Case No: HQ02X01287

Neutral Citation No: [2003] EWHC 2222 (QB)

IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 9 October 2003

Before :
THE HONOURABLE MR JUSTICE OUSELEY

- -

Between :

CHAGOS ISLANDERS
Claimant

- and -

1. THE ATTORNEY GENERAL

2. HER MAJESTY'S BRITISH INDIAN OCEAN TERRITORY COMMISSIONER
Defendant

- -

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Robin Allen QC, Simon Taylor QC, Anthony Bradley & Thomas Coghlin (instructed by Sheridan's Solicitors) for the Claimants

John Howell QC, Rhodri Thompson QC & Kieron Beal (instructed by Treasury Solicitor) for the Defendants

Hearing dates : 31 Oct, 1-15, 19, 21, 25, 27-29 Nov, 2-9, 11-20 Dec, 6-10 Jan.

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed may be treated as authentic.

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The Honourable Mr Justice Ouseley

Mr Justice Ouseley:

Overview

1. The Chagos Archipelago lies in the middle of the Indian Ocean. It is approximately 2,200 miles east of Mombasa in Kenya and a little over 1,000 miles south by west of the southern tip of India, and so about 1,000 miles east of Mahe, the chief island in the Seychelles, and 800 miles north-east of Port Louis in Mauritius. The largest island in the group is Diego Garcia; its irregular u-shaped sides enclose a large, deep lagoon. The group includes the Salomon islands, the islands of Peros Banhos, as well as a number of smaller islands.

2. The Chagos islands, with Mauritius, were ceded by France to the Crown by the Treaty of Paris in 1814. They were administered by the Crown from Mauritius as its "Lesser Dependencies" along with St Brandon and Agalega, which was about 1,000 miles from the Chagos islands, half way between Mauritius and the Seychelles.

3. Their economy was based on the production of copra and its by-product, coconut oil, from the coconut plantations. During the 19th century, the freeholds, as it is convenient to call them, passed into the private hands of the companies which ran the plantations, although there was an issue as to whether these private freeholds applied to the full extent of Diego Garcia, Peros Banhos and the Salomon Islands.

4. The companies ran the islands in a somewhat feudal manner. The vast distance from Mauritius left the plantation managers in day-to-day charge; visits by Mauritian officials were rare and the Magistrate was at best an annual visitor. Plantation managers had powers as Peace Officers to imprison insubordinate labourers for short periods, or to detain those threatening to breach the peace.

5. The plantation companies provided the sole source of employment on the islands, save for a meteorological station on Diego Garcia, though a few children, women and elderly people worked as servants for plantation company staff. They did this to earn their rations, although it does not appear to have been a universal requirement that the young and old should work. A few worked for the plantation companies in construction, administration or, perhaps, in fishing.

6. Company shops provided for simple purchases; wages were very low but the companies provided food rations, a small dispensary, very basic medical attention, limited educational facilities and a priest. Their agent, helped by a Mauritius Government subsidy, provided transportation by ship to and from Mauritius for departing or leave-taking workers or for those seeking more serious medical attention; often mothers-to-be went to Mauritius to give birth. The ship brought rations and other necessities or comforts.

7. The abolition of slavery in 1833, and the entitlement of slaves to remain in the colony in which they were freed, meant that many freed slaves had continued to work the plantations.

8. Although in theory from 1838, all Mauritian labourers were on contracts of one to two years' duration, renewable annually, many plantation workers continued working without a written renewal of their contracts. The contracts could only be renewed in front of a Magistrate on his occasional, supposedly annual, visits but even that was not routinely done, at least in latter years. Contracts were sometimes renewed when a worker returned from Mauritius following leave or a trip for medical purposes.

9. Over time, the plantation workers, whether recruits from Mauritius who stayed on or the descendants of slaves who never left, had families. Some of the children would leave for Mauritius, where relatives might be and to which they looked for a more varied life; they might simply not return. Others would become, from an early age, and after at best the most rudimentary and brief education, plantation workers. They would inter-marry, or marry Mauritian recruited labourers and in turn have families. After the Second World War, Seychelles' labourers were recruited as well, and some too inter-married, or married existing residents starting families on the islands.

10. The population, then, consisted of three strands, Mauritian and Seychelles contract workers and, to a degree intermingled with them, those who had been born on the islands and whose families had lived there for one or more generations. These latter were known as the Ilois, a term not always used with a precise or commonly agreed definition. Most of them lived on Diego Garcia, the largest island. They now, but again with no precise or commonly agreed definition, describe themselves as "Chagossians", a name which they prefer to "Ilois" because that has come to have pejorative connotations.

11. It is their existence, legal status and rights and what the United Kingdom Government and colonial administrations have believed about them, which lie at the heart of this case.

12. By the early 1960s, the islands' population was in decline, as low wages, monotonous work, the lack of facilities and the great distance to Mauritius and the Seychelles discouraged recruitment or the retention of labour. The plantations suffered from a lack of investment.

13. In 1962, a company called Chagos Agalega Company Limited was formed in the Seychelles. One of its main shareholders was a Mr Paul Moulinie. The company acquired almost all of the plantation islands, of Diego Garcia, Peros Banhos, the Salomon Islands, and Agalega from the Mauritian companies which had owned them. The company intended to and did run the coconut plantations for the production of copra; it believed that they could be revived and run profitably, notwithstanding years of decline.

14. In 1964, discussions started in earnest between the United States and the United Kingdom Governments over the possible establishment of American defence facilities in the Chagos Archipelago, or other Indian Ocean islands which formed part of the dependant territory of the Seychelles. A joint UK/US memorandum agreed on a course of political action, including the need to separate the requisite dependencies from Mauritius and the Seychelles.

15. The independence of Mauritius was imminent and the independence of the Seychelles was at least anticipated. The United States did not wish its facilities to be dependant on the goodwill and stability of such newly independent countries, whose view of American defence facilities in the Indian Ocean might not have coincided with its own. It proposed that the islands be detached from Mauritius and the Seychelles and formed into another, separate dependant territory. It was recognised that the establishment of a new dependency or colony would attract criticism in the United Nations, even more so were it to be created to facilitate an American military presence in the Indian Ocean. From an early stage, the United Kingdom and United States Governments recognised that the transfer or resettlement of those on the islands would be necessary, both for the effective security and operation of the military facility and to avoid the prospect of the new dependency becoming subject to international obligations in Article 73 of the UN Charter to protect the population and to develop their constitutional rights, perhaps towards independence. Islands populated by contract workers or with an insignificant population which could be transferred or easily resettled were obviously attractive in those respects.

16. In 1964, in pursuit of this objective, a joint Anglo-American survey of the islands including their population was undertaken. Its purpose was not publicised. It found little trace of the once distinctive Diego Garcian community. In 1965, the United Kingdom decided to proceed with the detachment of the islands. Discussions were held between the UK Government and the Governments of Mauritius and of the Seychelles upon the terms of the detachment of the Chagos Archipelago from Mauritius and of Aldabra, Farquhar and Desroches from the Seychelles. Agreement was reached on the detachment of the islands subject to the payment of compensation to the governments, compensation to the landowners and the payment of resettlement costs. The Mauritius Government was to receive compensation of £3m plus the resettlement costs; the Seychelles Government was to be provided with a new civil airport on Mahe.

17. On 8th November 1965, the British Indian Ocean Territory Order in Council, SI 1965/1920 was made. It established a new colony, the British Indian Ocean Territory. It comprised the Chagos Archipelago, Aldabra, Farquhar and Desroches. The Governor of the Seychelles became its Commissioner. The Order in Council provided its constitution, gave legislative powers to the Commissioner and provided for a general continuance in force of the existing laws applicable in the islands, either Seychellois or Mauritian.

18. On 30th December 1966, in an Exchange of Notes, the UK and US Governments agreed that the islands should be available to meet their various defence needs for an initial period of 50 years, and thereafter for 20 years, unless either Government gave notice to terminate the agreement.

19. The next stage was for the UK Government to acquire the land interests held by Chagos Agalega Company Limited. At this point, however, the US proposals were neither public nor approved by Congress. It was only a general defence interest which, publicly, underlay the creation of BIOT. If the land interests were acquired, the UK Government still wanted the plantations to operate, to bring in an income to offset the acquisition costs, until the defence facility was definitely proceeding to a known timetable.

20. On 8th February 1967, the BIOT Ordinance No 1, the Compulsory Acquisition of Land for Public Purposes Ordinance, was made; it empowered the Commissioner to acquire land compulsorily for a public purpose, notably and explicitly the defence purposes of the UK or Commonwealth or other foreign countries in agreement with the UK.

21. On 22nd March 1967, the Commissioner made the BIOT Ordinance No 2, the Acquisition of Land for Public Purposes (Private Treaty) Ordinance, enabling him to acquire land by agreement for the same public purposes. It was under this power that, on 3rd April 1967, Chagos Agalega Company Limited vested its lands in Diego Garcia, Peros Banhos, the Salomon Islands and others in the Crown, for £660,000. The Crown also acquired Farquhar and Desroches; it already owned Aldabra.

22. However, in order to maintain an income and to delay the need for resettlement of the population for as long as possible, the Commissioner granted a lease of the islands to Chagos Agalega Company Limited on 15th April 1967. It was terminable on six months' notice. The company gave notice in June 1967 for tax reasons, created by the compensation payment. Moulinie & Co (Seychelles) Limited, for which Paul Moulinie and his nephew Marcel Moulinie worked, took over the management of the plantations in January 1968. There was no signed management agreement, but the terms of an unsigned written agreement were put into operation.

23. On 12th March 1968, Mauritius became independent. By its constitution, Mauritian citizenship was conferred on everyone born in Mauritius by that date, including those born in that part of BIOT which had previously been part of the colony of Mauritius. They would also remain citizens of the United Kingdom and Colonies. This dual citizenship was not publicised at the time. Before the creation of BIOT, and yet more so thereafter, it was becoming clearer than perhaps had been thought in 1964, following the survey report, that there were inhabitants of Chagos who had been born there and some were second or third generation Ilois. This was a problem, and the morality and lawfulness of their removal in principle, of its manner, of the way in which others who had left voluntarily were unable to return to the Chagos and of their subsequent treatment has been debated for more than 30 years.

24. Thus, from 1964 onwards, the UK Government had been dealing with a number of aspects: the operation of the plantations, the ascertainment of the numbers and status of those working and living on the islands, the contemplation of their removal and resettlement somewhere, the means of achieving those ends, political relations with Mauritius, in particular over those matters, and suspicions or hostilities faced or risked in the UN.

25. To the plantation workers, little of this would have been known. They, and certainly the Ilois, were poorly educated, very largely illiterate, Creole speakers who lived a simple life with few modern facilities, dependent on their employer for their jobs and the necessities of life; they led no independent existence. The Moulinies were aware of more of the background. Marcel Moulinie gave evidence of telling them in January 1966 and of his uncle telling them in May 1967 that they might be asked to leave to make way for an American base.

26. In 1967 and 1968, on two voyages, the "Mauritius" brought plantation workers, including Ilois, to Port Louis in Mauritius. They came on leave, or on the expiry of their contract or for medical reasons. The "Mauritius" was operated by Rogers & Co, the Moulinie & Co agent in Port Louis; half the cost of it was met by the Mauritius Government, as it provided the means of transport between Mauritius and the various dependant islands. When those who had arrived in Mauritius in 1967 and 1968 eventually tried to return to the Chagos islands in 1968 and later, they were refused passage and were unable to return. The Mauritius Government made representations to the UK Government in September 1968 about the fate of some of those stranded in Mauritius. These Ilois are among the Claimants, asserting that the UK prevented their return by instructing Moulinie & Co or its shipping agent not to permit their return, and asserting that that was unlawful. In July 1968, the "Nordvaer", a 500-ton cargo ship, had been acquired by the BIOT Administration to connect the Seychelles, where it was based, and BIOT; the shipping link between Mauritius and Chagos largely ceased.

27. On 5th July 1968, the UK Government was told that the US Government had decided to proceed with an "austere" communication and other facilities on Diego Garcia. Plans which hitherto had been uncertain in all respects were by now becoming more certain, but they were still not publicly known. It was an important decision.

28. Approval for the US proposal was sought from the Prime Minister in submissions from the Foreign Office and the Commonwealth Office, drawing upon the advice of officials including legal advisers and the BIOT Commissioner, among others, (paragraph A144). The submission said that some 128 or 34% of the inhabitants of Diego Garcia were second-generation inhabitants. Various possibilities for their resettlement and the resettlement of other workers were canvassed. Agalega, Peros Banhos and the Salomon Islands were seen as possibilities because of their coconut plantations, working in which was the only skill which the Ilois and many other contract workers possessed. But the US was still unable to say whether any other islands would be required or when; and even after acceptance of its request in September 1968, it did not want its proposals publicised. This, unsurprisingly, discouraged commercial investment in other island plantations. Even if no defence facilities were ultimately constructed, the UK Government considered that it would be useful to avoid there being any permanent inhabitants in BIOT, so as to preclude obligations arising under Article 73 of the UN Charter or any other costs if the plantations were to close for economic reasons.

29. A further important submission, vital for these proceedings and backed by extensive working papers, was made to the Prime Minister in April 1969 (paragraphs A226-239). It covered the relevant issues comprehensively and without deceit or excess zeal by any officials. It contemplated the complete evacuation of BIOT. It was approved by the Prime Minister, the Chancellor of the Exchequer and the Secretary of State for Defence.

30. Discussions about resettlement options continued through 1969 and 1970; a number of ideas were canvassed and assessed but no firm conclusion was reached. The uncertain future of the islands of Peros Banhos and the Salomon Islands, as possible defence facilities, inhibited investment in them; the question of who would provide investment in plantations in Agalega was long discussed and remained unresolved for years. Resettlement in Mauritius or the Seychelles were options also to be pursued. The need for immigration legislation to back up the

Government's stated position as to the absence of an indigenous population, as well as to prevent people entering BIOT after the islands had been evacuated came to the fore. The nature of the powers, statutory or private land ownership powers, which would be involved in ensuring the evacuation of the islands, was also considered.

31. In December 1970, Congressional approval for the construction of the defence facility was announced. The US Government had told the UK Government shortly beforehand that it wanted Diego Garcia evacuated by July 1971.

32. The BIOT Administrator, Mr Todd, visited the islands in January 1971. On 24th January 1971, he told the assembled inhabitants of Diego Garcia that "we intended to close the island in July". He said that Peros Banhos and Salomon could run for some time. This was seen by him as a temporary solution to resettlement whilst longer term arrangements were put in place.

33. The longer term arrangements were seen as resettlement in the Seychelles of the contract workers, who were predominantly Seychellois, and in Mauritius, subject to Mauritius Government approval, or Agalega, of the families of Mauritian origin. Discussions between the UK and Mauritius Governments began in March 1971 when that approach was accepted, but a resettlement scheme remained to be determined and implemented.

34. On 16th April 1971, the BIOT Commissioner enacted the Immigration Ordinance 1971, No 1 of 1971. It made it unlawful for someone to enter or remain in the territory without a permit; it provided for the Commissioner to make an order directing that person's removal from the territory. It was given the minimum lawful publicity. There was an issue as to whether this provision was ever in fact relied on by the UK Government or the BIOT Commissioner in the evacuation of the islands.

35. Throughout the first half of 1971, internal discussions took place between the Foreign and Commonwealth Office, the Overseas Development Administration, the Treasury and externally with the High Commission of Mauritius, the Mauritius and Seychelles Governments and the US Embassy, seeking to establish work and resettlement opportunities and schemes. The potential of Agalega was raised.

36. In July 1971, the "Nordvaer" left Mahe to effect the evacuation of Diego Garcia, arriving on 25th July 1971 with engine trouble. It took some Ilois to Salomon and Peros Banhos before limping to Mahe, on the Seychelles. The "Isle of Farquhar", a schooner belonging to Moulinie & Co, was chartered, arriving in Diego Garcia early in September and then sailing to Peros Banhos and Salomon with mainly Ilois families. The Ilois left behind their homes, their pets and domestic animals, their larger items of moveable property, taking only a small quantity of personal possessions. They regarded Diego Garcia, rather than the Chagos Archipelago, as home. There is no evidence of physical force being used, but most of their dogs were rounded up and gassed or burnt in the "calorifer" used in copra production. The sadness and bitterness was continuing and evident. The task of closing down Diego Garcia was handled on the island wholly or almost wholly by Moulinie & Co and not by the BIOT Administration.

37. In early September, the "Nordvaer" arrived in Diego Garcia to take some wild horses, which the BIOT Administration had organised a team to take to the Seychelles, copra, equipment and the remaining Seychelles workers and Ilois who did not want to go to Peros Banhos or Salomon.

38. The conditions of the voyage to Mahe were dreadful and engendered many bitter memories of the horses being better cared for than the passengers. The Ilois numbered 7 men, 6 women and 17 children, outnumbered by Seychellois. In Mahe, they were accommodated in the unused section of the prison, between arrival on 30th September and departure on the "Mauritius" for Port Louis, Mauritius, on 8th October 1971. Some Ilois, receiving medical treatment, were left behind.

39. The evacuation of Diego Garcia was completed by the "Isle of Farquhar" which arrived in Mahe on 31st October 1971 with 9 Seychellois and one Ilois woman and child.

40. The population of Peros Banhos and Salomon was now 65 men, 70 women and 197 children, of whom 18 men, 18 women and 49 children had been transferred from Diego Garcia. In January 1971, the FCO thought that there had been 37 Ilois families on Diego Garcia.

41. About 100 Seychellois labourers had returned to the Seychelles. But the Mauritian authorities were estimating that there were about 1,000 Ilois already in Mauritius, evacuated, more recently stranded or looking to return after a longer absence, having arrived since the formation of BIOT in 1965.

42. Resettlement discussions continued meanwhile with the Mauritius Government; how much should be paid, to whom, and for what purpose remained unresolved. The focus at this stage was on resettlement of as many as possible on Agalega where Moulinie & Co operated coconut plantations, and on maintaining those on Peros Banhos and Salomon for as long as possible. Less complex discussions in respect of Seychelles contract workers were undertaken with the Seychelles Government. Mauritius and the Seychelles also faced internal difficulties with the receipt of funds which might appear to favour one group of residents over another and give them employment advantages over other poor inhabitants grappling with high unemployment. The cost of setting up BIOT and of constructing the new civil airport on Mahe had exceeded their financial allocations; the UK Government debated which Department should pay for any resettlement costs which had not been budgeted for.

43. It was not until 4th September 1972 that a payment of £650,000 was agreed between the UK and Mauritius Governments in discharge of the obligation undertaken in 1965 to meet the cost of resettlement of those displaced from the Archipelago since 1965 and who were yet to come. It was paid in March 1973.

44. The Seychelles contract workers were simply paid the balance of the contract sums due to them.

45. Meanwhile, the operation of the coconut plantations and copra production on Peros Banhos and the Salomon Islands was becoming economically unsupportable and was running

down. The prospect of further closures and moves was becoming clearer to the Ilois; they were becoming resigned and apathetic. Those on Salomon were told to move to Peros Banhos in May 1972, so as to concentrate population and production on one island, but they refused. In June 1972, the "Nordvaer" sailed to Mahe with 53 Ilois (15 men, 15 women and 23 children) from Peros Banhos and Salomon; they went on to Mauritius. They were warned that they might not be able to return.

46. In November 1972, the "Nordvaer" took a further 120 Ilois (73 adults and 55 children) from Peros Banhos and Salomon to Mauritius, arriving on 14th November. By now, Salomon had closed down.

47. In October 1972, a UK/US Exchange of Notes agreed to the construction of a limited naval base at Diego Garcia. It was no longer economic for Moulinie & Co to run copra production on Peros Banhos; the management fee which they received from BIOT was too small. Paul Moulinie and the BIOT Administrator, Mr Todd, sought closure and an evacuation in March or April 1973.

48. On 27th April 1973, the "Nordvaer" left Peros Banhos for Mauritius carrying 26 men, 27 women and 80 children, but on arrival at Port Louis, they refused to disembark: they had nowhere to go, no money and no employment. They received an offer of accommodation in the Dockers Flats area of Port Louis and a small sum of money.

49. On 26th May 1973, the "Nordvaer" left Peros Banhos for Mauritius via the Seychelles; it arrived on 13th June 1973 carrying 8 men, 9 women and 47 children or infants, according to the shipping list. This was the last of the population; the plantations closed.

50. The Ilois were experienced in working on coconut plantations but lacked other employment experience. They were largely illiterate and spoke only Creole. Some had relatives with whom they could stay for a while; some had savings from their wages; some received social security, but extreme poverty routinely marked their lives. Mauritius already itself experienced high unemployment and considerable poverty. Jobs, including very low paid domestic service, were hard to find. The Ilois were marked by their poverty and background for insults and discrimination. Their diet, when they could eat, was very different from what they were used to. They were unused to having to fend for themselves in finding jobs and accommodation and they had little enough with which to do either. The contrast with the simple island life which they had left behind could scarcely have been more marked.

51. There was no resettlement scheme when they arrived. Various schemes, including pig breeding, of improbable viability and in which the Ilois had no experience, were debated over time before being abandoned as unworkable. Rampant inflation between 1973 and 1978 substantially reduced the value of the payment of £650,000. Nothing concrete was done with it for years despite the pressing housing needs of the Ilois. The £650,000 paid to the Mauritius Government in 1973 was eventually expended, with accrued interest, in 1977 and 1978, not just to the 426 families who had been identified as having left the Chagos since 1965, but also to a further 169 families who had returned earlier, making 595 in all. It was paid in the form of a cash distribution. There was nothing for Ilois on the Seychelles.

52. The Ilois had, however, begun to organise themselves early on to improve their conditions and some Mauritian and Seychellois politicians became interested in their plight, whether to obtain votes, or out of genuine concern or as a means of criticising the Government of the day.

53. From an early stage, in 1974, Ilois were petitioning the UK Government for permission to return to Diego Garcia to tend their forefathers' graves; the Government said that it would consider this. But it refused to intervene with the Mauritius Government in relation to their resettlement.

54. In February 1975, Michel Vencatessen issued a writ in the High Court in London against the Attorney General, for the Secretaries of State for Defence and for Foreign and Commonwealth Affairs. Michel Vencatessen had left Diego Garcia on the "Nordvaer's" last voyage. Legal advice had been taken from Sheridans, solicitors, who, in turn, had consulted notable English barristers. He received legal aid. He had been put in touch with Sheridans through Gaetan Duval, an important Mauritius lawyer-politician. It was not in form a representative, let alone a group, action although in its inception and conduct it had a number of those features.

55. The writ claimed damages, aggravated and exemplary, for intimidation, deprivation of liberty and assault in the BIOT, Seychelles and Mauritius in connection with his departure from Diego Garcia, the voyage and subsequent events.

56. The action proceeded through the 1970s with a range of distinguished advocates on both sides. Discovery was to be particularly complex. By 1978, however, it was clear on both sides that the litigation, in practice, had to be regarded as a form of group litigation. The UK Government made an open offer to settle all the claims of all the Ilois for £500,000 plus costs in February 1978.

57. By mid-1978, Sheridans, following a visit to Mauritius, had obtained instructions on a wider basis, "on behalf of all the Ilois", they said. But the issues of whom Sheridans represented and what their status was as Ilois in relation to any offer, together with the mechanics of how all the potential claims of the Ilois other than Mr Vencatessen could be resolved, remained thorny ones.

58. Legal aid was not available in this action for Sheridans to advise all the Ilois. The Treasury Solicitor agreed to pay Bernard Sheridan's costs of going to Mauritius to represent the Ilois. Bernard Sheridan went to Mauritius in October 1979, taking with him the offer from the UK Government which had been raised to £1.25m, and 1,000 copies in English, of a form of quittance for the Ilois' claims, together with a French translation, (A480). He had received advice from Louis Blom-Cooper QC that the settlement was fair in view of the difficulties in the litigation, and that a trust fund should be set up to oversee its distribution.

59. Publicity was given to his visit; he held a number of meetings with the Ilois; over 1,200 quittances were signed. But there was considerable hostility from some Ilois who objected to

any renunciation of their right to return to Diego Garcia. He was unable to conclude his work and he returned to London to report.

60. Various committees of Ilois now joined together to become the Joint Ilois Committee, which comprised the older committee of Christian Ramdass with which Mr Vencatessen had been associated, the Beau Bassin Committee which had led the rejection of the quittances brought by Mr Sheridan, and the Ilois Support Committee of Kishore Mundil, a Mauritian politician.

61. Mauritian politicians had a particular interest in the renunciation by the Ilois of any right to return, as well as in using the fact, manner and purpose of the excision of the Chagos from Mauritius as a means of attacking the Government of Sir Seewoosegar Ramgoolam, which was in power from 1961 through independence until 1982. This interest was in the way in which the continued right of Mauritian citizens to return to the Chagos islands could be used as a means of asserting Mauritius' entitlement to the islands when the defence interests ceased.

62. The Joint Ilois Committee wished to continue negotiations. On the oral evidence given to me by those involved, it was said that most of the documents of this era did not represent accurately what they wished to say and had been written without their authority and indeed deceitfully by those whom they now realised had taken advantage of them, acting only as politicians pursuing their own political ends. However, they were taken at face value by Sheridans and the Treasury Solicitor.

63. In March 1980, a petition with 800 thumbprints or signatures of Ilois was sent by the JIC to Sheridans with a detailed letter of instruction. The renunciation of the right to return to Diego Garcia in exchange for a proper amount of compensation was proposed by the Ilois, at least on paper.

64. In July 1980, the Ilois who had led the rejection of the offer in 1979 set up a new committee, the Committee Ilois Organisation Fraternelle, CIOF (sometimes CIF). They would not renounce their right to return. The Front National de Soutien aux Ilois was formed from a number of groups including the JIC.

65. The formation, splitting, reformation of Ilois committees at this time reflected not just the differing locations of groups of Ilois in Port Louis and Mauritius, but also differing views as to the extent to which renunciation of the right to return should be resisted at the price of delaying a settlement or whether an enhanced sum would justify renunciation. Political protest and hunger strikes by women became a feature of the campaign by the Ilois for what they saw as their rights. The various Ilois committees made claims for £8m in compensation from the UK Government in the spring of 1981. In April 1981, the Mauritian Government agreed with Ilois representatives to send a Government delegation of three Ilois representatives and three representatives from the Mauritian Government to negotiate with the UK Government.

66. Meanwhile, the Vencatessen litigation and the looming contests over the disclosure of documents provided a continuous spur to the London end of the negotiations over a wider settlement. In April 1981, an Ilois delegation had met a visiting UK Minister in Mauritius and

had discussed with her compensation, the Vencatessen case and nationality issues. Negotiations were to continue in London in June 1981; the Mauritius Government agreed that Christian Ramdass should join the delegation as the representative of Mr Vencatessen. But before the delegation arrived in London, the CIOF decided to instruct Bindmans, solicitors.

67. The Mauritian delegation met with the UK Government in London at the end of June and the beginning of July, over four days. The Government increased its £1.25m offer with aid of £300,000, but this was not accepted. Negotiations broke down amidst powerful criticism of the stance taken by the UK Government towards the plight of the Ilois. Bindmans took the advice in consultation of John Macdonald QC. Mr Vencatessen wanted to press forward with his claim. This was the only non-political lever which the Ilois had. But Ilois demonstrations and rallies continued in Mauritius.

68. In November 1981, the CIOF said that it would be prepared to accept £1.25m now as a part payment towards the £8m still claimed. By early December, the CIOF, recognising that any settlement would have to be supported by the whole Ilois community, nonetheless put forward a figure of £6m as further and final compensation, without abandoning its contention that £8m was fully justified. Various Ilois groups met the High Commissioner to Mauritius to press their urgent cause; he made the same point: any settlement had to have the support of the whole community. No-one wanted a repeat of the events in 1979 when an agreement appeared to have been reached with many Ilois, but not on terms which were acceptable to all shades of opinion. As at other times, the definition of an Ilois and an assessment of their numbers were problematic for both sides, because that had a crucial effect on the calculation of compensation on a per capita basis as well as reflecting on the numbers whose agreement had to be obtained once they had been identified. Bindmans, advising the CIOF, were investigating the rights which the Ilois had over land, in contrast to the Vencatessen case which focused on tortious aspects. Sheridans pressed on with the case which was seen as capable of having a beneficial effect on the Ilois as a whole.

69. The UK Government recognised that further talks had to take place. Their resumption in Mauritius was announced and they restarted on 22nd March 1982. The Mauritian Government delegation again included representatives of the Ilois. Stephen Grosz, a solicitor with Bindmans, and John Macdonald QC were present to advise the CIOF, to which the majority of Ilois delegates belonged, but they saw themselves as advising the Ilois generally because of the extent to which the CIOF represented their interests; they were paid for by the Mauritius Government. Mr Ramdass was again a delegate because of the Vencatessen case. The UK Government's opening offer was £2.5m based on 426 families or 1,150 people who had left Chagos for Mauritius after the creation of BIOT. The sum was calculated by reference to the cost of a plot of land, the building of a house, and a capital sum for the establishment of a business. The disbursing of the fund was to be managed by a trust fund.

70. During the negotiations, one of the issues had been the way in which the language of the agreement and the settlement of claims might affect the right to return asserted by the Ilois and the assertion of Mauritian sovereignty over the Chagos islands. A second issue was as to how the UK Government could be satisfied that, if it were to pay over the settlement sum, there would be no further claims. The nature and effectiveness of those provisions was at issue in this

case. But it was clearly understood by the UK and Mauritius Governments, if by no others, that the Vencatessen litigation had to be withdrawn, if a settlement with the Ilois as a whole were to be reached.

71. In the course of negotiations, the offer was raised twice, ultimately to £4m in addition to the £650,000 previously paid to the Mauritius Government. The Mauritius Government also agreed to put in land to the value of £1m. The English lawyers advising the Ilois recommended acceptance of the offer as a fair settlement. A trust fund was to be set up to disburse the monies.

72. On 27th March 1982, the agreement between the two Governments was initialled; it was also initialled by Ilois representatives. Between the initialling of the agreement and its formal signing, the CIOF pressed the view of its English legal advisers that the agreement provided for compensation, but did not affect Mauritian sovereignty. It became a formal agreement signed by the two Governments on 7th July 1982 in the presence of Ilois representatives. It contained provision for Ilois to sign individual renunciation forms, for the retention of some money against further action and for a Mauritius Government indemnity, (paragraph A580).

73. Varying degrees of satisfaction were expressed at the agreement; as a compromise, not everything that everyone had wanted had been achieved. Widespread publicity was given to the agreement and to the formal signing ceremony.

74. On 30th July 1982, the Ilois Trust Fund Act 1982 was enacted by the Mauritius Parliament. The Trust Fund was to be managed by a Board of Trustees which included five representatives of the Ilois, initially appointed and subsequently subject to elections. The purpose of the Fund was to disburse the UK and Mauritius Government monies, together with a sum provided by the Indian Government, in promoting the economic and social welfare of the Ilois and of the Ilois community in Mauritius. The Seychelles workers, Ilois and Government were not involved in these discussions. The Seychelles islands within BIOT, Aldabra, Farquhar and Desroches were never evacuated and they were returned to the Seychelles on its independence in 1976.

75. There was then a delay in the withdrawal of the Vencatessen litigation for reasons connected with his personal view of what was his due as the person who had initiated the litigation which had led to this settlement. But, meanwhile, no money was paid over by the UK Government. Public and intense pressure was brought to bear on Mr Vencatessen by the Ilois and eventually he agreed to give instructions to Sheridans that the action was to be withdrawn. Proceedings were stayed by agreement on 8th October 1982.

76. On 22nd October 1982, a cheque for £4m was handed over at a ceremony at which Ilois representatives were present.

77. By December 1982, the Ilois Trust Fund Board had decided to whom the money would be disbursed. 1,260 Ilois adults and 80 minors were recorded as receiving an initial tranche of Rs 10,000 (£556 at the then prevailing exchange rate), although 250 or so more were registered (1,419 adults and 160 minors).

78. Elections took place in December 1982 for the Ilois representatives to the ITFB; Mr Michel Vencatessen's two sons and a nephew were elected. The ITFB began to discuss whether it was responsible for obtaining "renunciation forms" from those who received compensation. These forms renounced claims against the UK Government, as set out in the 1982 Agreement and the Mauritius Government had agreed to use its best endeavours to obtain one from every Ilois. This question would be discussed through 1983.

79. On 1st January 1983, the British Nationality Act 1981 made British Dependant Territories citizens of those Ilois who had been citizens of the United Kingdom and Colonies. During June 1983, a further Rs 36,000 per adult and Rs 23,000 per child were disbursed to Ilois for the purchase of a plot of land. Many families and individuals clubbed together to do so. But a number of Ilois were discontented with the ITFB decisions and two Ilois representatives resigned, including Simon Vencatessen. A new group, the Groupe Refugies de Chagos, or CRG, came into being.

80. Between 5th and 22nd September 1983, the final tranche of compensation, Rs 8,000 was made. Some Rs 75m, or just over £4m, was disbursed during 1983 to 1984 to 1,344 Ilois by the ITFB. When the Ilois went to the Social Security Office to collect this final sum, they were presented with a renunciation form to sign, or far more commonly, to put their thumbprint to. This form was a one-page legal document, written in legal English, without a Creole translation, (A647). Ilois members of the ITFB were on hand to witness the thumbprint or to identify the individual, but on the Claimants' case, they did not, and were in no position to, translate or explain the purport of the document. Only 12 refused to sign, including Simon Vencatessen; he did not receive this last tranche of money, although his wife did. He understood the purport of the renunciation form.

81. Simon Vencatessen later brought proceedings against the ITFB in the Supreme Court in Mauritius, claiming that it had no power to impose on him a requirement to sign a renunciation form as a condition of obtaining this last sum of money. He lost on the grounds that the 1982 Agreement and the ITFB provided a statutory remedy for the Ilois as an alternative to proceeding by an action in the UK or BIOT Courts. In 1989, the Supreme Court of Mauritius dismissed his claim. This decision was based on its decision in 1984 in Permal v ITFB to that same effect, (A698 and A749).

82. In January 1984, Ilois members of the ITFB wrote to the US President seeking an additional £4m compensation because the £4m paid by the UK Government was a full and final settlement. These endeavours were pursued sporadically over subsequent years. The £4m was already being seen as inadequate by at least some Ilois.

83. Over £250,000 remained in the ITF at the beginning of 1984. It was being withheld from distribution as part of the means of protecting the UK Government from any further litigation by those Ilois who had not signed renunciation forms. Should such an action be commenced, the UK Government could look to that £250,000 to meet the cost of the action. But the Ilois, short of money and needing every penny, were seeking its release in view of the large number of renunciation forms, at least 1,332 and later 1,339, which had been signed. It appears from the Claimants' case that at least 1,344 Ilois had received compensation. But the money was still

retained by the ITFB because it had claims outstanding from 238 workers who had established an entitlement, before the ITF Act was amended in 1984.

84. By mid 1985, the Chagos Refugee Group, amongst the leaders of which was Olivier Bancoult, were contending that the Ilois had been exiled through coercion, in violation of their human rights; they continued to claim that the compensation was inadequate. In 1986, certain Ilois sought the advice of US lawyers as to whether or not a claim existed. They wished to press for their return to the Chagos Islands. These matters rumbled on through the late 1980s. The ITFB in 1989 noted that an Ilois demonstration, seeking another delegation from the Mauritius Government to negotiate further compensation from the UK Government, was told by the President that the 1982 Agreement meant that compensation could now only be sought on a humanitarian basis. There was a further distribution of about £250,000 in 1987.

85. In May 1992, Bindmans were again approached for advice by Ilois representatives; among other issues being considered in September and October were land rights, nationality and citizenship. In October, Professor Anthony Bradley was instructed. In April 1993, he advised that any arguable claim against the UK Government was time barred (A756). In October 1993, he gave advice on constitutional rights, including the right to return (A759). A Mauritian lawyer suggested investigating the constitutionality of BIOT laws. The citizenship and nationality of Ilois were to be pursued.

86. In order to press the issue of the right to return, Bindmans advised that Ilois make applications to visit the Chagos Islands; applications were made in December 1993. The BIOT Commissioner sought details of who wanted to go and why.

87. The Principal Immigration Officer for BIOT through the BIOT Commissioner informed Bindmans that permission had been refused. The Commissioner provided details of the BIOT Court Registrar so that the decision could be appealed. Bindmans' advice was that the appeal should precede any Judicial Review of the constitutionality of BIOT laws.

88. Mr Wenban-Smith was given delegated powers by the BIOT Commissioner to determine the appeal, because of the risk of apparent bias, and on 12th May 1995, he allowed the appeals subject to various conditions. A debate ensued over timing and the presence of a television crew on the trip. It never took place. The fissiparousness of Chagossian groups continued, but Bindmans still dealt with the CIOF. A BIOT Social Committee was set up in October 1995 by other Chagossians.

89. In December 1996, a group of Seychelles Ilois petitioned the UN, the Queen and Prime Minister and the USA for fair compensation. Till then, very little had been done by the Seychelles Ilois; they had not been involved in the 1982 Agreement and although some were aware of the ITFB, no payments were made to them or intended for them. Seychelles politicians, in what had become, by a coup, essentially a one-party state, had not persisted with the Ilois cause; they now saw them as Seychellois and not as a special category. In January 1997, the FCO wrote to the Ilois Group of Seychelles denying any obligation to pay compensation.

90. In October 1997, the Chagos Social Committee (Seychelles) Association was registered to establish the rights of the Ilois in the Seychelles as British citizens and passport holders, who would seek compensation. They were said to number 200. On 24th November 1997, the British High Commission in the Seychelles rejected the claims: those who returned to the Seychelles were mostly contract labourers, the conditions and the scale of the economic problems in Mauritius, which the compensation addressed, did not exist in the Seychelles; there was no scope for a return to the islands.

91. Sheridans became involved again in 1998. They took up the validity of the 1971 BIOT Immigration Ordinance. Olivier Bancoult instructed them to proceed with Judicial Review proceedings in the High Court in England in August 1998. In March 1999, leave was granted by Scott-Baker J. On 3rd November 2000, the Divisional Court (Laws LJ, Gibbs J) held that section 4 of the Immigration Ordinance was ultra vires the BIOT constitution. A constitutional power to make legislation for "peace, order and good government" was held not to permit legislation which excluded the population from the territory. There was no appeal against this decision although, before me, the Defendants took issue with some of the facts stated in the judgment and at least questioned, "reserving their position", the correctness of the decision.

92. Subsequently, the Immigration Ordinance was amended, in effect to permit the return of Chagossians to Peros Banhos and Salomon. There were no defence reasons why islanders could not return to Peros Banhos and the Salomon Islands. But none have taken advantage of that possibility.

93. Through 1999 and 2000, Sheridans pressed the case for compensation for the Ilois and for the provision of infrastructure on the islands to permit a return by the Ilois.

94. The very fact of the success of the Bancoult Judicial Review, together with the conclusion from the judgment that the Ilois had been excluded under an unlawful Ordinance, gave them hope and confidence to organise and pursue other litigation. Documents hitherto withheld under the 30-year rule could now be examined at the Public Record Office. A lawyer in Mauritius, Mr Mardemootoo, in whom the various groups all felt able to repose their confidence, was found.

95. This litigation commenced in April 2002.

96. I have endeavoured to provide a brief introduction to the complex and long-evolving circumstances in which this litigation was brought; the detail is contained in the Appendix to this judgment. I have considered in more detail later in the main body of the judgment certain relevant topics: employment, property, the nature of the Vencatessen litigation as seen by the Ilois, and the organisation of the Chagossians. I describe and assess the evidence, but more detail is provided in the Appendix.

The Proceedings

97. This litigation commenced with a Claim Form and Group Particulars of Claim dated 25th and 23rd April 2002 respectively. Sheridans again are the solicitors. Anthony Bradley, who had

advised the CIOF in the 1990s, is second junior Counsel. A Group Litigation Order was made with the consent of the Lord Chief Justice on 11th April and sealed on 3rd July 2002.

98. The Claimants, the Chagos Islanders, are those born in the Chagos islands and their children. The claim form seeks: (i) compensation and restoration of their property rights, in respect of their unlawful removal or exclusion from the Chagos islands by the Defendants; and, (ii) declarations of their entitlement to return to all Chagos islands and to measures facilitating their return. The Group Particulars of Claim also seek declarations as to their property rights and restitution of property.

99. The Group Particulars of Claim identify two sub-groups: Claimants resident in Mauritius and Agalega represented by the Chagos Refugees Group, chaired by Olivier Bancoult, and Claimants resident in the Seychelles, represented by the Chagos Social Committee (Seychelles), chaired by Jeanette Alexis. There were 5,023 (4,959) Claimants; the Particulars of Claim provide a breakdown; all but 631 (570) were related to Mauritius; only 58 (24) related to Agalega; the rest, 573 (546), related to the Seychelles. Only 1,075 (1,072) of the 5,023 (4,959) were born on the islands; 557 (542) were deceased natives claiming through their heirs. The rest were the children of natives, alive or dead; of those 475 (461) were under 12. They are all listed by name in Schedule 2 to the Group Litigation Order. I should add at this stage that in the course of closing submissions, the Claimants handed in revised figures which total 4,959, though the accompanying note suggests 4,466 Claimants. I have put the breakdown of the figures totalling 4,959 in brackets above. Nothing much turns on the differences, but it illustrates the difficulties of testing individual claims.

100. The GLO was advertised in Mauritius and the Seychelles. The GLO required that the Group Particulars of Claim "contain general allegations relating to all the claims", and be verified. Questionnaires completed by each Claimant, supposedly explaining the basis upon which they fall within the group were made part of the Particulars of Claim, (paragraph 14 of the GLO). There were complaints from the Defendants about the absence or incompleteness of questionnaires for a number of Claimants. The questionnaires do not permit it to be seen how the large number of Claimants, particularly those who were not displaced from the islands at any time, relate to the multifarious claims. Some questions are irrelevant; relevant questions are omitted.

101. The Group Particulars are unhelpful: a partial selection of quotes from documents, and two sample life histories, from Olivier Bancoult and Therese Mein, with a lack of focus on the categories of Claimants making which claims, and how their circumstances relate to the two examples given. But its drafting invites those individuals' circumstances to be taken as typifying the Claimants. I leave aside at this stage justifiable criticisms of the way in which the relevant ingredients of the torts are related to the facts relied on, but the particulars are most notable for the range of significant events from the mid-1970s onwards which are simply ignored, particularly any reference to the receipt of any compensation or the 1982 Agreement, and the role of the ITFB.

102. The Group Particulars rely on six separate wrongs: misfeasance in public office, a new tort to be called "unlawful exile", negligence, infringement of property rights, infringement of

rights under the Mauritian constitution and deceit. The Claimants' Reply to the Defendants' contentions in the Defence as to abuse of process and limitation periods said that the claim also included damages for personal injury created by diseases linked to poor living conditions and mental illnesses. It is far from easy to find that pleaded in the original or amended Group Particulars of Claim, but that is a remediable pleading deficiency.

103. The Group Particulars specifically assert in paragraph 4: "This action does not address or seek to interfere with matters of foreign policy, national security or defence policy decisions, but merely seeks redress for the Defendant's tortious conduct against the Claimants". The Claimants' subsequent submissions, when pressed, did not sustain that seemingly simple dividing line.

104. Schedule 1 to the GLO contains the list of common or related issues of fact or law to which the GLO applies: 11 of fact, 21 of law. They appear to cover comprehensively the issues in the case.

105. The misfeasance case originally simply contended that the removals or exclusions of the Ilois were unlawful, whether or not they were carried out pursuant to the 1971 Immigration Ordinance.

106. By Amended Group Particulars of 3rd October 2002, this allegation was considerably elaborated. It was pleaded that the Defendants, their servants or agents as before, knew that the 1971 Immigration Ordinance was unlawful, or were reckless as to its lawfulness, knowing or being reckless as to its purpose in giving effect to an "unlawful or wrongful" policy, based on a conscious disregard of the Claimants' interests. The judgment in R v Secretary of State for the Foreign and Commonwealth Office ex p Bancoult was relied on.

107. Insofar as evictions and prevention of return were not based on that Ordinance, the Claimants relied on other illegal acts made up of (i) the Defendants' knowledge of a significant permanent population, (ii) the births, deaths and marriages of which the state possessed records, and whose homes and possessions were there to be seen, the nature and extent of which could have been surveyed but was not, (iii) the concealment from the UN, the Commonwealth Governments and Parliament of the true position, because the existence of a permanent population would impede the UK/US agreement and give rise to obligations on the UK Government under the UN Charter, and (iv) the related pretence that there was no such permanent population and taking of policy and administrative measures to ensure that there was no permanent population.

108. Such measures included (i) instructing Rogers & Co, the shipping agents for Moulinie & Co, not to allow Chagossians who had left voluntarily to return, (ii) failing to warn those who left voluntarily that they would be unable to return, (iii) in effect coercing islanders to leave without lawful authority, (iv) failing to balance their interests against the UK Government's interests through a failure to tell them what was happening and what their true position was, (v) failing to provide any adequate system for compensation before the islanders were displaced, and (vi) continuing to refuse to allow the islanders to return. In proposed Re-Amended Group Particulars, the Claimants also alleged (vii) that there had been no consultation with the

Chagossians about their future or the future of the islands, and (viii) that the acquisition of land had been done in such a way that those in apparent occupation of land had no recourse to a judicial tribunal.

109. Further acts of illegality pleaded were that it was at the Defendants' behest that the plantations were run down and closed, and that the Defendants could not lawfully either exclude the entire population of BIOT from "the one part of the territory that, in 1971, had an assured economic future (because of the planned US base)" compounded by the running down of the plantations knowing that this would remove the economic support for the entire population of the territory.

110. It was also pleaded that it was illegal for the Defendants in 1970 and subsequently to have adopted a policy of concealing the Claimants' status as citizens of the United Kingdom and Colonies from the Mauritius Government, the Chagossians and others. Deceiving citizens as to their citizenship, which deceit continued towards the Ilois after 1972 was itself an illegal act.

111. It was specifically and controversially pleaded, by way of pre-emptive strike, that the disclosed documents showed the Defendants' liability but that "it is not necessary as a matter of law for the Claimants to be able to identify bad faith on the part of a single officer for the Defendants to be liable". This was not so much a point as to evidence but a point as to the substantive law as to the requirements of the tort of misfeasance in public office.

112. The Defendants acted dishonestly, it was alleged, for the purposes of this tort because they acted in bad faith, knowing that what they said was untrue and that what they did was unlawful, or being reckless as to the truthfulness or lawfulness of what they said or did. No individual is named.

113. The dishonest statements were (i) that there were no permanent inhabitants of the Chagos islands when they knew that there were, (ii) that they failed to report to the UN on BIOT when they knew that they should have done, (iii) that they failed to inform Chagossians as to their rights as "belongers" and as British citizens, (iv) withheld information from the Mauritius Government as to their status, and (v) minimised publicity over the BIOT Immigration Ordinance.

114. It was pleaded that the Defendants knew that what they did illegally would injure the Claimants or were recklessly indifferent to that consequence because they knew or ought to have known of the Chagossians' property rights, their family and community connections in the islands, of their distinctive cultural identity which "could not readily survive intact" transplantation to Mauritius or the Seychelles and that their skills working the coconut plantations could not avail them elsewhere. They were removed under duress, without consultation and without proper facilities on their arrival in Mauritius or the Seychelles.

115. The misfeasance case relates to the period commencing with the lead up to the 1964 UK/US agreement and the creation of BIOT, and its principal aspects conclude with the arrival in 1973 of the last of the Chagossians in Mauritius and the Seychelles, although some later acts are relied on.

116. The initial contentions of the Defence as to the inadequacy of the pleaded allegations in constituting the tort of misfeasance were removed by the Amended Group Particulars. The real issues raised by the Defence were first as to the existence of any real prospects of the Claimants showing knowledge or recklessness as to any of the allegedly unlawful acts or the likelihood of harm to the Claimants from them; the Defence was not amended in response to the new allegations of knowledge and unlawfulness in the Amended Particulars of Claim but that response continued to be made in respect of them. Summary judgment was sought, in any event, in respect of the claims of those who were not in BIOT or who were unborn at the relevant times.

117. The misfeasance claim is closely related to the new tort of "unlawful exile" asserted by the Claimants. The ingredients of this tort, not on an exhaustive basis however, were set out by the Claimants in a note of 18th October 2002. The Crown cannot remove from or prevent the return to British Territory of a British citizen or "belonger" without statutory authority or the "free, voluntary and informed consent" of that person. The rights derived from Magna Carta, and from common, constitutional and international law. If the rights existed, there was a tortious remedy for their breach. This tort covered not just the events surrounding the evacuation of the islands but also the refusal to allow those from Diego Garcia and their descendants to return there; it is said to be a continuing tort.

118. The negligence case, as often stated, relates to the period which starts with the arrival in Mauritius and the Seychelles of those displaced from the Chagos. It does not assert that the decision to remove the inhabitants was itself negligent nor does it cover the immediate manner of their removal. It does not therefore appear to cover those who were not removed from the islands but were prevented from returning. I am not sure that that is the Claimants' intention. It too is said to be a continuing tort. The duty of care was said to arise from the Defendants' decision to close the islands; that led to a duty to make adequate provision for those whom closure had displaced, by way of funds and facilities which would provide a "roughly comparable lifestyle" to that which they had enjoyed on the islands. This duty was breached because not even their most basic needs were met, leading to great deprivation: adequate provision had never been made.

119. The Claimants' property rights were said to have been acquired by prescription or succession. Mauritius property law, including the Civil Code in force from 1805, applied and granted rights to those in unequivocal possession of non-Crown lands with an intention to own it. Those rights were protected by the Mauritius Constitution.

120. The Claimants' contention that the Mauritius Constitution also provided rights in respect of inhuman treatment was not further particularised.

121. The deceit case was that false statements of existing facts had been made in documents, or even impliedly through inaction, to the Chagossians, the UN, the UK Parliament, the press and the Government of Mauritius. The false statements were that the Chagossians were not permanent residents of, and had no rights to remain in, the Chagos islands, had no rights under the UN Charter and were not British citizens. The Claimants relied on the same facts as to dishonesty as they relied on in relation to misfeasance in public office. The purpose of the deceit

was to procure the quiescent removal of the islanders, without their asserting any of their rights and to prevent other persons assisting them to assert those rights. The Claimants and others relied on those representations, as was said to be demonstrated by the unhindered and unopposed evacuations, and the lack of public dissent. The Defendants had wilfully taken advantage of the poverty, ignorance, illiteracy and isolation of the Claimants.

122. This tort appears to cover the period from the inception of the proposal to create BIOT until the Bancoult Judicial Review proceedings.

123. The various torts and wrongful acts are said to have caused the islanders first, broadly, to have been deprived of the right to reside in the Chagos, enjoying the lifestyle, grants and assistance to which they would have been entitled as a permanent population, and second, to suffer individual losses of real and moveable property, jobs, income and "security, dignity and a sense of identity". They suffered instead a minority status, characterised by discrimination and poverty in many manifestations. Damages, aggravated and exemplary, are sought. Also sought are declarations (i) that the continued refusal of the Defendants to allow the Chagossians to return is unlawful, and (ii) as to the steps necessary to make that right of return, to live in each of the previously inhabited Chagos islands, practicable.

124. The Group Defence of 28th June 2002 stated that the Defendants would seek to strike out the Particulars of Claim and seek summary judgment on the grounds that there were no reasonable grounds disclosed for bringing the claim and the Claimants had no real prospect of succeeding. The claims either did not satisfy the requirements of the pleaded causes of action, or were unknown to English law, or, if the laws of Mauritius were relied on, were irrelevant to BIOT, and were in any event statute barred or an abuse of process. A detailed response followed but it did not purport to be the full factual response.

125. The jurisdiction of the High Court was not challenged for the purposes of this action, although the BIOT Commissioner did not abandon his contention that the BIOT Courts were the proper forum. The nature and whereabouts of the BIOT Courts make a curious footnote in colonial legal history.

126. The essence of the Defendants' pleaded case in response was that those present on the islands at the point of closure, were present as licensees at will of the owners of the islands, initially Chagos Agalega Company Limited, and subsequently the Crown. It was Chagos Agalega Company Limited and the subsequent management company, Moulinie & Co, which was responsible for reducing the number of workers, for recruitment and organising the transport of the workers and their dependants to Mauritius, Agalega and the Seychelles upon closure of the islands. BIOT was created to enable the United Kingdom to enter into an agreement with the United States of America for the advancement of their mutual defence and security interests. It was admitted that the plantations were run down and closed as a result of the UK/US Agreements and the subsequent decisions of the United States in respect of Diego Garcia. The plantations on Peros Banhos and Salomon closed because they were not economic after the closure of the Diego Garcia plantations. The Defendants said that they had made adequate provision for resettlement through the agreement with Mauritius and the arrangement for the transfer of people to Peros Banhos and the Salomon Islands.

127. It was denied that the Defendants removed individuals against their will or did so dishonestly or in bad faith; instead, they co-operated to minimise the disruption to those engaged on the plantations by seeking to give a degree of choice as to where those displaced from Diego Garcia and the other islands were subsequently settled, by providing financial support to the Government of Mauritius and obtaining their agreement to a sum of money in discharge of the resettlement obligation which the United Kingdom Government had undertaken.

128. It was said that it was only after the creation of BIOT that the Defendants were aware that there were individuals who had been living on the islands for at least one generation. It was arranged that they should have the status of Mauritian citizens on the independence of Mauritius in 1968. It was denied that they had any right personally or by virtue of property to remain on the islands or that they were permanent inhabitants or "belongers" of BIOT. It was disputed that the Defendants knew of or were reckless as to the possible legality of section 4 of the Immigration Ordinance 1971. As to the allegation that the Defendants knew or were reckless as to the probability of their action injuring the Claimants, the Defendants contended in the Defence that they were concerned to ensure their proper treatment and entered into a commitment to the Mauritius Government to meet the resettlement costs, protected their rights of citizenship and thereafter sought to maintain plantation working where possible, to obtain employment for them on the islands, and examined development and investment.

129. The Defendants asserted that they recognised the need to make appropriate financial and administration arrangements for the resettlement of individuals but they believed that it was only a small number of those working on the plantations who had substantial personal links to the Chagos islands and that there would be no real difficulties in making appropriate arrangements of them which they did. It was denied that the Defendants knew or ought to have known that the compensation arrangements might prove unacceptable or inadequate or that they were aware that any losses would be caused for which they would not be compensated by their departure from the islands in terms of real or moveable property.

130. Once the state of Mauritius became independent, it was not for the Defendants to control the way in which the independent Government carried out the arrangements for resettling the Ilois. The two commercial operators of the copra plantations exercised their own judgment in respect of recruitment and operation in the circumstances prevailing after the 1965 UK/US Agreement; the Defendants were not obliged to provide a subsidy to copra production and the copra plantation operators did not act as agents of the Defendants. The Defendants did not have control either over the implementation of the UK/US Agreement and the policy decisions under that Agreement made by the US.

131. Much of the Defendants' pleading in relation of the alleged tort of unlawful exile drew upon the defence in relation to misfeasance. It was said in those circumstances that there had been no breach of any common law or international law. It was denied that the Defendants removed any individuals from the islands or that if they did so, they did so pursuant to the 1971 Immigration Ordinance, but rather asserted that they did so in the exercise of the private rights which they had as operators of the plantation. In respect of Diego Garcia, it was said that it was not practical in view of the importance of Diego Garcia to defence interests for any Claimants to

return to Diego Garcia, and that in respect of the other islands, the practicalities of the American attitude in 1969 onwards for a number of years made investment in those islands impracticable. Although the Immigration Ordinance 2000 permitted Chagossians to return to BIOT except for Diego Garcia, the Defendants were not obliged to undertake the investment required for a viable resettlement of those islands.

132. The Defendants asserted that the pleading of negligence was wholly inadequate and that insofar as there was a duty of care owed, that duty had been discharged by the agreement with the Government of Mauritius in 1972, the payment of the resettlement costs in 1973 and the further payment of £4m in 1982. No admissions were made as to loss or damage or causation.

133. The Defendants denied that the Chagossians had acquired any ownership of real property within the islands, denied the relevance of Mauritian law to any claim and any breach of Mauritian law, and asserted that these claims as with the others was statute barred.

134. The Defendants asserted that the pleadings on deceit were wholly inadequate and should be struck out as frivolous, vexatious and embarrassing. This was because of the very generalised allegations as to what was said to have been said to a very wide and heterogeneous group of individuals, businesses and organisations.

135. It was specifically pleaded that the Claimants must have known of their rights before the Bancoult litigation because of the pleadings in the Vencatessen action. Various allegations about abuse of process were made.

136. The Reply of the Claimants on abuse of process and limitation contended in summary:

i. that the Limitation Act 1980 had no application because for all or the vast majority of the Claimants, the Defendants' acts had denied them any real and substantive access to justice, and in any event, it would be unconscionable to permit the Defendants to rely on the Act;

ii. that the Foreign Limitation Periods Acts 1984 excluded or modified the operation of the Limitation Act 1980;

iii. that Article 3 of the BIOT Courts Ordinance 1983 required the time limits in the Limitation Act 1980 to be adjusted to meet the particular circumstances of these Claimants;

iv. that the Limitation Periods were not applicable to the continuing torts of unlawful exile and deceit which latter had only ended with the Bancoult litigation;

v. that the Claimants were disabled within the meaning of the Limitation Act because they had been outside the jurisdiction of the BIOT Courts and of the High Court of England and Wales as a result of the Defendants' actions, which had also caused them to be impoverished, ignorant, illiterate and physically separated from those Courts;

vi. that the action was based upon the fraud of the Defendants and deliberate concealment of relevant facts, in particular in concealing their citizenship removing the islanders, preventing their return and infringing other rights of theirs and failing to make adequate provision for them, accordingly section 32 of the Limitation Act 1980 meant that the actions were not statute barred; and

vii. that the actions were also actions for personal injury and it would be equitable pursuant to Section 33 of the Limitation Act 1980 to allow the actions to proceed. The injuries included diseases linked to poverty, poor living conditions, malnutrition and included such illnesses as malaria, gastro-intestinal infections, drug addictions and mental illnesses.

137. The Claimants were unable to discover with reasonable diligence that the Defendants had behaved fraudulently and unconscionably at an earlier stage because they were uneducated, trusting, without access to pre-legal advice and effectively under the control of the Defendants who had misled the islanders at all stages as to their rights and status.

