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SPEECH 5

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
GROUP B.

1971 R. No.3670

Royal Courts of Justice
Friday, 19th December, 1975

Before:

MR JUSTICE MEGARRY

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, Ltd., Room 392, Royal Courts of Justice, and 2, New Square, Lincoln's Inn, London, W.C.2.)

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

MR J.E VINELOTT, Q.C., MR P.L. GIBSON and MR D.C. UNWIN (instructed by The Treasury Solicitor) appeared on behalf of the Defendants.

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SPEECH - DAY FIVE

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A MR JUSTICE MEGARRY: Mr Vinelott, before we part with the question of discovery, at any rate for the time being, there is one thing I would say. You emphasised most firmly yesterday that the course the Crown proposed to take of approaching any other Government in this case was not one to be expected in other case. On that matter, if there were to be another case where the ground put forward for Crown privilege was a need for confidentiality between Governments and if there were material which was truly material for the litigant's case but the Crown were to say well, our ground for resisting discovery is this bond of confidence between us and the other Government and no matter how important it is to the litigant we do not propose even to approach the other Government", then I think, so far as I am concerned, I should know what to say and I feel sure that my Brethren would also know what to say.

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C MR VINELOTT: Of course one cannot foresee all circumstances and there might be some very good reasons which make it necessary that a competent judge should decide the issue.

MR JUSTICE MEGARRY: That I fully accept. But if it is a case where the other Government might agree but the Crown come to this court and say "Well, we are not even going to find out", that would be a different situation.

D MR VINELOTT: Your Lordship would then require to know that everything that could reasonably be done has been done, I agree.

MR MOWBRAY: We hope it will not be necessary to say very much more about that topic.

E At any rate, meantime we could just proceed with looking at the documents, and would your Lordship take bundle No.1 at page 2. The great majority of these earlier documents are concerned with the individual ownership of phosphates, but there are some other points that also emerge. Your Lordship has a dispatch on page 2 from the Secretary of State to the High Commissioner. He transmits a copy of a letter from Lord Stanmore applying on behalf of the Pacific Islands Company for a guano licence in Ocean Island, and then I need not read the next paragraph. "Ocean Island does not, so far as I am aware, at present form part of the Gilbert and Ellice Protectorate" etc; (reading to the end of the paragraph): "as to any rights which they may have in the guano deposits in the island". That just shows that somebody was contemplating they may have some rights but no more than that.

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G Then on page 9 is a dispatch from the High Commissioner to the Secretary of State. This also relates to ownership: "Referring to your telegram" etc; (reading to end of second paragraph): "in that respect as may be satisfactory to both parties" - that means the company and the landowners. "Under these circumstances, I defer taking any action" etc; (reading to end of letter): "who, if they part with it, will be entitled to the consideration paid for it". So that is clear recognition by the Crown that the individual owners owned the phosphate.

A I should have said if my friend wishes me to read anything in between I would be glad to do so. We would now turn to page 13. This is from Lord Stanmore, a personal letter, or written from his own house apparently, to the Under Secretary of State; "Sir, I have the honor to acknowledge the receipt of your letter of the 20th ult" etc; (reading to the words, at the end of the fourth paragraph on page 14): "as any payment made would go to the native owners of the Island" - so he is expecting that the payment will possibly go to the owners.

B "It appears to the board that Sir George has not altogether appreciated the distinction between the licence fee, which would be payable to the Crown, and the rent which would be payable to the proprietors, according to agreement with them", and that is all I need read of that.

C Going to page 38, this is the 1900 licence, which was I think twice replaced.

MR JUSTICE MEGARRY: 38 or 39 ? 38 is a letter, 39 is the indenture dated the 2nd Octpber. 1900.

MR MOWBRAY: The indenture starts on the same page as the letter in my copy.

D MR JUSTICE MEGARRY: 38 is a letter from the Pacific Islands Company, so the numbering has gone wrong.

MR MOWBRAY: Yes, my Lord. Would your Lordship be so kind as to tell me the date of that letter ?

MR JUSTICE MEGARRY: October 5th, 1900. The previous page, page 37, is a printed letter from Lord Stanmore.

E MR MOWBRAY: Yes, I am one page out, my Lord. It is 39 in your Lordship's bundle. I will not read that, unless anybody wishes; that is a licence which was replaced. I will go on to page 43. At the top of that page there is an annexation of Ocean Island, and I expect your Lordship has already read that. Then there is Queen's Regulation No.2 of 1900 "To prohibit the collection and removal of guano and other fertilising substances from waste or unoccupied lands in the Gilbert and Ellice Islands Protectorate". The substance of it is in 2: " From and after the first day of January, 1901, the collection and removal of guano and other fertilising substances from waste or unoccupied lands in the Gilbert and Ellice Islands Protectorate without the permission first obtained of the High Commissioner for the Western Pacific or of the Resident Commissioner of the aforesaid Protectorate, is prohibited", and I do not think I need read any more of that.

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H Would your Lordship turn on to page 47, the second letter on that page. It is addressed, I suppose, to Lord Stanmore from the Colonial Office: "In reply to your letter of the 12th instant" etc; (reading letter)

Then we can go right on to page 71. That is the proclamation made by Capt. Tupper when he raised the flag on Ocean Island. I expect your Lordship has read that already.

MR JUSTICE MEGARRY: We have had the second licence in the meantime, have we not? I do not imagine anything turns on it.

A MR MOWBRAY: I do not think so, my Lord. I think the licence itself is in a PD bundle, but nothing really turns on it. The method of acquisition of Ocean Island as a colony does affect, to a certain extent, the applicable law which is relevant, as we have to establish individual ownership of the phosphate. So the fact that the Pylades went there and Capt. Tupper raised the flag is relevant.

B MR JUSTICE MEGARRY: What is the proclamation date - the 28th November, is it?

MR MOWBRAY: No, that is the order to do it I think, my Lord. It is the 28th September, 1901. That is the date it actually happened.

C Then if your Lordship would go to page 74. This is part of a Pacific Islands Company communication. If your Lordship would look at "Land purchase and lease deeds: Mr Campbell expressed an opinion that the latter" - the lease deeds - "should be registered at Tarawa" etc; (reading to end of paragraph). I do not think I need read any more of that.

