IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2022] SGHC 83

Suit No 628 of 2020 (Summons No 1478 of 2021)

Between

(1) Ok Tedi Fly River Development Foundation Ltd
(2) Tom Waipa
(3) Brian Goware
(4) Gariba David Marude
(5) Sisa Baidam
(6) Max Giawele
(7) Robin Inberem Moken Morgen
(8) Bob Wai
(9) Bosi Kasiman

… *Plaintiffs*

And

(1) Ok Tedi Mining Ltd
(2) PNG Sustainable Development Program Ltd
(3) Mekere Morauta
(4) The Independent State of Papua New Guinea
(5) TMF Trustees Singapore Ltd

… *Defendants*

GROUNDS OF DECISION

[Civil Procedure — Pleadings — Striking out]

[Equity] — [Fiduciary relationships] — [When arising] — [Characteristics of an *ad hoc* fiduciary]
[Tort] — [Conspiracy] — [Elements of unlawful means conspiracies]

TABLE OF CONTENTS

Ok Tedi Fly River Development Foundation Ltd and others
v
Ok Tedi Mining Ltd and others

[2022] SGHC 83

General Division of the High Court — Suit No 628 of 2020 (Summons No 1478 of 2021)
Vinodh Coomaraswamy J
19, 20, 30 August 2021

12 April 2022

Vinodh Coomaraswamy J:

Introduction

1 The first defendant has owned and operated a mine ("the Mine") near the Ok Tedi River in the Western Province of Papua New Guinea since 1981.[1] The Mine is an exceptionally lucrative open cast gold and copper mine.[2] But the Mine has caused and continues to cause environmental damage affecting certain communities in the Western Province.[3] The plaintiffs in this action refer to these

---

1 Cameron James Clark's 1st Affidavit dated 30 March 2021 ("CJC's 1st Affidavit") at para 15 (Bundle of Cause Papers ("BCP") Vol I, Tab 2).

2 CJC's 1st Affidavit at para 15 (BCP Vol I, Tab 2).

3 Proposed Amended Statement of Claim ("PASOC") at paras 17, 20–24.

communities as "the Affected Communities".[4] I shall adopt that term for convenience, without necessarily accepting all of its premises and implications.

2 In the late 1990s, the members of the Affected Communities commenced litigation against the first defendant and its majority owner seeking compensation for the environmental damage caused by the Mine. The majority owner became increasingly concerned about potential liability and reputational damage if it were to continue to be involved in the operation of the Mine through the first defendant. As a result, the majority owner transferred all of its shares in the first defendant to the second defendant in 2002.

3 The plaintiffs now advance in this action three claims against the first defendant arising from the circumstances of that transfer. First, the plaintiffs claim that the first defendant deceived members of the Affected Communities into dropping their claims in the litigation by fraudulently misrepresenting to them that the transferred shares would be held for the benefit of the Affected Communities and that the income from the shares would be applied towards compensating the members of the Affected Communities for the environmental damage caused by the Mine.[5] Second, the plaintiffs claim that: (a) the first defendant was a fiduciary for the members of the Affected Communities because, by making those fraudulent misrepresentations, it voluntarily undertook to act in the interests of the Affected Communities; and (b) the first defendant went on to breach the duties it owed them as their fiduciary.[6] Finally, the plaintiffs claim that the first defendant conspired with the second and third

---

4 PASOC at paras 2C–2D.

5 Amended Statement of Claim dated 12 November 2021 ("ASOC") at p 84.

6 Proposed Amended Statement of Claim ("PASOC") at para 50(d) and p 100, para (4).

defendants to cause loss to the members of the Affected Communities by unlawful means.

4 This first defendant now applies to have all three claims struck out. I have allowed the first defendant's application in part. I have struck out as being obviously unsustainable the plaintiffs' claims for breach of fiduciary duties and in conspiracy. I have declined to strike out the plaintiffs' claim against the first defendant in deceit.[7] I cannot say on affidavit evidence alone that the claim in deceit is obviously unsustainable. It raises questions of fact and of mixed fact and law which ought to be resolved at trial.

5 The plaintiffs have appealed against my decision to strike out their claims for breach of fiduciary duties and in conspiracy. These are the grounds for my decision against the plaintiffs on those two claims. The first defendant has not cross-appealed against my decision not to strike out the plaintiffs' claim in deceit. I therefore do not, in these grounds, set out my reasons for declining to find that that claim is obviously unsustainable.

The parties

The plaintiffs

6 The plaintiffs bring this action in their own right and as representatives of all of the members of the Affected Communities.[8]

---

7 Minute Sheet dated 30 August 2021 ("MS") at p 1.

8 PASOC at paras 6 and 8.

7 The first plaintiff is a company incorporated in Papua New Guinea in 2016.[9] It brings this action as the assignee of causes of action originally vested in members of certain communities forming a subset of the Affected Communities.[10] In the alternative, the first plaintiff brings this action as trustee on behalf of those same individuals under O 15 r 14 of the Rules of Court (2014 Rev Ed) ("the Rules").[11]

8 The second to ninth plaintiffs bring this action as a representative proceeding under O 15 r 12 of the Rules on behalf of all the members of the Affected Communities.[12] Whether the second to ninth plaintiffs have the procedural right to bring this action as a representative proceeding is the subject matter of a separate challenge by the first defendant. In this judgment, I shall assume in the plaintiffs' favour, without deciding the issue, that they indeed have the right to do so.

The defendants

9 The first defendant ("OTML") is a company incorporated in Papua New Guinea in 1981 to develop and operate the Mine.[13]

10 The second defendant ("PNGSDP") is a company limited by guarantee incorporated in Singapore in 2001. PNGSDP was incorporated for the specific purpose of being the transferee of 52% of the shares in OTML ("the Shares") from OTML's majority owner. PNGSDP is obliged to hold the Shares and to

---

9 John Malcolm Wylie's 1st Affidavit of 9 September 2020 ("JMW's 1st Affidavit") at p 1193.

10 PASOC at paras 1, 2A–2C, 6.

11 PASOC at para 7.

12 PASOC at para 8.

13 CJC's 1st Affidavit at para 21 (BCP Vol I, Tab 2).

receive and apply the dividends and other money arising from them ("Distributions")[14] to promote sustainable development within Papua New Guinea and to advance the general welfare of the people of Papua New Guinea, in particular those of the Western Province, by carrying out programmes and projects for social and environmental purposes for their benefit.[15]

11 The third defendant ("Sir Mekere") was the Prime Minister of Papua New Guinea from 1999 to 2002.[16] He died at the age of 74 in December 2020.[17] That was about five months after plaintiffs commenced this action. In October 2021, the plaintiffs wholly withdrew their claims against Sir Mekere.[18] He is therefore no longer a defendant to this action. Despite that, the plaintiffs have not yet amended the writ to reflect the withdrawal. The title to this action therefore continues to show Sir Mekere as the third defendant.

12 The fourth defendant ("the State") is the Independent State of Papua New Guinea.

13 The fifth defendant holds as trustee very broad security interests over virtually all of PNGSDP's present and future assets – including the Shares and Distributions – as security for the punctual performance of PNGSDP's obligation to indemnify certain persons (see [51]–[55] below). The fifth defendant replaced the original trustee of the relevant security interests. The original trustee was appointed at the time the Shares were transferred in 2002.[19]

---

14 PASOC at para 36; JMW's 1st Affidavit at p 462.

15 PASOC at para 56(a); JMW's 1st Affidavit at p 428, Art 3(i).

16 PASOC at para 12.

17 CJC's 1st Affidavit at para 10(c) (BCP Vol I, Tab 2).

18 Notice of Discontinuance/Withdrawal filed on 18 October 2021.

19 PASOC at para 14; JMW's 1st Affidavit at p 534, 538.

Nothing material to this decision turns on the identity of the security trustee at any given time. It is therefore unnecessary to distinguish between the fifth defendant and the original trustee. I shall accordingly refer to both of them simply as "the Security Trustee".

14 The plaintiffs do not in this action allege that the Security Trustee has committed any wrong. As a result, they do not seek to hold it liable for any relief.[20] They have named it as a defendant only to ensure that it is bound by the outcome of this action. The Security Trustee has therefore not participated in this action otherwise than simply to confirm that it will abide by any order the court may make.

The factual background

15 This application is the latest episode in long running litigation over the past 30 years in Singapore, Papua New Guinea[21] and Victoria[22] arising from the operation of the Mine. The five earlier judgments in Singapore arising from the litigation can be found at:

(a) *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2016] 2 SLR 366;

(b) *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 ("*State v PNGSDP (HC)*");

(c) *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 1 SLR 97);

---

20 PASOC at para 14; CJC's 1st Affidavit at para 10(e) (BCP Vol I, Tab 2).

21 JMW's 1st Affidavit at para 35 and p 963.

22 PASOC at para 25.

(d) *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 2 SLR 200 ("*State v PNGSDP (CA)*"); and

(e) *Ok Tedi Fly River Development Foundation Ltd and others v Ok Tedi Mining Ltd and others* [2021] SGHC 205 ("*Ok Tedi (PNGSDP)*").

16 In *Ok Tedi (PNGSDP)*, I heard and allowed PNGSDP's application to strike out the plaintiffs' claims in this action in their entirety as against PNGSDP. That decision is the subject of a pending appeal. OTML's striking out application, which is the subject matter of these grounds, could not be heard together with PNGSDP's striking out application because, for various reasons, OTML was served with the writ of summons and entered an appearance in this action about six months after PNGSDP.[23] In that sense, PNGSDP has had the benefit of a six-month head start over OTML in its efforts to extricate itself from this action without a trial.

