IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2022] SGCA 76

Civil Appeal No 4 of 2022

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

… *Appellants*

And

PNG Sustainable Development Program Limited

… *Respondent*

In the matter of Suit No 628 of 2020

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 Limited
(2) PNG Sustainable Development Program Limited
(3) Mekere Morauta
(4) The Independent State of Papua New Guinea
(5) TMF Trustees Singapore Limited

… Defendants

GROUNDS OF DECISION

[Civil Procedure — Pleadings — Striking out]
[Equity — Fiduciary relationships — When arising]

Ok Tedi Fly River Development Foundation Ltd and others
v
PNG Sustainable Development Program Ltd

[2022] SGCA 76

Court of Appeal — Civil Appeal No 4 of 2022, Summons No 6 of 2022 and AD/Summons No 37 of 2021
Sundaresh Menon CJ, Tay Yong Kwang JCA and Steven Chong JCA
15 September 2022

2 December 2022

Sundaresh Menon CJ (delivering the grounds of decision of the court):

Introduction

1 This was the latest chapter of a long-running dispute over the liabilities and proper corporate governance of the respondent, PNG Sustainable Development Program Ltd, a Singapore-incorporated company limited by guarantee. Around the time that proceedings were commenced in the General Division of the High Court by way of Suit No 628 of 2020 ("Suit 628"), the value of the respondent's assets was about US$1.48bn. In Suit 628, it was argued that in the light of all the circumstances giving rise to the incorporation of the respondent and the statement of its objects, it could be inferred that the respondent had voluntarily undertaken to act in the interest of members of the Affected Communities, and that by so undertaking, the respondent became a fiduciary and was subject to fiduciary duties that were owed to members of the

Affected Communities. The Affected Communities are certain communities in the Western Province of Papua New Guinea ("PNG") which have been adversely affected by the environmental damage caused by the operations of a mine in that province ("the Mine"). The appellants are representative members of the Affected Communities. The appellants contended that the respondent had acted in contravention of the fiduciary duties that it allegedly owed to the Affected Communities.

2 The High Court judge ("the Judge") was not persuaded and struck out the entirety of the appellants' claim against the respondent pursuant to O 18 r 19(1) of the Rules of Court (2014 Rev Ed): *Ok Tedi Fly River Development Foundation Ltd and others v Ok Tedi Mining Ltd and others* [2021] SGHC 205 ("GD"). The appellants appealed against the Judge's decision. In AD/Summons No 37 of 2021 ("SUM 37") and Summons No 6 of 2022 ("SUM 6"), the appellants sought leave to amend their statement of claim and to adduce further evidence in support of their appeal. The appellants contended that they should be allowed to take their claims to trial. After hearing the arguments, we were satisfied that these applications were in vain. The considerable difficulties the appellants faced at first instance, in their claim that they were owed fiduciary duties, had not been overcome and so continued to hinder their position in the appeal. Furthermore, we were satisfied that these difficulties also applied to the new claims founded on an alleged breach of trust that they advanced on appeal. As we explain below, this was quite apart from the preliminary objection that on appeal, the appellants should not be allowed to advance claims against the respondent that would put their claims on a wholly different footing than that on which the Judge had considered them.

Facts

3 The facts have been set out exhaustively at [3]–[36] of the GD and we do not propose to restate them in any detail. Briefly, the background to this dispute reached back to 1976 when The Independent State of Papua New Guinea ("the State") and an Australian multinational mining company now known as BHP Group Limited ("BHP Group") incorporated a company in Papua New Guinea, known as Ok Tedi Mining Limited ("OTML"), to own and operate the Mine. BHP Group held 52% of OTML's shares ("the Shares") through its wholly owned subsidiary, BHP Minerals Holdings Pty Ltd ("BHP Minerals"). Apart from BHP Minerals, there were three other shareholders of OTML: the State, Inmet Mining Corporation and Mineral Resources Ok Tedi No 2 Limited (collectively "the Shareholders"). Whilst the Mine was exceptionally lucrative, it was also exceptionally harmful to the environment in which the Affected Communities were situated (GD at [15]–[17]).

4 In late 2000, BHP Group announced its intention to divest its shares in OTML. OTML's stakeholders then engaged in extensive negotiations as to the arrangements that would facilitate BHP Group's exit from OTML. A key part of the exit plan was for BHP Minerals to divest its entire 52% shareholding in OTML to a special purpose vehicle. The respondent was incorporated in Singapore in October 2001 to be that special purpose vehicle (GD at [20]–[21]).

