

ON APPEAL

1/78

FROM THE FULL COURT OF THE
SUPREME COURT OF QUEENSLAND

BETWEEN:

THE CORPORATION OF THE DIRECTOR OF
ABORIGINAL AND ISLANDERS ADVANCEMENT

APPELLANT
(DEFENDANT)

AND

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

RESPONDENTS
(PLAINTIFFS)

RECORD OF PROCEEDINGS

FRESHFIELDS
GRINDALL HOUSE,
25 NEWGATE STREET,
LONDON EC1A 7LH

SOLICITORS FOR THE APPELLANT.

COWARD CHANCE,
ROYEX HOUSE,
ALDERMANBURY SQUARE,
LONDON EC2V 7LD

SOLICITORS FOR THE RESPONDENTS.

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 KAWANGKA,
FRED KERINDUN, BRUCE YUNGA PORTA,
JOHN KOOWARTA

Respondents
(Plaintiffs)

RECORD OF PROCEEDINGS

FRESHFIELDS,
Grindall House,
25 Newgate Street,
London EC1A 7LH

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the Appellant.

Solicitors for the Respondents.

(i)

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 KAWANGKA,
FRED KERINDUN, BRUCE YUNGA PORTA,
JOHN KOOWARTA

Respondent
(Plaintiffs)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

NO.	Description of Document	Date	Page
	<u>In the Supreme Court of Queensland</u>		
1	Writ of Summons (endorsement of claim only)	5th March 1976	1 - 2
2	Statement of Claim	22nd March 1976	3 - 8
3	Demurrer to Plaintiff's Statement of Claim	23rd April 1976	9 - 10

No.	Document	Date	Page
4	Reasons for Judgment of Lucas J.	5th October 1976	11 - 34
5	Reasons for Judgment of Douglas J.	5th October 1976	35 - 39
6	Reasons for Judgment of Kneipp J.	5th October 1976	40 - 53
7	Judgment of the Full Court	8th October	54
8	Order of the Full Court granting leave to amend Statement of Claim	1976 21st October 1976	55 - 56
9	Order of the Full Court granting Leave to Appeal to Her Majesty in Council	22nd October 1976	57 - 58

LIST OF DOCUMENTS ON THE FILE
Not transmitted to the Privy Council

No.	Description of Document	Date	
1	Writ of Summons (other than endorsement of claim)	5th March 1976	
2	Entry of Appearance by Defendant	25th March 1976	
3	Entry of Demurrer	28th April 1976	
4	Notice of Motion for Conditional Leave to Appeal to Privy Council	15th October 1976	
5	Affidavit of Denis Vincent Galligan	18th October 1976	
6	Order of Full Court granting Conditional Leave to Appeal to Her Majesty in Council	21st October 1976	
7	Affidavit of Denis Vincent Galligan	21st October 1976	
8	Notice of Payment of Security	21st October 1976	
9	Draft Index to Record of Proceedings filed	24th November 1976	

DOCUMENT TRANSMITTED TO PRIVY COUNCIL
BUT NOT REPRODUCED

Description of document	Date
Certificate of Registrar of Supreme Court of Queensland at Brisbane certifying transcript of Record of Proceedings	11th March 1977

1.

IN THE PRIVY COUNCIL

No. 8 of 1977

ON APPEAL 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 PIENKINNA, GERALDINE KAWANGKA,
FRED KERINDUN, BRUCE YUNGA PORTA,
JOHN KOOWARTA

Respondents
(Plaintiffs)

RECORD OF PROCEEDINGS

In the Supreme
Court of Queensland

No. 1

No.1.

WRIT OF SUMMONS

Writ of Summons

(ENDORSEMENT OF CLAIM ONLY)

Endorsement of
Claim only

IN THE SUPREME COURT OF QUEENSLAND

5th March 1976

B E T W E E N :

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

Plaintiffs

and

THE CORPORATION OF THE DIRECTOR
OF ABORIGINAL AND ISLANDERS
ADVANCEMENT

Defendant

(ENDORSEMENT OF CLAIM ON WRIT OF SUMMONS)

The Plaintiff's claim is on behalf of
themselves and all other Aborigines resident on
the Aurukun Reserve:

- | | | |
|----|---|---|
| | <u>Writ of Summons</u> | |
| 1. | A declaration that in entering into an agreement dated about 4th December, 1975 with Tipperary Corporation, Billiton Aluminium Australia B.V. and Aluminium Pechinery 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. | Endorsement
of claim only
(continued)
5th March 1976 |
| 2. | A declaration that the defendant holds on trust for the plaintiffs any moneys by way of profits received pursuant to the said agreement. | 10 |
| 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. | |

3.

No. 2

STATEMENT OF CLAIM

In the Supreme Court
of Queensland

No. 2

Statement of Claim

22nd March 1976

Delivered the 22nd day of March, 1976.

1. The Plaintiffs are Aboriginal residents of the reserve at Aurukun, in the State of Queensland (referred to herein as "the Reserve" and described in paragraph 3 hereof), and sue on behalf of themselves and all other Aboriginal residents of the Reserve (herein collectively referred to as "the plaintiffs").

2. The Defendant is a corporation sole:-

20

(a) Constituted by "The Aborigines and Torres Strait Islanders Affairs Acts, 1965 to 1976" ("the Act of 1965") and;

(b) Continued in existence by the "Aborigines Act, 1971-1975" ("the Act of 1971") under the abovementioned name.

3. By Order-in-Council duly published in the Government Gazette and:-

(a) Dated 12th November, 1921, land described in the Schedule to the said Order in Council was pursuant to "The Land Acts 1910 to 1920" ordered to

30

30

In the Supreme
Court of
Queensland

No. 2

Statement of
Claim

(Continued)

22nd March 1976

be temporarily reserved and set apart for the purpose of a reserve for the Aboriginal Inhabitants of the State, Cape Keerweer;

(b) Dated 3rd July, 1958, land described in the Schedule to the said Order-in-Council was pursuant to the said Acts as amended ordered to be permanently reserved and placed under the contract of the Director of Native Affairs as trustee for the benefit of the Aboriginal Inhabitants of the State, Aurukun;

10

(c) Dated 29th October, 1959, the Schedule to the Order-in-Council referred to in paragraph 3(b) hereof was pursuant to the said Acts as amended ordered to be amended by the addition thereto of a further area of land also permanently reserved and placed under the control of the said Director as trustee;

(d) Dated 24th October, 1972, the description of the said land was pursuant to "The Land Act of 1962" ordered to be amended by the addition thereto of a further area of land and as shown on Plan Pa. 3 deposited in the Survey Office was placed under the control of the Director of Aboriginal and Island Affairs as trustee.

20

4. By the "Aborigines Act and other Acts Amendment Act 1975" the name of the said corporation sole was changed to "The Corporation of the Director of Aboriginal and Islanders Advancement".

5. By the Act of 1971, it is, in sections 29 and 30 thereof provided in effect that the trustee of a reserve (being land reserved as aforesaid for the benefit of Aborigines) to whom application is made for a permit to enter on a reserve for any purpose of prospecting or mining may enter into and require the applicant and any other persons to enter into such agreement as the trustee thinks fit, and that such agreement may include provision for participation by the trustee in the profits of the mining venture to be carried on in the reserve for the benefit of Aborigines resident on the reserve, or other Aborigines as the agreement provides.

30

40

6. The Reserve is a reserve within the meaning of

the said sections of the 1971 Act.

22nd March 1976

7. On or about 4th December, 1975, the defendant purporting to act in his capacity as trustee of the Reserve and pursuant to the powers conferred by the said sections of the 1971 Act, purported to enter into a form of agreement (herein referred to as "the Director's Agreement") with Tipperary Corporation, Billiton Aluminium Australia V.B., and Aluminium Pechiney Holdings Pty. Limited (herein referred to as "the Companies") and:-

10 (a) To approve the proposed granting to the Companies of a Special Bauxite Mining Lease, upon the terms and conditions of a certain franchise agreement, in respect of the whole or part of the lands of the Reserve; and 10

(b) To agree to grant to the Companies permission to enter upon the Reserve for the purposes of permitting or enabling the Companies to carry out the terms and conditions of the said franchise agreement.

20 8. It was a term of the Director's Agreement inter alia that:- 20

(a) Not later than the end of the third year of mining activity the Companies should pay to the defendant on behalf of Aborigines three per centum of the net profits of the Companies from the Companies mining operations on the Reserve;

(b) Net profits of the Companies should be determined in accordance with accepted accounting practices and conventions applicable to mining and beneficiation activities in Australia; 30

(c) The certificate of the Companies' auditors as to the amount of net profits for any particular period should be accepted by all parties as final and conclusive. 30

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

In the Supreme
Court of
Queensland

No. 2

that:-

Statement of
Claim

(Continued)

22nd March 1976

(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;

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

10

(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;

20

(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;

30

(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 particularly

40

In the Supreme
Court of
Queensland

No. 2

specify) that the Director's Agreement should be entered into in the aforesaid form;

Statement of
Claim

(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.

