

# Is the Limit of the Equitable Doctrine of Fiduciary Liability Determinable?

*Mabo* and the Fiduciary Duty  
Principle in a Non-Western  
Common Law Jurisdiction

H.A. Amankwah\*

## INTRODUCTION

The fiduciary obligation concept was initially an essential appurtenance of the use device, the progenitor of the modern trust institution. The rivalry between the common law courts and the Court of Chancery which the Chancellor developed resulted in the fragmentation of rights and interests in property giving rise to the legal-equitable interest dichotomy.<sup>1</sup> The resultant position was that while the legal interest in property may inhere in one person (that is, the feoffee to uses), the enjoyment of the beneficial interest could be another person's endowment (that is, the cestui

---

\* BA, LLB (Ghana), LLM (Cornell), SJD (NYU); Faculty of Law, James Cook University.  
<sup>1</sup> See, generally, R. Megarry and H.W.R. Wade, *The Law of Real Property* (5th ed., London: Stevens & Sons Ltd, 1984), Chapter 4; R. Sackville *et al.*, *Property Law Cases and Materials* (5th ed., Sydney: Butterworths, 1994), 190 ff.; R.P. Meagher *et al.*, *Equity: Doctrines and Remedies* (3rd ed., Sydney: Butterworths, 1992), 130 ff.; *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.

que use) and all this because of the Chancellor's tenacity in ensuring the enforcement of the observance of the confidence and trust which the feoffor reposed in the feoffee (the trustee). So strongly did the Chancellor feel about the fiduciary's obligation of honouring the feoffor's trust and confidence that he would enforce its observance against any person into whose possession the *res* fell and who derived such right of possession through the fiduciary.

It is axiomatic that 'the categories of fiduciary obligation are not closed'.<sup>2</sup> The concept is malleable and pliable enough to accommodate diverse relational situations: trustee-beneficiary, agent-principal, guardian-ward, company directors-corporation.<sup>3</sup>

However, the doctrine has been reformed in other places where the common law has been transported to suit the peculiar circumstances of the legal terrain.<sup>4</sup> The oft-quoted dictum of Lord Denning MR (as he then was) in *Nyali v A-G*<sup>5</sup> in relation to colonial Africa is instructive here:

The next proviso [the East African Order in Council 1902] provides, however, that the common law is to apply 'subject to such qualifications as local circumstances render necessary'. This wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification. Just as with an English oak, so with the English common law. You cannot transplant it to the African continent and expect it to retain the tough character which it has in England. It will flourish indeed, but it needs careful tending. So with the common law. It has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refinements, subtleties and technicalities which are not suited to other folk. These off-shoots must be cut away. In these far-off lands the people must have a law which they will respect. The common law cannot fulfil this role except with considerable qualifications.

In the United States,<sup>6</sup> the fiduciary duty of government to Aborigines (Indians) was founded on some principle of guardianship. In Canada, it rested on the proposition that 'Indian interest in [land] is inalienable except upon surrender to the Crown'.<sup>7</sup> The Mandate and Trusteeship System of the League of Nations and the United Nations rested on a 'sacred trust'

<sup>2</sup> Per Megarry V-C in *Tito & Ors v Waddel* (No. 2) [1977] Ch 106, 235.

<sup>3</sup> *Percival v Wright* [1902] 2 Ch 421.

<sup>4</sup> The received common law comprises the doctrine of equity. Section 1(1) of the *Interpretation Act 1960* (Ghana) typifies the position throughout West Africa. It provides: 'The common law as comprised in the laws of Ghana, consists in addition to the rules of law generally known as the common law, of the rules generally known as the doctrine of equity. ...'

<sup>5</sup> [1956] 1 QB 1, 16-17.

<sup>6</sup> See, for example, *Cherokee Nation v Georgia* 30 US (5 Pet) 1 (1831) where Marshall CJ thought the relation between the US Government and the indigenous Indians resembled that of 'a ward to his guardian', at 16-17.

<sup>7</sup> Per Dickson J in *Guerin v The Queen* (1984) 13 DLR (4th) 321, 330.