5 The substance of the arrangements, through which BHP Group was to exit OTML, was subsequently recorded in a suite of written contracts, to which members of the Affected Communities (and for that matter, the appellants) were *not* party, including (GD at [26]–[33]):

(a) The Ok Tedi Mine Continuation (Ninth Supplemental) Agreement entered into between BHP Group, OTML and the Shareholders;

(b) A master agreement entered into between the respondent, BHP Group, OTML and the Shareholders setting out the parties' primary obligations ("Master Agreement"). By cl 3.1 of the Master Agreement, BHP Minerals agreed to transfer the Shares to the respondent. The consideration for this transfer was the respondent's contractual undertaking in cl 3.2 of the Master Agreement to comply with a schedule to the respondent's articles of association ("the Articles") called the "Program Rules". The respondent gave this undertaking expressly for the benefit of four entities: BHP Group, BHP Minerals, the State and OTML, thereby giving each of these four entities a direct right to enforce the Program Rules against it. This is separate from and independent of the respondent's obligation to its members for the time being to comply with the Program Rules as a component of the respondent's corporate constitution (see [7] below);

(c) Two deeds of indemnity which the respondent executed in favour of BHP Group ("BHP's Indemnity") and the State ("the State's Indemnity") respectively; and

(d) Three contracts, namely a security deed, an equitable mortgage over the Shares and a security trust deed ("Security Trust Deed"), collectively referred to as "the Security Arrangements" which the respondent entered into as security for the punctual performance of its obligations under BHP's Indemnity and the State's Indemnity. Under the Security Arrangements, TMF Trustees Singapore Ltd ("the Security

Trustee") held very broad security interests over virtually all of the respondent's present and future assets.

The transfer of BHP Minerals' shareholding in OTML to the respondent was effected on 7 February 2002.

6 We digress to observe that the various agreements were negotiated over a considerable period of time; and although the Affected Communities were not party to the agreements that the respondent was subject to, it appeared that the Affected Communities were concerned parties and had interactions with some of the other parties. This was unsurprising since these communities were among those affected by the operations of the Mine. For example, certain members of the Affected Communities entered into contracts, known as Community Mine Continuation Agreements ("CMCAs"), with OTML. While the appellants said that the CMCAs showed, among other things, the said members releasing OTML, BHP Minerals and BHP Group from all claims arising from the operation of the Mine, the appellants did not say and indeed they accepted that the CMCAs did not set out the *respondent's* purported obligations to the members of the Affected Communities. This was unsurprising given that the respondent is not party to the CMCAs.[1] For the avoidance of doubt, and as we will come to later, we did not accept that any obligations were owed by the respondent to the members of the Affected Communities.

7 The respondent's corporate constitution is set out in the (a) memorandum of association ("the Memorandum"); (b) the Articles; and (c) the Program Rules. Its objects are set out in cl 3 of the Memorandum, and

[1] 15/9/2022 NE 14–16.

these are, among other things, to apply the income from the Mine to "promote sustainable development within, and advance the general welfare of the people of, [PNG], particularly those of the Western Province of [PNG]". Rules 9 to 10 of the Program Rules set out a contractual framework as to how the respondent was to apply the income from the Mine. This framework, among other things, both permits and obliges the respondent to apply the income from the Mine for the benefit of two classes of people: (a) the people of the Western Province of PNG; and (b) the people of PNG. As the Judge noted, the Affected Communities or their members are not referred to specifically, much less exclusively, in the respondent's corporate constitution (GD at [21]–[25]). The Affected Communities were encompassed within both the generic categories of people mentioned as beneficiaries, and likely, more particularly, in the first of those categories.

8 Suit 628 was preceded by an earlier suit, Suit No 795 of 2014, between the State and the respondent, in which the State sought, among other things: (a) an order that it had the right to appoint directors to the respondent's board, and (b) a full account of the respondent's dealings with its assets. The State failed in that earlier litigation, both at first instance and on appeal (see respectively *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2019] SGHC 68 and *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 2 SLR 200 (GD at [12]–[13]).

