

ROTAN TITO AND OTHERS V. SIR ALEXANDER WADDELL AND OTHERS
(RE-PLANTING ACTION)

SUMMARY OF PROCEEDINGS, MONDAY, 10 NOVEMBER 1975.

1. Mr Macdonald (Counsel for the Banabans) began by taking up the objection raised by Mr Browne-Wilkinson the previous day which implied that certain of Mr Macdonald's submissions should not be allowed in the light of the pleadings. After a lengthy and technical discussion between both Counsel and Mr Justice Megarry, his Lordship decided to permit Mr Macdonald to continue his submissions under this head but warned that he might subsequently conclude that these ought not to be allowed.

2. Mr Macdonald then invited his Lordship to consider the position of the Crown. He began by making a number of submissions which he listed as follows:-

(a) (i) The Crown in the UK and the dependent territories is one and indivisible.

(ii) The word "realm" includes the Colonies but does not include Protectorates, however, in the case of the latter it is the same one and indivisible Crown of the United Kingdom and Dependent Territories which is the Protector.

(iii) This doctrine of the indivisibility of the Crown in respect of the United Kingdom and Dependent Territories has survived the emergence of separate Crowns ~~from~~^{for} independent members of the Commonwealth (the plaintiffs accept that there are separate Crowns for each independent territory).

(b) The defendant in this case is the Crown, i.e. the one and indivisible Crown of the United Kingdom and Dependent Territories. The Attorney General appears on behalf of the Crown and not on behalf of himself. He is named as defendant because the plaintiffs have chosen to sue the indivisible Crown in the English Courts.

- (c) The case pleaded and the relief sought relates to obligations arising in respect of the Crown in the right of the United Kingdom Government.
- (d) If the Crown was sued in the right of the Gilbert Islands Government in this country the defendant would still be the Crown, and in this country the Crown would still be the fourth defendant, not the Attorney General for the Gilberts.
- (e) The present Court was the correct Court, and jurisdiction could be proved under the Crown Proceedings Act of 1947, or on the authority of a celebrated legal action of 1911. (*Dyson v. The A.G.*)
- (f) Under the 1947 Act at distinction can be drawn between the liabilities of the Crown in the right of the United Kingdom Government and in the right of other Governments.
- (g) The plaintiffs accepted that although there was only one Crown, the Government of the Colony could be regarded as distinct from the Government of the United Kingdom.
- (h) A Colony Government could only be considered distinct if
- (i) it had a representative Legislature in the technical sense of at least half of one House being elected rather than nominated, or
 - (ii) from the setting up of Courts, a Legislative Council or other such bodies.

An important factor in ~~the~~ determining whether or not a Colony Government was distinct was whether or not there was local Ministerial responsibility to either a Representative Legislature or to a Legislative Council, but not just to the Governor. In practical terms,

/said

said Mr Macdonald, he was thinking of a situation in which local Government was being carried on, at least in part, by local Ministers, rather than by civil servants (at least in part, allows for the possession of reserved powers by the Governor in many colonial situations).

- (i) The plaintiffs accepted that from the implementation of the Gilbert and Ellice Islands Order of 1970 there had been a separate Colony Government. They did not accept that there had been a distinct Colony Government before that date. (Mr MeQuesne had already submitted that there had been a separate Colony Government since 1893 in the shape of the High Commission for the Western Pacific).
- (j) Under the 1947 Crown Proceedings Act the only question to be determined was whether the liability arose other than in the respect of Her Majesty's Government in the United Kingdom. Further, if the liability arose in respect of the United Kingdom Government alone, or in respect of the United Kingdom Government and the Colony Government, then there was a jurisdiction under the Act and the case did not fall under Section 40.
- (k) The words "in respect of" (in Section 40 of the Crown Proceedings Act) had the widest possible meaning of any words in attempting to convey some link or relationship between two concepts.
- (l) The breach of obligation in question was the failure to prescribe trees under the A and C Deeds, and that stemmed from an obligation which had been ~~enforced~~ into by the Crown on the advice of the United Kingdom Government. This by itself might be sufficient to show the necessary connection with the United Kingdom Government.

- (m) At all times the Crown, acting on the advice of the United Kingdom Government, could have and still could discharge the obligations because it has the ultimate control (i.e. the Crown still has the power to direct the Colony Government to re-plant).
- (n) If the previous submission was not true then the Court had the power to make a declaration in favour of the plaintiffs and the Court's jurisdiction to make such a declaration had not been affected by the 1947 Act.
- (o) The plaintiffs submitted that the Court should make the necessary declaration because
- (i) the Crown acting on the advice of the United Kingdom Government can carry it out;
 - (ii) the plaintiffs have a sufficient interest in the declaratory relief sought;
 - (iii) a plaintiff who could sue either in the United Kingdom High Court or in the High Court of the Western Pacific may reasonably decide to sue in the United Kingdom Courts when the United Kingdom Government has ultimate control.
- (p) It was no answer to say that
- (i) the Resident Commissioner on Ocean Island no longer existed, or
 - (ii) the Resident Commissioner had been replaced under the Gilbert and Ellice Islands (Amendment) Order of 1971 (para.5, sub-paragraph (3)) by a Governor. The plaintiffs believed that the Courts would be reluctant to construe that this Order was meant to terminate existing contractual obligations of

the Crown unless the clearest and most unambiguous words had been used;

(iii) the answer to this problem lay in his Lordship giving the widest possible construction to the wording of the A and C Deeds, and construing the Resident Commissioner on Ocean Island as the person with the delegated powers of the Crown in respect of Ocean Island.

3. Mr Macdonald then considered each of these topics in detail referring to the documentary evidence or citing legal authorities in support of the submissions already made, though in several cases he had nothing to add to his initial statement. He was discussing topic 'L' when the Court rose.

Pacific Dependent Territories Department
Foreign and Commonwealth Office