(political trust?) of 'civilisation'.<sup>8</sup> Even here in Australia, Dawson, in his dissenting judgment, was prepared to admit a fiduciary relation between government and Aboriginals on the basis of 'the existence of *some sort of aboriginal interest existing in or over the land*',<sup>9</sup> relying on the authority of the Canadian cases (emphasis added).

There would appear to be more in the power/dependency axis than meets the eyes of legal writers and commentators and which could form an appropriate basis for holding the Crown in breach of a fiduciary duty in its dealings with indigenous Australians and their land upon colonisation.

## THE FIDUCIARY DUTY IN *MABO*

In the *Mabo* case there was the hint that the defendant's liability could well rest on its breach of a fiduciary duty to indigenous Australians consequent upon the Crown's assumption of sovereignty over the continent. The plaintiff submitted:

The Defendant is under a fiduciary duty, or alternatively bound as a trustee, to the Meriam people, including the Plaintiffs to recognise and protect their rights and interests in the Murray Islands. ...<sup>10</sup>

The plaintiffs would have argued this proposition as an alternative basis for the defendant's liability had they not succeeded in their proof of native title, but since they succeeded on this basis, the court did not see any compelling reason to delve into the matter. None of their Honours (except Toohey J) gave the matter any considerable thought.<sup>11</sup> Brennan J (with whom Mason CJ and McHugh J agreed) opined that some fiduciary duty situation could be involved in the Crown's exercise of its discretion to grant land rights to the settlers had native title been 'surrendered to the Crown in expectation of a grant of tenure to the indigenous title holders'.<sup>12</sup> However, his Honour was of the view that it was 'unnecessary to consider the existence or extent of such a fiduciary duty'<sup>13</sup> in the circumstances and glossed over the matter.

Deane and Gaudron JJ thought of the fiduciary obligation from the angle of a remedial relief — that is, the situation in which a constructive trust could be imposed on a defendant to prevent unjust enrichment.<sup>14</sup>

---

<sup>8</sup> C. Weeramantry, *Nauru: Environmental Damage Under International Trusteeship* (Melbourne: Oxford University Press, 1992), *passim*; *Tito & Ors v Waddell* (No. 2), *supra* n. 2; UN Doc GAOR 1.2 Supp. 5 (1946); 8 *UN Treaty Series* 181 (1947).

<sup>9</sup> (1992) 175 CLR 1, 166–7.

<sup>10</sup> *Id.* 199.

<sup>11</sup> *Id.* 199–205.

<sup>12</sup> *Id.* 60.

<sup>13</sup> *Id.* 113.

<sup>14</sup> *Id.* 163–9.

Dawson J also considered the matter in some detail, but having determined that native title did not survive the Crown's acquisition of the continent, dismissed the matter.<sup>15</sup> Hughes properly pointed out that his Honour reserved stating an opinion on the converse of the situation he assumed, that is, whether a fiduciary duty relation would have existed had he determined that native title survived the Crown's acquisition of Australia.<sup>16</sup> This would have been a useful intellectual exercise into a difficult subject.

Before examining Toohey J's analysis of the subject, it is appropriate to express some views on the methodology of their Honours. Their Honours lost a valuable opportunity to tackle head-on a problem which the exercise of a little foresight would have made obvious to them as likely to recur. By temporarily shrugging off the challenge, they were putting off the evil day and would, therefore, be saddled with its consideration at some future time.

As an earlier case before the court involved not the common law but the construction of a dispositive scheme, that is, a statutory trust,<sup>17</sup> it can be said that the situation which the *Mabo* case presented the court was a case of first impression. Native title was novel and complex enough for their Honours, and they perhaps thought it wise not to exacerbate further an already tangled situation by considering the ramifications of a fiduciary obligation situation. With the greatest respect, however, to Brennan J, it is unimaginable that a people would surrender their interests to another person for that other only to grant it back to them, unless, of course, that kind of transaction was entered into on the clear understanding that the surrender would be reciprocated in some manner beneficial to them — for example, by receiving in return protection from that other.<sup>18</sup>

Again with due deference to Deane and Gaudron JJ, this writer finds it difficult to comprehend why their Honours took such a narrow view of the nature of a fiduciary obligation. The court itself enunciated in an earlier case (on which Toohey J also relied), in stating that 'the categories of fiduciary relationships are not closed',<sup>19</sup> as follows:

The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act on behalf of or in the interests of another person in the exercise

<sup>15</sup> *Id.* 166.

