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

[2021] SGHC 205

Suit No 628 of 2020 (Summons No 3880 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 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]
[Trusts] — [Constructive trusts] — [Requirements for imposition of remedial constructive trust]
[Tort] — [Conspiracy] — [Elements of lawful means and unlawful means conspiracies]
[Restitution] — [Unjust enrichment] — [Elements of unjust enrichment] — [Interceptive subtraction] — [Total failure of consideration, exploitation of weakness and ignorance as unjust factors]

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

[2021] SGHC 205

General Division of the High Court — Suit No 628 of 2020 (Summons No 3880 of 2020)
Vinodh Coomaraswamy J
15, 21, 25, 29 January 2021

30 September 2021

Vinodh Coomaraswamy J:

Introduction

1 The subject-matter of this action is a fund worth about US$1.48 billion[1] which the second defendant holds and administers. The plaintiffs bring this action in an attempt to secure, among other relief, an order that the second defendant pay the entire fund over to the first plaintiff to hold and administer.[2]

2 The second defendant has applied to strike out the entirety of the plaintiffs' claim against it under O 18 r 19(1) of the Rules of Court (2014 Rev

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1 John Malcolm Wylie's 1st Affidavit of 9 September 2020 ("JMW's 1st Affidavit") at para 29.

2 Proposed Amended Statement of Claim ("PASOC") at p 100.

Ed). I have allowed the application. The plaintiffs have appealed against my decision. I now set out the grounds for my decision.

Background

The plaintiffs

3 The plaintiffs bring this action as representatives of all of the members of certain communities in the Western Province of Papua New Guinea which have been adversely affected by the environmental damage caused by an open pit gold and copper mine at Mount Fubilan in that province ("the Mine").[3] The plaintiffs refer to these communities as "the Affected Communities". The members of the Affected Communities number over 147,000 individuals.[4]

4 The first plaintiff is Ok Tedi Fly River Development Foundation Ltd ("the Foundation"). The Foundation is a company incorporated in Papua New Guinea in 2016.[5] It brings this action as the assignee of causes of action originally vested in the members of certain communities forming a subset of the Affected Communities.[6] In the alternative, the Foundation brings this action as trustee on behalf of those same individuals under O 15 r 14 of the Rules of Court.[7]

5 The second to ninth plaintiffs are individual members of the Affected Communities. They bring this action as a representative proceeding under O 15

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3 PASOC at para 17.

4 PASOC at para 3.

5 JMW's 1st Affidavit at p 1193.

6 PASOC at paras 1, 2A–2B, 6.

7 PASOC at para 7; Samson Jubi's 2nd Affidavit of 15 October 2020 ("SJ's 2nd Affidavit") at para 47.

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r 12 of the Rules of Court on behalf of all of the members of the Affected Communities.[8]

The defendants

6 The first defendant is Ok Tedi Mining Limited ("OTML"). OTML is a company incorporated in Papua New Guinea for the specific purpose of owning and operating the Mine.

7 The second defendant is PNG Sustainable Development Program Ltd ("PNGSDP"). PNGSDP is a company limited by guarantee incorporated in Singapore in 2001 for the specific purpose of holding 52% of the shares in OTML ("the Shares"), receiving the dividends and other money arising from the Shares ("Distributions")[9] and applying Distributions, in part, to promote sustainable development within Papua New Guinea and to advance the general welfare of the people of Papua New Guinea – particularly those of the Western Province – by carrying out programs and projects for social and environmental purposes for their benefit.[10]

8 The third defendant is Sir Mekere Morauta ("Sir Mekere"). Sir Mekere was the Prime Minister of Papua New Guinea from 1999 to 2002. He was the Chairman of PNGSDP's board of directors ("the Board") from 2012 to 2017 and a member of PNGSDP[11] from 2013 until he died at the age of 74 in 2020.[12] Sir Mekere has been credited with having had "the most impact in terms of

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8 PASOC at para 8, p 6.

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

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

11 PASOC at para 11.

12 John Malcolm Wylie's 4th Affidavit of 30 December 2020 ("JMW's 4th Affidavit") at para 21 and pp 9 to 11.

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reformist policies which set the conditions for prosperity, growth and new models for governance for his nation"[13] and was described on his death as a "champion reformist" and "an extraordinary Pacific statesman".[14]

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

10 The fifth defendant is TMF Trustees Singapore Ltd ("the Security Trustee"). The Security Trustee holds 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 [29]–[33] below). The fifth defendant replaced the original security trustee appointed under the security arrangements.[15] Nothing material to this decision turns on this identity of the security trustee. I therefore draw no distinction between the fifth defendant and the original security trustee.

The previous litigation

11 This action is the latest episode in long running litigation over the past thirty years in Singapore, Papua New Guinea[16] and Victoria[17] arising initially from the Mine and its activities and, more recently, from attempts to assert control over PNGSDP and its assets.

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13 JMW's 4th Affidavit at p 11.

14 JMW's 4th Affidavit at p 9.

15 JMW's 1st Affidavit at p 534.

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

17 PASOC at para 25.

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12 The Singapore litigation commenced in 2013. That is when PNGSDP brought an application against the State seeking to reverse or annul the State's attempts to assert control over PNGSDP.[18] In 2014, PNGSDP's application was converted into an action by the State against PNGSDP seeking, among other things: (a) a judicial determination that the State had the right to appoint a majority to PNGSDP's Board; and (b) a full account of PNGSDP's dealings with its assets.

13 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 ("*State v PNGSDP (HC)*") and *Independent State of Papua New Guinea v PNG Sustainable Development Program Ltd* [2020] 2 SLR 200 ("*State v PNGSDP (CA)*")).[19]

14 The plaintiffs in this action were not parties to that earlier litigation. The outcome of that litigation therefore gives rise to no *res judicata* which affects any of the issues in this action or in the striking out application now before me. But some of the findings from the two judgments in that litigation have some bearing on this application. I will refer to those findings as necessary.

The Mine and the environmental damage

15 The background to the plaintiffs' claim against PNGSDP goes back to 1976. That was when the State and an Australian multinational mining company now known as BHP Group Limited ("BHP Group") incorporated OTML to own and operate the Mine.

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18 HC/OS 795/2013.

19 JMW's 1st affidavit at para 31.

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16 OTML shares were held as follows for most of its existence. BHP Group held 52% of OTML's shares through its wholly owned subsidiary, BHP Minerals Holdings Pty Ltd ("BHP Minerals").[20] 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.

17 The Mine is exceptionally lucrative, generating a substantial proportion of Papua New Guinea's gross domestic product. Unfortunately, the Mine is also exceptionally harmful to the environment in the Affected Communities.[21]

18 Between 1994 and 1996, as a result of the environmental harm which the Mine was causing to the Affected Communities, individual members of the Affected Communities brought proceedings against BHP Group and OTML in the Supreme Court of Victoria and in Papua New Guinea.[22] In 1996, all of those proceedings were settled by a settlement agreement.[23]

19 In 2000, the parties to the settlement agreement alleged that the agreement had been breached. As a result, they brought a class action against BHP Group and OTML in the Supreme Court of Victoria ("the 2000 Class Action").[24]

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20 PASOC at para 18.

21 PASOC at paras 20 to 24.

22 PASOC at para 25.

23 PASOC at paras 26 to 28.

24 PASOC at para 29.

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PNGSDP's incorporation

The divestment

20 Soon after the 2000 Class Action commenced, BHP Group announced its plan to exit as a shareholder of OTML.[25] The full factual background to the exit plan can be found in the two judgments in the earlier Singapore litigation (see [12] above). That background need not be repeated here. It suffices for present purposes to say that a key part of the exit plan was for BHP Minerals to divest its entire 52% shareholding in OTML to a special purpose vehicle.

21 PNGSDP was incorporated in Singapore in October 2001 to be that special purpose vehicle.[26] PNGSDP's corporate constitution is set out in three documents: (a) its Memorandum of Association ("the Memorandum"); (b) its Articles of Association ("the Articles"); and (c) a schedule to the Articles called the "Program Rules".[27]

PNGSDP's objects

22 Clause 3 of the Memorandum sets out PNGSDP's three objects ("the Objects"). The Objects can be summarised as follows:[28]

> (a) To promote sustainable development within Papua New Guinea and to advance the general welfare of the people of Papua New Guinea, particularly those of the Western Province, through programs and projects for social and environmental purposes for their benefit.

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25 PASOC at para 30.

26 JMW's 1st Affidavit, para 22.

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

28 PASOC at para 56; JMW's 1st Affidavit at para 23 and p 428.

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(b) To identify and evaluate, finance, project manage and report on programs and projects which support sustainable development for the people of Papua New Guinea, particularly those of the Western Province.

(c) To carry out the sustainable development program set out in and in accordance with the Program Rules.

It is significant that the Objects refer generally to the people of the Western Province and of Papua New Guinea and do not refer specifically to the Affected Communities or their members.

The Program Rules

23 The Program Rules has effect as part of the statutory contract embodied in its Articles as between PNGSDP and its members for the time being. I analyse PNGSDP's contractual obligations under the Program Rules in greater detail at [77]–[79] below. For now, it suffices to note the following two points.

24 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 and the accumulated investment income earned on the Long Term Fund.[29] 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.

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

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25 Second, cl 9 of the Program Rules, among other things, both permits and obliges PNGSDP to apply the Distributions for the benefit of two classes of people: (a) the people of the Western Province; and (b) the people of Papua New Guinea (see [78]–[79] below).[30] 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 were 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 Papua New Guinea.[31] The plaintiffs complain about this feature of the Program Rules and describe it as "the Shared Benefits Arrangement".[32]

The exit plan is implemented

26 The exit plan was implemented between December 2001 and February 2002 in a number of steps. Four of those steps are relevant for present purposes.

27 First, BHP Group, OTML and OTML's four shareholders (including the State and BHP Minerals) entered into a contract known as The Ok Tedi Mine Continuation (Ninth Supplemental) Agreement ("Ninth Supplemental Agreement").[33] By this contract, BHP Group confirmed its intention to exit OTML and agreed that BHP Minerals should transfer the Shares to PNGSDP.[34]

28 Second, PNGSDP entered into a contract known as the "Master Agreement" with BHP Group, OTML and OTML's shareholders (including the

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30 JMW's 1st Affidavit, p 452.

31 John Malcolm Wylie's 3rd Affidavit of 23 November 2020 ("JMW's 3rd Affidavit") at para 12, p 42; Transcript, 15 January 2021, pp 12:28–13:14.

32 PASOC at para 45(f).

33 JMW's 1st Affidavit at p 632.

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

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State and BHP Minerals).[35] By cl 3.1 of the Master Agreement, BHP Minerals agreed to transfer the Shares to PNGSDP.[36] The consideration for this transfer was PNGSDP's contractual undertaking in cl 3.2 of the Master Agreement to comply with the Program Rules.[37] PNGSDP gave this undertaking expressly for the benefit of four entities: BHP Minerals, BHP Group, the State and OTML. PNGSDP thereby gave each of these four entities a direct right to enforce the Program Rules against it, separate from and independent of its obligation to the members of PNGSDP for the time being to comply with the Program Rules as a component of PNGSDP's corporate constitution.

29 Third, PNGSDP executed two deeds of indemnity: one in favour of BHP Group ("BHP's Indemnity")[38] and another in favour of the State ("the State's Indemnity").[39] Under BHP's Indemnity, PNGSDP agreed to indemnify BHP Group, its subsidiaries (including BHP Minerals but not OTML) and all of those subsidiaries' directors, officers and employees for any and all liability arising from any future environmental damage caused by the Mine, including BHP's liability to the State. Under the State's Indemnity, PNGSDP agreed to indemnify the State, its political subdivisions, instrumentalities and authorities and any Minister or officer of such instrumentality and authority acting in that capacity against all liability arising from any environmental damage caused by the Mine.

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

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35 JMW's 1st Affidavit at p 470.

