

ROTAN TITO & OTHERS v. SIR ALEXANDER WADDELL & OTHERS
(RE-PLANTING ACTION) SUMMARY OF PROCEEDINGS
MONDAY, 27 OCTOBER 1975.

1. Mr Macdonald (Counsel for the Banabans) began his address by pointing out that the Banabans' consent to the mining of Ocean Island had been obtained in two stages. There was a general agreement in 1913 which included the phrase "re-planting whenever possible", and the plaintiffs would argue that that obligation was global in operation, i.e. it extended across the 250 acres covered by the Agreement and all other relevant areas. Subsequently, the Pacific Islands Company entered into 297 separate obligations under the A & C Deeds involving 186 acres. In these cases Mr Macdonald argued the Company had an unqualified obligation in so far as the words "whenever possible" do not appear. He went on to say that the Company entered into the 1913 Agreement and the A & C Deeds, with its eyes wide open, and with experience of a number of re-plant experiments which had been conducted since the earliest days. They did not however appreciate the extent of the obligations which they had undertaken. Neither the Company nor the BPC had re-planted and the plaintiffs therefore demanded either the specific performance of the re-planting or damages in lieu.

2. For the convenience of the Court Mr Macdonald then set out the order in which he proposed to tackle the various aspects of this subject as follows:-

- (1) What does "re-plant" mean in the 1913 Agreement and A & C Deeds in the light of the admissible facts?
- (2) Can it be done?
- (3) Has the 1913 Agreement been superseded by the A & C Deeds, or do they both subsist? (The plaintiffs claim that they do both subsist.)
- (4) The 1913 Agreement:
 - (a) To what land the obligation applies.
 - (b) The number of trees to be planted under that obligation (the plaintiffs claim that this should be by reference to what was there before).

- (c) What is the meaning to be attached to the phrase "whenever possible"?
- (5) The A & C Deeds:
- (a) The plot by plot obligation.
 - (b)
 - (c) What trees existed before and their approximate extent?
 - (d) The Resident Commissioner's function to specify types of trees.
 - (e) Why the Court can and should properly undertake the rôle which the Resident Commissioner cannot if, as the defendants claim, no longer exists.
- (6) When the obligation to re-plant arises:
- (a) In connection with the 1913 Agreement.
 - (b) In connection with the A & C Deeds.
- (7) Despite Mr McCrindle's submission that the plaintiffs and defendants are not parties to the 1913 Agreement and the A & C Deeds, the plaintiffs claim that they are still bound by those Agreements in a number of ways.
- (8) The position of the Crown:
- (a) Under 1947 Crown Proceedings Act.
 - (b) Apart from that Act.
- (9) The question, raised by Mr McCrindle, as to whether the present Court is the proper jurisdiction.
- (10) Can there be specific performance?
- (a) The engineering problems and the difficulties of importing soil; (b) the level of damages which would be appropriate, which the plaintiffs claim should be either:
 - (i) The cost of doing the work; or
 - (ii) should be related to the fact that had re-planting been undertaken the Banabans could have successfully maintained a settlement on Ocean Island and should be compensated accordingly.

- (11) Questions relating to the red land.
- (12) Questions relating to the purple land.
- (13) Questions relating to the yellow land.
- (14) Any other matters.

3. Mr Macdonald then began his argument by consideration of the meaning of the word "re-plant" in the context of the 1913 Agreement. He claimed that it implied setting the nut or seed in a sufficient planting medium to take root and grow, having the necessary access to enable planting (and also harvesting) to take place and providing sufficient care of young plants until they had become established. (It is not easy to define a period for this, but with coconuts it would be at least several years.) Re-planting he said meant more than just inserting nuts in bare coral rock and leaving them. He then cited evidence to show that the soil or phosphate dirt of Ocean Island "if not dug down too deep" (as in the old version) would support coconuts and pandanus very well. He argued that the need to leave the soil in which the plants could grow was well appreciated in the early days of phosphate mining, and the ways in which this could be achieved were frequently discussed. He argued that the obligation to look after the young plants was derived from the "proper construction" of the term "re-plant".

4. Mr Macdonald then considered the question "can it be done": at this point he gave a further list of sub-headings which he intended to consider in turn. They were:-

- (1) Climate and rainfall.
- (2) Pandanus and almonds.
- (3) Characteristics of the coconut palm.
- (4) What the experts say should be done.
- (5) Mr MacRoberts 1964 re-planting.
- (6) The general vegetation pattern.
- (7) The early re-planting.
- (8) The 1940 re-planting.
- (9) The 1954 re-planting.
- (10) Why the 1940 survivors are still alive.

(11) Senator Walker's evidence.

By way of preamble Mr Macdonald said that those experts who had seen the Island (Dr Robinson, Senator Walker and Mr Northolt) saw it at the end of a long period of drought, and at least one of these gentlemen had admitted that their opinion was probably influenced by the condition in which they saw the island. Mr Macdonald then cited evidence to show that although the climate of Ocean Island could adversely affect the yield of coconut trees and other crops; it did not preclude their cultivation, and that human subsistence was quite possible. He went on to demonstrate that pandanus and almond trees grow easily and in abundance on Ocean Island despite the lack of soil, but that these trees need to be planted in order to bear satisfactory fruit, this he said had not been done; it should have been done and it was obviously possible. At this point Mr Browne-Wilkinson intervened to ask if the BPC obligations could be fulfilled simply by planting almond and pandanus trees. If that was the case, he said, then "let us do it". Mr Macdonald promised that he would develop the point at length in due course. He then discussed the characteristics of the coconut palm and argued that given an adequate planting medium coconuts would grow and bear fruit on Ocean Island, and that given adequate care and attention, spectacular results could be achieved. This was Mr Macdonald's final point before the Court rose.

(It is expected that Mr Macdonald will continue to address the Court for the next two weeks.)

Pacific Dependent Territories Department
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