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

SUMMARY OF PROCEEDINGS FRIDAY, 28 NOVEMBER 1975

The day's proceedings began with the plaintiffs' counsel, Mr MacDonald, continuing technical submissions as regards specific performance, in particular on how any order should be worded so that it would cover the named plaintiffs and others not specifically named (this point arose because the Banabans have a system of joint ownership of land).

Mr MacDonald said that the work to be done was sufficiently defined in the contract, but if he was wrong damages would be available in lieu. He then summarised his submission on damages. If awarded they 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 $A32 million. There was no question of any percentage being awarded. 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. Mr MacDonald also said it would not be adequate to base damages on the cost of supplying coconuts in future by buying either a plantation in Fiji or elsewhere or a virgin island on which palms could be planted. 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.

Mr MacDonald concluded that he did not wish to make any criticism of the conduct of HMG over the past 70 years and he had not been instructed to do so. He referred to a point in the evidence where Mr Rotan had asked if he himself could put questions to the court and had been told he could only do so through his counsel. The question he wanted to ask was "Why has the BPC not done what it said it would?".

CROWN COUNSEL, MR VINELOTT

Mr Vinelott opened by referring to the pleadings and defining the terminology. The claim being made against the Crown was that the Governor, as exercising the power of the Crown in respect of Ocean Island, was bound to prescribe the trees and shrubs that should be planted. He did not wish to range over all the issues of the case where the Phosphate Commissioners were the prime defendants; nevertheless there were still a wide range of issues raised by the case relating to the Crown and of interest to the public. He gave a summary of the arguments he would expand later.

1. Question of Jurisdiction

i. The first issue raised under this heading was whether the court here could entertain a claim for a declaration that the Crown was under a contractual obligation to prescribe replanting (assuming there was such an obligation) when such a contract would have been entered into by the Crown in the performance of the administration of a Dependent Territory.

/Considering

Considering possible remedies, Mr Vinelott said that a petition of right would not have been available before the Crown Proceedings Act 1947 if the claim were being made for a breach of contract on the part of the Crown in right of a Colony or Protectorate Government; but the plaintiffs were not doing this. They said that the Crown was liable in the United Kingdom since the contract was entered into on the advice of Her Majesty's Government in the United Kingdom.

ii. Mr Vinelott said that the plaintiffs claimed to be entitled to enforce the A and C Deeds; to make this claim, they would have to show that, as against the Crown, they were entitled to enforce this obligation. They claimed the benefits of the Deeds [ie the replanting] on the ground that they were entitled to them as being annexed to the plots of land mentioned in the Deeds. In order to establish their right to the benefits annexed to the land, it was necessary to establish the title to the land itself. Since the Mozambique case, a court should not be called upon to decide such title to land outside the United Kingdom.

Novation

Mr Vinelott took the view that the Crown could not be said to be party to the contract between the Commissioners and the landowners, although the plaintiffs' counsel had argued that it was a tripartite rather than a bilateral contract. The Crown, in the Resident Commissioner, was there to approve the form of the deed and to specify the trees to be replanted in his capacity as a government official acting as an agent of the Colony Government, but not on behalf of Her Majesty's Government in the United Kingdom.

Returning to the 1913 Agreement, Mr Vinelott submitted that there was no ascertainable land to which the benefit of the covenant in the A and C Deeds could be annexed, since it was not clear exactly what plots of land were involved.

iii. On the question of the over-mining claim, Mr Vinelott said it was doubtful whether the court should be asked to decide on the question of over-mining because this would assume the establishment of some form of individual ownership of the phosphate. The definition of ownership of land on Ocean Island was not clear; particularly over the distinction between surface and undersurface rights (ie below surface minerals). The Colony 1928 Mining Ordinance, therefore, alone was used to define mineral rights in land. However, Mr Vinelott continued, the Judge was being asked to award damages on the basis of individual ownership of mining rights, and if this were so, there was a strong case that the court should observe the principle of the Mozambique case.

In reply to questions from the Judge, Mr Vinelott said he was not arguing the validity of the Court's jurisdiction, since this had already been done, but he was saying that it was in the public interest that the principles of this case should be strongly related to the Mozambique one.

