

BRIEF NOTES ON TRANSCRIPTS NOS. 24(2), 25, 26, 27(2) and 28(2),

5th, 6th, 9th, 10th and 11th FEBRUARY, 1976.

1. The position of the Crown vis a vis the legislation and the royalties, whether as a trustee, or in a fiduciary relationship. The RC, Mowbray alleges, was in a fiduciary position because in fixing a royalty, he was affecting someone else's property rights.
2. Mowbray "In the present case the function of fixing the royalty was both imposed by law and voluntarily assumed by the Crown. I say it was both; it was imposed by the 1928 Ordinance, and I say it was also voluntarily assumed by the Crown because there was no independent legislature, and the Crown thereby assumed the duty. We say that as there was a fiduciary relationship then at least in fixing a royalty payable by itself the Crown was under an equitable duty to take care"
Vice Chancellor "Fixing a royalty payable by itself?"
Mowbray "Yes, by its own creature, the EPC".
3. Vice Chancellor - "You are saying this 'the Crown was in a fiduciary position in relation to the 1913 landowners; the deal was all one transaction, therefore the Crown was in a fiduciary position in relation to the 1931 landowners'. That is your proposition". Mowbray "Yes".
4. Vice Chancellor "Statutory power is one thing; statutory duty is another".
Mowbray "It depends how much of the 1928 Ordinance you read whether you treat the RC and what he did as a power or a duty. He did not have to grant a lease to anyone".
5. Vice Chancellor "...Lord Justice Moulton says 'nobody must allow himself to get into a position where his interest conflicts with his duty'".
6. Mowbray "You cannot separate the servants of the Crown who ran the compulsory purchase machinery on the one hand from the interest of the Crown through the EPC on the other hand"... (Grimble) owed a duty to the Crown to fix the royalty and, again as a Crown servant, he owed a duty to the Crown to look after its interests, including the Crown's interests in the EPC, and the imperial interest in having phosphate at a reasonable price".
7. Mowbray "There will a claim against the Crown in quasi contract for letting the Banabans' land".
Vice Chancellor "Is it open to you on the pleadings?"
Vinlott "we should say it is certainly not open on the pleadings. There is no trace of quasi contract".
8. Mowbray states that, when the RC wrote his 1927 despatch, though he knew the royalty should be $\frac{1}{3}d$ he fixed it at $10\frac{1}{2}d$ - and he formally fixed the latter figure on 12th January, 1931, the same date as the lease.
9. Mowbray "It was an invalid determination. It was made on completely the wrong basis. It was not an attempt to fix a commercial royalty. At best it was an attempt to fix the royalty that would be good for the Banabans to have".
10. Vice Chancellor "We are back...to the old point of the fiduciary duty of a trustee on the one hand, and the governmental duty of a government official on the other hand, and where you have something being set up by statute, then since statute can do anything, it might be speaking in terms of governmental duty or it might be speaking in terms of fiduciary obligation. You have got to construe the thing to get at what he is talking about.
11. Mowbray "the amending Ordinance of 1937 imposed a trust".
12. Mowbray "We say the 1928 Ordinance expressly created a trust". "The intention of the 1937 Ordinance was to validate the trusts in the lease".
13. Mowbray "...the landowners never agreed or were asked to agree to the rescission of the trust for them in the 1928 Ordinance, only to the community as a whole taking their place"
Vice Chancellor "In other words, you are saying the existence of a trust was never agreed but merely a substitution of beneficiaries under what was and continued to be a trust".

14. Mowbray "...the position as it was at the time of the 1947 agreement. This is the position in the Spring of 1947. ..the Banabans were on Rabi, not yet properly settled down, in a strange country and a strange climate, living in tents, suffering from disease, and they had not yet recovered from the harrowing experience of the war. There is just a sentence from Mr. Maude's printed memorandum of the 2nd September, 1946, which sums it up...'It will take some years for the Banaban community to recover from their treatment during the Japanese occupation. They were only a shadow of their former selves when discovered by the Allied Occupation Forces'. That just sums the position up as far as the Banabans were concerned; they were not yet truly fit to deal with difficult and important matters of business, and they were reliant on the support of the Crown and on the help and advice of the Officer in charge of the resettlement. They were in need of independent advice in any large commercial transaction if ever anyone was".
15. With regard to the duties of a trustee in dealing with his beneficiary, Mowbray argued that the Crown should have intervened in the transaction saying "Look here; you are negotiating with my creature (BPC). I know you are doing that and therefore because it is my creature you are negotiating with, I am under a duty to tell you this and that, and to advise you the other". Mowbray argued that the Banabans should have been told 'Go and get some independent advice'.
16. Mowbray "The Crown therefore owed a duty of full disclosure to the Banaban landowners and had to ensure that the BPC paid a full commercial price or that they had competent independent advice".
17. Vice Chancellor "I am concerned as to whether there is any authority on the question of dealing between the beneficiaries and the creature of the trustee (BPC). If it had been a negotiation between the UK Government and the Banaban landowners, then the authorities on which you rely would have been in point. But here you are suing the UK Government for failing to make a disclosure in a transaction not between the UK, but the BPC and the Banaban landowners. If there is any authority on that then I would like to be referred to it!"
18. Lengthy argument then ensued as to whether the Banaban Fund Ordinance, No. 25 of 1948, was ultra vires, Mowbray arguing that it was not, and Vinelott holding the contrary view.
19. Vinelott "...may I say a word on this question of extraterritoriality. I think this is plainly one of the central issues in the case..We do not contend that quo ad funds coming into Fiji the Fiji Ordinance was ultra vires because of the extraterritorial effect. They did in fact alter the trusts...no difficulties arise either as regards the moneys in Fiji when the legislation was passed or as regards moneys afterwards coming into Fiji and into the control of the Fiji Banabans. But we do not accept that the Fiji Ordinances gave these Fiji bodies any right to sue to recover outside Fiji, nor did they give them any right of action in respect of any alleged breach of duty on the part of anybody concerned with the earlier negotiations of the fixing of these royalties"
Vice Chancellor "So as regards what they got there is no problem about the property being rightly held by the Council or Elders on whatever trusts affect them. But as to what they have not yet got and what they are suing for, then you say you do not accept the effectiveness of the Fiji ordinance". Vinelott "Precisely".
20. Mowbray "...regarding the extraterritoriality of the Fiji Ordinance, it is of importance only if the 1937 Ordinance created a charitable trust. Vinelott did not suggest yesterday that there was a charitable trust. He said the whole thing was governmental, and indeed that is all that is pleaded about this..."
Vinelott "We of course say that there is no trust, but if there is a trust it must be a charitable trust".