The Public Trustee as Executor of the Estate of the Late Helmut Pareroultja & Ors v Central Land Council [2000] NTSC 90

PARTIES:	THE PUBLIC TRUSTEE as Executor of the Estate of the Late HELMUT PAREROULTJA & ORS v CENTRAL LAND COUNCIL
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY OF AUSTRALIA
JURISDICTION:	CIVIL
FILE NO:	No. 6 of 1993
DELIVERED:	3 November 2000
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JUDGMENT OF:	ANGEL J

CATCHWORDS:

Practice and Procedure – summary judgment application to strike out wholly or partly the amended statement of claim as not disclosing a cause of action – application to be decided on the words of pleading alone – inappropriate to cure drafting or incidental defects – terms of equitable relief to be decided at trial – *Supreme Court Rules* 1994 (NT) O 23, r 1 and r 2

Negligence – economic loss – whether contractual in an instance where a duty owed by A to B may arguable give rise to a duty owed by A to C

Supreme Court Rules (NT), O 23, r 1 and r 2
Aboriginal Land Rights (NT) Act 1976, s 23, s 35 and s 43

Wilson v Union Insurance Co (1992) 112 FLR 166, applied
Egan v The Commonwealth Minister for Transport (1976) 14 SASR 445, applied
Lietzke (Installations) Pty Ltd v Morgan (1973) 5 SASR 88, referred to
Northern Land Council v The Commonwealth (No 2) (1987) 61 ALJR 616, referred to

REPRESENTATION:

Counsel:

Plaintiffs:	Mr A H Silvester, Ms R Webb
Defendant:	Mr T Robinson

Solicitors:

Plaintiffs:	Noonans
Defendant:	Central Land Council

Judgment category classification:	B
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IN SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 6 of 1993

The Public Trustee as Executor of the Estate of the Late Helmut Pareroultja & Ors v Central Land Council [2000] NTSC 90

BETWEEN:

THE PUBLIC TRUSTEE AS EXECUTOR OF THE ESTATE OF THE LATE HELMUT PAREROULTJA & ORS

Plaintiffs

AND:

CENTRAL LAND COUNCIL

Defendant

REASONS FOR JUDGMENT

(Delivered 3 November 2000)

ANGEL J*:*

[1] This is an application pursuant to Order 23 Rules 1 and 2 that the proceedings be dismissed or alternatively that the Amended Statement of Claim be struck out wholly or in part as not disclosing a cause of action.

[2] In *Wilson v Union Insurance Co* (1992) 112 FLR 166 at 181 Kearney J said:

> "For Union's application for summary judgment under O 23, whether under r 23.03(1)(a) or r 23.03, to be successful it must show that the plaintiff's case is unsustainable in fact or in law. Order 23 is intended as a means for dealing with actions which are absolutely hopeless, those so obviously frivolous or unsustainable or untenable that it is plain and beyond rational debate that they cannot succeed. The power under O 23 is to be exercised by a court with great caution; an applicant bears a heavy burden. If the plaintiff shows an arguable case, one which is not unworthy of serious discussion and

> of evidence being led, a case not hopeless beyond argument, an application under O 23 should be dismissed. The question is whether it would be open to the plaintiff on the pleadings to prove facts at trial which would constitute a cause of action: see *Mutual Life & Citizens' Assurance Co Ltd v Evatt* (1970) 122 CLR 628 at 631. The affidavit process is unsuitable when facts are in dispute, and this also points to the jurisdiction being exercised only when the case is obvious and clear beyond doubt.".

Where an application is to strike out on the ground that no reasonable cause of action is disclosed the Court looks at the words of the pleading alone: *Egan v The Commonwealth Minister for Transport* (1976) 14 SASR 445 at 448 per Bray CJ, citing *Dey v Victorian Railways Commissions* (1949) 78 CLR 62 at 109, per Williams J, and *Wenlock v Moloney* [1965] 1 WLR 1238 at 1242-43, per Sellers LJ. The question is what the Amended Statement of Claim discloses not what some other source of information might disclose. The defendant's application falls to be decided on the words of the pleading alone.