36 JMW's 1st Affidavit at p 474.

37 JMW's 1st Affidavit at p 475.

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

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

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entered into a security deed ("the Security Deed"),[40] an equitable mortgage over the Shares ("the Equitable Mortgage")[41] and a security trust deed ("the Security Trust Deed".[42] I shall refer to these three contracts collectively as "the Security Arrangements".[43]

31 The parties to the Security Deed are PNGSDP, OTML and the Security Trustee.[44] 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. 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 upon issuance in PNGSDP's name.[45]

32 The parties to the Equitable Mortgage are PNGSDP and the Security Trustee. By the Equitable Mortgage, PNGSDP created an equitable mortgage over its present and future interest in the Shares, in all after-acquired Shares and in all future rights arising from the Shares in favour of the Security Trustee as security for the punctual performance of its obligations under BHP's Indemnity and the State's Indemnity.[46]

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

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

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

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

44 JMW's 1st Affidavit at p 534 and 546.

45 JMW's 1st Affidavit at p 546, at cl 2.3.

46 JMW's 1st Affidavit at p 607 to 608, cl 2.1.

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33 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 and, in particular, how it is to enforce its security rights under the Security Deed and the Equitable Mortgage and how it is obliged to distribute the proceeds of any such enforcement as between the many persons for whose ultimate benefit PNGSDP had granted the security.

The State expropriates the Shares

34 In 2013, during an intractable dispute between the State and PNGSDP over control of PNGSDP which led to the earlier litigation in Singapore (see [11]–[13] above), the State expropriated PNGSDP's 52% shareholding in OTML without compensation.[47] It did this by enacting legislation[48] which cancelled the Shares and obliged OTML to issue to the State new shares equivalent to 52% of its issued and paid-up share capital.

35 As a result of this legislation, PNGSDP ceased to be a shareholder of OTML in 2013. PNGSDP therefore ceased receiving any Distributions in and from 2013. Part of the plaintiffs' case against PNGSDP is that this amounted to Mine Closure within the meaning of the Program Rules and obliged PNGSDP to activate what the plaintiffs call "the Mine Closure Plan".[49] By that term, the

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47 JMW's 1st Affidavit at para 30.

48 JMW's 1st Affidavit at p 764.

49 PASOC at para 112.

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plaintiffs refer to the combined effect of cll 9.4, 9.5, 10.3 and 10.4 of the Program Rules. I analyse the effect of these clauses at [79] below.

The plaintiffs commence this action

36 The plaintiffs commenced this action in July 2020 against OTML, PNGSDP, Sir Mekere, the State and the Security Trustee. For reasons which will become apparent (see [46] below), the impetus for this action was my judgment in the earlier Singapore litigation.

37 In order to analyse the plaintiffs' claims against PNGSDP and to explain why I have struck all of them out, it is first necessary to analyse briefly the plaintiffs' claims against OTML.

The plaintiffs' claim against OTML

38 Of the plaintiffs' multiple claims against OTML, the only one which is relevant for present purposes is the claim in deceit. That claim arises in the following way.

39 After BHP Group decided to exit its investment in OTML in 2000, OTML appointed teams of Community Relation Officers ("CROs") to communicate the exit plan to the members of the Affected Communities. The plaintiffs' case is that OTML, acting through the CRO teams, fraudulently made two misrepresentations in 2000 and 2001 to the members of the Affected Communities or their representatives about the nature of the exit plan.[50] The

[50] PASOC at para 32.

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plaintiffs call these representations collectively "the Share Offload Representations".

40 The plaintiffs plead that the Share Offload Representations were to the effect that, in consideration of the members of the Affected Communities discontinuing the 2000 Class Action and releasing OTML, BHP Minerals and BHP Group from liability:

(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 on the members of the Affected Communities of the environmental damage caused by the Mine.[51]

41 The plaintiffs' plead that the meaning and effect of the Share Offload Representations were that:[52]

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

(b) The Shares and 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.

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51 PASOC at para 32.

52 PASOC at para 32A.

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

42 The plaintiffs then plead that OTML is liable to the members of the Affected Communities in the tort of deceit[53] on the following four grounds, with each ground tracking the elements of the tort.

43 First, the plaintiffs plead that the Share Offload Representations are false in that:

(a) OTML did not have any honest belief or any present intention to carry out the Share Offload Representations at the time it made the representations;[54] and

(b) the exit plan as eventually implemented falsified the Share Offload Representations in three ways:

(i) BHP Minerals transferred the Shares to PNGSDP outright and therefore the Shares were *not* held on trust for the members of the Affected Communities.[55]

(ii) by reason of the Shared Benefits Arrangement, 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.[56]

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53 PASOC at para 42.

54 PASOC at para 45(a).

55 PASOC at para 45(g).

56 PASOC at para 45(f).

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(iii) the Shares were subject to the Security Arrangements and were therefore *not* unencumbered.[57]

44 Second, the plaintiffs plead that OTML made the Share Offload Representations fraudulently, either knowing that the two representations were false or recklessly, not caring whether they were true or false.[58]

45 Third, the plaintiffs plead that, in reliance on the truth of the Share Offload Representations, the members of the Affected Communities or their representatives executed:[59]

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

(b) contracts with OTML known as Community Mine Continuation Agreements ("CMCAs") providing for, among other things, the Mine to continue operations and for the members of the Affected Communities to discontinue the 2000 Class Action and release OTML, BHP Minerals and BHP Group from all claims arising from the operation of the Mine.[60]

It is common ground[61] that in or around 2012, through CMCA extension agreements ("CMCEAs"), the members of the Affected Communities have agreed to extend the life of the Mine to 2025.

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57 PASOC at para 45(c).

58 PASOC at para 47.

59 PASOC at paras 33 and 48, p 110.

60 PASOC at para 33.

61 JMW's 1st Affidavit at para 105; Second defendant's written submissions of 7 January 2021 ("2DS") at para 78; Plaintiffs' written submissions of 7 January 2021 ("PS") at para 109.

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46 Fourth, the plaintiffs plead that the members of the Affected Communities discovered that the Share Offload Representations were false only in April 2019, when I delivered my judgment in *State v PNGSDP (HC)*. From that judgment, the members of the Affected Communities learned for the first time that the Shares and Distributions were not subject to any trust and were not unencumbered.[62]

PNGSDP's striking out application

47 The plaintiffs' case against PNGSDP comprises four claims: (a) breach of fiduciary duty; (b) remedial constructive trust; (c) conspiracy by lawful and unlawful means; and (d) unjust enrichment.

48 PNGSDP submits that the plaintiffs' claims ought to be struck out on both procedural grounds and substantive grounds. The procedural grounds are as follows: (a) none of the plaintiffs have the standing to bring these claims; (b) the plaintiffs' claims are barred by Papua New Guinea legislation and by contractual provisions in the CMCAs and CMCEAs;[63] and (c) the plaintiffs' claims are time-barred under the Limitation Act (Cap 163, 1996 Rev Ed).[64] In order to focus on the substance of the plaintiffs' claims against PNGSDP, I shall assume all of these procedural grounds in the plaintiffs' favour without coming to any decision on them.

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62 PASOC at paras 45(h) to 45(i).

63 2DS at paras 77–84.

64 2DS at paras 85–88.

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The proposed amended statement of claim

49 In the course of argument on PNGSDP's substantive grounds for striking out the plaintiffs' claim, I pointed out to plaintiffs' counsel a number of shortcomings in the plaintiffs' statement of claim.[65] As a result, before concluding his oral submissions, plaintiffs' counsel tendered a proposed amended statement of claim ("PASOC").[66] He did so on the basis that the PASOC set out the plaintiffs' best and final pleading on each of their four claims against PNGSDP.[67]

50 It is a well-established principle that a defective pleading ought in general not to be struck out if its defects can be cured by amendment. I therefore allowed the plaintiffs to resist PNGSDP's striking out application by relying on the PASOC, rather than their statement of claim as filed and served. I have accordingly approached PNGSDP's striking out application on the basis that the plaintiffs cannot improve upon the manner in which they have pleaded their four claims against PNGSDP in the PASOC, either by further amendment or by supplying further particulars of the very serious allegations the plaintiffs make in it.

51 In the extracts from the PASOC which I quote in this judgment, I have omitted all underlining found in the original which signifies a proposed amendment to the plaintiff's statement of claim as filed and served.

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65 Transcript, 21 January 2021, p 107:8–108:25.

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

67 Transcript, 21 January 2021, p 112:14–113:8.

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52 Having considered the parties' submissions in light of the PASOC, I have allowed PNGSDP's application in full and struck out all four of the plaintiffs' claims against PNGSDP. I now summarise the law on striking out before explaining why I have struck out each of the four claims.

Law on striking out

53 A pleading may be struck under O 18 r 19(1)(*a*) 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. 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* [2012] 1 SLR 457 at [110].

54 A pleading may be struck out under O 18 r 19(1)(*b*) if it is scandalous, frivolous or vexatious. There is no suggestion that the PASOC is 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 plainly or obviously unsustainable if it is either (*The "Bunga Melati 5"* [2012] 4 SLR 546 ("*Bunga Melati 5*") 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
>
> (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

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beyond question that the statement of facts is contradicted by all the documents or other material on which it is based".

55 I now apply these principles to each of the plaintiffs' four claims against PNGSDP to explain why I have struck it out.

Fiduciary duty claim

The plaintiffs' pleaded claim against PNGSDP

56 The plaintiffs' pleaded basis for their claim that PNGSDP owed a fiduciary duty to the members of the Affected Communities is that PNGSDP: (a) "voluntarily undertook to act in the interest of the members of the Affected Communities in circumstances giving rise to a relationship of trust and confidence";[68] and (b) PNGSDP had the ability "to affect the interests of the members of the Affected Communities".[69] The plaintiffs accordingly plead that PNGSDP owes the following five fiduciary duties to the members of the Affected Communities:[70]

(a) a duty to "act *bona fide* in the interests of the members of the Affected Communities";

(b) a duty "to act for proper purposes, including but not limited to ensuring that [PNGSDP] complies with the Program Rules";

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68 PASOC at para 60.

69 PASOC at para 61.

70 PASOC at para 61.

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(c) a duty "not to advance or promote its own or external interest to the prejudice of or contrary to or in conflict with the interests of the members of the Affected Communities";

(d) a duty "to administer the Objects for the benefit of the members of the Affected Communities in a trustee-like manner"; and

(e) a duty "to disclose to the members of the Affected Communities and/or their representatives any breaches of duty owed to the members of the Affected Communities".

57 Central to this claim against PNGSDP is the second pleaded duty: that PNGSDP owes the members of the Affected Communities a fiduciary duty to comply with the Program Rules.[71] The plaintiffs' case is that this encompasses a duty to administer the Long Term Fund in compliance with the Program Rules in a way which benefits the members of the Affected Communities.[72] The plaintiffs disavow any suggestion that this is a duty to benefit *only* the members of the Affected Communities or to elevate benefiting the members of the Affected Communities over benefiting the people of the Western Province or the people of Papua New Guinea[73] (see [25] above). The plaintiffs accept that PNGSDP owes this duty concurrently to the members of the Affected Communities as well as to Papua New Guineans who are not members of the Affected Communities, whether their communities are in the Western Province or outside the Western Province.[74]

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71 Transcript, 21 January 2021, pp 22:3–5, 23:1–6.

72 Transcript, 29 January 2021, pp 46:20–25, 50:27–29.

73 Transcript, 29 January 2021, pp 46:28 to 47:31.

74 Transcript, 29 January 2021, pp 46:15–27, 54:14–25.

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58 The plaintiffs cannot and do not allege that the members of the Affected Communities and PNGSDP have a relationship of trustee and *cestui que trust*.[75] It is not their case, therefore, that the members of the Affected Communities have any proprietary interest in any of PNGSDP's assets.[76] Equally, they do not allege that PNGSDP is within any of the other settled categories of fiduciaries. They also do not, by this action, intend to invite the court to develop fiduciary law by establishing a new category of fiduciaries.[77] Their claim is simply that, in the circumstances of this case, PNGSDP owes an *ad hoc* fiduciary duty to the members of the Affected Communities.[78] The question is therefore whether this claim is unsustainable in either sense set out at [54] above. That in turn requires setting out the circumstances in which an *ad hoc* fiduciary duty arises.

When an ad hoc *fiduciary duty arises*

59 In *Turf Club Auto Emporium Pte Ltd and others v Yeo Boong Hua and others and another appeal* [2018] 2 SLR 655 ("*Turf Club*"), the Court of Appeal explained that there is no universal definition of a "fiduciary" (at [42]):

> … There is no universal definition for the term ["fiduciary"], though we note that there appears to be growing judicial support for the view that a fiduciary is "someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence" …. It has also been said that "[f]iduciary duties are obligations imposed by law as a reaction to particular circumstances of responsibility assumed by one person in respect of the conduct of the affairs of another" …. The concept of a fiduciary has also been described as one that "encaptures a situation where one person is in a relationship with another which gives rise to a legitimate expectation, which equity will recognise, that the fiduciary will not utilise his or her position

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75 Transcript, 15 January 2021, p 114:1–15.

