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1971 R. No. 3670

IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

GROUP B.

Royal Courts of Justice,

Wednesday, 14th January, 1976.

Before:

THE VICE-CHANCELLOR

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ROTAN TITO

and

THE COUNCIL OF ELDERS

v.

HER MAJESTY'S ATTORNEY GENERAL

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(Transcript of the Shorthand Notes of The Association of Official Shorthandwriters Limited, Room 392, Royal Courts of Justice and 2, New Square, Lincoln's Inn, London, W.C.2.)

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MR. W.J. MOWBRAY, Q.C., MR. J.R. MACDONALD, MR. L.A. TUCKER and MR. C.L. PURLE (instructed by Messrs. Davies, Brown & Co.) appeared on behalf of the Plaintiffs.

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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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MR. MOWBRAY: My Lord, we had got to page 242 of Bundle 8.

A THE VICE-CHANCELLOR: That was a 7B and 7C document.

MR. MOWBRAY: Yes. I think I had read it. There was a reference in paragraph 4 to the royalty fund being devoted solely to the use and benefit of the natives of Ocean Island.

B Now would your Lordship turn to page 269. That is the reply from the Colonial Office. (Reads first paragraph). There is something about exchanges in paragraph 2 and there is some more in paragraph 3. Would your Lordship begin in that para. at the words: "He is prepared" etc. (reading remainder of paragraph.)

C I turn now to page 291, unless my friend wishes to read anything in between. This is from the company to the Colonial Office and is in reply to that letter. It is a 7B and 7C document. It is mostly about the exchange of land which was the point they were in contention about at that stage. I can take your Lordship straight to paragraph 9 on page 292. (Reads paragraph). Your Lordship observes the expression "The sole use and benefit of the natives of Ocean Island". We would say those words without the word "trust" would be enough to create a trust. If someone pays some money to someone else expressly for the sole use and benefit of third parties, that is enough to create a trust. We would also make the comment which we have made once or twice before that the emphasis introduced by the use of the word "sole" indicates that it was important to the company that the natives should have this money.

D THE VICE-CHANCELLOR: Why does the sole use and benefit necessarily carry the implication of a trust? Why should it not perhaps have been paid on some agency basis?

E MR. MOWBRAY: It might have been held as an agent, but an agent who holds his principal's money holds it on trust.

THE VICE-CHANCELLOR: On a fiduciary basis somehow, at any rate.

MR. MOWBRAY: Yes.

F THE VICE-CHANCELLOR: At any rate, it makes it perfectly plain who was to be the beneficial owner.

MR. MOWBRAY: Yes.

THE VICE-CHANCELLOR: The natives of Ocean Island.

G MR. MOWBRAY: Yes. Later in this bundle there are other letters about exchanges of land. That is something which I think your Lordship need not be concerned with in this action. You know about it as a matter of background anyway. We can therefore turn to bundle 9. The exchanges only come in in this way, that at one stage there was a proposal to pay for some of the land included in the proposed exchange out of the trust fund and it comes in in that way, but your Lordship does not need to be au fait with all the details of the exchange.

H In bundle 9 I first turn to page 28, unless my friend wants anything earlier. This is a 7B document and there is a little reference to the ownership of the phosphate, though it is admittedly only in a letter from the company. (Reads paragraph 3 on page 28). That is the reference to ownership, and of course it is open to the comment that at any rate they will insert this. (Reads paragraphs 4 and 5 of letter). We just refer to the correspondence which has taken place between the Colonial Office and the Company as showing



where the agreement was being made. That is why it is a 7C document, I think, and it is just a part of the process of negotiation between the two.

A We can now go to page 50 which is a letter from the Colonial Office to the Company dated 14th March, 1913. It is a 7B and 7C document. It is also one of the letters referred to in paragraph 3 of the Statement of Claim. The Statement of Claim sets up an exchange of letters as constituting a preliminary agreement, not merely negotiations for an agreement, between the Government and the Company, and this is one of them. I had better read it all. (Reads down to the words in paragraph 3) "be confined to three areas as follows". I need not read (a), (b) and (c). I can go to paragraph (2) on page 51. (Reads paragraph). Pausing there for a moment, there is reference there to individual owners' consent being required. There is nothing about communal consent being required. Communal consent would have been required if the phosphates were communally owned. (Reads paragraph (3).) That suggestion was subsequently dropped. (Reads paragraph (4) and (5).) I pause there again and make two comments. The royalties are to be devoted to the general benefit of the natives, not to individual landowners. That, as we say, was subsequently altered. There is also a reference to an additional royalty that rather put the Crown royalty in the same category as this royalty, which helps a little with the construction of the ordinance. (Reads paragraphs (6) and (7).) That is reverting when the work was over. I need not read (8) or (9). Paragraph (10) is about uniform prices for goods at the stores and (11) is about water. (Reads paragraph 4).

D I can turn now to page 65 where there is a letter from the Company to the Colonial Office. This is the reply and is a 7C document. It says: "With reference to your letter" etc. (reading to the words) "on the 27th inst." There was a direct conversation between the Company and the Colonial Office. "I am instructed to inform you" etc. (reading to the words at the end of the paragraph) "a fortnight's time." Then follows some narrative which I do not need to read. Paragraph 2 is something about the area becoming worked out. In paragraph 5 there is something about exchanges. In paragraph 6 there is reference to the form of contract, and in paragraph 7 there is something about P & TD's. Paragraph 8 is something about not removing trees before it is necessary. (Reads paragraph 9). We refer to that on the question of United Kingdom control. That is the way the company thought matters were going to be handled on the outside.

F I can now go to page 85. I should read the telegram at the top from the High Commissioner to the Secretary of State, which is a 7C document. It was received on the 3rd April, 1913. (Reads telegram). The reply to that comes later.

G The letter on that page is a 7B and a 7C document. It is from the Company to the Colonial Office. It is from the Secretary of the Company or is signed by the Secretary of the Company and it starts by "Referring to our conversation with Sir Hartmann Just this morning". So there was another conversation. It goes on: "I am desired by my directors" etc. (reading to the words) "Ocean Island phosphate lands." Then there was something about what they said to Sir Hartmann in the morning. I can go straight to paragraph 3. (Reads paragraph 3). Pausing there, that suggestion was dropped, but it looks as though he is speaking of the royalty fund and he is saying that should just fall into the royalty fund. He speaks of "the fund". (Reads paragraph 4). So we refer to that last part as a request, at any rate, that instructions should be given to the High Commissioner.

H The next document is a cable which is a 7C document, and it is the reply to the High Commissioner's inquiry about going to Ocean Island that your Lordship has recently read. (Reads telegram.) So it is obvious that Mr. Harcourt is going to be giving instructions about the settlement.



A I can now turn to page 96. This is also relevant on the question of United Kingdom control, although it is not in our particulars. It is from the Colonial Office to the Company. (Reads to the words in paragraph 3) "Captain Quayle Dickson, who has now arrived in England from Ocean Island" - so he got there in the end! - "states that he is unaware" etc. (reading to the end of the letter). That is just another letter showing that the Colonial Office was in charge.

B I can now take your Lordship to page 108. This is from the Under-Secretary of State to the Company. It is a 7C document and it is one of the letters referred to in paragraph 3 of the Statement of Claim. (Reads letter).

I can now take your Lordship to page 126, which is the reply to that. This is also in paragraph 3 of the Statement of Claim and it sets out the terms of the arrangement. Paragraph 3 says: "The Board have carefully considered" etc. (reading to the words) "are as follows", and then they set them out as amended. I do not think I need read them.

C Paragraph 4 says: "In the next preceding paragraph, subsection 2, no time limit has been inserted for the exchange of the (about) 47 acres of land outside the delimited area" and he goes on to deal with that point, and I can go to paragraph 5. (Reads paragraphs 5 and 6).

D He replies on the same page. (Reads paragraph 2 of letter of 30th April, 1913.) They put no time limit in, but he had given them an extra two years. (Reads paragraph 3 of letter).

May I ask your Lordship now to turn to page 143, which is a 7C document because it concludes the agreement between the PPC and the Colonial Office. (Reads paragraphs 2, 3 and 4 of letter.)

E Turning on to page 147, this is a 7C document showing United Kingdom control. It is a despatch from the Secretary of State to the High Commissioner in which he says: "With reference to your telegram of the 8th instant, I have the honour to inform you that I approve of your proposal to send Mr. Mahaffy to Ocean Island" - we did not read that telegram - "But, as I have stated in my telegram" etc. (reading to the end of the paragraph). Pausing there, the Secretary of State is going to have a detailed consideration of the drafts. (Reads paragraphs 2 and 3). Pausing again, Mr. Mahaffy is going to negotiate with the natives and going to be informed what are the arrangements made between the company and the Colonial Office. (Reads paragraphs 4, 5 and 7, omitting paragraph 6).

