IN THE PRIVY COUNCIL

NO.8 OF 1977

ON APPEAL

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)

CASE FOR THE APPELLANT

FRESHFIELDS
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SOLICITORS FOR THE APPELLANT.

COWARD CHANCE,
ROYEX HOUSE,
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SOLICITORS FOR THE RESPONDENTS.

Judgment 1 of 1978

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 :

DONALD PEINKINNA, GERALDINE KAWANGKA,
FRED KERINDUN, BRUCE YUNGA PORTA,
JOHN KOOWARTA (Plaintiffs)
Respondents

- and -

THE CORPORATION OF THE DIRECTOR OF
ABORIGINAL AND ISLANDERS ADVANCEMENT
(Defendant)
Appellant

CASE FOR THE APPELLANT

RECORD

1. This Case is divided into Parts as follows:

Part A - Introduction (Paragraphs 1 - 42)

Part B - The reasons for Judgment of the Members of the Full Court (Paragraphs 43 - 61)

Part C - Appellant's Submissions (Paragraphs 62 - 116)

Part D - Reasons (Paragraph 117)

2. This is an Appeal from an Order of the Full Court of the Supreme Court of Queensland (Lucas J., Douglas and Kneipp JJ.) delivered on 5th October, 1976 whereby the Full Court by a majority (Lucas J. and Douglas J., Kneipp J. dissenting) overruled the Appellant's Demurrer to the Respondents' Statement of Claim, and ordered that the Respondents recover against the Appellant their costs of the Demurrer to be taxed. p.11

3. Orders granting conditional leave to appeal and final leave to appeal to the Judicial Committee were respectively made by the Full Court on the 21st and 22nd days of October, 1976. pp.57-58

4. The questions in this Appeal concern the provisions of certain enactments of the Queensland Parliament namely the Aurukun Associates Agreement Act 1975, the Aborigines Act 1971, the Land Act 1962-1975, and also the powers of the Appellant who is constituted a corporation sole by Section 8 of the Aborigines Act 1971.

5. As appears from the preamble to the agreement which is set out in the Schedule to the Aurukun Associates Agreement Act 1975 (which agreement is hereafter called the Companies' Agreement) a consortium of Mining Companies (referred to in the Companies' agreement as "Tipperary", "Billiton" and "Pechiney" and hereafter referred to as the "Companies") were the holders of Authority to Prospect 493M a mining tenement 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. The Companies discovered deposits of Bauxite over and under a considerable part of the surface of the area held under the Authority to Prospect and desire to bring the deposits into production.

6. Section 334(1) of the Land Act 1962-1975 authorises the Governor-in-Council to grant in trust, or by Order in Council to reserve and set apart, Crown Land for any public purpose. By Section 5 of the same Act "Crown Land" is defined in terms, in effect, as land other than that which has already been granted in fee, leased, licensed or reserved and in addition "public purposes" are defined by reference to a considerable number of enumerated objects or purposes including one stated as "aboriginal reserves".

RECORD

7. In Queensland reserves of Crown Land are commonly made for the objects or purposes enumerated in Section 5 of the Land Act 1962-1975 including, in a number of cases, for "aboriginal reserves".

8. By a series of Orders in Council referred to in paragraph 3 of the Statement of Claim certain Crown Land in the State of Queensland was reserved in terms which as finally expressed were "Reserve for the benefit of the Aboriginal inhabitants of the State, Aurukun" and the Appellant was constituted Trustee of that reserve. p.3 ll 27-31 p.4 ll 1-24

9. Aurukun is situated in a remote area of the State of Queensland which may accordingly be thought of as suitable for a reserve for aborigines. There exists in Queensland protective legislation dealing with aborigines and their affairs and in its current form this is constituted by the Aborigines Act, 1971. There are considerable numbers of persons in Queensland and also in other parts of Australia who in varying degrees of directness are of aboriginal descent. Similarly in varying degrees these people are assimilated into the cultures and life styles of the white inhabitants. Generally speaking many of those least assimilated live on reserves provided for them and Aurukun can be regarded as an example. An idea of the numbers of persons being referred to can be gathered by consulting an official government publication, the Queensland Year Book 1975, at page 185 for data from the June 1971 census. This gives amongst other figures a population for what are described as "aborigines" and "islanders" in Queensland of 24,414 out of an Australian total of 106,290. It is to be understood that the numbers of persons with at least some part aboriginal blood would not readily be ascertainable in any exact fashion, but the numbers would be large.

10. The area covered by the aforesaid Authority to Prospect and the area which the Companies desire to mine is situated either in whole or in part within the Reserve referred to.

11. By the Aurukun Associates Agreement Act 1975 the Premier of Queensland was authorised to make, for and on behalf of the State of Queensland, an Agreement with the Companies, the terms of which are set out in the Schedule to the Act. Section 3 of the Aurukun Associates Agreement Act 1975 provides as follows:-

"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 Governor in Council shall by Proclamation notify the date of the making of the Agreement".

By proclamation dated the 27th day of December, 1975 published in the Government Gazette, the Governor in Council notified that the date of the making of the Companies' Agreement was the 22nd November, 1975.

12. This Companies' Agreement is also referred to in places in the Reasons for Judgment given in the Court below as "the Companies' Agreement" or otherwise as "the Franchise Agreement".

13. The development of the bauxite deposits was regarded as a very large project in terms of capital (see the recitals to the Companies' Agreement) and an elaborate agreement not usually associated with grants of mining interests was used. The Companies' Agreement itself provided (cl 2 Part III) that on the signing of the Companies' Agreement a Special Bauxite Mining Lease should be granted to the Companies as tenants in common and that their existing authority to Prospect should be contemporaneously surrendered.

14. The Special Bauxite Mining Lease was provided (cl. 5 Part III) to be in the form and contain the conditions, set out in a Schedule to the Companies Agreement. Amongst the conditions contained in the Special Bauxite Mining Lease were what were described as "Special Conditions", which were set out in the first schedule to that Lease, which was itself the fourth schedule to the Companies' Agreement. These special conditions provided that the conditions of the lease should be those set out in the Companies' Agreement.

15. The area covered by the Special Bauxite Mining Lease was within the area of the Authority to Prospect and was in whole or in part within the Reserve.

16. The Companies' Agreement made extensive provision upon a great number of matters and inter alia provided for the mining and treatment of

bauxite and certain other minerals, environmental care the construction of a refinery, export of minerals, the payment of royalties, the construction of a harbour, and the development of a town.