[3] The relief claimed by the plaintiffs is set forth in paragraphs 24 and 25 of the Amended Statement of Claim as follows:

> "24. THE PLAINTIFFS SEEK THE FOLLOWING ORDERS:
>
> (a) a declaration that at all material times after 18 November 1981 the CLC was a constructive trustee for the plaintiffs;
>
> (b) a declaration that the plaintiffs and their advisors are entitled to inspect the register in relation to
>
> (i) the Mereenie area;
>
> (ii) the Haasts Bluff Aboriginal Land Trust; and

(iii) aboriginal, communities and groups that the CLC considered were affected by the grant of Petroleum Leases to the joint venturers over the Mereenie area

and, in relation to each, any map, document or other references compiled and maintained for the purposes of S.24 of the Act or otherwise, including all source material (including anthropological reports and information) for the compilation thereof;

(c) a declaration that in the administration of its trust for the Mereenie royalties the CLC was bound not to pay or apply any trust monies other than to the traditional aboriginal owners in accordance with the principles;

(d) alternatively to (c) above a declaration as to whom the Mereenie royalties should have been paid in what proportion and in accordance with what principles;

(e) a taking of accounts of the trust, alternatively, in respect of the Mereenie royalties, all receipts by the CLC and payments thereof;

(f) orders tracing trust property;

(g) the appointment of the Public Trustee of the Northern Territory as trustee of the Mereenie royalty fund in place of the CLC;

25. AND THE PLAINTIFFS ALSO CLAIM

(a) damages for breach of statutory duty;

(b) damages at common law;

(c) damages in equity for breach of fiduciary and/or breach of trust;

(d) equitable restitution in accordance with the principles to the plaintiffs and other traditional aboriginal owners and other aboriginal persons who have a traditional interest in the Mereenie area or to any incorporated Aboriginal communities or groups the members of which are such traditional Aboriginal owners, of all Mereenie royalties found not to have been paid in accordance with clauses 4.1 and 4.2 of the Mereenie agreement or the principles;

(e) interest

(f) costs

(g) an interlocutory restraining the defendant from paying Mereenie royalties otherwise than in accordance with the Mereenie agreement, the principles and consents of the senior traditional owners of each group referred to in paragraph 12(d) hereof.".

[4] The material facts pleaded to sustain the plaintiffs' claims are as follows.

[5] In paragraph 1 the plaintiffs plead that the deceased Helmut Pareroultja and other personal plaintiffs are traditional Aboriginal owners both at common law and for the purposes of the Aboriginal Land Rights(NT) Act 1976 as amended ("the Act") of all the land in central Australia the subject of the petroleum leases on which is established the Mereenie oil and gas field and that they are entitled to the use and occupation of that area for the purposes of s 4(1) of the Act.

[6] In paragraph 2 of the Amended Statement of Claim the plaintiffs plead that the Mereenie area is part of land the title to which is held by the Haasts Bluff Aboriginal Land Trust, an Aboriginal Land Trust established pursuant to s 4 of the Act.

[7] Paragraphs 4 and 5 of the Amended Statement of Claim are as follows:

"4. At all material times in relation to the Mereenie oil and gas field, the CLC, exercising or purporting to exercise its powers under s.27 of the Act and its functions under s.23(e) of the Act, acted for and on behalf of aboriginal persons, including the plaintiffs, entitled by Aboriginal tradition to the use and occupation, for the purposes of s.4(1) of the Act, of the Mereenie area. A reference to the CLC hereafter is a reference to the CLC acting in that capacity.

5. On 18 November 1981 the CLC, in pursuance of its powers in s.43 of the Act, entered into an agreement ("the Mereenie Agreement") with Magellan Petroleum (NT) Pty Ltd ("Magellan"), United Canso Oil and Gas Pty Ltd ("United"), Oilmin (NT) Pty Ltd ("Oinmin"), Krewliff Investments Pty Ltd ("Krewliff"), Transoil (NT) Pty Ltd ("Transoil") and Farmout Drillers NL ("Farmout") (all hereinafter called "the Mereenie Joint Venturers").".

[8] None of the Mereenie Joint Venturers are parties to the action.

[9] After pleading that certain conditions precedent to the commencement of the operation to the Mereenie Agreement had been fulfilled and that on a date unknown to the plaintiffs in late 1981 or early 1982 the Mereenie royalties had become due, the plaintiffs plead that at all material times thereafter, royalties were paid by the Mereenie Joint Venturers to the defendant pursuant to the Mereenie Agreement.

