

G.P.O. Box 1404,

Suva, Fiji.

19th February, 1976.

New Army

Herewith "precis" of the last batch of transcripts which I recently received. Mowbray has now virtually ceased his production of documents, and is getting down to what he calls his "propositions". There is much interesting stuff in it, but, owing to the time factor, I have kept the "precis" short. For example, a good deal of the latter part of the last transcript deals with Grimble's action under the 1931 Ordinance, where he had to fix the royalties - his position as an officer of the Crown, where Crown interests were obviously involved, and his statutory duties under the Ordinance where it is argued he had obligations to do his best for the Banabans. However, such things I think - or, at any rate, sincerely hope - are far above our heads.

2. I finished doing the last of the transcripts last night and this morning received your letter of the 14th February. You must be in fighting trim to spew out such a succession of erudite epistles.

3. Before I answer your letter(s), I would make the following remarks regarding the last transcripts:-

- (a) they are very definitely "E & O E". Time is of the essence in sending this letter to you, so I have had no time to check the "precis";
- (b) I am sorry to have to send you some photocopies of some of the pages in the last lot of transcripts but they subjects which it is virtually impossible to precis briefly, and yet they are subjects about which I think it is important for you to know something - especially the second lot;
- (c) I realize that this (and earlier material I have sent you may weigh you down a bit. I personally am shortly handing over a heavy envelope of material to the UK HC here with the request that it may be sent home by the bag and delivered as soon as possible to await my arrival at the RCS. This should not be difficult since we are to take a week en route.

4. Now to sit down to answer your letters; first, your letter of the 9th February:-

- (1) your paragraph 3(1) - I am having the minutes of our meeting with the Banabans about Kennedy in June, 1946, photocopied, and certified, since that might prove necessary and it is best not to take chances. I now enclose the photocopies;
- (2) your paragraph 3(2) - I have kept and am keeping Lester Gaynor fully informed of our movements. He wants us to ring him (call collect) from Miami (now presumably New Orleans);
- (3) Your paragraph 3(4) - Pearl Binder's separate reprint posted to you yesterday;
- (4) your paragraph 3(5) - I doubt if you will get away with this for if you agree with both, you will continuously contradict yourself! As for the three hour maximum, I think you will be lucky to get away with it;
- (5) your paragraph 4 and enclosure - that will be quite enough snide remarks from you, Maude, about your colleague;
- (6) your paragraphs 5 and 6 - I doubt if this material is worth using;
- (7) your paragraph 7 - the VC and Mowbray are still battling away about trusteeship, etc. I think my earlier point is still valid - i.e. what is it from a legal aspect?

- (8) your paragraph 8(8) - distribution of copies of the Statement of Intentions - we must agree on what we are going to say. My feeling is that we did hand out some copies;
- (9) your paragraph 8(17) and (30) - noted and my notes amended accordingly; and,
- (10) your paragraph 10 - the Banaban Funds Ordinance. I have checked again with the Fiji file. Eric Bevington started the ball rolling with a minute to Vaughan (AG) to frame a Bill. Vaughan did so and returned file to Eric. I noted on 22.4.48, that you were due on the "Matua" and to b.u. then I then minuted -
"RC, GEIC, (Mr. Maude), I should like to discuss this draft Bill with you after you have perused it. Will you please telephone me. P.D.M. 29.4.48."
I later noted (10.5.48.) "Spoken with AG. Definitions to be excluded but preamble altered. Maude agrees". So you may have been at the discussion with AG, or not; but you saw the Bill and agreed with its provisions subject to my last note;
- (11) your paragraph 11(a) - it would not be possible to obtain proper advice on this locally, and we shall have to wait till London;
- (12) your paragraph 11(b) - I have looked through all the Gazettes (bound volumes) between 1940 and 1969 (which is the latest we have) and- believe it or not Ordinance No. 3 of 1940 has never been amended, and no Island Land Code (including that for Banaba) has ever been proclaimed by the HC as required by the Ordinance; and,
- (13) your paragraph (unnumbered, antepenultimate!) - I should have given you my telephone number - Suva 383514 (home) Suva 22113 (WP Archives). I am sorry I did not have the benefit of your advice.

5. Now for your letter of the 14th February (I can scarcely keep up with this torrential inflow! (Letter's paragraphs unnumbered again)!