17 The subject matter of this long running litigation was and is:

(a) the environmental damage caused by the Mine;

(b) the decision of the Mine's majority owner to cease its involvement in the Mine by transferring the Shares to PNGSDP in 2002 and the suite of contracts entered into on that occasion and at or around that time;

(c) the State's expropriation of the Shares in 2013; and

---

[23] Memorandum of Service filed on 15 January 2021; Memorandum of Appearance filed on 15 January 2021.

(d) a fund now worth about US$1.48 billion[24] which PNGSDP is bound to hold and administer in accordance with the suite of contracts.

18 The general background to this long running litigation is set out in detail in *State v PNGSDP (HC)* at [8] to [36] and in *State v PNGSDP (CA)* at [5] to [11]. The background relevant to this specific action is set out in *Ok Tedi (PNGSDP)* at [15] to [37]. To enable this judgment to be read and understood on its own, it is necessary to restate some of the background from *Ok Tedi (PNGSDP)*, supplemented as necessary by additional facts which are relevant only to the plaintiffs' claims against OTML.

The Mine and the environmental damage

19 Until the Shares were transferred to PNGSDP in 2002, OTML's ultimate majority owner was a multinational mining company now known as BHP Group Limited ("BHP Group"). BHP Group incorporated OTML in 1981 to develop and operate the Mine.[25] Until 2002, OTML's shares were held as follows. BHP Group held 52% of OTML's shares through its wholly owned subsidiary, BHP Minerals Holdings Pty Ltd ("BHP Minerals").[26] The State held 30% of OTML's shares: 20% directly and 10% through a corporate vehicle. A minority shareholder held the remaining 18% of OTML's shares.[27]

20 In 1995, the State and BHP Group established a system of statutory compensation for loss and damage caused by flooding arising from the operation of the Mine. The system comprised both general compensation

---

24 JMW's 1st Affidavit at para 29.

25 CJC's 1st Affidavit at paras 16, 21 (BCP Vol I, Tab 2).

26 PASOC at para 18.

27 JMW's 1st Affidavit at para 19.

payable to all residents of areas which suffered loss or damage and specific compensation payable to individuals who suffered particular loss or damage.[28]

21 Between 1994 and 1996, the members of the Affected Communities brought proceedings against BHP Group and OTML in the Supreme Court of Victoria and in Papua New Guinea.[29] They claimed compensation in those proceedings for the environmental damage which the Mine had caused and was continuing to cause to the Affected Communities.

22 In 1996, all of these proceedings were settled. The terms of the settlement, broadly speaking, committed BHP Group to pay the claimants' legal costs and to underwrite the general compensation fund under the statutory scheme (see [20] above). In exchange, the claimants agreed to terminate the proceedings and support the statutory scheme, thereby becoming eligible to receive compensation under the scheme.[30]

23 In 1999, OTML commissioned a report to assess the risks which the Mine posed to human health and to the environment and to make recommendations. The preliminary recommendation in June 1999 was that the Mine close immediately, or at the latest by 2001.[31] That was well before the end of the Mine's economic life.

---

28 CJC's 1st Affidavit at para 28 (BCP Vol I, Tab 2).

29 CJC's 1st Affidavit at para 30 (BCP Vol I, Tab 2); PASOC at para 25.

30 CJC's 1st Affidavit at para 31 (BCP Vol I, Tab 2); PASOC at paras 26–28.

31 CJC's 1st Affidavit at paras 38 and 52 (BCP Vol I, Tab 2).

BHP Group decides to exit OTML

24 BHP Group was concerned about the damage which the Mine's operation was causing to the environment in the Affected Communities and to BHP Group's corporate reputation in Australia. As a result, BHP Group was prepared to accept the recommendation and to close the Mine early.[32] But OTML's other shareholders and the State were opposed to early closure.[33] The Mine was extremely profitable for its shareholders and was an important contributor to Papua New Guinea's economy for the State (see *State v PNGSDP (CA)* at [5]).[34] They believed that it was possible to use part of the Mine's profits to prevent, mitigate and alleviate the past, present and future environmental damage arising from its operations. It is fair to say as well that the Mine brought economic and other benefits to the members of the Affected Communities which led the weight of opinion in the Affected Communities to oppose early closure.

25 Given the diverging views between BHP Group on the one hand and OTML's shareholders and the State on the other, BHP Group decided to exit OTML. This would allow the remaining shareholders to continue to operate the Mine through OTML without BHP Group being involved or being exposed to legal and reputational risk.[35] The surrounding communities were told of BHP Group's exit plan (the "Exit Plan").[36]

---

32 CJC's 1st Affidavit at para 39 (BCP Vol I, Tab 2).

33 CJC's 1st Affidavit at para 40 (BCP Vol I, Tab 2).

34 CJC's 1st Affidavit at para 52 (BCP Vol I, Tab 2).

35 CJC's 1st Affidavit at paras 40 and 46 (BCP Vol I, Tab 2); PASOC at para 30.

36 CJC's 1st Affidavit at paras 41 to 45 (BCP Vol I, Tab 2).

The Consultation Programme in 2000 and 2001

26 In July 1999, as a result of the risk assessment report (see [23] above), OTML undertook a first round of community consultations to consider the way forward with the Mine, taking into account the environmental damage which it caused.[37]

27 In late 1999, the State invited the World Bank to comment on the risk assessment report. The World Bank accepted the report's conclusion that the preferred option to prevent further environmental damage to the Affected Communities was to close the Mine early. But the World Bank criticised the report for failing to consider the trade-offs involved in early closure and therefore failing to recognise that closure would inflict disastrous social costs on the Affected Communities and economic costs on Papua New Guinea and the State.[38] The World Bank therefore recommended a process of public consultation to arrive at a consensus on the way forward.

28 As a result of the World Bank's recommendations, in February 2000, the State initiated a programme of further community consultations ("the Consultation Programme")[39] with the leaders of about 156 villages and over 100,000 inhabitants of six regions of the Western Province ("the CMCA Regions").[40] The CMCA Regions were the regions most directly affected by the operation of the Mine.

---

37 CJC's 1st Affidavit at paras 55 and 56 (BCP Vol I, Tab 2).

38 CJC's 1st Affidavit at para 54, p 1774 (BCP Vol I, Tab 2 and Vol III).

39 CJC's 1st Affidavit at para 56, "CJC-36" (BCP Vol I, Tab 2 and Vol III).

40 CJC's 1st Affidavit at paras 59 to 60 (BCP Vol I, Tab 2).

29 The purpose of the Consultation Programme was: (a) to explain to those living in the CMCA Regions the environmental impact of mine continuation and the social and economic impact of mine closure; and (b) to ascertain from those most directly affected by the environmental damage whether they wanted the Mine to continue or to close and, in either case, on what terms.[41] Whatever the outcome, the intention was that the Consultation Programme would achieve finality between the State, the people of Papua New Guinea and OTML about the way forward with respect to the Mine.[42]

30 BHP Group was not involved in the Consultation Programme.[43] It had already taken a settled decision to exit OTML.

31 The Consultation Programme was a joint effort of the State and OTML.[44] OTML established a Community Relations ("CR") department to lead the Consultation Programme.[45] Each community nominated two members to represent them in the consultations.[46] Independent, non-governmental organisations observed the operation of the Consultation Programme to ensure that the communities were properly informed and their interests properly protected.[47] The Consultation Programme continued for about a year and involved several rounds of what started as consultations and then became negotiations.[48]

---

41 CJC's 1st Affidavit at para 57 (BCP Vol I, Tab 2).

42 CJC's 1st Affidavit at paras 64 to 65 (BCP Vol I, Tab 2).

43 CJC's 1st Affidavit at para 87 (BCP Vol I, Tab 2).

44 CJC's 1st Affidavit at para 64 (BCP Vol I, Tab 2).

45 CJC's 1st Affidavit at para 62 (BCP Vol I, Tab 2).

46 CJC's 1st Affidavit at para 61 (BCP Vol I, Tab 2).

47 CJC's 1st Affidavit at para 74 (BCP Vol I, Tab 2).

48 CJC's 1st Affidavit at para 62 (BCP Vol I, Tab 2).

32 The Consultation Programme found widespread support for mine continuation, so long as the existing statutory compensation scheme (see [20] above) was enhanced to address the environmental damage the Mine had caused and was continuing to cause. In-principle agreements to this effect were recorded in six heads of agreement ("the CMCA Heads of Agreement"). The parties to the CMCA Heads of Agreement were OTML, the State, the provincial government of the Western Province and each of the six CMCA Regions.[49]

33 Although the CMCA Heads of Agreement were not in themselves a binding or final resolution, they expressly envisaged a binding and final resolution in two ways. First, they provided that, if the State decided in favour of mine continuation, each CMCA Region would negotiate and enter into a mine continuation agreement with OTML which would set out the terms on which the Mine would continue to operate.[50] Second, they also provided that these mine continuation agreements would cover all issues and achieve binding finality on the terms of mine continuation in perpetuity.[51]

34 OTML and the CMCA Regions then negotiated the mine continuation agreements.[52] Some of the six CMCA Regions were further subdivided, creating a total of ten CMCA Regions. OTML and the ten CMCA Regions entered into ten separate Community Mine Continuation Agreements ("CMCAs") between November 2001 and April 2004.[53]

---

49 CJC's 1st Affidavit at para 65 (BCP Vol I, Tab 2).

50 CJC's 1st Affidavit at para 67 (BCP Vol I, Tab 2).

51 CJC's 1st Affidavit at para 68 (BCP Vol I, Tab 2).

52 CJC's 1st Affidavit at para 69 (BCP Vol I, Tab 2).

53 CJC's 1st Affidavit at para 70 (BCP Vol I, Tab 2).

35 The CMCAs set out the terms for mine continuation. So long as the Mine continued in operation, the CMCAs obliged OTML to pay to each CMCA Region annual compensation for: (a) the environmental damage caused by the Mine; (b) for depriving the CMCA Region of possession of land; and (c) for associated loss and damage.[54]

36 OTML's case is that the CMCAs set out with finality as against the ten CMCA Regions the terms on which OTML would continue to operate the Mine.[55] It is also OTML's case that the purpose of the compensation scheme agreed in the CMCAs was to compensate the ten CMCA Regions, thereby discharging OTML's obligation to pay statutory compensation to the CMCA Regions in accordance with Papua New Guinea's Mining Act.[56]

The 2000 Class Actions

37 While all this was going on, two individuals acting as representatives of their respective communities commenced two class actions in the Supreme Court of Victoria against BHP Group and OTML ("the 2000 Class Actions"). The claimants alleged that BHP Group and OTML had breached the 1996 settlement agreement (see [15] above).[57] These claimants included but were not limited to members of the ten CMCA Regions.

