Spear

ROTAN TITO AND OTHERS v. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)
SUMMARY OF PROCEEDINGS, FRIDAY, 14TH NOVEMBER 1975.

1. The day was taken up with submissions by Mr Macdonald (Counsel for the Banabans) on the possibility of importing soil into Ocean Island so that re-planting of the mined out areas could be carried out. Having ascertained that the 1963 Ordinance had not been superseded by any subsequent legislation, he argued that on his interpretation of that Ordinance that was no absolute prohibition on the importation of soil into Ocean Island. Although the plaintiffs recognized the difficulties inherent in any such scheme, the matter was one for the discretion of whosoever had taken over the functions of the Resident Commissioner in respect of the Ordinance.

2. Mr Macdonald said that a very valid comparison could be made between Ocean Island and Nauru and referred to the evidence of Mr Ken Walker to the effect that soil had been imported into Nauru from Australia. He also cited the evidence of Mr Bryden that Gilbert and Ellice Islands Ministers had been "in touch with the United Nations about the future of Ocean Island" and to the evidence of the Reverend Tebuke Rotan concerning the same discussions. Mr Macdonald suggested that in the light of such high level consultations the successor to the Resident Commissioner would be more likely to acquiesce in the importation of soil into Ocean Island. Mr Justice Megarry commented that there was nothing to show that the GEIC Government would or would not take such an attitude.

3. Mr Macdonald said, that in the light of all the evidence which had been put before the Court, he believed that the successor to the Resident Commissioner, having weighed all the arguments, would consider it reasonable to exercise his discretion by allowing soil to be imported into Ocean Island. He based this belief largely on the evidence that also in the light of discussions which his clients had had with the Gilbertese Government. Mr Vinelott (Counsel for the Crown)

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intervened to point out that, whatever discussions had taken place, the Court had heard no evidence on the matter and it was, therefore, improper for Counsel to introduce it into the argument. Mr Justice Megarry said that "diplomatically" he had not heard Mr Macdonald's last few words.

4. Mr Macdonald then cited legal authorities to show that in cases where the Court felt that it could not prescribe specific performance as a remedy for breach of contract because it was not entirely clear from the contract what ought to be done, the Court could still award damages. The Courts, he said, were more ready to decree specific performance in cases where there had been part performance than in other cases. This was very important in the present case where the defendents and their predecessors had had the use of the land for 62 years; the Crown as chief beneficiary had had the use of it since 1920; the landowners had received the only benefit to which they were entitled under the A and C Deeds, namely, payment for surface rights, and therefore the re-planting obligation was the only thing which remained to be done.

5. Mr Macdonald went on to say that the degree of definition required in cases of specific performance has fluctuated. It is not necessary, he said, for a contract to lay down detailed plans and specifications with regard to an obligation therein. It is sufficient that the general nature and scope of the work should be explained.

6. The case was adjourned until Monday, 17 November 1975.

Pacific Dependent Territories Department
Foreign and Commonwealth Office