

*Privy Council Appeal No. 8 of 1977*

**The Corporation of the Director of Aboriginal and  
Islanders Advancement** - - - - - *Appellant*

v.

**Donald Peinkinna and Others** - - - - - *Respondents*

FROM

**THE FULL COURT OF  
THE SUPREME COURT OF QUEENSLAND**

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JUDGMENT OF THE LORDS OF THE  
JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,  
DELIVERED THE 25TH JANUARY 1978

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*Present at the Hearing :*

LORD SALMON  
LORD EDMUND-DAVIES  
LORD RUSSELL OF KILLOWEN  
LORD SCARMAN  
SIR HARRY GIBBS

*[Delivered by LORD SCARMAN]*

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This is an appeal by the defendant from an order of the Full Court of the Supreme Court of Queensland overruling the defendant's demurrer to the plaintiffs' Statement of Claim. The Full Court was divided, Lucas and Douglas JJ. for overruling the demurrer, Kneipp J. for upholding it.

The question for the Board is whether the Statement of Claim discloses any cause of action.

The appellant is the Director of Aboriginal and Islanders Advancement in the State of Queensland: he will be referred to as "the Director". The plaintiffs are Aboriginal residents of the reserve at Aurukun and sue on behalf of themselves and all other Aboriginal residents of the reserve. They allege that the Director, who is the trustee of the reserve, has acted in breach of trust by entering into an agreement ("the Director's Agreement") assenting to bauxite mining operations in the reserve upon terms which include payment of a share of net profits to him "on behalf of Aborigines" generally.

The reserve is situate in a remote part of Cape York. It is inhabited, their Lordships were told, by some 700 Aborigines. There is a population of more than 24,000 Aborigines and Islanders in the State of Queensland.

In recent years bauxite has been discovered in the area of the reserve. On or about the 4th December 1975 the Director, as trustee of the reserve, entered into the Director's Agreement, by which he agreed terms

with three mining companies upon which he was prepared to approve the grant to them by the Crown of a special bauxite mining lease and to give them permission to enter the reserve for the purpose of their mining operations. One of the agreed terms was that "not later than the end of the third year of mining activity" the companies would "pay to the Director on behalf of Aborigines" 3% of the net profits.

The agreement was entered into upon the understanding that the companies were about to enter into an agreement ("the franchise agreement") with the State of Queensland governing the terms and conditions of a bauxite mining lease which the Crown would be prepared to grant to the companies.

The Director and the companies knew, and it was so declared in Clause 1 of the Director's Agreement, that the franchise agreement would itself be authorised by a statute to be styled the Aurukun Associates Agreement Act.

The Director's Agreement was in due course followed by the Aurukun Associates Agreement Act 1975 (royal assent, 12th December) which authorised the State of Queensland to enter into the franchise agreement. Section 3 of the Act provided that upon the making of the franchise agreement its provisions were to have "the force of law as though the agreement were an enactment of this Act." The Governor in Council by proclamation notified the 22nd December 1975 as the date of the franchise agreement.

The sequence of events was as follows:—

(1) Orders in Council 1921-1972, ordering that Crown land at Aurukun be reserved and set apart for the public purpose of an Aboriginal reserve, and ordering that the land be placed under the control of the Director as trustee,

(2) discovery of bauxite in the area of the reserve,

(3) 4th December 1975: the Director's Agreement agreeing terms upon which he was prepared to approve a mining lease and to give leave to enter the reserve,

(4) 12th December 1975: the Aurukun Associates Agreement Act validating and giving the force of law to the proposed franchise agreement between the State and the mining companies governing the conditions upon which a mining lease would be granted by the Crown,

(5) 22nd December 1975: the making of the franchise agreement, as a result of which the lease was granted and the terms of the Director's Agreement became effective.

It was against this background that on the 5th March 1976 the plaintiffs issued their writ. Their basic case is that the Director is the trustee of a public charitable trust for the benefit of the Aborigines resident on the reserve and, by entering into an agreement under which he is to receive a share of profits "on behalf of Aborigines" without limitation, has acted in breach of the obligations he owes the Aborigines resident on the reserve as their trustee.