138. It was said that there was no abuse of process rising out of the Bancoult litigation; there was no duty to test the validity of the 2000 Ordinance by applying for permission to return to Diego Garcia and it was not necessary for the validity of the 2000 Ordinance to be challenged in Judicial Review because of the factual relationship between a decision as to its validity and the material relied on for the rest of the Claimants' claim. This was not a case of Henderson v Henderson abuse.

139. The Reply also denied that the renunciation forms could found an allegation that the Claimants were abusing the process of the courts in these proceedings because they would not have been aware of the content or purport of those documents and so there was no clear and unequivocal waiver of rights by persons fully informed as to them. Indeed, it was said to have been unlawful for a Government with governing responsibilities to treat its citizens in that way.

140. A Case Management Conference was held before Master Turner on 16th July 2002, who ordered a trial of a number of preliminary issues.

141. The preliminary issues were (i) "whether the Claimants were unlawfully removed from or prevented from returning to the Chagos Islands as pleaded" and (ii) a long list of scheduled issues, the detail of which the parties were to agree, including whether the action was statute barred, whether the pleaded case constituted the tort of misfeasance in public office, and whether they could establish its ingredients, in respect of which a variety of aspects were raised. The existence of a tort of unlawful exile, the justiciability of the national security and international obligation issues raised by the asserted right to return to Diego Garcia, the inadequacy of the pleading of the negligence and deceit case, and the applicability of Mauritius law and the Mauritius Constitution were also issues raised in the Schedule.

142. Master Turner also made orders for disclosure and the exchange of witness statements for the purposes of that trial. The time estimate was 7-10 days. It was not then thought by either side that there would be much more disclosure of documents. There had been a debate as to

whether the issues should be dealt with on the pleaded facts or whether, as the Claimants wished, live evidence at least on their side should be called. Master Turner, plainly encouraged by the Claimants' submission that the evidence of comparatively few witnesses for the Claimants would suffice to provide the factual matrix necessary for the determination of the Defendants' preliminary issues, ruled that live evidence should be called. The Defendants did not appeal that decision.

143. The basis for Master Turner's decision was common sense case management and justice. The pleadings were vague or incomplete as to many factual assertions; yet filling in those gaps, the full extent or implications of which could lead to further facts becoming relevant, through the taking of instructions over long distances from largely illiterate people dealing with events long ago via interpreters and then rendering the answers into pleadings, would be very expensive, time consuming and of debateable completeness or accuracy; live witnesses would be able to deal with those issues immediately, and the true scope of what they wished to say ascertained, clarified and checked or tested. As the aim of the Defendants was to defeat the whole or large parts of the case without a full trial, in circumstances where the Claimants were elderly, at least in their eyes had suffered at the hands of the very colonial power from which they were seeking justice, and were suspicious that as illiterate Creole citizens they were discriminated against in comparison with other colonial citizens, it was only just that the Claimants should have their opportunity to have their say, and should not feel as though the lawyers had dealt with it behind their backs.

144. Although not all of those aspects were explicitly part of Master Turner's thinking, it became increasingly clear to me as the case was prepared for trial and being tried, that he was right to have ordered as he did and the considerations to which I have referred weighed heavily in favour of the process undertaken, very prolonged though it turned out to be.

145. Unfortunately, the nature of the issues thus to be dealt with was not altogether clear and the parties could not agree. Part of the problem related to the question of which witnesses were necessary for which issues and, more importantly, what factual issues if any were to be finally decided at the preliminary stage. I held two pre-trial reviews, on 26th September and 11th October 2002. The list of issues was refined and the questions for the Court became generally expressed in terms of whether there was a reasonable prospect of the Claimants establishing the facts necessary for their claim or for defeating the Defendants' contention that the claims were statute barred. In general, binding findings of fact would not be made except in relation to abuse of process and so far as was necessarily implicit in the formulation of the limitation issue. The Defendants did not therefore have to provide oral evidence lest binding findings of fact were made against them at this preliminary stage. There were issues of law to be resolved. In summary, the fifteen issues covered:

> i. the factual evidence of compulsory removal of Claimants or the prevention of their return to the Chagos Archipelago and the lawfulness of such acts;
>
> ii. in relation to the tort of misfeasance in public office, the prospects of it being shown that the Defendants acted unlawfully or if they did so, whether they knew or were reckless as to that unlawfulness;

iii. the existence of and legal requirements of the alleged tort of unlawful exile;

iv. whether the alleged duty of care arose;

v. the prospects of Claimants showing that they had any real property rights, in particular in the light of the acquisitions by the Crown, and the possible applicability of Mauritian law;

vi. the relevance of the Mauritian Constitution;

vii. the ingredients of the tort of deceit and the Claimants' prospects of showing that the tort had been committed;

viii. the prospects of any cause of action not being statute barred or property right not being extinguished;

ix. abuse of process in the light of the settlement of the Michel Vencatessen litigation and the later Bancoult litigation.

146. Various other orders were made in an endeavour to clarify what the pleadings were actually contending for; the Particulars of Claim were amended. The Claimants' Reply on Limitation and Abuse of Process went through a number of editions, the last one accompanying their closing submissions.

147. The hearing in the end lasted 37 days, not without some gaps. Many more witnesses were called by the Claimants than had been anticipated. They were called to deal with concerns which I raised during the hearing, with particular reference to the limitation and abuse arguments. Those concerns revolved around what the Claimants knew generally about the 1982 settlement, the Vencatessen litigation, the distribution of the £4m by the ITFB and, as it transpired, subsequent occasions when legal advice was sought by the Ilois. I felt that there were many significant witnesses who had not been called, the absence of whom was very surprising in the light of the contentions. The disclosure of documents from both the Defendants' and Claimants' files continued through the hearing and while written closing submissions were being prepared. Both sides complained about the inadequacy of the others disclosure. Some relevant documents were not in the control of either party.

148. The giving of evidence was slowed not just by the need for almost all the Claimants who gave evidence to do so through an interpreter. Documents had to be translated orally, and even if written in Creole, read to witnesses and at least in part translated for the Court. I am grateful to the many who acted as interpreters, for a language with few interpreters, many of whom, including a former President of Mauritius, came at short notice, at some disruption to their own lives.

149. Written closing submissions with a brief flurry of rebuttals and counter-rebuttals were provided for those submissions not concluded by 10th January 2003. The process ended towards the end of March.

General

150. Mr Allen QC for the Claimants submitted that the Defendants' applications were unjust as a matter of intuition or perception. It was unjust that they should have no personal adjudication on the wrongs which they had suffered and the claims which they brought. His clients had been treated unjustly; it was unthinkable that a British Government could so treat the Chagossians. They had been displaced as a people by the Government of the United Kingdom which had eschewed any governmental obligation to them and was now seeking to prevent adjudication on the wrongs done to them. They had never had "any independent comprehensive high level review" of their rights or of the wrongs done to them. They had been treated in a way which it was inconceivable that, eg the Scots would be treated.

151. Paradoxically, however, it was the creation of BIOT in 1965, in advance of the removals which, as Mr Allen accepted, provided the opportunity for some of the Chagossians' grievances to be raised. Had they been removed by the UK from the Archipelago to Mauritius while the islands were still part of Mauritius before independence, or had they been removed by Mauritius after independence from islands which had remained constitutionally part of Mauritius, the removal itself would not have generated claims about exile or a removal which was in principle one which no Government could inflict on its citizens. They would have been removed from one part of Mauritius to another part in the public interest, whether for defence purposes or because the islands' economy could no longer sustain them. Of course, the politics involved in such a route would have been completely different; it would not have been sufficiently certain for the UK or US Governments and the internal politics of Mauritius never contemplated such a course.

152. As Mr Allen reminded me, the fact that this application has lasted so long and has involved so many witnesses and bundles of documents (some newly arriving during the hearing), does not alter the purpose of the hearing: it is not a mini-trial. But it is to deal with the issues ordered to be dealt with, as to an extent they evolved during the hearing; it includes strike-out proceedings but it is also an application for summary judgment. Still less, however, would any trial of the action be a form of public inquiry into the overall actions or omissions of the UK Government towards the Chagossians over three decades and more, notwithstanding many comments and arguments from him which were more addressed to heaping moral opprobrium on the Defendants than to dealing with the issues to which the applications give rise. Neither the applications nor any trial of the action would constitute a high level, independent and comprehensive review of the rights of the Chagossians, the absence of which Mr Allen complained about. Nor could any trial constitute an inquiry at a general level into governmental wrongdoing or incompetence.

153. If, as Mr Howell QC said, the actions or parts of it should be struck out or summary judgment entered in whole or in part, that is the application of the system of law to the case. It would be the proper form of personal adjudication. Justice does not require an obviously unmeritorious case to be allowed to proceed. Ill-treatment does not require a hopeless case to be

allowed to continue. Indeed, to raise false hopes would not be fair. There is every good reason to avoid the waste of public money and court resources which the continuation of hopeless claims or contentions would otherwise create.

154. In saying that, I am acutely conscious of the position of at least some of the Claimants. I have not heard oral evidence from the Defendants on any issues of real significance, although I have had a great deal of material in the form of documentary evidence about what happened over the years, upon which the Defendants rely. It does appear that, in the absence of unexpectedly compelling evidence to the contrary, at least some Claimant Chagossians could show that they were treated shamefully by successive UK Governments. Whatever view might be taken of the importance of the strategic defence aims underlying the creation of BIOT, the evacuation of the islands and the establishment of the base on Diego Garcia, some who had lived there for generations were uprooted from the only way of life which they knew and were taken to Mauritius and the Seychelles where little or no provision for their reception, accommodation, future employment and well-being had been made. Ill-suited to their surroundings, poverty and misery became their common lot for years. The Chagossians alone were made to pay a personal price for the defence establishment on Diego Garcia, which was regarded by the UK and US Governments as necessary for the defence of the West and its values. Many were given nothing for years but a callous separation from their homes, belongings and way of life and a terrible journey to privation and hardship. Such arrangements as were made in the early 1970s did not take effect for several years and came too little and too late to alleviate their problems. An eventual accord in 1982, driven by litigation, produced an offer which was intended to improve their sad conditions but which was not evidently generous. Their poverty, sadness and sense of loss and displacement impel their continuing desire to return to the islands which were their home.

The Chagossians' Oral Evidence

155. It was the Claimants who wanted to provide some oral evidence for the purpose of these applications. Initially, this evidence was to show the way of life which they had led on the Chagos, the manner in which they had been compelled to leave the islands or prevented from returning to them, the harsh conditions of their voyages to Seychelles and Mauritius and the destitution in which they had been left there for so long, without assistance or compensation from the UK Government. It was to re-assert their entitlement to return, and their strong attachment to the Chagos, indeed to particular islands within the Archipelago. But it became clear to me during the cross-examination of the witnesses whom the Claimants had initially decided to call, that there was much relevant evidence on other issues in respect of which obvious witnesses were not being called. Those issues related to the series of negotiations leading to the 1982 Agreement, the Agreement itself, the signing or thumbing of renunciation forms, the way in which the ITFB had dealt with those forms, the withdrawal of the Vencatessen litigation and the nature and extent of the legal advice which, over the years, the Ilois, or some of them at any rate, had received and to which publicity had been given. Those issues were directly relevant to the Claimants' case on limitation.

156. The evidence of the individual Chagossians was given through interpreters of varying experience. Some of the Chagossians were elderly; some had been very young when they left

the Chagos and arrived in Mauritius and the Seychelles. Inevitably, for all, the events surrounding the 1982 Agreement were twenty years past. The individuals were mostly illiterate in any language, spoke only Creole, and lacked significant education. Documents had to be translated in the witness box, and could not be read by them to assist understanding or recollection. Legal concepts were, not surprisingly, poorly understood, at least at any level of complexity, though the witnesses all had and expressed a strong sense of their rights as they perceived them and what rights they would or would not give up. Some legal ideas, notably the making of a claim or bringing proceedings, lacked a clear or consistent Creole translation. Witnesses were also often troubled by ideas of time, how long ago something had happened, and whether something had happened at the same time as something else. Witnesses would sometimes lose the thread of the questions, and could not be brought back to it, and when reminded of what they had recently said, would deny it or give a very different answer as that earlier question was then put again. Accordingly, their evidence requires a careful appraisal.

157. But certain observations are apposite at this stage. It was plain that the written witness statements, which for the most part the witnesses were prepared to adopt as true, could not be regarded as accurate or reliable or as the witnesses' testimony on many aspects. The language of many of the witness statements was far too advanced and detailed to be the true recollection of the actual witness in anything approaching their own words. It appears that one of the problems with the way in which the statements were taken in Mauritius is that the person preparing the statement provided information in it which may be true, for example exchange rates, but which is not within the knowledge of the deponent. This leads to a false impression of the witness' knowledge. It is impossible to tell the extent to which the written statement has been influenced by the statement taker, no doubt acting in good faith, or the extent to which the statement has been affected by the way in which the story has been taken down in Creole and translated into English and then back again.

158. But, even making those allowances, there are some surprising errors in the witness statements and some surprising omissions. There was a surprising lack of material in the witness statements on issues of real importance including the relevant material for the claim to property rights by prescription, as to their beliefs about the nature and purpose of the 1982 Agreement, the existence of the renunciation forms and what they and the Chagossian community more generally had known or believed about the availability of legal advice, and about certain of the wrongs said to have been done, such as the alleged denial of British citizenship. This is not a criticism that each document upon which the witnesses were cross-examined should have been previously considered, but there was often scarcely a reference to important aspects.

159. The witnesses, quite properly in this case, gave evidence in chief at some length; this evidence was often at variance, in matters large or small, with their statements. The oral evidence itself was frequently self-contradictory; what was said in cross-examination being at variance with evidence in chief, or with earlier answers in cross-examination.

160. The lack of reliability may, in part, be attributed to a lack of understanding of the questions and a loss of the thread, but it also reflected an unreliable memory. Some answers would be given to questions about events which they at other times would deny happened or deny that they remembered. The frequency with which witnesses were unable to remember

events or simply did not know about them itself suggested that they had unreliable memories of events now too long ago for more reliable evidence to be forthcoming. Indeed, the lawyers who gave evidence were often unable to do more than rely upon the documents for their recollection as to what had happened.

161. Evidence was also given, as if at first hand, about events which the witness could not have seen or heard. As Mr Allen put it, there was an element of "collective" or "folk memory". As Mr Howell suggested, stories went round which became lodged in people's minds as events which had happened and then as events which they had witnessed. Those amount to much the same, but the evidence thus given is of little practical help, for it is impossible to know whether it has any foundation in fact or not. There might be value in "collective" or "folk memory" evidence, or in a fairly sound general picture in which the individual details were more uncertain, if one were seeking a generalised or collective view for the purposes of an inquiry into the conduct of the UK Government. But I am concerned with litigation in which, on issues such as negligence and damages for personal injury, what happened to each individual Claimant would need to be measured with rather greater precision.

162. The unreliability of so many memories and the large gaps in recollection and knowledge were compounded by the willingness of a number of Chagossian witnesses to take refuge in a loss of memory and a denial of knowledge in order to evade questions on obvious problems: in particular, about the Vencatessen litigation, the withholding by the ITFB of £250,000 while sufficient renunciation forms were collected, and the occasions when legal advice had been sought. At times, Mr Allen's repeated emphasis on their naivety and ignorance as an explanation was overstated and did the Chagossians in their determination and endeavour less than justice. Many were, I concluded, alive to the significance of the passage of time since 1982 and the importance of what they had or had not been told about their rights and used their asserted poor recollections as a device to avoid facing up to evidential problems. For some, this did not appear to be an unfamiliar refuge. Even if that were too harsh a judgment, those gaps in memory show how difficult it now is for reliable evidence to be given on important issues.

163. I also concluded that some Chagossian witnesses gave deliberately false evidence on a number of issues, notably, but not only, Mrs Charlesia Alexis.

The Witnesses

164. Mrs Talate was the first witness and gave much evidence which other Chagossians were to agree with or to be affected by. She had been born, she said, on Diego Garcia but she could not remember when, because of her suffering.

165. She was asked in cross-examination why the statement which she had sworn in the Bancoult Judicial Review proceedings said that she had been born on Peros Banhos and said that it was a mistake on the birth certificate for it to record that she had been born on Diego Garcia, the mistake having arisen because she had moved from Peros Banhos to Diego Garcia when she was one month old. In that statement, it had said that her principal interest would be to return to Peros Banhos where her grandparents were buried, and her parents and she had been born. In order to explain the discrepancy, she said that she had told the truth but the person who wrote

down what was in the first statement had written down a lie, which I found surprising. She could not remember when she was born but her witness statement said it was 19th March 1941, which I assume someone inserted from her birth certificate. She was unable to read or write or to speak English.

166. She had left Diego Garcia when the island was sold, as she put it, and had gone to Peros Banhos. She described how she was told that they had to leave Peros Banhos, the terrible conditions on the "Nordvaer", and the poor conditions in Mauritius. Over time, she became closely associated with the CRG, one of its leaders from the very beginning although she denied being its Treasurer. She was elected to the ITFB in December 1983.

167. Her evidence was striking for the difference between her witness statement and her oral evidence, in style and content, and for the contradictions and changes to which her evidence was subject. She was an important Chagossian figure, and their main witness on many areas. When the renunciation form was translated to her, it was for many subsequent witnesses, they said, the first time they had heard of any such document or its contents. But the gaps in her evidence about what she had known or understood, or what the Chagossians generally had thought were very extensive.

168. I concluded that Mrs Talate was not a credible or reliable witness, certainly on any matter of detail, and could be persuaded that things had happened which either did not happen to her or did not happen at all, or that she had seen things which she had not. Her witness statement bore no resemblance to any evidence which she could give in her own way; it drew conclusions eg over poverty, which were far too legalistic and sophisticated for her; its language was not hers, translation apart; so much of it she disagreed with that it cannot be taken, beyond the most general level, as an accurate or reliable piece of evidence.

169. Her oral evidence gave rise to many problems. Initially in chief she remembered signing her statement after it had been read to her in Creole and she said that the statement was true. She told me, however, that her statement was read back to her in French, some of which she understood and some of which she did not; it had all been read back to her in one go, reading from a prepared document, although she had spent nearly a whole day being asked questions. There was an element in her evidence of collective memory, that is, evidence which describes what happened to others, where she was absent, as if she had been present and which might be true. There was also undoubtedly confusion of language and thought and an inability to relate questions and answers to specific times. The strength and depth of feeling for Diego Garcia and the emotions attached to her experiences are entirely genuine. The general picture of life on Chagos, the fears of simple and in every sense ill-informed people, and the general picture of life in Mauritius can be taken, for present purposes and in view of the limited scope for challenge, as a basis for showing the general picture which the Claimants' overall might be able to prove at trial. Mr Howell did not take substantive issue with them for these purposes. It is much more problematic when it comes to the details of what happened to whom, when, and to what degree; here it is unreliable.

170. I also formed the strong view that she was being evasive when answering questions about what she knew of the Vencatessen litigation, the 1982 negotiations, what she knew when she was

on the ITFB about the 1982 Agreement, the existence of a possible legal remedy which either had been used or could still be used, and of the extent to which Ilois were informed of what was going on through their various organisations. She was in a general sense aware of the significance which that had for the case as a whole. I do not regard her as having been a truthful witness in a number of instances. If that judgment is too harsh, she is, by reason of the passage of time, a witness whose memory is no longer reliable on specific and important individual details. Her evidence had real significance because, overall, it showed how difficult it would be, with the passage of time, to place reliance on what she said in detail. She was not alone in this; it was commonplace among the Chagossian witnesses. It goes directly to their prospects of success.

171. Jeanette Alexis was the Chairman of the Chagos Social Committee (Seychelles) and a personnel manager in a Seychelles Ministry. She was the daughter of Mrs Mein, who was Charlesia Alexis' sister. Her father had been the Assistant Administrator and the shopkeeper on Diego Garcia at East Point, registering those who came to work, doing administrative jobs and taking Mass when there was no priest. She was born on Diego Garcia in 1961 and her parents and her grandparents had also been born on the Chagos islands. Her brothers and sisters had been born there too. She described a stress-free existence. Her mother had never had to work. She had had a happy childhood with plenty to eat. She left Diego Garcia in 1971 for Peros Banhos and then had gone to the Seychelles with her parents. She described the harshness of life there, the difficulties of obtaining Seychelles citizenship, and the occasional contacts with Mauritian Ilois groups. Her father had set up an informal group which she helped with. The Seychelles Government had done nothing to help and the Ilois were frightened of making a fuss in what became a one-party state in case they were deported. She could afford no lawyers.

172. Her committee was set up in 1997. Her correspondence with the Foreign Secretary had been ignored until the FCO wrote explaining why there had been no compensation for Ilois on the Seychelles: there had been few Ilois there and the resettlement problems of Mauritius did not exist.

173. She struck me as a generally honest and intelligent witness, except she was surprisingly now unaware of her father's efforts to obtain compensation or her aunt's campaign in the 1980s. Other evidence showed that she must have known of Mrs Alexis' activities. She may have forgotten subsequently, what she once knew.

174. Mrs Mein, the mother of Jeanette Alexis, was born in 1933 on Diego Garcia as her parents, grandparents, and sisters and brothers had been. She had gone from Diego Garcia to Peros Banhos before coming to the Seychelles. She had met her husband when he came to work on Diego Garcia. He was a Seychellois. Her husband did administrative work for the company, accounting work and keeping the registers. She did no employed work. Her house was in concrete blocks with iron sheets, four bedrooms and other rooms. When she left Diego Garcia, she had had to leave behind all her furniture, all the flowers and fruits of her garden, all her animals, ducks, chickens and so on. They had to leave behind the small boat her husband used for fishing. She described her evacuation and the life in Seychelles.

175. She was an honest witness, although clearly some of the detail had dimmed in her memory and her ability to follow a line of questions had diminished over time and with ill health, because I would judge that she had a clear general picture of what life was like on Diego Garcia and how it had subsequently changed. She had no recollection at all of making her witness statement, though her daughter explained how carefully it had been done. She could not remember her age or when she was born, nor going to see a lawyer about a case.

176. Mrs Piron was born on Diego Garcia and left when she was 26. She was now 57. Diego Garcia had been her home, but her mother had been born on Peros Banhos, her father in Farquhar, and her mother's parents had been born in the Seychelles and Mauritius. She was 20 years old when she started work. Her evidence supported the general picture of life in the Seychelles to which she had gone from Diego Garcia with her husband or partner, who was a Seychellois and their three children. (It was not altogether clear whether one or more gentlemen were involved but a certain informality in family arrangements appears not to have been uncommon.) Some of her descriptions, in particular living in a ditch with her family after having lived with her mother-in-law, seemed exaggerated and affected by a failing memory.

177. Rita David was born in 1947 on Diego Garcia, as were her brothers, sisters and all the ancestors she could trace, back to her great-great-grandparents who had been born on Chagos. She had worked on the copra plantations as a child; her parents worked on them. She had lived on Salomon when she got married and appears to have lived on Peros Banhos from 1969 to 1971 after which she went to Mauritius. Her evidence about the general conditions on Chagos or Mauritius fitted with other evidence. She was half-sister to Simon Vencatessen, but not Michel's daughter, and niece to Mr Saminaden. She said she did not remember receiving any money after Michel's case, contrary to her witness statement. She could neither read nor write.

178. Mrs David's evidence was of importance because it demonstrated the high level of fragility of memory about events so long ago and the unreliability of the witness. Events which one would have expected to have been firmly in her mind, and about which she had made sworn statements, were the subject of contradictory evidence from her.

179. Marie Elyse was 77 and the mother of Olivier Bancoult. She was born on Peros Banhos, as was all the rest of her family. She worked for the plantation company doing a variety of lighter jobs and her husband was in the heavy copra industry, a sawyer. She had six children on Peros Banhos, but one of them Noellie was injured in 1968 and the Administrator said that she had to take the baby to Mauritius for an operation. She went with her husband and all the young children. She expected to be in Mauritius for just three months, but after her child had died on Mauritius, she went to the office of Rogers & Co to seek to return. Mr Autard of Rogers & Co said to her in Creole three times that Peros Banhos had been closed and he could not arrange for her passage back to Peros Banhos, that all the islands had been sold by the English, and that it would be too dangerous there because of the bombs. She had to go back to tell her children and husband what had happened and that she could not return; she was very upset in court.

180. But for all the personal trauma of which she spoke, she agreed that paragraph 3 of her present statement was wrong when it said she had lived all her life on Peros Banhos until 1973 (because she had left in 1968) and that she was forced to leave (whereas her evidence was that

she was not forced to leave at all). The contradiction between 1968 and 1973 is plain on the face of her statement, however. There was other confusion over whom she travelled with, her son Alex and his five children or not; her Judicial Review statement had said so, but this time she denied it. Later, she said Alex was nine when they left but that could not be right as Olivier was four and is ten or so years younger.

181. She was a confused witness, not reliable on matters of significance in her life, in particular in her description of what she had discussed or not discussed with her son, Olivier Bancoult, about litigation and the activities of the Chagos Refugee Group. He did not describe any problems with his father's health in his statements in the way in which his mother had done in hers. She could not remember making her statement, but at another stage apparently did so.

182. Marie Jaffar had been born in 1952 on Salomon and her father and grandfather were also Chagossians. In 1966, she had left the Chagos islands voluntarily when her mother needed medical help in Mauritius. After she was better again, she and her mother had gone to Rogers & Co in April 1967 to book the return journey but Rogers & Co had said that the British had sold the islands because of independence but did not say to whom. Her witness statement said her mother had returned from Rogers & Co to tell her what had been said which included the islands had been sold to the Americans. They did not know what to do because all their belongings were on Salomon. They cried in despair. They quickly had to find work. After two years, her mother found work as a part-time maid, but her step-father got no employment at all. She started work as a maid servant at the age of sixteen, which would mean it was about 1968. Later, she said she had got a small children's allowance (child provision) of Rs 15 and had started work straight away on arrival at fourteen. Her written statement endorsed what Mrs Elyse and Mrs Talate said about conditions in Mauritius.

183. It was difficult to reconcile the various pieces of her evidence. The only issue in my mind was whether she was deliberately untruthful or whether, as I would prefer to believe, the major discrepancies and improbabilities over relevant and significant features of her experiences were the product of the passage of time and the unreliability of her memories over that period, which undermine the value of what she had to say except at the most general level. It was the quality of recollection which, as with others, was the most telling feature of her evidence.

184. Joseph Laval had been born on Diego Garcia in 1955, as had his parents and grandparents. He described leaving in 1971 and going to the Seychelles en route for Mauritius where he and his family were put up in the prison on the other side of the courtyard from the prisoners, but they were still locked up by 6 o'clock in the evening.

185. When he was asked questions about the money received from the ITFB, he was very slow in answering and rather resistant to explaining what he knew about where the money had come from. He had been in debt and unable to pay his debts from the money which he had received. He was unable to read or write or speak English. He seemed unaware that he was one of the Claimants in the case. He had never thought of bringing a case before.

186. He then remembered that he had received Rs 7,000 from the ITFB which, he said, was because he was a Chagossian; then Rs 10,000 and finally Rs 36,000 for a house. He thought that

the Mauritian Government had paid this because they had taken him from the islands. He had not understood that if he signed the document to get the last sum of money which he got that he would lose his rights. He had met Mr Mardemootoo and now understood his rights, although previously he had said he only knew Mr Mardemootoo by name. His written statement makes reference to the value of rupees in 1982, part of which is said to explain why the sum he received was an insignificant amount. He did not know before he came to England that the currency in England was pounds, nor did he know how many rupees were necessary in 1982 to buy pounds. He could not remember anybody telling him anything about that, although he had agreed that he had told his story to Mr Mardemootoo who had written it down and that it had been read back to him by someone else in Creole and that he had signed to show that it was correct.

187. He said that he earned Rs 10,000 a month. But in one of the claim form documents, the questionnaire, about which he had no recollection, his monthly income had been given as Rs 1,500. He could not remember how much he was earning in 1982 either. He did not know either how much he could have earned in 1982. He thought that the Mauritian Government was giving them money in 1982 so that they could feed themselves. He said he did not know that people were trying to get money from the British Government. They just put their thumbprint down when they got money. He had forgotten about signing any form when he got money from the ITFB in 1983. He could see his signature but had never asked what he was signing. He never went to any meetings or supported any Ilois groups. He had only got to know Mr Bancoult four years ago, and was in favour of the Chagos Refugee Group.

188. He had used the Rs 36,000 to buy property, although in his written statement he said that it had all been used to pay off money lenders. I asked him about this and he then said that he had used the money to repay Mauritian money lenders. He said that he had forgotten that he had used the money to repay the money lenders, but that in fact is what he had done. It was his brother who bought the land, but he then said that he did own the house in Baie du Tombeau and the Government had given him the land.

189. Baie du Tombeau and Point aux Sable were the areas where, according to Mr Bancoult's Judicial Review statement, 85 houses were built for the Ilois by the Central Housing Authority and 450 plots of land were made available free for house building by the Ilois but which they had to pay for. But he said, many Ilois needed the money and used compensation to pay debts and so sold the land or house.

190. Mr Laval's evidence was somewhat unreliable and not always truthful. It may be that some allowance has to be made for the way in which the statement was taken and information inserted which the maker of the statement could not possibly know. It may mean that the witness statement itself is of limited value, but even making that allowance, the oral evidence which he gave was nonetheless self-contradictory on a number of occasions. He rather exemplified the evidential problems of the Chagossians so long after the event.

191. Mr Ramdass said that he had gone to Mauritius from Diego Garcia where he was born in 1934, with his mother for her medical treatment. He was then an adult, already married, but they had been unable to return. He was somewhat vague about when this was but agreed that his son, Eddy, had been born in Mauritius in 1957 and that he, the father, had never subsequently

returned to the islands. This suggested either that he was mistaken about being refused a return passage, or that such refusals happened because of employment reasons quite independently of BIOT. At all events, by 1971, he must have known something of Mauritian ways. He said that he established not so much a committee as a small family group, which included Mr Piron and Mr Saminaden. Michel Vencatessen was his uncle. Committee or not, he organised petitions and by 1974 agreed that he had become recognised as an Ilois leader along with others in his group. He was in contact with Ilois in different communities including Mrs Alexis. He had been an Ilois representative on the Resettlement Committee and had been involved in setting up the Michel Vencatessen litigation and in meeting with Mr Sheridan in 1979 when 1,200 quittances were signed. In 1981 and 1982, he was part of the Ilois group in the Mauritius Government delegations. He had witnessed the signing of the renunciation forms in 1983 and had become an elected Ilois ITFB member in December 1982.

192. It was plain from Mr Ramdass' evidence, as to events in 1979 to 1981 as it was in relation to later events, that his memory had faded, as he himself asserted. He said that he often got confused. What he could remember was often unreliable and plainly in conflict with reliable contemporaneous material. His evidence changed repeatedly. He could not remember evidence he had given recently. Although he was elderly, not in good health and his wife in Mauritius was unwell, he was clearly evasive at times when his memory was not playing him tricks, and some of his answers were untrue. There was clearly some pressure on him from Mrs Alexis, not just as a result of past disagreements in 1979, 1980 and subsequently, but also directly as a result of him accusing her in court, correctly as it happens, of having been engaged in fraud on the ITFB. (This led to an altercation outside court. Mr Ramdass repeatedly denied that there had been any communication between them; but he later changed his evidence to say that they had only spoken about food; Mrs Alexis always spoke in a loud voice. He explained that he could not remember why he had said what he had said and denied that there had been any conversation at all and wanted to apologise to Mrs Alexis. He denied being afraid of her. From all that I had been told, this was plainly untrue. Indeed, after a sequence of denials by Mrs Alexis that there had been any conversation at all between them, she admitted that in fact they had been talking but only about what to eat. She too persistently lied over that.)

193. Whether or not his evidence was the result of evasion or forgetfulness, I am quite satisfied that in 1981 he knew of the role of the litigation in the settlement negotiations and of his role as the representative of Mr Vencatessen's interests. I reject as incredible the idea that in 1979 and 1980 he had no idea what were the basic requirements of the UK Government in relation to a settlement as relayed to his group by Mr Sheridan. Likewise, I regard as incredible his contention that he had no idea what was in the letters or petition which were organised by the JIC. Mrs Alexis, according to reports, had denounced the petition saying that people had not understood what was in it. There is nothing to suggest that Mr Ramdass was surprised at what had been done in his name in 1980. It was all of a piece with what had happened in 1979. It is difficult to see how he could only have found out about the contents of the letters in court in the light of his witness statement or in the light of his answer that he had begun to distance himself from Mr Mundil because Mr Mundil had betrayed them. He could not remember the manner in which he was saying he had been betrayed. Mr Ramdass said also in his evidence that he could no longer understand all the letters that were written relating to his group and in his name, in

which negotiations leading to a final settlement had been discussed, because he was now too old. That may be the explanation, but it does not add to the reliability of his evidence.

194. Mr Sheridan had been the senior partner in Sheridans. It was when Mr Ramdass contacted Gaetan Duval, a leading lawyer-politician in Mauritius, who had put him in touch with Donald Chesworth, an English adviser to the Mauritius Government, that Mr Ramdass' group contacted Mr Sheridan. Thereafter, he was involved in the Vencatessen litigation, though Mr Glasser, the Head of Litigation, had day-to-day procedural charge of the case. He had been to Mauritius often, was involved in the settlement attempt in 1979 and his firm had been involved in giving subsequent advice on settlement before and after the 1982 Agreement. He regarded his firm as acting for Mr Vencatessen in a test case for the Ilois, and indeed he came to regard the Ilois more generally as clients.

195. It was plain from many answers which Mr Sheridan gave that his memory of the events of the late 1970s and early 1980s had faded. He could not remember many matters which were referred to in the documents or which, from other sources, it was plain had happened in fact. He had a good recollection of the specific events surrounding the signing of the quittances in 1979 but not of those to whom he spoke and for whom he acted, but was very dependent on documentary material. He did not disagree with what it showed.

196. Mr Glasser's evidence was largely superseded by Mr Sheridan's. He could recollect little beyond the correspondence and that did not always remind him of what had happened anyway.

197. Mr Gifford, the partner of Sheridans in charge of this case, gave evidence about its origin in the Bancoult Judicial Review and the impediments, including lack of leadership, confidence and important documents to the bringing of an action earlier than was done. He was asked about the Statements of Truth attacked to various Particulars of Claim and the investigations made to establish them.

198. Mr Grosz of Bindmans was instructed in about April 1981 by the CIOF. He advised the Ilois delegates on the 1982 negotiations and Agreement with the benefit of the advice of Mr Macdonald QC whom he instructed. He advised that it was a fair settlement including the provision of renunciation forms, as did all the English lawyers. He was involved again in 1990 and through till the mid 1990s for the CIOF, first in seeing what proceedings could be brought against the UK and Mauritius Governments and then in seeking entry permits to Chagos. He instructed Professor Bradley who considered much of the same ground as this current action covers. The view arrived at was that no case in the UK had a reasonable prospect of success.

199. His evidence, as was not surprising, was very much drawn from the documents. He had limited independent recollection as he often said, even though his evidence goes back only twenty years.

200. Mrs Alexis also gave evidence about the events in 1979 and subsequently. She had been born on Diego Garcia on 8th September 1934, the same year as Mr Ramdass. Her parents, grandparents, and great-grandparents had also been born there as had her husband and all but two of her children. She, her husband and children had gone to Mauritius in 1967 when her husband

needed medical treatment. When that was concluded, Rogers & Co said that the islands were closed. They had suffered terribly after that because they were unable to return and all their things were left behind. They got a small house through an aunt of her husband. It was plain from all the documentary material, though not from her witness statement, that she had been a leading figure in the endeavours by the Chagossians over twenty or more years to gain compensation and the right to return to the islands. She was involved in setting up a committee in July 1979 which was instrumental in leading opposition to the quittances brought by Mr Sheridan. This Beau Bassin Committee evolved into the CIOF of which she became President. She was on the delegations which negotiated in 1981 in London and in 1982 in Mauritius. Subsequently, she was on the ITFB for a number of years. She became President of and remained active in the CRG. She was a regular visitor to the British High Commission in Mauritius seeking more money and assistance in various ways. She participated in various campaigns including demonstrations and hunger strikes over the years. She was convicted of making a fraudulent claim on the ITFB in respect of her two dead children; she served three months. She had an undoubted strength of character, a conviction in the rightness of her cause and in the ill done to the Chagossians. She said if things were going wrong, Ilois would come to her and if a row or noise were necessary, she would play her part. She was also willing to lie and did so on a number of occasions, including about her altercation with Mr Ramdass over his pointing out that she had been involved in fraud. Her manner on that occasion, about which there is no doubt that she was lying, sullen, downcast and dogged, was repeated on a number of occasions, although I recognise the limitations of demeanour as a guide to truthfulness, especially of a witness from a different background mediated through a translator. Like other Chagossian witnesses, she took refuge in her illiteracy and in the passage of time since a number of the events about which she gave evidence, to avoid facing up to important but difficult questions for their case.

201. It is difficult to convey without going through all the questions and answers, how reluctant Mrs Alexis was to answer even simple questions if she could see that there was some element of difficulty for her case which an answer would create, but it happened time and time again.

202. Mr Rosamund Saminaden was born on Salomon Island in 1936, but he grew up in Diego Garcia. When he was sixteen, his mother moved back to Mauritius where she had been born and although she returned to the Chagos later, he stayed behind in Mauritius until, in 1967, he went to Peros Banhos as the Administrator needed a blacksmith, but he had not signed a contract. His witness statement did not mention his living in Mauritius for fifteen years up to 1967 because he had not been asked about it. He then said he had gone from Peros Banhos to work on Diego Garcia, but on his timings he must have returned to Peros Banhos. In 1973, the islands closed. He was forced to leave and they went to Mauritius. He lived in Dockers Flats for fifteen years after he returned to Mauritius. In 1973, he met Christian and Eddy Ramdass and Michel Vencatessen and they started to make representations to the Governments for financial support. Michel Vencatessen was his brother-in-law. He became part of a group with those three, together with Mr Piron and Mrs Vythilingam. He was on it to represent people deported in 1973. The others represented those who had come earlier. He represented the Dockers Flats area, Mr Piron another area and Mr Ramdass and Mrs Vythilingam lived in Roche Bois. He agreed that

he remained an elected Ilois representative, working with Olivier Bancoult on the Welfare Trust Fund.

203. Mr Saminaden was, at times, rather an evasive witness but he was also one, like others, whose age slowed his ability to remember what had happened. Not all the problems were down to the lapse of time, although, with him, there was clearly a good deal of room for an honest lack of comprehension of all the details, as well as for the comprehension, which there might once have been, to have disappeared. Mr Saminaden was inclined to downplay the significance of his role in advancing the Vencatessen litigation, in liaising with Mr Sheridan and his role on the Resettlement Committee as a representative of the Ilois from Dockers Flats. The impression might be gained that the Chagos organisation in the 1970s was rather less than in fact it had been. There were a number of discrepancies between the oral evidence and the witness statement, for example over whether he saw Mr Sheridan speaking in 1979 or merely heard about it. I do not regard those as of any real significance as to honesty, but they demonstrate the problems of reliability which events so long ago give rise to.

204. Simon Vencatessen, who was born in 1944 on Diego Garcia, is the son of the late Michel Vencatessen and a cousin of Christian Ramdass. He said his father had stayed in Mauritius for seven years until 1971; he thought he had left Diego Garcia for Mauritius in 1968 and was still there when his father went back. He could read and write a bit in Creole and French, but not English. He was involved in the withdrawal of the Vencatessen litigation in 1982. He became a member of the ITFB with his half-brother, Francois Louis. He brought a case against the ITFB claiming that it was not entitled to require Ilois to sign renunciation forms in order to receive compensation from it. He was another whose evidence was unreliable, evasive and not credible in important areas, particular over the nature of his father's case and over the significance of what he knew about the renunciation forms in 1983.

205. Mrs Kattick now lives in France, but she was born in 1953 on Peros Banhos, leaving in 1967 to go to Mauritius from where she was unable to return to the Chagos. She learned no English but had learned a little reading and writing in French when she left school in Mauritius. She supported the CIOF in around 1977 or 1978 and did various organising tasks for it; she was elected to the ITFB in December 1982, beating her sister, Mrs Naick, and Mrs Alexis. She witnessed, with Mr Ramdass, the thumbing of the renunciation forms in September 1983. Thereafter, she lost interest in Ilois affairs, left the ITFB and went to France in the late 1980s. When she was in Mauritius she only got one year's schooling, but it was free because she was too old for entry to school when she arrived there. She learned to read some French when she was in France.

206. Her questionnaire as a Claimant in this case said that she had been forced on board the boat to leave Peros Banhos like animals. She was asked about that. She said she had to go with her parents. She could not remember exactly whether anybody had forced her parents on board. She had to go because her parents went. She was asked why she had said on the form they would have to be deported because the island had been sold. She said that was true. She had a brother whose form said that they left in 1965 and his parents went to Mauritius for vacation but she said that was not so. She did not know that her sister also said that her parents went for a vacation. All she could remember was that they had to leave the island as it had been sold. But

a 1967 departure does not fit with deportation. Her evidence in chief was contradictory and one version contradicted her questionnaire. She had said in chief that she had been at school in Peros Banhos and was still there when she left. In cross-examination, she said that she had had three years' education in Peros Banhos, leaving school at ten, some three to four years before she left. That fits with a departure in 1967, but contradicts deportation. (Otherwise, she would have had some six to seven years' education in Peros Banhos.)

207. Mrs Kattick was intelligent and astute; she knew where the problems lay for the Ilois in terms of the length of time that had elapsed and the importance of their knowing or not knowing what had been said or done in 1982. She frequently contradicted herself because, although she did not want to lie, she did not want to say things which would harm the Ilois case. She was prepared, however, to give completely untruthful answers if she thought that it was necessary. Again, if that is too harsh a judgment on her, her evidence is completely unreliable. Many of the things that she said are simply not credible for someone who had been active in Ilois affairs in the late 1970s and early 1980s. She had not pursued obvious questions with her sister and colleagues in the CIOF. She had been keen to point out the anger which Chagossians would have felt about renunciation forms, but gave the feeblest of reasons as to why she herself had not pursued the matter at the ITFB or later with anyone else when she heard renunciation forms being mentioned. She again took refuge in saying that she could not remember and in what she said she had not been told.

208. Olivier Bancoult was born on Peros Banhos in 1964. His family had come to Mauritius in 1967 for medical treatment for a younger sister who had died. They had been unable to return to the islands because his mother had been told that the islands were sold and there was no shipping. He recalled the poverty and family misery and desperation that followed.

209. He had attended Port Louis College where he was taught in English and French and attained Grade 5 School Certificate in subjects including English, French, Maths and Commerce. He could write French, but he did not have to read in English in order to pass his exam at school. His English was very poor when he spoke to the High Commissioners in Mauritius whom he met. He had recently taken steps to improve it.

210. He had been a founder of the CRG in 1983, as an Ilois group for Ilois, because they felt betrayed by Mauritian politicians and intellectuals. He was its first Secretary. After his success in the Judicial Review, the CRG, which had been dormant for some time, had come back to life. His mother, he said, had been in the CIOF. He had served in the ITFB from 1984. I did not find all aspects of his evidence wholly reliable; on many aspects, including importantly what he knew and understood had been the impact of the Vencatessen case, the final nature of the 1982 Agreement, backed up by renunciation forms, and the subsequent actions of the Chagossians in pursuing various political and legal avenues, he was, I regret, not straightforward or truthful. He knew why it was a problem.

211. Mr Marcel Moulinie relied upon his witness statement used in the Bancoult Judicial Review dated November 1999 to which he annexed an unsigned statement which had been prepared for the Government in 1977 in connection with the Vencatessen litigation. He made a number of comments, correcting what he had said in that 1977 statement, but he appeared to

have very limited recollection, if any, of giving it. He also produced a supplementary witness statement. He described the background to events over the years. He had been born in the Seychelles in 1938. In 1965, he had begun to work for his uncle Paul in the Chagos Agalega Company, going to Diego Garcia in 1966. He was the company manager there, Peace Officer and the BIOT agent. He received instructions, after 1970 by telex, from Mr Todd and Sir Bruce Greatbatch, the Commissioner and Governor of the Seychelles. He managed the plantations and workforce and had been involved in the meetings at which the Ilois were told what was happening to them. He gave evidence about the interaction between Government and plantation operations, workforce and evacuation. Although his memory was unclear at times, he did his best as a witness.

212. Mr Henry Steel, Principal Legal Adviser to the BIOT Government, gave evidence about the legal system in BIOT. He was one of only two witnesses called by the Defendants. There was no registrar or judge of the BIOT Court until 1981 and no registry either, even though the relevant ordinance had been in force in 1976. The relevant laws were published in the BIOT Gazette in London and he thought copies would have been sent to BIOT, but not Mauritius or the Seychelles. Until 1984, the registry would have been in BIOT, but there was a sub-registry in England publicly notified for the first time in 1994. The BIOT Supreme Court could exercise all its powers in the UK. There was no formal legal aid system in the BIOT courts. A complicated table setting out the history of the BIOT courts, its registry and powers, was agreed by Mr Steel, it having been prepared by Mr Taylor.

213. Mr Canter, a former RN Lieutenant Commander, gave unchallenged evidence that he arrived on Diego Garcia in November 1971 after all the plantation workers had left, that there were no RN Officers there when he arrived and that he was the first to be stationed there permanently.

Employment

214. It was clear from the evidence that, with very few exceptions, there was no employment on the islands other than that provided directly by the plantation company, by the company staff or in its administration. In his 1977 statement, apparently prepared for the purposes of the Vencatessen case, but not signed, Mr Marcel Moulinie had said that all persons on the islands were employed by the company but he corrected that in his statement for the Bancoult Judicial Review to say that there were some Ilois employed privately by the administrators in domestic work. In his statement for the Judicial Review, Mr Moulinie said that although it was not the practice to require Ilois to sign written contracts, he thought that there was a practice adopted by the company's shipping agents to require all workers returning from holidays in Mauritius and the Seychelles to sign contracts before returning. Contracts were not signed on the Chagos islands anyway because they had to be signed in front of a magistrate who came rarely and no-one saw the need for Ilois to sign or renew contracts on such occasions. The contracts contained standard terms which required a worker to be returned either to Mauritius or the Seychelles, or rather an obligation on the company to pay for a return fare, but he said that he did not see how those terms could properly be applied to those settled on the Chagos islands for generations. They spent most of their working life engaged under purely informal contracts. Children could work without a written contract.

215. He said in evidence to me that the workers were the company workers employed by the Seychelles-based Chagos Agalega Company Limited. The practice of requiring contracts to be signed upon return from leave was maintained lest young Mauritians decided to take advantage of the boat trip to go for a free ride and then come back. Most people who went on holiday had to sign contracts when they returned, just like Michel Vencatessen. These were for two or three years. (But Mrs Talate and Mrs David said that they had not signed contracts on return.) The nurse and teacher worked for the company, which also provided the priest. The meteorological station on Diego Garcia was rather separate. All needed and earned rations through working for the company or its staff, and had a variety of spare-time activities.

216. There was no evidence, nor even a suggestion, that people came to the islands other than to work for the plantation company or its staff, or on the Meteorological station. There were no independent traders or craftsmen, farmers or fishermen. Although people went fishing and built boats and houses, this was not an independent means of existence. Indeed, the low pay, and payment in kind through rations and other supplements such as assistance with accommodation at least in the form of construction labour and materials, would have prevented such an independent economy arising. It was the plantation company which employed those who helped in the company shop or in house building and all the evidence pointed to those as being activities directed by the company to make necessary provision for its workers. See also paragraph A63 for example.

217. There was no evidence that people left employment with the company and stayed on the islands, and found some other occupation or survived with no occupation at all, except for those too old to work who could receive a pension and rations. As Mrs Talate said, everyone got rations. Even pensioners often did light work for the company. There would have been no basis for rations to be distributed to such people, and as the witnesses said, the provision of rations was necessary. Women in general worked; there do not appear to have been any who declined to work, and it was exceptional if someone lived or could live off their husband's wages. Mrs Mein was one such – her husband was in a senior position. She said no-one stopped working – even people without pensions had an easy job like cutting grass. The children, by the same paternalistic or feudal process, were given company jobs after their education finished at 12; they were not left unemployed, to fend for themselves without rations. They worked and, in turn, their own offspring, if they stayed, became workers. There was no unemployment because everyone worked and had to work for the company. Mr Bancoult's evidence in the Judicial Review suggested that people could choose not to work for the company though, in practice, they did, or had domestic jobs. Some wives or "co-habitees" were not employed but were housewives. The unfit or disabled were not forced to work or leave the islands. Mrs Piron said that parents might let a child stay in the house and not work but she had not known it.

218. There was no sufficient evidence at this stage as to ascertain the contractual terms of employment of those who had no written contract or whose written contracts had expired but who remained on the islands working for the plantation company. The evidence suggested that it was rare for people to be compelled to leave, though unruly or un-co-operative workers were occasionally removed.

Property

219. In 1965, there were 12 villages in Diego Garcia, of which the largest was East Point which had a church, cemetery, school, sanatorium and senior management housing. Mr Moulinie, in his witness statement, said that houses were restricted to residential areas to maintain security and sanitation. There was a traditional labourer's house type with a concrete base and wooden frame, and a roof which needed replacing every two years. It would typically have three bedrooms and one living room, with toilet, shower, kitchen and a front and rear garden on which families were encouraged to grow fruit, vegetables and to rear animals. He said that it was clear when he arrived in 1966 that many families had lived in the same house for many years and even generations.

220. When somebody wanted to start their own home, they would look for a plot of land within a designated residential area and, having found that, would come to him to identify the plot, because he needed to know where each worker lived. He organised the labour force to build the home, and had a more or less permanent labour force of eight workers skilled in building houses. He would refuse anyone permission to build on a remote part of the island. It would take about two weeks to build a house and the couple who then moved in would occupy it "as their home, free from interruption as far as I was concerned. It was their home to live in until they chose to leave. If either or both of them died, then their children might take over occupation of it or alternatively, if they were of age, they could arrange for friends or other relatives to take over the home when they died. I know many examples of children who inherited their parents' property but cannot actually say that I know of a case where friends inherited. In principle, I would not have objected to this taking place". In cross-examination, he said that the land always belonged to the company but they gave the land when someone came to ask for a piece of land, providing it was in a building area. He meant that if permission was asked and it was in the right area, then they always allowed them to live there. In the 1977 statement, he had said that the island belonged to the company, they never allowed anyone to own plots of land or houses and the islanders understood who owned the land. If he had to relocate a worker, which happened occasionally, arrangements would be made for a suitable house of equivalent quality to be built and a payment would be made to compensate for the loss of garden produce. But he did not recall any occasion when he forced a labourer to move from one home to another against his wish. Islanders were free to go wherever they liked all over the islands except for the private property of individuals, and they could do so on carts, on foot, on bicycles or walking. They could go where they wanted by boat.

221. Mrs Talate said that on Diego Garcia she had moved from house to house, from time to time, but all of the houses had been close to the beach. She had had a four-bedroomed house on Diego Garcia with a kitchen, living area and toilet, but no shower. The houses were boarded with iron sheets and some had concrete. The houses she lived in had not been built by her husband. There had always been land by the house for cultivation and rearing poultry. She said that when people moved house on Diego Garcia, they did so because there was different work which they were required to do in different places on Diego Garcia. But when people moved house, nobody gave them any money for it. People did not move into a house that someone else had occupied, although she did not accept that that necessarily meant that they moved into a new house every time. "We knew from the Administrator that we could take the land for the house".

222. Mrs Mein said that people would choose a piece of land and build a house; they did not choose a house. Once they had chosen the piece of land, they would consult the Administrator who would agree because he was a good man and he would then get male workers to go and help build it. It then belonged to them, and if the father and mother died it would go to the children; it would be the Administrator who would tell them that the house was for the children in such circumstances. They would be able to give their house to someone else if they had no children. It was unclear whether she could remember that happening. But the Administrator had to agree because he had given them the land. She said that people did not change houses, it was a question of finding another place to make a house. They did not just agree to change with friends. There were one or two empty houses where people had gone away but not come back. I found it difficult to get a clear answer as to what would happen if a coconut worker had to leave working in a particular place and go somewhere else, but eventually she said that if someone had to change the place at which they worked, the house would remain empty just as if someone had gone abroad; but the Administrator could permit someone to move into it, and if the worker came back then they would build another house for him. But it was a rare occurrence for Ilois to be sent to Mauritius for bad behaviour and when the person she had in mind was sent, his house just rotted and fell down. If they got a pension, they could stay in that house. The Administrator did not force people to leave their houses.

223. Mrs Elyse went further – they did not even need the Administrator's permission; they would choose the land and he would provide the building materials. Mrs Jaffar's and Mrs David's evidence was similar. There does not appear to have been any difference between the three island groups in this respect.

224. Mrs Talate's witness statement, for what it is worth, said that they were all regarded as owners of their plots of land and houses. They chose "free, private and available land", telling the Administrator so that he knew who occupied which land but "everybody respected other's property rights". They lived on their property "continuously, without interruption, peacefully, publicly, without challenge as owners". Those are not her words; I rather doubt she ever thought in those terms. Someone has drawn inferences from what she may have said and expressed that as her evidence.

225. Mrs Elyse said all they had to do to get a house was to tell the Administrator where they wanted it and he would provide the materials.

The nature of the Vencatessen litigation

226. It had been apparent to the Treasury Solicitor and Sheridans that the Vencatessen case was in the nature of a test case and they negotiated accordingly. The Mauritius Government knew that it was an important case. A number of Ilois witnesses said what they had believed the significance of the Vencatessen litigation to be. Mr Ramdass insisted that he did not know Mr Vencatessen's approach to a settlement because it was Mr Vencatessen's decision about a case which he had brought for his own family on his own account. Mr Allen suggested that Mr Vencatessen was "a cipher". The evidence does not support that, but Mr Allen's submission involves rejecting the reliability of what Mr Ramdass said. Mr Ramdass agreed that he had been

to London in 1981 as an observer, to represent Mr Vencatessen's interests but when it was suggested that that was because the British needed to know the terms upon which the Vencatessen litigation would be withdrawn, he simply said that he did not know about it. He was not sure whether the Vencatessen case had been a way of putting pressure on the British Government. He denied that they had ever sought publicity for their cause.

227. Mr Ramdass gave inconsistent evidence about this aspect of the litigation. He said variously that the case had not been brought for the benefit of the Ilois but for Mr Vencatessen personally and that Mr Ramdass did not know if it was hoped that if he won everyone would benefit. The case was Mr Vencatessen's idea. Very shortly afterwards, he said that he had helped in the case for the well-being of the Ilois because he thought that compensation to Mr Vencatessen could be distributed for their benefit. He could not say whether his uncle hoped that all Chagossians would benefit but he imagined that if he took the money and distributed it, it would be good for the Ilois. Mr Ramdass' curiously contradictory evidence derives, in my judgment, from a realisation as to the importance for this case of the extent of knowledge about the existence of the Vencatessen litigation.

228. Mr Saminaden in his witness statement said that he had first learned about the Vencatessen case from Mr Duval in 1978. It was a family affair which Mr Vencatessen kept to himself. In chief, he said that he had learned about the case when he disembarked in Mauritius years earlier. Later, he said that the committee of his group had not been in existence before the Vencatessen case started but asserted that he had still only learned of the case through Mr Duval and had then become a member of the group but then said that the group had been in existence in 1974. He agreed he had been on the committee when he had to sign the paper (in 1975) in order for Mr Vencatessen to get legal aid. He did not know why Mr Vencatessen had been chosen to bring the case in Britain but he was seeking compensation from the British Government because it had done something wrong in uprooting him from Chagos and thought that others would benefit if Mr Vencatessen won his case. He described the case as Mr Vencatessen's, but said that Mr Ramdass looked after it. Although Mr Vencatessen was his brother-in-law, at no time did he mention it to him. It was clear, notwithstanding what his witness statement said about 1978, that he knew of the case from the outset. This was an unsurprising confusion over dates.

229. His committee, he said, helped Mr Vencatessen decide what to do by discussing matters with the committee, although the letters went to Mr Ramdass' address because Eddy, his son, knew English; sometimes they would go there to be told what was in the correspondence. He had left the committee after a while because he needed to go to work.

230. Mrs Alexis claimed that she had first heard of the Vencatessen case only after 1982 which I simply do not believe. Later, she said that Mr Ramdass had been on the 1981 delegation because there was something related to the court case which Mr Ramdass could sign for Mr Vencatessen. It was only in 1981 that she knew that Mr Vencatessen had a case in court but she said that was a case for his family. I do not believe that that is how she understood things in reality. Later, she said, when explaining that Mr Ramdass was there to represent Mr Vencatessen's interests because he could not travel, that she did not know that he had a case in court. She might have been tired or confused, but my very firm impression is that she knew very well why Mr Ramdass was there but equally knew very well the problem of admitting that in

1981 she knew that someone had brought a case which led to the payment of money to the Ilois. The problem was, if what she later said about the Agreement and the renunciation forms were true, why had others not been pressed to bring cases? She said she had not asked Mr Ramdass what he was doing there because his case was a family thing and she did not have the right to enter into discussions about it. It was not a case for the Chagossians but for him alone.

231. Mrs Talate, in her witness statement, said she was aware of the case and at first, in chief, said she knew nothing of it, though she had known Mr Vencatessen, because they lived far apart in Mauritius. Later, she agreed that she did know about it when the English came to Mauritius and brought money. She had known Mr Vencatessen as an important Ilois in Diego Garcia. Later still, she remembered that Mr Ramdass had gone to London as Mr Vencatessen's representative because of the case, and that was when she had found out. She recalled no lawyers from the 1970s, but agreed that she had known Mr Sheridan had been helping the Ilois. She was wary and unwilling to be truthful; she was aware of the importance of what had been known of the potential for litigation. Later, she agreed she had become aware of it when Mr Ramdass went to England – her third version.

232. Simon Vencatessen knew Christian Ramdass because he was his cousin but knew nothing of any committee, saying that they simply had meetings within family groups. He remembered his father bringing a case; so far as he knew it was a private or family case brought in England and he could not remember whether any other Ilois would benefit if he won, and that he did not think that the other Ilois knew about the case in effect until 1982, when he first knew of it, when it had to be withdrawn. But he later agreed that it was Mr Ramdass' committee which looked after his father's case and that his brother, Joseph Fleurie, was also on that committee. He took some interest in the case, as his father's son and agreed that he remembered signing a letter of 21st May 1981 to Sheridans, (16/326), about the case, somewhat before it was withdrawn, in contradiction to his other evidence. He could not remember any discussions with his father or Mr Ramdass about the case. He said he was quite unaware of whether the Ilois took any interest in his father's case at all. He simply did not know. He did not remember any newspaper articles about it because he did not read the newspapers.