9 In Suit 628, the appellants' case was premised on the respondent having "voluntarily [undertaken] to act in the interest of the members of the Affected Communities in circumstances giving rise to a relationship of trust and confidence" even though, as we have already highlighted at [5]–[6] above, none

of the members of the Affected Communities – whether then or now – were or are a party to any of the suite of written contracts the respondent entered into and even though, as we have already highlighted at [7] above, neither the objects for which the respondent was established nor the Program Rules identify the members of the Affected Communities as a distinct class. The appellants contended that the respondent breached its fiduciary duties to the members of the Affected Communities when it failed to administer its assets in compliance with the Program Rules.

10 The Judge patiently addressed the arguments before him and set out his reasoning in considerable detail. In summary, he found that the respondent gave no undertaking whatsoever – voluntary or otherwise, express or implied, in respect of any of its assets – to the members of the Affected Communities at any time. It certainly did not do so in the Master Agreement; nor did it do so in any other way. The only undertakings which the respondent gave in respect of its assets to anyone at any time were those set out in the suite of written contracts it entered into following its incorporation and it gave them only to the counterparties to those contracts (GD at [73]–[74]). To suggest that the respondent gave a non-contractual undertaking to members of the Affected Communities was plainly and obviously unsustainable because such an undertaking would be wholly inconsistent with both the express contractual obligations which the respondent undertook and the express discretionary powers which the respondent acquired under the suite of written contracts it entered into. It followed that there could be no fiduciary duties owed by the respondent to the members of the Affected Communities which was pleaded to arise "by virtue of the [respondent's] voluntary undertaking to act in the interests of the members of the Affected Communities" (GD at [75]–[86]). Flowing from these findings, the Judge dismissed the pleaded breaches of the

respondent's fiduciary duties (GD at [102]–[105]). The focus of the present appeal was on those findings of the Judge. While the Judge also dismissed the appellants' claims on the basis of a remedial constructive trust, lawful and unlawful means conspiracy and unjust enrichment, these were outside the scope of this appeal as the appellants no longer pursued them.[2]

Our decision

No evidence of the respondent having undertaken any duty to the Affected Communities

11 We state at the outset our difficulty in accepting the appellants' narrative of the respondent having undertaken to act in the interests of the members of the Affected Communities. To begin with, the appellants had no answer to the key reasons underlying the decision of the Judge as set out in the GD at [70]–[86]. The parties had entered into a string of carefully negotiated contracts and it was untenable in those circumstances that a separate and effectively *equivalent set of obligations* were undertaken as fiduciary obligations in favour of the appellants with whom the respondent was never in a contractual relationship (see [5]–[6] above).

12 As we pointed out to Mr Adrian Tan, who appeared for the appellants, we could see no basis for relying on the contracts set out at [5] above to establish the existence of an undertaking that was said to be in essentially the same terms as some of the express contractual obligations, but assumed by the respondent in favour of the members of the Affected Communities who were not party to the contracts that the respondent had entered into. As the Judge rightly noted in the GD at [73]–[74], the only undertakings which the respondent gave in respect

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[2] Appellants' Skeletal Submissions at [14].

of its assets to anyone at any time were those set out in the suite of written contracts it entered into following its incorporation and it gave them only to the counterparties to those contracts. Thus, by cl 3.2 of the Master Agreement, the respondent agreed and undertook for the benefit of BHP Group, BHP Minerals, the State and OTML that it will comply with the Program Rules (see [5(b)] above). And by cl 8.7 of the Master Agreement, the parties agreed (rather obviously, at least to common lawyers), that the Master Agreement "confers rights only upon a person expressed to be a party, and not upon any other person". Having gone to considerable lengths to provide for and delineate the rights and obligations of various parties by contract, including having the respondent undertake certain specific contractual obligations, it seemed implausible that the parties would have also undertaken similar obligations in favour of others with whom there were no binding contractual arrangements.

13 Mr Tan accepted that the essence of the appellants' case was that the appellants are able, in their own right and on behalf of the Affected Communities, to and do seek to enforce the contractual obligations owed by the respondent to the contractual counterparties, and that they seek to do this because the latter were not taking steps to enforce the obligations owed by the respondent to them.[3] But this ran into the seemingly inseparable obstacle that the appellants had no privity of contract with the respondent. In an attempt to circumvent the lack of privity, the appellants described themselves as beneficiaries of a fiduciary duty so that they could, in effect, take on all of the rights of the contractual counterparties and enforce them against the respondent. This included the respondent's undertaking in its contracts to comply with the Program Rules (see [5(b)] above). The problem with the appellants' case was

[3] 15/9/2022 NE 35.

that it was nowhere spelt out how the appellants (or the Affected Communities) acquired such a right or became a beneficiary of a fiduciary obligation owed by the respondent. Nor was it clear how or where the respondent supposedly took on those obligations to members of the Affected Communities. The fact that the respondent had given various undertakings to the other parties to those contracts (such as to BHP Group, BHP Minerals, the State and OTML to comply with the Program Rules) did not mean that it had given a similar undertaking to the appellants. In fact, the converse was more likely to be true.