This case, the Director submits, is wholly misconceived. He submits that there is no trust enforceable in equity: that, if there is, it is for the benefit of the Aboriginal inhabitants of the State: that he has acted for the benefit of that class: that in any event the acts alleged against him as being breaches of trust are authorised by law: and that upon a proper understanding of the law none of the acts complained of in the Statement of Claim is a breach of trust.

It is now necessary to set out in full the Statement of Claim. It is as follows:

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:—

(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 11th November, 1921, land described in the Schedule to the said Order in Council was pursuant to '*The Land Acts 1910 to 1920*' ordered to 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 control of the Director of Native Affairs as trustee for the benefit of the Aboriginal Inhabitants of the State, Aurukun;

(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 February, 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.

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.

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:—

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

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

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

- (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.

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 about 4th December, 1975 with Tipperary Corporation, Billiton Aluminium Australia B.V. and Aluminium Pechiney Holdings Pty. Limited and in granting to the said Companies a right on the terms of the said agreement to enter upon the Reserve, the defendant acted in breach of trust.
2. A declaration that the defendant holds on trust for the plaintiffs any moneys by way of profits received pursuant to the said agreement.
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."

The majority of the Full Court, overruling the Director's demurrer, held that there was a trust and that it was not possible to rule as a matter of law that the allegations in the Statement of Claim which, for the purpose of a demurrer have to be assumed to be true, did not disclose a breach of trust. Kneipp J., in his dissenting judgment, held that the Aurukun Associates Agreement Act 1975 ratified and recognised as valid and subsisting the Director's Agreement, by entering into which, the plaintiffs say, the Director acted in breach of trust. It was not possible, in his judgment, to hold that by entering into an agreement thus validated by law the Director had acted in breach of trust.

Their Lordships have reached the conclusion that sections 29 and 30 of the Aborigines Act of 1971 constituted statutory authority for the acts alleged by the Statement of Claim to be in breach of trust. Their Lordships also agree with the reasoning and conclusion of Kneipp J. as to the effect of the Act of 1975. Accordingly they are of the opinion that the Director's contention that the Statement of Claim is bad in law is correct, and that his demurrer should be upheld.

The first allegation in the Statement of Claim is that the Director lacked power to enter into the Director's Agreement: paragraph 9 (a) and (b) (i) of the Statement of Claim. Sections 29 and 30 of the Aborigines Act 1971, in their Lordships' view, make it impossible to sustain this allegation. Section 29 provides in effect that no person other than a lessee under a mining lease or his agent may prospect or mine on an Aboriginal reserve without the approval and permission of the trustee of the reserve or the Minister. Section 30 authorises the trustee (or the Minister) to enter into such agreements concerning mining on reserves as he (or the Minister)

thinks fit. He may make such agreement a condition precedent to the granting of a permit under section 29. Subsection (2) of section 30 provides:—

“(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”.

The Director's Agreement, by clause 2(c), provided that the mining companies should:

“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.”

In the opinion of the Board it is beyond argument that this provision for participation by the trustee in the profits of the proposed mining venture is authorised in terms by subsection (2).

Mr. McPherson, Q.C., for the respondents made a valiant attempt to persuade the Board that the words in the subsection “for the benefit of Aborigines resident on the reserve, or other Aborigines as the agreement provides” created two mutually exclusive classes, between which the trustee of the reserve had to choose. Upon such a construction, it would follow, he submitted, that, by agreeing to a participation in profits on behalf of Aborigines without limitation, the Director had failed to keep within the statute, since it authorised a participation for the benefit of either Aborigines resident on the reserve or other Aborigines, but not for the benefit of Aborigines generally. Their Lordships cannot so construe the words of the subsection. Moreover such a construction would have absurdly unjust consequences. It would mean that the Director must apply the profits, which may prove very large, either for the benefit of the 700 Aborigines resident on the reserve to the exclusion of all other Aboriginal inhabitants of the State or for the other Aborigines of the State to the total exclusion of the Aborigines resident on the reserve. In their Lordships' view the words mean simply “for the benefit of Aborigines whether resident on the reserve or not,” leaving it to the Director to make such provision on behalf of Aborigines as he thinks fit to include in the agreement. And this is exactly what by clause 2(c) of the Director's Agreement he has done.

In the opinion, therefore, of the Board it cannot be said that the Director lacked the power to enter into the Director's Agreement. He was acting within the authority conferred upon him by statute.

