which the Banabans should be free to accept or refuse, fixed the royalty at 10½d., though it thereby became binding on the Banabans and they were not free to reject it. He had no choice because the terms had been settled in London, but as a matter of fact, since the time when he wrote those letters in 1927 he had shown himself personally committed to a royalty of 10½d. and indeed he had shown himself ready to approve even terms considerably less advantageous than those which had previously been settled as the minimum that could be regarded by the Government as reasonable.

That is a long story and your Lordship will see it as we go through the documents, but on his personal commitment to the 10½d. royalty I can give your Lordship a few facts. The Resident Commissioner at this time was Mr. Grimble, later Sir Arthur Grimble. In August and September, 1927 he recommended the Banabans to accept the 10½d. royalty. He told the Banabans that the 10½d. royalty was the royalty which the BPC could afford to pay without going out of business. The Banabans' answer was 20d., that is to say, 1s.8d. The Resident Commissioner said that was an impossible royalty, absolutely impossible. So his position had changed somewhat from the letter earlier that year saying that 10½d. did not approach the limit of the Commissioners' capacity to pay.

In this connection of the Resident Commissioner's personal commitment would your Lordship look at page 141 in Bundle 22. This is on a question of how his recommendations to the Banabans accorded with his own convictions or at any rate his own earlier convictions. Page 141 is part of a despatch of 30th July, 1927 to the High Commissioner. It is his account of his meeting with Mr. Gaze from which I picked out some figures earlier.

I start at paragraph 4: (reads paragraph to the words) "to the Banabans." Pausing there, that may be correct if he meant it in one way but it is not correct if he meant it in another. It appears from other documents that an increase of 1d. per ton on phosphate brings out an increase of about 0.6d. a ton on the superphosphates that are manufactured from them.

Reading on: "(5)" etc. (reading to the words) "inconvenience to the average buyer." Your Lordship sees that he says 3s. a ton is 2s. more than now paid. That shows that he is lumping together the Government royalty of 6d. and the Banaban royalty of 6d. which were the existing royalties and all these figures are lumping together Government and Banaban royalties, so that to translate that last sentence into Banaban terms it cannot justly be claimed that a royalty for Ocean Island of even as much as 2s.6d. per ton for the Banabans plus 6d. for the Government would cause any practical inconvenience. It was because of that that I got a little out of step on some of these figures a little earlier.

Reading on: "(6)" etc. (reading to the words) " might be the case." That would be again 1s.6d. to the Banabans and 6d. to the Government. "I then put it to Mr. Gaze" etc. (reading to the words) "2s. a ton" - that is 1s.6d. to the Banabans - "Mr. Gaze was obliged" etc. (reading to the words) "1s.3d. a ton" That would have been 9d. for the Banabans and that was what the Commission was offering at that stage - "Mr. Gaze's answer was" etc. (reading to the words) "wellbeing of the community". That would have been the 10½d. royalty that he is referring to there. "But as a matter of business" etc. (reading to the words) "adopt such an attitude." In other words, he is not saying it is a commer ial royalty, he is saying it is a possible offer and he is certainly not saying it is something which should be imposed upon them.

In the rest of this despatch he goes on to consider raising the payment for the surface instead. We will read the whole of that later, but I do not need to read any more of that despatch at this stage. I have read that to show the contrast between what Mr. Grimble had been thinking in 1927 at least and what he had been saying to the Banabans in 1927 later in the year when he recommended them to accept the 10½d. royalty and told them it was the royalty the BPC could afford to pay and that 1s.8d. was impossible.

That despatch which I last read was interposed in an explanation that Mr. Grimble had become personally heavily committed to the 10½d. royalty. On the 5th August, 1928 he wrote a letter to the villagers of Buakonikai which shows two things. This is the letter your Lordship knows as the Buakonikai letter. It showed his strong commitment to the 10½d. royalty and it also showed that he understood himself to be under no duty to fix a proper figure. It is in Bundle 24.

12.30

MR. JUSTICE MEGARRY: I am just looking at section 5of the mining ordinance, the concluding words, "and subject to" etc. (reading to the words) "Resident Commissioner may prescribe."

MR. MOWBRAY: That is the one, that is the fixing of the royalty by the Crown.

MR. JUSTICE MEGARRY: Arbitration does not reach to the minerals, arbitration only goes to the surface rights.

MR MOWBRAY: Yes, and on the arbitration for surface rights the existence of the mineral has to be disregarded.

MR. JUSTICE MEGARRY: Because that is going to be dealt with by the Resident Commissioner.

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: So the Banabans had their day in court before the arbitrators, whoever they were, on, in a sense, the relatively unimportant question of the surface rights but on the very important question of royalties it was merely a matter of prescription by the Resident Commissioner.

MR. MOWBRAY: That is exactly it. I was going to refer your Lordship to a letter in Bundle 24. It is the authorised version of this letter which is at page 128(a) of the Bundle. The letter shows two things. It shows that Mr. Grimble was very heavily personally committed to the 10½d. royalty and it also shows that he did not understand that he had to fix a proper return. It was written at the time when the Banabans, having looked as if they were going to agree to 10½d. royalty, had changed their minds. It says: "To the people of Buakonikai, greetings" etc. (reading to the words) "I am your loving friend and father, Arthur Grimble."

MR. JUSTICE MEGARRY: Now that, I think, is dated 5th August, 1928. The translation has not got it on.

MR. MOWBRAY: No.

MR. JUSTICE MEGARRY: But page 127, which was the previously unagreed translation has got that date on it.

MR. MOWBRAY: Yes, and I suppose an address.

MR. JUSTICE MEGARRY: That is signed, and then there is a postcript.

MR. MOWBRAY: Yes. Perhaps I need not read that postcript.

MR. JUSTICE MEGARRY: That is 5th August, 1928. What was the date when the Resident Commissioner did the prescribing?

MR. MOWBRAY: 12th January, 1931. Now, we say two things about that letter. First, after writing it, whether as Resident Commissioner or as Mr. Grimble, the Resident Commissioner could not fix a royalty which was higher than 10½d. without enormous embarrassment and considerable damage to his authority as Resident Commissioner and that of his successors. It is true that he did not carry out his threat to fix the royalty at less than 10½d., but the letter shows that he could not politically speaking have fixed it any higher. The letter also shows that Mr. Grimble did not understand himself to be under any duty to fix a proper figure. In any case, the royalites had been settled in London, as I have said. Mr. Grimble was a man set under authority, there was a chain of command running from the Secretary of State in Whitehall through the High Commissioner at Suva to him and he had no choice about what figure to fix.

We come now to the date your Lordship was thinking of, when the Resident Commissioner took possession on the 10th January, 1931. There is a document he executed when he took possession which says he was satisfied that the terms were reasonable and he made a proclamation fixing the royalty on the 12th January, 1931. He had, I think, made one or two earlier proclamations and one of them is in the PD Bundle at page 78. There were some procedural tangles and a considerable degree of confusion about the formal making of this compulsory purchase.

The proclamation at page 78 of the PD Bundle was not the effective proclamation. It wrongly got into that bundle and it got into it because it got into our pleadings. I am very sorry about that. The relevant one is in Bundle 28, at page 3. That proclamation recites the 1902 licence. (Summarises document down to the word) "Secretary of State for the Colonies may from time to time direct."

MR. JUSTICE MEGARRY: So that the whole of the 8½d. goes to the community?

MR. MOWBRAY: It does under the proclamation, since your Lordship observes that, but it should not have done according to the ordinance. The ordinance provided that it should go to the former owner or owners.

MR. JUSTICE MEGARRY: Yes, exactly.

MR. MOWBRAY: Reading on: "such royalties to be paid" etc. (reading and summarising down to the word) "accordingly." That is dated 12th January, 1931.

MR. JUSTICE MEGARRY: Who is it to be paid to? Who are the royalties to be paid to? It says who has got to do the paying and what they are going to be paid and says for whom they are to be held in trust and so on, but the payee is not specified anywhere.

MR. MOWBRAY: Of course, this was the royalty to be reserved by a lease of what had become on entry Crown Land, so it would be payable to the landlord, the Crown, on these trusts. The lease was dated the same day and that is the document which is in PD.18, page 82.

