IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2020] SGCA 44

Civil Appeal No 78 of 2019

Between

Independent State of Papua New Guinea

… *Appellant*

And

PNG Sustainable Development Program Ltd

… *Respondent*

In the matter of Suit No 795 of 2014

Between

Independent State of Papua New Guinea

… *Plaintiff*

And

PNG Sustainable Development Program Ltd

… *Defendant*

JUDGMENT

[Contract] — [Formation] — [Certainty of terms]
[Contract] — [Contractual terms] — [Implied terms]
[Companies] — [Memorandum and articles of association] — [Effect]
[Companies] — [Members] — [Rights]

Independent State of Papua New Guinea
v
PNG Sustainable Development Program Ltd

[2020] SGCA 44

Court of Appeal — Civil Appeal No 78 of 2019
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Chao Hick Tin SJ
27 February 2020

30 April 2020 Judgment reserved.

Sundaresh Menon CJ (delivering the judgment of the court):

Introduction

1 The parties in this appeal have been engaged in a longstanding dispute over the proper corporate governance of the respondent, PNG Sustainable Development Program Ltd. The respondent is a Singapore-incorporated company limited by guarantee. At the time proceedings were commenced in the High Court by way of Suit No 795 of 2014 ("Suit 795/2014"), the value of the respondent's assets exceeded US$1.33bn. In Suit 795/2014, it was argued that pursuant to an agreement that was only partly captured in writing, the appellant holds significant rights of oversight and control over the respondent that are directly enforceable against it and irremovable without the appellant's consent. The appellant contended that the respondent had acted in contravention of these rights and additionally, breached its obligations as a charitable trustee.

2 The High Court judge ("the Judge") was unpersuaded and entirely dismissed the appellant's claims: *Independent State of Papua New Guinea v PNG Sustainable Development Program Limited* [2019] SGHC 68 ("Judgment"). Appellate relief is now pursued on substantially identical grounds.

3 As we explain below, we acknowledge that the appellant's case holds some intuitive attraction. The respondent is a well-resourced company, incorporated for the purpose of realising profits from certain mining operations and applying these to carry out a programme of sustainable development for the benefit of the people of Papua New Guinea ("PNG"). To achieve this objective, the respondent's constitution accords its directors broad powers to manage its funds and to make amendments to the company's corporate structure with what might appear to be only minimal safeguards to ensure accountability. The proposition that the parties behind the respondent's incorporation, which included the appellant, must have intended and insisted on having greater measures in place to keep the company in check, is persuasive at some level.

4 That being said, the appellant's case has considerable difficulties, which we will explore in detail later in this judgment.

Facts

5 The facts have been set out exhaustively at [8]–[31] of the Judgment and we do not propose to restate them in their entirety. Briefly, the background to this dispute originates with an agreement between the appellant and BHP Minerals Holdings Pty Ltd ("BHP"), presently the world's largest mining company, to develop the Ok Tedi gold and copper mine in the Western Province

of PNG. Ok Tedi Mining Limited ("OTML") was incorporated for this purpose. There were four shareholders: the appellant, BHP, Inmet Mining Corporation and Mineral Resources Ok Tedi No 2 Limited: (Judgment at [8]). The operations at the Ok Tedi mine, whilst profitable, caused extensive environmental damage in the Western Province. In late 2000, the growing economic and reputational cost of this damage prompted BHP to express its intention to shut down the mine prematurely. The appellant, however, was strongly of the view that the mine should remain operational because its profits contributed substantially to the gross domestic product of PNG. In an effort to accommodate the positions of both parties, which were pulling in opposite directions, OTML's stakeholders commenced extensive negotiations on arrangements that would facilitate BHP's exit from OTML without compromising the mine's operations: (Judgment at [9]–[12]).

6 By October 2001, these negotiations were in their final stages. The terms of the resulting agreement are captured in a letter dated 18 October 2001 from OTML to the Controller of Foreign Exchange of the Bank of PNG, whose approval was required for some of the envisaged transactions. In broad terms, it was agreed that the Ok Tedi mine would remain operational subject to enhanced environmental arrangements. BHP would divest its entire 52% shareholding in OTML to a special purpose vehicle which would be independent of OTML as well as OTML's past and present shareholders. As that special purpose vehicle, the respondent was incorporated in Singapore on 20 October 2001 as a company limited by guarantee. Its initial members were two lawyers from a Singapore law firm who retired after the admission of three new members, these being two of the respondent's directors and a Singapore-resident director. It was also decided that the transfer of BHP's shares to the respondent would be conditional

upon its release from liabilities arising under the Interim Management Agreement and indemnification by the respondent against claims for environmental damage caused by the Ok Tedi mine.

7 The substance of the parties' arrangements were subsequently recorded in a suite of written contracts (the "Written Contracts"), to which the respondent was also a party. The most relevant of these for the present appeal are a security trust deed in respect of the OTML shares ("Security Trust Deed") and a master agreement setting out the parties' primary obligations ("Master Agreement"). Relevant legislation was also enacted to give effect to the said arrangements. The transfer of BHP's shareholding in OTML to the respondent was effected on 7 February 2002: (Judgment at [22]).

