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Chancery Division

Banabans fail except on replanting issue

Tito and Others v Waddell and Others

Tito and Others v Attorney General

Before Sir Robert Megarry, Vice-chancellor

His Lordship, giving judgment in an action brought by Banabans, the inhabitants of Ocean Island, rejected their claims against the Attorney General for disputed royalties for phosphate extracted from the island and for a declaration that the Crown ought to pay one of them or was accountable to him for those payments.

But in another action, against the British Phosphate Commissioners, he held that although they were entitled to a decree of specific performance of an agreement to replant fruit-bearing trees on part of the island, an order for damages would be a proper order to make.

The hearing of the actions started on April 8, 1975, and went on for 206 days, until June 18, 1976. In addition, 15 days his Lordship spent viewing the island. His Lordship took four and a half days to deliver the judgments.

Mr J. R. Macdonald, QC, and Mr C. L. Purle for the Banabans in the first action; Mr R. A. MacCrindle, QC, Mr N. C. H. Browne-Wilkinson, QC, and Mr D. K. Rattee for the British Phosphate Commissioners; Mr J. G. Le Quesne, QC, Mr J. E. Vinelott, QC, Mr P. L. Gibson and Mr D. C. Unwin for the Attorney General.

Mr W. J. Mowbray, QC, Mr J. R. Macdonald, QC, and Mr Purle for the Banabans in the second action; Mr Vinelott, QC, Mr Gibson and Mr Unwin for the Attorney General.

His Lordship said that Ocean Island lay just south of the Equator, in the Western Pacific, and roughly half way between the Hawaiian Islands and Australia. Its nearest neighbour was Nauru, some 160 miles to the west. Both Ocean Island and Nauru were known as phosphate islands because of their high-grade phosphates. In its natural state, the surface of the island consisted of grass, trees and vegetation, growing more or less directly out of alluvial phosphate, with very little of what could be called "top-soil" in any real sense of the word; but there were outcroppings of coral pinnacles of a greyish colour.

When phosphate was discovered on Ocean Island in 1900, there were 500 indigenous inhabitants who called the island Banaba, and were themselves known as Banabans. For 20 years the phosphate was extracted by a British company, first by the Pacific Island Co Ltd and from 1902 by a subsidiary, the Pacific Island Phosphate Co Ltd. Then, in 1920, the British Phosphate Commissioners were constituted by the governments of the United Kingdom, Australia and New Zealand, who had jointly acquired the mining undertakings which the company had built up on Ocean Island and on Nauru. Since 1920 the mining was conducted by the British Phosphate Commission, with one commissioner appointed by each of the three countries. The commissioners, who were never incorporated, held the undertaking in trust for the three governments in the proportion of 42 per cent (United Kingdom) 42 per cent (Australia) and 16 per cent (New Zealand).

The mining of phosphate on Ocean Island was carried on with the Banabans remaining in residence; but the outbreak of the war in 1939, and the occupation of the island by the Japanese in 1942, had curtailed production and brought it to an end. The Japanese transferred most of the Banabans to another island, and when, in 1945, Ocean Island was recovered from the Japanese it had been devastated and was uninhabitable. Though the Banabans' right to return to the island had been carefully preserved, it was plainly impossible for them to go back immediately after the war. Another island, Rabi, had been bought for them in 1942 out of a fund built up out of phosphate royalties; and it was to Rabi that they went.

From any practical point of view there had long been no question of the Banaban community as a whole ever returning to live on Ocean Island. Phosphate had been extracted from about three-quarters of the island, and when the last of the workable phosphate would have gone in another two or three years, little would be left save a desolation of uninhabitable pinnacles surrounded by a run of land bearing such buildings and plant as the commissioners had abandoned on it.

There were two main aspects of the litigation, one physical and the other financial. The first action was principally concerned with the former, the second with the latter. In the first action claims were made by a selection of the Banaban landowners against the commissioners.