[10] It is now regrettably necessary to set out the plaintiffs' pleading extensively. The plaintiffs plead in paragraphs 9 to 20 (inclusive) as follows:

"9. By reason of:

(a) the matters set out in paragraphs 2, 4, 6 and 8 hereof;

(b) the functions of the CLC set out in s.23 of the Act;

(c) the powers of the CLC set out in s.35 of the Act;

(d) the prohibitions contained in ss.5(2), 6 and 43(2) of the Act;

(e) the powers of the CLC set out in s.43 of the Act; and

(f) the terms of the Mereenie agreement

the CLC owed to the plaintiffs both common law and statutory duties in the exercise of its powers and functions, in particular:

(i) to ascertain whom were the traditional owners of the Mereenie area;

(ii) to ascertain whom were the Aboriginal persons or groups of persons who might be affected by the Mereenie oil and gas project;

(iii) to consult with those persons or groups referred to in sub-paragraphs (i) and (ii) above;

(iv) to decide to whom the Mereenie royalties should be paid and in what proportions;

(v) to negotiate the agreement with the Mereenie Joint Venturers on behalf of the traditional Aboriginal owners of land held by a Land Trust being the Mereenie area;

(vi) to negotiate the agreement on behalf of any other Aboriginals interested in the land being the Mereenie area;

(vii) to negotiate terms and conditions in the agreement with the Mereenie Joint Venturers on behalf of and for the benefit of those persons identified in (i) and (ii) above having regard to the effect of the grant of the mining interest on them;

(viii) to negotiate on behalf of and for the benefit of those persons identified in the sub-paragraphs (i) and (ii) above an amount, (being the amount referred to in clause 4.1 of the Mereenie Agreement) to be paid by the Mereenie Joint Venturers to the CLC ("the signature bonus"),

(ix) to negotiate on behalf of and for the benefit of those persons identified in sub-paragraphs (i) and (ii) above a further amount (being the amount referred to in clause 4.2 of the Mereenie Agreement) to be paid by the Mereenie Joint Venturers to the CLC calculated in accordance with the agreement ("the negotiated royalty payments"),

(x) to execute the agreement on behalf of and for the benefit of those persons identified in (i) and (ii) above, and

(xi) to make provision for the distribution of the monies to be paid to the Land Council by the Mereenie Joint Venturers under the agreement to or for the benefit of the groups of Aboriginal people specified in the agreement.

10. The common law duties of the CLC referred to in paragraph 9 above included a duty to take all reasonable care in the exercise of its powers, functions and duties.

11. The statutory duties referred to in paragraph 9 above included:

(a) in exercising any of the powers and functions referred to in paragraph 9 hereof;

(i) to have regard to the interests of the Aboriginal owners of the Mereenie area;

(ii) to consult with the traditional Aboriginal owners of the Mereenie area;

(iii) not to have consented to and entered into the Mereenie Agreement, unless it was satisfied that the traditional Aboriginal owners of the Mereenie area understood the nature and purpose of the proposed action and as a group, consented to it;

(iv) not to have consented to and entered into the Mereenie Agreement, unless it was satisfied that any Aboriginal community or group that may be affected by the proposed action had been consulted and had had adequate opportunity to express its view to the CLC (s.23(3));

(v) to apply and pay all Mereenie royalties in accordance with the Mereenie Agreement and not otherwise (s.35(3));

(b) to compile and maintain a register setting out:

(i) the names of the persons who, in the opinion of the CLC were traditional Aboriginal owners of the Mereenie area;

(ii) in relation to any group of traditional Aboriginal owners of the Mereenie area, a map or other references showing the sites belonging to them in so far as such can be done without breach of Aboriginal usage (s.24));

(c) where the CLC was informed that there was or is or there may arise, a dispute between Aboriginal owners with respect to the Mereenie area, to use its best endeavours by way of conciliation for the settlement or prevention of that dispute (s.25);

(d) at all times in the discharge of its functions and powers in relation to the Mereenie Agreement and the Mereenie royalties to comply with the *Audit Act* (C'th).