17. It was in the Companies' Agreement also provided:-

(i) that the making of the Companies' Agreement was authorised by the Queensland Parliament (cl 3 Part I);

(ii) that the provisions of the Mining Act of Queensland should, except insofar as varied or modified by the Companies' Agreement, apply to that agreement and to the Special Bauxite Mining Lease and any Special Mining Purposes Leases granted under the Agreement itself. (cl. 5 Part III);

(iii) that the State of Queensland should when required by the Companies and on an appropriate surrender by them, grant to the Companies Special Mining Purposes Leases in either of the forms as set out in the Fifth Schedule to the Companies Agreement (cl 27 Part III);

(iv) That the Companies should submit to rights of access granted to other persons by the Queensland Minister for Mines and Energy across the area of the Special Bauxite Mining Lease (cl 9 Part VIII);

(v) that the Governor in Council might require the Companies to surrender to the Crown in right of the State of Queensland lands from within the area of the Special Bauxite Mining Lease (cl 10 Part VIII);

(vi) that (cl. 11 Part VIII) if the Companies should be in default in respect of their obligations under any provisions of the Companies' Agreement or any condition of the Special Bauxite Mining Lease, then after notice, the Governor in Council was to be free to determine the agreement and forfeit to the Crown the lands held under it; and

(vii) that (cl. 19 Part VIII) it was to be an obligation of the Companies under the Companies' Agreement and also a condition of the Special Bauxite Mining Lease that the Companies should carry out their responsibilities and obligations contained in a certain agreement (hereafter referred to as the Director's Agreement) which was set out in the Third Schedule to the Companies' Agreement.

18. Included among the recitals to the Companies' Agreement is the following 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".

19. Sub-clause (3) of Clause 2 of Part III of the Companies' Agreement provides as follows:-

> "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."

20. The Director's Agreement was in the Companies' Agreement referred as though it were in existence but undated (cl. 19 Part VIII) and its terms although again undated were set out in the Third Schedule to the Companies' Agreement. In fact, on 4th December, 1975 the Appellant entered into the Director's Agreement with the Companies. It is with this Agreement that the Action is primarily concerned. After its passage through the Queensland Parliament the Aurukun Associates Agreement Act 1975 received the Royal assent on 12th December, 1975.

21. Section 334 of the Land Act 1962-1975

has already been referred to (cl. 6 of this case) and it is one of a number of sections contained in Part XI of that Act dealing with Grants, Reserves and Reservations for Public Purposes. A number of provisions relate to the two procedures dealt with viz. the grant of land in trust and the reserving and setting apart of Crown Land for a public purpose. Included among the provisions relating to reservations for public purposes are the following:-

(i) reservations made for public purposes under the earlier repealed Acts dealing with Crown Lands are deemed to be made under the current Act (s. 334(3)).

(ii) trustees may be appointed to control lands which are reserved for Public purposes (s. 335(1)) and a holder of office under the Crown may be appointed trustee (s. 336(2)). Trustees need not be individually named but may be specified by official names (s. 337(1)).

(iii) the Governor in Council may from time to time by order in Council rescind in whole or in part or modify any reservation which has been made (s. 334(4)).

(iv) trustees have power to make by-laws (s. 339) with respect to certain specified purposes concerning a reservation (It is not suggested that any by-laws were made with respect to the reservation in question in the present case).

(v) during the continuance of a reservation a limited power of leasing (s. 343) is conferred upon the trustees but all rentals received must be applied solely for the purposes of the trust (s. 346).

(vi) provision is conferred for approval to be given by the Governor in Council for liberty to mortgage in aid of improvements or for other purposes approved by the Governor in Council (s. 351).

(vii) The trustees while they have power, subject to approval, to surrender or transfer the land in question to the Crown, have otherwise no power to sell or transfer the land (s. 342).

(viii) the trustees are obliged to keep proper books of account in respect of the trust (s. 341) and all moneys received by them on behalf of the trust are to be paid into a bank trust account until applied by them to the purposes for which they have been received (s. 341(1)).

22. S. 350 of the Land Act 1962-1975 prohibits trustees from permitting anyone to occupy or use reserve land for any purpose contrary to or inconsistent with the purpose for which the land was reserved.

23. When possession of Australia was taken in the name of His Majesty ownership of all land in the colony was regarded as passing to the Crown or as being within the power of the Crown to dispose (Attorney-General v. Brown (1847) 2 SCR (N.S.W.) App 30) and was thereafter dealt with by the Crown upon a basis which came to be formalised by certain enactments. So far as Queensland is concerned the Australian Waste Lands Act 1855 s. 6 and the Constitution Act 1867-1972 ss.30, 407 provide the framework upon which the later Acts dealing with Crown Lands were passed by the Queensland Legislature. The Crown in right of the State of Queensland may now deal with these Crown lands only in the way prescribed by the relevant statutes (Australian Alliance Assurance Co. Ltd. v. Goodwin (1916) St.R.Qd. 225 at 254) and in the present case reference is to be made to the Land Act 1962-1975 and its predecessors.

24. The basis upon which grants of Crown Land in trust and dedications or reserves of Crown Land for public purposes, have from time to time been made generally in Australia and also in Queensland may be gathered by reference to Randwick Corporation v. Rutledge 102 C.L.R. at pages 69-78 in the judgment of Windeyer J. and to Attorney General on the Relation of Currie v. Down and Others (1905)

St. R. Qd. 16 at p. 19 and 20. RECORD

25. The Aborigines Act, 1971, which has already been referred to and described as protective in its terms, provides for a number of matters including the establishment of Aboriginal Councils (s. 31) Aboriginal Courts (s. 32) and an Aboriginal Advisory Council (s. 33), the supply of liquor on reserves (s. 34), the management of property of aborigines (s. 37 and 45), the administration of estates of aborigines (s. 40) the restriction of creditors' rights against aborigines in certain cases (s. 42), control over contracts entered into by aborigines in certain circumstances (s. 43), the appearance which may be made in court on behalf of aborigines (s. 50) and relationships short of marriage entered into between male and female aborigines (s. 49). The Act also provides for the making of regulations on a number of topics including the terms of employment of aborigines (s. 56). These provisions are referred to generally to illustrate the policy adopted by the Legislature in Queensland towards aborigines.

26. The Aborigines Act 1971 also provides for the continuance of matters done under prior legislation dealing with aborigines and now repealed by it (s. 4) and provides further that certain persons officials and institutions shall ensure the functioning of the scheme of the legislation e.g. the Director (ss. 7, 8).

27. In Part III of the Aborigines Act of 1971 reserves are dealt with and the Act states how they are to be conducted and regulated (s. 15). Entry upon and residence within reserves is subjected to strict control. (ss. 17 to 28). Aborigines who desire to take up residence upon a reserve must apply for a permit either to the Chairman of the Aboriginal Council or to the Director and similarly, in the case of aborigines and other persons who desire to visit a reserve, permits are required (ss. 20, 23). These permits are made subject to revocation.

28. An Act of the Parliament of the Commonwealth of Australia, obviously enacted in pursuance of a different policy, is entitled Aborigines and Torres Strait Islanders (Queensland) Discriminatory Lands Act of 1975 and it makes completely different provision in respect of reserves and the rights of aborigines and while s. 109 of the constitution of the Commonwealth of Australia has the effect that the Commonwealth legislation prevails over the Queensland legislation to the extent that if any inconsistency exists between the two, the terms

and policy of the former will it is suggested be of no assistance in arriving at the true construction of any doubtful provisions which may exist in the remainder of the Queensland Act.