MR. JUSTICE MEGARRY: I was just going back to the ordinance. I do not want to take you to it in detail, but I want to understand the general thing.

There is to be a lease of the said land for such period as may be required for the purpose of the licence subject to - and there are two "subject tos" here and the first is payment by the holder of compensation to the original owner or owners . . . "as the Secretary of State shall direct", so that that is not going to be a payment made under the lease, that is going to be a payment to the original owner or owners so as to provide compensation. Then the second "subject to" is "payment of such royalties" etc. (reading to the words) "may prescribe." Then in 6(ii) "any monies payable by way of compensation for royalties" - so that covers both of the "subject tos" - "shall be paid to the Resident Commissioner to be held by him in trust on behalf of the former owner or owners of the native or natives of the colony."

MR. MOWBRAY: Yes, so if there was a compulsory purchase the Resident Commissioner was to receive the royalties and was to hold them on trust for the former owners and then under 7 it was the same, if the lease was granted by agreement.

MR. JUSTICE MEGARRY: The acquisition of rights was being the subject of agreement.

MR MOWBRAY: Yes.

MR. JUSTICE MEGARRY: But in fact Clause 7 did not work.

MR. MOWBRAY: It did not happen.

MR. JUSTICE MEGARRY: It was done under Clause 6.

MR. MOWBRAY: Yes, that is right.

MR. JUSTICE MEGARRY: But the two "subject tos" are, (1) payment to the original owners, and, secondly, the payment of royalties. If you have got to go to go to the original owners you have got to go to the original owners, there is no problem about that, but the machinery under 6(ii) is to pay it to the Resident Commissioner and then presumably he passes it on to the original owner or owners.

MR. MOWBRAY: Yes, and if the original owner or owners are natives I think one substitutes the Commission for the owners in 6(ii). Then it is subject to such directions as the Secretary of State may from time to time give.

MR. JUSTICE MEGARRY: Then any monies payable are to go in trust for the former owner or owners.

MR. MOWBRAY: That is so.

MR. JUSTICE MEGARRY: And not for the benefit of the Banaban community generally.

MR. MOWBRAY: That is right.

MR. JUSTICE MEGARRY: And yet the proclamation seems to be altering what the ordinance has laid down.

MR. MOWBRAY: It did not comply with the terms of the ordinance. There was a subsequent ordinance which to a very large extent cured the discrepancy by bringing in, as we say, the Banaban community generally in place of "native or natives" in the 1928 ordinance. That is putting it very broadly.

The lease bore the same date as the Proclamation. It is page 82 of the same bundle. It recites the parties and contains recitals very similar to the recitals in the proclamation and I can read from the bottom of page 82. (Summarises document, referring in particular to the habendum clause).

MR. VINELOTT: I do not want to press my friend for an answer, but it would help us both to clarify the issues if he could say whether he takes the view that the words "all phosphates shipped from Ocean Island" extended the royalty to all phosphates shipped from any source, that is either 1930 or 1913. That, I think, was the view taken in the Colony at the time and the way in which the royalty was calculated.

MR. JUSTICE MEGARRY: Would you prefer to answer that at 2, or do you wish to answer now?

MR. MOWBRAY: I can answer now. The lease changed the royalty to "all phosphates shipped".

MR. JUSTICE MEGARRY: Wherever they came from?

MR. MOWBRAY: Nothing else would have been practical. In fact, that was the next thing I was going to refer to according to my note.

MR. VINELOTT: Then there is no dispute between us. I thought it might be better to have common ground.

MR. MOWBRAY: Yes, the 10½d. royalty was paid on all phosphates shipped from Ocean Island, and that is what it says in the lease, page 86, clause 2 (reads passage).

MR. JUSTICE MEGARRY: Sometimes "all phosphates shipped" means "all phosphates shipped" and sometimes it means something else.

MR. MOWBRAY: Apparently no one is contending for anything else.

MR. JUSTICE MEGARRY: There is a merciful simplicity on at least that part of it.

(Adjourned for a short time)

MR MOWBRAY: We had agreed that the 10½d royalty was payable on all phosphate shipped from Ocean Island after the beginning of 1931 and it replaced the 6d royalty which was paid under the 1913 agreement. In fact the 10½d royalty was duly paid from 1931 to 1947.

Your Lordship observed that under the mining ordnance the surface compensation under what is called the compensation clause had to be fixed by arbitration. The arbitration duly took place. The Banaban landowners had a representative at the arbitration. It took place on Ocean Island. At the suggestion of the Colonial Office in London a Mr J.S Neill was appointed to represent the Banabans at the arbitration. He was a Barrister and an Officer of the Crown in Tonga, slightly senior to Mr Grimmond. His fee was paid out of the Banaban funds and he came to Ocean Island and addressed the Banabans at a meeting held on the 24th January, 1931. He told the Banabans - quote correctly - that the royalty was not subject to arbitration. That is what your Lordship noticed in looking at the 1928 ordnance. Then he was questioned by Rotan and other leading Banabans and he said that the royalty had been prescribed in accordance with law and every action taken had been in accordance with law. What Mr Neill said is important, in our submission, on questions of the Limitation Act and what is called fraudulent concealment.

Also important on those questions are some things which the High Commissioner said on the 29th July, 1931. The High Commissioner then was Sir Murchison Fletcher and he came to Ocean Island partly at least to persuade the Banabans to accept the position, and he addressed the Banabans on the 29th July, 1931, at a general meeting. He told them that they had the British Government to guard the interests of the Banabans and to ensure that they received the best possible price for the phosphate, and he said this, that if the High Commissioner, representing the interests of the Banabans, were to ask too much, the Commissioners (that is BPC) would have to close down as they would not be able to pay.

At the same meeting the High Commissioner said to the Banabans that any minerals under the land belonged to the Government. He said the Government could do what it pleased with them. He said the surface owners had not planted the minerals and were not responsible for them, therefore they belonged to the Crown. We are open to correction about this, but we think that, apart perhaps from one jocular earlier remark, that was the first suggestion that the Crown owned the minerals.

MR JUSTICE MEGARRY: That was a jocular remark made earlier.

MR MOWBRAY: Yes, my Lord, but I cannot trace it. We have looked for it.

MR JUSTICE MEGARRY: I think it is in Bundle 5, page 37.

MR MOWBRAY: That is the one I was thinking of, my Lord. I do not think one can treat that as a serious investigation into the law. I am much obliged to your Lordship.

In saying what he did about the Crown owning the phosphates the High Commissioner may have thought that he was

following the instructions of the Secretary of State. The Secretary of State had telegraphed to him on the 26th November, 1930, that no admission was to be made to the Banabans that rights in phosphate deposits belonged to individual Banabans claiming surface land rather than to the community as a whole. We say that meant the Banaban community as a whole not the Colony and the Crown. At any rate, the High Commissioner's claim that the Crown owned the underlying phosphate was inconsistent with earlier statements of the Crown servants and contrary to the applicable law, as we shall show.

MR JUSTICE MEGARRY: I think in Ocean Island No.1 the Crown said they were not suggesting the minerals on Ocean Island belonged to the Crown.

MR VINELOTT: Precisely what the Resident's letter meant may be a matter of some dispute, but, of course, your Lordship will have in mind he was talking about a situation of possible compulsory acquisition and he may have had in mind that the minerals were at the disposal of the Crown. But whatever he meant ----

MR JUSTICE MEGARRY: There is no existing claim by the Crown that the minerals on Ocean Island belong to the Crown.

MR VINELOTT: That is so, my Lord.

MR MOWBRAY: I am very much obliged to your Lordship and to my learned friend.

I would just like to add this, that later on Sir Murchsion convinced himself that the low roaylty fixed in 1931 was a reason for regarding the Crown as the owner of the phosphates.

The visit of the High Commissioner to Ocean Island in July, 1931, did not put an end to the problems that followed upon the compulsory purchase. There were two further problems. The first concerned the currency in which the royalty and compensation ought to be paid. UK Sterling was the official legal tender in the Gilbert & Ellice Islands Colony but Australian currency had for many years circulated there and been accepted. That created difficulties when the Australian Pound was devalued in April, 1930. There were doubts at the Colonial Office as to whether the compensation and royalty should be paid in the lower Australian currency inview of the trust for the Banabans and the Crown's interest in BPC. On the 16th July, 1934, the Secretary of State refused to resolve those difficulties himself. He considered that, in view of the Crown's position as trustee, he did not think he should.