12. The duties set out in paragraphs 9(i) and (xi) inclusive and 11(d) included a requirement that in accordance with local Aboriginal custom the Mereenie royalties were to be distributed according to the following principles ("the Principles"):

(a) any benefit derived from the Aboriginal ownership of the Mereenie area was payable to or in accordance with the express wishes of those persons or persons being, according to custom, the senior traditional owners of the areas comprising the Mereenie area (and not otherwise);

(b) each senior traditional owner or group of senior traditional owners represented the custodians of that land and their relatives and family within that group and as such whether and what amount was payable to custodians or other relatives or families and family members within that group or other persons was a matter solely within the discretion of each relevant traditional owner (and not otherwise);

(c) it was a matter solely for each senior traditional owner or group of senior traditional owners to decide whether and in what proportions any moneys paid or payable to a senior traditional owner or group of senior traditional owners were to be distributed to other Aboriginal interests ("traditional interests") other than to custodians or other relatives or families and family members within that group;

(d) that the Mereenie area was traditionally owned by two groups broadly described as:

(i) Malbungka group;

(ii) Pareroultja group

(e) each of which groups were represented by one or more senior traditional owners;

(f) that the Mereenie royalties were to be paid in equal shares to the groups refereed to in sub-paragraph (d) hereof;

[(g)] that other Aboriginal groups having traditional interests in the Mereenie area included groups known as:

(i) the Coulthard/Breedon group;

(ii) the Ephraim Wheeler group;

(iii) the Clyne group; and

(iv) the Bulla/Multa group.

13. In breach of its common law and statutory duties the CLC:

(a) negotiated with the Mereenie Joint Venturers on behalf of and for the benefit of itself and/or other Aboriginals not interested in the Mereenie area as traditional owners or custodians or other relatives or families and family members within the traditional owners group, but on behalf of or for the benefit of itself or others;

(b) received in 1982 a payment of $500,00, the signature bonus, pursuant to clause 4.1 of the Mereenie Agreement and thereafter paid some of the Mereenie royalties received, on behalf of and for the benefit of itself and/or other Aboriginals who were not interested in the Mereenie area as traditional owners or custodians or other relatives or families and family members within the traditional owners group, contrary to the principles;

(c) withheld Mereenie royalties and applied them for its own administration costs and expenses;

(d) invested Mereenie royalties and applied the interest earned thereon to its own purposes; and

(e) otherwise at all material times distributed Mereenie royalties otherwise than in accordance with the principles.

14. Further and in the alternative, at all material times:

(a) the CLC owed the common law and statutory duties pleaded in paragraphs 10, 11 and 12 hereof to the plaintiffs and to the Aboriginal traditional owners of the Mereenie area;

(b) the CLC was a statutory corporation charged with the powers and functions set out in the act;

(c) in the discharge of its powers and functions the CLC had available to it all the financial and human resources of a modern business or statutory corporation including funds, skilled personnel and advisors including managers, economists, accountants, lawyers, anthropologists, computer and information systems, libraries, and access to information;

(d) the plaintiffs and the traditional Aboriginal owners of the Mereenie area as a group are and at all material times were:

(i) of Aboriginal descent;

(ii) living a traditional Aboriginal lifestyle;

(iii) suffering from serious economic disadvantage;

(iv) not proficient in speaking, reading, writing or understanding English;

(v) possessed of limited formal education;

(vi) unskilled in financial, legal or managerial matters; and

(vii) unknowledgeable and inexperienced in business, in particular oil and gas developments, royalty agreements, the administration of monies and in the powers and duties of trustees.

15. In matters involving the determination of just who would be entitled to participate in the distribution of the Mereenie royalties, and in what proportions, the plaintiffs and the traditional owners of the Mereenie area as a group are and

were always dependent upon the goodwill and business and technical expertise of the CLC.

16. In matters involving proper administration and accounting for the receipt and distribution of the Mereenie royalties the plaintiffs and the traditional Aboriginal owners of the Mereenie area as a group are and were always dependent upon the goodwill, business and technical expertise of the CLC.

17. At all material times the CLC knew the matters set out in paragraphs 12, 14, 15 and 16 above and additionally, knew, in relation to the distribution of the Mereenie royalties:

    (a) whom and on what basis, anthropologists employed or contracted by the CLC, had identified and listed as traditional Aboriginal owners of the Mereenie area;

    (b) whom and on what basis, anthropologists employed or contracted by the CLC, had identified and listed as other Aboriginal persons interested in the Aboriginal land comprising the Mereenie area;

    (c) whom and on what basis, anthropologists employed or contracted by the CLC had identified and listed as Aboriginal communities and groups that may have been affected by the grant of Petroleum Leases over the Mereenie area;

    (d) that the information in relation to sub-paragraphs (a), (b) and (c) above and/or in refusing to account for the receipt of Mereenie royalties and their distribution or payment, neither the plaintiffs nor any of them or to the other traditional Aboriginal owners of the Mereenie area;

    (e) that by not providing the information in (a), (b) or (c) above and/or in refusing to account for the receipt of Mereenie royalties and their distribution or payment, neither the plaintiffs nor any of them or the other traditional Aboriginal owners of the Mereenie area would or could know how the CLC was exercising its discretion in determining who would receive royalties and in what proportions, nor whether the Mereenie royalties or all of them were being distributed in accordance with the Mereenie agreement, and/or the principles.