233. Others gave equally vague and contradictory answers. Mrs Kattick denied knowing of the case or that Mr Vencatessen had had to withdraw it in 1982, until very recently.

234. Rita David, half-sister of Simon Vencatessen (but not the daughter of Michel), and niece of Mr Saminaden, had heard of the case as she heard a lot of people talking about it. Olivier Bancoult's mother, Marie Elyse, had heard of it, according to her statement, some three to four years ago. But despite a possible translation problem as to when she knew, in oral evidence she denied three times ever having known. She looked very bemused.

235. Mrs Jaffar's witness statement said she knew Michel Vencatessen and was aware of his case and that it had led to the compensation in 1984. In chief, she said she did not know him till four or so years ago, when she met Mr Mardemootoo, and did not know where the ITFB got its money from. Her witness statement, which she earlier confirmed as correct, was untrue she said. She also said at one point that it was only now in court that she had heard his name. This was not credible.

236. Olivier Bancoult had heard of the case but said that it had been a family case. So far as he knew, no Ilois had received legal advice about proceedings in an English court until 1998. He agreed that he had known that Mr Vencatessen had had to withdraw his case in order for the Ilois to receive the money under the 1982 Agreement. This, he thought, was because there were people outside the scope of the Agreement who wanted a share, but he was unable to say why he thought the UK Government might pay £4m and still leave themselves open to be sued.

The Organisation of the Chagossians

237. There were Ilois on Mauritius by 1971, who had left the islands voluntarily or who had done so and had been unable to return. Others arrived at various stages, some, rightly or wrongly, under the impression that they had been promised some assistance in resettlement.

238. An Ilois committee of some sort was set up by Christian Ramdass in the early 1970s. However representative or otherwise Mr Ramdass' committee was, it had organised petitions and held meetings for the Ilois. Mr Ramdass said that by 1974 he was recognised as an Ilois leader. Mr Sheridan's judgment that they were a representative body was informed in 1978 and 1979 by his experiences of meeting them and the Mauritius Government. It was also the Mauritius Government's judgment that they were representative because they were on the Resettlement Committee. They played a part in the collection of 1,200 signatures for the quittances in 1979 in the first attempt to settle the Vencatessen case on a group basis. Simon Vencatessen said it was a family group, but that underplays the role. This group, according to Mr Saminaden, had about 100 adult members, but the CIOF was rather larger. Even after the departure of the rival CIOF from the JIC, Mr Ramdass continued to represent the JIC with Mr Mundil in the 1981 and 1982 negotiations which received advice from Sheridans before and after the negotiations of 1981 and 1982. Even though the JIC was wound up in September 1982 because it regarded its work as having been completed, Mr Ramdass, Simon Vencatessen and Francois Louis were made members of the ITFB in December 1982.

239. Although there was to be much criticism by the Chagossian witnesses of political interference by Mauritians who were alleged to have been seeking to use the condition of the Ilois for their own ends, the intervention of the Mouvement Militant Mauricien or MMM in 1979 seems to have had the support of some Ilois of a more militant tendency. A committee was elected on 8th July at Beau-Bassin, a meeting of what the press reported to be 1,400 Ilois. There are reports that a committee of 28 was elected. The President was Mrs Alexis and other committee members included Elie Michel and Mrs Talate. This committee was to become the Ilois Committee of a Mauritius Creole organisation, the Organisation Fraternelle. Mrs Kattick said when she joined in 1977 or 1978, it had more than 1,000 supporters particularly from Roche Bois. It was this group that was responsible for the campaign to stop the quittances in 1979. The disagreements between Mrs Alexis and Mr Ramdass were still reverberating in 2002 before me. They joined together in the Joint Ilois Committee along with the Ilois Support Committee of Mr Mundil (which, according to Mr Saminaden, did not include Ilois) and the FNSC. Initially, the JIC appointed Sheridans to act for them after the return of Mr Sheridan to London in November 1979. But the CIOF broke away in June 1980 and pursued its more militant line with demonstrations and hunger strikes. The CIOF, with the backing of the OF, were able to instruct

Bindmans in 1981 to bring a case for 225 Ilois against the Mauritius Government. It was accepted as the main representative body for the Ilois, although it combined with the JIC to seek £8m from the UK Government. Three of its members were part of the Mauritius Government delegation to the negotiations in 1981 and 1982. They were Mrs Alexis, Mrs Naick and Elie Michel.

240. Mrs Alexis said that her committee received publicity and sometimes held press conferences so that the Ilois' needs would be known. She knew that Ministers read the newspapers and so would hear about what the Ilois wanted. They also held public meetings, and not just in relation to the period 1979 to 1981, attended by a large number of Ilois at which what was happening would have been explained. She agreed that her committee, the CIOF, had had quite a number of members who came from the different places where Ilois had communities in Mauritius. At one point, in 1980, she had wished to persuade the Mauritius Government that the CIOF represented the Ilois, but she could not remember obtaining a document signed by over 1,100 Ilois in order to prove that point to them. Later, she remembered a meeting of 400 Ilois at Beau-Bassin in 1980 which had passed resolutions when it was trying to prove that it represented the majority of Ilois. She remembered resolutions about interest on the money paid to the Mauritius Government and about their rights on Diego Garcia. She and Mrs Naick were, she said, the Ilois representatives rather than Mr Mundil, Mr Michel or Mr Ramdass.

241. The CIOF instructed Bindmans initially in 1981 and then again in 1982 together with Mr Macdonald during and after the negotiations for the Agreement. The CIOF supported the Agreement and urged the Mauritius Government to sign it. At some point around 1983, it lost the support of the Ilois and was supplanted by the Chagos Refugee Group of which Mrs Alexis became the first President. She was joined in the CRG by Mrs Talate, Mrs Lafade and Olivier Bancoult. Mr Bancoult said that the CRG was founded because Mauritian intellectuals and politicians such as Elie Michel had taken decisions above their heads of which they were not aware, and would say that they would find solutions for the Ilois in the Creole constituencies as a way of getting votes and yet betrayed them. I asked him what betrayal there had been up to the point where the Chagos Refugee Group had been created, to which he replied that he knew they had been betrayed when he saw the letters to which reference had been made in court during the course of his cross-examination, which he had not been aware of at the time. He said that the 1982 Agreement was an act of betrayal and he thought so at the time. He then said that today they could see that there were conditions attached, but he did not know about them in 1982 and 1983.

242. He said that the Chagos Refugee Group became more official from the time when they started to combat fraud because a lot of people were trying to get money dishonestly in the name of Chagossians who had died. (In fact one of those was its leading light, Mrs Alexis.) The Group had gone dormant for a time, coming back to life about two years ago. Insofar as the Chagos Refugee Group was founded because by 1983 (and before the renunciation forms) the Chagossians had lost confidence in the ability of Mauritian politicians and intellectuals to help them, I found it difficult to see why reliance was placed on them for the purposes of subsequent correspondence and meetings and that there was not greater suspicion sooner about the forms. Mrs Alexis said it was founded in 1980.

243. Mr Michel remained in the CIOF. CRG representatives were elected to the ITFB in September 1983 and launched their campaign to unblock
the £250,000, to establish that the Ilois were British citizens, to obtain social benefits accordingly, to obtain £4m from the USA and to raise complaints against the UK Government in an international forum. They persuaded the ITFB to pay for a US lawyer to advise them. They too appear to have lost influence in turn in about 1989 when the CIOF regained support and Elie Michel was re-elected to the ITFB and remained there until 1994. As Mr Grosz said, the Ilois had then come back to the CIOF. The CIOF again instructed Bindmans and obtained legal advice from Mr Grosz, Mr Macdonald, Mr Bradley and Mr Lassemillante. They held general meetings with the Ilois.

244. In October 1995, the BIOT Social Committee was formed which garnered individual support on a large scale and had some involvement with Bindmans.

245. It was surprising, as Mr Howell said, that in view of the issues so little was said in the witness statements of the Chagossians about the organisations which, during the 1980s and 1990s, had taken up the Ilois interests. The documentary material, much of it press reports, contains many references to substantial meetings of the Ilois both before 1981 and on many subsequent occasions. Significant publicity was given to demonstrations, hunger strikes and press conferences organised by Ilois. Ilois affairs were a matter of keen political interest in Mauritius because they related to international affairs and defence; they also provided an opportunity for Mauritian politicians to attack the Mauritius Government for the way in which it had allowed the Chagos Islands to be separated from Mauritius before independence, for the way in which it had handled resettlement and for the way in which various conditions attached to any agreement with the UK might affect the claims over the islands which Mauritius was keen to maintain. A meeting was held and publicised during the 1982 negotiations at Roche Bois on 27th March 1982. Many witnesses said that they had been betrayed by Mauritian politicians. Mauritian politicians may have had their own interest to pursue, whether gaining Ilois votes to secure election, or using Ilois issues as a means of attacking the Government of the day or other rival political organisations. But the number of people who, from differing standpoints, were interested in Ilois affairs, however selfishly, can only mean that the range of interests of the Ilois would have been kept to the fore in Mauritius by its politicians. They would have taken opportunities to advance rather than to hinder the Ilois cause as a means of enhancing their own position, however selfishly. There was a community rather than a diversity of interest in maintaining the right of the Ilois to return to the Chagos as a component of the claim by Mauritius. That is a feature which comes out strongly in the material relating to the 1982 Agreement and subsequently.

246. There was no evidence of any act of betrayal by Mauritius politicians; a number of witnesses complained that they had been betrayed by Mauritian politicians, when faced with correspondence in English or other statements which they were said to have made which referred to the renunciation of certain claims. These usually related to claims for money. But there is no justification for that thought, if the thought was indeed a genuine one rather than a dishonest means of denying knowledge of what they had done. To agree to take a sum of money in full and final settlement of financial claims or to offer to do so did no more than reflect what the UK Government had required as a matter of principle before any sum was paid to the Ilois. It was

also what all the English lawyers advised was appropriate so long as the sum itself was satisfactory. No-one advising or leading the Ilois can have supposed otherwise and it cannot honestly be regarded as an act of betrayal for such finality to have been offered in return for the sums of money which the Ilois were asking for. If there was a point at which the interests of Mauritius politicians and the Ilois diverged, it arose either after the 1982 Agreement when the Mauritius Prime Minister in 1984 said that to pursue claims against the UK Government would be an act of bad faith or, when during and after the 1982 negotiations, it was suggested that the Agreement should not be completed because it did not retain sufficiently clearly the rights of the Ilois to return to Chagos. I am dealing here with the Mauritius politicians such as Mr Michel and Mr Mundil who were helping the Ilois, rather than the Mauritius politicians in power against whom complaint was made about the insertion of Article 4 into the 1982 Agreement and the obtaining of renunciation forms in respect of claims against the Mauritius Government as well. It is not that I regard those complaints as well-founded, it is simply that they are irrelevant to the Ilois claims that those who were helping them were in fact betraying them. They attributed the betrayal to the fact that they were either not Creole and were clever such as Mr Mundil, who was Rector of the University of Mauritius, or were Creole but not Ilois such as the Michel brothers of the CIOF.

247. The picture painted by the Chagossian witnesses of the community of Chagossians in Mauritius in the late 1970s, 1980s and 1990s was also too partial to be realistic. I accept Mr Howell's submissions that the evidence shows that the Ilois constituted a relatively small community, largely concentrated in a few areas of Port Louis. Some of the groups, notably CRG and CIOF, had local representatives as Mr Ramdass and Mr Saminaden made clear. Many were inter-related through the fairly informal familial arrangements which appeared to have existed among many. It is not credible that relatives would not talk to each other about matters which went to the very heart of the conditions in which they lived. Quite apart from general meetings, it is clear that news and rumours would travel fast by word of mouth. What happened in 1979 over Mr Sheridan's quittances illustrates the point. It was further illustrated by the pressure put on Mr Vencatessen in 1982 to withdraw his case. It was a constant refrain of Mr Allen that the Ilois were poor and illiterate, unused to the ways of the world or of Mauritius. They themselves were happy to describe themselves as stupid and childlike but that too is only a very partial picture. Some had received modest education in Mauritius, such as Mrs Kattick, Eddy Ramdass and Francois Louis. Some could speak and read a little English. The ITFB placed press advertisements in relation to the distribution of money. There were press communiqués. The Ilois listened to radio and television and had wanted major decisions of the ITFB broadcast. Mrs Jaffar and Mr Ramdass could read newspapers which often contained substantive material about the Ilois and their cause. Mrs Alexis said that a number of Ilois had come to claim part of the distribution of funds under the 1982 Agreement from France, the UK and the USA because they had been written to by their families.

248. The Ilois were capable of organising, not merely demonstrations and hunger strikes or contact with lawyers in Mauritius, the UK and the USA; they also organised petitions. Some of these were designed to show how much support a particular group had and both Sheridans and Bindmans received such petitions although some thumbprints were duplicated on the 800 thumbprint or signature petition to Sheridans in 1980 and this may have been the position on others as well and although not all of the Ilois may have known the substance of what they were

petitioning for, it is not credible that there was a general unawareness of what the groups were doing for the Ilois community and what progress was being made, with what outcome.

249. It is unrealistic for the Chagossians on Mauritius to portray themselves as ineffectual and ignorant, led by the nose by cynical Mauritians who would betray them or as people who knew nothing over a period of twenty years of what had been happening. The groups showed themselves able to obtain legal advice, to obtain the support of the Mauritius Government financially for the payment of their fees. They persuaded the Mauritius Government to organise a delegation at Government level to press the cause with the UK Government in 1981 and 1982. This was notwithstanding the agreement which Mauritius itself had reached with the UK over resettlement costs and concerns which had been expressed about whether the Ilois might become better off than Mauritians, however fanciful that might seem. The Chagossians were able to and did reject offers which they regarded as too low and were supported in that by those who led them including Mr Mundil. Although a number of the Chagossian witnesses, notably Mrs Alexis, Mr Ramdass, Mr Saminaden, Mrs Kattick, Mr Vencatessen and Mr Bancoult, were not always reliable witnesses, whether because they were forgetful or not altogether truthful, they were not stupid. The development of the Ilois cause over the years showed that they were extremely determined and in their varying ways had been effective in obtaining for the Ilois compensation which the UK Government had never wished to pay.

250. It is inconceivable, after the storm created in 1979 by the Sheridan quittances, that Mr Ramdass, Mrs Alexis and other Ilois leaders such as Mr Michel and Mr Mundil would have been unaware of the importance of what was in documents which they were asked to sign in connection with the receipt of money from the UK Government or in relation to any compensation claim. I accept Mr Howell's point that if someone had wanted to deceive the Ilois about the negotiations in 1982, the terms of the Agreement or the renunciation forms, there would always have been others, whether politicians or Ilois, who would have been only too keen to expose that deception. There were ample means because of the press publicity and political debate whereby any such attempted deception would have come to the notice of such leaders and politicians. Gaetan Duval, Paul Berenger and other leading politicians had taken an interest in the Ilois cause. There had been debates in the Mauritius Assembly about Mr Sheridan's visit and the attitude of the Government towards the quittances. Indeed, there had been a critical report to the Mauritius Parliament about the very creation of BIOT and the excision from the Mauritian dependencies of the Chagos Archipelago. A report in 1980 (para 586) to the Mauritius Parliament was critical of the way in which the £650,000 had been distributed and of the delay in its distribution.

251. In November 1980, a further Ilois committee came into being, the FNSI which included the MMM, the PSM, the JIC and nine other Ilois bodies. It did not include the CIOF. This appears to have split away in June 1980 as a result of a petition which suggested that the right to return to Chagos might be given up. Mrs Alexis denounced that petition although she had put her thumbprint to it because she said many of those signing it had not understood what they were doing and the Ilois would never renounce their right to return to Chagos. She then set out to show that her committee represented the majority of Ilois and had obtained a petition containing 1,133 signatures out of the 1,300 Ilois in the country (para 580).

252. The Ilois also had a degree of political support in the UK from MPs, including Mr Dalyell and Mr Cook, from a religious leader, Trevor Huddleston, and a support committee. Journalists were interested in what had been done to them by the UK Government. If any Ilois had wished to be put in contact with solicitors with a view to advice or litigation, there were means directly or indirectly for them to use, as Mr Ramdass had done, with fewer support resources in 1974, and Mr Michel in 1981.

253. None of the Chagossian witnesses described any of their political activities on behalf of the Ilois, how they were organised and how the groups related to each other and the Mauritius Government except in the most perfunctory way. Cross-examination elicited information grudgingly and not wholly truthfully. Mrs Alexis' witness statement did not mention that she had been President of the CIOF and of the CRG. Mr Allen suggested that a false impression of their organisation could easily be gained. I agree, but that would only be by taking their witness statements at face value.

254. On all the evidence, there was a very different level of organisation among the smaller number of Ilois on the Seychelles. Mrs Charlesia Alexis, who was Mr Mein's sister-in-law and aunt to Jeanette Alexis, had gone to the Seychelles in 1980 with Mr Michel for the CIOF. There had been a Comite Fraternelle des Ilois de Seychelles, and Mrs Alexis explained to them at a meeting to which Mr Mein and Jeanette Alexis went, that they were demanding compensation. Mr Berenger by 1981 did not think much of Mr Michel's endeavours to involve the Seychellois Ilois in the negotiations. The UK Government did not want to involve them and thought that the Seychelles Government did not want to involve them either. A few, it appears, tried to make claims on the ITFB but were unsuccessful.

255. There had only been one group of Ilois on the Seychelles before Jeanette Alexis' group, the Ilois Group of Seychelles. It existed when they had visits from Mauritius in the 1980s and she helped at the committee to register people, but it never did anything. She was just assisting her father as the unofficial secretary. He died in 1989. It had just faded away. She was unaware, though she assisted in his letter-writing, that her father had sought compensation from the British in 1978, (8/1473 and 1478). He had not mentioned it to her, or indeed to her mother. I found that odd. Her eldest sister had gone to live in Mauritius, but they had had little contact with her, but she had said that there were payments being made in the 1980s and Jeanette Alexis said that they had tried to get their names registered, but she had been told that the list was closed and the payments were for Mauritius residents only. She said that they had visits in the 1980s from two Mauritian Ilois groups who took their names and birth certificates, but that nothing came out of it. But it is surprising that she could not remember more of what Mrs Alexis, I am sure, had explained about what she was doing on her visits.

256. The Seychelles Government had done nothing to help because it did not want to get involved or to upset the Mauritius or UK Governments. After the Seychelles became a one-party state run by the SPUP, she had become scared because there were threats that if they continued asking for money they would be deported. She had not been aware in the 1970s and 1980s that she was a sort of British citizen because they had been told they were Mauritians. She had found out later. It was not until 1997 that the committee of which she was Chairman had been set up and there had been no contact with lawyers or professional advisors in the early 1980s.

Misfeasance in Public Office
The Bancoult decision

257. It is important before turning to the detail of the submissions, to ascertain the limits of the Bancoult case because of the effect which it has on what is reasonably arguable. I accept that the Bancoult decision makes it reasonably arguable that the passing of section 4 of the 1971 Immigration Ordinance was unlawful because it permitted the wholesale removal or exclusion of the population from BIOT. It is also reasonably arguable that the exercise of prerogative powers to achieve that same end would be unlawful; see paragraph 61 where Laws LJ expressed considerable doubt as to whether the prerogative could enable such an end, and he concluded that there was no other existing legislation which empowered the enactment of section 4. If it were desired to achieve the aim of clearing the whole of BIOT, specific legislative power would have been necessary. It is to be noted that the Divisional Court accepted the high importance of the defence facility and did not suggest that that its provision could not have been a proper purpose for the clearance of the population, quite the contrary. Its point was confined to the need for a different legislative power to achieve that end. That legislative power could have been provided by Her Majesty, for the Court concluded that BIOT was a ceded and not a settled colony, judged, as it had to be, at the time when it became part of the Crown's dominions in 1814 and so was not subject to the same limiting effect of the words "peace, order and good government" as is found in the British Settlements Act 1887; paragraph 52 of Bancoult. That was not suggested to be incorrect by the parties in this case. Both those last conclusions are obiter and Mr Howell was inclined to submit that the conclusions should be given a narrow reading and he reserved the right, if it existed, to argue that the whole decision was wrong. For my part, whatever reservations I have about the decision and various parts of it, I do not see that the conclusions which I have referred to can possibly be said to be unarguable. It follows from that that if the Defendants excluded the Chagossians from returning to the islands between 1965 and 1971, in 1967 and 1968 in particular, and did so as a step towards the removal of the BIOT population, that too would be arguably unlawful. It may have been unlawful to prevent Ilois returning whatever the reason in the absence of legislation. Indeed, the same reasoning would apply to all subsequent exclusions up to the enactment of the BIOT Immigration Ordinance 2000.

258. I have expressed my conclusion that it is reasonably arguable that section 4 of the Immigration Ordinance was unlawful even though that is the clear conclusion of the Divisional Court, from which there was no appeal on the leave granted. I put it that way because I do not consider that the Divisional Court is by any means clearly correct in treating section 4 as empowering the removal of the population. Section 4 sets up a permit system, and requires anyone present in BIOT to have a permit to be there or to be exempted from that requirement. These permits are to be issued by an immigration officer who is given the widest possible discretion as to their issue or cancellation; a four year period is the normal period of grant. An appeal lies against the refusal of a permit to the Commissioner. It is an offence to remain without a permit after the coming into force of the Ordinance. The removal power in sections 10 and 11 permits the Commissioner to make an order directing the removal, of someone unlawfully present, from out of the territory, indefinitely or for a period, and to direct how that order be carried into effect. That removal "out of the territory" can be either "to the place

whence he came, or, with the approval of the Commissioner, to a place in the country to which he belongs, or to a place to which he consents to be removed" if its government consents. Section 4 is thus an essential component in the system of control over residence but it is not sufficient by itself as a matter of the structure of the Ordinance to achieve removal of a person or population. Its operation requires an order. It is inapplicable to intra-BIOT movement.

259. It is the making of the removal direction which, it could well be said and indeed was said by Mr Howell, is the point at which any unlawfulness in the exercise of the power to remove would arise, were it to be used against an Ilois; the restrictions on the place to which he could be removed needed to be considered in judging the lawfulness of section 4 of the Ordinance or its operation. What therefore needs to be examined is the lawfulness of section 4 in an Ordinance with those removal restrictions. I see some force in those points and they have not been considered in the Bancoult case. I do not accept Mr Allen's submission that Mr Howell is precluded from taking them because there was no appeal. The parties are different and more importantly, there was no misfeasance action then envisaged which would have made a substantial difference to the way in which the evidence was presented and analysed. This matters because of the evidence about the way in which it was envisaged that the discretionary removal power would be exercised, by those framing the 1971 Ordinance, and whose purposes, deduced from the documents, were given such weight by the Divisional Court. The nature of any unlawfulness and the purposes of the officials or Ministers is plainly relevant to the mental component of misfeasance.

260. Mr Howell's point takes on a wider significance in this case because he submits that there is no evidence at all of the making of any removal order by the Commissioner and that is correct. Therefore he submits the Divisional Court was wrong to hold that the removals were effected under the 1971 Ordinance. I shall deal later with why he is obviously right but I have had the advantage of much fuller documentation and argument on these aspects than the Divisional Court and so I feel less anxiety about differing from their briefly stated and factual premise on that point. Mr Howell was also critical of the Divisional Court's approach to the concept of "belongers" and citizenship.

261. I do not consider on the material before me that I should be influenced by the Divisional Court conclusion, in paragraph 1, that in 1971 the whole of the population of BIOT was compulsorily removed to Mauritius. Leaving aside the fact that the removals took place over a period of 18 months, and that the inhabited islands in the Seychelles part of BIOT were never depopulated, there is no dispute but that when Diego Garcia was evacuated, a choice was given to the Ilois of going to Peros Banhos, Salomon, (both in BIOT), Agalega or Mauritius. There was only no choice available of staying on. Moreover, section 4 did not apply to this choice: they could choose and some did to go to other BIOT islands; even if they had been forced to do so, sections 4, 10 and 11 had no application to such a transfer within BIOT; it had no application to a decision not to stay in BIOT. Although the Defendants admitted that their acts led to the run down of Peros Banhos and Salomon, there is at least room for argument on the evidence that the later departures from Salomon, whether of the Ilois who were long term residents of those islands or of those who chose to go there when Diego Garcia was evacuated, were voluntary albeit in the context of a Government caused run down, and that it was only the last departures from Peros Banhos which were a compulsory removal out of BIOT. I am for those reasons

unable to regard the Bancoult decision as closing off what may be a raft of arguments which can properly be developed on the fuller evidence which I have had. The Claimants too, took issue with the apparent conclusion that the Chagossians had no real property rights on Chagos.

262. It seems to me also to follow from the Bancoult decision that where the Crown acquires land for a public purpose, as it did, there may be a public law limitation on the way in which it exercises its rights of ownership, and not necessarily simply to ensure that it uses it for the purpose for which it was acquired; this is reflected in paragraph 58 of Bancoult.

263. I have difficulty, however, with the obiter comment that the use of private property rights makes no difference. I can see no basis upon which it can be said that a private landowner would have been obliged to permit an islander to remain on his land or to create property rights in his favour. The authorities would have been obliged, if upholding the rule of law, to assist in removing the trespassers. The solution to the evident problems would have lain in the realm of politics and legislation. Further, if the power to acquire land compulsorily, or by agreement is exercised for the purpose provided for by statute, the exercise of private land ownership powers is necessary to give effect to what is a proper public purpose. I have seen no authority which, absent statutory provision, requires the former owner or occupier of land so acquired to be given further rights or entitles him to defy the new owner in the exercise of his rights. If the Crown is inhibited from removing the Ilois as a landowner, it is difficult to see how that inhibition alone could impose some obligation on the Crown to keep some plantations going, with whatever else is necessary such as managers, transportation, rations and subsidies, for an indefinite period. The purpose of compulsory purchase, or of acquisition by agreement in its stead, is to enable land ownership powers to be exercised.

264. Additionally, the Bancoult reasoning was that the purpose behind the taking of the powers in the Immigration Ordinance was what mattered. I say that because of the weight apparently given to the documents which record the thinking of various officers at various times. The reasoning does not appear to have been, or at least confined to, an analysis of the powers actually obtained set against the limits of section 11. Indeed, it appears to have been contemplated that the same powers could lawfully have been obtained for the purpose of dealing with a catastrophe. The reasoning does not appear either to be that the powers obtained were lawful but that the assumed exercise of those powers was an unlawful exercise of the discretionary powers. If follows that if a part, or a substantial part, of the purpose behind the taking of the powers in the Private Treaty Ordinance was to assist in the removal of the population from BIOT, then it is arguably open to the same objection as was the Immigration Ordinance.

265. There was an issue as to whether it was unlawful for the UK to evict the Chagossians for the purposes of the defence interests of the UK itself even though such a step might have been entirely unnecessary for the defence interests of BIOT judged in isolation. Mr Allen said that it was unlawful to clear BIOT completely for those purposes; there was an obligation to leave so much of the islands as would enable Chagos (which was only part of BIOT) to function as an economic entity, supporting the Chagossians. He said that there had been no defence requirement for a base on Diego Garcia in order to protect BIOT. Accordingly, and paragraph 4 of the Group Particulars notwithstanding, Mr Allen submitted that no power existed which could

permit defence interests to assume such an importance that the islanders were unable to continue their way of life, not just somewhere in BIOT or Chagos, but moreover on each island notably Diego Garcia. I did not understand him to submit that it would be unlawful under the BIOT Order for the defence interests of the UK and Colonies to be taken into account in passing BIOT Ordinances, provided that the islanders could continue their way of life, the logic of the Bancoult decision notwithstanding.

266. It is clear from Bancoult that the defence needs of the UK, and of its colonies as parts of the world which shared its security and defence interests, entitled the Sovereign to permit the creation of the US defence facilities and to evict the entire population of BIOT in order to advance their effectiveness in protecting the interests of the UK. The issue was only whether, in order to give effect to that, albeit upon the creation of a colony with the express intention that it should be used for precisely such defence purposes, it was sufficient to give to the Commissioner power to legislate for "peace, order and good government" of the territory or whether some other legislative power had to be invoked. There was no issue as to whether it could be done at all. Mr Howell rightly pointed out that the constitutional reality was that the external affairs of BIOT were the responsibility of the Crown; the colony had been created for the collective security of the UK, its colonies and her allies.

267. I do not regard it as arguable that there could be no power at all, however it might be enacted or expressed, to remove the whole indigenous population of BIOT for defence purposes. It might not be necessary to do so; it might be disproportionate; whether it should be done is a matter of political judgement. But to say that it could not be done, where the people were removed to countries of which they were also citizens and which were willing to accept them, is to deny the essence of sovereignty, and its essence in a Parliamentary democracy with power over the Crown in right of its colonies and is to substitute for it the rule, not of law but of judges. If there were such governing responsibilities as those of which Mr Allen spoke, they were the responsibilities of politicians elected and answerable to Parliament. Misfeasance is not an action in respect of the views of Parliament still less a judgment on its failures.

268. Bancoult however seems to me to proceed on a wider basis than simply that a restriction on the relevance of UK defence interests arose, only at the point where the inhabitants were removed from BIOT. It is an arguable consequence of the line of reasoning in Bancoult that the sole interests relevant to the exercise of the powers under section 11 are those of the inhabitants, or as paragraph 57 of Bancoult suggests variously, its population, belongers, or "subjects of the Crown, in right of their British nationality as belongers in the Chagos Archipelago". The high political reasons underlying the creation of the defence facility "are not reasons which may reasonably be said to touch the peace, order and good government of BIOT …". To my mind, UK and Colonies defence interests are thereby excluded from relevance in the exercise of section 11 powers. It follows that the very declaration of the public purpose behind the Private Treaty Ordinance shows that it was enacted for a purpose which lies outside section 11. It would not matter for these purposes what property interests the population might or might not have had, or simply moved within BIOT. I have some difficulty with the starting point of that line of reasoning but the consequence seems to me to follow from the central thinking in Bancoult.

269. Mr Allen's more limited submission as to the scope of the powers contained in the BIOT Order is not one which is addressed in Bancoult. But the limitations, which he suggests, go further than that the BIOT Order did not empower legislation to permit the exclusion of all the islanders from the whole of BIOT. Mr Allen accepts that it is relevant for the Commissioner to have regard to the defence interests of the UK and Colonies when passing legislation. But, for Bancoult, I would have thought that is obviously right. The UK is responsible for BIOT's defence and foreign policy affairs; indeed it is difficult to see that BIOT could have any such interests distinct from those of the UK and Colonies. For the Commissioner to be unable to enact legislation to advance the interests of the UK and Colonies, of which BIOT was part, in the sphere for which the UK was responsible would be a considerable restriction. But if that interest is a relevant interest, it is difficult to see how the Commissioner is limited as a matter of law in the significance which he attaches to that interest as opposed to those of the islanders. They are both relevant interests for the territory. Again, this is relevant to the mental ingredient of the tort.

270. It cannot be for the Court to assess the degree of disturbance to the islanders which any given defence or foreign policy interest might justify, and to rule an enactment or its use unlawful or lawful accordingly.

271. It may well be that Bancoult, should be taken as imposing a limit, on the scope of the BIOT Order, only to the extent that it cannot permit the total removal of a population, the logic of Bancoult's reasoning notwithstanding. Any more extensive limit as contended for by Mr Allen would inevitably involve the Court in making judgments as to defence and foreign policy matters, weighed against the islanders' interests and economic prospects which it is not for the Courts to do.

272. The alternative views would then be either that the UK and Colonies' defence interests had no part to play under the BIOT Order at all (which has not been suggested by the Claimants), or that Bancoult is wrong in its approach to the existence of a limit at all on the powers in the BIOT Order, and in its underlying reasoning that the defence interests of the UK and Colonies are irrelevant to the exercise of powers for the peace, order and good government of a territory created to advance those very interests.

273. Either way, I do not regard Mr Allen's more limited submission as arguable; it is either too bold or insufficiently bold.

1. The Law

274. The Claimants and Defendants agreed that the starting point for a consideration of this tort was the decision of the House of Lords in Three Rivers District Council v The Bank of England (No 3) [2003] 2 AC 1, [2000] 2 WLR 1220. The essence of the tort is the deliberate abuse of his powers by a public officer, dishonestly or in bad faith, a conscious disregard for the interests of those who will be affected by official decision making. It is an intentional tort which cannot be committed accidentally or negligently or from a mere failure to act or from a misunderstanding of the legal position. The tort had two forms. The first arose where a public officer used his power for an improper purpose with the specific intention of injuring a person, known as targeted malice. The second form arose where a public officer acted in a way in which

he knew he had no power to act, or was recklessly indifferent to the legality of his act, knowing that his act would probably injure the Claimant or a class of persons of which the Claimant was member, or recklessly indifferent as to the probability of such harm. It was sufficient recklessness if the act was done, not caring whether it was illegal or whether the consequences happened. It is sufficient if the act is done without an honest belief that it is lawful because misfeasance is the purported exercise of power otherwise than in an honest attempt to perform the relevant duty. A decision not to act can also give rise to liability. The illegality can arise from a straightforward breach of statutory provisions, from acting in excess of powers or from exercising them for an improper purpose. The only recoverable losses were those which the public officer had foreseen as the probable consequence of his act. There was general agreement on those principles.

275. In this case, the Claimants did not allege targeted malice, though Mr Allen suggested that disclosure of the papers behind the drafting of the various property Ordinances might show that they had been drafted with a view to circumventing the property rights of the Chagossians and so justify a pleading of targeted malice. Subsequently, more documents were disclosed to deal with this new allegation, volume 23. There is nothing in those documents to support any such case and the Claimants' supplementary written closing submissions did not suggest that there was. The Claimants' case is of deliberate misconduct with foresight of injury.

The identification of individuals

276. The first issue which I deal with arises from paragraph 79(k) of the Amended Particulars of Claim, in which the Claimants say that it is unnecessary as a matter of law for them to identify bad faith on the part of a single officer in order for the Defendants to be liable. The Defendants say that that pleading should struck out and that as the Claimants do not identify any individuals who are said to have acted in bad faith the whole claim under this head should be struck out; it also has no reasonable prospects of success.

277. Mr Howell accepted that a corporate body could be liable for misfeasance, where the actions of some individuals could be attributed to a corporate body other than by vicarious liability, such as in the case of a decision by councillors, and that there could also be vicarious liability for employees if the appropriate tests were satisfied for such liability. But none of those situations were what this pleading had in mind.

278. Mr Howell also accepted that it was not always necessary for a pleading to name an individual if, from the particulars given and from the documents, it was possible for sufficient notice of the case against the officials to be given for the Defendants to prepare their defence. This was the position in the Three Rivers District Council case when the strike out application was considered in the House of Lords on the detail of the allegations; [2001] UKHL 16, [2001] 2 All ER 513 4 and 62 per Lords Steyn and Hope respectively. But the averment at issue here was so framed for a different reason; it was not because the Claimants thought that adequate particulars had been already been given one way or another of the case against the individual Ministers and officials. A perhaps different approach is to be found in the speech of Lord Hutton at paragraph 126, where he says that particulars do not have to be given of the individual officials whose actions brought about the misfeasance alleged, if the allegation is one of corporate misfeasance.

279. The vice in the pleading, submitted Mr Howell, was that it was intended to support an argument that the tort, which involves bad faith, could be committed even though no one individual satisfied the necessary ingredients of the tort. So, one official could reach a decision on the basis that he honestly believed that an act would be lawful, while another official knew that it would be unlawful to so act but did not know that anyone was going to do that. That would not involve committing the tort. Mr Howell relied on Armstrong v Strain (1951) 1 TLR 856 at 872. Devlin J held that the necessary knowledge for the tort of deceit could not be found by adding the innocent mind of a principal, who knew facts which showed what his agent said to be untrue but did not know what the agent was saying, to the innocent mind of the agent who did not know that what he was saying was untrue. This was not a case of someone being used as an innocent dupe for the purposes of furthering the deceit. This decision was upheld in the Court of Appeal, [1952] 1 KB 232. The necessary mental ingredients for the tort of deceit have a close relationship to the mental ingredients for misfeasance. This approach was applied in the context of corporate contempt in Z Ltd v A [1982] 1 All ER 556 CA.

280. I am not at all sure that the Claimants had thought through the point of this pleading. Mr Allen suggested that it covered the position of a policy maker who possessed the necessary mental ingredients for the tort, but whose policy was implemented by others who lacked it. It might cover the adviser, who knew that a policy was unlawful but did not advise the decision maker of that. Otherwise he invited me simply to prefer the approach of the House of Lords in Three Rivers to the pleading of names.

281. This averment should be struck out. It is misconceived in law and cannot afford a basis upon which the claim can succeed; if it remained, it would cause the focus of this part of the litigation to move from the knowledge of individuals, which lies at its heart, to a more general inquiry into governmental wrongdoing. From the whole tenor of Mr Allen's submissions, I am satisfied that is what underlies this pleading. He complained that the Defendants' applications were intuitively unjust partly because there had never been "an independent comprehensive high-level review" of the rights of the Chagossians or of the wrongs done to them. He argued that the starting point for the examination of the misfeasance claim was the catalogue of maladministration, bias, unfairness, reckless incompetence, omissions, buck passing and evasions over the years. I do not accept this approach. Misfeasance is a tort of personal bad faith; it is a serious allegation. At trial the necessary ingredients will have to be shown. The making of the allegation should not be the vehicle for a general inquiry into wrongdoing.

282. Mr Howell is entirely right in his submission that the tort cannot be shown by adding one innocent mind to another innocent mind. The averment is not necessary in order to provide for the policy maker who knows of the illegality where those he knew to be implementing it did not, or for the adviser who deliberately kept the decision maker in the dark about the illegality. Each of those cases involves a guilty mind, deliberate silence and innocent dupes; liability, perhaps vicariously, for misfeasance can be found. Armstrong v Strain does not preclude that at all. What would not constitute misfeasance would be the situation where an official knew that a policy would be unlawful but did not know that it would be carried out, and the person carrying it out did not know that it was unlawful. It would not show competence in government and it might not be readily believed on the facts but it would not involve misfeasance.

283. Insofar as Mr Allen suggests, by his reference to preferring the approach in Three Rivers, that in corporate misfeasance it is unnecessary to identify individuals, he is wrong. If Lord Hutton was differing from the other two in the majority as to the basis upon which the pleadings were adequate, and suggesting that in corporate misfeasance it was not necessary to show that anyone had the requisite knowledge, I do not think that the authorities cited by him bear out the point. In Bourgoin SA v MAFF [1986] QB 716, it was an agreed assumption that the Minister himself had the relevant knowledge; in Dunlop v Woollahra Municipal Council [1982] AC 158 PC, it was clear against which persons the allegation as to knowledge were made and it was their acts and knowledge as councillors which would have been attributed to the Council for the purposes of corporate misfeasance. I think that in reality Lord Hutton, like Lords Steyn and Hope, is making a narrower point as to pleading adequacy in the context of the pleadings and documentation in that case.

284. Viewed in that light, I do not derive much assistance from Three Rivers; the state of the pleadings and documentation is not discussed in detail and in any event any detailed comparison of that case compared to this would be wrong. Each case has to be decided on its own material. All that can be drawn from it is the pleading point that it is not always necessary for the Particulars of Claim to identify the individuals who it is alleged had the requisite knowledge and who did the acts complained of, provided, and this is important, that the nature of the case which the Defendants have to meet appears adequately for the just, effective and expeditious preparation and disposal of the case, from the pleadings with the documentation. On that basis, I reject Mr Howell's further submission that if I struck out the contentious averment, I should dismiss the whole misfeasance case. It is not always necessary as a matter of pleading that the individuals should be identified, whether by name or position or in some other way, such as by authorship of a particular document. Whether it should be required depends on the whole documentation and the nature of the case.

285. A very large amount of Government documentation has been produced. There are several strands of correspondence: internal FCO memos between various of its departments and between various officials some of which related to the preparation of advice to Ministers, advice to Ministers, correspondence with and between the FCO and the two Governors or High Commissioners, correspondence between the FCO and the UK Mission to the UN. Some are advisory, some are drafts or comments on drafts and internal debate. There are many officials who appear in the written material and Ministers as well. The Claimants rely on this documentation for their misfeasance case. I regard it as wholly unfair for this serious allegation to be made without any attempt in the light of all this material to identify in the pleadings those against whom so serious an allegation is made. It must be possible for the Claimants to identify them, or the major ones, by name or position, or authorship of documents. The Defendants could not possibly know how far back and how widely they would have to interview potential witnesses and those witnesses would not know whether an allegation was being made against them which their statements had to answer. The Claimants argued that the claim should not be struck out as having no reasonable prospect of success because cross-examination might help their case. For the immediate purposes of this pleading, that only reinforces my conclusion: how are the Defendants to know whom to call for any such cross-examination without any particulars of the persons against whom this allegation is made? Are they to face a speculative

cross-examination to see if an allegation can be made against them? That would be a wholly unfair and wasteful way of conducting litigation. Whatever else may result from these applications, the Claimants must plead the names, or other identifying material, of those who they say had the relevant knowledge, of what precisely and what they are alleged to have done. These allegations should have been tied in to the documents disclosed. There is ample material for them to have been working on if they truly have a case of misfeasance.

286. I am reinforced in my firm conclusion by what Mr Allen said, under some judicial prodding, as to whether he did indeed contend that certain individuals had the requisite knowledge or whether he accepted that the striking out of the averment would end his misfeasance case. I received the distinct impression that this aspect of the case had not been thought through with the care it deserved for the making of such serious allegations. He said that the Prime Ministers and Foreign and Colonial Secretaries between 1964 and 1973 would be included. (The Prime Ministers are not actually parties at all.) The Foreign Secretary in 1982 was included and, it appeared, all subsequent ones because the policy of denying that there was a permanent population on the islands had been maintained throughout the 1990s. All Permanent Under-Secretaries involved in drafting advice to Ministers were included because, if they removed relevant material from the eyes of the decision maker, that would be misfeasance for which the UK Government would be vicariously liable. The BIOT Administrators and the Commissioners over time were also to be named. Mr Aust was then too junior for reliance to be placed on his advice. But Mr Allen also seemed to suggest that any officials who wrote the documents upon which he relies would have the relevant knowledge. Such extemporising is not the way litigation should be conducted. The allegation must be properly pleaded if the action is to continue.

287. Once the misconception underlying this averment is recognised and the averment is struck from the Claimants' case, the importance of the 1968 and 1969 Prime Ministerial submissions is undeniable. The decisions made in reliance on approval of those submissions were the justification for what followed, not some excess of official zeal concealed from Ministers, whilst officials somewhat improbably took the burden of implementing their own policy, politically and morally controversial, leaving Ministers free from any opprobrium over the execution of policies of the highest importance, sensitivity and controversy. But it means that for the Claimants to succeed, they have to have reasonable prospects of contending that the Prime Minister of the day knew of or was recklessly indifferent to the illegality of his policy, or that his Foreign Secretary was or that the Commissioner of the day was or that unnamed officials duped them over illegalities to which they alone were alive. There is nothing to suggest that officials were acting off their own bat.

The "framework" submissions

288. Mr Allen outlined the history of what he called the Defendants' "wrongs". The UK and US Governments wanted an island which had no resident population. The UK Government had earlier information available which contradicted the conclusions of the Newton report which had probably been slanted to assist defence purposes. They also had subsequent information which put matters in a different light. The UK Government had always been aware that there would be difficulties at the UN and so sought to conceal from it that there was a permanent population, to represent them as transient workers who belonged to the Seychelles or to Mauritius. Misleading

information about the purpose behind the creation of BIOT was provided to the UN. After the Government bought the islands in 1967, the decisions which it made or permitted to be made, eg about permitting Ilois to return from Mauritius, impinged on its "governmental obligations".

289. Notwithstanding fresh statistics in 1967 which showed that there were more Ilois than had been thought there was no modification in policy and approval was given to the US proposal. By 1969, the Government had decided that all the Chagos had to be evacuated even though there were no definite defence plans beyond the use of Diego Garcia. This was to prevent a permanent resident population giving rise to obligations under Article 73 of the UN Charter and also because the Treasury were reluctant to invest in the plantations. The approval of the Mauritius Government to the resettlement of the Ilois was a temporary expedient but to assist in obtaining the approval of that Government, the UK Government, as a matter of policy withheld information from the Ilois that they were UK Citizens.

290. Those Ilois who went to Mauritius expecting to be able to return to Chagos were left to their fate, and not brought back. The Government either decided this itself or acquiesced in Mr Moulinie's policy. Negotiations over resettlement were deliberately stalled.

291. The Immigration Ordinance was brought in to clothe the expulsion of the Ilois with apparent legality but was given the minimum possible publicity. The Ilois were given no real choice; the offer to go to Peros Banhos and Salomon was illusory because the Government intended to close them anyway. Those clearances were managed inhumanely and the departing Ilois had no choice of where to go. The resettlement negotiations were slow, the sum paid inadequate, the pig-breeding scheme known to be unworkable and the payment of anything for the benefit of the Ilois long delayed.

292. The UK Government received frequently inadequate and misleading advice, and relied on its position as plantation owner to remove all the population without statutory or other public law authority. Later, at the 1982 negotiations, the UK Government seemingly abandoned individual quittances but later included them in the Agreement and insisted that the Mauritius Government collect them. Mr Allen identified fifteen wrongs perpetrated in that history some of which could not be tortious, eg letting the plantations run down, and others could not be justiciable, eg failing to honour UN Charter obligations.

293. I have already adumbrated the way in which the Claimants advance their case on the pleadings. The overarching theme was that the Defendants and their officials knew at all relevant times that there was an indigenous population of two or more generations on the Chagos, and pretended to the outside world that these were only, or virtually only, contract labourers by which they meant transient or temporary workers. They then removed that population when they knew or were recklessly indifferent to the illegality of so doing. They did so not only for defence purposes but also because, BIOT having been created, an indigenous population in that new colony would attract the protection of Article 73 of the UN Charter. The structure of Mr Allen's submissions did not therefore involve any analysis, by tracing through the documents in a coherent way, what any one official or Minister did and knew in relation to any one of the allegations of illegality and dishonesty. The evidence upon which they rely at this stage is largely the documentary material disclosed by the Defendants, but it is supplemented by

the Ilois' own evidence about their way of life, their ancestry, their employment, the way property was dealt with, about what happened to them at the time of the expulsions or when they were unable to return, their reception and subsequent life in Mauritius and the Seychelles, and their dealings with the UK Government. But it is the documentary material upon which the Claimants rely for showing what the Ministers and officials were doing and with what knowledge. The documentary material has been set out at length in Appendix A and I do not propose to summarise the material here. The Claimants' case was that they had a reasonable prospect of success in their allegations from that material alone and in effect submitted that reading it made out their case sufficiently for this stage of proceedings.

294. The attack mounted by the Defendants is their contention that there are no reasonable prospects of success for this claim.

295. Mr Allen made a number of what he called "key" submissions as to illegalities which did not as such feature as allegations in the Particulars of Claim under that head, but which can be seen as the underlying theme of a number of his specific allegations. These related to what he called the governmental obligations which the Defendants owed to Chagossians because the Defendants remained collectively their Government; alternatively the Commissioner of BIOT was their Government with the UK Government in a governmental relationship with them because of the control which it could exercise, albeit only through the lawful use of the prerogative or legislative act. Mr Allen drew on what was said by Laws LJ in Bancoult at paragraph 57: "peace, order and good government of any territory means nothing, surely, save by reference to the territory's population". They were to be governed not removed under that power. This was said to require fair consultation, a recognition that no international agreement could trump all their rights, adequate funding for resettlement, and a duty of good faith which required the Government to put right in the 1982 negotiations, and to acknowledge, what it had done wrong. These were mandatory duties which the Defendants could never abandon nor could it contrive to get its citizens to forego those rights. They could only be removed by legislative act by a body with the power to pass such legislation. This asserted governmental relationship ran through other parts of the Claim, such as the claim in negligence. The consequence for the misfeasance claim was that, just as the Defendants were not able to rely on section 4 of the Immigration Ordinance for the removal of the population, they were unable to rely on any other power, such as the prerogative or private landowner powers. Those powers might enable the base to be set up but they could not make lawful the exclusion of the population or taking so much land that it was impossible for them to live on the islands.

296. A good deal of this was not particularised at all; it is not in the pleadings and the source of the duty to act justly, to whom it was owed, and what all these governmental obligations entailed was not clear. They appeared to be very extensive with positively enforceable obligations to care for the citizens, to house and educate, to provide for community life and employment opportunities without any limit in time or cost.

297. Expressed in those broad terms, Mr Allen's framework submissions are untenable. The Commissioner of BIOT has no positive duty to do anything other than that which relevant legislation and the Royal Instructions may require him to do. A power to do only that which is in the interests of "peace, order, and good government" may impose a limit on what the

Commissioner can do, but it does not impose any legally enforceable duty to act in some vague way for "the people". No legislative power of the width necessary for Mr Allen's submission was identified. The Commissioner is subject to the limitations of the BIOT Order and is neither compelled to enact the legislation for which the Claimants contend, nor has he done so. Neither the Commissioner nor the UK Government has any duty to provide for a welfare state in the absence of legislation. I can see no basis for saying that there is a legal duty to provide employment, or housing on or transportation to Chagos, including Diego Garcia or to compel the private landowner and employer to do so for any individual Chagossian or all of them. There was no obligation to maintain an economy and to prevent the coconut plantations closing or to provide substitute work. There was no obligation to prevent landowners exercising their private rights to prevent someone living on a particular piece of land or to require them to provide land for Chagossians to live on, or to permit the landowners' rights to be overridden by a form of mass trespass; that would be the antithesis of a civil society unless accomplished by legislation. If the landowner had decided to give up running coconut plantations and to remove the islanders from the land to make way for tourist enterprises, there would have been room for political debate as to what should happen but not for legal debate as to the power of the landowners, (assuming that the Ilois had no property rights themselves). There is no obligation on the legislature to prevent private landowners exercising their rights and refusing to permit onto land those whom they are not willing to allow to reside there. There is no obligation to require employers to employ particular individuals or to provide them with transportation to or from the Chagos. There is no obligation on the legislature to so enact nor has the Sovereign required the Commissioner to so legislate nor has She passed any such Act herself. I do not see anything in Bancoult which would support such an approach.

The Components of the Misfeasance Claim: Prevention of Return

298. I propose to deal with the sequence of allegations as to misfeasance in chronological order. I have already accepted that it is reasonably arguable that if the prevention of the return of Ilois in 1967 and 1968 was on the instructions or, indeed at the request of the Defendants, that was unlawful. I think that it is also reasonably arguable that, in those circumstances, if the Commissioner or his agents knew that those who were going to Mauritius might not be able to return for that same reason, there was a duty on them to forewarn the Ilois. However, there is no evidence that any Defendant or its agents knew or thought that those who left would be prevented from returning. Mr Moulinie may have known what the general pattern of recruitment would be and it may have been a common expectation that Ilois would be re-employed and transported back to the Chagos if they so wished; of course there was no obligation on them to return or to do so at any particular time. It is clear from the evidence of the Chagossians that they regarded themselves as free to make that choice and some stayed for substantial periods in Mauritius, some arriving before BIOT was even created. It must have been obvious to the islanders that there were no new recruits or returners from Mauritius in 1967 and yet others left in March 1968 apparently without inquiry as to their prospects for return. Mrs Talate's witness statement for what that is worth suggests that they were aware of the decline in numbers and of the absence of people who had gone to Mauritius. There is also some evidence that, even before the creation of BIOT, there could be difficulties for those who left the islands for Mauritius as

others were recruited to take their place, as would seem inevitable, as there appears to have been no obligation on the Ilois to return after a particular period. But Moulinie was not the agent of BIOT in transporting to Mauritius those who wished to go there nor when they said or failed to say anything about whether they might return. The fact that some Ilois were advised to go to Mauritius in connection with medical treatment imposed no different duty and certainly not upon the Defendants. Mr Moulinie may have realised that recruitment of those leaving in 1967 and 1968 was not certain and nothing was said; he might be criticised for that. But that is not something for which any responsibility arguably lies with the Defendants as a breach of any duty by them or other illegality, let alone one of which they knew or were recklessly indifferent to.

299. Mr Howell's main point was that there was no evidence that the Defendants had been instrumental in fact in preventing the return of anyone in 1967 or 1968. Those decisions were the consequence of the Moulinies' recruitment policies. The position to my mind is as follows. The contemporaneous material shows that there were two boatloads of Ilois, one in May 1967 and the other in March 1968, some or all of whom were unable to obtain passage back and were left stranded. First, it is quite plain that the proposals for the defence facility were at the root of the problem because of the uncertainty which they created for investment and the related need for labour; the company had given notice to quit its lease, effective at the end of 1967 and there were negotiations about a management agreement in the latter part of 1967. The UK Government in that period faced the prospect of direct management of the plantations. Second, the focus of Moulinies' recruitment was to become the Seychellois because the islands' economic links and shipping ties from July 1968, following acquisition of the "Nordvaer", were focussed on the Seychelles. That refocus itself may well have been independent of the defence proposals. Third, the evidence of Marcel Moulinie was that there had been no instructions, so far as he knew, from Mr Todd to Rogers & Co not to take returning Ilois, although he had also said that they had given no such instructions either and was not aware that his uncle had done so. The documentary evidence shows, however, that recruitment instructions were given by the company to Rogers & Co to take no more workers from Mauritius. Fourth, the evidence of Mrs Jaffar and Mrs Elyse on what was said, to whom and in what circumstances or when, suffers from certain problems, but does not assist in answering the question of who gave instructions that they were not to be recruited. They said that they were refused passage for reasons connected with the creation of BIOT, the defence arrangements with the Americans and the closing of the islands (even though at that time their closure was not imminent). The telegram of 29th February 1968 from Moulinie & Co to Rogers is consistent with their evidence.

300. In my judgment, it is clear that the decisions were made by Moulinie & Co on the basis of what it thought necessary for employment purposes. First, there was a clear change in recruitment pattern so as to employ more Seychellois than Mauritians as contract workers. The uncertainty of what would happen to the islands or any of them and when was an obvious factor for Moulinie & Co to worry about. This pattern is evident in the May 1967 Administrator's Report of his visit to the islands. The discussions between the Commissioner and the CO refer to Mr Moulinie saying that he would not be recruiting additional labour from Mauritius on the second trip there of the "Mauritius". Second, the Commissioner's concern, as it was of the CO, was to make the most of the asset for which it had paid and to make appropriate arrangements for running the plantations, not for removing the population or running down the plantations. The references upon which the Claimants rely need to be seen in that overall context. Third, the

Mauritius Government raised the question of those who had arrived in May 1967 when the "Mauritius" was due to return to the islands in March 1968; it wanted them re-employed on Chagos. But it was dealt with by the Commissioner as an employment matter for Moulinie & Co. Moulinie had no need for the 75 workers. So the Commissioner told the CO that it would tell him to recruit what labour was needed for the efficient running of the islands and who was employed was up to him. That reflects a legitimate position from a plantation management point of view and there is no reason to suppose that Moulinie would have acted any differently if he had not been told that. Fourth, it is clear that Moulinie told Rogers & Co not to recruit any more in its telegram of 29th February 1968 because the islands were fully manned; the reference to concluding negotiations with the MoD shows the effect of uncertainty and not interference. This may be the source of the information which Rogers gave to the Ilois who were refused a return passage. Fifth, the degree of control exercised over the cost of running the plantations can be seen from the extent of approval necessary for materials. Mr Allen argues that this shows the extent to which the BIOT administration would have been involved in the decisions about recruitment. That may be so but the evidence points clearly to the reason for that: the desire to make the plantations work economically; that may have affected the levels of recruitment and that may have affected indirectly who was recruited. But that is not the point. The question, sixth, is: did the Defendants try to stop the recruitment of the Ilois in Mauritius? There is nothing in the Commissioner's advice, if it was advice, to Moulinie about what to do over the Mauritius Government request which amounts to a prevention of the Ilois returning, let alone that it was so advised in order to exclude them so as to assist in depopulating the islands. That is the nub of the point.

301. There is a recognition, at least arguably, in the May 1968 BIOT memorandum, (23/171-5), that recruitment could be used as an aid to resettlement, but it is merely a discussion document and one which precedes the July 1968 US decision, which affected the future planning significantly. There is no suggestion in any other of the pre- July documents that the recruitment of Ilois on Mauritius should be minimised for resettlement or other reasons; the concern was with the overall level of the workforce. The emphasis is on making the islands economically efficient.

302. Again, in relation to the Ilois stranded after their arrival in March 1968, a similar picture emerges clearly. The Defendants' line at that time was that the matter was one between employer and employee. It is also plain that the CO and High Commissioner in Mauritius were aware that there were Ilois who had connection by descent with the islands and who might have been affected by the defence proposals. There is nothing in the exchanges to suggest that they were however trying to prevent the recruitment of Ilois. The most that can be said is that they were not trying to encourage or to facilitate it, or to bring about their return to Chagos; they were more washing their hands of the problem. The notes reiterate that it is an employment matter, or one for resolution as the picture became more certain as to how long the islands would be functioning. It was also pointed out in the FCO paper of 24th October 1968 that Moulinie now wanted to recruit more Ilois for Diego Garcia; the documents also show that they were aware that recruitment of Ilois would pose additional resettlement problems and that there was a potential problem if only some of those stranded in Mauritius were recruited. Thus recruitment of those Ilois was seen as unadvisable. Nonetheless, and to my mind crucially, the upshot of it was that because Moulinie wanted to recruit 100 Ilois from Mauritius in November 1968, he was

authorised to do so albeit on one year contracts only. That latter requirement shows a degree of control over recruitment being exercised by the Defendants; but, generally, the signing of a contract upon return to the islands is something which at least some Ilois certainly did, because some contracts have been produced, and there was a company concern about recruits joyriding around the islands on the boat and then returning free of cost. It shows however that the Defendants did not prevent the return of the Chagossians. It does not matter for these purposes that the recruitment did not in fact proceed.

