

IN THE PRIVY COUNCIL

No. 8 of 1977

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME
COURT OF QUEENSLAND

B E T W E E N:

THE CORPORATION OF THE DIRECTOR OF
ABORIGINAL AND ISLANDERS ADVANCEMENT

Appellant
(Defendant)

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- and -

DONALD PEINKINNA, GERALDINE KAWANGKA,
FRED KERINDUN, BRUCE YUNGA PORTA,
JOHN KOOWARTA

Respondents
(Plaintiffs)

CASE FOR THE RESPONDENTS

Record

1. This Case is divided into Parts as follows:-

- PART A - CIRCUMSTANCES IN WHICH APPEAL ARISES
(paragraphs 2-22)
- 20 PART B - REASONS FOR JUDGMENT OF THE MEMBERS OF
THE FULL COURT (paragraphs 23-26)
- PART C - RESPONDENTS' SUBMISSIONS (paragraphs 27-
34)
- PART D - REASONS (paragraph 35)

PART A - CIRCUMSTANCES IN WHICH APPEAL
ARISES

- p.54
pp.3-8
pp.9-10
pp.55-56
pp.57-58
2. This is an appeal from an order of the Full Court of the Supreme Court of Queensland (Lucas, Douglas, Kneipp JJ.) delivered on 8th October 1976, whereby the Full Court by a majority (Lucas, Douglas J.J., Kneipp J. dissenting) overruled the demurrer of the appellant (defendant) to the Statement of Claim of the respondents (plaintiffs) and ordered that the appellant pay to the respondents their costs of the demurrer to be taxed. By order made by consent of the respondents and the appellant on 21st October 1976 the Full Court ordered that the appellants have leave to amend their Statement of Claim in certain verbal respects not material to the substance of this appeal. 10
3. By order made on 22nd October 1976 the Full Court gave to the appellant final leave to appeal to the Judicial Committee of Her Majesty in Council. 20
4. The principal questions which are involved in the appeal are the following matters of law:-
- (a) whether the appellant, in entering into an Agreement dated 4th December 1975 to permit mining on the Reserve at Aurukun on which the plaintiffs reside, acted (in the circumstances alleged in the Statement of Claim) in breach of his duty - 30
- (i) as trustee of the Reserve;
- (ii) as trustee of the power conferred on him by section 30 of the "Aborigines Act 1971-1975";
- (b) whether the enactment of the "Aurukun Associates Agreement Act 1975", incorporating a Schedule containing further Schedules (including a Third Schedule which comprises a copy of the terms of the proposed Agreement) had or has the effect - 40
- (i) of validating any such breach of duty of the appellant; or
- (ii) of relieving the appellant of the

consequences of any such breach of duty;

(c) whether it is a breach of the duty of the appellant as trustee to pay into a fund described as the Aborigines Welfare Fund moneys representing profits derived pursuant to the said Agreement from a mining venture to be carried on in the Reserve;

10 (d) whether the plaintiffs, on their own behalf, or on behalf of themselves and all other Aborigines resident on the Reserve, have sufficient interest or standing to institute these proceedings or to claim the relief sought in the action.

20 5. By an Order in Council made in 1921 certain defined areas of Crown land situated in the Cape York Peninsula forming part of the State of Queensland were temporarily reserved and set apart for the purpose of a Reserve "for the use of the Aboriginal Inhabitants of the State, Cape Keerweer." By a further Order in Council in 1958 the said land was permanently reserved and set apart for the purpose of a Reserve "for the benefit of the Aboriginal Inhabitants of the State, Aurukun", and was placed under the control of the Director of Native Affairs (now the appellant) "as trustee". Subsequent Orders in Council have amended the area of the said Reserve.

p.3. 1.27.

p.4. 1.3

p.4. 11.4-10

p.4. 11.11-24

40 6. The said Orders in Council were made pursuant to the power conferred in that behalf by "The Land Act of 1910" (as from time to time amended) which, in section 180(1), authorised the Governor in Council to reserve and set apart Crown Land (as defined in section 4 of that Act) required for public purposes. By section 4 of that Act, "public purposes" was defined to include "Aboriginal reserves".

p.11. 11.20-23.

