Transcript No. 22 (Volume 1)

THE VICE CHANCELLOR: Number 7 is the same as your initial group of amendments?

A MR. MOWBRAY: Yes.

THE VICE CHANCELLOR: Then is number 6 a draft omitting the abandoned claim?

MR. MOWBRAY: No. Some particulars of Crown Royalties that we have never claimed got into our particulars of amounts claimed and we are taking them out here. So that is all there is.

B THE VICE CHANCELLOR: It looks more formidable than it is.

MR. MOWBRAY: Yes, there are a lot of amendments, but the reasons for them are perfectly simple. Then the amendments to the defence, I think I am right in saying, are all just consequential on the first thing I mentioned, the reference to the local government. There are just one or two alterations of dates.

C THE VICE CHANCELLOR: What are you talking about now? I have the amendments to the statement of the claim, but I have no other documents.

MR. VINELOTT: I have the amendments to the defence and they are consequential. (Copy handed to his Lordship.) They are consequential on the amendments to the statement of claim. There are one or two amendments which were made I think informally when your Lordship was dealing with the pleadings and they
D have been put in too. I hope the further amendments will now sweep up all the amendments informally made when we went through the pleadings before, together with the new amendments.

THE VICE CHANCELLOR: I follow. Then I will retain these two statements of proposed amendments and my original pleadings until such time as the necessary retyping has been done.

E MR. MOWBRAY: If your Lordship pleases. I think it is fair to say that points 1, 2 and 3 are common ground between my learned friend and myself. Point number 4 he was inclined to admit - that is, "the native landowner" etc. (reading to the words) "1916." I want to alter 4 to a revised form to show the real issue and when I have done that my friend will not be able to admit it.

THE VICE CHANCELLOR: Mr. Vinelott, without tying you down to admitting every
F word that Mr. Mowbray utters, is there any serious dispute on point number 3?

MR. VINELOTT: No. There is not any dispute on 4, as it stands, but I understand my friend is going slightly to modify it.

THE VICE CHANCELLOR: Yes, so as to induce you to dispute it.

G MR. MOWBRAY: Of course that is not the main object! It is to show what is between us. Can I give your Lordship my revised 4: "By native customary law that the individual owner of land was also owner of the phosphates beneath was recognised between 1900 and 1916." I just note under that that the laws of descent and the laws restricting alienation in the Maude Report are common ground.

MR. VINELOTT: Having heard that proposition may I make one observation on
H paragraph 2 that I ought to have made before. I refer to the last words "So far as recognised by the Crown" which I think reflect something of importance where you find that the reception of English law recognises native custom by a concession amounting to a course of practice. My friend nods and I think it reflects that statement in Halsbury. It is a passage which I

have to confess I am not too sure that I understand. It is founded on some Australian cases. I do not think it has been in any way in issue in this case how far recognition by the Crown comes into it if native customary law is to survive reception of English law. I do not think it is going to be an issue, but I thought I ought possibly to make a word of qualification to reserve my position in case anything does turn upon that.

THE VICE CHANCELLOR: I am not understanding. Where is the statement in Halsbury?

MR. VINELOTT: It is paragraph 1197 which your Lordship read yesterday. The third paragraph says: "The applicability" etc. (reading to the word) "practice." The cases cited are New Zealand cases. "The extent of these words" etc. (Reading to the words) "course of practice." In the present case the express enactment is section 20 of the 1893 ordinance and there is no difference between my learned friend and myself as regards the terms of that ordinance. We accept that the words "so far as circumstances permit" mean that if you have established rights under customary law English law is not imported so far as inconsistent because the circumstances do not admit the reception of English law if the result would be to alter private rights.

THE VICE CHANCELLOR: You accept that English law will not oust private rights under native law.

MR. VINELOTT: That is so. So that brings my friend and myself together and the rest of the qualification about the political concession seems to me irrelevant and it is reflected in this proposition by the words "so far as recognised by the Crown". I only wanted to make this qualification, that I may want to come back to this point if it turns out in the course of the argument that there is some difference between my friend and myself on that. Otherwise, we are entirely at one on those propositions. Your Lordship will hear what my friend has to say, but I think we diverge on the law only when we come to 1913. Up to then the difference between us is a question of fact, What is native customary law?

