

1925

KENYA

C.O. 366  
35684  
5 JUL 25

DATE

3rd July 1925.

G'S DEP NORTHCOTE.  
833

BRITISH IMPERIAL OIL CO'S OIL PIPE LINE.

The survey, regarding - with legal opinion  
by Attorney General. Notice of breach of lease  
has been served upon Magadi Soda Co. Encloses three  
copies of notice of breach and requests any necessary  
steps be taken.

Previous Paper

MINUTES

O.A.C. 36670

copy opinion to Lyall Grant - 8 DEC 1925  
M1 36247  
OCT 1925

Subsequent Paper

M1 36247

The points on which we appear to require legal opinion are

- (1) whether the existing Shikharaj Post lease can be held to be subject to the provisions of the Nagadi lease of 1911 <sup>(is it?)</sup>  
(the Nagadi lease not being mentioned in the Shikharaj lease)
- (2) Whether, if the answer to (1) is yes, the Post lease has been <sup>infringed</sup> in breach of the provisions of the Nagadi lease
- (3) If the answer to (1) is no, can the existing Post lease be held to have been <sup>infringed</sup> in breach of any <sup>provisions of</sup> the indenture of Contract of 13 April 1901 - or if which <sup>provisions</sup> appear to refer to the <sup>contract</sup> <sup>of</sup> 13 April 1901 & which have effect?

It will be <sup>found</sup> <sup>that</sup> <sup>the</sup> <sup>provisions</sup> <sup>of</sup> <sup>the</sup> <sup>contract</sup> <sup>of</sup> <sup>13</sup> <sup>April</sup> <sup>1901</sup> <sup>are</sup> <sup>not</sup> <sup>enforced</sup> <sup>by</sup> <sup>legislation</sup> <sup>and</sup> <sup>what</sup> <sup>action</sup> <sup>is</sup> <sup>to</sup> <sup>be</sup> <sup>taken</sup> <sup>in</sup> <sup>the</sup> <sup>event</sup> <sup>of</sup> <sup>the</sup> <sup>notice</sup> <sup>being</sup> <sup>found</sup> <sup>that</sup> <sup>the</sup> <sup>notice</sup> <sup>is</sup> <sup>not</sup> <sup>valid</sup>, <sup>presumably</sup>, <sup>the</sup> <sup>local</sup> <sup>Govt</sup> <sup>should</sup> <sup>be</sup> <sup>able</sup> <sup>to</sup> <sup>cancel</sup> <sup>and</sup> <sup>advise</sup> <sup>to</sup> <sup>withdraw</sup> <sup>it</sup>.

was made subject to the Magadi contract. I ~~have~~<sup>have</sup> looked to see whether the contract imports terms of the Magadi lease, but I cannot find that it does. I do not therefore at present see how the Attorney General comes to the conclusion which he states in the last two lines of the second paragraph of his minute. We might draw the Governor's attention to this difficulty.

On the other hand, the new Port Lease clearly renders the pipe line illegal; and as that lease is to date from last November, unless something is done we shall be conveying to the Company a lease coupled with a breach of which we have full notice. As I have said all along therefore, I do not think there should be any question of the notice being withdrawn at the present stage.

H.P.

2/9

A draft to OTS can

10/10

1979 at all

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looked to see whether the contract imports the terms of  
the Magadi lease, but I cannot find that it does.  
I do not therefore at present see how the Attorney  
General comes to the conclusion which he states in  
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withdrawn at the present stage.

H.P.

7/9

Draft to O.P. case

J.H.K.

15/9 at all

Bohanley  
Mr. Dyke  
P. A. Allen

369

The Pt have now received to consider the action taken by the local Govt. in serving the breach of notice on the Nagadi Soda Coy's liquidator.

Copies of the notice and the Attorney-General's arguments are on 35684/25.

In a subsequent let. (38432/25) the <sup>States that the</sup> Govt. has informed the Nagadi Soda Coy. & the Oil Coy. that with ~~no~~ prejudice to its objections the Govt. will not intervene in the prevailing method of importation of oil. He has also appointed a Cttee. to advise with regard to the importation of oil & coal.

It is not certain that the question of the notice will become an issue again, but it seems to be necessary to examine the reasons which led the Govt. of Kenya to take the steps of serving the notice.

