[1977]

[CHANCERY DIVISION]

TITO AND OTHERS v. WADDELL AND OTHERS (No. 2)

[1973 R. No. 2013]

TITO AND OTHERS v. ATTORNEY-GENERAL

[1971 R. No. 3670]

1975 April 8–11, 14–18, 21–25, 28–30; Megarry V.-C.
May 1, 2, 5–8, 12–16, 19–23;
June 3–5, 9–13, 16–20, 23–27, 30;
July 1–4, 7–11, 14–18, 21–25, 28–31;
Oct. 22–24, 27–31;
Nov. 3–7, 10–14, 17–20, 24–28;
Dec. 1–5;

1975 Dec. 15–19;
1976 Jan. 12–16, 19–23, 26–30;
Feb. 2–6, 9–13, 20, 23–27;
March 1–5, 8–12, 15, 18, 19, 22–26, 29–31;
April 1, 2, 5–9, 13, 14, 27–30;
May 3–7, 10–14, 17–21, 24–28;
June 8–11, 14–18;

Nov. 29, 30;
Dec. 1–3

Crown—Colony—Trusts—Phosphate island—Compulsory acquisition of land for mining under colonial legislation in name of Crown—Lease by colonial official to mining commissioners—Royalties to be held "in trust" for islanders—Funds applicable for benefit of island community and landowners—Whether fiduciary obligation on Crown—Whether indivisibility of Crown imposing liability for colonial government's obligation—Applicability of limitation period or doctrine of laches—Whether bar against Crown proceedings—Whether conflict of interest and duty—Whether breaches of self-dealing or fair-dealings rules—Mining Ordinance 1928 (*Gilbert and Ellice Islands Ordinances No. 4 of* 1928), *ss.* 6, 7—*Limitation Act* 1939 (2 & 3 *Geo.* 6, *c.* 21), *s.* 2 (2) (7)—*Crown Proceedings Act* 1947 (10 & 11 *Geo.* 6, *c.* 44), *s.* 40 (2)

Trusts—Nature of trust—Crown—Colonial official acting under local legislation in name of Crown—Compensation and royalties to be held on "trust" for natives—"Trusts in higher sense" and "trusts in lower sense"—Whether enforceable trust or governmental obligation—Whether Crown trustee

Mines—Mining lease—Construction—Right to extract phosphates from Pacific island—Obligation to "replant" with trees and shrubs—Prescription by resident commissioner—Mining undertaking passing to mining commissioners—Abolition of office of resident commissioner—Appointment of governor—Extent of obligation to replant—Whether prescription of trees enforceable obligation—Whether condition precedent—Whether mining commissioners liable under doctrine of novation—Whether liable under doctrine of benefit and burden—Appropriate remedy—Damages

Mines—Mining lease—Construction—Removal of sand and shingle from "beach" of Pacific island—Extent of beach—Jurisdiction of English court in relation to foreign land

Contract—Benefit and burden—Pure or conditional doctrine—Mining leases with replanting obligation—Government appointees taking benefits—Changes of appointees—Whether present appointees liable on obligation to replant—Whether obligation running with land—Whether in law as well as equity

Specific Performance—Obligation to replant—Suitability of remedy—Phosphate mining on island—Obligation to replant with trees and shrubs prescribed by colonial official—Whether prescription contractual or governmental obligation—Whether court able to prescribe—Difficulty of supervision—Need for concurrence of all parties—Whether damages more suitable

Damages—Contract—Breach—Obligation to replant devastated land—Measure of damages

In 1900 phosphate was discovered on Ocean Island, a small island in the Pacific. The island was called Banaba by the inhabitants, and they themselves were known as the Banabans. In the same year the island became a British settlement. In 1900 and 1901 the Crown granted to a British company exclusive licences to occupy the island and mine the phosphate. In 1902 those were superseded by the third and last licence, granted to a subsidiary of the company for a term of 99 years from January 1, 1902, and providing for certain payments to be made to the Crown. From 1907 onwards the payments were to be a royalty of 6d. per ton on all phosphates exported; and in 1909 that royalty was made payable to the Government of the Gilbert and Ellice Islands Protectorate by which the island was administered. In 1916 the protectorate became the Gilbert and Ellice Islands Colony, and Ocean Island became part of it. At all material times English law applied to the island, apart from any relevant native customary law. The colony had a Resident Commissioner who administered it under the High Commissioner for the Western Pacific.