8 The respondent's corporate constitution is set out in the (i) Memorandum of Association (the "Memorandum"); (ii) Articles of Association (the "Articles"); and (iii) Rules of the PNG Sustainable Development Program (the "Program Rules"), a document of considerable importance to the present appeal, that was annexed to and formed part of the Articles (collectively, the "Constitutional Documents"). Its objects are set out in the Memorandum, and these are, among other things, to apply the income from the Ok Tedi mine to "promote sustainable development within, and advance the general welfare of the people of, [PNG], particularly those of the Western Province of [PNG]" (the "Sustainable Development Purposes"). The objects clause in the Memorandum is a provision of especial importance because it defines the very purposes for which the venture existed and it was suggested that this was foundational to the entire plan. In the premises, much attention was devoted at the hearing before us to the questions of how readily the objects clause could be amended to effect drastic changes to the purposes for which the respondent had been brought into

existence in the first place, and how this would frustrate and defeat the entire premise of the parties' agreement. We will turn to that shortly.

9 The appellant's case in Suit 795/2014 was premised on the existence of a "partly oral and partly written" agreement concluded "in or around October 2001" between the appellant and BHP on behalf of themselves *and the respondent* (the "Agreement") even though the latter might not yet have been in existence at the time. Besides the terms outlined at [6] above, the substance of the Agreement as pleaded is said to be as follows:

> (a) The respondent's structure and Constitutional Documents would be specifically agreed such that oversight of the company would be vested equally in the appellant and BHP (the "Agreed Oversight Structure"). In particular, the Agreed Oversight Structure contemplated that:
>
> > (i) the members, directors and staff of the respondent would report and be accountable to the appellant and BHP;
> >
> > (ii) the right to appoint the respondent's members and directors would be shared equally between the appellant and BHP; and
> >
> > (iii) the appellant and BHP would be entitled to information pertaining to the respondent and to access its books of account, accounting and other records.
>
> (b) Even though the Agreed Oversight Structure was meant to regulate the appellant's and BHP's rights in respect of the control of the affairs of the *respondent*, it was to be directly enforceable against the

respondent (the "Direct Enforceability Term"). Further, it could not be amended without the consent of the appellant and BHP (the "Consent Term").

(c) Pursuant to the Agreement, the respondent would hold the OTML shares on a charitable trust (the "Trust") for, among other things, the Sustainable Development Purposes.

10 The appellant contended that the respondent breached the Agreement and the terms of the Trust by (i) effecting changes to its Constitutional Documents in contravention of the Agreed Oversight Structure; (ii) failing to provide an account of its dealings and assets; and (iii) dealing with assets in breach of its objects in the Memorandum and the Program Rules.

11 The Judge patiently addressed the multiplicity of arguments before him and set out his reasoning in considerable detail. In summary, he found the existence of the Agreement to be unsupported by the available evidence: (Judgment at [104], [198] and [289]). It followed that the Trust did not exist because it was pleaded to arise "[p]ursuant to the Agreement": (Judgment at [305]). Moreover, he found that there was no evidence to support a finding of an intention to create the Trust and in any case, the Trust was never constituted. Further, even if it had been constituted, the Trust's purposes could not be regarded as exclusively charitable: (Judgment at [306]). Flowing from these findings, the Judge dismissed the pleaded breaches of the Agreement and Trust: (Judgment at [343]). The present appeal challenges the entirety of the Judge's findings.

Our decision

Existence of the Agreement

12 We state at the outset our difficulty in accepting the appellant's narrative of a "partly oral and partly written" Agreement. The extensive negotiations preceding BHP's exit from OTML involved sophisticated and well-resourced parties, acting at all times with the benefit of their own legal advice as well as the involvement of a third-party neutral tasked to help bridge differences that arose along the way. It seemed implausible, in these circumstances that they would have *intended* to leave some things out of the suite of agreements that they had eventually entered into. We therefore asked Mr Alvin Yeo *SC* ("Mr Yeo"), who appeared for the appellant, whether it was his case that the parties *intended* to enter into these quite elaborate arrangements on terms that they would be partly in writing and partly oral. He readily and candidly accepted that that was *not* his case. But this immediately highlights the insuperable difficulty confronting Mr Yeo. Firstly, if it was not being contended that the parties *intended* to keep a part of their agreement oral, then it is unclear to us how there could be an oral agreement at all.

13 But beyond this, if it was not his case that the parties *intended* to keep a part of these arrangements oral and reduce them into writing, then it would seem to follow that the so-called oral agreement was an unintended omission from the written agreements. Yet, Mr Yeo did not seek rectification of the Agreement. Further, given the complexity of the anticipated transactions and the period of time over which these were negotiated and finalised, it seems to us almost as implausible that significant terms, such as those pleaded by the appellant, would have been *mistakenly* omitted from the agreed form of documentation. This is especially so because the consensus reached at *each stage of the parties'*

negotiations was reduced into and reflected in writing. A three-page "Heads of Agreement" dated 29 June 2001 detailed their initial consensus on key issues. Some months later, an updated "Summary of Agreements", reflecting the agreements reached as of 13 September 2001, received the approval of PNG's National Executive Council and BHP's board of directors. The proposed agreements then underwent further revisions, culminating in detailed Written Contracts, the Constitutional Documents and legislation.