The pipe line from the Oil Coy. (34723) is not a very great contribution to the solution of the problem. (i) It does not show the pipe line as it passes near Nagadi

land, and (b) it bears no evidence that it has been approved by the Gov<sup>r</sup>. The <sup>oil</sup> Coy say 3790 that their local agents affirm that the original of this plan was passed by T.P.W.

The matter appears to be a legal one, i.e. was the action of the Nagadi Coy. in suffering a pipe line to be run across their port property at Shalinuzzi, a breach of their covenants with the Gov<sup>r</sup> of Kenya. See the att<sup>y</sup> General's minutes enclosed with 35684/25.

It may be observed.

- (1) That the draft 'Port Lease' has not yet been executed, & any provisions it may contain when executed are irrelevant to this connection.
- (2) That the earlier existing lease of the present Port Site (13.65 acres) was not made subject to the "new Nagadi lease of 12 April, 1911" and to the Indenture of Contract dated the 13<sup>th</sup> of April 1911. [Both these instruments will be found in the volume bound in red leather below] The att<sup>y</sup> General seems to have gone as far as he

19728/25

copy on  
2448

KENYA.

No. 833.

GOVERNMENT HOUSE,  
NAIROBI,  
KENYA

3rd July, 1925.

C. O.  
35684

Sir,

In continuation of Mr. Denham's despatch No. 523 of the 5th May, paragraph 3, relative to the construction of an oil pipe line by Messrs. Smith Mackenzie as Agents for the British Imperial Oil Company to which reference is made in the description of the Depot Works intended to be leased to the new Magadi Soda Company, I have the honour to transmit a copy of a letter from Messrs. Smith Mackenzie to the Director of Public Works together with a legal opinion by the Attorney General upon the construction of this pipe line.

2. I also enclose a further opinion by the Attorney General upon receipt of which I have, by the Acting Governor's direction, caused a notice of breach of the Lake Magadi Lease of the 12th April 1911 to be served upon the Manager of the Magadi Soda Company.

Three copies of the notice of breach are enclosed and I have to request you cause such steps as are necessary in this matter to be taken.

I have the honour to be,

Sir,

Your most obedient, humble servant,

GOVERNOR'S DEPUTY.

THE RIGHT HONOURABLE

LIEUTENANT COLONEL L. C. M. S. AMERY, P. C., M. P.,

SECRETARY OF STATE FOR THE COLONIES,

DOWNING STREET,

LONDON, S. W.

O.A.C.  
2/11/25  
Smith Mackenzie  
P.W. - 18-3-25.

G's Opinion  
dated 20-6-25.

G's Opinion  
dated 29-6-25.

Notice of Breach  
dated 1-7-1925.

C O P Y.

371

SMITH, MACKENZIE & CO.

THE BRITISH IMPERIAL OIL COMPANY (S.A.) LTD.

Milindini,

Mombasa, 18th March, 1925.

The Hon'ble  
The Director of Public Works,  
Public Works Department,  
Nairobi.

Sir,

THE BRITISH IMPERIAL OIL CO. (S.A.) LTD.  
RE: PROPOSED BULK STORAGE TANKS, SHIMANZI.

We have the honour to acknowledge receipt of your letter No. 910 of the 16th instant.

The arrangement by which we are able to pump petroleum into our Storage Tanks was a matter of private negotiation between our Principals and the Magadi Soda Co., Ltd., and these negotiations took place in London.

In order that you may understand the position, we would inform you that we have our own pipe line which runs down the Conveyor nearest the Deep Water Pier and so on to the Magadi Pier where we have a connection to enable us to connect up with the discharging tankers.

With regard to paragraph 5 of your letter, we have to inform you that the pipe line was constructed by us, and it is the property of the British Imperial Oil Co. (S.A.) Ltd, and therefore for their sole use. The Magadi Soda Co. Ltd. have their own Fuel Oil pipe line which runs down the Conveyor nearest Makupa.

We have the honour to be,

Sir,

Your obedient servants,

SG. Smith Mackenzie & Co.

Agents.



3721

217/25

(21)

The Hon'ble Ag. Colonial Secretary.

Clause 4 of the draft Port Lease is clear that the Lessees will not themselves use the pier for any other purposes than those incidental to working Lake Magadi; nor will they allow it to be used by others.

The earlier lease was of 13.65 acres of the present Port Site and was granted in a subsidiary indenture which made the grant subject to the terms and conditions of the main Magadi Lease of 13th April, 1911.

