ROTAN TITO AND OTHERS v SIR ALEXANDER WADDELL AND OTHERS
(REPLANTING ACTION)

SUMMARY OF PROCEEDINGS TUESDAY, 2 DECEMBER 1975

Mr Vinelott continued his speech. He concluded from detailed reference to documentary evidence in Bundles 14, 15, 16 and 22:

1. That it was clearly intended at the time of the 1913 Agreement and until the 1915 drought that replanting should be carried out in the pits between the mined pinnacles, while some mulching and tending should be done by the Banabans. Also, in future, somewhat more phosphate was to be left after mining than formerly.

2. The obligation to replant stemmed primarily from the Government's insistence that mined out areas should if possible be put to some beneficial use. This policy rested on the view that the future of the mining operation would be reconsidered when the 250 acres had been exhausted. The success or otherwise of the replanting that was done would be a factor in this reconsideration.

3. The replanting was to some extent experimental and it would take some years before its success could be measured by the trees bearing fruit.

4. The Banabans were given no guarantee of the success of the replanting or that they would necessarily be able to get to the trees to pick the fruit.

Mr Vinelott then turned to Mr Rotan's evidence given on (evidence) days 4, 5, 7 and 8. During the period 1912-1926 Mr Rotan had only visited Ocean Island twice, once for a few days in 1915 and again for about a year in 1918/19. Mr Rotan had not seen the 1913 Agreement until he came to England about the case, though he had been told at the time what was supposed to be in it. During his visits to Ocean Island in 1915 and 1918/19 he had not gone specifically to the mining areas to see if any trees had been replanted; he did not believe that any such planting would have been a success, because there had not been "enough" soil. In reply to Mr MacDonald's saying there had been no cross-examination on this latter point, Mr Vinelott said that in the light of technical evidence it was not important to establish the exact amount of soil left in the pits as about 18 foot or so would be needed for growing coconut trees. (See argument about dolomitised coral in yesterday's proceedings.)

From Mr Rotan's evidence Mr Vinelott concluded:

1. Mr Rotan considered replanting between pinnacles to be a waste of time.

2. Since he knew from an early date that the 1913 Agreement did not provide a limit on the depth of extraction of phosphate and that the Company were not obliged to level out the mined land, he must have taken the view that there was no point in replanting in the context of the 1913 Agreement.

/Submissions

Submissions on A and C Deeds

Mr Vinelott then turned to the exact construction of the wording in the A and C Deeds relating to the Resident Commissioner's duty to prescribe replanting "as nearly as possible to the extent to which it (ie the land) was planted". Mr MacDonald, the plaintiffs' counsel, had construed the words "to the extent" to mean that the same number of trees should be replanted as had been growing before. Mr Vinelott contended that in the context of the covenant it was irrational to expect the Resident Commissioner to prescribe the same number of, say, almond trees to be planted as previously growing coconut trees (the Resident Commissioner would do this as he had discretion over the type of trees to be replanted). Rather, he said, "extent" could be construed to mean trees should be replanted at a similar density to what had been supported on the land before.

Mr Vinelott continued to expand various points that he had raised yesterday.

1. Was there any legal obligation on the Resident Commissioner to prescribe the replanting of trees?

He said that the Resident Commissioner had no such legal duty, for several reasons:

i. The Resident Commissioner's duty was to approve the terms of the deeds rather than to take action arising from these terms - such duty was consistent with the Island Regulations.

ii. It was difficult to see from the deeds how the then Resident Commissioner could bind his successor by contract.

iii. The Resident Commissioner was mentioned in these deeds as replanting was a matter of public policy which was stated with Banaban interests in mind.

iv. Contrary to what Mr MacDonald had implied, there was no form of legal agreement between the Company and the Government as to what should be done with regard to the mining and replanting; all that happened was a negotiated understanding on the terms on which the Banabans should be allowed to enter into future transactions. The Resident Commissioner's governmental duty was to ensure that future land transactions complied with these minimal conditions and there was no promise that the Company should acquire future land. At no point was there any contract between the Government and the Company or between the Government and the Banabans.

2. What was the function of the Resident Commissioner if he was not under any duty to prescribe replanting?

It was purely governmental; the Resident Commissioner was chosen as he was the person responsible for administering policy locally.

3. What would be the result if the Resident Commissioner did not prescribe replanting?

Mr Vinelott said that the Resident Commissioner's prescription was a condition precedent to any obligation the Company had to replant trees on the mined-out land. For instance, after 1915 no

/replanting

replanting was prescribed by the Resident Commissioner, therefore any replanting done would not have been in performance of any contractual obligation. Mr Vinelott expanded this argument with reference to various law reports of cases involving a third party to whom reference could be made to establish what could be constituted as performance under a contract. He concluded that there was nowhere, in the Crown's submission, where an independent obligation resting on the Resident Commissioner could be spelt out; if he did not so prescribe, then the Company could not be claimed against for not having replanted.

4. Mr Vinelott made the point that if there had been an obligation on the Resident Commissioner he would have expected the contract to have spelt it out more clearly.

QUESTION OF JURISDICTION

Mr Vinelott expanded this under three heads, summaries of which he had given in his earlier summary last Friday.

Head 1. This concerned the question of whether a judge can or should make a declaration in terms of the order sought by the plaintiffs since the actual order sought was founded on the proposition that the Resident Commissioner acted on the advice of Her Majesty's Government in the United Kingdom.

If this proposition was incorrect, the Court might have to make a declaration against the Crown in right of the Colony Government. If this were so, Mr Vinelott said, after reference to the Crown Proceedings Act 1947 and various cases, it would raise questions about the extent of the Court's jurisdiction. For instance, a United Kingdom court would not have jurisdiction over a case which might result in damages being awarded which should properly fall to the charge of a Colony Government rather than on UK revenue.

Mr Vinelott, having submitted that the words "in respect of" in section 40(2)(b) of the 1947 Act should not be construed widely (and, in particular, not so as to cover a situation where it was merely a question of advice having been given by the UK Government), continued his argument in the next day's proceedings.