- (a) paragraph 1 - enough of this skiting. Maude,
(b) paragraph 2 - the attached are likely to be the last lot of precis sent to you, but I will watch the next lot - probably the last before I leave;
(c) paragraphs 3 - 5 - no, I think the following explanation is more likely. I met Tofinga in the street some weeks ago, and he said he was off to London on the case the following day. So I jocularly made some remark to the effect that I might turn up one of these days to see that he could translate words like "Kairoroa" properly. He may well have taken this to mean that I was going and informed the plaintiffs accordingly. Vinelott never mentioned, or even hinted, that our appearance was to be a surprise. Luckily, after outlining my feelings about Rotan to Macdonald at some length, all I said was that "I had even been approached by 'the other side'" but I did not elaborate and he did not pursue the point. But I wish I had known of Vinelott's views;
- (d) your paragraphs 6 and 7 - I think you should explain this to Vinelott in London;

- (e) your paragraph 8 - tickets - the AG UKHC here has sent a succession of telegrams to Sands but says he can get no reply. British Airways cannot of course issue my ticket until they know (presumably from British Airways in Canberra) just what all the various flight numbers are and on what days); also hotel reservations, etc. I wish you could get some decisive action on this either thru' Sands or British Airways Canberra. I will go and see the latter this afternoon and try and stir them up. Bag - okay, I will get it here. Insurance - I have done this for myself here. Hotels - I note that you are booking for me too - good;
- (f) your paragraph 9 - good; I will go and pawn my tropical clothes;
- (g) your paragraph 10 - I quite agree. But I have just compiled a letter to Ing giving him the hours I have spent on transcripts, "position papers", discussions with UKHC, etc. and asked that I should be compensated as he said in a letter to you (I think in November) that we certainly must not be out of pocket. I think they will be reasonable. Take it up when you get home - before we give evidence!; and,
- (h) your paragraph 11 - I have got you a rather inferior photocopy of the Order in Council of 27.1.16. The trouble about the one of 1900 is that there was no WPHC Gazette then and the files of those years are in a shocking state. But to revert to the 1916 Order. It will not help you per se - repeat per se. But I have sent you a copy of the earlier Proclamation which made all the other G&E Islands into a Colony, because sections of that which I have marked do meet your point, and the provisions must surely apply to Ocean Island when it was incorporated in the Colony by the 1919 Proclamation.
- Reverting to the 1900 Proclamation - was there one? All I can find at present is a Proclamation by the HC (O'Brien) annexing Ocean Island at the instance of the SS. I realize that that is not an Order in Council and will search further but must now get this letter, etc. away.

See you on the 29th - if I can get the ticket - Love to Honor,



*Up to date
of etc in duplicate
attached.*

Dear Harry

G.P.O. Box 1404,
Suva, Fiji.

Sunday, 8th February, 1976.

For quite a few days past, my hands have been overflowing with the preparation of what I might call "position papers" for you; with coping with telegrams from Davies, Brown & Co, telephone conversations with John Macdonald in London and you and Honor in Canberra; with arranging details concerning my insurance for the visit to the UK; for acquiring a new servant and "breaking her in" - since the burglary; and so on and so forth. Nevertheless, I have in between whiles been able to glance at some of the transcripts, the pile of which is now mounting somewhat rapidly.

2. I see from Ing's letter to you of the 19th January, that he has sent you the transcript for the 14th January (I only received it two days ago!). And, apart from the particular pages to which Ing has drawn your attention, the whole of the transcript will, if you can manage to - at least - skim through it, I think make clear to you how appallingly difficult it would be for me to attempt much of a summary of each transcript.

3. As I read the first two or three transcripts (fortunately these are sensibly numbered in series), to try and find out what they are about, I note two or three main points:-

- (a) the whole exercise so far appears to be what might be termed "presentation of documents" (I believe "production of documents" is the correct term) on which the plaintiffs propose to rely to prove their case;
- (b) as, however, usually Mowbray (plaintiffs' counsel) merely reads a few lines from each document, though stating who wrote it, and to whom, it is appallingly difficult I find to understand just what brick in the edifice, so to speak, each document is intended to be;
- (c) all one can do therefore is to follow the gist of what Mowbray says about the documents he is producing and try and forecast just what points he is trying to make, with a view to proving them later on; and,
- (d) finally, there are mysterious reference to "7B" and "7C" documents - see, for example, page 3G of transcript No. 8 of the 15th January, which Ing sent to you. My interpretation - but I feel pretty unsure about it - is that these numbers refer to groups of documents designed to deal with "trusteeship" and "ownership of phosphates". I fear that is the best guess I can make.

4. On the foregoing basis, I now attempt to record hereunder just what each transcript is about. In this connexion, I am sending herewith transcript No. 5, (which illustrates (b) and (c) above, though No. 8 already sent you may do that too.