29. Sections 29 and 30 of the Aborigines Act 1971 are of considerable importance and are referred to in paragraphs 5 and 9 (a) of the Statement of Claim. They deal with the question of mining on reserves. Section 29 of The Aborigines Act 1971 provides as follows:-

"29. REGULATION OF MINING IN RESERVES.
(1) 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 -

(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;

(b) a person who holds a miner's right or to whom an authority to prospect or other mining entitlement, other than a mining lease, is granted, whether before or after the date of commencement of this Act, is not thereby entitled to be on a reserve for any purpose of prospecting or mining, and such a right, authority or entitlement shall be construed as including a condition that it is granted subject to this section.

(2) A person who seeks to enter on a reserve for any purpose of prospecting or mining may make application to the trustee of the

reserve for a permit in that behalf.

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

(4) If the trustee of a reserve refuses a permit or revokes a permit the applicant or, as the case may be, permittee may apply to the Minister for a permit to enter on the reserve concerned for any purpose of prospecting or mining.

Upon application made to him the Minister may grant or refuse a permit and he may at any time revoke a permit granted by him.

(5) A person shall not be entitled to be on a reserve for any purpose of prospecting or mining unless -

(a) he is the lessee under a lease, duly granted, that entitles him to a mining tenement situated on that reserve, or he is there bona fide as agent (authorised for that purpose) of such a lessee; or

(b) he is authorised so to be by a subsisting permit granted by the trustee of the reserve or, as prescribed by this section, the Minister, or he is there bona fide as agent (authorised for that purpose) of a person so authorised."

30. Section 30 of The Aborigines Act 1971 provides as follows:-

"30. 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 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 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."

RECORD

31. S. 56 of the Aborigines Act 1971 enables regulations to be made concerning the grant of aid to aborigines (s. 56(13)) and concerning a fund called the Aborigines Welfare Fund "for the general benefit of Aborigines" (s. 56(14)). S. 36(1) of the Act states that in the course of granting aid to aborigines the Director may apply money held by him "for the benefit of Aborigines generally".

32. Sec. 44 of Part V of the Mining Act 1968-1975 in force at relevant times, authorised the Governor in Council in his discretion to grant and cause to be issued mining leases over reserves for public purposes. The character of the reserves referred to was clarified by the amendments made by the Mining Act and Another Act Amendment Act 1974 to the definition of "reserve" in s. 7 of the principal Mining Act. Although the views of the person or authority having the care and management of the reserve in question have to be regarded by the Governor in Council, a full discretion remains S. 44(4). A lease when granted over a reserve would ordinarily relate only to the earth below the surface (s. 44(3)). In the present case however sub-clause (3) of clause 2 of Part III of the Companies' Agreement makes the particular provision which is set out above (see para. 19 of this case).

33. The principal relief claimed in the Statement of Claim is that the Appellant, in entering into the Director's Agreement with the Companies and in granting to the Companies, a right, on the terms of the said Agreement, to enter upon the reserve, acted in breach of trust.

p.7 l1 16-22

RECORD

34. The Statement of Claim alleges in Paragraph 7 that the Appellant purportedly acting in his capacity as trustee of the reserve and pursuant to the powers conferred by sections 29 and 30 of the Aborigines Act 1971 entered into the Director's Agreement and approved the grant to the Companies of a Special Bauxite Mining Lease in respect of the whole or part of the lands of the Reserve and agreed to grant to the Companies permission to enter upon the Reserve to enable them to carry out the Companies' Agreement (which, in the Statement of Claim is referred to as "the Franchise Agreement"). p.5 ll 2-19

35. Paragraph 8 of the Statement of Claim sets out the effect of clause 2(c) of The Director's Agreement which provides, inter alia, that "not later than the end of the third year of mining activity" the Companies shall "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 or about the Reserve". p.5 ll 20-34

36. Paragraph 9 of the Statement of Claim alleges that in entering or purporting to enter into the Director's Agreement and approving or purporting to approve the grant of the Special Bauxite Mining Lease, and agreeing or purporting to agree and to grant permission to the Companies to enter upon the Reserve, the Defendant acted in breach of trust in that:- p.5 ll 35-39 p.6 ll 1-11

"(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 the 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:-

....."

The alleged particulars of such failure are then set out.

37. The relief claimed by the Respondents in the Statement of Claim is as follows:- p.7 ll 14-28

"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. Ltd. 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 monies by way of profits received pursuant to the said Agreement.

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

38. The Appellant, pursuant to Order 29 Rule 1 of the Rules of the Supreme Court demurred to the whole of the Statement of Claim and specified grounds in law. pp. 9 and 10

39. Under the Rules of the Supreme Court of Queensland the procedure of demurrer is available for objection in law to the pleading of an opposite party or to part of that pleading (O 29 R 1,2) and while some ground in law must be stated for a demurrer the party demurring is not limited in argument to the ground so stated (O 29 R 2). On the argument of a demurrer the facts as stated in the pleading of the opposite party must be accepted at least for the purposes of the argument.

40. The Statement of Claim of the plaintiffs to which objection was taken by demurrer is shown on examination to contend for two major propositions:-

RECORD

(a) the Director could not in the discharge of his functions under ss. 29 and 30 of the Aborigines Act, 1971 lawfully enter into an agreement which in terms provided for participation in profits of a mining venture by the making of a payment described as being "on behalf of Aborigines". (Statement of Claim Cl. 9(a) and cl. 9(b)(i)), and the Director accordingly could not on the basis of concluding such an agreement lawfully approve the grant of a Mining Lease upon a reserve or grant permission to enter a reserve for the purpose of mining (Statement of Claim cl. 9, introductory part), and

p. 6 ll 2-15

p. 5 ll 35-39

(b) because of matters which in the present case the Director is said to have taken into consideration and other matters which he is said to have failed to take into consideration at and prior to the time of entering into the Director's agreement and approving the grant of the Special Bauxite Mining Lease and granting permission to enter the reserve, the Director failed to make a proper exercise of his discretion and he acted in breach of trust (Statement of Claim paras. 9(b)(ii) to (vi) inclusive).

p. 6 ll 15-40
p. 7 ll 1-8

41. A further allegation to be noticed in the Statement of Claim is that because of an intention imputed to the Director of making a payment of the agreed share of profits or some part of it into the Aborigines Welfare Fund provided for by the Aborigines Act of 1971 the Director intends to commit a breach of his duty as trustee (Statement of Claim Para.9).

p. 7 ll 9-13

42. On the demurrer the appellant argued against the propositions contended for in the Statement of Claim and in addition argued against the entitlement of the plaintiffs to sue for the relief sought in the action as it was constituted.