38 Once the CMCAs were agreed, the ten CMCA Regions chose to receive compensation and other benefits from OTML under the terms of the CMCAs

---

54 CJC's 1st Affidavit at paras 75 and 103(a) (BCP Vol I, Tab 2).

55 CJC's 1st Affidavit at paras 75 and 85 (BCP Vol I, Tab 2).

56 CJC's 1st Affidavit at para 107 (BCP Vol I, Tab 2).

57 CJC's 1st Affidavit at para 32 (BCP Vol I, Tab 2); PASOC at para 29.

rather than to continue with the 2000 Class Action.[58] As a result, the terms of the CMCAs obliged the ten CMCA Regions to opt out of the Class Action and to release OTML and BHP Group from all liability.[59]

39 In 2003, the 2000 Class Actions came to an end when all of the remaining claimants entered into a settlement agreement.[60]

PNGSDP's incorporation

40 In the meantime, BHP Group had settled on the mechanics of its Exit Plan. A key part of the plan was for BHP Minerals to transfer the Shares to a special purpose vehicle. PNGSDP was incorporated in Singapore in October 2001 to be that special purpose vehicle.[61]

41 PNGSDP's corporate constitution is set out in three documents: (a) its Memorandum of Association; (b) its Articles of Association ("the Articles"); and (c) a schedule to the Articles called the "Rules of the PNG Sustainable Development Program". This schedule is more commonly referred to as "the Program Rules".[62]

42 PNGSDP's objects, as recorded in its memorandum of association, include promoting sustainable development within Papua New Guinea and advancing the general welfare of the people of Papua New Guinea – particularly those of the Western Province – through programmes and projects for social and

---

58 CJC's 1st Affidavit at paras 35 to 36 and 71, "CJC-43" to "CJC-52" (BCP Vol I, Tab 2 and Vol IV).

59 CJC's 1st Affidavit at paras 71 to 73 (BCP Vol I, Tab 2).

60 CJC's 1st Affidavit at para 36 and "CJC-17" (BCP Vol I, Tab 2 and Vol II).

61 JMW's 1st Affidavit at para 22.

62 JMW's 1st Affidavit at para 23, pp 433, 447.

environmental purposes for their benefit. It is significant that PNGSDP's objects refer to the people of the Western Province and of Papua New Guinea generally and do not refer to the CMCA Regions, the Affected Communities or their members specifically.

43 The Program Rules have effect as part of the statutory contract embodied in the Articles as between PNGSDP and its members for the time being.

44 The Program Rules have two key aspects.

45 First, the central provision of the Program Rules obliges PNGSDP to establish a fund known as the Long Term Fund. The purpose of the Long Term Fund is to hold, broadly speaking, two thirds of all Distributions together with the accumulated investment income earned on the Long Term Fund.[63] Under the Program Rules, PNGSDP undertook express contractual obligations to its members as to how it was to apply: (a) Distributions; (b) the Long Term Fund; and (c) investment income earned on the Long Term Fund.

46 Second, cl 9 of the Program Rules, among other things, both permits and obliges PNGSDP to apply Distributions for the benefit of two classes of people: (a) the people of the Western Province; and (b) the people of Papua New Guinea.[64] Both of these classes include, but are not confined to, members of Affected Communities. This is because not all of the communities in the Western Province have been affected by the environmental damage caused by the Mine. The members of the Affected Communities are therefore a subset of the people of the Western Province, who are in turn a subset of the people of

---

63 JMW's 1st Affidavit at pp 451–453, 463 (Program Rules, cll 9.2, 9.3, 9.4, 9.5, 21.1).

64 JMW's 1st Affidavit, pp 451–452.

Papua New Guinea. The plaintiffs complain about this feature of the Program Rules and describe it as "the Shared Benefits Arrangement".[65]

BHP Group implements the Exit Plan

47 In 2002, BHP Group caused BHP Minerals to transfer the Shares to PNGSDP and thereby achieved its objective of exiting OTML.[66] PNGSDP paid BHP Minerals and BHP Group no monetary consideration for the Shares. The consideration was instead the suite of contracts which preceded[67] and accompanied[68] the transfer. Part of the purpose of this suite of interlocking and interdependent contracts was to release and insulate BHP Group and persons affiliated with it (apart from OTML) from all liability arising from past and future environmental damage caused by the Mine.

48 Four of these contractual arrangements are relevant for present purposes.

49 First, BHP Group, the State, OTML and OTML's shareholders entered into a contract known as the Ok Tedi Mine Continuation (Ninth Supplemental) Agreement ("Ninth Supplemental Agreement").[69] By this contract, BHP Group confirmed its intention to exit OTML and agreed that BHP Minerals should transfer the Shares to PNGSDP.[70] The State went on to give legislative effect to the Ninth Supplemental Agreement by enacting the Mining (Ok Tedi Mine

---

65 PASOC at para 45(f).

66 CJC's 1st Affidavit at paras 51 and 105 (BCP Vol I, Tab 2).

67 JMW's 1st Affidavit at para 26.

68 JMW's 1st Affidavit at para 27.

69 JMW's 1st Affidavit at p 632.

70 PASOC at para 38; JMW's 1st Affidavit at p 635.

Extension (Ninth Supplemental) Agreement) Act 2001 (No 7 of 2001) (PNG).[71] The first schedule to the Act is the Ninth Supplemental Agreement. The second schedule to the Act comprises the CMCAs.

50 Second, PNGSDP entered into a contract known as the "Master Agreement" with BHP Group, OTML and all of OTML's shareholders.[72] By cl 3.1 of the Master Agreement, BHP Minerals agreed to transfer the Shares to PNGSDP.[73] The consideration for this transfer was PNGSDP's contractual undertaking in cl 3.2 of the Master Agreement to comply with the Program Rules.[74] PNGSDP gave this undertaking expressly for the benefit of four entities: BHP Minerals, BHP Group, the State and OTML.

51 Third, PNGSDP executed two deeds of indemnity: one in favour of BHP Group ("BHP's Indemnity")[75] and another in favour of the State ("the State's Indemnity").[76] Under these indemnities, PNGSDP agreed to indemnify BHP, the State and a very broadly defined group of affiliates (apart from OTML) for any and all liability arising from any future environmental damage caused by the Mine.[77]

52 Finally, in February 2002, as security for the punctual performance of its obligations under BHP's Indemnity and the State's Indemnity, PNGSDP

---

71 CJC's 1st Affidavit at para 77 (BCP Vol I, Tab 2).

72 JMW's 1st Affidavit at p 470.

73 JMW's 1st Affidavit at pp 474–475.

74 JMW's 1st Affidavit at p 475.

75 PASOC at para 45(b); JMW's 1st Affidavit at para 24(b), pp 498 and 504.

76 JMW's 1st Affidavit at para 24(c) and p 516.

77 JMW's 1st Affidavit at pp 501–504, 519–523 (cll 1.1 and 2.1).

entered into: (a) a security deed ("the Security Deed");[78] (b) an equitable mortgage over the Shares ("the Equitable Mortgage");[79] and (c) a security trust deed ("the Security Trust Deed").[80] I shall refer to these three contracts collectively as "the Security Arrangements".[81]

53 The parties to the Security Deed are PNGSDP, OTML and the Security Trustee.[82] By the Security Deed, PNGSDP created an equitable mortgage over Distributions and a fixed and floating charge over virtually all of PNGSDP's present and future assets in favour of the Security Trustee for the benefit of the State and BHP as security for the punctual performance of its obligations under BHP's Indemnity and the State's Indemnity.[83] The Security Deed required PNGSDP to deposit with the Security Trustee a duly executed blank transfer form in respect of the Shares and to direct OTML to forward the original certificates for the Shares directly to the Security Trustee once OTML had issued them in PNGSDP's name.[84]

54 The parties to the Equitable Mortgage are PNGSDP and the Security Trustee. By the Equitable Mortgage, PNGSDP created in favour of the Security Trustee an equitable mortgage over its present and future interest in the Shares, in all after-acquired shares in OTML and in all future rights arising from these

78 JMW's 1st Affidavit at para 24(d) and p 534; PASOC at paras 45(b)(iii)–45(b)(iv).

79 JMW's 1st Affidavit, at para 24(f) and p 603.

80 JMW's 1st Affidavit, at para 24(e) and p 571.

81 PASOC at para 45(b); JMW's 1st Affidavit at para 24(f).

82 JMW's 1st Affidavit at pp 534 and 546.

83 JMW's 1st Affidavit at p 546 (cll 2.1 and 3.1).

84 JMW's 1st Affidavit at p 546 (cl 2.3).

shares as security for the punctual performance of its obligations under BHP's Indemnity and the State's Indemnity.[85]