5. Transcript No. 5 (enclosed) deals with the following:-

- (a) ownership of, and rights to, the phosphate deposits, as shown by documents produced or presented by Mowbray - from SS, HC, RC, BPS;
- (b) there is discussion as to ownership of surface rights and sub-surface rights, and the power of disposition of owners;
- (c) Mowbray argues that there was individual ownership of both the surface land and the minerals thereunder;
- (d) he cites the Phosphate & Trees Deeds as proof of (c);
- (e) it is agreed by both Mowbray and Vinelott (pages 13-16) that Ocean Island became a Colony by settlement from 2nd October, 1900, when the flag was hoisted coupled with the grant of the licence; and,
- (f) the UK Government was the trustee of the 1913 royalties, argues Mowbray (page 20F & H).

6. I think the point concerning (f) is that - if they are correct, then, in absence of Banaban customary land law or custom, UK legislation would apply; if there was Banaban customary land law or custom, then UK law would apply insofar as Banaban customary land law or custom did not apply on any particular point.

7. May I add this comment? It would seem from the brief pieces of correspondence cited by Mowbray that all the writers mentioned in paragraph 5(a) wrote in the sense that the Banabans individually owned "the land" in each case, from which the obvious deduction is, as Mowbray insists, that each Banaban owns the surface land, and the minerals beneath. But surely that was an unwarranted assumption of the part of each writer? None of them I venture to suggest made any enquiry whatever as to whether there was any Banaban custom or customary law on the subject - hence their ignorance and the way they wrote, and the interpretation (by Mowbray) of what they wrote. So the vital question that I assume you will be asked was whether there was before the coming of the Europeans a Banaban customary law or custom as to ownership and disposal of land. Once you have given a convincing answer to that question, it seems to me that it is then up to Megarry to decide, after hearing argument from both sides probably, whether such custom or customary law applied; if so to what extent; whether it was affected by English law; and so on. But you would, I assume, be "out of it" at that stage.

8. And so on to Transcript No. 6; there are quite a number of points in these 29 pages and, of course, repetition as documents are produced. I have insufficient time to coordinate such points, and simply record them below as they arose, thus:-

- (a) plaintiffs concede two payments made by BPC may be set off against claim;
- (b) plaintiffs' claim is of two elements (1) additional sum that would have been obtained if phosphate had been exported at 'world market prices', plus (2) some part of sum paid to GEIC by BPC in taxation;
- (c) in several places, the argument is repeated that P&T deeds mean that surface land and minerals beneath each piece were individually owned; Crown recognized this position;
- (d) Dickson referred to title of every native to every piece of land and he and Ellis must have assumed phosphate under each piece. But Megarry said that did not follow.
"Of course the company was after the phosphate, but if the natives simply had a title to the surface of the land and no more, the company could not get the phosphate underneath it without doing a deal with the landowner of the surface rights, but would they be recognizing a right in the landowner to ownership of the minerals beneath.

Mowbray - They are recognizing some title.

Megarry - They are recognizing that the individual landowners have got an individual title to something, but not necessarily the phosphate underneath";

- (e) this letter is in the particulars of both 7B and 7C documents, that is, particulars of documents helping to establish a trust of the 1913 royalty, and helping to establish that the trust was approved by HMG;
- (f) "on that reference (in a letter) to the right of the native owner to demand his own price for the land, we say that includes the phosphates under the land and indicates an assumption - perhaps no more than an assumption - in the Colonial Office that the natives owned the phosphate";
- (g) meeting of Dickson & Ellis with Banabans - many references to selling land with its minerals by the landowner, and sales of loose phosphate. But no Banabans expostulated that minerals were owned by Banaban community in accordance with their custom or customary law; therefore argued that minerals were owned by individuals;
- (h) Megarry on trusts - if ex gratia payment made to trustee X as a trustee, he holds what he receives as trustee for the beneficiaries. He cannot be blamed later for not getting more than that sum; there is no obligation on him to obtain more as Mowbray argues, either then or on later occasions e.g. 1931 and 1947;
- (i) there are numerous references to correspondence designed to show that all control and decisions in these matters were made in London by SS;