303. The language of the documents of 28th October 1968 certainly shows that the Defendants could and at times did exercise control directly over recruitment of Ilois. It was not simply a matter left entirely to Moulinies' commercial judgement. But the general tenor of the documents is that the Defendants were looking at the economics of the plantations and save at the last were not concerned with whom Moulinie recruited, whether Ilois or not. There is nothing in the pre-November 1968 documents to suggest that they had given secret instructions that Ilois were not to be recruited and were deceiving each other about their motives or decisions. I do not consider it to be a reasonable inference that what was seen in October or November 1968 to be the attitude of the Defendants towards Ilois recruitment must have been their attitude at an earlier date. The Mauritius Government in March 1968 might have thought the non-return was a BIOT responsibility but that is simply not borne out by the evidence. By October 1968, after the July 1968 US decision, there is evidence that the Defendants contemplated preventing the recruitment of Ilois because of the resettlement implications, but they did not in fact do so. Indeed there was a limit, according to Mr Moulinie, of 250 on the number of male adult workers on Diego Garcia. There is no documentary evidence to support that, but if it is correct, the population figures show that that limit was not in danger of being exceeded and so it never acted as a constraint on the recruitment of Ilois.

304. The Defendants did not do anything to assist or to require the return of the Ilois but that is not the basis of the allegation of misfeasance here. There is no domestic legal obligation on a Government to arrange for the return of its citizens to those territories where they can reside. It cannot be said that there was a duty on the Defendants to arrange for the Ilois to return to the islands, let alone one which left aside any question of employment or how they would be fed or housed. It is not sufficient for this allegation of misfeasance for the Claimants to show that the defence proposal was an unsettling factor which contributed to or even caused the company's refusal to recruit the stranded Ilois. Nor is it sufficient to identify some discussion about what numbers should be employed, for the Defendants had a legitimate interest in the size of the labour force whether they were to manage the plantations directly or through an agreement under which they would bear the cost burden. I consider that the Claimants have no reasonable prospect of showing that the Defendants in fact prevented the return of the stranded Ilois.

305. In any event, if there had been a duty not to prevent the return of the islanders or even to facilitate it, there is no evidence at all that any Defendant or official knew of any such duty, or was recklessly indifferent to it. There is nothing to suggest that there was or was ever thought to be a duty to re-employ those who went to Mauritius or to require their re-employment regardless of economic needs or to provide transportation or a means of subsistence for them. Neither Defendant had ever employed the Ilois or transported them; they were not abandoned by either Defendant in a remote or inaccessible spot to which they had taken them. These Ilois went

voluntarily to a country of which they were citizens and with which some enjoyed varying degrees of family connection.

Components of Misfeasance: A Duty to Consult

306. Mr Allen, in the re-amended Particulars of Claim, for which amendment I give permission, contended that there was a failure and I suppose therefore he suggests a duty, to consult islanders over "important decisions" as to the future of the islands or as to their own futures. As an allegation of fact, that failure is undeniable. Reading between Mr Allen's lines, he means that they should have been consulted about where they were to go and with what provision for housing, employment and the replacement of the amenities of life which they had hitherto enjoyed. It is reasonably arguable that, as the law has developed and notwithstanding the absence of supporting analysis, there was a duty to consult the Chagossians over what their future was to be, once it had been decided to clear any island for defence purposes. I find rather difficult, however, the notion that there was an obligation to consult the Ilois, (and if them why not the temporary residents or the Moulinies, or UK residents and taxpayers?) about the defence interests of the UK and its colonies. There is plainly no obligation to consult those who might be affected by any international obligation which the UK Government might have it in mind to enter and I cannot see why there was any obligation to consult on whether BIOT itself should have been created. There is no obligation to consult before legislation is proposed or enacted in the absence of a statutory duty or a promise to do so. Neither is alleged to have existed here. If there were, as the Claimants say, any obligation to carry out an assessment, as a Government, of the consequences of the setting up of the base, and there plainly was such an assessment pursued over time, that does not itself oblige consultation about those consequences more generally.

307. I do not regard there as being any prospect at all of the Claimants being able to succeed in demonstrating that such a duty was one of which the relevant officials were aware in 1971 or 1973 or to which they were recklessly indifferent. The wider he seeks to make the duty, the more hugely improbable his case becomes. It was recognised by Ministers that it would have been desirable to consult the Ilois about their future, but there were reasons why that could not be done. There is nothing to suggest that they realised that they were under some obligation to consult or that they were recklessly indifferent to any such duty. I think that in the late sixties and early seventies there would have been some surprise at the thought that there could be an enforceable legal duty to consult at all, let alone over defence matters. Even were the Claimants to succeed in establishing that there had been a duty to consult the Ilois over whether there should be a defence facility on Diego Garcia, it is not conceivable that it would have made the remotest difference to the outcome. It must have been perfectly obvious to the Defendants that the Ilois would wish for no change for the worse in their situation but their desires were not important in this context. They were given an element of choice about where to go when Diego Garcia was evacuated.

Components of Misfeasance: Removals

308. I have already set out the brief facts as to the evacuation of the islands which shows why what is said in Bancoult about the timetable of removals is wrong. It was not a process of compulsory removal all at one go. That is what gives rise to the Defendants' argument that, on the ratio of Bancoult, the removal from Diego Garcia was lawful because only those who chose to do so left BIOT, and thereafter it was economic circumstance rather than Government compulsion which led to the evacuation of the other Chagos islands in BIOT, coupled with the voluntary decisions of the islanders exercised so as to leave Salomon, and then so as to leave Peros Banhos in part before its final closure. At worst, say the Defendants, the only ones compelled to leave BIOT were those left on Peros Banhos who had not left voluntarily beforehand.

309. One allegation of the Claimants was that it was unlawful to close Diego Garcia because it was the one part of BIOT which had an assured economic future, as a result of the base. But the UK Government tried on a number of occasions to persuade the US to allow Chagossians to work on the defence facility, particularly in construction work. It had no success at all ever. The US adhered to the position which it had adopted at the outset. The UK tested whether there was any need to close the whole of Diego Garcia for defence reasons but the US asserted that it was so and the UK accepted that position. It is more than a little odd to take advantage of the defence proposal to argue that that is what gave Diego Garcia its future, but at the same to deny an essential feature of it as seen by those responsible for creating it, namely that it had or would have no resident population to limit its effectiveness as a location for that very facility. In substance, this is an allegation that the base should not have been created on the terms upon which it was. The Court is not in a position to judge the defence assessment which underlies that and will not do so. It is inconceivable that the Defendants could have thought that there was a legal obligation to compel the US to accept Ilois workers or to forego the facility, or were recklessly indifferent to the legalities of the position.

310. In the same paragraph of the Particulars, there is a different allegation that it was unlawful to close the one part of Chagos with an assured future as a coconut plantation and thereby to withdraw support from the other islands' plantation economies. The two allegations do not fit easily together nor does the allegation fit easily with the contention that the departures from Peros Banhos and Salomon were engendered for other than economic reasons. It was pleaded that the Defendants had run down the plantations deliberately or allowed that to happen knowing that they were thereby depriving the entire population of the territory of economic support. This is untenable. The Defendants wanted to keep the plantations going for as long as possible as is evident from all the documentation. There was a tension between that and their desire to avoid having a permanent population on BIOT. That latter objective argued for a rapid decision. I cannot see what the illegality is in what they did in the interim between 1965 and 1971. If, however, the allegation includes any later period, the allegation becomes in effect that they could not remove the islanders from the whole of BIOT and that they had to leave enough land for the Ilois to maintain a viable economy. The agreement with the US could not be given effect, therefore, whatever the route taken to provide for the removal of the Ilois. This is an example of the governmental obligations which Mr Allen relies upon. I deal with that point as part of the allegation that the removal of the Ilois from the whole of BIOT was unlawful, regardless of the means whereby that was accomplished.

311. Mr Allen put the allegations of unlawfulness over the removal of the population in a number of ways. The Defendants ignored their governmental obligations to the permanent inhabitants; their interests were a material consideration which was ignored in the formulation of policy. It was unlawful to clear the Ilois off Diego Garcia if there was nowhere else for them to go which had a viable economy. The Defendants proceeded as if they were operating a private estate. There was no authority for the removal of a British citizen as such from the place where he was entitled to reside. The 1971 Immigration Ordinance clothed the BIOT administration with an ostensible power even if it had not been used in fact to bring about the evacuations. He made an allied submission to the effect that it was unlawful to have a policy of clearing the islands which was based upon the deceit that there was no permanent population and to seek to give effect to that deceit. Whether there is a reasonably arguable case depends, for so many of these allegations, upon what power was used and upon whether it could ever be lawful to remove the whole BIOT population for defence or other purposes in the absence of specific legislation.

312. I have already expressed the view that Bancoult held, strictly obiter, that legislation enacted through the Sovereign's powers could provide that authority and certainly could do so where the people are citizens of the country to which they are removed and that country is willing to receive them. Although it may be necessary to consider some of Mr Allen's arguments in more detail when dealing with the existence of a tort of unlawful exile, much of the material upon which he relies demonstrates that exile is permitted if done by legislative authority but not if done by virtue of the prerogative. English history contains legislation which has had that effect, in the Transportation Acts. The UK has not ratified the 4th Protocol to the ECHR, which in Article 3 prohibits expulsion of a national from the territory of the state of which he is a national and requires him to be permitted entry there. There is some authority which supports the permissible scope of legislative authority. In Thornton v The Police [1962] AC 339 PC, leave to appeal was refused on the ground that the judgment of Hammet J was clearly correct. He held that nothing in the British Nationality Act 1948 "precludes either the United Kingdom or any of the colonies from enacting such legislation as they chose to regulate and control the entry into their territory or residence therein of persons whatever their status may be". In the same vein, Lord Denning MR held in R v Secretary of State ex p Thakrar [1974] QB 684 CA that the obligation in international law owed by one state to another to admit its nationals expelled by another could not be relied on by an individual, conflicted with immigration legislation and in any event only arose if the national had nowhere else to go. It is perfectly clear that the Ilois were not removed until arrangements had been made for them to go to countries of which they were citizens and which were willing to take them. The legal issue is as to the lawfulness of so acting without specific legislative power. I have said that in the light of Bancoult that unlawfulness is reasonably arguable. The other factual issues relate to which power was used or whether the departures were voluntary and whether the Claimants have reasonable prospects of showing that the Defendants knew that they were acting unlawfully or were recklessly indifferent to that.

313. The starting point for the Defendants' submissions is the acceptance that the relevant international agreements with the US were ones which the UK Government could properly enter into and seek to implement. The point at which that implementation cut across the rights of individuals is the point at which it would require to be examined for its legality in the absence of

legislative powers. The Defendants were entitled to take steps to procure the implementation of the defence facilities subject only to any supervening rights which the islanders had. It cannot by itself justify the breach of the rights of individuals. Once the lease to Chagos Agalega Company Limited had terminated, there was no individually enforceable domestic legal obligation on the Commissioner or on the UK Government to cause the plantations to continue to operate in order to provide employment opportunities or the other concomitants of a viable society, food, housing or education and so on. The Ilois contracts might come to an end, but there would be no obligation on the Defendants to employ them or to procure that the company renewed their contracts. There would be no legally enforceable obligation to prevent the company landowner requiring the workers to leave its property if they had no rights to be there. To my mind, this otherwise compelling analysis has to recognise that the thinking in Bancoult was not confined to the specific effect of the Immigration Ordinance but extended to any legislation with the same purpose or effect and was thought also to cover the use of private landownership rights by the Crown, albeit obiter.

314. The Defendants' case is that it is clear upon all the evidence, including that of the Chagossians, that a choice was offered to the Ilois of Diego Garcia as to whether to go to another BIOT island. They were encouraged to go to those islands, or to Agalega. They were not at that stage all removed from BIOT or required to leave. There were also Ilois who subsequently left Peros Banhos and Salomon voluntarily. It may have been uncertainty which caused some to choose to go to Mauritius rather than to a BIOT island or to leave when they did, but that does not alter the position and does not amount to a compulsion to leave BIOT. But the illegality contemplated by the Divisional Court is a compulsory removal through the specific exercise of a purported statutory power. Accordingly, whilst the Divisional Court may be right as to the legal position if the facts had been as it apprehended them to be, on the incontestable facts, the illegality which it contemplated could only arise for those who were compelled to leave Peros Banhos. There is no evidence that that was accomplished by use of the Immigration Ordinance. The evidence is that the island had become unviable as a coconut plantation; there were too few workers and the company and the Defendants decided to close them as the landowner and to evacuate the inhabitants. The dependency of the Ilois on work for rations, building materials and transportation was evident from the way in which they described life on Chagos and the problems they felt arose when the rations were running down; that may not have happened in fact but they perceived it as an attempt to starve them out. There would have been no comparable means of the Ilois subsisting there alone without employment or other subsidy. This is a powerful analysis, but it has to be seen in the light of what I see as the thinking in Bancoult.

315. At the stage of seeing whether there is an arguable case, I appreciate that it can be said that the offer of employment on another island in BIOT was illusory because of the uncertainty over the future of the islands created by the defence proposals and no guarantees were offered as to the future of Peros Banhos and Salomon. Mr Todd told the Ilois, according to his notes, that the other islands would be open for some time. The reality was that the Ilois could see that the time would come when the plantations would close and they would be compelled to leave. Additionally, the US had always made it clear to the UK Government that it might want to have the whole of Chagos. There was, in the background, also the concern of the UK Government that unless the population were removed from BIOT, there would eventually be a permanent population, if there were not one already, which would attract the obligations of Article 73 of the

UN Charter and constitute an economic problem for the UK. All the decisions on the future of the island plantations after 1965 can be attributed to the creation of BIOT, the defence proposal and to the uncertainty which it created. The UK Government compelled the closure of Diego Garcia and the removal of the Ilois from it. Even on the Defendants' own case, it was the economic conditions created by the closure of the plantations on Diego Garcia for defence purposes and the subsequent uncertainties, which led to the drift of Ilois away from Salomon and then from Peros Banhos leading to their ultimate economic collapse. It is possible to say that in those circumstances the Defendants closed the islands and compelled the removal of the population from BIOT. Whether they used the Immigration Ordinance, or as I think overwhelmingly probable, they used their private law rights, a possible case, derived from Bancoult, could be mounted that the actions were unlawful as a sequence of events which flowed from the closure of Diego Garcia, which foreseeably led to the enforced removal of the whole population without specific legal authority. I saw no evidence to support Mr Allen's contention that the closure of Peros Banhos was brought about by subtle pressure from the Defendants on Moulinie & Co.

316. I regard it as being clear that the private law rights were used because there is no evidence that the procedures envisaged by the Immigration Ordinance were ever deployed even in a vestigial form, second the language used at the meetings was that the islands were being closed, and third, having acquired the land and as they believed all the interests in it, private powers would have been the simplest method of saying that the Ilois had to go. It would have been consistent with the argument that they had no rights there, property or otherwise. The documents show that the Ordinance was a back up to stop Ilois making for another island and to control their return should it be attempted. It could not apply to transfers within BIOT, or to the making of a choice to stay in or leave BIOT; it could only have applied to the final closure of Peros Banhos anyway and there is no evidence that it was used at that stage.

317. I turn from whether the actions were arguably unlawful in achieving the complete removal of the Ilois from BIOT, to examine whether there is an arguable case that any Defendant knew that to be the case or was recklessly indifferent to it.

318. Even if the Ilois from one or more islands had been compelled to leave under the Immigration Ordinance, there is no evidence that anyone thought that that was unlawful or was recklessly indifferent to that. This is closely related to the allegation that the enactment of the Ordinance was unlawful because of the purpose to which it was to be put, but again there is no evidence whatsoever that anyone knew or was recklessly indifferent as to its lawfulness. It is useful to put this in the context of what the law was. Specific legislative power was necessary on the assumption, which I make for these purposes, that the private powers could not be used. The form of Immigration Ordinance was more than a simple vehicle for expulsion as I have explained. The provision of the BIOT Order under which it was made enabled the Commissioner to make laws for "peace, order and good government" and that plainly encompasses the ability to pass immigration and residence controls. The only question is as to the limits on that power and whether it is more limited than the full power of the Sovereign who retains the power to make laws outside those limits. There is no issue but that the complete, removal of all the inhabitants could lawfully be achieved. If anyone had researched the scope of that phrase in 1971, they would have come to the case of Ibralebbe v The Queen [1964] AC

900,923. Viscount Radcliffe said of that phrase, which was used to confer legislative power on the Parliament of independent Ceylon, that it connotes "in British constitutional language, the widest law-making powers appropriate to a Sovereign". This was not an unusual conclusion for in Winfat Enterprise (Hong Kong) Co Ltd v A-G of Hong Kong [1985] AC 733, the Privy Council remarked that that had been repeatedly stated. It was argued in Liyanage v The Queen [1967] 1 AC 259 PC, again in relation to Ceylon that a Ceylon Act, passed after an abortive coup, which severely trammelled the rights of suspects, was unlawful because it offended against fundamental principles which had been inherited into the Ceylon constitutional framework. But it was held that the Ceylon (Constitution) Order in Council, which contained the phrase in issue, coupled with the Ceylon Independence Act were intended to and did give the full legislative powers of a sovereign independent state. The Independence Act provided for certain limits on UK legislation which had previously been enacted and for the removal of a bar to enactments repugnant to UK laws. It did not enlarge the law-making power. "Commonwealth and Colonial Law" by Roberts-Wray 1966 contains much in the same vein at p 369.

319. The Divisional Court's conclusion that those words were something less than the full sovereign power in the case of BIOT may be right but it could not possibly be said that someone enacting the 1971 Ordinance could have known that that was so or could have been recklessly indifferent to legality. The phrase is capable of permitting acts which infringe the fundamental rights of citizens as they might be regarded conventionally; a lawyer pre-Bancoult might have asked why it would not cover the removal of the inhabitants to a place of which they were citizens and which had agreed to take them especially where it was being done was for a sound reason in the interest of the security of the UK and her allies. The UK was responsible for the external relations of BIOT. Although the Sovereign might be divisible, Queen of Mauritius or BIOT and separately Queen of the United Kingdom, the power to legislate in section 11 was provided for the territory to be governed by reference to the needs of the UK and Colonies as a whole and their defence and foreign policy needs in particular for which aspect of BIOT the UK was responsible. Indeed it had specifically created BIOT for defence of the UK and Colonies. Section 11, if the scope of the phase in issue varied with context, has to be read in that light. The restrictions on the legislative power would be found in the Royal Instructions, the power of disallowance, any applicable UK law and the BIOT Order. The Chagos population could all have been removed to Mauritius, if BIOT had not been created. Indeed, as the only evacuation to which the Ordinance could conceivably have applied was that of Peros Banhos in 1973, there would have been a reasonable argument along the lines referred to by Gibbs J, that the removal of those who had lost all practical means of support and life was a proper use of such powers.

320. None of the material leading up to the enactment of the 1971 Ordinance suggests that any lawyer, draftsman, policy maker or whoever thought that the powers in the BIOT Order did not permit the Ordinance to be enacted. Nor is there any suggestion that there was no power to pass such an enactment because of the object for which it was to be passed, taking that to be the removal of the Ilois to Mauritius and the Seychelles. Insofar as its objective was to back up or permit the evacuation of the colony, that objective was seen as a necessary one and the Ordinance was a way of achieving it. There is no suggestion that anyone doubted that that could lawfully be done. It was recognised that politically the objective of permitting a US defence facility to be created in the Indian Ocean at the expense of people who had lived there for a number of generations would be controversial; but never that it could not be done lawfully. Nor

do I see any evidence from the whole of the documents that this was because the Ministers and officials were ignoring the possibility, suspecting that it could not be done. The purpose of obtaining such powers, in so far as they related to the removal of the population, was to promote the defence interests of the UK, its Colonies and allies. The use of powers taken under section 11 of the BIOT Order with the aim of promoting that interest had been made explicit in the 1967 Property Ordinances and the subsequent acquisition which was not a secret. No one suggested until the Bancoult judicial review that that might be unlawful. The passage or use of an Immigration Ordinance to promote that same interest would not have been any more obviously unlawful, once defence interests were acknowledged to be relevant under section 11, whatever the political controversies.

321. Legal advice was obtained, and not just about how to draft the legislation. The Commissioner received some legal advice; he was entitled to suppose that if it had been thought unlawful, the Legal Adviser would have raised the point, but he did not. I do not think that, in view of the material disclosed, it could be that he gave advice orally and that there are no notes of it or that the notes have not been disclosed. There is no reason to suppose that the Legal Adviser would have kept the Commissioner in the dark about it. It is perfectly clear that if a lawyer is involved, the Commissioner is entitled to take it that he is not doing something which may be unlawful. He would have realised the controversial nature of it and I can see why he would agree to give the Ordinance no more publicity than the legal minimum. But I do not accept Mr Allen's basic point that any politician would have known that the Ordinance was outside the powers of the Order because it was to be used to assist in the removal of the Ilois.

322. The Prime Minister was told of the position in a Brief from the Foreign Secretary attached to the Defence. It is a full brief. It refers to the numbers of Ilois, their status and nationality and to the advantages of preparing to resettle all of them out of BIOT. This would be achieved by negotiations with Mauritius and the Seychelles. It was approved by the Prime Minister. There is no suggestion in the Brief or in the Annex, or in any of the working papers which contributed to the Brief, that the proposal to resettle the Ilois was unlawful although the precise means were not discussed. It was clear that they were not to be given the option of staying. Legal advice was given in Paper No 3 that an Immigration Ordinance, which was necessary for other reasons too, could provide for the Ilois to be removed but that it could not be administered so as to leave them with nowhere to go.

323. There had already been a debate within the FO on 23rd October 1968, (5/555), between Mr Aust, the Legal Adviser and others about immigration legislation which was needed for other reasons too, including the need to reconcile the former Mauritius and Seychelles laws which applied to the different parts of BIOT depending on their previous attachment. There were further discussions in February and March 1969. Again, none of them suggest that the removal of the Ilois from BIOT, whether by an Ordinance or through private rights would be unlawful. That is not because they thought that it would be, but that it would be better to keep quiet or to keep Ministers in the dark. Ministers were fully briefed and there is no suggestion in the documents that officials would carry out the dirty work or leave Ministers out of it or ill-informed nor that they exceeded their authority or instructions. There is no realism to the notion that they were trying to deceive themselves and not say what they thought. It is because they did not think that it would be unlawful. It was not obvious to Ministers that there was some illegal

act afoot as Mr Allen suggested it should have been; there was an appreciation that this would be unpopular with the Ilois and others, but not that it could not lawfully be done. The same applies to lawyers. They saw wide powers under the BIOT Order and there were no legal restrictions on what they did. The actual or incipient application to BIOT of Article 73 of the UN Charter did not create a relevant legal obligation for these purposes although it added to the political problems. In January, February and December 1970, there were further discussions about the way in which removal might be effected, with the private law rights more to the fore, but again there is nothing to suggest that anyone knew, or was recklessly indifferent to the legality of what was being proposed. It is clear that the many individuals involved all thought that it was lawful to remove the Ilois from BIOT using either an Immigration Ordinance or private rights or both. In December 1970, Miss Emery suggested to the PIOD that there was something repugnant to the general tenor of British immigration legislation in the Ordinance. Mr Aust replied that it was severe but not so very different from the then proposed reforms to UK immigration law.

324. Mr Allen made some play, understandably, of Mr Aust's note of 16th January 1970, (6/842), in which Mr Aust spoke of the role of the Immigration Ordinance in "maintaining the fiction". The fiction was that there was no permanent population. It could then be said that they had no permanent rights. Mr Howell said that it had not been passed for that purpose in the end but to provide the power to deport and to control entry. I think that the real point of this is in the recommendation which is that the whole of BIOT should be cleared because of the problems which a partial evacuation would pose for the fiction, enabling the permanent population to grow. There is a different issue here, which I shall deal with later which arises from what Mr Allen submits is a whole series of deceits about the true status of the islanders. But I do not see that that remark shows that Mr Aust was recklessly indifferent to the law. After all, a major purpose of the Ordinance was to remove or to provide legal back up for the removal of the permanent population and that fiction does not suggest that he thought that it might be unlawful to remove them.

325. Mr Allen also said that the Foreign Office could not shelter behind the advice of Mr Aust, because he was only comparatively junior at the time although he has subsequently attained some eminence. In March 1971, he was only 29, and 27 when he wrote the above memo. He had been in post as an Assistant Legal Adviser for only a few years; it should have been obvious that he lacked the seniority to be dealing with these issues. Mr Allen said that Mr Aust had been instructed to advise on how to maintain the fiction. I do not see such instructions. That is his worldly wise assessment of the position which the Government was maintaining. I have only read his notes; they do not read as though he was out of his depth in the law or in dealing with those who sought his advice. On the face of it, there is nothing to warrant Mr Allen's submission.

326. It is not alleged that subsequently, the Defendants became aware of or were recklessly indifferent to the unlawfulness of the Ordinance until the Bancoult decision. That decision is the reason why the UK accepted before the UN Human Rights Committee that its prohibition on Ilois returning to the islands was unlawful and only to that extent. The Immigration Ordinance 2000 was enacted so that, in short, British Dependant Territories citizens connected with BIOT could return to the islands, save Diego Garcia. But that still does not entitle them to go on private land.

327. I turn from the Immigration Ordinance to the use of private landowner powers. It can only be said that the Defendants were not entitled to close an island to pursue the defence facility on the basis of the Bancoult reasoning, that no public body's powers could be exercised, having regard to the defence interests of the UK and Colonies. Dealing first with the enactment of the relevant land acquisition Ordinances, which I accept Bancoult's reasoning as to the irrelevance of defence interests to section 11 makes arguably unlawful, I find nothing in the evidence to suggest that anyone ever contemplated that such a limitation existed, let alone knew or was recklessly indifferent to it. Mr Allen's own advocacy shied away from the underlying reasoning. I am less than persuaded as to the correctness of the underlying reasoning as to the scope of section 11 in Bancoult.

328. Mr Allen argued that there was an obligation to leave so much of the island of Diego Garcia as would enable the Chagossian way of life on the main island to continue so that there would be work for the Chagossians. This is unarguable, as I have already said. There is no obligation on a government to provide for a particular level of economic activity; how many was it to provide for given that the Ilois were not obliged to stay? Were they obliged to work? If so, on what terms? The argument becomes no more than an argument that a government owes a legally enforceable duty to provide some form of welfare state and subsidised economy for its people, even if its legislature has not so enacted. But whatever the merit in that argument, which is somewhat beyond the cutting edge of public law jurisprudence, it is quite impossible to suppose that any Defendant or any official should have put his mind to such a legal proposition and realised that that was the law or that anyone who did not do so was recklessly indifferent to the legality of what he was doing.

329. I have accepted that it is reasonably arguable that the use of private land ownership rights to remove the whole population of BIOT was unlawful, because of the obiter remarks of the Divisional Court. I assume for these purposes that the earlier acquisition Ordinances were lawful. But there are real problems with that dictum which go directly to whether someone arguably knew that private law powers could not be so used or was recklessly indifferent to that. It is commonplace for compulsory purchase powers to be taken but for a private purchase agreement to be reached instead. The removal of those who once had rights or none is achieved through the exercise of private ownership powers for the public purpose. It has not been suggested that, if relevant, a balanced assessment of defence needs against the needs of the population could not properly lead to the conclusion that the former were the weightier. But the Crown in those circumstances is nevertheless, on the obiter remarks, disabled from using the private powers which it has taken under an unchallenged public Act for an unchallenged public purpose. The basis for the illegality must be that, even though the Ilois were arguably compelled to leave the whole of BIOT for a country of which they were citizens and which was prepared to take them, specific legislation was necessary for that specific removal. The Divisional Court does not contemplate any obligations on the Commissioner once the lands had been lawfully acquired: was he to provide jobs and if so what and for how long, or housing and education? Insofar as there was an inhibition on the use of the private landowner powers, it is difficult to see why it should endure once arrangements had been made for the islanders to go to a country of which they were citizens and which was prepared to take them. No-one was compelled to leave BIOT until that point. However, whatever the true legal position, there is no basis for saying that

any Defendant knew that the dicta of the Divisional Court represented the legal position or was recklessly indifferent to it.

330. The points which I have already made about legal advice apply to this power too.

331. It is said, of the re-amended Particulars of Claim, (paragraph 79/E/5), that there was no lawful authority for the removals, which were achieved by coercion. This adds nothing; if it is intended to do so it should be particularised or struck out. There is no evidence that coercion in a physical sense was used in the removals. The pleading and the Claimants' statements have used language which suggests it but there is no evidence for that. If the allegation is that the Ilois had no choice about leaving Diego Garcia and that they had no choice about leaving Peros Banhos, because none were given the unappealing option of staying without support, that is obviously true, but I do not think that that is what is meant. There is no allegation that there was any trespass to the person to anyone nor that anyone on behalf of the Defendants authorised or carried out any such act. The assertions about intimidation through threats of bombing or of being killed were not sustained in any evidence; the witnesses who claimed in their witness statements to have had such conversations with US or British officers did not speak English and did not support those allegations in their oral evidence. Mrs Talate's evidence is pleaded as typical of the Ilois experience. There was a fear of the planes which they saw taking off low over where they lived on Diego Garcia. I do not find it difficult that fears and rumours spread but that does not make them true, however real the fear. Mr Prosper, according to Mrs David, said that there might be bombs on the base which would make Peros Banhos unsafe; but she agreed that what was in her recent statement about being removed by British Officers was wrong and she agreed that there was no British official present at that meeting. There was understandable distress and fear created by the killing of the dogs. But there were no British Officers present at the evacuations, although there is photographic evidence appended to the witness statement of Mr Mandary, who was not called, that an American Officer was present at a meeting in January 1971 where the closure of Diego Garcia was announced to the Ilois. There was no evidence as to the position on Salomon when the last worker left and the evidence about what happened on Peros Banhos was vague. There were inconsistencies in the evidence of Mrs Mein and her daughter as to when they left but it appeared from her oral evidence that they left before the end because other labourers stayed and Mr D'Offay replaced her husband. Mrs Talate left in 1972, before the end having chosen to go there from Diego Garcia; she was told by Mr Prosper that the islands were closing. There is not the slightest evidence of the threat of or the actual use of force or intimidation to bring about the removal of the Ilois, or that there was any for which either Defendant was responsible.

332. The allegation in paragraph 79(e)(7) of the re-amended Particulars of Claim that the removals were unlawful because no adequate system for compensating the displaced population had been set up is not a basis for alleging misfeasance. There was some form of compensation, Rs 500 for those who went to BIOT, and the resettlement agreement with the Mauritius Government which had been reached before the closure of Peros Banhos. I have no difficulty with that being arguably inadequate if there were a legally enforceable duty to provide an adequate scheme but no such duty has been identified. There is no duty to so legislate and no existing power has been identified; if there were a duty to legislate, there is simply no basis for

saying that anyone knew of such a duty or was recklessly indifferent to it. This should be struck out.

333. It is not an allegation which appears to derive from the evidence about promises of compensation which were said to have been made by Moulinie or Mr Prosper or Mr Todd before people left the islands. Even if it did, it would not arguably found a case of misfeasance. Mr Todd's note of the meeting on Diego Garcia does not suggest that any promise was made by him and it would have been against policy for him to have done so; it is not realistic to suppose that he would have done so in advance of arrangements being made with Mauritius. Mr Moulinie had no authority to say anything about compensation being paid by the UK in 1966 which is the only vaguely recollected occasion when he might have done so. So far as statements by Paul Moulinie are concerned, there is no evidence that he had any authority to make them for the Defendants or that any such authority would have been given earlier than the agreement with the Mauritius Government in 1973. The real problem with the oral evidence, apart from its many unreliabilities generally looking back over 30 years, is that is inconsistent with the compensation intentions which the Defendants had before any arrangement with Mauritius in 1972. The sum was agreed at £650,000 in September 1972 and paid in spring 1973. The UK aim was to persuade those leaving Diego Garcia not to go to Mauritius and to go instead to the other islands, so it would have been especially surprising if the promises of compensation had been related to the option which the UK did not wish them to take. There is ample room for confusion in Ilois minds over what was promised to those on Diego Garcia if they would go to Peros Banhos and Salomon. There is no evidence about what was said on Salomon. What Mrs David said was said on Peros Banhos could have related to that agreement with Mauritius. The Ilois petition of about October 1974, referring to the promises made by a "military chief" that money would be paid to the Mauritius Government by the UK for compensation for the Ilois could also refer to that agreement but it would not have been said before the departures from Diego Garcia. Accordingly, it does not seem remotely likely that anything before the agreement with Mauritius or before the departures from Diego Garcia about compensation in Mauritius, was said with the permission or authority of the UK Government. If it was said after the agreement with Mauritius, and affected the Ilois' decision as to whether or when to leave, it is not untrue. There was provision for compensation; it turned out to be far smaller in practice when eventually disbursed in part because of the rampant inflation over the period in Mauritius and the growing debts of the Ilois.

Components of Misfeasance: Land Acquisition

334. It is now alleged that the purchase of the lands of Chagos Agalega Company Limited under the Acquisition of Land for Public Purposes (Private Treaty) Ordinance 1967 was additionally unlawful because the Ilois had some property interests which meant that they should have been notified of the purchase. The method had been adopted to avoid giving them notice. There are a good many hurdles in the way of that as an argument as to illegality at all. The Commissioner had legal advice about the making of the Ordinance. There is no evidence that he knew or was recklessly indifferent to any illegality in the making of the Ordinance or in its use

on this occasion. No Particulars are provided to assist. This allegation should be struck out of the misfeasance claim. I deal further with this point when considering the property claim.

Components of Misfeasance: Deceit and the UN

335. There are a series of allegations about deceit and pretence. In summary, the Claimants allege that the Defendants had a policy of denying that there was a permanent population of Ilois even though they knew the truth; they used language in public which was designed to convey a picture which they knew to be untrue and to quiet anxieties and controversies which would otherwise have arisen. This was done to deceive the UN in relation to the application of Article 73 to BIOT, the Commonwealth Heads of Government, and MPs. It is pleaded that it was unlawful for a policy and administrative decisions to be based on a pretence and that that constitutes an illegality for the purposes of misfeasance. This was given effect to in the removals and exclusions with which I have dealt. There is a related allegation that the Defendants adopted a policy in 1970 of concealing from the Chagossians, the Mauritius Government, (until 1972), and others that the Chagossians were Citizens of the UK and Colonies in order to encourage the Mauritius Government to take them in and on more favourable terms than might otherwise have been negotiated. Deceiving one's citizens is also illegality for the purposes of misfeasance. There is also an allegation that the Defendants wilfully failed to balance the individual needs of the Ilois against the foreign and defence interests of the UK by failing to communicate to them their true legal position and the Government policies that affected them.

336. The pleading of these allegations suffers from some drawbacks. It looks as though they are intended to form the basis for saying that the removals were unlawful, but some relate to subsequent periods. So they must be free standing allegations of misfeasance.

337. It is quite clear that the decisions and actions of the Defendants were not taken on a false basis, which appears to be the first allegation. They investigated through surveys what the population was and certainly knew by the Todd report of 1967 that the Newton Report might have underestimated the numbers of Ilois at a time after the creation of BIOT, which some of the documents show was intended to have no permanent population at all. They were very well aware of the dual citizenship which was acquired upon the independence of Mauritius and that therefore the BIOT population retained its UK and Colonies citizenship. They had a clear and honest picture that the Ilois had no property rights. It is not said in this respect that the Defendants deceived the Claimants, who obviously also knew the true position.

338. I accept that, without going through all the documents, the Government arguably sought to paint a different picture from the one it knew to be correct in its dealings with the UN over whether there was a permanent population. The Defendants would have maintained that same stance generally. But this does not advance the Claimants. This is not an allegation of deceit on the Chagossians who knew what the true position was. I do not see how it can be alleged that there is an actionable legal duty of candour and truthfulness towards the UN, other governments or politicians or MPs, let alone one which can ground an action for misfeasance by those to

whom the remarks were not made. The consequence of the lack of candour or half truths may have been that those who might have created more political controversy in support of the Ilois or in opposition to the defence facility, did not do so, but that does not ground an action for misfeasance. It is perfectly possible to recoil from some of the comments without them grounding an action in misfeasance. But whether or not it is wise to conceal facts from the UN or to give a false impression to other Governments must depend on a political judgement which it is for Parliament to judge. There might have been good reasons for not giving ammunition to those who would oppose the UK's defence policy and for trying to find formulae which are partial truths and only to be used if necessary. The judgement that the defence policy might require UN obligations not to be fulfilled is a matter which is not justiciable in this Court. This is a matter of foreign relations and defence strategy. The way questions are answered in the House of Commons is a matter for the House of Commons.

339. Mr Allen made broader submissions about the UN in relation to deceit, but it is convenient to deal with them here. The essence is that the Defendants made false representations to the UN knowing them to be false in order to prevent the protection of Article 73, which it is said the UK knew would apply to BIOT, being afforded to the islanders. But for those deceptions, the UN would have tried at least to give effect to their rights. Mr Howell submitted that this was in effect either trying to enforce rights under an international treaty or trying to obtain the ruling of the Court on the meaning of an international treaty, because the essence of Mr Allen's argument was that what the UK did was in breach of the UN Charter, which was a matter which could not be determined without reaching a conclusion on what it meant or how it applied to the facts. This was not the same as the deception of A, through representations to B, intending B to be the conduit for A to be told.

340. Mr Howell relied upon a number of authorities. In J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1990] 2 AC 418 499-501, Lord Oliver said that municipal courts could not adjudicate on or enforce rights arising out of international treaties, unless they had been incorporated into domestic law. Individuals cannot derive rights from such treaties nor are their rights affected by them, as Mr Allen pointed out correctly was the position with the various UK/US agreements which led to the establishment of the defence facility. The UN Charter was outside the purview of the court not only because it had been made in the pursuit of foreign relations but also because it was irrelevant. This was said to be well established. In a thorough review of the authorities in Lonrho Exports Ltd v Export Credit Guarantee Department [1999] Ch 158 at p179, Lightman J said that the court had to follow the interpretation of the Crown and cannot venture its own interpretation of international treaties, nor could it seek to see whether the Crown had implemented its provisions in good faith as required; there are of course exceptions but they do not apply here.

341. It is not possible to reach a view on whether the UK acted in breach of the Charter without analysing what the Charter means. Mr Howell persuaded me that I could not say that the UK Government had decided what it meant; it had acted because of the way in which it knew others might seek to interpret it. He illustrated that in relation to BIOT: it was not clear that all non-independent territories were non self-governing for the purposes of Article 73 and had a duty to be brought to independence; that would rather depend on the circumstances. There had been no General Assembly resolution that BIOT was a NSGT. The UN's concern has been with

the detachment of BIOT. Here Mauritius would be, and would have been after the creation of BIOT, anxious lest BIOT became independent and would not support the UK in achieving that; the Seychelles likewise till its islands were restored in 1976.

342. In R (Abbasi) v Secretary of State for Foreign Affairs [2002] EWCA Civ 1598, 6th November 2002, [2003 UKHRR76] the Court of Appeal held that there was no authority which supported the imposition of an enforceable duty to protect the citizen, and that although the court was able to intervene, in limited ways, in the way in which the FCO used its discretion whether to exercise its right to protect a citizen, the court would not interfere with matters of foreign policy. The question of whether a court would intervene rather depended on how administrative the decision was or whether there was a policy which might give rise to a legitimate expectation. Here, the relationship with the UN and other states over how to deal with the proposal for an internationally controversial defence arrangement and the consequences for the people on the islands in terms of UN rights is plainly a matter of high policy, in which relationship the Court should not interfere. This allegation should be struck out anyway. I am also satisfied that the Claimants' broader submissions seek to recover damages for misfeasance or deceit by reference to what was said to the UN or to other Governments and to that extent those claims are unarguable. But, as Mr Allen pointed out, the terms could be referred to for what they showed about the factual background and I shall deal later with whether this is a case of deceit through a third party who was intended to be the conduit for the deceit.

343. I accept that the Government also arguably sought to avoid referring to the dual citizenship of the Ilois between 1970 and 1972 when dealing with the Mauritius Government. Again, I do not see how that can ground an allegation of illegality, let alone one upon which the Claimants can rely in a misfeasance action. This is a matter of foreign relations. Besides, the Mauritius Government only had to look at its Constitution and the Mauritius Independence Act which made the position clear. The Prime Minister of Mauritius knew of the position.

344. One needs to be careful about what is deduced from the documents anyway about what was known or said about the status of the Ilois. Some are drafts or discussion documents and not necessarily the actual public stance adopted. Some are only for use if necessary and it is not in evidence whether what was proposed to be said actually was said. Some contain comments to protect or advance a particular departmental interest. I say that because there is a danger that the internal documents are treated as the final acts, although they may suggest an outlook, thought process, intention or knowledge. At this stage it is reasonably arguable that what was the agreed line was used on some occasions to the UN or other bodies. However, the description of the Ilois as workers is true on the evidence. No-one worked other than for the plantation company or in a domestic capacity for senior staff. There was no independent economy. Even if for those who were too old to work, there was a company pension or rations, many did light work. There may have been women who did not work at various times but their husbands were working for the company. But there is no evidence of self-employed labourers or fishermen or retailers. At least that is a view which could properly and honestly be held and the reports of Mr Todd suggest that all the Ilois were employed. It is also clear that no-one thought that the Ilois had any property rights to any part of the islands; the islands were owned either by the plantation company or by the Crown. It may be that that view is possibly wrong, but it is a view that was genuinely held and there were perfectly good reasons for holding it. How such a position fits with the rights of

those same people who have been there for a number of generations is a matter of some difficulty. The partial truths focussed on the former and ignored the latter part of the problem. The problem with the phrase "contract workers" is that whilst it is true in one sense, it also conveys, perhaps intentionally, the different impression that they are short term or transient. At other times the language shifted to refer to "transients" which pushes further still away from the truth and the numbers who might have a wider right were minimised by aligning them with the short term workers. But the arguable factual point needs to be seen in that light.

345. I do not consider that it is misfeasance for the Defendants, without more, to seek to make the facts fit what they have said the position is. That simply goes to the question of whether the removals were lawful or not, and whether it was lawful to remove a permanent population. If it is, the fact that their status has not been told truthfully and fully to the world does not alter the lawfulness of the act. I do not consider that the Defendants' approach to the description of the Ilois' status evidences the requisite mental state for misfeasance. The purpose of the half truths or lies was not to deceive themselves as to the law and to enable decisions to be taken on a false basis. They knew only too well what the true position was and that is why they acted to bring about the clearance of BIOT, if that is what they actually did. They misrepresented the position to others for political reasons so as to quell opposition to the defence proposal, to the creation of BIOT and to the removals.

346. I do not consider that the fact of such an approach to the existence of a permanent population, as is arguably revealed by the documents, evidences guilty knowledge in relation to other acts which are alleged to be illegal. There is no connection between them. Nor do I consider that the sometimes harsh and contemptuous language used about the Chagossians shows any requisite knowledge or recklessness, much though I understand why Mr Allen sought to rely on it.

Components of Misfeasance: Deceit and Citizenship

347. So far as citizenship and the Chagossians is concerned, this pleading, unlike the allegation over the permanent population does contend that the true position was kept from the Ilois. It is said that the Defendants sought to conceal the position and also that they deceived the Ilois, which is I suppose, an allegation that the Defendants' endeavours were successful. This latter allegation is entirely unparticularised. There is no documentary evidence suggesting that the Ilois should be told that they were not UK citizens or that the Mauritius Government be asked not to tell them. There is no evidence of any Ilois being told that he was not a UK citizen when he was, whether in their oral evidence or in the documents. The evidence is all the other way: when they asked they were told. Michel Vencatessen had "British Citizen" stamped in his travel card in the Seychelles. It was set out perfectly clearly and accurately in the Defence to the Vencatessen litigation in 1975. The Minister, Mrs Chalker, was asked about the position in 1981 before the delegation came to London and replied correctly. Cherry Alexis applied for and got his British passport in 1985.

348. As to the former allegation that the Defendants sought to conceal the position, it is readily arguable that the UK Government was deliberately not forthcoming to the Ilois, and especially not in the early days of the decision to evacuate or during the removals and the early years in Mauritius. It arguably adopted the policy of saying something less than the whole truth in the hope that the implicit denial would be effective. In October 1974, (8/1373-1374), it declined to assist the Ilois, in response to a petition seeking its help, by saying that Mauritius had accepted responsibility for their resettlement and that it could not intervene between Mauritians and their Government. A Mauritian newspaper was pursuing the line that the Ilois were British citizens. Mr Howell said that it was an accepted principle of nationality law that one Government would not intervene between its citizens and the Government of the other country of which they were nationals when they were in that country and that is the principle which underlay the stance. Mr Allen said that that principle could not apply where the individuals were in that other country as a result of wrongs done to them by the country from which they were now seeking protection. Either contention may be the legal position, but the principle of dominant nationality was not the reason, arguably, for the non-intervention. The documents are consistent with a desire to avoid it being known that the Ilois were dual nationals, unless the truth had to be told. The UK Government may well have known that the Ilois did not know really what their British status was, and have done nothing to enlighten them.

349. I do not consider that omission to be an arguably illegal act or one which would have been known to be illegal. I do not accept the general premise of so much of Mr Allen's argument which relies on the assertions of a governmental responsibility arising out of the fact of citizenship. I do not see the source of a positive obligation on a Government, unpalatable though it may be, to tell its citizens of their legal status. No untruth was said; although the Defendants were avoiding telling the whole truth, they did tell the truth when the issue directly came up. If the author intended to create a false impression, I can see a basis for his acknowledging that that was wrong in a moral or political sense; but, if that were illegal, there is nothing to suggest that he suspected that it might be. The Defendants' actions were on a number of occasions harsh, callous and less than wholly candid, arguably. It may be that the Defendants should have communicated more with the Ilois about their situation as a matter of responsible politics; it may be that there are many views possible on that. But I am unable to find the illegality in that which would ground an action for misfeasance, arguably.

Components of Misfeasance: Overriding the Islanders' Interests

350. Finally, it is alleged that the Defendants acted with a conscious disregard for the rights of the islanders and allowed other interests to override them completely. This may in part be the same point in fresh language as I have already considered. It is also wrong on the facts. The documents show some concern about whether the US can be persuaded not to take the whole of BIOT; there were some albeit fruitless endeavours to persuade the US to take Ilois workers. The submission to the Prime Minister and other documents show that although the removal of all the islanders was envisaged, their welfare was to be regarded as an important consideration. There were no removals until after arrangements had been put in place for them to go to countries of which they were citizens and which would take them. Some already had a degree of connection

with those countries. There was an agreement for a resettlement fund which would have been more effective had it been distributed earlier by the Mauritius Government. Some thought went into provision for their resettlement. What was done and omitted can readily be criticised but it is simply wrong to say that all was done in disregard of the Ilois and conscious disregard is not justified at all. The fundamental problem was that there was an irreconcilable clash between the interests of the Ilois and the defence interests of the UK and USA. The resolution of that clash was a matter of politics at a fraught time internationally. Whether as the losers in that clash, the Ilois were treated as they should have been is another matter.

Misfeasance: Conclusion

351. Accordingly, I do not regard there as being an arguable case of misfeasance. If there were, I would stay proceedings until there were a proper pleading of who did what and with what knowledge or recklessness. The pleading is wholly inadequate for allegations of that gravity and the material exists for a far more explicit pleading, if the case exists. Some of the individual allegations are inadequately pleaded, or are too vague to remain anyway and I have indicated those which I would have struck out. It is also impossible to see how the tort could apply to those who left Chagos whilst the islands were still part of Mauritius, or who had not been born there by 1973.

352. Mr Allen says that it is premature to reach a conclusion on this, as on other matters, in advance of full disclosure of documents and cross-examination. This, he reminds me correctly, is not a mini-trial. He pointed out all that was said by the majority in the House of Lords in Three Rivers, although there is also an application for summary judgment here. I am acutely conscious of the gravity of the allegations and of the treatment meted out to the Chagossians by this country as a colonial power. But I cannot allow an argument to continue for no better reason than sympathy with the Claimants' collective misfortune. There is no basis for supposing that there are any significant documents on the Defendants' side which have not been disclosed. The spirit in which the Defendants have conducted this litigation is different from that in which the earlier litigation started so long ago by Michel Vencatessen was conducted according to Mr Gifford. In any event, the Claimants can read all the relevant documents released under the 30 year rule. Mr Allen proclaims the arrival of volume 23 as the proof that it could not be said that there were no more documents. I accept that there may be documents which have not been disclosed; but that is because the allegation leading to their disclosure has not been made. Volume 23 responds to the allegation that the Private Treaty Ordinance documents had not been disclosed and the Claimants might have wished to make an allegation of targeted malice, a late piece of speculation by the Claimants. The disclosed documents do not support that allegation, they show it to be unsustainable and it has not been pursued. Mr Allen seeks to make something of the documents which have been revealed in another context. But that amounts to saying that if he makes more unfounded allegations, some other documents may emerge by that sidewind. I do not think that anything of significance emerged from that late volume. I am wholly unpersuaded that I should allow the misfeasance case to continue on the speculative possibility that something significant will be thrown up in view of what has already been disclosed, the 30

year rule, the evident openness of the Defendants, and in the absence of any obvious undisclosed stream of correspondence.

353. One of the factors which persuaded the House of Lords to allow the Three Rivers case to continue was the prospect that cross-examination of the Bank's witnesses might throw light on events. Mr Allen suggested some topics upon which he would like to cross-examine. It is not helpful to his cause in that respect that he was, until his closing submissions, unwilling to identify anybody against whom an allegation personally was made. How was the witness to be identified to whom he might wish to put these points? As I understood his case, after taking up some time trying to discern the legal framework to what he had painted with a broad brush and general feeling, the senior Ministers were not the only targets of these allegations but anybody who featured as the author of the documents which he relied on. So he had a large cast list. But the Prime Minister and Foreign Secretary in office from 1964 to 1970 are dead; the Foreign Secretary from 1970 to 1974 is also dead. Sir Edward Heath is not recorded as having any personal involvement, unlike his Foreign Secretary. A number of other Ministers, from that and later periods are dead, though not all. I do not know about the Commissioners or High Commissioners and Governors. But Mr Todd is dead. Many of those who are alive or who might be are elderly. All those who gave evidence about that period would be doing so about what they had known or believed thirty or more years ago, and however wide Mr Allen casts his net the period crucial for this claim is 1965 to 1974 or thereabouts. I do not believe that they would be able to do more than to rely upon what the documents say. Mr Sheridan, giving evidence about events 20 to 25 years ago was reliant on the documents for his understanding; he accepted what they showed even though he had no actual memory of many events. Mr Glasser was in much the same position. Mr Grosz, who is not elderly, dealing with events of 10 to 20 years ago was unable to remember important details and was reliant on interpreting documents, which did not always refresh his memory. The evidence of the Chagossian witnesses showed how the passage of time had diminished the accuracy and extent of their memories. Where the evidence of a witness is inconsistent with the extensive array of contemporaneous material, it is very difficult to see how the former rather than the latter would be preferred.

354. There is no reason to suppose that the role of a witness, linking and explaining documents, is of particular importance in this case. The documents are extensive. They were not written for public consumption for the most part and there is no reason to suppose that they do not contain the actual views and beliefs of the authors. They had no reason to deceive each other. The documents, by their very tone, suggest internal candour. There may, of course, be an element of self-protection in some of what is written by one official to another on a controversial plan in case of trouble later if it all unravels, but that aspect is unhelpful to Mr Allen's approach. Mr Allen's case as to the iniquity of the Defendants' actions and motives is that the documents show it. I have dealt with what they may show, but it is difficult to see that a new case could be fashioned out of cross-examination. A witness might be asked about what he knew or suspected for the purpose of the mental element of the tort, but the documents explain what was known and believed and why the stances and lines which Mr Allen criticises were adopted. Appealing though it might be, and in one sense perhaps justified, it is not the function of litigation to provide a forum in which, outside of the framework of the torts alleged, cross-examination is permitted so as to achieve the effect of an inquiry into possible government failings and

wrongdoings of the nature generally alleged by Mr Allen as his starting point for the consideration of this tort.

355. Mr Allen suggested that particular areas where cross-examination would advance his case were about why the Chagossians were not consulted in relation to the plans for the Chagos, what was said in Whitehall but which is not referred to in the documents and what historical research was done into the position of the Chagossians in the 1960s and if none, why not. As to the first, I have already dealt with the possible duties as a matter of law. I would have thought that the answer as to why they were not consulted about whether there should be a defence facility was tolerably obvious; it is discussed by the then Foreign Secretary in the memo of April 1969. I cannot see what any cross-examination would advance. They could have been consulted about what was to become of them; that failure is arguably unlawful. But I cannot see how cross-examination has any prospect of showing what the documents do not even hint at, which is that whoever Mr Allen targets as a relevant malefactor, knew or suspected that there was a legal duty to do so.

356. As to the second, I have already dealt with the significance of the documents. People communicated by documentary means, they minuted meetings, they wrote notes on each others' memos. Communications with the UN mission or the BIOT Commissioner or High Commissioners were in writing. There was every reason for officials to put down what they thought in writing. So many were involved that it is difficult to see that there could have been some general conspiracy or even a tight knit one to keep off paper the supposed recognition that there was something perhaps unlawful about what was proposed. More curious still, the notion that they were prepared in robust or callous language to deal with the way in which the political problems were to be handled, upon which Mr Allen relies so heavily, and yet were to deal with other, legal, anxieties in conversations never to be recorded. His case is that the papers raise an arguable case of misfeasance; they do not. He cannot hope to make it good by a speculative, wide-ranging cross-examination of whomsoever he eventually identifies, who is still alive and can remember what he thought at the time other than through the documents. It is not without importance in this context that, at any trial, the burden will be on the Claimants to prove their case and to do so with the cogency required in relation to allegations of such gravity.

357. As to the third, it is clear from the documents what research was done. There are also subsequent internal reviews, one in particular by the FCO in 1983. Whilst in certain respects its conclusions may be inadmissible, it is a relevant document in showing what material was available within the FCO at the relevant times. None of his other suggested topics bear upon this tort eg why was no provision made for Seychelles Ilois, to which the answer appears many times in the documents, or why did the UK Government not insist on simultaneous Creole translations in 1981 and 1982 (for which no-one asked).

358. It may be right that there is more evidence which the Chagossians could give on the evacuations and their inability to return. But it was their wish to give oral evidence about these matters so as to establish that their various allegations had a factual base and to give colour and context to the legal issues. They were put forward as typical. If they did not support all the allegations of fact in the pleadings, as they did not, there is no reason to suppose that any others would do any better. The pleadings were presumably based on the witness statements which had

been prepared for the hearing and on those prepared for the Bancoult Judicial Review. In certain respects the basis of the pleading has been shown to be inaccurate. I do not accept that an allegation should be made and then the witness found to sustain it. In other respects, the evidence has clarified what was ambiguously alleged in a way which was capable of suggesting one thing while meaning another. I refer to the use of the words "forced" and "coercion" in relation to the actual evacuations which suggest possibly that physical force was used when it plainly was not; it means that they had no choice.

Deceit

359. There is a familial resemblance between the pleadings, and their deficiencies, in this tort and misfeasance. It is pleaded that the Defendants made false statements of existing fact to a range of people, including but not limited to the Chagossians, knowing them to be false, intending the Chagossians and others to act on them to the detriment of the Chagossians. Although the individuals making the representations are not specified, this is a case where the pleadings incorporate by reference specific documents which may or may not identify some of those against whom this serious allegation is made. But the pleading makes it clear that it relies as well on other unspecified documents. As with the inadequate pleading of the misfeasance claim, this vagueness is not appropriate for the reasons which I have given. A claim of dishonesty against a large group of individuals, or some and perhaps not others, is unfair and a wasteful way of conducting proceedings. There is no reason why they should not be identified even if it is only as the author of the document. I would require that to be done before any further steps were taken. That should enable it to be seen what is alleged to have been represented to whom and how. Anything less would make the efficient preparation of the case very much more difficult. There is no more scope for corporate dishonesty in deceit than in misfeasance, other than by the attribution to a corporate body of the dishonesty of an individual. Jaffray v Society of Lloyd's [2002] EWCA Civ 1101 CA 26th July 2002 at 65, 70-74, and the individual conclusions, illustrate that in the context of deceit.

360. The false statements of past or existing fact alleged were that the Chagossians were not permanent residents or belongers of the Chagos islands, that they had no right to remain in the Chagos islands, that they were not British citizens and that they had no rights under the UN Charter. These representations were made expressly in the identified documents or impliedly "from non-disclosure or inaction" to the Chagossians, the UN, the UK Parliament, the British press and to the Government of Mauritius. There was a duty on the UK to provide full and frank information to the UN so that it could carry out its obligations to protect the Chagossians. The Defendants acted dishonestly because they created and maintained the fiction that there was no permanent population even though they knew that not to be true. They did not tell the Chagossians of their possible rights as belongers or British citizens and they deceived the Mauritius Government on the same point. They failed to report to the UN on BIOT as they knew they should have done. They tried to mislead the press and Parliament and tried to minimise the publicity given to the Immigration Ordinance.

361. What was pleaded as the purport of the identified documents, and of the whole documentary record, was that the Defendants knew that there was a permanent population, that they devised terminology to convey the opposite to others than the Chagossians, and sought to

conceal their UK citizenship from the Mauritius Government. Those particular representations are acknowledged not to have been made to the Chagossians to whom the representations are rather different. The purpose of this pleading was to allege that the deceitful representations were made so that those who might have helped the Chagossians to assert their rights did not do so. These agencies and organisations included the UN, Parliament, the press and the Government of Mauritius. This led, as intended, to evacuations without international interference and significant demur from those bodies, so they acted on the misrepresentations as intended by doing nothing.

362. Recognising that the Chagossians would have known that a representation to them that there was no permanent population was untrue, Mr Allen pleaded that different but related representations were made. These were that they had no choice but to move out when required and were not told of their rights or their position as UK citizens. They had rights as the permanent population of a non self-governing territory under the UN Charter. Unfolding events were presented as a fait accompli. The representations were "buttressed" by statements at meetings that the islands would become dangerous, that the US needed all the islands, that compensation and homes would be provided. They were "reinforced" by intimidation: the arrival of troops, low flights and the killing of the dogs. The Chagossians acted as expected and left, complying with instructions with which they thought, wrongly, they had to comply, unaware of their rights. The Defendants took advantage of their poverty, ignorance and illiteracy; they controlled their means of communication with the outside world.