RECORD

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

REASONS OF LUCAS J.

p.19 l 40 — 43. Notwithstanding a submission made on behalf of the appellant to the effect that the Director's agreement must be taken to have received statutory authorisation or approval or adoption, Lucas J. took
p.22 ll 1-5 — the view that it had not been given the force of law and its provisions and things done under it were not immune from challenge.

p.18 ll 29-32 — 44. He took the view just mentioned although he noticed that s.3 of the Aurukun Associates Agreement Act 1975 expressly gave to the Companies' Agreement the force of law as though it were an enactment of the Act and although he observed that the Companies' Agreement contained a number of references to the Director's
p.18 ll 36-38 — Agreement, i.e. in the fourth recital of the Companies'
p.20 l 20 — Agreement in clause 2(3) of part III of the Companies'
p.20 ll 25-38 — Agreement in clause 19 part VIII of the Companies' Agreement and notwithstanding that the Director's Agreement was itself set out in a schedule to the
p.21 ll 1-4 — Companies' Agreement.

p.21 ll 9-13 — 45. He appeared persuaded by the considerations that the parties to the Director's Agreement were different from the parties to the Companies' Agreement,
p.21 ll 20-25 — that it was only the Companies' Agreement which was referred to in the express validating provisions to be found in section 3 of the Act, and clause 19 of part VIII of the Companies' Agreement which expressly made it an obligation of the Companies under the Companies' Agreement and a condition of the special Bauxite Mining Lease that the companies should carry out their responsibilities and obligations contained in the Director's Agreement, was an indication that the force of law had not been given to the Director's Agreement
p.21 ll 26-36 — rather than that it had.

p.21 ll 37-49 — 46. He considered that section 14(2) of the "Acts Interpretation Act 1954-1971" which states "every schedule to an Act shall be deemed to be part thereof" provided no assistance upon the question since the present case was one concerned with a schedule to a schedule to an Act.

p.22 l 14 — 47. Upon the further questions raised on the demurrer, he felt that it was necessary to examine the powers and duties of the Director as a trustee which he considered are contained in the Land Act 1962-1975, although the particular power of the Director to enter

into an agreement of the type under consideration in this case is contained in s.30 of the Aborigines Act 1971.

RECORD

48. He considered that the effect of s.29 of the Aborigines Act 1971 is that the holder of a Mining Lease does not need a permit to enter a reserve for purposes of mining or prospecting so that while the reason for inserting clause 3(b) in the Director's Agreement appears obscure nevertheless the Director must be taken as acting under the provisions of s.30 of the Aborigines Act 1971 in making the Director's Agreement.

p.23 ll 36-38
p.24 ll 24 & 25
p.23 ll 16-18

49. While he considered that there was no necessity for an agreement concluded under the powers contained in s.30 of the Aborigines Act 1971 to provide at all for a participation by the trustee in mining profits nevertheless, if an agreement does provide for participation it must be for the benefit of "Aborigines resident on the reserve or other aborigines" and that in such cases the Agreement itself must properly specify who are the recipients who take the share of profits.

p.25 ll 7-11
p.25 ll 15-30

50. While there were difficulties in deciding whether the intention in the concluding words of s.30(2) of the Aborigines Act 1971 was to describe two mutually exclusive classes of aborigines he thought that the Director's Agreement in terms refers to neither of such two classes.

p.25 ll 31-35
p.26 ll 1-3

51. On the other hand he thought that since the Director's powers and duties as trustee are those which are contained in the Land Acts 1962-1975 then for this reason moneys which the Director receives as trustee must be dealt with as prescribed by the provisions of those Acts and accordingly the share of mining profits provided to be paid to the Director in the present case was required to be applied for the purposes of the trust constituted under the Land Act 1962-1975 i.e. "for the benefit of the aboriginal inhabitants of the State Aurukun".

p.26 l 6
p.26 ll 34-44
p.27 ll 1-5
p.30 ll 14-17
p.28 ll 19-22
p.30 ll 19-23

52. Although he considered that section 350 of the Land Act 1962-1975, which provides that trustees of the reserves shall not permit an occupation or user of the reserved lands for a purpose which is contrary to or inconsistent with the purpose for which the land was reserved, must be taken to have been modified by s.29 of the Aborigines Act 1971 apparently he did not think that s.30 of the

p.27 ll 32-40

RECORD

Aborigines Act 1971 modified the requirements of the Land Act 1962-1975 as to the Director's dealing with funds as a trustee once the Director received funds as a trustee under s.30 of the Aborigines Act 1971.

p.28 ll 23-39

53. He then thought one was left to consider the ambiguity inherent in the phrase used in the reservation of the lands in question under the Order-in-Council viz. "for the benefit of the aboriginal inhabitants of the State, Aurukun." This 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." While the second meaning just stated was wider than the first he did not think it was as wide as the phrase used in the Director's Agreement: "For the benefit of Aborigines"it being remembered that clause 1 of the Director's Agreement imports the definition of "Aborigine" found in the Aborigines Act 1971.

p.28 ll 31-34

p.28 ll 35-39

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p.29 ll 2-48
p.30 ll 1-9
p.34 ll 11-28
p.28 ll 17-44
p.29
p.30 ll 1-9
p.30 ll 40-45
p.30 ll 32-40

54. On this branch of his reasons, he noted the several separate indications which appeared in the Director's Agreement and which indicated an intention to benefit those aborigines who might be on the Aurukun Reserve from time to time and he appeared to conclude that the phrase: "For the benefit of Aborigines" used in the Director's Agreement took its meaning from the context of the Agreement itself so that it became in some way not inconsistent with the terms on which the trustee of this reserve would be obliged to hold trust moneys under the provisions found in the Land Act 1962-1975 nor apparently with the terms on which the Director was required by s.30(2) of the Aborigines Act 1971 to make provision for any participation in profits.

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p.30 ll 3-9
p.28 ll 23-40

55. He felt himself able to reach this conclusion without either finally construing the relevant parts of the Director's Agreement or even finally deciding the meaning of the terms in which under the Land Act 1962-1975 the reservation was made of the Lands at Aurukun.

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p.30 ll 24-32
p.31 ll 1-16

56. In deciding the demurrer he did not, it seems, feel obliged to give any particular weight to the allegation in paragraph 9(a) of the Statement of Claim or the related allegation in paragraph 9(b)(1) of the Statement of Claim.

RECORD

57. So far as the further allegations in paragraph 9(b)(ii) to (vi) inclusive of the Statement of Claim were concerned, he appeared to be prepared to conclude that since matters of this sort would under the general law give rise to claims for relief against a trustee of a private trust at the instance of a cestui que trust, the same duties and obligations would apply to the Director exercising the discretions referred to in s.30 of the Aborigines Act 1971. p.31 ll 1-16

58. Dealing with the claim in paragraph 10 of the Statement of Claim that the Director intended to pay some or all of the share of profits into the Aborigines Welfare Fund he appeared to conclude that the fund was not the sort of trust fund referred to in the provisions of the Land Act 1962-1975 under consideration and accordingly such an action would constitute a breach of trust on the part of the Director. p.31 ll 17-39

59. He then concluded that the plaintiffs' assumption of a right to sue in a representative capacity could not be challenged in demurrer proceedings and on the further point which arose because the plaintiffs did not sue on the relation of the Attorney General in respect of the alleged breaches of a public trust he found that the plaintiffs were particularly and specially affected to a greater degree than other persons so that they had standing to sue and he accordingly overruled the demurrer. p.32 ll 16-21 p.33 ll 20-24 p.35 ll 19-24 p.35 ll 25-26

REASONS OF DOUGLAS J.

