ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)
SUMMARY OF PROCEEDINGS: WEDNESDAY, 19 NOVEMBER 1975.

1. Most of the morning was taken up by Mr Macdonald (Counsel for the Banabans) putting forward a number of submissions designed to show that specific performance was the most appropriate remedy. In particular he sought to reject the arguments earlier 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. Mr Macdonald argued that it was crucial that any re-planting work should be undertaken forthwith by the BPC themselves and maintained that, should the Banabans undertake the work, using any damages which they might obtain there would inevitably be a greater delay because it was not practicable for the necessary surveys to be undertaken while mining was still in progress.

2. Mr Justice Megarry viewed this line of argument with the greatest scepticism observing that the preliminary work and preparations for re-planting would take a considerable time whoever was responsible, and he suggested that in the light of the evidence before him the BPC had in the past been reasonable in granting the Banabans access to Ocean Island. He did not believe that if the Banabans were awarded damages the BPC would refuse them surveying facilities.

3. Mr Macdonald summed up this part of his argument by saying that specific performance was a peculiarly appropriate remedy in this case because of the difficulty of measuring in damages the nature of the re-planting and its benefits. He reiterated his earlier arguments that the Banabans had not delayed in pursuing their legal rights concerning re-planting and that they should not, therefore, be deprived of specific performance.

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4. Mr Macdonald then turned to the criticism that the Banabans had not sought to ensure a re-planting obligation in any mining agreements subsequent to the 1913 negotiations. He argued that in respect of the 1973 Tripartite Agreement the land on the North and the North-east of the Island had never been useful for growing trees and the remaining land was building land. Mr Justice Megarry seemed to consider this point very important. He remarked that the "congeniality aspect" was relevant even to the land in the North and North-east, and even more so to the building land. Mr Macdonald said there was nothing in the evidence to suggest the remotest chance that the BPC would have been prepared to enter into a re-planting convenant in 1973. His Lordship appeared to take the view that since the question had never been raised in the negotiations prior to the 1973 Agreement it was idle to rely on a lack of evidence to prove what the attitude of the BPC may or may not have been.

5. In respect of earlier negotiations Mr Macdonald said the 1931 acquisition was compulsory and subsequently the Banabans felt that they had lost the right of refusal to lease their lands. This, he said, was relevant to the absence of a re-planting obligation from the 1947 negotiations and this belief on the part of the Banabans could be substantiated from the evidence of Mr Rotan and other plaintiffs. Mr Justice Megarry suggested that there may be a distinction between the Banabans feeling they had lost the right "to say no" and a feeling that they had lost their right to ask for particular terms.

6. Mr Macdonald said that in the context of this particular set of submissions the Banabans had at all material times been negotiating from a position of great weakness. His Lordship pointed out that this did not prevent them from obtaining increases (in their revenues). Mr Macdonald argued that these were "largely to keep pace" (with inflation) which caused Mr Vinelott (Counsel for the Crown) to point out that this could hardly apply to the increases between 1931 and 1940 which was

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not an inflationary period.

7. Mr Macdonald then read out a draft Order which he had prepared in the light of Mr Brown-Wilkinson's requests the previous day for greater elucidation of what the Banabans wished to have done. This was put aside for further consideration by Mr Browne-Wilkinson who will deal with it during his right of reply on the question of the depth of soil required for re-planting.

8. Mr Macdonald then put forward four propositions concerning damages. These were:

(a) When damages are awarded in lieu of specific performance, under Lord Cairn's Act (which permits damages to be paid in lieu of specific performance), they must be a real substitute for the specific performance.

(b) Such damages are not necessarily based on the same measure of damages as for the Common Law.

(c) In many cases, the cost of doing the work has been held to be the real substitute for carrying out the obligation and it is so in the present case.

(d) It was within the contemplation of the parties to the 1913 Agreement and the subsequent Deeds that if the re-planting was not done (presumably by the BPC), they (i.e. the landowners) would have to do it themselves or get someone else to do it for them.

9. The rest of the day was taken up with an examination of authorities in support of these various propositions.

/In the absence of a successor to the present writer these daily reports are being discontinued and this is, therefore, the last report which will be distributed./

Pacific Dependent Territories Department
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