The land on Ocean Island was divided up into a large number of small plots (most of them being less than one acre in extent) owned by individual Banabans or groups of Banabans. Under King's Regulations made by the High Commissioner under the Pacific Order in Council 1893 there were severe restrictions on the purchase and lease of land from native landowners, and the transactions that were permitted required the approval of the Resident Commissioner. The company sought to avoid those restrictions by evolving "P and T deeds," under which the company merely bought the right to remove phosphate and trees from the land for five or ten years. By 1909 the legality of the P and T deeds was being questioned, and the company was finding it difficult to obtain further land for mining from the Banabans. Prolonged negotiations took place between the company on the one hand and the Colonial Office in London and the High Commissioner and the Resident Commissioner on the other hand. Finally, the terms that should be put before the Banabans for the acquisition of further land were agreed. In November 1913 an agreement based on those terms (the "1913 agreement") was made between the Banaban landowners and the company, with the Resident Commissioner as witness to the signatures or marks. The 1913 agreement provided, inter alia, for the acquisitions to be made only in three specified areas of the island. In addition to agreeing to pay certain sums to each landowner who granted mining rights to the company, the company agreed to pay the government an additional royalty of 6d. per ton. The first year's additional royalty (apart from £300) was to be expended for the benefit of the existing Banaban community. Subject to that, the £300 and the interest on those royalties were to be distributed as annuities to all Banabans who thereafter leased mining land

to the company. The agreement also provided that the company should return all worked-out lands to the original owners, and should "replant such lands—whenever possible—with coconuts and other food-bearing trees, both in the lands already worked out and in those to be worked out."

Pursuant to that agreement many Banaban landowners executed deeds granting the company the right to remove phosphate and trees from their lands for a term ending in 1999. Two forms of deed were used, the A deeds where a P and T deed was to be replaced, and the C deeds for new acquisitions. Each form of deed provided that when the company ceased to use the land the company "shall replant the said land as nearly as possible to the extent to which it was planted at the date of the Company's operations under Clause I (i) hereof with such indigenous trees and shrubs or either of them as shall be prescribed by the Resident Commissioner for the time being in Ocean Island"; and the land was to revest in the landowner when in the Resident Commissioner's opinion that might be without prejudice to the company's operations.

In 1920 the governments of the United Kingdom, Australia and New Zealand purchased the undertakings of the company on Ocean Island and Nauru, a nearby phosphate island which had become mandated to the British Empire. All the rights of the company on those islands were vested in three British Phosphate Commissioners, one to be appointed by each of the governments; but the governments agreed not to interfere with the conduct of the phosphate business. Though they were referred to as the "Board of Commissioners," the commissioners were never incorporated. The agreement was that phosphates were to be allotted to the three countries on a non-profit-making basis and according to their percentage interests, though in the event very little was ever sent to the United Kingdom. The change of ownership from the company to the commissioners was explained to the Banabans, who all seemed satisfied. From 1923 onwards the commissioners were seeking to acquire more land for mining. By 1927 they had agreed with the Colonial Office, the High Commissioner and the Resident Commisioner upon the terms that were to be put before the Banabans for a further 150 acres. The Resident Commissioner then put those terms before the Banabans; but with minor vacillations they strongly opposed any further acquisitions.

The Mining Ordinance 1928 of the Gilbert and Ellice Islands Colony was then enacted, authorising the compulsory acquisition of land in the colony for mining purposes. Under the Ordinance the Resident Commissioner was empowered to take possession of land, thereby making it Crown land. He could then lease it to the holder of a Crown licence to mine in return for compensation for the land (apart from minerals), which was to be fixed by arbitration, and a royalty for minerals, which was to be prescribed by the Resident Commissioner. Under the Ordinance any compensation or royalty was to be held by the Resident Commissioner "in trust" for the former owners of the land, subject to the directions of the Secretary of State for the Colonies. In 1931, the Resident Commissioner, acting under the Ordinance, by proclamation took possession of 150 acres of phosphate land and leased it to the commissioners ("the 1931 transaction.") The proclamation and lease provided for the commissioners to pay a royalty of 2d. per ton, to be accumulated in a "Banaban Provident Fund," and a further royalty of 8½d. per ton, to be held (not saying by whom) "in trust" for the Banaban community generally as the Secretary of State should direct. The provision in the Ordinance of 1928 for royalties to be paid to the former landowners was ignored. In 1937, however, the landowners concerned agreed to waive their

rights to royalties, and the Mining (Amendment) Ordinance 1937 was enacted which amended the Ordinance of 1928 by (inter alia) removing any mention of a trust. It also provided that royalties should be paid to the Resident Commissioner who was to pay or apply them as the High Commissioner directed for the benefit of the natives of the island or atoll from which the minerals were derived. There was also a retroactive validation of past payments.