76 Transcript, 15 January 2021, p 126:20–25.

77 Transcript, 21 January 2021, p 7:7–18.

78 Transcript, 21 January 2021, p 7:13–21.

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> in such a way which is adverse to the interests of the principal" …

60 In the earlier case of *Tan Yok Koon v Tan Choo Suan and another and other appeals* [2017] 1 SLR 654 ("*Tan Yok Koon*"), the Court of Appeal set out three important principles of fiduciary law.

61 First, "the hallmark of a fiduciary obligation is that the fiduciary is to act in the interests of another person": *Tan Yok Koon* at [192]. The core liability that this entails is a single-minded duty of loyalty to that other person. As authority for this, the Court of Appeal cited the judgment of Millett LJ (as he then was) in the English Court of Appeal decision of *Bristol and West Building Society v Mothew* [1998] Ch 1:

> … A fiduciary is someone who has undertaken to act for or on behalf of another in a particular manner in circumstances which give rise to a relationship of trust and confidence. *The distinguishing obligation of a fiduciary is the obligation of loyalty. The principal is entitled to the single-minded loyalty of his fiduciary.* This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and his interest may conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligations. They are the defining characteristics of the fiduciary. …
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> [emphasis in *Tan Yok Koon* omitted; emphasis added in italics]

62 Second, the term "fiduciary" is not a premise but is instead a label applied to a person once the court concludes that that person owes an obligation of a fiduciary character to another: *Tan Yok Koon* at [193]. To put it another way, a person "is not subject to fiduciary obligations because he is a fiduciary; instead, it is because he is subject to such obligations and rules that he is a fiduciary": *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

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the circumstances of the case and not purely on the category into which his broader relationship with that person falls (*Turf Club* at [43]):

> While there are settled categories of fiduciary relationships – such as the relationship of a trustee-beneficiary, director-company, solicitor-client, between partners – it does not mean that all such relationships are invariably fiduciary relationships. In these relationships, there is a strong, but rebuttable, presumption that fiduciary duties are owed. Equally, the categories of fiduciary relationships are not closed or limited only to the settled categories. Fiduciary duties may be owed even if the relationship between the parties is not one of the settled categories, provided that the circumstances justify the imposition of such duties … whether the parties are in a fiduciary relationship depends, *ultimately, on the nature of their relationship and is not simply a question of whether their relationship can be shoe-horned into one of the settled categories (eg, a partnership) or into a non-settled category (eg, a joint venture or quasi-partnership).*
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> [emphasis added]

63 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].

64 In *Susilawati v American Express Bank Ltd* [2009] 2 SLR(R) 737 at [41], the Court of Appeal suggested *obiter* that Wilson J (dissenting) in the decision of the Supreme Court of Canada in *Frame v Smith* [1987] SCR 99 ("*Frame*") had set out a helpful description of the three circumstances which will give rise to a fiduciary duty owed by one person (F) to another person (B): (a) F is entitled to exercise some discretion or power; (b) F is able unilaterally to exercise that

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discretion or power so as to affect B's legal or practical interests; and (c) B is peculiarly vulnerable to or at the mercy of F.

65 In support of this aspect of its striking out application, PNGSDP cites the later decision of the Supreme Court of Canada 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*"). In *Alberta*, the Supreme Court of Canada held that Wilson J's analysis in *Frame* is not a complete code for identifying when a fiduciary duty arises (at [29]). In particular, the court cited its own intervening authority which had established that vulnerability in the broad sense – *ie*, vulnerability resulting from factors external to the relationship between F and B – is not the most relevant consideration in ascertaining whether F owes B a fiduciary duty (at [28]). The most relevant consideration is whether any vulnerability arises from the relationship between F and B itself.

66 The Supreme Court of Canada therefore reformulated the elements from *Frame* and held (at [30]–[36]) that F owes a fiduciary duty to B if (the *"Alberta framework"*):

> (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]).

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

67 The Supreme Court of Canada concluded this part of its analysis in *Alberta* with the following summary of when an *ad hoc* fiduciary duty arises (at [36]):

> In summary, for an *ad hoc* fiduciary duty to arise, the claimant must show, in addition to the vulnerability arising from the relationship as described by Wilson J. in *Frame*: (1) an undertaking by the alleged fiduciary to act in the best interests of the alleged beneficiary or beneficiaries; (2) a defined person or class of persons vulnerable to a fiduciary's control (the beneficiary or beneficiaries); and (3) a legal or substantial practical interest of the beneficiary or beneficiaries that stands to be adversely affected by the alleged fiduciary's exercise of discretion or control.

68 I consider the framework set out in *Alberta* to be consistent with the principles set out in the Court of Appeal authority which I have cited at [59]–[64] above. I therefore adopt and apply the *Alberta* framework to analyse whether the plaintiffs' claim that PNGSDP owes the members of the Affected Communities an *ad hoc* fiduciary duty is sustainable. In my view, the plea is plainly and obviously unsustainable because the first and third elements in the *Alberta* framework (see [66(a)] and [66(c)] above) are absent.

69 I address these two elements in turn.

No undertaking to members of the Affected Communities

70 The first element of the *Alberta* framework requires PNGSDP to have given an undertaking of responsibility to act in the best interests of the members of the Affected Communities. To establish this element, the plaintiffs rely on the circumstances leading up to PNGSDP's incorporation (set out at [15] to [33] above), the circumstances in which OTML made the Share Offload

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Representations (set out at [38] to [46] above) and the content of PNGSDP's Objects (see [22] above).

71 The plaintiffs thus plead their case on the first element in the *Alberta* framework as follows:[79]

> 57. The fundamental purpose of [PNGSDP] was to hold the Shares, and administer the income derived from the Shares for sustainable development purposes for the benefit of the people of Papua New Guinea, and in particular, the people in the Western Province (i.e. the members of the Affected Communities) in accordance with the Program Rules.
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> 58. The underlying intent behind the setting up of [PNGSDP] was that the substantial income from BHP Minerals' former shareholding in the Mine would be applied towards ameliorating the environmental damage caused by the Mine to the members of the Affected Communities. This was to be done through [PNGSDP].
>
> 59. Having regard to all the circumstances giving rise to the incorporation of [PNGSDP], and the objects of [PNGSDP], [PNGSDP] undertook to carry out the Objects to ameliorate the environmental damage caused to the members of the Affected Communities by the Mine.
>
> 60. The Program Company voluntarily undertook to act in the interest of the members of the Affected Communities in circumstances giving rise to a relationship of trust and confidence.

72 The plaintiffs plead, further, that the content of PNGSDP's undertaking to act in the interest of the members of the Affected Communities was to hold the Shares and to apply Distributions towards the Objects for the sole purpose of ameliorating the environmental damage caused by the Mine.[80] The plaintiffs' case is that PNGSDP gave this undertaking to the members of the Affected Communities when it entered into the Master Agreement.[81] because that is the

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79 PASOC at paras 57 to 60.

80 PASOC at para 60(d).

81 PASOC at para 60(e).

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moment when PNGSDP accepted the Shares and the right to Distributions – assets to which it would not otherwise be entitled – and undertook to comply with the Program Rules in carrying out the Objects.[82]

73 The plaintiffs' case on the first element is plainly and obviously unsustainable. PNGSDP gave no undertaking whatsoever – voluntary or otherwise, express or implied, in respect of the Shares and Distributions or otherwise – to the members of the Affected Communities at any time, whether when it entered into the Master Agreement or otherwise. The only undertakings which PNGSDP gave in respect of the Shares and Distributions to anyone at any time are those which are 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. These undertakings include, but are obviously not limited to, the undertaking that PNGSDP gave for the benefit of BHP Minerals, BHP Group, the State and OTML in cl 3.2 of the Master Agreement (see [28] above) to comply with the Program Rules.[83]

74 The plaintiffs do not even suggest that PNGSDP gave a contractual undertaking to members of the Affected Communities to hold the Shares and to apply Distributions towards the Objects for the sole purpose of ameliorating the environmental damage caused by the Mine. This is for obvious reasons. The members of the Affected Communities have no contractual rights against PNGSDP under the Master Agreement or under any other contract, written or otherwise. None of them – whether then or now – are a party to any of the suite of written contracts PNGSDP entered into. As for the Master Agreement itself, it states the obvious (at least at common law) when it provides in cl 8.7 that it

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82 Transcript, 29 January 2021, p 44:5–9.

83 JMW's 1st Affidavit at p 470.

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"confers rights only upon a person expressed to be a party, and not upon any other person".[84]

75 Further, it is plainly and obviously unsustainable to suggest that PNGSDP gave a non-contractual undertaking to members of the Affected Communities to hold the Shares and to apply Distributions towards the Objects for the sole purpose of ameliorating the environmental damage caused by the Mine. Any such undertaking would be wholly inconsistent with both the express contractual obligations which PNGSDP undertook and the express discretionary powers which PNGSDP acquired under the suite of written contracts it entered into.

76 I examine these obligations and these discretionary powers in turn.

PNGSDP's express contractual obligations

(1) The Program Rules

77 By cll 9 and 10 of the Program Rules, PNGSDP undertook a cascading and comprehensive set of express contractual obligations as to how it was to apply Distributions, the Long Term Fund and investment income earned on the Long Term Fund both before and after Mine Closure. It undertook these obligations through the Articles to the members of PNGSDP for the time being and also through cl 3.2 of the Master Agreement (see [28] above)[85] for the benefit of BHP Minerals, BHP Group, the State and OTML.

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84 JMW's 1st Affidavit at p 484.

85 JMW's 1st Affidavit at p 475.

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78 Before Mine Closure, PNGSDP undertook the following express contractual obligations under cll 9 and 10 of the Program Rules:

(a) To establish the Long Term Fund and to invest it and account for it as a separate fund, segregated from its general assets.[86]

(b) To apply Distributions for the following high priority purposes and in the following order:

(i) first, to pay its own operating expenses for the next six months as approved by the Board;

(ii) second, to meet certain of its contractual obligations including any liability to indemnify BHP under BHP's Indemnity and the State under the State's Indemnity;[87] and

(iii) third, to meet any call for capital by OTML, but only if certain conditions were met and if so determined by the Board.[88]

(c) To pay into the Long Term Fund roughly two thirds of the Distributions which remained after discharging the high priority purposes;[89]

(d) To apply the remaining roughly one third of Distributions which remained for the Objects at the discretion of the Board as follows:

(i) one third for the benefit of the people of the Western Province; and

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86 JMW's 1st Affidavit at pp 453 at cl 10.1 and 463 at cl 21.1.

87 JMW's 1st Affidavit at p 462.

88 JMW's 1st Affidavit at pp 451 at cl 9.2 and 463 at cl 21.1.

89 JMW's 1st Affidavit at pp 451 to 452 at cl 9.2(d) read with cl 9.1(a).

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(ii) two thirds for the benefit of the people of Papua New Guinea.[90]

(e) To capitalise as part of the Long Term Fund and reinvest all investment income earned on the Long Term Fund, subject only to deductions necessary to make up any shortfall in meeting the high priority purposes out of Distributions;

(f) Not to draw on the capital of the Long Term Fund for any purpose other than to make up any shortfall in meeting (subject to certain immaterial exceptions) the first two high priority purposes out of Distributions and investment income.[91]

79 After Mine Closure, PNGSDP undertook the following express contractual obligations under cll 9 and 10 of the Program Rules:

(a) To apply Distributions only to meet the high priority purposes (see [78(b)] above) and to pay the entire balance Distributions into the Long Term Fund;[92]

(b) To apply Distributions and the investment income earned on the Long Term Fund to meet the first two high priority purposes;[93]

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90 JMW's 1st Affidavit at pp 451 to 452 at cl 9.1(b) read with cl 9.2(e).

91 JMW's 1st Affidavit at pp 453 at cl 10.2.

92 JMW's 1st Affidavit at pp 452 at cl 9.4.

93 JMW's 1st Affidavit at pp 452 at cl 9.5.

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(c) To apply all of the remaining investment income (subject to certain immaterial exceptions) and 2.5% of the Long Term Fund's capital in the following ways in the following order of priority:[94]

(i) first, to make up any shortfall in meeting the first two high priority purposes out of the investment income;

(ii) second, to meet the third high priority purpose; and

(iii) only then, to carry out "Sustainable Development Purposes".

