

~~CHH 92~~

19/1963

No. 13 of 1962.

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL SUPREME COURT OF
NIGERIA

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

17 JUN 1964

25 RUSSELL SQUARE
LONDON, W.C.1.

BETWEEN:

SIR ABUBAKAR TAFAWA BALEWA Appellant

- and -

SENATOR CHIEF T. ADEBAYO DOHERTY
Respondent

SIR VAHE ROBERT BAIRAMIAN
JAMES MALCOLM HARRISON and
GERALD PERCY COOKE Pro-forma
Respondents

AND BETWEEN:

SIR ABUBAKAR TAFAWA BALEWA Appellant

- and -

WESTERN NIGERIAN DEVELOPMENT
CORPORATION Respondent

SIR VAHE ROBERT BAIRAMIAN
JAMES MALCOLM HARRISON and
GERALD PERCY COOKE Pro-forma
Respondents

CASE FOR THE RESPONDENT

SENATOR CHIEF T. ADEBAYO DOHERTY

HATCHETT, JONES & CO.,
90, Fenchurch Street,
LONDON, E.C.3.

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CASE FOR THE RESPONDENT

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Record

1. This is an appeal from a judgment of the Federal Supreme Court of Nigeria dated the 27th October 1961 in two consolidated suits in favour of the first Respondent in each suit upon questions referred to the Court under section 108 of the

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Constitution of the Federation of Nigeria.

2. The principal questions arising in this appeal are (a) whether the Commissions and Tribunals of Enquiry Act, 1961 in so far as it applies to the whole Federation of Nigeria exceeds the power of Parliament under the Constitution; and (b) whether section 3(4) of the said Act is void.
3. On the 21st July 1961 the second, third and fourth Respondents in each suit were appointed by the first Appellant to form a Tribunal of Enquiry under the Commissions and Tribunals of Enquiry Act No. 26 of 1961. The matters to be inquired into included the general business operation and financial policy of the National Bank of Nigeria Limited and its subsidiary Companies during the period 1st October 1959 to 31st December 1960, the relationship and dealings at any time between the Bank and its directors on the one hand and the Western Nigerian Development Corporation and its statutory predecessors on the other hand and whether in respect of any matters affecting the business and affairs of the Bank any director of the Bank had failed to adhere to the standards of conduct or propriety demanded of him in his office. The first Respondent in the first suit was at all material times the director of the Bank.
4. The Tribunal of Enquiry held its first sitting on the 25th July 1961. On the 25th July 1961 on an ex parte motion by the Respondent Chief Doherty the High Court of Lagos granted an interim injunction restraining the pro-forma Respondents from holding the Tribunal of Enquiry for a period of seven days.
5. On the 26th July 1961 a Writ of Summons was issued by the Respondent Chief Doherty claiming against the Appellant and the pro-forma Respondents a declaration that the Tribunal of Enquiry was illegal, unconstitutional and invalid; an injunction restraining the pro-forma Respondents from holding the said Enquiry; and such further or other orders as the Court deems fit to grant. On the 27th July 1961 a Writ was issued by the Respondents Western Nigerian Development Corporation claiming against the Appellant and the pro-forma Respondents a declaration that the Tribunal of Enquiry was illegal, unconstitutional and invalid, alternatively was illegal, unconstitutional and invalid in so far as it purported to authorise an enquiry into the relationship and dealings between the National Bank of Nigeria Limited and the Western Nigerian Development Corporation and its statutory predecessors; an injunction restraining the pro-forma

Respondents from holding the Enquiry and such further or other orders as the Court deemed fit to make.

6. The two suits were consolidated by order of the High Court of Lagos on the 31st July 1961.

7. At a hearing before the High Court of Lagos on the 31st July 1961 the pro-forma Respondents gave an undertaking that the Tribunal would not resume sitting until the present suits were disposed of. By an order of Onyeama J. of the same date the following questions were referred by the High Court of Lagos to the Federal Supreme Court under section 108(2) of the Federal Constitution: (a) whether or not the Commissions and Tribunals of Enquiry Act, 1961, is within the competence of the legislative powers of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal Competence anywhere within the Federation; (b) whether or not section 3(4) of the said Act is constitutional and valid or contravenes sections 21, 31 and 108 of the Constitution of the Federation of Nigeria; and (c) whether or not sections 8(c), 8(d), 15(a) and 18(1)(b) of the Commissions and Tribunals of Enquiry Act, 1961 (or any of them) are constitutional and valid or contravene sections 20 or 21 of the Constitution of the Federation of Nigeria.