7. "The Land Act of 1910" was repealed by "the Land Act 1962-1975" ; but by section 4(15) (a) thereof all Orders in Council and all appointments made, including appointments of trustees of reserves, under the repealed Act as amended, and in force and subsisting at the commencement of "The Land Act of 1962", continued to be of full force and effect and were deemed

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to have been made under the analogous provisions of "The Land Act of 1962". Hence, the Orders in Council constituting the Aurukun Reserve are now deemed to have been made under the "Land Act 1962 - 1975". The provisions of that Act which are analogous with -

p.25. 11.8-14.

(a) section 180(1) of "The Land Act of 1910" are the provisions of section 334(1) of the "Land Act 1962 - 1975";

p.25. 11.15-16.

(b) section 4 of "The Land Act of 1910" are the provisions of section 5 of the "Land Act 1962 - 1975".

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8. By the Order in Council made in 1958 the Aurukun Reserve (hereinafter referred to as "the Reserve") was placed under the control of the Director of Native Affairs. By a series of legislative enactments concluding with the "Aborigines Act 1971 - 1975" the holder of the office of the Director was constituted a corporation sole under the name "The Corporation of The Director of Aboriginal and Islanders Advancement". Hence, the Reserve is now under the control of the corporation sole constituted by the present appellant under the said name as trustee "for the benefit of the Aboriginal Inhabitants of the State, Aurukun".

p.3. 11.21-26
p.4. 11.25-28

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9. The powers and functions of the appellant with respect to the Reserve are regulated :-

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(a) in part by the "Land Act 1962 - 1975" already mentioned (hereinafter referred to as the "Land Act"), and

(b) in part by the "Aborigines Act 1971 - 1975" (herein referred to as "the Act of 1971").

Section 341(1) of the "Land Act" provides that -

p.25. 11.36-44

"All moneys received for or on behalf of the trust by the trustees shall be paid by the trustees into a bank, to the credit of a general or separate trust account, until such moneys are applied by the trustees to the purposes for which they have been received."

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10. By the Act of 1971 it is provided in section 29, so far as material, that - pp.4,22,23

"(1) Notwithstanding the provisions of The Mining Acts 1898 to 1967 or of any other Act relating to mining -

(a) a lease that would entitle the lessee to a mining tenement situated on a reserve shall not be granted unless the trustee of the reserve or the Minister has approved;

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.....

(3) The trustee of a reserve to whom application is made may grant or refuse or permit and at any time may revoke a permit granted by him."

The Reserve at Aurukun is a "reserve" within the meaning of the Act of 1971 and of section 29 thereof. p.4. 1.42

11. Section 30 of the Act of 1971 further provides so far as material that -

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"(1) The trustee of a reserve to whom application for a permit is made under section 29 of this Act or the Minister where such an application is made to him may, as a condition precedent to his granting a permit or otherwise in connexion with his granting a permit, enter into and require the applicant and any other person to enter into such agreement as the trustee, or as the case may be, the Minister thinks fit. p.23. 1-23

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(2) An agreement shall provide for such terms and conditions as the parties thereto agree upon, and may include provision for the participation by the trustee or any other persons in the profits of the mining venture or ventures to be carried on in the reserve, if the permit is granted, for the benefit of Aborigines resident on the reserve, or other Aborigines as the agreement provides."

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By section 5 of the Act of 1971 the term

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- p.3. 11.14-20 "Aborigine" means "a person who is a descendant of an indigenous inhabitant of the Commonwealth of Australia other than the Torres Strait Islands." Each of the plaintiffs is an Aborigine within the meaning of this definition and each of them is resident on the Reserve.
- p.5. 11.2-9 12. On 4th December 1975 the appellant entered into an Agreement (herein referred to as "the Director's Agreement") with three companies, namely, Tipperary Corporation, Billiton Aluminium Australia B.V., and Aluminium Pechiney Holdings Pty. Limited ("the Companies"). Clause 3 of that Agreement provided that the appellant "in his capacity as trustee of the Reserve ... and pursuant to the powers vested in him pursuant to sections 29 and 30" of the Act of 1971 - 10
- p.5. 11.10-20
- p.21. 1.37
- p.22. 1.14
- (a) approved the granting of a Special Bauxite Mining Lease to the Companies upon the terms and conditions of a certain Franchise Agreement; and 20
- (b) agreed to grant to the Companies permission to enter upon the Reserve for the purposes of permitting and enabling the Companies to carry out the terms and conditions of the Franchise Agreement. 30
- The Franchise Agreement referred to in the said clause 3 of the Director's Agreement was by clause 1 thereof defined to mean "the Agreement about to be entered into between the State of Queensland of the First Part and the Companies which agreement will or is intended to be authorised by an Act to be styled the Aurukun Associates Agreement Act of the year in which it will be enacted." 40
13. By Clause 2(c) of the Director's Agreement it was provided that the Companies should in the exploitation of the designated minerals (meaning bauxite and other minerals defined in the Agreement) -
- P.5. 11.22-27 "(c) not later than the end of the third