On an intervention by Mr MacDonald, Mr Vinelott 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 Mining 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

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".

It would probably be unnecessary to return to this head.

2. Question of Construction

Mr Vinelott said that if the A and C Deeds were construed in the light of the surrounding circumstances as they appeared at the time, the inference must be:

i. The Resident Commissioner had discretion to choose, if any, the trees that should be planted.

ii. He was given this discretion because it was uncertain what, if any, useful trees or shrubs would grow.

iii. He was to prescribe the trees by reference to the state of the land and on the footing that there was no obligation to restore it to its original state.

These three propositions, he said, would remain good whether the view was taken that the Resident Commissioner was a party to and bound by a contract or acting as a government officer.

Furthermore, he said, since it was quite plain from attempts to replant that no useful trees or shrubs could be grown in the mined 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 revegetating itself with scrub plant.

Mr Vinelott pointed out that the reason for the failure of these experiments in replanting was due to the fact that the coral limestone on Ocean Island is dolomitised [ie it had become hardened by impermeable mineral deposits]. Had it been soft coral capable of holding water, as elsewhere in the Gilbert Islands, the experiments might have worked. This was what was expected at the time as there was no reason to believe that Ocean Island coral was different from that to be found elsewhere in the Colony.

3. Question of Equitable Relief

Mr Vinelott gave a background summary to his arguments. He pointed out that at the time of entering into the Covenants it was expected that the 250 acres would be worked out in 10-20 years, at the end of which the Government expected to decide on whether or not to stop the mining.

Also, in the ordinary way, the cost of replanting would have been added to the costs of mining by the Company.

Following the failure of the replanting attempts in 1913-1915, the Resident Commissioner, Mr Grimble, saw no point in including a replanting covenant in further leases of land and this was not done, nor was it asked for by the Banaban land holders.

/Mr Vinelott

Mr Vinelott expanded the point that the cost of replanting would have been included in the cost of mining. No provision at any time was made by the Company for replanting, and had it been it would probably have pushed up the price of the phosphate. The Banabans had accepted Royalty payments made on the basis that no provision had been made in the mining costs for replanting and never raised the question when doing so. Neither was replanting considered in the calculations of the distribution of the surplus made under the Wellington Agreement. In view of the general lack of relevant evidence, Mr Vinelott ultimately announced that he would re-frame this submission in due course.

After the luncheon break, Mr Vinelott raised a series of points concerning his analysis of the replanting project.

[Details of points 1-4 can be provided from the Treasury Solicitor's notes]

5. The original object of the replanting was to provide a source of food for the Banabans should it be decided to halt mining on Ocean Island. The Banabans would then have had the rest of Ocean Island plus what could be produced on the 250 acres for food cultivation. In fact, with hindsight, it could be seen that any decision to halt mining would have been a harsh one in the light of the 1915 drought and the fact that the Banabans were known to be the poorest people in the Pacific. The Colonial Office had been careful not to do anything that would prejudge the decision on the continuation of mining.

In the event the mining was continued, and the realisation of the impossibility of preserving land for replanting was one of the factors which ultimately led to the acquisition of Rabi Island where the Banabans agreed to stay.

When Mr Vinelott turned again to the question of the provision for replanting in the BPC's costs, the Judge raised several questions: how was it known that no provision had been made - were disclosed or undisclosed documents involved? Would new pleadings be involved? Mr Vinelott said he did not consider he was arguing outside the pleadings but said he would reconsider these issues. The Judge said he would treat this summary as provisional.

/Question

Question of Construction -- Detailed Arguments

Mr Vinelott defined in his terms the word "plant". He did not agree with Mr MacDonald's definition: it was not inherent in the meaning that what was planted would bear fruit eventually; to plant meant essentially to insert something in the ground. The expectation that what was planted would bear fruit arose not from the word "plant" itself but from the assumption that the action would be carried out with the intention of having sensible results.

Surrounding circumstances relevant to construction

1. It was believed by Ellis and others that coconuts would grow in the residual phosphate in the foot of the pits.

2. The belief had good grounds; coconuts grew elsewhere in the Gilberts on bare coral.

3. Before 1913 experiments in replanting had shown apparently successful results. It was unknown at the time that Ocean Island coral was dolomitised.