<sup>16</sup> C. Hughes, 'The Fiduciary Obligation of the Crown to Aborigines: Lessons from the United States and Canada', (1993) 16(1) *University of New South Wales Law Journal* 70, 73. See also A. Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World', (1994) 110 *LQR* 238.

<sup>17</sup> *Northern Land Council v The Commonwealth* (1987) 61 ALJR 616.

<sup>18</sup> British colonial history is replete with examples of this kind of arrangement, witness the *Gold Coast (Ghana) Bond of 1844*. See also the view of David Tan on this: 'The Fiduciary as an Accordion Term: Can the Crown Play a Different Tune?', (1995) 69 *Australian Law Journal* 440.

<sup>19</sup> *Supra* n. 8 at 200.

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 the 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?<sup>20</sup>

Were their Honours influenced in the view they held by the incalculable cost to the defendant any finding of a breach of a fiduciary duty on its part would entail?<sup>21</sup>

Toohy J analysed the fiduciary obligation of the Crown to Australia's indigenous population, more critically relying on North American decisions principally.<sup>22</sup> Positing that if the Crown's power to alienate the traditional rights and interests of the people of Murray Islands put a fetter on their ability to alienate those rights and interests, thus rendering them virtually inalienable except perhaps to the Crown, the resulting power-vulnerability equation<sup>23</sup> gave rise to a fiduciary relationship between the Crown and the Merian people; and while recognising that a fiduciary owes the beneficiary certain duties — for example, loyalty, accountability, maintenance of the integrity of the trust property,<sup>24</sup> etc. — he chose to resolve the issue *via* a remedial approach — that is, the imposition of a constructive trust on the Crown.<sup>25</sup>

The imposition of constructive trust would seem, however, to be

<sup>20</sup> *Hospital Products Ltd v United States Surgical Corporation*, *supra* n. 1 at 96–97.

<sup>21</sup> In *Kinloch v Secretary of State for India* (1880) 15 Ch D 1, Baggallay and Bramwell LJ emphasised the 'enormous expense' and 'monstrous inconvenience' which a finding of a fiduciary duty on the part of the Crown and its agents would entail (p. 13). In the Court of Appeal (1881) 7 App Cas 619, Lord Selborne LC formulated the two classes of trust as follows:

'Now the words "in trust for" are quite consistent with, and indeed are the proper manner of expressing, every species of trust — a trust not only as regards those matters which are the proper subjects for an equitable jurisdiction to administer, but as respects higher matters, such as might take place between the Crown and public officers discharging, under the directions of the Crown, duties or functions belonging to the prerogative and to the authority of the Crown. In the lower sense they are matters within the jurisdiction of, and to be administered by, the ordinary courts of equity; in the higher sense they are not. What their sense is here, is the question to be determined, looking at the whole instrument and at its nature and effect.' (pp. 625–6).

This was in respect of the interpretation of a written document in the Royal Warrant in issue.

In respect of other situations where a written document would be lacking (i.e. when ever trust could be implied), Lord O'Hagan LJ said:

'There is no magic in the word "trust". In various circumstances, it may represent many things, and the Secretary of State to whom a delegation was made for special and specified purposes, might well be described as a "trustee" for the Crown as, for the Crown, he was required to take on himself the distribution of the property in question. But he was not constituted a "trustee" for a *cestui que trust* entitled, according to the rules of equity, to ask for the administration of a fund.' (p. 630).

<sup>22</sup> *Supra* n. 8 at 199–205.

<sup>23</sup> *Id.* 203.

<sup>24</sup> *Id.* 204.

<sup>25</sup> *Ibid.*

antithetical to the premise of his earlier consideration of the issue of the extinguishment of native title — that is, that this could eventuate by the promulgation of clear and unambiguous legislation to that effect.<sup>26</sup> This would, of course, be inconsistent with his own prescription that the Crown's duty in the circumstances of the Meriam people consisted in ensuring that 'traditional title is not *impaired* or *destroyed* without the consent of or otherwise contrary to the interests of the titleholders'<sup>27</sup> (emphasis added).