The second allegation of breach of trust is that the Director has improperly exercised his discretion as trustee of the reserve in the respects specified in paragraph 9(b)(ii) to (vi) of the Statement of Claim. In effect, the allegation is that by entering into the agreement he has failed to consider properly or at all, or to take account of, the wishes and interest of the plaintiffs, who are the class intended to be benefited by the alleged trust.

All that the Director has done by agreeing a participation in the profits in the terms of clause 2(c) of the agreement is to ensure that his share of the profits shall be for the benefit of Aborigines.

He has made no decision yet as to the application of any profits, once received, save that it is alleged in paragraph 10 of the Statement of Claim (and the Board must assume) that he intends to pay them, or some part of them, into the “Aborigines Welfare Fund”. Upon the

view their Lordships have expressed when dealing with his suggested lack of power to enter into the agreement this second allegation is not sustainable. Section 30 (2) of the Aborigines Act 1971 is a complete answer in law: he has entered into an agreement which accords exactly with what is contemplated and authorised by statute.

Similarly the allegation contained in paragraph 10 of the Statement of Claim (the third allegation of breach of trust) cannot be sustained in law.

The Director intends to pay the profits, or part of them, into a statutory fund which is "managed and controlled by the Director and maintained for the general benefit of Aborigines": Regulation 4 of the Aborigines Regulations of 1972. Mr. McPherson sought to argue that upon the proper construction of the Regulation, pursuant to which the Fund is established, the Director cannot lawfully pay into the Fund moneys other than those specified in sub-regulation (1) of the Regulation, which makes no mention of mining profits: nor can he pay money out of the Fund save for the purposes specified in sub-regulation (2), which does not mention payments for the benefit of Aborigines resident on a reserve. Suffice it to say that their Lordships find nothing in its detailed provisions which cut down the general words of Regulation 4 that the fund shall be "maintained for the general benefit of Aborigines".

Indeed, the fund is to be maintained for the self-same purpose as that for which section 30 (2) of the Aborigines Act 1971 authorises the Director to participate in the profits of a mining venture—the benefit of Aborigines. Their Lordships have, therefore, concluded that sections 29 and 30 of the Act 1971 constitute a complete answer in law to this action.

It is, accordingly, unnecessary for their Lordships to express an opinion as to whether the Director, as trustee of the reserve, is the trustee of a trust enforceable in equity. Whether he is or not, he can rely on the two sections to establish his demurrer to the Statement of Claim. Nevertheless, having heard extensive and elaborate submissions on this and other points, they think it right to make some observations on the other matters raised in argument before them.

If any trust enforceable in equity exists, it is, as Mr. McPherson for the respondents recognised, a public charitable trust arising by reason of the Land Acts and the Orders in Council made under them. Although the Statement of Claim is not explicit as to the nature of the trust alleged, Mr. McPherson has made it clear that the respondents allege a public charitable trust, with the Director as trustee, for the benefit of the Aborigines resident on the reserve. Their Lordships will assume, without deciding, that the Orders in Council reserving and setting apart the lands at Aurukun for the public purpose of an Aboriginal reserve and appointing the Director as trustee of the reserve create a public charitable trust. The relevant sections of the Land Act 1962-1975 (re-enacting with some amendments earlier provisions) are section 334 which empowers the Governor in Council to reserve Crown land for a public purpose and section 5 which defines "Crown land", "public purposes", and "reserve". Upon the assumption that a trust exists, the critical question becomes:— for what class of persons does it exist? This is a question of construction of the relevant Orders in Council. The 1972 Order (paragraph 3 (d) of the Statement of Claim) was in force at the date of the Director's Agreement. It contains two schedules. The first sets out, among other matters, the public purpose for which the scheduled land is reserved. The purpose is described in these words:

"Reserve for the Benefit of the Aboriginal Inhabitants of the State, Aurukun."

The second schedule is a description of the land reserved. Mr. McPherson submits that, upon the true construction of the words of the first schedule, the class for whose benefit the public charitable trust is created is that of the Aborigines of the State resident on the Aurukun reserve. Their Lordships reject this construction. It appears to them clear that the word "Aurukun" is introduced into the first schedule solely as the name of the reserve, linking the reserve mentioned in the schedule with the land described in the second schedule and for no other purpose. The public purpose for which the reserve is created is stated in the words "for the Benefit of the Aboriginal Inhabitants of the State."