- (j) in re the correspondence concerning the licence fee, and the argument of the SS that, the licence having been granted, the fee cannot be now raised, Megarry comments:-
"the natives made a shockingly bad bargain but of course that, unlike the licence is not a perfectly general matter and merely relates to the land the company has already got, so there is nothing to stop the natives from making a much better bargain for any further land".
"But the C.O. do not seem to be recognizing here that there is any duty on them to see that the natives do get a better deal for further land";
- (k) P&T deeds. Mowbray argues that they were documents effecting a sale, "and not only products of the land, but also in the circumstances a considerable proportion, and they were sold by individual owners, not just the surface, but a considerable portion of the land down to a considerable depth...There were 300 of them; they were by individual natives; they are contrary to any custom that the native did not own the phosphate under his land and in fact they establish a contrary custom";
- (l) paragraph 6 of Dickson's confidential despatch of 23/10/10 contains "further indications of natives seem(ing) to be willing to sell the phosphate under their land in support of our contention that there is no contrary native custom, indeed there is a native custom of ownership of the phosphate under the landowner's land";
- (m) Megarry notes that discussions were extensively held between the SS and the BPC but that the Banabans were not consulted; and,
- (n) arising out of RC's confidential despatch to HC of 11/8/11, Mowbray refers to a statement in paragraph 9 that "no common land exists... It may well be that what was in the RC's mind was that there was no common land which was owned top to bottom by the community as a whole but still one would have thought if there had been communal ownership of phosphates he would have mentioned it there. Also going to individual ownership of the phosphates if (sic) paragraph 15(b) - 'That the company should never refuse to purchase phosphate ~~rock~~ rock from the natives, obtained from their own ground'. He is recognizing there the right of the individual to take phosphate from his own ground and sell to the company".
9. Now for Transcript No. 7, dated 13/1/76; again there is repetition - to prove individual ownership of phosphate; to show that SS controlled all decisions; and to show that the UK Government was a trustee. However:-
- (a) Mowbray argues that in certain correspondence the Crown declares and admits itself to be a trustee;
- (b) Mowbray argues that "these sales of loose phosphate as establishing a native custom that the landowner owns the phosphates under his land and this is recognition at a high level by the Crown (in a despatch) of that custom";
- (c) Mowbray cites correspondence regarding the establishment of the trust and HMG's control of it;
- (d) in telegram HE to SS, former states "as individual ownership is recognized, do not think the natives will agree to royalty being divided between the whole community". Mowbray continues "That must have been individual ownership of the phosphate because the royalty is being paid for the phosphate...";
- (e) Mowbray "It occurred to us last night that Your Lordship's questions about the 1913 trust yesterday might partly be answered in this way; The Crown denies there was a trust....This is an issue which Your Lordship has to decide. The Crown say that any obligation was governmental";
- (f) Mowbray, in referring to CO minutes, states:"Of course the 1/- there is the sum of the Crown's 6d and the Banaban royalty...there is a reference here to "a 1/- royalty" and that indicates that the Crown thought that the two royalties were very much alike at least, the 6d Crown royalty and the 6d Banaban royalty were very much alike

(g) Megarry "You have used certain letters to indicate a connexion between what was being paid to the Government and what was being paid to the Banabans and here what is being paid to the Government they call a royalty and what is being paid to the Banabans they call a payment".

Mowbray "We say they were both royalties".

Megarry "The true nature of a royalty, I thought you said was that was something paid to the owner for rights in connection with his land".

Mowbray "No, it does not matter what you call it. Commercially..."

Megarry "It is something that the company has got to pay and that is it".

.....

Megarry "It does not matter how the company looks at it, it depends on usage by the Government".

10. Mercifully, as you have been sent Transcript No. 8, I can pass over it in silence in this letter.

11. Now for Transcript No. 9, much of which relates to the accumulation and use of the Banaban Fund; as for details:-

(a) Mowbray "This is a memorandum by Mr. Mahaffy about the nature of land tenure in the Protectorate. It is replaced in the end by Mr. Maude's findings on that, but we would like to show Your Lordship this preliminary discussion as well. It is dated 19/1/15".

Megarry "Has this got anything to do with Ocean Island?"

Mowbray "...That is the Gilbert Islands, and if that is a reference to Ocean Island it is the first suggestion of communal ownership of land (paragraph 2), and even there there is no suggestion that there is a difference between the surface, or whatever it is, and the minerals, or whether "communal" there means family. It is the only mention of "communal" in that memorandum and perhaps it means family";

(b) Mowbray is constantly seeking to prove that the Crown Agents, who held the Banaban Fund, were subject entirely to the instructions and directions of the SS;

(c) the Secretary to the SS expresses in a letter to Lord Balfour that it is the view of the CO that they are the "protectors of the natives' interests". On this, Megarry "You can protect someone's interests without being a trustee. On the other hand a trustee is someone who does naturally protect the interests of the beneficiaries";

(d) on a discussion as to the utilization of Banaban funds, Megarry - "These are distinguished public servants writing these minutes and obviously had no thought that in many years to come the question of the nature of the trust would have to be looked at and the Procrustean bed of trusts applied to their commonsense approach to what was fair and right and proper to do".