MR. MOWBRAY: I am certainly not going to kick that gift horse in the teeth. What it amounts to is that I have undertaken to show recognition whereas my learned friend now says "You need not show recognition," that the Crown would not seek to say that English law comes in in such a way as to disturb native rights under customary law. I have prepared what I am going to say rather on the basis that I do need to establish this. At Head 4 I say that there has been recognition and at 1 I say there is a customary law under which the landowner is owner of the minerals. I have separated them in that way because of these constitutional questions and perhaps I might go on putting them in that order. As I said long ago, we rely on the Crown recognition of these rights - I mean express recognition between 1900 and 1916 - as helping to establish the rights as well as for other purposes and we rely on them also as admissions.

THE VICE CHANCELLOR: Admissions?

MR. MOWBRAY: Admissions by the Crown that the rights existed.

THE VICE CHANCELLOR: I understand admissions against interest. The Crown does not in these proceedings claim any ownership of the minerals, but does the question of admission come into the question whether the ownership of minerals is communal or individual? That is not a question of admission by the Crown, is it? That is nothing to do with an admission against interest, which is the true form of admission. It is not against the Crown's interest.

MR. MOWBRAY: Well, it is in these proceedings, though no doubt it was not understood to be against the Crown's interest in 1900. That is so, I agree. The first important recognition or Crown act in which we can see the individual ownership of the phosphates recognised is King's Regulation No.1 of 1903, Section 2. That recognised that if the flag had not been raised on Ocean Island outright sales of land for mining by individual Banabas would have been valid. I do not know if your Lordship remembers this point. We discussed it when we were reading the regulation. It is to be found in Volume 2, page 8. There were restrictions on the sales of land to non-natives and in Section 2 of the Regulation it says: "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" - that is the proclomation of 1900 - "and the provisions of Section 13 part 3 of the (Regulations) had not been in force as regards the said Ocean Island at the time such sales were made." What they are saying there is that these sales that are scheduled sales should be as valid in effect as if the flag had never been raised and there had never been any legislation forbidding sales to non-natives. That would have failed in its purpose unless a sale by the natives for mining purposes before 1900 would have been valid. So there is a recognition there that pre-1900 sales by the natives would have been valid and that is sales for mining purposes so there must have been individual sales by the individual owners of the land.

THE VICE CHANCELLOR: Logically it does not necessarily carry the point, does it, because if the native landowner in fact only had surface rights but he had a power to make a disposition that authorised mining the proceeds in fact belong to the community. It depends on what native law is. The most obvious situation is the one you are contending for, namely, the native owner owned not only the surface but also the minerals underneath and therefore there is validation. But it might also work if he had only surface rights coupled with some sort of power of disposition, so logically it does not carry the point. It is the easiest and simplest explanation and the most likely explanation to say that this is a recognition that you do own anything underneath the soil.

MR. MOWBRAY: Yes, that is the simplest and likeliest, if one knew nothing about Ocean Island. There is no suggestion anywhere that anybody had any separate power different from ownership over what was underneath. So really ownership is the only thing left.

THE VICE CHANCELLOR: Yes. And of course in Regulation 1 the recital is: "Whereas it is expedient to legalise", so the word "legalise" - "this will make legal these sales" you say makes them legal for the purposes for which they were made.

MR. MOWBRAY: Absolutely, for mining purposes.

THE VICE CHANCELLOR: If the sale is then legalised for the purpose for which it is made, namely mining, then, etc.

MR. MOWBRAY: Yes. There is a similar point on page 70 of the same document. I should tell your Lordship that I number that point about King's Regulation No.1 of 1903 my point 4.1 under Head 4.

There is a similar point numbered 4.2 in a letter on page 70 of the same bundle.

THE VICE CHANCELLOR: This is a High Commissioner letter.

MR. MOWBRAY: Yes, from the High Commissioner to the Pacific Islands Company: "I am directed by the High Commissioner" etc. (reading to the words) "Ocean Island" these are other parcels - "in reply" etc. (reading to the words)

MR MOWBRAY: That is an enormous help and saves quite a lot of trouble. Your Lordship remembers that section 8 provides that three of the Gilbert and Ellice Islands Colony order in council entrenches civil rights by customary law. So that recognises native laws and customs, though it does not say what.

I would just like to mention, before we leave 5, that of course if English law alone applies it would suffice for our purpose on the question of how far ownership goes down into the earth. I do not mean to cite your Lordship authority on that, we can make our point in this narrow way, that English law comes in and it is only modified by any contrary system and there is no contrary custom. Or we can say "Well, that is a rather narrow way of looking at it; there is plenty in the documents to show there was a positive custom that landowners owned the minerals.

No.6 is Rotan owns the land in the 1913, 1931 and 1947 areas. That is not quite accurate and I would like to amend it slightly to: Rotan owns land in the 1913, delete 1931, and 1947 areas. So he owns land in the 1913 and 1947 are and his ancesstor owned land in the 1931 area, now Crown land.

