

ROTAN TITO AND OTHERS v SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION): SUMMARY OF PROCEEDINGS,
TUESDAY, 4 NOVEMBER 1975.

1. Mr Macdonald (Counsel for the Banabans) continued his plot by plot examination of the BPC's obligation to re-plant in the mined out areas. There was some discussion concerning the categorisation of the various plots and also the question raised the previous day as to whether Mr Macdonald's argument were "as pleaded". Mr Macdonald managed to satisfy his Lordship on this point and nothing he had said was disallowed. Mr Macdonald then pointed out that many of the plots concerned were on or near tramways which had been used in the pre-war mining operations. He cited evidence to show that such tramways were often widened and used as roadways for current mining operations and as such roadways were sited and re-sited as and when required it was very possible that plots adjacent to such a tramway would be required for access. If this were true a claim of laches could not fairly be levelled against the Banabans.
2. Mr Macdonald then turned to the question of whether or not there had been a breach of the A and C deeds. He argued that the prescribing by the Resident Commissioner of the types of trees to be re-planted in the mined out land was not a condition precedent to the BPC's obligation (i.e. not an essential term of the contract) but only the means by which the contract was to be carried out. The BPC, he said, had ceased to use 50% of the central and eastern mining area in 1969, and it had been conceded by Mr McCrindle that they had not re-planted the land. Mr Macdonald maintained that the obligation to re-plant arose immediately the land was no longer required by the BPC and was not deferred until the Resident Commissioner should prescribe which trees were to be planted.
3. Mr Macdonald then turned to the question of novation (i.e. the transfer of the benefits and/or burdens of a particular contract to persons who were not parties to the original agreement). He cited evidence to show that the transition from

the Pacific Phosphate Company to the British Phosphate Commissioners had been carried out smoothly, without any clear break and without any perceptible change in the conduct of the operations or the rights of the Banabans. In particular he argued that provision had been made in the purchase agreement for the Company to carry on the phosphate mining on behalf of the three Governments until the Commissioners could be appointed. Mr Macdonald demonstrated that the Resident Commissioner had at all relevant times acted as a bridge between the Company and the Banabans, and that the Banaban rights of ownership had not been adversely affected by the change in the ownership of the Company. This was clearly understood by all parties.

4. Contesting Mr McCrindle's submission that the Banabans had given no consideration to this matter Mr Macdonald argued that the Banabans had raised no objection to the transfer of the Company to the British Phosphate Commissioners and that the terms of the purchase implied the release of the Company from their obligations and the substitution of the Commissioners in its place. The rest of the afternoon was devoted to citing legal authorities on this point.

Pacific Dependent Territories Department
Foreign and Commonwealth Office