60. Douglas J. took the view that:

(a) The Director's Agreement is not part of the Companies' Agreement and accordingly is not to be taken as referred to by s.3 of the Aurukun Associates Agreements Act 1975 and so does not have the force of law as though it were a part of the Companies' Agreement. p.37 ll 31-34

(b) The Director's Agreement does not become part of the Companies' Agreement by virtue of the provisions of s.14(2) of the Acts Interpretation Act 1954-1971 and it is not covered by that subsection. p.38 ll 27-40

(c) Nothing in the Aurukun Associates Agreement Act 1975 directly states that the provisions of the Director's Agreement are to have the force of law as though part of the Act. p.37 ll 31-34

(d) Accordingly the submission that the Director's Agreement must be taken as having received statutory authorisation, approval or adoption, failed. p.39 l 40

RECORD

p.40 l 1 (e) On the other matters he agreed with the reasons of Lucas J.

REASONS OF KNEIPP J.

61. Kneipp J. took the view that:

p.42 ll 24-28 (a) He accepted that the duties and obligations of the Director of the Reserve at Aurukun although not specifically stated had to be ascertained by considering the title of the Reserve and the provisions of the Aborigines Acts 1971.

p.42 ll 34-41 (b) The legislature clearly enacted a special enactment because it thought that the agreement intended to be made with the companies could not be satisfactorily implemented within the framework of existing legislation.

p.46 l 31 (c) One might note the relative dates of execution of the Companies' Agreement (called by His Honour the "Franchise Agreement") on 22nd November, 1975 and the
p.46 l 20 Director's Agreement 4th December, 1975.

p.50 ll 20-45 (d) The Director's Agreement although not incorporated
p.51 ll 1-6 in the Companies' Agreement was impliedly approved and ratified by it so that it would be inconsistent with the legislative will and intent as disclosed by the Aurukun Associates Agreement Act 1975 and the Companies' Agreement to assert that the Director's execution of the Director's Agreement could now be called into question.

p.51 ll 40-46 (e) The legislative approval of the Companies'
p.52 ll 1-14 obligation to pay THREE PER CENTUM of the profits extended to approving the purpose to which it was proposed that the money would be put by the Director.

p.52 ll 15-36 (f) In respect of paragraph 9(a) of the Statement of Claim the provisions of the Director's Agreement are not invalid on the ground that the use of the phrase "on behalf of Aborigines" in clause 2 of the Director's Agreement is not one or other of two classes referred to in s.30 of the Aborigines Act 1971 because:-

p.52 ll 36-42 (i) The expression "on behalf of the Aborigines" as used in the Director's Agreement should be taken as equivalent to the expression "for the benefit of other Aborigines" as used in s.30(2) of the Aborigines Act 1971.

(ii) Alternatively, if the effect of the expressions in the Director's agreement are different from those used in s.30(2) of the Aborigines Act 1971, the Director's Agreement has been ratified by the Aurukun Associates Agreement Act 1975 which, being of special application overrides the provisions of s.30 which are of general application.

RECORD
p.52 ll 42-46
p.53 ll 1-2

(g) So far as paragraph 10 of the Statement of Claim is concerned even if the moneys should not be paid into the "Aboriginals Welfare Fund" the Statement of Claim does not put forward any basis upon which the plaintiffs as aboriginal residents of the reserve can complain because the appellant if he holds the moneys in trust, holds them in trust "for aborigines" a much wider class which may or may not include the plaintiffs and the Statement of Claim does not allege any duties said to be owed to any wider class.

p.53 ll 3-28
p.53 ll 30-34
p.53 ll 37-44

(h) Upon the remainder of the Plaintiff's arguments, he did not need to come to any conclusion.

p.48 ll 1-5

(i) The demurrer accordingly should be allowed.

p.54 l 5.

PART C - APPELLANT'S SUBMISSIONS

FIRST BRANCH

62. No relevant aspect of the Director's Agreement is open to challenge and neither is the execution of that agreement, because in both aspects the legislature has indicated an intention of approving and, should it be necessary, validating the agreement. In support of this proposition, a number of matters may be advanced.

63. It is not necessary that the legislative approval or validation take any particular form, but rather it is a question of sufficiently indicating an intention to approve or validate. It does not matter whether the indications which the legislature gives are to be characterised as express or implied although it is probably true to say that in the present case there are some indications which are express and some which are implied. The question of statutory construction arising in this case should be answered by a decision that in the end the legislative approval and sanction has been made sufficiently clear.

64. Although it could be argued that the whole of the Director's Agreement has been adopted approved and ratified, it is probably an unnecessary distraction to direct all attention to this larger question. Putting aside the distinct allegation in paragraph 10 of the Statement of Claim of an intention by the Director to pay into the Aborigines Welfare Fund, the only aspects of the Director's Agreement which are challenged in the pleadings are the form of the obligation imposed on the Companies to pay the agreed share of profits "to the Director on behalf of Aborigines" and the decision of the Director to execute an Agreement containing a provision in this form.

65. The relevant portion of the Director's Agreement is clause 2(c) and this imposes an obligation on the Companies and it therefore must be regarded as included among those "responsibilities and obligations" of the Companies which are referred to in clause 19 of part VIII of the Companies' Agreement and which are given the force of law (section 3 Aurukun Associates Agreement Act 1975).

66. More broadly put it is also true to say that the scheme of the Act just mentioned involves the giving of legislative approval to all aspects of the Companies' Agreement and included amongst those aspects are the various obligations assumed by the Companies, whether under the Companies' Agreement itself or under the scheduled Director's Agreement.

67. Clause 19 of part VIII of the Companies' Agreement ensures both that the obligations owed by the Companies to the Director shall in addition be owed by the companies to the State of Queensland and also that breaches by the Companies of their obligations to the Director shall involve the Companies in breaches of condition under the Special Bauxite Mining Lease. There are obvious reasons why the legislature would have wished to ensure this.

68. The legislature does not leave the matter solely in the realm of private law with a right by the State to sue for appropriate relief in the event of breach. It chooses to enact the arrangements giving them the status of an Act of the Legislature rather than proceed merely by entering, through one of its agencies, into an ordinary commercial contract.

69. Then by adding the "force of law, as though enacted" feature (s. 3 of the Aurukun Associates Agreement Act 1975) the legislature chooses to place the whole scheme and certainly that aspect dealing with the matter of sharing mining profits between the Companies and the Director, beyond the power of any person to subject it to legal challenge.