(Continued)

22nd March 1976

10 9. 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. 10

AND the plaintiffs on behalf of themselves and all other Aborigines resident on the Aurukun Reserve claim:-

20 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. 20

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

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.

30 5. Costs. 30

Place of Trial: BRISBANE

W.T. McMillan
Solicitor for the Plaintiffs

The Defendant is required to plead to the within statement of claim within twenty-eight days from the time limited for appearance or from the delivery of the statement of claim

In the Supreme
Court of
Queensland

No. 2

whichever is the later, otherwise the plaintiffs
may obtain judgment against it.

Statement of
Claim

(Continued)

22nd March 1976

W.T. McMillan

Solicitor for the Plaintiffs

This Pleading was settled by Mr. McPherson Q.C.
and Mr. Hanger of Counsel.

9.

No. 3

In the Supreme Court
of Queensland

No. 3

Demurrer to
Plaintiff's
Statement of
Claim

23rd April 1976

D E M U R R E R

Delivered the Twenty-third day of April 1976

The defendant demurs to the whole of the plaintiffs' 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.

20 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. 20

30 3. The Constitution of the defendant as Trustee of the Reserve referred to in the 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 30

In the Supreme
Court of
Queensland
No. 3

the operation of those provisions. And other
grounds sufficient in law.

Demurrer to
Plaintiff's
Statement of
Claim

(continued)

23rd April 1976

(W. J. White)
Crown Solicitor
Solicitor for the Defendant

This Pleading was settled by Mr. Macrossan of
Queen's Counsel and Mr. Carter of Counsel.

NOTICE TO BE ENDORSED ON DEMURRER

The Plaintiffs are required to set this
Demurrer down for argument within ten days,
otherwise judgment will be given against them
on the matters demurred to.

10

(W. J. White)
Crown Solicitor
Solicitor for the Defendant

REASONS FOR JUDGMENT - LUCAS J.

10

10

This is a demurrer to a statement of claim. The plaintiffs named in the heading of the action are aboriginal residents of the reserve at Aurukun, and sue on behalf of themselves and all other aboriginal residents of the reserve. The defendant is The Corporation of the Director of Aboriginal and Islanders Advancement, now constituted under the Aborigines Act 1971-1975; I shall refer to the defendant as "the Director".

20

20

By a series of orders in Council made under the Land Act 1962-1971 and its predecessors, the Director was constituted trustee of the reserve at Aurukun. The effect of the orders-in-council is set out in the statement of claim, and we were supplied with copies of them. It is not necessary to refer to their contents in more detail than to say that by the second schedule to the last of them, that of 24th February, 1972, the reserve is described as "Reserve for the benefit of the Aboriginal inhabitants of the State, Aurukun", and its extent is described by reference to a numbered plan deposited in the Survey Office. I shall refer to the reserve for convenience as "the Aurukun reserve".

30

30

From paragraph 5 onwards, the statement of claim was in the following form:-

"By the Act of 1971 it is, in sections 29 and 30 thereof provided in effect that the trustee of a reserve (being land reserved as aforesaid for the benefit of Aborigines) to

40

40

In the Supreme
Court of
Queensland

No. 4

Reasons for Judgment
of Lucas J.

(Continued)

5th October 1976

whom application is made for the permit to enter on a reserve for any purpose of prospecting or mining may enter into and require the applicant and other persons to enter into such agreement as the trustee thinks fit, and that such agreement may include provision for participation by the trustee in the profits of the mining venture to be carried on in the reserve for the benefit of Aborigines resident on the reserve, or other Aborigines as the agreement provides.

10

6. The Reserve is a reserve within the meaning of the said sections of the 1971 Act.

7. On or about 4th December, 1975, the defendant purporting to act in his capacity as trustee of the Reserve and pursuant to the powers conferred by the said sections of the 1971 Act, purported to enter into a form of agreement (herein referred to as 'the Director's Agreement') with Tipperary Corporation, Billiton Aluminium Australia V.B., and Aluminium Pechiney Holdings Pty. Limited (herein referred to as 'the Companies') and:-

20

(a) To approve the proposed granting to the Companies of a Special Bauxite Mining Lease, upon the terms and conditions of a certain franchise agreement, in a respect of the whole or part of the lands of the Reserve: and

30

(b) To agree to grant to the Companies permission to enter upon the Reserve for the purposes of permitting or enabling the Companies to

40

carry out the terms and conditions of the said franchise agreement.

In the Supreme Court of Queensland

8. It was a term of the Director's Agreement inter alia that:-

No. 4

(a) Not later than the end of the third year of mining activity the Companies should pay to the defendant on behalf of Aborigines three per centum of the net profits of the Companies from the Companies mining operations on the Reserve:

Reasons for Judgment of Lucas J.

(Continued)

5th October 1976

(b) Net profits of the Companies should be determined in accordance with accepted accounting practices and conventions applicable to mining and beneficiation activities in Australia;

(c) The certificate of the Companies' Auditors as to the amount of net profits for any particular period should be accepted by all parties as final and conclusive.

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:-

(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;

40

In the Supreme
Court of
Queensland

No. 4

Reasons for Judgment
of Lucas J.

(Continued)

5th October 1976

- (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; 10
 - (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; 20
 - (iv) Failed to take into account the wishes of the plaintiff 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; 30
 - (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 plaintiff 40

cannot until discovery more particularly specify) that the Director's Agreement should be entered into in the aforesaid form;

In the Supreme
Court of
Queensland

No. 4

- (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.

Reasons for Judgment of Lucas J.

(Continued)

5th October 1976

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

AND the plaintiffs on behalf of themselves and all other Aborigines resident on the Aurukun Reserve claim:-

1. a declaration that in entering into an agreement dated the 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.

20

30

40

In the Supreme
Court of
Queensland

No. 4

Reasons for Judgment
of Lucas J.

(Continued)

5th October 1976 The demurrer was to the whole of the statement of claim, and was in the following form:-

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."
- "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. 10
 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. 20
 3. The Constitution of the defendant as trustee of the Reserve referred to in the 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. 30
And other grounds sufficient in law." 40

In the first place it does not seem that the provisions of Order 29 Rule 6 have been strictly complied with in this case, since the statement of claim did not set out at length the document referred to as "the Director's Agreement" (and it is convenient to call it by that name), nor was it set out at length in the demurrer. But the whole of the agreement was before us, and its terms were freely referred to. Neither party objected to this course, and it is in the circumstances reasonable to treat the matter as though one of the parties had set out the Director's Agreement at length.

In the Supreme
Court of
Queensland

No.4

Reasons for Judgment
of Lucas J.

(continued)

5th October 1976

The Director's Agreement is contained in the Third Schedule to an agreement between the State of Queensland and three companies, Tipperary Corporation, ("Tipperary"), Billiton Aluminium Australia B.V. ("Billiton"), and Aluminium Pechiney Holdings Pty. Ltd., ("Pechiney"), which latter agreement is itself the schedule to the Aurukun Associates Agreement Act 1975. It is convenient to refer to it as "the Companies Agreement".

The last mentioned act by section 3 provides as follows:-

(the reference is to the Companies Agreement).

"Upon the making of the agreement the provisions thereof shall have the force of law as though the agreement were an enactment of this act."

The Companies agreement regulates the terms and conditions upon which the Companies may operate with a view eventually to the mining of bauxite. It recites (the fourth recital) that the companies have entered into the Director's Agreement; the recital is as follows:-

In the Supreme
Court of
Queensland

No. 4

Reasons for Judgment
of Lucas J.

(Continued)

5th October
1976

"And whereas the companies have entered into an agreement dated the day of 1975 with the Director as trustee of the reserve in respect of their responsibilities and obligations to him on behalf of the Aborigines."

The companies were the joint holders of an Authority to Prospect issued under the provisions of the Mining Act. The Companies agreement provided for the grant to the companies of a Special Bauxite Mining Lease over the lands described in the second schedule to the agreement. Those lands were the whole or part of the lands comprised in the Authority to Prospect (see the first recital to the Companies agreement), and, in turn, the lands comprised in the Authority to Prospect were situated either in whole or in part within the Aurukun reserve (see recital C to the Director's Agreement). The lease was to be granted upon the signing of the Companies agreement and upon the surrender of the authority to prospect.