55 The parties to the Security Trust Deed are the Security Trustee, PNGSDP, BHP Group, the State and OTML. The Security Trust Deed sets out the rights, duties, powers and immunities of the Security Trustee.[86]

The CMCA extension agreements

56 The CMCAs[87] envisaged the State, OTML, the CMCA Regions and PNGSDP engaging in discussions from time to time to review the operation of the CMCAs.[88] One such review was held in 2011. At the conclusion of that review, the parties agreed to allow the Mine to operate until 2025. To record this agreement, the parties executed nine CMCA extension agreements in 2012 ("CMCA EAs"). The State went on to give legislative effect to the CMCA EAs by enacting the Mining (Ok Tedi Mine Extension (Eleventh Supplemental) Agreement) Act 2014 (No 56 of 2014) (PNG) (the "Eleventh Supplemental Agreement Act").[89]

57 Under the CMCAs and the CMCA EAs, OTML has made payments totalling approximately PGK874.16m, or almost $340m, to the CMCA Regions

---

85 JMW's 1st Affidavit at pp 607–608 (cl 2.1).

86 JMW's 1st Affidavit at pp 586–589 (*eg*, cll 8 and 9).

87 CJC's 1st Affidavit at para 96 (BCP Vol I, Tab 2).

88 CJC's 1st Affidavit at para 97 (BCP Vol I, Tab 2).

89 CJC's 1st Affidavit at paras 98 to 99 (BCP Vol I, Tab 2).

from 2001 to 2020.[90] The plaintiffs do not allege that OTML has breached any of its obligations under the CMCAs or the CMCA EAs.[91]

The State expropriates the Shares

58 In 2013, during an intractable dispute between the State and PNGSDP over control of PNGSDP which led to the earlier litigation in Singapore, the State expropriated the Shares without compensation.[92] It did this by enacting legislation[93] which cancelled the Shares and obliged OTML to issue to the State new shares equivalent to 52% of OTML's issued and paid-up share capital.

59 As a result, PNGSDP ceased to be a shareholder of OTML in 2013. With that, PNGSDP stopped receiving Distributions. PNGSDP continues, however, to hold the Long Term Fund and the investment income which it continues to generate subject to its corporate constitution including the Program Rules.

The plaintiffs commence this action

60 The plaintiffs commenced this action in July 2020 against OTML, PNGSDP, Sir Mekere, the State and the Security Trustee. The impetus for this action is said to be (see [73] below) my finding in *State v PNGSDP (HC)* (at [301]–[341]) that PNGSDP did not hold the OTML shares, Distributions or the Long Term Fund on any sort of trust for the people of Papua New Guinea, let alone specifically for the members of the Affected Communities (see also *State v PNGSDP (CA)* at [11]). One of my reasons for arriving at this finding was that

---

90 CJC's 1st Affidavit at para 101 (BCP Vol I, Tab 2); Cameron James Clark's 3rd Affidavit dated 8 July 2021 ("CJC's 3rd Affidavit") at para 180 (BCP Vol XII, Tab 8).

91 CJC's 1st Affidavit at para 101 (BCP Vol I, Tab 2).

92 JMW's 1st Affidavit at para 30.

93 JMW's 1st Affidavit at p 764.

the provisions of the Security Deed were inconsistent with any such trust (*State v PNGSDP (HC)* at [320]–[331]).

OTML's striking out application

61 OTML's striking out application was heard and determined on the basis of the plaintiffs' proposed amended statement of claim ("PASOC"). The plaintiffs tendered the PASOC on 22 January 2021 during the hearing of PNGSDP's striking out application.[94] For the purposes of OTML's striking out application, the plaintiffs confirm that they have no further amendments to make to the PASOC.[95] I therefore proceed on the basis that plaintiffs' claim against OTML as set out in the PASOC represents its best and final pleading of its case against OTML, *ie* that it cannot be improved by amendment.

62 OTML submits that the plaintiffs' claims for breach of fiduciary duties and conspiracy ought to be struck out on three procedural grounds. First, the first plaintiff has no standing to bring these claims against OTML.[96] Second, these claims are barred by the contractual provisions of the CMCAs and CMCA EAs which have the force of law in Papua New Guinea by reason of the Ninth and Eleventh Supplemental Agreement Acts.[97] Third, these claims are time-barred under the Limitation Act (Cap 163, 1996 Rev Ed).[98]

---

94 TSMP Law Corporation's letter to the Registry dated 21 January 2021; Transcript, 25 January 2021, p 2:3–11.

95 Transcript, 19 August 2021, pp 152:31–153:1.

96 First Defendant's Written Submissions: Striking-Out Application dated 5 August 2021 ("1DS") at paras 352–368.

97 1DS at paras 167–177.

98 1DS at paras 59–164.

63 I have found that none of these procedural objections are grounds for striking out the plaintiffs' claims in deceit. That applies equally to their claims for breach of fiduciary duties and conspiracy. I therefore need not say more about these procedural objections. I will focus instead on the substance of the plaintiffs' claims for breach of fiduciary duties and in conspiracy.[99]

Law on striking out

64 A pleading may be struck under O 18 r 19(1)(*a*) of the Rules if it discloses no reasonable cause of action. A reasonable cause of action is a cause of action with some chance of success when only the allegations in the pleading are considered: *The "Tokai Maru"* [1998] 2 SLR(R) 646 at [44]. So long as the statement of claim discloses some cause of action or raises some question fit to be decided at trial, the mere fact that the case is weak and is not likely to succeed is no ground for striking it out under this limb of O 18 r 19(1): *Ng Chee Weng v Lim Jit Ming Bryan and another* [2012] 1 SLR 457 at [110].

65 A pleading may be struck out under O 18 r 19(1)(*b*) of the Rules if it is scandalous, frivolous or vexatious. There is no suggestion that the plaintiffs' pleaded claims against OTML are scandalous. A pleading is frivolous or vexatious if it is obviously unsustainable (*Singapore Civil Procedure 2021* vol 1 (Cavinder Bull gen ed) (Sweet & Maxwell, 2021) at para 18/19/12). A pleading is unsustainable if it is either (*The "Bunga Melati 5"* [2012] 4 SLR 546 at [39]):

> (a) *legally unsustainable*, *ie*, where "it may be clear as a matter of law at the outset that even if a party were to succeed in proving all the facts that he offers to prove he will not be entitled to the remedy that he seeks"; or

---

99 MS at pp 2–3.

(b) *factually unsustainable*, *ie*, where "it is possible to say with confidence before trial that the factual basis for the claim is fanciful because it is entirely without substance, [for example, if it is] clear beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

66 I now apply these principles to the plaintiffs' claims for breach of fiduciary duties and in conspiracy which are the subject matter of this judgment. Athough the plaintiffs' claim in deceit is not the subject matter of this judgment (see [5] above), an understanding of that claim is essential to understand the two claims which are. It is therefore necessary to commence the analysis by summarising the plaintiffs' claim in deceit.

Deceit claim

67 The plaintiffs plead that OTML represented to the members of the Affected Communities that, in consideration of their discontinuing the 2000 Class Actions and releasing OTML, BHP Minerals and BHP Group from liability:[100]

(a) the Shares and Distributions would belong beneficially to the members of the Affected Communities; and

(b) Distributions would be used to ameliorate the effects of the environmental damage caused by the Mine on the members of the Affected Communities.

The plaintiffs refer to these two pleaded representations as "the Share Offload Representations".

---

100 PASOC at para 32.

68 The plaintiffs plead further that the meaning and effect of the Share Offload Representations were that:[101]

(a) the members of the Affected Communities would have a beneficial interest in the Shares and Distributions "from the outset";

(b) "[t]he Shares and the Distributions would be held on trust for the benefit of the members of the Affected Communities and/or for the purpose of ameliorating" the environmental damage caused by the Mine; and/or

(c) the Shares would be unencumbered.

The plaintiffs refer to this pleaded meaning and effect of the Share Offload Representations as the "Share Offload Understanding".

69 The plaintiffs then plead that OTML is liable to the members of the Affected Communities in the tort of deceit[102] on the following four grounds, with each ground tracking each of the four elements of the tort.

70 First, the plaintiffs plead that the Share Offload Representations are false in three respects:

(a) BHP Minerals transferred the Shares to PNGSDP outright and therefore the Shares were *not* held on trust for the members of the Affected Communities (see [60] above).[103]

---

101 PASOC at para 32A.

102 PASOC at para 42.

103 PASOC at para 45(g).

(b) By reason of the Shared Benefits Arrangement (see [46] above), Distributions were *not* to be applied for the benefit of the members of the Affected Communities but were instead to be shared with Papua New Guineans who were unaffected by the environmental damage caused by the Mine.[104]

(c) The Shares were subject to the Security Arrangements and were therefore *not* unencumbered.[105]

71 Second, the plaintiffs plead that OTML made the Share Offload Representations fraudulently in that it did not have any honest belief or any present intention to carry out the Share Offload Representations at the time it made the representations[106] and made those representations either knowing that they were false, or recklessly not caring whether they were true or false.[107]

72 Third, the plaintiffs plead that, in reliance on the truth of the Share Offload Representations, the members of the Affected Communities or their representatives:[108]

(a) executed forms agreeing to opt out of the 2000 Class Actions ("Opt-Out Forms"); and

(b) executed the CMCAs providing for, among other things, mine continuation and for the members of the Affected Communities to discontinue the 2000 Class Actions and release OTML, BHP Minerals

104 PASOC at para 45(f).

105 PASOC at para 45(c).

106 PASOC at para 45(a).

107 PASOC at para 47.

108 PASOC at paras 33 and 48, p 110.

> and BHP Group from all claims arising from the operation of the Mine[109] in exchange for OTML's promise to make annual payments to, among others, the members of the Affected Communities[110] as "full compensation" for the environmental damage caused by the Mine.[111]

73 Finally, the plaintiffs plead that the members of the Affected Communities discovered that the Share Offload Representations were false only when I delivered my judgment in *State v PNGSDP (HC)*. The plaintiffs plead that the members of the Affected Communities learned from that judgment for the first time that the Shares and Distributions were not subject to any trust and were not unencumbered (see [60] above).[112]

74 With that background, I now turn to analyse whether the plaintiffs' claims that OTML breached its fiduciary duties to the members of the Affected Communities and conspired to cause them loss are obviously unsustainable. For the purposes of this analysis, I am prepared to assume in the plaintiffs' favour, without deciding, that OTML's deceit claim is well founded. In particular, I will assume from this point forward that OTML did in fact make the Share Offload Representations to the members of the Affected Communities and that the Share Offload Representations are indeed false. Whether these assumptions are valid will, of course, have to be determined at trial.