D If your Lordship would turn on to page 78, the second letter here refers to an earlier purchase by the Pacific Islands Company. We say that the purchase by that company would have been for the purpose of obtaining phosphate and this letter also helps to deal with the individual ownership of the phosphates: "In further reference to my letter of July 18th last" etc; (reading to end of letter). And then there are some so-called leases. Then your Lordship sees the schedule and then copies are enclosed 1 to 7. The first three are indeed leases for 20 years; the fourth to seventh are freehold purchases. So the first three are not for mining purposes at all they are for ancillary purposes, but the deeds 4 to 7 are sales of entire right and title, and what we say is that those sales must have been to enable the phosphate to be dug and the company would not have bought the entire rights and titles of the vendors unless they had thought that the vendors were able to give an entire right and title to the phosphates.

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G Going on to the next page, this document is also relevant on ownership. This is from the Colonial Office to the Company: "I am directed by Mr Secretary Chamberlain to acknowledge the receipt of your letter of the 5th instant and to return to you the Ocean Island leases" - that is the answer to the letter your Lordship has just read. "With regard to Nos. 2 and 7, I am to request you to draw the attention of the Pacific Island Company to the Queen's Regulation No. 2 of 1896 and with regard to the other documents to Part III of the Queen's Regulations Nos. 5 of 1893 and 3 of 1894, and to the High Commissioner's proclamation of the 28th November, 1900".

H One of those is on page 42 or 43, my Lord.

MR JUSTICE MEGARRY: I do not understand this. What is the common element between 2 and 7? 2 is a lease and 7 is an entire right and title. It may be a question of date because 2 and

A 7 are 1900, but then, you see, 5 is even earlier in 1900, so it cannot be the date that is the common element. Why are 2 and 7 within one of the Queen's Regulations and the others within another one? 2 is 21st September, 1900, 7 is November, 1900, so that is the autumn of 1900, but then if you look at 5 that is May, 1900, so it is even earlier than those two.

MR MOWBRAY: That was before the proclamation of 28th November, 1900.

B MR JUSTICE MEGARRY: But then, you see, 2 and 7 are singled out for reference to Queen's regulation No.2, all the others, including 5, are Part III of Queen's Regulations Nos. 5 of 1893 and 3 of 1894 and the proclamation of the 28th November. So they seem to be putting No.5, which is the earliest in date, in the same category as the other ones later in date. So, as I say, what is the common element between 2 and 7 on the one hand and all the others on the other hand? It probably does not matter a bit, but at the moment I do not understand it and if it is necessary for me to understand it you must explain it to me at some later time. If it is not necessary for me to understand it I will remain not understanding it.

C MR MOWBRAY: That is all a long time ago and I do not think we need ask your Lordship to understand it.

D Would your Lordship go on to page 92. This is from the Company to the Colonial Office and I had better read the whole thing. It is relevant on ownership too. "I am instructed to acknowledge receipt of your letter" etc; (reading letter). Then those documents are returned on the 20th September, 1901, and there had already been some sales and some leases. In the previous letter you had the leases first and the sales afterwards.

E In fact a further Regulation was made, which your Lordship will see if we go on to page 97. This is from the Acting High Commissioner to the Secretary of State: "I have the honour to acknowledge the receipt of your despatch" etc; (reading to the words): "by the Regulation (No.V of 1893" - and your Lordship remembers he had to enquire whether the lessor owned the land and whether he would be left destitute or whether he and his family would be left destitute - "and has satisfied himself that its provisions have been fulfilled" etc; (reading to end of letter) - a sort of compromise solution.

F If your Lordship would then turn to page 103, this is the Pacific Islands Company to the Colonial Office on the formation of the Pacific Phosphate Company. It says the Phosphate Company has been formed and it is desirable that the licence should be assigned to it. It says the new company is a British company and the directors, your Lordship sees, include Lord Stanmore and Mr Arundel.

G Then one can go on to page 104. This is the Pacific Island Company to the Colonial Office. I need not read the first part. "2. There can, of course, be no objection to the registration of the Company's leases in Ocean Island" etc; (reading letter)

Then there is the reply (reading letter).

A Then over the page, the Secretary of State to the High Commissioner: "2. In view of the special circumstances ... I am prepared, if you consider that such a step would be justified, to approve of your legalising the sales to the company by issuing a Gilbert and Ellice Regulation for the purpose".

I need not read anything more in that bundle, unless my friend wishes me to.

B If your Lordship takes Bundle 2 and turns to page 8, this is the King's Regulation which was authorised in London; "Whereas it is expedient to legalise the sale to the Pacific Islands Company Limited of certain parcels of land on Ocean Island ... by natives ... on dates subsequent to that of the proclamation ... The sales of land specified in the schedule hereto shall therefore be held to be valid and effectual for all purposes as if the terms of the High Commissioner's proclamation aforesaid and the provisions of section 13 Part III of the Gilberts Regulation 5 of 1893" and so forth "had not been in force as regards the said Ocean Island ... at the time such sales were made".

C So there is a solemn document validating certain sales of land, which must have been contemplated on all hands to include the phosphate in the land, and it is validating them, obviously not, in our submission, because anyone had any doubts about the ownership of the phosphate, but only because the sale of the phosphate, or of the land including the phosphate, was forbidden by certain regulations. So that is a clear recognition of individual ownership in a solemn document.

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E MR JUSTICE MEGARRY: Just a moment. "The sales of land specified in the schedule hereto shall therefore be held to be valid and effectual for all purposes as if the terms of the High Commissioner's proclamation" and so on "had not been in force". So that is saying: well, let the proclamation and the regulations be regarded as not being in force and let the prohibition on disposition be removed. Is it doing more than validating it for the purposes of the proclamation and regulations? Do you say it is validating it for all purposes whatsoever so that even if the landowner in fact under the customary law had no power to dispose of the minerals nonetheless this validated it?

F MR MOWBRAY: No, that is not the submission I was making.

G MR JUSTICE MEGARRY: I want to understand what your argument is.