THE VICE-CHANCELLOR: Now Crown land ?

MR MOWBRAY: Yes, it is now Crown land because when the Resident Commissioner entered it became Crown land.

THE VICE-CHANCELLOR: Under the resumption.

MR MOWBRAY: Under the resumption. It became Crown land but subsequently in 1947, after the 1947 agreement, the Crown indicated that that would be turned back to the owners when the mining finished. Rotan will give evidence of his title.

THE VICE-CHANCELLOR: His ancesstor owned and he now owns land in the 1931 area. Is that right ?

MR MOWBRAY: His ancesstor owned it but it is now Crown land and it will come back to him under the Crown's promise that it will be returned.

THE VICE-CHANCELLOR: Yes, of course, they gave a mere bare promise by the Crown. There is no recognisable interest at all in that land otherwise. Is that it ?

MR MOWBRAY: Well, we call it a promise and we need not put it any higher than that in this case. I expect it will come back and the point will not arise. I am reminded that his mother died in 1927, so he himself owned the land in 1931. Perhaps, just to make it read, we could say "owned or owns".

THE VICE-CHANCELLOR: I have got: "Rotan owns land in the 1913 and 1947 areas and his ancesstor owned land in the 1931 area, now Crown land, which the Crownhas promised to return.

MR MOWBRAY: We can substitute "he" for "his ancesstor". He owned land in the 1931 area.

I do not need to elaborate 7 or 7.1.

8 does not arise now because the Crown does not claim the phosphate.

THE VICE-CHANCELLOR: In 7 you say he or his predecessor owned and I can take out "his predecessor", can I ?

MR MOWBRAY: No, because if the phosphate went before 1926 he never owned it. If the 1913 land phosphate was dug out and spread in Australia before his mother died, he never owned that phosphate.

No.9, there is no contrary Banaban custom. Now we come on to fact and I will try to pursue this as a matter of fact now. 9.1 there is nothing to the contrary in the Maude Report or the subsequent memorandum. I would like to add a 9.11 after that: there is nothing to the contrary in Bundle 32, page 43. That is an intervening report by Mr Barton on Mr Maude's views which he had ascertained.

For 9.12 I will just mention the Maude Report, the one about descent and alienation. It is at Bundle 29 page 16, but I do not think your Lordship need turn to it. It is only about descent and about adoption, and so forth, and powers of alienation and there is nothing about the subject-matter of the ownership. That is our submission about that.

9.13 is the minute in Bundle 32 page 43.

THE VICE-CHANCELLOR: On 9.11 I had Bundle 32 page 43.

MR MOWBRAY: Yes, I just wanted that up near the top because it is an addition to the other two Maude matters.

THE VICE-CHANCELLOR: Do you want it again on 9.13 ?

MR MOWBRAY: I do not mind whether it is in again or not, but I would like your Lordship to look at it. The minute starts at page 42 and it is a minute by Mr Barton, the Acting High Commissioner. The passage I am referring to really starts at 3 at the bottom of page 42: "I have since seen Mr Maude and discussed with him" etc; (reading to the words): "contrary to their own customs". Then at 4: "Mr Maude now agrees with me".

The only things mentioned there as establishing a contrary custom are the caves, and I will deal with them at 9.3.

THE VICE-CHANCELLOR: What about (b).

MR MOWBRAY: That is where he refers to the caves: "They had no conception of the surface owner owning the subterranean rights".

THE VICE-CHANCELLOR: And (c) ? As far as that goes that is really against you, is it not ?

MR MOWBRAY: Yes, as far as it goes, but in our submission it goes nowhere. The true way of looking at it is that before

1900 the Banabans had no notion of any minerals so there could not have been an ancient custom about minerals. So one cartainly cannot distinguish between one type of mineral and another, especially radium! What we say is that (b) puts the thing upside down. It is not a question of someone having no conception of subterranean rights. To show the subterranean rights were different from the surface rights you have to show that they had some conception of a different ownership of what was underground and different rights over what was under ground. I will have a little more to say about the caves in a minute.

THE VICE-CHANCELLOR: It is a very difficult concept to say you can own the surface without owning what is underneath. How far do you go down ? Do you own the top spit of the soil ? If you extract the phosphate lying on the surface and the surface then goes down six inches, if the landowner does not own anything below the surface who does own the six inches, or one foot, or two or three feet down ? What happens on the Island now that the phosphate is being excavated 60, 70, 80 feet down ? If the individual landowners formerly owned just the surface who owns the new surface ?

