G.P.O. Box 1404,
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26th December, 1975.

Professor H.E. Maude, O.B.E.
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Dear Harry

I hope that you will not think this letter too much of an imposition to read. I have recently received two lots of documentation on the Banaban High Court case through the FCO. It comprises about 50 or 60 pages so far (though I have not yet counted it). It is <u>not</u> the verbatim speeches of the various Counsel when summing up, but notes (by an FCO officer ?) summarizing what transpired in Court each day. I now further precis it for your benefit, for I think you should be aware of how things have been going.

2. The notes have little useful to contribute as far as the BPC are concerned, since, judging by them, they only commenced making the notes towards the end of the speech of Counsel for the BPC. He had something to say on the calculation of the quantum of damages, alleged desecration of a Banaban burial ground, and allegations that sand had been taken from certain beaches.

3. Macdonald, at the outset of his summing up, stated that he proposed to tackle the various aspects of the subject as follows:-

"(1) what does re-plant mean in the light of the 1913 Agreement and the A & C deeds in the light of the admissible facts?
(2) can it be done ?
(3) has the 1913 Agreement been superseded by the A & C deeds, or do they both subsist ? (The plaintiffs claim that they do both subsist).
(4) the 1913 Agreement:-
  (a) to what land the obligation applies.
  (b) the number of trees to be planted under that obligation (the plaintiffs claim that this should be by reference to what was there before).
  (c) what is the meaning to be attached to the phrase "whenever possible" ?
(5) the A & C deeds:-
  (a) the plot by plot obligation.
  (b) (sic).
  (c) what trees existed before and their approximate extent.
  (d) the Resident Commissioner's function to specify types of trees.
  (e) why the Court can and should properly undertake the role which the Resident Commissioner cannot if, as the defendants claim, no longer exists.
(6) when the obligation to re-plant arises:-
  (a) in connexion with the 1913 Agreement.
  (b) in connexion with the A & C Deeds.
(7) despite Mr. McCrindle's submission that the plaintiffs and defendants are not parties to the 1913 Agreement and the A & C deeds, the plaintiffs claim that they are still bound by those Agreements in a number of ways.
(8) the position of the Crown:-
  (a) under the 1947 Crown Proceedings Act.
  (b) apart from that Act.

(9) the question, raised by Mr. McCrindle, as to whether the present Court is the proper jurisdiction.

(10) Can there be specific performance ?

(a) the engineering problems and the difficulties of importing soil;

(b) the level of damages which would be appropriate, which the plaintiff claim should be either:

(i) the cost of doing the work; or

(ii) should be related to the fact that had re-planting been undertaken the Banabans could have successfully maintained a settlement on Ocean Island and should be compensated accordingly.

(11) questions relating to the red land.

(12) questions relating to the purple land.

(13) questions relating to the yellow land.

(14) any other questions.

(Note - I do not know to what questions 11-13 refer)

4. In my view the point at (10)(b)(ii) is rubbish !

5. Of all the foregoing questions, the only one on which I think that I would venture to give an opinion (and you may feel the same - since all are really legal questions - is (5)(c).

6. I think I should also quote the following paragraph from Macdonald's summing up:-

"Mr. McCrindle had earlier maintained that specific performance should not be carried out since damages were an adequate remedy. He had argued that the re-planting was mainly for purposes of food production, not beautification of the island, and that food could be obtained at a fraction of the cost elsewhere. Money from damages on the other hand could be more profitably spent on the development of Rabi. Mr. Macdonald did not accept that the replanting was only for food production but in order to make Ocean Island acceptable as a home for the Banabans. Mr. Justice Megarry asked if this really made sense when a thousand acres of the island was not involved in the case and would never, in fact, be re-planted. Mr. Macdonald pointed out that even the re-planting of one sixth of the island which the plaintiffs claimed would double the area of greenery on the island and this, he said, was very relevant to whether or not the Banabans could use the island as a home".

7. I can only say "What bal .....derdash, ahem! "

8. Again, I quote Macdonald:-

"In particular he (Macdonald) sought to reject the arguments put forward by Mr. McCrindle that damages of specific performance were an adequate remedy. Mr. Macdonald based this contention principally on the argument that the Banabans were by no means only concerned with their future food supply but with the acceptability of Ocean Island as a home in future years".

