Spare

ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)
SUMMARY OF PROCEEDINGS, MONDAY, 17 NOVEMBER 1975.

1. Mr Macdonald (Counsel for the Banabans) continued his submissions concerning the liability on the part of the Crown to ensure that the re-planting was carried out. He argued that the British Phosphate Commissioners were, in effect, trustees for their respective Governments and subject to instructions from them, and that those Governments would idemnify the Commissioners against the cost of any specific performance which the Court might order. Mr Browne-Wilkinson intervened to say that the question of the Commissioners acting as trustees for their respective Governments had not been raised in the pleadings and that to introduce it now would raise serious questions of possible sovereign immunity in respect of the Australian and New Zealand Commissioners. Mr Macdonald maintained that the question of sovereign immunity had already been discussed and that the defendents had waived any claims on those grounds. Mr Browne-Wilkinson replied that this was not so. The question of sovereign immunity had been considered in great depth and it was only in the light of the pleadings and the fact that the Commissioners were being sued as individuals and not as the agents of their Governments that the question of immunity had not been pursued. It was well established, said Mr Browne-Wilkinson, that one could not get at a sovereign state through its trustees. If it had been clear, as was now being pleaded and alleged, that the Commissioners <u>were</u> acting as trustees then, suggested Mr Browne-Wilkinson, this would have fundamentally altered the attitude of the Governments of Australia and New Zealand. The defendents, he said, made no concessions on the question of sovereign immunity.

2. Mr Macdonald then continued his submissions as to why the Court should direct specific performance. He argued that, apart from the types of trees, the task which needed to be done was adequately defined by the 1913 Agreement and the A and C Deeds. On a proper construction of the 1913 Agreement, since the defendents had implied right of access to do the mining,

so they also had implied the right of access to do the necessary re-planting. If this were not true, said Mr Macdonald, the plaintiffs would procure from the landowners the necessary rights of access. In the present case, he said, the only problem of definition of the work to be done arose in respect of which trees and shrubs should be prescribed and that was a problem which the Court could easily rectify by doing the necessary prescribing.

3. Mr Macdonald then turned to the engineering problems which had been raised by Mr McCrindle during his consideration of the words "whenever possible". On the question of the importation of soil into Ocean Island Mr McCrindle had made a number of submissions which Mr Macdonald summarized as follows:

(a) It was a project which any Engineer would find impossible to justify on any rational criteria.

(b) The defendents relied strongly on the reports by the Committee of Experts on the rehabilitation of Nauru.

(c) The costs would be enormous.

(d) The estimates of the experts concerning the feasibility of the scheme varied enormously.

(e) The problem of fissures and soil erosion.

(f) The legal problems of access.

(g) The problem of the duration and complexity of the operations.

4. On the first point, Mr Macdonald said that if by "rational criteria" Mr McCrindle had meant economic criteria then the plaintiffs agreed with him, however, he referred to passages in the evidence of Professor Russell and Mr Ken Walker where they had suggested that all such reclamation schemes were uneconomic in the narrow sense in this country or elsewhere. According to Mr Walker the justification for such a scheme depended on how much value the community put on the intangible social benefits which it might bring. Mr Macdonald therefore maintained that the uneconomic aspect of this case was quite irrelevant since it was equally true of all reclamation schemes.

5. He then referred to the 1966 Report of the Committee of Experts on Nauru. Although the Committee had concluded that it was impractical and even, in the Nauruan context, undesirable to re-soil the whole of the mined out areas on Nauru, they had put forward a scheme for the reclamation of land for water supply purposes, an airport, residential areas and other facilities. In other words, said Mr Macdonald, they were proposing to ~~complete~~ treat an area of 500 acres (double the relevant area on Ocean Island) to a process of levelling and spreading; exactly the same as the first stages of any rehabilitation operation on Ocean Island. The experts were agreed, said Mr Macdonald, that the engineering feat was possible and the Nauru Report helped the plaintiffs rather than the defendents.

6. Mr Macdonald then referred to the evidence of Mr King concerning the duration and complexity of the rehabilitation operations. He concluded firstly that all the various engineering stages were done every day all over the world. Secondly, that if there were no prior geological survey, the design of the restored landscape of Ocean Island was fairly straightforward. Thirdly, that not until a geological survey had been completed and the Consulting Engineer produced his plans could one say whether or not the restoration could be done. The plaintiffs however, submitted that no geological survey was necessary and, if that was correct, then the design function was fairly straightforward. Fourthly, said Mr Macdonald, if a good Engineer had designed it (i.e. the restoration scheme) then a good Engineer could build it.

Pacific Dependent Territories Department
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