year of mining activity pay to the Director on behalf of the Aborigines Three Per Centum of the net profits of the Companies' mining operations conducted in on and about the Reserve ... The certificate of the Companies' auditors as to the amount of net profits for any particular period shall be accepted by all parties as final and conclusive;"

p.21. 11.29-35

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14. The Franchise Agreement which is referred to in the Director's Agreement is an agreement between the State of Queensland and the Companies, the making of which was authorised by section 2 of the "Aurukun Associates Agreement Act 1975" (herein referred to as "the Act of 1975"). The Act of 1975 received the Royal Assent on 12th December 1975, i.e., eight days after the Director's Agreement was entered into, and a copy of the Franchise Agreement is set out in the Schedule to the Act of 1975. Section 3 of the Act of 1975 provides that -

p.35. 1.38 -
p.36. 1.14

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"Upon the making of the Franchise Agreement the provisions of the Agreement shall have the force of law as though the Agreement were an enactment of this Act."

15. To the Franchise Agreement set out in the Schedule to the Act there are appended a further five schedules, the third of which sets out the Director's Agreement. By clause 19 of Part VIII of the Franchise Agreement contained in the Schedule, it is provided that -

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"It shall be an obligation of the Companies under this Agreement and a condition of the Special Bauxite Mining Lease that the Companies shall carry out their responsibilities and obligations as defined in the agreement entered into between the Director and the Companies bearing date the _____ day of _____ 1975, and set out in the Third Schedule to this Agreement."

p.19. 11.27-38

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16. In this action commenced by writ of summons issued on 5th March 1976 the respondents as plaintiffs delivered their Statement of Claim on 22nd March 1976. After pleading various of the

pp. 1 - 2

pp.3-8

Record

provisions of the legislation hereinbefore referred to, the Statement of Claim in paragraph 9 thereof alleged as follows:-

p.5. 1.34-39 -
p.6. 1.1-40

"9. In entering or purporting to enter into the Director's Agreement, and approving or purporting to approve the said Grant of Lease, and agreeing or purporting to agree and to grant the said permission to enter, the defendant acted in breach of trust in that:-

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(a) Under sections 29 and 30 of the Act of 1971 or otherwise he lacked power to enter into an agreement providing for participation in the profits of the mining venture to be carried on in the Reserve by payment to the defendant "on behalf of Aborigines" of a percentage of the said profits;

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(b) He failed to exercise his discretion as trustee either properly, generally, or at all in that he:-

(i) Agreed or purported to agree to a provision in the form of that referred to in paragraph 8 hereof;

(ii) Failed to consider either properly or at all whether any such percentage of profits payable by the Companies should not have been made payable for the benefit solely or principally of the plaintiffs;

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p.6. 11.21-40

(iii) Failed to take into account either properly or at all representations, arrangements and agreements made by or on behalf of the plaintiffs with Tipperary Land Corporation in the period from in or about the month of July 1968 until in or about the date of the said Director's Agreement with respect to the terms on which mining should be permitted in the said Reserve;

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(iv) Failed to take into account the wishes of the plaintiffs or to discuss the terms of the proposed Director's Agreement with the Plaintiffs or any of

them or any person acting on their behalf;

(v) Took account of the fact that it was the wish of the Executive Government of Queensland or some or more members of such Government (which members the plaintiffs cannot until discovery more particular specify) that the Director's Agreement should be entered into in the aforesaid form;

p.7. 11.1-9

(vi) From in or about the month of November, 1975 and thereafter regarded himself as bound to enter into an agreement in the form of the Director's Agreement without reference to the plaintiffs or any of them or any person acting on their behalf."