H MR MOWBRAY: What this regulation is saying is: the sale shall be as valid as it would have been if the other regulations did not exist, or if the British flag had not been hoisted. What we say about that is that that recognises - not validates but recognises the validity, according to the native customary law, of the sale, and it recognises the individual ownership of the phosphate enabling the landowner to sell.

MR JUSTICE MEGARRY: I still do not understand. Just supposing for one moment the state of the customary law on the island at the time was this, that the individual landowners owned the

surface and had the limited powers of disposition which are common ground, but that the right to all the minerals under the surface should be community property for the benefit of the Islanders generally. Does this regulation alter that position ?

MR MOWBRAY: It does not alter it, for instance, for 1899; it does not alter anything. What we say is that it is only consistent with a Crown view that the native landowners owned the phosphate, because it is saying that. If the regulations did not exist he could sell it.

MR JUSTICE MEGARRY: If the regulations did not exist on that law which I am asking you to assume for this purpose he could sell the purchaser something that accorded with the limitations on disposition but he could not do anything about the phosphate underneath because that is vested in the Banaban community.

MR MOWBRAY: What I say is this is not consistent with a view that the law was as your Lordship stated it.

MR JUSTICE MEGARRY: That was really what I asked, because it seems to me this is of very considerable importance. In other words, although it says "shall therefore be held to be valid and effectual for all purposes" if it simply stopped there you might regard it as saying that even though the community as a whole had not been involved in this transfer of the minerals, nonetheless this disposition by someone who did not own the minerals was to convey the minerals; but the "as if" bit can be read as saying: "Well, all this does is it lifts any prohibition in the proclamation and King's regulations but it still leaves the power of the native landowners, or the absence of power of the native landowners, exactly where it was before and, therefore, if he had not got the right to transfer the minerals he has not transferred them!" What I want to get at is what you contend this regulation is doing ?

MR MOWBRAY: It left the law as it was apart from the regulations. So far I entirely agree with your Lordship and I am very much obliged to your Lordship for putting it so clearly. What we say is that if the law had been, or had been thought to be, as your Lordship stated it, that the minerals were communally owned, this regulation could not have been said to be held to be valid and effectual.

MR JUSTICE MEGARRY: That is the point. It is said against you they certainly could have used this phraseology. If in enacting this regulation the view of the Crown had been that only the surface was with the landowner and the minerals were with the community, it could still have been drafted in this way because this is merely lifting any prohibition contained in the proclamation and regulations.

MR MOWBRAY: In our submission, it assumes that if you lift the prohibition in the proclamation then the sale is valid. It assumes that. It does not enact that, it assumes it.

MR JUSTICE MEGARRY: So you say although it does not change the law -----

MR MOWBRAY: It does not change the law of land ownership, but

it could only have taken the form it did if the Government assumed that the landowners owned the phosphates - the individual landowners owned the phosphates.

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MR JUSTICE MEGARRY: Leave out the "as if" clause and let us stop at valid and effectual for all purposes. There I fully understand your submissions and there you can even go further and say it would be a legislative act validating the transaction notwithstanding the absence of the community's consent. But, you see, the "as if" clause seems to be narrowing the thing down, in fact it is certainly narrowing the thing down so that all it does is to make it valid and effectual for all purposes as if there had not been a King's Regulation.

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MR MOWBRAY: Yes, my Lord.

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MR JUSTICE MEGARRY: Not for all purposes as if there had not been the King's Regulation and there had not been the Banaban system of landownership which left the minerals in the community. Do you see the point?

MR MOWBRAY: Yes, my Lord, I think I do. But if the regulation had not been enacted, on the community ownership view the sales would not be valid.

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MR JUSTICE MEGARRY: Well, the sales would be perfectly valid but it would not have worked as regards what was underneath if you had not got community consent.

MR MOWBRAY: It would not have been valid as regards the substance that the company was buying the land for.

MR JUSTICE MEGARRY: I follow.

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MR MOWBRAY: If the regulations had not been enacted, then assuming communal ownership of the minerals, the sale would not have been a valid sale. So when the High Commissioner said the sale shall be held to be valid as if they had not been enacted, he is by inference -- not by enactment, by inference saying that apart from those regulations the sale is valid, and that shows that he did not think that any one of the individual owners named as the vendor in the schedule had to give consent to the sale. That is why we say this is a solemn recognition of the individual ownership of the phosphates.

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Would your Lordship go on to page 12. This is the middle of a report "On the Land Question at Ocean Island": "1. We then asked the object of the meeting and John Kekana as spokesman said, as we expected" etc; (reading paragraph)

So that is the first reference in the documents to the sale of loose phosphate on the lands. That is one of the things we rely on as showing the individual ownership of the phosphate.

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Now would your Lordship kindly pass on to page 60. This is a BPC Sydney letter dated the 26th November, 1903, to the High Commissioner. "We beg to call your attention to the fact that the following documents" and then there are numbers and who the land is sold by, "are not included in the

list of land purchases legalised" etc; (reading to bottom of page): "legalising the purchase of these eight pieces of land".

A Then would your Lordship turn to page 69 headed "Suva, 9th December, 1903". This is from the High Commissioner to the Pacific Islands Company and this also relates to ownership: "I am directed by the High Commissioner for the Western Pacific" etc; (reading to the centre of page 79): "therefore, considers the issue of a regulation on the subject is unnecessary".

B So that is not quite such a solemn act, but it is a recognition that individual owners could sell to the Pacific Islands Company, which only wanted the land to dig the phosphate out.

C MR JUSTICE MEGARRY: Well, "no prohibition of the purchase of land from natives was in force in the island, and there was no obstacle to their acquisition by the company or by any individual". So they are saying nothing as to the right of the vendor to transfer, they are merely saying there is no regulation in force to erect an additional hurdle in the path, as it were. I do not think it knocks down the existing hurdle, it merely says there is no extra hurdle erected. Is that not right ?

D MR MOWBRAY: If your Lordship pleases. If the Crown thought that only the community as a whole could sell the phosphate presumably it would have said so and the High Commissioner would presumably have said so at that stage.