F Next, page 160 is a 7C document. It is a minute by the Chief Judicial Commissioner of the Western Pacific. It encloses some draft instruments at paragraph 2. (Reads paragraph 2). That is where the agreement is to be gathered. (Reads paragraph 3.) That is all I want to read of this minute. I make these comments. First, as I mentioned, there is the reference in paragraph 2 to the agreement having been made between the Colonial Office and Baltic House.

G THE VICE-CHANCELLOR: He says that No.1 is an agreement which embodies the terms and conditions to be gathered from the correspondence. He is not describing the correspondence as an agreement, he is describing it as containing terms and conditions. It is not quite the same thing.

H MR. MOWBRAY: I beg your Lordship's pardon, that is so. The Crown did not attempt to make the agreement for the natives. Then your Lordship sees that he says where he has interposed the Resident Commissioner and he says "In none of these cases is any determining authority mentioned in the correspondence." This is of interest and perhaps important in connection with the 1928 ordin-



ance. The surface compensation, so to speak, was settled by arbitration, but it was a subsequent judicial commissioner who put in the Resident Commissioner as the person to fix the royalty. One gets a similar process here: when he has got no determining authority he puts in the Resident Commissioner.

We can turn to page 164. This is a despatch from the High Commissioner to the Secretary of State and is 7B and 7C. I had better start from the beginning: "With reference to the telegrams" etc. (reading to the words at the end of (a)) "other fertilising substances." These are the drafts which the Chief Judicial Commissioner has prepared. "(b) Draft of indenture" etc. (reading to the words) "(c) Copy of minute" - that is the minute your Lordship has read - "2. I enclose also a copy of a letter which I received on the 30th ultimo from Mr. Dickinson" - and I do not think I need read more of that.

Then comes a draft. It was not used, it was rejected by the Colonial Office.

THE VICE-CHANCELLOR: Of course, this is something that plainly is an agreement between the authority in the United Kingdom on the one hand and the Company on the other, and if that had ever been carried forward and put into execution this case would bear a somewhat different aspect.

MR. MOWBRAY: That is so.

THE VICE-CHANCELLOR: The most one can say about that is that this is how the Chief Judicial Commissioner thought the correspondence ought to be made formal, as it were. In fact, that was not done.

MR. MOWBRAY: It was not done. Now perhaps your Lordship would like to look at paragraph 8: (Reads paragraph 8 to the words) "in any year of the said term". Would your Lordship also read paragraph 5? (Reads paragraph 5). "For the use of" is the phrase he uses.

At page 167 there is a draft lease which I need not read. That is all we wish to refer to in this bundle, and I can now pass to bundle 10. We shall be jumping about to a certain extent in this bundle, in an attempt to make clear to your Lordship just how the final terms of the 1913 agreement came about. Would your Lordship turn first to page 43. This is from the Colonial Office to the PPC. (Reads first paragraph). These are the A, B and C deeds that your Lordship knows all about. (Reads second paragraph). These are different from what the Chief Judicial Commissioner had drafted. Your Lordship is familiar with their terms. Your Lordship has looked at them from another point of view and they are relevant on the question of individual ownership of the phosphates. Does your Lordship see in A the recital: "Whereas by a deed" etc. (reading to the words) "within the next . . . years" that is the recital of the P & TD and it is confirmation, if confirmation were needed, that that deed effected a sale of phosphates.

I look next at the operative part. (1) is a surrender of the P & TD and (2)(i) says: "The said AB" etc. (reading to the words) "remove all trees" etc. I need not read more than that. That is consistent with individual ownership of the phosphate under the land. I suppose it would have been consistent also with community ownership of the phosphate if there had ever been any suggestion that the community's consent was also required, but there is no suggestion from anyone that the consent of the community was required over and above this A deed. There was no compulsory purchase legislation on foot and the Crown now admits it had no right to the phosphate. So these are the deeds which everybody thought were going to give the company the right to take away the phosphate and the only person who is giving it is the individual owner. So we pray those A, B and C deeds in aid on our case that the individual owner owns the phosphate under his land.



The B and C deeds are in similar terms as far as the relevant parts go. The C deed is missing from this bundle. I think your Lordship has seen it. It does not matter.

A We can go on to page 66. This is a letter from the Secretary of the PPC to the Chief Representative in Melbourne and it is relevant on questions of United Kingdom control of what was going on. It says: "On the 11th instant the Colonial Office sent us draft deeds for the land transactions at Ocean Island" - that is the letter your Lordship has just seen - "Copies of these are enclosed" etc. (reading to the words) "and we wrote to the Colonial Office about them". I do not think I need read the rest of that paragraph.

B Commenting at this stage, that shows the control of the Colonial Office over quite detailed things about the drafting of documents: it shows the Secretary of State's recognition of the individual ownership so far as those draft deeds A, B and C recognise individual ownership. I do not think I need read any more of that letter, and I can go straight to page 69.

C At page 69 we have a despatch from the Secretary of State to the High Commissioner. It is relevant on United Kingdom control and on the ownership of the phosphates. (Reads paragraph 2). Then he details the drafts. (Reads paragraph 4).

D THE VICE-CHANCELLOR: A good deal seems to have been assumed in the drafting, and so on, that here the Colonial Office is applying its mind to the question of land ownership and he is cautiously expressing doubts as to what the occupier can do. If the occupier was simply an unqualified owner it would be one thing, but they were treating him simply as being an occupier and they were doubtful whether he had any power to lease the land. It goes some way towards nullifying the effect of the assumptions that you have been so carefully pointing out in some of the earlier documents.

MR. MOWBRAY: It does, and that is why I have read it.

E THE VICE-CHANCELLOR: Of course.

MR. MOWBRAY: What we say about this paragraph is that the doubts reflected there are doubts about the powers of alienation of an individual owner and not about his ownership.

THE VICE-CHANCELLOR: The powers of alienation of an individual occupier.

F MR. MOWBRAY: Yes, an occupier. Of course it was right that the owner of land on Ocean Island could not simply alienate it, could not sell it to the company to defeat his descendants, his heirs. We say it is that sort of doubt which is at the root of this paragraph and not a doubt about whether the community owned the phosphate.

G THE VICE-CHANCELLOR: Yes, you can say a doubt as between the owner - with quotation marks round it - and his family and not a doubt as to the position as between the owner and the community.

MR. MOWBRAY: Yes. There had been no suggestion that the community owned anything at that stage. The reason a trust fund was set up was not the thought that the community owned the phosphate, but that the individual could not be trusted not to spend the money.

H THE VICE-CHANCELLOR: I follow.

MR. MOWBRAY: We can pass to page 91. This goes to United Kingdom control. It is a telegram from the High Commissioner to the Secretary of State which says:



"Eliot considers term of agreement (b) prejudicial to (c) (d)." This is a reference to page 69.

A THE VICE-CHANCELLOR: It also refers to page 96. CD is discussed on page 96, but I think the transcription here is unhappy because instead of (b) I think it should be a big B.

MR. MOWBRAY: Yes, that is it, agreement B.

B THE VICE-CHANCELLOR: So all those small letters in brackets should be capital letters, and it should refer to the top of page 96. Similarly with A, B and C later on. If you turn those all into capitals it begins to be more intelligible.

MR. MOWBRAY: I am very much obliged. I had not understood that. The telegram continues: "It is suggested, for your consideration, that in all agreements companies should pay yearly rental for each piece of land on which railways are laid" etc. We need not read more there.

C I turn next to page 92 where the Secretary of State says in a telegram to the High Commissioner: "Eliot may use his discretion in consultation with Edwards as to holding over Agreement B in any or all cases. Am not prepared to approve suggested alteration in agreements as to rent for railways."

We read those just to show that Mr. Harcourt was giving instructions about detailed things like the rent for railways.

D Going on now to page 97, this goes to the same kind of point. This is a despatch dealing with the same thing as that telegram and in paragraph 3 it says: "As regards the further suggestion in your telegram, I do not think it would be reasonable to require the company to pay rent for the land on which railways may be laid," and so on. I do not think I need read more of that.

E Page 99 is a despatch from the High Commissioner to the Secretary of State and it encloses a memorandum by Mr. Eliot the Resident Commissioner, on the effect of draft agreement B. Mr. Bickham Escott says in paragraph 2: (reads paragraphs 2 and 3 down to the words) "communicated to Mr. Eliot."

I had better read Mr. Eliot's memorandum, because it is relevant on the question of ownership. He says: (reads memorandum). Your Lordship knows what happened about these proposed exchanges, and one can very well understand it.

F THE VICE-CHANCELLOR: In the end I think there was only one CD.

MR. VINELOTT: One or two.

MR. MOWBRAY: One, I am told.