363. Mr Allen argued that the representations to others than the Chagossians were relevant because misrepresentations did not have to be made directly to the person for whom they were intended. He referred to Swift v Winterbotham 1873 [LR] 8QB 244. A bank employee gave a false reference to another bank, inquiring of it as to the solvency of its customer, intending that the inquirer's customer should act on the lie and engage in a business deal which failed. The misled customer sued the bank which had given the false reference. This does not support the sort of case which Mr Allen mounts. It is plain that a misrepresentation can be made through a conduit, and that it can be made to an agent. It can be made to someone who, having sought the information as an agent, is expected to pass it on to the person who acts upon it in the way intended. But Mr Allen's case is that the representations were not passed on. They were acted on by others in an entirely different way. I also found the case of Farah v Home Office, 6th December 1999 CA (unreported) of no assistance. It concerned a representation about immigration status to a carrier in the expectation that it would decide not to carry the passenger; such a representation arguably founded a negligence action because there was arguably a sufficient degree of proximity between the Home Office and the passenger to give rise to a duty of care.

364. I do not consider that it is arguable that the Claimants can sue in deceit in respect of representations which were not made to them directly or to an agent and in reliance upon which they did not act, being unaware of them. I regard that as obvious. Jaffray illustrates it, but it is incontrovertible. I accept that it is arguable that false statements were knowingly made to third parties about the status of the Ilois as residents on Chagos, but with the intent that those third parties should act on them, rather than communicate them to the Ilois, who would have known that the statements were untrue. They may have been intended the persuade those third parties to

do nothing to investigate or assist the Ilois, or to reduce opposition to the Defendants' defence policies. Mr Allen sought to create a variant tort of deceit to fit the problem. He urged that it was arguable that if a false representation is made to a third party, intending him not to alert the Claimant to harm which is intended to be done to him by the representor, but which he would have helped to avert or to warn the Claimant about, the variant tort of deceit would have been committed. This he said was consistent with principle. It was stronger if there was a duty owed to the Claimant by either of the others but not essential. I do not follow this. If the act done or representation made to the Claimant, whether by word or deed, is a wrong which sounds in damages as a tort, the Claimant has his remedy. If it is not, I do not understand why the fact that a lie has been told to a third party converts it into one. This whole basis of claim is posited on an absence of communication between third party and Claimant. This is not a case where the third party owed a legal duty to communicate with or to look after the interests of the Claimants, in the exercise of which the false statements interfered, deceiving the Claimants. Indeed, Mr Allen really sees this part of his argument as strengthening his case that there was a deception practised on the Chagossians.

365. The only relevant representations are, indisputably, those which were made to the Chagossians. There are no agents to whom they were made. It has to be pleaded that they were as to past or present fact, the natural and probable result of which was to induce the Chagossians to act on them in the way in which they did act, that they were intended to act in reliance on them and suffered loss in consequence. The representation must have been known to be untrue or to have been made recklessly, not caring whether it was true. As with misfeasance, this is a tort which requires to be proved with cogent evidence.

366. The specific documents pleaded cannot constitute any relevant representations because they are all internal documents with a restricted circulation and there is no evidence, and it would be hugely improbable anyway, that they came into the hands of the Claimants or were read by them. Other documents may evidence what was said to them at various times, but the striking feature of those documents is that not one was for public consumption and although some may have led to a public statement, those are not referred to specifically. What is meant by the assertion that they were made by implication from non-disclosure, is that the specified representation was not made and that its content was not expressly denied either. There may be occasions where there is a duty to speak such as where a representation was made believing it to be true but the representor discovers that it was untrue, but none of those circumstances apply here. Silence does not ground deceit by itself in the absence of a duty to speak and no such duty is alleged.

367. There are a series of allegations about the way in which the evacuations were effected through the representation that the Chagossians had no right to remain on the Chagos islands and no choice but to go, buttressed and reinforced in various ways. The representation is not alleged to have been that they could not remain on any individual island, or that they could not remain because their contracts had been terminated or their employment ceased with the closure of the plantations. It is not said that they were falsely told that they had no right to be on any particular island, only that they were falsely told that they had no right to remain on even one island.

368. There is very limited oral evidence that any such representation was made but I can see an argument that it is implicit in the conduct of the Defendants, is consistent with what they reveal about their thoughts in the documents and is what would have been said if the issue had come up. So I think the Claimants have some prospects of getting some kind of case to that effect off the ground even before the evacuation of the last island in 1973. If it were said it would, arguably, have been to encourage islanders to go peacefully when the time came. I have already expressed my views on the prospects of the intimidation allegations, the promises of compensation and the statements of danger being made good but that does not mean that the basic premise for the allegation that the representation was made is ill-founded. I have also dealt with the absence of evidence to show that they were made on behalf of the Defendants.

369. The representation is alleged to be false because the islanders were the permanent population of a NSGT and thereby entitled to the protection of the UN under Article 73. I do not understand how this can be thought to be arguable. The Article confers no individual rights and can scarcely be thought to have done so. The UK is entitled so far as any domestic law obligations go to ignore it. It is fanciful to suppose that there could have been representation which was intended to cover international treaty obligations between states. Mr Todd, for example, would not have intended any statement to cover that. He would have been focusing on the contract and residence position. Even if there had been such a representation, it would be necessary to show that it conferred rights against the UK on the people of BIOT. I have already explained that the nature of those obligations, as between states and the UN, are not justiciable nor are any representations about them capable of founding any arguable deceit claim. There is no evidence that anyone who might have made any such representation to the Ilois knew of or was reckless as to the falsity of that statement. As the Article could not ground a right anyway, even if the position was falsely stated, it would not have entitled them to stay and so no loss flows. The representation, arguments about the UN apart, is either true or, insofar as the effect of the Bancoult case is to falsify it, it is not arguable from any of the material that it would have been known to be false or suspected to be false. There is no evidence which suggests that those who made the statement did so other than in the belief that what they did and said was true.

370. It is not clear whether the allegation that they were said not to be belongers was something which was said to the Chagossians. I rather doubt it, but the concept is sufficiently uncertain for it to be very difficult to see how any statement about it could be made deceitfully. Neither of those representations are of existing fact either. There is no evidence that any Claimant was intended to or did act upon any such representation anyway.

371. Dealing with what was said about UK citizenship in connection with achieving the removals, there is simply no evidence that any representation about it was made at all. It is therefore alleged that the position was concealed. That goes nowhere in the absence of an arguable duty to state the position. The usual suspect of "governing responsibility" is the only candidate, no duty being specifically identified in this context. It is not an arguable basis for imposing a duty, breach of which amounts to deceit. There is no arguable case in relation to the tort of deceit.

Exile

372. Mr Allen submitted that there was arguably a tort of unlawful exile but that the court should be slow to attempt any compendious definition. I am prepared to go along with that. Its essential features would be that the Crown could not send out of British territory a British citizen of the territory or a belonger of that territory without either the free consent of the person or by statutory authority. Similarly the Crown may not prevent or obstruct the return of such a person without statutory authority. The tort continues to be committed from the moment of wrongful departure until return. Here, it was alleged that the Chagossians were "belongers" to Chagos (rather than BIOT), and were citizens of the UK and Colonies or British Dependant Territory citizens by connection only with BIOT. They were removed without their consent, or without fully informed consent, and those who had left voluntarily were prevented from returning or their return was obstructed as was that of the islanders who left on the evacuations. The tort continues in relation to Diego Garcia because the Crown has not contemplated that they can return there at least to live; it continues in relation to Peros Banhos and Salomon because the Crown has not removed the practical impediments to that return, which include the cost of transportation and the creation of an infrastructure which would sustain a modest but viable way of life.

373. Mr Allen submitted that the right not to be exiled otherwise than with consent or statutory authority is well established. He referred me to Magna Carta: "No man shall be ... exiled … but by lawful judgment of his peers or by the law of the land". A number of academic histories of the law and well known commentaries from Blackstone, Holdsworth, Stephen and others broadly support that position. Exile or transportation as a punishment, to which consent was given to avoid something worse, was replaced by statutory provisions for the transportation of convicts to colonies. International treaties, to which the UK is a party, reflect that developing law. The Universal Declaration of Human Rights, 1948 states in Article 13(2) that "Everyone has the right to leave any country including his own and to return to his country". The International Covenant on Civil and Political Rights, 1966 states in Article 12(4) that "No-one shall be arbitrarily deprived of the right to enter his own country", a Covenant ratified by the UK in 1976.

374. He next reasoned that those treaties and the developing jurisprudence over the years meant that there was a common law right not to be exiled. In Plender on "International Migration Law" 2nd ed 1988 p133, it is said that "The principle that every State must admit its own nationals to its territory is accepted so widely that its existence as a rule of law is virtually beyond dispute". But he also considers who can enforce that right, whether it is the expelling state or the individual and whether it is the enforcement of a right at international law which requires the domestic law to have incorporated the principle of international law. He does not set it out as a principle of common law in the UK which can only be removed by specific legislation; that may be the position but the quote relied on by Mr Allen does not support his proposition read in context. In Van Duyn v Home Office [1974] ECR I 1337 at p1351, the European Court of Justice remarked, in relation to its approach to the free movement of workers and public policy within the Treaty of Rome, that "Furthermore, it is a principle of international law … that a state is precluded from refusing its own nationals the right of entry or residence".

375. Mr Allen then made the very broad submission that such rules of international law were incorporated into English law without Act of Parliament being necessary even though Protocol 4 of the ECHR had not been ratified. I have referred to this earlier. Mr Allen relied upon the analysis of the doctrines of incorporation or transformation of international law by Lord Denning

MR in Trendtex Trading Corporation v Central Bank of Nigeria [1977] QB 529 553. The case concerned the developing international law to cope with the commercial activities of state bodies which might enjoy state immunity. Lord Denning took the view that international law was incorporated into domestic law unless it was in conflict with statutory provision; his change of view since Thakrar was to enable domestic law to respond to changes in international law rather than it being bound by the interpretation of international law upon a particular point when it was first decided, if international law had later evolved. Domestic law could evolve as the incorporated international law evolved. It may be that Mr Allen has put somewhat too broad an interpretation on Trendtex if he regards it as authority for the proposition that international law is enforceable without more by subject against Crown so long as no Act of Parliament is contravened.

376. Mr Allen also suggested that no Government could sever its connection with its citizens; it owed the obligations to them which reciprocated the duties and loyalties owed by them. But he appears also to have accepted that the state could sever that relationship, if it did so by lawful means.

377. He said that where there was a right, there was a remedy for its breach in tort citing Ashby v White [1703] 92 ER 126 at p134 and in what he called modern jurisprudence, Neville v London Express Newspaper [1919] AC 368 at p392 and 405. I am not sure how far this sort of general point can advance his case. The first case is the earliest in the line of authority which developed into misfeasance. The question in the second case was not whether a tort should be held to exist, nor was the conclusion that wherever loss was suffered through a wrong, a tort should be created so that damages could be awarded. If that were so, damages would be available routinely for administrative acts which were unlawful, but they are not. The question was whether in order to recover damages for the tort which existed, it was necessary to show specific loss. He said that there were analogies with other torts such as trespass to the person or to property. That may be so but tells against rather than for another tort to be recognised, after so many years of the developing law on exile, during which time it has never been the subject of any argument, that I was shown, that it was a tort. An additional reason why it was argued that it should be a tort was that it would provide a remedy for wrongs and in that way hold liable those who did wrong, maintain the obligations of those who wield power to wield for its lawful ends only and thus vindicate the rule of law in a civil society.

378. The fundamental reason why the existence of this tort is unarguable derives from the very nature of the tort. It does not rely on any allegation of trespass to person or property. It is not a tort of deceit or misfeasance. It is not a tort of false imprisonment or negligence. It is no more and no less than a particular example of a tort for unlawful administrative acts, attempted in the field of immigration. It would be of wide scope. There is no logical reason why it should not apply to any judicially reviewable error in a deportation or entry visa decision. If the justification is that the Government should be encouraged to act lawfully, that argument would apply to very many categories of case. It is difficult to see why one group of people should have the benefit of tortious protection from unlawful acts, on the basis of citizenship or nationality or "belonging" whereas others entitled to enter or to consideration should not. It has been clear for many years that an ultra vires act does not of itself give rise to tortious liability; Three Rivers DC

v Bank of England (No 3), per Lord Steyn at p190 (AC) and at p1230 WLR citing other recent House of Lords authority.

379. Mr Allen put forward no reasons why those principles should not apply to this case. Accepting for present purposes that a citizen could not be exiled as a matter of common law, that provides no reason for a tort to be created. The remedy is by way of Judicial Review, and the difficulties in that respect faced by these Claimants do not afford a basis for creating a tort sounding in damages. There is no parallel in false imprisonment; this is false exclusion and there are no analogous cases such as exclusion from the highway or a public place. There is no parallel in any general tort because this tort can by its very nature only be committed by the state; it was not seriously suggested that a private landowner other than the state would not be able to exercise its private law rights so as to exclude an individual from a territory if it owned the necessary land.

380. Nor did Mr Allen seek to rely on any statutory duty which he said was breached and which might sound in damages within the limited categories set out in X (Minors) v Bedfordshire County Council [1995] 2 AC 633. The Confirmation of the Charters, giving statutory effect to Magna Carta, was relied on by him to show how the common law had developed, not as the statute breach of which arguably founded a claim for damages. His references to international law do not directly assist. They create no individual rights. There was, contrary to what Mr Allen said, a relevant reservation to the ratification of the ICCPR 1966, which reserved the right not just to apply the Convention separately to each of the territories of the UK and Colonies, but also to apply such immigration legislation in each of its territories as it thought fit for those who did not have the right to enter or remain. This thus leaves open the question of who has such a right. I think that it is of some significance that Protocol Four of the ECHR has not been ratified. I do not find the concept of the "belonger" of real help. It is of significance where it is provided for in specific colonial legislation, but it was not part of the BIOT local statutory provision.

381. Mr Allen also alleges that the tort comprises the obstruction or prevention of the return of those who were exiled or who left voluntarily but wish to return. By "obstruction", Mr Allen has in mind, at least, a breach of an obligation to assist in the return of those who left voluntarily. An omission in that respect is said to be tortious. The indissoluble bonds of citizenship and the governing obligations imposed such a duty. This is untenable. There is no duty to provide transport, employment, the wherewithal to sustain life or accommodation and a refusal to do so cannot be tortious. There can be no obligation, still less a tort if it is breached, to make private land available. I have already dealt with the prevention of return on the facts, but there is no better justification for prevention of return being part of a tort of exile than there is for obstruction.

382. There can be no tortious liability for enacting the 1971 Immigration Ordinance, nor for enacting the property acquisition Ordinance which enabled the Crown to acquire the private rights which it then exercised. There can be no tort of exile in relation to the enforced move of islanders from one island to another; there is no possible right to stay on one particular island unless that particular island itself is the relevant territory of citizenship. There is no basis for arguing that there is any right, in principle, for the Chagossians who lived on Diego Garcia not to

be removed from Diego Garcia to another BIOT island, let alone to another island within the Chagos Archipelago. If there is a right not to be exiled, and a right to return, it can only apply to BIOT and not to Chagos, let alone to every island within the Archipelago. None of the law relied on by Mr Allen would support such a right. It is a commonplace for people to have to leave the area in which they live because of Government proposals. Here the Claimants can only succeed in relation to the removals from Diego Garcia, because the move from Diego Garcia to another BIOT island was temporary and the other islands were closed as a consequence of the effects of the defence proposals. Much of the pleading of this tort is designed to promote such a right and to apply it to the other islands individually. (There is some evidence that the islanders regarded themselves as residents of one particular island rather than as residents of the whole Archipelago.) It is also designed to counter the effect of the 2000 Immigration Ordinance which permits return to Peros Banhos and Salomon, and which puts an end to any argument about the tort continuing. One can see how this is important to the Claimants but that is not the point in law. It is reflected in a pleading which makes no distinction between those who left the Chagos before the creation of BIOT, those who were born there, and those who were born on Mauritius and have never been there.

383. The tort does not arguably exist.

Property and Rights Under the Constitution of Mauritius

384. These two heads of claim did not entirely overlap but as most of the relevant argument in relation to the Mauritius Constitution concerned property rights it is convenient to deal with them all here. Once again, the pleadings, at the third attempt in the Re-Amended Particulars of Claim, do not contain all the allegations raised by the Claimants' submissions. I shall deal first with those which are raised by the pleadings. The other points could be the subject of a further amendment.

385. The property case as pleaded is that the Chagossians acquired ownership of the land which they occupied by prescription or succession under the French Civil Code which was applicable in Mauritius and hence in its Chagos Dependency both before the creation of BIOT and in 1967 when the land was acquired from the Chagos Agalega Company Limited. This required thirty years occupation of the land but that did not have to be by the same person for the whole period. Once acquired, those rights were capable of being transferred or inherited. The Chagossians did the acts of an owner, such as building a house or growing crops, with the intent that they should be owners. All this was manifest and uninterrupted. The rights thus acquired entitled them to enjoy, exploit and to alienate the land. The rights were not acquired over Crown land; and it must follow that the claim is that they were acquired over the private land of the plantation company. I say this because although there is some land on Diego Garcia, at least, which was not in the freehold ownership of the plantation company, that land was thought to be Crown land, and the land which the company did own covered on any view the main areas where houses were to be found. No other private owner has even been hinted at as the person against whom this acquisition by prescription has occurred.

386. There are obvious problems in the way of this as the source for some of the general assertions about the rights of Chagossians and of the wrongs which it is said, but not pleaded,

were done by the passing of the relevant legislation and by the acquisition of the land from the Chagos Agalega Company Limited. The right asserted is not one which is confined to someone who was born on the islands but could apply to the last occupier in the thirty year period, who could have been a contract worker. There are many Chagossians who might not have lived in a house which had been erected for thirty years. The latest point at which someone's house would have had to be erected on Chagos, in order to take advantage of this argument, is 1937 because, if by 1967 the right had not accrued, there would have been no right which it could have been said the relevant legislation and purchase improperly removed. No witness gave evidence that there was any such property although Mr Marcel Moulinie said that when he arrived in 1965, he had understood that some houses had been lived in by generations of Chagossians. But from the evidence as to how the houses were built, it is plain that in the years about which the witnesses spoke, many Chagossians built the houses in which they lived far more recently than 1937. Indeed, no person at all is identified as enjoying a right so acquired. The questionnaire which is supposed to be part of the Particulars of Claim is quite incapable, except by happenstance, of identifying any person who could claim to be the beneficiary of the right as pleaded. The actual evidence given revealed the difficulty of statements attributing legal concepts of ownership, possession and occupation to those who naturally say in respect of where they live, that that is their house. Their claims were not supported by Mr Marcel Moulinie who denied that they owned any land. In the Bancoult case, Laws LJ said at paragraph 7 that no Ilois enjoyed property rights in any of the land but he did not have the advantage of the current pleading or evidence. I do not consider that I can at this stage hold that it is not reasonably possible that such a claim could be made out and Mr Howell did not press its unlikelihood. So I shall proceed on that basis. Nonetheless, the very weakness of the evidence to support the claim is relevant to the assertion that there was any knowledge of or reckless indifference to illegality or that the legislation was enacted or used to acquire land in a manner which was designed to defeat the property rights of Chagossians.

387. The unpleaded allegations are, first, that the Acquisition of Land for Public Purposes (Private Treaty) Ordinance 1967 No 2 was ultra vires the BIOT Order, as was the subsequent acquisition because the Ordinance and the acquisition had been undertaken for the purpose at least in part of depopulating the islands. The logic of the Bancoult case, in relation to the Immigration Ordinance, meant that other legislation with the same purpose was likewise unlawful. Second, the Ordinance was unlawful because it contained no provision for notifying those Chagossians in apparent possession that their rights were to be over-reached into compensation, they had no means of challenging the lawfulness of the acquisition or of disputing the amount of compensation due or the portion which they might receive or even of knowing that any was available to be claimed. This was closely related to the submissions made about the Mauritius Constitution.

388. The pleading in relation to the Constitution was to the effect that the Mauritius (Constitution) Order 1964, an Order in Council, was part of the law of BIOT and that the fundamental rights which it contained were infringed by the actions of the Defendants. The rights relied on are property related save for the right to protection from inhumane treatment. The pleading is seriously deficient as it contains no particulars of any act relied on as constituting a breach of any of those rights; if the action were to proceed, the allegation should specify what acts are relied on under each head. At present, the best that can be said is that I have from the

submissions some sort of sense of what the Claimants are driving at in relation to property and I assume that everything from the fact and manner of evacuation, the journey and the lack of reception or assistance in Mauritius is encompassed by the allegation of inhuman treatment. These allegations were said to encompass torts, unpleaded, which included trespass and conversion, which were torts by BIOT law and under English law.

389. I shall deal first with the pleaded property case on the basis that a Claimant might be found with the arguable real property interest. Mr Howell relied on a sequence of Ordinances to show that any property rights which the Chagossians might have had were extinguished. First, the Private Treaty Ordinance of 1967 provided in section 3 as follows:

"Whenever the Commissioner is satisfied that it is necessary or expedient to acquire on behalf of the Crown any land in the Territory for any purpose which in the opinion of the Commissioner is a public purpose he may, if the owner or apparent owner agrees to sell such land at the price offered by the Commissioner, acquire such land in accordance with the provisions of this Ordinance."

390. "Public purpose": "… includes the provision of defence and other necessary facilities for or on behalf of the United Kingdom Government or for or on behalf of any Commonwealth or foreign Government with which the United Kingdom has agreed to the provision of such facilities."

391. Section 7 stated: "A declaration in the instrument of acquisition that it was necessary or expedient to acquire the land for a public purpose or that the purpose for which the land was acquired is or was a public purpose shall be conclusive proof of the matters stated herein."

392. Section 5 provided for the vesting of the land in the Crown free of any other interests, and section 6 for those interests which thus extinguished to be related to the price paid; in effect they were over-reached into the purchase price. They stated:

"5. The land described in the Schedule of the instrument of acquisition shall … vest absolutely and irrevocably in the Crown free from any mortgages, charges, interests or rights whatsoever of any interested party, except as may have been specially reserved in the aforesaid instrument.

"6. (1) The rights, interests, charges or mortgages of any interested party in or over the land thus acquired shall, upon such land vesting in the Crown, be related to the price stated in the instrument of acquisition which shall be deemed for all purposes to be the price agreed upon between the Commissioner and the owner or apparent owner of the land so acquired."

393. An "interested party" and "owner" were defined as follows:

"'Interested party' means any person being an owner or co-owner of land the subject of acquisition under this Ordinance or having any right, beneficial interest, charge or mortgage in or over such land.

‘Owner’ includes a lessee, a usufructuary or any other person having a beneficial interest in the land."

394. Mr Howell's simple submission was that that vested land free of any other rights and so the Chagossians had no property rights thereafter. They had been extinguished insofar as they had had any in the first place. As a simple matter of statutory construction, I accept that is unanswerable. The claim related only to the price to which others could look to the vendor. If there had been any acquisition by prescription, the owner would have been an "interested person" within the definition of that word. The contrary was not argued.

395. Mr Taylor for the Claimants in response first pointed out that there was some land on Diego Garcia which did not belong to the vendor, Chagos Agalega Company Limited, at all. Without investigating title in any depth, this appears to be well-founded but unimportant in this context, for the areas which it did own were the areas of residence of the Ilois; they were the settlements round the coconut plantations and copra production areas. No-one has suggested that there was any other private freehold owner. The Crown already owned some land. The instrument of acquisition dated 3rd April 1967, (3/28), referred in the Schedule to what was conveyed as being the islands of Diego Garcia, Peros Banhos and Salomon and two other groups together with all buildings, rights and interests whatsoever. Any other land would have been acquired from the other owner anyway, under the same instrument, but no other owner has come forward to assert any title.

396. Mr Taylor next said that this instrument of acquisition meant that land vested, without notice to anyone in apparent possession as he said the Chagossians were, whereupon the interests became interests only in a purchase price which was distributed through a rapid procedure of which the Chagossians had no notice. He contrasted this with the notice provisions in the Compulsory Purchase Ordinance 1967 No 1. Notice had to be given to "the owner or person in apparent possession". Any "interested person" could then claim a higher price than that stated in the notice of acquisition and any dispute could go to arbitration. The Commissioner could then decide whether to proceed with the acquisition, if that were the price which he had to pay, and if he did so, the rights acquired would then relate to the purchase price in the same way. The relevant expressions were defined in the same way in both Ordinances. He suggested that the Private Treaty Ordinance had been enacted in bad faith to avoid these provisions in the Compulsory Purchase Ordinance. This was ad hominem legislation directed at the islanders.

397. There is no evidence to support that at all. It is commonplace to have the two powers. There is no legal obligation to proceed by one route as opposed to another. The legality of the purchase could have been challenged but never has been until now. There is a suggestion in the documents that it was seen as an advantage in the Private Treaty Ordinance to include some provisions from the Compulsory Purchase Ordinance. These appear to relate to the clearing of other interests off the title acquired. There is nothing at all to suggest that it was intended to avoid giving notice to any Chagossians. There is nothing to suggest that anyone thought that they might have any rights of possession at all; Mr Moulinie did not think that they did. It is perfectly clear that workers, even if there for many generations, can occupy property simply as service occupiers for the better performance of their duties. There is no contemporaneous evidence from any source that suggests that anyone thought the position was otherwise. There is

no evidence of anyone erecting a house without the company's assistance to him as its worker. It is just simpler in those circumstances to proceed by private treaty. Moreover, occupation is not possession. If notice had to be given under the Compulsory Purchase Ordinance to the owner "or person in apparent possession", there is no basis for supposing that notice would have been given to anyone other than Chagos Agalega Company Limited; just as with the Private Treaty Ordinance, the agreement was with the owner "or apparent owner" looking at the definitions. I do not think that there is a difference in meaning in the two expressions or in the people to whom they might be applied. If the owner differed from the person in apparent possession, there was no obligation to give notice to more than one.

398. Mr Howell's first statutory provision clearly disposes of the claim.

399. The second statutory provision upon which Mr Howell relied was the Acquisition of Land for Public Purposes (Repeal) Ordinance 1983. This provided: "Whereas all land in the Territory is Crown Land, the Compulsory Acquisition of Land for Public Purposes Ordinance 1967 and the Acquisition of Land for Public Purposes (Private Treaty) Ordinance 1967 are repealed, and it is hereby confirmed and declared that all land in the Territory is Crown Land."

400. The confirmation and declaration do not just have the effect of putting beyond doubt the effect of the repeal of the Acquisition Ordinances. Mr Taylor submitted that this could not add anything to the position which had already been arrived at. But, in my judgment, if "confirmed" adds nothing, it is quite clear that "declared" does. I can see no way round the construction which Mr Howell seeks to put upon this Ordinance. In Winfat Enterprise (Hong Kong) Co Ltd v Attorney -General of Hong Kong [1985] AC 733 PC, the effect of similar language in the New Territories Land Court Ordinance 1900 was considered. Section 15 of it provided: "All land in the New Territories is hereby declared to be the property of the Crown …". It deemed the occupiers to be trespassers unless their occupation was authorised by the Crown. This replaced Chinese customary tenure, which was assignable and heritable. One of the issues in the case was whether that customary interest survived so that a developer whose land was being acquired for a price below its market value, could rely on it. It was held that the land vested in the Crown under that wide declaratory power. The effect of the BIOT Repeal Ordinance is thus unarguably to remove any Chagossian property rights which had survived the acquisition of land from Chagos Agalega Company Limited. If there were any surviving interests over the intervening fifteen years from the acquisition, and no claim had come forward, they were thus ended. More than twelve years had elapsed since the evacuation of Diego Garcia anyway, when the land was fully possessed by others.

401. Mr Taylor submitted that these two acquisition Ordinances were ineffective because they did not comply with the Royal Instructions to the Commissioner as to how he should legislate. He argued that they did not comply with sections 4(2) or 5(7). These provide:

> "4. In the enacting of laws the Commissioner shall observe, so far as is practicable, the following rules:

> "(2) Matters having no proper relation to each other shall not be provided for by the same Ordinance: no Ordinance shall contain anything foreign to what the title of the Ordinance imports …
>
> "5. The Commissioner shall not, without having previously obtained instructions through a Secretary of State, enact any Ordinance within any of the following classes …
>
> > "(7) Any Ordinance of an extraordinary nature and importance whereby Our prerogative, or the rights of property of Our subjects not residing in the British Indian Ocean Territory, or the trade, transport or communications of any part of Our dominions or any territory under Our protection or any territory in which We may for the time being have jurisdiction may be prejudiced."

402. He said that the former was breached because the one Ordinance made provision for both acquisition and for the consequences of acquisition; the latter was breached because of the severe effects which the 1983 Ordinance had on the rights of the individuals who were not resident in BIOT. As to the former, I conclude that there is nothing which arguably breaches the Royal Instructions; the two matters relate to each other and are sensibly included in the one Ordinance, the title of which is apt to cover its total content. An extinguishment provision upon an acquisition for a public purpose is not unexpected. But, even if there had been a breach of the Instructions, that does not invalidate the Ordinances by virtue of section 4 of the Colonial Laws Validity Act 1865, which provides: "No colonial law passed with the concurrence of or assented to by the governor of any colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any instructions with reference to such law or the subject thereof which may have been given to such governor by or on behalf of Her Majesty, by any instrument other than the letters patent or instrument authorising such governor to concur in passing or to assent to laws for the peace, order, and good government of such colony, even though such instructions may be referred to in such letters patent or last-mentioned instrument."

403. The BIOT Order itself provides, in section 11(2) and following, for the Sovereign to disallow legislation and She has not done so. As to the latter asserted breach, the same two points apply. In addition, any acquisition made in this tidying up provision, is no more than a tidying up acquisition where the principal power has been exercised or was thought to have been and where there were not thought to have been rights outstanding anyway.

404. The third Ordinance upon which Mr Howell relied was the Courts Ordinance 1983 No 3 in force from 1st February 1984. Section 3(1), (3) and (4) provide as follows:

> "3.
>
> > "(1) Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England: Provided that the said law of

> England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary...
>
> "(3) Subject to subsection (4) of this section, no enactment, rule of law or any other part of the law of Mauritius or Seychelles shall form part of the laws of the Territory after the appointed day, except to the extent that any such enactment, rule of law or part of such law may have been applied to the Territory by a law made by the Commissioner after the appointed day under section 9 of the British Indian Ocean Territory Order 1976 or any corresponding provision superseding that section.
>
> "(4) In any proceedings commenced before the appointed day, the law to be applied shall be the law in force immediately before the appointed day, unless all the parties to the proceedings agree that the law to be applied shall be as in subsections (1) to (3) of this section."

405. "Specific law" is defined as a law made under section 11 of the BIOT Order or its replacement in 1976, when the Seychelles islands were returned to the Seychelles, and an applicable UK Act or statutory instrument.

406. Mr Howell submitted that the effect of this was to disapply the Mauritian civil property law upon which the Claimants relied and hence to remove any rights which they may have had. (I accept that it is reasonably arguable that the "rules of law" in section 15 of the BIOT Order, below, is a phrase wide enough to include the common law or equitable principles which would be invoked as substitutes for the disapplied provisions of the Civil Code under which the Claimants might have enjoyed property rights.) This is too ambitious a submission at any rate for this stage of proceedings. Section 11 of the Interpretation and General Clauses Ordinance 1981 No 4 prevents the repeal of any local enactment affecting any right previously acquired under any enactment. Mr Taylor relied upon this provision and it may be that the Civil Code of Mauritius falls into that category. But I consider the stronger point to be that section 3 is inapt, arguably, to remove rights at all. If, despite the two Ordinances which were already effective, some property right had survived, I do not read section 3 as removing it. It would have to be transformed instead into something recognisable in English law, but subject to the permitted local variations which would give ample scope for adaptation. It does mean that any pleaded right would have to be couched in perhaps different language from that of the Civil Code but I have no difficulty in seeing that something could be pleaded. However, that still leaves intact Mr Howell's two earlier and better points, which are conclusive as to property rights subject to the effect of the Mauritius Constitution.

407. I now turn to the asserted application of the Mauritius Constitution which was relied on as a source of rights and to defeat the position in which the two Ordinances showed the Claimants clearly to be, in relation to property rights. Mr Taylor relied on the rights set out in the Schedule to the Mauritius (Constitution) Order 1964. It is the Schedule which contains the Constitution. The first Chapter contains the fundamental rights which represent the Claimants' primary target for inclusion in the BIOT legislative canon but, surprisingly, they did not limit

their case to that part and said that other parts might also be included. Those other parts include Chapters dealing with the setting up of the legislature in Mauritius, the Council of Ministers, the judicature, the public service and the Governor. I regard the inclusion of those parts, other than Chapter 1, in the BIOT legislation as nonsense. It would be wholly inconsistent with the BIOT Order.

408. The rights relied on from Chapter 1 are as follows:

> "1. It is hereby recognised and declared that in Mauritius there have existed and shall continued to exist … each and all of the following human rights and fundamental freedoms, namely –
>
> > (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation.

and the provisions of this Chapter shall have the effect for the purpose of affording protection to the said rights and freedoms subject ot such limitations of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of the said rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

> "5. No person shall be subjected to torture or to inhuman or degrading punishment or other such treatment.
>
> "6.
>
> > "(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say – …
> >
> > > "(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
> > >
> > > "(c) provision is made by a law applicable to that taking of possession or acquisition –
> > >
> > > > "(i) for the prompt payment of adequate compensation; and
> > > >
> > > > "(ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining prompt payment of that compensation.

"(5) Nothing in this section shall be construed as affecting the making or operation of any law for the compulsory taking of possession in the public interest of any property, or the compulsory acquisition in the public interest of any interest in or right over property, where that property, interest or right is held by a body corporate established by law for public purposes in which no moneys have been invested other than moneys provided by the government of Mauritius.

"7.

"(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.

"(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision that is reasonably required –

"(a) in the interests of defence, …

"14.

"(1) Subject to the provisions of subsection (5) of this section, if any person alleges that any of the provisions of sections 1 to 13 (inclusive) of this Constitution has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may also apply to the Supreme Court for redress.

"(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subjection (1) of this section."

409. Mr Taylor submitted that these fundamental rights applied in the Chagos immediately before BIOT was created. It should not be assumed, without clear words, that the legislative structure of the new colony was designed to remove those rights, which the islanders had enjoyed hitherto. Although there might be power to do that when a colony was granted independence, as the case of Liyanage v The Queen [1967] 1 AC 259 PC showed in relation to the independence of Ceylon and fundamental rights to a fair trial, that had no application to the creation of a new colony, especially when the territory had already enjoyed those rights. The BIOT Order should be construed accordingly. Accordingly, those rights were still enjoyed when the acquisition Ordinances were enacted, when the actual acquisitions took place and when the population was removed.

410. Mr Howell relied upon the wording of the BIOT Order. He also pointed out that Laws LJ in Bancoult had held that there was no written constitution embodying fundamental rights for BIOT; paragraph 43. I do not find the latter point conclusive in the light of the more extensive arguments which Mr Taylor has provided, a team overlap notwithstanding. Each side before me

has relied on and taken issue with what was said in that case on a variety of issues. Whilst Bancoult can make something arguable, I am not disposed to accept it as making anything unarguable as far as the Claimants are concerned.

411. The relevant provisions of the BIOT Order are as follows:

> "5. The Commissioner shall have such powers and duties as are conferred or imposed upon him by or under this Order or any other law and such other functions as Her Majesty may from time to time be pleased to assign to him, and subject to the provisions of this Order and any other law by which any such powers or duties are conferred or imposed, shall do and execute all things that belong to his office according to such instructions, if any, as Her Majesty may from time to time see fit to give him.
>
> "11.
>
> > "(1) The Commissioner may make laws for the peace, order and good government of the Territory, and such laws shall be published in such a manner as the Commissioner may direct.
>
> "15.
>
> > "(1) Except to the extent that they may be repealed, amended or modified by laws made under section 11 of this Order or by other lawful authority, the enactments and rules of law that are in force immediately before the date of this Order in any of the islands comprised in the Territory shall, on and after that date, continue in force therein but shall be applied with such adaptations, modifications and exceptions as are necessary to bring them into conformity with the provisions of this Order.
> >
> > "(2) In this section 'enactments' includes any instruments having the force of law."

412. Section 18 of the Order is also important. It alters the Mauritius Constitution by deleting from the definition of Mauritius in section 90, as from the creation of BIOT, those Mauritius Dependencies which became part of BIOT.

413. Mr Howell argued that the Mauritius Constitution had no application at all in BIOT. His first contention relied upon the geographical extent of "Mauritius" as redefined by the BIOT Order. If section 1 of Chapter 1 was indeed part of the BIOT legislation, it was immediately disapplied by its own terms because it only applied to Mauritius. It did not matter what had been the position immediately before the creation of BIOT, because the continued application of the Mauritius Constitution rendered it inapplicable on its own terms. It only declared rights to exist in Mauritius and therefore by necessary application of the definition of "Mauritius" did not declare those rights in BIOT. Mr Taylor submitted that section 15 of the BIOT Order permitted that wording to be adapted to meet the position in BIOT by treating "Mauritius" as being BIOT or as the Mauritius part of BIOT. I was not wholly persuaded by Mr Howell's argument on this

in isolation though there is force in it. It needs to be considered with other points to see if the Claimants' case is not reasonably arguable. I say that because the alteration to the Mauritius Constitution was obviously necessary to limit its future geographical application, and although it may be a pointer as to what was intended in BIOT, that has to be considered also against the pre-existing rights enjoyed in the Chagos.

414. To Mr Taylor what primarily mattered was the fact that the rights had been enjoyed in Chagos immediately before the creation of BIOT. It is upon the words of section 15 that the Claimants rely. That depends upon the meaning given to "enactments and rules of law". "Enactments" is defined as including "instruments having the force of law". The Constitution, submitted the Claimants, was one such instrument or enactment. There was no need to give the word a narrow meaning as contended for by the Defendants which would confine it to Acts of Parliament or a broader meaning which extended only to secondary legislation in addition. The significance of previously enjoyed fundamental rights was important here. Mr Taylor referred to R v Conway 1943 EDL 215, Gutsche J, who described "enactment" as a wide and general word; but however wide he said was its ambit, he did not suggest that it covered a constitutional Order in Council. Mr Howell found support in Rathbone v Bundock [1962] 2 QB 260 D Ct 273. This held, in the different context of road traffic regulation, that unless extended to statutory instruments expressly, "enactment" meant an Act of Parliament. I did not find that compelling in view of its very different context and the fact that, as in Conway, the issue here was not considered.

415. No resolution is to be found in the Interpretation and General Clauses Ordinance 1981, though in it "Imperial" or "United Kingdom enactment", to which the Ordinance does not apply, includes any Order in Council.

416. Notwithstanding the absence of decisive authority, (although what there is tends to support Mr Howell), I do not regard the position as doubtful. The phrase has to be construed in context. The BIOT Order was the Constitution for BIOT. It provided for a new colony, drawn from both the Seychelles and Mauritius. Its creation had a purpose. Mauritius was redefined by the BIOT Order so as to exclude BIOT from the Mauritius Constitution. It would be very odd if by the sidewind of the general incorporation of existing laws from the two colonies from which the islands had been detached, BIOT had incorporated a part of the Constitution of one colony from which it was being detached, and had provided for fundamental rights to be enjoyed only by those who were in the former Mauritius part. This is the importance of the definition of "Mauritius". It confirms what is clear enough from the other factors in the interpretative matrix. When Mr Howell's first point is joined to these others, it seems to me incontestable that the Mauritius Constitution was not incorporated. It is not controverted by authority or interpretative provision.

417. I recognise what Mr Taylor says about fundamental rights but that does not seem to me to be an argument of any real force in the light of those other factors. Had their incorporation been intended, there would have been an express incorporation or listing of the rights to be enjoyed. His distinction between what can be done upon the independence of a colony and upon the creation of a new colony is unsupported by any reason. I see no reason in law why there should be any difference; the rights created depend upon the way in which the sovereign power is

exercised and that can deliver what Laws LJ described in Bancoult as "wintry asperity" instead of the benignity hitherto enjoyed if the sovereign power so wishes and can do so politically. It may be brutal but the context of the legislation shows that the preservation of fundamental rights, and in one part of BIOT only, was not a legislative objective. I do not consider that the phrase "rules of law" is apt to cover the constitutionally derived rights upon which Mr Taylor relies.

418. Even if Mr Taylor were right, I do not see how that would avail his property rights arguments. If the Ordinances are otherwise valid, they would take precedence over any such rights as were preserved by the incorporation of part of the Mauritius Constitution. The Claimants' argument is that the rights in question are within the scope of section 15 of the Order and it is that which enables them to be preserved as an enactment. But it is clear from the terms of section 15 that it does not entrench them as rights which cannot be overridden or as rights against which the constitutionality or validity of Ordinances has to be measured. Accordingly, by virtue of section 15 (1), they can be repealed or modified by legislation passed under section 11 for the "peace, order and good government" of BIOT or passed under other lawful authority. I regard Mr Taylor's argument that an Ordinance could only have the effect of overriding existing law under section 15 if it expressly said so, as an understandable but untenable attempt to interpret section 15 as some half effective entrenching provision. It could only require clear words as to the legislative effect intended and there is no doubt about that in the Ordinances. If the Ordinances do conflict with any provisions of the constitution, their language is clear enough to enable them to override those constitutional provisions. I do not accept that the effect of section 3 of the Private Treaty Ordinance is to require all actual owners of all interests to agree to the sale of property; that is wholly contrary to the rest of the provisions of the Ordinance, including the overreaching provisions. Mr Howell pointed out that in Winfat Enterprises, above, the Crown Lands Resumption Ordinance was made under the power in the New Territories Order to make laws for the "peace, order and good government" of the Territories. That was held to permit the acquisition of land at a price which ignored the development value of the land, even though the Peking Convention, under which the New Territories were leased, forbad expropriation and required a fair price to be paid for land acquired. Unless an attack can be mounted on the legislation in question as not being within section 11, that legislation could remove property rights without compensation or compliance with other provisions of the Mauritius Constitution. There is no English law to which the Ordinance has been shown to be repugnant in the sense of section 2 of the Colonial Laws Validity Act.

419. Mr Howell further submitted that it would be very difficult for the Court to give effect to the Mauritius Constitution, even if somehow it were incorporated into BIOT legislation as entrenched rights. The rights are subject to the limitations set out in the Constitution. First, the right in section 6 was not breached nor that in section 1 because what happened was legislative extinction of title with the interest overreached into the purchase money. Section 1 dealt with deprivation of property and section 6 dealt with compulsory purchase; neither dealt with legislative extinction of title with a provision for overreaching into the purchase price; La Compagnie Sucriere v Government of Mauritius 1995 (3) LRC
494 PC. As a matter of dry legal analysis that is clearly correct. The Claimants might however have been able to make something of the manner in which the payments were made, to say that this was in reality a deprivation of property and that the availability of knowledge as to the acquisition and possible share of the purchase money was so limited as to amount to deprivation

without compensation. But it is difficult to see how that would invalidate the legislation itself. Second, section 6 permits compulsory acquisition in the interests of defence; unless the defence interests of the UK and her Colonies are irrelevant, and the only relevant defence interest is that of BIOT itself, which was not suggested by Mr Allen, it is difficult to see how the Court could be in a position to assess the nature and extent of the defence needs, national security and foreign policy against the interests of the islanders. The only argument was that the UK had balanced the interests in a way which was unlawful because of the interests of the islanders which were completely overridden. However, that might go to the vires of the legislation and whether the appropriate compensation procedures had been emplaced and followed through. If the Claimants had overcome the many hurdles to establish an entrenched right in BIOT to the benefit of the property provisions of the Mauritius Constitution, it is arguable that they were breached, but I do not see that they can achieve the necessary steps on the way.

420. There was some argument about the role of double actionability in relation to the Claimants' reliance upon the incorporated parts of the Mauritius Constitution, to the extent that it had been incorporated. Mr Howell launched the argument as yet another reason why the Claimants' case was hopeless. Part of the problem of analysis arises from the rather poor pleading which underlies this part of the case. If it is said that acts were done which were torts recognisable as such both in English law and in BIOT law, that meets the requirements of the principle of double actionability in tort and the Constitution is irrelevant. On that basis there is no need at all to examine the double actionability rule, even before the coming into force of the Private International Law (Miscellaneous Provisions) Act 1995 on 1st May 1996, which removes the double actionability rule in relation to acts done after that date. None of the acts relied on in relation to the property rights arise after 1996, and there are no pleaded acts in relation to inhuman treatment which arise after that date, or none which are not already pleaded in relation to other torts. For example, part of Mr Taylor's argument was that there had been a conversion of or trespass to the Claimants' property. But that raises no double actionability issue.

421. If it is said that there is a cause of action based directly upon the parts of the Constitution which were allegedly incorporated into BIOT law, that is not an action in tort, and since it is to torts alone to which the double actionability rule applies, its disapplication under the principles in Red Sea Insurance Co v Bouygues SA [1995] 1 AC 190, 197-200 does not arise. It appears, despite some of the submissions, that this is the Claimants' point and that it includes an argument that section 14 of the Mauritius Constitution was also incorporated into BIOT law, providing a direct means for enforcing those rights. If it had been, which it has not, there might have been a case for the direct enforcement of those rights through the English Courts, if the relevant property legislation did not override the property related rights including privacy here. I refer to enforcement through the English Courts rather than the BIOT Courts because the Defendants do not seek to take jurisdictional points and are prepared at present for the English Courts to be regarded as having the same powers as the BIOT Court. Jurisdiction, which is absent, cannot be created by consent but at this stage, that is no adequate reason for holding against the Claimants.

422. If the enforcement of rights said to be derived from the incorporation of the Mauritius Constitution is by way of an action for damages for tort, rather than directly, such a claim in the English Courts would infringe the principle of double actionability. There was and at present still is no cause of action in tort for breach of privacy or for taking property under statutory

authority, if it clearly so provides, without compensation. An action in trespass in theory would satisfy the double actionability rule, but the alleged breach of the Constitution is not arguably the same as the tort of trespass. There is no tort as such of subjecting someone to inhuman treatment; it may constitute other recognised torts, in which case double actionability is satisfied but there is no pleading of any such tort or reference to the facts upon which it might be based. There is no tort of breaching a constitutional right.

423. Mr Allen submitted that it was inconsistent with the Defendants' position that it was not taking any forum or jurisdiction point, for the Defendants to argue that the tort must be doubly actionable in order to found the applicable law upon which the Claimants rely, in the forum in which they seek to contest matters. The choice of law is not a jurisdictional point. The Claimants relied on the Red Sea case and Pearce v Ove Arup Partnership [2000] Ch D 402 CA. These are two authorities relevant to the contentions that there are exceptions to the rule of double actionability in certain circumstances, in which the law of the place where the wrong was done could be enforced by the Court dealing with the case, even where there was no comparable tort in that country. At this stage, I would not regard it as impossible for the exception to be made out if the torts existed in BIOT law; the problem lies with the inclusion of the rights in the first place.

424. I turn to the unpleaded argument that the Private Treaty Ordinance was outside the powers of section 11 of the BIOT Order because it was not made for the "peace, order and good government" of the territory. This argument proceeds by way of analogy with the Immigration Ordinance 1971 and the reasoning of the Bancoult decision. The purpose of the Ordinance and of the consequential acquisition of land from Chagos Agalega Company Limited was in part the legitimate one, on the Claimants' case, of providing for a defence facility for the UK and the USA. But it was also in part for the illegitimate purpose of removing the population of BIOT whether as an end in itself or as a means to the achievement of the particular defence facilities actually provided. However powerful a case could be made for the UK's defence interests, section 11 did not provide such an enabling power. On the Bancoult reasoning, this was not a matter of balance between the competing interests for the Commissioner to decide, but rather the Commissioner simply lacked the power to enact legislation under section 11 which was not in the interests of the people who were to be governed, regardless of the strength of the competing defence and foreign policy interests. The Private Treaty Ordinance was invalid, the acquisition of land under it and the consequential extinction of title was either ineffective or sounded in damages for trespass or conversion of real and personal property. The Compulsory Purchase Ordinance was likewise ineffective.

425. The Claimants' position was that the defence interests were a relevant matter for the colonial power to take into account but that it could not allow them to override the interests of the inhabitants or belongers of BIOT. The Claimants accept that the acquisition of land for the defence purposes of the UK is a legitimate purpose for the exercise of section 11 powers but with a limit on the extent to which the interests of the population can be affected. At this stage, the point being made by the Divisional Court as to the extent of the powers available under section 11, namely that those who represent the established population cannot be removed through the use of section 11 legislation, must be reasonably arguable, however persuasive Mr Howell's

contrary arguments and whatever the possible extent to which the legal analysis was affected by an erroneous factual premise about the evacuations.

426. On a narrower basis, Mr Howell argued that the stated objective of the Private Treaty Ordinance, to permit the acquisition of land to give effect to the defence needs of the UK or other allied governments, falls within section 11 as providing a perfectly good reason for the acquisition of private land. The Claimants' argument was unsound because it posited that there was some obligation on the Commissioner to prevent a private land owner exercising his powers if that had the effect of removing the population. If there were some limit on the powers of acquisition, how much private land had to be left, for whom and why, when they had no right to reside there? The Government should not be in a worse position when exercising its powers to acquire and use land for a public purpose. There was no purpose, behind the legislation or the land acquisition, of removing the population but it would not have been unlawful if it had been part of the purpose to remove people from part of BIOT, Diego Garcia, to another part, as happened. A distinction should be drawn, in any event between the Ordinance and the acquisition which were perfectly lawful, and any unlawfulness associated with the removal of all the population which is what offended in Bancoult. Finally, any unlawfulness in the Ordinance or in the acquisition could not now affect the ownership or the lease subsequently granted to the US or the extinction of title.

427. I take the view that what is reasonably arguable in this context has been settled by Bancoult, whatever may be the position after all the argument as to what the true ratio is and whether it is right in what it says, as I have discussed earlier. I do regard it as reasonably arguable that one purpose behind the land acquisition was to enable private land owning powers to be used, if necessary, to remove the whole population, even though that was not the prime aim in 1967. The memo of 25th February 1966, (4/179), (A62) from the Colonial Secretary to the BIOT Commissioner illustrates the point. It was moreover landowning powers which it is quite clear were used to remove the people who were removed. This is reasonably arguably not a case where powers to remove were taken but not used and powers taken for another purpose, entirely or substantially, were the powers used. Following Bancoult's reasoning, it is not the removals alone which might be unlawful, it is the taking of the power to do achieve that.

428. I accept, however, Mr Howell's submission that any unlawfulness in the Ordinance could not now affect the effectiveness of the acquisition, the lease granted to the US or the extinction of any title, Chagos Agalega Company Limited's or a Claimant's. Too long has passed with no challenge being raised. A return to the previous position is not possible.

429. There are plainly delay and prejudice considerations of some magnitude which lie in the way of an application for judicial review to quash the Private Treaty Ordinance, not least because it was repealed in 1983. Its purpose in relation to the UK's defence interests was plain on its face and had been so for the 16 years before its repeal without any point being taken. Third party interests had intervened together with those of the defence and foreign policy interests of the UK and the US. This argument would involve quashing the 1983 Ordinance. I do not see the basis upon which that could be done. It does not appear either to have the same continuing effect as the 1971 Immigration Ordinance and its quashing would have to be accompanied by restitution of interests acquired long ago for it to have a direct effect on any claim to return. Any claim for

damages for trespass which relied upon the possible unlawfulness of the Private Treaty Ordinance to remove a defence argument as to lawful authority, but which left intact the 1983 Ordinance, would be governed and defeated by the ordinary law relating to limitation. There is no basis for that aspect of the pleadings to be amended to raise a case which cannot succeed.

430. There is no arguable claim for damages in relation to property rights, whether arising under the rights said to be incorporated from the Mauritius Constitution or otherwise, nor for breach of any other fundamental rights so derived.

Negligence

431. This claim related solely to the conditions faced by the Chagossians upon their arrival in the Seychelles and in Mauritius after the evacuations and faced by those who were prevented from returning to Chagos after going to Mauritius for vacation, medical treatment or the like. It did not relate to the conditions experienced on some of the voyages and indeed despite the evidence about them, there is no specific cause of action pleaded which relates to them. They might be relevant to any claim for aggravated damages.

432. The basis of the claim is that there was and is a duty to provide for the well-being of those Chagossians who were removed from or prevented from returning to Chagos and for their descendants. The pleading is unclear as to whether it covers those who left the Chagos voluntarily before the creation of BIOT, or indeed afterwards. No limit on the number of generations to whom this duty is owed is stated, though in their further closing submissions, the Claimants say that this means those who are entitled to British citizenship as a result of their connection with the Chagos under the British Overseas Territories Act 2002. That is of limited help in defining those to whom the duty was owed before that date. It appears from submissions and from the contention that this is a continuing tort and that a duty is owed in 2003 to the children and grandchildren of someone removed in 1971. It is not clear if those who are not living on Mauritius or the Seychelles are included. It is another piece of inadequately thought out pleading.

433. This duty continues so long as they suffer. The duty is to take reasonable steps to provide for their well-being, which includes housing, feeding, employment, healthcare, social needs and community facilities. It is a duty to take care of them. What was necessary was the wherewithal to lead a roughly comparable lifestyle to the one which they had enjoyed on the Chagos. Although the duty is said to be to take reasonable steps, the steps required are in fact those necessary to achieve that particular outcome; they involve the direct or indirect payment of money.

434. The source of this wide-ranging duty is the governmental obligation owed, the assumption of responsibility for them and the events to which they were subjected. Part of the unpleaded background but which surfaced in submissions was the Defendants' knowledge that the Chagossians were illiterate, did not speak English, had no access to lawyers to assist in the enforcement of their rights and were made indigent by the acts of the Defendants. Another part was the allegation that the Defendants were the employers or paymasters of the Chagossians or in a closely analogous position. (The former is just wrong; the latter merely an inaccurate way of

saying that the Defendants exercised control indirectly over many aspects of their lives, daily and in the longer term.) The Defendants were responsible for the creation of communities of Chagossians in Mauritius and in the Seychelles "many of whom were compelled to live in conditions of abject poverty with no means of escape …". The assumption of responsibility was evidenced by the payment of some compensation under the 1982 Agreement. The pleadings point to the creation of BIOT, the acquisition of the land and the day to day control which the Defendants had over the plantations and over their long term future, and over the islanders and their long term future as well. It was the Defendants who decided to close the plantations and to evacuate the islands. The Defendants had accepted that there would be a resettlement obligation upon them.

435. The breach of duty, it was said, started with the initial failure to make adequate provision for those who were stranded on Mauritius and prevented from returning, and then for those who were evacuated from the Chagos. The pleading assumes that all left involuntarily or that it makes no difference to the liability of the Defendants. There is a continuing failure to make adequate provision for them. The pleading refers to the great poverty in which most have lived, with few of the amenities of life or adequate facilities in relation to jobs, healthcare, education and housing. This had been caused by the displacement from the Chagos with inadequate resettlement arrangements. Such facilities have never been provided and so there is a continuing failure. The Agreements of 1972 and 1982 did not discharge those obligations in fact and could not do so in law, as they were Agreements with a third party, the Government of Mauritius.

436. The full scope of this pleading cannot be appreciated without regard to the second revision to the draft Amended Reply on Limitation and Abuse, which accompanied the written closing submissions. This repeated a point made at an earlier stage that the negligence claim, and the other causes of action, should be seen as including a claim for damages for personal injuries. I would not have realised that just from reading the original Particulars of Claim. But in the proposed Re-Amended Particulars of Claim it is said that the personal injuries included diseases linked to poverty and poor living conditions. These included malaria, stomach disorders, Hepatitis A, mental illness, suicide and drug addiction. These were caused by the Defendants' unspecified "wrongful acts" and by the poverty into which those acts cast the Claimants. It is not alleged that those personal injuries were reasonably foreseeable as a result of those acts. It is not clear, but I think it probable that there are two causes said to be at work, wrongful acts and poverty, which may act both separately or together. The pleaders excuse the vagueness about which individual Claimants have suffered from what injuries, on the grounds that these are only group Particulars. I am not at all persuaded by that. This claim came in as a means of dealing with a very obvious and potent limitation argument, so as to try to take advantage of section 33 of the Limitation Act 1980. It does not appear to have been thought of before then. None of the questions on the individual questionnaires relate directly to such a head of claim and they are part of the group Particulars. If the questionnaires had yielded the basis for such a head of claim, it would only have been by happenstance.

437. Mr Howell contended that the pleadings gave rise to no arguable case, first, by contending that no duty of the width contended for could arguably arise in negligence; in effect it was a matter for legislation. Mr Taylor supported the pleadings by the following submissions. Whether a duty of care arose was a fact-dependant question of law. It would be a startling result

if there were no duty requiring reasonable conduct from the Defendants towards the Claimants, leaving the behaviour of unreasonable governments to be moderated only by Judicial Review. This claim did not depend upon it being established that any of the removals or the prevention of return was itself an unlawful act. The Defendants had control over the Claimants' destinies, took the decisions which led to their departures and to their being unable to return, and did so knowing that they would be harmed thereby. The Defendants accepted in many documents before and after the removals that they were responsible for the Claimants' resettlement. BIOT had been created with removals in mind. The Claimants had been "hijacked". That made it fair, just and reasonable that there should be a duty of care imposed on their relationship. The level of control, the governing obligations and the weakness of the Chagossians created a relationship of sufficient proximity. There was a duty to take reasonable steps to avoid harm to them. The Claimants asserted that their case was close in principle to the circumstances in which liability arose in Home Office v Dorset Yacht Co Ltd [1970] AC 1004. The Home Office owed a duty of care to neighbouring owners to take reasonable steps to control the boys so as to avoid the manifest risk to their property if they did not do so. As Mr Howell correctly pointed out, the acts which the boys ought to have been inhibited from doing were unlawful acts. That decision is some distance away from this case.

438. Mr Taylor responded to Mr Howell's next submission that if there were any such duty, the discretionary or policy component was such that it could not be justiciable, by contending that the relevant decisions leading to the evacuation of the islands were unlawful, but that in any event, what was being complained of was not the removals as such but the lack of provision for those removed or prevented from returning. Anyone could see the scope for psychological or other harm. The governmental discretions exercised here were not of such a nature as to mean that the court would be substituting its views for those of the executive, in circumstances where it was Parliament's intention that the executive should make the decisions. Alternatively, this should be seen as an abuse of discretion.

