

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

SUMMARY OF PROCEEDINGS MONDAY, 1 DECEMBER 1975

Mr Vinelott continued his speech. He began by summarising the points he had made at the end of Friday afternoon.

Mr MacDonald had said earlier that the replanting scheme would have worked if the company had left 6 foot of residual phosphate in the pits as it had said it would. However, Mr Vinelott said, the Company had done what it said; instructions had been given to do everything possible to make the replanting a success. The scheme had failed because the rock was dolomitised.

Mr Vinelott expanded this point by reference to the evidence of the experts, Senator Walker, Dr Robinson, Mr Notholt, Professor Russell and Dr Childe. From this evidence was drawn the fact that the rock on Ocean Island was dolomitised, and therefore impervious to roots. Roots could in theory grow down through fissures in the rock, but this depended on there being water holding soil wedged in the fissures, and this was unlikely to happen in those that were very deep, as some of them are. In fact no-one had observed any trees growing in the fissures and only a few suitable fissures had been found.

Therefore, one would need considerably more than 6 foot of residual soil in which to grow the coconut trees, because their roots could not root in the limestone beneath as is possible on soft coral. Dr Robinson's estimate of 2-3,000 cubic foot of soil required for replanting would probably average a requirement of 12 cubic foot in each pit, based on the calculation of their being cone shaped rather than cylinder shaped.

Mr Vinelott then gave arguments for the construction of the phrase "whenever possible ..." in the 1913 agreement.

[Some of these missed as FCO representative not in court]

Mr Vinelott stressed that his primary submission was that the Resident Commissioner's obligation was a governmental one and not a legal one. Nor was it easy to see how the Resident Commissioner could bind his successor to a form of contractual obligation.

Mr Vinelott concluded the day by quoting at length from various documents in the agreed "bundles". Quoting from bundle 2 he showed that consideration had been given before 1913 to the possibility of flattening the land mined and of transferring soil from other parts of the Island, but these schemes were rejected as impracticable methods of carrying out the policy to replant. Nevertheless both the government and Company showed concern to see the replanting was properly done, and the attempts were carried out under their supervision.

Mr Vinelott referred the Judge to several documents in the period 1910-1915, being largely correspondence between the Colonial Office, the Resident Commissioner and the Phosphate Company, and records of meetings between representatives of all three, to show that in this equable and drought-free period, the Colonial Administration had made every possible effort to impress

on the Company the need to carry out the replanting obligation; and that the Company itself had tried its best to replant certain areas with food-bearing and other trees. For example, at a meeting between Albert Ellis and the High Commissioner in Suva in 1911 the latter had insisted that the Company should not cut down all the trees on the lands leased to them by the Banabans; they should plant any kind of tree that would grow in the mined parts, and they should leave sufficient phosphates at the base of the workings to enable the new trees to grow. In 1912, Ellis confirmed that some replanting had been successfully undertaken but it was too early to say whether the trees would bear fruit. In 1913 the Resident Commissioner, Eliot, again secured an undertaking from the Company that they would replant all worked out lands although they could not guarantee that coconuts would eventually be produced. Eliot later wrote to Ellis confirming that replanting (mainly with coconuts) should go ahead quickly by means of establishing nurseries initially and by leaving more phosphate at the base of the workings although he conceded that because of the state of the terrain some of the replanting might eventually prove to be a waste of time. Further correspondence in 1914 and 1915 between the Resident Commissioner, the Company and the Colonial Office, made it plain that all concerned were keen to make a success of the replanting exercise, although it was recognised that given the number of years for a new coconut tree to bear fruit the scheme would essentially be experimental for several years.

Other points of interest to emerge during Mr Vinelott's coverage of the replanting operation were that as early as 1910 the subject of a possible Trust Fund based on contributions by the Company, for the "permanent" benefit (i.e. having in view the possible purchase of another island to which the natives might in future be transferred) of the Banabans was raised in discussions between the Colonial Office and Lord Stanmore, Chairman of the Company. This led to firm statements from the Colonial Office during the ensuing two years to the effect that there would be no question of HMG agreeing to the removal of the Banabans without their full consent; the rights of considerable numbers of Banabans to live on Ocean Island had to be adequately safe-guarded. The Office also made it plain to the Company that on the complex question of earlier land sales and land leases, sales of land as such were absolutely invalid, and leases would not be validated until the Resident Commissioner had been satisfied that they were not manifestly to the disadvantage of the natives nor contrary to sound public policy.