(Adjourned for a short time)



MR MOWBRAY: We had read page 99 in this bundle and the reply it is convenient to take out of date order. It is page 246, the last page of the bundle. (Reading letter)

A If your Lordship would turn back to page 99, your Lordship sees that in that memorandum Mr Ellis said, about six lines down, "CD in exchange to lease to the company for an indefinite period the right to extract all phosphate from his plot". So we say that is a little help on the Secretary of State recognising ownership.

B Then would your Lordship go over the page to the next letter on page 100.

THE VICE-CHANCELLOR: I have forgotten what happened about the C Deed documents. Were they revised.

C MR MOWBRAY: No. There is a subsequent despatch from the Secretary of State saying he quite understands that probably nobody would want to do this, but somebody might.

D Page 100 is a letter from the company on Ocean Island to their Chief Representative at Melbourne. It concerns the trust and United Kingdom control: "Land Question. Mr Eliot today made the suggestion to me" etc; (reading to end of first paragraph): "bring matters to a satisfactory conclusion" and that was subsequently done.

E On page 119 is a rather important letter from Mr Ellis to the Resident Commissioner - Mr Ellis who was then on Ocean Island. It contains, I think, the first mention of the annuity scheme and there is an account of what the Banabans are going to be told about the annuities, that is that it should be provided out of the income from the invested royalties. They were always called annuities but in fact they fluctuated with the income and they were not really annuities at all. I had better read this whole letter. (Reading letter).

F There are two or three things to notice about this letter. First of all, your Lordship sees that at (c) on the first page there is a provision that the devoting of the whole income from the invested royalties to the owners was to cease at such time as the Secretary of State might decide that the sum was beyond that required for the purpose of the annuities. The royalties were to be put into the fund and invested and the whole income from that fund was to be increased year by year because new royalties were being added into the account, and the whole income was to be paid out in annuities to the owners until the Secretary of State decided otherwise and decided the owners were getting enough in fact. Then at (d) he sets out how the thing should be explained to the Banabans, and about seven lines up from the bottom: "That these sums will be divided yearly among those who are now to lease the land from the date on which the company starts the felling of the trees ... and that the manner in which such division" is to be decided by the community - nothing about coming to an end when the Secretary of State thinks they have got enough. We do not know the explanation for that. It may have been that it was thought that the then landowners' consent would be obtainable when they had got enough, I do not know.



THE VICE-CHANCELLOR: How is that significant to anything in this case? It is an interesting point to speculate on, but does it directly bear on this case?

MR MOWBRAY: Precisely what was in their minds as to why this point was not put to the Banabans, no; that it was not put to the Banabans and that the resulting written agreements simply provided for an annuity to be paid to the landowner is significant.

We had better read most of the next letter, which is a letter from Mr Ellis to the secretary of the company in London. This is of relevance on the question of the trust and also the United Kingdom control of the Government side of the transaction: "You will note by T/cs" - I do not know what that contraction means. It might be some kind of copies or transcripts - "exchanged with the Resident Commissioner" etc; (reading to the end of the first paragraph on page 122): "I have no doubt the directors will see the expediency of my meeting him in the matter".

I need not read the next paragraph, I can carry on: "There are some other minor details to be agreed" etc; (reading to the end of the first paragraph on page 123): "I am sanguine that he will carry things through".

I can leave out the next paragraph, and carry on: "I enclose T/c of a letter and some notes I had prepared" etc; (reading to end of letter)

Then we go on to page 125. This is Mr Ellis's reply to the letter which I have read. He acknowledges receipt and says: "With reference to the payment" etc; (reading to end of letter).

THE VICE-CHANCELLOR: I do not understand that. The first year's royalty is the £4,743. Why is the company really concerned with it? They have got to pay it anyhow, so why is he saying "I would have preferred to place the matter before our board of directors", and so on?

MR MOWBRAY: The company, I think, had asked, or at any rate subsequently asked, to be consulted about the spending of the fund. They felt that they had some interest in how it was spent.

THE VICE-CHANCELLOR: You mean putting too much purchasing power in the hands of the inhabitants, but they were getting most of their labour from outside the island in fact.

MR MOWBRAY: Yes. One does not know quite what was in the mind of the company, but maybe it was that they wanted to make sure that the native landowners had a satisfactory deal and that this part of their consideration was handled in a satisfactory way because the day would come when they would want some more land. That is part of our submission, that the company had an indirect business interest in seeing that the fund was properly dealt with.

Your Lordship sees in this letter in paragraph 2 a



reference to "the Banaban royalty", which tends to confirm that they were the beneficiaries of it, and in paragraph 4, "While anticipating that the royalty for the benefit of the Banabans", a similar point.

A We can go on to page 126, the letter starting on that page to Mr Ellis from Mr Eliot. This also goes to United Kingdom control. (Reading paragraph 1 and 2 of letter). Then he refers to a letter from Mr Harcourt and says Mr Ellis may have been misled by something in another letter. So your Lordship there sees Mr Eliot treating the correspondence which passed between the directors and the Secretary of State as vital for this purpose.

B I can pass on to page 134, unless my friends want anything before that. This is a despatch from the Resident Commissioner to the High Commissioner and I think I had better read the whole of this. What he proposed was subject to approval by the High Commissioner. It goes to United Kingdom control and the existence of a trust. (Reading letter).

C In that letter the Resident Commissioner is verging towards what was finally agreed, that the whole income should go towards the annuities to those who parted with their land. He is putting it to the High Commissioner and the Secretary of State as being something that he supposes the Secretary of State would consent to - that is in 5 towards the end, "I have no doubt that permission might be obtained to utilise the accruing interest for the payment of an annuity to those who have parted with their lands". There are two statements that it is a trust fund or trust monies. The first is in paragraph 4 "Should I find that the purposes of the proposed trust fund are understood", and paragraph 5 "It will be made clear that no part of this trust money can be touched ... without the permission of Your Excellency". Then in 5 the permission of the Secretary of State is required, and that is a little help to show that the Crown in right of the United Kingdom was the trustee.

D THE VICE-CHANCELLOR: "Without the permission of Your Excellency and the Secretary of State" ?

E MR MOWBRAY: It does not prove it, but it helps.

F THE VICE-CHANCELLOR: "Your Excellency" is the High Commissioner for the Western Pacific and the Secretary of State, of course, is the Secretary of State in London.

G MR MOWBRAY: Well, if this had been the Crown in right of the Western Pacific or the Crown in right of Ocean Island the Secretary of State would not have come into it.

H Your Lordship also sees in 3 "As your Excellency is aware, the Pacific Phosphate Company have undertaken to pay the extra 6d a ton to the proposed Banaban Fund". That is obviously the same fund as the trust fund or the trust money, and that is helpful because the Banaban fund is a phrase which is used undefined in the 1913 agreement.

With those comments I can move on to page 146. I just wanted to mention this letter here from Mr Eliot to Mr Ellis. It is concerned with a detailed consideration of the acreages and so forth and your Lordship should just see that



that discussion was also going on between these gentlemen. I do not think I need read any of it, unless anybody wishes it.

A I can go on to page 152, the report of the first meeting with the natives.. This report is signed by Mr Ellis, Mr Edwards (I am not quite sure who he was) and Mr Corrie, the Interpreter. I think Mr Edwards was the company's manager on Ocean Island. Your Lordship sees the Resident Commissioner was present, that is Mr Ellis; Mr Murdock as an interpreter; Mr Darbishire, the Clerk - I think he was the Government clerk - Mr Ellis, Mr Cleeve-Edwards and Mr Corrie, and Mrs Eliot and Mrs Darbishire.

B I will read the first part shortly: "The Resident Commissioner addressing the natives, first touched on the object of the meeting, and then went on to relate the story of 'The Goose that laid the Golden Egg'". Then about ten lines down: "About four years ago Mr Mahaffy, who was then the Resident Commissioner had been convinced that the Banabans were not paid enough for their land, and that the method of working the island was not being conducted to the best advantage. The Government acting on his representations had cried halt ..."

C "Since then the Government and the Company had been going into matters in England, and very slowly, step by step, the latter had agreed to the demands of the Government, until a definite settlement had been arrived at. The result achieved will make the Banabans the richest natives in the Pacific. The Government had authorised him to state the terms to the Banabans, and to settle the land question". Then he explained why Mr Mahaffy was not there but knew all the terms, and so forth, and I think I need not read any more of that paragraph.

D "The Resident Commissioner then said that before proceeding further with his address that day, the Banabans were at liberty to say all they had in mind. After the terms of settlement were once stated to them, he did not wish to hear any objections".

E THE VICE-CHANCELLOR: That is not a very happy sentence, but I think on page 158 that is put right, when he says, at the top of page 158, he will hear anything from them except alternative suggestions.

F MR MOWBRAY: Yes. It might have been that he was asking them to get over their usual grumbles before he got on to the main business. At any rate, he did ask them for their comments here.