10

20

Returning at this point to the statement of claim, its allegations may be summarized by saying that it asserts that the entering into by the defendant of the Director's agreement was preceded by breaches by him of his fiduciary duty as trustee of the Aurukun reserve (particularised in paragraph 9) and that he intends (contrary to his fiduciary duty as trustee) to pay moneys accruing to him "on behalf of Aborigines" into the "Aborigines Welfare Fund". Assuming for the moment the locus standi of the plaintiffs to sue, there can be no doubt that the facts so alleged, or some of them, would show a cause of action against a trustee under the general law. But it is said, in support of the demurrer, that because of the provisions of the Aurukun Associates Act, the Director's agreement must be taken to have received statutory authorisation or approval or adoption, so that it is beyond the power of any person to challenge it or to

30

40

challenge anything done under it (or, I should perhaps add, anything proposed to be done under it). Alternatively, it is said that even if the Director's agreement is challengeable, it is not challengeable at the suit of the plaintiffs.

In the Supreme
Court of
Queensland
No. 4

10 The first question for decision, therefore,
is whether it is the case that the Director's
agreement has received statutory authorisation,
or, to adapt the words of section 3 of the
Aurukun Associates Act, quoted above, 10
whether it has the force of law as though
it were an enactment of the act. I have
already set out the fourth recital to the
Companies agreement; the Director's agreement
is mentioned also in clause 2 of Part III of the
Companies agreement, the clause which deals with
the grant to the companies of the Special
Bauxite Mining Lease. Clause 2(3) authorises
20 the companies to do certain things which would
otherwise be unlawful under the Mining Act
"subject always to the terms of the agreement
entered into between the Director as trustee
of the reserve and the companies which is
set out in the third schedule hereto." It is
mentioned again in clause 19 of Part VIII
which is as follows:-

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

30 "It shall be an obligation of the
companies under this agreement and
a condition of a Special Bauxite
Mining Lease that the companies 30
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."

40 By section 3 of the Aurukun Associates
Act, which I have quoted, it is "the 40
provisions of the agreement", that is, the
provisions of the companies agreement,
which are to have the force of law.

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

Is the Director's agreement "a provision" of the Companies agreement? It is set out in a schedule to that agreement, but that in my opinion is not conclusive. Of course many agreements contain schedules which must be considered to be part of them, for example, an agreement for the sale of a business which sets out the details of the plant in a schedule. But in this case the State of Queensland, which of course is a party to the Companies agreement, is not a party to the Director's agreement. The fact that the latter agreement is set out as a schedule to the former does not then, in my opinion, of itself make the latter agreement part of the former. Nor does the act expressly say that the Director's agreement is "to have the force of law". Section 2 describes carefully the agreement which the Premier is authorised to make on behalf of the State; it is the Companies agreement, and that is the agreement which, by definition in section 2 is given the force of law in section 3.

10

20

If it had been the legislative intention to give the Director's agreement the force of law there would have been no necessity for the provisions of clause 19 of part VIII; the obligations of the companies under the Director's agreement would, by virtue of Section 3 itself, have assumed the nature of statutory obligations if the Director's agreement had been given the force of law by the operation of that section.

30

Some slight reliance was placed on section 14(2) of the Acts Interpretation Act, which provides that "every schedule to an act shall be deemed to be part thereof". But the Director's agreement is not a schedule to an act; it is a schedule to an agreement which itself is a schedule to an act. As I have said, the fact that it is a schedule to an agreement does not of itself make it part of that agreement; in my opinion section 14(2) of the Acts Interpretation Act has no application.

40

For these reasons I am of the opinion that the Director's agreement has not been given the force of law by section 3 of the Aurukun Associates Act, and its provisions, and things done under it, are not immune from challenge. But the argument for the plaintiff made it clear that the validity of the agreement was not attacked; it was preceded by breaches of trust, and the director intended to do something under it which would amount to a breach of trust. It is necessary, then to examine the nature of the powers and duties of the director as trustee.

In the Supreme
Court of
Queensland
No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

Those powers and duties are derived from the Land Act. The particular power to enter into an agreement of the type now under consideration is contained in section 30 of the Aborigines Act. Before turning to the relevant provisions of the Land Act, I should set out in full clause 2(c) and 3 of the Director's agreement. (The Companies agreement is referred to in the Director's agreement as "the Franchise Agreement"). Clause 2(c) is as follows:-

"The companies shall in the exploitation of the designated materials within the Authority to Prospect and pursuant to the Franchise Agreement:-

(c) not later than the end of the third year of mining activity, pay to the Director on behalf of Aborigines THREE PER CENTUM of the net profits of the Companies from the "Companies" mining operations conducted in on and about the Reserve

Clause 3 is as follows:-

"The Director, in his capacity as trustee of the Reserve, in consideration of the premises and of the agreements on the part of the Companies abovementioned, and pursuant to the powers vested in him pursuant to Sections 29 and 30 of

In the Supreme Court of Queensland

No. 4

Reasons for Judgment of Lucas J.

(Continued)

5th October 1976

the Aborigines Act hereby:-

(a) approves the proposed granting of a Special Bauxite Mining Lease to the Companies upon the terms and conditions of and pursuant to the Franchise Agreement; and

(b) agrees to grant to the Companies and to their respective directors, officers, employees, agents, contractors invitees and licensees permission to enter upon the Reserve for the purpose of permitting and enabling the Companies to carry out the terms and conditions of the Franchise Agreement."

10

The Director then was acting under Section 30 of the Aborigines Act in making the Director's agreement. Section 29 also has a bearing on the matter; Section 29(1)(a) is as follows:-

"Notwithstanding the provisions of the Mining Acts 1898 to 1967 or of any Act passed in amendment thereof or in substitution therefor or of any other Act relating to mining -

20

(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."

The Section goes on to provide that the holder of a mining entitlement, other than a mining lease, is not entitled to enter a reserve for any purpose of mining or prospecting unless he holds a permit granted by the trustee of the reserve. But this restriction does not apply to the holder of a mining lease or his agents; see section 29(5).

30

Section 30 is as follows:

"Agreements concerning mining on reserves."

(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 connection with his granting a permit, enter into and require the applicant and any other persons to enter into such agreement as the trustee or, as the case may be, the Minister thinks fit.

10

10

In the Supreme Court of Queensland

No. 4

Reasons for Judgment in Lucas J.

(Continued)

5th October 1976

(2) An agreement shall provide for such terms and conditions as the parties thereto agree upon, and may include provision for 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."

20

20

The necessity for clause 3(b) of the Director's agreement seems obscure; if the companies held a mining lease they would not require a permit for any purpose of prospecting or mining. It may have been thought that the operations to be carried out under the companies agreement were wider than could be comprehended within the term "prospecting or mining", but there does not seem to be any provision in the Aborigines Act, either in section 29, 30 or elsewhere, for the trustee of a reserve to grant a permit for any wider purpose. But the Director's agreement was entered into before the Companies agreement was executed (see recital B of the Director's agreement) and perhaps it was thought necessary to insert clause 3(b) to preserve the position while the companies held an authority to prospect, until the agreement should be executed and the Mining Lease granted.

30

30

40

40

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

Section 30(2) of the Aborigines Act speaks of provisions which may be included in agreements made by the trustee of a reserve; such an agreement may or may not include provision for participation by the trustee in the profits of the mining venture; if it does, it seems clear from the subsection that participation by the trustee must be for the benefit of "Aborigines resident on the reserve, or other Aborigines". The ultimate recipients of the share in the profits for which such an agreement provides are not of course themselves parties to the agreement. The trustee, when he makes such an agreement, makes it in his capacity as trustee, and I should not have thought that the person who obtains a permit with a view to carrying on a mining venture would be particularly concerned to see to the detailed application of the share of the profits which he pays to the trustee. But the concluding words of the subsection "as the agreement provides" do seem to contemplate that the ultimate recipients of the share are to be specified in the agreement, at least as falling into one or other of the two classes mentioned.

10

20

30

The words "Aborigines resident on the reserve, or other Aborigines" themselves have their difficulties. Are they intended to describe two mutually exclusive classes? If so, this means that if the latter class is selected, Aboriginal residents of the reserve are not to have any share of the profits at all. The word "Aborigine" is defined in the Act in very wide terms (section 5); the definition would include persons with the smallest possible percentage of aboriginal blood. It may have been thought desirable for this very reason that the agreement should specify the persons for whose benefit the profits

40

are to be applied. However this may be, the Director's agreement in this case refers to neither of the two classes; the obligation of the companies is to pay the share of the profits to the Director "on behalf of the aborigines."

In the Supreme
Court of
Queensland

No. 4

The Director's powers and duties as trustee are, as I have said, set out in the Land Act, Section 334(1) is as follows:-

Reasons for
Judgment of
Lucas J.

"The Governor-in-Council may from time to time grant in trust, or by order-in-council, reserve and set apart any crown land which, in the opinion of the Governor-in-Council, is or may be required for any public purpose."

(Continued)

5th October 1976

By section 5, "public purposes" is defined to include "aboriginal reserve". By section 335 the Governor-in-Council may place any land reserved and set apart under the control of trustees; a body corporate may be a trustee; the Director is constituted a body corporate by section 8 of the Aborigines Act. By section 336(2) the holder of an office under the Crown may be appointed a trustee under his official name. Section 337 requires a register of trustees to be maintained in the Department of Lands. By section 338 trustees may sue or be sued in their official names, that is, in the name specified in the order-in-council constituting the trust (see section 337(1)). By section 341, they are to keep proper books and accounts in respect of the trust, which are to be audited at least once a year. The fourth paragraph of section 341(1) is as follows:-

"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."