17. By a further paragraph of the Statement of Claim (which said paragraph was inadvertently also numbered 9 but in respect of which leave has been granted to amend by renumbering the same to read 10) it was further alleged that :-

p.7. 11.9-13

p.56

[10.] Further or in the alternative, the defendant intends, in breach of his duty as trustee, to pay the said profits or some part thereof into a fund described as the "Aborigines' Welfare Fund" established or continued pursuant to the Act of 1971.

p.7. 11.9-13

18. The "Aborigines Welfare Fund" is governed by "The Aborigines Regulations of 1972". Regulation 4(1) thereof provides that the Fund shall be managed and controlled by the appellant Director and maintained "for the general benefit of Aborigines", and also specifies in detail the "sources" of the moneys which shall be paid to the Fund. The sources so specified do not include profits from mining ventures on a reserve.

p.30. 11.33-40

p.30. 1.30

19. By their Statement of Claim the respondents as plaintiffs on behalf of themselves and all other Aborigines resident on the Aurukun Reserve claimed the following relief:-

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p.15. 1.23 -
p.16. 1.7

1. A Declaration that in entering into an agreement dated about 4th December 1975 with Tipperary Corporation, Billiton Aluminium Australia B.V. and Aluminium Pechiney Holdings Pty. Limited and in granting to the said Companies a right on the terms of the said agreement to enter upon the Reserve, the defendant acted in breach of trust.

2. A declaration that the defendant holds on trust for the plaintiffs any moneys by way of profits received pursuant to the said agreement.

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3. An injunction restraining the defendant from paying the said moneys or any part thereof into a fund styled the "Aborigines Welfare Fund".

4. Further or other relief.

5. Costs.

20. The Appellant as defendant did not plead to the Statement of Claim but, pursuant to Order 29, Rule 1 of The Rules of the Supreme Court, demurred to the whole of the Statement of Claim as being bad in law on the following grounds:-

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pp.9-10

"The defendant demurs to the whole of the plaintiff's Statement of Claim and says that the same is bad in law on the following grounds:-

1. The plaintiffs have no standing in law to claim the relief set forth in the Statement of Claim on behalf of themselves and "all other aboriginal residents" of the Aurukun Reserve.

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2. The Aborigines Act of 1971 empowered the defendant to enter into the agreement containing the term referred to in paragraph 9(a) of the Statement of Claim which is a term of the agreement set forth in the Third Schedule to the Aurukun Associates Agreement Act of 1975, to which reference will be made on the hearing of this Demurrer.

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3. The Constitution of the defendant as Trustee of the Reserve referred to in the

10 Statement of Claim was made pursuant to the provisions of the Land Acts and did not cast on the defendant as Trustee the obligations assumed by the allegation in paragraph 9(b) of the Statement of Claim nor the duties assumed by the matters alleged in paragraph 9(b) of the Statement of Claim nor any duties other than those expressed by the provisions of the Land Acts and the Aborigines Act of 1971 or which result from the operation of those provisions. And other grounds sufficient in law."

21. Although not specifically referred to in the Demurrer, the appellant at the hearing of argument on the Demurrer raised a further ground to the following or like effect :-

20 By the enactment of the Act of 1975, the Director's Agreement received statutory authorisation, approval and adoption such that it is not possible in law to challenge that Agreement or to challenge any action taken in accordance with it or to call in question the execution of that Agreement. cf.p.18. 11.39-45 p.35. 11.16-21 p.48. 11.30-40

See the reference to this in the reasons for judgment respectively of Lucas J., Douglas J. and Kneipp J.

30 22. Argument on the Demurrer was heard before the Full Court on 26th, 27th and 28th days of July 1976 and judgment overruling the demurrer was delivered on 8th October 1976. p.54

PART B - REASONS FOR JUDGMENT OF THE MEMBERS OF THE FULL COURT

23. Each of the members of the Full Court published reasons for judgment. These reasons are summarised below.

24. Lucas J. considered :- pp.11-34

40 (a) that the Director's Agreement was not "a provision" of the Franchise Agreement (referred to in the Statement of Claim and by His Honour in his reasons as "the Companies' Agreement"), and so was p.20. 1.1- p.21. 1.4