E The next page I would like to refer to is page 86. This is a King's Regulation "To amend and consolidate certain Regulations affecting the Gilbert and Ellice Islands Protectorate" and it is No.3 of 1903. It is sometimes referred to as the 1903 Consolidating Regulations. Your Lordship sees the term "Protectorate" is defined to include The Gilbert and Ellice and Ocean Island. Then if your Lordship turns to page 88, section 17: "The sale of land owned by natives to non-native persons shall be unlawful". Then procedure on leasing land: "If any non-native person enter into a lease of land owned by a native he shall forthwith submit such lease to the Resident Commissioner, who shall at a convenient opportunity make inquiry of the native lessor and of the native authorities of the island in which the land is sought to be leased shall be situated. If it shall appear that the lease is for a period of more than twenty-one years, or that the land sought to be leased is not the property of the proposed lessor, or that the lease has been unfairly obtained, or that the terms are manifestly to the disadvantage of the native lessor, or that there will not be left sufficient land to support the family of the lessor, or if the lease is otherwise contrary to sound public policy, the Resident Commissioner shall refuse to confirm such lease; otherwise the Resident Commissioner shall cause a copy of such lease to be entered in a book to be kept for the purpose and shall make an indorsement on the lease to the effect that the lease has been confirmed and registered, and shall make a charge of one pound ... The registration of the lease

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shall not be conclusive evidence of title as against a person not claiming through the lessor". I do not think I need read any more of that.

A What we say about this provision - which was re-enacted I think at least twice, and your Lordship saw the 1908 ordinance in the PD Bundle in not quite identical terms -----

B MR JUSTICE MEGARRY: There are six conditions there: over 21 years; not property of proposed lessor, unfairly obtained, manifestly to the disadvantage of the lessor, insufficient land left, otherwise contrary to sound public policy. The Resident Commissioner must make enquiry about all those and he has got to refuse or confirm it.

C MR MOWBRAY: Yes. What we say is that whenever the Resident Commissioner registered a lease under this or its successors he was recognising that the lessor was the owner of the land; and if it was a mining lease he was recognising him as the owner of the phosphate. Your Lordship will see that over 300 phosphate free purchases were registered. Whether they should, strictly speaking, or not under this -----

D MR JUSTICE MEGARRY: That became a matter of high controversy about 1908-1909.

E MR MOWBRAY: Yes. But it is irrelevant to this submission. If the Resident Commissioner thought it was registerable, then he must have also thought that the lessor owned the land, and if it was a mining lease he must have thought he owned the phosphate.

F MR JUSTICE MEGARRY: What about the last sentence of that section?

G MR MOWBRAY: "The registration of the lease shall not be conclusive evidence of title as against a person not claiming through the lessor".

H MR JUSTICE MEGARRY: Supposing the true position is that ownership of the minerals is in the community, ownership of the surface is in individuals. The registration of leases is not "conclusive" evidence of title against the mineral owners, but it would appear to be some evidence. So the word "conclusive" seems to me to be helpful to you.

MR MOWBRAY: Yes, my Lord.

MR JUSTICE MEGARRY: It could have said "shall not be evidence of title" but it simply says shall not be "conclusive" evidence, therefore it certainly is some evidence of title.

MR MOWBRAY: Yes. This was not a land registration provision, that is what it is saying. I am much obliged

MR JUSTICE MEGARRY: It does seem to be contemplating that it is some evidence against those not claiming through the lessor.

MR MOWBRAY: Yes, my Lord.

A MR JUSTICE MEGARRY: I cannot remember whether that was in the other regulation we looked at. I do not know whether it matters and you are probably coming to it anyway. It is in the PD Bundle, I think.

MR MOWBRAY: Let us look at it now while your Lordship is thinking about it. It is page 6, page 11 of the bundle, and it is section 24.

MR JUSTICE MEGARRY: Yes, it is in there, not "conclusive" evidence.

B 11.30

C MR MOWBRAY: Your Lordship remembers that the way we put this is that the recognition by the Crown of these rights is a separate element in our argument from the existence of the rights themselves. As we see it, we have to show your Lordship that individual ownership of the phosphates existed in native customary law, or at any rate it exists in English law that was imported and there is no native customary law to the contrary. We have to show that first, and then we have to show that the land law so established was recognised by the Crown, because this was a colony by settlement and the English law comes in to a colony by settlement subject to native customary law which is recognised by the Crown.

D MR JUSTICE MEGARRY: If a native customary law does here exist in the way I have been suggesting as a possibility - namely surface in individuals, minerals in the community - the Crown can change that position by legislation, but if the Crown does not change it by legislation, then you say it is important to see what the Crown recognised the position as being. Is that it ?

E MR MOWBRAY: Yes, my Lord.

MR JUSTICE MEGARRY: And if the Crown treated the individual as owning both the minerals and the surface, then you say that is evidence that there was no native system existing ?

(Continued on next page)

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A MR MOWBRAY: It is both. That would be some evidence of the existence of individual ownership of the phosphates. But we also rely on it quite separately for a Crown recognition of the native law under which the owner of the surface owns the minerals underneath.

MR JUSTICE MEGARRY: At the moment I do not see how your "also" is any different from your first point.

B MR MOWBRAY: Take some entirely different piece of native law or custom, take the custom of suttee. I do not know anything about Indian law, whether that was recognised or not, but one can take an imaginary new colony by settlement where a custom like suttee existed. It would only become part of the law of that colony under British rule if or so far as it was recognised by the Crown. It would be an existing native customary law: it would not be part of the law affecting, for instance, settlers unless it was recognised.

C MR JUSTICE MEGARRY: I follow. You say there are two quite separate things: (1) is recognition by the Crown of what the native law is, and (2) is acceptance by the Crown of that law as continuing to apply, is that it?

MR MOWBRAY: Unfortunately, the word "recognised" is a word which is used for the acceptance of the law.

D MR JUSTICE MEGARRY: I see. All right, recognition of what the law is: recognition of that law as continuing. Would that be it?

MR MOWBRAY: If your Lordship pleases. It is No.2 of our outline heads of argument. That might assist your Lordship.

E MR JUSTICE MEGARRY: At the outset you had seven heads.

F MR MOWBRAY: No, it was after we had outlined the facts we handed to your Lordship a typewritten document. It is paragraph No.2. No.1 is "Ocean Island was a colony of settlement. (2) It therefore received English law but subject to native customary law so far as recognised by the Crown." So we have to show two things, one, that there was a native customary law, and secondly, that it was recognised.