By this time, between 1934 and 1935, the Banabans were, in the view of BPC, more content than they had been before. The BPC were anxious that the compulsory purchase should not be reopened, if possible, and feared that it would be if any hints were given to the Banabans that the currency question was under discussion. The Colonial Office confirmed to BPC that it had no intention that the Banabans should know about the currency discussions.

The second problem your Lordship has already observed.

It was that the trusts in the lease did not accord with the Mining Ordnance of 1928. So on the 10th December, 1937, the Mining (Amendment) Ordnance, 1937, was enacted. It is at page 93 of the PD bundle, if your Lordship would turn to that. . . Your Lordship sees it is to be read and construed as one with the Mining Ordnance 1928, called the principal Ordnance, and then section 6(2) and section 7 are amended. Section 6(2) now says: "Any monies payable by way of compensation for any land acquired from any native or natives" etc; (reading to the words): "in such manner as the High Commissioner may from time to time make". I expect your Lordship is turning back to page 63 ?

MR JUSTICE MEGARRY: Yes. So old 6(2) was compensation or royalties, new 6(2) is compensation only, no royalties.

MR MOWBRAY: That is right, my Lord. The trust has changed. It used to be on behalf of the former owner or owners ----

MR JUSTICE MEGARRY: The words "in trust" are now removed and the destination has changed.

MR MOWBRAY: No, not the destination.

MR JUSTICE MEGARRY: The same destination but the word "trust" is removed.

MR MOWBRAY: The word "trust" is removed, but your Lordship sees it still says "Shall be paid to the Resident who shall apply the same ..."

MR JUSTICE MEGARRY: Or apply the same for their benefit.

MR MOWBRAY: Yes. Of course we say if A holds money and is obliged to apply it for somebody else's benefit he is a trustee for them, and although the five letter word "trust" is missing from this Ordnance there is still a statutory trust.

MR JUSTICE MEGARRY: The phrase "native or natives" is taken away from the word "trust" and tacked on to the land to be acquired. So it is a substantial recasting.

MR MOWBRAY: It is a recasting, my Lord. As your Lordship has observed, the royaltiy is taken out of that provision altogether. So we are talking about surface compensation only, and there is a provision that it shall be paid to the Resident Commissioner who is to pay the same to or for the benefit of the former owner or owners. The royalty is now taken down into section 7.

MR JUSTICE MEGARRY: The old section 7, which was to deal with acquisition by agreement, never had anything to bite on and that has now passed out completely and is replaced by an entirely new section 7 to deal with the royalty.

MR MOWBRAY: It deals with all royalties, whether fixed by agreement or fixed under section 5. So the royalties that your Lordship has been considering come down in the saale and they are rolled up with other royalties payable by agreement. Here the trusts are changed.

MR JUSTICE MEGARRY: Again the words "in trust" are taken out.

A MR MOWBRAY: The five letter word "trust" is taken out, yes.

MR JUSTICE MEGARRY: The phrase "in trust" was there before and in each case they have got rid of the words "in trust". Now it is an obligation to pay out of the fund.

MR MOWBRAY: So the Resident is under a statutory obligation to apply those monies for the benefit of the natives.

B MR JUSTICE MEGARRY: The Secretary of State is disposed of.

MR MOWBRAY: The Secretary of State has gone and the High Commissione has come in instead.

MR JUSTICE MEGARRY: Yes, it has been recasted.

C MR MOWBRAY: There is a general recasting. It is all a little difficult to hold in one's mind because the royalty fixed under section 5 is taken out of section 6(2) and put into 7. So again we say that there is really a statutory trust here because the Resident Commissioner is directed to apply the royalties for the benefit of the natives - that is the natives generally now - and where A holds money and is obliged to apply it for the benefit of B to Z inclusive there is a
D trust.

MR JUSTICE MEGARRY: There is a statutory obligation, is there not ?

MR MOWBRAY: Yes, it is a statutory trust.

E MR JUSTICE MEGARRY: A statute can create a trust, or a statute may create an obligation which is not a trust. You have then got the question of construction: what does the statute do ? The statute may, I suppose, create an obligation which is not a trust to pay or apply property in a particular way. One can think of Governmental provisions for what used to be called Poor Relief, and so on. However, I see the point: one has got to construe what is being done by the statute.

F MR MOWBRAY: Yes. This is part of our legal argument, of course, but your Lordship will see the way we put this. We say there is authority that if A holds money for B there is a trust and we say it makes no difference if that is regulated by statute. Alternatively we say "All right, if it was not quite a rust it was some statutory obligation which puts the Crown in the same fiduciary position as if it had been a
G trust". Finally we say "Even if it was not quite that, even if it was Governmental, then the declaritory jurisdiction of this court is still there.

MR JUSTICE MEGARRY: The case has got tobe proved the whole way: questions of fiduciary duty and Governmental duty, and so on, and how they relate to each other.

H MR MOWBRAY: Yes, my Lord, that is right. That is a question of law and construction.

As to the facts, the Banaban landowners, who were interested under the trust in the 1928 Ordnance were all

asked to consent to the royalties going to the community generally. That was before the 1937 Ordnance was enacted. In return the former owners were to have annuities out of the income of the royalty fund. Sir Murchison Fletcher was strongly opposed to the annuities being on too liberal a scale, but in the end a scale was agreed with the landowners. TheSecretary of the Western Pacific High Commission counselled that the Banabans should not be told that the former landowners were entitled under the 1928 Ordnance -----

MR JUSTICE MEGARRY: I am sorry, I am not following. I thought the Banaban landowners were asked to agree ?

MR MOWBRAY: That is right, my Lord.

MR JUSTICE MEGARRY: Without being told what was being taken away from them ?

MR MOWBRAY: Well, what the Secretary minuted was "No whisper of the legal position must be allowed to reach the Banabans". He ended that minute with questionmarks, in all fairness.

The Banabans were asked if they would agree to the royalty going to the community as a whole and they all consented except Rotan and his family. In July, 1937, a new High Commissioner visited the Banabans. His name was Richards - he was a Knight but I am afraid I am not sure what his first name was. At a meeting which he held with the Banabans on the 24th July, 1937, the Banaban landowners, other than Rotan and his family, told him they were willing to waive their rights to phosphate royalties in favour of the community generally, subject to the payment of certain annuities.

MR JUSTICE MEGARRY: And the annuities were to come out of the royalty fund ?

MR MOWBRAY: Out of the income of the royalties.

MR JUSTICE MEGARRY: So on that footing the royalties would go into the royalty fund, produce an income and the income would be used to provide the annuities. Is that it ?

MR MOWBRAY: That is it, my Lord. The High Commissioner agreed and later the landowners, other than Rotan, signed a formal waiver. We will look at that when we go through the documents, my Lord. As all the Banabans owned land, or almost all owned land, and as they had very limited powers of alienation, no great change was involved in shifting the benefit from individual landowners to the community as a whole.

MR JUSTICE MEGARRY: I suppose the landowners were nearly all adult Banabans, then there would be a lot of younger Banabans who would have an expectation of coming into some form of landownership eventually.

MR MOWBRAY: Yes, and as the mining roled over the Island the Banabans as a whole would share instead of the individual owner whose land happened to be mined first or mined seventeenth.

MR JUSTICEMEGARRY: You would get a collection of landowners. First of all landowners of land which had already been mined and they would presumably get the benefit of the fund but they may have received all the payments they were going to get. Then there would be those whose land was being mined and they would get annuities for their land. Then there would be those who land was going to be mined in future enjoying their land but getting no annuities. Finally there would be some who owned land which was never going to be mined at all and they would just keep their land. So there were various classes.

MR MOWBRAY: Yes, there were various classes. The only comment I would make, of course, is that I am not sure there were many in the 1931 class some of whose land had not already been taken. There would be overlapping classes.

The Colonial Office had insisted on the consent of all the landowners being obtained to the diversion of the royalties from the former owners to the community generally. As I told your Lordship, Rotan did not consent, but the High Commissioner did not hold up the amendment for a single dissenter and Rotan's annuities were paid into a deposit account for him and he finally drew them out in 1946. So he is not now in a position to complain that the 1937 Ordnance should not have been enacted.