Record

- not, by reason of section 3 of the Act of 1975 or otherwise, given the force of law. Accordingly, His Honour held that the provisions of the Director's Agreement, and things done under it, were not immune from challenge;
- p.21. 1.3-4
- p.21. 11.10-14
p.21. 11.15-16
- p.25. 11.31-45 -
p.26. 11.1-7
- p.30. 11.17-40
- p.26. 11.1-7
- p.27. 11.16-24
- p.30. 11.1-15
- (b) that the appellant Director's powers and duties as trustee were set out or derived from the Land Act, and these included the duty imposed upon a trustee by section 341(1) of that Act requiring that moneys received for or on behalf of the trust by the trustee should be paid into a separate trust account until such moneys were applied by the trustee to the purposes for which they had been received;
- (c) that the "Aborigines' Welfare Fund", into which it must be taken that the Appellant Director intended to pay the profits received under the Director's Agreement, was not such a trust fund account as was envisaged by section 341 of the Land Act;
- (d) that any application of the moneys referred to, other than to the objects of the trust, would constitute a breach of trust; and there was nothing to suggest that the trust so constituted was incapable of enforcement in the same manner as under the general law;
- (e) that the share of the profits received by the appellant Director under the Director's Agreement was received by him not as beneficial owner but as trustee, and must be applied by him to the purposes of the trust, that is, "for the benefit of the Aboriginal inhabitants of the State, Aurukun";
- (f) that the allegations of fact contained in paragraph 9(b) of the Statement of Claim must, for the purposes of the Demurrer, be taken to be true; and at least some of them were of such a nature that, being established, they
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could give rise to some relief against a trustee at the instance of a cestui que trust under the general law;

(g) that the objection that the plaintiffs could not sue in a representative capacity, was an objection for want of parties, and one which therefore could not properly be made the subject of a demurrer; p.31. 11.15-31

10 (h) that the objection that the plaintiffs lacked standing or interest to sue failed because -

(i) the interest claimed by the plaintiffs as residents of the Reserve was a right as possible beneficiaries to compel the appellant as trustee, in the application of the moneys which accrued to him by virtue of the trust, to exercise his discretion in a fair and reasonable and proper manner; p.33. 11.22-31

20 (ii) the interests of the plaintiffs were particularly and specially affected in a degree greater than those of other persons, and, this being so, they could themselves sue in respect of a breach of the public trust.

30 25. On the questions referred to in sub-paragraphs 24(b) to 24(h) hereof Douglas J. did not deliver separate reasons but agreed with the reasons for judgment of Lucas J. On the question involved in sub-paragraph 24(a) His Honour considered :- p.35. 11.10-15
p.39. 1.1

(a) that the provisions of section 3 of the Act of 1975, conferring on the Franchise Agreement (referred to by His Honour as the Companies' Agreement) the force of law, applied only to the provisions of the Franchise Agreement and not to the provisions of the Director's Agreement; p.36. 11.22-27

40 (b) that there was nothing in the Act of 1975 itself which stated directly that the provisions of the Director's Agreement p.36. 11.28-31

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should have the force of law;

p.37. 11.21-
22

(c) that none of the provisions of the Franchise Agreement purported to make the Director's Agreement part of the Franchise Agreement;

p.37. 11.26-
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(d) that the provisions of section 14(2) of the "Acts Interpretation Act 1954-1971" did not constitute the Director's Agreement a schedule to the Act of 1975 or make it part thereof

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p.38. 1.40

Accordingly, His Honour held that this ground of demurrer also failed.

p.46. 1.42-
p.47. 1.5

26. Kneipp J. did not find it necessary to resolve the question referred to in sub-paragraphs 24(b) to 24(d) hereof. In his dissenting judgment His Honour concluded that the Demurrer should be upheld --

p.49. 11.10-
11

(a) not for the reason (which His Honour held to be incorrect) submitted by the appellant that the Director's Agreement formed part of the Franchise Agreement, and so, by virtue of section 3 of the Act of 1975, had the force of a statutory enactment;

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but --

p.49. 1.20-
p.50. 1.4

(b) for the reason that the Director's Agreement was impliedly approved or ratified by the Franchise Agreement, and that it was inconsistent with the legislative will and intent, as disclosed by the Act of 1975 and the Franchise Agreement, to assert that the Director's execution of the Director's Agreement could now be called in question;

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(c) in so far as concerned the question referred to in sub-paragraph 24(c) hereof, for the reason that, if the appellant Director held in trust the moneys received from the Companies, he held them in trust for Aborigines, a class which was much wider than, and might or might not include, the plaintiffs, who claimed on behalf of all Aboriginal inhabitants of the Reserve.