18. By reason of the matters set out in paragraphs 12, 14, 15 and 16 hereof, the CLC knew that if it administered and distributed

the Mereenie royalties otherwise than in accordance with the Mereenie Agreement or the Act, and/or the principles set out in paragraph 12 hereof or otherwise unlawfully, and without accounting to the plaintiffs and the other traditional Aboriginal owners of the Mereenie area, that it would and in fact did occupy a position of ascendancy and power over the plaintiffs and by reason of such power would be in no position to object, complain or otherwise oppose it if:

(a) it did not consult with the plaintiffs and the other traditional Aboriginal owners of the Mereenie area in accordance with the Act;

(b) it did not account to the plaintiffs and the other traditional Aboriginal owners of the Mereenie area for the receipt of any or all Mereenie royalties and their distribution;

(c) it distributed Mereenie royalties to persons other than in accordance with the principles hereof;

(d) it withheld any part of or otherwise failed to distribute all of the Mereenie royalties in accordance with the Mereenie agreement or the Act or otherwise distributed unlawfully;

(e) it applied any part of the Mereenie royalties for a purpose not authorized by the Mereenie Agreement;

and accordingly that CLC was a fiduciary of the plaintiffs.

19. The fiduciary duty that was owed by the CLC to the plaintiffs was a duty to act exclusively in the interests of the plaintiffs and the other traditional Aboriginal owners of the Mereenie area, and not in its own interests or the interests of other Aboriginal persons or, groups, communities or associations not having any traditional ownership of the Mereenie area, while exercising the aforesaid ascendancy or power it had over the plaintiffs and the other traditional Aboriginal owners of the Mereenie area, in order to protect them from loss or damage or to enable the plaintiffs to protect themselves and the other traditional Aboriginal owners of the Mereenie area from the loss and damage that occurred.

20. In breach of the fiduciary duty the CLC owed to the plaintiffs, and in acting in its own interests or the interests of other Aboriginal persons or groups, communities or associations not

having any traditional ownership in the Mereenie area and contrary to the interest of the plaintiffs the CLC:

20.1 paid or purported to pay Mereenie royalties in accordance with a scheme for identifying the recipients thereof otherwise than in accordance with the principles;

20.2 paid Mereenie royalties to those not eligible to receive them;

20.3 determined the distribution of the Mereenie royalties in breach of the principles arbitrarily and/or capriciously;

20.4 withheld part of the Mereenie royalties and applied them towards its general administration or other costs.".

[11] Paragraphs 20.1 to 20.4 inclusive are extensively particularized and the plaintiffs plead in paragraph 21 that in consequence of the breaches of fiduciary duty allegedly owed by the defendant to the plaintiffs, the plaintiffs suffered loss and damage. Alternatively the plaintiffs plead that by reason of the matters pleaded in paragraphs 1 to 19 of the Amended Statement of Claim the defendant was a constructive trustee receiving, holding and distributing Mereenie royalties for the benefit of the plaintiffs and other traditional Aboriginal owners of the Mereenie area and further that in breach of the defendant's duties as a trustee, the defendant paid royalties to those not eligible to receive them, has failed to account to the plaintiffs for its administration of the trust and has invested monies "negligently or in breach of the investment requirements of the *Trustee Act*".

[12] None of the traditional Aboriginal owners of the Mereenie area other than the plaintiffs are parties to the proceeding. No recipient of monies from the defendant is a party to the action.

[13] Section 35(3) of the Aboriginal Land Rights (NT) Act 1976 provides:

> "35. (3) Moneys paid to a Land Council under an agreement made under section 43 or 44 shall be applied by the Land Council in accordance with the agreement or, if the agreement makes no provision in relation to the application of the moneys, shall be paid to –
>
> (a) Aboriginal Councils the Aboriginals in the areas of which are affected by the agreement; and
>
> (b) any incorporated Aboriginal communities or groups the members of which are affected by the agreement,
>
> in such proportions as the Land Council determines.".

