Professor Maude Canberra.

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

SUMMARY OF PROCEEDINGS THURSDAY, 27 NOVEMBER 1975

(The court did not sit on 21 November and the days of 24, 25 and 26 November were taken up by plaintiffs' counsel in detailed technical submissions concerning the "purple" and "red" lands and the question of whether the court has jurisdiction to try a case involving title to land outside England and Wales.)

1. The day began with the conclusion of the legal submissions started yesterday concerning the court's jurisdiction.

2. Mr MacDonald, the plaintiffs' counsel, then turned to his final summing up.

He submitted that the plaintiffs were seeking specific performance of clause 12a of the 1913 Agreement and of the replanting covenants of the A and C deeds. Furthermore the company had entered its obligations with its eyes wide open: it knew about the nature of the terrain and had had experience of drought in 1910 and of its own replanting experiments. It had been conceded that the replanting sought in the proceedings had not been done.

3. He continued with a summary of legal points already made in earlier summing up concerning the 1913 Agreement and the A and C deeds. The term "replanting" meant to set coconuts in the ground so that they would take root, grow and bear fruit. Sufficient planting medium should be provided to enable this to be done. He quoted from evidence given on the possibility of being able to replant at all and concluded that trees would have grown if the company had done what it said it would do.

4. Of relevance to the Crown, Mr MacDonald said that the only function of the Resident Commissioner on Ocean Island in the context of the replanting case was to specify the types of trees to be planted: this obligation could today be discharged by the Governor of the Gilbert Islands and the United Kingdom Government could direct him to do so. Mr MacDonald said that, if this submission was wrong, the court could prescribe the types of trees.

5. Mr MacDonald made more technical submissions, particularly as regards the title to the various plots of land: he also reiterated his view expressed earlier that the British Phosphate Commissioners were trustees in right of the governments of UK, Australia and New Zealand. Mr MacDonald spoke on the position of the Crown. He submitted that the Crown in the United Kingdom and the Dependent Territories is one and indivisible and reference in his argument to the Crown would have this meaning unless qualified by the phrase "in respect of rights in ...". Furthermore the fourth defendant* is the proper party if the Crown is sued in the courts of England and Wales. The court has jurisdiction under the Crown Proceedings Act 1947 and this jurisdiction would not be excluded by section 40 of that Act. He also said that the suggested liability arose in respect of Her Majesty's Government in the United Kingdom and that the words "in respect of" in section 40(2)(b) should be given their widest construction.

* i.e. the Attorney-General

/Mr MacDonald

Mr MacDonald said that the Crown's obligation under the A and C deeds stems from an obligation entered into by the Crown on the advice of the UK Government. At all times the Crown, acting on the advice of the UK Government, could and can discharge the obligation because it has ultimate control. Quoting the case of Attorney General v Dyson (1911), he said that the court has jurisdiction to make a declaration against the Crown. The court here should make such an order because (a) the Crown, acting on the advice of the UK Government could carry it out (b) the plaintiffs have sufficient interest in the declaratory relief sought, and (c) it is not unreasonable for the plaintiffs to sue in the United Kingdom because the UK Government has ultimate control.

He continued that on the construction of the A and C deeds the expression "Resident Commissioner" should be construed to include the person for the time being exercising on behalf of the Crown powers in respect of Ocean Island. Furthermore, the Court should avoid a construction which would suggest that the Crown had intended to avoid its existing contractual obligations by changing the office of the person whose power it was to discharge the obligation on its behalf. (This refers to the change from the Resident Commissioner to the Governor.) Mr MacDonald disclaimed any suggestion that the Crown had possessed such an intention and described this as "untenable".

6. In the course of further summaries of legal submissions Mr MacDonald mentioned the question of soil. He said that there is nothing in the Gilberts 1963 Customs Ordinance which makes the importation of soil illegal. The 1963 Ordinance introduced the distinction between prohibited and restricted goods and on the proper construction of the Ordinance restricted goods are those that could be imported with the consent of the Resident Commissioner, now the Governor. He submitted that the Governor would be likely to allow the soil in because he could be satisfied that the soil had not been used for growing such as coconuts, bananas and sugar, and that it was reasonably free from weeds and had not been cultivated for a period of 5 years previously. He said that in striking a balance between the possible harmful effects to the Colony and the harmful effects to Ocean Island itself of importing soil against the advantages of having the replanting done, the balance would fall in favour of allowing the soil in.

7. The rest of the day was spent in discussion between the judge and counsel about the exact form of the order of specific performance against the BPC.