9. In his final summing up, Macdonald said the plaintiffs sought specific performance; that the Court could prescribe the types of trees to be planted; that the Crown as well as the BPC were liable in this case. Damages, he said, should be a real substitute for specific performance and -

"should be calculated on the basis of the cost of having the work done: the cost of replanting the 250 acres with 2 foot of soil would be at least $A 32 million....Furthermore he contended that the

> Banabans had suffered not merely a loss of food but also of amenities, and this too should be taken into account. .... One approach would be to consider the cost, at the date of the eventual order, of BPC obtaining a release of the covenants to replant; a substantial award on this basis would enable the Banabans themselves to replant mined-out parts of the island and would be a real substitute for specific performance".

10, Macdonald must be joking if he things Rotan & Co. will replant the island! So much for Macdonald. Vinelott then summed up.

11. First, he argued that the Crown was not liable in this case. On the question of minerals, he said:-

> "the Crown was not asserting any rights to the minerals, and it would be quite impossible to do so in the light of the Minigg Ordinance of 1928. However in some sense, ownership of the minerals could be said to be vested in the community; if so, this would reinforce his contention that there was doubt that the case was for an English court to determine. Questioned again by Mr. Macdonald about the distinction between surface rights and mineral rights, Mr. Vinelott referred to Professor Maude's study of Banaban land matters and concluded that the question of ownership of minerals on Ocean Island was one of considerable "doubt and difficulty".

12. Vinelott's argument is odd to my way of thinking. He denies that the Crown has any rights in the minerals (as surely they had under the Ordinance quoted) but uses that cleverly to reinforce his argument that the Crown is therefore not liable in the case. The reference to Professor Maude is absolutely splendid!

13/ On the question of the trees to be planted, he said;

> "since it was quite plain from attempts to replant that no useful trees or shrubs could be grown in the mind-out areas, replanting would not answer the problem of provision of food. (This was one of the plaintiffs' pleas). It was not necessary to plant coconut trees to provide amenity; if that also was wanted, since the island was effectively re-vegetating itself with scrub plant".

(Note - I do not think there should be a semi-colon in the last sentence, but a comma).

14. He said that the failure of replanting experiments was due to the fact that the coral limestone on Banaba was dolomitized (i.e. hardened by impermeable mineral deposits).

15. No leases of land after 1913-15 containing covenants as to replanting, following failures, nor was such provision sought by the Banabans themselves. The realization of the impossibility of preserving land for replanting was one of the factors which ultimately led to the acquisition of Rabi where the Banabans agreed to stay. The company did all it could as regards replanting (he cited evidence to this effect) but the dolomitization of the limestone frustrated all attempts to replant.

16. Mr. Vinelott then delat with the obligations of the Resident Commissioner, which he denied were legal ones. And he then argued that in any case the Court had no jurisdiction to hear this case. He then argued that the plaintiffs delay in asserting rights were such as to make enforcement of the covenant entered into inequitable, and argued that the conduct of the plaintiffs and their predecessors was such that they could be regarded as having waived their rights under the contract for reasons which he then gave.

16. That is that. It is appallingly difficult to compress all the material sent to me, especially as so much of it is legal argument, citation of cases, and so on. But I hope that the foregoing paragraphs will give you some idea of what has taken place on the summing up by the two Counsel. One thing is crystal clear and that is that no Counsel bothered to raise any of the peripheral matters on which you were asked to comment in connexion with Rotan's evidence. The Judge having allowed all this extraneous evidence to be giben must surely be wondering why there is no mention whatever of it in the summings-up.

17. Must close now. I see the second case has started before Xmas, so we may be wanted I would guess around the end of January.

18. This letter is strictly "E & O E."; I am not checking it back.

19. Finally, I have with me - pinched, of course, from the Lord Chancellor's flat in the House of Lords, a copy of The Geographical Magazine for June, 1974, containing an ever so erudite article by Pearl Binder on "Two Pacific Islands of the Banabans" - Chequered life for displaced islanders. Have you a copy ? I also have a copy of the article by itself - also pinched. Would you like one or the other ?

Yours ever,

Tom Paddy