MR JUSTICE MEGARRY: You are relying, then, on this Crown recognition as doing two things, first, as some evidence of what that native law in fact was, and secondly, as recognition of that law by the Crown as continuing.

G MR MOWBRAY: That is it. Would your Lordship now turn to page 100 of Bundle 2. This is another King's Regulation. It is No.3 of 1904, and in paragraph 4 it says: (Reads para.) Then over the page is a provision similar to the one in 1903.

MR JUSTICE MEGARRY: Is this the first regulation dealing with sales of native land?

H MR MOWBRAY: My friend thinks so. I think so too. My friend points out that this applies to the whole protectorate. Both sections do.

MR JUSTICE MEGARRY: Because back on page 88 it says "sale of land owned by natives to non-natives persons shall be unlawful", finish, flat prohibition.

A MR MOWBRAY: Yes.

MR JUSTICE MEGARRY: So this is a marked change in government policy, is it not?

MR MOWBRAY: Yes. It is now permitted, but in limited quantities and subject to a similar kind of regulation to leases.

B MR VINELOTT: There is an indication in the history books that this was to do with the acquisition of land by churches.

MR JUSTICE MEGARRY: Title, fairness, not needed for support, three requirements.

MR MOWBRAY: Yes.

C MR JUSTICE MEGARRY: The title of the vendor or vendors. I was wondering if the Resident Commissioner relished his conveyancing functions.

D MR MOWBRAY: One thing one does get from reading these documents is a great admiration for the Resident Commissioner who had to turn his hand to absolutely everything, building roads, being a lawyer, and so on. Would your Lordship turn the page again. Here is an extract from Mr Arundel's letter of 19th April to the Secretary of the Western Pacific High Commission. It is page 102. He says: "(5) Registration" etc. (reading to the word) "trees". Your Lordship gets a good idea of what those documents would have looked like because there is a specimen P & TD. I will not refer to it now. Your lordship has seen a P & TD, so your Lordship has a good idea of what was enclosed. "I agree with Mr Cogswell" etc. (reading to the words) "furnish you with the same." So that is the first seven of the P & TD system. Would your Lordship now turn the page.

E MR JUSTICE MEGARRY: Do we not need Mr Merton King's reply to Mr Gaze?

F MR MOWBRAY: If your Lordship pleases. He says: "Registration" etc. (reading to the words) "returned herewith."

MR JUSTICE MEGARRY: So they are not going to register them, but they are going to report them none the less on a sort of de bene esse basis.

G MR MOWBRAY: Yes. But what he is saying is that the High Commission only registers claims to land, and subsequently some of these things were registered as leases.

H Now an entirely different topic. On page 107 begins the first of the law officers' opinions, the historic law officers' opinions in this case. We need not read the whole. The conclusions start at page 119: "We have taken the matter" etc. (reading to the words) "is in the affirmative." That was that Ocean Island was a British possession, part of his Majesty's dominions. I think that is common ground. We need not worry too much about that.

Then they go on: "(2) We think that" etc. (reading to the words) "1887." I think that is 1887. "(3) It became part" etc. (reading to the words) "their hoisting of the flag - "

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MR JUSTICE MEGARRY: Is it "and then a hoisting of the flag"?

MR MOWBRAY: Yes, I am obliged to your Lordship, that makes sense - "and then a hoisting of the flag."

B

MR VINELOTT: I do not think that is right, my Lord. If you go back to page 109, there is an account of the history, and one can pick it up four lines from the bottom: "The Pacific Island Company occupied the island under a lease from the natives and hoisted the British flag, though without authority from the British Government to do so. That the British flag was hoisted on the 5th May 1900. That a licence was eventually issued to the Pacific Island Company on the 2nd October, 1900."

C

MR MOWBRAY: Then they went on that the British flag was hoisted --

MR VINELOTT: Afterwards it was hoisted by Tucker.

MR JUSTICE MEGARRY: So what comes after "their" is a squiggle.

D

MR VINELOTT: You have that when there is an incomplete line. The first line of (3) is a very good example. So it is "occupation by the Pacific Islands Company and their hoisting of the flag."

MR JUSTICE MEGARRY: That does seem to be right, Mr Mowbray.

E

MR MOWBRAY: So be it. I am very much obliged to my learned friend. So they say it became part of his Majesty's dominions in that way.

MR JUSTICE MEGARRY: When did they hoist the flag?

MR MOWBRAY: 5th May, 1900.

F

MR JUSTICE MEGARRY: So it looks as if the law officers' opinion is saying that the visit of the gunboat and the ceremony, and so on followed but it had already become part of his Majesty's dominions by the company hoisting the flag on 5th May, 1900.

MR MOWBRAY: Yes.

G

MR VINELOTT: ". . . together with . . ."

MR MOWBRAY: Yes, "together with his Majesty's licence to occupy".

MR JUSTICE MEGARRY: What was the date of that?

MR VINELOTT: 2nd October (page 110).

H

MR MOWBRAY: They go on: "(4) The High Commissioner" etc. (reading to the words) "1887." Your Lordship might like to note that we shall be coming to a subsequent opinion which bears on that question and which is in bundle 8, page 170. Not too much turns on it. ¹⁴ "These Regulations" etc.

(reading to the words) "We have the honour to be" and it is signed by Sir Robert Finlay and Sir Edward Carson. We rely on the part of that opinion - it is common ground actually - that the colony was a colony by settlement.

A

MR JUSTICE MEGARRY: At this date it was only a protectorate.

MR MOWBRAY: No, it was not a protectorate. It was one of her Majesty's dominions.

MR JUSTICE MEGARRY: And therefore it was a colony from the outset.

B

MR MOWBRAY: Yes.

MR JUSTICE MEGARRY: Even though it gets included in the Gilbert and Ellice Islands Protectorate.

C

MR MOWBRAY: It was not quite included in the protectorate. It came under the officials of the protectorate, but it was not part of the protectorate.

MR JUSTICE MEGARRY: Not part of the protectorate, but under the protectorate government, was that it?