The Program Rules define "Sustainable Development Purposes" as "projects and other applications which, in the discretion of the Company (acting in accordance with the Objects), are for long term social, economic and/or environmental benefits of the people of Papua New Guinea".[95]

80 As PNGSDP submits,[96] this entire contractual framework of cascading obligations excludes any possibility of PNGSDP owing a single-minded duty of loyalty to the members of the Affected Communities in respect of the Shares, Distributions or the Long Term Fund.

(2) The Security Arrangements

81 The Security Arrangements also make it plainly and obviously unsustainable that PNGSDP gave any undertaking of responsibility to act in the best interests of the members of the Affected Communities. As PNGSDP

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94 JMW's 1st Affidavit at pp 453 at cll 10.3 and 10.4

95 JMW's 1st Affidavit at pp 464 at cl 21.1

96 Transcript, 15 January 2021, p 30:6–9.

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submits,[97] the Long Term Fund forms the bulk of PNGSDP's assets. It therefore forms the bulk of the assets charged in favour of the Security Trustee under the Security Arrangements.[98] The effect of the Security Arrangements is to subordinate the interests of the members of the Affected Communities even further in the application of Distributions and the Long Term Fund than provided in cll 9 and 10 of the Program Rules.

PNGSDP's express contractual discretionary powers

82 The express contractual discretionary powers which PNGSDP acquired under the suite of written contracts it entered into also make unsustainable the plaintiffs' case that PNGSDP gave any such undertaking of responsibility.

83 The Program Rules give PNGSDP the unqualified contractual discretion to undertake sustainable development projects for the exclusive benefit of persons *other than* members of the Affected Communities. The Program Rules make no reference whatsoever to PNGSDP applying any funds, whether before or after Mine Closure, to advance the best interests of the members of the Affected Communities as such, let alone for the purpose of ameliorating the environmental damage caused by the Mine. Before Mine Closure, cll 9 and 10 of the Program Rules treat the members of the Affected Communities no differently from Papua New Guineans in the Western Province outside the Affected Communities, and who are therefore unaffected by the Mine's environmental damage (see [78(d)(i)] above). After Mine Closure, the Program Rules treat the members of the Affected Communities no differently from Papua New Guineans in general (see [79(c)(iii)] above). Both before and after Mine Closure, therefore, PNGSDP's Board has an unqualified contractual discretion

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97 Transcript, 15 January 2021, p 27:2–10; Transcript, 25 January 2021, p 81:3–9.

98 JMW's 1st Affidavit at pp 538, 546 (Security Deed cll 1.1 and 3.1).

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to confer no benefits at all on members of the Affected Communities. As PNGSDP submits,[99] this discretion excludes any possibility of PNGSDP owing a single-minded duty of loyalty to the members of the Affected Communities in respect of the Shares, Distributions or the Long Term Fund.

84 This discretion also excludes any undertaking to act in the best interests of the members of the Affected Communities only at the last tier, after PNGSDP discharges its contractual obligations in respect of the high priority purposes under cll 9 and 10 of the Program Rules and when it considers applying funds for the benefit of the people of the Western Province or of Papua New Guinea. I accept PNGSDP's submission[100] that it cannot have given an undertaking of responsibility to act in the best interest of the members of the Affected Communities so as to owe them a duty of single-minded loyalty when it has an express and unqualified contractual discretion under cll 9 and 10 of the Program Rules to apply funds so as to confer no benefit at all on members of the Affected Communities. PNGSDP cannot have given an undertaking of responsibility to the members of the Affected Communities which would be breached by an act which is within PNGSDP's express contractual discretion under the Program Rules.

85 PNGSDP's power to amend the Program Rules is a contractual power which contradicts an undertaking of responsibility to act in the best interests of the members of the Affected Communities. Although Art 8 of the Memorandum is framed negatively,[101] its contractual effect is to give PNGSDP the power to

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99 Transcript, 15 January 2021, p 30:6–9.

100 Transcript, 15 January 2021, pp 38:27–39:21.

101 JMW's 1st Affidavit at p 431.

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amend the Program Rules with the consent of BHP Group and the State.[102] Thus, cl 3.2 of the Master Agreement specifically contemplates amendment of the Program Rules: it provides that PNGSDP's obligation to comply with the Program Rules under that clause is an obligation to comply with the Program Rules "as those Rules may be amended from time to time".[103] Indeed, the Program Rules have been amended in accordance with Art 8 of the Memorandum twice: in April 2003[104] and April 2004.[105]

86 PNGSDP has no obligation to seek the consent of the members of the Affected Communities before exercising its power to amend the Program Rules. PNGSDP therefore has the contractual power to exclude all projects for the benefit of the members of the Affected Communities from the scope of the Program Rules. No doubt this exercise of the power is purely theoretical: neither BHP Group nor the State is likely to consent to any such amendment. But what is important is the existence of the power and the potential for it to be exercised without the consent of the members of the Affected Communities and contrary to their interests. The mere existence of this power destroys any basis for an undertaking of responsibility to act in the best interests of the members of the Affected Communities.

No legal or substantial practical interest

87 The third element of the *Alberta* framework requires the plaintiffs to establish that PNGSDP has a power which may be exercised so as to affect the legal interests or the substantial practical interests of the members of the

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102 JMW's 1st Affidavit at p 431.

103 JMW's 1st Affidavit at p 475.

104 JMW's 1st Affidavit at p 465 to 466.

105 JMW's 1st Affidavit at p 467 to 468.

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Affected Communities. The Supreme Court of Canada in *Alberta* explained 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.

88 The plaintiffs cannot establish this element as they have neither a legal interest nor a substantial practical interest at stake.

No legal interest

89 The plaintiffs submit that members of the Affected Communities had a legal interest for the purposes of this element as follows.[106] Members of the Affected Communities had the legal right to sue OTML and others for the environmental damage which the Mine had caused to the Affected Communities. PNGSDP was created to receive and hold the Shares and to administer Distributions as part of a transaction in which the members of the Affected Communities agreed to discontinue the 2000 Class Action and to give up those legal rights.

90 I do not accept this submission. There is no way in which PNGSDP could ever adversely affect the legal right of the members of the Affected Communities to sue OTML or others. PNGSDP came into existence after the members of the Affected Communities had given up that entitlement. PNGSDP is able to do no more than hold the Shares and administer Distributions and the Long Term Fund.

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106 Transcript, 29 January 2021, p 44:26–32.

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No substantial practical interest

91 In the alternative, the plaintiffs submit that members of the Affected Communities have a substantial practical interest that may be adversely affected by PNGSDP's exercise of power over the Long Term Fund as follows.[107] PNGSDP alone has the financial resources to alleviate or ameliorate the environmental damage caused by the Mine's past and ongoing activities and the harm to the health and well-being of the members of the Affected Communities.

92 The plaintiffs appear to be alleging that PNGSDP can affect the practical interests of the members of the Affected Communities by distributing or withholding funds for sustainable development projects that are for their benefit.[108] If this is the plaintiffs' case, I accept PNGSDP's submission that withholding a benefit does not amount to affecting a substantial practical interest for the purposes of the *Alberta* framework.[109] At common law, a person has no obligation to confer a benefit on another unless the benefit is bargained for as part of a contract or arises under an institutional trust. It is no part of the plaintiffs' case that the members of the Affected Communities either bargained for these benefits or that PNGSDP is a trustee for them under an institutional trust.

93 Indeed, the plaintiffs accept that withholding a benefit, without more, cannot amount to affecting a practical interest for the purposes of the *Alberta* framework.[110] But they argue that PNGSDP is not merely withholding a benefit. They assert instead that PNGSDP is failing to perform its duty under the

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107 Transcript, 29 January 2021, p 44:21–25.

108 Transcript, 21 January 2021, p 20:2–12.

109 Transcript, 25 January 2021, p 76:6–13.

110 Transcript, 29 January 2021, p 42:16–20.

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Program Rules to administer, for the benefit of the members of the Affected Communities, assets that it received solely for the purpose of benefiting persons affected by the environmental damage caused by the Mine.[111] But unless that submission presupposes the fiduciary duty it seeks to prove, PNGSDP's duties under the Program Rules are contractual duties owed only to PNGSDP's members for the time being and the four entities for whose benefit it gave its express contractual undertaking in cl 3.2 of the Master Agreement to comply with the Program Rules (see [28] above). And the fact that PNGSDP owes these contractual duties to third parties cannot transform the mere withholding of a benefit into an effect on a substantial practical interest for the purposes of the *Alberta* framework.

Conclusion on the third element

94 As PNGSDP submits, a failure to confer a gratuitous benefit on a person cannot affect a legal or a substantial practical interest of that person for the purposes of the *Alberta* framework.[112] In *Alberta*, the court explained that a legal or a substantial practical interest must be connected to a specific and pre-existing interest recognised in private law (at [51]–[52]):

> … It is not enough that the alleged fiduciary's acts impact generally on a person's well-being, property or security. The interest affected must be a specific *private law* interest to which the person has a pre-existing distinct and complete legal entitlement. Examples of sufficient interests include property rights, interests akin to property rights, and the type of fundamental human or personal interest that is implicated when the state assumes guardianship of a child or incompetent person. …

111 Transcript, 29 January 2021, pp 42:21–43:3.

112 Transcript, 25 January 2021, p 76:25–28.

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> Access to a benefit scheme without more will not constitute an interest capable of attracting a fiduciary duty. …
>
> [emphasis in original in italics]

95 Like the government in *Alberta*, PNGSDP has an unqualified contractual discretion in applying the Long Term Fund for the benefit of Papua New Guineans in the Western Province and elsewhere in Papua New Guinea, subject only to its contractual obligation to comply with the Program Rules.[113] The members of the Affected Communities do not have any property right or other private law interest which is adversely affected by PNGSDP's exercise of its powers under the Program Rules. They also have no substantial practical interest at stake. The plaintiffs have failed to establish the third element in the *Alberta* framework.

Alberta cannot be distinguished

96 In an effort to argue that PNGSDP became subject to an *ad hoc* fiduciary duty to the members of the Affected Communities when it entered into the Master Agreement, the plaintiffs attempt to distinguish *Alberta*. It is therefore now necessary to consider the facts of *Alberta*.

97 The dispute in *Alberta* arose out of the government of Alberta's decision to increase the charges payable by residents of long-term care facilities. The government was entitled in law to ask residents to bear the costs of their own accommodation and meals. However, the government was entirely responsible for the cost of residents' medical care. Some 12,500 residents of Alberta's long-term care facilities as a class sued the government, claiming that the government had breached a fiduciary duty by raising the residents' charges beyond the actual cost of accommodation and meals in order to cross-subsidise part of the cost of

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113 Transcript, 25 January 2021, p 76:15–16.

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their medical care. The plaintiffs' claim was struck out on the grounds that the government owed the plaintiffs no fiduciary duty.

98 The plaintiffs seek to distinguish *Alberta* on the grounds that in that case, one class of persons contended that they should receive more benefits from the government than another class of persons. Here, the plaintiffs argue that there are no competing classes: the members of the Affected Communities have a unity of interests with Papua New Guineans in the Western Province and Papua New Guineans elsewhere in Papua New Guinea. The interest of all three classes is simply that PNGSDP should comply with the Program Rules.[114]

99 In my view, *Alberta* stands for a broader proposition than that advanced by the plaintiffs. That proposition is that an *ad hoc* fiduciary duty will rarely be owed to a group of persons who can be sub-divided into classes with competing interests where each sub-class has equally valid claims to the alleged fiduciary's assistance (*Alberta* at [44]). *A fortiori*, an *ad hoc* fiduciary duty will rarely be owed exclusively to any one sub-class of the group. As the Supreme Court of Canada explained in *Alberta* (at [43]–[44]):

> The duty is one of utmost loyalty to the beneficiary. As Finn states, the fiduciary principle's function "is not to mediate between interests. It is to secure the paramountcy of one side's interests . . . The beneficiary's interests are to be protected. This is achieved through a regime designed to secure loyal service of those interests" …
>
> Compelling a fiduciary to put the best interests of the beneficiary before their own is thus essential to the relationship. Imposing such a burden on the Crown is inherently at odds with its duty to act in the best interests of society as a whole, and its obligation to spread limited resources among competing groups with equally valid claims to its assistance …
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> [emphasis in original in underline]

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114 Transcript, 29 January 2021, pp 46:15–27, 54:14–25.