14 To add to these difficulties, to suggest that those undertakings in the contracts somehow extended to the appellants would have contradicted some of the terms of those very contracts that provided that the rights were not intended to be conferred upon non-parties (see [12] above).

15 Mr Tan also submitted that there were now issues in the running of the respondent which the parties to the contracts were not acting to enforce.[4] But even if this were true, that just did not mean that we could transpose a contractual obligation owed to the contractual counterparties into one that was capable of being enforced by non-parties. To put it bluntly, the fact that the contractual counterparties may not have been interested in enforcing the contractual obligations owed to them did not give the *court* the licence to create an interest in a party who may want to enforce those rights but was a stranger to the contract. If the members of the Affected Communities wanted to be in a position to enforce the Program Rules in their own right, they had to have negotiated for that right at the relevant time. Having failed to do so, we did not see how we could now create a right in their favour to enforce those obligations.

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4 15/9/2022 NE 28.

16 The Judge also noted that the existence of any such undertaking on the part of the respondent to members of the Affected Communities would have been inconsistent with both the express contractual obligations which the respondent undertook and the express discretionary powers which the respondent acquired under the suite of written contracts it entered into. The provisions in the written contracts and in the respondent's corporate constitution weighed against any such duty or obligation being owed by the respondent to members of the Affected Communities. The Judge's analysis is set out in the GD at [77]–[86] and it is worth recalling his reasoning in some detail.

17 The Judge found that by Rules 9 to 10 of the Program Rules, the respondent undertook a *cascading* and *comprehensive* set of express contractual obligations as to how the respondent was to apply the income from the Mine. The respondent undertook these obligations to its members for the time being and also through cl 3.2 of the Master Agreement for the benefit of BHP Group, BHP Minerals, the State and OTML. We reiterate that the Affected Communities or their members are not referred to specifically, much less exclusively, in Rules 9 to 10 of the Program Rules (or for that matter, in the respondent's corporate constitution). Given the *entire* contractual framework of cascading obligations that the respondent undertook, the Judge found that it excluded any possibility of the respondent owing an obligation to members of the Affected Communities in respect of the income from the Mine (see also [5(b)] and [7] above). The effect of the Security Arrangements in charging the bulk of the respondent's assets in favour of the Security Trustee subordinates any purported interest of the members of the Affected Communities even further in the application of the income from the Mine than provided in Rules 9 to 10 of the Program Rules (see also [5(d)] above). These express contractual obligations made it plainly and obviously unsustainable that the respondent

gave any undertaking of responsibility to act in the best interests of the members of the Affected Communities (GD at [77]–[81]).

18 The Judge also found that the Program Rules gave the respondent the unqualified contractual discretion to undertake sustainable development projects for the exclusive benefit of persons *other than* members of the Affected Communities. This arises out of our earlier observation that the Affected Communities or their members are not referred to specifically, much less exclusively, in the respondent's corporate constitution (see [7] above). The Judge found that the respondent had an unqualified contractual discretion to confer no benefits at all on members of the Affected Communities. Doing so would be within the respondent's express contractual discretion under the Program Rules (GD at [82]–[84]).

19 Relatedly, cl 8 of the Memorandum and cl 11 of the Security Trust Deed preclude any alteration of the Articles "so as to amend the Program Rules" without prior written approval of BHP Group and the State. Prominent by its absence in this process is any mention of the Affected Communities, which meant that the respondent was not obliged to seek the consent of the members of the Affected Communities before exercising its power to amend the Program Rules. It followed that the respondent notionally had the contractual power to exclude any projects that were for the benefit of the members of the Affected Communities from the scope of the Program Rules (GD at [85]–[86]). While it might be unlikely that such power would in fact be exercised in this way, the Judge thought that the mere existence of such a power destroyed any basis for finding an undertaking of responsibility to act in the best interests of the members of the Affected Communities.