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PART C - RESPONDENTS' SUBMISSIONS

27. The appeal against the decision of the Full Court should, it is respectfully submitted, fail for the following reasons :-

- 10 (1) The land comprised in the Reserve is subject to a public charitable trust constituted by the Orders in Council made pursuant to the "Land Act" reserving the setting aside that land for the purpose of a reserve "for the benefit of the Aboriginal Inhabitants of the State, Aurukun."
- 20 (2) As trustee of the Reserve the appellant is subject to all the duties and liabilities of a trustee under the general law except to the extent (if any) that these duties or liabilities are or have been positively modified by statute.
- (3) The appellant is as trustee bound to exercise his powers and discretion (including the power conferred by section 30 of the Act of 1971 of making an agreement with respect to mining on the Reserve) in an honest, independent and proper manner. This, it is alleged, he failed to do.
- 30 (4) In addition, the appellant is as trustee bound by section 341(1) of the "Land Act" to pay into a separate trust account all moneys received for the trust. Profits received pursuant to the Director's Agreement are, but "The Aborigines Welfare Fund" is not, within the terms of section 341(1).
- (5) The respondents as residents of the Reserve are :-
- 40 (a) beneficiaries of the trust of the land of the Reserve;
- (b) discretionary objects of the power conferred on the appellant Director as trustee by section 30 of the Act of 1971 -

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and, as such, the respondents have a direct and special interest, beyond that of other members of the public, entitling them to proceed in their own names for redress in respect of any existing or apprehended breach of trust by the appellant.

- (6) By enacting the Act of 1975 Parliament cannot be taken to have intended to exonerate the appellant from the ordinary consequences of any or all breaches of trust on his part in entering into the Director's Agreement, nor to have intended to exempt him from such consequences in respect of apprehended future breaches of trust in respect of trust moneys receivable pursuant to that Agreement. 10

28. As to the first of the above submissions, the respondents respectfully submit that :- 20

- (a) A disposition subject to a condition or trust for the benefit of inhabitants of a particular area is a public charitable trust: Goodman v. Mayor of Saltash (1882) 7 App. Cas. 633, at p. 642, per Lord Selborne L.C.
- (b) Among the "public purposes" defined in section 5 of the Land Act are "Aboriginal reserves". A trust for the benefit of Australian aborigines is a charitable trust: Re Matthew [1951] V.L.R. 227, at p.231-232, per O'Bryan J.; Re Bryning [1976] V.R. 100, at p.102, per Lush J. 30
- (c) Land set apart and reserved for public purposes ceases to be "Crown land" within the definition in section 5 of the Land Act, and so ceases to be land with which the Crown can deal under section 6 of that Act, unless and until the reservation is rescinded in the manner provided in section 334(4) of that Act. 40

- 10 (d) A permanent reservation for public purposes of Crown land pursuant to legislation such as section 334(1) of the Land Act creates a public trust of that land binding on the Crown: Williams v. Attorney-General for New South Wales (1913) 16 C.L.R. 404, at p.440, per Isaacs J.; at p.462, per Higgins J.; Council of the Municipality of Randwick v. Rutledge (1959) 102 C.L.R. 54, at pp. 74-77, per Windeyer J.

29. As to the second of the above submissions, it is respectfully submitted that:-

- 20 (a) The authority of the Director to make the Director's Agreement is derived solely from -
- (i) his position as "trustee of the reserve" under whose control the Reserve has been placed pursuant to section 335(1) of the Land Act;
- (ii) the power conferred upon him as "trustee of a reserve" by sections 29 and 30 of the Act of 1971.
- 30 (b) In making the Director's Agreement the appellant purported to act "in his capacity as trustee of the Reserveand pursuant to the powers vested in him pursuant to sections 29 and 30 of [the Act of 1971]".
- (c) "reserve" is defined in section 5 of the Act of 1971 to mean "any land reserved and set apart by the Governor in Council for the benefit of Aborigines under the provisions of the law relating to Crown Lands."
- 40 (d) Parliament had chosen to use the expression "trust" in respect of the Reserve and "trustee" in respect of the appellant, and neither the Land Act nor the Act of 1971 denies him the character and liabilities of a trustee under the general law.

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- (e) In Australia the courts exercise jurisdiction over trustees in respect of a breach of a public trust similarly constituted: see Attorney-General v. Teece (1904) 4 S.R. (N.S.W.) 347; Down v. Attorney-General for Queensland (1905) 2 C.L.R. 639; Attorney-General for New South Wales v. Cooma Municipal Council [1963] S.R. 287.