Be that as it may, Toohey J's analysis of the trust institution in relation to government operations in Australia threw wide open the door to a future reconsideration of the entire issue by the highest court in the nation. Indeed, in the challenge which the State of Western Australia mounted against the *Native Title Act*,<sup>28</sup> the court examined anew the scope of s. 51(xxvi) (the 'races power' provisions) of the Constitution of Australia (1900) and reached the conclusion that 'special laws' enacted for a race in terms of those provisions could evoke a judicial evaluation of the needs of the people of that race.<sup>29</sup> As Tan suggests, that analysis of the court coupled with earlier decisions would appear to provide additional grounds for arguing a case of the Crown's fiduciary obligation to indigenous Australians.<sup>30</sup>

## THE FIDUCIARY DUTY IN A NON-WESTERN COMMON LAW JURISDICTION

There is a way in which the equitable doctrine of fiduciary liability has been adapted for application in former British West Africa<sup>31</sup> and which could provide a useful insight into alternative ways of looking at the current Australian situation if the West African law is purged of its esoteric

<sup>26</sup> *Id.* 192–7.

<sup>27</sup> *Id.* 204.

<sup>28</sup> *The State of Western Australia v The Commonwealth* (1994) 183 CLR 373. Some academics hold the view that the High Court could have decided the *Mabo* case on the basis of a constitutionally guaranteed right — that is, the right of property: I.K. Omar, 'The Semantics of *Mabo*: An Essay in Law, Language and Interpretation', (1995) 2 *James Cook University Law Review* 154.

<sup>29</sup> *Supra* n. 28 at 459–69.

<sup>30</sup> 'The Fiduciary as an Accordion Term...', *supra* n. 18 at 454.

<sup>31</sup> Perhaps a short history of the evolution of the West African court system will not be out of place here.

By the *Supreme Court Ordinance 1876*, as amended 1 *Laws of Gold Coast* c.7 (1920), the Supreme Court of Judicature was created for the Gold Coast colony (which in 1876 included Lagos colony, now a part of Nigeria) 'and for territories thereto near and adjacent wherein Her Majesty may at any time before or after the commencement of this Ordinance have acquired powers and jurisdiction': *ibid.* s. 12. The court comprised the Full Court — the appellate tribunal — and Divisional Courts sitting in each of the administrative provinces of the colony. Appeals from the Full Court lay to the Privy Council. In 1928, the West African Court of Appeal was established as the penultimate Court of Appeal for British dependencies in West Africa, with jurisdiction to entertain appeals

customary law content. The common law needed careful tending in exotic climes. This approach is being canvassed because of our option for a multicultural society; our unity in diversity can only thrive on a philosophy of open-mindedness, adaptability to change, and a willingness to borrow from the leaves of the books of other non-indigenous cultures.

The orthodox application of the fiduciary obligation doctrine in the colonial setting of the South Pacific is symbolised by *Tito's case*.<sup>32</sup> In that case, Megarry V-C, relying on Lord Selborne's formulation,<sup>33</sup> said the concept of trust is an elastic one and could have several meanings,<sup>34</sup> and spoke of at least two such denotations: 'trusts in the lower sense'<sup>35</sup> and 'trusts in the higher sense'.<sup>36</sup> Trusts in the latter category create 'equitable obligations enforceable as such by the courts'.<sup>37</sup> Trusts in the lower group 'are not

---

from the Supreme Courts of Gambia, Gold Coasts (now Ghana), Nigeria and Sierra Leone: 1 *Laws of Gold Coast* c.5 (1937), as amended. The Gold Coast judiciary was reorganised by extending the *Supreme Court Ordinance* of 1876 to the later accretions to the British jurisdiction — namely, Ashanti and the Northern Territories — thereby creating one Supreme Court for the whole colony. Thus, immediately prior to Ghana's independence (6 March 1957), the highest tribunal situated in the Gold Coast was the Supreme Court from which appeals lay to the WACA and thence to the Privy Council.