In 1940 the Banabans petitioned the Secretary of State, seeking to acquire an island in the Fiji group which would serve as a second home for them, in view of the extent of the mining on Ocean Island; and in 1942 Rabi, which was part of Fiji, was bought for them out of their funds. In the meantime the commissioners had made proposals to the Banabans for the acquisition of a further 230 acres of mining land on improved terms. The Banabans found the terms acceptable, though they wanted to have paid to them more of the money that was going to the funds being held for them; and no firm agreement was made. In 1942 the Japanese occupied Ocean Island. They killed or deported to other islands most of the Banabans, and devastated the island.

After the war ended in 1945 the High Commissioner arranged for the Banabans to be collected together; and as Ocean Island was uninhabitable they agreed to go to Rabi for an initial period of two years. In 1947 the commissioners negotiated with the Banabans for the acquisition of most of the remaining phosphate land on Ocean Island, with an area of 671 acres. The terms offered were an improved version of the 1940 offer, but although the High Commissioner thought them reasonable, they did not fully allow for inflation. The Banabans had little knowledge of the value of phosphates and the effect of inflation, and the officer whom the High Commissioner had appointed to assist them on Rabi was instructed to take no part in the negotiations. Subject to a small improvement the Banabans accepted the terms offered. Soon afterwards, by a majority of some 85 per cent. in a secret ballot that they conducted, the Banabans decided to make Rabi their headquarters and home. In 1948, in return for an annual payment, the Banabans agreed to the commissioners removing sand and shingle "from the beach at Ocean Island" for making concrete and other work. From 1956 onwards the Banabans sought increases in the royalties, and although they were not legally required to do so, from time to time the commissioners made certain increases; but they were considerably less than those which the Banabans claimed. In 1971 the office of Resident Commissioner was replaced by that of Governor.

After various claims had been made by the Banabans politically and internationally, in 1971 they caused a writ to be issued against the commissioners and Her Majesty's Attorney-General. For convenience, in 1973 the action was divided into two actions, one mainly against the commissioners but with the Attorney-General a defendant ("Ocean Island No. 1"), and the other against the Attorney-General alone ("Ocean Island No. 2"). By consent, No. 2 was heard first, and No. 1 immediately afterwards.

In Ocean Island No. 2, the plaintiffs were a Banaban landowner and the Council of Leaders, a Banaban body that had been incorporated by a Fiji Ordinance which provided for all royalties accruing to the Banaban community to be paid into a fund under the Council's control. The plaintiffs claimed that the rates of royalty payable under the 1931 and 1947 transactions had been less than the proper rates, and that in relation to those transactions the Crown had been subject to a trust or fiduciary duty for the benefit of the plaintiffs or their predecessors. The Crown was therefore liable to the plaintiffs

by the Governor of the Colony (who had replaced the Resident Commissioner), was bound to prescribe any trees or shrubs, and that the claim against the Attorney-General accordingly failed (post, pp. 691C–F, 693G–694A).

(9) That if what was to be done was sufficiently defined, a decree of specific performance would not be refused on the ground of difficulty of supervision; that the obligation to replant was not of such a nature as to make it necessarily unsuitable for specific performance; that specific performance would not be decreed unless all parties entitled to enforce the contract were before the court, and that such requirement could not be avoided by seeking an order conditional upon the concurrence of those who had not been made parties but ought to have been; and that in the circumstances the order for specific performance, sought in respect of 15 small and scattered plots of land, would be an order of futility and waste, and ought not to be made, especially as damages would be a far more suitable remedy (post, pp. 694G–H, 695H–696B, 697G, 699C–F).

Wilson v. *Northampton and Banbury Junction Railway Co.* (1874) 9 Ch.App. 279 applied.