MR MOWBRAY: It is accepted, as I understand it, that the land reverts to the Banaban landowners when the BPC has gone, and what reverts is not surface.

THE VICE-CHANCELLOR: It could not possibly be the old notional surface.

MR MOWBRAY: No. And, of course, what is left is coral not mineral at all. What Mr Maude seems to have been arguing for was that everything under the surface - not the mineral, but everything under the surface belonged to the Crown.

THE VICE-CHANCELLOR: I have got 9.11 as being nothing contrary in Banaban custom, and 9.12 is the Maude Report, is it ?

MR MOWBRAY: Maude's report, and we need not turn to that. 9.13 is his memorandum, the 1946 memorandum. Would your Lordship turn to paragraph 21: "As regards the surface rights, investigations have shown" etc; (reading paragraph) I will deal with all these references to bangabangas together, but your Lordship sees there is a reference there to it being owned by "groups".

THE VICE-CHANCELLOR: Not the community.

MR MOWBRAY: Not the community. I should tell your Lordship straight away that Rotan's evidence will be that there were two bangabangas which were owned by the community as a whole over which the community as a whole had rights, but all the others were owned by the landowner.

THE VICE-CHANCELLOR: So, therefore, this paragraph is wrong ?

MR MOWBRAY: Inaccurate, yes.

THE VICE-CHANCELLOR: Either the surface owner or the community had bangabanga rights. One thing that did not happen is what Maude says did happen.

MR MOWBRAY: Yes; perhaps he did not know about that. As I say, I will come back to the bangabangas.

A Would your Lordship turn to paragraph 56. He deals with these under surface rights again here: "The previous paragraph will have shown the two main points" etc; (reading to the words): "or whether they" - that is the Banabans - "possessed both surface and under surface rights". What I would like to point out there is that he is not even suggesting that the under surface rights belong to the community as a whole.

B THE VICE-CHANCELLOR: This is an either/or argument, either it is the Crown or the individuals, he does not consider the possibility of the community.

MR MOWBRAY: No. The Crown does not claim it now so, so far as Mr Maude's arguments go, individual ownership is the only possibility left. He goes on: "Should it be held that" etc; (reading to the words): "will cause considerable difficulties".

C

THE VICE-CHANCELLOR: If you go on he says: "Large landowners" etc; (reading to the words): "despite the fact that either would be contrary to their own customary law".

MR MOWBRAY: Yes. "contrary to their own customary law" is hard
D to understand unless it is another reference to the bangabangas, because that is the only other thing in the memorandum.

THE VICE-CHANCELLOR: Well, that is something to the contrary, is it not ? Proposition 9.11 says there is nothing to the contrary in the Maude Report or the later memorandum.

MR MOWBRAY: Well, that is a rather shorthand way of putting it.
E Putting it in longhand, the only thing to the contrary in the Maude Report is really the bangabangas, and you cannot erect on the bangabangas this superstructure that Mr Maude has attempted to erect.

THE VICE-CHANCELLOR: Let me get this plain. What are you treating as the Maude Report and what are you treating as the later memorandum ?

F

MR MOWBRAY: This printed document is the later memorandum.

THE VICE-CHANCELLOR: The 1946 memorandum.

MR MOWBRAY: Yes, the 2nd September, 1946. The only indication of why it would be contrary to their own custom is in the
G previous passage I showed your Lordship, paragraph 21, where he refers to bangabangas, and, as I shall very shortly be coming on to argue, the existence of bangabangas does not prove anything about the ownership of the phosphate.

Then on to 9.2, separate ownership of trees. Your Lordship has not seen anything in the documents about separate ownership of trees. I only mention it because Rotan might
H mention it.

THE VICE-CHANCELLOR: Somewhere there is a statement that it is perfectly possible for A to own the trees on B's land.

MR MOWBRAY: I thought I had seen that in the documents, but then when I looked through them again I could not find it.

A MR VINELOTT: I am sure it is there and we would agree to that.

MR MOWBRAY: I wondered afterwards if perhaps your Lordship had heard it in No.1.

THE VICE-CHANCELLOR: It is certainly not a matter of evidence in No.1, but I think it is in the documents. Whether it is
B mentioned in the documents in No.1 or not I do not know, but certainly somewhere in the documents there is a statement that it is possible for trees on someone's land to be owned by somebody else.

MR MOWBRAY: Our comment is pretty short on that. So be it. All that shows is that the ownership could be severed or not - the ownership of the land could be severed or not.
C There is no suggestion that the trees were communally owned.