[14] Section 43 of that Act provides:

> 43. (1) A Land Council may agree with an applicant for a mining interest in respect of Aboriginal land in the area of the Land Council for the giving of consent by the Land Council to the granting of that mining interest to that applicant in consideration of the payment to the Land Council by the applicant of an amount or amounts specified in, or calculated in accordance with, the agreement and of the acceptance of such other terms and conditions as are provided for in the agreement.
>
> (2) Where, by virtue of sub-section 40 (2), (3), (4), (5), (6) or (7) or a Proclamation under paragraph 40(1)(b), a mining interest in respect of Aboriginal land may be granted without the consent of the Land Council for the area in which the land is situated, the mining interest shall not be granted unless the applicant for the mining interest has entered into an agreement under seal with the Land Council containing such terms and conditions as are agreed on by the parties having regard to the effect of the grant of the mining interest on Aboriginals, which terms may include a requirement for the payment to the Land Council by the applicant of an amount or amounts specified in, or calculated in accordance with, the agreement.
>
> (3) An agreement of the kind referred to in sub-section (1) or (2) in respect of a lease or other mining interest authorizing the recovery of minerals of any kind shall not be made unless and until –

(a) the terms and conditions on which that lease or other mining interest is to be granted have been determined; and

(b) where the rate of royalty payable to the Crown in respect of minerals of that kind in force at the time those terms and conditions are determined is a higher rate than the rate in force at the commencement of this section, the Minister has made a determination under sub-section 63(3) in respect of the royalties at that higher rate,

and an agreement purporting to be made in contravention of this sub-section is void and of no effect.

(4) An agreement under sub-section (1) or (2) may make provision for the distribution of any moneys paid to the Land Council under the agreement to or for the benefit of such groups of Aboriginals as are specified in the agreement

(5) Where a Land Council, in entering into an agreement under sub-section (1) or (2), fails to comply with sub-section 23(3), with respect to the Aboriginal land to which the agreement relates, that failure does not invalidate the entering into the agreement by the Land Council.".

[15] Counsel for the plaintiffs admitted that the plaintiffs' action is novel. It was submitted that the case involved private rights vis-à-vis the plaintiffs as senior traditional owners as defined in the Act and the defendant established under that Act arising out of the Mereenie mining agreement entered into pursuant to s 43 of the Act. It was submitted that in negotiating and entering into the Mereenie Agreement the defendant was required to act on behalf of and in the interests of traditional Aboriginal owners of the land including the plaintiffs. See ss 23 (1)(a), (b) and (c) and s 23(3). Counsel for the defendant on the other hand stressed that the plaintiffs were not parties to the Mereenie Agreement and submitted that if the plaintiffs have a

remedy at all it lay in public law not in private law, and that no duty of care owed by the defendant to the plaintiffs could be erected around the Mereenie Agreement to which the plaintiffs were not a party. However I am unable to agree with that submission. Counsel for the plaintiffs, as I have said, confessed that the plaintiffs' claims may be novel and that they may lie at the intersection of private law and public law, tort and equity and administrative law. Nevertheless the plaintiff's claims are, I think, arguable. They are not, I think, demonstrably unarguable. An instance where a duty owed by A to B may give rise to a duty owed by A to C and thus constitute a foundation for an action in negligence may be seen in the dissenting judgment of Bray CJ in *Lietzke (Installations) Pty Ltd v Morgan* (1973)5 SASR 88, particularly at 93-102. That case was decided in 1973 and of course the law of negligence and breach of duty to prevent pure economic loss has moved on or progressed since then. Counsel for the defendant submitted that the Mereenie Agreement was not a private agreement, requiring as it did Ministerial approval. However the necessity for Ministerial approval, it seems to me (at least arguably) does not deny the Mereenie Agreement the status of a contract between the parties to it giving rise to private contractual rights. One question for trial, it seems to me, is whether the defendant's contractual obligations under the Mereenie Agreement in combination with s 23(1) and (3), s 35(3) of the Act give rise to a duty of care to the plaintiffs; see the reasoning of Bray CJ in *Lietzke (Installations) Pty Ltd v Morgan*, supra, particularly at 101, 102.