---

109 PASOC at para 33.

110 CJC's 1st Affidavit at p 1863 (cl 17) (BCP Vol IV).

111 CJC's 1st Affidavit at p 1863 (cl 19) (BCP Vol IV).

112 PASOC at paras 45(h)–45(i).

Breach of fiduciary duties claim

The plaintiffs' pleaded case

75 As with the plaintiffs' claim against PNGSDP for breach of fiduciary duties (see *Ok Tedi (PNGSDP)* at [58]), the plaintiffs do not allege as against OTML that: (a) OTML is a trustee for the members of the Affected Communities; (b) OTML is within some new category of fiduciary which the plaintiffs submit the law should recognise; or (c) OTML holds legal title to any property in which the members of the Affected Communities have a proprietary interest.[113]

76 The plaintiffs' case is simply that OTML owes fiduciary duties to the members of the Affected Communities because, in all the circumstances of this case, it is an *ad hoc* fiduciary for them.[114] The plaintiffs' case proceeds as follows. By making the Share Offload Representations, OTML voluntarily undertook to act in the interests of the members of the Affected Communities and was in a relationship of trust and confidence with them.[115] The members of the Affected Communities were vulnerable to the actions of OTML in ensuring that the content of the Share Offload Representations was carried out for their benefit.[116] Further, OTML had the power to decide whether to carry out an arrangement in which the beneficial interest in the Shares and in Distributions would in fact belong to the members of the Affected Communities.[117] OTML therefore had the power to affect the interests of the members of the Affected

---

113 Transcript, 20 August 2021, pp 100:8–109:11; Plaintiffs' Written Submissions dated 5 August 2021 ("PS") at paras 150–199.

114 PASOC at paras 51–55.

115 PASOC at para 51.

116 PASOC at para 51(a)

117 PASOC at para 51(b).

Communities.[118] In these circumstances, therefore,[119] OTML became an *ad hoc* fiduciary for the members of the Affected Communities.

77 The plaintiffs' case as to the content of OTML's fiduciary duties is as follows. As an *ad hoc* fiduciary, OTML owes the members of the Affected Communities six duties.[120] These duties include a duty to act *bona fide* in the interests of the members of the Affected Communities and a duty not to advance or promote OTML's own interests to the detriment of or in conflict with the interests of the members of the Affected Communities. Most importantly, OTML has a duty to carry out the content of the Share Offload Representations,[121] *ie*, to ensure that: (a) the members of the Affected Communities beneficially own the Shares and Distributions;[122] and (b) Distributions are used to ameliorate the effects on the members of the Affected Communities of the environmental damage caused by the Mine.

78 The plaintiffs' case as to OTML's breach of its fiduciary duties proceeds as follows.[123] OTML deceived the members of the Affected Communities in the manner described at [70] to [72] above. First, it entered into the Security Arrangements contrary to the Share Offload Representations. OTML thereby deprived the members of the Affected Communities of the opportunity to claim any beneficial interest in the Shares and Distributions and to have the Shares and Distributions applied for their benefit without hindrance or encumbrance. Second, OTML effected the Shared Benefits Arrangement. OTML thereby

---

118 Transcript, 20 August 2021, pp 106:25–107:6.

119 PASOC at para 52.

120 PASOC at para 52.

121 PASOC at para 52(d).

122 PASOC at para 52(e).

123 PASOC at paras 53–54.

diluted the entitlement of the members of the Affected Communities to benefit from the Shares and Distributions by allowing persons outside the Affected Communities to benefit from them as well.

79 The question I must decide is whether a claim that OTML was an *ad hoc* fiduciary for the members of the Affected Communities is obviously unsustainable (see [65] above).

When an ad hoc *fiduciary duty arises*

80 I had to analyse the circumstances in which one person (F) becomes an *ad hoc* fiduciary for another person (B) in *Ok Tedi (PNGSDP)*. A fuller analysis of the relevant principles may be found there (at [59]–[68]). For present purposes, it suffices to extract and restate the following principles.

81 First, "the hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of another person": *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*") at [192]. The core liability that this entails is a single-minded duty of loyalty to B: *Bristol and West Building Society v Mothew* [1998] Ch 1.

82 Second, a person is not subject to fiduciary obligations because he is a fiduciary; instead, he is a fiduciary because he is subject to fiduciary obligations: *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") at [42]. Thus, whether a person owes a fiduciary duty to another depends on the nature of his conduct in relation to that other person in all the circumstances and not purely on the category into which his broader relationship with that person falls (*Turf Club* at [42]–[43]).

83 Third, a fiduciary duty is voluntarily undertaken. It arises as a legal consequence of the fiduciary's voluntary conduct and is not imposed by law independently of the fiduciary's intention to engage in that conduct. But, because the obligation is a legal consequence, it can arise even if the fiduciary was not subjectively willing to undertake the obligation or to accept that legal consequence when he engaged in that conduct: *Tan Yok Koon* at [194].

84 Fourth, in *Ok Tedi (PNGSDP)* at [68], I adopted the framework for ascertaining when F becomes an *ad hoc* fiduciary for B which the Supreme Court of Canada set out in *Her Majesty The Queen in Right of Alberta v Elder Advocates of Alberta Society and James O. Darwish, Personal representative of the Estate of Johanna H. Darwish, deceased and Attorney General of Canada and Attorney General of British Columbia as Interveners* [2011] 2 SCR 261 ("*Alberta*") at [30]–[36]. Under that framework, F becomes an *ad hoc* fiduciary for B if:

(a) F gives an undertaking of responsibility, express or implied, to act in B's best interests. In other words, F must undertake "to act in accordance with the duty of loyalty reposed on" F (at [30]) and to forsake the interests of all others (including F himself) in favour of B in relation to the legal interest at stake (at [31]).

(b) B is vulnerable to F in the sense that F has a discretionary power over B or over the class to which B belongs (at [33]).

(c) F's power may affect B's legal interests or his substantial practical interests (at [34]).

85 Further, where B alleges that F owes the *ad hoc* fiduciary duty not just to B but to a class of persons of which B claims to be a member, it is necessary

that that class of persons be defined: *Ok Tedi (PNGSDP)* at [67] citing *Alberta* at [36].

86 As I said in *OK Tedi (PNGSDP)* (at [68]), I consider the *Alberta* framework to be consistent with the principles set out by the Court of Appeal in *Tan Yok Koon*, *Turf Club* and *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737.

87 I also accept, as OTML submits,[124] that the threshold for establishing that F has become an *ad hoc* fiduciary for B is a very high one (*Turf Club* at [43]). The threshold is especially high in a commercial setting, where the parties deal at arm's length and choose to govern their legal relationship by contract (*Turf Club* at [45]). First, a finding that F gave any sort of undertaking of responsibility to act in B's best interests will be justified only in exceptional circumstances (*Turf Club* at [43] and [45]; *Deutsche Bank AG v Chang Tse Wen* [2013] 1 SLR 1310 at [110] to [111]). This is because a commercial party does not ordinarily undertake to subordinate its own interests to another's. Second, in a commercial setting, B will not be deemed to be vulnerable to F simply because B mistakenly trusted or relied on F (*Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 ("*Hospital Products*") at [66] to [67] *per* Dawson J). Finally, where F and B have entered into a contract, the terms of their contract have primacy in assessing F's power to affect B's legal interests. Any *ad hoc* fiduciary duty which may be superimposed on their relationship will have to conform to the terms of their contract (*Hospital Products* at [70] *per* Mason J).

---

124 1DS at para 272.

88 I therefore apply the *Alberta* framework to analyse whether the plaintiffs' claim that OTML became an *ad hoc* fiduciary for the members of the Affected Communities is obviously unsustainable. For the following reasons, I accept OTML's submission that that claim is obviously unsustainable, even with the benefit of my assumption in the plaintiffs' favour that their case in deceit is well-founded (see [74] above).

No voluntary undertaking to the members of the Affected Communities

89 In my view, it is obviously unsustainable that OTML gave any undertaking of responsibility to the members of the Affected Communities as required by the first element of the *Alberta* framework (see [84(a)] above). This element requires OTML to have voluntarily undertaken responsibility, expressly or impliedly, to act in relation to the Shares and Distributions in the best interests of the members of the Affected Communities in accordance with a duty of loyalty reposed in OTML, forsaking the interests of all others (including OTML itself) in favour of the members of the Affected Communities. The plaintiffs plead that OTML undertook this responsibility when it made the Share Offload Representations.[125] I find the plaintiffs' case obviously unsustainable for two reasons.