The main claim in the first action was for specific performance of contractual obligations to replant certain land with trees and shrubs, or alternatively, for damages. The Attorney General was concerned only in a minor degree. The contention was that the United Kingdom government, acting by the governor of the Gilbert and Ellice Islands colony, was bound to prescribe the trees and shrubs that were to be planted.

The second action was very different. It was brought by Mr Rotan Tito, who claimed to be the owner of much land on Ocean Island, and by the council of leaders, an incorporated body which was in effect the governing body of the Banabans. The defendant was the Attorney General. There were three main heads of claim. The first two related to the Crown standing in a fiduciary position towards the Banabans in connexion with two transactions, one in 1931 and the other in 1947. The 1931 transaction was, in essence, the compulsory acquisition of 150 acres, whereas the 1947 transaction was a voluntary agreement. For the transaction, the core of the Banabans' claim was that the royalty payable to them under a mining lease granted to the commissioners by the resident commissioner of the Gilbert and Ellice Islands as part of a compulsory process, was fixed under the relevant clause by an officer of the Crown, the resident commissioner, in a transaction in which the mining rights were being conferred by the Crown upon the Crown itself, in the shape of the British Phosphate Commission, so that there was a conflict of duty and interest. The royalty was fixed at less than a proper figure, the Banabans claimed, and so the Crown must pay compensation to make up the amount in fact paid by way of royalties to the amount that ought to have been paid. An alternative basis for the claim was that the mining lease was a lease by a fiduciary to itself, which produced the same consequences.

The 1947 transaction consisted of an agreement made by the Banaban landowners with the commissioners for the mining of 291 and 380 acres in return for certain lump sums and a royalty. No direct element of compulsion entered into that, though the compulsory powers still existed and had not been forgotten; but the claim was that the Crown stood in a fiduciary position towards the Banabans, and so the agreement was an agreement between a fiduciary acting by its creatures, the commissioners and the beneficiaries of the fiduciary. The Crown as such fiduciary was therefore, it was claimed, under a duty to make full disclosure to the Banaban landowners, and to see either that they received a full commercial price or that they had competent independent advice.

The Crown failed to discharge that duty, it was said, by failing to reveal that the phosphate was being sold at less than its true value to Australian and New Zealand concerns for manufacture into super phosphates. Substantial benefits were thus being conferred on Australian and New Zealand farmers instead of higher royalties being paid to the Banabans.

Furthermore there had been no disclosure of what sums were being paid by the commissioners to the Gilbert and Ellice Islands in respect of phosphate exports, in lieu of taxation or otherwise; and nothing was done to ensure that the Banabans had proper advice. The royalty payable under the 1947 agreement was far below the proper amount, and so the Banabans were entitled to compensation against the Crown.

The broad constitutional position was that under the Pacific Islands Protection Act, 1875, the British Settlements Act, 1887, the Foreign Jurisdiction Act, 1890, and the Pacific Order in Council, 1893, a high commissioner for the Western Pacific was established, together with a system of courts and other institutions, and provisions as to the law applicable. Article 108 of the Order in Council empowered the high commissioner to make, alter and revoke Queen's regulations for various purposes.

In 1892 the islands in the Gilbert and Ellice groups were proclaimed a British protectorate. On October 2, 1900, after some correspondence between the Pacific Island Co Ltd and the Colonial Office in London, a licence in the name of Queen Victoria and extended by the Secretary of State for the Colonies, was granted to the company, which had applied for a licence on January 4, 1900. The licence granted the company the exclusive rights to occupy Ocean Island for 21 years from January 1, 1901, for the purpose of removing fertilizing substances, and to display the British flag in token of the occupation. Thus jurisdiction over Ocean Island was obtained peacefully and without any overt act of conquest or coercion. It became part of the Crown's dominion by virtue of the occupation of the island by the company, and the hoisting of the flag on May 5, 1900, complied with the Crown's licence to the company, and it thereupon became a British settlement under the Foreign Settlements Act. On any footing Ocean Island was part of the Gilbert and Ellice Islands colony from 1916 onwards.