70. The legislative enactment of the obligation of the Companies to pay the share of profits to the Director upon a basis which becomes incorporated into the Companies Agreement and thus into the Act itself, means that persons are precluded from bringing a challenge to the form of the obligation and also to the fact of its having been agreed upon but it further means that any earlier inconsistent statutory provisions and statutory or legal obligations and duties are overruled. Any duties or obligations of the Director which may otherwise have applied but which are inconsistent with the legislature scheme will be affected in this process of overruling. In other words, if need be, the law is to be regarded as changed.

71. The statutory scheme involves that the legislature is to be regarded as saying not only what the Director's Agreement or the relevant part of it shall be taken unchallengeably to be, but also from the Director's point of view what is the agreement which he was entitled to enter into and should have entered into. His discretions are to be taken as having vanished with the enactment.

The situation may be regarded as equivalent to the Director having entered into the particular profit sharing arrangement under statutory direction and with full statutory sanction and protection given in advance.

72. Another way of putting it would be to say that the execution of the Director's Agreement and the operation of such an agreement in that special form have been not only sanctioned but also adopted by the legislature as an essential basis of the overall statutory scheme.

73. The Companies' Agreement is itself undeniably required to be treated as part of the enactment and the Director's Agreement should not be regarded as just incidentally scheduled to the Companies' Agreement as a convenient way of referring to it. The Director's Agreement has, or relevant parts of it

have been truly incorporated as part of the Companies' Agreement. The Companies' Agreement together with the Special Bauxite Mining Lease (Fourth Schedule), the Director's Agreement (Third Schedule), the particulars of land under the lease (Second Schedule) etc. and their respective provisions are to be regarded as being from the point of view of the legislature fixed except for the possibility of a variation under the statutory mode which is authorised (sections 2 and 4 of the Aurukun Associates Agreement Act 1975).

74. The interdependence of the various features of the scheme is further shown by the facts that: the execution of the Companies' Agreement presupposed the execution of the Director's Agreement (see clause 9 of part VIII in the Fourth recital to the Companies' Agreement): the conditions of the Companies' Agreement become conditions of the special lease (see the first schedule to the lease which itself is the fourth schedule to the Companies' Agreement); the Companies' responsibilities and obligations under the Director's Agreement are thus incorporated into both these documents; and so far as surface rights are concerned the provisions of the Mining Acts are overriden by the Companies' Agreement, but the terms of the Director's Agreement are imported to limit the extent of this repeal and so incidentally receive further legislative recognition (clause 2(3) of part III of the Companies' Agreement).

SECOND BRANCH

Alternatively, these arguments are put.

75. The reserve as originally constituted under the early Land Acts and thereafter continued is a particular form of statutory trust not fully analogous with privately constituted purpose trusts.

76. The statutory trust of the type under consideration must be set up and can have validity only as a "public trust" (section 334 of the current legislation, the Land Act 1962-1975 and section 181 of the Land Act 1910) and more specifically only as a reservation for the "public purpose" of an "aboriginal reserve".

77. To say the least, it would be an extremely doubtful proposition that under the Land Act, proceeds or profits of the trust could lawfully be diverted for the private benefit of individuals, even if aboriginals. Certainly under that legislation profits or proceeds derived from a use for a purpose contrary to or inconsistent with the reservation could not lawfully

arise out of the land (c.f. s.4(5) of the Aborigines Act 1971). Even if they did arise, no group of individuals could properly claim that those proceeds should be held for them or expended for their benefit.

78. The public nature of reservations made under the Land Act helps us construe the vague words of the Orders in Council, or rather confirms the more likely meaning appearing on the face of the words themselves. The phrase "aboriginal inhabitants of the State, Aurukun" does not mean "the aboriginal inhabitants of Aurukun". It involves a broad reference to all aboriginal inhabitants of the State and the reference to Aurukun merely informs where the reserve is located.

79. If there is any class of persons who could claim to be in contemplation of benefit from a public reservation made under the Land Act for the purpose or object of an aboriginal reserve it would be the class "all aboriginals", or, if there is a territorial limitation to be implied as a matter of construction in the intended operation of the legislation itself, it would be perhaps "all aboriginals who may from time to time reside in the State" and certainly no narrower class.

80. It is possible to go further and suggest that in truth the public reservation is not for any class of individuals at all and that the words of the Land Act must be taken to prevail over the words of any Order in Council made under their authority so that the words of the Acts will control the effect of a reservation made under them. The reservation should be regarded as though being in the terms "at Aurukun, for Aboriginal purposes."

81. Accordingly, considering the trusts or quasi trusts raised by the provisions of the Land Act 1962-1975 and the position of the Director appointed as trustee thereunder, there are insuperable difficulties in the way of the narrow representative action launched in the present case by the plaintiffs as indeed in the way of any action brought other than on the relation of the State Attorney General under the well known principle illustrated in Queensland by a case such as Bradford -v- Municipality of Brisbane 11 Q.L.J. 44. This proposition is returned to in argument below.

82. The provisions of the Aborigines Act 1971 give no more support to the plaintiffs. If in aid of their cause, the plaintiffs are inclined to see the Director as being appointed under the Land Acts as a trustee for the Aboriginal inhabitants of the Aurukun reserve, there are still grave difficulties in the way of viewing the powers arising under sections 29 and 30 of the Aborigines Act 1971 as additional trust powers conferred under any trust for them, since, inter alia, a power to direct the share of mining profits arising from operations on the reserve to aborigines other than residents upon the reserve is specifically conferred (see the words of s.30(2) of the Aborigines Act 1971) and would be completely inconsistent with such a trust.

83. On a broader basis, provisions for permission to be given for extensive mining operations especially operations over the surface and soil of the reserve (see clause 2 part III of the Companies' Agreement) cannot be regarded as a feature of any trustee power or responsibility arising under the Land Act 1962-1975 but should be regarded as conferred under a parallel legislative policy which is designed to ensure that mineral wealth even on public reserves may be tapped in appropriate cases.

84. The trustee eo nomine, is put in the position of a person who must be consulted before an entry is made upon a reserve for mining purposes (section 29(2) of the Aborigines Act 1971) but his position is very different from a trustee with legal ownership exercising full discretions of a trust kind. For example, the Minister may overrule him both upon his decision as to entry upon the reserve (s.29(4) of the Aborigines Act 1971) and as to any provisions which ought to be made for participation in mining profits. (s.30 of the same Act) Certainly, the Minister is a person who stands completely outside the ambit of any trust relationship and this supports the view that when a trustee makes decisions under sections 29 and 30 of the Aborigines Act 1971 he is not acting in his capacity as trustee, but is exercising collateral powers although it is under the name of trustee that he is identified as the person who is to act.

RECORD

85. The sections of the Aborigines Act 1971 are the source of independent powers given to a person who in other contexts acts as trustee of a particular reserve. The powers would be more properly described as administrative discretions, and they are given to one who is a Crown servant appointed to execute the functions delineated by the Aborigines Act 1971 itself (see section 7 thereof). Because of this character of the powers themselves, provided that a provision for participation in profits is, as to form, of a type which the Director is by section 30 of the Aborigines Act 1971 authorised to agree upon (and it will be submitted that it is) then the decision will be challengeable only in a properly constituted suit and, it is submitted, only for lack of bona fides; at least it will not be challengeable upon the grounds taken in clause 9(b)(ii) to (vii) of the Statement of Claim, to which the argument will shortly return.