[16] The plaintiffs case in tort appears to run thus:

(1) the Mereenie Agreement imposed a legal contractual duty on the defendant to distribute moneys paid to the defendant under the Agreement for the benefit of such groups of Aboriginals as are specified in the Agreement (see s 43(4) of the Act and compare s 35(3) of the Act);

(2) the plaintiffs assert a breach of that duty;

(3) as to the remaining question whether the plaintiffs who are not parties to the Mereenie Agreement were within the ambit of that duty, the plaintiffs are arguably owed such a duty, first, because of the agency pleaded in paragraph 4 of the Amended Statement of Claim (see above), and secondly by virtue of the reasoning of Bray CJ in *Lietzke*, supra, at 101-102, viz:

> "We have, then, a duty and a breach of it. All that remains is to see that the appellant was within the ambit of that duty. In my view it was, not because it can found directly on the scheme, as it was no party to it, but because the existence of the duty under the scheme should have caused the respondent to direct his mind to persons in the position of the appellant as likely to be directly affected by any omission on his part to perform the duty in question.".

So here, say the plaintiffs. Although not parties to the Mereenie Agreement, the plaintiffs as traditional owners should have been in contemplation of the defendant as being directly affected by any breach on its part of its legal duty to distribute royalties under the agreement.

[17] I reject the defendant's submission that no arguable case lies in negligence.

[18] I turn to the plaintiffs' allegations of a breach of fiduciary duty.

[19] As Mason J, as he then was, said in *Hospital Products Ltd v US Surgical Corp* (1984) 156 CLR 41 at 96-97:

> "The critical feature of fiduciary relationships is that the fiduciary undertakes or agrees to act for, or on behalf of, or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense. The relationship between the parties is therefore one which gives a fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.".

[20] The plaintiffs assert a fiduciary duty arising from the circumstances of the Mereenie Agreement in the context of the plaintiffs being traditional Aboriginal owners of the subject land and of the Land Rights (NT) Act. They rely on the defendant's statutory position and its powers under the Land Rights (NT) Act, particularly ss 22 to 28 inclusive and s 32, its statutory control by ss 63, 64 and 35(1) and (2) proscribing what moneys might be applied to administrative costs and expenses of the defendant, on the statutory provisions relating to the keeping of proper accounts (s 37), the

circumstances in which the defendant can make distributions other than with the approval of the Minister (s 35), the audit provisions (s 39) and the consultation provisions.

[21] I have reached the conclusion that the plaintiffs' alternative claims of breach of fiduciary duty and breach of trust should go to trial. In this regard I particularly note *Northern Land Council v The Commonwealth (No 2)* (1987) 61 ALJR 616, where the High Court on a strike out application, after noting that whether a particular relationship was such as to found a fiduciary relationship "or a trust of some kind" had not been argued, said at 620:

> " … the question whether other allegations in the Amended Statement of Claim might give rise to a fiduciary relationship should not be determined in the abstract but should be determined in light of the facts found at trial.".

That statement, with which I respectfully agree, by which I am bound and which I dutifully follow, is adverse to the defendant's submissions that the plaintiffs' allegations should be struck out *in limine*.

[22] As regards the trust claim counsel for the defendant referred to *Wickstead & Ors v Browne* (1992) 30 NSWLR 1. That was a strike out case where it was alleged that a trust company had been negligent in the exercise of trust powers. A majority of the Court confirmed the fundamental rule in the law of trusts that a trustee is not liable in negligence for a breach of trust and struck out the allegations of negligence. In that case the existence of an express trust was not in dispute. In the present case the trust allegation is

plainly contentious. What is sought is the imposition by the Court of a constructive trust as an alternative to the claims in negligence and breach of fiduciary duty and I am of the view that the trust issue, too, should proceed to trial and be decided in light of the facts found at trial. In so saying I do not disagree with a number of criticisms made of the nature and scope of the declaratory and equitable relief sought, but, again, I do not think it appropriate on an application such as this to tinker at the edges or to shut the plaintiffs out peremptorily. It is true the plaintiffs do not appear to have addressed the issue of the plaintiffs' limited interest (if any) in unadministered trust assets – see *Official Receiver in Bankruptcy v Schultz* (1990) 170 CLR 306 – but no good purpose would be served by striking out certain heads of the relief claimed now. They will not complicate or lengthen the trial; the terms of any equitable relief to which the plaintiffs may ultimately be entitled will need to be carefully addressed if and when the time comes. The case is one with some complexities and any relief shall have to be moulded to fit the circumstances. The present summons is not the occasion for curing drafting or incidental defects.

[23] That the plaintiffs' alternative claims should be summarily dismissed or struck out has not been clearly demonstrated. The whole of the plaintiffs' case should go to trial. The defendant's summons is dismissed.