20 On appeal, the appellants contended that the Judge erred by putting the proverbial cart before the horse. By this, they meant that whether the respondent had the power to amend the Program Rules against the interest of the members of the Affected Communities depended, in the first place, on whether a fiduciary relationship existed between the respondent and members of the Affected Communities.[5] Likewise, whether the respondent had the power to confer no benefits at all on members of the Affected Communities depended on the anterior factual question of whether the respondent was set up with the Affected Communities firmly in mind.[6]

21 In our view, the appellants' argument sidestepped the issue and failed to squarely confront the Judge's interpretation of the material provisions. The Judge undertook a detailed analysis of the various provisions in the written contracts and in the respondent's written constitution to determine whether a fiduciary relationship could be said to exist between the respondent and members of the Affected Communities. In our judgment, the Judge's interpretation of these provisions, including his view that the respondent could confer no benefits at all on members of the Affected Communities and could notionally amend the Program Rules to the detriment of the said members, was correct, and this was consistent with the other provisions in the written contracts and the respondent's corporate constitution. As the Judge observed, the members of the Affected Communities are not identified as a distinct class in any of the suite of contracts and the Program Rules make no reference whatsoever to the respondent applying any funds, whether before or after Mine

5 Appellants' Case at [89]; Appellants' Skeletal Submissions at [30].

6 Appellants' Case at [72]; Appellants' Skeletal Submissions at [27]–[29].

Closure, to advance the best interests of the members of the Affected Communities (GD at [83] and [102] and see also [7] above).

22 The appellants attempted to address this last point by arguing that the main or fundamental purpose behind the incorporation of the respondent was to ameliorate the environmental damage caused by continuing mining activities.[7] On this basis, it was submitted that if that was the respondent's fundamental purpose and if members of the Affected Communities were the ones adversely affected by the environmental damage caused by the Mine, then it would establish the necessary nexus for a fiduciary relationship to be found between the respondent and members of the Affected Communities. As to this, we asked Mr Tan whether it was his case that the respondent had undertaken to members of the Affected Communities that it would hold its assets for the *sole* purpose of ameliorating the environmental damage caused by the Mine. He readily and candidly accepted that that was *not* his case.[8] Indeed, he could not have done otherwise given that ameliorating the environmental damage caused by the Mine is not identified specifically as even a part of the purpose for which the respondent was established (GD at [83] and [102]). Looking at the respondent's objects set out in cl 3 of the Memorandum, they are worded in broad terms which militated against the appellants' submission that the respondent's purpose is in fact much narrower and much more specific (see [7] above). Once the appellants conceded that it was *not* their case that the sole or fundamental purpose of the respondent was to ameliorate the environmental damage caused by the Mine, it fatally undermined their case that the respondent was established

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7 Appellants' Case at [29]; Appellants' Skeletal Submissions at [24] and [27].

8 15/9/2022 NE 34.

with the appellants (meaning, the members of the Affected Communities) specifically in mind.

23 The appellants instead pointed to the reference to the people of the Western Province in, amongst others, the Program Rules to support their case that the respondent undertook to act in the interest of the members of the Affected Communities. The difficulty with this was that the people of the Western Province is a larger group than the Affected Communities, the latter being, at best, a subset of the former (see [7] above).

24 Taking into account the extensive and protracted negotiations that preceded BHP Group's exit from OTML and the carefully negotiated suite of agreements, we were satisfied that the plain meaning of the contractual documents must be given effect to. This meant that the contractual reference to the people of the Western Province referred to a class which included, but was not confined to, members of the Affected Communities, since not all of the communities in the Western Province were affected by the environmental damage caused by the Mine (GD at [25]). This in turn supported the Judge's finding that the express contractual obligations which the respondent undertook and the express discretionary powers which the respondent acquired made it unsustainable for the court to hold that the respondent undertook any such responsibility, as the appellants contended, to members of the Affected Communities. Hence, the appellants' principal case that the respondent owed fiduciary duties to members of the Affected Communities simply could *not* get off the ground.