Mowbray "No, that must be so. And of course if one gets a trust of which the Government - to use an inaccurate phrase - was trustee, it being our Government, the question could hardly ever arise whether it was a trust or whether it was something else because they would carry it out if it was a Governmental obligation and it makes no difference to the beneficiaries whether they think it is a trust or not as long as they carry it out. It is only because the question arises incidentally in this action that we have to discover whether it is a trust or whether it is something else".

Megarry "And if it is a trust, what kind of trust, who were the trustees and what are the trusts, whether there were any overriding powers and, if so, which?"

(e) in a despatch RC to HC (no date given but about 1916) it is stated:- "the right to decide (on the use of Banaban funds) would lie solely with the Secretary of State as trustee of the Fund"; and,

- (f) in a further despatch of the RC to HC about the same time, the phrase is used "the Secretary of State for the Colonies as trustee of the Banaban Fund" - and Mowbray states that they rely on this too
12. Now for Transcript No. 10 of 16/1/76 (another 31 pages!); details:-
- (a) HC states that under terms of 1913 agreement, the yearly interest on the Banaban Fund up to £1,000 is paid out, etc. But any excess amount reverts to the capital fund. But cut-off at £1,000 is not mentioned in 1913 agreement, nor to the Banabans;
 - (b) Banaban royalties appear in the Colony balance sheet among the investments - Megarry - "That is being treated as one of the assets of the Colony";
 - (c) Megarry, following up (b), "it is putting the accounting responsibility apparently in the Colony rather than on the SS";
 - (d) Mowbray, after referring to various documents "...that series of communications shows the SS operating the account, the SS authorising the advance, and it helps to show that the Crown in right of the UK was the trustee";
 - (e) Mowbray cites HC "I enclose a copy of a despatch from the RC forwarding a statement of the amount due to the Colony from the Banaban Royalty Trust Account", so there is a recognition that there is a trust".
Megarry "If as a matter of convenience it is called the Banaban Fund or the Banaban account one can well see people may not think it was in the form of a trust, but if you refer to it as the Banaban Trust Fund one would have thought that might entail in people's minds that it was a trust fund and some part of the CO seem to have given some sort of recognition to that, but nobody else seems to have given much thought to any concept of a trust";
 - (f) Mowbray cites letter from Secretary to the HC to Ellis stating - "I take the opportunity of again informing you that the various matters which have been raised in connection with the phosphate commission at interviews with the HC will be referred to the SS for the Colonies for his information and final decision";
 - (g) Mowbray "We rely on those three documents together as showing a recognition by Mr. Churchill that the fund was a private fund of which the Government acted as trustees. So the Government is there defined as a trustee, the Banaban Fund was a trust fund and it was a private fund. That is the opposite of a Governmental fund";
 - (h) on whether payment by the EPC was a royalty or a tax, Megarry says - "You might say it is a royalty because it is not taxation. A tax is normally imposed on people without their consent. On the other hand, if a royalty is being paid by agreement between the Government on the one hand and the payer on the other hand, it may be they would regard that as a royalty because it would not be strictly taxation at all";
 - (i) Mowbray citing a telegram from the SS to HC (no date given, 1924 ?) "So besides typing the whole thing to the SS in all kinds of ways, that telegram is also relevant on the question of Crown recognition of the natives' ownership of the minerals. It is really hard to think that the first paragraph would have been phrased as it is, or the last sentence 'These rights extend to full ownership of land and minerals thereunder', if there was some difference between the ownership of the land and the ownership of the minerals"; and,
 - (j) Megarry "Well, you get in this sort of case two different aspects. There are property rights, on the one hand, and a trustee, even if it is of governmental policy, of course, is none the less a trustee and bound to behave as a trustee should. Secondly, of course, if the trusteeship is of a Governmental nature, then that trustee will have also Governmental functions to perform, and any trustee who has been

"concerned with relatively young beneficiaries coming into relatively large sums of money and not particularly well fitted to handle it knows that there can be very grave disadvantages in giving people in a position of inexperience what they are entitled to in law and in equity. And when you have Governmental responsibility for a relatively obscure island being considered by those exercising Governmental power, then you may well have these two considerations pulling against each other in some respects. There may not have been sufficient awareness on the part of some people as to what were the property rights of those concerned, but certainly there seems to have been a very strong awareness of Governmental duty and the duty of Government to protect those not really experienced of the ways of modern life. You are bound to have that conflict".

Mowbray "And, of course, we say that it was resolved the wrong way in 1931.