2.30

The Banabans' consent was not sought to any cancellation of trusts, merely the diversion of the royalties from particular owners to the general Banaban community. They were never asked to waive any rights in favour of the Crown. They were redorded as having agreed to "waive any rights to phosphate royalties in favour of the Banaban community".

MR JUSTICE MEGARRY: I am not quite sure what the relevance of that is. All this is a prelude to a change in the law, is it not ?

MR MOWBRAY: Yes, my Lord.

MR JUSTICE MEGARRY: Then you simply look, do you not, to see what the new law is in place of the old ? It does not matter whether they waived it or not; if in fact the true effect of the enactment is to wipe out some trusts, the trusts are wiped out.

MR MOWBRAY: Well, my Lord, it is working up to this, that the statute was enacted under a limited power for enactment in the Gilbert and Ellice Islands Order in Council, and, in our submission, if it resulted in a merely Governmental obligation - by which we understand the Crown means something which gave the Banabans no justicial rights at all - then it was ultra vires, because it disregarded their land owning rights which are specifically preserved from contrary legislation in the Gilbert & Ellice Island Order in Council. That was proviso 3 which I read.

MR JUSTICE MEGARRY: You say the amendment legislation went further than any waiver; is that right ?

MR MOWBRAY: Yes, my Lord.

MR VINELOTT: I think I may, perhaps, observe that there has been no claim that this ordnance was ultra vires as yet.

MR MOWBRAY: That is a matter of law.

MR JUSTICE MEGARRY: My note has not got any further than your saying this amendment went further than any waiver, and then you say it was ultra vires, do you ?

MR MOWBRAY: Yes, as contravening the Banabans' customary land-owning rights.

MR JUSTICE MEGARRY: Protected by ?

MR MOWBRAY: Proviso 3 to section 8 of the Gilbert and Ellice Islands Order in Council.

MR JUSTICE MEGARRY: Mr Vinelott says that is not pleaded and you say it is a question of law.

MR MOWBRAY: Yes, my Lord. So I say they did not waive anything in favour of the Crown. Also, I just remind your Lordship at this stage, that trusts of the proclamation and of the lease were not at any rate expressly revoked. They were trusts, with the word "trust" in them, for the Banaban community generally and they were pretty close, if not word for word the same, as the trusts in the 1937 ordnance. I will not ask your Lordship to compare them now, we will come to them later.

So proceeding with the facts: the royalty fund was referred to after 1937 by the servants of the Crown again and again as the Banaban royalty trust fund. There are over a dozen references down to 1947. There are also references to its being held "in trust" for the benefit of the Banaban community. We have found four such references spread out from 1938 to 1948. But in spite of that, the Crown have pleaded in this action that section 3 of the 1937 ordnance left no trust at all, no justiciable issue at all, and we say that no Banaban could have understood that that was what he was being asked to agree with.

I am afraid I have gone ahead of myself a bit.

MR JUSTICE MEGARRY: It is very largely my fault because when I do not understand something I do ask questions and I am afraid in answering my questions you get taken out of your course.

MR MOWBRAY: If I may say so, I am very pleased to help your Lordship in that way and I do not in the least mind.

Would your Lordship take page 88 of the PD bundle. This is the first of the tax commutation ordnances. Your Lordship recalls that the sums payable under tax commutation ordnances we claim as royalties payable by agreement which are caught by the Mining Ordnance as amended in 1937. This is the first of the commutation ordnances and in our pleadings we claim a trust of the sums payable under section 4 of this

ordnance. In our pleadings we claim that, but your Lordship will not be hearing any argument in favour of that proposition on this ordnance. We shall be saying that this ordnance provides an instructive contrast to some of the other ordnances in which the royalties are preserved, but your Lordship should, perhaps, see this as a matter of history and I will take your Lordship through it very shortly.

MR JUSTICE MEGARRY: You say the pleadings claim that the sums payable under this ordnance have been caught by the 1937 amendment ordnance. Is that right ?

MR MOWBRAY: Yes.

MR JUSTICE MEGARRY: But in fact you are not going to advance that claim. This is now being shown simply as a contrast with some other ordnances where that claim is still alive. Is that right ?

MR BOWBRAY: That is so, my Lord, and as a history of the commutation of the BPC tax affairs. Your Lordship sees this is the British Phosphate Commissioners ordnance 1934 and there is a definition section. Then it says "BPC shall be and is hereby exempted from the payment of all taxes payable and levied under" etc (reading to the words): "import duty", and so on. 5 is an exemption from capitation tax. Then 4: "In lieu of payments in respect of which exemption" etc; (reading to the words): during such year". In other words, the BPC guarantee the whole of the Gilbert and Ellice deficit. Then your Lordship sees the proviso: "If the Commissioners give notice in writing" etc; (reading to the words): "then this ordnance shall cease to have effect from June, 1937".

MR JUSTICE MEGARRY: So it is to have a three years' run but it is to be terminable at the end of the three years.

MR MOWBRAY: That is really only history, my Lord. Your Lordship can see that that must have resulted from an agreement that it would only continue after three years if the agreement lasted.

The next commutation ordnance was enacted on the 1st July, 1938. It is at page 94 of this bundle. It was enacted on the 1st July, 1938, and the sums payable under section 4 we do claim as royalties held on trust for us. The early part of that ordnance is similar.

MR JUSTICE MEGARRY: The letting off part.

MR MOWBRAY: The letting off part, as your Lordship says. Then in section 4: "In consideration of the exemption granted in the last preceding section" etc; (reading to the words): "on the first day of each quarter of the financial year" ----

MR JUSTICE MEGARRY: Do you claim that ?

MR MOWBRAY: Yes, my Lord. "(b) In addition to all other royalties payable, a royalty of 6d for every ton of phosphate exported from Ocean Island in excess of 300,000 tons during the year ended on the 30th day of June, 1939, and in excess

of 250,000 tons during each succeeding year ending on the 30th day of June".

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MR JUSTICE MEGARRY: And you claim that ?

MR MOWBRAY: Yes, my Lord. Then (c) is a transitional provision which I do not think I need read.

MR JUSTICE MEGARRY: Do you claim that ?

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MR MOWBRAY: No, I do not think so, my Lord. That is a carry over of the previous one which we are not claiming.

MR JUSTICE MEGARRY: You claim under (a) and (b).

MR MOWBRAY: That is it, my Lord. Then reading on: "... and shall guarantee that in respect of the phosphate exported during each financial year ended on the 30th day of June

C

a royalty of 6d a ton ... amounting to not less than £6,000" etc.

I should read sub-section (3) of section 4 on the next page: "All amounts payable by theCommissioner under this ordnance should be paid to the Treasurer of the Colony or to such other person in the Colony as the Resident Commissioner

D

may direct".

Then I do not think I need read 5. 6: "This ordnance shall come into operation on the 1st July, 1938 and continue in force for a period of five years unless it shall be repealed before the expiration of that period", and then there is a proviso prserving existing liabilities and a repeal of the earlier ordnance.

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Your Lordship will see that an ordnance of that kind could hardly be enacted except pursuant to an agreement between BPC and the Government. In fact there was an agreement. I am reminded we have to show that these royalties are payable by agreement to bring them within the 1928 ordnance.

MR JUSTICE MEGARRY: Later on you are obviously going to deal

F

with this more fully, but can yougive me some indication now of why you say these two payments fall under that ordnance ?

MR MOWBRAY: The second one is easier than the first, so may I start with that. It is in section 7 as inserted by the 1937 ordnance on page 93 of the bundle: "Any monies payable by way of royalty, whether prescribed under section 5 hereof or fixed by agreement, should be paid to the Resident Commissioner".

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So they are monies; they are payable by way of royalty (it says so in the ordnance) and they are fixed by agreement. I am just going to give your Lordship the details of the agreement.

MR JUSTICE MEGARRY: Anything called a royalty fixed by agreement ?

H

MR MOWBRAY: I do not know that we just say "called" a royalty, my Lord.

MR JUSTICE MEGARRY: The thing is royalties are payable for the publication of a song. Is that by agreement ?

MR MOWBRAY: It would have to have some connection with phosphates.

MR JUSTICE MEGARRY: A phosphates song lauding the beauty of phosphates!