G Perhaps I had better read the first statement: "John Tekana said that when Mr A.F. Ellis first came to the island" etc; (reading to end of statement).

H I will not read any more on that page, unless my friend wishes. Then there is something about the raising of the flat, and so forth, and I need not read that. Then we come to the second meeting. Again present were the Resident Commissioner, Mr Eliot; Mr Murdock the interpreter, and Mr Darbishire the Clerk, Mr Ellis, Mr Cleeve-Edwards and Mr Corrie; a large number of Banabans and some Gilbert Islanders and others married to Banaban women, and the Police who were dismissed after the opening ceremony, and Mrs Eliot and Mrs Darbishire.



First of all the Resident Commissioner dealt with some complaints, or referred to some complaints, and in the next paragraph he then proceeded to deal with the terms of settlement.

A THE VICE-CHANCELLOR: You do not want the penultimate sentence of the previous paragraph: "Unless it was possible to arrange the matters here, he would bring it before the Home Government"?

MR MOWBRAY: I am very much obliged to your Lordship, yes.

B "He then proceeded to deal with the terms of settlement" etc; (reading to to the bottom of page 155): "not to be wasted".

Then I do not need to read the next three paragraphs and I can carry on: "A further point arranged by the Government was that the company undertook not to acquire any lands except the 145 acres in the mining areas" etc; (reading to end)

C I want to comment on that in a minute, but would your Lordship turn to page 167. There is another account of the same meeting, in fact I think the two meetings, but it is not so full an account and I do not wish to read it. It may be a Government account but it does not quite say whose account it is and I will not read it unless my friends wish.

D Going back to page 155, at the bottom of that page, the last paragraph, "The company was to pay a royalty to them of 6d a ton" - that is, to the Banabans. So there in layman's language one is saying the Banabans are getting the money and that helps with the establishment of a trust.

E THE VICE-CHANCELLOR: "He had arranged for the first year's payment of royalty to be spent locally, for their general benefit, not to be wasted". So he is telling them that the first payment was going to be £5,000 and was going to be spent for their general benefit, not to be wasted.

F MR MOWBRAY: Yes. Then the other reference to the royalty fund is on page 157, the first complete paragraph: "He then went on to describe the proposed annuity fund". Just pausing there a moment, it is a little confusing because everybody spoke of the annuity fund as a separate fund from the royalty fund, from the Banaban fund whereas it was really just income; it was not a fund which was held as a separate fund, it was just the income which was distributed in an agreed way among the landowners. That way of speaking went so far that when one gets the accounts of the Banaban Fund or the Banaban Trust Fund - of which your Lordship will be seeing a good many later - there is no income account.

G THE VICE-CHANCELLOR: Well, on page 157 near the top "The royalty of say £5,000 invested would bring in £150 per annum interest at 3%". Now the first £5,000 was going to be paid over in cash and that was going to be spent. So that is referring to the £5,000 in subsequent years that was going to be invested and that £5,000 invested each year would constitute the Banaban Fund and the fruits of that fund would be called the Annuity Fund, the difference being that the Annuity Fund was something which was paid to the landowners for their land whereas the Banaban Fund was a community fund in favour of the Banabans generally. Is that right?

H



MR MOWBRAY: Well, my Lord, the part about the Banaban Fund being for the community generally is a matter on which I could not altogether agree with your Lordship.

A THE VICE-CHANCELLOR: What was it for, then ?

MR MOWBRAY: What we would say, basically at any rate, was that the former landowners had a perpetual right to the income of this fund and that swallows up the whole beneficial interest in this fund. They had perpetual rights to income and those rights to income descended to their heirs in the same way as land did.

B

THE VICE-CHANCELLOR: It is an indefinite gift of income ?

MR MOWBRAY: It is an indefinite gift of income. They could not forfeit the income because they had no more right of alienation of the income than they had right of alienation of the land. so the ordinary rule that someone who has an indefinite right of income can call for the capital does not apply because the right to the income swallowed up the whole beneficial interest.

C

THE VICE-CHANCELLOR: Could any disposition be made of the capital of the fund ?

MR MOWBRAY: Well, my Lord, that is a matter, perhaps, of doubt, but the Secretary of State may have had power to apply capital for community purposes.

D

THE VICE-CHANCELLOR: If you had an application that would reduce the income, and there is also the reference in a letter to which you drew my attention earlier on to the landowners being subject to some sort of power in the Secretary of State to cut off any further income going to them if he thought they had got enough.

E

MR MOWBRAY: They were not told that.

THE VICE-CHANCELLOR: They were not told that. Somewhere at some stage what the rights were in this sum of money, both capital and income, must have crystallised in some sort of way, but we have not got to that yet.

F

MR MOWBRAY: They certainly should have done. We have not got to it yet and your Lordship may in the end, when your Lordship reads the document, come to the conclusion you cannot find it; but what we say is that the right to the income swallowed up the beneficial interest. It is conceivable on the documents that the Secretary of State had power to divert the capital to community purposes. It is conceivable, but we submit he did not have any such right. But it is clear that capital was put to community purposes and it is, I think, equally clear that that was done with at any rate the acquiescence of the landowners.

G

THE VICE-CHANCELLOR: Then why is this arrangement on that footing not either a perpetuity or a charitable trust ?

H

MR MOWBRAY: It is not perpetuity, my Lord, because there is an immediate, absolute, indefinite right of income in the



landowner. He cannot alienate it.

A THE VICE-CHANCELLOR: The capital has got to be held in perpetuity for whoever for the time being is entitled to the land. Is that right ?

MR MOWBRAY: Yes.

B THE VICE-CHANCELLOR: The landowner owns a plot of land. He during his life is entitled to the income appropriate to that piece of land and when he dies the members of his family who succeed him are then entitled to it for ever. So the capital is tied up to provide income for a series of persons unknown in the future.

MR MOWBRAY: Yes.

C THE VICE-CHANCELLOR: That sounds to me like a perpetuity and you cannot get out of it by saying that the present landowner has of course the right to receive the present income because the vice of the transaction was to have a capital sum of money tied up in perpetuity. Of course if it is a charitable trust it is exempt altogether from the perpetuity rules, but if it is not a charitable trust, then why is not the whole thing a perpetuity ?

D MR MOWBRAY: We would say that the descent of the right, to the perpetual income was no more perpetuitous than the right of the descent of the land.

THE VICE-CHANCELLOR: A trust fund to pay money in perpetuity to whoever was entitled to it, would that not be perpetuitous?

MR MOWBRAY: But this arrangement exactly followed the land tenure on the island.

E THE VICE-CHANCELLOR: We are getting into strange waters.

MR MOWBRAY: Of course we shall have to go into it, my Lord. We say it is a commercial transaction so it is not a charity.

F THE VICE-CHANCELLOR: You may have a commercial transaction and then the fruit of that commercial transaction may be disposed of in a perpetuitous way or otherwise. Unless you say that the money came from a commercial transaction and therefore was not charitable money at all -----

MR MOWBRAY: No. We say the settlement - to use what we say would be the wrong word - was itself a commercial transaction.

G THE VICE-CHANCELLOR: You must develop this at a suitable stage. At the moment I am puzzled.

MR MOWBRAY: If your Lordship pleases. Just to round off what I was saying: if the whole thing was void, then there was a resulting trust to the landowners. Likewise if the content of the trust was left so vague as to be unenforceable there was a resulting trust to the landowners.

H THE VICE-CHANCELLOR: Anyway, it is no part of your case to say it was a charitable trust ?



MR MOWBRAY: No, rather the reverse.

A I was referring to this first parageaph on page 157. That is where the Banabans were told that all the royalties but the first would be invested and that the income would be paid to the Banabans. Again it was put in layman's terms -----

B THE VICE-CHANCELLOR: Of course, one must not expect too much of a minute taken in these circumstances, but it does not very clearly appear just what was being explained to the Banabans about the terms of settlement. At the top of 157 the Resident "went on to describe the proposed annuity fund ... Out of this first payment of royalty £300 will be set aside towards the annuities for the first two years". I do not quite know how far it was explained what "these annuities" are. There is a perfectly general statement on page 155 at the beginning of the second paragraph, "He then proceeded to deal with the terms of settlement" and it may be that Mr Ellis in making this note was taking it for granted that the terms of the settlement would be known and need not be recorded in the minute of this meeting.

C MR MOWBRAY: They were recorded in the letter which I previously read to your Lordship.

D THE VICE-CHANCELLOR: But this is explaining it to the inhabitants of Ocean Island. This does not seem to me to be a complete setting out of exactly what was explained to them.

MR MOWBRAY: Our understanding is exactly the same as your Lordship's, if I may respectfully say so, that Mr Ellis was assuming there that his reader would know what was in the previous correspondence and that that is what was being explained.

