ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION): SUMMARY OF PROCEEDINGS
THURSDAY, 30 OCTOBER 1975.

1. Mr Macdonald (Counsel for the Banabans) concluded his submissions concerning the re-planting of the mined out lands by saying that all the experts agreed that the main problem of coconut cultivation on Ocean Island was the uneven distribution of the rainfall, but that the evidence demonstrated that, despite the uneven climatic balance on Ocean Island, it was possible to grow coconuts in non-drought years at subsistence level. Notwithstanding the limited planting medium in which many coconuts had been set they had survived and had in some cases produced nuts. Many of those which had died would most certainly have survived had they been provided with an adequate planting medium.

2. If one considered cosmetic effect rather than food or copra production then areas C and D showed a marked contrast to the other areas and showed what could be done in this direction. The results from the 1954 planting, given that the coconuts had only been allowed at most 18 inches of phosphate and had immediately been subjected to a three-year drought, were far from discouraging. Furthermore, the prospects of success for these trees would have been even better if they had received the sort of care to which they were entitled under the proper construction of the term "re-plant". This implied, said Mr Macdonald, the application of the necessary nutrients, the watering of the young plants in the nursery, and some watering when the seedlings were planted out.

3. At this point Mr Browne-Wilkinson intervened to say that watering of planted out trees had been expressly disallowed by Mr Macdonald in his opening speech of April 16th. The plaintiffs had claimed that there was no obligation to water planted out trees but only to replace those which died within two years of planting. This said Mr Browne-Wilkinson was an issue of crucial importance given the limited water resources of Ocean Island and the need to supplement local catchment with

/imported

imported supplies. Mr Macdonald admitted that there was no obligation on the BPC to irrigate the trees or to provide regular watering, but he said that watering could in some cases compensate for the lack of adequate planting medium which was the most important element as far as the plaintiffs were concerned.

4. Mr Macdonald then said that the arguments he had just presented did not take into account the survival of the 1940 and 1954 trees which had been planted in extremely unpropitious circumstances and had endured a fourteen months drought. They must, said Mr Macdonald, have been obtaining water from somewhere and if this were true then the six foot of planting medium which the experts had regarded as a minimum was probably even more than was absolutely necessary. The plaintiffs accepted that the re-planting of coconuts, as opposed to pandanus and almonds, would be a slow and a difficult task, and that his Lordship might not therefore decide that in this case specific performance would be a suitable remedy. From the point of view of liability however, there was no question that the re-planting could have been undertaken. The obligation was entered into before the land was mined and could have been fulfilled if the Pacific Phosphate Company had done what they said they would and left sufficient planting medium for the coconuts to flourish. The Company had entered into these obligations in the light of several re-planting experiments, with a full appreciation of the nature of the terrain and with experience of the 1910 drought, and had continued to undertake such obligations even in the 1916 drought when the Resident Commissioner was already writing that the re-plant scheme was as dead as the trees in the mined out land.

5. Mr Macdonald then mentioned two subsidiary points concerning aborting nuts and coconut yield. He cited evidence to show that "aborting nuts" was a term which could be loosely applied either to flower sprays which did not develop into nuts, or more accurately, to nuts which did form but which failed to develop fully and fell to the ground prematurely. Both phenomena were attributed by the experts to drought conditions. He then showed

/how

how the evidence of Dr Robinson concerning the probable average yield of coconut palms on Ocean Island conflicted with the estimates of Senator Walker and Dr Child. Mr Macdonald said that the evidence of Senator Walker and Dr Child was to be preferred, since the one had a long experience of living in the Pacific, and the other was the only expert with experience of coconuts in very adverse conditions. The plaintiffs conceded that the yield from Ocean Island coconuts would be low but not as low as Dr Robinson had suggested. This concluded the submissions on the possibility of re-planting the mined out land.

6. Mr Macdonald then turned to Mr McCrindle's submission that the re-planting provision in Clause 12(a) of the 1913 Agreement had been superseded by the specific terms of the various A and C deeds. Mr Macdonald maintainced that the parties to the 1913 Agreement and the A and C deeds were different and had not intended that there should be any merger. The benefit of Clause 12(a) extended not only to the owners of particular plots covered by the A and C deeds, but to all the land embraced by the 1913 Agreement. After considerable discussion about the proper construction to be put upon the wording of Clause 12(a) it was agreed that Mr Macdonald should give the matter further consideration and return to it at a later date.