I am of <sup>the</sup> opinion that under these two documents the lessees have no power or right to permit the erection of a pipe line over the pier or to enter into any private agreement for that purpose.

The preamble to the 1911 Magadi lease premises inter alia that the contract is to construct certain port works at Kilindini.

Clause 3 of the lease granting ancillary powers limits them to things necessary and convenient for working soda.

Clause 24 provides that the lessees shall not dispose of the benefit of the lease without the previous consent of the Crown Agents.

Under the earlier port lease therefore although the prohibition is not in express terms as in the draft Port lease, the user was equally restricted to purposes incidental to the exploitation of soda and the restriction is an implied term.

The erection of the pipe line and any arrangement made in regard thereto is therefore illegal.

*W. H. G. Jones*  
ATTORNEY-GENERAL.  
20. 6. 1925.

229/25.

(28)

The Hon'ble Ag. Colonial Secretary.

It is for Government to decide on the action to be taken. If Government decides to act under the powers of the lease under which the Kilindini (Shimani) site is held then a notice complaining of the breach and demanding remedy should first be served. Draft notice herewith.

It is understood there is a local receiver here and it should go to him with copies to the liquidator in England.

If action is decided upon it should be immediate, otherwise there is a danger of the defence of acquiescence on the part of the Government being advanced.

It must be observed that if action is not taken to stop this breach, then in view of Clause 4 of the draft Port Lease the new Mawdi Company will have conveyed to them a property with an existing and continuing breach of the lease under which it is granted and conveyed. This will place them in the position of having Government entitled to reenter at any time. But there is the complication that any failure to act now would probably result in Government being stopped, in taking action then and thus Clause 4 of the draft Port Lease would be rendered nugatory.

ATTORNEY-GENERAL.  
29. 6. 1925.

To

The Receiver of the Magadi Soda Company  
and All parties interested.

I HEREBY give you notice that you have committed breaches of the covenants that you will use <sup>the</sup> premises demised under the Indenture of the 22nd October, 1919, of that piece of land containing 13.65 acres at Kilindini, subject to the terms and conditions specified in an Indenture of contract dated the <sup>12</sup> 13th day of April, 1911; to wit that you shall have the right to do all things necessary and convenient for the working of soda and further that you shall not otherwise dispose of the benefit of the lease without the previous consent of the Crown Agents which said leases containing such covenants you hold of this Government.

The particulars of the said breaches are specified in the schedule hereto.

AND I hereby require you immediately on the receipt of this notice to remedy the said breaches by ceasing to use or permit to be used the said pipe line and further within two months from the date of this notice to remove the said pipe line and to pay the Government 95 as compensation for the said breaches, and on your failure to comply with this notice within the time aforesaid it is the intention of Government to re-enter upon the premises and claim damages for breach of the said covenants.

SCHEDULE

Constructing or permitting or allowing the construction of <sup>a</sup> pipe line over the Shimani pier at Kilindini and allowing the said pipe line to be used for

the

the conveyance of oil by others than yourself  
and for purposes other than those allowed by  
the said indenture and lease.

Nairobi

day of July

1925.

*J. H. S. Northcote*  
ACTING COLONIAL SECRETARY.

To

The Receiver of the Magadi Soda Company and  
All parties interested.

I HEREBY give you notice that you have committed breaches of the covenants that you will use the premises demised under the Indenture of the 22nd October, 1919 of that piece of land containing 13.65 acres at Kilindini, subject to the terms and conditions specified in an Indenture of contract dated the 12th day of April, 1911; to wit that you shall have the right to do all things necessary and convenient for the working of soda and further that you shall not otherwise dispose of the benefit of the lease without the previous consent of the Crown Agents which said leases containing such covenants you hold of this Government.

THE particulars of the said breaches are specified in the Schedule hereto.

AND I hereby require you immediately on the receipt of this notice to remedy the said breaches by ceasing to use or permit to be used the said pipe line and further within two months from the date of this notice to remove the said pipe line and to pay the Government £5 as compensation for the said breaches, and on your failure to comply with this notice within the time aforesaid it is the intention of the Government to re-enter upon the premises and claim damages for breach of the said covenants.

SCHEDULE

Constructing or permitting or allowing the use of a pipe line over the Shimani Pier at Kilindini, or allowing the said pipe line to be used for the purpose of conveying soda water to be used for the consumption of others than those allowed by the said Indenture.

Nairobi.