86. There are difficulties which Lucas J. noticed in the way of alleging that the provision for participation in mining profits, upon which the Director agreed, was one in fact agreed in connection with an exercise of power under s.30, since it appears to have been agreed in connection with the granting of a lease rather than a permit. If this were so the challenge which the Statement of Claim makes upon the basis of a wrongful exercise of the power granted under section 30 of the Aborigines Act 1971 would fail, since the occasion for the exercise of such power would not have presented itself. The profit would then be more properly regarded as a windfall one contributed by the companies rather than one to which challenges could be brought as is done in this suit apparently on the basis that the plaintiffs are a special class named in section 30.

p.24 ll 24-42

87. In any event the plaintiffs, or the "Aboriginals resident on the reserve" to whom section 30(2) of the Aborigines Act 1971 refers are not a class to whom trust duties or duties of a trust nature are owed and the references made by the respondents in the Court below to cases dealing with trust powers or collateral powers are misconceived.

88. The nature of the power to be exercised under section 30 of the Aborigines Act 1971 and the extent of any limitation upon that power will have to emerge, as a matter of statutory construction from the terms of the Aborigines Act 1971 and in particular the section just mentioned. There is no reason to start with the preconception that the powers of the Director conferred under section 30 are in their character, mere additions to the trust powers which he otherwise possesses under the Land Act 1962-1975. They are in their nature quite contrary to the trust powers and obligations granted and imposed under the Land Act 1962-1975.

89. Additional reasons may be advanced in support of the proposition that the Director's powers granted under section 30(2) of the Aborigines Act 1971 are not trust powers at all and certainly not additional trust powers conferred upon him in his character as trustee under the Land Act 1962-1975.

90. The Minister is placed in a position where he can overrule the Director's decision if an applicant for a mining permit and the Director cannot agree upon terms.

91. The contrast in language to be seen in the changes between "may" and "shall" throughout section 30 emphasise the changes in meaning intended.

In connection with the granting of a permit an agreement "may" be required, in which case any agreement "shall" provide for such terms as are agreed upon and there "may" be included provisions for participation in mining profits for the benefit of Aborigines.

The discretion given to the Director allows the grant of a simple permit, without more, and it also allows for the grant of a permit to be made in conjunction with an agreement.

If an agreement is insisted upon, it may not provide for participation in profits or any payments at all, and, even if it does, it need not be for the benefit of any Aborigines.

RECORD

92. The opening words of section 30(2) of the Act: "an agreement shall provide for such terms and conditions as the parties thereto agree upon" are wide enough to allow the inclusion of a provision for the payment of a share of profits for any public purpose, such as into consolidated revenue, whether or not such a provision is inserted on the initiative of the trustee or of the Minister, and the following words of the sub-section do not restrict the scope of the power to insist on profit sharing but merely illustrate some possible ways in which the power may be exercised. Those words and perhaps the earlier words of the section may be regarded as "directory" only.

93. It is noteworthy that provision for sharing may be for sharing by persons other than the trustee, even though the trustee is the one who insists upon it: see the words in sub-section 30(2) "trustee or any other persons".

94. Finally if a particular provision is nominated to be for the benefit of aborigines, it may be for the benefit of "aborigines resident on the reserve" or it may be for "other aborigines".

95. The "four corners" of the power, as some of the cases refer to the concept of width of a conferred executive discretion (c.f. Associated Provincial Picture Houses Ltd. -v- Wednes bury Corporation (1948) 1 K.B. 223 at 228 are in this instance widely spaced.

96. The provision for participation in profits which was actually made by the Director's Agreement in this case was for a payment "to the Director on behalf of Aborigines" and a provision in such terms should because of the very breadth of the power involved be regarded as within its scope.

97. If, contrary to what is suggested, some limitation upon the breadth of the power is to be implied from the concluding words of sub-section 30(2), the phrase "other aborigines" therein appearing should nevertheless not be narrowly or artificially construed. It should not be regarded as pointing to a class which is necessarily exclusive of another class of "Aborigines resident on the reserve"... The word "or" which occurs at that point in the sub-section should be given a meaning equivalent to "and/or" and such an approach to construction has in other contexts been adopted.

98. The "other aborigines" who may be selected may include some, all or none of the aborigines resident on the reserve. There may be a bare nomination of "aborigines" (a term which is defined, see section 5 of the Aborigines Act 1971) or there may be a selection of aborigines made other than by reference to such a qualifying factor as residence on the reserve. RECORD

99. The policies being served or acknowledged by section 30 look far beyond the confines of a particular reserve. Mineral wealth of the state, is, in appropriate cases, to be mined even though it is situated on a reserve, yet the unforeseeable discovery of considerable mineral wealth on one reserve is not necessarily to result in there being conferred lavish and disproportionate benefit upon that reserve to the relative disadvantage of other reserves or of the State or the public interest generally. One would assume a background of this degree of basic wisdom at least when approaching the task of construction of this particular section and additionally, one should, if free to do so, avoid the absurd result that either all or none but not merely some of the determined share of mineral wealth located on a particular reserve may go to the benefit of that reserve. Accordingly, it is submitted that one should not conclude that completely exclusive classes are being referred to in the concluding words of sub-section 30(2) of the Aborigines Act 1971. 10 20

100. It is submitted that the term of clause 2(c) of the Director's Agreement, providing for a payment "to the Director on behalf of aborigines" is within the area of discretion allotted to the Director under section 30 of the Aborigines Act 1971 i.e. that it is within the "four corners" of that particular executive discretion. More specifically the term of the Director's Agreement which is challenged is within the scope of the opening words of sub-section 30(2) which portion of the sub-section should be read independently of the words which follow. Alternatively it is within the area covered by the words which allow for benefit to "other aborigines" in the concluding words of the sub-section where the separate classes are referred to. In the further alternative even if those classes are correctly to be construed as exclusive, the provision in the Director's Agreement for a payment "to the Director on behalf of Aborigines" 30 40

cannot be regarded as inconsistent with the words of sub-section 30(2) of the Act since a provision in that form does not put it beyond the power of the Director to comply with the requirements of the sub-section even on its narrowest construction. No breach would occur at the stage of his entering into such an agreement. With the further powers and discretions available under the Aborigines Act 1971, the Director would still be free, at a later time, to direct expenditure for the benefit of either of the two classes of aborigines. Afterall, the Director's Agreement does not require payment to the Director "on behalf of all Aborigines" and the sub-section does not speak of "all aborigines resident on the reserve" any more than it speaks of "all other aborigines".

RECORD

101. The sub-section under consideration does not require all the machinery provisions connected with expenditure or distribution which may for the future be proposed by the Director to be set out in detail in any agreement concluded by him with applicants for mining or prospecting rights.