Any such undertaking is inconsistent with the commercial setting

90 The commercial setting in which the plaintiffs allege that OTML made the Share Offload Representations makes the required voluntary undertaking of responsibility obviously unsustainable. I say that for three reasons.

---

125 PASOC at para 51.

(1) A voluntary undertaking of responsibility is at odds with OTML's pursuit of its own commercial interests in adversarial negotiations

91 First, a voluntary undertaking of responsibility is completely at odds with OTML's status as a commercial entity and the adversarial nature of the Consultation Programme. OTML was brought into existence and has always carried on its business for profit and to generate returns for its shareholders on their capital through its operation of the Mine.[126] OTML was not brought into existence and did not carry on its business at any time for altruistic purposes. There is no basis whatsoever for the plaintiffs' suggestion that OTML is or is regarded as a "social institution".[127] Indeed, it appears to me that OTML could not have conducted itself in these discussions and negotiations so as to subordinate its own interests to the interests of the members of the Affected Communities without OTML's directors and management themselves breaching their fiduciary duties to OTML and its shareholders as a whole.

92 OTML therefore initiated the Consultation Programme in pursuit of its own commercial interests. The plaintiffs accept that the effect of the CMCAs, which was the culmination of the Consultation Programme, was to secure the discontinuance of the 2000 Class Action against OTML and to release OTML from liability.[128] OTML's pursuit of its own commercial interests in this way is completely inconsistent with any voluntary undertaking of responsibility to the members of the Affected Communities.

---

126 CJC's 1st Affidavit at para 161.

127 CJC's 1st Affidavit at para 161; Samson Jubi's 5th Affidavit ("SJ's 5th Affidavit") at para 113.

128 PASOC para 33(b); 1DS para 301.

93 The Consultation Programme was adversarial rather than altruistic.[129] OTML engaged with the CMCA Regions throughout the Consultation Programme at arm's length.[130] The clearest indication of this is that non-governmental organisations felt the need to observe the operation of the Consultation Programme to ensure that OTML did not misinform the CMCA Regions or take advantage of their lack of sophistication in the discussions which eventually turned into negotiations in the course of the Consultation Programme.

94 The CMCAs were therefore the outcome of a genuine negotiation.[131] OTML took it upon itself to equip members of the CMCA Regions with negotiating skills.[132] The CMCA Regions had legal advice or access to legal advice.[133] The CMCA Regions were not compelled to enter into the CMCAs.[134] If the outcome of the Consultation Programme was that the CMCA Regions wanted OTML to continue to operate the Mine only upon terms as to compensation, benefits and otherwise which OTML considered uncommercial, I am satisfied that OTML would simply not have entered into the CMCAs and would have considered its options. I am equally satisfied that, if OTML offered a package of compensation and benefits that the CMCA Regions considered inadequate, they would have refused to sign the CMCAs and considered their options. All of this is completely inconsistent with OTML voluntarily undertaking any responsibility to the members of the Affected Communities.

---

129 SJ's 5th Affidavit at "SJ-55".

130 CJC's 1st Affidavit at para 21.

131 1DS at para 322.

132 1DS at para 320.

133 1DS at para 321.

134 CJC's 1st Affidavit at para 163.

95 As I have pointed out, it is not easy for F to become an *ad hoc* fiduciary for B in a commercial setting such as this. It would therefore take exceptional circumstances to find that OTML voluntarily undertook responsibility to the members of the Affected Communities in the course of or by reason of the Consultation Programme. There are no exceptional circumstances in this case. In fact, all of the objective circumstances suggest that OTML undertook no such responsibility whatsoever.

(2) A voluntary undertaking of responsibility is at odds with the existence and the terms of the CMCAs

96 Second, a voluntary undertaking of responsibility is completely at odds with the existence and the terms of the contracts which OTML entered into with the CMCA Regions, *ie* the CMCAs. The intention of OTML, its shareholders and the CMCA Regions in entering into the CMCAs was that the CMCAs would completely document and govern the relationship between OTML and the CMCA Regions.[135] The CMCAs were given effect to by national legislation. They continue to bind the parties today, pursuant to the CMC EAs, and expressly provide that they are "the complete, final and binding basis" on which the Mine is to continue in operation.[136]

97 The CMCAs expressly permit OTML to continue to operate the Mine on the terms which they set out as to compensation and benefits. The plaintiffs accept that OTML has complied with all of its obligations under the CMCAs and the CMC EAs and has paid a substantial sum by any measure to the CMCA Regions in compensation and benefits over the past 20 years or so (see [57] above). In any event, whether OTML has breached the CMCAs or complied

135 CJC's 3rd Affidavit at para 185.

136 CJC's 1st Affidavit at paras 125(c)–125(e).

with them is irrelevant. The very existence of the CMCAs negates the necessary voluntary undertaking of responsibility and confines the plaintiffs' remedies to contract.

(3) A voluntary undertaking of responsibility is at odds with the suite of contracts entered on the occasion of the Shares being transferred to PNGSDP

98 Third, a voluntary undertaking of responsibility is completely at odds with the suite of contracts which OTML entered into when BHP Mineral transferred the Shares to PNGSDP in 2002. These include the Master Agreement, the Security Deed, the Security Trust Deed and the Ninth Supplemental Agreement. Under these agreements, OTML participated in PNGSDP encumbering the Shares and Distributions in favour of the Security Trustee for the ultimate benefit of BHP Group and the State. Any voluntary undertaking of responsibility to carry out the Share Offload Representations and to ensure that the members of the Affected Communities obtained a beneficial interest in the Shares or Distributions is wholly inconsistent with the terms of this suite of contracts.

99 The plaintiffs make no attempt to reconcile or accommodate the terms of this suite of contracts or of the CMCAs with the scope or content of the voluntary undertaking of responsibility necessary to make OTML an *ad hoc* fiduciary for the members of the Affected Communities. They do not because they cannot. The voluntary undertaking of responsibility that the plaintiffs seek to establish cuts across the terms of all of these contracts and cannot be reconciled with them.

Any such undertaking is inconsistent with the plaintiffs' case in deceit

100 In any event, a voluntary undertaking of responsibility is wholly inconsistent with the plaintiffs' case that OTML made the Share Offload Representations fraudulently. That case asserts that, at the time OTML made the Share Offload Representations, it had no present intention to carry them out and therefore had no honest belief in their truth.[137]

101 An intention on OTML's part to perpetrate a fraud on the members of the Affected Communities cannot, as a matter of logic, coexist with the necessary voluntary undertaking of responsibility to them. F cannot voluntarily undertake responsibility to act in B's best interests at the same time as it deceives B into acting against B's own best interests.

102 As I have pointed out, F's voluntary undertaking of responsibility to B is an essential element of F becoming an *ad hoc* fiduciary for B. That is so even if the test to ascertain whether F has voluntarily undertaken responsibility to B is an objective rather than a subjective one (see [83] above). It is not the law that a court can, contrary to the objective circumstances and the objective nature of F's conduct, somehow impute a "voluntary" undertaking of responsibility to F or somehow impose one on F. That is so even if F is for some reason considered deserving of equity's moral condemnation (*eg*, as a fraudster) or if B is for some reason considered deserving of equity's protection (*eg*, as unsophisticated subsistence farmers).

103 If OTML's claim in deceit is well founded, therefore, the first element of the *Alberta* framework must necessarily be absent. That in turn makes the plaintiffs' claim for breach of fiduciary duty obviously unsustainable.

---

137 PASOC at paras 45(a) and 47.

No power to affect legal or substantial practical interests

104 I also consider the plaintiffs' case on the third element of the *Alberta* framework to be obviously unsustainable. The third element requires the plaintiffs to establish that OTML has a power which may be exercised so as to affect the legal or substantial practical interests of the members of the Affected Communities. *Alberta* explains this element as follows (at [35]):

> In the traditional categories of fiduciary relationship, the nature of the relationship itself defines the interest at stake. However, a party seeking to establish an *ad hoc* duty must be able to point to an identifiable legal or vital practical interest that is at stake. The most obvious example is an interest in property, although other interests recognized by law may also be protected.

105 The plaintiffs' case on this element proceeds as follows. OTML "had the power to decide whether to effect an arrangement where the beneficial interest in the Shares and/or [Distributions] would in fact belong to the members of the Affected Communities" [emphasis in original omitted].[138] This is because OTML had "substantial influence and involvement" in effecting the arrangements including and surrounding the transfer of the Shares which failed to confer any beneficial interest in the Shares on the members of the Affected Communities. OTML had this influence because, among other reasons, BHP Minerals held a controlling 52% stake in OTML.[139]

106 OTML's case in response proceeds as follows. OTML had no power or discretion over the Shares. It therefore could not have affected the interests of the members of the Affected Communities in the Shares, whether in a legal or

---

138 PASOC at para 51(b).

139 PS at paras 198–199; PASOC at para 136(e).

practical sense.[140] It was BHP Minerals and then PNGSDP who owned and controlled the Shares. OTML had no "power to decide whether to effect an arrangement where the beneficial interest in the Shares and/or any income therefrom would belong to the…Affected Communities."[141]

107 I accept OTML's submission. I find that OTML had no power to affect the legal or practical interests of the members of the Affected Communities in respect of the Shares[142] for two reasons.