D

MR MOWBRAY: It was a colony whose immediate government happened to be the government of the protectorate, the same people, the holders of the same office.

MR VINELOTT: I think that is the case pleaded in the defence. It was an unusual situation of a colony then becoming within the limits of the protectorate geographically for the purposes of government. I mentioned earlier that it is an unusual if not unique situation. There was a similar situation in Sierra Leone.

E

MR JUSTICE MEGARRY: Then as from 5th May 1900 or 2nd October 1900, from the very start, it was a British colony and for governmental purposes was governed by those who were officers of the protectorate. Is that right?

MR MOWBRAY: That is right.

F

MR VINELOTT: Yes.

MR JUSTICE MEGARRY: But it was not governed by them until there was the order in council which brought it within the protectorate jurisdiction.

MR VINELOTT: That is right.

G

MR JUSTICE MEGARRY: So it starts off by being a British colony with no special governmental position other than it was a British colony.

MR MOWBRAY: It would be within the Pacific Order in Council which just blanketed that part of the Pacific.

H

MR VINELOTT: Yes. From 2nd October, I would have thought was the right date, it became a colony, because hoisting the flag without authority would not make it a colony, but that coupled with the grant of the licence would.

MR JUSTICE MEGARRY: Yes, a sort of ratification, acceptance by the Crown of somebody's unauthorised hoisting of the flag.

A MR VINELOTT: That is how we put it.

MR MOWBRAY: Yes.

B MR VINELOTT: From that date it is within the ambit of the Pacific Order in Council, but it is not actually within the administration of the protectorate until an order is made extending that administration to Ocean Island.

MR JUSTICE MEGARRY: Subject to the law of the Pacific Order in Council, but it had not got a governmental structure - no governmental structure until it is put under the jurisdiction of those administering the protectorate.

C MR VINELOTT: I think that is precisely the position. Perhaps I should give your Lordship the date of the proclamation by which the High Commission extended administration of the protectorate. 28th November, 1900 was the date, so it was very shortly after, and all this is set out in paragraph 1 of the defence. When I say "all", it is shortly stated there.

D MR MOWBRAY: Yes, we need not embark on that short period. The position in British law, if I may put it like that, in that part of the Pacific seems to have been that there was a High Commissioner who had a court and on the mere terms of the Pacific Order in Council his court had jurisdiction in that part of the Pacific, whether the flag had ever been raised or not, though I suppose it could not actually be exercised without some assertion of dominion.

E MR JUSTICE MEGARRY: When paragraph 1 of the defence says that Ocean Island became a British settlement within the meaning of the Act of 1885 on 5th May, 1900 I think now, Mr Vinelott, you are saying that is probably not quite right.

MR VINELOTT: That is right. I think that is probably the wrong date, I think it is 2nd October.

F MR JUSTICE MEGARRY: It looks as if now you are saying 2nd October.

MR VINELOTT: Yes, and undoubtedly, as my friend has said, right from the start the High Commissioner and his court had jurisdiction, but I think your Lordship will find, from recollection, looking at the 1893 Order, it was only to be exercised over British persons.

G MR JUSTICE MEGARRY: British subjects.

MR VINELOTT: That is the constitutional position. We, for the purposes of good government, exercised jurisdiction over British subjects who were trading.

H MR MOWBRAY: That is quite right.

MR JUSTICE MEGARRY: Then, still on that sentence, when it says that Ocean Island became a British settlement within the meaning of the Act of 1887, that is equivalent to it becoming

a British colony acquired by settlement.

A MR VINELOTT: That is so.

MR MOWBRAY: After we have read all the bundles we will take your Lordship through that in a little more detail, though not at great length.

MR JUSTICE MEGARRY: Through what?

B MR MOWBRAY: The question of it being a colony by settlement and what the British Settlement Act says and so forth. Would your Lordship now turn to page 138, an extract from Mr Arundel's report. He was the Vice-Chairman of the company. Paragraph 5 on that page says: "Phosphate and Trees Purchase System" etc. (reading to the words) "object lesson to the natives." I need not read more of that.

C Actually the deeds were registered and some 300 were registered, and we say there could hardly be a clearer recognition that the owner of the land also owned the phosphates. No doubt as between him and his heirs he was treating the phosphate as being part of the fruits of the land. He was entitled to consume the fruits and he was claiming here that the phosphate from the land was part of the fruits of the land. That seems wrong to an English property lawyer who is brought up on putting aside three-quarters of the proceeds of unopened mines back into capital.

D MR JUSTICE MEGARRY: Of one thing I think you can be sure, and that is that none of the owners of land on Ocean Island were thinking of the Settled Land Act 1882.

MR MOWBRAY: Exactly.

E MR JUSTICE MEGARRY: You say the owner was treating the phosphate as being part of the fruits of the land.

MR MOWBRAY: Yes. When he took and spent the whole proceeds I do not suppose he thought it out.

F MR JUSTICE MEGARRY: That is the point. I should be very surprised if there had been any conscious thinking out "Well, I am entitled to take the fruits of the land. If I sell the phosphate that is fruits of the land and therefore I am entitled to keep it."

MR MOWBRAY: No, it was something that had not cropped up before.

G MR JUSTICE MEGARRY: Nobody stopped him doing it and he did it.

MR MOWBRAY: And his children presumably did not stop him, or maybe they got a share. One does not know.

H MR JUSTICE MEGARRY: It is very far from being fruits of the land, it is something to ensure that the land will not have any fruits. You dig out all the phosphate, leave it all barren pinnacles and what fruit does that land give you?

MR MOWBRAY: I say respectfully that your Lordship is rightly speaking as a property lawyer.

A MR JUSTICE MEGARRY: I should have thought one was speaking like almost anyone anywhere. If you are going to talk about fruits of land, a process which destroys the land and renders it barren is one which, I should have thought, any lawyer almost anywhere, or indeed any non-lawyer, would recognise. What is barren cannot produce. I do not think it was a quirk of English property law.

B MR MOWBRAY: No, but at any rate I am not suggesting that ideas about fruits and so forth passed through anyone's mind. What I say is that the proceeds of the transactions were treated more like the proceeds of the phosphates ---

MR JUSTICE MEGARRY: I am inserting the words "in fact" in the proposition - "As between the owners and the heirs he was in fact treating the phosphate as being part of the fruits of the land."