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p.118 1.15

8. The Commissions and Tribunals of Enquiry Act, 1961, includes the following provisions :-

"2.(1) In this Act, "the Prime Minister" means the Prime Minister of the Federation.

(2) A commission of inquiry is a tribunal of enquiry and accordingly references in this Act to commissions of inquiry shall include references to any tribunal of enquiry or court of enquiry however established.

.....

3.(1) The Prime Minister may, whenever he shall deem it desirable issue a Commission appointing one or more Commissioners, or any quorum of them that may therein be mentioned, to hold a Commission of Inquiry into any matter or thing within or affecting the general welfare of the Federal Territory, or into any matter or thing within Federal competence anywhere within the Federation, in respect of

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which in his opinion, an inquiry would be for the public welfare, or into the conduct of any chief or the management of any department of the public service. The Prime Minister may also appoint a secretary to the Commission who shall perform such duties as the Commissioners shall prescribe.

.....

(4) The fact that a commission is issued under this section shall be sufficient proof of the proper exercise by the Prime Minister of his authority to do so; and neither the Commission itself nor any action of the Prime Minister in relation thereto shall be enquired into in any court of law." 10

9. The Federal Constitution of Nigeria includes the following provisions :-

"S21.(1) In the determination of his civil rights and obligations a person shall be entitled to a fair hearing within a reasonable time by a court or other tribunal established by law and constituted in such manner as to secure its independence and impartiality: 20

Provided that nothing in this subsection shall invalidate any law by reason only that it confers on any person or authority power to determine questions arising in the administration of a law that affect or may affect the civil rights and obligations of any person.

(2) Whenever any person is charged with a criminal offence, he shall, unless the charge is withdrawn, be entitled to a fair hearing within a reasonable time by a court. 30

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S31.(1) Any person who alleges that any of the provisions of this Chapter has been contravened in any territory in relation to him may apply to the High Court of that territory for redress.

(2) Subject to the provisions of section 108 of this Constitution, the High Court of a territory shall have original jurisdiction to hear and determine any application made to it in pursuance of this section and may make such orders, issue such writs and give such direc- 40

tions as it may consider appropriate for the purpose of enforcing, or securing the enforcement, within that territory of any rights to which the person who makes the application may be entitled under this Chapter.

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S64.(1) Parliament shall have power to make laws -

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(a) for the peace, order and good government of Nigeria (other than the Federal territory) or any part thereof with respect to any matter included in the Legislative Lists; and

(b) for the peace, order and good government of the Federal territory with respect to any matter, whether or not it is included in the Legislative Lists.

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(2) The power of Parliament to make laws for the peace, order and good government of the Regions with respect to any matter included in the Exclusive Legislative List shall (save as provided in section 72 of this Constitution) be to the exclusion of the legislatures of the Regions:

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THE SCHEDULE.

Part I

The Exclusive Legislative List

.....

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Item 44. Any matter that is incidental or supplementary -

(a) to any matter referred to elsewhere in this list; or

(b) to the discharge by the Government of the Federation or any officer, court or authority of the Federation of any function conferred by this Constitution.

Part II

The Concurrent Legislative List

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Item 28. Any matter that is incidental or supplementary to any matter referred to in this list.

Part III

Interpretation

1. In this Schedule references to incidental and supplementary matters include, without prejudice to their generality - 10

(d) the establishment and regulation of tribunals of enquiry.

S108.(2) Where any question as to the interpretation of this Constitution or the constitution of a Region arises in any proceedings in the High Court of a territory and the court is of opinion that the question involves a substantial question of law, the court may, and shall if any party to the proceedings so requests, refer the question to the Federal Supreme Court." 20

10. In judgments delivered on the 27th October 1961 the Federal Supreme Court answered the three questions referred to them as follows :-

"1. The Commissions and Tribunals of Inquiry Act, 1961, is not within the competence of the legislative power of the Federal Parliament in so far as the said Act purports to have effect in relation to matters and things within Federal competence anywhere within the Federation. 30

2. Section 3(4) of the said Act is void.

3. Section 8(c) is valid. Sections 8(d), 15(a) and 18(1)(b) are void to the extent that they empower the Commissioners to impose a sentence of fine or imprisonment."