As a colony by settlement, Ocean Island received English law, subject to any relevant customary law; and that was not affected when, in 1916, Ocean Island became a part of the Gilbert and Ellice Islands, a colony by coercion. Article 20 of the Pacific Islands Order in Council, 1893, provided that, subject to the other provisions of the order, civil and criminal jurisdiction [illegible] under the order, "so far as circumstances admit", was to be exercised "upon the principles and in conformity with the substance of the law for the time being in force in and for England . . .". That language, it was contended, was wide enough to let in any recognized Banaban law; and that was not seriously disputed.

Royalties conferred by various statutes were necessarily those imposed in respect of minerals which had been extracted under mining rights acquired under the compulsory process and those payable under the agreements whereunder the mining rights were acquired. The Banabans' claim to declarations in respect of "the disputed royalties" and the "disputed payments in the nature of royalties" failed and would be dismissed.

The use of a phrase such as "in trust for", even in a formal document such as a royal warrant, did not necessarily create a trust enforceable by the courts. The term "trust" was one which could properly be used to describe not only relationships which were enforceable by the courts in their equitable jurisdiction, but also other relationships such as the discharge, under the jurisdiction of the Crown, of the duties or functions belonging to the prerogative and the authority of the Crown. Trusts of the former kind, so familiar in Chancery, were described by Lord Selborne in *Kinloch v Secretary of State for India Council* ((1882) 7 App Cas 619) as being "trusts in the [illegible] sense"; trusts of the latter kind, so unfamiliar in the division, he called "trusts in the higher sense".

It was clear that the determination whether an instrument had created an enforceable trust or a trust in the higher sense was a matter of construing, looking at the whole instrument in question, its nature and effect, and its context. The language used [illegible] fairly towards an obligation of government—and not an enforceable trust, and the government was the government of the Gilbert and Ellice Islands colony.

[illegible]

If any fiduciary relationship existed, it must be founded on a trust. The 1931 transaction did not put the Crown, or any officer of the Cro[redacted] into any fiduciary position [redacted] relation to the Banabans or any of them.

Furthermore, in their context, the provisions of the relevant statute, despite the use of the words "in trust", were far more consonant with a governmental obligation than a trust or fiduciary duty enforceable in the courts. The imposition of a statutory duty to perform certain functions, or the assumption of such a duty, could not, as a general rule, impose fiduciary obligation or even be presumed to impose any. Accordingly, the 1931 transaction did not place the Crown in any fiduciary relationship towards the Banabans, and the indivisibility of the Crown did not mean that an obligation entered into by the government of a colony or other dependent territory could be said to be an obligation of the United Kingdom government, mainly because it was entered into in the name of the Crown. The 1947 transaction provided even less support for the existence of an enforceable trust.

In the result, therefore, the Banabans' claim in the second action failed and would be dismissed.

His Lordship then gave judgment in the first action. He considered first the only claim in respect of something other than mining phosphate, namely, the claim of damages for the alleged wrongful removal of sand and the destruction of the ground.

In their defence the commissioners relied on the sand agreement and on limitation. The sand agreement, made in 1948, stated that, in return for certain specified payments, the Banabans raised no objection "to the removal of sand and shingle from the beach of Ocean Island". No question had arisen on the location of the beach, and it had not been suggested that the sand agreement was not binding. But there was considerable debate on the meaning of "beach", a word which was not a term of art and on which no authorities were cited.

In his Lordship's judgment, all that lay to the landward of high-water mark and was in apparent continuity with the beach at high-water mark would normally form part of the beach. Discontinuity might be shown in a variety of ways: in the way of sand dunes, or a cliff, shrubbery, trees, promenade or roadway, or a dozen other natural or artificial structures or entities which would indicate where one left the beach for something else. But until one reached some such indication the beach continued. From the evidence put before the court and from the view of Ocean Island his Lordship concluded that what could properly be called the beach at one point ran inland until it reached the earth road running in a north-westerly direction, except in so far as any area was occupied by the cemetery. Thus the claim for the wrongful removal of sand and destruction of the cemetery failed in its entirety.