14 This impression of an attempt to capture the parties' arrangements in writing comprehensively is bolstered by express provisions, which prohibit the amendment of certain types of arrangements. In particular, cl 8 of the Memorandum and cl 11 of the Security Trust Deed preclude any alteration of the Articles "so as to amend the Program Rules" without prior written approval of the appellant and BHP. These provisions are complemented by cl 3.2 of the Master Agreement, which mandates the respondent's compliance with the Program Rules and so provides an avenue for enforcing such compliance against the respondent. Having gone to considerable lengths to provide for and delineate, what from a practical perspective, was the largely immutable nature of the Program Rules, it seems to us only reasonable to conclude that the parties would have signposted any other aspects of their agreement that were intended to be subject to similar restrictions. Yet they did no such thing.

15 The appellant contends that the absence of express terms may be overcome by way of contractual implication. This argument faces a couple of obstacles: specifically, the point at which the Agreement allegedly came into being and the uncertain nature of its terms. On the former, we accept the Judge's findings that the two possibilities which emerged at trial do not align with the

appellant's pleadings: (Judgment at [150]–[156]). The suggestion that the oral agreement was concluded on 13 September 2001, that being the date on which the Summary of Agreements was concluded, fails because this predates the appellant's pleaded case of "in or around October 2001" by about a month. The second option considered by the Judge which was sometime after 13 September 2001 and before 18 October 2001 does not really address the first point of inconsistency. Instead, it seeks to mask that by opting for impermissible vagueness. This broad period leaves unclear the point at which the Agreement was finalised. No alternative possibility that is in line with the pleadings has been put forward on appeal. The appellant's inability to specify when the Agreement was allegedly entered into, in our judgment, undermines its very existence.

16 Secondly, it is well-established in our jurisprudence that a court will only imply a term where it is "necessary" to give effect to what the parties have agreed (*Sembcorp Marine Ltd v PPL Holdings Pte Ltd and another and another appeal* [2013] 4 SLR 193 ("*Sembcorp Marine*") at [100]). The inability to find the requisite consensus makes it impossible to imply any terms. Indeed, in our judgment, the evidence does not even show that the parties assented to the terms of the Agreement, and this forecloses any possibility of the court stepping in to imply such terms.

17 There is a further hurdle the appellant must overcome. In summarising the law on when a term will be implied into a contract, in *Sembcorp Marine* we held that implication was a gap filling exercise, which made it necessary for the court first to ascertain the purported "gap" in the contract. A gap is only remediable by implication where "the parties did not contemplate the issue at all and so left a gap" (at [94]–[95], [101(a)]). This is to be distinguished from

circumstances where the parties contemplated the gap but chose not to provide for it because (i) they mistakenly thought it would be adequately addressed by the express terms of the contract; or (ii) they could not agree on a solution as to how they would fill the notional gap.

18 The Judge correctly found that the facts of the case before him fell within these latter situations: (Judgment at [281]). In affirming his determination, we note the evidence of Mr Charles Mercey ("Mr Mercey") of NM Rothschild & Sons Ltd, a company appointed by OTML to facilitate the BHP exit negotiations. Mr Mercey's evidence is of particular importance because he was one of only two witnesses at trial who gave direct evidence on these negotiations. Having acted as a mediator or, in any event, as a third-party neutral, he was also a "disinterested witness": (Judgment at [267]). Mr Mercey testified that:

> … the possibility of entrenching rights more widely was raised very early on, in July, in the memo which Blake Dawson Waldron produced on organisational structures. And everyone was aware of that possibility and the fact that they could entrench provisions regarding not only the appointment of directors but all the other matters covered by the articles of association. But they chose not to.
>
> The overriding concern of the parties at the time was that the [respondent] abide by the [Program Rules], and it was the [Program Rules] which people wanted to have entrenched.

19 The thrust of this excerpt is that the parties actively deliberated the possibility of entrenching various provisions in the Constitutional Documents, including those, which apparently would have embodied the Agreed Oversight Structure, before ultimately deciding *not* to do so. Their primary focus instead was on implementing safeguards in respect of the Program Rules (in the manner

set out at [14] above). It follows from this that there was, in fact, no true gap in the final legal documentation.

20 Faced with these difficulties, Mr Yeo then submitted that the terms of the Agreement were perhaps *mistakenly* excluded. However, as we pointed out to him "[t]he proper remedy for such a situation is [not implication but] the rectification of the [relevant] instrument[s] in equity": (*Sembcorp Marine* at [96]). As rectification was not pleaded, the appellant cannot now seek relief on this basis. Moreover, there was nothing in the evidence to suggest that any such mistake had even occurred or how it was that a matter that must be shown to have been assented to could have been omitted from the documentation. Aside from all this, and even more fundamentally, as noted in the previous paragraph, the evidence suggests that there was no such assent at all and hence, also, no mistake at all.