12.07 C MR MOWBRAY: Yes. Your Lordship knows that subsequently landowners did not simply spend the whole proceeds. Subsequently landowners left the proceeds in a fund and merely took the interest, and in between they must have been convinced that that was the right thing as between them and their heirs, they started to think of their unborn grandchildren. I am not sure there is anything more in that bundle.

D Let us go on to bundle 3, page 7.

MR JUSTICE MEGARRY: From the Resident Commissioner's Office.

E MR MOWBRAY: Yes, to the High Commission. I would like to read a passage from page 10, paragraph 9. This also goes to ownership. "Complaints" etc. (reads paragraph). That is the beginning of this long story where one says it is the value and the other says it is a fictitious value. That looks like a little more evidence of sales by native owners. They are talking about land worked or required by the company and they must have been complaining about what they were getting or likely to get as consideration. Perhaps not a very important point.

F We can go now to page 35, headed "Suva, Fiji" and dated 24th July, 1906. This is about the registration of P & TDs. It is from the secretary of the Western Pacific High Commission and I think it must be to the company. "Sir, I have the honour" etc. (reads letter). So it looks from that as though he did register those documents and it looks as though by then at least the P & TD had reached the form in which your Lordship has seen it. Would your Lordship interpose the last page of Bundle 4 here. That is a P & TD, No.270. Your Lordship remembers that a time limit was inserted and it seems to have been inserted before the letter I have just read. I do not know whether your Lordship has seen this before. The limit comes at the end, "with the right to remove and ship the same within the next ten years". You see that "the said native does hereby sell to the said company all the coconut trees," etc. "and all the rock and alluvial phosphate that may be found." So that is on its face a clear sale of phosphate.

G

H

A MR JUSTICE MEGARRY: Going back to page 35 in bundle 3, it seems as though 49 of those were registered. Would your Lordship turn to page 36, the reply, which says: "We have the honour" etc. (reads letter).

We can now turn to page 62, the middle letter from the Colonial Office to the Pacific Phosphate Co. Ltd. This is the evidence for a point which is pleaded in the defence. "I am directed", etc. (reads first para. of letter). I do not think I need read more unless my friend wishes.

B MR VINELOTT: Would my friend read page 50?

MR MOWBRAY: That is land purchase deeds: "(41) . . . The Resident Commissioner has returned to us" etc. (reads para).

C MR JUSTICE MEGARRY: That is a pragmatic approach: it does not matter whether it does not get registered and therefore the thing is invalid in some way, "we have done what we propose to do and the rest will be all right."

MR MOWBRAY: And the phosphate has gone and there is nothing anyone can do.

MR JUSTICE MEGARRY: Well, you make no comment on that, I imagine.

D MR MOWBRAY: That was written by someone not a party to these proceedings. I do not make any comment.

E That is all from bundle 3, unless my friend has something he wishes to read. Would your Lordship now turn to bundle 4 and go straight to page 20. This is headed "Enclosure No.120." This is written from the Resident Commissioner's office by Mr Mahaffy, who signs himself as Assistant to the High Commissioner. It is written to the High Commissioner. I would like to read the whole of this, or at any rate a large part of it. He says: "I have the honour to direct" etc. (reading to the words on page 21) "(7) . . . Mr Cogswell" - he was the Resident Commissioner at the time - "was drawn up" etc. (reading to the words) "17) Your Excellency will observe that under the lease from the Colonial Office" --

F MR JUSTICE MEGARRY: That is a licence rather than a lease, is it not?

MR MOWBRAY: It is, really. -- "by virtue" etc. (reading to the words) "such rights" - that is his emphasis - "as a native" etc. (reading to the end of paragraph 21).

G MR JUSTICE MEGARRY: I have not seen that before. It is a remarkably comprehensive and far-sighted document.

MR MOWBRAY: Yes, I thought so when I was reading it through. He obviously had thought about it deeply.

H MR JUSTICE MEGARRY: Do not feel any hesitation about reading through a document on the ground that it may have been read through before in the other action, because in that action I was looking at it with the rights and wrongs of that action in mind and now I have a rather different viewpoint.

A MR MOWBRAY: I am very much obliged. We will read the whole of page 31, if we may. These are Colonial Office minutes. "Ocean Island. Position of the Pacific Phosphate Coy." etc. (reading) " Mr Johnson: This reveals a State of affairs" - that is the one your Lordship has just seen - "which may become serious". Mr Macdonald points out that the despatch referred to is page 44. These minutes quite often come out of order because they have different dates on them. Page 44 is the despatch from the High Commission which encloses Mr Mahaffy's statement.

B MR JUSTICE MEGARRY: The despatch from Mr Mahaffy is the one we have been looking at at page 22.

C MR MOWBRAY: Yes, and these comments are directed to it. (Reads on to the words) "phosphate trees system". So that is some indication of individual ownership, not much. "If they do" etc. (reading to the words) "quoted in the lease." He means the licence and the covenant to respect other inhabitants - "but there are" etc. (reading to end of para) "company to be bound."

Then it goes on: "This serious difficulty could not be foreseen because at the time when the original -- "

D MR VINELOTT: May I suggest that the transcription has gone wrong there and that it should read - "original deed and licence were signed no one had or could have had any exact knowledge of the character" - the original is page 34.

MR JUSTICE MEGARRY: You say "any exact"?

MR VINELOTT: Yes, "exact knowledge of the character and extent of the deposits." I think that is a more accurate transcription.

E 12.30 MR MOWBRAY: That is what we think too. We rather agree about that. "The only thorough" etc. (reading to the words) "representatives to an interview." That is signed by Mr Dale, presumably. "Proceed in first instance" etc. (reading to the middle of page 38) "registration of each lease."

F I would like to pause there and say two things. Going back to page 37, we undertook to try to tell your Lordship which of these documents were in those long lists of documents which were given as particulars. This is the first, I think, and it is a 7C document in that it is one of the documents which are referred to, pleaded specifically as documents we are relying on to show that the United Kingdom Government was the trustee of the 1913 royalties. It is not a very strong inference from this page.