The *Courts (Amendment) Ordinance* of 1957 created the High Court and the Court of Appeal as component parts of the Supreme Court, and abolished the right of appeal to the WACA whose appellate jurisdiction was transferred to the Court of Appeal. However, the Privy Council retained its ultimate appellate jurisdiction — Ghana (Appeal to Privy Council) Order in Council, 1957, *Laws of Ghana* No. 387 (1957). The Republic Constitution (1 July 1960) again reorganised the Ghana Judiciary. There are now two Superior courts — the High Court and the Supreme Court. The right of appeal to the Privy Council was abolished by the *Constitution (Consequential Provisions) Act 1960*. The Supreme Court is today the court of last resort in Ghana. Article 42(4) of the suspended Republic Constitution reads:

'The Supreme Court shall in principle be bound to follow its own previous decisions on questions of law, and the High Court shall be bound to follow the previous decisions of the Supreme Court on such questions, but neither Court shall be otherwise bound to follow the previous decisions of any court on questions of law.'

Similar developments occurred in Nigeria, Sierra Leone and the Gambia with those nations' attainment of independence. However, the corpus of judicial decisions of the WACA remain authoritative in all the jurisdictions to date so that it is common place to talk of a West African common law; see, for instance, E.W.C. Daniels, *The Common Law in West Africa* (London: Sweet & Maxwell, 1964). In land matters especially, as Olawoye comments in his own work, *Title to Land in Nigeria* (Lagos (Nigeria): Evans Brothers Ltd, 1981), 19:

'The celebrated dictum of Lord Haldane in *Amodu Tijani v Secretary, Southern Nigeria*, referred to below, derived from a report on land tenure in West Africa, and a good number of cases which are referred to in this work are of Ghanaian or Sierra Leonian origin. It is on these common principles that this work is, in the main, based, although efforts will be made to refer to significant local variations which have been made known by judicial decisions. A person interested in the laws of a particular locality should make his own inquiries as to possible variations in that particular locality.'

<sup>32</sup> *Supra* n. 2.

<sup>33</sup> *Supra* n. 21.

<sup>34</sup> *Supra* n. 2 at 216.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> *Id.* 211.

understood as relating to a trust as enforced in a court of equity'.<sup>38</sup> Conceding, however, that since the word is in common use in the English language, it can therefore be hardly disputed 'that a trust may be created without using the word "trust"'.<sup>39</sup> He concludes: 'In every case one has to look to see whether in the circumstances of the case and on the true construction of what was said and written, a sufficient intention to create a trust has been manifested.'<sup>40</sup> The plaintiff's action failed because his Lordship thought (as was the case in *Kinloch's case*) the issue in the case centred on the interpretation of a colonial Ordinance providing that receipts from certain mining operations 'shall be paid to the resident commissioner and shall be held by him *in trust* on behalf of'<sup>41</sup> the people of designated Island territories in the West Pacific<sup>42</sup> (emphasis added). Ironically, his Lordship found, however, that in their dealing with the people of the Islands, the agents of the Administering Authority (i.e. the British Government) had acted 'more like a wolf than a shepherd'<sup>43</sup>

In *Amodu Tijani v The Secretary Southern Nigeria*,<sup>44</sup> Viscount Haldane, speaking for the Privy Council, quoted from Rayner CJ's *Report on Land Tenure in West Africa* (1898) to illustrate that communal title in West Africa was symbolised by the chief or headman's ownership. This person, he said, 'is to some extent in the position of a trustee, and as such holds the land for the use of the community or family'.<sup>45</sup> In West Africa, therefore, the trust concept as sanctioned by the Privy Council has been adapted to suit the peculiar circumstances of former British territories there, for the purposes of determining native title issues, a title which is *sui generis* and autochthonous and has no apposite counterpart in English jurisprudence.

A chief or stool occupant,<sup>46</sup> family head or other person in charge of communal or corporate property has been held to be subject to some of the onerous obligations equity imposes on a trustee in law generally.<sup>47</sup> Among these, the duties to act in good faith, not to derive benefits from the *res*, not to allow a conflict of duty and interest situation in his or her dealing with the *res* (loyalty?) and to account for his or her stewardship

---

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> *Ibid.*

<sup>41</sup> Sections 6(2) and 7 of the *Mining Ordinance* (No. 4 of 1928), Gilbert and Ellice Islands.

<sup>42</sup> Banabans, Fiji, Nauru, and Ellice and Gilbert Islands.

<sup>43</sup> *Supra* n. 2 at 208–10.

<sup>44</sup> [1921] 2 AC 399.