This 1st day of July 1925. ACTING RECEIVER

Receiver of the Magadi Soda Company and  
All parties interested.

I HEREBY give you notice that you have committed  
of the covenants that you will use the premises  
used under the Indenture of the 22nd October, 1919 of  
that piece of land containing 13.65 acres at Kilindini,  
subject to the terms and conditions specified in an Indenture  
of contract dated the 12th day of April, 1911; to wit that you  
shall have the right to do all things necessary and convenient  
for the working of soda and further that you shall not other-  
wise of the benefit of the lease without the previous  
consent of the Crown Agents which said leases containing such  
covenants you hold of this Government.

THE particulars of the said breaches are specified  
in the Schedule hereto.

AND I hereby require you immediately on the receipt  
of this notice to remedy the said breaches by ceasing to use  
and permit to be used the said pipe line and further within  
two months from the date of this notice to remove the said  
pipe line and to pay the Government £5 as compensation for  
the said breaches; and on your failure to comply with this  
notice within the time aforesaid it is the intention of  
the Government to re-enter upon the premises and claim damages  
for breach of the said covenants.

#### SCHEDULE.

Constructing or permitting or allowing the construction  
of a pipe line over the Shimanzi Pier at Kilindini and allow-  
ing the said pipe line to be used for the conveyance of oil  
or others than those allowed by the said indenture and lease.

Nairobi,

this 1st day of April 1925

Allen 29/25

Muse 30  
Bottanley 30

Stipchey.  
J. Inceburgh.  
C. Davis.

Grindle.  
S. Wilson  
Macteson Smith

Wright Gore.

C. D.  
R 30 SEP  
D 166

Downing Street, 377

September, 1925.

Sir,

1 - OCT 1925

I have the honour to acknow-

ledge the receipt of your despatch No. 883

of the 3rd July relative to the oil pipe

line constructed for the British Imperial

Oil Company on the Kilindini (Shimani)

site leased from the Magadi Soda Company

In view ~~however~~ of the later corres-

pondence noted in the margin, it is not

necessary to go closely into the legal

position at the present time, but from a

preliminary examination, it would appear

to be as follows:-

If, as stated by the Attorney General, the

old Port Lease had been made subject to

the terms of the ~~late~~ <sup>lake</sup> Magadi Lease of the

12th April, 1911, there would appear to

be considerable support for the view which

he takes. The Port Lease, however,

whether designedly or not, was made subject

to

DRAFT. Cons: r. minuta

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copy to ~~grant~~ Grant. - 8 OCT 1925  
my 14/10/25

3. Tel. No. 341 1st Augt.  
3. Tel. No. 373 21st do.  
S. desp. No. 812 24th do.

copy of when the  
Grant after  
and

to the Indenture of Contract of the 13th April 1911 and I am advised that there is nothing in the Contract importing the terms of the ~~main~~ Lease. It is, therefore, not clear how the Attorney-General comes to the conclusion in para. 2 of his minute of the 20th June, 1911, that the Port Lease made the grant of <sup>the</sup> site of 13.65 acres subject to the terms and conditions of the main ~~Magadi~~ Lease of the 12th April, 1911. I propose that the matter should be further discussed with the Attorney-General on his arrival in England, but it seems desirable that your attention should be drawn to this difficulty.

3. It is also necessary to bear in mind

that the new Port Lease ~~renders~~ renders the pipe ~~in~~ in question illegal, and that as ~~that~~ that ~~since~~ since from November last, the Government ~~will~~ will ~~no~~ no ~~action~~ action is taken, the conveyance <sup>a</sup> ~~of~~ of ~~the~~ the ~~land~~ land ~~is~~ is ~~invalid~~ invalid <sup>a</sup> ~~and~~ and ~~therefore~~ therefore ~~cannot~~ cannot ~~be~~ be ~~conveyed~~ conveyed ~~to~~ to ~~the~~ the ~~Government~~ Government ~~as~~ as ~~an~~ an ~~instrument~~ instrument ~~under~~ under ~~the~~ the ~~old~~ old ~~Lease~~ Lease. <sup>London</sup> ~~The~~ The ~~instrument~~ instrument ~~will~~ will ~~require~~ require



*to be regularized*  
consideration, but I do not consider  
that there should be any question at  
this stage of withdrawing <sup>the</sup> notice  
served on the Company.

I have, etc.,

(Signed) L. S. AMERY