108 First, it is common ground that OTML never owned the Shares. BHP Minerals held the Shares when OTML was incorporated in 1981.[143] BHP Minerals transferred the Shares to PNGSDP in 2002.[144] OTML never had any legal right or power to determine whether BHP Minerals should transfer the Shares or Distributions for the benefit of the members of the Affected Communities. As OTML puts it, if BHP Minerals was going to deal with the Shares in a manner contrary to the Share Offload Representations, OTML had "no role in that. BHP [Minerals] will just do what it wants to do…because the [S]hares don't belong to [OTML]".[145]

109 Second, the plaintiffs' submission that BHP Minerals controlled OTML is neither here nor there. The plaintiffs argue this control was evidenced by BHP Minerals' majority stake in OTML and its right to nominate senior officers of

---

140 1DS at para 294.

141 1DS at para 294.

142 MS dated 30 August 2021 at pp 1–2.

143 PASOC at para 18.

144 PASOC at para 45(b), p 112 (definition of "Shares").

145 Transcript, 19 August 2021, p 96:17–21.

OTML. It submits that BHP Minerals' control of OTML indicates "an alignment of interests" between the two entities.[146]

110 I reject the plaintiffs' submission for two reasons.

111 First, the point here is not whether BHP Minerals had the power to control OTML but whether OTML had the power to control BHP Minerals. It does not follow from BHP Minerals' right to appoint senior officers of OTML that OTML therefore somehow had the power to control BHP Minerals (including its decision to transfer the Shares to PNGSDP and the terms of the transfer). The plaintiff's submission is a *non sequitur*.

112 Second, even if it were the plaintiffs' case that BHP Minerals and OTML were a single economic entity such that the BHP Minerals' power to control the Shares can somehow be attributed to OTML, this case is nowhere pleaded.[147] Under O 18 r 19(1)(*a*) of the Rules, the reasonableness of a cause of action must be assessed only on the basis of the allegations pleaded (O 18 r 19(2) of the Rules; *Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin and others* [1997] 3 SLR(R) 649 at [21]). As for the remaining heads of O 18 r 19, the plaintiffs have put forward the PASOC as their best and final pleading of their claims against OTML. The single economic entity argument cannot save the plaintiffs' obviously unsustainable case on the third element of the *Alberta* framework as pleaded.

113 In these circumstances, the allegation that OTML had a power which it could exercise so as to affect the legal or substantial practical interests of the

146 PS at para 198.

147 Transcript, 19 August 2021, p 95:10–19.

members of the Affected Communities is obviously unsustainable. As OTML submits,[148] the absence of power in the hands of the alleged fiduciary negates an *ad hoc* fiduciary duty (*Galambos v Perez* [2009] 3 SCR 247 at [84]).

No vulnerability to OTML

114 It follows from my conclusion on the third element of the *Alberta* framework that the plaintiffs' case on the second element is also obviously unsustainable. The second element requires the members of the Affected Communities to be vulnerable to OTML in the sense that OTML has a discretionary power over them. The plaintiffs plead that the members of the Affected Communities were vulnerable to OTML "in ensuring that…the Share Offload Representations [were] carried out".[149] OTML had no such discretionary power over the Shares. The vulnerability required by the second *Alberta* element simply could not arise.

115 In the course of oral submissions, plaintiffs' counsel submitted that the members of the Affected Communities were vulnerable to OTML's exercise of power in another sense. The submission is that OTML's operation of the Mine damages the land in the Affected Communities, which in turn affects the livelihoods of the members of the Affected Communities as subsistence farmers.[150]

116 This allegation is nowhere pleaded.[151] The plaintiffs have put forward the PASOC as their best and final pleading. This submission cannot save the

---

148 1DS at para 273.

149 PASOC at para 51(a).

150 Transcript, 20 August 2021, p 107:3–22.

151 Transcript, 20 August 2021, pp 155:28–156:15.

plaintiffs' obviously unsustainable case on the second element of the *Alberta* framework as pleaded.

No breach of duty

117 Even if OTML owed the pleaded fiduciary duties (see [77] above) to the members of the Affected Communities as their *ad hoc* fiduciary, I consider any argument that there was a breach of these fiduciary duties to be obviously unsustainable.

118 The Share Offload Representations are not representations of past or present fact.[152] Their content is promissory in nature. The Share Offload Representations amount to a promise that the Shares will become the property of the members of the Affected Communities in equity without encumbrance and that Distributions will be applied exclusively for the benefit of the members of the Affected Communities.

119 But, as I have pointed out, the Shares are shares in OTML, not property owned by OTML. And Distributions are due to OTML's shareholders, not to OTML itself. OTML never owned or controlled the Shares and never received Distributions or controlled how they could be spent. Only BHP Minerals owned the Shares. Only BHP Minerals and BHP Group had control over whether to transfer the shares, when to transfer the shares, to whom to transfer the Shares, on what terms to transfer the shares and whether to create a trust over the Shares. Only OTML's shareholders received Distributions and had any control over how to spend them or whether to create a trust over them.

---

152 PASOC at para 44.

120 The promissory content of the Share Offload Representations relates to matters which are not in any way within OTML's control. Even if OTML was an *ad hoc* fiduciary for the members of the Affected Communities, and thereby obliged to carry out the content of the Share Offload Representations, any claim that OTML breached the duty to do so is obviously unsustainable.

Conclusion on fiduciary duties claim

121 For the foregoing reasons, I hold to be obviously unsustainable the plaintiffs' claim that OTML was an *ad hoc* fiduciary for the members of the Affected Communities and that it breached the fiduciary duties owed to them. All of these claims are accordingly struck out.

Conspiracy claims

122 The PASOC alleges that OTML was a conspirator in three unlawful means conspiracies. The PASOC calls them "Conspiracy B", "Conspiracy C" and "Conspiracy D".

123 The plaintiffs' case is that Sir Mekere was a conspirator in Conspiracies B and C. Although the plaintiffs have withdrawn their claims against Sir Mekere, they have not withdrawn their allegation that he was a conspirator in these two conspiracies. It therefore remains necessary to consider Sir Mekere's role in these alleged conspiracies.

124 For the reasons which follow, all three conspiracies are obviously unsustainable.

Conspiracy B

125 I begin my analysis with Conspiracy B. This is an alleged conspiracy between OTML, PNGSDP, Sir Mekere and the State to cause OTML to make the Share Offload Representations and thereby: (a) to deceive the members of the Affected Communities into discontinuing the 2000 Class Action and abandoning their claims against OTML, BHP Group and/or BHP Minerals; and (b) to deprive the members of the Affected Communities of a beneficial interest in the Shares and Distributions.[153] Conspiracy B is said to have caused the members of the Affected Communities to suffer loss which is equivalent to the damages they would have secured in the 2000 Class Action.[154]

126 To establish Conspiracy B, the plaintiffs must prove the following (*EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]):

(a) that OTML, PNGSDP, Sir Mekere and the State combined to do certain acts;

(b) that they intended to cause damage or injury to the members of the Affected Communities by those acts;

(c) that the acts were unlawful;

(d) that the acts were performed in furtherance of the combination; and

(e) that the members of the Affected Communities suffered loss as a result of the conspiracy.

153 PASOC at para 136A.

154 PASOC at para 136D.

No combination

127 The plaintiffs' pleaded case on the element of combination is obviously unsustainable.[155] A combination requires: (a) an agreement between the conspirators to pursue a course of conduct; and (b) concerted action taken pursuant to that agreement (*EFT Holdings* at [113]). The conspirators must be "sufficiently aware of the surrounding circumstances and share the object for it properly to be said that they were acting in concert at the time of the acts complained of" (*Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 at [111], cited in *EFT Holdings* at [113]).

128 In *Ok Tedi (PNGSDP)*, I struck out the plaintiffs' claim against PNGSDP as a conspirator in Conspiracy B. I found that the plaintiffs' allegation that PNGSDP knew that OTML had made the Share Offload Representations was without factual basis. That left entirely unsustainable the plaintiffs' case that PNGSDP knew that the representations were false and *therefore* shared the common agreement or object to deceive the members of the Affected Communities (*Ok Tedi (PNGSDP)* at [136]). I therefore analyse Conspiracy B on the basis that PNGSDP has been found not to be a conspirator.

129 The remaining alleged conspirators in Conspiracy B are OTML, Sir Mekere and the State.[156] The plaintiffs' case is that OTML, Sir Mekere and the State combined to carry out OTML's deceit of the members of the Affected Communities[157] knowing that the Share Offload Representations were made and were false.[158]

---

155 MS at p 2.

156 PASOC at para 136.

157 PASOC at para 136(i).

158 PASOC at paras 136(c) and 136(h).

130 The first point I make is that the plaintiffs' pleaded case on Conspiracy B fails to identify the specific individuals in OTML who entered into the combination. As OTML points out,[159] for a corporate entity to be "fixed with the requisite intention or state of mind, it is necessary to pinpoint some human actor with that state of mind and to determine whether…that state of mind also counts as the company's" (*The Dolphina* [2012] 1 SLR 992 at [205]). All that the plaintiffs can do in the PASOC is to refer to unidentified "CRO teams" making the alleged Share Offload Representations on behalf of OTML.[160] That does not suffice.

131 Further, the plaintiffs' plea is that OTML, Sir Mekere and the State shared the common agreement and object to deceive the members of the Affected Communities into discontinuing the 2000 Class Action and abandoning their claims against OTML, BHP Group and BHP Minerals. The pleaded basis for this allegation is that:[161]

(a) Sir Mekere was the Prime Minister of Papua New Guinea when the Share Offload Representations were made.

(b) The State and Sir Mekere were involved in negotiating with OTML the manner in which the members of the Affected Communities should be compensated for the environmental damage caused by the Mine;

---

159 1DS at paras 341 and 344.

160 PASOC at para 32.

161 PASOC at para 136(a)–136(c), 136(f).

(c) Sir Mekere and the State were aware that the Share Offload Representations had been made to the members of the Affected Communities and that the Share Offload Representations were false; and

(d) Sir Mekere and the State were involved in and aware of the Shared Benefits Arrangement and the Security Arrangements.