MR MOWBRAY: It would have to have some connection with the subject-matter, if you like - the 1928 ordnance as amended. Just what connection is a matter for argument. There is some authority that a dead rent can be a royalty, and we say that (a), the 20,000, is like a dead rent.

MR JUSTICE MEGARRY: If in the second tax commutation document they had not called it "royalty", if they had called it something else, you would find it more difficult. The word "royalty" is the one you find attractive ?

MR MOWBRAY: Well, it certainly helps, my Lord. Certainly with (b) we do not just say as it is called a royalty. It is a royalty; it is payable on every ton of phosphate removed, and a royalty in its secondary sense - and we will come to it in due course - is a sum of money payable for the removal of minerals, and if one finds it in an ordnance dealing with the taxation of a mining concern expressed as so much a ton it is not just that it is called a royalty, it is a royalty.

MR JUSTICE MEGARRY: If there is something genuinely called a royalty, then it does not matter who it is made payable to it will be caught by the amended version of the mining ordnance?

MR MOWBRAY: If it is a royalty for phosphates on Gilbert and Ellice, yes.

MR JUSTICEMEGARRY: If the BPC had made some agreement they would pay ld a tonroyalty to some charity on the island, the charity would have got it under some amendment to the mining laws ?

MR MOWBRAY· Yes, my Lord.

MR JUSTICE MEGARRY: You will come to your argument on that and it is not fair to ask you a lot of questions at this stage, but it does not look to me to be a very sensible proposition on the face of it.

MR MOWBRAY: We cannot say that it was an intended consequence of the 1927 ordnance, but it was, we say, an accidental consequence.

MR JUSTICE MEGARRY: A happy accident for you, an unhappy accident for somebody else.

MR MOWBRAY: Yes, my Lord. We have to show your Lordship that we got these royalties as a result of agreement and the agreement which resulted in the 1938 ordnance which your Lordship last read, or the terms of it, were agreed in London between Mr Gaye (who was then the United Kingdom Phosphate Commissioner) on the one side and the Colonial Office (mainly acting through Sir John Shuckworth) on the other. It was confirmed by a formal letter dated 2ndFebruary, 1938, from MrGaye to the Under Secretary of State at the Colonial Office, and that was accepted by a formal letter from the Colonial Office saying "I am directed by Mr Secretary Ormsby Gore", and

so on - he was the Secretary of State at the time. At that stage the Secretary of State wrote to the High Commissioner "You will no doubt cause the legislation necessary to give effect to the new agreement to be enacted".

MR JUSTICE MEGARRY: Supposing there had been no legislation. Would it have been ineffective ?

MR MOWBRAY: I suppose so, my Lord. A Government cannot be compelled to collect tax and I suppose it can agree not to do so in return for some other money. Anyway, the High Commissioner had plenary powers under section 5 of the Order in Council and, in my submission, yes, it could be effective. In fact, some of these agreements were made without legislation, as your Lordship will be seeing.

Now I turn to the Banabans' position. In 1940 the BPC approached the Banabans again to obtain 280 further acres of mining land. They offered total royalties to the Banabans of 1/- a ton, and that is the last act before the war. The negotiations were cut short before the coming of the war to the Pacific. I must give a brief account of what followed because it affects the Crown's duties in 1947.

BPC and the administration left Ocean Island ahead of the Japanese advance. The Banabans were left bhind. The Japanese warships arrived at the end of August, 1942, and Japanese troops landed without opposition. Some days later the Japanese Marines went through the villages pillaging and looting. Eventually the Japanese deported the Banabans. Before that was done the food ran out and the Banabans were reduced to eating weeds, pawpaw and the growing fruits of the doconut trees. The Japanese summarily beheaded three of the natives for stealing food and they killed all the lepers. They took the remaining Banabans to other islands in the Gilbert and Ellice and Solomons Groups ----

MR JUSTICE MEGARRY: There were a few left on the Island, were there not, doing some form of work ?

MR MOWBRAY: I am not quite sure how to construe the record of that. There may have been, but I am not quite sure. At any rate, it was not more than one or two. They were removed in two lots, but in the end they were all removed.

MR JUSTICE MEGARRY: I was thinking of the events that happened after the Japanese surrender.

MR VINELOTT: My recollection is that there were a few left but they were Gilbertese.

MR MOWBRAY: I am very much obliged to my friend; they were Gilbertese largely. The Banabans deported had to work as slaves for the Japanese. They were not given adequate food and they were reduced to begging and stealing food. Some of them lived in appalling conditions of damp and mud and they were not used to damp in Ocean Island, it being very dry. At the end of the war the Banabans heard that they were to be killed. They were made to dig their own graves, then they were marched towards the graveyard and halted only 100 yards from the graves and their lives were spared only because the

Japanese Colonel was living with a Banaban girl and he interceded on their behalf.

MR JUSTICE MEGARRY: Have these episodes anything to do with what I have to decide in this case ?

MR MOWBRAY: Well, I submit they have, my Lord.

MR JUSTICE MEGARRY: Are they really relevant to this case ?

MR MOWBRAY: They are relevant on the kind of advice that should have been obtained for the Banabans shortly afterwards when they came to negotiate a very important commercial transaction. The Island of Rambi was bought by the Crown out of the company provident fund royalties and the Banabans were persuaded to go back.

MR JUSTICE MEGARRY: That was done before the Japanese came.

MR MOWBRAY: Yes, my Lord, that is out of date order. The Banabans were persuaded to go back. Rambi was a much wetter place than they were accustomed to.

(Continued on next page)

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
GROUP B.

1971 R. No.3670

Royal Courts of Justice
Monday, 15th December, 1975

Part II

Before:
MR JUSTICE MEGARRY

ROTAN TITO
and
THE COUNCIL OF ELDERS

v.

SIR ALEXANDER WADDELL KCMG,
STANLEY CHARLES GAINEY
SIR ALLAN BROWN CBE
and
HER MAJESTY'S ATTORNEY GENERAL

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(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters, Ltd., 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 TUCKER, and MR C.L PURLE (instructed by Messrs Davies Brown & 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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SPEECH - DAY ONE

By the beginning of 1946 there was a rather heavy incidence of pulmonary illnesses among them. By the middle of 1946 a disease which soundsfunny but which is not funny to people who have not been exposed to it before, measles, broke out, and there was much sickness and 40 deaths.

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MR. JUSTICE MEGARRY: I do not think you will find many adult males in this country regrd measles as an amusing disease.

MR. MOWBRAY: The Banabans - this is the point - had still not recovered from the war and its sequels. They were still in such a state of mind and body that they were incapable of regarding carefully all that was said to them on business matters and it was while they were going through that the BPC renewed their proposal for more mining land.

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Going back a little in time, in March 1946 Mr. Maynard the BPC representative came to Rabi and asked the Banabans whether they would accept the 1940 terms, that is to say the terms which had been proposed in 1940 which were 230 acres at £175 per acre plus 1s. a ton royalty. The Banabans made a counter offer of £225 per acre and 1s.6d. a ton royalty. Mr. Maynard did not accept. He left the island and did not come back for over a year.

C

Now I will give your Lordship some other events of 1946. On the 12th March, 1946 the Secretary of the Western Pacific High Commission wrote a long memorandum on the taxation of the BPC. He concluded by submitting that they must endeavour to secure as much revenue from the phosphate industry as it could reasonably be expected to provide. Immediately before that passage the Secretary quoted a despatch of 1939 which read like this: "The question may become one of whether the BPC or the British taxpayer should shoulder the burden." The point was that any ultimate deficit in the Gilbert and Ellice colony's accounts would have to be shouldered by the British taxpayer.

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Then on the 24th June, 1946 the High Commission sought from the Secretary of State approval of a new commutation agreement under which the BPC would pay besides the old royalty of 6d. a royalty of 1s.3d. a ton and a fixed contribution of £24,000 a year. The £24,000 was considered by the Crown to be a substitute for the taxes which the BPC would otherwise have had to pay. The 1s.3d. was considered a royalty for the reduction in value of the colony's resources.

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On the 24th August, 1946 the Secretary of State replied that the matter would have to be referred to the United Kingdom Treasury. That was apparently done and a Mr. Serpell replied from Treasury Chambers on the 4th November, 1946. He said the question of the BPC contribution should be looked at in the light of the profit being made or to be made by the BPC at post war price levels. "I feel it would be wrong to approve provisional agreement without further information on this point." So he thought post war price levels and that the BPC was making profits were relevant considerations.

