

ROTAN TITO AND OTHERS V. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION): SUMMARY OF PROCEEDINGS
WEDNESDAY, 5 NOVEMBER 1975.

1. Before the main business of the day Mr Browne-Wilkinson (Counsel for the BPC) put in a qualification to a concession which he had made earlier in the proceedings. He had conceded that according to the pleadings the plaintiffs were entitled to request specific performance of the re-planting even though they could not prove a breach of contract. He now wished to establish that he did not concede that the plaintiffs were entitled to the re-planting, merely that the pleadings did not debar them asking for it to be done even if they could not prove breach of contract by the BPC.
2. Apart from this initial intervention by Mr Browne-Wilkinson the entire day was taken up with submissions by Mr Macdonald (Counsel for the Banabans) on *novation. The BPC he said had paid the royalties provided for in the 1913 Agreement from 1920 until at least 1931, although, in the plaintiffs view, they were still paying them. During that period there had been three changes of Australian Commissioner and one change of UK Commissioner, yet they had never question their obligation to pay the royalties and these payments had been accepted by the landowners. These payments, said Mr Macdonald, were most readily explicable on the basis of a novation which had occurred at the earliest on the date of the meeting at which the Banabans were told about the transfer of a Company to the Commissioners (i.e. September 1920) or, at the latest, on the date of the first royalty payment after 31 December 1920. Mr Macdonald said there was no evidence for the Commissioners contracting in their own individual names but that they were in fact trustees for the Crown in the right of the three Partner Governments.
3. He then cited evidence to show that there had been a general assumption on the part of the Commissioners that they were entitled to the rights enjoyed by their predecessors and by the Company. This "continuing to enjoy rights", said Mr Macdonald,

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constituted a novation. The business of mining he said, had been the same since 1920 and the Crown had been the beneficial owner of the business throughout. The Commissioners had continued to enjoy rights of access under the 1913 Agreement and the A and C deeds and had continued to pay royalties provided for in the Agreement until 1931 when a new Agreement came into force. Finally, said Mr Macdonald, the fact that in 1940 and 1941 the then Commissioners purported to re-plant under the obligation in the A and C deeds points again to successive novations. Mr Macdonald summed up by saying that successive generations of Commissioners had enjoyed the benefits of mining for 55 years; they had mined the land and had enjoyed the rights of access and yet were now seeking to claim that they were not bound by an Agreement from which they had derived so much benefit because they were not one of the original parties.

4. Mr Macdonald then turned to the question of "benefit and burden", and the remainder of the day was taken up with the citing of various legal authorities.

Pacific Dependent Territories Department
Foreign and Commonwealth Office

FOOTNOTE

*The plaintiffs are faced with a difficulty in that the British Phosphate Commissioners are not a corporation as understood by the law (though they often behave as such), but three separate individuals responsible to three separate Governments who, for convenience, choose to act in concert. Mr Macdonald must therefore prove a novation (i.e. the passing on of the rights and obligations under the 1913 Agreement and the A and C deeds) not only in 1920 when the Commissioners succeeded to the Pacific Phosphate Company but also for each successive generation of Commissioners. It is well established, however, that in the case of a group of trustees, though they have no corporate identity, the rights and obligations pass from generation to generation. Mr Macdonald's attempts to prove novation will therefore be much simplified if he can demonstrate that the Commissioners are, in effect, trustees for their respective Governments.