ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)

SUMMARY OF PROCEEDINGS, THURSDAY, 23 OCTOBER 1975

1. The day opened with a consideration of the application made by Mr Macdonald on Wednesday that the plaintiffs should have the last word. Mr Vinelott opposed the application on the grounds firstly that the application was far too late, and secondly, that a view, although evidence, was not evidence in the normal sense but was rather a chance for the Judge to inform himself at the invitation of one of the parties. This view was endorsed by Mr Browne-Wilkinson who pointed out that Mr McCrindle had made his closing speech on the understanding that the Crown would have the last word: he also argued that since a Judge has a right to refuse a view it cannot, therefore, be adduced as evidence in the same way that a witness could.

2. In reply Mr Macdonald admitted the lateness of the application but referred to Mr Justice Megarry's judgment concerning the view which said that the application by the plaintiffs for the Judge to view Ocean Island should be regarded as an application by the plaintiffs to "tender certain evidence". In his ruling Mr Justice Megarry said that the present agreed order of speeches would remain, but he reserved the right to invite Mr Macdonald to address him on certain facts which he himself might raise after the final speech by Counsel for the Crown. He also said that he might be prepared to consider an application by Mr Macdonald to address the Court in his own right after the other final speeches.

3. Mr Browne-Wilkinson then resumed his discussion of concealment by fraud. He argued that there had been nothing unreasonable or unconscionable in what the BPC set down since, for practical reasons, it was in the interests of both the Commissioners and the Banabans that the phosphate beyond the boundary line be mined at that time. The important question was whether or not the BPC had an obligation to communicate this to the plaintiffs, but in fact

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this question did not appear in the pleadings. The plaintiffs claim was not that the over-mining had been concealed from Mr Kaiekeiki, the Banaban representative on Ocean Island, but that he had been misled by the BPC as to what the 1947 boundaries were. Mr Browne-Wilkinson brought evidence to show that the Banabans' Counsel had been aware as early as 1961, from a written report by Mr Kaiekeiki, that over-mining had taken place. Despite this there had been no action taken until 1967. Mr Browne-Wilkinson claimed that this could not be regarded as reasonable diligence and if that was the case, then the action against the Commissioners was Statute-barred.

4. Mr Browne-Wilkinson then considered the question of damages claimed by the plaintiffs in respect of phosphate wrongfully removed from the purple land. He argued that the damages as calculated were excessive and that a more accurate calculation of the value of the phosphate involved would produce a lower figure. He also claimed that the BPC would be entitled to offset against any damages the cost of raising (as distinct from cutting or hewing) the phosphate, and if the over-mining had been done innocently then they were also entitled to offset the cost of severing the phosphate. He argued that the plaintiffs claim, although it took into consideration the royalties already paid to the plaintiffs did not take into consideration the royalties paid to the GEIC, despite the fact that the phosphate could not be marketed until this tax had been paid. Mr Browne-Wilkinson was still pursuing these arguments for mitigation of any possible damages when the Court rose.

Pacific Dependent Territories Department
Foreign and Commonwealth Office