25 We briefly deal with the appellants' application in SUM 37 to adduce further evidence in this appeal. This evidence took the form of various

documents including statements made by various parties that were reported in the newspapers.[9] The appellants did not rely on these as an independent basis for saying that the respondent undertook to members of the Affected Communities that it would act in their interest. But these documents were introduced to make the case that the respondent knew that those the appellants represent were affected by the operations of the Mine and were to be compensated for that.[10] Having considered the documents, they did not in any way change our views as set out at [11]–[24] above. Quite apart from the fact that the statements in this collection of documents vary quite widely, none of these documents could overcome the fact that when the exit plan was implemented, the members of the Affected Communities were not party to any of the contracts with the respondent. Further, the framework of the written contracts and the respondent's corporate constitution, as we have demonstrated above, weighed against such a duty or obligation being found to be owed by the respondent to members of the Affected Communities. The documents would therefore not have made a difference to the appeal, and we accordingly dismissed SUM 37.

26 In the final analysis, we saw no reason to disturb the Judge's finding that the appellants' case that the respondent owed a fiduciary duty to the members of the Affected Communities was plainly and obviously unsustainable. We therefore affirmed the decision of the Judge.

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9 AD/SUM 37/2021 1st Affidavit of Samson Jubi (10.12.2021) at [32].

10 Appellants' Skeletal Submissions at [14] and [29].

Reliance on an assumption of responsibility or legitimate expectation

27 In the course of the hearing and faced with the difficulties of trying to establish that the respondent had undertaken to the members of the Affected Communities to act in their best interests, the appellants applied for leave by SUM 6 to amend their statement of claim. In their proposed amended statement of claim, the appellants contended that the respondent "voluntarily undertook and/or assumed responsibility and/or there was a legitimate expectation giving rise to a fiduciary duty for the [respondent] to act in the interest of the members of the Affected Communities by applying the Assets under the [respondent's] control in accordance with the Program Rules, in circumstances giving rise to a relationship of trust and confidence" [words in underline reflect the appellants' proposed amendments].

28 To the extent the appellants contended that a voluntary undertaking need not be communicated expressly to the beneficiary, we may have agreed.[11] But in so far as the appellants appeared to suggest that fiduciary obligations need not be voluntarily undertaken, we disagreed. As noted by this court in *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 at [194] ("*Tan Yok Koon*"):

> … [T]he fiduciary undertaking is voluntary in the sense that it arises *as a consequence of the fiduciary's conduct*, and is not imposed by law independently of the fiduciary's intentions. This is not to state that the fiduciary must be subjectively willing to undertake those obligations; the undertaking arises where the fiduciary *voluntarily places himself in a position* where the law can ***objectively*** impute an intention on his or her part to undertake those obligations. …
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> [emphasis in original]

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11 Appellants' Case at [65].

29 In *Tan Yok Koon* at [196], the question before the court was whether a resulting trustee is or can be a fiduciary. While the court observed that not every resulting trustee is subject to a fiduciary relationship, it held that "in the rare case, it may well be that the *facts and circumstances* leading to the imposition of a resulting trust may also disclose an undertaking by the trustee – whether *express* ***or*** *implied* – to act in a certain way" [emphasis in original]. The relevant inquiry was whether the party concerned had put itself in a position in which a fiduciary duty can be imputed by law and held to have been undertaken (see *Tan Yok Koon* at [199] and [206]).

30 The principal difficulty that stood in the way of such a claim was the Judge's finding that the respondent could not be said to have undertaken (whether expressly or impliedly) to act in the best interests of the members of the Affected Communities at any time (GD at [73] and *Tan Yok Koon* at [205]). In truth, stripped to its core, the appellants' proposed amendments at [27] above seemed to us to be just another way to contend that a fiduciary duty ought to be imposed on the respondent in favour of members of the Affected Communities when we have already rejected this (see [11]–[26] above).

31 We add that unlike the situation that the court was dealing with in *Tan Yok Koon* and *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*") where there was an underlying relationship between the parties to begin with and the question was whether the nature of that relationship and the surrounding circumstances give rise to a fiduciary relationship (in *Tan Yok Koon*, it was in the context of a notional relationship between a resulting trustee and beneficiary and in *Turf Club*, it involved parties in a joint venture), Mr Tan could not identify what sort of relationship the respondent and the members of the

Affected Communities had. The furthest he could go was to argue that they were connected in or by the fact that the members of the Affected Communities had given up certain rights to recover damages arising from the environmental damage caused by the Mine which then enabled the respondent's incorporation and its subsequent receipt of the Shares from BHP Minerals. But as we had pointed out to Mr Tan, the members of the Affected Communities had given up those rights pursuant to arrangements or agreements they had presumably concluded with other parties (see [6] above).[12] What they did not do, however, was to conclude an agreement with the respondent. If they had wanted to secure for themselves the right to enforce the Program Rules, it was up to them to have secured those rights. Having failed to do so, it cannot be said that the respondent, through its incorporation and its receipt of the Shares from BHP Minerals, had assumed some responsibility to the appellants. It was clear to us that the respondent and members of the Affected Communities were not in any formal relationship, much less a relationship of mutual trust and confidence that could have given rise to a legitimate expectation on the appellants' part that the respondent would not act in any way that was adverse to the appellants' interests.