They awarded the costs of each of the first Respondents of 150 guineas and directed that these costs be costs in the cause.

11. The judgment of Ademola F.C.J., Mbanefo, C.J., of the Eastern Region and Unsworth F.J. defined the main issue on the first question to be whether the incidental and supplementary powers in Item 44 of the Schedule of the Federal Constitution were wide enough to enable Parliament to enact legislation for the whole Federation in terms of the 1961 Act. The judgment based its finding with regard to the first question on the decision in the case of Attorney-General for the Commonwealth of Australia -v- Colonial Sugar Refining Co. (1914) A.C. 237, having also considered the further Australian cases of Ex parte Walsh, (37 C.L.R. 36 at p.70) and Le Mesurier -v- Connor, (42 C.L.R. 481 at p.497):

p.128 1.26

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"The effect of these decisions appears to be that in Australia ancillary legislation must come either within the well-established rules relating to matters incidental to the subject matter of legislation or be incidental to the execution of a specific existing power. We have found the decisions of the Australian Courts helpful in considering the Sugar Refining case in its relation to the ancillary provisions in the Constitution of the Federation. The Constitution of the Federation includes in Item 44 of the Exclusive List the two types of ancillary legislation mentioned in the Australian cases. Paragraph (a) clearly relates to matters ancillary to the subject matter of legislation, which in Australia is an implied power, and paragraph (b) of that Item relates to matters ancillary to the discharge of the functions referred to in that paragraph. It is true that Item 44 is a separate legislative power and refers to supplementary as well as incidental matters, but it is nevertheless ancillary only and must be construed accordingly.

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This leads to consideration of whether the Commissions and Tribunals of Enquiry Act, 1961, is a valid exercise of the power conferred by Item 44. The legislation is very similar to that which was under consideration in the Sugar Refining case. It covers the whole field of Federal Legislative competence, and possibly more, and enables a Commission of Inquiry to compel the attendance of witnesses, the disclosure of information and the production of documents on any matter within that field designated by the Prime Minister. We are of the view that the legislation is too wide to come within paragraph (a) of Item 44. This paragraph would

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permit of legislation providing for Tribunals of Inquiry and matters incidental thereto, but it is not wide enough to provide generally for the attendance of witnesses, the disclosure of information and the production of documents as this is not incidental to legislation establishing or regulating tribunals or commissions of inquiry, as was held in the Sugar Refining case. The legislation does not come within paragraph (b) of that Item, as it is not ancillary to the discharge of any of the functions referred to in that paragraph. In this respect consideration has been given to the Attorney-General's submission that the legislation might be tied to other laws which provide for inquiries. It is possible that these laws might support a general Act dealing purely with procedure, if the general Act were incorporated in the other laws, but they cannot support the general powers given to the Prime Minister under section 3(1) of the Act to appoint Tribunals on any matter within Federal competence, with the compulsory powers referred to previously." 10 20

p.134 L41 With regard to the second question the three learned Judges rejected the contention for the Appellant that the provision of S3(4) meant no more than -
p.135 1.4 that the Courts could not inquire into the desirability of appointing a Commission, which was a matter for the discretion of the Prime Minister, alternatively that the provision could be read in such a way as to comply with the constitutional requirements : 30

p.135 " We do not think that the wording of the sub-section is capable of the construction that it applies only to the discretion of the Prime Minister, and we consider that the sub-section is clearly contrary to the provisions of sections 21, 31 and 108 of the Constitution. This defect could only be remedied by the deletion of the sub-section (which is any event is unnecessary in so far as it may relate only to the well-established rules relating to the exercise of discretionary power) or by completely redrafting the sub-section so as to make it a declaratory provision only." 40

p.135 Lastly the three learned judges held that S8(c) of the 1961 Act was valid (a decision against which there is no cross-appeal) but that Sections 8, 15 and p.136 18 were invalid to the extent that they empowered the Commissioners to inflict a punishment of a fine or imprisonment, being contrary to S20 of the Federal 50

Constitution. This was not disputed by the Appellant.