E Then I carry on, if I may, with the third meeting starting at page 158. It is a similar dramatis personae - in fact I think it is exactly the same except that the manager was not there. "The Resident Commissioner started by saying that since the last meeting he had found out that the Banabans change about in their views like trees swayed by varying winds. He wanted to know what their views were when not affected by all the talk they had been hearing of late from those who talked loudest. He wanted the opinion of Banaba, not of Ooma Village", and I need not read the rest of that paragraph.

F "In interpreting this Mr Murdoch made an error, and the natives took it that all who were against the terms should stand up. The Ooma village division stood up practically intact" etc; (reading to the words): "That was wrong and must be stopped", and I do not read the rest of that, or the next paragraph unless my friends wish.

G "The Commissioner then said that if they wouldn't part with their lands", etc; (reading to end of minute).

H THE VICE-CHANCELLOR: What was the document that was before them?

MR MOWBRAY: That is the 1913 agreement, my Lord. Would you like to look at that at this stage ?



THE VICE-CHANCELLOR: I just want to be quite certain what it was.

A MR MOWBRAY: It was the 1913 agreement and it is page 32 of the PD Bundle. Your Lordship sees it is signed by Mr Ellis and then the signatures of the natives follow.

THE VICE-CHANCELLOR: But apart from the date and the signatures, and so on, presumably it was that document that was read over to the natives in English and afterwards by Mr Murdoch in their native language ?

B MR MOWBRAY: Yes, my Lord. Certainly your Lordship sees the company undertakes to hand over the whole of the first year's contribution to the Banaban fund. Then there is a provision that after deducting £300 the whole is to be expended on the existing Banaban community, and so forth. Then there is a reference to the annuity scheme in 9. Then there is this provision about it being £150 a year representing simple interest C on the yearly sum of £5,000 payable by the company to the Banabans through the Government. Then 11 says it will fluctuate. Then 12(b) the royalty of 6d should be paid by the company through the Government for the Banaban fund.

D THE VICE-CHANCELLOR: Of course I have been looking at this agreement in the other case for other purposes. It is quite explicit on the first page, that as to the just under £5,000 "the whole of this amount will be expended for the benefit of the existing Banaban community". They then turn to what is to happen about the annuity and what becomes the annuity scheme, but there is nothing to deal explicitly, is there, E with the subsequent £5,000, or whatever the royalty comes to ? 12(b) says that the 6d a ton royalty is to be paid through the Government by the company for the Banaban fund so that part of that money gets into that fund, but what that fund is to be used for, is that spelled out ?

MR MOWBRAY: Then one comes back to 10, and one sees that for the first three years the £150 will be available, which represents the simple interest.

F THE VICE-CHANCELLOR: That is merely the interest for annuities. What I am saying is this: Here you have a Banaban Fund. It is going to be fed by royalties. The first year's accretion to that fund is going to be spent for the benefit of the existing Banaban community less the £300 which is going to start off the annuity fund. Then you have the annuity payments dealt with, again reasonably explicitly ----

G MR MOWBRAY: That is the income.

H THE VICE-CHANCELLOR: That is the income. You have got first a payment of the royalty to the fund and that was to be spent. That is the first £5,000. The document then leaves the question of the gross money coming into the fund and turns its attention to the income that will spring from the fund and deals with that. Then it goes back to the question of what is going to happen about the subsequent years in which the 6d royalty is to be paid and it deals with that 6d royalty going into the Banaban fund, but it does not appear to say who that fund was to be held for. The income of that fund



has already been dealt with, but is there anything to say who is to have the capital ?

A MR MOWBRAY: No, my Lord, and in our submission there is no need to, because the provision about income is settled and that exhausts the beneficial interest.

THE VICE-CHANCELLOR: Therefore the capital must be held in perpetuity to deal with the income.

MR MOWBRAY: That is what was agreed.

B THE VICE-CHANCELLOR: You cannot have all the beneficiaries joining together and putting an end to the trust because you say the land passes down in the family, and therefore you have got a neat, tight perpetuity.

MR MOWBRAY: You have only got the same perpetuity you had with the land. That is what we say.

C THE VICE-CHANCELLOR: But any landowner can dispose of his land within the family.

MR MOWBRAY: Well, as far as this goes he could dispose of his income in the same way as he could have disposed of his land. There is nothing in here to say he could not dispose of it in any other way, but we suppose that he would be subject to the same limits.

D THE VICE-CHANCELLOR: I follow.

MR MOWBRAY: What we say about this meeting is that if A and B make an agreement by which A agrees to sell something to B and B agrees to pay the price to C on trust for B, or for B -----

E THE VICE-CHANCELLOR: If If A sells something to B and B pays the price to C it would be on trust for A.

MR MOWBRAY: I beg your Lordship's pardon, yes. And if C knows about the agreement and accepts the trust, he is a trustee of the trust. We say that is so where C is the Crown as much as where C is a subject, and that is the legal construction that we shall be erecting on this meeting and on the document.

F THE VICE-CHANCELLOR: How much does it depend on the meeting when in fact you have got the document ? The construction of the document is one thing; overtones at a meeting may be very much another thing.

G MR MOWBRAY: Yes. We say there were overtones, but no more than that, probably.

THE VICE-CHANCELLOR: It is primarily the document, is it not ?

MR MOWBRAY: It is primarily the document, certainly. The acceptance of the first year's royalty was an acceptance there and then in a very formal manner by the Resident Commissioner of some of the trust money.

H THE VICE-CHANCELLOR: But then, you see, you have got that on



A the document. As to the first £5,000 that is in clause 7, that the company undertake to hand over to the Resident Commissioner the first year's contribution to the Banaban Fund, and so on, and the meeting goes on to show that that happened.

MR MOWBRAY: It happened.

B THE VICE-CHANCELLOR: Then under 12(b) the royalty of 6d per ton on all phosphate shipped will be paid to the Government by the company for the Banaban fund. So again you have got that on the face of the document. Does the meeting really add anything?

C MR MOWBRAY: Well, I do not want to re-open old wounds, my Lord, but Mr Ellis was only a witness to this document. He was there at the meeting actually accepting a cheque on behalf of the Banaban Fund. So there is a little extra in that, we have got an actual acceptance of some of the trust fund.

THE VICE-CHANCELLOR: But apart from that does the meeting carry you any further?

MR MOWBRAY: I do not think so, my Lord. They help to explain what is meant by the Banaban Fund.

D THE VICE-CHANCELLOR: You rely primarily on the written agreement and the fact that there was a meeting, but what was said at the meeting does not really add much to help you explain it. Is that right?

MR MOWBRAY: That is just right, my Lord; I am much obliged.

(Adjourned for a short time)

E

F

G

H



MR MOWBRAY: My Lord, we had finished with those meetings. Would your Lordship now turn to page 200 in bundle 10. This is the letter which was handed over with the cheque. (Reads letter).

A THE VICE-CHANCELLOR: That might raise pretty problems, but it did not happen.

MR MOWBRAY: It did not happen. The next page is the answer to that letter. (Reads page 201). We have a comment to make on the first paragraph of that letter. This is the Resident Commissioner saying that only the landowners' signatures are needed, those of the owners of the land which was to be acquired. That is inconsistent with any idea that the community owned the phosphate.

B Would your Lordship kindly turn to page 204 and look at the first of the letters dated 1st December? There is there a request by Mr Ellis to keep the agreement open for signature a few days longer. In the next letter dated 1st December Mr Eliot agrees to that.

C Then at page 205 is a letter from Mr Eliot to Mr Ellis referring to another letter "in which you request that in future your directors may be given sufficient time to consider any proposed expenditure of royalties accruing to the Banaban Fund" - your Lordship remembers that - "I have the honour" etc. (reading to end of letter).

THE VICE-CHANCELLOR: That is the point I commented on before the adjournment.

D MR MOWBRAY: Yes. There is the phrase at the end of the first paragraph, "trust fund". We emphasise the words "trust fund", of course; this is an acknowledgement by the Government that it was a trust fund "to be used solely in the interests of the Banabans at the discretion of the Secretary of State." That is not quite what was said at the meeting. Your Lordship may like to compare that with page 157. The first paragraph on page 157 your Lordship looked at in detail, and then the little paragraph numbered (2), the annual payment of royalties and division of the interest on the accumulated capital and so forth, there is nothing there about the discretion of the Secretary of State, but there is a mention of how all the money would be disposed of at the end of the first paragraph: "He did not know what would be done with all the money but the British Government would find a way to expend it in their interests." That is all we have to say about the letter at page 205.

F Turning to page 207, the last letter on that page is to Mr Eliot and is Mr Ellis acknowledging receipt of letter No.48, the one your Lordship has just seen, and saying in paragraph 2: (Reads paras 2 and 3). It is only fair to say that that discussion does seem to relate not only to the first nearly £5,000 but also to subsequent payments.