32 We therefore saw no basis at all for disturbing the Judge's finding that the appellants' fiduciary claim was plainly and obviously unsustainable.

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12 15/9/2022 NE 41–45.

New arguments based on fiduciary power and trusts

33 On appeal, the appellants also sought in SUM 6, to advance new arguments based on the existence of a trust relationship. It was not disputed that this was a new point and in considering whether we should exercise our discretion to allow the appellants leave to pursue this, we were guided by our decision in *Sunbreeze Group Investments Ltd and others v Sim Chye Hock Ron* [2018] 2 SLR 1242 at [24] and [26]–[28] ("*Sunbreeze*"). The relevance and applicability of these principles were not in dispute. Suffice to note, the proposed amendments by the appellants in SUM 6 could and should have been pursued before the Judge at first instance. It may also be noted that the amendments sought to be made in this connection were substantial and introduced completely new arguments based on a discretionary trust and/or a *Re Denley* purpose trust (see *In re Denley's Trust Deed* [1969] 1 Ch 373). If allowed, it would have put the appellants' claims against the respondent on a wholly different footing. As these new arguments were not canvassed at all before the Judge, any decision on our part to allow the amendments would have required us to decide material aspects of the striking out application (the very subject matter of the present appeal) as a first instance court in substance, which would have been at odds with the exercise of appellate jurisdiction, as explained in *Sunbreeze*. For these reasons, we dismissed SUM 6.

34 In any event, the proposed amendments were in substance another attempt to repackage the original fiduciary duty claim as a trust claim and the Judge's earlier reasons for striking out of the fiduciary duty claim would likewise have applied to defeat any such claim. The circumstances leading up to the respondent's incorporation, the respondent's constitutional documents and the alleged statements in various documents did not provide any support at

all for the allegation that parties intended to create a trust, much less one in favour of the Affected Communities, which were never even mentioned in any of these documents. All of the reasons that justified the Judge's finding that the respondent could not be said to have undertaken (whether expressly or impliedly) to act in the best interests of the members of the Affected Communities at any time, made it plainly and obviously unsustainable that there was an intention to create a trust to benefit the members of the Affected Communities (see [11]–[32] above).[13]

35 In SUM 6, the appellants also advanced a new argument based on the existence of a fiduciary power. The appellants contended that the respondent was accountable to the members of the Affected Communities for the improper exercise of its fiduciary power.[14] As the respondent pointed out, however, the appellants' new fiduciary power claim was contingent on the appellants' ability to establish that there was a fiduciary relationship between the respondent and members of the Affected Communities in the first place.[15] Having affirmed the Judge's finding that the appellants' fiduciary claim was plainly and obviously unsustainable, it followed that the appellants' new fiduciary power claim was also plainly and obviously unsustainable.

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13 Appellants' Case at [96]; Appellants' Skeletal Submissions at [42].

14 Appellants' Skeletal Submissions at [55].

15 Respondent's Case at [93]; Respondent's Skeletal Submissions at [13].

Conclusion

36 For these reasons, we dismissed the summonses and the appeal. We fixed the costs of the appeal and of the summonses in the aggregate sum of $80,000 (inclusive of disbursements) and made the usual consequential orders.

Sundaresh Menon
Chief Justice

Tay Yong Kwang
Justice of the Court of Appeal

Steven Chong
Justice of the Court of Appeal

Adrian Tan Gim Hai, Tang Hang Wu, Ong Pei Ching, David Aw Jingwei, Angela Chai Rui Min and S Lingesh Kumar (TSMP Law Corporation) for the appellants;
Mark Jerome Seah Wei Hsien, Gan Yingtian Andrea, See Kwang Guan, Alexander Choo Wei Wen and Philip Teh Ahn Ren (Dentons Rodyk & Davidson LLP) for the respondent.