Megarry - But you are reading his (HC's personal letter to CO) letter as showing there was, perhaps, an over-emphasis on Government and an under-emphasis on the fiduciary character of their duty.

Mowbray - Yes; not sufficient recognition of property rights, which cannot be taken away just because people would be better without them".

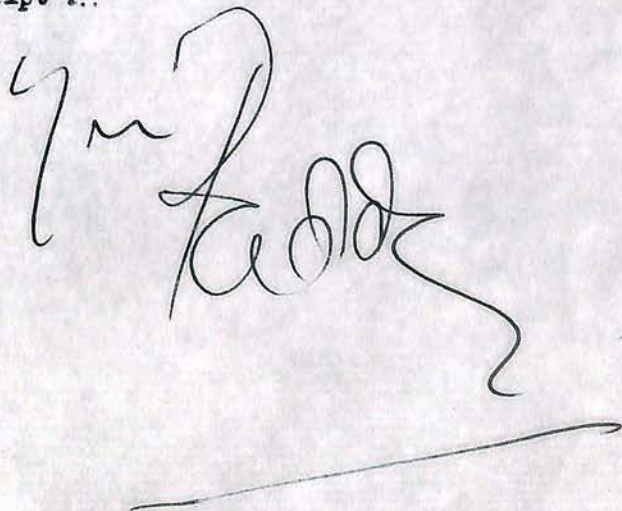
13. Now for Transcript No. 11 of 19/1/76 (another 31 pages!); details:-
- (a) Eliot in a despatch (no date given) suggested that two-thirds of the current royalties should be paid to individual landowners and one third to a trust fund. In this connexion, Megarry said that he supposed that there was some over-riding power of diversion or allocation (of funds) in someone, the Crown in some sort of right somewhere. Mowbray then commented "The unalienability of the land probably was not properly understood by Mr. McClure. Certainly the full nature of the land-holding rules on Ocean Island had not been determined in the way that we now see them, and he may not have understood that land-owners were not free to make any arrangements they liked about what was being treated as the fruits of the land";
 - (b) several instances are cited by Mowbray of the very close cooperation between the CO and BPC - almost a "hand-in-glove relationship";
 - (c) Mowbray refers to a despatch RC to HC (which I have identified as No. 49 of 6/2/25) and John Macdonald asks him to read paragraph 4 concerning communal water-holes. It is thus (but is not helpful):-
"4. The water question is not, at the moment, serious. The cement cistern in Tabwewa village still contains 6,000 gallons. In the other three villages recourse is had to the numerous communal water holes of the island. The water in these caves will hold out for several months more. Several, in fact have not yet been opened up. So far as the Police....". (I think village cisterns were built later in 1925);
 - (d) in several cases, Mowbray is concerned to point out that the BPC is planning increased production, and the installation of new equipment and machinery for that purpose, and that, coupled with the company's profits, indicate that the BPC had no intention of withdrawing if the cost of land, and royalties, were pushed too high;
 - (e) Vinelott draws attention to a BPC memorandum emphasizing the need to maintain the high quality of phosphate exported from Ocean Island and the need to reduce its cost;
 - (f) Mowbray continuously emphasizes throughout the fact that it was HMG who took almost all decisions;
 - (g) Mr. Cowell (of the CO ?) is cited as follows:- "I would lay it down that the SS must regard any comparison with the rates fixed for similar land acquisition in Nauru as entirely fallacious;
 - (h) in a telegram RC to HC during negotiations, Grimble stated "the terms do not however approach the limit of the Commission's capacity to pay without prejudice to itself or its customers";