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Mr. Webber the recipient of that letter at the Colonial Office minuted on the 16th November, 1940, "I think we should be quite sure that the consumers of the phosphates to whom the profits are indirectly passed on are paying a price for the phosphates which ensures that the country is adequately compensated." Ultimately the Colonial Office and the Treasury accepted the BPC's proposal.

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That exchange of missives shows that the Treasury here and, on consideration, the Colonial Office thought that price levels of phosphates and the benefit which was being conferred on Australian and New Zealand farmers were relevant considerations in deciding a proper royalty for the

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BPC to pay. There was then agreement. On the 25th February, 1947 the High Commission enacted the British Phosphate Commissioners taxation ordinance, 1947. That is page 99 of the documents referred to in the pleadings, PD.99.

MR. JUSTICE MEGARRY: That is the third ordinance, is it?

MR. MOWBRAY: Yes. In section 3 it lets the BPC off import duty on various articles and there is a similar provision to the one your Lordship has summarised before and a penalty for contravening it. Then it says: "The Commissioners and all persons bona fide" etc. (reading to the words) "provisions of" various regulations and ordinances (reads on to the words) "under the income tax laws." So that is the letting off part.

Then I come to 7(i): "In consideration" etc. (reading to the words) "phosphates exported from Ocean Island."

MR. JUSTICE MEGARRY: Do you claim those three?

MR. MOWBRAY: Yes.

MR. VINELOTT: (b) As well?

MR. MOWBRAY: Yes, (b) is claimed. That is the 1902 6d. under the original licence.

MR. VINELOTT: I have not quite understood what my friend was saying. I had thought it was pleaded that there was no claim to the Government royalty of 6d. imposed in 1902. If my friend is claiming that perhaps he would say whether he is claiming it from 1902, or when he claims it from.

MR. MOWBRAY: We claim it from the time it came payable to the Banabans, that is from the 1937 ordinance.

MR. VINELOTT: You do not claim before that?

MR. MOWBRAY: No, I do not claim before that.

MR. JUSTICE MEGARRY: So the 1937 ordinance, you say, was effective, even on the original government 6d. as from the date when the 1937 ordinance took effect.

MR. MOWBRAY: Yes. It was not retrospective.

MR. JUSTICE MEGARRY: That claim does not depend, then, upon the thing being set up under some other ordinance and there called a royalty?

MR. MOWBRAY: No.

MR. JUSTICE MEGARRY: The original 6d., if I may so call it, from the time of the 1937 ordinance had not been set out in a subsequent ordinance as a 6d. royalty or any other description.

MR. MOWBRAY: No.

MR. JUSTICE MEGARRY: So there you base the claim simply on the fact that it was something called a royalty imposed by the 1902 charter, I suppose? I forget what that calls it.

MR. MOWBRAY: Reserved by it. It calls it a royalty, I think. It is right at the bottom of page 3.

MR. JUSTICE MEGARRY: "A royalty of 6d. per ton."

MR. MOWBRAY: Yes. We certainly say that that 6d. was caught. Our claim does not depend on, although it is certainly assisted by, statutory references to the sums claimed as royalties.

A MR. JUSTICE MEGARRY: No, but if you have something imposed by a later statute and called a royalty then you say it bites on that but if you have got something created earlier not in fact called a royalty in any statute of the time nonetheless if in its true nature it is a royalty the 1937 ordinance bites on that. If it is a royalty then it is caught.

MR. MOWBRAY: Yes, and about, for instance, the original 6d. royalty we say not merely was it called a royalty, but it was a royalty.

B

Now I was reading page 100 and I had better read subsection 4 at the end of the page, because that may have some influence on it. It says: "All amounts payable" etc. (reading to the words) "may direct".

MR. JUSTICE MEGARRY: It does not make any difference whether it is called a government royalty in a later statute.

C MR. MOWBRAY: No, that is merely to distinguish it from the royalties which were limited to the Banabans under the lease. Those are merely pointing-out type of words.

MR. JUSTICE MEGARRY: So that the transaction is saying: "You get off all sorts of taxation in return for paying money which does not really belong to you and which goes to the government but which is really Banabans' money".

D MR. MOWBRAY: Yes, that is so, though of course it was what I called the dead rent whch was considered by the government as being the approximate equivalent to the taxes they were going to get off.

MR. JUSTICE MEGARRY: That goes to the Banabans too on your claim - the Banabans get the dead rent as well, you are claiming that?

E MR. MOWBRAY: Yes. That is a more difficult claim, I agree.

Now, four things emerge from this taxation ordinance and from what I have told your Lordship. First, the royalty under the taxation ordinance was agreed between the Crown and the BPC. Secondly, the United Kingdom Treasury and on consideration the Colonial Office thought that the benefit to the Australian and New Zealand farmers was relevant. There is something else that I forgot to point out, that the ordinance is revocable after five
F years. It is section 9 which says that the ordinance shall be deemed to have effect from 1st April, 1946 for five years.

MR. JUSTICE MEGARRY: Unless it shall have been repealed before the expiration of the period. Any legislation is always revocable unless you have an entrenched constitution.

G MR. MOWBRAY: No, but apparently the agreement must have been for five years. I am not sure that that appears from anywhere else. That is the short term of years which I referred to at the very beginning. The Government royalty of 1946 was limited for five years and if the Banaban royalty had been limited for five years then they would have had a chance to increase it later on. Then the fourth thing is that the Crown got an extra royalty of 1s.3d.

H MR. JUSTICE MEGARRY: They did not, the Banabans did.

MR. MOWBRAY: The Banabans got it, yes.

MR. JUSTICE MEGARRY: Why on earth should the government be saying "A lot of taxes would otherwise come into the public revenue for the whole of the Gilbert and Ellice Islands colony for use in defraying the expense of the colony so we are now going to let you off paying all these taxes and so on not in return for your paying a penny piece in substitution for those taxes but in return for you paying a lot of money to the Banabans"? What is the sense of that, or has it not got any sense, but is it just a happy accident, to go back to a phrase which I think you used?

MR. MOWBRAY: That was a phrase that your Lordship used.

MR. JUSTICE MEGARRY: I used it. All right.

MR. MOWBRAY: We cannot say that the effect of the 1937 ordinance on these government royalties was appreciated. It was not appreciated, obviously. Also during 1946 Mr. Maude, who was then the Chief Land Commissioner of the Gilbert and Ellice Islands colony wrote a lengthy memorandum on the future of the Banabans which I think your Lordship has seen. The memorandum, among other things, considered the question of future land acquisitions by the BPC. Mr. Maude approved the further acquisition of land but considered it would be advantageous for the BPC to enter into a single and final settlement with the Banabans covering all the land on Ocean Island that the BPC would acquire immediately or in the future. His memorandum was completed on the 2nd December, 1946, and then was submitted to the Secretary of State in London. The BPC were told to postpone their negotiations with the Banabans until the Secretary of State had reached a decision on Mr. Maude's memorandum and then in January 1947 the Secretary of State approved the recommendations.

Following that, in April 1947, Mr. Maynard with other representatives of the BPC returned to Rabi. He had left unsatisfied before in March of the previous year. Just before Mr. Maynard returned to Rabi on the 25th March, 1947, the Secretary of the Western Pacific High Commission wrote a letter to Major Holland, who was the officer in charge of the Banaban settlement scheme. That is the letter at PD.102. I think your Lordship has seen it before. It says: (reads letter).

Major Holland advised the Banabans that the BPC representatives would be coming and they should tell the representatives what they wanted. On the 9th April, 1947 Mr. Maynard and the other representatives of the BPC met representatives of the Banaban landowners and explained their proposition. In accordance with Mr. Maude's memorandum the BPC offered to purchase the remaining mineable land on Ocean Island or purchase rights over it. This time the Banabans were offered payment of £200 per acre for some of the land, £65 per acre for the rest and a royalty of 1s.3d. a ton.

Next day, 10th April, 1947, the relevant landowners signed the 1947 agreement which is at page PD.103. I would like your Lordship to look at that. It is a memorandum of agreement between the Banaban landowners of Ocean Island and the British Phosphate Commissioners in the presence of EGL Holland, Administrative Officer, Fiji.