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30. With respect to the third of the above submissions:-

- (a) a trustee is bound to exercise his powers and discretion "with an entire absence of indirect motive, with honesty of intention, and with a fair consideration of the subject": Re Beloved Wilkes's Charity (1851) 3 Mac.& G. 440, at p. 448, per Lord Truro L.C.; Re Koczorowski [1974] Qd.R. 177, at p. 185, per Dunn J.
- (b) The conduct of an officer of State acting as trustee of land set aside from the public domain and reserved for dependent peoples should be judged by the most exacting fiduciary standards : Seminole Nation v. United States 316 U.S. 286 (1942), at pp.296-297; and relief will be given in respect of an abuse of discretion which constitutes a breach of such fiduciary duty: Pyramid Lake Paiute Tribe of Indians v. Morton 354 F.Supp. 252 (1972), at pp.254, 256 - 257.
- (c) Paragraph 9(b) of the Statement of Claim contains allegations of fact that in entering into the Director's Agreement the appellant failed to exercise his power and discretion in the manner required of a trustee. For the purpose of proceedings on demurrer, these facts must be treated as admitted: Lubrano v. Gollin & Company Proprietary Limited (1919) 27 C.L.R. 113, at p.118, per Isaacs J.

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31. As to the fourth of the above submissions, it is respectfully submitted that:-

- 10 (a) Moneys representing profits received by the appellant and derived pursuant to the Director's Agreement from the mining venture on the Reserve are, within section 341(1) of the Land Act, "moneys received for or on behalf of the trust by the trustees", and as such must be paid into a trust account as provided in that subsection. Such moneys are received on trust for the public purposes for which the land is reserved, and are not held or received on trust for the Crown: see Council of the Town of Gladstone v. Gladstone Harbour Board /1964/ Qd.R.505, at p.521, per Gibbs J. (with whom Jeffriess J. Concurred).
- 20 (b) "The Aborigines Welfare Fund" is not a trust account within the meaning of section 341(1) of the Land Act. Regulation 4 of "The Aborigines" Regulations of 1972", which governs payments into that Fund does not authorise payment into that Fund of moneys representing profits as aforesaid.
- 30 (c) In paragraph 9 of the Statement of Claim it is alleged (and is to be taken as admitted for the purpose of the demurrer) that the appellant does intend to pay such moneys into that Fund.

32. As to the fifth of the above submissions, it is respectfully submitted that:-

- 40 (a) It is the respondent plaintiffs, as residents of the Reserve at Aurukun, who are the beneficiaries of the charitable trust, which is "for the benefit of the Aboriginal inhabitants of the State, Aurukun". Those persons are a clearly ascertainable class of persons: cf. Re Christchurch Inclosure Act (1888) 38 Ch.D. 520, at p.530, per Lindley L.J.;
- (b) Alternatively, if the said trust is for the benefit of all Aboriginal inhabitants of the State (and not merely those resident on the Reserve

at Aurukun), then the respondent plaintiffs are, within the meaning of section 30(2) of the Act of 1971, "Aborigines resident on the Reserve", for whose "benefit" the power to agree conferred by section 30(2) may be exercised by the appellant as "trustee". As such respondent plaintiffs are potential recipients of benefits, or discretionary objects of a "trust power": Gartside v. Inland Revenue Commissioners /1969/ A.C. 553, at p.617, per Lord Wilberforce.

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(c) As potential recipients of benefit under a trust power, the respondent plaintiffs have a right to be considered by the trustee and are entitled to have their interest protected by a court of equity: Gartside v. Inland Revenue Commissioners (supra). Even if regarded as the objects not of a trust power but only of a "mere" power, the respondents are entitled to require that the appellant as trustee properly consider whether they should receive benefit from the exercise of that power conferred by section 30(2) of the Act of 1971: McPhail v. Doulton; Re Baden's Deed Trusts /1971/ A.C. 424, at p.449, per Lord Wilberforce. An improper exercise of a mere power entitles the potential beneficiaries of that power to remedy or relief in a court of equity. See Re Deane (1888) 42 Ch.D. 9, at p.20, per Cotton L.J.; at p.22, per Fry L.J.

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(d) Irrespective of whether the power is to be regarded as a "trust" power or a "mere" power, the respondent plaintiffs as resident inhabitants of the Reserve possess an interest which is specially affected by the trustee's exercise of his power and which is greater than the interest of any ordinary member of the public. As such, they are entitled to relief in proceedings instituted without the

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intervention or assistance of the Attorney-General. See Lang v. Purves (1862) 15 Moore P.C. 389, at pp.422-423, per Lord Kingsdowne; Bradford v Municipality of Brisbane (1901), 11. Q.L.J. 44; Dean v. Attorney-General of Queensland [1971] Qd.R.391, at p.401, per Stable J.