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100 In *Alberta*, the government had an obligation to spread limited resources among competing groups of citizens with equally valid claims to the government's assistance. Thus, the Supreme Court of Canada was satisfied that the government did not have to act with undivided loyalty to the plaintiffs, who, being residents of long-term care facilities, were a sub-class of the class of citizens.

101 It is true that the Supreme Court of Canada formulated this proposition in the context of a fiduciary duty alleged to be owed by a government to its citizens. But I consider it equally applicable to PNGSDP. PNGSDP has undertaken contractual obligations which *oblige* it in certain situations to prioritise certain interests over and above the best interests of the members of the Affected Communities. Thus, PNGSDP is contractually obliged to accord the highest priority under the Program Rules to its own expenses and then to the interests of very wide class of persons whom it agreed to indemnify under BHP's Indemnity and the State's Indemnity. Further, PNGSDP has an unqualified contractual discretion to decide how to spread its limited resources among competing groups of Papua New Guineans. PNGSDP even has the contractual power to exclude entirely the members of the Affected Communities from its bounty. I therefore consider *Alberta* a highly persuasive authority that PNGSDP cannot owe an *ad hoc* fiduciary duty to the members of the Affected Communities, even though *Alberta* was decided as between a government and its citizens.

Conclusion on fiduciary duties claim

102 The fundamental flaw in the plaintiffs' claim is that superimposing an *ad hoc* fiduciary duty upon PNGSDP's obligations, discretions and powers under the carefully constructed suite of contracts which PNGSDP entered into

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undermines the entire framework of the law of obligations. The plaintiffs' case is that PNGSDP owes an *ad hoc* fiduciary duty to the members of the Affected Communities which arises from but prevails over PNGSDP's contractual obligations, discretions and powers. That would elevate the members of the Affected Communities above the counterparties to PNGSDP's suite of contracts, even though: (a) if PNGSDP were to disregard the interests of the members of the Affected Communities, at most it would simply fail to confer a gratuitous benefit upon them; (b) none of the members of the Affected Communities provided any consideration to PNGSDP; (c) none of the members of the Affected Communities are privy to any one of the suite of contracts PNGSDP entered into; (d) the members of the Affected Communities are not identified as a distinct class for the purposes of any one of these suite of contracts; (e) ameliorating the environmental damage caused by the Mine is not identified specifically as any part of the purpose for which PNGSDP was established; and (f) the provisions of the suite of contracts are inconsistent with the content of the *ad hoc* fiduciary duty alleged.

103 Further, it cannot be said that the provisions in the suite of contracts merely shape the content of PNGSDP's *ad hoc* fiduciary duty to the members of the Affected Communities. Those provisions directly contradict the existence of any such fiduciary duty.

104 All of my findings on the plaintiffs' claim for breach of fiduciary duty in this action are entirely consistent with my findings in *State v PNGSDP (HC)*. There, I found that PNGSDP did not hold the Shares, Distributions or the Long Term Fund on any sort of a trust (*State v PNGSDP (HC)* at [301] to [341]). I reached that finding for a number of reasons including the effect of cll 9 and 10 of the Program Rules and the Security Arrangements. The Court of Appeal dismissed the State's appeal and expressly upheld my finding that no trust exists

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(*State v PNGSDP (CA)* at [52]). Although that litigation quite obviously involved a different issue between different parties (as I acknowledge at [14] above), all of the reasons that justified my finding that there was no trust for the purposes of that litigation make it plainly and obviously unsustainable that PNGSDP owes any *ad hoc* fiduciary duty to the members of the Affected Communities.

105 For all of these reasons, I hold that the plaintiffs' case that PNGSDP owes an *ad hoc* fiduciary duty to the members of the Affected Communities is plainly and obviously unsustainable. It is therefore struck out. Given this holding, the plaintiffs' claim that PNGSDP has breached its fiduciary duty must also be struck out.

Remedial constructive trust claim

106 In *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve (sole executrix of the estate of Ng Hock Seng, deceased) and another* [2013] 3 SLR 801 ("*Anna Wee*"), the Court of Appeal discussed the remedial constructive trust ("RCT") *obiter* (at [169]–[185]). I assume in the plaintiffs' favour, without deciding, that Singapore law recognises the RCT.

107 The plaintiffs seek an RCT over the Long Term Fund.[115] Thus they pray in the PASOC for a declaration that PNGSDP holds all its assets derived from the Shares – which include Distributions and the Long Term Fund – on constructive trust for the members of the Affected Communities.[116] They also seek orders that PNGSDP render an account of the Long Term Fund and that

115 Plaintiffs' Supplemental Aide Memoire at para 14.

116 PASOC at para 50(e).

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the Foundation take over from PNGSDP the administration of the Long Term Fund for the benefit of the members of the Affected Communities.[117]

108 The plaintiffs submit that the RCT is both a right and a remedy:[118] it is a trust imposed where "the defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it" (*Koh Cheong Heng v Ho Yee Fong* [2011] 3 SLR 125 at [43], citing Lord Denning MR in *Hussey v Palmer* [1972] 3 All ER 744 at 747). The basis for imposing a remedial constructive trust is "a state of knowledge which renders it unconscionable for the recipient to keep the moneys": *Anna Wee* at [172].

109 I do not accept the plaintiffs' submission. I accept instead PNGSDP's submission that, even if Singapore law recognises the RCT, it is a remedy and not a right. Therefore, an RCT may be granted as a remedy only if a plaintiff is able to establish a right arising from a cause of action recognised in Singapore law.[119] In *Ching Mun Fong (executrix of the estate of Tan Geok Tee, deceased) v Liu Cho Chit* [2001] 1 SLR(R) 856 ("*Ching Mun Fong*") at [36], the Court of Appeal characterised an RCT as a "restitutionary *remedy* which the court, in appropriate circumstances, gives by way of equitable relief" [emphasis added]. In *Anna Wee*, the Court of Appeal also stated that the appellant's argument for the imposition of an RCT as a remedy was "parasitic" on the success of her unjust enrichment claim (at [169]). To be clear, the Court of Appeal did not in that case hold that an RCT was available as a remedy for unjust enrichment. On the contrary, the Court of Appeal said it would be hesitant to recognise the RCT as a remedy for a claim in unjust enrichment because the availability of the RCT

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117 PASOC at para 131.

118 Transcript, 21 January 2021, p 48:20–30.

119 Transcript, 25 January 2021, p 85:30–31.

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depends on fault whereas liability in unjust enrichment is independent of fault (*Anna Wee* at [182]).

110 A plaintiff can secure an RCT over a defendant's property as a remedy only if it can first establish a right against the defendant arising from a cause of action known to law. In *National Bank of Oman SAOG Dubai Branch v Bikash Dhamala and others* [2021] 3 SLR 943, Tan Siong Thye J imposed an RCT over moneys and assets received by the defendants in that case. But the plaintiff in that case secured the RCT only as a remedy, after it had established that the defendants were part of an unlawful means conspiracy to induce the plaintiff fraudulently to disburse loans and thereafter to dissipate the moneys received from the plaintiff (at [55] and [66]).

111 Even as a remedy, an RCT will be imposed only if the conscience of the recipient of the property is affected while the recipient continues to retain the property (*Ching Mun Fong* at [36]; *Anna Wee* at [172] and [182]). The plaintiffs rely on the same factors to seek an RCT against PNGSDP as they do to claim that PNGSDP owes an *ad hoc* fiduciary duty to the members of the Affected Communities.[120] For the same reasons that I have found that PNGSDP could not possibly owe the members of the Affected Communities an *ad hoc* fiduciary duty, I find also that PNGSDP's conscience is not affected by the matters on which the plaintiffs rely so as to give rise to an RCT or to warrant extinguishing PNGSDP's property rights in the Long Term Fund in favour of the Foundation. This is an alternative ground on which I have struck out the plaintiffs' claim for an RCT, even if they were able to establish a recognised right sufficient to warrant in principle the award of an RCT as a remedy.

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120 Transcript, 21 January 2021, p 49:27–30.

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Conspiracy claims

112 The plaintiffs also advance against PNGSDP claims in lawful and unlawful means conspiracy. To establish a claim in unlawful means conspiracy, a plaintiff must prove the following (*EFT Holdings, Inc v Marinteknik Shipbuilders (S) Pte Ltd* [2014] 1 SLR 860 ("*EFT Holdings*") at [112]):

(a) that two or more persons engaged in a combination to do certain acts;

(b) that those persons intended to cause damage or injury to the plaintiff by those acts;

(c) that the acts were unlawful;

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

(e) that the plaintiff has suffered loss as a result of the conspiracy.

113 The elements of a lawful means conspiracy are the same as the elements of an unlawful means conspiracy save that element (c) requires the plaintiff to establish that the conspirators carried out lawful acts with the predominant purpose of causing injury or damage to the plaintiff, which purpose was in fact achieved (*Quah Kay Tee v Ong and Co Pte Ltd* [1996] 3 SLR(R) 637at [45]).

114 The plaintiffs plead against PNGSDP one lawful means conspiracy and four unlawful means conspiracies. They refer in the PASOC to the lawful means conspiracy as "Conspiracy A" and to the unlawful means conspiracies as "Conspiracy B" to "Conspiracy E". I deal with each in turn.

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Lawful means conspiracy

115 Conspiracy A is pleaded as a conspiracy between PNGSDP and Sir Mekere to stop the activation of the Mine Closure Plan after the State cancelled PNGSDP's shares in OTML in 2013 and PNGSDP stopped receiving Distributions. It is common ground that PNGSDP has not implemented the Mine Closure Plan, including the obligation to draw on the Long Term Fund for Sustainable Development Purposes as required by cl 10.4 of the Program Rules. The plaintiff's case is that this failure is a contravention of an implied term in the Program Rules to the following effect: if PNGSDP is deprived of Distributions while the Mine continues to operate, Mine Closure has occurred and PNGSDP must administer the Mine Closure Plan set out in the Program Rules.[121]

Factually unsustainable

116 Conspiracy A is factually unsustainable. The factual basis of the plea in the PASOC[122] that PNGSDP and Sir Mekere acted with the predominant intention to injure the members of the Affected Communities is bereft of particulars and of any evidential basis. It is completely fanciful.

117 The plaintiffs submit that evidence of the alleged conspirators' predominant intention to injure the members of the Affected Communities is the failure to activate the Mine Closure Plan and to draw on the Long Term Fund for Sustainable Development Purposes in breach of the implied term.[123] The plaintiffs' case is that it makes no commercial sense for PNGSDP to attempt

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121 PASOC at para 122.

122 PASOC at para 135F.

123 Transcript, 25 January 2021, pp 31:25–32:29.

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to continue to operate under the Program Rules as though Mine Closure has not taken place even though the flow of Distributions from OTML has permanently ceased.[124] In response, PNGSDP submits that there is no such implied term in the Program Rules because the rules expressly define Mine Closure.[125]

118 I accept PNGSDP's submission. The concept of "Mine Closure" is of fundamental importance to the Program Rules. The parties to the Program Rules therefore addressed their minds directly to defining the concept and did so expressly. Clause 21.1 of the Program Rules defines "Mine Closure" as the "*permanent* cessation of *all* mining and milling activities at or in association with" the Mine [emphasis added].

119 The Program Rules make distinct and express provision dictating how PNGSDP must apply Distributions, the Long Term Fund and the investment income before Mine Closure (see [78] above) and after Mine Closure (see [79] above). The combined effect of these provisions is to leave no gap which the parties did not contemplate and which an implied term is necessary to fill (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 at [94]–[95], [101]).

120 It is common ground that the Mine has not permanently ceased all mining and milling activities.[126] "Mine Closure" as defined in cl 21.1 did not occur in 2013 and has not occurred to date. It is plain and obvious that there is no implied term in the Program Rules to the effect pleaded by the plaintiffs. It is equally plain and obvious that PNGSDP was under no contractual obligation

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124 Transcript, 25 January 2021, p 34:4–21.

125 Transcript, 29 January 2021, pp 3:12–4:2.

126 Transcript, 15 January 2021, pp 35:31–36:1, 98:25–99:2.

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to implement the Mine Closure Plan in 2013 and is under no such obligation today. Therefore, the failure to activate the Mine Closure Plan is indistinguishable from PNGSDP complying with its contractual obligations under the Program Rules. The failure is incapable of evidencing a predominant intention to injure the members of the Affected Communities. The plaintiffs' case on Conspiracy A is plainly and obviously unsustainable.