(10) That damages for breach of a contract to do work on the land of another might be assessed either on the basis of the cost of doing the work or on the diminution in the value of the land by reason of the work not having been done; that in determining which basis to apply the fundamental rule was that the plaintiff was to be compensated for his loss or injury, and not that of requiring the defendant to disgorge what he had saved by not doing the work; that the plaintiff could establish that his loss consisted of or included the cost of doing the work if he could show that he had done the work, or intended to do it, even though there was no certainty that he would; that that applied whether the damages were awarded at common law or under the Chancery Amendment Act 1858 (Lord Cairns' Act); but that the plaintiffs had failed to establish that the cost of replanting represented their loss, and so they could not recover damages on that basis; and that the damages should be more than nominal or minimal, and in the absence of agreement they should be reserved for further argument (post, pp. 700H–701A, 704D–E, 705F–G, 707A, 708A–B, 709E).

Wigsell v. *School for Indigent Blind* (1882) 8 Q.B.D. 357, D.C. considered.

Per curiam. If in Ocean Island No. 2 the Crown had been in a fiduciary position towards the two plaintiffs and their predecessors their claims would not be barred by any period of limitation, for a breach of the fair-dealing and self-dealing rules is not a breach of trust. Although the doctrine of laches applies to such claims, it is no bar because it has not been pleaded (post, pp. 626E–F, 627G, 628A–B, 629E).

Even though the right of the Council of Leaders to sue depends in part on Fiji legislation taking effect in Ocean Island, and the right of the other plaintiff to sue depends on his showing title to land outside the jurisdiction, the objection that they lack any title to sue ought not to prevail (post, pp. 638H–639B).

Although the Crown Proceedings Act 1947 provides a bar to the claim based on the 1931 transaction, it is no bar to the claim based on the 1947 transaction (post, pp. 632G–633A); but even if there is jurisdiction, either under the old Exchequer equity jurisdiction or under the general law, to make the declarations sought, the court ought not to make them (post, p. 636F–G).

No claim in respect of the 1931 transaction can in any event be based on a conflict of interest and duty or the grant of a lease by a fiduciary to itself, for although the Crown had at least a substantial interest in the commissioners' undertaking and so could be said to be self-dealing, the Resident

Commissioner had acted in obedience to the Ordinance of 1928; and in respect of the 1947 transaction the fair-dealing rule cannot in any event be said to have been infringed by any failure of the Crown to disclose to the Banabans what sums the commissioners were paying to the colony in lieu of taxation, or that they operated on a non-profit-making basis, or by any failure to see that they had proper advice, for the Banabans were disposing of land that they owned free from any trust, and they could not be said to have been disposing of beneficial interests under a trust to the trustee or his creatures (post, pp. 617E–H, 618E–619B, 620H—621C).

The following cases are referred to in the judgment in Ocean Island No. 2:

Ackbar v. *C. F. Green & Co. Ltd.* [1975] Q.B. 582; [1975] 2 W.L.R. 773; [1975] 2 All E.R. 65.

Attorney-General v. *Wilts United Dairies* (1922) 91 L.J.K.B. 897, H.L.(E.).

Ayersi v. *C. & K. (Construction) Ltd.* [1976] A.C. 167; [1975] 3 W.L.R. 16; [1975] 2 All E.R. 537, H.L.(E.).

Banda and Kirwee Booty (1866) L.R. 1 A. & E. 109.

Banda and Kirwee Booty, (No. 2) In re (1875) L.R. 4 A. & E. 436.

Bank voor Handel en Scheepvaart N.V. v. *Slatford* [1953] 1 Q.B. 248; [1952] 1 All E.R. 314.

Barraclough v. *Brown* [1897] A.C. 615, H.L.(E.).

Bombay and Persia Steam Navigation Co. Ltd. v. *Maclay* [1920] 3 K.B. 402.

British South Africa Co. v. *Companhia de Moçambique* [1893] A.C. 602, H.L.(E.).

Bulmer, In re [1937] Ch. 499; [1937] 1 All E.R. 323, C.A.

Burghes v. *Attorney-General* [1912] 1 Ch. 173, C.A.

Calgary and Edmonton Land Co. Ltd., In re [1975] 1 W.L.R. 355; [1975] 1 All E.R. 1046.

Cannon Street (No. 20) Ltd. v. *Singer & Friedlander Ltd.* [1974] Ch. 229; [1974] 2 W.L.R. 646; [1974] 2 All E.R. 577.