21 We return here to the point with which we commenced this part of our analysis. In suggesting that the terms of the Agreement might have been omitted by mistake, Mr Yeo would have had to accept that the parties set out to capture the entirety of their agreement in written form. In other words, the oral aspects of the Agreement were accidentally and unintentionally left in an oral state. In our view, this was fatal to the appeal. An enforceable agreement requires a meeting of minds, a common intention amongst the contracting parties to be bound in a certain manner. The difficulties in the present case come down to these: there was no pleading or case founded on mistake and seeking rectification of the written agreements; there was no evidence of any agreement or consensus beyond the written agreements; and there was no evidence that OTML's stakeholders intended to create legal relations beyond the substance of their written agreements. As such, supplemental oral terms such as the Agreed

Oversight Structure could never have been envisaged and could neither bind the respondent nor form the basis for any relief.

Plausibility of the respondent's case

22 Nonetheless, in fairness to Mr Yeo's efforts, we recognise, as we have stated at the outset, that there was a certain attraction to the appellant's case. However, having analysed the position, we are satisfied that the parties did in fact know what they were doing and that they ended up with a particular balance of rights and safeguards with which they were comfortable. We begin by observing that it was and is undisputed that the appellant and BHP entered into a suite of written agreements some of which, as we shall shortly explain, were directly enforceable against the respondent. In this way, they put themselves in a position to secure the respondent's compliance with its objects, in particular, the Sustainable Development Purposes. Notwithstanding this, Mr Yeo contended that the respondent's case was not a plausible one in that it contemplated that its directors are vested with a very wide discretion as to how the company's funds are to be applied. Even if it were true that the objects and the Sustainable Development Purposes could be enforced, this would not count for much if the directors had the power to amend the objects clause of the Memorandum. Mr Yeo invited us to consider the counterfactual to the hypothesis that because these arrangements had been so carefully negotiated, it could not be the case that the parties would have left some aspects of their agreement undocumented in the Written Contracts. In particular, he submitted that the counterfactual, which is that it was open to the directors to alter the very purpose of these arrangements, was simply untenable.

23 Mr Yeo noted that according to the respondent, save possibly for situations involving the Program Rules, its directors are not subject to any checks and balances in the exercise of their powers. This, he said, must mean that they are free to make substantial changes to the respondent's Memorandum and Articles. Given the potential for abuse that this would present and the tremendous public interest in these arrangements, Mr Yeo submitted that it was inconceivable that the appellant and BHP would have gone along with an arrangement in which they were going to be largely at the mercy of the respondent's directors. Mr Yeo also argued that although the original Constitutional Documents chart an intended course for this venture, on the respondent's case, most if not all aspects of the respondent's governance structure are vulnerable to change by the directors. This includes, in particular, as we have already alluded to, cl 3 of the Memorandum, which sets out the company's objects. Rogue directors would be free to amend and even remove the substance of cl 3. If this were correct, it could negate the original purpose for which the respondent was incorporated. The parties surely could not have intended such an outcome.

24 In reply, Mr Philip Jeyaretnam *SC* ("Mr Jeyaretnam") dismissed this hypothesis as fanciful. Although the respondent's position before the Judge appeared to be that cl 3 of the Memorandum is not entrenched (see Judgment at [193]), before us, Mr Jeyaretnam submitted that the respondent's directors simply do not possess an absolute discretion to alter the objects of the company. He said this was borne out by the express terms of cl 8 of the Memorandum, the effect of which is to provide that the Program Rules shall not be amended in any respect without the prior approval in writing of the appellant and BHP. It was the respondent's position that the restrictions imposed by cl 8 apply with equal

force to the Sustainable Development Purposes. Our attention was directed to r 2 of the Program Rules which states "[t]he Program must be administered in accordance with *the Objects*" [emphasis added]. It was submitted that the phrase "the Objects" had to be construed a shorthand reference to the "Objects" in cl 3 of the respondent's Memorandum which included the following:

> Objects
>
> 3. The objects for which the Company is established are:-
>
> (i) To promote sustainable development within, and advance the general welfare of the people of, [PNG], particularly those of the Western Province of [PNG], through supporting programs and projects in the areas of capacity building, health, education, economic development, infrastructure, community self-reliance, local community leadership and institutional capacity and other social and environmental purposes for the benefit of those people.
>
> (ii) To identify and evaluate, finance, project manage and report on (but not for commercial reasons or profit) either by itself or in association or collaboration with other institutions having objects wholly or partly similar to the [respondent], programs and projects which support sustainable development for the people of [PNG] particularly those of the Western Province …
>
> …
>
> (iii) To carry out the PNG Sustainable Development Program in accordance with the 'Rules of the PNG Sustainable Development Program' scheduled to and forming part of the Articles of Association of the [respondent] as amended from time to time (the "Program Rules"), and to perform all the functions and duties of the [respondent] under the Program Rules.
>
> 4. Provided that it adheres to the Program Rules, the [respondent] may do all such other things as are incidental or conducive to or in

> furtherance of the attainment of the objects in clause 3 of this Memorandum…

25 It is evident from these provisions of the Memorandum that the objects of the respondent are rooted in the "PNG Sustainable Development Program" which in turn is to be carried out in accordance with the Program Rules. If the objects clause of the Memorandum was incorporated into the Program Rules and if the latter could not be amended otherwise than with the agreement of the parties, it would follow that the Sustainable Development Purposes are entrenched in the Program Rules, safeguarding them from the actions of the respondent's directors. To this extent, whatever other powers the respondent's directors might have had, this would not extend to the amendment of the objects set out in the Memorandum.