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October
1976

This of course means that the moneys referred to must eventually be applied to the objects of the trust, for until so applied they are to remain in the trust account. It would seem, therefore, that any other application of them would constitute a breach by the trustee of his statutory duty.

By section 341(5) a bank is to disclose to the Auditor-General upon demand the existence of any such account. There is no power of sale, and a restricted power to lease (section 342, 343). Section 346 is as follows:-

"The trustees of land granted in trust or of a reserve shall apply solely for the purposes of the trust all moneys received by way of rent or otherwise in respect of any lease of such land or reserve or any part thereof."

This section, however, applies to leases granted by the trustee, who cannot himself of course grant a mining lease. Section 350 provides generally speaking, that trustees are not to permit the occupation of a reserve for a purpose contrary to or inconsistent with the purpose for which the land was reserved. In this case the land was reserved, and was placed under the control of the Director as trustee, as a "reserve for the benefit of the Aboriginal inhabitants of the State, Aurukun." If it be supposed that an entry upon the land for the purpose of prospecting and mining is a purpose contrary to or inconsistent with the purpose specified in the order-in-council, the provisions of section 350 of the Land Act must be taken to have been modified by section 29 of the Aborigines Act, to which I have already referred. Section 351 confers a power to mortgage in certain circumstances, and in sections 353 and 354 there is provision of the termination and winding up of a trust.

10

20

30

40

Such are the powers and duties of trustees of reserves as set out in the Land Act. There is no suggestion that the Director, as trustee of a reserve for the benefit of aborigines, is not to be subject to these provisions to the same extent as any other trustee under whose control reserved land is placed pursuant to the Land Act, that is, in their entirety. Nor is there anything to suggest that a trust so constituted is incapable of enforcement in the same manner as under the general law. The characteristics of a trust established in this manner were considered in Randwick Corporation -v- Rutledge (1959) 102 C.L.R. 54, particularly in the judgment of Windeyer J., at pp. 71-78.

If anything is clear about the Director's agreement, it is that he does not receive the share of the profits as beneficial owner; he receives them as trustee, and they must be applied to the purposes of the trust, that is, "for the benefit of the Aboriginal inhabitants of the State, Aurukun". That again is an ambiguous phrase. It could mean either "for the benefit of the Aboriginal inhabitants of the State who live at Aurukun" or "for the benefit of the Aboriginal inhabitants of the State generally, and this particular reserve is situated at Aurukun". The second suggested meaning would of course refer to a wider class than the first suggested meaning. But even the wider meaning is not as wide as the expression in clause 2(c) of the Director's agreement "for the benefit of Aborigines". For by clause 1 of the agreement, the word "Aborigine", is, subject to the context, to have the same meaning as the word has in the Aborigines Act. I have already quoted the definition in the act; it would include a person with the most minute percentage of Aboriginal blood, wherever in the world he might happen to live.

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October
1976

The definition must, as I have noted, give way to the context, and it appears to me that there are many indications in the Director's agreement that it was intended to be an agreement for the benefit, not of Aborigines throughout the world generally, but of Aborigines from time to time upon the Aurukun reserve. By clause 1 "the reserve" is defined as the Aurukun reserve. Recital D speaks of "the assurances then given by Tipperary for the betterment of Aborigines within the reserve"; these assurances were specified in what are called in the agreement "the letter agreements", to which the Director's agreement was intended to give formal shape, and as Recital D also says, "the letter agreements" were made after negotiations and consultation with, among others, "the Council and Elders of the Aborigines at the Reserve". In Recital F, Billiton and Pechiney acknowledge their acquiescence in "the letter agreements". Recital G recites that the parties have agreed to execute the Director's agreement in order formally to record the letter agreements, and in particular, "the provision which the companies propose to make for and towards the betterment of Aborigines upon the reserve during the continuance of the Franchise Agreement." By clause 2(d) upon the termination of the operations of the companies under the Franchise Agreement, capital installation, fixtures and improvements are to revert to the Director "for the sole use and benefit of Aborigines on the reserve". By clause 2(f) the companies operations are to be carried on "so as to cause as little inconvenience as practicable to the aborigines upon the reserve". By clause 2(m) roads and clearings are to be constructed, after consultation with "the mission", that is the Presbyterian Mission at Aurukun, so that they will be useful not

10

20

30

40

only to the companies but to "Aborigines upon the reserve". I have already quoted clause 3.

It is not of course necessary to construe the Director's agreement for the purposes of this judgment, but the statutory provisions and the other matters to which I have referred form part of the background against which we were invited to examine the allegations in the statement of claim.

10 In summary then the Aurukun reserve has been placed under the control of the Director as trustee, as a reserve "for the benefit of the Aboriginal inhabitants of the State, Aurukun". Pursuant to the Land Act, he is, as such trustee, required to pay "all moneys received for or on behalf of the trust" into a trust account. He is to apply such moneys "to the purposes for which they have been received". Money paid to
20 him pursuant to the obligations of the companies to pay him a share of the profits would be received by him in his capacity as trustee.

30 Turning back to the substantial allegations in the statement of claim, it is alleged in paragraph 9(a) that the Director lacked power to enter into an agreement providing for participation in profits "on behalf of Aborigines". I am not sure that this paragraph adds anything to the other allegations to which I will refer. Even if the wording of the relevant clause in the agreement does not follow what appears to have been contemplated by section 30(2) of the Aborigines Act, it does not seem to me that that of
40 itself would require or authorise the Director to commit any breach of trust in the application of the profits which come to him. It might be that he would have to exercise a discretion in accordance with his fiduciary duty to apply the profits in a proper manner, in selecting suitable objects for the application of the money, but I do not think that the presence in the agreement of this provision would prevent him from doing that.

In the Supreme Court of Queensland

No. 4

Reasons for Judgment of Lucas J.

(Continued)

10 5th October 1976

20

30

40

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October
1976

It is alleged in paragraph 9(b) that "he failed to exercise his discretion (that is in entering into the Director's agreement) either properly generally or at all in that he-" and then six particulars are given. They are all, except possibly the first, allegations of fact and therefore must, for the purposes of the demurrer, be taken as being true. It is not necessary to set out the particulars again; it is sufficient to say that at least some of them are of such a nature that, being established, they could give rise to some relief against a trustee at the instance of a cestui que trust under the general law.

10

It is alleged in paragraph 10 that the Director intends, in breach of his duty as trustee, to pay the profits or some part of them into the "Aborigines' Welfare Fund". It must be taken as a fact that he does intend to do this. The "Aborigines' Welfare Fund" is dealt with in section 56(14) of the Aborigine Act and Regulation 4 of The Aborigine Regulations of 1972. The regulations show that the fund was established under the Regulations of 1966 (repealed) and is continued under the regulations of 1972. The fund is maintained "for the general benefit of aborigines". There are detailed provisions as to the moneys which may be paid into the fund and the purposes for which those moneys may be expended. The fund is certainly not such a trust account as is envisaged by section 341 of the Land Act; the regulation shows that the moneys from a number of different sources may find their way into it.

20

30

40

I am of the opinion therefore, that the statement of claim discloses a cause of action, and the final question is as to the standing of the plaintiff to sue for relief.

The alternative argument advanced in support of the demurrer, to which I have referred briefly above, had two branches. First it was said that the plaintiffs were not within the provisions of order 3 rule 10, and could therefore not sue in a representative capacity. Secondly it was argued that in any event the plaintiff had no right to sue at all, whether as representative plaintiffs or otherwise. The argument was that if the director was constituted as trustee by reason of the statutory provisions, he was the trustee of a public trust, and it followed that the Attorney-General would be the only plaintiff who could competently sue in respect of a breach of it.

With regard to the first point, I am of opinion that it is not one which can properly be made the subject of a demurrer. Carrick v. Armstrong (1969) Qd. R. 185 is an authority, binding on us, to the effect that a demurrer for want of parties will not lie. A complaint that an action is not properly constituted by representative plaintiffs suing under order 3 rule 10 is really nothing more than an objection that all the necessary parties are not before the court; in other words that the action must fail for want of parties. There is ample provision apart from a demurrer in the rules of court for raising an objection of this nature. I do not think that it is a point which is open on demurrer.

The second branch of the argument, however, does not seem to me to fall into the same category; it is not based on a defect of parties, but on the proposition that the plaintiffs have no standing to sue at all. This is a point which has regularly been dealt with on demurrer. The distinction between the two branches of the argument may be observed by reference on the one hand to Duckett v. Gover (1877) 6 Ch. D. 82, in which Jessel M.R. allowed a demurrer on the ground that the action should have been commenced in the name of a company and not by one shareholder suing on behalf of himself

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of Lucas
J.