G THE VICE-CHANCELLOR: Exactly. If the Secretary of State's discretion did apply to all payments it is difficult to see how that could then be regarded as belonging solely to the landowner who was to receive the income. So we are in difficulty there.

H MR MOWBRAY: Yes, we are in difficult territory. Then we would like to turn to page 230, unless my friends want to look at anything in between. Page 230 is a despatch from the High Commissioner to the Secretary of State enclosing a confidential letter from the Resident Commissioner which he sent direct. He says he concurs in Mr Eliot's proposals. I will read a large part of this letter. (Reads first para of letter on page 231).



A THE VICE-CHANCELLOR: This is something new. This is not the High Commissioner approving. At page 230 the High Commissioner is, as I understand it, approving Confidential letter No.3 of 12th ultimo, which is page 134.

MR MOWBRAY: Your Lordship is absolutely right.

THE VICE-CHANCELLOR: He is doing that on the 19th December. Now we come to 22nd December, a subsequent letter written by the Resident Commissioner to the High Commissioner.

B MR MOWBRAY: Yes. It was page 134, as your Lordship says. Here at page 231 he encloses Memorandum B, page 103, and we will go back to that at the end of this despatch; it is a short account of the meeting. Then he says in paragraph 2 on page 231: "The terms having been accepted" etc. (reading to the words in para.3) "foreshadowed in my letter above quoted" - he means he foreshadowed going beyond, your Lordship remembers - "and that I hold" etc. (reading to the words in para 7) "prices in their stores". I do not think I need read more about that, and I can go to paragraph 8. (Reads paras. 8 and 9 and first four lines of 10). I need not read more there, nor need I read 11, which is about the exchanges. I need not read paragraph 12.

C THE VICE-CHANCELLOR: Paragraph 13 is about it being tactless to arrive on a company vessel instead of the next Navy ship.

D MR MOWBRAY: Yes, it made it look as if he was in the company's pocket. I will read the last sentence: "Had arrangements been made" etc. (reading to end of para 13). "H.M.'s Government" there means the United Kingdom Government.

Just looking back over that document, on page 232 at the end of paragraph 3 it says: "This sum has been placed to a separate local trust account". So the Resident Commissioner thought there was a trust.

E THE VICE-CHANCELLOR: The first £4,700 is going to be spent locally on some sort of immediate expenditure to show the islanders they were getting some immediate benefit, particularly the older ones, from the transaction so recently agreed.

F MR MOWBRAY: Yes. At any rate, he thought that was trust money to be put in a trust account, and that helps to show that the whole of the royalties were trust money.

THE VICE-CHANCELLOR: Yes, but that first payment was being dealt with in a different way, was it not, from the subsequent payments?

MR MOWBRAY: That is so.

G THE VICE-CHANCELLOR: This first payment was going to be spent, he says here, at the communi'y's pleasure, subject to his veto on anything wasteful.

MR MOWBRAY: Yes.

H THE VICE-CHANCELLOR: And as he/got the money and it is to be spent for them, he puts it in a trust fund, a very proper thing to do. But that does not really carry the point as to payments of the 6d. royalty in subsequent years which certainly were not going to be spent immediately as the local community wanted subject to the Resident Commissioner's veto: that might be dealt with on a quite different basis. This only carries your first year's immediately expendable dollop of money.



A MR MOWBRAY: Yes, it does not necessarily follow that subsequent payments would be dealt with in the same way. On the other hand, he has started off with a trust fund and he goes on in paragraph 4: "The method of expenditure of the whole of the simple interest on the capital accruing to the Banaban trust fund as from the 1st July 1913 has also been agreed upon" so it is still a trust fund, or it is a different trust fund, it does not matter which, after it is invested and the income accrues. Then after the income has become enough to divide among the natives the excess of interest is to be reinvested in the trust fund. So it is a trust fund.

THE VICE-CHANCELLOR: Or some sort of accumulation.

B MR MOWBRAY: It is getting worse and worse, I agree!

THE VICE-CHANCELLOR: And who is going to get that? Since the cut-off has come in, since no additional interest is going to be paid to the landowners because they are already getting enough - that is the only reason why the excess is being put back into the fund - some of them must be beneficially entitled to it.

C MR MOWBRAY: Yes. In the last resort there would be a resulting trust.

THE VICE-CHANCELLOR: A resulting trust to whom?

D MR MOWBRAY: The company was not a settlor; the company was paying for the land. This was the landowners' money and the landowners were the settlors and the resulting trust would be for them.

THE VICE-CHANCELLOR: And although the income has now been cut off because they have got too much, none the less they are beneficially entitled under a resulting trust. Is that it?

MR MOWBRAY: Yes, that would be so.

E THE VICE-CHANCELLOR: So this cutting off is then nugatory.

MR MOWBRAY: If it really were the case that there was no beneficial interest, no beneficial trust to claim, or if I am wrong in saying that you can have a perpetual trust of income like a perpetual rent charge which is not subject to the rule against perpetuities. Anyway, we will argue that later.

F THE VICE-CHANCELLOR: You are merely storing up materials for argument at a later stage.

G MR MOWBRAY: Yes. I think that is all we have to say about that document. I think we should now go back, as I said, to page 103. This is Enclosure B, as it was referred to, "Ocean Island Land Negotiations". I think I had better read this to your Lordship. It is relevant on which aspect of the Crown was the relevant one in setting up this trust. "On Friday 7th November" etc. (reading to the words) "H.M. Civil Service". I am sure it has been emphasised to your Lordship before that when the Resident Commissioner received the cheque it was a formal occasion. "Throughout" etc. (reading to the words) "At the first meeting". He gives the account of what happened at the first meeting rather briefly. Your Lordship has seen a more extended account. "(4) On the 19th November" etc. (reading to the words) "had been drawn up." I do not think I need read more of that. Then: "On 21st, 24th and 25th November" etc. (reading to the words) "arranged by the British Government." We say the British Government there is the home Government. "On the 26th and 27th" etc. (reading to the words) "rose in a mass protesting."



A At paragraph 7 it says: "On the 29th November" etc. (reading to the words) "refused." I need not read more of that. "On Saturday 6th" etc. (reading to the words) "all villagers were represented," and there is an account of what happened on the 9th which I need not read, except for something the Resident Commissioner said to the meeting at the bottom of page 107: "He pointed out" etc. (reading to the words) "set aside," etc. What he is telling them is that the home Government had made the terms for them.

B At paragraph 10 on page 108: "Early on the 10th" etc. (reading to the words) "fully attended that day." I do not think I need read more.

THE VICE-CHANCELLOR: They asked if there was a trust and stated that they were now satisfied that the terms were from the British Government.

MR MOWBRAY: Yes, I am obliged. That shows that "British Government" means the home Government.

C THE VICE-CHANCELLOR: That is how it has been used in this document.

MR MOWBRAY: Yes. That is the last document we refer to in that bundle. We have taken some of the documents out of date order.

D Would your Lordship now take bundle 11 and turn first to page 10. That is part-way through a letter from the secretary of the company to Mr Ellis in New Zealand. I want to read the third paragraph. (Reads it).

Page 16 is a despatch from the Resident Commissioner to the High Commissioner. This is a 7B document. (Reads first five paragraphs).

E May I turn next to page 19. These are the letters referred to. They are 7B and 7C documents. They go to United Kingdom control because the matter was being referred to London, or at any rate to the High Commissioner. (Reads Enclosure 1). (Reads Enclosure 2, reply from Resident Commissioner). So he was consciously by-passing the High Commissioner and obtaining the ruling of the Secretary of State on a matter of £50 a year.

F May I next refer to page 27, a letter from Mr Ellis to Mr Eliot. We read it in connection with the individual ownership of the phosphates. "I have carefully considered" etc. (reading to the words in the 6th line) "When Mr Campbell" - he was the then Resident Commissioner - (reading on to the words) "grasp the legal technicalities involved." There is Mr Ellis, who had considerable experience with the Banabans, writing for a particular purpose, and he said they thought they were selling the phosphates. That is all I want to read of that letter.

G I can turn next to page 29. It is a letter from the Resident Commissioner to Mr Ellis. It is a 7C document, that is, it goes to United Kingdom control. (Reads paras 1, 2 and 3). There follow some detailed discussions. I can pass to paragraph 8. (Reads para 8, omits para 9 and reads para 10). So there is another topic being referred direct to the Secretary of State.

H THE VICE-CHANCELLOR: How does that help you? The Secretary of State is obviously concerned in some way for the Government. If there are some documents of land transactions which are contrary to the law which applies to the island, then in that way the Secretary of State is concerned, is he not?



A MR MOWBRAY: We would say this helps to establish that the only government of Ocean Island was the United Kingdom Government and it was governing through or through the medium of a High Commissioner and Resident Commissioner, but it was the United Kingdom Government and that was the only government there.