Chapman v. *Michaelson* [1909] 1 Ch. 238, C.A.

Chippewa Indians of Minnesota v. *United States* (1937) 301 U.S. 358.

Chippewa Indians of Minnesota v. *United States (No. 2)* (1939) 307 U.S. 1.

Civilian War Claimants Association Ltd. v. *The King* (1930) 46 T.L.R. 581; 47 T.L.R. 102, C.A.; [1932] A.C. 14, H.L.(E.).

Commissioner of Stamp Duties (Queensland) v. *Livingston* [1965] A.C. 694; [1964] 3 W.L.R. 963; [1964] 2 All E.R. 692, P.C.

Deschamps v. *Miller* [1908] 1 Ch. 856.

Dyson v. *Attorney-General* [1911] 1 K.B. 410, C.A.

Dyson v. *Attorney-General (No. 2)* [1912] 1 Ch. 158, C.A.

Edgeter v. *Kemper* (1955) 136 N.E. 2d 630.

Edwards v. *Bairstow* [1956] A.C. 14; [1955] 3 W.L.R. 410; [1955] 3 All E.R. 48, H.L.(E.).

Esquimalt and Nanaimo Railway Co. v. *Wilson* [1920] A.C. 358, P.C.

Fort Berthold Reservation Tribes v. *United States* (1968) 390 F. 2d 686.

Guaranty Trust Co. of New York v. *Hannay & Co.* [1915] 2 K.B. 536, C.A.

Hardoon v. *Belilios* [1901] A.C. 118, P.C.

Hodge v. *Attorney-General* (1839) 3 Y. & C.Ex. 342.

Holmes, In re (1861) 2 J. & H. 527.

Ibralebbe v. *The Queen* [1964] A.C. 900; [1964] 2 W.L.R. 76; [1964] 1 All E.R. 251, P.C.

Imperial Mercantile Credit Association (Liquidators) v. *Coleman* (1873) L.R. 6 H.L. 189, H.L.(E.).

Johnson, In re [1903] 1 Ch. 821.

Kayford Ltd., In re [1975] 1 W.L.R. 279; [1975] 1 All E.R. 604.

King v. *Victor Parsons & Co.* [1973] 1 W.L.R. 29; [1973] 1 All E.R. 206, C.A.

to make up the amounts actually paid by way of royalty to the amounts that ought to have been paid. A

In Ocean Island No. 1, 12 Banaban landowners sued the three British Phosphate Commissioners and the Attorney-General, with 14 Banabans as nominal defendants who took no part in the proceedings. One plaintiff sued the commissioners for damages for the conversion of sand removed from his land and the destruction of a burial ground. Other plaintiffs sued the commissioners for the specific performance of contractual obligations to replant the worked-out land with trees and shrubs, or alternatively for damages, and claimed against the Attorney-General a declaration that the United Kingdom Government, acting by the Governor of the Gilbert and Ellice Islands Colony, was bound to prescribe the trees and shrubs that were to be planted: — B

Held, (1) that in Ocean Island No. 2 the use of the term "trust" in relation to the Crown did not necessarily create a true trust, enforceable by the courts (a "trust in the lower sense"), but might create a "trust in the higher sense," or governmental obligation, not enforceable in the courts; that it was a question of construction whether in all the circumstances a true trust had been created, one material factor being whether the person required to hold on trust was described in his personal or in his official capacity; and that as there was nothing in the Ordinances or in the various instruments or other documents which sufficed to show that the Crown had undertaken any enforceable trust or fiduciary obligation such as was alleged, none had been created (post, pp. 596G—597A, B–E, 602 G–H, 603B, 605D–E, 607H, 610B, 614H—615A). C D

Kinloch v. *Secretary of State for India in Council* (1882) 7 App.Cas. 619, H.L.(E.) applied.