If, therefore, it be assumed that a public charitable trust with the Director as trustee arises under the Land Act, it is a trust for the benefit of the Aboriginal inhabitants of the State. It would follow, therefore, that by entering into an agreement for a share of mining profits to be paid to him "on behalf of Aborigines" the Director was acting as was his duty under such a trust (if it exists). For it was not challenged that it is necessary to imply into the Director's Agreement (and, indeed, into section 30(2) of the Aborigines Act 1971) a limitation to Aborigines of the State of Queensland.

Even if, therefore, a public charitable trust be assumed to arise under the Land Act, the Board is satisfied that the Statement of Claim discloses no cause of action. The class, for whose benefit such a trust is assumed to exist, is the same as that for whose benefit section 30(2) was enacted, and the same as that specified in clause 2(c) of the Director's Agreement. But, even if, contrary to this view, the class for whose benefit the trust exists were that of the Aborigines resident on the reserve, the Board is satisfied that the authorisation of the Director's Agreement to be found in section 30(2) of the Aborigines Act 1971 would make it impossible to say that by entering into the agreement he acted in breach of trust. He was exercising a power conferred on him expressly by statute.

Suppose that under the Land Act the Director is in respect of this reserve trustee in some sense for the benefit of Aboriginal inhabitants. It does not follow from this that his powers, not under the Land Act, but under the Aborigines Act, are exercisable as trustee for the benefit of Aborigines on this reserve. The label accorded to him under the latter Act does not make him such in his exercise of those powers. He is in their Lordships' opinion given by the latter Act an administrative power to constitute a public charitable trust for Aborigines of the State. That this is an administrative power is stressed by the fact that the Minister is given the same power. On their Lordships' construction of the Aborigines Act it is not possible to assert that the power under the Aborigines Act is held upon trust for the Aboriginal residents of Aurukun. How can there be a trust for a class which empowers the exclusion of the entire class?

In the course of his argument Mr. Macrossan, Q.C., for the Director, raised a number of other formidable objections to the Statement of Claim. The first was that the suit is not brought by the Attorney-General. "The Queen as *parens patriæ* is the guardian of charity and it is the duty of her Attorney-General, who represents the Crown for all forensic purposes, to intervene and inform the court if the trustees of a charitable trust fall short of their duty": *Tudor on Charities* 6th ed. p. 450, citing *National Anti-Vivisection Society v. I.R.C.* [1948] A.C.31 per Lord Simonds at p.62. This general rule applies in Queensland. The Attorney-General has not brought, or been made a party to, the suit. However it is unnecessary for their Lordships to decide whether the demurrer could succeed on that ground.



Another objection to the Statement of Claim, which impressed Kneipp J., who founded his dissenting judgment upon it, is that the Director's Agreement, by entering into which the Director is said to have acted in breach of trust, is recognised by law as a valid agreement.

The Board agrees with Kneipp J. in thinking that the legislature has by statute recognised the obligations of the Director's Agreement as being, in the judge's words, "proper and suitable to this particular occasion." Section 3 of the Aurukun Associates Agreement Act 1975 provides that the franchise agreement "shall have the force of law as though the Agreement were an enactment of this Act." Clause 19 of Part VIII of the franchise agreement provides 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 the date the                      day of                      1975, and set out in the Third Schedule to this Agreement".

Mr. Macrossan for the Director has gone so far as to submit that the effect of clause 19 and the scheduling of the Director's Agreement to the franchise agreement is to confer upon the Director's Agreement the force of law as though it were an enactment of the Act of 1975. This view found no favour with the Full Court: neither does it with this Board. But the Board agrees with Kneipp J. that the Director's Agreement has been recognised by the statute as a valid and subsisting agreement. In the circumstances it cannot be said that by entering into it the Director acted in breach of trust.

Accordingly, their Lordships will humbly advise Her Majesty that the appeal be allowed, and the demurrer upheld. The action must be remitted to the Full Court for judgment on the demurrer to be entered against the plaintiffs. The Director is to have his costs here and below.

**In the Privy Council**

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**THE CORPORATION OF THE  
DIRECTOR OF ABORIGINAL AND  
ISLANDERS ADVANCEMENT**

v.

**DONALD PEINKINNA AND OTHERS**

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DELIVERED BY  
LORD SCARMAN