3.30

(Reads document down to the words) "already held by the Commission." So my friend's previous question would also apply to this arrangement. We say that the 1s.3d. royalty replaced the 10½d. royalty. Your Lordship has already read claim 3 and I need not read it again.

Then (4) is: "Nothing in this memorandum" etc. (reading to the end) and that is signed in the presence of Major Holland.

So by that agreement the royalty is 1s.3d. as proposed by the BPC. The Banabans did not know when they entered into that agreement that the Crown was getting 1s.9d. in royalties, that is the old 6d. royalty plus the 1s.3d. royalty which your Lordship has just seen under the 1946 arrangements. And the Banabans did not know when they signed the 1947 agreement that the BPC was currently conferring a benefit on the farmers of Australia and New Zealand. We say that the benefit being conferred at that time was about 16s.6d. a ton, that is, the phosphate was being sold in Australia and New Zealand at about 16s.6d. below its market price. If the Banabans had known that they would never have agreed to accept 1s.3d. a ton. They would have insisted on taking at least their share of that benefit and we say that they would have succeeded in obtaining the whole of it either by negotiation or by a proper operation of the compulsory purchase provisions in the 1928 ordinance as amended.

MR. JUSTICE MEGARRY: The Resident Commissioner would prescribe, if he had done it properly.

MR. MOWBRAY: Yes. If one had gone by negotiation subsequent events show that the BPC would be unlikely to have claimed any profit for itself presumably because it was a non-profit making organisation, but if it did we say that the Banabans would have been able, since their bargaining strength was about equal to that of the BPC, to obtain half the total benefit for themselves. We say that half the total benefit was 8s.10½d. a ton. That is a rather confusing figure, but we get it by adding the 16s.6d. benefit to Australia and New Zealand farmers to the 1s.3d. benefit which the Banabans were getting under the 1947 agreement and dividing by 2. The thinking behind that is that there is so much produced in this phosphate, and under what did happen Australia and New Zealand got 16s.6d. and the Banabans got 1s.3d. of it and really it should all have been put together and the Banabans should at least have had half of it.

MR. JUSTICE MEGARRY: What do you call the 17s.9d., the true benefit, as it were?

MR. MOWBRAY: We call that the benefit.

MR. JUSTICE MEGARRY: The total benefit?

MR. MOWBRAY: The total benefit.

MR. JUSTICE MEGARRY: And that, you say, is the smallest amount that the Banabans should get?

MR. MOWBRAY: Yes, on the gloomiest view. If the Banabans had had knowledge of the Crown royalty of 1s.9d. they would have seen that it was limited to expire in five years and they would not have tied themselves to a fixed royalty for more than a few years. As it was, they fixed the royalty without limit of time. The Crown knew all about the benefit to Australia and New Zealand and of course about the Crown royalties totalling 1s.9d. The Crown was trustee of the royalties from the phosphates under the mining ordinances and it was a trustee of the Banaban royalties and the Crown owned in equity at least 42 per cent of the BPC. This was after the second Statute of Westminster, so there is an interesting and, we hope, irrelevant question about whether there is more than one Crown now with separate crowns of wholly independent territories. At any rate, the crown we are talking about, the Crown that is the defendant before your Lordship owned 42 per cent of BPC and that is enough for our purposes.

Therefore the Crown is under a duty to disclose the information to the Banabans and to ensure that they got full value or at least competent advice.

We say they did not get full value or anything like it, they had no advice, and it is common ground on the pleadings that the Crown did not disclose the benefit to the New Zealand farmers or its own extra 1s.3d. royalty. Our evidence will be that the BPC did not disclose it either and that the Banabans did not know about it until at the earliest late 1965.

MR. JUSTICE MEGARRY: As I understand it, you are saying the Crown held certain royalty payments - let me try to put it in a neutral way - on trust for the Banabans. You are not saying, as I understand it, that the Crown held the phosphate deposits on trust for the Banabans. Is there any allegation that the phosphate deposits were vested in the Crown on trust for the Banabans?

MR. MOWBRAY: The only phosphate deposits that were vested in the Crown at all were the 1931 deposits.

MR. JUSTICE MEGARRY: Which they duly released to the Commissioners.

MR. MOWBRAY: Yes. The freehold reversion on those phosphates was vested in the Crown because under the 1928 ordinance when the Resident Commissioner entered it became Crown land.

MR. JUSTICE MEGARRY: Yes, I follow, but apart from that there is no question of any phosphate deposits being vested in the Crown.

MR. MOWBRAY: Apart from that no phosphate was vested in the Crown.

MR. JUSTICE MEGARRY: You see, going back to the familiar example of the fruit on the tree, the royalties are the fruit and the deposits are the trees and the trees which are deposits yield the fruit. At the moment it looks to me as if you are saying that as the Crown held certain fruits of the trees, namely, certain royalties on trust therefore when there are negotiations as to certain parts of the tree itself then the Crown was in a fiduciary position to the beneficiaries for whom they held the fruits and other bits of the trees.

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: In one case the Crown held the whole of the tree itself in trust for the Banabans and therefore were negotiating for the disposal of the fruit of that tree but it looks to me as if one possible contention can be said to be putting that into reverse and saying if you hold any of the fruit on trust therefore the disposition of any other fruits in the future must also be held on trust.

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: When you come to advance your argument on the law you obviously will deal with that.

MR MOWBRAY: Yes.

MR. JUSTICE MEGARRY: It is a point that is passing through my mind at the moment and I think it is only right to mention it.

MR. MOWBRAY: I am very much obliged. It is one of the points we have in mind to argue before your Lordship. May I mention one or two facts involved in it. As far as the 1931 phosphates themselves are concerned, the freehold reversion, we would say there was a trust for the Banabans. Your Lordship remembers it was a term of the arrangement that the worked-out land should revert to the Banabans. That would have been specifically enforceable as an agreement in our submission and that means that there was a trust for the Banabans or a reversion. But that is not the main part of

our contention. A part of it depends on this fact, the very fact that Mr. Vinelott drew attention to, that on each of these changes all the royalties changed so that the royalties that the Crown was trustee of also went up. That brings the Crown much closer. I will show your Lordship some authorities about mortgages and receivers and rents and profits and things like that which show the principle of that.

I think I had got to the 9th May, 1947. On that date there was a meeting of the Banabans at Rabi. They considered a statement of intentions by the Government and their representatives signedit. They voted by a majority of 270 to 48 to make Rabi their headquarters and home. That was a total vote of 318 out of an adult population 336.

The Government's statement of intentions included this: "Such decision to reside on Rabi shall in no way affect any rights to lands possessed by the Banabans on Ocean Island." And also the title to all worked-out phosphate lands which have or may in the future come into the possession of the Crown shall revert to the Banabans. The statement contained an express reference to the Banabans' royalty trust fund and it provided for its amalgamation with the Provident Fund and for revised trusts of the amalgamated Banaban funds.

MR. JUSTICE MEGARRY: What are the names given to those funds? They seem to vary a little in the documents. What was the name given to the two funds that were amalgamated into one?

MR. MOWBRAY: It is at page 68 of the bundle at (c). The Banaban Royalty Trust and the Provident Fund. were to be amalgamated into one fund to be called the Banaban Fund.

MR. JUSTICE MEGARRY: So it seems to be the Banaban Royalty Trust Fund and the Banaban Provident Fund.

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: It became the Banaban Fund?

MR. MOWBRAY: It became simply the Banaban Fund. In the next paragraph the management of the fund is said to be "vested in the Banaban Fund Trust Board."

MR. JUSTICE MEGARRY: The Banaban Royalty Trust Fund and the Banaban Provident Fund had become the Banaban Fund and that is for the benefit of the Banaban community on Rabi.

MR. MOWBRAY: Exclusively for the benefit of the Banaban community on Rabi Island. Since we have that document handy, would your Lordship look back at the other thing I referred to. It is on the previous page, 67, A.1: "Such decision to reside on Rabi" etc. (reading to the words) "Ocean Island," and A.2: "The total of all worked-out phosphate" etc. (reading to the words) "revert to the Banabans." Then your Lordship has the amalgamation of the funds at C.6 and at C.16, the end of the document on page 70, "The Banaban adviser" etc. (reading to the words) "Banaban Fund." Those are the four things that seem most relevant in that document.