(Continued)

5th October 1976

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

and all others; his Lordship thus applied the rule in Foss v. Harbottle 2 Hare 461; and on the other hand to Werderman v. Societe Generale D'Electricite (1881) 19 Ch. D 246, in which the court of appeal refused to allow a demurrer on the ground that the plaintiff ought to have sued a company rather than the individuals whom he did in fact sue. In the first case the Plaintiff had no right of action at all; in the second case it was clear that he had a right of action, but it was objected that he had sued the wrong defendant. Further, the High Court has adopted the practice of determining questions of a plaintiff's locus standi on demurrer; The Commonwealth v. Australian Commonwealth Shipping Board (1926) 39 C.L.R. 1; Attorney-General for Victoria v. The Commonwealth (1945) 71 C.L.R. 237.

10

20

The question then is whether the plaintiff has the necessary standing to complain of a breach of the public trust under consideration in the present case. In Bradford v. Municipality of Brisbane (1901) 11 Q.L. J. 44, Griffith C.J. said, after referring to authorities (at p. 46):-

"The effect of these authorities is that a private person can only maintain an action against a municipal corporation or other body holding property on a public trust where his own interests are particularly and especially affected in a greater degree than that of other persons...."

30

The test has been stated in various ways. In Boyce v. Paddington Borough Council (1903) 1 Ch. D. 109, Buckley J., said (at p. 114):-

40

"A plaintiff can sue without joining the Attorney-General in two cases; first..... and secondly where no

private right is interfered with but the plaintiff in respect of his public right suffers special damage peculiar to himself from the interference with the public right."

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October
1976

In Thorne Rural District Council v. Bunting
(1972) Ch. D. 470, Megarry J., assented to the
proposition that a plaintiff must have a
substantial interest in the subject matter
of the dispute recognised by the law. The
plaintiffs in the present case are the
residents of an aboriginal reserve; the
reserve is under the control of a trustee
who has in that capacity entered into an
agreement the object of which, as it seems
to me, is to regulate the activities of the
mining companies in such a manner as to cause
as little disturbance as possible to the
residents and to afford some benefit to
them; true, the residents are not
specifically named as objects of the trust,
but the interest they claim is a right as
possible beneficiaries to compel the trustee,
in the application of the moneys which accrue
to him by virtue of the trust, to exercise
his discretion in a fair and reasonable and
proper manner. They claim "a right to be
considered as a potential recipient of benefit
by the trustees" (see Gartside v. Inland
Revenue Commissioners (1968) A.C. 553 at
p. 617, per Lord Wilberforce). That was
a right, said his Lordship, which would
be protected by a Court of Equity. That
was a case in which the trustees were bound
to exercise their discretion in
some manner; in other words, it was a
"trust power" rather than a power
unaccompanied by an imperative trust
to distribute. I would be inclined
myself to think that in the present case
the director's duty was of the same
character; certainly so if he is
under the duty, pursuant to section 341
of the Land Act, to pay the trust money
into a trust account. I should have
thought that having done so, he would

10

20

30

40

10

20

30

40

In the Supreme
Court of
Queensland

No. 4

Reasons for
Judgment of
Lucas J.

(Continued)

5th October 1976

be under a duty to select appropriate objects and make a distribution of the fund, otherwise it would seem that the money must remain in the trust account forever. But in any event, the same principle has been applied to "mere powers" as well as "trust powers" that is, to trustees who are under no imperative duty to distribute, in the sense that although the court will not normally compel the exercise of the power, it will intervene if the trustees exceed their power, a concept which would include a distribution not authorised by the terms of the trust, for example, as the plaintiffs would say in this case, payment of the trust money into the "Aborigines' Welfare Fund". See McPhail v. Doulton (1971) A.C. 425 particularly at p. 449 per Lord Wilberforce.

10

In my opinion the proper conclusion is that the interests of the plaintiff are particularly and specially affected in a greater degree than those of other persons. That being so, they can themselves sue in respect of a breach of the public trust.

20

For the reasons I have given the demurrer should, in my opinion, be overruled with costs.

In the Supreme
Court of Queens-
land

No. 5

Reasons for
Judgment of
Douglas J.

5th October 1976

REASONS FOR JUDGMENT - DOUGLAS J.

10 In this matter I have had the advantage of reading
the proposed reasons for judgment of both of my brothers. 10
It is unnecessary to set out the matters preliminary to a
discussion on the demurrer pleaded, as they have been
dealt with adequately in the other judgments.

20 I propose now to deal with the first submission made
on the demurrer. That submission was that the Director's
Agreement must be taken as having received statutory
authorisation, approval and adoption, and that the total
effect is that it is beyond the power of any person to
20 challenge it, or actions taken in accordance with it.
The submission necessarily is antecedent to the other
submissions. It depends for its efficacy, on the facts
that the Director's agreement is referred to in the
Companies' Agreement, and is scheduled to that Agreement,
which Agreement is scheduled to, authorised by, and made
efficacious by the Aurukun Associates Agreement Act 1975.

30 If the Director's Agreement is accepted as being
part of the Companies' Agreement (see sec. 3 of the
Aurukun Associates Agreement Act 1975), or as being part
of the Schedule to that Act within the terms of sec.
14(2) of the Acts Interpretation Acts 1954 to 1971 there
can be no argument to the contrary of the above
proposition. The question to be resolved is, is either
proposition tenable?

I approach it first from the point of view of
ordinary construction of the terms used.

First of all the Aurukun Associates Agreement Act

In the Supreme
Court of
Queensland

No. 5

Reasons for
Judgment of
Douglas J.

(Continued)

5th October 1976

1975 authorises the making of the Companies' Agreement, and refers to it as "the Agreement, a copy of which is set out in the Schedule to this Act." Then section 3 provides:-

"3. Executed Agreements to have force of law. Upon the making of the Agreement the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act."

Section 4 goes on to provide for a variation of "the Agreement", and that such agreement may be varied pursuant to agreement between the Premier of Queensland and the Companies with the approval of the Governor in Council by Order in Council." The section further provides:- 10

"(2) Unless and until the Legislative Assembly, in accordance with section 6 (4), disallows an Order in Council approving a variation (made in the prescribed manner) of the agreement the provisions of the agreement making the variation shall have the force of law as though those provisions were an enactment of this Act." 20

It is to be noted that it is the Companies' Agreement to which these provisions apply. They could not apply to the Director's Agreement. Indeed, it seems to me, the only agreement which any of the terms of the Act can be logically construed as governing is the Companies Agreement. 30

Looking at the Act itself I cannot see anything stated directly to the effect that the provisions of the Director's Agreement shall have the force of law as though they were part of the enactment.

I turn to the Companies' Agreement as scheduled to the Act. The Director's agreement is referred in the preamble to the Companies' Agreement thus:-

" AND WHEREAS the Companies have entered into an agreement dated the day of 1975 with the Director as Trustee of the Reserve in respect of their responsibilities and obligations to him on behalf of Aborigines:"

It is referred to thus in Part III Cl. 2 (3):-

Reasons for Judgment of Douglas J.

"(3) Notwithstanding the provisions of subsection (3) of section 44 of the Mining Act the Companies shall have the right to disturb those parts of the surface of the Reserve included in the said Special Bauxite Mining Lease to the extent necessary to enable them to exercise all the rights and powers granted to them pursuant to this Agreement subject always to the terms of the agreement entered into between the Director as trustee of the Reserve and the Companies which is set out in the Third Schedule hereto."

(Continued)

5th October 1976

10

10

And thus in Part VIII Cl. 19:-

"19. Agreement with Director. 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 of this Agreement."

20

20

None of these clauses purports to make the Director's Agreement part of the Companies' Agreement.

The conclusion I come to is that neither the Act, or the terms of the Schedule thereto makes the Director's Agreement an agreement to which section 3 of the Act applies.

I turn shortly to sec. 14 of the Acts Interpretation Acts 1954 to 1971. Sec. 14 (2) provides "Every schedule to an Act shall be deemed to be part thereof." Clearly the Companies' Agreement is covered by this subsection. I cannot see that the Director's Agreement is. If a schedule to a schedule of an Act was to be included one would imagine that the legislature would have so stated. It is not my wish to be taken as stating that under this subsection a schedule to a schedule to an Act can never be taken as part of the original schedule. In every instance it would be a matter of construction. In the present instance I am of the opinion that the Director's Agreement is merely appended to the Schedule of the Act. It does not form part of the Schedule, but is there as a source of information.

30

30

In the Supreme
Court of
Queensland

No. 5

Reasons for
Judgment of
Douglas J.