439. Mr Howell had relied upon X v Bedfordshire County Council [1995] 2 AC 633 738h where Lord Browne-Wilkinson had held in relation to a statutory discretion, that a decision within it was not actionable at common law, and that a decision outside its ambit might be. The courts could not adjudicate on that ambit if the exercise of the discretion involved policy matters. So "a common law duty of care in relation to the taking of decisions involving policy matters cannot exist". Accordingly, for a decision in the exercise of a statutory discretion to be actionable at common law, it had to involve no element of policy matters, had to be outside the scope of the discretion, if that were justiciable, and then it had to be fair, just and reasonable for a duty of care to be imposed. Policy matters would include the allocation of resources and the determination of general policies. An allegation about the appropriate level of service for someone's needs might involve policy matters.

440. Mr Howell also relied on Stovin v Wise [1996] AC 923. It held that the minimum conditions for basing a duty of care on a statutory power were that there was in effect a public law duty to act and exceptional grounds for holding that the policy of the statute required compensation to be paid to those who suffered loss because the power was not exercised.

441. Mr Taylor responded with Phelps v Hilllingdon London Borough Council [2001] 2 AC 619. He rightly pointed out that there has been some qualification to the full breadth of what Lord Browne -Wilkinson said in X. Lord Slynn, at p653, held that the mere fact that an act was done within the ambit of a statutory discretion did not mean that no action at common law could arise from it. Whilst other conditions for tortious liability would have to be satisfied, it would only be non-justiciable if what had been done involved the weighing of competing public interests or was dictated by considerations upon which Parliament cannot have intended that the court should substitute its views for those of the executive. Lord Clyde, at p674, further stated that if what were done amounted to an abuse of the discretion because it was totally unreasonable, it too could be actionable.

442. Mr Taylor's primary case was that there had been no statutory power exercised when the resettlement provisions were being made. No power under the BIOT Order section 11 had been exercised and it did not matter thereafter whether the power was a prerogative power or some private power. This meant, submitted Mr Taylor that if the removals were an act of discretionary policy, the way in which it had been done, "without the greatest care and planning for the well-being of the displaced Chagossians" was such an abuse. He submitted that the Defendants were not exercising a statutory discretion when dealing with resettlement, but that if they had been exercising a power under the BIOT Order, it had been abused.

443. Mr Howell's third submission was that any duty to take reasonable steps had been discharged by the 1972 Agreement or by the 1982 Agreement. It did not matter that these were not agreements with the Chagossians individually because it was obvious that any duty of the sort pleaded by the Claimants was capable reasonably of being discharged by arrangements made with the Government of the country in which the Chagossians were residing. The situation in the Seychelles was different anyway. Mr Taylor submitted that the real issue was whether there had been a remedy for the breach of duty and that there could not have been a remedy as the damage continued to occur. The sum offered in 1972 was not and was known not to be sufficient. It was patently not possible to argue that a payment ten years after the Chagossians had left the islands discharged the duty of care. The only question was whether there had been a remedy for the breach of the duty not whether there had been a discharge; the 1982 payments could not be determined at this stage to be adequate compensation so as to remedy the breach. In any event this argument had no application to the Chagossians on the Seychelles.

444. This duty continued to the present because, according to Mr Taylor, there had been a pre-existing governmental relationship and the Defendants had knowingly put the Claimants in a position of destitution. I remained unclear as to whether this duty could ever be brought to an end because even if the Claimants were all to returned to Chagos, assuming that they all wanted to go there, there would be, claim the Chagossians, an obligation to provide them with a maintained economy to enable them to live a decent, basic life.

445. The starting point for an examination of the arguability of this pleading in relation to economic loss is the general approach to whether a duty of care arises. In addition to the foreseeability of damage, there must exist between the parties a relationship characterised by the law as one of "proximity" or "neighbourhood" and that the situation should be one in which the court considers it "fair, just and reasonable" that the law should impose a duty of a given scope

upon one party for the benefit of the other. The law has moved towards attaching greater significance to the more traditional categorisation of distinct and recognisable situations as guides to the existence, the scope and the limits of the varied duties of care which the law imposes; Caparo Industries Plc v Dickman [1990] 2 AC 605 618. Mr Taylor referred to Lord Slynn's comment in McFarlane v Tayside Health Board [2000] 2 AC 59 76, that an alternative test is to ask whether there has been an assumption of responsibility for the economic interest of the Claimant, with concomitant reliance upon that by the Claimant. It is to be noted that in that case, a duty of care in relation to contraception did not involve any assumption of responsibility for the costs of bringing up the child whose arrival pointed to earlier failings. Mr Howell drew my attention to Williams v Natural Life Health Foods [1998] 1 WLR 830 835 HL. This is consistent with McFarlane upon which the Claimants relied. The relevant assumption of responsibility has to create a special relationship; whether such an assumption of responsibility had occurred depended on an objective analysis of what was said or done by the Defendants, and whether the Claimants did in fact and could reasonably have relied upon an assumption of responsibility. So far as personal injury was concerned, all that had to be shown was that it was reasonably foreseeable that the Defendants' actions would lead to personal injury and that there was sufficient proximity of relationship, the former usually demonstrating the latter too.

446. I shall deal first with the claim as originally formulated and then with the claim based on personal injury. As pleaded, it is far too broad a claim to be arguable. Indeed it is scarcely possible to recognise it as a claim in negligence at all. It confuses the concept of a common law duty of care, with a general moral obligation to care for someone. It is not alleged to be a duty to avoid a reasonably foreseeable type of harm. It is not dependant upon an unlawful act. I understand why the case is pleaded in the broad terms in which it is; the Claimants seek redress for the treatment meted out to them in the 1970s, in circumstances where the idea that there is no legal redress at all, not even arguably, could seem to be an affront to moral justice. But the case has to be seen in a legal framework, nonetheless. An affront to justice is not a cause of action nor do unfulfilled moral or political obligations become the source of legal obligations.

447. The claim as pleaded, asserts a common law duty, owed by government to citizens of a very wide nature. It could not be argued that any such duty was owed by a private landowner to those who might be evicted from his land or by an employer to those whom he dismissed or to those who in consequence might lose tied accommodation. There is no duty on a contractor to renew a contract with a supplier who in consequence goes out of business. Neither the degree of proximity nor the policy component for the existence of the duty would be satisfied. There is no common law duty to avoid economic harm to others even if it is foreseeable or even if someone is knowingly put in a position where that harm may happen to him.

448. Given the asserted source of the duty in indissoluble governing obligations which endure from generation to generation, it is difficult to see how it could not also apply to anyone who was destitute or lacking their former lifestyle or basic amenities, whether they were in their country or in another one. It is not clear why it should not apply to any UK citizen resident in the UK, or to any UK citizen who was not in the UK but happened to be abroad. The pleaded case is not confined to those who were removed from the Chagos or prevented from returning, so that characteristic of some Claimants is not a necessary characteristic for the duty to arise. In any event there are many people who, in roughly analogous situations, may suffer at the hands of a

government decision in respect of which compensation is either unavailable or inadequate to enable resumption of a previous lifestyle. That is an unhappy consequence of blight, aircraft noise, planning decisions and compulsory acquisition, particularly where the acquired interests have no real market value. The duty would apply to all those too. The restrictions which the Claimants may try to impose upon their version of the tort are not principled but arbitrary, and disguise the wide and general ramifications which it would have. There is no reason why the duty should only arise upon removal to another country rather than upon removal to another BIOT island, or to another part of the same country upon which the means of sustaining the former lifestyle were absent or upon which conditions of destitution prevailed. Why should such a duty not exist to prevent the withdrawal of economic support for the plantations or transportation upon which the islanders depended for their lives in the islands? But the duty is more extensive yet. It covers not merely the then unborn children and grandchildren of those who were removed or prevented from returning, together with any who qualify under the British Overseas Territory Act 2002 as British subjects, but also all those who left the Chagos voluntarily even before the creation of BIOT. Indeed, the 2002 Act creates the further problem that section 6 gives British citizenship to people who were not British citizens before that Act, so the duty only began to apply to them when it was brought into force.

449. The scope of the duty is akin to a duty of equivalent reinstatement and perpetual maintenance whenever a Government decision impacts adversely on an individual. As pleaded, it is akin to the requirement to provide an advanced welfare state, with all the aspects of modern social welfare covered together with jobs. Although the duty is couched as a duty to take reasonable steps, it is in effect an obligation to achieve that outcome. This is to treat the law of negligence as requiring the sort of provision which it must be for the legislature to decide, for the implications for policy and expenditure are enormous. The claim does not depend upon any statutory duty being found nor upon any statutory power existing. The law of negligence would be exploited to impose on government a very extensive duty which no legislature has seen fit to impose. No power or duty has been identified either in UK legislation or in the BIOT legislation whereby either Defendant may undertake such extensive responsibilities for anyone, let alone citizens outside those territories. In the absence of such a statutory power, it cannot be negligent to act as if that power did not exist. Assuming that it is the prerogative which enabled the resettlement agreements to be made, it would be a quite extraordinary extension of the court's role for it to be enabled to impose such a duty on the exercise of the prerogative. The same would apply to any argument that section 5 of the BIOT Order gave the necessary power to the Commissioner. The law of negligence would be used not so much to regulate the exercise of a power but to impose duties and to make their non-performance actionable in damages in a way in which neither legislature has seen fit to do. It is akin to a judicially imposed duty to legislate with the terms imposed by the courts. I do not see any basis for the creation of such a duty at common law. A duty of care for its citizens, which is the fundament of the pleading, cannot comprise a duty to provide a welfare state for the citizenry wherever in the world they may be.

450. Nor can a government, without legislation, take upon itself so large an obligation and assume a responsibility sounding in damages for its breach. The 1982 Agreement cannot be relied on as the basis for any alleged assumption of responsibility in any case, because it was declared to be without acceptance of liability and was entered into several years after the arrival of the Chagossians in Mauritius. It could not help those who went to the Seychelles any more

than could the 1972 Agreement. This too was only with the Government of Mauritius, and it was not an agreement with the Chagossians. It too could not be a source for the assumption of responsibility. Responsibility for the removal of the impoverished and dependent Chagossians cannot create an assumption of responsibility for these purposes. There was no communication of responsibility to them for or on behalf of the Defendants, and none is pleaded. There were no acts done by the Chagossians in reliance upon anything which was said or done by the Defendants, and none are pleaded. If any were to be, the action thus based could only be brought by those individuals who satisfy those requirements. However, this claim is not so fine grained; quite deliberately, it is all-embracing. The questionnaire is incapable of refining the pleading.

451. Even if it were confined to a group of Chagossians who were removed or prevented from returning, the scope of the duty is so extensive that it cannot be found in any duty born of the tort of negligence. It is to be remembered that the case does not depend on any unlawfulness in the removals themselves. The claim assumes that the Commissioner could require the plantations to cease to operate, the islanders' employment and support to cease and even the islands to be cleared. I can see no reason in principle why the same duty on the Defendants would not arise if the Chagossians had been removed by the decision of the Chagos Agalega Company Limited. If a duty arises from the relationship of citizenship, it is difficult to see the rationale for such a restriction; why should there not be a duty imposed on a landowner who ceases to have a requirement for his workers and requires them to leave his land? His duty would be to provide for them as if they were still his workers. I note in parenthesis that the medical treatment which the Claimants receive on Mauritius is what they would have received in Mauritius had they remained on Chagos, and the education on Chagos was very limited indeed. But the duty appears to require not a 1971 Chagos lifestyle nor a 1971 Mauritius lifestyle but one which changes as the circumstances around them change.

452. There is no duty, nor even a power, let alone one actionable for damages, to do whatever may seem reasonable. The statutory power to do that has not been identified. The Claimants' contention that the Defendants' submissions stand in the way of the regulation of unreasonable conduct and impose no obligation to do what is reasonable shows how wide their submissions really have to be cast. There is no duty at common law to avoid even conditions of destitution for the citizen. This claim, in the guise of a negligence action, seeks to erect a duty to care and to create thereby a cause of action for circumstances in which neither misfeasance, statutory provision or constitutional right, or other recognised tort has provided.

453. As Mr Howell points out this is not a claim for breach of statutory duty. Nor is it a claim for damages for a negligent exercise of powers within the exercise of a statutory discretion. No such duty has been identified. If it had been, it is difficult how a duty of so wide an ambit could be justiciable; it plainly would give rise to major policy issues as to the allocation of resources and the determination of an appropriate lifestyle in which someone was to be kept. It would involve an interaction with a foreign government; it is plain that there was concern in Mauritius about the impact which special treatment for the Ilois would have on Mauritians; the Seychelles Government was of the view that all were Seychellois and that no differentiation should be made between its citizens. The definition of a form of welfare state, with foreign policy overtones, is not a judicial function. Parliament and the BIOT legislature could not have expected this to be an area in which the courts would substitute their views for those of the executive.

454. I regard as untenable the argument that the absence of the sort of provision for which Mr Taylor contends could show that there had been an abuse of some unidentified discretion. This is at present no more than a submission; no relevant parts of it have been pleaded. If the relevant statutory discretion were to be identified, as Lord Hoffmann said in Stovin v Wise, the Claimants would still have to show the exceptional grounds upon which the Court should hold that liability in damages arose for that irrational act. They have not attempted to address that point.

455. The claim in negligence for damages for economic loss is untenable. There is no duty situation of the sort necessary to justify the claim, and it could be neither fair, just or reasonable to impose the asserted duty if there were. Any claimed statutory duty of the sort which the Claimants would need to assert could not be justiciable. I do not know whether a more narrowly and precisely pleaded claim might have something in it but this claim does not.

456. Does the claim for damages for personal injury provide a better prospect for those who suffered from personal injury, on the assumption that the deficiency in the pleading as to reasonable foreseeability of harm is remedied? I bear in mind the breadth of the concept of personal injuries for Limitation Act purposes revealed by Phelps, above. I do not think that at this stage it can be said that it is clear that personal injuries of that breadth were not reasonably foreseeable. The essential features of life for the islanders were well known: they were used only to a very dependant and simple existence, they had very limited education, work skills of no relevance in Mauritius, they were unused to coping with unemployment, or with seeking private or public housing or dealing routinely with cash, social security, officials or a modern way of life or Mauritian social attitudes towards them. Their dietary needs on Chagos were reasonably catered for and their housing was adequately provided with sanitation. Their roots were known to be in the Chagos. It is arguable that it was reasonably foreseeable, as evidenced by the resettlement agreement in 1972, the preparations for resettlement and the Prosser Report, that at least so far as those going to Mauritius were concerned, the inadequacies of the proposals for their reception, housing, transport of personal possessions, social assistance for immediate needs to obtain food, some training or education for the life ahead, would lead to serious psychological effects, recognisable psychiatric illnesses and the illnesses associated with malnutrition and insanitary housing conditions. This would apply not just to the limited category of those who were the last to leave Peros Banhos but arguably, to all those whom I have identified as arguably having been compelled to leave the Chagos through the sequence of decisions made by the Defendants which they then implemented over time. It could not cover their descendants. I would not draw a distinction between those who went to Mauritius and those who went to the Seychelles for these purposes. It would not cover those who were unable to return. The duty arose upon removal; it is not a continuing duty.

457. The duty to take reasonable steps to avoid that harm arises not just from its arguable reasonable foreseeability, but also from the fact that it was the Defendants' acts, lawful or unlawful, which put them in that position of risking harm, about which they had limited choice. Even those who went temporarily to Peros Banhos and Salomon were told that it would not be forever. There was an option of going to Agalega but it is arguable that the choice of another island so far away or Mauritius itself, or the Seychelles is not so obvious that to decline it makes for a voluntarily assumption of risk. There was no obvious means whereby the full extent of the

information necessary for an informed choice to be made was provided to them. Accordingly, it is arguably not unreasonable for them to have chosen to go to Mauritius or to the Seychelles. It is arguable that that duty was breached. The material derives from the condition of the Chagossians some years after their arrival; after all they did not see any benefit from the 1972 agreement for several years during which inflation was rampant.

458. I accept that it is obvious that an agreement with the Mauritius Government, once it has been implemented, is capable of being a or indeed all the reasonable steps which it is necessary to take; but I do not regard it as unarguable that the 1972 Agreement was insufficient. The documentary material leading up to the evacuations shows an awareness of needs and of the difficulties which would be faced, but the Defendants arguably knew that the conclusion of the Agreement before the evacuation did not mean that anything would actually be done in practical terms by the time the islanders arrived. There is arguably no evidence that even any temporary arrangements for shelter, social security, money to tide them over and so on had been made, let alone anything which would give them a reasonable chance of avoiding personal injury. The evidence arguably shows that the Defendants knew that nothing was being done with the £650,000 as inflation ate away at its capability to achieve what was needed, and did nothing. It is arguable that the minimum requirement of a reasonable step is that it achieve something for the intended beneficiary rather than be merely an agreement with another for the discharge of the obligation, with no subsequent actions to ensure that it has been implemented. It is not necessary for me to identify the reasonable steps which should have been taken in the 1970s to avoid the personal injuries which were suffered. I appreciate that there is a significant causation problem but that is not a matter for this stage.

459. So far as the 1982 Agreement is concerned, obviously it does not affect those who went to the Seychelles. It would arguably still leave a claim for delayed performance of the duty of care even if it were discharged in 1982. It was plainly not an unconscionable bargain as a matter of settling speculative litigation as I discuss later. But that is not conclusive as to whether it plainly discharged the duty to take reasonable steps. The problem with that argument is that on the necessary hypothesis that there was a duty of care to certain individuals, its discharge depends more upon individual circumstances than a general assessment of the needs of the Chagossians. It would be a significant hurdle in the way of any action but I do not consider that that Agreement can now be said to render unarguable any claim for damages for personal injury.

460. The claim should be re-examined for the way in which it is pleaded should this case proceed. It would apply to a limited category of Chagossians, those who were compulsorily removed, who would have to plead and then prove a personal injury for which damages are given at common law, and that it was caused by the lack of reasonable steps being taken by the Defendants to prevent personal injury arising from the removals among the Chagossians generally. The reasonable foreseeability of injury arises from it being reasonably foreseeable that, among those who were removed, there would be some who would so suffer, rather than from it being foreseeable that any particular individual would so suffer; the nature of the steps required would reflect that rather than being those required to prevent any identified individual suffering personal injury. Credit would have to be given for any sums received or facilities provided under the 1972 and 1982 Agreements, and allowance made for any facilities, treatment or funds made available by the Governments of Mauritius and the Seychelles.

461. There is an arguable claim in negligence but only for personal injuries.

Abuse of Process

462. The abuse of process issues pursued before me were whether:

i. It was an abuse of process for those who had signed renunciation forms (paragraph A642) and received Rs 8,000 in consequence from the ITFB, or for anyone claiming through such a person, to bring these proceedings; and

ii. A lesser, but related issue, arose as to the position of Michel Vencatessen and his heirs, in the light of the withdrawal of his action in 1982.

462. The Defendants did not pursue their claims that these proceedings were an abuse of process because a challenge to the administrative conduct of the Defendants had been withdrawn in the Bancoult case, or because this present case involved a challenge to the vires of the 2000 Immigration Ordinance which ought to have been made by way of Judicial Review. That was a sensible position to adopt, in relation to the pleaded basis of challenge.

The effect of the Renunciation Forms

464. It is not entirely clear how many of the Ilois eligible for compensation under the terms of the ITFB Act, as amended, signed these forms. There were either 1,332 who signed out of the 1,342 to whom ID cards were issued, or 1,344. Mr Beal for the Defendants had, however, found forms for all but four of those to whom ID cards had been issued, suggesting that a trickle of signatures were obtained after June 1984. Either way, it would affect a considerable number of Claimants and their heirs.

465. It is difficult, however, to relate the forms to Claimants directly; their questionnaires are silent about them and the Claimants have not referred to the forms or to the compensation in their pleadings, even by way of acknowledging that any credit was due for it against damages claimed. I found that silence surprising.

466. The Defendants' case was that the renunciation forms covered precisely the causes of action now being pursued. Although the 1982 Agreement was an inter-governmental agreement, and although the Defendants could not contend that the signing of the renunciations constituted a series of contracts of compromise, nonetheless as a matter of principle, the pursuit of these claims by those who had signed or were their heirs was properly characterised as an abuse of process.

467. Mr Howell submitted that where a person A (an Ilois) agrees with another person B (the ITFB) that he will receive payment in settlement of any claim that he may have against a third person C (the UK Government), he A may no longer sue that third person C, even though that person C is not a party to that agreement and the person undertaking to make the payment B is

not the third person's agent. Any subsequent proceedings that he A may bring against that third person C are an abuse of the process of the court.

468. He relied on a number of authorities summarised in Chitty on Contracts 28th ed Vol 1 3-118: Welby v Drake [1825] 1 Car & P 557; Hirachand Punamchand v Temple [1911] 2 KB 11 CA; Morris v Wentworth Stanley [1999] QB 1004 CA 44-45. The Court, he submitted, would regard it as an abuse of process to allow a payee to take money to settle a case and thereafter to seek to maintain the original case. A litigant could not accept money on one basis and pursue the claim on another. If a form was signed in order to receive money, the money was accepted on the basis of what was in the form. Non est factum required both an absence of knowledge as to the document and that reasonable care had been taken in signing it. He recognised that a defence of non est factum would be available in principle and that its availability in practice to any Claimant would depend on the facts relating to that particular individual. But Mr Howell sought an indication from the court that that was to be the position. It was said that that would aid the future management of this case.

469. The Claimants' final position emerged in their latest version of the Amended Reply on Limitation and Abuse, for service of which I give permission. I appreciate the Defendants' submission that permission should be refused because it came too late and after evidence had been heard, a point made more in the context of the limitation arguments. But I do not consider that these applications should succeed on remediable pleading points or through the exclusion of relevant material. I was singularly unimpressed by the refusal of the Claimants to respond to the Defendants' request in February 2003 for information relating to the Amended Reply; the absence at that time for permission to amend was an inadequate basis for most of the information to be refused. But I do not regard that as a justification for refusing permission for the latest version to be served as the Amended Reply.

470. The Claimants submitted, first, that because, as the Defendants acknowledged, the proceedings could not be struck out in whole or against any individual Ilois, since any individual might be able to rely on non est factum, this ground of attack should fail immediately.

471. Second, Mr Allen sought to turn the tables and argue that on a generic basis, this abuse argument was untenable, and should be dismissed. The Chagossians had had only a hazy idea as to the effect of the 1982 Agreement and no idea at the time that they were being required to waive for all time any claims against the Defendants. The relative position of the parties mattered; the UK Government had abandoned any attempt to compromise claims in the legally binding ways which they knew and there was nothing wrong with the Chagossians taking advantage of their failure to do so. There was neither a contract of compromise nor a clear and unequivocal waiver of rights, either of which would have sufficed.

472. He referred to Johnson v Gore Wood [2001] 1 WLR 72 81-82 and Gairy v Attorney General of Grenada [2002] 1 AC 167 as setting out the relevant principles in an abuse claim. These were concerned with fundamental rules of justice between litigants, a necessary power to protect against oppressive or vexatious litigation. In the former, the House of Lords said that whether an action constituted an abuse of process should be judged broadly on the merits taking account of all the public and private interests involved. A scrupulous examination of all the

circumstances was required before an action should be dismissed as an abuse. The authorities relied on by Mr Howell were not referred to. The Claimant had a personal claim which had not been compromised, separable from, though clearly related to, the community claim which had been. It would be unjust, submitted Mr Allen, for the court to allow the UK Government to rely upon those forms unless the point had been taken at the first opportunity; they had been held by the FCO since they were sent there in 1984 as the recently disclosed letter of 12th September 1984, (19A/D/44), had shown and they had not been disclosed until 25th October 2002. They could have been deployed against the Bancoult Judicial Review, because that raised issues about the lawfulness of the 1971 Immigration Ordinance which were covered by the renunciation forms, and he had signed such a form; indeed, their existence had been referred to in the evidence in that case by both sides. The Defendants' deployment of those forms in pursuit of an abuse of process argument did not arise in their pleadings or before Master Turner, but was first raised before me on 26th September 2002.

473. Mr Allen submitted, third, that the forms could not affect infants who signed or those under a disability. He submitted, fourth, that the form was not an agreement, or, if so, that it was not the entire agreement - who were the other parties? What was the resettlement in Mauritius and by whom? What was the consideration? What was the compensation? Could any person signing the form sue on it in respect of any deficiencies in resettlement? For how long was declaratory renunciation to be effective?

474. Fifth, there was no evidence that any person signing it knew what was in it; the evidence was that they thought it was a receipt not a promise or agreement. The Chagossians would not have signed away the right to return leaving no enforceable right to return, which is the apparent effect of the agreement. It was not a mere giving up of the ability to enforce a right. They could not be negligent in signing the forms, when so many were being processed and there was neither translation, explanation, forewarning or advice available.

475. The fact that Elie Michel sought Bindmans' advice again in the early 1990s suggests that the effect of taking the money was seen as simply postponing for five years the right to take proceedings. Besides, to the extent that non est factum is a rule of justice to protect third parties, the Defendants were not true third parties. It is a rule of justice and individual circumstances matter; illiteracy is very important. Their signature could not constitute a clear and unequivocal waiver.

476. Sixth, in essence, the court should approach this as it would a bilateral contract of compromise; the label of abuse of process, if correct, was not important. Seen in that way, the court should be very slow to infer that a party intended to surrender rights and claims of which neither party was or could be aware or of which the releasing party was not and could not have been aware: BCCI v Ali [2001] UKHL [2001] ICR 337 16017. The relevant words had to be read in the context of the Agreement, the parties' relationship and all the circumstances known to the parties; an objective view of the parties' intention would then be reached. If the words were to cover claims of which no party was aware, or of which one party was unaware, appropriately clear words would have to be used. The form, covering, as it did, what was done "pursuant to the BIOT Order 1965" could not cover common law claims or ultra vires acts. It did not use the language of "full and final settlement".

477. Seventh, the requirement for such forms was a surreptitious insert into the 1982 Agreement. The negotiations had commenced on the basis that the earlier requirement for individual quittances which had proved such a stumbling block for Mr Sheridan in 1970 would be abandoned, as had already been signalled. The provisions of Article 4 were introduced to protect the Mauritius Government which was ultimately at risk of indemnifying the UK Government and were not in the first draft of the Agreement. This Article was not translated for the Ilois. The Trust Fund Act did not place any duty on the ITFB to obtain them.

478. Eighth, no individual had legal advice, let alone on an individual basis looking at his or her individual circumstances; a mass meeting was not an equivalent. Negotiations could be collective but not advice. Ninth, it was unlawful for the Defendants to bargain away its governmental responsibilities or its citizens' fundamental rights. In the light of all the circumstances, it would be unconscionable for Defendants to be allowed to rely on this abuse argument. They were aware of the problems of the Ilois, with different groups, political interference, the difficulties in seeking individual advice, but it had a governmental relationship with them and knew how desperate they were and how inadequate the £650,000 had been.

479. Mr Allen recognised that group litigation had not existed in 1982 in the way it now does and that the settlement in the thalidomide litigation afforded some practical guidance. But for all the difficulties in 1982 in achieving a global settlement for all the Ilois, as they then all seem to have wanted, he submitted that the only proper way to have proceeded was by individual advice and explanation for each Ilois and by developing the sort of practices which have only been seen much more recently in the settlement of group litigation, with dissentients trying to carry on as best they can or being barred. He recognised that this would have given rise to considerable practical difficulties over, say, conflicts of interest between groups of Ilois with different views, and their legal advisers; this could have led to very considerable delays in Chagossians, in their plight, receiving any money. But Mr Allen said that the UK Government ought to have learned from the speed with which it had attempted a settlement in 1979 and ought to have made sure that there were opportunities and time for alternative advice, with copies of the Agreement in Creole, or ought to have sought a parallel oral agreement.

480. The Defendants, in response, submitted that the fact that some, but not all, Claimants' cases, might be an abuse of process was no reason not to strike out those which were. That I regard as obviously correct in principle. Here, the fact that those Claimants to whom the argument applies, if it is otherwise sound, cannot immediately be identified, does not deprive the argument of force. If it is sound, the Claimants will have to be more explicit about who received money having signed renunciation forms.

481. If Claimants could be barred from bringing proceedings because they are an abuse of process, and yet defences, in principle, may be available to some against such a step, it becomes matter for individual adjudication as to whether such a case or defence succeeds in practice. To my mind, it assists effective case management for those issues to be so identified, focusing the minds of the parties upon the factual issues which they need to address. The fact that an argument as to abuse may not ultimately succeed, because particular facts may justify its defeat, is no reason to refuse to identify what the Claimants need to show in fact for their action to

succeed. There is a force, which I accept, in the Defendants' submission that, if its abuse point is sound and if the Claimants' evidence that no-one asked about the contents of the forms is destructive of any potential defence of non est factum, the Defendants' abuse case should be allowed to succeed now. Likewise, it is relevant for the consideration of the group litigation as a whole if it proceeds, by way of establishing a benchmark, if I conclude that those who have given evidence would have no reasonable prospect of establishing any defence to this abuse of process argument.

482. I accept that the authorities bear out Mr Howell's submission as to circumstances in which an abuse of process can occur as a result of someone accepting money from B to settle C's debt, but then suing C. I also accept that cases such as Johnson v Gore Wood show that there are different categories of abuse for which no exhaustive list exists. One category is where an issue could have been raised in earlier litigation between the same parties; another is where settlement of a corporate action leaves open or is expressed to leave open a related action by a shareholder. This abuse argument relates to what Mr Howell described as a "settlement" case. The point which Mr Allen made, which I accept, is that in consequence, the way in which that sort of allegation of abuse is examined bears a close familial relationship to the way in which an allegation that proceedings were in breach of a compromise agreement would be analysed. However, categorisation of cases is not the answer by itself. Mr Allen's point is well made that Johnson v Gore Wood shows an overarching requirement that the action be abusive of processes of the court, on its merits, looking at all the interests after a careful examination.

483. However, if in fact a Claimant has accepted payment of a lesser sum from B than was his due from C, in circumstances where the payment by B was agreed to be a substitute for payment from C, usually because B's payment was certain but C's was not, there is nothing unjust at all in relation to the principles of Johnson v Gore Wood in that person being unable to sue C – quite the reverse – the court should not allow its procedures to be used to enforce the debt which the creditor had settled by payment from another. Mr Allen's arguments to the effect that in each of the cases relied on by Mr Howell there was an acknowledged debt, and in one an election made as to whom to sue, are beside the point. It is a point which can only be relied on by the payer by intervening in the action. Mr Allen did not suggest that the authorities relied on by Mr Howell had been disapproved of or overtaken by Johnson v Gore Wood.

484. The real issue is whether a signatory to the renunciation form accepted in so doing the Rs 8,000 in return for not suing the UK Government; in other words, did the facts here fit the settlement type of case where the court would intervene to prevent an abuse of process? I emphasise Rs 8,000 because no other component of the distribution of £4m plus £1m land was subject to such a requirement. I regard as untenable the suggestion by Mr Allen that what would otherwise be an abuse of process, ceases to be one because circumstances subsequently changed, whether to show increased prospects of success in litigation or to show the inadequacy of the sum accepted.

485. Mr Allen submitted that, viewed as a settlement type case, there were a number of reasons which showed that no agreement of the sort relied on by the Defendants had been reached. I do not understand his point, on the parol evidence rule, as to what other terms might

have been part of the Agreement, as opposed to his argument about what the terms stated actually meant; no other orally agreed terms were suggested.

486. I do not accept Mr Allen's argument about the wording of the renunciation forms, to the extent that it goes to whether any agreement at all was reached when they were signed; it only goes to what was agreed. It does not matter that there was both a UK and a Mauritius Government form or that the ITFB were involved in their collection. Nor does it matter that no other party is specified; it is perfectly clear that the form involves acceptance of money from the ITFB in return for a renunciation of certain claims against the UK. For the purposes of this aspect of abuse, that is what matters.

487. I turn now to the various arguments as to the scope or meaning of the renunciation form, construing its language objectively in the relevant factual context. First, Mr Howell sought to distinguish the BCCI case, while not disputing its authority. It was, he said, a general release of all claims of any description; it was that which gave rise to the issue of whether or not a claim, the nature of which was not envisaged at the time of settlement by either party, fell within the scope of the compromised claims. BCCI was distinguishable on those grounds – the renounced claims are set out with some particularity in the renunciation form, although there may be room for debate as to their precise meaning. His case did not rely on general wording or unknown claims. BCCI, in my judgment, is concerned with the construction or application of the terms of a seemingly all embracing release to a claim the nature or existence or basis of which was unknown to all parties; the general release could not cover such claims; objectively judged in that factual matrix, the words did not cover such a claim. It would have applied also if one party had not known of the possibility of a claim. This was subject of course to clearer and more precise wording than had been provided in BCCI. There was also a concern that giving such a clause a very wide construction could be a vehicle for sharp practice, by someone with the relevant knowledge against another who acted in ignorance.

488. But that is rather different from the position here: the claims precluded are all claims arising out of an identified series of acts and omissions. The claims upon which the Claimants now rely and which the Defendants contend are covered by the form, were all in existence in 1984 as a matter of law, apart from the alleged tort of exile. They all bear a close kinship, albeit expressed in different language, to the Vencatessen claims, which the renunciation forms would obviously have been addressing, together with any similar claims however expressed. Indeed, much of the factual material was known or capable of being ascertained, although I accept that the question of what the UK Government knew, compared to what it said, was not fully known until papers were released under the 30-year rule, but the fact that some material had been withheld was known. Mr Allen's submission that a lack of knowledge of existing rights precludes an effective settlement, is too broad for BCCI to provide him with support. Assuming that the Ilois knew, or are to be taken to have known, what they were signing, none of the rights which they gave up were rights the very existence of which they were unaware of. They gave up rights which they say they were asserting. Their case is rather that they did not know that they had given up any rights, not that they had given up, through a form of words, rights which neither they nor the Government knew existed or even contemplated might exist. BCCI does not help Mr Allen. The Ilois were not obliged to sign the forms; they could decline the ITFB money and maintain an action.

489. I do not accept Mr Allen's next submission that the claims surrendered are not common law claims or claims in respect of ultra vires acts. Such a contention empties the form of meaning; the only claims which could arise were those in respect of unlawful acts, unlawful at common law or for want or abuse of statutory power. It is plainly not confined to future acts; it refers specifically to past acts.

490. It is perfectly clear that the form covers all the damages claims in these proceedings. It is less clear that it constitutes a renunciation of the right to return (as Mr Allen suggested) as opposed to the renunciation of a claim in respect of preclusion from returning or enforcement of the right to return, which right remained in existence (as Mr Howell suggested). Certainly, a claim in respect of preclusion is renounced; but so too (using the material words of the form) is any claim relating to: "Any future situation occurring in the course of or arising out of the consequences of what was done pursuant to BIOT or any such preclusion."

491. On any view, however, it covers all the claims in these present proceedings. I see no force in Mr Allen's question as to the duration of the renunciation of claims: it is indefinite. If Mauritius were to regain sovereignty or if the bases were to disappear (the lease has a maximum of 70 years from grant absent any renewal), the legal enforcement of any right to return would remain precluded; the claim could not be made.

492. Mr Allen's submissions about whether anyone could sue on the form, for compensation or resettlement and as to what the compensation was are not substantial responses to the issue raised by the Defendants as to the effect of these forms. Whatever else was included, the consideration clearly covered the Rs 8,000; it covered the remaining distributions by the ITFB including the anticipated community facilities. There is, I accept, past consideration as well in the references to compensation and resettlement, the bulk of the individuals' money having already been paid out. But that does not assist Mr Allen: this form of abuse may resemble the breach of a contract of compromise, but it is not the same as a breach. The real question is what was the basis upon which the ITFB paid over the Rs 8,000 and is that inconsistent with the claim now advanced?

493. There was no right to sue the Governments, who were not parties, so as to enforce more compensation and better resettlement. As was decided in the Permal case in 1984 and 1985, (paragraph A693), there were alternatives open: sign and bring a claim against the ITFB for the due portion; refuse to sign and sue either or both Governments. The Defendants' position on that aligns with what the Mauritius Supreme Court decided in both Permal and subsequently in the case brought by Simon Vencatessen, decided in 1989, (paragraph A743).

494. Accordingly, subject to the two substantive points remaining, I consider that the Defendants have clearly established that the form covers the claims in the present case and that, in principle, having accepted the money from the ITFB and signed the form renouncing claims, it is an abuse of process for those Claimants to bring these proceedings. The basis for the ITFB payment was that the form had to be signed; that issue was in fact litigated and upheld. There is no issue about that. The issue is about whether they knew what they were signing and nonetheless want to sue the Defendants in these proceedings.

495. I now turn to those two points which can be broadly described as the Claimants' absence of knowledge as to what they were signing and unconscionability. This entails some analysis of the factual material.

Knowledge

496. The immediate evidence about how the renunciation forms were signed has to be put into the factual circumstances leading up to their signature and indeed some subsequent events cast a light upon what was known in 1983 and upon what was fair.

497. Mr Howell submitted that in view of the signatures or thumbprints, the signatories were bound and the proceedings were an abuse unless there were reasonable prospects that the Chagossians could establish at trial the defence of non est factum. He referred me to Norwich and Peterborough Building Society v Stead [1993] Ch 116 12607 Court of Appeal, which also sets out the principles from Gallie v Lee [1971] AC 1004. It is for the person who has signed the document to show that the transaction which it effects is essentially different from the transaction intended so that the signatory can say that he did not consent to it. But he also has to show, even if illiterate or lacking in understanding of the law, that he acted responsibly and carefully according to his circumstances, although the law is readier to relieve him against hardship. That second requirement is expressed by reference to the position of innocent third parties who, knowing nothing of the circumstances of the signing of the document, may rely upon it.

498. There was no great dispute as to the law as opposed to its application to these facts. Mr Allen suggested, but I reject it, that because the principles in Gallie v Lee were expressed to originate in the need for protection for innocent third parties, non est factum did not apply where no innocent third party was at risk. I take the view that it protects the other party to the transaction as well, and is just as applicable to protect him, present at or absent from the signing by the person raising the plea. But the UK Government can also be seen here as an innocent third party, albeit that it would have been aware of the illiteracy of the Ilois; it was not in charge of the signing arrangements, and imposed no requirements as to how it was to be done. Nor did it "connive" in a particular form of process. It can be said, but that is another matter, that, despite the involvement of the Ilois on the delegations, the legal advice which they had and the publicity given to the full agreement, the UK Government organised no legal advice for the Ilois on an individual basis before they signed the form.

499. Mr Howell submitted that those signing had made no enquiries, or asked for it to be read or explained. The forms were evidently not simple receipts; they were asked to sign two forms, once for the UK and once for the Mauritius Governments. They could simply enquire whether these were receipts. Mr Abdullatif was present. Mrs Kattick and at least Mr Ramdass would have known what they were. They could have waited.

500. Besides, submitted Mr Howell, any appraisal of what the Ilois knew had to be set against the background of the long campaign for compensation. It had long been plain that the UK Government would only pay more money if there were to be no more claims like Michel Vencatessen's. It was absurd for the Ilois to seek to portray that case as a family case; the Ilois

tended to be concentrated in a few places in Port Louis and word would travel fast. It had received considerable publicity, as a test case. All the negotiations in 1979, the subsequent correspondence, the legal advice showed the Ilois organisations to be well aware of the UK Government's requirement that a settlement to be final, even though they would not renounce their rights to return. The Ilois themselves were using the litigation route as well as the political route and cannot have supposed that one case could settle leaving others to be commenced.

501. Through the 1982 negotiations, the position of the UK Government on this point had been clear, though it would not insist on the individual abandonment of the right to return. The evidence showed that the issue of a renunciation form had been raised with some of the Ilois delegation before Mr Grosz and Mr Macdonald left; the Agreement had been discussed and it was in a final form.

502. The Ilois delegates would not just have sat quietly, as observers; they were vocal, activist and organised. Elie Michel could understand enough English to get the gist; Mr Mundil was bilingual; Paul Berenger and Mr Bacha spoke Creole. There were meetings with the Ilois delegates alone. There was no incentive for concealment; the Agreement, with Article 4, was widely reported in the press. The CIOF took subsequent advice about it.

503. Mrs Alexis had lied over her knowledge of what had been the focal achievement of her long and tireless campaign: the CIOF contact with lawyers in correspondence before and after the 1982 negotiations, and their presence at the 1982 negotiations to advise the delegation, or that they had twice threatened litigation if negotiations failed; it was not credible that she had not known this was to be a full and final settlement, though she had written to President Reagan in those terms.

504. If she had thought that she had obtained £4m plus £1m and that anyone could still bring an action against the UK Government, it was a remarkable negotiating achievement and better than had been sought. But that had not been reflected in subsequent conduct: while dissatisfied with the amount of money, in practice once it had been distributed, no-one had brought an action against the UK; instead they had sought money from the USA. For her not to know about Article 4, and renunciation forms, there would have had to have been a conspiracy to deceive her whilst simultaneously all the relevant forms were being put in the press. She said she distrusted non-Ilois and so would not rely on the Mauritius Government. She said that the ITFB had no copy of the 1982 Agreement: "we knew it well", as she would have needed to do to tell the Ilois she represented about it. She had been an activist in 1983 in the CRG, not "just sitting at home" as she had said. She was pressing for payment of the money and for signatures to unblock the £250,000.

505. Mr Ramdass, submitted Mr Howell, was likewise not credible. Mr Mundil, with him on the JIC, had been his translator in 1981 and was fluent in English and Creole. It was not credible that he had no copy of the Agreement; his son sent one to Sheridans, who drew the renunciation obligation to the JIC's attention.

506. The 1982 Agreement was not difficult to understand in essence. It was highly improbable that the Ilois who initialled it were unaware of its essential features. There was every

incentive for the Ilois representatives to understand it in light of what happened in 1979, when some of the Ilois delegates in 1982 had led the opposition. They would need to explain the position to those whom they represented. There were plenty of people who could assist with the 1982 Agreement quite apart from the CIOF's English lawyers. Mr Bacha was a governmental official; Mr Berenger, an important politician, was on good terms with the CIOF.

507. The 1982 Agreement was the major event for the Ilois for a decade; it would have been discussed widely and the 1979 experience would have made them aware of the importance of the conditions which might be attached. It was inconceivable that anyone would try to keep the Ilois in the dark; there was no value in doing so, nor with the legal advisers, publicity and political interests any prospect of doing so. There was nothing in 1981 or 1982 to suggest that the Ilois could not distinguish between compensation claims which were settled and the right to return, or that they had any objection to settling compensation whilst leaving intact any right to return.

508. The ITFB conducted its meetings in Creole. Mr Ramdass' suggestion that they reverted to English for important matters rather begged the question of how he knew they were important. There were five Ilois. There had been controversy at the ITFB in February to April 1983 about whether the ITFB should be involved in collecting renunciation forms: Elie Michel, Francois Louis, Simon Vencatessen, Josephine Kattick and Christian Ramdass were there.

509. Those last two were to play a part in witnessing forms, not to identify people, because ID cards had been produced for that purpose. The Rs 8,000 were to be paid at Astor Court and not through the Post Office. It was being paid in a different way – there would have been discussion as to why.

510. There was a delay in the planned timetable which oddly no Ilois witness could remember.

511. It was not believable that the Ilois did not know of the forms. Mr Bancoult and Mr Louis could read and write some English. It was implausible that Mr Bancoult, who was quite confident and assertive, would have signed the document when most of it had been hidden from him, as he answered when pressed on the fact that it did not look like a receipt. It was a lie for him to say that he did not know what was in it till Mrs Talate gave evidence. He lied because if he knew, as a "B", most others with later initials to their surnames would also have known. He himself witnessed some signatures. He had written to President Reagan in 1984; he said "full and final" was bandied about the whole time. He was involved on the ITFB in 1984 in seeking to unblock the £250,000 and expressed no surprise at renunciation forms being raised in that context. For him to say that he did not know was not credible in the light of the many references to them at the ITFB. The CRG raised the issue with the High Commission in Mauritius, and he was part of the 1985 delegation to it which raised it. His denial of ever having seen one was untrue; he witnessed a later one.

512. Others resisted signing because they saw the risk of the forms being used to support preclusion; Francois Louis and Kishore Mundil formed an organisation (KMLI) to make that point. There was no protest that this was a dreadful revelation. KMLI helped CRG prepare a claim for £4m from the US.

513. Simon Vencatessen and Francois Louis had been elected representatives on the ITFB; they held a press conference. He pursued litigation on the point. They had no desire to hide their position. If they had an incentive to do so, it would be lest Ilois wanting the £250,000 unblocked would try to make them sign. Simon Vencatessen's evidence had been implausible. His witness statement and oral evidence were inconsistent over when he said he found out about the forms. In the former, he said Mr Bacha had said they were necessary and he had protested. The Minutes show his presence when advice was given that they were not for the ITFB to collect. His oral evidence was that he did not know of them till September 1983. He knew that £250,000 would be retained unless they were signed. He knew that it was full and final and hence did not sign.

514. The ITFB Minutes are full of discussion about how to get the £250,000 unblocked through obtaining the last few renunciation forms or persuading the UK that they had enough.

515. If the Ilois had not known generally, there would have been a cry of betrayal. Mrs Alexis said that they would have revolted. Yet it is clear that they did not do so at any stage. It is clear that the existence of the renunciation forms was talked about before and after signature in 1983 in the KTFB, and the press. No-one kept them a secret. The obvious inference is that they were known about.

516. No litigation was started or thought about for some years, although fresh advice was sought by the CIOF in 1990. If the inhibition lasted till 1985 or five years from the Agreement as Ilois witnesses suggested, it is surprising that their poverty did not drive them to it. Mrs Alexis and Mr Saminaden exaggerated the lack of organisation and stupidity of the Ilois. It was implausible that Mr Ramdass had not known of the forms till after the 1982 Agreement, and after a protest heard nothing more till he met Mr Mardemootoo recently. He was on the ITFB in 1983 when the forms were discussed. His son had a copy of the Agreement. He was related to Francois Louis and Simon Vencatessen who refused to sign, the latter bringing a case about it.

517. Mr Howell described Josephine Kattick as evasive when it came to dealing with whether the settlement had been "final". She had been an activist, a member of the CIOF Committee and her sister had been prominent in Ilois affairs and part of the Ilois delegation. Her evidence was contradictory about her knowledge of the Agreement in 1982. She had been aware of the renunciation forms from discussions in September 1983 at the ITFB, and that those were the forms which she had witnessed. She made no protest and told no-one of them. It was obvious that she had known what they were. She was an intelligent witness, but not always honest or reliable as was shown by other aspects of her evidence, over her education and being deported from Chagos when she had left in 1967, later saying that she had been prevented from returning by Rogers & Co.

518. Mrs Talate was an active Ilois campaigner in the late 1970s and early 1980s; she was a leading member of the CIOF and was one of those who thumbed the CIOF letter instructing Bindmans. She knew Mr Ramdass and Mrs Alexis on the 1982 delegation. She had been on the ITFB for three years. She had received money from it. Her variable evidence about her knowledge of the source of the money, or of her receipt of it, and on other matters made her

unreliable and at times untruthful. Her witness statement had not dealt with many important areas, failing to disclose her true role.

519. Rita David was similarly unreliable. She completely changed her evidence midstream about whether she had been aware of the 1982 Agreement, the payment of money and that no more would come from the UK Government from saying that she knew of those events to denying all knowledge.

520. Rita Elyse, Olivier Bancoult's mother, had said that she had been involved in meetings and protests seeking money from the UK Government. Her later claims not to know that the Agreement meant that no more could be sought were not credible. She played down her contact with her son and his ability to read English; she denied that what he said about that in his Judicial Review witness statement was correct. Given what he must have known about the unblocking of the £250,000 when he was on the ITFB, it is incredible that he would not have told her and of the associated renunciation forms.

521. Mrs Jaffar's evidence that she never went to meetings, thought committees merely took advantage of her, never heard of negotiations, lawyers or protests, was not credible and was contradicted in part by her witness statement and in part by her involvement as a CRG elected committee member. She denied the truth of her witness statement which referred to her knowledge of the Vencatessen case. Her CRG involvement would have led to knowledge of the renunciation forms. She was unreliable in other respects too.

522. Mr Laval was not credible. Mr Saminaden, however, did know that the £8m sought in 1981 had been final and that Michel Vencatessen had to withdraw his case. His evidence as to what he and the Ilois then thought they could do about other cases was vague, at one time accepting that they could bring no more cases, then resiling. He had known that the forms were not receipts. He had only recently heard of his nephew's, Simon Vencatessen, case.

523. None had asked for an explanation of what they were signing: none of those who gave evidence could discharge the burden. It was for the signer to take reasonable steps to obtain an explanation and to receive legal advice. None were compelled to sign or to sign that day. There was no evidence of adult disability. It was reasonable for parents to sign for those under eighteen.

524. Mr Allen put the renunciation forms into a different context in which he said that they were a manifestation of the deceit and dishonesty practised by the UK Government on the Chagossians for more than ten years by 1983, and subsequently. They were at a real and obvious disadvantage of which the UK Government was aware and which it did nothing to address. He developed those arguments further in relation to unconscionability.

525. He pointed out the absence of full and informed individual advice being given to each Chagossian being asked to sign away fundamental rights. The forms were in English, which he said showed that this was a wilful attempt to prevent the Chagossians understanding the document. (English, however, was the official language of Mauritius and there was no evidence of much greater literacy in Creole.)

526. It is my task at this stage to say whether or not there is a reasonable prospect of Ilois who signed those forms making out a defence of non est factum. I consider that it is important to focus primarily on what happened when the forms were signed and the immediately preceding period. I recognise the contextual arguments and regard them as relevant but not, at this stage, decisive for most of the Ilois. I accept, however, Mr Howell's analysis of the sequence of events and the reliability and truthfulness of the Chagossian witnesses, as it is clear from the references to it in Appendix A. I can deal briefly with it here.

527. The Ilois had plainly become, to a significant degree, sensitised to the idea of renouncing their right to return to Chagos as a result of the political storm which led to Mr Sheridan's departure in 1979. It had been an issue in the run-up to the 1981 negotiations and again in 1982. It had become clear that there had to be some other solution if there were to be any agreements. It was envisaged and expressed in correspondence before the 1982 negotiations and again verbally at the 1982 negotiations that individual renunciations of that right would not be sought. The adverse reaction of the Ilois to suggestions of giving up that right had always been strong and genuine. I do not think that the difference between giving up the right and giving up the claim to the right would have been understood by them generally then, any more than it was now.

528. There was a mass meeting at which the outcome of the 1982 negotiations were explained, and the 1982 Agreement received widespread publicity. But it is not easy at this stage, indeed I doubt very much whether it will ever be possible, to be sure how well known it was in 1982 that there was a provision in the Agreement for some renunciation form, which individuals would have to sign.

529. This is by no means the same as saying that they did not know generally that the 1982 Agreement was final, that further actions could not now be brought against the UK, and that there might be some mechanism for preventing that.

530. There was a widespread awareness that the Vencatessen litigation had to be withdrawn because of the pressure put on Mr Vencatessen by the Ilois to withdraw it, so as to enable the money to be paid. It is obvious that that suggested that there would be some bar to the bringing of further money claims, but not necessarily that the precise means of prevention was known.

531. I regard as wholly unreliable or as positively untrue most of what the Chagossian witnesses said about the correspondence in 1979-1982 which referred to money being paid in full and final settlement. There was no reason for Mr Mundil to deceive them about his seeking compensation on that basis, or to keep them in the dark. Eddy Ramdass could read a little English. There were plenty of helpers. It would have reflected the UK Government's unvarying position, which it always sought to make clear, to everyone. I found their accounts of how the 1981 and 1982 negotiations proceeded to be untruthful and wholly unreliable. I do not believe that the Chagossian delegates were kept in the dark by anyone – it was not in anyone's interests for the Agreement to founder or to be torn up when its contents were made public. Nor do I believe that they did not ask what was going on or felt inhibited from doing so. They had felt no

inhibitions in 1979. Their personal activities were demonstrations, allegations, protests, hunger strikes, organising committees, seeking publicity and political support.

532. There was advice available in 1981 and 1982 from Sheridans and Bindmans, though only Mr Grosz and Mr Macdonald were present in 1982. Both sets of lawyers were fully alive to and accepted the justification for the UK Government's persistent theme that it would not pay over any money without guarantees that it would not have to pay more. I am sure that that point was communicated to the Ilois delegates, even through translation, and was understood by them. It is not a difficult point. I find it very hard to believe that that broad position was not also obvious to the Ilois generally as a result of the mass meetings, press publicity, and discussions among themselves. The general air of congratulations and gratitude all round on this result after so long cannot have left an impression that more could be asked for. The means by which that was to be achieved, which included the individual renunciation form and the withholding of £250,000 was explained to the Ilois delegates by the English lawyers. I am less certain how far those precise requirements were known to the Ilois in general as a result of the 1982 Agreement meetings, despite the report in "L'Express".

533. After the Agreement, the leaders of the CIOF took further advice on the Agreement. I do not believe that Mr Michel did not know what Bindmans advised, nor that he kept it from at least the leaders of the CIOF, including Mrs Alexis. I am sure that the renunciation forms were discussed by the English lawyers with the Ilois delegation before they left because Bindmans and Mr Macdonald did not raise it as a new clause in the Agreement they subsequently saw. I am sure they would have noticed it and specifically referred to it, if it had been new. Sheridans also advised the JIC on the Agreement specifically referring to the renunciation forms. I am quite satisfied that it was generally known this Agreement was intended to put an end to financial claims and that there was to be some mechanism for preventing further claims. I am not so clear that beyond the delegates and the leaders that it was appreciated that the mechanism included individually signed renunciation forms.

534. The Minutes of the ITFB record discussions on at least one occasion in March or April 1983 (Minutes signed 16th April) about the role of the ITFB in collecting the forms. The Ilois representatives on the ITFB at that time were Simon Vencatessen, Francois Louis, Christian Ramdass, Elie Michel and Mrs Kattick. However, no forms had been drafted by that stage.

535. There is also evidence that there was a hitch in the process on 29th August 1983; that may have been about the amount and not the forms. It does seem, however, that Mauritian politicians had been clear, at least with Ilois leaders including Mrs Alexis, that the forms had to be signed, but it is not clear at how large a meeting that was. Mr Berenger, Leader of the Opposition, and two MLAs representing the largest concentrations of Ilois, were there.

536. I turn now to focus more closely on the events surrounding the signing of the forms. It is to be remembered that the 1982 Agreement was reached in April of that year. The first tranche of payments of Rs 10,000 was made in December 1982, paid out at the central Post Office – no renunciation forms were required. The second, land purchase related, tranche was paid by June 1983 – no renunciation forms were required. The third tranche, where the forms were signed, proceeded without any radio or press announcement that renunciation forms were required.

There is nothing in the fact that a Ministry Office was chosen as the venue for the distribution to alert anyone to a different process. True it is that the forms do not look like receipts – they are too long and there are no figures such as might have become familiar from handling money, wages in the Chagos "carnet", pension or other benefits. But if the document itself was thought sufficient to raise a query in someone's mind, it is surprising that the proposal to collect them was not announced in advance. The fact that two forms had to be signed, one for each Government, would not of itself have told the Ilois much.

537. There was no-one to read or translate the documents. Most Ilois were illiterate and spoke Creole, whereas these documents were in English with some legal complexity.

538. I am quite satisfied that Mr Ramdass and Mrs Kattick knew very broadly what function the forms performed in relation to the 1982 Agreement, as part of the mechanism for preventing further claims and making the settlement full and final and that they were not receipts; I do not think that they knew the precise terms especially in relation to the right to return. There is no evidence that they had had any opportunity to see them beforehand or to go through them. They were not in a position to offer more than a rudimentary explanation that they were part of making the 1982 Agreement full and final. They, too, were illiterate and unsophisticated.

539. But I am not clear at all that explanation was any part of their function anyway. They were there to witness, because the forms might have a legal significance, showing that the person who thumbed it was the person who should have thumbed it. ID cards might well have sufficed, but this witnessing was also to invest the document with some legal proof in a simple way. They may not have been very efficient, but Mr Howell put over much weight at this stage on their presence. They were often not immediately beside the person as he thumbed or indeed always there at all.

540. It is not clear for how long Mr Abdullatif was there or what his role there was, although he could have furnished an explanation.

541. Mrs Talate said she asked a civil servant what the form was, but did not reveal the reply, beyond saying that they treated Ilois like dogs. One asked why there was more than one form to sign and was told that was because they were getting Rs 8,000. No-one else asked anything about them. One said they did not have the right to ask. Mr Saminaden said they were told that they had to sign to get the money. Others, however, described in similar language how they thought it was a receipt:

> "All that I know whenever I go to a bank, even to get my pension, I have to sign in order to get a sum of money." (Mrs Alexis)
>
> "What I understood was that I signed it and got my money, that was it." (Mr Ramdass)
>
> "I thought I was signing for a sum of money." (Mr Bancoult)
>
> "Wherever you go when you get money you have to sign."

"When I signed the paper I signed in order to get Rs 8,000." (Mrs Jaffar)

No copies were available to be taken away. There was no separate arrangement for minors other than that their parents had to sign for them. There were no arrangements for those under other disabilities and there was no evidence that there were any.

542. Only a dozen or so refused to sign. Francois Louis could read and understand and told Simon Vencatessen. But there was seemingly no widespread dissemination of their views or other reaction. His later litigation provoked no uproar about renunciation. Renunciation forms were discussed in the ITFB when Mrs Alexis, Mr Bancoult, Mr Vencatessen and other Ilois representatives were present. The discussion was about the unblocking of the last £250,000 and the UK Government's requirement for the forms. But it provoked no outcry. All of that subsequent absence of reaction suggests strongly that the leaders at least knew that they had signed forms which put an end to compensation claims and assumed that the Chagossians generally knew it, because they had all understood that back in 1982. It also points strongly to their evidence that it was thought just to be a receipt being untrue.

543. However, even Mr Berenger seems to have been surprised to discover later that there were two forms, one in favour of the Mauritius Government, which covered the claim or right to return.

544. At this stage, however, notwithstanding the way in which the evidence points and the compelling analysis by Mr Howell, I cannot conclude that it is plain that the Chagossians in general knew that the document was more than a receipt. It is possible that they could show that that is what they thought. My reluctance derives from the lack of public notification some sixteen months after the 1982 Agreement that it was on the third and smallest tranche that these forms were to be signed. The Chagossians were poor and so in need of the money, illiterate and no explanation was offered of a written document in another language. They generally knew, I am satisfied, that the Agreement was final and contained some mechanism to give effect to that end; but that is not to say that when they signed these forms, they knew what they were signing was more than a receipt and was that mechanism in the form of promise to abandon all claims, financial or otherwise. The distinction between a general awareness of a broad position and the knowledge of the particular document being signed at a particular time is one which I consider it necessary to draw.