Following that meeting and agreement on the 21st September, 1948, the Banaban Funds ordinance 1948 was enacted by the Fiji legislature or at any rate passed by the Fiji legislature and it received the Governor's assent on 29th September, 1948. That was the assent of the Governor of Fiji. The Governor of Fiji was the same person as the High Commissioner of the Western Pacific and the two posts were held by the same person from time to time until 1952.

The ordinance took effect on 1st January, 1949. It is at page PD.105. One of the points at issue in this action is whether this ordinance took effect on the royalties issuing from Ocean Island, so I had better read the Long Title: (reads Long Title). (Summarises ordinance.)

A

MR. JUSTICE MEGARRY: I see it puts the word "'trust" in there.

MR. MOWBRAY: Yes. "The trust fund shall be operated" etc. (reading to the words) "part of the trust fund."

That is our second hound. I have called the others hares, the sums are hares and this is the second hound chasing them.

B

Then Clause 11 is what is to be done with the trust fund (reads same).

MR. JUSTICE MEGARRY: What sort of point are you making about 10, that the Fiji legislature should take the Gilbert and Ellice Islands royalties away from them?

C

MR MOWBRAY: That would be quite a difficult thing to argue without the 1937 Gilbert and Ellice section.

MR. JUSTICE MEGARRY: I follow that. If you have a legislature all within the colony that, of course, subject to the constitution, can do what it wills within the colony. But the idea that an ordinance of the Fiji legislature can have any effect on funds arising in the Gilbert and Ellice Islands colony, or can have any effect on taking away from the Gilbert and Ellice administration funds which are going to the administration and say "They must go to the Banaban Trust Fund instead" is a proposition that I must say I should find some difficulty or expect to find some difficulty in following.

D

MR. MOWBRAY: To be honest, we expected that your Lordship would. The way we put it is this. Your Lordship is talking about the government royalty now.

E

MR. JUSTICE MEGARRY: Yes.

MR. MOWBRAY: It would be very difficult to argue that this section should bite on the government royalty were it not that the 1937 ordinance did so with the result that the government had no beneficial interest.

MR. JUSTICE MEGARRY: If the 1937 Gilbert and Ellice ordinance has done the trick for you it has done it and that is the end of the matter but how does this make it any better? It may be consistent with it but I do not see what legislative power Fiji has over Gilbert.

F

MR. MOWBRAY: It is largely a matter of locus standi, but the corporate plaintiff is the successor of the trust board here though on any view I have to trace the title.

MR. JUSTICE MEGARRY: I can see the tracing of the title point, but I am asking about section 10. The title point is to do with the constitution of the board and so on, and of course any competent legislature can set up what corporations it wishes within its jurisdiction and they will be recognised in other jurisdictions. Of course you have to show that it was set up and that the present plaintiffs are duly their successors and so on according to the law of the jurisdiction where they are. I follow all that, but the question is whether you are going to claim that section 10 gives you any help or adds anything in any way to what you had in the 1937 Gilbert ordinance.

G

H

MR. MOWBRAY: Well, I am bound to confess ---

MR. JUSTICE MEGARRY: You are not abandoning it?

MR. MOWBRAY: I am not abandoning anything, but I freely admit that it is much easier to give some operation to section 10 of this ordinance if one can establish or after one has established that the 1937 ordinance bit on the particular sum, whether it is Banaban royalty or government royalty, because then the Gilbert and Ellice exchequer generally had no beneficial interest in the sum. It is much easier to say that the Fiji legislature, which has taken the Banabans under its wing, can do what it likes with its money.

MR. JUSTICE MEGARRY: You are looking at the difficulty fairly in the eye and passing on.

MR. MOWBRAY: For the time being.

4.00 p.m.

If I might say a word about the Banaban royalties in this connection or first about the Banaban royalties, we say that as the Banabans had made Rabi their headquarters and home there was a strong enough territorial connection with Fiji to make a Fiji ordinance about the Banabans' funds intra vires the Fiji legislature.

MR. JUSTICE MEGARRY: The Banabans were living in Fiji.

MR. MOWBRAY: Yes.

MR. JUSTICE MEGARRY: And the Banabans had got certain rights and were beneficiaries of certain sums and so on and there could hardly be any question, could there, that the Fiji legislature could deal with those rights?

MR. MOWBRAY: So we would submit, but it is denied by the Crown in their pleadings.

MR. JUSTICE MEGARRY: Well, yes.

MR. MOWBRAY: The view which your Lordship tentatively suggested was presumably the opinion of the Fiji legislature and its legal advisers, also of the Governor who assented to it and was the same person as the High Commissioner who had plenary powers of government in the Gilbert and Ellice, so your Lordship is in good company.

Then we come down to the spring of 1950. We are back on some Crown royalties. As soon as spring 1950, the Crown began to feel that the extra Crown royalty of 1s.3d. was not enough. I should perhaps interpose here that a great deal of the rest of what I have to say is concerned with the Crown royalties. It is necessary that I should take your Lordship through these documents on that claim, the claim for Crown royalties. Your Lordship will also see the U.K. Government applying considerations and seeking information about these royalties which supports our contention that the benefit conferred on Australia and New Zealand was a very relevant consideration for the Banabans which they did not know in 1947 when they negotiated their 1947 agreement.

Going back to the spring of 1950, the Crown began to feel that the Crown royalty of 1s.3d. on top of its old 6d. royalty was not enough and on the 20th March, 1950 the Acting Chief Secretary of the Western Pacific High Commission wrote to the British Phosphate Commissioners seeking a royalty of 6s.8d. a ton. On the 7th May, 1950 the Colonial Office minuted that a

benefit was received by Dominions farmers and that it was impossible to determine an equitable level of royalty without information about costs of production, the selling price of the phosphates and their world market value.

A On the 11th May, 1950 representatives of the BPC went to the Colonial Office direct and complainted that the High Commission's demands were extortionate. On the 3rd July, 1950 the Colonial Office wrote to the United Kingdom Treasury asking, among other things, what would be a fair sale price in Australia and New Zealand, what the BPC charged outside those countries - the non-profit price only applied in those two countries and the United Kingdom - and they also inquired the price of Nauru and Makatea phosphates.

B MR. JUSTICE MEGARRY: Was not Nauru also on a non-profit making basis?

MR. MOWBRAY: It was, yes, all part of the same agreement.

MR. JUSTICE MEGARRY: Was there any point in making that inquiry?

C MR. MOWBRAY: I do not understand it myself.

MR. JUSTICE MEGARRY: Makatea I can understand.

MR. MOWBRAY: Makatea was a free market. It was well recognised in the Colonial Office that the United Kingdom Treasury had a real interest in the matter because the Gilbert and Ellice Island colony was grant aided. What the BPC did not pay would have to come out of the United Kingdom Treasury. The High Commission was instructed that any agreement should be referred to
D the Secretary of State for the Colonies for approval. Some negotiations took place in Suva but as they said they were ad referendum.

MR. JUSTICE MEGARRY: What does that mean?

MR. MOWBRAY: It meant that any results had to be referred to London. The Colonial Office exerted a close control over the tactics of negotiations
E which followed, that is to say, over the negotiations in Suva.

It was calculated in London that the BPC was foregoing a profit of 22s. a ton in favour of the Australian and New Zealand farmers. The Colonial Office after consulting the Treasury here suggested a royalty of 7s. or 8s. a ton. Your Lordship remembers that the Western Pacific High Commission's request for 6s.8d. had been described as extortionate by the BPC. When the Treasury came to obtain some information they suggested a royalty of 7s. or
F 8s.

The negotiations were transferred to London and a 6s. royalty was agreed, after the Western Pacific High Commission had been consulted. This time the 6s. royalty included the old 6d. royalty, the original 1902 provision.

G MR. JUSTICE MEGARRY: So the 1s.9d. had gone up to 5s.6d., is that right?

MR. MOWBRAY: No, the 1s.9d. had gone up to 6s., and the extra 1s.3d. had gone up ---

MR. JUSTICE MEGARRY: The 1s.3d. had gone up to 5s.6d.?

MR. MOWBRAY: Yes.

H (Adjourned till tomorrow morning at 10.30)

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