

ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)
SUMMARY OF PROCEEDINGS, TUESDAY, 11 NOVEMBER 1975.

1. Mr Macdonald (Counsel for the Banabans) continued his examination of the various submissions he had made the previous day concerning the position of the Crown in the action before the Court.
2. With regard to topic 'M' on his list of submissions (i.e. that the Crown could have and still could discharge its obligations because it has the ultimate control), Mr Macdonald referred to the Gilbert and Ellice Islands Order, 1974 (i.e. the present Constitution) to show that under section 20(2) the Governor performs the functions of his office, "including those he exercises in his discretion, according to such instructions as may be given to him by Her Majesty". If the plaintiffs submission was correct that the Governor had replaced the Resident Commissioner then the functions to discharge the obligations imposed on the Resident Commissioner were ones which fell within his discretion. Mr Justice Megarry pointed out that under section 27(1)(a) discretionary powers were limited to those "conferred upon him by this Order", and asked what in the Order conferred the sort of discretionary power to which Mr Macdonald was referring. Mr Macdonald agreed that there was nothing in the Order which conferred any such power and said that he would instead rely on section 27(2)(a) which said that the Governor would not be required to consult the Council of Ministers in cases where "the service of Her Majesty would sustain material prejudice thereby". This provision, he said, applied equally to the 1970 Constitution (section 26(2)(a)).
3. Mr Macdonald contested the submissions earlier made by Mr LeQuesne that the Colony had possessed a separate Government since 1893. He argued that the limited functions of the local executive and their responsibility to the Colonial Office in London made it quite clear that the Colony Government could not be regarded as in any way independent. Mr Vinelott (Counsel for the Crown) intervened to point out that Mr LeQuesne had
/argued

argued that the Colony Government was distinct from, rather than independent from, the Government in the United Kingdom.

Mr Macdonald continued by saying that the obligations in question had been entered into as a result of a decision taken by the Secretary of State in London and that at all material times the UK Government could and still could ensure that these obligations were fulfilled by instructing the Resident Commissioner/Governor accordingly. Mr Macdonald concluded that section 40 of the Crown Proceedings Act of 1947 was therefore not relevant to this case.

4. Mr Macdonald then cited the case of Dyson versus the Attorney-General of 1911 to show that the Courts had power to make a declaratory judgment against the Attorney-General and, he said, it had been accepted by Mr LeQuesne that this power had not been altered by the 1947 Crown Proceedings Act. He then reiterated his submissions made under topic (o) and said that Mr LeQuesne's case on this point had been based on the situation in self-governing Dominions rather than Colonies. The plaintiffs maintained that as the Crown in the right of the United Kingdom and Colonies is one and indivisible then the Attorney-General of a Colony could not sue the Attorney-General of the United Kingdom. Mr Justice Megarry considered this "very interesting". Mr Vinelott intervened to say that the power of the Court to make a declaratory judgment depended on whether the case was in the proper jurisdiction. It was wrong in principle, he said, for the Court to make a declaration concerning land ^{not} title in Timbaktu Mr Macdonald said that the plaintiffs were/asking the Court to legislate on the legality of Acts of the Colony executive but to make a declaration which would be binding on the United Kingdom Government. Mr Justice Megarry observed that the Attorney-General was being sued in the correct Court; the question was whether it should not be the Attorney-General of the Gilbert and Ellice Islands who ought to be sued.

5. On topic (p) Mr Macdonald had nothing to add, but Mr Justice Megarry sought to clarify the initial submission by establishing that the question was really one of construction (i.e. the term

"Resident Commissioner" was not to be construed as someone have that precise title, but as anyone performing the sort of functions which the title implied. Mr Macdonald concurred with this.

6. Mr Macdonald then turned to the question of land titles which had been deferred from the previous Friday. Mr Browne-Wilkinson (Counsel for the BPC) rose to say that the defendants accepted that there was prima facie evidence for Mr Rotan Tito's ownership of his plots. He then read out a list of plots in respect of which the defendants acknowledge that there is prima facie evidence that the plaintiffs listed own shares in those plots but, he said, the defendants do not accept that there is prima facie evidence for the size or content of those shares. The remainder of the day was taken up with Mr Macdonald proving title to ownership of the various plots.

Pacific Dependent Territories Department
Foreign and Commonwealth Office