(Continued)

5th October 1976

In coming to the above conclusions I have derived comfort from certain statements in the case of The Queen on the prosecution of The Great Western Railway Company -v- The Midland Railway Company 1887 L.H. 19 Q.B.D. 540. At p. 548 Stephen J. said:-

"I have this further observation to add; I think that the fact of the agreement being put into a schedule does not really affect the case; what affects the case is what parliament says about it, and I therefore agree with Lord Cairns that if an agreement is scheduled, and the Act says it is to be implemented and fulfilled, it would be just the same as if the agreement were enacted in the body of the Act; putting it into the schedule would only be a more convenient course for the draughtsmen to follow."

10

Wills J. at p. 552 adopted what was said by A.L. Smith J. in The Great Western Railway Company -v- The Halesowen Railway Company 1883 Vol. 52 L.J.Q.B. 473. I refer to p. 479:-

20

"It seems to me that the best mode of putting shortly the intention of making an invalid and unauthorised agreement as binding upon the company as though they had been in existence and had authorised it at the time it was drawn up, is to say that it is hereby confirmed and made binding upon them."

In the context of the legislation these statements can be referred to only in relation to the scheduling of the Director's Agreement, and as to whether it thus forms part of the Act, or the Schedule to the Act.

30

The first case was later referred to in the House of Lords, and distinguished on the facts of the case before the House. That was the case of Fyx Granite Co. Ltd. -v- Ministry of Housing and Local Government 1960 A.C. 260. Viscount Simmonds said of it at p. 285 "That case is not binding on your Lordships, but it is of respectable antiquity and I see no reason to challenge its correctness."

40

In my opinion the first submission fails.

39.

In the Supreme
Court of
Queensland

Otherwise I agree with the reasons of my brother Lucas. NO. 5

The demurrer should be overruled with costs.

Reasons for
Judgment of
Douglas J.

(Continued)

5th October 1976

REASONS FOR JUDGMENT - KNEIPP J.

10 Before the Court is a demurrer to a Statement of Claim. The litigation arises out of a proposed mining venture, involving the mining of bauxite by a group of companies("The Companies") on or partly on an Aboriginal Reserve known as Aurukun. 10

20 Part XI of the Land Act 1962-1975 authorises the Governor in Council to grant in trust, or to reserve and set apart, Crown Land for any public purpose; Section 334(1). A defined public purpose is "Aboriginal Reserves": Section 5. Where land is set apart and reserved for a public purpose, it may be placed under the control of trustees: Section 335(1); and there are provisions, which I need not now refer to, as to the powers and duties of trustees. 20

30 Part III of the Aborigines Act 1971-1975 contains provisions relating to Aboriginal Reserves, two of them being particularly relevant to this case. Section 29 provides, among other things, that, notwithstanding the provisions of the Mining Acts, a lease that would entitle the lessee to a mining tenement shall not be granted unless the trustee of the reserve or the Minister charged with the administration of the Act has approved. Section 30 I set out - 30

"Agreements concerning mining on reserves.

(1) The trustee of a reserve to whom applications for a permit is made under section 29 of this Act or the Minister where such an application is made to him

In the Supreme
Court of
Queensland

No. 6

Reasons for
Judgment of
Kniepp J.

(Continued)

5th October 1976

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 persons to enter into such agreement as the trustee or, as the case may be, the Minister thinks fit.

(2) An agreement shall provide for such terms and conditions as the parties thereto agree upon, and may include provision for participation by the trustee or any other persons and 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."

10

By a series of Orders in Council under the Land Acts the land known as the Aurukun Reserve has been reserved and set aside as a "Reserve for the benefit of Aboriginal Inhabitants of the State, Aurukun", and The Director of Aboriginal and Islanders Advancement as he is now known ("The Director") has been appointed trustee. His duties and obligations are not specifically stated, but are to be ascertained, I apprehend, from the title of the reserve and the provisions of the Land Act and the Aborigines Act.

20

The Aurukun Associates Agreement Act ("The Aurukun Act") is an act to authorise an agreement between the State of Queensland and the Companies concerning the proposed mining venture, which, as has been said, is to be carried on either on or partly on the Aurukun Reserve. The proposed operation is plainly a very large one, involving the expenditure of very large sums of money, and obviously it was thought that the agreement which had been arrived at as to its establishment and continuation could not be satisfactorily implemented within the framework of existing legislation. Hence the enactment of the Aurukun Act.

30

40

The Act itself is comparatively brief. By section 2 the Premier is authorised, on behalf of the State, to make with the Companies an agreement

("The Franchise Agreement") a copy of which is set out in the Schedule to the Act. Section 3 provides that on the making of the Agreement "the provisions thereof shall have the force of law as though the Agreement were an enactment of this Act". It is not necessary to refer to the remaining sections.

The agreement is an elaborate document, covering a variety of subjects, including such matters as the proper care of the environment, the grant of a special bauxite mining lease, water supplies, harbour facilities, local government, and the acquisition of land. The fact that Section 3 of the Act not merely approves the provisions of this Agreement, but gives its provisions the force of statutory enactments, which as will be seen is a matter of some importance, is reflected in many of those provisions. Some of them expressly override other statutes, such as the Mining Acts; some confer powers or authorities on the Governor in Council; one of them erects a statutory tribunal for the resolution of disputes.

One provision relates to the fact that the Aurukun Reserve is involved. There is a recital: "And Whereas the Companies have entered into an agreement dated the day of 1975 with the Director as Trustee of the Reserve in respect of their responsibilities and obligations to him on behalf of Aborigines". Then it is provided by Clause 19 of Part 8 that -

"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."

I shall refer to the agreement between the Companies and the Director as "the Director's agreement". First, I set out the recitals (they

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Kniepp J.

(Continued)

5th October 1976

In the Supreme
Court of
Queensland

No. 6

Reasons for
Judgment of
Kniepp J.

(Continued)

5th October 1976

refer to the Companies as "Tipperary", "Billiton",
and "Pechiney"):

"WHEREAS:

- A. Tipperary, Billiton and Pechiney are or are entitled to be or become the holders as tenants in common in the interests of FORTY PER CENTUM, FORTY PER CENTUM AND TWENTY PER CENTUM of Authority to Prospect 493M issued pursuant to section 23A of The Mining Acts 1898 to 1967 and section 12A of The Mining on Private Land Acts 1909 to 1965; 10
- B. The Companies having found deposits of bauxite over and under a considerable part of the surface of the area held under the aforesaid Authority to Prospect are about to enter into the Franchise Agreement to enable them to bring the said deposits into production and to produce bauxite and alumina if economically feasible; 20
- C. The aforesaid Authority to Prospect is situated either in whole or in part within the Reserve;
- D. In and about the month of August, 1968 Tipperary after negotiations and consultation with the Council and Elders of the Aborigines at the Reserve, the Reverend J.E. Gillanders, the Superintendent of the Presbyterian Mission at the Reserve appointed pursuant to The Aborigines and Torres Strait Islanders' Affairs Act of 1965 to 1967 (repealed), Mr. S.E. Edenborough of the Australian Presbyterian Board of Missions and the Director entered into two separate agreements (hereinafter referred to as "the letter agreements"), one with the Federal Secretary, Australian Presbyterian Board of Missions and the other with the Director which specified the conditions under which Tipperary 30 40

was to be permitted access to the Reserve for the purpose of prospecting and otherwise developing the mineral resources within the said Authority to Prospect, and the assurances then given by Tipperary for the betterment of Aborigines within the Reserve;

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Kniepp J.

10 E. The letter agreements were never reduced to a formal agreement but consisted merely of an exchange of correspondence;

10 (Continued)

F. Billiton and Pechiney desire to acknowledge their acquiescence in the letter agreements and jointly and severally with Tipperary accept the obligations as therein contained as joint holders of the said Authority to Prospect;

5th October 1976

20 G. In order to record, formally, the letter agreements and, in particular, the provisions which the Companies propose to make for and towards the betterment of Aborigines upon the Reserve during the continuance of the Franchise Agreement, the parties have agreed to execute this Agreement."

20

30 Clause 2 is in the form of a series of covenants by the Companies. Many of them relate to matters which would obviously be of concern to the Director and to inhabitants of the Reserve, such disturbance of or damage to timber, the causing of inconvenience to Aborigines on the Reserve, the refilling of test holes, the hunting of game, and so forth.

30

40 One covenant, the subject of a great deal of the discussion before us, is (so far as is relevant) that the Companies will "pay to the Director on behalf of Aborigines THREE PER CENTUM of the net profits of the Companies from the Companies' mining operations conducted in on and about the Reserve." Clause 3 is as follows:-

"The Director, in his capacity as trustee of the Reserve, in consideration of the premises

40

In the Supreme
Court of
Queensland

No. 6.

Reasons for
Judgment
of Kniepp J.

(Continued)

5th October 1976

and of the agreements on the part of the Companies abovementioned, and pursuant to the powers vested in him pursuant to sections 29 and 30 of the Aborigines Act hereby:-

- (a) approves the proposed granting of a Special Bauxite Mining Lease to the Companies upon the terms and conditions of and pursuant to the Franchise Agreement; and
- (b) agrees to grant to the Companies and to their respective directors, officers, employees, agents, contractors, invitees and licensees 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."