26 In determining the plausibility of the respondent's case, we first consider the nature of the legal vehicle that was *chosen* by the parties to carry out the respondent's objects. The respondent is a company limited by guarantee. This species of corporate entity has some particular features. First, members do not buy or own shares in the company, meaning the company has no initial paid-up capital. Instead, the members undertake to contribute a specified and typically small amount to the company's assets in the event of its being wound up (see s 4(1) of the Companies Act (Cap 50, 2006 Rev Ed) ("Companies Act"); Pearlie Koh, *Company Law* (LexisNexis, 3rd Ed, 2017) at para [1.35]). Second, unlike a company limited by shares, a company limited by guarantee cannot be registered with a share capital (s 17(5) of the Companies Act) or listed on the stock exchange. As noted by the learned authors of Hans Tjio, Pearlie Koh and Lee Pey Woan, *Corporate Law* (Academy Publishing, 2015) at para [04.003], this has a couple of notable implications:

> … The absence of a share capital effectively prevents the company from raising capital through the sale of equity, while the restriction on profit participation limits the company's ability to attract funds on the promise of profit sharing.

27 To summarise, a company limited by guarantee has no immediate access to capital and possesses a limited fund-raising capacity following its incorporation. It is understandable that from the perspective of profit-driven enterprises, there are little, if any, advantages in choosing to incorporate a company limited by guarantee. Such a company would, by its very nature, hinder a key objective of its operations, which would be to generate as much capital as possible to be channelled towards the company's business venture(s).

28 That is not to say that a company limited by guarantee is devoid of usefulness. For one thing, this type of company still possesses all the general advantages of incorporation, including the ability to enter into contracts and own property as a separate legal entity: s 19(5) of the Companies Act. Furthermore, leaving aside the sale of equity, there is nothing to prohibit the company from raising funds through alternative means. Potential sources of income might include endowments, donations, grants, charges or even subscription fees. The point to be drawn from this second observation is that although its operations are not oriented towards the generation of capital, a company limited by guarantee is still capable of being a going concern.

29 As a result of these features, this model of incorporation holds appeal, in particular, for groups focused on "charitable, scientific, religious or artistic activities" (*Walter Woon on Company Law* (Tan Cheng Han gen ed) (Sweet & Maxwell, 3rd Ed, 2009) at para [1.59]; see also, *Halsbury's Laws of Singapore - Company Law (Volume 6)* (LexisNexis Singapore, 2019) ("*Halsbury's Laws of Singapore*") at para [70.013]). Such organisations generally seek out the

benefits of a corporate status to facilitate operations or administer their public-spirited objectives. Besides being able to enter into employment or leasehold contracts, a designated legal entity can also be used to hold property, such as the OTML shares and annual dividends declared on them. In the particular context of this case, there was little need for the respondent to generate capital by itself because its primary function was and is to receive, safeguard and where appropriate, apply assets for the public purposes that were spelt out at the outset, namely, the Sustainable Development Purposes. Incorporating it as a company limited by shares could have been counterproductive because shareholders, being legitimately interested in their own profits and returns, might have wished that it be run with a similar focus in mind. Indeed, where exclusively non-profit bodies are concerned, the use of a company limited by shares would run counter to the profit-maximising objectives underlying incorporation.

30 A company limited by guarantee makes for an ideal alternative in such circumstances. The lack of any share capital means that the company in question can be used for varied purposes in no specific order of priority. Some or none of these purposes may be commercial in nature. This affords incorporators significant freedom in determining how the company should operate.

31 The absence of any shareholders and their accompanying demands comes at a cost. Greater flexibility to the manner in which the company can be run also translates into greater independence for the company's directors. Whilst they remain subject to the usual directors' duties and liabilities, the directors do not face the pressure of having to meet the expectations of shareholders concerned with seeing profitable returns on their investment. This apparent lack of accountability might be a potential cause for concern because directors are already conferred very wide powers of oversight under the Companies Act. In

particular, s 157A(1) provides that "[t]he business of a company shall be managed by, or under the direction or supervision of, the directors". This hands the directors a general right of management and ordinarily, the ability to "exercise all the powers of a company except any power that [the Companies Act] or the constitution of the company requires the company to exercise in general meeting" (s 157A(2) of the Companies Act). This language is mirrored in the model constitutions for private companies limited by shares and companies limited by guarantee in the First and Second Schedules to the Companies (Model Constitutions) Regulations 2015 (S 833/2015).

32 The decision of this court in *Chan Siew Lee v TYC Investment Pte Ltd and others and another appeal* [2015] 5 SLR 409 ("*TYC Investment*") illustrates that the circumstances in which the general meeting is required to exercise the company's powers are fairly limited. In *TYC Investment*, the constitution of the company in question restricted the powers of a director to sign cheques on the company's bank account without another director's approval (at [5]). Disagreements between the directors resulted in a deadlock, preventing the payment of fees and expenses owed to third parties. In response, the company's shareholders convened an extraordinary general meeting and passed resolutions to, among other things, approve the relevant payments (at [11]]–[13]).

