ROTAN TITO AND OTHERS v SIR ALEXANDER WADDELL AND OTHERS
(REPLANTING ACTION)

SUMMARY OF PROCEEDINGS THURSDAY, 4 DECEMBER 1975

Mr Vinelott began by saying, in answer to a question the judge raised yesterday, that, with one exception, a Colony Government had never been known to acquire property in England. In the case where this happened a lease was acquired; and in considering the implications of this the FCO decided that section 40 of the Crown Proceedings Act 1947 would in fact bar the lease-holder from legally enforcing payment of rent in the UK. To avoid this problem, a Colony Government would have to acquire property in the UK through an agent (for example, a UK government agency) who could then be sued in UK courts should the necessity arise.

Summary of Laches and Acquiescence

Mr Vinelott summarised and in some cases refined his arguments presented yesterday:

1. It was plain by 1920 that the first replanting attempt, which was experimental, had failed.

2. Up to 1920 some Banabans may well have believed that there was a legal obligation on the company not to mine deeper than 12 feet. Were this done in the central area of mining, replanting might have succeeded since 50 or more foot of phosphate would have been left in the pits. However, after the explanations given to the Banabans in 1930, this belief could no longer be held; Mr Rotan's evidence showed this.

3. In the 41 years between 1930 and 1971 no attempt was made to assert that there was any legal obligation to replant. In fact, the Banabans accepted by implication that replanting on the lines already tried was a waste of time. There was an attempt to assert that there was a moral obligation to replant in this period (ie in 1968), and this assertion was consistent with the view that there was no longer any legal obligation to carry out the work.

4. There were three occasions when it would have been natural for the Banabans to claim that there was a legal obligation to replant: in 1928-30, in 1947 and in 1968.

Therefore, Mr Vinelott submitted, these facts made possible a claim of acquiescence and implied waiver of rights (i.e. the Banabans' right to replanting), and further that the apparent waiver had altered the position of the parties. This was because:

i. For many years no attempt had been made to leave any residual phosphate in the mined out pits in order to reduce the cost of replanting, had it been intended.

ii. The same rate of Royalty on every ton of shipped phosphate had been paid irrespective of the area from which it was mined and of whether or not the lease of the land contained a replanting covenant. In fact in 1947 this was pointed to as a factor beneficial to Banabans.

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Furthermore, Mr Vinelott said, had replanting been intended, its cost would have been a factor in determining what Royalty payment could be afforded.

iii. That the claim had been made so late in mining operations, in 1971 that is, meant that the cost of replanting could not be met realistically from the proceeds of the sale of the comparatively small amount of remaining phosphate.

In answer to questions, Mr Vinelott said that there had been other attempts to replant by the BPC, one in 1940 and another in 1953. The Banabans showed no interest in this and none had said that the Company should be doing more than it was. Admittedly, after the failure of the 1913 replanting, less phosphate was left in the pits, but no one queried it. In fact, in the light of present scientific knowledge, it would not have made much difference whether 6 foot or less soil had been left behind. The 1953 replanting attempt was not related to any legal obligation; it was part of the Company's scheme to provide food for the labourers. In reply to the Judge, Mr Vinelott said these later replanting attempts did not refute his argument that replanting was considered to be hopeless after the first failure; time and changes in personnel meant the extent of the failure was either forgotten or not known.

Mr Vinelott concluded his main argument. However, there were two more points that he wanted to draw to the judge's attention.

1. This concerned the question of the failure to make vesting deeds on the appointment of each successive Phosphate Commissioner. The plaintiffs had described this as a "tangle", but Mr Vinelott said that it did not in fact make any difference to the issues, a Commissioner's letter of appointment put him in as good a position as if he had been appointed by legal deed; as against just the partner governments, he could not be said to have legal title to the assets, although it would be difficult to prove this legally as against a third party should it be called into question. This, however, was not the present situation. Nevertheless, Mr Vinelott said, this did not mean that the partner Governments had behaved casually in their appointment of Commissioners.

2. This point concerned the question of the construction of the categories of prohibited and restricted imports as listed in the Second Schedule, of the 1963 GEIC Customs Ordinance. The plaintiffs had argued that soil, only being listed as a restricted import, could be brought into Ocean Island (see for example, paragraph 6 of summary of proceedings for 27 November). Mr Vinelott showed that the key factor in restricting an import lay not primarily in its properties (although this was so for imports prohibited outright: they were identifiable by their descriptions) but in the discretion of the Collector (i.e. of customs duties etc). The two exceptions to this in the Schedule did not leave this discretion with the Resident Commissioner, although he had general discretion to restrict the importation of goods not specifically regulated elsewhere in Colony law. The Resident Commissioner could not by virtue of this general discretion overrule the discretion of the Collector, or other specified officer, and therefore could not deal with the importation of soil, which fell under the category of imports restricted at the discretion of the Collector. This

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would apply to the importation of soil to Ocean Island and would have bearing on the question of awarding specific performance.

Finally, Mr Vinelott concluded by asking Mr MacDonald to clarify an apparent inconsistency between the draft Order, which listed the proportions of trees to be planted, and the Statement of Claim, which said that the Resident Commissioner should prescribe the planting. Mr MacDonald said he still held that the right conclusion was that the Governor should prescribe types of trees to be planted, but if this was not upheld, it would be appropriate for the court to do so in its order. The present form of the Order had this situation in mind. The point was also suggested by Mr Vinelott that if a governmental obligation rather than a legal one was found to hold, and it had not been carried out, the court would have no authority to prescribe any replanting. There was also discussion on the question of having a timescale linked to any Order to replant, should one be made and should it be enforceable by a UK court; Mr Vinelott suggested that if (contrary to all his submissions) the Court found that the Governor had a legal obligation to prescribe, the only relief in the first instance should be a declaration to this effect with time for consideration by the Governor (and possibly a return to the Court in due course for the position to be reviewed).

Mr Browne-Wilkinson, Counsel for the BPC, having been given the opportunity to reply on fresh points made since his earlier concluding speech and of concern to the BPC, argued them in detail during the rest of the day and concluded on the following day when the proceedings ended.

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SUMMARIES OF PROCEEDINGS

NOTES

1. Reference has been made in the summaries to the Mozambique case, Dyson case, and to over-mining; a brief explanation of each is given below:

(1) The Mozambique Case

The House of Lords gave the decision in the British South Africa Company v. Companhia de Mocanbique case that "the English Courts have in general no jurisdiction to determine directly title to foreign immoveables /i.e. land/ nor can they entertain any action which substantially involve the determination of such title /e.g., in that case, an action to recover damages for trespass to land situated abroad/". (Reported at 1893 AC 602 and summarized at P.30 of Vol.7 of Halsbury's Laws of England (third edition).)

(2) The Dyson Case

The decision of the Court of Appeal in Dyson v. Attorney General in 1911 was given at a time when "petition of right" was the principal form of civil proceeding against the Crown. This decision is authority for the proposition that a declaratory judgment can be made against the Attorney General as a defendent representing the Crown (the plaintiff was held not to be bound instead to proceed against the Crown by petition of right). (Reported at 1911 1KB 410)

(3) Over-Mining

Reference to over-mining concerns one of the claims made against the BPC that mining had wrongly extended to land on Ocean Island not leased to BPC. This land is referred to as the "purple land". The Crown is not directly concerned in this claim.