THE VICE-CHANCELLOR: But that does not go any way towards showing that there was a trust by the United Kingdom Government, does it?

B MR MOWBRAY: No. One way we found your Lordship's jurisdiction over the Crown in this case is under the Crown Proceedings Act, and for that purpose we have to show that the liability arose in respect of or did not arise otherwise than in respect of the United Kingdom Government. One way of showing that is that the United Kingdom Government was the only government concerned when the liability arose.

C Would your Lordship turn to page 33. It is a 7C document. It is a letter from Mr Ellis to Mr Eliot and it is replying to the letter your Lordship has just seen. (Reads first words on page 34). Then he sets out some history and I can pick up the story about half way down the page: "Up to 27th April, 1911" etc. (reading to end of paragraph) "called in question." Again that is a letter from the company, but it is the company saying it was a purchase and sale. I will not read the rest of the letter, which is on much the same lines, but adds very little to what your Lordship saw in the previous letter.

D Unless my friend wants something before it I can take your Lordship to page 73, which is a 7C document, a letter from Mr Ellis to the secretary of the company. Mr Ellis is now writing from New Zealand. (Reads para.4 to words at the top of page 74) "large sums under the annuity."

E The rest of that letter relates to the price of trees. You remember the question whether trees were to be paid for separately and whether it was coconut trees only or all kinds of trees. At the bottom of page 73, when he says that the sum would increase, of course, the capital was going to increase each year, so even if the rate of interest reduced a little probably at any rate in the earlier years the amount of income would increase. He says "the division of it" - that must be the interest - "rests entirely between the Resident Commissioner and the Banabans." So that does not square perhaps with anything we have seen so far unless it merely means that the Banabans are going to decide which of the landowners are to have it divided among themselves, how the interest is to be divided among the landowners and the Resident Commissioner has a veto. I think that must be what it means.

F Page 79 is a 7B and 7C document. We get there some Colonial Office minutes in which they consider the 1913 agreement. (Reads page 79). That accords with the way we understand the agreement, and it says "trust fund". So there is someone at the Colonial Office who thinks it is a trust. There is some more irrelevant matter, and then at the bottom it says "Wait for letter coming from the company."

G May I turn to page 87, some Colonial Office minutes about a Parliamentary question. "Mr Wedgwood,- To ask the Secretary of State" etc. Your Lordship remembers the importance we attach to these Parliamentary questions being answered. I had better read this. The minute says: "Mr Potts" etc. (reading to bottom of page 87) - and now this continues on page 91 - (reads to end of page 91). We say it was not really a Government royalty at all, the extra 6d. was for the Banabans. Perhaps that is all they meant. I suppose he was thinking of a supplementary question or something like that, and he would be able to say the company was paying twice as much as it had been a year earlier.



I can pass now to page 94. This is not specified in our particulars.

A THE VICE-CHANCELLOR: You have got the answer to the question on page 92, have you not? They are different questions but substantially the same answer.

MR MOWBRAY: Yes, I am obliged. (Reads Mr Wedgwood's question and the answer). I wonder if that was not the supplementary he was replying to, because there is something above that that I cannot read. I think I can just read it - "in the Gilbert & Ellice Islands is excessive".

B THE VICE-CHANCELLOR: But the question begins with the words "additional taxation upon the phosphates monopoly on the island." That was the form of the question. So there seems to have been another question.

C MR MOWBRAY: But above Mr Wedgwood's name on page 92 there is a line which says "in the Gilbert & Ellice Islands is excessive." That is the end of the answer which was proposed in the minute on page 91: "No, Sir, I have no reason to think that the nagive taxation in the Gilbert Islands is excessive." So it looks as though he answered the question of which notice was given and then Mr Wedgwood asked a supplementary and we had the supplementary and the answer to that.

THE VICE-CHANCELLOR: Yes.

D MR MOWBRAY: Then on page 94 there are some more Colonial Office minutes to which we attach some importance on the question of United Kingdom Government control. The summary of what is being dealt with is at the top: (Reads typewritten passage beginning) "Duplicate of despatch". There was a proposal that they should be paid for out of the new trust fund, and that is exhaustively discussed in London in these minutes. I think I had better read quite a lot of this. I start on page 95, at the top: "In Phosphate and Trees Purchase Agreements", etc. (reads to bottom of page 96).

E Turning to page 105, this is a 7C document and is a letter from the company to the Under-Secretary of State. It is again about exchanges and areas and the different mining areas and so forth, and the letter puts forward detailed and familiar arguments for the Colonial Office. I will not read it. I am merely noting that a lot of detailed discussion is still going on in London between the company and the Colonial Office.

F The Colonial Office minutes on that letter are more relevant. They appear at page 118, but before we get to that may I ask you to look at page 114, from the Secretary of State to the High Commissioner. This concerns United Kingdom control of detailed matters and also the ownership of the phosphates. The letter of 31st March, 1914, says: "I have received direct" etc. (reading to the words in the middle of para.3) "only a life interest in their lands." I need not read more of that. There is obviously an assumption underlying all that that the individual Banabans are able to deal with the phosphate under their lands so far as their rights as between themselves and their family allow. We refer to that letter on the question of United Kingdom control: there is detailed consideration of half a dozen documents dealing with very small pieces of land.

G H At page 118 we come to the comments on the document which started at page 105. This is a 7B and a 7C document. Your Lordship sees how page 105 is summarised here: "Expresses appreciation" etc. (reading to the word) "trees." I think I ought to read most of this. It says: "Mr Lambert. I entirely concur" etc. (Reads to end of page 122).



A THE VICE-CHANCELLOR: What is the point of this ? Simple showing the Colonial Office considering the negotiations as a matter of some detail ?

MR MOWBRAY: Yes, there is that, and we are also coming to a suggestion that some money for the missing land should be repaid to the company out of the trust fund.

B Then I can take your Lordship to page 130. This is the reply which resulted from those considerations. It follows what they said at paragraph 5 and I will not read it all:

C "Mr Harcourt regrets that he is not prepared to entertain the proposal" or increase the limit to 230 acres. At 6 he says he is not aware "when the previous correspondence with you took place that, notwithstanding the terms of the Phosphate and Trees Purchase Agreements, your company had been in the habit of paying the natives for each coconut tree". Then over the page "In these circumstances Mr Harcourt is unable to allow your company to depart from this undertaking by consenting to your proposal that the payment for coconut trees should be made out of the Banaban Fund".

MR VINELOTT: Would you read that more fully ?

D MR MOWBRAY: I had better start at the top of the page again. "In these circumstances" etc (reading paragraphs 6 and 7).

E The next letter on that page is a 7(c) document. It is a despatch from the Secretary of State to the High Commissioner. At 2 he says something nice about Mr Eliot. In 3: "I am prepared to approve the arrangements made by him for payment to the natives out of the Banaban Fund" (reading letter) That is a 7(c) document. It does not perhaps help very much to establish what the trusts of these funds were, but it does show the Secretary of State -----

F THE VICE-CHANCELLOR: If the trust had already been set up, then, of course, these arrangements that individual landowners are going to be able to obtain compensation for pandanus trees out of the fund must have been made under some power to divert the fund or direct that payment be made ?

MR MOWBRAY: There are two possibilities, really. One is that it was done under such a power; the other is that there really was not any power, but the payment was made and the Banaban landowners acquiesced and it is too late for them to complain now.

G THE VICE-CHANCELLOR: The landowners got the money, so they would not complain. The other landowners might, because this was being paid out of the Banaban Fund. It must have been paid out of the initial payment, which was being paid to the benefit of the Banabans generally. Once you go beyond the £4700-odd you run into a very strange state of affairs.

H MR MOWBRAY: Yes, you do. This payment for the other trees was only about £400, so it could easily come from the £4,000-odd. We do not know where it came from, as my friend very fairly says.

THE VICE-CHANCELLOR: We do not know where it came from ?



MR MOWBRAY: We do not know whether it came from principal or interest, or which year. Presumably it came from principal, capital.

A MR VINELOTT: I do not want to interrupt, but these pandanus trees, of course, go on being paid for until 1922 and we just do not know which year these payments were made from. It is pure inference to say they were paid out of the first year.

B THE VICE-CHANCELLOR: Any pandanus paid for promptly must as a matter of timing have come out of the £4,700-odd. Once it gets beyond that anything might have happened, nobody really knows.

MR VINELOTT: Nobody really knows.

C MR MOWBRAY: Would your Lordship turn to page 149. This is a 7(b) document relevant on the question whether there was a trust. This is a despatch from the Resident Commissioner to the High Commissioner. It is really about the pricing of the stores, and there is something about how the £4,000-odd is going to be spent and that starts at paragraph 9: "I may add that the balance of the first year's royalty" etc; (reading to end of despatch). It still does not answer the question, because one does not know whether the pandanus was taken in before one got the balance of £4,000.