10

It was common ground that the Director's agreement was executed by the parties to it on or about 4th December, 1975. The Statement of Claim does not refer to execution of the Franchise Agreement. But Section 3 of the Aurukun Act provides that the Governor in Council should notify the date of the making of the agreement by Proclamation, and we were informed by Counsel that a Proclamation was made on 27th December, 1975. In fact, the proclamation appears in the Gazette for 27th December, 1975, and is to be judicially noticed: Evidence and Discovery Acts, 1867-1972, Section 1. It shows that the Franchise Agreement was executed on 22nd November, 1975.

20

30

The plaintiffs claim to be aboriginal inhabitants of the Aurukun Reserve, and they sue "on behalf of themselves and all other aboriginal inhabitants of the Reserve." The Director is the defendant to the action. Basic to the plaintiffs' case are the following propositions -

1. The lands included in the Reserve are the subject of a public trust.
2. As trustee of the Reserve, the Director has all the duties of a trustee, except to the

40

extent that they are modified by statute.

3. The defendant is, as trustee, bound to exercise his powers, including the power (conferred on him by Section 30 of the Aborigines Act) to enter into agreements relating to mining on a reserve.
4. The plaintiffs, as inhabitants of the Reserve, are discretionary objects of the power conferred by Section 30 of the Aborigines Act, and are therefore competent to complain of any abuse or misuse of that power by the Director.

In the Supreme
Court of
Queensland

No. 6

Reasons for
Judgment of
Kniepp J.

(Continued)

5th October
1976

Some explanation of the fourth proposition is called for. It is based mainly on the fact that Subsection (2) of Section 30 of the Aborigines Act, which has been set out above, provides in substance that any agreement made by the Director concerning mining on a reserve may provide for payment of a portion of the profits made from the mining to the Director "for the benefit of aborigines resident on the reserve, or other aborigines as the agreement provides". The plaintiffs claim, therefore, that they are possible beneficiaries under any agreement made by the Director; that in considering whether he should enter into an agreement, or in considering what the terms of an agreement should be, he should give proper consideration to the question whether they should in fact be made beneficiaries; that if he does not give proper consideration to that question he commits a breach of trust; and (relying on decisions in connection with private discretionary trusts) that as possible beneficiaries they are entitled to complain of that breach of trust. I would also assume, although I do not recollect that it was submitted, that they were interested not only in possible pecuniary benefits, but also in matters such as possible disturbance or nuisances resulting from mining, and that the Director should give proper consideration to their interests in connection with those matters.

I have felt a great deal of difficulty about some of the foregoing propositions, which were

In the Supreme
Court of
Queensland

No.6

Reasons for
Judgment of
Kniepp J.

(Continued)

5th October 1976

discussed at length in argument, but in the view which I take it is not necessary to resolve them. I am prepared, for the purpose of considering whether the demurrer should succeed, to assume that they are correct.

The plaintiffs then rely on allegations of fact contained in the Statement of Claim. Those allegations, of course, must be taken as being correct for the purpose of proceedings on demurrer. They are as follows:-

10

"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:-

(a) Under sections 29 and 30 of the Aborigines Act 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;

20

(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;

30

(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;

(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

40

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;

In the Supreme Court of Queensland
No. 6

(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;

Reasons for Judgment of Kniepp J.

(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 particularly specify) that the Director's Agreement should be entered into in the aforesaid form;

5th October 1976

(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."

The first claim in the prayer to the Statement of Claim is for a declaration that in entering into the Director's agreement the Director "acted in breach of trust". I need not refer now to the others.

The Director demurs to the whole of the Statement of Claim. It sets out three grounds, but I do not refer to them, because none of them covers precisely the main ground argued for the Director, on which I think that he is entitled to succeed. That ground is that the Director's agreement was authorised or approved by the legislature, and that the Director's execution of it cannot now be called in question. The Director was entitled to argue this ground, although it was not pleaded in the Demurrer: R.S.C., O. 29 r. 2.

The primary argument, as I understood it, was

10

10 (Continued)

20

20

30

30

40

40

In the Supreme
Court of
Queensland
No. 6
Reasons for
Judgment of
Kniepp J.

(Continued)

5th October
1976

that, by virtue of Section 3 of the Aurukun Act, the Franchise Agreement has the force of a statutory enactment (as has been seen, this is plainly so); that the Director's agreement is both referred to in the Franchise agreement and set out in a Schedule to that agreement; that the Director's agreement is thus "incorporated" in the Franchise agreement; and that the Director's agreement, as part of the Franchise agreement, also has statutory effect. I do not think that this is correct. Merely to refer in a statute to a contract, even with approval, is not sufficient to give the contract statutory force, although it may, of course, have the effect of giving the contract immunity from attack. And, if the Director's agreement has statutory effect, why was it provided specifically in the Franchise agreement that the Companies should carry out their obligations under the Director's agreement?

10

However, I think that it is clear that the Director's agreement was impliedly approved or ratified by the Franchise agreement, and that it is inconsistent with the legislative will and intent, as disclosed by the Aurukun Act and the Franchise agreement, to assert that the Director's execution of it can now be called in question. The Act and the Franchise agreement constitute a special legislative package, obviously designed to set out in detail the whole of the terms and conditions on which the venture was to proceed, including terms and conditions considered suitable having regard to the fact that mining on an Aboriginal reserve was involved.

20

30

The legislation was clearly enacted on the basis that, so far as that aspect was concerned, the venture would proceed according to the terms and conditions set out in the Director's agreement. This, I think implies legislative approval of the Director's agreement, and of his executing it. To put it more narrowly, perhaps, it seems to me that the imposition on the Companies of a statutory obligation to observe their agreement with the Director, and the inclusion of their obligations as conditions of the special statutory lease, plainly amount to legislative adoption of

40

those obligations as being proper and suitable to this particular occasion. If that be so, then surely it must be said that the Director's action in executing the agreement which spells out those obligations has been ratified by the legislature, and cannot now be called in question.

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Kniepp J.

I think that this view of the matter is supported by decisions relating to the confirmation of contracts by statute. I refer to the facts of two of them. In re Wilton's (Earl) Settled Estates ((1907) 1Ch. 50) a tenant for life of settled land entered a contract for sale which constituted a breach of trust. A private Act was passed which provided that the agreement was confirmed and made binding on the parties thereto respectively, and that "the same may and shall be carried into effect accordingly." It was held that the vendor was bound to carry out the sale with all its consequences, and that all the parties interested in the settled land were bound although they were not mentioned in the Act. In Manchester Ship Canal Co. -v- Manchester Racecourse Co. ((1900) 2 Ch. 352; (1901) 2 Ch. 37) the plaintiff and defendant companies had made an agreement by which the defendant, the owner of certain land, gave the plaintiff the right of first refusal of that land in certain circumstances. Later, by an Act, the agreement was "confirmed and declared to be valid and binding upon the parties thereto". It was held that every clause of the agreement had statutory validity, so that no objection to it on the grounds of remoteness or uncertainty could be taken. In these and in such other decisions along the same lines as I have examined the statutory confirmation extended to the whole agreement, and not merely to the obligations of one party, but I think that in principle they are not distinguishable from the present case.

10 (Continued)

5th October 1976

There was one submission for the plaintiffs which I should mention at this point. One of the obligations imposed by the Director's agreement on the Companies was, as has been seen, to pay 3% of their net profits to the Director "on behalf of Aborigines". It was argued that, even if this provision had received statutory approval, the

20

30

40

In the Supreme
Court of
Queensland

No. 6

Reasons for
Judgment of
Kniepp J.

(Continued)

6th October 1976

approval should be read as extending only to the obligation to pay, and not to the purpose to which it was proposed that the moneys be put. The plaintiffs were therefore free, it was said, to argue that a use of the moneys "on behalf of Aborigines" was or might be a breach of trust. I think that to look at the matter in this way is to look at it altogether too narrowly. Clearly a matter relevant to a consideration as to what amounts should be paid would be the use to which they are to be put, and if the legislature has approved of the amount to be taken, then I think that the approval should be taken to extend to the purpose to which it is to be put.