545. I do not consider that the Chagossians generally have no reasonable prospects of showing that they took reasonable care in the circumstances. The first relevant circumstance is their knowledge of the potential legal significance of the document: they had not been alerted to its having any significance beyond that of a receipt by past events or current warning. On that assumption, there was no reason to ask. As I have discussed, I do not consider that the size of the document and the absence of figures is, at this stage, a compelling counter factor. Second, there was only limited evidence that there was anyone to ask – no-one had any translating, explanatory or advisory function. Mr Abdullatif may have been there, but that is not the same as his having an explicit function. They generally were illiterate, simple and trusting and English was not their language. I have already dealt with the role of Mrs Kattick and Mr Ramdass.

546. Third, the process was conducted with some rapidity; it was not a form of legal consultation or group meeting. It appears that people came in one at a time, approached a grille, took the money and signed the document: no signature, no money. Fourth, although a handful could read and some did object and it might have been possible to return having taken advice, there was an emphasis on achieving a timetabled distribution. Fifth, the Ilois were desperate for money; that would have reduced their opportunity for calm deliberation.

547. Mr Howell is right that being in a hurry or being illiterate is no cause for carelessness, but he has not yet the strength of case to succeed. There is force in Mr Allen's more general submission about the role of justice in abuse proceedings. I do not consider that it would be just for the individual Claimant to be precluded from showing individually what they knew or did not know. Those considerations do not, however, apply to some of those who gave evidence before me.

548. My strong impression was that the translation of the forms in court, which would have meant little enough as Creole legalese, caused the witnesses all to focus on the renunciation of the claims to return to Chagos. They denied knowledge of the form in consequence and were unable or unwilling thereafter to distinguish compensation from other claims. But that by itself is not enough to exclude all those witnesses. I am quite satisfied that any Claimant who was a member of the 1982 delegation or who served on the ITFB in 1983 and signed the forms is in a different position. First, the former knew of the requirement for individual forms as part of the mechanism for giving effect to the finality of the 1982 Agreement. The latter, if they did not know it before, would have known it through the ITFB discussions. They all would have appreciated that the document being signed in September 1983 was that form. The gap between agreement in April 1982 and the signing of the forms in September 1983, and the absence of forms for the first two tranches, would have been of much less significance for someone who knew what the mechanisms were.

549. Second, the form as signed is not radically different in character from what they expected. I say that despite the fact that it includes a renunciation of claims to return to Chagos which they may not have known of and would have resisted, had they known. The document is still a renunciation form; it deals with BIOT related claims and ends their ability to sue. The inclusion of an unknown but important provision does not make it radically different for these purposes.

550. Third, whatever their precise knowledge of that, they were in a position to ask about it and to ask for time to take advice. They had been in touch with English and Mauritian lawyers and could have asked for advice again. They had ready access to English speakers and to Mauritian politicians, civil servants, or indeed to the ITFB and Father Patient. They could have asked to see the form and take one away. Those on the ITFB were in a position to ask to see them in advance because of the April meeting and the emergency meeting on 30th August 1983. Mrs Alexis knew of them in advance; she could ask Mr Berenger what they said. They did not exercise reasonable care about what they were signing, and have no prospects of showing that they did. Olivier Bancoult is not within the category which I have referred to, but I am quite satisfied, from his position in the CRG, his relationship to other active Ilois leaders, and from all

his evidence, that he knew that the forms were part of the mechanism for preventing further claims, albeit that he may not have known that they referred to claims to return to Chagos.

551. Mr Saminaden agreed that he knew that the forms were not receipts, that the £8m claim had been "final" and that Michel Vencatessen had had to withdraw his case. He initially agreed that it all meant that the Ilois could bring no more cases, and although he resiled from that, I am quite sure that that was not because he was correcting himself but because he realised the problems which his answers were creating for the case as a whole. I am satisfied that he knew that the forms were part of the mechanism for preventing any further claims being brought, although he too may not have known what it contained about claims to return to Chagos. Even if he thought that it was a restriction on bringing claims for five years, which I doubt, he knew the essence of the form, that it prevented claims. He took no step to inform himself better, which he too could have done through the contacts which had acquired over the years, up to 1983.

552. Mrs Talate had been an active Ilois campaigner at the relevant time, and a leading member of the CIOF. I accept what Mr Howell submitted about her, as set out earlier. The burden of proof would be upon her to show that she did not know what the document's essential character was, and that she had taken reasonable steps. Her evidence was so poor, of such unreliability that she has no prospect of discharging any evidential burden on this matter.

553. That same point is true of the evidence of Mrs David, Mrs Elyse, Mr Laval and Mrs Jaffar. Rita Elyse was also Olivier Bancoult's mother; they must have spoken about this. Accordingly, the inclusion of the following claims is an abuse of process: Mrs Talate, Mr Ramdass, Mr Saminaden, Mrs Kattick, Mrs David, Mrs Elyse, Mrs Jaffar, Mr Laval, Mr Bancoult, and should she become a Claimant, Mrs Alexis. Their heirs as such have no claim either other than in their own rights.

554. It is convenient at this stage to deal briefly with Michel Vencatessen's heirs. There was some prospect at one time that it might be said that the withdrawal of his action was vitiated by duress. That was not in the end pursued. Mr Thompson QC for the Defendants submitted that, as the present proceedings covered the same ground as that case and that Michel himself would be barred from bringing these proceedings, his heirs should likewise be barred from claiming through him. This was not disputed and is obviously correct. It does not, however, prevent any of his heirs suing in their own right.

555. At one time, it appeared that the Claimants were seeking to suggest that the forms had been signed knowingly but under the economic duress of their circumstances. This was in their skeleton argument, but not actually pleaded. (Indeed, it was not until the draft Re-Amended Reply of 29th November 2002 that it was pleaded that the Chagossians had not known what they were doing, although it had come out with their first witness.) But there was no evidence to support the contention of economic duress. The witnesses said that they would simply not have signed away their rights for Rs 8,000.

556. I turn now to deal with unconscionability.

557. Mr Allen put his case in two ways. First, the renunciation forms were not binding because there had been an unconscientious use of power by the Government in the way in which it had procured their signature. Second, it was not possible for the Government by a financial settlement to provide proper consideration for the forced removal of the fundamental rights of the Claimants; it ought to meet its inalienable governmental responsibility towards them.

558. For his first contention, Mr Allen submitted that what was necessary was for a party to make unconscientious use of its superior position or superior bargaining power to the detriment of someone suffering from some special disability or disadvantage. This weakness had to be exploited in some morally culpable manner, leading to an oppressive transaction. These propositions are drawn from the judgement of Mr Peter Millett QC in Alec Lobb Ltd v Total Oil Ltd [1983] 1 WLR 87 94-95. This decision was affirmed in the Court of Appeal [1985] 1 WLR 173; the principles were not in dispute but the Court emphasised the need for unconscientious behaviour rather than a mere disparity of bargaining power. That point was not at issue.

559. A serious disability was one which affected significantly the ability of the weaker party to make a judgement as to his best interests. Categories of disability which were well-established were illiteracy or lack of education, lack of assistance where explanation was necessary, age and poverty. The courts were ready to set aside unconscionable transactions with "poor and ignorant persons" where there had been no independent advice; Fry v Lane [1888] 15 Ch D 679. A modern description of those persons was provided by Megarry J in Cresswell v Potter 1968 reported in [1978] 1 WLR 255. "Poor" was "of a lower income group" and not destitute; "ignorant" was "less highly educated". This needs to be judged in the light of the transaction in question and of the documentation which it involves. Again, I regard those points as established.

560. It is also clear that the availability of legal advice will not necessarily save a transaction. Cresswell v Potter illustrates that. The need for advice and the true nature of the transaction would have to be drawn to the weaker party's attention before the availability of legal advice could save a transaction. The advice given would have to be independent. That I accept as a general point but much may depend on the circumstances.

561. Moreover, the quality of the advice had to be examined by the court. It was necessary to see whether the lawyers had access to all the relevant information, the time and resources to deal with the problem properly. The advice had to be sufficient to protect the weaker party's interests. Even if the lawyer explains the disadvantages and that the client is under no obligation to sign that may not be sufficient however forcibly that is done. It may be necessary to refuse to act. Mr Allen relied on Credit Lyonnais Bank Nederland BV v Burch [1997] 1 All ER 144 CA and Boustany v Piggott [1995] 69 P&CR 298 CA. These cases bear out Mr Allen's point. Mr Allen submitted that there was an analogy between that and the provision of advice collectively but not individually. That rather depends on the circumstances.

562. Usually, there had to be knowledge of the weakness of the other party and for these purposes it is clear enough that the Defendants were aware of the condition of the Ilois upon which Mr Allen relied as constituting disabilities: illiteracy, ignorance of legal matters and poverty. The UK Government was clearly aware that it had a stronger position than they had. It was also aware that they were very unlikely to have access individually to legal advice about the

signing of the forms. If the disability and the absence of independent advice are established, the burden of showing that the transaction was not oppressive in conduct or in its terms is cast upon the stronger party, here the Government; Cresswell v Potter above, 257.

563. I shall for present purposes accept that argument as to the change in burden of proof, but I am not at all clear that it is right. It certainly is so said in that case and in Burch's case at page 152. However, in Portman Building Society v Dusangh [2000] 2 All ER (Comm) 221 CA, Ward LJ 234 said that where a case was strong enough on its face in terms of conduct and terms, unconscionable conduct could be inferred if there was no explanation offered to displace that inference. The idea of a change in burden of proof was not supported. Yet the two other cases are reasonably clear that there is a point at which the burden switches.

564. I accept that it is possible to infer from the terms of the transaction that the stronger party has exploited his position in an unconscionable way as well as from the manner in which the negotiations proceed. But the test is couched in strong terms; the transaction must be oppressive. There must be some impropriety in the conduct of the stronger party and in the terms of the transaction which offends the conscience of the court so that the stronger party should not retain what he has unfairly obtained. If an intermediary is involved, the stronger party must be shown to have actual or constructive notice of any relevant impropriety; Credit Lyonnais.

565. There was an issue as to whether it was necessary for the position of the parties to be restored in order for relief to be granted. It is not necessary for me to resolve that because I accept that, for these purposes, a sufficient restoration would be achieved by the giving of credit for the sums received against any damages awarded. The forms were only signed in return for Rs 8,000.

566. The relevant principles have recently been dealt with in Dusangh and what I have set out and accepted above reflects those principles. Dusangh makes it clear that the importance of legal advice is not so much that it is a necessity in all cases for the disproof of unconscionable conduct but that its absence assists in the drawing of the inference that there had been such conduct.

567. Both parties placed their submissions in the differing contexts as they saw them in which the forms were signed. The UK Government, submitted Mr Allen, had not merely known of the disabilities of the Chagossians, it had been responsible for them being in that state in Mauritius. They were a weak and vulnerable population engaged in adversarial negotiation with the very Government which should have been taking responsibility for them. They had been kept in the dark for years about the actions of the Government and it was only recently that its deceits had come to light.

568. The legal advice was inadequate. First, the lawyers were unaware of all that was to come out about those deceits and accordingly did not give advice with full knowledge of the relevant facts. Second, it was not clear how representative was any group which had instructed lawyers, whether the CIOF or Mr Ramdass' group. Nor could anyone know how far or how accurately any such advice had been disseminated; their structures and memberships were as far from clear as were their means of communicating with their members or the Chagossians generally. The Treasury Solicitor had been aware in 1979 of what was required for any settlement to be

effective but those safeguards had been abandoned in 1983. As Mr Allen acknowledged, the scale of the task of getting everyone to agree or dealing with those who wanted more than others from an overall pot or who did not want to sign the forms at all would have been a huge task and could have involved many different lawyers as conflicts of interests arose. The lawyers in 1982 had neither the time nor the money to undertake the necessary work. The Claimants themselves were unfamiliar with lawyers and legal ways.

569. The conduct of the UK Government was unconscionable. It did not conduct the negotiations in 1982 in Creole or provide for adequate translations into Creole by those whom the Claimants could trust. It did not attempt to communicate the outcome of the negotiations to all the Chagossians. The requirement for the forms came into the Agreement late and despite Sir Leonard Allinson saying that individual renunciations of the right to return would not be required. There was evidence, (19/B/8), that the UK side was trying to keep that quiet because questions about how it was to be implemented were said to be best left until the agreement was signed. They were printed in English without any translation or explanation being available. The fact that they were in English was part of a deliberate attempt to prevent the Chagossians understanding what the forms were. There was no forewarning that they were to be required in return for the smallest tranche of money some sixteen months after the Agreement had been reached. The sum paid was of the order of £2,500 for each Chagossian and the Rs 8,000 represented only £400.

570. Mr Howell submitted that the UK Government had plainly not acted in an unconscionable manner and that the terms of the form were not oppressive. The 1982 agreement was intended to be the solution to the problems faced by the Ilois and to their claims. It was intended to be final and to contain mechanisms to make that effective. This was understood by the Ilois, by their representatives and their lawyers with the latter at least understanding more of the detail as to how that was to happen. The lawyers had all realised that, whoever precisely their clients may have been, they were in effect advising the Ilois generally. In 1979, Mr Sheridan had been advised by Mr Blom-Cooper QC that £1.25m was a fair settlement. In 1982, Sheridans had advised that the Vencatessen case be withdrawn and had not suggested that the settlement was unfair; Mr Glasser confirmed in evidence that they had thought that it was fair. Mr Grosz and Mr Macdonald had both concluded that it was fair and should be accepted.

571. Measured by the claim, reduced to £6 million in December 1981 by the CIOF, the overall settlement was five sixths of what had been sought. That figure had been sought for distribution among 900 families and although the UK Government was not concerned to define how the money was to be distributed, it did its calculations on the basis that there were at most only 426 families to be compensated. It was the ITFB which decided who was to receive the money and widened the range of participants from those accepted as entitled to compensation by the UK Government, but not so extensively as to cover 900 families; it was the ITFB also which decided that the money was to be distributed on a per capita basis without reference to any difference in needs or losses which might have been experienced. There was no complaint from the Ilois about those decisions. Mr Beal, for the Defendants, produced a valuable table of the Ilois populations surveyed on the islands, (so it would not include those Ilois who were unable to return from Mauritius), which showed 680 Ilois individuals in total on the three island groups in July 1970.

572. That settlement was reached in relation to a case which was at best speculative, and indeed with the benefit of hindsight and more materials remained so, at its highest. Anyone rejecting the offer on the basis that he wished to pursue litigation would have had to calculate his possible claim, assess how long it would take, perhaps without legal aid and with limitation problems, and decide whether he would prefer the certainty of the money now.

573. It is not easy to compare exchange rates over time to obtain a real sense of what the money was worth but Mr Howell pointed out that the benefit income of the poor in Mauritius in 1981 could be as little as Rs 3,600 pa (although I think that that is too low to be realistic), but that each of 426 families would receive over Rs 111,000 from the original offer of £2.5m and Rs 223,000 from the total of £5m. That sum of £5m would be worth today about £10.5m. At the 1982 exchange rate of Rs 19: £1, Rs 111,000 was about £5,000.

574. Although each individual Ilois might be poor and ignorant, it was necessary to realise that they did not live in isolation from each other or from the groups which had campaigned for them. They were a well-organised community, represented on the 1981 and 1982 delegations, their groups had instructed lawyers and started what was in reality a test case. They had plenty of political support and access to lawyers and advisers in Mauritius. They were participants on the ITFB. In reality, unfair advantage could not be taken of their position.

575. There had been no morally culpable behaviour in seeking to make the agreement final and to make that finality effective. In reality, the Ilois had recognised that in their correspondence. The Ilois sought a settlement. The Claimants' criticisms of the 1982 negotiations were ill-founded; there was nothing wrong with Sir Leonard meeting privately with the Prime Minister of Mauritius or with the Foreign Secretary writing to him. The Ilois had legal advice to the UK Government's knowledge and the arrangements for translation were a matter for the Mauritius Government. There was no evidence that the Ilois delegation was kept in the dark or that matters were concealed from them by the UK delegation. The inclusion of the requirement for individually signed forms during the 1982 negotiations was not done covertly nor did it hold up the payment of money to the ITFB nor did it hold up the bulk of the payments. There was no point in reaching an agreement which the Ilois were not prepared to sign up to. The terms of the agreement were the subject of a press communiqué. If there were failures on the part of the Ilois or their lawyers to keep up with or to explain what was happening, those were not matters for which the UK Government was to blame, let alone morally culpable.

576. The UK Government had not stipulated the terms of the renunciation forms nor drafted them. It had not specified how they were to be collected. The evidence showed only that the High Commissioner was aware that some Ilois had refused to sign, which would have suggested to him that they knew what they were, but that subsequently they had decided to do so and it showed that the few who then did not sign were under some Ilois pressure to do so. There was no Ilois complaint that they had been tricked at any stage when the forms were discussed, as they often were on the ITFB, and as the Ilois continued to campaign for more money particularly from the USA.

577. If there was any shocking conduct attendant upon the obtaining of the signatures, it was the responsibility of the ITFB or of the Mauritius Government but there is no evidence from them to that effect. In reality, there was no point in trying to keep the Ilois in the dark as the Claimants suggested. There was no evidence that they had been prevented from inquiring about the forms. There was no evidence of protest about them from those on the ITFB or when Simon Vencatessen brought his action. There was no satisfactory answer to why there was no protest other than that there was knowledge of the purpose of the forms.

578. Mr Howell submitted that the absence of individual legal advice only went to the question of whether someone was in a weaker position capable of being exploited and did not of itself show that they had in fact been treated in a morally culpable manner, shocking the conscience of the court. There was no evidence that even one claimant who signed the form had such prospects of success that he would have been advised individually to litigate rather than to accept what was then on offer, let alone such prospects that it could be said that his acceptance of the offer was oppressive. Indeed, a global offer was what the Ilois themselves sought, they did not seek to differentiate on an individual basis and none of them made the sort of complaint pursued by Mr Allen. Their complaint was a collective one that they would not have signed the forms at all if they had known what they contained and collectively lacked advice about them.

579. My task is to say whether the Claimants have a reasonable prospect of showing that they were in a position in which they could be exploited and if so, whether the Defendants have shown that the Claimants have no reasonable prospects of showing that the Defendants behaved in a morally culpable manner leading to an oppressive transaction from which the Claimants should be relieved. I put it that way in the light of the point I made earlier about the burden of proof.

580. It is clear that the signatory claimants have reasonable prospects of showing that they fall into a number of categories of weaker party: illiterate, ignorant or ill-educated and very poor and in real need of money. It is also clear that they have reasonable prospects of showing that the UK Government was fully alive to their problems. I consider that they may be able to show that as the forms were sought by the UK Government, indeed pressed for, to serve its interests under the agreement and that in collecting them the Mauritius Government was acting as its agent, the UK Government should be treated as being on constructive notice as to the manner in which they were collected. The High Commissioner was in a position to observe or to inquire, had he so wished but he did nothing so far as the evidence before me goes. There is scope for arguing that the manner in which the signatures were obtained involved the exploitation of those weaknesses in a morally culpable manner. They were asked to sign a legal form without explanation at the time as to its purpose or content by those who knew of their weakness. I was wholly unpersuaded that there was any sound evidence that there had been any attempt to prevent them understanding what was in the form, it is rather that no positive attempt to inform them was made at the time. There is no justification for saying that there was any trickery. The signing of the forms was to the UK Government, to the Mauritius Government and to the ITFB the working out of what had been agreed in 1982 with the knowledge and consent of the Ilois. I do not think that it adds to the Claimants' case that the UK Government was, on any view, responsible for at least many of the signatories being in Mauritius.

581. The crucial issue is whether the transaction itself is clearly not oppressive or shocking to the conscience of the court. I am satisfied that the signatories cannot succeed on this first limb of Mr Allen's case. I accept the broad thrust though not necessarily all the detail of the arguments of Mr Howell on this matter, which I have set out above. The matter does have to be looked at in the context of the 1982 agreement which I am quite clear was understood by the Ilois in general to be a final agreement. It was generally known that that was an enduring requirement of the UK Government, if it were to pay over any more money. That had been accepted in correspondence, at least to the eyes of any reader, by the Ilois representatives. I have said elsewhere that I do not accept as remotely true that they did not know what was being said in that correspondence and would not have agreed to that point had they known; that would simply have ended negotiations straightaway and the litigation would have followed its course.

582. The delegates had legal advice and members who were able to translate what was said or to explain it. There was no reason for the UK Government to suppose that that had not been done. Although it may not have known about the subsequent legal advice, the fact that it was sought and no complaint was raised about the terms of the agreement, supports the conclusion that all that had been done properly. It also makes it more difficult for it to be said that the transaction envisaged, but to which no objection was taken, was oppressive. I do not accept that there was anything covert about the insertion of Article 4. It was not a secret protocol, it was discussed with the Ilois' lawyers and they advised on it. The agreement and all its terms were publicised. The UK government had no reason to suppose that the Ilois representatives were not representative or unable effectively to communicate with the Ilois. Indeed, there is plenty of evidence that the Ilois met and had the agreement explained to them at least in broad terms.

583. The advice which was given by two firms of solicitors and by a QC was that the terms were fair, including the obligation to sign an individual renunciation form or perhaps more accurately in the case of Sheridans, that requirement was not said to be unfair. The amount in total was seen as a fair settlement by the parties to the agreement, though no doubt any compromise leaves some desires unmet. There is no evidence that any part was seen as oppressive or obtained by unfair tactics or the exploitation of the weaknesses of the Ilois. They had not merely had legal advice but political assistance from people whose interests however selfishly coincided with theirs at that time. Whether measured against what the Ilois asked for in December 1981 or against some other measure, the sum in total could not remotely be described as evidencing an oppressive transaction. The Ilois were being asked to give up what all the lawyers knew was a speculative piece of litigation which might in due course provide some with an unknown amount of money in return for something now to relieve their poverty.

584. The subsequent working out of the distribution of the ITFB money was the responsibility of the Board and its Ilois members, initially appointed and then elected. There is no evidence that any Ilois disagreed with the per capita payment. There was disagreement over who should qualify but that working out of the agreement was not the responsibility of the UK Government.

585. Mr Allen exaggerates the need for individual legal advice. As I have said, it was not the concern of the Ilois at any stage to divide up the sum according to some assessment of individual losses or needs. The sort of process which he envisaged would have entailed each individual being advised as to the amount which he might receive if the litigation succeeded, discounting

that by the prospects of success, reaching some agreement with his fellow Claimants as to how the sum was to be shared and meanwhile receiving nothing whilst lawyers got themselves utterly enmeshed in conflicts of interests between clients who disagreed on how to split the global sum and who should benefit. The sophistications of settling group actions would have had to be invented and given effect to among people who were admittedly not familiar with legal concepts. Alternatively, the matter would have been fought to an individual conclusion in a series of test cases. If any such process had been instituted in 1982 or 1983, holding up the payment either of the £4m or the payment of the Rs 8,000 for what, so far as I could tell from the way in which Mr Allen explained how it all ought to have been done, would have been a very long time, the lawyers would have had a very hard time of it from the Ilois people themselves who really needed the money. They would have been extremely cynical of the way in which the only beneficiaries of the proposed settlement would have been the lawyers. No one suggested this farandole in 1982 or 1983 as the way in which these matters should be done. His submission was a counsel of perfection, utterly remote from the real world of the Ilois' needs in 1983. The fact that it was not done does not remotely show the oppressiveness of the transaction. Neither Bindmans nor Sheridans were said to have been negligent at any stage yet they were responsible for advising Ilois about the wisdom and mechanics of the settlement. Bindmans thought that they were advising the Ilois generally through the CIOF and saw nothing wrong at any stage with the negotiations, the content of the Agreement, or the mechanics as described in the Agreement for procuring Ilois assent, generally or individually.

586. There was no obligation on the individual Ilois to abandon litigation before the agreement was signed and it remained open to any Ilois to bring proceedings rather than take the money if he so wished. If an individual Ilois had calculated that instead of taking Rs 8,000, he would be better suing for damages, he could have done so. But it is impossible to believe that anyone would have advised him to do so; he would have been told that the form was just what the agreement envisaged, that there would no more money without litigation for years and I do not see on what basis there would have been any legal aid for such a case. It would not have been privately funded. There is no evidence that in 1983 any lawyer would have offered such advice or that any Ilois would have heeded it. Indeed there is evidence, from the concern over the few non-signers after September 1983 needed to procure the unblocking of the £0.25m, that there would have been intense pressure placed upon those Ilois to sign, with the CRG and Mrs Alexis to the fore.

587. The advice which the Ilois needed was collective advice about whether the global sum with the conditions attached was a reasonable offer. The UK Government was entitled to approach the signing of the forms on the basis that that advice is what the Ilois had had and that the signing of the forms was the working through of the terms collectively agreed. I do not accept the picture painted by some of the Chagossian witnesses of the way in which there was no communication between them; it is wholly at odds with the evidence of meetings, protests, organisations, relationships and their concentration within a few parts of Port Louis. It is conceivable that there might have been collective advice in September 1983 not to sign the forms, to forego the Rs 8,000 and the blocked money in return for the right to continue litigating but that speculative possibility, which the evidence suggests would have been turned down flat, does not remotely show that the transaction was oppressive.

588. Mr Allen is wrong in his submission that the legal advice was deficient, and was to be discounted in judging the unconscionability of the Defendants' conduct and of the transaction, because the lawyers lacked the information which now has come to light about what the UK Government was doing. It is inevitable in settling litigation that the decision is not made in the light of all the information which a trial might bring. The lawyers all knew that the UK Government was resisting the disclosure of some documents and that the potential for argument about discovery had not been exhausted. Those advising at the time were aware of all those points. There is no suggestion that the agreement was procured by some deception practised at the negotiations which has only now come to light.

589. On that limb of his argument, Mr Allen fails to persuade me that he has any real prospects of showing that the transaction was oppressive or shocking to the conscience of the court. Viewed in 1982 and 1983, it was a reasonable offer which was worked through according to its terms. There was a global settlement in the form of the 1982 agreement with legal advice; the terms of the distribution, the amount and to whom, was decided by a Trust Fund; the renunciation forms gave effect to the other side of the deal in the way envisaged by the agreement. If an Ilois did not want to settle on that basis, the agreement left it open for him to bring proceedings if he were so minded. Ilois had instructed lawyers on a number of occasions and threatened litigation as well. They had rejected offers in the past which they did not find acceptable. Neither the Permal nor Simon Vencatessen cases in the Mauritius Supreme Court elicited any reaction that the settlement, with individual renunciation forms, was unconscionable.

590. I now turn to the second basis upon which Mr Allen said that the forms were unconscionable. As the Government responsible for the Ilois, it could not reach an agreement with them to wash its hands of responsibility for them or to remove their fundamental rights. This point goes to the content of the renunciation forms rather than to the manner in which they were signed. As I understood it, no matter how much advice had been given, the removal of those rights was not open to a government to accomplish. I was not clear as to the source or scope of this inhibition on the ability of two parties to litigation or potential litigation to settle their differences, nor as to whether a judgement in favour of the Government in the Vencatessen litigation would have suffered from the same disability.

591. This ground is untenable. It is no different from saying that there can be no settlement of a case against the Crown or of these cases.

592. Accordingly, I reject the contention that the signing of the forms, if otherwise effective in law, could arguably be set aside as unconscionable. Mr Howell complained that this contention came too late for it to be considered, that he would have asked questions about it in cross-examination had he known that this was to be argued and that I should not allow the amendment to the Reply which raised it. I disagree. It is not so very different a point from others which Mr Allen raised; it is rather a new garb for some well-known complaints about the Defendants' conduct over the years. I could not see how more cross-examination would have advanced Mr Howell's case whereas I could see every advantage in strike out proceedings for allowing pleadings to raise the full case which either party wished to raise.

593. So far as infants are concerned, I do not see any reason to reach a different conclusion on unconscionability because what was done seems to me to have been wholly sensible. But the question of capacity may affect the effectiveness of the forms in creating the foundation for the abuse argument in the first place. That is not a point which I consider I can deal with at this stage on the material before me; it may also be a matter which depends on individual cases.

594. The final point raised by Mr Allen against this abuse of process argument was that it should have been raised earlier either in the Bancoult Judicial Review, or in these proceedings. I do not accept either contention. It would have been pointless in the former; a Claimant could have been added to challenge the vires of the 1971 Immigration Ordinance who had not signed such a form. It would have provided the occasion for prolonged evidence and submission on an issue, in effect, of standing, when there was a real issue of general application in the vires of legislation. There is a significant difference between saying that a claim for compensation, made after a final settlement has been reached, is an abuse and saying that an application for Judicial Review to determine the validity of legislation in force is an abuse of process. The fact that such a point was not taken, so as to prevent or delay that application, is not a reason why it should not be deployed in this subsequent but related action. It is an argument mirrored by the Defendants' now abandoned arguments about what should have been dealt with in those or other Judicial Review proceedings.

595. There was no objection from the Claimants to this abuse issue being dealt with as part of this application. The question is not whether it is open for consideration in view of the timing or manner in which it was raised. The question is whether it could be dealt with fairly in those circumstances; the Claimants did not suggest to the contrary.

Limitation

596. On the face of the claim, all the causes of action for damages are statute barred. The Claimants have raised a number of arguments as to why that is not so, or as to why time has not stopped running or should be extended. It is for the Claimants to show that they have reasonable prospects of success in their arguments. These were deployed in their revised form in a proposed Amended Reply.

Limitation:
The Applicability of the Limitation Act 1980

597. Mr Allen's first contention was that the Limitation Act 1980 did not apply to any person who had a good cause of action but was unable to enforce it. For this startling proposition, he did not refer to any part of the Act itself but rather to a dictum of Lord Atkinson in Board of Trade v Cayzer, Irvine and Co Ltd [1927] AC 610 628 at which he said that the whole purpose of the applicable Limitation Act "is to apply to persons who have good causes of action which they could, if so disposed, enforce, and to deprive them of the power of enforcing them after they have lain by for the number of years… and omitted to enforce them. They are thus deprived of the remedy which they have omitted to use". Upon this, Mr Allen constructed an argument that

because the Defendants had deprived the impoverished and illiterate Claimants of access to the courts of BIOT or of the UK, they had not omitted to use their remedies and so the Act did not bite.

598. This is one of his weaker points. There is no relevant provision to that effect within the Act and this dictum does not constitute a rule of interpretation. All that was being said was that where the particular form of contract provided that a particular cause of action should not arise until certain conditions were fulfilled, in that case the making of an arbitrator's award, the Limitation Act did not bite at an earlier stage; see O'Connor v Isaacs [1956] 2 QB 288 326, Diplock J.

The Limitation Act and Unconscionability

599. Mr Allen's next and related point was no more arguable. It was to the effect that the Court could suspend the effect of the Act where it would be unconscionable to allow the Defendants to rely upon it. He referred to the sort of wrongs which he regarded as the starting point for, though not the content of, his misfeasance claim. He added that there had been no legal system in BIOT to which the Claimants had had access and no legal aid system either. Even if all his facts were incontrovertible, he demonstrated no basis upon which a court could decide that a statute could be removed from the arena to which its language made it apply, simply because a court thought that it would be unconscionable to allow a party to rely upon the rights which Parliament had given him. The 1980 Act is quite explicit in prohibiting the bringing of a cause of action after the relevant time limit, and has made varied and explicit provision for the circumstances in which time should not run against a Claimant or should be extended. That represents the Parliamentary view of where it would be wrong to allow a Defendant to take advantage of the passage of time and marks the balancing of the interests of finality in litigation and fairness to a Claimant.

The Foreign Limitation Periods Act 1984

600. Thirdly, Mr Allen argued that the operation of the 1980 Act was excluded or modified by the Foreign Limitation Periods Act 1984 and the BIOT Courts Ordinance 1983. Section 1(1) and (2) of the 1984 Act provide:

> "1. Application of foreign limitation law
>
> "(1) Subjection to the following provisions of this Act, where in any action or proceedings in a court in England and Wales the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter -
>
> "a. The law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

> "b. except where that matter falls within subsection (2) below, the law of England and Wales relating to limitation shall not so apply.
>
> "(2) A matter falls within this subsection if it is a matter in the determination of which both the law of England and Wales and the law of some other country fall to be taken into account."

601. Also relevant are the following parts of section 2 which make exceptions to section 1; Mr Howell relied upon them.

> "Exceptions to s 1 2 (1) In any case in which the application of section 1 above would to any extent conflict (whether under subsection (2) below or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict. (2) The application of section 1 above in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings."

602. Mr Allen contended that the effect of the 1984 Act was that BIOT limitation law applied unless both BIOT law and English law fell to be taken into account, in which case the 1980 Act should still be discounted under section 2 of the FLPA because of the public policy and undue hardship considerations.

603. He related that argument to the provisions of the BIOT Courts Ordinance 1983 No 3, which contains the BIOT provisions on limitation, incorporating, subject to some scope for adaptation, the English law on limitation. Section 3 of the Ordinance, which I repeat here for convenience, provides:

> "3.
>
> "(1) Subject to and so far as it is not inconsistent with any specific law for the time being in force in the Territory and subject to subsections (3) and (4) of this section and to section 4, the law to be applied as part of the law of the Territory shall be the law of England as from time to time in force in England and the rules of equity as from time to time applied in England: Provided that the said law of England shall apply in the Territory only so far as it is applicable and suitable to local circumstances, and shall be construed with such modifications, adaptations, qualifications and exceptions as local circumstances render necessary."

604. Section 13 is also relevant. It reads so far as material:

> "13. The jurisdiction of the Supreme Court shall be exercised, as regards practice and procedure
>
> (a) in civil matters, in accordance with rules of court made under section 14, and in default thereof, in substantial conformity with the

practice and procedure for the time being observed in England by the High Court of Justice."

605. There are no Rules of Court under section 14.

606. Mr Allen drew the threads of his argument together by submitting that, whether under the undue hardship/public policy rubric in the 1984 Act or under the adaptation of English law to local circumstances as might be necessary under the proviso to the Courts Ordinance, the circumstances of the Claimants warranted the exclusion of the 1980 Act. He referred to the displacement of the Chagossians, their continued wrongful exclusion under the Immigration Ordinance, their extreme poverty, their lack of familiarity with a legal system in a paternalistic society, their general lack of access to legal advice, the lack of time, funding and access to information of those lawyers who had been involved; they had acted on behalf of only tiny numbers of Chagossians anyway and their advice was not communicated effectively to the community as a whole. Others who had helped had their own political motives.

607. Mr Howell objected to so late an amendment, after cross-examination, as unfair. He said that the form of pleading about legal access was vexatious and irrelevant. There are certain problems, as ever, with the loose and imprecise way in which the pleadings have been drafted. For the present I am prepared to see whether there is anything of substance in the Reply as proposed.

608. I do not consider that Mr Allen can be right in seeking to say that the 1984 Act permits the English law on limitation to be disapplied. It is the foreign law on limitation, which, if otherwise applicable, can be disapplied for reasons of public policy including hardship. Section 1 disapplies English law subject to exceptions set out in both subsection (2) and in section 2(1). The existence of the circumstances relied on by the Claimants are irrelevant unless they show that the foreign law is to be disapplied, but they have been relied on to precisely the opposite effect by the Claimants. The language of the 1984 Act might be thought a trifle muddled in section 2, as to what parts of section 1 are to be disapplied but a little thought makes it tolerably clear. Evans J held in Arab Monetary Fund v Hashim [1993] 1 Lloyd's Rep 543 592 that the relevant hardship was that caused by the application of the section, that is the application of the foreign law. That assessment involves a comparison of the relevant competing laws on limitation. Besides, it is obvious that Parliament did not consider that the English laws on limitation were contrary to its public policy or created hardship, or did only so when compared to foreign law.

609. Even if Mr Allen were right and the question were whether English law on limitation fell to be disregarded in favour of BIOT law, the factors relied on are incapable themselves of giving rise to undue hardship or of being contrary to public policy unless they too were capable of leading to an extension, postponement or suspension of the running of time under the 1980 Act. That is because it is not for the Courts to hold that the balance contained within the 1980 Act is contrary to public policy, including the creation of undue hardship. Mr Allen also has some difficulty in showing that any tort upon which he relies falls outside the scope of section 1(2), though if he were to have a direct action upon the content of the Mauritius Constitution, it might be one within the scope of section 1 of the 1984 Act. I note that Mr Allen only relies upon the

law of BIOT although it is far from clear that the negligence claim would not fall to be governed by Mauritius and English law.

610. If BIOT law does apply to any cause of action, and is not disapplied because of double actionability, or public policy including hardship, it is necessary to see what it consists of as a matter of limitation. I accept Mr Howell's submission that section 3 of the Courts Ordinance deals with substantive law and that it is sections 13 and 14 which are relevant here because it deals with procedural laws, of which limitation forms part. There may be exceptions to that general rule, where a right is barred and not just a remedy, but Mr. Allen did not take issue with it. As the practice and procedure is to be in substantial conformity with English law, there is no reason to disapply the relevant statutory provisions and no case was put forward under this section that they should be disallowed. Even if section 3 were the relevant section, there is nothing in the local circumstances which warrants an adaptation. No adaptation was specified; what was sought was a wholesale disallowing of the periods of limitation for a particular group of claimants who do not live in BIOT, and have not done so for almost the whole of the period in question, and where few of the acts relied on as constituting the various torts were done. This is misconceived; the process of adaptation is not one which varies according to the needs of various claimants, which is what they argue, but is something which would be good for all as a result of local conditions. It would be odd indeed if the English law on limitation were thought incapable of dealing with disability, access to lawyers, and the fact that someone has been disadvantaged in the pursuit of a claim by the very acts in respect of which he seeks to sue. There is nothing in this argument of Mr Allen's.

Limitation and Continuing Torts

611. The fourth argument is that there are continuing torts in respect of which, as I understand the argument, it is said, not that time is not barred in relation to anything which has continued to be done in the period of limitation, but that no limitation period has started yet to run. Presumably the argument is that until the tort has stopped, any damage can be sued for irrespective of when it was done and that remains the position for so long as the tort goes on. This was asserted to be the law. No reasons were given. I do not find this easy to follow. Limitation periods are expressed to run from when the cause of action accrued. If it has not started to run, that would mean that the cause of action had not yet accrued. The claim should be struck out on that ground. I assume that the Claimants do not seek that. If the tort continues, it means that a fresh cause of action accrues daily or with each fresh damage. So, the continuing tort of exile, if it existed, would not be time barred in relation to the period of six years preceding the commencement of this action; but that is all. Deceit was alleged to be a continuing tort, but that is clearly wrong. No fresh act of deceit or further damage is alleged in the six years preceding the commencement of the action. The continuing duty of care towards citizens is said to be a duty which continues to be breached. If it existed in the form claimed, the breach would be continuing in the six years preceding the commencement of the action. Those are the only two claims which would be affected by this argument in isolation.

Limitation and disability

612. Mr Allen next relied upon disability. The relevant provision of the 1980 Act is section 28(1) which provides:

"28. Extension of limitation period in case of disability

"(1) Subject to the following provisions of this section, if on the date when any right of action accrued for which a period of limitation is prescribed by this Act, the person to whom it accrued was under a disability, the action may be brought at any time before the expiration of six years from the date when he ceased to be under a disability or died (whichever first occurred) notwithstanding that the period of limitation has expired."

613. Section 38(2) declares that an infant or person of unsound mind is a person under a disability. Mr Allen contended that that was not an exhaustive definition of disability, and that "disability" could include being outside the jurisdiction of the BIOT Courts or of the High Court of England and Wales as a result of the Defendants' acts, and being impoverished, ignorant and illiterate and physically separated from those Courts as a result of their acts. The former had historically been a disability; he referred to the 1623 Limitation Act.

614. This is unarguable. The definition is not a deeming provision leaving other disabilities to be allowed for by judicial improvisation, or by reference to the repealed legislation of 1623. It is unwise to construe the 1980 Act as if it incorporated provisions from earlier repealed Acts without any express provision to that effect. Section 38(2) is clearly a definition section, as Yates v Thakeham Tiles Ltd [1995] PIQR 135 CA makes clear at pp139-140 and 143. It relates to legal not to physical disability. No Claimant under such a disability at the date when any cause of action accrued has been identified, though that is not to say that there are none, nor has the ending of any such period of disability been identified. In reality, there is only one arguable claim in tort, for negligence giving rise to personal injuries. It is difficult to see how even for an infant in 1973, the period of disability did not expire many years before this action was brought and indeed before 1998.

An Action Based on Fraud

615. Mr Allen then contended that the running of the period of limitation had been postponed under section 32(1)(a) or (b) of the 1980 Act, because the whole action was based upon the fraud of the Defendants or the deliberate concealment of facts by them. Section 32 provides, so far as material:

"(1) Subject to [subsections (3) and (4A)] below, where in the case of any action for which a period of limitation is prescribed by this Act, either –

"a. the action is based upon the fraud of the defendant; or

"b. any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant; or … the period of limitation shall not begin to run until the plaintiff has discovered the fraud, concealment or mistake (as the case may be) or could with reasonable diligence have discovered it.

References in this subsection to the defendant include references to the defendant's agent and to any person through whom the defendant claims and his agent.

> (2) For the purposes of subsection (1) above, deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment of the facts involved in that breach of duty."

616. The whole action was said to be based on fraud, not just because an action in deceit was a case based on fraud, but rather because "fraud" in this context meant unconscionable behaviour, falling short of "fraud" or even of moral turpitude. What was required was behaviour which made it unconscionable for a defendant to rely on the lapse of time as a bar to the claim.

617. The acts of unconscionable behaviour relied on, in summary, were (1) the Defendants' failure to treat the Chagossians as their citizens, which they were, (2) concealing that the Chagossians were permanent inhabitants of the Chagos and citizens of the United Kingdom and Colonies and belongers to BIOT, (3) preventing the return to the islands, without lawful authority, of those who had left temporarily, (4) deporting Chagossians without lawful authority, (5) infringing their property and constitutional rights, and (6) knowingly making no or inadequate provision for the displaced Chagossians.

618. Mr Allen relied upon a number of authorities in support of his proposition that "fraud" for the purposes of section 31(1)(a) covered claims based on unconscionable behaviour. In Applegate v Moss [1971] 1QB 406 CA at p413, Lord Denning M R considered the predecessor provision of section 32, which was section 26 of the Limitation Act 1939. It is correct in one sense that Lord Denning gives "fraud" the meaning, wider than the common law meaning, for which Mr Allen contends. The context was a claim for concealed defective foundations. But the Court was considering, not the equivalent of section 32(1)(a), an action "based on fraud", but the rather different predecessor to "deliberate concealment" in section 32(1)(b) of "fraudulent concealment", a phrase not to be regarded as included in disguise in the 1980 Act. The same distinction is true of Clark v Woor [1965] 1 WLR 650 and Kitchen v RAF Association [1958] 1 WLR 563. Sheldon v RHM Outhwaite Ltd [1996] AC 102 HL, to which Mr Allen also referred, is not in point at all, save for the emphasis which it places, unhelpfully to him, on not construing the 1980 Act by reference to the 1939 Act.

619. Indeed, the importance of the distinction between an action based on fraud, (1)(a), and fraudulent concealment, (1)(b), was borne out by one of the other cases upon which Mr Allen relied, Beaman v ARTS Ltd [1949] 1 K B 550 CA at p558. It held that an action based on fraud requires an allegation of fraud to be a necessary part of the cause of action. So a claim for conversion, with the added but unnecessary epithet "fraudulent", was not a claim based on fraud. But the unconscionable conduct of the bailee of the goods postponed the running of time under section 26(1)(b) of the 1939 Act, fraudulent concealment. As Mr Howell submitted, it is highly unlikely that now repealed and difficult expression "fraudulent concealment" which has disappeared from section 32(1)(b) was intended to reappear in section 32(1)(a). Lord Millett in Cave v Robinson [2002] UK HL 18, [2002] 2 WLR 1007 at p19 drew attention to the limited

value of looking at new statutory expressions in the light of earlier expressions which they did not mean to reproduce.

620. On the Claimants' proposed Amended Reply, the only action which could fall within section 32(1)(a) is the deceit claim. Paragraph 19A(i) does not suggest that the misfeasance claim falls within section 32(1)(a). The Claimants plead that the fraud, and the unconscionable behaviour for that matter, was not discovered, or its full extent at any rate, until the Bancoult Judicial Review was being researched or until the availability of documents under the thirty year rule. Disclosure was given in Bancoult and again in this case and "a truer and fuller picture began to emerge". I deal later with when relevant matters were or could have been discovered, after dealing with deliberate concealment. But my conclusion is that even if the deceit claim were arguable, time began to run well before 1996, six years before the commencement of this action.

Deliberate Concealment

621. The Claimants also relied on section 32(1)(b). An array of facts were said to have been deliberately concealed. In the original version of the Reply, paragraph 20, these were:

> "(1) The Claimants were citizens of the United Kingdom and Colonies.
>
> "(2) The Claimants had rights to remain in the Chagos islands as belongers.
>
> "(3) The Defendants knew that the Claimants (or at least some of them) had rights to remain in the Chagos islands as belongers.
>
> "(4) The Defendants, their servant or agents, were responsible, directly or indirectly, for preventing the return to the Chagos islands of those who had lawfully left and wished to return between 1965 and 1973.
>
> "(5) The Defendants had no lawful power to order the Chagossians to leave the Chagos islands or to require them to be so ordered.
>
> (6) The Defendants themselves had anticipated in numerous internal documents, the need to make adequate provision for the exiled Chagossians."

622. In the proposed Amended Reply, paragraph 20(vii), a further list was added by reference to parts of the Claimants' closing submissions:

> "(7) 'the fiction that there was no permanent population' (the main point); this appears to relate to (5) above, but does not appear to be the sole basis for (5), but rather a related but distinct point.
>
> "(8) in relation to misfeasance, the pleaded 'bad faith and illegality';

"(9) in relation to unlawful exile, 'the fact that there had been no lawful authority for the exile' and 'the fact that there had been no pressing need for the exile in any event';

"(10) in relation to negligence, certain facts relating to the calculation of £650,000, the fact that it was merely all that was left from an original budget which had been overspent and the fact the pig breeding scheme was impractical and underfunded;

"(11) in relation to property rights, 'the fact … that Chagos Agalega had been paid for its interests in the island' and that 'the UK Government had passed legislation which in its view overreached any subsidiary property rights onto the purchase price';

"(12) in relation to constitutional and property rights, 'the fiction that there was no permanent population';

"(13) in relation to deceit, the fact that the Government had deceived the UN in relation to the presence of a permanent population and that the Government had not given the Chagossians 'the choice to which they were entitled'. The 'nub' of these two alleged facts 'being that the Chagossians were entitled to stay on the islands'."

623. The acts principally relied on as the acts of deliberate concealment appear to be that documents had been withheld or redacted in the Vencatessen litigation under an extensive public interest immunity claim. At its conclusion, those disclosed had had to be destroyed . A number of documents were also not disclosed at all. He relied on the same processes of disclosure for the purposes of section 32(1)(b) as he did for section 32(1)(a), as showing that the concealment ceased, with the Bancoult case, this case and the ending of the thirty year period.

624. Documents from 1965 examined at the Public Record Office were said to illustrate some of the key points which the Claimants made. They showed that at that time, the Defendants knew (1) that there were second generation Chagossians, (2) that they had obligations (of an unspecified source, whether legal, moral, political, and if legal, whether domestic, colonial or international, public or private) to compensate them, to assist in their resettlement, to "ensure … appropriate employment opportunities" for displaced Ilois, to consult them, and (3) that they had obligations under the UN Charter to secure the advancement of the Chagossians in a number of ways, to protect them, to develop their self-government, and to report on their conditions. (This latter is pleaded as a known UN obligation in 1965 – though Chagos was never a territory or political entity in 1965 either before or after the creation of BIOT.)

625. They also showed, submitted Mr Allen, that (unnamed) British officials (but not Ministers, seemingly at this stage) developed "an untrue account" of (I infer) the existence of a permanent population with the intention of evading obligations to the Ilois under the UN Charter and obtaining the support of other nations at the UN. The documents showed no immediate requirement for any evacuation from Diego Garcia, and a not so immediate requirement for Peros Banhos or Salomon. Acquisition of land was intended to reduce scrutiny of the UK Government's actions and the compensation payable to a minimum.

626. This was relevant to deceit, misfeasance and negligence. Mr Allen related the documents to the causes of action in this way. For misfeasance, they showed knowledge and concealment of the existence of a permanent population of Ilois, awareness of the "governmental obligations" owed which the concealment of the population's existence would assist in evading. They evidenced, as it was expressed, the Government's dishonesty and conscious disregard of the interests of those who were going to be affected by official decision-making. The same applied to deceit. For negligence, those documents which showed an early knowledge of the position of the population and the likelihood of harm to it were relevant to the question of whether it was fair, just and reasonable that tortious liability should exist and whether there was a breach of a duty of care.

627. Mr Allen referred to volume 17 of the documents to support his point about the significance of what had been withheld in the Vencatessen case. It showed what, he said, had been concealed or redacted in the Vencatessen litigation. Mr Howell made submissions about it, to the opposite effect. Mr Allen said that the redactions showed that the UK Government had misled the UN about a permanent population, had taken decisions about clearance at the behest of the US, which were based on the geographical ignorance of the US as to the distance of Peros Banhos and Salomon from Diego Garcia and on an unformulated, distant and unspecified defence need, and had decided on a compensation/resettlement figure which had not been calculated by reference to individual or community needs. Those redactions related to all the causes of action. Essentially the same points emerged from the documents for which public interest immunity had been claimed in the Vencatessen litigation; added points were the different treatment of Ilois in the Seychelles, immigration control if the Ilois had no right to permanent residence and the deliberate policy, for a while, of not mentioning that the Ilois had British citizenship.

628. The proposed Amended Reply also includes a further contentious paragraph, 22A, which appears to relate either to the effect of the deliberate concealment of facts on the ability of the Claimants to bring an action, or to constitute a second set of acts of deliberate concealment. It is said that whenever a Chagossian, pre-Bancoult, sought legal advice, "no lawyer has been able to advise with any confidence on the basis of evidence" as to the rights and remedies now claimed. This was because of their lack of resources, "the strategy and tactics" of the Defendants, until the Bancoult case, not to reveal the truth as to what had been done to the Chagossians, to deny legal responsibility for their plight, to deny access to information which might help them, to ignore their destitution and to rely on their confusion. They were treated as a problem, to be solved by others and "not as individual citizens for whom [the Defendants] had an inalienable governing responsibility".

629. He further relied in this context upon the acceptance, only in October 2001, by the UK Government to the UN Human Rights Committee that the prohibition on the return of the Ilois, who had been removed from the Chagos, was unlawful. There is rather less in that last point than Mr Allen thought. There was no such general acceptance of unlawfulness. The UK Government's acceptance simply related to the limited effect of the Bancoult decision on section 4 of the Immigration Ordinance 1971.

630. Mr Allen relied thirdly on section 32(2) for the purposes of his deliberate concealment argument. There were, he said, a number of duties owed, although only those obligations under chapter XI of the UN Charter were actually specified in the pleading. Those obligations were to secure the advancement of the Chagossians in various ways, and to protect them, to develop their self-government and to send certain information about their condition to the UN Secretary-General on a regular basis. These duties were alleged to have been breached "particularly", but no other period was specified, in the late 1960s and early 1970s.

631. These breaches of duty were concealed, it was said, in the internal and confidential decision-making processes of the UK Government, and were only revealed thirty years after the events to which they related. It was thus unlikely that the breaches would be discovered for some time.

632. The facts involved in those breaches of duty, which were concealed deliberately, are pleaded in paragraph 29, they are similar but not identical to the first six facts relied on under section 32(1)(b), in paragraph 20. (Curiously, the newly pleaded facts in paragraph 20(vii) are not added to paragraph 29; the amendment to one fact in paragraph 20(v) to assert that the false premise for all important decisions was that there was no "or no substantial" permanent population, is not carried across, but a new allegation is added only for the purposes of section 32(2) that the Defendants were engaged in a policy of clearances of the islands. The differences may not be great; but they appear to have been deliberate. The reference to there being concealment of the fact that there was "no substantial permanent population" is an unusual averment in the pleadings; "substantial" is omitted elsewhere. It may admit that the existence of a less than substantial population was not concealed. This is not surprising in view of the material disclosed in the Vencatessen case. It is highly debatable how sizeable a population has to be before it is "substantial".) It may be fairer to treat this part of the pleading as also having some of the vague and haphazard characteristics of all the Claimants' pleadings and to incorporate the other facts into this allegation as well. Insofar as there is an allegation of deliberate concealment through non-disclosure, it was wrapped up in the material deployed by Mr Allen in the course of those other submissions.

633. It was only in the final version of the proposed Amended Reply that the Claimants addressed the question of when they actually or with reasonable diligence could have discovered the fraud or concealment. So, despite the Defendants pointing out this omission at an early stage, it was only rectified as closing submissions were nearing completion.

634. Paragraphs 31A and 31B are a peculiar piece of pleading; they combine proper pleading with submission, and a little political theory. It asserts that the burden of proof in relation to this matter lies upon the Defendants. That is wrong and plainly so, as I shall deal with later. It next asserts, in my view uncontentiously, that in principle the behaviour of a Defendant is relevant to when the use of reasonable diligence might have uncovered fraud or concealment, and equally uncontentiously, that in principle the personal circumstances of a Claimant can likewise be relevant.

635. Their reasonable diligence case is that the relevant matters could not have been discovered earlier than they were, ie in the run-up to the Bancoult litigation, with the thirty year

period expiring. That is said to be because of three broad contentions. First was the nature of the Chagossians: uneducated, illiterate, poor, unsophisticated, struggling merely to survive. Second was the absolute power of the Defendants over them, ignoring their rights, refusing any economic development in the Chagos, following the dictates of the US, unnecessarily allowing the closure of the plantations, not consulting the Chagossians and saying nothing about them to the UN. Third was the behaviour of the Defendants after the clearances: denying their British citizenship, refusing to look after them, paying to the Mauritius Government a sum which the UK Government knew to be inadequate, failing to ensure that it was properly spent, paying nothing for the Seychelles Chagossians, concealing the existence of a permanent population, setting up a scheme in 1982 which required its citizens to renounce their rights without ensuring their access to the BIOT Courts or legal aid, and denying their responsibility in preventing return to the islands or for evacuating them (as the Defendants still did).

636. In short, it was pleaded that the Defendants' persistent and deliberate deceit of its citizens as opposed to governing them with the good faith and concern for their welfare which was and is "the hallmark of a modern reasonable government", was the cause of the Claimants being unable, until 1998 or even later, to discover the fraud and deliberate concealment of facts.

637. There are very substantial hurdles in the way of the Claimants' contentions and they have no prospect of overcoming them overall. First, most of the so-called facts said to have been concealed are not facts at all, but contentious assertions as to law: (2), (3), (5), (8), (9), (13); or as to the inferences to be drawn from a complex of primary and secondary material: (4). Others are irrelevant to the existence of a cause of action: (6), (10), (11).

638. Second, what matters is not simply whether a fact which might provide evidential support for a claim has been concealed; what matters is that, as section 32(1)(b) requires, the concealed fact be "relevant to the plaintiff's right of action". That means that a fact which suffices to constitute or to complete a cause of action. This is clear from Johnson v Chief Constable of Surrey 19th October 1992, CA (unreported), in which the "concealment" of the unreliability of a confession, made manifest by the quashing of the conviction, might evidentially assist but was not a necessary part of the action for false imprisonment. The Court of Appeal agreed with what was argued to be this narrow approach to section 32(1)(b) in C v Mirror Group Newspapers [1997] 1 WLR 131. It therefore behoves the Claimants to relate the concealed facts to the causes of action in that way. I shall deal later with how the asserted facts allegedly concealed relate to the cause of action in the statutory sense, but suffice it to say for the present that the Claimants have not drawn in their analyses the clear and vital distinction between facts necessary for a cause of action and facts which provide evidential support for it.

639. Third, it is necessary that the facts relevant to the right of action should have been "deliberately concealed". The first and principal act of deliberate concealment relied on by the Claimants is the claim for privilege and other related non-disclosures in the Vencatessen litigation. I should point out that the Claimants, when tested, disclaimed any allegation that there was any impropriety at all by anyone in the conduct of the Vencatessen litigation or in the processes of discovery: it was not said that privilege had been wrongly let alone dishonestly claimed. In any event, Mr Vencatessen, on the advice of Sheridans and leading counsel and on the accepted facts, voluntarily accepted a settlement rather than pursue the chances of success in

a contested action, after the lawyers debated whether further discovery should be sought in court, in which Mr Vencatessen might or might not have been successful. Accordingly, the Claimants' contention that the untested but honest and legitimate non-disclosure of documents in the Vencatessen action was an act of deliberate concealment from all the current Claimants, rests entirely upon the assertion, which I accept as correct for current purposes, that the discovery decisions were conscious, and in that sense deliberate, decisions of the Defendants, which involved the withholding of material, and were in that sense alone acts of concealment.

640. This is not a realistic analysis of the statutory provisions. I do not consider that the honest use of the protections afforded by the law, let alone their untested use, can be regarded as deliberate concealment for these purposes. Were it otherwise, non-disclosure sanctioned by the Court on evidence honestly put forward by a defendant, would prevent time running if a writ were issued even on a specious or hopeful basis. The connotations of the statutory language are not those of the honest use of legitimate restrictions on disclosure.

641. It is also clear from Cave v Robinson Jarvis & Rolf [2002] UKHL 18, [2002] 2 WLR 1107 at pp23, 59 and 60 that section 32 requires more than a conscious or deliberate decision to withhold information, and more than mere non-disclosure. It requires active concealment, or withholding information which is actively sought, or withholding it when there is some other circumstance which imposes a duty to disclose it. It is possible only to conceal deliberately that which a person knows, not that which he ought to have known. It requires a deliberate breach of duty which is unlikely to be discovered for some time and which is then actively concealed or not disclosed when there was an obligation to disclose.

642. Accordingly, I regard it as clear that the Claimants cannot rely on the non-disclosure of documents in the Vencatessen litigation as constituting an act of deliberate concealment for the purposes of these proceedings.