12. Brett F.J. found it difficult to discern any principle in the Sugar Refining Co. case (supra) by which the validity of Act No. 26 of 1961 under the Federal Constitution could be tested. However, he agreed with the other Judges of the Federal Supreme Court that the Act was ultra vires to the extent set out in paragraph 10 of this case :

10 " I have already suggested that the Nigerian Constitution itself gives reason to suppose that its framers were aware of, and tried to avoid, difficulties which had arisen under other federal constitutions, and in particular the Australian Constitution. If it was their intention to confer wider powers in relation to tribunals of inquiry on the Nigerian Parliament than the Australian Parliament possesses, I think it is a fair comment that they have not chosen to adopt anything like such express words for that purpose as in the instances which I have already cited, relating to the implementation of treaties and the freedom of inter-territorial trade and commerce. The inclusion of Item 44(a) as a separate matter in the Exclusive Legislative List, the reference to supplementary as well as incidental matters, and the express mention of the establishment and regulation of tribunals of enquiry in Part III of the Schedule must all be given their due significance, but the express mention of a matter in Part III of the Schedule does not take it out of the category of incidental and supplementary matters, and the power of Parliament in relation to tribunals of enquiry remains a power in relation to a matter incidental or supplementary to other matters. The submission that when an ancillary power of this kind is conferred it is not to be exercised in such a way as to interfere with personal rights independently of the exercise of the power to which it is incidental or supplementary, seems to me to be well founded. To give an example, the right to enter on private land for specific purposes might reasonably be held to be incidental or supplementary to a variety of matters in the Legislative Lists, but this would not enable Parliament to confer a general right of entry, nor would the right to require the necessary information on which to base an assessment to tax validate a law requiring such information except for the purpose of assessing

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liability to an actual tax."

p.140 1.9 13. Taylor F.J. agreed with the judgment delivered
p.140 1.15 by the Federal Chief Justice, but added that he rejec-
- ted the contention advanced on behalf of the Respondent
p.141 1.32 Chief Doherty that there was a distinction between the
words "commission" and "tribunal" and that the refer-
ence to tribunals of inquiry in Part III of the
Schedule to the Federal Constitution could not there-
fore empower the Federal Parliament to legislate for
commissions of inquiry.

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14. It is respectfully submitted that the 1961 Act is ultra vires the Federal Parliament as found, both for the reasons given in the judgment delivered by the Federal Chief Justice and for the reasons given by Brett F.J. In addition the Respondent Chief Doherty will contend :

(a) that the words "within Federal competence" in S3(1) of the Act are too wide to be restricted to matters referred to in the legislative lists and cannot be construed in such a way as to come within Item 44 of Part I or Item 28 of Part II of the Schedule to the Federal Constitution;

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(b) that the word "commission" has a wider meaning than the word "tribunal", which is limited to the carrying out of a judicial or quasi-judicial function, and that deletion of the words "Commission of inquiry" from the exclusive list of the Nigerian Constitution in force in 1957 and the eventual insertion of the words "tribunals of inquiry" in the Interpretation Part of the Schedule of the 1960 Constitution shows that it was not intended to give the Federal Parliament power to make general laws for commissions of inquiry. The provisions of S2(2) of the 1961 Act cannot increase the powers of the Federal Parliament.

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15. It is respectfully submitted that this appeal should be dismissed with costs for the following amongst other

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R E A S O N S

1. BECAUSE the Federal Supreme Court were right in declaring the Commissions and Tribunals of

Inquiry Act 1961 invalid as stated, both for the reasons given in the judgment delivered by the Federal Chief Justice and for the further reasons given by Brett F.J.

2. BECAUSE the words "within Federal Competence" in S3(1) of the Act can only be construed in such a way as to give the Federal Parliament powers exceeding matters referred to in the legislative lists.
- 10 3. BECAUSE the power to legislate for the establishment and regulation of tribunals of inquiry in Part III of the Schedule of the Federal Constitution does not confer power to legislate for commissions of inquiry.
4. BECAUSE the decision of the Federal Supreme Court was right as to the second and third questions referred to them.

DINGLE FOOT

DICK TAVERN

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ON APPEAL

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