D Then we can turn to page 188, a telegram from the High Commissioner to the Secretary of State. (Reading telegram). Then the reply from the Secretary of State (reading telegram),

THE VICE-CHANCELLOR: Was a new form in lieu of A devised by the Resident Commissioner?

E MR MOWBRAY: No. That is all we wish to read in that bundle and we will go on to Bundle 12, if we may.

F We do not want to read anything before page 31. On page 31 is a letter from the Resident Commissioner to the Company's Acting Representative on the island: "Referring to interviews which I have had with Mr Anderson" etc; (reading letter) Your Lordship sees that is exactly what the Secretary of State had told them to do.

We can go to page 36, which is the reply, paragraph 3: "Notwithstanding the wording of these deeds" etc; (reading paragraph). So everything turned out the way it was decided by the Secretary of State.

G Then we can turn to page 64, the first letter on the page, again to show United Kingdom control in fine detail. The first letter is a letter from the Colonial Office to the Pacific Phosphate Company: "I am directed by Mr Secretary Harcourt to acknowledge the receipt of your letter of the 3rd instant" etc; (reading to end of first paragraph)

H The next letter is from the Colonial Office: "I am directed by Mr Secretary Harcourt" etc; (reading letter) That is a small matter where the Secretary of State is calling for a report. So he is going to make the decision, not the High Commissioner.



A Then page 65, from the Resident Commissioner to the Company's representative on the island: "Referring to previous correspondence on the subject of the settlement of the land question" etc; (reading letter).

B On page 69 there is a reply, at 2: "It is observed that you consider the most suitable arrangements in future would be that the payment due on account of the Banaban royalty should be made in England to the Crown Agents for the Colonies"; etc; (reading to the words: "We have since paid over to you an amount of £4000 and the balance, will be handed to you by our Accountant forthwith". Then in 4 he gives some more details and I do not think I need read that. Then five lines down page 70: "My understanding is, however, that you wish this amount to be dealt with in London. I therefore could arrange to give you a draft drawn on London in favour of the Crown Agents for the Colonies ... which you could send forward to England by the next steamer leaving for Australia, if you so desired" etc; (reading to paragraph 6): "I note you are anxious to have this money invested as early as possible ..."

C This is just machinery, really, about how the payments were made. I can take your Lordship to page 72, where the Resident Commissioner sends on copies of the correspondence to the High Commissioner. Then on page 77 we get a despatch from the Resident Commissioner to the High Commissioner. He has had direct receipt of a copy of the Secretary of State's despatch --- I am sorry, I have gone to the wrong page.. It is page 77 I want and it is a 7(b) and 7(c) document, but it is a letter from the Resident Commissioner to the Acting Representative on Ocean Island: "I have the honour to acknowledge the receipt of your letter of yesterday's date No.54 of 1914 on the subject of the payment of Banaban Phosphate Royalty. ... I have informed your Mr Sobey that it will be quite convenient if your Accountant pays in the outstanding balance", and then he gives some details. "I thank you for the offer to let me have a draft on London in favour of the Crown Agents", and it goes on: "but it is possible that your Board and the Colonial Office have already arranged this matter" etc; (reading to end of letter).

F That is a 7(b) document, I think, because it shows that the royalty is going to be paid straight into a special fund in London and it is not going into the Protectorate or the Ocean Island Colony account in any way. And it is a 7(c) document because of the references to the approval of the Secretary of State. If the Secretary of State was a trustee he would have been consulted. It may be he has not been consulted because there is only one Government, but if he were a trustee he would have been consulted.

G THE VICE-CHANCELLOR: "... should be paid in London half yearly to the Crown Agents to the credit of the Banaban Royalty Fund". There still remains the question: who had got the authority to get any money out of that fund. Let us accept that someone is entitled to this fund as a trustee or otherwise, you are still left with no reason why it should not, for example, be paid to the Crown Agents for the Banaban Royalty Fund with the Resident Commissioner as trustee, or the



Secretary of State, or anyone. The mere fact that it is paid to the Crown Agents in London does not tell you very much about who is the trustee at that time, or who has got any authority over the fund.

A MR MOWBRAY: No, that part of it is the 7(b) part which helps to establish that it is a trust fund. It is the references to the Secretary of State which help to establish that he is the trustee; he is the person referred to as the person who has got a say about whether that is an appropriate way of dealing with the trust money.

B THE VICE-CHANCELLOR: It does not take you terribly far in making him a trustee.

MR MOWBRAY: It does not go very far, my Lord, no.

Going to page 116, this is a letter to the company from the Under Secretary of State. (Reading letter). There it is; there is the Colonial Office giving a direction about how this, as we say, trust money is to be dealt with.

C THE VICE-CHANCELLOR: I wonder what the Crown Agents' accounts show.

MR MOWBRAY: We will see that.

THE VICE-CHANCELLOR: That comes later, does it ?

D MR MOWBRAY: We will see the precise directions to the Crown Agents. Would your Lordship turn to page 131. These are the directions to the Crown Agents from the Colonial Office: (Reading letter).

THE VICE-CHANCELLOR: This is November, 1914. Was Ocean Island part of the Protectorate ?

E MR MOWBRAY: No, my Lord, Ocean Island was not part of the Protectorate. It was being administered -----

THE VICE-CHANCELLOR: It was a Colony being in fact administered, for convenience, by the Protectorate.

MR MOWBRAY: Yes, by people who happened to be Officers of the Protectorate.

F THE VICE-CHANCELLOR: So what happened was that the money which belonged to the Banaban Fund is credited on behalf of the Governmental authority administering the Colony ----

MR MOWBRAY: To a separate account.

G THE VICE-CHANCELLOR: What has the Protectorate got to do with it if you have got a trust fund ?

MR MOWBRAY: Well, what has the Protectorate got to do with it anyway, one might ask ?

THE VICE-CHANCELLOR: The Protectorate has got governmental functions on Ocean Island.

H MR MOWBRAY: Yes. I think I can explain. The Crown was the trustee and the Crown can only operate through some Government or other. The Crown Agents were acting as bankers or as investing agents and they had to look to some governmental



A person to take their instructions from seeing that the Crown was the trustee. So it is no inconsistency with our submission that this is trust money that it has got the name of the Gilbert and Ellice Island Protectorate on the account in the books of the Crown Agents.

THE VICE-CHANCELLOR: But it is the Protectorate and not the United Kingdom Government.

MR MOWBRAY: That is so. One gets the original direction from the Secretary of State, from Downing Street, and then the name on the account should have been (if it was not) "For the account of the Gilbert and Ellice Island Protectorate, Banaban Fund". The trust account should have had some such legend on it. We say that was only a name, that was the method of identifying the account, and if the Colonial Office was dealing with the Crown Agents it had to identify the part of the world in question so as to be able to refer to it conveniently. The Banaban Fund was put under the Gilbert and Ellice Island Protectorate in that classification and not as a matter of a separate account through which the Crown was a trustee.

THE VICE-CHANCELLOR: As far as one can see from this, the Crown Agents must have treated this as authority to accept instructions from the Gilbert and Ellice Island Protectorate as to the disposition of what was in the account, because nobody else had any authority and inferentially the only person who had any sort of authority must have been the Protectorate. If the "Banaban Fund" is merely a name given to the account and it does not identify any humanbeings or corporations as having any power to deal with the account, it looks as though it must be the Protectorate. "Obey the instructions of the Protectorate as to the disposition of what is in this account" seems to be a fair inference from that letter. Would you agree?

MR MOWBRAY: I would agree, my Lord. I am not sure if I told your Lordship that is a 7(b) document. What I agreed to is that the Crown Agents, on that document, would take their directions from the Gilbert and Ellice Government. I do not mean, of course, that the Crown in right of the Gilbert and Ellice Protectorate or the Crown in right of Ocean Island was the trustee as opposed to the Crown in right of the United Kingdom. Even assuming there were two Governments at that time, a trustee can tell his bankers to act on X's instructions without giving up his trusteeship. Your Lordship will see later that the Secretary of State makes the decisions about the fund and refers to himself as a trustee of a private trust, and so forth.

THE VICE-CHANCELLOR: You say there is nothing to stop him paying money into a bank account in London and then saying later on he is going to give instructions about it himself, and then to facilitate all that he puts it in the name of the Ellice Island Protectorate.

MR MOWBRAY: Well, your Lordship sees the income is to be paid to the Protectorate Government, the current account. That was convenient because that money was going to be distributed in Ocean Island to the landowners so they would need that money in hand. As I said to your Lordship, the separate account of



A the Banaban fund is only a capital account, and apparently that is the reason why the income went straight into the Government's current account and would be dealt with there. That is the end of that bundle.

THE VICE-CHANCELLOR: Then we will stop at that stage.

(Adjourned until tomorrow morning at 10.30)

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