7. Mr Macdonald therefore passed over Items 3 and 4(a) on his main list of topics to consider 4(b): the number of trees to be planted under the 1913 Agreement. He maintained that this should be by reference to what was there before and that this claim was derived from the word "re-plant". The plaintiffs did not claim replacement tree for tree, but the same sort of mix in the same sort of numbers. Mr Justice Megarry queried how this was physically possible given the nature of the mined out areas, and the fact that the obligation must be tailored to what was possible. Mr Macdonald accepted that there might be physical limits but said that it was necessary to quantify what ought to be done where possible. He referred to documents of July and August 1915 showing the number of trees on land acquired for mining from which an average per acre for various types of trees could be calculated. He also cited the 1939-40 re-planting by the BPC where it had been the intention to re-plant at the rate of 58 coconuts and 36 pandanus and almond trees per acre. It

/was on

was on the basis of what had been done by the BPC in 1940 that the plaintiffs state their present claim, since the BPC re-planting showed what was possible. The plaintiffs did not claim that all these trees which had occupied the undisturbed land should be replaced, since this was clearly not practicable. Mr Justice Megarry queried whether what the BPC had in fact done could be used to establish the proper construction of the 1913 Agreement and this matter was again deferred for further consideration.

8. Mr Macdonald then turned to the proper construction to be given to the words "whenever possible". Mr Macdonald said that the present difficulties of re-planting relate only to what his Lordship might instruct in the way of a remedy. These difficulties were not present originally and, therefore, do not relate to the interpretation of the original agreement. Mr Macdonald maintained that the word "employed" was whenever not wherever and therefore, there was no complication that some areas might be more difficult to re-plant than others. The word "whenever" had been used because, in the light of the 1910 drought, the parties realized that coconut planting was not feasible at all times, and may have to be deferred until climatic conditions were more suitable. It had a purely temporal significance and was not used in the wider sense of "in whatever circumstances". It could also mean, said Mr Macdonald, when mining of the land was completed and access for the purpose of planting was possible. Mr Justice Megarry intervened to say that surely the words "whenever possible" implied that it was sometimes not possible, otherwise why was the phrase not "as soon as possible". Mr Macdonald was not disposed to accept this.

9. Mr Macdonald then pointed out that the re-planting obligation was a plot by plot obligation, and that the difficulties faced by the defendants were difficulties of their own making, since they had entered into so many of these A and C deeds. He then turned to the proper construction of the words "as nearly as possible" with regard to the extent to which the land was to be re-planted. This phrase, which appears in the A and C deeds, spelt out that the re-planting should be as near as possible to

/the

the original distribution of the trees on the land and was therefore an unqualified acceptance by the Company to plant at least some trees on each plot. The Company had inserted the words "whenever possible" in the 1913 Agreement and could have easily inserted appropriate qualifications in the A and C deeds. They had not done so.

10. Mr Macdonald then turned to the function of the Resident Commissioner to prescribe the trees to be planted on the mined out land. He said that the function of the Resident Commissioner was not "of the essence" of the obligation, but only incidental to the primary obligation which was to re-plant. The Resident Commissioner had no function to decide whether re-planting should be carried out since this was laid down in the Agreements. Nor had he any function to show how the re-planting should be done or prescribe the extent of the planting, since this was made clear in the deeds by the words "as near as possible". His only function was to prescribe the types of trees or shrubs which ought to be planted. If this obligation had broken down either

(a) because the Resident Commissioner no longer exists, or

(b) because he was unwilling to carry out the functions allotted to him,

then Mr Macdonald maintained, legal authorities show that the Court will intervene and order the function of a third party to be performed where the rôle of the third party is not "of the essence" of the obligation, but is only instrumental in carrying it out. The remainder of the day was taken up with an examination of the various legal authorities on this point.

Pacific Dependent Territories Department
Foreign and Commonwealth Office