121 For completeness, I should add that Conspiracy A is wrongly pleaded as a lawful means conspiracy. The plaintiffs' case is that PNGSDP's and Sir Mekere's conspiracy to breach a contract (*ie*, the alleged implied term) caused damage to the members of the Affected Communities. A breach of contract is an example of unlawful means for the purposes of the tort of conspiracy (*Nagase Singapore Pte Ltd v Ching Kai Huat and others* [2008] 1 SLR(R) 80 at [23]). I have rejected the existence of any implied term. Therefore, there cannot possibly be any breach of the Program Rules. Re-labelling Conspiracy A as an unlawful means conspiracy will not save it from being struck out.

Legally unsustainable

122 Conspiracy A is also legally unsustainable. I accept PNGSDP's submission that the principle in *Said v Butt* [1920] 3 KB 497 prevents Sir Mekere from being held liable as a conspirator with PNGSDP, at least while he was a director of PNGSDP.[127] If Sir Mekere is legally incapable of conspiring with PNGSDP to contravene the alleged implied term, Conspiracy A is unsustainable because PNGSDP would be the only remaining alleged conspirator.

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127 2DS at paras 70–71.

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123 The Court of Appeal explained the principle in *Said v Butt* in *PT Sandipala Arthaputra and others v STMicroelectronics Asia Pacific Pte Ltd and others* [2018] 1 SLR 818 ("*PT Sandipala Arthaputra*") at [65] in these terms: a director is ordinarily immune from liability in tort for authorising or procuring his company's breach of contract in his capacity as a director, unless he acted in breach of his personal duties to the company.

124 At the outset, I note that there is no contractual relationship between the members of the Affected Communities and PNGSDP. At first blush, it may appear that the *Said v Butt* principle is irrelevant. Nonetheless, it is the plaintiffs' case that PNGSDP and Sir Mekere conspired to breach an implied term in the Program Rules. The Program Rules constitute a contract to which PNGSDP's members for the time being are parties, and in respect of which PNGSDP gave a contractual undertaking to comply with for the benefit of BHP Minerals, BHP Group, the State and OTML. I am therefore satisfied that the principle in *Said v Butt* remains relevant and will now consider its applicability.

125 The plaintiffs plead that this case is within the exception to the principle in *Said v Butt* because Sir Mekere breached his fiduciary duty to PNGSDP.[128] In particular, they allege that Sir Mekere failed to act in PNGSDP's best interests because he caused PNGSDP to act with the predominant purpose of injuring the members of the Affected Communities. This allegation is bereft of all particulars and any evidential basis. It is the barest of bare allegations. I do not accept that this allegation brings this case within the exception to the principle in *Said v Butt*. To come within the exception, the Court of Appeal in *PT Sandipala Arthaputra* held that it is insufficient merely to allege that the director acted with the intent of injuring another (at [66]):

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128 PASOC at para 135H.

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> If the director acted in the best interests of the company and not in breach of any of his other duties owed to the company, *notwithstanding that he also possessed the intention to injure the third party or to induce a breach of contract* as against the third party (as the case may be), he would still be entitled to the protection of the *Said v Butt* principle.
>
> [emphasis added]

126 Even assuming that Sir Mekere acted with the predominant purpose of injuring the members of the Affected Communities,[129] or attempted to cause PNGSDP to injure them, this does not necessarily entail that he breached his fiduciary duty to act in PNGSDP's best interests. The suite of contracts which PNGSDP entered into expressly oblige and empower PNGSDP to act contrary to the interests of the members of the Affected Communities in dealing with the Shares, Distributions, and the Long Term Fund.

127 I also accept PNGSDP's reliance on *Chong Hon Kuan Ivan v Levy Maurice and others* [2004] 4 SLR(R) 801 ("*Ivan Chong*") for the proposition that it is insufficient for a plaintiff to make bare allegations in its statement of claim that a director-defendant acted outside the scope of his authority (at [45]).[130] Additionally, Woo Bih Li J (as he then was) went on to say that merely alleging that a defendant-director acted with a sole or predominant intention to injure a plaintiff does not itself bring the plea within the principle in *Said v Butt*. A predominant intention to injure the plaintiff is an element of every lawful means conspiracy. If a bare pleading of this element sufficed to deprive a defendant-director of the protection of the principle in *Said v Butt*, the principle would be emasculated (at [46]).

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129 PASOC at para 135F.

130 Transcript, 29 January 2021, p 9:23–27.

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128 I agree, with respect, with the reasoning of Woo J (as he then was) and apply it to the context of a claim for lawful means conspiracy. *PT Sandipala Arthaputra* confirms that a plaintiff has the onus of proving that a defendant-director's acts breached his duties to the company in order to bring the case within the exception to the principle in *Said v Butt* (at [65]). The plaintiffs cannot discharge this onus on the basis of their pleaded case. The claim in lawful means conspiracy is legally unsustainable.

Unlawful means conspiracies

129 The four pleaded unlawful means conspiracies may be summarised as follows:

(a) Conspiracy B: OTML, PNGSDP, Sir Mekere and the State conspired to cause OTML to make the Share Offload Representations fraudulently. The members of the Affected Communities were deceived by the Share Offload Representations into discontinuing the 2000 Class Action and abandoning their claims against OTML, BHP Group and/or BHP Minerals arising from the environmental damage caused by the Mine;[131]

(b) Conspiracy C: OTML, PNGSDP, Sir Mekere and the State conspired to cause OTML to breach the fiduciary duty which it owes to the members of the Affected Communities. OTML did in fact breach that fiduciary duty by effecting the Security Arrangements and the Shared Benefits Arrangement.[132]

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131 PASOC at para 136.

132 PASOC at para 136E.

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(c) Conspiracy D: OTML and PNGSDP conspired to have PNGSDP breach the fiduciary duty which it owes to the members of the Affected Communities. PNGSDP did in fact breach that fiduciary duty by making improper investments in the Daru Deep Water Project and Mine Life Extension.[133]

(d) Conspiracy E: PNGSDP and Sir Mekere conspired to have PNGSDP breach the fiduciary duty which it owes to the members of the Affected Communities from 2012 onwards.[134]

Conspiracies D and E

130 The unlawful act which is the basis for Conspiracies D and E is PNGSDP's breach of its fiduciary duty to members of the Affected Communities. I have found that PNGSDP does not owe any such duty. There is therefore no unlawful act to sustain Conspiracies D and E. Nor can the unlawful act for these conspiracies be PNGSDP's breach of the Program Rules. There is no contractual relationship between PNGSDP and the members of the Affected Communities. For these reasons, Conspiracies D and E are legally unsustainable and are struck out.

Conspiracies B and C

131 As for Conspiracies B and C, the element of "combination" in these two conspiracies is factually unsustainable. A combination requires an agreement between the conspirators and concerted action 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

133 PASOC at paras 136J–136L.

134 PASOC para 136O.

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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]). For both conspiracies, the PASOC is wholly bereft of any particulars of the alleged combination among PNGSDP and the other alleged conspirators

132 I consider Conspiracies B and C now in turn.

(1) Conspiracy B

133 The plaintiffs plead that PNGSDP became a party to Conspiracy B after it was incorporated on 20 October 2001.[135] The plaintiffs allege that PNGSDP agreed or shared a common object from the date of its incorporation to deceive the members of the Affected Communities *because* PNGSDP was aware that the Share Offload Representations were false.[136] But, this presupposes that PNGSDP knew that the Share Offload Representations had been made to the members of the Affected Communities in the first place. The plaintiffs' case for PNGSDP having that knowledge is that PNGSDP was controlled by representatives of both BHP Group and the State ("the Control Allegation").[137] In response, PNGSDP submits that the Control Allegation contradicts my findings in *State v PNGSDP (HC)* with the result that the plea of the requisite knowledge is without factual foundation.[138]

134 For reasons similar, but not identical, to those advanced by PNGSDP, I find that the Control Allegation is factually unsustainable. It is, of course, true

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135 PASOC at para 136(d).

136 PASOC at para 136(h)–136(i).

137 PASOC at para 136(e).

138 Transcript, 29 January 2021, p 12:2–20.

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that BHP Group as a member of PNGSDP had the power to appoint three "A" directors to PNGSDP's Board. It is also true that three independent Papua New Guinea institutions each had the power to appoint one "B" director to PNGSDP's Board.[139] But in *State v PNGSDP (CA)* at [47], the Court of Appeal found that BHP Group, OTML, PNGSDP, Sir Mekere and the State intended PNGSDP to be "independently managed and free from any undue external influence", even though measures were put in place to ensure adequate supervision of PNGSDP. The State and BHP Group also both ceased to be members of PNGSDP, thereby giving up any ability to enforce their right to appoint directors to PNGSDP's Board or indeed to enforce any of their other rights under PNGSDP's constitution (*State v PNGSDP (CA)* at [47]).

135 Further, in various communications, BHP Group disclaimed any control over PNGSDP. In a 2002 media release announcing BHP Group's nominees for PNGSDP's Board, BHP Group stated that its nominees would "act entirely independently of BHP Group under the Memorandum and Articles of Association of [PNGSDP] …".[140] Further, in a letter sent to the State in 2013, BHP Group reiterated that PNGSDP had been managed independently since its creation and that BHP Group had never sought to influence decision-making by PNGSDP's Board.[141]

136 This is where my reasoning differs from PNGSDP's submission on the Control Allegation. To be fair to the plaintiffs, the Control Allegation (*ie*, control in fact) is not necessarily contradicted by the Court of Appeal's finding in *State v PNGSDP (CA)*. That finding is merely that BHP Group and the State

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139 SJ's 2nd Affidavit at p 1378, Article 24 of PNGSDP's original constitution.

140 JMW's 1st Affidavit at para 95, p 1465.

141 JMW's 1st Affidavit at para 95, p 1466.

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intended PNGSDP to be independent, not that it was *in fact* independent. Nonetheless, the plaintiffs plead no particulars and provide no evidence even to begin to suggest that BHP Group and the State acted contrary to this intention. The plaintiffs therefore have absolutely no factual basis on which to allege that PNGSDP knew that the Share Offload Representations had been made. That leaves entirely unsustainable the plaintiffs' case that PNGSDP knew that the Share Offload Representations were false and *therefore* shared the common agreement or object to deceive the members of the Affected Communities.

(2) Conspiracy C

137 Conspiracy C is factually unsustainable for the same reasons. As pleaded, Conspiracy C involves the same conspirators as Conspiracy B. The alleged acts performed in furtherance of the combination in Conspiracy C are identical to those alleged in Conspiracy B: entering into the Security Arrangements and the Shared Benefits Arrangement and thereby knowingly falsifying the Share Offload Representations.[142] To establish that PNGSDP was a party to Conspiracy C, the plaintiffs merely repeat their case on Conspiracy B.[143] Again, there is a complete lack of particulars and evidential basis even to suggest that PNGSDP was in a combination with OTML, Sir Mekere and the State to carry out the breaches of the fiduciary duty which OTML allegedly owes to the members of the Affected Communities. Conspiracy C is plainly and obviously unsustainable.

142 PASOC at paras 136, 136E.

143 PASOC at para 136E(a).

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Conclusion on conspiracy claims

138 For all of the foregoing reasons, I have struck out all of the plaintiffs' conspiracy claims against PNGSDP as being plainly and obviously unsustainable.

Unjust enrichment claim

139 The plaintiffs claim that PNGSDP is unjustly enriched by retaining funds that should have been applied under the Mine Closure Plan for the benefit of the members of the Affected Communities, *ie* the Shares and the Distributions.[144] PNGSDP's enrichment is alleged to be unjust because it has come about as a result of:

(a) a failure of consideration from OTML for the execution of the Opt-Out Forms because OTML failed to procure fulfilment of the Share Offload Representations;[145]

(b) exploitation of weaknesses by OTML in that the members of the Affected Communities were misled into executing the Opt-Out Forms in ignorance of the fact that the Shares and Distributions were not held on trust and not unencumbered;[146] and/or

(c) ignorance of the members of the Affected Communities at the time they executed the Opt-Out Forms as to the fact that the Share Offload Representations were false and/or would not be fulfilled and

144 PASOC at para 132(a).

145 PASOC at paras 33, 132A(b).

146 PASOC at para 132A(c).

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that the Shares and Distributions were not held in accordance with the Share Offload Understanding.[147]

Law on unjust enrichment

140 To succeed in a claim for unjust enrichment, a plaintiff must prove that (*Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and another and another appeal* [2011] 3 SLR 540 at [110]; *Anna Wee* at [98]):

(a) the defendant has been enriched;

(b) the enrichment was at the plaintiff's expense;

(c) an unjust factor is present which makes it is unjust to allow the defendant to retain the enrichment; and

(d) the defendant has no defences available to it.