33 In determining whether the shareholders had the power to do so, we noted that the court will usually lean towards preserving the division of powers between the board of directors and shareholders in a general meeting as set out in the constitution (at [36]). Reserve powers may only be implied in favour of the general meeting on the basis of *necessity* in exceptional circumstances (at [37]). The predicate of such necessity will generally be the existence of a deadlock within the board of directors (at [48]). In addition, any reserve power

must be limited to a dispute in relation to the performance of a *bona fide* obligation owed by the company to a third party and where there is nothing to suggest that it would not be in the company's best interests to honour those obligations (at [45]). What follows from this is that the members face an uphill task in acquiring even a limited degree of power to manage the affairs of the company.

34 The evidence before us indicates that OTML's stakeholders appreciated the potential difficulties that came with a company limited by guarantee, not least the issue of whether and how the directors would be controlled in any meaningful way. First and foremost, we note that all the parties were represented by lawyers and accordingly, must be taken to have known the legal consequences of the decisions that they were making. Moreover, the structure of the Constitutional Documents and Written Contracts, in particular the substance of and provisions relating to the Program Rules, suggest that these arrangements were intentionally designed to overcome the limitations of a company limited by guarantee. With this in mind, we now turn our attention to considering the relevant portions of the parties' written agreements in detail.

35 We begin with an examination of the Program Rules. Referencing cl 3 of the Memorandum (set out at [24] above), the respondent is tasked with carrying out the PNG Sustainable Development Program. As the "Rules of the PNG Sustainable Development Program", the function of the Program Rules is to prescribe the terms that the respondent must adhere to in running this venture:

RULES

of the

PNG SUSTAINABLE DEVELOPMENT PROGRAM

1. ESTABLISHMENT OF PROGRAM

The name of the Program is the "PNG Sustainable Development Program".

2. OBJECTS OF THE PROGRAM

The Program must be administered in accordance with the Objects.

…

It is evident that from their outset, the Program Rules make explicit that the PNG Sustainable Development Program, defined as "the Program" under r 1, is to be carried out with a certain overarching purpose in mind. More specifically, as set out above, r 2 stipulates that the Program *must* be administered in accordance with the Objects, these being the respondent's objects in cl 3 of the Memorandum.

36 To that end, much of the Program Rules concern the proper management of the respondent's income in line with the Sustainable Development Purposes. Key terms work together to limit the ways in which the respondent's directors can deal with moneys available for the Program. The foundation for this is r 8.1, which prohibits any distribution, payment or application of funds save where these are made in accordance with other provisions in the Program Rules, namely "[rules] 9, 10 and 12":

8.1 Distributions limited

No distributions or payments must be made by the [respondent], and no person having control over funds of the Program will permit any funds of the [respondent]

> to be applied, except in accordance with clauses 9, 10 and 12. Borrowed funds may be applied only as permitted by the terms of the relevant loan agreement and for any of the purposes contemplated in clauses 9, 10 and 12.

37 Directions on how the respondent's funds should be used are predominantly set out in rr 9 and 10, which specify the manner and order of priority in which the respondent's distributions, investment income and "Long Term Fund" must be applied. Beyond this, r 12 confers the respondent's board of directors a limited discretion to meet calls by OTML "for its shareholders to subscribe for further capital in OTML". Taken together, rr 8.1, 9, 10 and 12 delineate the boundaries that the respondent's directors have to operate within whilst administering the Program.

38 Whilst they nonetheless have wide discretionary powers for this purpose, it is relevant to note that the actions of the respondent's directors are subject to external scrutiny and review by the appellant, BHP and OTML. Pursuant to r 20 of the Program Rules, the respondent is compelled to provide these parties with the annual accounts of the Program along with a report of its activities:

> 20. **Report to [BHP], OTML and the [appellant]**
>
> The [respondent] must give annually:
>
> (a) a copy of the annual audited accounts of the Program;
>
> (b) a report of the Program's activities describing:
>
> (i) the financial status of the Program (including details of payments made under Contractual Obligations, the balance of the Long Term Fund and its [i]nvestments);

> (ii) the Projects supported by the [respondent] and amounts committed for or spent on each Project; and
>
> (iii) the amount spent by the [respondent] on Operating Expenses and the proportion of that expenditure to amounts spent on Projects: and
>
> (iv) details of any OTML shares subscribed by the Company,
>
> to [BHP], OTML and the [appellant].

The requirement to produce this information on an annual basis functions as an in-built check and balance mechanism, regulating annual expenditure and encouraging director accountability.

39 As we have already said, the foregoing provisions not only serve a regulatory function but also are aimed towards ensuring compliance with and the fulfilment of the Sustainable Development Purposes. It is telling that in deciding whether to exercise their discretion under r 12 of the Program Rules, the respondent's board "must make this decision having regard to *the Objects* and how best they might be achieved" [emphasis added]. The respondent's objects are not an ancillary consideration. Rather, their fulfilment remains the respondent's overriding objective and must be kept at the forefront of the board's consideration at all times. In the same vein, rr 9 and 10 require that a portion of the respondent's available moneys is to be channelled towards the Sustainable Development Purposes:

> 9.2 Application of Distributions received before the Mine Closure Date
>
> Distributions received by the [respondent] before the Mine Closure Date must be applied as follows, in the following order of priority:

