

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

SUMMARY OF PROCEEDINGS WEDNESDAY, 3 DECEMBER 1975

Mr Vinelott continued to expand his arguments under Head 1 of the jurisdiction question. He argued at length and in detail on the finer points of the application of the Crown Proceedings Act and judgments given in previous cases, in particular the Dyson case which had already been cited in the court action. From this he made the following points:

- i. If a declaration was being sought on an issue relating to title or trespass that could not be enforced in the United Kingdom, then the court would have no jurisdiction.
- ii. If the contract was not entered into by the Crown in right of the UK Government, the court would not have jurisdiction to make a declaration on the principles of the Dyson case. Even if the court did have jurisdiction, it ought not to exercise it because:
 - a. the court would not have jurisdiction to enforce the declaration;
 - b. the persons who would be affected by the order, that is those through whom the Crown acts in the Colony, in particular the Governor, were not before the court;
 - c. constitutionally the Governor would be required to consult with the local Council of Ministers on a matter of this kind first.

Mr Vinelott considered the question of whether the Crown could be said to have entered a contract through the Resident Commissioner in right of Her Majesty's Government in the UK. Having again considered previous cases and Mr MacDonald's arguments, he contended that, given a sufficient degree of responsibility - particularly plenary executive, legislative and judicial powers - a Colony Government was in law to be considered a distinct entity from the United Kingdom Government. Thus, someone could act as an official of a Colony Government, and in doing so he would not be acting as an agent of the United Kingdom, as was claimed by the plaintiffs. Mr Vinelott claimed that the Resident Commissioner was acting under the instructions of the Colony Government distinct from the United Kingdom Government.

Head 2 The issue raised under this head was that if one were to rely upon a right which is annexed to land, such as the benefit of replanting under the covenant between the Banabans and the Company, then, if the court were to enforce that right it must, and could only do so, by deciding first who was the owner of the land. However, in this case, the court had no jurisdiction, following the Mozambique case, to establish ownership to land. The Judge would have to bear this in mind.

Mr Vinelott turned to novation. The declaration sought by the plaintiffs against the Crown assumed that novation would be to a tripartite contract, that is one which included the Crown. (Mr Vinelott had already argued that the Crown could not be said to be party to the contracts between the Company and the Banabans.)

If it was considered that the Crown was party to the contracts problems of novation arose. It could not be said, as it would have to be, that by his inactivity with regard to the replanting the Resident Commissioner's successor assumed the obligations of the 1915 Agreement and the deeds.

Head 3 Quoting from documentary evidence, Mr Vinelott raised the question of ownership of mineral rights as opposed to ownership of surface rights and showed that the Government had consistently taken the view that following a native distinction rights to minerals below the surface of the land were communal rather than individual. This would have some bearing on the case.

Mr MacDonald said there was nothing in the pleadings or elsewhere to show that ownership of minerals was other than individual and he reserved the right, if necessary, to amend the pleadings. Mr Vinelott said he did not intend to make this more of an issue than that it drew a parallel to the relevance of the Mozambique case to this one.

QUESTIONS OF LACHES AND ACQUIESCENCE

After referring to paragraphs 32 and 33 of the pleadings (page 66), Mr Vinelott expanded his arguments on these two points. (Laches refer to a delay in asserting rights such as to make enforcement of the covenant entered into inequitable; acquiescence refers to a delay such as to mean the right no longer holds.) He said that the conduct of the plaintiffs and their predecessors was such that they could be regarded as having waived their rights under the contract for various reasons:

- i. The Banabans knew that the only replanting attempted was in mined out pits. Some doubted, like Mr Rotan, that this form of planting would be fruitful, and after the 1915/16 drought it was plain the replanting had failed anyway. This view seems to have been accepted on both the Banaban and Company's sides; it was not until 1971 that there was a suggestion on the Banaban side that the BPC should do more.
In answer to questions, Mr Vinelott said that 1968 references to rehabilitation in fact bore out his point. The suggestion to rehabilitate Ocean Island was a moral one made in the light of modern developments in other open-cast mining areas and on the implied understanding that there was no outstanding legal obligation to do more replanting.
- ii. Prior to 1930 some Banabans may have believed the Company had an obligation limiting the amount of soil that could be mined, but after then no-one should have remained under this misconception.
- iii. Replanting was not mentioned by the Banabans in the 1928-31 land transactions, nor was it mentioned in 1947 over the Royalty negotiations.
- iv. Since the same Royalty rate was paid to the Banabans whether their land deeds mentioned replanting or not, it could be said that the landowners accepted there was no further liability to replant.

- v. Once the Banabans had agreed (by popular vote) to remain on Rabi Island, the reasons that underlay the original replanting obligation (to provide for the Banabans' future after the end of mining) no longer held; no one on the side of the Government thought it still necessary to contemplate prescribing replanting.

All these points, Mr Vinelott said, reinforced the Crown's plea of acquiescence (ie that the Banabans had done nothing about their present claim for so long as to have lost any right to the replanting benefit).