I have struck out the plaintiffs' claim in unjust enrichment on the grounds that their case on the second and third of these elements is plainly and obviously unsustainable. That makes it unnecessary to analyse the first and fourth of these elements.

Enrichment not at the plaintiffs' expense

141 The Court of Appeal has described the second element as "the requirement of a nexus between the value that was once attributable to the claimant and the benefit received by the defendant, *ie*, the defendant has received a benefit from a subtraction of the claimant's assets" (*Anna Wee* at [113]).

147 PASOC at para 132A(c).

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142 It is no part of the plaintiffs' case that the members of the Affected Communities have now or have ever had in the past any proprietary interest in PNGSDP's assets, whether in the Shares (before they were cancelled), in Distributions or in the Long Term Fund.[148] There is therefore no basis to allege that PNGSDP received an immediate benefit from the members of the Affected Communities or that PNGSDP received any benefit which is traceable from the assets of the members of the Affected Communities (see *Anna Wee* at [115]–[116]).

143 The plaintiffs nevertheless seek to satisfy the second element as follows. They submit that the Shares were "meant for" them by reason of the Share Offload Representations. The members of the Affected Communities relied on this representation to execute the Opt-Out Forms. They therefore had "an interest" in the Shares which PNGSDP intercepted.[149] As regards the Long Term Fund, the plaintiffs plead that it "should have been applied for their benefit" under the Program Rules following *de facto* Mine Closure[150] but that PNGSDP has failed to implement the Mine Closure Plan.

144 Although the plaintiffs do not use this label, their case relies on the theory of interceptive subtraction. According to Professor Peter Birks, an interceptive subtraction occurs where assets were "on their way, in fact or law, to the claimant when the defendant intercepted them" but were "never reduced to the ownership or possession of the claimant" (see Peter Birks, Unjust Enrichment (Oxford University Press, 2nd Ed, 2005) at p 75).

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148 Transcript, 25 January 2021, p 13:24–27.

149 Transcript, 25 January 2021, pp 11:4–18, 13:32, 15:8–9.

150 PASOC at para 132.

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145 PNGSDP submits that the second element cannot be made out as the members of the Affected Communities never owned the Shares or the Long Term Fund to begin with. For this reason, and because the members of the Affected Communities also lack a contractual or personal right to the Shares and to the monies in the Long Term Fund, interceptive subtraction cannot apply.[151]

146 Before analysing interceptive subtraction further, I note that the Court of Appeal in *Anna Wee* did not accept that a mere factual entitlement to the property which the defendant has received is sufficient to establish interceptive subtraction (*Anna Wee* at [123]). In the Court of Appeal's view, *obiter*, only a legal entitlement to the property which has been intercepted will suffice (*Anna Wee* at [123]):

> The words 'on the way' imply that the passing of hands was the last step in the chain of legal entitlement which the claimant would be entitled to demand. It is at this last step that interception is made on Prof Birks's theory of interceptive subtraction. We thus note that even on Prof Birks's theory of interceptive subtraction, certainty is still required. In our tentative view, the preferable position is that the claimant must show some form of *legal (and not merely factual)* entitlement to the property which is received by the recipient. However, until such issue arises squarely for determination by this court and we have had the benefit of hearing full arguments from parties, we do not take a definitive position.
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> [emphasis in original in italics]

Despite this, I assume in the plaintiffs' favour, without deciding, that a factual entitlement to property suffices for interceptive subtraction. Even so, the plaintiffs' case that it had a factual entitlement to the Shares or the Long Term Fund is plainly and obviously unsustainable.

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151 Transcript, 25 January 2021, pp 81:16–23, 84:1–8.

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147 According to Professor Birks, a plaintiff who relies on interceptive subtraction must show that "the wealth in question would *certainly* have arrived in the plaintiff if it had not been intercepted by the defendant *en route* from the third party" [emphasis added] (Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, Rev Ed, 1989) ("*Birks's Introduction*") at pp 133–134). This requirement of certainty is not without its criticisms (see Lionel D Smith, "Three-Party Restitution: A critique of Birks's Theory of Interceptive Subtraction" (1991) 11 OJLS 481 at 486, cited in *Anna Wee* at [120]). But I have no doubt that the plaintiffs' claim falls far short of satisfying the requirements of interceptive subtraction even on the view of certainty which is most generous to the plaintiff.

148 In respect of the Shares, the factual entitlement of the members of the Affected Communities to the Shares is premised on the non-fulfilment of the Share Offload Representations.[152] Yet, even assuming that the action in deceit against OTML succeeds, the members of the Affected Communities would be entitled only to *damages* for the loss which they suffered as a result of relying on the misrepresentation (*Wishing Star Ltd v Jurong Town Corp* [2008] 2 SLR(R) 909 at [28]). The remedy for the tort of fraudulent misrepresentation is not an order requiring the representor to fulfil the representation it made to the representee (*Tiananmen KTV (2013) Pte Ltd and others v Furama Pte Ltd* [2015] 3 SLR 433 at [43]). It also bears emphasising that PNGSDP received the shares in consideration of its contractual undertaking to create a security interest over the Shares under the Security Arrangements.[153] Any allegation that the members of the Affected Communities had a factual entitlement to the Shares

152 PASOC at paras 132A(a)–132A(b).

153 PASOC at paras 45(b)(iii)–45(b)(iv).

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at all, let alone to the requisite degree of certainty, is plainly and obviously unsustainable.

149 In respect of Distributions, the Program Rules preclude the members of the Affected Communities from asserting any factual entitlement to them. Before Mine Closure, cl 9.2 stipulates that PNGSDP is obliged to make the high priority payments out of Distributions before applying the remainder for the benefit of Papua New Guineans in the Western Province and elsewhere in Papua New Guinea. Even then, only a third of the remainder is earmarked for "the people of the Western Province of Papua New Guinea". The members of the Affected Communities are a subset of the people of the Western Province. It is unsustainable to allege that it was even remotely "certain" that sustainable development projects implemented out of the distributions would benefit the members of the Affected Communities. It is entirely within the discretion of PNGSDP's Board to apply that part of the Distributions for sustainable development projects which benefit communities in the Western Province which are *not* Affected Communities. Furthermore, the Program Rules do not require PNGSDP to transfer the Distributions directly to the people of the Western Province, let alone to the members of the Affected Communities. Finally, all Distributions are subject to the Security Arrangements.[154] Any allegation that the members of the Affected Communities had a factual entitlement to Distributions at all, let alone to the requisite degree of certainty, is plainly and obviously unsustainable.

150 In respect of the Long Term Fund, the Program Rules dispel any notion of the members of the Affected Communities having a factual entitlement to the fund. Before Mine Closure, PNGSDP can draw on the Long Term Fund only to

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154 PASOC at paras 45(b)(iii)–45(b)(iv).

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pay certain high priority expenses and not at all for carrying out the Objects. After Mine Closure, PNGSDP can draw on the Long Term Fund to pay certain high priority expenses and only 2.5% of the Long Term Fund for Sustainable Development Purposes. Further, both before and after Mine Closure, the Long Term Fund is also subject to the Security Arrangements.[155]

151 In respect of the investment income earned on the Long Term Fund, PNGSDP is obliged to apply this after Mine Closure:

> … for the benefit of the *people of the* ***Western Province*** and those of the ***rest of PNG*** in ***proportions to be determined by the Board*** at the time of Mine Closure with the objective of minimising the dislocation in the Western Province … and assisting with … the maintenance of expenditures on services and support for Sustainable Development Purposes within the Western Province of Papua New Guinea at the level funded by OTML and its associated entities before Mine Closure.
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> [emphasis added]

152 Although cl 10.4 undoubtedly makes express reference to the object of mitigating dislocation in the Western Province, it is perfectly possible that the sustainable development projects undertaken will all target and benefit communities in the Western Province other than the Affected Communities. The only certainty is that PNGSDP's Board must *consider* implementing sustainable development projects which benefit the Affected Communities, the Western Province or Papua New Guinea as a whole.

153 Any allegation that the members of the Affected Communities had a factual entitlement to the Long Term Fund at all or to the investment income earned on it, let alone to the requisite degree of certainty, is plainly and obviously unsustainable.

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155 PASOC at para 45(b)(iv).

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154 Thus, there is no basis for the plaintiffs to assert that the members of the Affected Communities had a factual entitlement to any of PNGSDP's assets. And they certainly had no contractual right to receive assets from PNGSDP. Put another way, the members of the Affected Communities had no wealth which PNGSDP subtracted from them, whether directly or even by interception. Even if a mere factual entitlement suffices to establish interceptive subtraction, therefore, the plaintiffs' case on the second element is plainly and obviously unsustainable.

No unjust factor

155 A plaintiff will succeed in a claim in unjust enrichment only if it can establish on the third element the presence of a particular unjust factor recognised in Singapore law as yielding a right to recovery (*Anna Wee* at [134]). A plaintiff cannot succeed in a claim in unjust enrichment simply by showing that it is "unjust" in some abstract sense for a defendant to retain an enrichment. So too, a plaintiff cannot succeed simply by showing the absence of a juristic reason for the defendant's enrichment (*cf Alberta* at [82]).

156 The Court of Appeal in *Anna Wee* referred to sets of "unjust factors" summarised in the two leading academic treatises: (a) Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd Ed, 2011) ("*Burrows*"); and (b) Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 8th Ed, 2011) ("*Goff & Jones 8th*"). *Burrows* (at p 86) lists eleven main unjust factors (*Anna Wee* at [132]):

> As regards the cause of action of unjust enrichment, the main unjust factors can be listed as follows: mistake, duress, undue influence, exploitation of weakness, human incapacity, failure of consideration, ignorance, legal compulsion, necessity, illegality and public authority ultra vires exaction and payment.

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Goff & Jones 8th (at para 1-22) lists eleven slightly different unjust factors (*Anna Wee* at [133]):

> Lack of consent and want of authority; mistake; duress; undue influence; failure of basis; necessity; secondary liability; ultra vires receipts and payments by public bodies; legal incapacity; illegality; and money paid pursuant to a judgment that is later reversed.

157 The three unjust factors which plaintiffs rely on are set out at [139] above: (a) failure of consideration by OTML when it failed to procure fulfilment of the Share Offload Representations after members of the Affected Communities had executed the Opt-Out Forms in reliance on those representations;[156] (b) exploitation of weakness by OTML when it deceived the members of the Affected Communities into executing the Opt-Out Forms while they were unaware that the Shares and Distributions were not to be held on trust and were not to be unencumbered;[157] and (c) the ignorance of the members of the Affected Communities that the Share Offload Representations would not be fulfilled when they executed the Opt-Out Forms.[158]

158 I will consider each unjust factor in turn.

Failure of consideration

159 The concept of consideration as an unjust factor is distinct from the concept of consideration as a requirement for a valid contract (*Benzline Auto Pte Ltd v Supercars Lorinser Pte Ltd and another* [2018] 1 SLR 239 ("*Benzline*") at [48]). Failure of consideration as an unjust factor means a failure of basis (*Benzline* at [46]). The concept of failure of basis is summarised in

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156 PASOC at paras 132A(a)–132A(b).

157 PASOC at para 132A(c).

158 PASOC at para 132A(d).

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Charles Mitchell, Paul Mitchell & Stephen Watterson, *Goff & Jones: The Law of Unjust Enrichment* (Sweet & Maxwell, 9th Ed, 2016) *("Goff & Jones 9th*") at para 12–01, as follows:

> … The core underlying idea of failure of basis is simple: a benefit has been conferred on the joint understanding that the recipient's right to retain it is conditional. If the condition is not fulfilled, the recipient must return the benefit. …

160 The inquiry as to whether there is a failure of basis has two parts: first, what was the basis for the transfer in respect of which restitution is sought; and second, whether that basis has failed (*Benzline* at [46]). The plaintiffs plead that the consideration for the members of the Affected Communities, or their representatives, signing the Opt Out Forms was for OTML to procure the performance of the Share Offload Representations.[159] But we need not be detained in this case by this inquiry.