132 OTML accepts that representatives of the State did correspond with it about Mine continuation and the management of the environmental damage caused by the Mine. It also accepts that representatives of the State "attended some consultations with communities".[162] But, it argues that the State had no control over, or significant involvement in, OTML's decision-making process in carrying out the Consultation Programme.[163] Accordingly, OTML submits that there is no "basis for pleading that the late Sir Mekere and the State were even *aware* that the Share Offload Representations were made by OTML" [emphasis in original in italics].[164]

133 I accept OTML's submission. There is no evidence that Sir Mekere or the State were involved in OTML's decision to make the Share Offload Representations to the members of the Affected Communities. And it does not follow from the State's involvement in the Consultation Programme that Sir Mekere and the State knew that OTML had decided to do so or that it had in fact done so. The plaintiffs' case that Sir Mekere or the State were in any way involved in or aware of OTML's decision to make the Share Offload Representations to the members of the Affected Communities is utterly bereft of any evidence.

---

162 CJC's 1st Affidavit at para 167 (BCP Vol I, Tab 2).

163 1DS at para 349; CJC's 1st Affidavit at para 167 (BCP Vol I, Tab 2).

164 1DS at para 349.

134 The plaintiffs' response to this point is set out in the fifth affidavit of Samson Jubi ("Mr Jubi"). Mr Jubi is a consultant to the first plaintiff. His evidence is that the State was "heavily involved" in the Consultation Programme. As evidence of this, he refers to a letter dated 15 February 2000 issued by the State's Minister for Mining and Bougainville Affairs to leaders of communities in the Western Province of Papua New Guinea ("the 15 February 2000 Letter").[165] By the 15 February 2000 Letter, the State directed that "government officers and OTML…work together and carry out [the Consultation Programme] throughout the affected areas of Western Province".[166] These consultations were targeted at "all groups in [the] Western Province who will be affected by mine continuation or mine closure."[167]

135 On the basis of this letter, Mr Jubi avers that Conspiracy B should be permitted to go to trial:[168]

> I believe there would ***likely*** have been communication between [OTML] and the State over the manner in which the Affected Communities should be compensated for the damage caused by the Environmental Disaster. This would have ***at least extended*** to whether the Affected Communities would be compensated under both the CMCA compensation schemes and separately with an interest in the Shares as promised by the Share Offload Representations.
>
> [emphasis added]

136 This is pure speculation. Even taking into account Mr Jubi's affidavit, there is no evidence that Sir Mekere and the State were involved in or aware

---

165 SJ's 5th Affidavit at para 145; CJC's 1st Affidavit at para 56 (BCP Vol I, Tab 2).

166 CJC's 1st Affidavit at p 1801 (BCP Vol III at p 1808).

167 CJC's 1st Affidavit at p 1800 (BCP Vol III at p 1807).

168 SJ's 5th Affidavit at para 146 (BCP Vol X at p 5424).

that OTML had decided to make or had made the Share Offload Representations to the members of the Affected Communities.[169]

137 The 15 February 2000 Letter does not at all suggest that OTML told Sir Mekere and the State of its decision to make the Share Offload Representations (before the fact), or that the representations had been made (after the fact). All that the letter confirms is the State's interest in whether the Mine should continue or close. The letter states explicitly that the State will use the "full report on the outcome" of the Consultation Programme to make its decision about the future of the Mine.[170] It is a wholly speculative leap to move from that to assert that the State was involved in the Consultation Programme to the extent of being kept abreast of the representations that OTML had decided to make or did make to the members of the Affected Communities on the ground in the course of the Consultation Programme.

138 Further still, if the State were indeed involved in the compensation arrangements OTML was going to make for the Affected Communities, it is pure speculation to suggest that OTML told the State about *both* the CMCAs and the Share Offload Representations either while the Consultation Programme was ongoing or when OTML reported to the State at the conclusion of the Consultation Programme.[171] As the plaintiffs accept, "the Shares do not form part of the compensation under the CMCAs payable by [OTML] to the Affected Communities for environmental damage".[172] The Share Offload Representations and the CMCAs are therefore two distinct forms of

---

169 1DS at para 349.

170 CJC's 1st Affidavit at p 1801 (CP Vol III at p 1808).

171 CJC's 1st Affidavit at p 1801 (BCP Vol III at p 1808).

172 SJ's 5th Affidavit at paras 26, 54, 68 (BCP Vol X at pp 5383, 5395, 5399).

compensation from two distinct sources and for two distinct purposes. Mr Jubi even recognises that the Share Offload Representations are "effectively compensation from *BHP*" [emphasis added], not OTML.[173] This distinction holds true even if the plaintiffs' case is that both forms of compensation together form a single compensation "package".[174] Given this distinction, Mr Jubi's belief that OTML was likely to have discussed *both* the CMCAs and the Share Offload Representations with the State is not just speculation, it is baseless speculation.

139 In addition, the direction in the 15 February 2000 Letter to government officers and OTML to work together to conduct the Consultation Programme does not suffice to save Conspiracy B from being struck out. The plaintiffs have not pointed to a shred of evidence that any government officer actually knew that OTML had decided to or had actually made the Share Offload Representations.[175]

140 In these circumstances, the allegation that either Sir Mekere or the State knew of the Share Offload Representations is pure speculation. Because the alleged combination in Conspiracy B is predicated on Sir Mekere and the State having this knowledge, the pleading of a combination to found Conspiracy B obviously unsustainable.

---

173 SJ's 5th Affidavit at para 68 (BCP Vol X at p 5399).

174 Transcript, 20 August 2021, p 83:1–14.

175 1DS at para 206.

Intention to injure

141 I also accept OTML's submission that the plaintiffs' plea that the alleged conspirators had any intention to injure the members of the Affected Communities is wholly speculative and obviously unsustainable.

142 Taking the plaintiffs' case at its highest, their case is that Sir Mekere and the State came to know about the Share Offload Representations in the course of their communications with OTML during the Consultation Programme about OTML's intended arrangements to compensate the members of the Affected Communities for the environmental damage caused by the Mine. That was in fact expressly pleaded as part of the plaintiffs' case until the plaintiffs deleted that averment by amendment in the PASOC.[176] As OTML points out, the plaintiffs cannot at the same time allege that OTML was involved in a conspiracy to cause damage to the members of the Affected Communities by unlawful means while also advancing a case that Sir Mekere, the State and OTML were communicating about conferring an *ex gratia* benefit on the members of the Affected Communities. The plaintiffs appear to be approaching the failure to confer an *ex gratia* benefit as some sort of injury or loss recognised at common law as sufficient foundation for a claim in conspiracy. There is no legal basis for that approach.

143 For these reasons also, Conspiracy B is obviously unsustainable and is struck out.

---

176 PASOC, deleted para 134(c) on page 87.

Conspiracies C and D

144 I turn now to consider Conspiracies C and D. It is convenient to take them together.

145 Conspiracy C is pleaded as a conspiracy between OTML, PNGSDP, Sir Mekere and the State to cause OTML to breach the fiduciary duties it allegedly owed to the members of the Affected Communities (see [77] above) and thereby: (a) to cause them to discontinue the 2000 Class Action and abandon their claims against OTML, BHP Group and/or BHP Minerals; and (b) to deprive the members of the Affected Communities of a beneficial interest in the Shares and Distributions.[177] Like Conspiracy B, Conspiracy C is also said to have caused the members of the Affected Communities to suffer loss which is equivalent to the damages they would have secured in the 2000 Class Action.[178]

146 Conspiracy D is pleaded as a conspiracy between OTML and PNGSDP to cause PNGSDP to breach the fiduciary duties it allegedly owed to the members of the Affected Communities. The plaintiffs plead further that PNGSDP did in fact breach its fiduciary duties by making two specific investments for the sole benefit of the Mine, and not for the benefit of the members of the Affected Communities.[179]

147 OTML's and PNGSDP's breaches of these fiduciary duties are the unlawful acts for both Conspiracy C and Conspiracy D. I have held in this judgment that OTML was not an *ad hoc* fiduciary for the members of the Affected Communities and therefore never owed them any fiduciary duties. I

---

177 PASOC at para 136A.

178 PASOC at para 136D.

179 PASOC at paras 136J–136L.

made the same finding in respect of PNGSDP in *Ok Tedi (PNGSDP)* (at [105]). There are therefore no unlawful acts to sustain Conspiracy C and Conspiracy D.

148 Both Conspiracy C and Conspiracy D are obviously unsustainable and are struck out.

Conclusion on conspiracy claims

149 In summary, all of the plaintiffs' claims against OTML in conspiracy are struck out as being obviously unsustainable.

Conclusion

150 For all of the foregoing reasons, I have struck out the plaintiffs' claims in equity and in the tort of conspiracy against OTML. As I observed in *Ok Tedi (PNGSDP)* at [182], the plaintiffs appear to have approached the PASOC as a box-ticking exercise, in which to plead each of the constituent elements of their claims against PNGSDP regardless of the available evidence. That approach did not save the plaintiffs' claims against PNGSDP. That approach has not saved their claims against OTML either.

Vinodh Coomaraswamy
Judge of the High Court

Tan Gim Hai Adrian, Ong Pei Ching, Veluri Hari, David Aw Jingwei and Ng Rui Wen
(TSMP Law Corporation) for the plaintiffs;
Cavinder Bull SC, Adam Muneer Yusoff Maniam, Chua Xyn Yee and Liu Siew Rong (Drew & Napier LLC) for the first defendant;
The second to fifth defendants absent and unrepresented.