(2) That neither the statutory duty under the Ordinance of 1928 to fix a royalty and hold it in trust nor any statutory duties imposed by the Ordinance of 1937 sufficed to impose on the Crown any enforceable statutory obligation of a fiduciary nature; and that the principle that the Crown was one and indivisible did not make the Government of the United Kingdom liable for any equitable obligation of the Government of the Gilbert and Ellice Islands Colony (post, pp. 607D–H, 608 A–B, 609F–H, 611C–D, 613B–D, 614G). E

(3) That in Ocean Island No. 1, under the agreement of 1948 for the removal of sand and shingle from the "beach," the term "beach" was not confined to the foreshore, but included both the foreshore and all that lay to landward of it and was in apparent continuity with the beach at high water mark, or was more akin to the foreshore than to the hinterland; that the burial ground was not part of the beach and had not been destroyed by the commissioners; that the sand taken by the commissioners in about 1964 had been removed only from the beach, as so construed, and not from the burial ground; that jurisdiction was not excluded merely because the sand had been removed from foreign land, and that in any case the claim was barred by limitation and should be dismissed (post, pp. 644B–D, 646D, H–647A, 648D–F, 649A). F G

Government of the State of Penang v. *Beng Hong Oon* [1972] A.C. 425, P.C. applied.

(4) That the obligation to "replant" in the 1913 agreement and in the A and C deeds must be construed in its context, and, so construed, it was an obligation to replant the land as it was after it had been worked out or had ceased to be used by the company; that in the circumstances existing when those documents were signed "replant" meant planting in suitable positions in the worked-out land in a few feet of loose phosphate and did not require the extensive levelling and other engineering operations and the massive importation of soil for which the plaintiffs contended; that that construction was sup- H

ported by the qualification of the replanting obligation by the words "whenever possible" in the 1913 agreement, and "as nearly as possible" in the A and C deeds, which referred to what was reasonably practicable and not to what could be achieved only by a vast expenditure of time, effort and money; and that merger might take place distributively, so that despite the differences in language between the replanting obligations in the 1913 agreement and in the A and C deeds, the former had merged in the latter for all land subject to an A or C deed (post, pp. 654B, 655E–H, 658C–D, 660F, H–661B).

(5) That the defendant commissioners, who had not been parties to the 1913 agreement or the A and C deeds, could not be made liable to the plaintiffs on the obligations to replant under any doctrine of novation, because on the facts it was impossible to infer the making of the multiplicity of new contracts in place of the old that novation required (post, pp. 663B–C, 664D–E).

(6) That as a matter of construction the benefits of the 1913 agreement and the A and C deeds had not been made conditional upon bearing the burdens of them, and the defendant commissioners were accordingly not liable to the plaintiffs under the doctrine of conditional benefits and burdens; that nevertheless there was an independent doctrine of pure benefit and burden; that whether a person was subject to the pure doctrine depended upon whether the circumstances in which he came into the transaction showed that the doctrine was intended to apply, and whether he had some claim to the benefit; that the circumstances of the present case showed that each commissioner was intended to take the benefits and also the burdens; that although the defendant commissioners had not sufficiently taken any benefits under the 1913 agreement to make them liable for the burdens of it, they had taken enough benefits under the A and C deeds to make them subject to the burdens of those deeds; that as the plots of land subject to those deeds had been treated globally and not individually by the commissioners, the effect of taking the benefit of the deeds must also be treated globally; that each commissioner who took any benefit was liable for the whole of the burden; that as the replanting obligation in the A and C deeds imposed a legal burden the defendant commissioners were liable on it at law; that the benefit of the obligation to replant ran with the land both at law and in equity, and jurisdiction was not excluded merely because the land was foreign land; and that the defendant commissioners were accordingly liable to the plaintiffs for damages for any breach of the replanting obligations in the A and C deeds (post, pp. 676C–677A, G–678C, G–679A, G, 681E–G, 682A–C, 683A, D–G, 684E).

Halsall v. *Brizell* [1957] Ch. 169 applied.

(7) That the prescribing by the Resident Commissioner of the trees and shrubs to be planted was a minor or subsidiary part of a minor or subsidiary part of the A and C deeds as a whole, and the court was reluctant to permit the non-performance of such a provision by a third party to provide a defence to an action on a contract, especially where the contract had been partly performed; and that if specific performance were to be decreed the court would provide for the specifying of the trees and shrubs, while if damages were awarded instead probably no such specifying would be required (post, pp. 689B–C, G–H).

(8) That in the A and C deeds the Resident Commissioner entered into no contractual obligation to prescribe trees and shrubs either on behalf of himself, his successors, the Crown or the Government of the United Kingdom; that the function of prescribing trees and shrubs was governmental or administrative, and not contractual; that no declaration should therefore be made that the Government of the United Kingdom, acting