161 The plaintiffs' reliance on this unjust factor is unsustainable for a more fundamental reason. Even if this unjust factor is made out and the claim succeeds, the plaintiffs will not be entitled to the remedy they seek: to hold PNGSDP liable to account for the monies that should have been applied for the benefit of the members of the Affected Communities.[160]

162 On the plaintiffs' case, the party who was enriched is OTML. What is the benefit that the members of the Affected Communities conferred on OTML for which there has been an alleged failure of basis? This benefit could not have been the Shares, Distributions or the Long Term Fund because: (a) these assets were never the property at law or in equity of the members of the Affected Communities; (b) it was never a factual certainty that these assets were destined

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159 PASOC at para 33A.

160 PASOC at para 133.

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for the members of the Affected Communities; and (c) it defies the facts and logic to say that the Shares or Distributions are an enrichment which the members of the Affected Communities conferred upon OTML.

163 The benefit that the members of the Affected Communities conferred on OTML was the release of their right to sue OTML.[161] So, even if I assume that the Share Offload Representations formed the basis of the release and that this basis failed due to non-fulfilment of the Share Offload Representations, the members of the Affected Communities would be entitled to recover only their right to sue or the value of that right. This is because restitution restores to the plaintiff only the value received by the defendant (*Goff & Jones 9th* at para 36-02). Even if a failure of consideration is made out as against OTML, an attempt to hold PNGSDP liable to account for monies that it should have applied for the benefit of the members of the Affected Communities on the basis of this unjust factor is plainly and obviously unsustainable and should be struck out.[162]

Exploitation of weakness

164 The unjust factor of exploitation of weakness is used in *Burrows* at p 300 to refer to unconscionable bargains which equity will set aside. The plaintiffs appear to rely on *MSP4GE Asia Pte Ltd and another v MSP Global Pte Ltd and others* [2019] 3 SLR 1348 for the proposition that this unjust factor forms part of Singapore law.[163] But, a closer reading of that case shows that Andrew Ang SJ was merely illustrating possible unjust factors by reference to *Burrows* and *Goff & Jones 8th* without accepting that those unjust factors form part of Singapore law (at [143]–[145]). I have done the same at [157] above. It is

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161 PASOC at para 33(b).

162 PASOC at para 133.

163 Transcript, 21 January 2021, p 51:16–18.

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unnecessary for me to determine whether exploitation of weakness as an unjust factor forms part of Singapore law because the PASOC does not even disclose exploitation in the sense described in *Burrows*.

165 For this unjust factor, *Burrows* clarifies that the law is not responding to lies, as in the tort of deceit. Rather, the law seeks to protect a plaintiff who suffers from a weakness (whether mental or arising from the plaintiff's circumstances) which is not so extreme as to constitute an incapacity (*Burrows* at p 300). *Burrows* sets out three elements which must be established to succeed on this unjust factor (at p 300):

> First, that the claimant has a mental or circumstantial weakness [**"*the First Element*"**]; secondly, disadvantageous terms [**"*the Second Element*"**]; and, thirdly, although the evidential burden of proof may here be on the defendant, a lack of independent advice given to the claimant [**"*the Third Element*"**].
>
> [emphasis added]

Graham Virgo in *The Principles of the Law of Restitution* (Oxford University Press, 3rd Ed, 2016) ("*Virgo's Restitution*") at pp 278–286 and *Goff & Jones 9th* at paras 11-59–11-65 recognise that unconscionable bargains are also an unjust factor.

166 The plaintiffs fail on all three elements of exploitation of weakness. I begin by considering whether the plaintiffs have pleaded a sustainable case of mental or circumstantial weakness so as to satisfy the First Element.

167 With regard to mental weakness, *Burrows* at p 301 identifies two categories of plaintiffs: expectant heirs and the poor and ignorant. It is readily apparent that what *Burrows* is describing corresponds to the narrow doctrine of unconscionability recognised by the Court of Appeal in *BOM v BOK and*

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another appeal [2019] 1 SLR 349 ("*BOM*") at [141]–[142]. This is put beyond doubt when *Burrows* at pp 302–303 traces the origin of the "poor and ignorant" category of plaintiffs to *Fry v Lane* (1888) 40 Ch D 312 ("*Fry*") at 322 and later *Cresswell v Potter* [1978] 1 WLR 255 ("*Cresswell*") at 257. The narrow doctrine of unconscionability formulated in *BOM* is a modification of the requirements in *Fry* and *Cresswell* (*BOM* at [141]).

168 It follows that if "exploitation of weakness" is an unjust factor, a plaintiff who relies on this unjust factor must be able to invoke the narrow doctrine of unconscionability as set out in *BOM*. To do so, a plaintiff must show that she was suffering from an infirmity that the other party exploited in procuring the transaction (*BOM* at [142]). If she does so, the burden is then cast onto the defendant to demonstrate that the transaction was fair, just and reasonable. In this regard, while successfully invoking the doctrine of unconscionability does not require a plaintiff also to establish the Second or Third Elements, these are factors which the court will invariably consider in assessing whether the transaction was improvident (*BOM* at [142]).

169 As to what infirmities fall within the ambit of the narrow doctrine of unconscionability besides poverty and ignorance (which were identified in *Fry* and *Cresswell*), the Court of Appeal included situations where the plaintiff is suffering from other forms of infirmities, whether physical, mental or emotional in nature (*BOM* at [141]). But the Court of Appeal qualified the scope of relevant infirmities by stating at [141] that:

> … ***not every*** infirmity would *ipso facto* be sufficient to invoke the narrow doctrine of unconscionability. It must have been of sufficient gravity as to have ***acutely*** affected the plaintiff's ability to "conserve his own interests" (see the High Court of Australia decision of *Blomley v Ryan* (1956) 99 CLR 362 at 381). Such infirmity must also have been, or ought to have been, evident to the other party procuring the transaction.

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[emphasis in original in bold italics]

170 The plaintiffs' case is that OTML exploited the weakness of the members of the Affected Communities by *misleading* them into thinking that the Shares and Distributions would be held on trust for them and would be unencumbered.[164] This pleading does not address the meaning of "poor and ignorant". In *Cresswell* at 257, Megarry J clarified that "poor and ignorant" refers to someone who is "a member of the lower income group" and "less highly educated" respectively in modern parlance. While I accept that the members of the Affected Communities are as a whole individuals who are poor and unsophisticated, the plaintiffs do not plead these circumstances as the factual basis for exploitation of weakness as an unjust factor. The gist of the plaintiffs' case on exploitation of weakness appears instead to be an alleged misrepresentation. As *Burrows* highlights, misrepresentation falls outside the ambit of this unjust factor.

171 With regard to circumstantial weakness, *Burrows* concedes that there "is little support in English law for setting aside transactions for this form of exploitation" (at p 306). Circumstantial weakness is a situation in which the plaintiff is merely in "difficult circumstances" (*Burrows* at p 306). In any case, I repeat my finding in the preceding paragraph that there are no other relevant infirmities which arise on the pleaded facts which enliven the narrow doctrine of unconscionability.

172 For completeness, *Burrows* also suggests that inequality of bargaining power as described by Lord Denning in *Lloyds Bank Ltd v Bundy* [1975] QB 326 at 339 may be a type of circumstantial weakness which amounts to an unjust factor (*Burrows* at p 306). But Lord Denning's principle of inequality of

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164 PASOC at para 132A(c).

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bargaining power was squarely rejected as an ill-founded principle in *BOM* at [133].

173 In summary, the plaintiffs have pleaded no mental or circumstantial weaknesses which could conceivably establish the First Element in exploitation of weakness as an unjust factor. I am also satisfied that the PASOC fails to address the Second and Third Elements. In any event, exploitation of weakness as an unjust factor is completely at odds with the contractual obligations, discretions and powers under the suite of contracts which PNGSDP entered into. Accordingly, I hold that a claim in unjust enrichment based on the unjust factor of exploitation of weakness is plainly and obviously unsustainable and have therefore struck it out.

Ignorance

174 Ignorance in this context is a term of art. *Goff & Jones 9th* at paras 8-02–8-03 explains that this unjust factor consists of situations of "lack of consent" or "want of authority":

> … Where D is ***enriched at C's expense*** without the intermediation of any third party – as where D simply steals from C – C's "lack of consent" is ordinarily a sufficient description of the operative ground. This is also true in many cases where D is immediately enriched as a result of the actions of a third party, X, but at C's expense. However, the position is different if X is a party who ***owns or controls assets subject to duties and powers to deal with them for C's benefit***. Here, if X acts within his authority, then C will have no remedy; but if X acts outside his authority, his "want of authority" will itself constitute a sufficient ground for recovery by C. …
>
> [emphasis added]

175 In my view, the plaintiffs cannot succeed on lack of consent as an unjust factor in this case because the members of the Affected Communities never had a proprietary interest or a factual entitlement to the requisite degree of certainty

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in the Shares or Distributions. There was no legal or factual obligation on OTML, PNGSDP or BHP Minerals to obtain the consent of the members of the Affected Communities to the transfer the Shares from BHP Minerals to PNGSDP. Their lack of consent to the Shares and the Distributions being held on terms which falsify the Share Offload Understanding[165] is simply legally irrelevant. It cannot satisfy the requirements of ignorance as an unjust factor.

176 My reasons in the preceding paragraph above are sufficient to dispose of the unjust factor of lack of consent. But, in addition, it is my tentative view that lack of consent must be distinguished from vitiated intent. This distinction is another reason that a claim founded on this final unjust factor is plainly and obviously unsustainable. Where there is lack of consent, the plaintiff has *no* intent to enrich the defendant at all. Paradigms include a plaintiff whose property is stolen, a plaintiff who is unaware that his property is being taken from him and a plaintiff who is aware that his property is being taken from him but is powerless to prevent it (*Goff & Jones* at paras 8-01–8-02, 8-09). In contrast, in a situation of vitiated intent, the plaintiff *does* intend to enrich the defendant, but his intent is vitiated or defective. The paradigm here is a mistake.

177 Ignorance as an unjust factor is not concerned with vitiated intent. That falls to be considered under other unjust factors such as mistake. The plaintiffs rely on none of these other unjust factors. This distinction is drawn in *Goff & Jones 9th* at para 8-08, *Virgo's Restitution* at p 131 and James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd Ed, 2016) at p 281. Because the members of the Affected Communities *did* intend to release their right to sue OTML, BHP Minerals and BHP Group but now assert simply that they were ignorant that the Share Offload Understanding would be falsified

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165 PASOC at para 132A(d).

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when they did so, their case is one of vitiated intention, not ignorance. The plaintiffs' case on the unjust factor of ignorance or lack of consent is plainly and obviously unsustainable.

178 The want of authority analysis described in *Burrows* does not assist the plaintiffs either. Want of authority was rejected as an unjust factor by the Court of Appeal in *Alwie Handoyo v Tjong Very Sumito and another and another appeal* [2013] 4 SLR 308 at [111]–[114].

179 For the avoidance of doubt, I do not hold that ignorance (specifically, a lack of consent as described in *Goff & Jones 9th*) is an unjust factor which forms part of Singapore law. This is not a settled question: see *Anna Wee* at [139], [166]; *AAHG, LLC v Hong Hin Kay Albert* [2017] 3 SLR 636 at [74], *Ong Teck Soon (executor of the estate of Ong Kim Nang, deceased) v Ong Teck Seng and another* [2017] 4 SLR 819 at [24]. I hold merely that it is unnecessary for me to decide the question because the plaintiffs' case is unsustainable even if it does form part of Singapore law.

Conclusion on unjust enrichment

180 Alleging that they are victims of a deception by OTML is insufficient to satisfy the second element of unjust enrichment or to bring the members of the Affected Communities within any of the three unjust factors on which the plaintiffs rely. I do not accept that the law of unjust enrichment affords the members of the Affected Communities a remedy which has the effect of circumventing a contractual framework (*ie*, the Ninth Supplemental Agreement, the Master Agreement, the Program Rules and the Security Arrangements) that expressly provides for the transfer of the Shares to PNGSDP and, in consideration, for PNGSDP to subject the Shares to the Security Arrangements.

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181 The plaintiffs' claim in unjust enrichment is plainly and obviously unsustainable. I have accordingly struck it out.

Conclusion

182 In summary, I have struck out all four of the claims which the plaintiffs have advanced against PNGSDP in the PASOC. The plaintiffs appear to have approached the PASOC as a box-ticking exercise, in which to plead each of the constituent elements of each of the plaintiffs' four claims. That approach has not been sufficient to survive striking out. In my view, it is not necessary to await a trial of this action in order to conclude that all four claims against PNGSDP are, for the reasons I have given, plainly and obviously unsustainable.

Vinodh Coomaraswamy
Judge of the High Court

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