- (i) discussing acceptance of the "Grimble" offer, Megarry comments:-
"There are at least three possibilities. First of all that they should be entirely free to accept or refuse - no pressure, no fuss or anything. Secondly, that they are legally free to accept or refuse but pressure might be applied to them without invoking eventual compulsion. Thirdly, compulsion... And Governmental pressure, of course, is a particularly real factor, or possible factor, in the case of a relatively primitive community such as this as compared with landowners in England;
 - (j) Mowbray then refers to another despatch from Grimble (neither No. nor date cited, but I have traced it down as Mowbray mentioned that it was something about boundaries and that "the tendency to subdivision is accounted by the custom of making adoptive gifts".
(Note - Will copy that despatch and attach as Appendix to this letter);
14. New for Transcript No. 12 of 20/1/76 (another 28 pages!) details:-
- (a) Mowbray "This is the last, or very nearly the last, of the documents illustrating what I call the up and down process on which we rely to show either that there was only one Government of the Gilbert and Ellice and that was the UK Government, or else to show that the UK Government was making the decisions and so any liability arose in respect of the UK Government";
 - (b) much of this Transcript deals with the 1925 - 31 negotiations, especially the early negotiations being conducted by Grimble. But continuous emphasis is laid on Grimble's awkward position, and the close ties between EPC and Co, and the fact that all decisions were being made by the CO;
 - (c) Mowbray on a memorandum by Gaze (undated) "The RC commenced negotiations with the Banabans in the second half of July...It was evident that the Banabans did not grasp either the full provision made for their present and future needs". etc. (reads to end of paragraph). "We shall be saying that they still lacked proper knowledge and experience of such things in 1947 when they were allowed to negotiate on their own behalf";
 - (d) Mowbray refers to telegram to Governors General of Australia and New Zealand and cites reference therein to "rights extend to full ownership of land and minerals thereunder";
 - (e) Mowbray again citing a telegram from SS to HC, (or an SS minute, it is far from clear, thus, "About paragraph 3 'impression prevails that rights in phosphate deposits should be treated as belonging to individual Banabans claiming surface land rather than to community as a whole. Such a principle has not been followed in the past and cannot be admitted", the SS may have been misled by an earlier reference to the 1913 royalties going to the community as a whole. Your Lordship recalls that was first suggested, not because the individual landowner was not thought to own the phosphate, but because it was thought that he could not be trusted to handle the money. And it was suggested in a context in which the individual 1913 landowners' consent was going to be required to the then proposed sale anyway, and it was contemplated that their consent ~~was~~ ~~the royalties away from themselves~~ would be needed and would be obtained, including their consent to any diversion of the royalties away from themselves to the community as a whole. So the suggestion here that the community owned the phosphates was erroneous. It is as erroneous as the subsequent suggestion to Your Lordship that the Crown owned them. That suggestion has now been abandoned, but it is equally erroneous. The words "cannot be admitted" are, perhaps, significant. The wording of this document was very carefully considered and it may be that someone was thinking to himself "Well, it may be a fact but, anyway, we are not going to admit it";

- (f) on paragraph 4 of the document mentioned in (e), Mowbray says "Your Lordship will see that the first draft of this Ordinance would have put a figure in the Ordinance for the royalty, and if that had been done, and if the arbitrator had been allowed to take account of the value of the phosphates, the whole thing would have come out in the wash because the surface owner would have got the rest of the value. But that is not what happened, the arbitrator was forbidden to have any regard to the value of the phosphates";
- (g) discussing a CO memorandum, Mowbray says "Just looking back at that sentence 'we are the trustees of the natives in this matter', I would not quarrel there with the suggestion that the word 'trustees' is used there in a more general sense than in other places that we have seen. If one speaks of a trust fund one is talking about a trust in the legal sense; if one says "we are trustees of the natives in this matter" in that general way one is not talking about a trust in the legal sense" Megarry "He could not have been using it in the legal sense unless you went back before 1800 or thereabouts, when it would have been possible to hold a native in trust. You cannot be trustees of natives"; and,
- (h) on the negotiations, Megarry has this to say "There are two quite different things, and I am wondering if they are not in danger of being lost sight of at this stage. One is what terms it is reasonable to put forward as an offer to the Banabans. The second is what terms it is reasonable to impose on the Banabans. Every process of bargaining starts with one side asking for more than they really expect to get and the other side offering rather less than they expect to have to pay in the end, and the reasonableness of the offer and the reasonableness of the imposed terms are two quite different things".

15. Transcript No. 13 of 21/1/76 is 28 pages long; it deals almost wholly with the history of the matter of the final stages of the 1925-31 negotiations. It is extraordinarily difficult to follow at all intelligently owing to the fact that only snatches of documents are cited, and seldom any dates. I have come to the conclusion that there are no details in this transcript which I need record.

16. And those are all the transcripts which I have thus far received, though I fear more will be on the way. I hope these notes, which I felt to be about the only way of bringing out some salient points, are of some use to you. I am conscious that the standard of typing leaves much to be desired, but I am so weary that I have not the will to correct the errors, which I think are in any case fairly obvious. But it must be remembered that these eight pages represent in fact a precis of no fewer than 215 pages of "transcript"!!!



G.P.O. Box 1404,
Suva, Fiji.
10th February, 1976.

Mon cher Professeur,

I bati ni kukurei ...for your letter of the 30th January, which I received yesterday afternoon. Anything one sends through officialdom takes years and years. However..... Fortunately, your letter arrived just as I was making up a large envelope full of material for you, having completed one letter at an early hour this morning.