G MR JUSTICE MEGARRY: It will be some while before you get to 1913.

H MR MOWBRAY: Yes. But 7C is that the trustee is the United Kingdom Crown. 7B is that the trust exists. This was all being done in London, that is the point. The minutes say: "We have therefore full power to deal with the present difficulty under King's Regulations". It is all one.

A The other thing I was going to mention is on page 38. It only confirms what your Lordship could see for yourself, that the P & TD was a sale of phosphate, and there is the Colonial Office recognising that each P & TD was a sale of the phosphate by the individual owner.

B I can go now to page 39 at the new paragraph: "It is not perhaps necessary" etc. (reading to the words) "convenient for the population." I will read the last paragraph on the next page: "? arrange interview" etc. (reading to the end) "1908." So it is Regulation 3. Then he adds: "The whole story illustrates the fact that" etc. (reads to the words) "goal posts."

C Page 83 is another memorandum by Mr Mahaffy. He says: "The allegations" etc. (reads to end of para 13). I have said we rely on that. I have it marked in my copy, but I think it is really more prejudice than something to rely on.

We can go to page 102, and I will read the whole of this. It is from the Colonial Office to the Managing Director of the Pacific Phosphate Co. (Reads to top of page 103) "are left to the natives", and then he invites the company's views.

D That was a letter of complaint. We say that if it had occurred to the Crown at that stage that the individual natives had no power to sell the phosphate under their land some indication of that would have found its way into a letter of that kind.

E Page 124 is from the Pacific Phosphate Co., 9th November, 1909 to the Under Secretary of State, Colonial Office. I had better read the whole of this, although your Lordship has seen it before. (Reads first para). We read this letter in this action on the character of the 1900 agreement between the King and the natives and on the question of ownership of the phosphate. He refers to the Under Secretary's letter and then goes on: "(2) Although the phosphate" etc. (reads to end of para 3).

F Pausing there, that shows that even the company did not claim that the agreement of 1900 was more than a kind of franchise or what he calls a charter or concession. I think this is common ground.

MR VINELOTT: Yes.

G MR MOWBRAY: That the company had to go on and treat with the individual owners. It is common ground. So that is the first thing we say about paragraph 3. The second is that when a mining concern acquires an interest in land under some necessary arrangements it does so in order to take the minerals away and this paragraph shows the Pacific Phosphate Co. Ltd. thought it could get valid permission to take the minerals away from the native proprietors.

A Then he goes on in paragraph 4: "In the same manner" etc.,
(reading to the words) "which they grow." That last effect
was subsequently one of the arguments raised for doubting
whether individual owners owned the whole. We will see that
later. "It is obvious", he goes on in paragraph 5, "that in
order to raise" etc. "dissatisfaction or objection."
I see your Lordship underlining. That is something we rely
on. They were being recognised; the landowners' title was
thereby recognised "without a hint of dissatisfaction or
objection."

B That is all I wish to read of that letter and we can
turn to page 130.

MR JUSTICE MEGARRY: The original agreement of 3rd May, 1900,
the grant by the King, is to be found somewhere in these
documents?

C MR MOWBRAY: No, my Lord. It is not in the bundles in this
action. It is in the AG bundle in the first action.

MR JUSTICE MEGARRY: But I gather nothing really turns on it.

MR MOWBRAY: I do not think so. The limited nature of what it did
is common ground. Page 130 is about the Resident Commissioner's
refusal to register the P & TDs.

D MR JUSTICE MEGARRY: That is Cpt. Quayle Dickson.

MR MOWBRAY: This is his refusal. He says: (Reads letter).
We read that as marking a new departure.

MR JUSTICE MEGARRY: Yes. Up till now certain doubts and
hesitations have been expressed about them but they have been
recorded or registered without a clear refusal.

E MR MOWBRAY: Yes. Then we get the reply recording facts which
we do rely on: (Reads letter down to the words) "immediate
steps" and so forth.

F There is one thing I should have said on the previous
letter. Capt Quayle Dickson must have recognised that he
was intimating a change of policy and the only reason he
gave was that the deeds did not comply with the existing
regulations. If he thought that there was another good
reason for not registering them, namely, that the lessor had
no title, one would have thought, in an important letter of
that kind, he would have said so, but he did not.

G MR JUSTICE MEGARRY: It was not the only reason, ^{"not} according to
the regulations." Paragraph 3 seems to be further reasons
in certain cases, but your comment can apply to those, and in
fact I think it rather strengthens your point.

MR MOWBRAY: Yes.

H MR JUSTICE MEGARRY: He says they are not in accordance with
regulations and moreover in some cases "I cannot trace the
people and they have died." One thing he does not say is
that the grantors had no right to grant.

A
B
MR MOWBRAY: Yes. Then I can go to page 155. This is a 7B document. It is the first 7B document. It is the first document we rely on as helping us to establish the trust of the 1913 royalties. It reads: "The Resident Commissioner" etc. (reading to the words) "Downing Street." I should read on to page 156: "Have agreed subject to your concurrence. What do you think of it", I suppose it should be, and then it should start a new sentence, I suppose. (Reads to end) "greatly exaggerated". As I say, that is a document we rely on as establishing a trust, and we have given that in our particulars. It is also of interest as a matter of background that it is mentioned that the thing is subject to Colonial Office, Downing Street, and in the end the whole thing, your Lordship will see, is tied up in London.

MR JUSTICE MEGARRY: Should not that also be a 7C document too, with "Colonial Office Downing Street" at the end?

C
MR MOWBRAY: We are reluctant to add to those lists of documents or to alter them again. We say that we are not confined in our evidence to the documents which are mentioned in the particulars and we read this document as evidence.

D
MR JUSTICE MEGARRY: I am trying to understand the nature of the difference between the 7B and the 7C documents. The 7B documents, as I understand it, are to establish that there was a trust.

E
MR MOWBRAY: Yes. I see what your Lordship means, that is absolutely right. It might as well have been included in 7C, but it just was not. So we can go on to page 160. I had thought that we could perhaps finish this bundle before the adjournment, but we shall not be able to do so, and if your Lordship approves I will leave page 160 until we resume.

(Adjourned till 10.30 a.m. on
Monday, 12th January, 1976).