> …
>
> (e) to the Current Purposes Allocation as follows:
>
> (i) 1/3rd in accordance with the Objects and at the discretion of the Board *for the benefit of the people of the Western Province of [PNG]*; and
>
> (ii) 2/3rd in accordance with the Objects and at the discretion of the Board *for the benefit of the people of [PNG]*
>
> …
>
> 10.3 Application of Long Term Fund after the Mine Closure Date
>
> After the Mine Closure Date the capital …. of the Long Term Fund must be applied in the following ways …
>
> (d) to Sustainable Development Purposes in accordance with clause 10.4.
>
> …
>
> 21.1 Definitions
>
> …
>
> 'Sustainable Development Purposes' means projects and other applications which, in the discretion of the [respondent] (acting in accordance with the Objects), are for *long term social, economic and/or environmental benefits of the people of [PNG]*.
>
> [emphasis in italics]

40 In our judgment, a close examination of the Program Rules reveals how central the respondent's objects, especially the Sustainable Development Purposes, are to the PNG Sustainable Development Program. In the same way that the Objects are rooted in the Program (see [25] above), the Program derives its meaning from the Objects. The two are interdependent. Taking the wording of rr 9.2 and 10.3 as an example, a substantive amendment to the Objects would make compliance with these provisions impossible, rendering this part of the Program meaningless. The Program Rules are only capable of effectively governing the Program if they are read and implemented with the respondent's

objects in mind. The upshot of this is that cl 3 of the Memorandum is effectively incorporated within the Program Rules.

41 Another notable feature of the Program Rules is their inclusion as part of the respondent's Constitutional Documents. Pursuant to the statutory contract between the members and the respondent, and amongst the members *inter se* (s 39(1) of the Companies Act), the respondent's members are empowered to apply to court to restrain an impending breach of the constitution or set aside an act done in contravention of the same (*Halsbury's Laws of Singapore* at para [70.145]). It follows that the substance of the Program Rules is directly enforceable against the respondent, giving teeth to the provisions we have examined above. This is complemented by cl 8 of the Memorandum, which, as considered at [24], generally precludes an amendment to the Program Rules. Save to the extent that they can lawfully be varied, the Program Rules along with the objects in cl 3 of the Memorandum, are entrenched and immutable.

42 The respondent's members are not alone in holding direct rights of enforcement with respect to the Program Rules. The respective signatories of the Security Trust Deed and Master Agreement possess separate contractual rights, which may similarly be employed towards regulating directorial conduct. Particular focus should be placed on the Master Agreement, this being the main document that captures the essence of the parties' finalised agreement. The appellant, BHP, OTML and the respondent are *all* party to this contract. Necessarily, each of them have the ability to enforce the obligations specified in the Master Agreement directly against one another. Of present relevance is cl 3.2, the respondent's agreement to comply with the Program Rules:

> In consideration of the transfer of the Shares under clause 3.1, the [respondent] agrees and undertakes for the benefit of [BHP],

> BHP Billiton, the [appellant] and the [respondent] that it will comply with the Rules of the PNG Sustainable Development Program which are set out in the schedule to [the Articles] (as those Rules may be amended from time to time). The obligation imposed by this clause on the [respondent] survives Completion.

The respondent is subject to an ongoing obligation faithfully to carry out the PNG Sustainable Development Program in accordance with the Program Rules. The effect of cl 3.2 is that where the respondent fails to do so, the remaining signatories of the Master Agreement can contractually compel the company's compliance. This enables the appellant, BHP and OTML to directly enforce rights in their favour that are set out in the Program Rules, such as r 20.

43 What may be gathered from the foregoing analysis is that the Program Rules is a document of great significance in which the parties invested considerable thought, time and effort. The reason for this is clear. BHP's agreement to exit OTML was predicated on the understanding that the substantial income from its former shareholding in OTML would be applied towards ameliorating the environmental damage caused by the Ok Tedi mine. Mr Paul Anderson, the chief executive officer of BHP at the material time, testified that BHP wanted an assurance that there would be limits on how the respondent would be run. The parties defined these limits in the Program Rules. In doing so, they made certain to emphasise the underlying importance of the respondent's objects by requiring the Program to be "administered in accordance with the Objects". This objective was reinforced with a host of supporting provisions. The consequence of this is that the respondent's objects as set out in the Memorandum and the Program Rules are inextricably linked, thereby ensuring that the Sustainable Development Purposes remain paramount.

44 These arrangements dispel any concerns of rogue directors being able to repurpose the respondent for their personal gain. Whilst retaining a substantial degree of autonomy, they are compelled to act in compliance with the Sustainable Development Purposes, which are to be implemented through the Program Rules. As an additional precaution, the appellant and BHP took steps to entrench the Program Rules in the respondent's constitution and provided for direct rights of enforcement against each other as well as the respondent. In this way, they guaranteed that the respondent's directors would be held accountable for any breaches of their obligations under the Program Rules.

45 This offers necessary context to the decision to incorporate the respondent as a company limited by guarantee. On the affidavit evidence of Mr Mercey, the respondent was "not intended to operate with a view to *maximising* profit" [emphasis added]. Although the respondent had to carry out certain "commercial or quasi-commercial functions", pursuant to the Sustainable Development Purposes, a significant aspect of its activities would be charitable in nature. Consequently, the parties wanted to avoid "the need for shareholders, who would have a claim on any profits". A company limited by guarantee was a direct answer to these concerns. For the reasons discussed at [30], it also allowed the parties to incorporate a company flexible enough to carry out a range of activities and serve multiple functions. Any downsides to this type of legal vehicle could be managed by the protections surrounding the Program Rules. This would preserve the original character and purpose of the respondent.