2. I have not time to answer your letter if I am to catch this morning's post, but will do so shortly. I have, however, looked carefully at paragraph 8 of your letter. First, you ask for page 5 of Enclosure (2) to Grimble's despatch No. 175 of 27/5/32, and then in the final sentence you say the whole draft Ordinance was missing from the material I sent you. I don't believe it. You check. Be that as it may; do you require page 5 of Enclosure (2), (which was Grimble's Bill) or the whole Bill. ? So I am playing it safe and sending you the whole Bill.

3. I have now heard that we leave here on 29th February and are to appear as the last two witnesses for the Crown. Never a dull moment is there ? Don't be worried over too many small things, especially finance; I am sure that Ing will prove to be very helpful if things are explained to him when we reach London. Get well quick, with more draught Guinness!

In great haste,

Professeur H.E. Maude, OBE.

J. M. Mac

Account for payment
of photocopies will follow.

Non Vieux

G.P.O. Box 1404,
Suva, Fiji.

10th February, 1976.

~~Edmund~~ Hereunder you will find my letter (and enclosure) of the 8th ~~May~~, which attempts a kind of precis of 215 pages of the transcripts which have so far been sent to me (save for No. 8, which Ing sent to you direct).

2. But the matter is not quite as formidable as it might seem. I can now, having read and made notes on the transcripts, do what I could not have attempted before - namely, make a list of the salient points in the transcripts and my summary in my letter of the 8th May. It would probably be sufficient for you simply to cast your optic over the lists below, but, if you feel you can face up to it, it would be a good idea if you could also skim through my earlier letter. So read this letter first and then decide what you will do.


3. I think I can summarize the points which Mowbray has been trying to make in producing documents are as follows (in no particular order):-

1. that each piece of land on Ocean Island is owned individually by a Banaban, i.e. the surface land and the minerals under that piece of surface land;
2. HMG worked in very close touch indeed with the BPC in negotiations, etc.
3. HMG was a trustee - of the 1913 royalties and of the Banaban Fund;
4. such funds were trust funds;
5. in all important matters, and often in matters of detail, HMG made the decisions;
6. that there was only one Government of the GEIC and that was HMG, or else the WK Government was making the decisions and so liabilities which arose are in respect of the UK Government (see paragraph 14(a) of my letter of the 8th May); and,
7. Crown Agents/were also subject to close decision making and directions from HMG.

4. The other following points are also I think worth making:-

- (a) Ocean Island became a Colony by settlement when the flag was hoisted and a licence issued (see paragraph 5(a) of my letter 8th May);
- (b) Crown alleges it is not a trustee and that its obligations were purely governmental; (see paragraph 9(e));
- (c) McClure's alleged ignorance of land matters - see paragraph 13(a);
- (d) "vomunal water holes" - see paragraph 13(e);
- (e) use of the word "trustee" - see paragraph 14(g);
- (f) protection of natives' interests - see paragraph 11(c);
- (g) trusts and governmental obligations - see paragraph 11(d); also paragraph 12(j);
- (h) "pressures" by Megarry; and,
- (i) Banabans being allowed to negotiate alone in 1947 - see paragraph 14(c).

Ao ti ngaia anne;



Professor H.E. Maude, O.B.E.,
Arthur Circle 77,
Forrest,
Canberra, A.C.T. 2603.

P.S. Do you wish me to continue to making these "Precis" of the transcripts and sending them to you, please ?

G.P.O. Box 1404,
Suva, Fiji.

Professor Maude, O.B.E.,
77 Arthur Circle,
Forrest, Canberra.

11th February, 1976.

K. Minions - Ja Pitika -

Herewith are the "precis" of the next week's transcripts. They are coming to you a bit quicker as I am getting more into the way of handling them, and also because they deal with circumstances as I knew them. The next lot will deal with affairs, to a considerable extent, after my time, which will make compiling the "precis" difficult.

2. I hate to tell you that you must/- or anyway skim through - these "precis", but you ought to do so on certain points which really do concern you. All the main lines of the argument - as set out in my letter of the 10th February - are much the same, but there are specific references which affect you; thus, 1(g), (i), (j) and (l); 2(a); certainly 3(a), as well as (b) and (e); 4(k) & (l); 5(c) (this is important in view of my 'position paper' that I sent you - we must challenge this), (e) and (g).

3. Apart from these precis, one thought does occur to me; are the FCO authorities in the places where we are staying, Honolulu, San Francisco, and New Orleans (?) being authorized in advance to meet our hotel expenses there? Otherwise it means we have to carry quite a bit of money with us.

4. Will try and reply to your letter of 30th January shortly.

W. P. Mac