10

I should also refer to sub-paragraph (a) of paragraph 9 of Statement of Claim, which has been set out. This sub-paragraph pleads that under Section 29 and 30 of the Aborigines Act "or otherwise" the Director "lacked power" to enter into an agreement for payment of a share of profits "on behalf of Aborigines". Section 30 refers to participation of profits "for the benefit of aborigines" resident on the reserve, or other Aborigines -----". The phraseology is not very happy: it is not clear whether the two classes are mutually exclusive, or whether the second overlaps the first. Nor is the phraseology of the Director's agreement any happier: it uses the expression "on behalf of", which to me is not the same as "for the benefit of", and uses the general term "Aborigines", which plainly would include both the classes referred to in Section 30. the argument, I apprehend, is that, whatever is meant by Section 30, the expression used in the Director's agreement has a different meaning, and that this provision of the Director's agreement is therefore invalid. I think that probably the correct answer is that the expression "on behalf of" and "Aborigines" should be taken as being equivalent to the expressions "for the benefit of" and "other Aborigines", whatever be the correct meaning of the latter expression. Alternatively, if the effect of the expressions used in the agreement is different from that of those used in Section 30, I think that the agreement has been ratified by the Aurukun Act, which, being of

20

30

40

special application, overrides Section 30, which is of general application.

There is one further matter to be mentioned. Paragraph 10 of the Statement of Claim reads:-

"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."

There is a claim for an injunction restraining the Director from paying into the Aborigines Welfare Fund any moneys paid to him by the Companies.

The Fund in question is maintained pursuant to Regulations made under the Aborigines Act. It is provided that moneys from certain defined sources should be paid into it, and that such moneys may be paid out of it for certain defined purposes. It is argued that payment into the Fund of moneys received from the Companies would be a breach of trust, and reference is made to provisions of the Land Acts relating to the keeping of accounts by trustees of reserves. The answer to this claim, it seems to me, is that even if the moneys should not be paid into the Fund, and if it is assumed that the Director intends so to pay them, the plaintiffs' Statement of Claim does not put forward any basis on which they could complain about it. The plaintiffs' claim is on behalf of all Aboriginal inhabitants of the Reserve. If my view is correct, the Director will hold the moneys, if he holds them in trust at all, for "Aborigines", a much wider class, which may or may not include the plaintiffs. There is authority for the proposition that a demurrer may not go to any question of parties, but here there is more than a question of parties involved. The Statement of Claim, it seems to me, is designed to allege, and does allege, duties owed by the Director to the plaintiffs as Aboriginal inhabitants of the Reserve, and breaches of those duties. It does not allege any duties said to be owed to any wider class, and argument on the demurrer was not directed, except perhaps

In the Supreme Court of Queensland

No. 6

Reasons for Judgment of Kniepp J.

(Continued)

5th October 1976

In the Supreme Court of Queensland incidentally, to the questions whether there are any such duties, and if there are, who can enforce them. I think that this contention of the plaintiffs fails also.

No. 6

Reasons for
Judgment of
Kniepp J.

In my opinion the demurrer should be allowed.

(Continued)

5th October 1976

JUDGMENT OF THE FULL COURTIn the Supreme
Court of
QueenslandNo. 7Judgment of
the Full
Court

8th October 1976

FULL COURT: BEFORE THEIR HONOURS MR. JUSTICE
LUCAS, MR. JUSTICE DOUGLAS and
MR. JUSTICE KNEIPP

The Eighth day of October, 1976

The Defendant having on the 23rd day of April,
1976 demurred to the Plaintiffs' Statement of Claim
AND UPON HEARING Mr. McPherson of Queen's Counsel
and Mr. Ranger of Counsel for the Plaintiffs and
20 Mr. Macrossan of Queen's Counsel and Mr. Carter
of Counsel for the Defendant on the 26th, 27th, 20
and 28th days of July, 1976 and the 5th day of
October, 1976

IT IS THIS DAY ADJUDGED that the said Demurrer be
overruled and that the Plaintiffs do recover
against the Defendant their costs of the said
Demurrer to be taxed, AND IT IS ORDERED that
the further consideration of the proposed amendments
to the Plaintiffs' Statement of Claim be adjourned
30 to a date to be fixed, and that the defendant have
leave to deliver a defence as it may be advised. 30

By the Court

(L.S.) R. HORE
Acting Registrar.

In the Supreme
Court of
Queensland

No. 8

Order of the
Full Court
granting
leave to
amend
Statement of
Claim

21st October
1976

FULL COURT: BEFORE THEIR HONOURS
MR. JUSTICE D. M. CAMPBELL
MR. JUSTICE KELLY AND
MR. JUSTICE DUNN

THE 21st DAY OF OCTOBER, 1976

20

UPON HEARING Mr. Hanger of Counsel for the
Plaintiffs AND UPON HEARING Mr. Macrossan of
Queens Counsel with him Mr. Carter of Counsel
for the Defendant

IT IS ORDERED by consent that the Plaintiffs
have leave to amend the Statement of Claim
delivered in this action by making the
following amendments:-

- (1) in paragraph 3(a) thereof, omitting
the figures "12" and inserting in
lieu thereof the figures "11"
- (2) in the fourth line of paragraph 3(b)
thereof, omitting the word "contract"

30

In the Supreme
Court of
Queensland.

No. 8.

Order of the
Full Court
granting leave
to amend
Statement of
Claim

(Continued)

21st October 1976

and inserting in lieu thereof the word
"control"

(3) in paragraph 3(d) thereof, omitting the
word "October" and inserting in lieu
thereof the word "February"

(4) by omitting the figure "9" where it
appears immediately before the
commencement of the paragraph
numbered 9 on page 6 of the
Statement of Claim and inserting
in lieu thereof the figure "10".

10

BY THE COURT

(L.S.) R. HORE
ACTING REGISTRAR

In the Supreme
Court of
Queensland.

No. 9.

ORDER OF THE FULL COURT GRANTING LEAVE
TO APPEAL TO HER MAJESTY IN COUNCIL

Order of the
Full Court
granting Leave
to Appeal to
Her Majesty
in Council
22nd October 1976

IN THE SUPREME COURT
OF QUEENSLAND

W 553 of 1976

IN THE MATTER of the RULES
REGULATING APPEALS FROM QUEENSLAND
to Her Majesty in Council
(Imperial Order in Council of
18th October, 1909)

- and -

10

IN THE MATTER of an application for
Leave to Appeal to Her Majesty
in Council by THE CORPORATION OF
THE DIRECTOR OF ABORIGINAL AND
ISLANDERS ADVANCEMENT from the
judgment of the Full Court of the
Supreme Court of Queensland in
Action No. 553 of 1976 between
DONALD PEINKINNA, GERALDINE
KAWANGKA, FRED KERINDUN, BRUCE
YUNGA PORTA, JOHN KOOWARTA
Plaintiffs and THE CORPORATION OF
THE DIRECTOR OF ABORIGINAL AND
ISLANDERS ADVANCEMENT, Defendant

20

FULL COURT: BEFORE THEIR HONOURS
MR. JUSTICE D.M. CAMPBELL
MR. JUSTICE KELLY AND
MR. JUSTICE DUNN

THE 22nd DAY OF OCTOBER, 1976

UPON MOTION this day made unto the Court by Mr.
Macrossan Q.C. with him Mr. Carter of Counsel for
THE CORPORATION OF THE DIRECTOR OF ABORIGINAL AND
ISLANDERS ADVANCEMENT (hereinafter referred to as
"the Applicant")

30

AND UPON HEARING Mr. Hanger of Counsel for DONALD
PEINKINNA, GERALDINE KAWANGKA, FRED KERINDUN,
BRUCE YUNGA PORTA, JOHN KOOWARTA (hereinafter
referred to as "the Respondents")

AND UPON READING the affidavit of DENIS VINCENT

In the Supreme
Court of
Queensland.

No. 9.

Order of the
Full Court
granting
leave to
Appeal to
Her Majesty
in Council

22nd October
1976

(Continued)

GALLIGAN filed herein on the 21st day of October, 1976 and the Order of the Full Court of Queensland dated the 21st day of October, 1976 giving conditional leave to appeal from the Judgment and Order of the Full Court of Queensland in Action No. 553 of 1976

THIS COURT DOTH ORDER that the Applicant have final leave to appeal to Her Majesty in Council from that part of the Judgment and Order of the Full Court of Queensland in the said Action No. 553 of 1976 in this Honourable Court on the 8th day of October, 1976 whereby -

10

10

The Court ordered that the Demurrer be overruled

AND it was further ordered that the Plaintiffs recover the costs of the Demurrer to be taxed

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of and incidental to this motion abide the event unless Her Majesty in Council should otherwise order

AND THIS COURT DOTH FURTHER ORDER AND ADJUDGE that the costs of and incidental to this motion be paid by the Applicant in the event of the said appeal not being proceeded with or being dismissed for want of prosecution.

20

20

BY THE COURT

(L.S.) R. HORE
ACTING REGISTRAR

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 KAWANGKA,
FRED KERINDUN, BRUCE YUNGA PORTA,
JOHN KOOWARTA

Respondents
(Plaintiffs)

RECORD OF PROCEEDINGS

FRESHFIELDS,
Grindall House,
25 Newgate Street,
London EC1A 7LH

Solicitors for the Appellant.

COWARD CHANCE,
Royex House,
Aldermanbury Square,
London EC2V 7LD

Solicitors for the Respondents.