102. It has already been stated in the argument under the first branch that in any event the Aurukun Associates Agreement Act 1975 with the Companies' Agreement and the Director's Agreement overrides the provisions of sub-section 30(2) of the Aborigines Act 1971 should the latter be in any way inconsistent. Under the Director's Agreement the Companies are obliged to pay the share of profits to the Director "on behalf of aborigines" and the form of that obligation is approved by the Companies' Agreement.

103. Accordingly the grounds of challenge taken in paragraph 9(a) and 9(b)(i) of the Statement of Claim should fail. p.6 ll 2014

104. Further, as stated, the powers which the Director exercises under sub-section 30(2) of the Aborigines Act in concluding an agreement have nothing to do with trust powers or more particularly trust powers arising under the Land Act 1962-1975. Certainly they do not concern trust powers which call for exercise potentially for the benefit of individuals resident on the Aurukun Reserve. It then appears that the various grounds specified by way of challenge to the execution of the Agreement apparently upon an assumption that such trust duties apply, lack substance (see para 9(b)(ii) to (vi) inclusive of the Statement of Claim). p.6 ll 15-40 p.7 ll 1-9

RECORD

105. If we accept that, as a matter of form, the Director was entitled to conclude an agreement in the terms that he did, a Court cannot go further and review his actual decision to enter into such an Agreement. There is no allegation of bad faith in the pleading. The Director is by section 30 of the Aborigines Act 1971 left free to proceed to his decision as he chooses.

106. He need not consult with the residents of the reserve or any other aborigines who may be referred to in sub-section 30(2) of the Aborigines Act or give weight to their wishes. On the other hand, he is free, if he chooses, to "take account" of the wish of the executive government both as a matter of general principle where such a wide discretion applies and particularly in view of the fact that his own discretion may be overriden by the Minister under section 30. The Director should be regarded as having been free to arrive at his considered decision by "in or about November, 1975" or by any other date provided it is reasonably close to the date of the enactments. After all, the form of the Director's Agreement had to be settled before the Bill could be presented to the legislature. Also, as has already been argued, under the terms in which the Director did agree, he has in effect postponed his decision regarding the extent if any, to which aborigines resident on the reserve should be benefited and he may choose to consult with them later.

p.6 ll 15-40
p.7 ll 1-9

107. For these reasons, the individual grounds of challenge specified in paragraph 9(b)(ii) to (vi) should all fail. Under the procedure of demurrer, each should be separately considered for validity and all should fail.

THIRD BRANCH

p.7 ll 10-15

108. Paragraph 10 of the Statement of Claim challenges as being in breach of trust, the Director's alleged intention to pay all or some of the profits into the fund described as the "Aborigines Welfare Fund".

109. There is no trust duty involved in such a payment by the Director, or none under which the plaintiffs can claim an interest. The Director is merely dealing in an executive way with the profits arising under the Director's Agreement.

110. Within the Aborigines Welfare Fund, the moneys would remain under the control of the Director and may be applied by him for the benefit of such aborigines as are referred to in the Director's Agreement (clause 2(c)) or for the benefit of the Aborigines referred to in sub-section 30(2) of the Aborigines Act 1971 or either class mentioned in that sub-section.

111. Even if the Aborigines Act 1971 and the Regulations thereunder are construed in such a way that limits to particular areas the scope for expenditure of the contents of the Aborigines Welfare Fund the payment by the Director into the Fund would still not be in breach of any trust or executive duty imposed upon him. The Aborigines Welfare Fund is declared to be for the general benefit of aborigines and a payment into the fund would not be inconsistent with ways of exercising discretion open to the Director under s.30(2) of the Aborigines Act 1971.

112. Further on the arguments presented under both the first and second grounds of this case if any trust duties at all are applicable to the share of profits in the Director's hands upon and after payment of the profits to him by the Companies, they are trust duties owed generally to "aborigines" not just Aurukun residents and the plaintiffs do not represent this wider class and they have not made allegations in their pleading which on such a basis show an entitlement to complain.

FOURTH BRANCH

113. Finally, the plaintiffs have no standing to complain upon any of the grounds taken by them in the Statement of Claim since the breaches of duty complained of are misconceived and if any have occurred they are breaches of public statutory duty. The general principle applies and an action in respect of any such breaches must be brought on the relation of the Attorney General.

114. The plaintiffs, or all the residents of the Aurukun Reserve, do not possess any special interest beyond that of Aborigines in general. This appears to be so if one regards either the terms of the Director's Agreement or sub-section 30(2) of the Aborigines Act 1971. If one looks further to the reservation for public purposes made under the Land Act 1961-1974, the plaintiffs still do not possess any interest beyond that of the general public.

RECORD
p.3 ll 14-19

115. The representative action launched in the present case is based on an assumption that the "residents" of the Aurukun Reserve have the "same interest in the subject matter of" the cause (c.f. order 3 rule 10 of the Rules of the Supreme Court of Queensland) notwithstanding that they are a fluctuating body of persons who cannot, under the legislation, acquire any permanent right of residence and notwithstanding that the Statement of Claim does not specify a time at which the qualification of residence is to be taken for the purposes of the challenges made in the action. The date of exercise by the Director of his discretion in arriving at a decision to enter into the Director's Agreement, and the date of delivery of the Statement of Claim and other possible dates would all be ambiguously embraced by the Statement of Claim in its present form and this is objectionable. If the intention was to refer to persons who are from time to time resident upon the reserve that should have been stated.

RECORD
p.3 ll 14-19

116. Finally, for all the reasons mentioned above there is no identical interest shared by the "residents" taken as a class at whatever date, which can constitute an interest peculiar to them rather than to aborigines in general or the public at large. Therefore, the action in its present representative form cannot be maintained.

117. The appellant respectfully submits that the Judgment of the Full Court of the Supreme Court of Queensland was wrong and ought to be reversed, and this appeal ought to be allowed with costs for the following (among other)

REASONS

(1) BECAUSE the Director's Agreement or relevant aspects of it have received legislative approval and sanction and the Director's action in entering into an Agreement in such terms has similarly been approved and sanctioned by the Legislature under the Aurukun Associates Agreement Act 1975.

(2) BECAUSE the Director's Agreement was one which the Director could validly enter into in accordance with Section 30 of The Aborigines Act 1971.

(3) BECAUSE the Director, in entering into such an Agreement was not in breach of any duty imposed on him as a trustee of a reserve under the Land Act 1962-1974.

(4) BECAUSE the Plaintiffs do not have standing nor do they have sufficient interest in the subject matter of the suit to permit them to bring this action representative in form without the fiat of the Attorney General.

JOHN G.C. PHILLIPS

No. of 1977

IN THE PRIVY COUNCIL

ON APPEAL

FROM THE FULL COURT OF THE SUPREME COURT OF QUEENSLAND

BETWEEN

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

Respondents

- and -

THE CORPORATION OF THE DIRECTOR OF ABORIGINAL AND ISLANDERS ADVANCEMENT

Appellant

CASE FOR THE APPELLANT

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