THE VICE-CHANCELLOR: I do not remember any horizontal trees on Ocean Island. Trees have roots that go down.

MR MOWBRAY: Well, I suppose I was disregarding the roots. But if you have separate ownership of trees all that shows is that you can have A owning a fixture on B's land.

D

THE VICE-CHANCELLOR: If B owns the land and he grants to A the five coconut trees with the right to collect their fruits and go on the land, and so forth, that is not inconsistent with B owning the surface of the land and also all that lies beneath it.

MR MOWBRAY: No, and it is not inconsistent with B owning all
E above it. Even less is it an argument towards communal ownership because it is not suggested there was communal use of the trees.

THE VICE-CHANCELLOR: I do not think Mr Vinelott's strongest argument will be founded on trees.

F MR MOWBRAY: I can move on to 9.3. I will leave 9.3 as it is, communal use of bangabangas is not to the contrary, although we admit there were two communally used bangabangas.

First of all 9.31: it proves nothing about the phosphates because it is water not phosphates that are enjoyed. In English law someone else can have a right to draw from a spring on a landowner's land. I should not
G wonder if there was something rather like a communal right in some villages to draw water from someone' else's land, but that does not mean that no spring is privately owned and it certainly does not mean that no land is privately owned. The bangabangas are in the coral not in the phosphate and communal use of bangabangas, in our submission, just does not prove any communal interest in anything under the surface.

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THE VICE-CHANCELLOR: It may be that to get down to a bangabanga you have to go down through the phosphate.

MR MOWBRAY: Yes, but then you have to cross the land as well and that does not make the land communal.

A Then I can move on to No.10, Banaban customary law recognises the landowner as owning the minerals. Now 9 has been somewhat to the effect that there is nothing to the contrary, now I am going from the negative to the positive and I am going to show your Lordship the rule or Banaban customary law which was recognised by the Crown.

B So 10 is Banaban customary law recognised, and 10.1 is that will be our evidence by Rotan and he will tell your Lordship about wheeling wheelbarrows of phosphate from his grandfather's land and selling it to BPC.

10.2, there cannot have been any ancient custom about minerals. I have dealt with that already, or partly I have dealt with it already. I have said the Banabans had no idea
C of minerals before 1900, and also I would like to add this: there is no distinction in mineral value between the surface phosphate and the deeper phosphate - or not of any substance.

THE VICE-CHANCELLOR: Generally speaking, as I understand it, there is virtually no recognisable top soil on the Island, it is virtually phosphate dirt even on the surface.

D MR MOWBRAY: And that makes it difficult to distinguish between a surface owner and an owner of minerals or phosphate, because there is not any difference.

THE VICE-CHANCELLOR: You do have in No.1 in the photographs a slightly different colouration in the top few inches of the soil in some of the excavations, but generally it is phosphate dirt.

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MR MOWBRAY: That is only colouring or, to a very limited extent, phosphate content.

On to 10.3: Banaban landowners sold loose phosphate from their land without comment or complaint. I will give your Lordship some details about this, or perhaps I will
F just give your Lordship a list of some relevant documents: Bundle 2, page 12; Bundle 5, pages 30 to 31; Bundle 7, page 190. Let us just look at these. Bundle 2, page 12: "We then asked the object of the meeting and John Kekana as spokesman said, as we expected, that it was to ask if they could be paid in cash - or half cash and half trade for their phosphate rock..." So that is a reference to the sale of loose phosphate.

G

Then Bundle 5, pages 30 to 31. That is the general meeting your Lordship looked at once before this morning. (Reading extract) And those who were too lazy to dig their own rock did not sit back and let the others dig it and then say "Well, we will take our slice of the proceeds because that is community money". No-one rose at that meeting and said "What is all this about selling the rock, that is
H communal rock".

Then Bundle 7, page 190 just gives your Lordship

the tonnages set out: 1909 2,304 tons, 1910 3,672 tons. Those are very substantial amounts of phosphate; no-one on the Island could have been unaware of what was going on.

THE VICE-CHANCELLOR: A little above that: "The second recoomendation of the Resident Commissioner is, 'that the company should never refuse to purchase phosphate rock from the natives obtained from their own ground", and it goes on " The price to be paid to be not less than that paid at present".

MR MOWBRAY: Yes, my Lord.

THE VICE-CHANCELLOR: "It is not only by the sale of phosphate rock, but by the sale of fish and ground provisions that the Banabans are enabled to earn money". That is an indication of individual Banabans selling rock from their own ground.

MR MOWBRAY: Yes, my Lord.

(Adjourned for a short time)