46 We therefore hold that the correct interpretation of the substance and effect of the Program Rules is as set out at [35]–[40] above. In line with the spirit of the PNG Sustainable Development Program, cl 3 of the Memorandum should be taken as having been incorporated within the Program Rules. It

follows that the Sustainable Development Purposes are safeguarded from amendment by cl 8 of the Memorandum and capable of being secured by direct enforcement under cl 3.2 of the Master Agreement. On this basis, there is in fact no reason to think that the substance of the parties' arrangements as put forward by the respondent is as implausible as the appellant suggests.

47 Indeed, when considered in its totality, the respondent's case presents a compelling narrative to rival that of the appellant's. The parties' recorded agreements bear all the hallmarks of a finely calibrated arrangement, the product of extensive care and deliberation. Whilst concerned with ensuring the respondent's adequate supervision, the parties intended for the company to be independently managed and free from any undue external influence. Subject to the Program Rules, the directors would have the latitude to control how the Program would be run. This coheres with Mr Mercey's evidence at [18] that the parties looked into the possibility of entrenching other arrangements in the Constitutional Documents but eventually decided otherwise. Relatedly, the appellant and BHP chose not to subscribe to be members of the respondent, foreclosing their entitlement to rights under the company's constitution. They were content with the contractual remedies available under the Master Agreement.

48 These decisions signal an effort to strike a fair balance between the parties' respective concerns. They are fully consistent with the fact that the parties had ample legal representation and would have been advised of the different options available to them in the course of reaching the agreement that they did. This removes any basis for intervention by this court to remedy the perceived shortcomings of their decision. In the circumstances, we also think it difficult for the appellant to assert the existence of more extensive arrangements

beyond those reflected in the set of written documents. It is far more logical that having gone to such lengths to set up the respondent's governance structure, the parties would have detailed this exhaustively in writing, as opposed to choosing an odd mix of partly oral and partly written agreements that the appellant contends for.

Estoppel by convention

49 For completeness, we also consider the appellant's argument of an estoppel by convention. The elements of this action are set out in *Travista Development Pte Ltd v Tan Kim Swee Augustine and others* [2008] 2 SLR(R) 474 ("*Travista Development*") at [31]. For an estoppel to arise, the parties must have acted on an incorrect assumption of fact or law, which was either shared or acquiesced to. It must also be unjust or unconscionable to allow the parties (or one of them) to go back on that assumption. The appellant contends that the respondent is estopped from "denying the existence of facts giving rise to the Agreement", namely that the parties agreed to the Agreed Oversight Structure, Direct Enforceability Term and Consent Term (Judgment at [292]–[293]). These are said to be shared assumptions upon which the parties' written documentation rested and were reinforced by various representations from the respondent.

50 Having accepted that the substance of the parties' agreement is confined to their written documentation, any claim of estoppel must necessarily fail. Whilst the parties may have discussed terms reflective of the Agreed Oversight Structure, Direct Enforceability Term and/or Consent Term, they ultimately *did not agree* to entrench these provisions in writing. There was no meeting of minds as to these terms. This precludes the possibility of the parties holding any

shared assumptions as to the same. Thus, there is no basis on which to find a convention or any other understanding that the appellant and BHP would hold greater rights of control than are reflected in the suite of agreements that were entered into.

51 Even on the premise that shared assumptions *were* held, the parties must have formed these "pursuant to an agreement or something akin to an agreement" (*Travista Development* at [31(b)]). This presents the appellant with a second insurmountable difficulty. OTML's stakeholders entered into a multitude of written agreements, not all of which were executed by the same signatories. The appellant must therefore particularise which of the Written Contracts is subject to its pleaded estoppel because this would determine which parties are bound by that estoppel. Having failed to do so, its argument also fails for uncertainty.

Conclusion

52 For the foregoing reasons, we dismiss the appeal. We uphold the Judge's finding as to the non-existence of the Agreement. We also agree that on the appellant's pleaded case, the Trust's existence is predicated on the parties having entered into the Agreement. Thus, the Trust does not exist. The pleaded breaches of both the Agreement and Trust must necessarily fail.

53 Unless the parties are able to come to an agreement on costs, they are to file written submissions, limited to five pages, as to the appropriate costs orders they contend we should make. These submissions are to be filed within one month of the date of this judgment.

Sundaresh Menon Chief Justice	Andrew Phang Boon Leong Judge of Appeal	Chao Hick Tin Senior Judge

Alvin Yeo *SC*, Tan Whei Mien Joy, Koh Swee Yen, Lin Weiqi Wendy, Quek Yi Zhi, Joel and Ng Pei Qi (WongPartnership LLP) for the appellant; and
Philip Antony Jeyaretnam *SC*, Mark Jerome Seah Wei Hsien, Gan Yingtian, Andrea, Chua Weilin, See Kwang Guan and Ashwin Nair Vijaykumar (Dentons Rodyk & Davidson LLP) for the respondent.