His Lordship next considered the replanting obligations, and the Banabans' claim for their specific performance or damages in lieu thereof.

His Lordship made it clear that there was not, and never had been, any claim whatever that there was any legal obligation to replant the whole of the island. At its highest, the claim was that at most one-sixth of the island should be replanted.

Clause 12 of an agreement made in 1913 provided that, in the events which happened, "the company shall comply with the following conditions . . . namely: —(a) That they shall return all worked out land to the original owners, and that they shall replant much land—whenever possible—with coconuts and other food-bearing trees, both in the land already worked out and in those to be worked out".

Deeds were entered into between the company and the individual landowners over a period covering 1913 to 1927. The terms of the last clause of each of the deeds were identical and said that the end of the term, being December 31, 1999, or whenever the land ceased to be used by the company, it should replant the land as nearly as possible to the extent to which it was planted at the date of the commencement of the company's operations with such indigenous trees and shrubs as should be prescribed by the resident commissioner for the time being in Ocean Island and the lands should revert to the landowner or his heirs.

Under both the agreement and the deeds it was the company that entered into the transaction and the claim had been made against the three persons who were British Phosphate commissioners when the writ was issued. That raised the question whether the burden of the company's obligation passed to the commissioners.

When the first commissioners took over from the company the contemporary documents and circumstances made it plain that the commissioners were to take over not only the rights but also the liabilities. When thereafter a new commissioner was appointed, there were no documents to make that plain, but the circumstances were to the same effect. It was an absurd thought that a new commissioner was intended to take over the assets but not the liabilities which the outgoing commissioner, stripped of the assets, was to bear for the rest of his life, and his estate after his death. There was no question of any new commissioner having intended not, to accept the benefits but to commit himself to responsibilities instead.

Where there was a terminal liability, such as the obligation of replanting as in the present case, it would be right that the burden should ultimately be borne by the latest in the chain of persons liable at the time when the burden accrued. On that footing, the two defendant commissioners, being now in office, were properly subject to the whole of the liability.

Were the Banabans entitled to enforce the obligations? There was no reason why the benefit of the replanting obligations should not run with the land both at law and in equity. The obligations could hardly more clearly touch and concern the land, and the benefit of them must have been intended to run with the land and be enforceable by the owner for the time being. The present owners of the land were therefore the persons entitled to enforce the obligations.

One difficulty mentioned was that there had been no prescription of trees and shrubs by the resident commissioner. The absence of prescription was no bar to the Banabans' success. If specific performance was decreed, the court would, in the continued absence of any proper prescribing, make suitable provision for the trees and shrubs to be specified. If damages were awarded instead, probably no such specifying would be needed.

The complexities of specific performance were weighty and discouraging, but by themselves they did not suffice to induce the court to refuse specific performance. At the same time there were considerable advantages in making an award of damages.

In view of the decision in *Wilson v Northampton & Banbury Junction Railway Co* ((1874) 9 Ch App 279) damages would be not only a perfectly adequate remedy but also far more suitable. If the owners of the plots wanted to spend the money in having them replanted, then of course they could do so, but that expenditure would be of their own volition and not by order of the court. Thus, leaving aside the cases of part ownership, although the court could decree specific performance in the exercise of a proper judicial discretion, it ought not to do so.

In the absence of any clear authority on the matter, it should be considered as a matter of principle, and the same rules should be applied for the basis of damages as were applied to the breach of a contract to do work on the land of another, whether to build, repair, replant or anything else.

On the question of quantum of damages, his Lordship thought a further hearing would be necessary, unless the parties agree.

Solicitors: Davies, Brown & Co; Freshfields; Treasury Solicitor.