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33. As to the sixth of the above submissions, the respondents respectfully submit that:-

(a) The Franchise Agreement is not itself an Act of Parliament, but is merely an agreement contained in a Schedule to an Act of which "the provisions" are, by section 3 of the Act of 1975, to have "the force of law as though the Agreement were" an enactment of this Act.

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(b) The Director's Agreement has not by the Act of 1975 been either confirmed by or transformed into a statutory enactment, because -

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(i) the Director's Agreement does not form part of the Franchise Agreement, but is therein referred to simply for purposes of identification: c.f. Kent Coats Railway Company v. London Chatham & Dover Railway Company (1868) 3 Ch.App. 656, at pp.668-671, per Lord Hatherley.

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(ii) the effect would be to preclude a variation of the Director's Agreement otherwise than by Act of Parliament: cf. R. v. Midland Railway Company (1887) 19 Q.B.D. 540, at p. 547, per Stephen J.; at p.551, per Willes J.

(iii) clause 19 of Part VIII of the Schedule to the Act of 1975 declares it to be the obligation only of the Companies to carry out responsibilities and obligations as defined in the Director's Agreement

34. In any event, even if, by the Act of 1975, Parliament

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can be taken to have intended to validate, confirm, approve, or ratify the Director's Agreement, it is respectfully submitted that :-

- (a) Paragraph 9(b) of the Statement of Claim alleges facts (which occurred before the enactment of the Act of 1975) constituting it an improper exercise by the appellant of his discretion as trustee to have entered into the Director's Agreement. 10
- (b) The liability of the appellant in respect of such abuse of discretion and breach of trust is a matter which is quite distinct from and independent of the validity or invalidity of the Director's Agreement.
- (c) The Act of 1975 does not expressly relieve the appellant of his liability arising from his abuse of discretion or breach of trust. 20
- (d) Neither "validation", nor "confirmation", nor "ratification", nor "approval", by Parliament of the Director's Agreement can be taken to imply that Parliament thereby relieved or exonerated the appellant from liability in respect of such abuse of discretion or breach of trust; or deprived the respondents of the right to relief in respect thereof. 30

PART D - REASONS

35. The respondents respectfully submit that the appeal should be dismissed with costs and that the order of the Full Court appealed from should be affirmed for the following amongst other reasons:-

- (a) BECAUSE the Order in Council of 1958 constituted the lands of the Aurukun Reserve a public charitable trust, of which the respondent plaintiffs are, as inhabitants of the Reserve, the beneficiaries; 40
- (b) BECAUSE the appellant, in entering into the Director's Agreement, acted in breach of his duty -

(i) as trustee of the Reserve;

(ii) as trustee of the power
conferred by section 30 of
the Act of 1971 -

by exercising his discretion improperly
as alleged in the Statement of Claim.

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(c) BECAUSE the appellant in breach of his
duty as trustee, and contrary to the
power conferred by section 30 of the Act
of 1971, intends as alleged in the
Statement of Claim to pay into the
Aborigines Welfare Fund profits of mining
on the Reserve received by him pursuant
to the Director's Agreement.

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(d) BECAUSE the respondents as residents of the
Reserve are, in the character of potential
recipients of benefit arising from the
exercise of the appellant's powers as
trustee, possessed of an interest sufficient
to sustain the present action in their own
names.

(e) BECAUSE the Act of 1975 does not purport
to relieve the appellant of liability
for the ordinary consequences of his alleged
existing or intended breaches of trust,
or to deprive the respondents of their
remedies or right to relief in respect
thereof.

B. H. McPherson

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R. I. Hanger

IN THE PRIVY COUNCIL No. 8 of 1977

O N A P P E A L

FROM THE FULL COURT OF THE SUPREME
COURT OF QUEENSLAND

B E T W E E N:

THE CORPORATION OF THE DIRECTOR
OF ABORIGINAL AND ISLANDERS
ADVANCEMENT

Appellant
(Defendant)

- and -

DONALD PEINKINNA, GERALDINE
DAWANGKA, FRED KERINDUN, BRUCE
YUNGA PORTA, JOHN KOOWARTA

Respondents
(Plaintiffs)

CASE FOR THE RESPONDENTS

COWARD CHANCE
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Aldermanbury Square
London EC2V 7LD

Solicitors for the Respondents