643. It is in any event conceptually rather an odd position for the Claimants to have assumed. Implicit in their approach must be the contention that what had been withheld from Mr Vencatessen had been withheld from them all, and conversely that, if material had been disclosed to him, that would have precluded an assertion of deliberate concealment from any of them. Yet, the Claimants have been at pains to assert that the Vencatessen litigation was not in reality representative litigation, settled in 1982 along with the individual Vencatessen case. But unless they do accept that, which creates other significant hurdles for them, it is nigh on impossible to see how non-disclosure to Mr Vencatessen can be an act of deliberate concealment so far as they are concerned; it would be in reality simply an irrelevance and the acts of deliberate concealment would have to be sought elsewhere.

644. The Claimants' difficulties in this are accentuated by their reliance on the obligation on Sheridans to destroy the documents, which had been disclosed, at the end of the Vencatessen litigation. This is not said to be an act of deliberate concealment undertaken on behalf of the Treasury Solicitor but some unspecified significance appears to be attached to it. But it is difficult to see how it could go to what could be discovered with reasonable diligence, if disclosure in the Vencatessen litigation was or would have been disclosure to all. And if it was

not or would not have been such disclosure, how can the non-disclosure be other than confined to Mr Vencatessen himself?

645. Fourth, reliance on the degree of non-disclosure of documents in the Vencatessen case is itself incapable of satisfying the requirements of the statute. It is the fact, relevant to the right of action, which must have been deliberately concealed. As Mr Howell pointed out, that fact may have been disclosed in some other way or document or indeed never concealed at all.

646. Fifth, I do not accept what is implicit in Mr Allen's alternative argument on deliberate concealment which is that mere non-disclosure can of itself constitute deliberate concealment. There must be a duty to disclose the information withheld. No such duty has been identified. Deliberate concealment otherwise plainly entails a positive act.

647. Sixth, I shall deal later with other aspects of paragraph 22A of the proposed Amended Reply, but I cannot find in it any act of deliberate concealment. At its highest, it is an allegation of non-disclosure. The concealed but possible allegations of duties of disclosure can only derive from the "governmental obligations" of the Defendants, which I reject conceptually and as containing any duty of disclosure, or from the obligations in the UN Charter, which are not justiciable, for the reasons which I have given and are accordingly irrelevant to the legal position.

648. Seventh, and it is related, Mr Allen relies upon the UN Charter obligations, for the purposes of section 32(2). As I have said, these obligations are not justiciable. It is in any event far from clear that these alleged obligations existed at all. They are not pleaded as BIOT obligations. Had they been, the following problem would have been highlighted. Between 1965 and 1976, the Seychelles, and from 1965 to the present day, Mauritius, would have found moves to BIOT independence objectionable. This is only available as an argument against the UK Government anyway; it is not arguably an obligation on the BIOT Commissioner.

649. I accept Mr Howell's submission that such obligation as exists, if applicable, under the UN Charter is not within the scope of the "duty" in section 32(2). The duty in question in section 32(2) must be a duty in respect of a breach of which the Claimant seeks damages, but here they do not and cannot; they misconceivedly rely upon a deceit in relation to those obligations but they do not and cannot sue directly to enforce UN Charter obligations as individuals.

650. Moreover, it is perfectly obvious that the allegation that the breach was committed in circumstances where it would not be discovered for some time is unsustainable. It is all very well referring to the Government's internal and confidential decision-making process. It was clear what the UK Government was saying to the UN about the population (which the Claimants have been in a position to contest for years), that the population was not being nurtured to independence (because it was displaced thirty and more years ago) and that no information on its condition was passed to the Secretary General either before the evacuation of the Chagos or at any subsequent stage.

651. Further, the breach, if breach it was, was plain at all times from 1965 onwards, and it is hopeless for the Claimants, or any of them to argue, if that is the point upon which they rely, that the breach could not have been discovered with reasonable diligence at least twenty years ago.

652. Eighth, the approach which Mr Allen urged towards reasonable diligence is wrong. It is for the Claimants to plead and to show that they have reasonable prospects of proving that they could not have discovered the concealed facts earlier with reasonable diligence. They do not draw any distinction in the pleading between groups of Claimants other than, perhaps here, between those in the Seychelles and those in Mauritius. Otherwise, these pleadings treat them all alike. It is not arguable that the burden of proof rests on the Defendants. As Mr Howell submitted, it is for the Claimants to show that they could not have discovered the concealed fact, without taking exceptional measures of the sort which they could not reasonably have been expected to take. Paragon Finance v DB Thakeran & Co [1999] 1 All ER 400 at p418F per Millet LJ refers to the position, which I regard as generally understood and well-established. The Claimants know what they knew and when, and what steps they did or could take to discover matters. The dictum of Lord Millet in BP Exploration Ltd v Chevron Shipping [2001] UKHL 50, [2001] 3 WLR 949 at p111, deals with a provision in a different Act (though not dissimilar in import), was clearly a short comment obiter, which is not referred to, let alone assented to, by any other of their Lordships.

653. Ninth, in the light of those considerations, it is appropriate now to examine each of the purported facts, said to have been deliberately concealed.

1. The Claimants' UK citizenship: the desire on the part of the UK Government to avoid mentioning it to the Mauritius Government is not concealment from the Chagossians; the true position was in any event plain from the Mauritius Constitution and Independence Acts. Mr Allen's best point is the arguably implicit suggestion that they enjoyed no UK citizenship in the letter of 11th November 1974, (8/1374), emphasising that the UK Government could not intervene between the Mauritius Government and its citizens. But the evidence shows that whenever thereafter the direct question was raised, it was answered accurately by the UK Government eg by Mrs Chalker in 1981. It also shows that the Chagossians themselves actually knew of the position throughout eg Mr Vencatessen's case asserted it; lawyers such as Mr Duval knew of it. The publicity given to the breakdown of negotiations referred to it. All the lawyers advising in 1981 and 1982 knew of it; Mr Macdonald so advised the CIOF representatives in July 1981. Mrs Alexis' son, Mr Cherry, brought what was described as a test case in Mauritius, receiving widespread publicity in 1985 which confirmed their status. The CRG wrote many letters asserting their rights as UK citizens; Mr Bancoult's complaint was that he was not being given the fullness of the rights to which he thought he was entitled as a UK citizen. Bindmans advised on it again in the 1990s. All anyone who wished to know the position had to do was ask the UK Government or keep his eyes and ears open to events over the 1980s and 1990s, or ask any of the many lawyers who had been involved. Any Claimant could have discovered the position, if he did not already know it, at any time and well before 1998. This fact might be related to all the causes of action, in the sense required by section 31(1)(b).

2. Rights to remain in Chagos as belongers: I do not regard this as a fact at all, even if it had been expressed as right to remain in BIOT rather than the Chagos. The existence of such rights is perfectly reasonably in dispute. The position of the islanders in BIOT based upon their period of residence there was at least as much within their own knowledge as that of the Defendants. If they wanted to know what legal rights that might arguably give rise to, it is again difficult to see what act of deliberate concealment can be relied on. In any event, their various organisations were asserting their available rights; Mr Vencatessen asserted it; some basis must have existed in their minds for the oft-repeated assertion in 1979 and subsequently in the 1980, 1981 and 1982 negotiations and in the ITFB that they would not renounce their rights to return to Chagos. That can only be based on some tie encapsulated by the concept of "belonging" there. The 1994 Common Declaration of the Ilois People, signed or thumbed by 812 people asserted their right to live where they were connected by birth, descent, and citizenship. The CRG made similar points in 1985. I accept Mr Howell's submission that the Claimants have not begun to discharge the onus of proof on them in relation to showing that any of them did not know this "fact" or could not have discovered it with reasonable diligence well before 1998. This "fact" again might however relate to all causes of action.

3. The Defendants' knowledge of such rights: the evidence does not establish that such knowledge existed as a matter of fact. The Defendants clearly were uncertain as to whether there were belongers rights or whether such rights yet existed in the absence of legislative provision. But Mr Howell is right to point out that, if that knowledge were a fact, it is difficult to see that it was deliberately concealed for the purposes of the section. No-one asked either Defendant what it knew the position to be. It would be a basic act of diligence, reasonably to be undertaken, for someone to inquire what the Defendants thought about what to the Claimants was an important assertion. It is not an answer to say that the UK Government was pretending that there was no permanent population: the Newton report was disclosed in the Vencatessen case, and it shows a permanent population however much debate there may be over the numbers it shows. This fact might relate, as best I see it, to the misfeasance and deceit case.

4. The fact that the Defendants were responsible for preventing Chagossians returning before the evacuations: the problem with the Claimants' argument is that, whether or not in fact the Defendants were directly or indirectly responsible for that, they believed the Defendants to be responsible, for the most part. Their evidence was that Rogers & Co told them that the islands had been sold. Even if it were believed by some that Mauritius was behind it, or even Moulinie & Co at the time when they were unable to return, it is impossible to accept that any of the relevant Claimants have any prospect of establishing that they did not realise that fact, if such it be, a very long while ago, no later than the 1981 or 1982 negotiations or that they could not have discovered it by then with reasonable diligence. No evidence was given to me to suggest that those who could not return thought that the Defendants were not involved, until 1998 or thereabouts eg Mrs Elyse or Mr Bancoult, Mrs Jaffar. Mrs Jeanette Alexis, who was an evacuee and not in the same category as those prevented from returning, said she did not realise that the Defendants were involved till recently in the evacuations. It is a surprising view for her to have had, but she struck me as generally an honest witness. But even so, given the

visits of Mrs Charlesia Alexis to the Seychelles in 1980, who stayed with the family, the discussions about compensation and claims which must have taken place, the visits of other politicians such as Mr Berenger and Mr Michel, it is inconceivable that reasonable diligence eg a simple question to Mrs Charlesia Alexis or any Mauritian group, would not have put her right many, many years ago. Mr Macdonald thought the Defendants responsible, (15/121-2). This fact might go to all causes of action.

5. The absence of lawful authority to require the Claimants to leave: this is not a fact, but a highly contentious issue of law. It is however an assertion plainly made in the Vencatessen litigation and was considered on a number of occasions. Reasonable diligence would have involved asking a lawyer. If section 11 of the BIOT Order is restricted as was concluded in the Bancoult Judicial Review, it is necessary only to juxtapose the legislative power granted with the legislation enacted to see that it was ultra vires. It had never been suggested that it was enacted to make provision for the sort of catastrophe which the Divisional Court thought might justify it. This arguably goes to all causes of action, save negligence.

6. Anticipation of the need to make adequate resettlement provision: it is difficult to see how this "fact" relates to the negligence cause of action in the statutory sense, still less to the one arguable way in which such a case could be put, as I see it. There was no assumption of responsibility communicated to the Claimants. Insofar as it said to relate to it because it shows that it would be fair, just and reasonable to impose a duty and that it was then breached, the relevant facts are shown by the 1972 Agreement, and the payment, indeed by the 1982 Agreement. Neither were concealed.

7. The fiction that there was no permanent population: in reality the fact alleged to have been deliberately concealed is the Defendants' knowledge that there was such a permanent population. Mr Allen says that this was "a massive cover up and fundamental lie". Yet the problem with this argument stems from the fact that the Claimants themselves knew the true position about their permanence. They were in a position to say, with the Newton Report albeit differing from its figures, that by the time it was disclosed in 1976 or thereabouts, the Defendants must have known that there had been some permanent population. Their legal advisors, notably Mr Macdonald, were seeking material to show that the description of "contract workers" to convey short-term residence was a myth. I find it impossible to accept that reasonable diligence, including asking the Moulinies what they had said to the Defendants or asking Mr Todd about his surveys, which the Moulinies could have told them about, could not have disclosed that the Defendants must have known that there was a permanent population, however sophisticated were their attempts to avoid actually having to say so. This fact goes arguably to all causes of action.

8. The bad faith and illegality in the misfeasance pleading: this is an unsatisfactory way of alleging the deliberate concealment of facts. I do not see any new point not otherwise covered.

9. The absence of lawful authority for the exile has already been covered above; the absence of pressing need is not a fact, or a relevant fact to a right of action. Diego Garcia was not evacuated until it was needed as a whole for defence purposes; it has only been the Claimants who say that the defence facilities and they can co-exist on Diego Garcia – the Court cannot weigh the competing defence needs. As to the outer islands, the US wanted them cleared at some stage and there was a longer term UK interest in removing the population too. But it is not possible to say that there was a concealed fact that the US did not want them cleared, or only wanted them cleared because one US Defence Official got his distances significantly wrong.

10. Negligence: the calculation of the £650,000 and various points about the resettlement scheme. Even if all those points are facts and correct, the negligence claim does not depend on those facts and they are irrelevant to section 32(1)(b). There is no evidence that anyone asked how the £650,000 was calculated or how much the Mauritius Government had asked for (though it was £650,000 – and there was an Ilois number based calculation). Reasonable diligence would have involved asking the Mauritius Government or the Resettlement Committee, on which Ilois were represented. That would also have been a reasonable step to take in relation to any other matters about the adequacy of the sum, and the progress or wisdom of the pig breeding scheme. The Prosser Report was published in 1976. Documents dealing with reservations about the pig breeding scheme were among those disclosed in the Vencatessen litigation. Mr Macdonald, (15/124), advised that the adequacy of the £650,000 offer be investigated to see if it was made in good faith. There is no evidence to support the claim that a Claimant, if ignorant of any relevant fact, could not with reasonable diligence have discovered it.

11. Property rights and the overreaching legislation: the legislation, the fact of purchase and the payment of the price were never concealed. There is no evidence of anyone asking or not being told the precise position. The purchase price was referred to in the press in 1975 and by Mr Macdonald in his advice. He too knew of the Property Ordinances, (15/119, 128). He also advised that property rights be investigated.

12. Repeats (7) above in relation to constitutional and property rights.

13. Deceit: the deceit of the UN and the Chagossians entitlement to stay. This adds nothing to what I have already dealt with. Certainly what the UK actually said would have been ascertainable with reasonable diligence.

654. These "facts" therefore do not assist the Claimants in overcoming the statutory bar to these proceedings. It is necessary to say a little about their documentary analysis however.

655. The Claimants' Note on documents produced from the Public Record Office does not exemplify their contentions as to when they first saw what they contend was the true character of the Government's actions, even if that were a relevant concept within the Limitation Act. The fact that certain documents were not disclosed does not assist in showing that the relevant facts were concealed unless they are also known to be the only relevant source for the fact in question.

656. But, as Mr Howell, pointed out, volume 17 shows that the documents disclosed in the Vencatessen litigation, including the Newton Report, demonstrate the Defendants' awareness that there was a permanent population in the Chagos. The known population figures were disclosed eg in the March 1967 Report (paragraph A85), in the May 1967 Report (paragraphs A97-100), in the September 1967 despatch (paragraph A11), in the despatch of 4th June 1968 from the BIOT Commissioner to the CO (paragraph A134), of 1st August 1968 (paragraph A149), and in the report of Mr Todd's visit in July 1969 (paragraph A249). The position over the undertaking of the Mauritius Government in 1972 and its basis in humanitarian assistance not legal obligation had also been disclosed. Indeed, a limited amount of material about the stance at the UN had also been disclosed.

657. The newly disclosed documents do not bear out the implicit contentions by the Claimants that the Defendants thought that there were, or that there were in fact, legally binding obligations to compensate, consult, resettle, provide employment or to secure their political, economic and social advancement. They bear out a sense of moral or political or at best international but not individual legal obligation. The existence of the original undertaking by the UK Government to the Mauritius Government was publicly known, referred to in a Parliamentary Question by Mr Duval in the Mauritius Legislative Assembly; the agreement for £650,000 resettlement money was known, as was the way in which it was not spent for years. Whatever may be said about the dilatoriness or effectiveness or generosity of the UK Government's resettlement offer of £650,000, the newly disclosed documents do not show a conscious disregard for the Chagossians other than that their interest in remaining in BIOT was regarded as of too little significance when tested against its competition: defence and foreign policy interests.

658. The now disclosed correspondence between the Canadian Government official and the FCO over consultation does not begin to evidence any obligation to consult or promise to consult. All the correspondence as a whole shows that consultation was considered but thought pointless or impractical. After all, the one option which the Claimants really wanted was not open.

659. The correspondence now shows that the UK Government was very alive to the arguments that chapter XI might or did apply and to the political disadvantages which might attend its application. But the overall documentation shows the criticism of the stance adopted, by other countries and by Chagossian legal advisers such as Mr Macdonald. The contradiction between the UK's position and the facts as asserted by others or as said to be known to the UK was evident or readily ascertainable with reasonable diligence.

660. One of the real difficulties facing the Claimants with all their various causes of action is the extent to which the current arguments, sometimes in a different legal cloak, were foreshadowed by what was argued in the Vencatessen case. This means that it is very difficult to say that a fact relevant to the existence of the right of action was deliberately concealed as opposed to material which might advance or support the case, or offer flavour but not substance to it.

661. I have also tried to stand back from the detail to see to what extent in reality, shorn of the rhetoric, the Claimants needed either a fact contained only within the documents not disclosed in the Vencatessen or the documents themselves in order to make the averments necessary to set up the causes of action upon which they rely.

662. For misfeasance, the illegal actions are all acts of which the Claimants knew or could readily have discovered. I did not find in the documents, let alone only in the documents not so disclosed, the otherwise concealed fact of knowledge or reckless indifference to any illegality.

663. For deceit, the position as declared at the UN, if untrue, was at least known or discoverable to the Claimants. They have no chance of showing that they could not have discovered such deceits as they say exist with reasonable diligence. But the cause of action is misconceived anyway.

664. Exile depends on the unlawfulness of the acts of displacement or exclusion. What is necessary for that, as for illegality in misfeasance, is not dependant on what the Defendants knew. A permanent population cannot be displaced, in the absence of extraordinary circumstances which are not here relied on, by virtue of powers to make laws for the "peace, order and good government" of the territory, according to Bancoult. But I have no clear picture of what Mr Allen says the documentation relied on adds, beyond what is clear from the Order, the Ordinances and the known aim, for whatever reason (but not natural catastrophe or the like) of removing the islanders. The documentation does not provide that purpose, hitherto unknown. What was it supposed that the aim and upshot of the various legislative powers was? So, although the Bancoult judgment refers to various documents (but so far as I can see the decision should have been exactly the same if they had not existed, on the Divisional Court's reasoning), I do not see that they are necessary ingredients for the alleged illegality in the tort of exile. Indeed, if they are relevant to the vires of the Ordinance because, as the Divisional Court acknowledges through Gibbs J, precisely the same power can be taken for a proper and for an improper purpose, that suggests strongly to me that the documents really go only to the question of whether the use to which the power was put was within the proper scope of the discretionary power which had been enacted in the Ordinance. But the use to which the powers were put, whether the Immigration Ordinance or the private land ownership powers, was never disguised – it was all too manifest.

665. No facts only revealed in the documents "relate" to any property or constitutional rights based cause of action.

666. I cannot see how anything in the documents "relates" to the negligence case. The duty of care exists either because, on the Claimants' case citizens should be cared for, or because I see it, it is arguable that those so displaced should not be put at risk of personal injury. The breach is not dependant on the documents any more than the existence of the duty. The Claimants fail adequately to distinguish between documents which evidence facts relevant to rights of action in the statutory sense, documents which are only evidentially supportive, and documents relevant to the asserted catalogue of wrongs, which have never had the high-level review which they seek.

667. There is in essence only one point of substance which it might be said emerges from the documents – that is that the UK Government was prepared to give a deliberately false impression as to the existence, or rather extent of the permanent population, to the UN and others. That is not itself unlawful. That could in theory, but does not in practice, go to knowledge for the misfeasance or deceit cases. The documents do not show that the true position was deliberately concealed and not ascertainable with reasonable diligence.

668. The next point which I deal with under this head is the collation of points made under paragraph 22A of the proposed Amended Reply. I regard this paragraph as misconceived if its aim is to establish an additional basis of concealment to the non-disclosure in the Vencatessen case. There is no evidence to support the very vague and ill-considered pleading of dishonesty and bad faith; had it been properly particularised, its weakness would have been yet clearer. Much of it is simply at odds with the documents and any known facts. I would not permit this paragraph to remain, whatever else happened to the case. It is irrelevant to concealment what a lawyer may have been able to advise about with confidence. Even with the documents, no rational advice could have been confident.

669. Finally, I turn to those other matters relied on by the Claimants in paragraph 31B of the proposed Amended Reply, as going to what could have been reasonably expected of them by way of taking steps to ascertain the facts which they said had been concealed.

670. The contentions in relation to access to legal advice for the ignorant, the struggling, poor, ill-educated and unsophisticated, are in principle relevant. The difficulty is the facts. Mr Ramdass' group was able indirectly through a Mauritian lawyer-politician to contact Sheridans to bring the Vencatessen case in 1975. Other committees which became the JIC pursued it; they all knew of its relevance for the negotiations, and Agreement. The litigant, and the supporting committees, plainly had access to lawyers notwithstanding all those disadvantages. What that group did, others could have done, if they had not all seen the Vencatessen case as an action leading to a global settlement from which they would all benefit. Others could have contacted Sheridans in 1979, 1980, 1981, 1982 and at any time subsequently. Sheridans' costs were in part paid by the legal aid fund and, for the Ilois community, by the Treasury Solicitor and the Mauritius Government. They thought they were advising the generality of Ilois and so conducted themselves.

671. There was nothing secret about their involvement; it was widely publicised. If any individual had wanted advice, they could have found their name through support groups, they could readily have ascertained what the variety of support groups were doing and the politicians whose interests at least at times coincided with those of the Chagossians. I do not accept the picture of the non-Ilois painted by the Chagossian witnesses; these were excuses and deceitful evasions.

672. But it was not just the one firm involved. By 1981, Bindmans were instructed by the main representative group, the CIOF. Their involvement, physical presence, and the counsel instructed were widely publicised. They too were part funded by the Mauritius Government and at the time saw themselves as representing the Ilois generally, and advised on that basis. They did so in 1982 before and after the Agreement. They were again involved in the 1990s,

instructed by the CIOF and the BIOT Social Committee. The substance of the matters upon which they advised were many of those relevant to these proceedings.

673. It was the lack of prospects of success which meant that legal aid was not sought for proceedings in this country; with better prospects, Mr Grosz said that it would have been sought, as it was in the Vencatessen case.

674. I have already dealt with the extensive organisation and variety of groups available to the Chagossians. They could raise money for advice and support for actions. Their rights were a constant political issue. Their leaders were elected annually to the ITFB; they had contact with civil servants and the Mauritius Government. Lucien Permal and Simon Vencatessen were able to bring proceedings against the ITFB. A group brought proceedings against it in 1991 for documents. With Bindmans' advice, proceedings were brought under the Immigration Ordinance.

675. If they thought that the 1982 Agreement had created but a temporary embargo on suing the UK Government, there is no reason for further proceedings not to have been brought along the lines of the Vencatessen case by 1985 or 1987. It was suggested that there were attempts in 1990 or thereabouts. To the extent that further advice was sought, that undermines the contention about the absence of access. To the extent that it was not sought, that undermines the view that the Chagossians genuinely, and however improbably, thought that the 1982 Agreement and the withdrawal of the Vencatessen case was not the end. Mr Gifford may well be right in saying that they had called their best shot in 1982, and after the inadequacies of the money became apparent, they had and knew they had nowhere else to go.

676. The attempts by the Chagossians to play down the role of their organisations was discreditable. They did not seek to present a reasonably complete and truthful picture to the Court, when they knew that limitation was a major issue. It was only when I pointed out that significant witnesses were omitted, who could speak to what was or was not known, that several relevant witnesses were called. The allegations that the organisations were not representative were not supported by evidence: the claimants simply challenged someone else to disprove their counsel's assertions and to prove the contrary of their witnesses' failing or untruthful recollections. The burden is on them to show the matters which would justify an extension of time.

677. Finally and highly contentiously, the Claimants plead in paragraph 34(vi) that "a very large majority" of the Claimants living in Mauritius did not obtain "real and comprehensive" legal advice and because of the deprivation created by the Defendants had no "real effective and practical" means of access to "comprehensive" advice on English law before the involvement of Mr Mardemootoo in 1998. Thereafter, documents freshly available in the Public Record Office and disclosed in the Bancoult Judicial Review enabled the Claimants, since the result of that action, to take decisive legal action. The lawyers whom individual Chagossians (unspecified) did instruct had faced difficulties (unspecified but I infer the Claimants rely on the same conduct by the Defendants and non-disclosure of documents as already referred to).

678. This last pleading was highly contentious first, because until the amendment made with the closing submissions (though the Claimants had acknowledged the need to make an amendment to their Reply) it had been asserted, plainly untruthfully and it ought to have been plain to all the Claimants' lawyers that it was untrue, that no Claimant had had any practical access to legal advice. The amendments so far as material are in quotation marks in the preceding paragraph. It ought to have been obvious because Sheridans were involved earlier on, it was known to Sheridans and Mr Bradley, and plain from Bindmans' documents that the CIOF had sought legal advice in the 1990s and that other lawyers too had been involved. I accept the explanation as to how the pleading had not been checked and that there was no intention to mislead the Court. But I am left with a deep concern that this pleading of the Reply was constructed on the basis of what the position was wished to be, and not on the basis of any thought or investigation such as would permit the original or first draft amended pleading to be supported by a statement of truth. That concern rather persists with the final amended Reply because, for reasons to which I shall come, it is so at odds with the evidence.

679. It was highly contentious for a second reason. The reference to "a very large majority" was said to "de-particularise" the claim, rendering it uncertain. The allegation was vexatious according to Mr Howell; the Claimants' disclosure had been late and partial, its witnesses were supposed to provide the best evidence which they could call and when all had failed, they had sought to avoid the consequence, the dismissal of time barred claims, by lumping Claimants together in a way which prevented the identification of those whose claims might or might not be statute barred. Mr Howell urged that the proposed amended Reply at least in this respect should be refused permission to be served.

680. In my judgment, although there is force in what Mr Howell says, it is not itself a sufficient basis to refuse permission for the amendment. The real problems with the pleadings should be dealt with on their merits which I have yet to come to. The assertion that almost all Claimants, as opposed to all Claimants, may be imprecise but the essence of the contention is clear enough. If the real issue was one of form, I would remedy the pleadings by staying the action, requiring the completion of a new questionnaire by all Claimants, which was directed to answering the more specific and detailed questions, to be approved by the Court, relevant to the issues which are now raised and identifying which issues related to which named Claimant. This would be necessary for many aspects of the pleaded claims.

681. It is perfectly clear that the JIC, the CIOF, the BIOT Social Committee, the CRG and others represented and were relied on by most Chagossians. Those they did not represent knew what organisations existed and could find out what they knew and had been advised.

682. In any event, through the long years of Chagossian struggle, they were advised by many lawyers in addition to Sheridans, Bindmans and English counsel. There was advice available from Mr Duval QC, Mr Marc David QC, Mr Lassemillante, Mr Ollivray, Mr Bhayat and others. I accept that not all the others would have been well placed to offer direct advice on the complex issues in the case. But Mr Duval was in a position at least to point Chagossians in the right direction as the instructions to Sheridans showed. In the UK, lawyers pointed the CIOF to Bindmans. Mr Ollivray and Mr Bhayat were at the 1982 negotiations. Mr Lassemillante may have been more noisy than effective, as Mr Bancoult in effect described him, (and he would not

be the first advocate of whom that could be said), but that is not the point. He was a legal adviser with relevant knowledge.

683. The criticisms of the behaviour of the Defendants in paragraph 31B(ii) and (iii) do not show or tend to show that the Claimants could not have discovered the allegedly concealed facts with reasonable diligence. They do no more than explain why the Claimants were in the position set out in paragraph 31B(i).

684. The Seychellois Chagossians were not in so strong a position as those in Mauritius: there was no agreement on resettlement, or negotiations to settle litigation. The Seychelles Government was not interested in exploiting the Ilois for sovereignty claims, because on independence its islands were returned.

685. Nonetheless, there was information available to them, in 1980 about the Mauritian Chagossian claims and the Vencatessen litigation through the visits of Mrs Alexis and others. Some tried to claim under the 1982 Agreement. They could have contacted the Mauritius or English lawyers for their case to be pursued.

686. Mr Howell objected to these proposed amendments coming after cross- examination but I see no reason not to consider them, and to deal with the points which he raises against them on their merits. Section 32 is of no avail to the Claimants.

Limitation and personal injury

687. Mr Allen lastly relied upon the special provisions in relation to personal injury in section 33 of the 1980 Act. This provides:

> "(1) If it appears to the court that it would be equitable to allow an action to proceed having regard to the degree to which –
>
> > "a. the provisions of section 11 [or 11A] or 12 of this Act prejudice the plaintiff or any person whom he represents; and
> >
> > "b. any decision of the court under this subsection would prejudice the defendant or any person whom he represents;the court may direct that those provisions shall not apply to the action, or shall not apply to any specified cause of action to which the action relates.
>
> "(3) In acting under this section the court shall have regard to all the circumstances of the case and in particular to -
>
> > "a. the length of, and the reasons for, the delay on the part of the plaintiff;
> >
> > "b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the plaintiff or the defendant is or is likely to be less cogent than if the action had been brought within the time

allowed by section 11 [, by section 11A] or (as the case may be) by section 12;

"c. the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the plaintiff for information or inspection for the purpose of ascertaining facts which were or might be relevant to the plaintiff's cause of action against the defendant;

"d. the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;

"e. the extent to which the plaintiff acted promptly and reasonably once he knew whether or not the act or omission of the defendant, to which the injury was attributable, might be capable at that time of giving rise to an action for damages;

"f. the steps, if any, taken by the plaintiff to obtain medical, legal or other expert advice and the nature of any such advice he may have received."

688. Sections 11 and 14 are also relevant. So far as material, they provide:

"11 Special time limit for actions in respect of personal injuries

"(3) An action to which this section applies shall not be brought after the expiration of the period applicable in accordance with subsection (4) or (5) below.

"(4) Except where subsection (5) below applies, the period applicable is three years from –

"(a) the date on which the cause of action accrued; or

"(b) the date of knowledge (if later) of the person injured."

"14 Definition of date of knowledge for purposes of sections 11 and 12

"(1) [Subject to subsection (1A) below,] in sections 11 and 12 of this Act references to a person's date of knowledge are references to the date on which he first had knowledge of the following facts -

"(a) that the injury in question was significant; and that the injury was attributable in whole or in part to the act or omission which is alleged to constitute negligence, nuisance or breach of duty; and

"(c) the identity of the defendant; and

> "(d) if it is alleged that the act or omission was that of a person other than the defendant, the identity of that person and the additional facts supporting the bringing of an action against the defendant; and knowledge that any acts or omissions did nor did not, as a matter of law, involve negligence, nuisance or breach of duty is irrelevant.
>
> "(2) For the purposes of this section an injury is significant if the person whose date of knowledge is in question would reasonably have considered it sufficiently serious to justify his instituting proceedings for damages against a defendant who did not dispute liability and was able to satisfy a judgment.
>
> "(3) For the purposes of this section a person's knowledge includes knowledge which he might reasonably have been expected to acquire -
>
> "(a) from facts observable or ascertainable by him; or
>
> "(b) from facts ascertainable by him with the help of medical or other appropriate expert advice which it is reasonable for him to seek; but a person shall not be fixed under this subsection with knowledge of a fact ascertainable only with the help of expert advice so long as he has taken all reasonable steps to obtain (and, where appropriate, to act on) that advice."

689. I have already referred to the Claimants' pleadings in respect of the personal injuries and to some of their drawbacks when dealing with the negligence claim. It was accepted by the pleading that, for the purposes of sections 11 and 14, all of the Claimants who made a claim in respect of personal injuries knew of the statutorily relevant facts before the start of the three year period ending with the issue of these proceedings. No specific date or dates for such knowledge is pleaded, but reliance is placed for the purposes of section 33 on the disclosure of information in the Bancoult proceedings. It is indisputable but that the causes of action accrued many years ago. So the key issue is whether or not there is any reasonable prospect of time being extended under section 33. I use the expression "reasonable prospect", not solely because that is how the question was formulated, but also because although I recognise that, in principle, a decision on the application of section 33 can be made before trial, it may also be appropriate for that decision to await trial in certain circumstances, unless the answer to its application is already clear.

690. The Claimants' pleadings and submissions on section 33 only partially follow the structure of section 33. So far as section 33(3) is concerned, the first submission is that the injuries will continue to occur until their previous "basic decent living conditions" are restored. I have already dealt with the unarguability of the general claim in negligence. If there is a continuing breach of duty leading to personal injuries in respect of those compelled to leave the Chagos by the sequence of decisions for which the Defendants were responsible, no individual has been identified nor his related circumstances so as to sustain such a case, and I do not see how it can be said that there is a continuing duty to them anyway, of the limited nature which I regard arguably as existing.

691. The Claimants assert, without much elaboration, that the evidence of neither party would be made any less cogent by what delay (unspecified) there might have been. In support, they simply say that the evidence of the Defendants is "largely contained in official documents"; this suggests a very limited role for cross-examination and oral evidence from the Defendants. I consider that appraisal to be correct and such recollection as any witnesses had, would be almost wholly dependant on those documents, and even those documents could well fail to enable events accurately to be recalled; this was the nature of the evidence of Mr Sheridan, Mr Glasser, Mr Grosz and, to some extent, Mr Moulinie. But this assertion contradicts the Claimants' stance in relation to the continuance of the misfeasance proceedings, which posited that much of value could emerge from cross-examination of the Defendants' witnesses, whoever they might be. The evidence of what happened to the Chagossian community was said to be "still plain for all to see". But, to my mind, that can relate to current circumstances only; it cannot deal with the sequence of events or with causation, or the position in 1973, 1982-3, 1990 or at any other time. The pleading, so far as individual Claimants were concerned, was merely that what happened to individuals would be a matter of evidence in due course. As an attempt to deal with section 33(3), it provides nothing of value, and its very paucity suggests that there is little more to be said about the obvious difficulties which the Claimants face.

692. The Claimants blame the Defendants' conduct in not providing information which might have allowed the Claimants to ascertain the facts relevant to this cause of action, until the Bancoult Judicial Review proceedings. The partial disclosure and subsequently required destruction of what was disclosed in the Vencatessen action is also referred to. The Defendants' conduct was simply to deny responsibility for the Claimants, it is pleaded.

693. Next, it is asserted (without any being identified) that some had periods of disability as minors or through mental illness.

694. It is then pleaded that the Claimants, I infer all of them, acted promptly and reasonably in the circumstances in bringing this case (not just the personal injury claim) in the light of the information disclosed in the Bancoult Judicial Review. This is not further particularised or elaborated. The Claimants also rely on the highly contentious pleading in paragraph 34(vi) about what access to legal advice was available to the vast majority of Chagossians.

695. I accept Mr Howell's submission that the particulars of claim do not comply with the requirements of CPR 16 PD rule 4. This is because the relevant details are not available from the questionnaires as to injury, losses, or medical reports, if any are to be relied on. It is not clear if any of the suicides are alleged to be fatal accidents. Nonetheless, this deficiency is remediable and not a justification for summary judgment or strike out against the Claimants. But I propose to deal with these pleaded claims on their substantive merits, or lack of them. There is an interaction however; the vagueness and opacity of the pleadings, their rather uncertain approach to facts which ought to be set within a properly understood legal framework has resulted to an extent from or permitted the substantive problems to be overlooked, not wrestled with and thought through. Had that been done, the weaknesses of the case must have become clearer.

696. I do not regard the Claimants as having any reasonable prospects of success in their limitation argument in relation to personal injuries. For these purposes, I accept that some Chagossians might have suffered personal injuries of the type asserted, that those might constitute personal injuries for the purpose of sections 11 and 33, and that some might have been caused by the negligence of the Defendants. But it is to be emphasised that it is only the material relevant to the requirements of sections 11, 14 and 33 which matters; ie non-disclosure, say, is only relevant to the extent that it bites upon the claim for personal injuries. The question of when knowledge arose of relevant facts and what advice was available, and when, are relevant for and conceded by the Claimants for the purposes of sections 11 and 14 but arise again under section 33.

697. I accept that the burden of proving that the claim has been brought within the relevant period of limitation is on the Claimants; London Congregational Union Inc v Harriss and Harriss [1988] 1 All ER 15 CA at pp30, 34, 37. This also applies to the justifications for stopping time running and for extending it.

698. The relevant causes of action for the purposes of a claim for damages for personal injuries obviously encompasses the negligence claim. It also covers a breach of duty; the duty which must be breached for these purposes is not the broad duty to avoid infringing the rights of others, a duty to avoid committing torts or breaches of contracts; it is a duty to take care to avoid personal injury; Stubbings v Webb [1993] AC 498. So, the only relevant facts, knowledge, delay and legal advice for these purposes are those which relate to a negligence-based personal injuries claim. No other relevant duty has been pleaded.

699. The issue which section 33 raises is whether the application of section 11 would prejudice either party. Thus, the Court has a discretionary power to direct that the section shall or shall not apply. This more general power to disapply the time limit may well reflect the shorter three year time limit applicable to personal injury cases. The statute lists, non-exhaustively, the relevant factors.

700. It is self-evident that there is no prejudice from being unable to pursue an unarguable case. The personal injury claim is not unarguable but is not strong; at present it passes muster. Accordingly, the application of the three year limitation period does not prevent the Claimants putting forward a powerful claim, with good prospects of success.

701. The prejudice to the Defendants in relation to any personal injury claim, which for these purposes is the claim that matters, is clear and serious. It relates to the cogency of the evidence which they can produce, and so I shall consider it later under that head.

702. I now turn to the specific factors set out in of section 33(3) of the 1980 Act. First, the reasons for delay. In my judgment, the affected Claimants were in a position to bring proceedings for damages for personal injury when the asserted personal injury manifested itself in a significant way. These injuries, principally ill-health of one form or another, are relevant because they were supposedly unusual in Chagos. The conditions which led to them were evident; the change was evident. Even if a period is allowed for the realisation of what was happening, the establishment of trends, and the time taken for problems to manifest themselves,

the first cases should have been started by the time of the 1982 Agreement. The Prosser Report, the slowness of resettlement, the submissions to the negotiations in 1981 and the experiences and claims of the Chagossians gave them the relevant knowledge. It is difficult to imagine any whose claims manifested themselves later than 1990, but again no such date with supporting justification are put forward in respect of any Claimant.

703. Their argument appears to be that relevant facts were not disclosed. This is wrong. The Claimants knew of their injury, the change of conditions, who was responsible for that change, and that, save for the 1972 and 1982 Agreements, nothing had been done for them. They knew of the availability or lack of health care and what those who provided them with health care thought about the impact on their well-being of the change of circumstances in which they lived. If they did not, it was in any event an obvious question to ask. They could reasonably have been expected to inquire of medical experts and of lawyers as to their position. The section provides that it is irrelevant whether the Claimants knew that the acts or omissions of the Defendants amounted to negligence or a breach of duty of care.

704. So, I conclude that the period of delay is between just under thirty years and a lesser period, unlikely to be less than ten years but varying from Claimant to Claimant, and in respect of which the Claimants have provided far too little material to sustain any argument that the delay is not of a very substantial scale, given the obvious starting point.

705. The Claimants' reasons for any delay appear to be the Defendants' conduct in putting them in Mauritius and the Seychelles in the first place without proper provision, denying responsibility for them and not providing information. But these are inadequate reasons. The very existence of the cause of action is that they were displaced there without provision or adequate provision. They knew that all along. It is difficult to see what denial of responsibility or of information occurred which was relevant to this cause of action, or to delay.

706. The only documents of any possible significance which were not disclosed were those which related to the concern that the resettlement scheme by way of pig breeding would be unattractive to the Chagossians. The Claimants appear in their amended Reply, however, to be making assertions related to the generality of their claims rather than focusing on the reasons for delay and any non-disclosure of documents relating specifically to a claim in negligence for personal injuries.

707. Second, the reduction in the cogency of the Defendants' and Claimants' evidence by reference to the delay. I regard the Claimants' assertions as to the Defendants' evidence insofar as they relate to the personal injuries claim as wholly inadequate to justify any extension. The Defendants' evidence in relation to any duty of care or its breach may very well be confined to the written material in practice. But there are issues as to whether any Claimant suffered in fact the alleged personal injury eg was Claimant A depressed, did he or she suffer from stomach or respiratory disorders? The evidence of the Claimants was sufficiently unreliable to suggest that that itself would be a major issue. Yet how could that now be tested for a period of perhaps thirty years? Some of that may be a diagnosis unsupported by any medical evidence; if it is, there has been no disclosure of even one contemporaneous medical report to illustrate the point, nor of

any hospital records. The Defendants' prospects of evidence challenging factual assertions as to past ill-health are obviously significantly and adversely affected.

708. Even more problematic would be issues as to causation. In view of the absence of sound illustration as to the nature of even one individual's case, how it might be supported by expert evidence, medical history and personal testimony, it is difficult to see how any evidence in response from the Defendants could be other than immensely reduced in cogency. They do not have the opportunity to test any history with anything approaching contemporaneity. Whatever wrongs the Defendants did in the past, they could not now fairly defend themselves on that score.

709. The evidence which the Claimants themselves called was to my mind the clearest proof of why the cogency of the evidence of both Claimants and Defendants would be seriously adversely affected. The evidence as to what happened to individuals in terms of accommodation and social security was usually self-contradictory and incomplete; what they did with the money which they received was at times problematic. The general picture must yield for these purposes to the specific details provided by individuals to what happened to them. Evidence as to the availability and use made of medical care was unreliable and incomplete. Evidence about when individuals became ill, and what form that illness took was likewise unreliable eg Mrs Elyse's and Mr Bancoult's evidence about his father's condition. It was of a piece with a general lack of reliability over the detail of the Claimants' evidence and yet the detailed reliability of each individual's evidence matters here. There was no evidence suggesting that what they had to say on an individual basis could be reinforced by medical records, and to what degree.

710. Section 33(3)(c) deals with the conduct of the Defendant. I have already dealt with this in part in relation to the reasons for delay. The relevant conduct is that which relates to the negligence claim for damages in personal injuries, rather than the other claims. Such acts as were identified do not relate to delay or concealment or any other act relating to whether it was equitable for this claim to proceed. Certainly, no request for information and no refusal by the Defendants to supply requested information was identified for the purposes of this particular claim. General references to non-disclosure in the Vencatessen litigation and to a failure to provide unspecified information, which it was never said had been requested anyway, simply do not begin to grapple with the statutory provisions which the Claimants seek to invoke. The problems with reliance on non-disclosure in the Vencatessen litigation have been dealt with already; the Claimants face both ways on its significance for this case: what was disclosed to one, was not disclosed to all, yet what was not disclosed to one, was concealed from all. That litigation did not fully test discovery because it was settled. No fact, relevant to this cause of action, has been said, or plausibly said, to have been deliberately concealed. The Claimants may not have been aware of what transpired between the UK and Mauritius Governments in 1972 and onwards, or of the advice which the former received about the poor prospects of the pig breeding scheme, but this cannot advance their case. As Mr Howell pointed out, this shows that no assumption of responsibility, had been communicated to the Claimants, which is the opposite of what they wish to prove. In any event, the relevant agreements and the slowness of payment under the 1972 Agreement was a matter of contemporaneous public knowledge or ready ascertainment. The condition of the Chagossians and their health was known to them; they knew of the involvement of the Defendants in their removal. There were no equivalent agreements

with the Seychelles but I do not think it plausible that the Seychelles Chagossians did not know or could not readily have found out, quite simply, about the Defendants' involvement.

711. As to "disability" in section 33(3)(d), if a narrow view is taken of its scope, it is correct that no "disabled" Claimant has been identified for this claim, still less the impact of any such disability after the accrual of the cause of action. If "disability" is given a wider interpretation than section 38 would provide, so as to encompass illiteracy, the arguments in relation to this particular claim do not change. The information in question was not unknown because unread; it was available from what the Claimants could see had happened, from any medical notes which they could see being written and from any inquiries which they could make in person, or through their organisations or representatives, whether in Mauritius or in the Seychelles. Poverty and ignorance of the law are not relevant disabilities.

712. Section 33(3)(e) requires a Claimant who seeks to persuade the Court that it would be equitable to allow his action to proceed, to provide some evidence about the promptness and reasonableness of what he did, once he knew that what the Defendant did or did not do could justify a claim in damages. Mr Howell submitted that this provision had not been addressed by the Claimants. That is correct.

713. The pleadings imply that the Claimants or almost all of them had no relevant knowledge until 1998. But it is plain that the generality of Claimants knew of their uprooting, that that had been caused by the Defendants' actions and had led to the poverty, malnutrition, unsanitary, housing and the consequent physical and mental illnesses. If any Claimant had not known that, there were many Chagossians who would have put them in the picture without any difficulty upon a simple inquiry. The Claimants likewise knew that this might be capable of giving rise to an action either by the time of the start of the Vencatessen action, or at the latest by the time of the 1982 Agreement and the well-publicised withdrawal of that action. The reality is that the Bancoult Judicial Review and its outcome have nothing to do with the personal injuries claim. The documents disclosed may assist in arguing that the Defendants were negligent but it is not arguable that those documents reveal the ingredients of a cause of action for damages for personal injury which was hitherto unsuspected.

714. The Claimants identify no steps which they took promptly, because their argument is the untenable one that the starting point for an examination of what they did is 1998 or later. Hence they impliedly contend that these proceedings were started reasonably promptly (albeit more than three years after the relevant knowledge was obtained). Even on that basis, they have not acted promptly. But that is not the real point. The real point is that they did nothing after the 1982 Agreement.

715. After 1982, the Claimants face this problem. If, as most of the witnesses asserted, there was no individually binding settlement and the renunciation forms were ineffective, there is no reason for them not to have started proceedings at any subsequent time. If, as others thought, the upshot of the Agreement and the payment of money by the ITFB, merely meant that they could not sue until 1985 or for five years, there is no reason for proceedings not to have been begun by the late 1980s.

716. I do not believe that that is what they actually thought at the time. All their actions show that, whether or not the precise mechanism was fully understood, they knew that there was a full and final settlement and they could not have money from the ITFB and bring a claim against the Defendants. They started no proceedings, although legal advice was available; their organisations started no proceedings for personal injury whether before or after the late 1980s. They made claims on the US Government. They never asserted that damages became payable again. Yet they knew that they were still living in poverty and that they had concluded that the ITFB money was insufficient, and thus they had every incentive to sue again.

717. However, taking the Claimants' evidence at face value, they thought that they could start proceedings after 1985 or five years from the Agreement. But they did not do so. Their reasons were difficult to follow in view of the poverty and harsh conditions in which they were still living. They said they had no leaders; yet they elected representatives to the ITFB; they had organisations whether solely Chagossian or not; they had political contacts; they could obtain legal advice as to their position. Some in fact did so. Some asserted that they had been deceived by Mauritians; yet the evidence of that was no more than that there had been some letters or petitions suggesting full and final compensation in return for the giving up of claims, including at times but not always the right to return to Chagos. There was some potential for a conflict between the desire for Mauritius sovereignty eventually and a right of return to Chagos immediately, but there was and is a strong common interest in the islands becoming Mauritian. But they set up their own organisations led by Chagossians in 1983 to 1985, notably the CRG, so the alleged malign influence of those who had wanted to assist them, would by then have been neutralised.

718. Mr Gifford felt that the reason for inaction was that the Chagossians had called their best shot in the 1982 Agreement and had thought thereafter that there was nothing they could do until documents emerged in 1997 and 1998 making a re-examination of litigation, buoyed by the success of Olivier Bancoult, feasible. I am not sure that that fully reflects the seeking of advice in the 1990s but as a conclusion I felt that it indicated that the Claimants had reached a final agreement with the Defendants in 1982. In any event, I do not consider that the events of the late 1990s had any real bearing on the personal injury claim, which was advanced to assist the limitation argument.

719. The Seychelles Chagossians knew the same relevant facts at the same time as their counterparts in Mauritius or could readily have ascertained them. Some would have had an awareness of the 1982 negotiations, and that lawyers had been involved. I do not consider it realistic to conclude other than that they knew by 1982 at the latest that a damages claim might be capable of arising from any illnesses from which they suffered as a result of their poverty in changed circumstances. The pleadings do not differentiate between the Chagossians in this context.

720. I have regarded the Chagossians who have given evidence relevant to the limitation issues as in effect giving evidence which is of general relevance to the Claimants. The Claimants correctly submitted that their individual cases were not test cases. But the purpose of the applications being considered was quite clear; the Claimants selected the witnesses whom they thought appropriate in order to explain and illustrate, not just what they thought of their

individual position, but what the Chagossians as a community had or had not known or done. When it became clear that relevant witnesses were not being called to deal with these issues, the Claimants were given a further opportunity to call other witnesses who were supposedly better able to deal with the issues.

721. Finally, section 33(3)(f). It is in relation to the obtaining of medical and legal advice that the highly contentious pleading, in paragraph 34(vi) of the amended Reply, to which I have referred is presumably made. It does not actually refer to any steps which were taken; it refers to the reasons why no steps were taken, by the "very large majority" of Claimants. It is said that the advice and access was not "real"; I assume it is meant that the opportunities were theoretical and some of the lawyers not skilled in the relevant areas. There was no legal aid. But, the assertions in the pleadings are simply and obviously wrong.

722. It is clear that the Chagossians, at least in Mauritius, had access to both Mauritian and English lawyers. A few used that access personally and very many did so through representatives. To the extent that any Chagossians were not represented by those groups, many more were aware of their activities.

723. In sequence, an illiterate Chagossian, with the support of a group of largely illiterate Chagossians, was able by 1975 to start legally aided litigation in the UK, having been put in touch with a firm which prides itself on being one of the few willing and able to take on such work. Mr Vencatessen had been able to use a Mauritian lawyer-politician and his contacts to instruct Sheridans. That case raised many of the issues now raised. It was quickly seen as a test case and generally beneficial. The description of it as a personal or family case, by some Chagossian witnesses, begs the question: each could have done likewise. No-one suggested some personal peculiarity possessed exclusively by Mr Vencatessen which entitled him alone to bring proceedings.

724. Sheridans instructed distinguished counsel who provided advice on causes of action, the conduct of litigation, prospects of success and the reasonableness of the settlement. If Mr Allen's point is that "real" advice cannot be given until disclosure is complete (including disclosure of that which is privileged), it is nonsense.

725. Sheridans visited Mauritius on three occasions. In 1979, the visit of English lawyers was not a secret. It was deliberately publicised by Sheridans. Their presence and activities were widely known. Of course, it is right that the advice given was short, was not tailored to individuals and may well have been partially grasped at best. But it was clear that access to English lawyers was possible and practical. The JIC continued to instruct Sheridans and to receive advice. Mr Ramdass went to the 1981 and 1982 negotiations on behalf of Mr Vencatessen. This was agreed to at a public meeting at which his role in relation to the Vencatessen case was explained – it was obvious that that case related to the ensuing negotiations.

726. Another group, the CIOF, also claiming to be the most representative, instructed Bindmans. They also, through a circuitous route, were able to instruct one of the other of the firms which Mr Gifford regarded as able to do this type of case. Bindmans also instructed

distinguished counsel. They advised the CIOF before, during and after the 1982 Agreement. They regarded themselves as advising the Chagossian community, because of the representative nature of the CIOF. Their presence and role was publicised.

727. Bindmans were again instructed in 1990 and 1995 by the CIOF and then by the BIOT Social Committee. The advice given covered many areas of relevance to those proceedings including the effect of the renunciation forms and the problems of limitation.

728. These bodies did not exist in a vacuum; representatives were elected to the ITFB, CIOF members brought an action against the ITFB in 1991 to obtain documents so that Bindmans could advise on them; the CIOF obtained 812 signatures in 1994 for the Common Declaration of the Ilois People and the BIOT Social Committee claimed to represent 1,000 people.

729. There were other lawyers, in Mauritius, who provided advice or could have done, notably Mr Duval, Mr Ollivray and Mr Lassemillante. It is all very well Mr Bancoult saying that the latter was always talking about human rights but was ineffective. There was a real opportunity for advice. Chagossians could have sought advice about a personal injuries claim from a wider range of lawyers than might have been available for a misfeasance claim.

730. There is no evidence that medical advice about the possible causes of the conditions from which they suffered was ever sought; perhaps it was regarded as obvious.

731. I do not consider it reasonable to suppose that a Court might regard it as equitable to extend the time for bringing the personal injuries claim. As Mr Howell pointed out, it was inherent in the negotiations in 1982 that there might be a claim by Chagossians. If it was thought that it had then been settled, it cannot now be said that those who took that view, even if wrongly, should now be entitled to sue. Those who were not of that view, chose not to proceed with a personal injuries claim.

732. The UK Government paid a substantial sum by way of settlement twenty years ago. The settlement was considered to be reasonable by two experienced firms of solicitors advised by leading English counsel. If the Claimants thought that there had been no effective settlement, they could have sought advice.

733. The Seychelles Chagossians did not benefit from that settlement but there was sufficient knowledge among them that it had occurred and that the ITFB would distribute money, for them to have been put on inquiry as to whether they too should pursue an action as Mr Vencatessen had done. It would have been quite simple for them to be in touch with the CIOF, Mr Berenger, Mr Michel and Mrs Alexis to find out how matters had evolved. Mrs Alexis had been to the Seychelles in 1980 and, I am quite sure, did explain what was happening at least in broad terms. Seychelles Chagossians knew enough to attempt to make claims on the ITFB, albeit unsuccessfully. It would not have been difficult, at any stage, for contact between the two groups to have revealed the names of the solicitors and to pursue the claims.

734. They may not have done so because of a fear of the Seychelles Government, which might not have welcomed a group of what it saw as Seychellois obtaining benefits which other

Seychellois could not. This feeling may have been initially more intense at the time of the "Liberation Day" coup, but I have had no evidence which suggests that it was an abiding fear through till 1998 when, just coincidentally, Mauritian Chagossians instructed Mr Mardemootoo.

735. Accordingly, I conclude that the Claimants have no reasonable prospects of persuading a Court that it would be equitable to direct that this action for damages for personal injuries be allowed to proceed.

Property

736. Section 17 of the Limitation Act operated so as to extinguish any title which the Claimants might have had in any property on the Chagos by say 1979 (twelve years from the acquisition from Chagos Agalega Company Limited) or 1983-1985 (twelve years from the removal of the Chagossians). No claim in relation to a breach of trust has been alleged. Mr Taylor submitted that the extinguishment of title left intact any other remedies which the Claimants might have in respect of their property. This is misconceived. If there is no title, they have no cause of action or rights to be enforced by remedies.

The Specific Issues

737. There were fifteen issues which I ordered to be dealt with. Although the issues developed, as a result of the evidence and submissions, beyond the precise scope of the questions contained in the amended Schedule to my Order of 26th September 2002, it would, I feel, be useful to set out in one place, my conclusions on those defined issues.

738. There are Claimants who arguably could show that they were compulsorily removed by the Defendants from Chagos. The compulsory removals were arguably unlawful. There are Claimants who were unable to return to the Chagos but those who arrived in Mauritius in 1967 and 1968 were not arguably prevented from returning by the Defendants. Nor were the Defendants under any arguable obligation to assist their return. After the evacuation of the Chagos, the Defendants have forbidden their return to any part (subject to scope for individual permits) until the 2000 Immigration Ordinance. It is arguable that any reliance on section 4 of the 1971 Immigration Ordinance to inhibit return to Chagos was unlawful.

739. There is however no prospect of the Claimants showing that the Defendants enacted the 1971 Immigration Ordinance knowing or being reckless that it was unlawful, or that any removal or prevention of return whether before or after 1973 was unlawful.

740. There is no arguable tort of unlawful exile.

741. There is no arguable duty of care to take reasonable steps for the well-being of the Claimants, as pleaded in paragraph 87 of the Group Particulars of Claim. There is an arguable duty of care to take reasonable steps to avoid personal injury to those who were compulsorily removed from BIOT between 1971 and 1973 but it is not a continuing duty. It arose upon removal and accrued when personal injury resulted, subject to the effects of the Limitation Act.

742. It is possible that some Claimants or their successors may be able to show that before 1967 they had real property interests in BIOT. The Crown acquired land in BIOT for a public purpose in 1967 by the agreement of 16th March 1967 pursuant to Ordinance No 2 of 1967. It is not arguable that any such rights were not thereby acquired and extinguished or extinguished by a later Ordinance even though it is arguable that that Ordinance of 1967 was ultra vires. If the Claimants had any surviving real property rights, it is arguable that the 1983 Courts Ordinance required those rights to be adapted from the Mauritius Civil Code into English law.

743. The Constitution of Mauritius did not arguably apply to any part of BIOT after the creation of BIOT, and could not override any BIOT legislation. If it had done, its effect would arguably not have been removed by the 1983 Courts Ordinance.

744. The matters pleaded in paragraph 96 of the Group Particulars do not constitute the tort of deceit. There is no real prospect of any Claimant showing that any false statement of existing fact was made to a Claimant by or on behalf of the Defendants, that it was intended that it should be acted on by that Claimant to his detriment or that any Claimant did so act. Although it is arguable that false statements of fact were made to third parties by the Defendants, it is not arguable that they were made so that the Claimants would act on them to their detriment. It is arguable that some third parties omitted in consequence to do what otherwise they would have done to support the Ilois or oppose the UK's defence policies or both, and that that was intended.

745. The Claimants have no prospects of success of recovery in view of the Limitation Act and any title to land in BIOT was extinguished at the latest by 1985 by the operation of section 17 of the Limitation Act 1980.

746. The present proceedings involve an abuse of process by the Claimants whom I have identified as a result of the signing of the renunciation forms. It may or may not be an abuse for other Claimants, which would have depended on their evidence. There are no other abuses involved.

747. These questions do not specifically cover the claim for a declaration as to the right to return to Diego Garcia, to receive assistance in doing so and in achieving in the Chagos a certain lifestyle. It is however plain from the conclusions which I have expressed that I do not regard the claim for the latter declaration to be arguable. The former is unarguable on the basis pleaded, which does not involve an attack on the vires of the 2000 Immigration Ordinance, by reference to the relevance under Section 11 of the BIOT Order of UK and Colonies defence interests. Those conclusions were arrived at in the course of dealing with the specific issues, notably misfeasance and exile.

Conclusion

748. I shall hear counsel on the precise form of Order, but the Defendants succeed on their application for summary judgment against the Claimants. Had I not been of that view, there are a few passages in the Claimants' pleadings, which I give leave to serve, which I would have struck out as vexatious. Principally, however, I would have stayed proceedings until a proper

questionnaire, relevant to all the claims in question had been drafted and filed, and I would have required Particulars of Claim to identify by category which Claimants pursued which claims. I would have required the many deficiencies in the pleadings to be remedied thereafter.