<sup>45</sup> *Id.* 404.

<sup>46</sup> The stool is to West Africans what the throne signifies to Britons. It is a kind of chair. Bentsi-Enchill said: 'As the symbol of the unity of the family or clan it is a consecrated chair, an object in which is held to be enshrined the soul or spirit of the common ancestor.' *Ghana Land Law* (London: Sweet & Maxwell, 1964), 29; see also K.A. Busia, *The Position of the Chief* (London: Oxford University Press, 1968), 33. In respect of Nigeria, see Olawoye, *supra* n. 31 at 22; T.O. Elias, *Nigerian Land Law* (4th ed., London: Sweet & Maxwell, 1980), 77; and *Amodu Tijani's case*, *supra* n. 44.

<sup>47</sup> *Abude v Onanor* (1986) 12 WACA 102.

feature prominently in all the discourses on the content of the fiduciary duty of the trustee.

Before examining the content of the fiduciary obligation of a trustee under West African customary law it may perhaps be helpful to deal with the question of how trusteeship comes into existence. A chief or head of family assumes office by election, although among some Akan groups some positions were hereditary, and even in these circumstances, the final say sometimes rested with particular persons in a lineage — the Queen mother, for example, among the Ashanti — after protracted, behind the scenes, and often delicate and complex consultations, negotiations and manoeuvres.<sup>48</sup>

That trusteeship arises by election under West African customary law stands in sharp contrast to the British Crown's unilateral assumption of sovereignty in former colonial territories where the acquisition of sovereignty occurred in some instances through war and conquest. Again, in former British colonial possessions, the legal consequences of the Crown's assumption of sovereignty depended sometimes on whether the territory was settled or conquered. Additionally, it is inconceivable that in a culture where oral tradition rather than documentation is the common mode of effecting legal relationships, issues of a dispositive trust such as those the courts were faced with in *Kinloch* and *Tito* would arise. It is conceded, however, that sometimes it is the intention of the settlor rather than anything else that determines the existence or otherwise of a trust under the law of equity. Under customary law, however, that consideration does not arise, for as Asante pointed out:

The creation of the typical Anglo-American trust depends on the settlor's intention. But intention is utterly irrelevant to the establishment of fiduciary relations between the head and members of the family. The head voluntarily assumes his office, but is placed in a fiduciary position by virtue of the office and without respect to his intentions. Thus there is no analogy here with either an express or implied trust; the former is predicated on the overt intention of the settlor, the latter on his inferred expectations. The analogy with a constructive trust is valid to a point: both fiduciary situations arise by operation of law. ...<sup>49</sup>

<sup>48</sup> M. Gluckman, 'Natural Justice in Africa', (1964) 9 *Natural LF* 25; R.S. Rattray, *Ashanti Law and Constitution* (London: Oxford University Press, 1923), 23; D. Kimble, *A Political History of Ghana* (Oxford: The Clarendon Press, 1963), 127.

<sup>49</sup> 'Fiduciary Principles in Anglo-American Law and the Customary Law of Ghana — A Comparative Study', (1965) 14 *International & Comparative Law Quarterly* 1144, 1149. See also *Re Armstrong* [1960] VR 202.

## Good Faith

Acting in good faith connotes the attainment of a certain degree of honesty, the making of appropriate disclosures and the provision of adequate information in respect of dealings affecting the *res*. A chief must generally not alienate stool property except in consultation with his or her councillors, and a family head must likewise not dispose of family property except with the knowledge and consent of principal members. However, the stringent requirement of the law is sometimes dispensed with. Since the chief sometimes acted alone, it has been held that the requirement amounts to no more than ensuring some form of communal representation and that, therefore, he or she could alienate communal land with the concurrence of his or her linguist.<sup>50</sup> The analogy of the modern corporation which acts through its officers would seem appropriate here.

The good faith requirement has been more stringently enforced under the common law than at customary law, but under the law of equity the duty relates more to the obligation to disclose any personal interest the fiduciary may have in any business he or she transacts on behalf of the beneficiary.<sup>51</sup> But as will be evident presumably, since at customary law a fiduciary could also be a beneficiary at the same time, a strict insistence on the observance of the rule would seem otiose.

## Conflict of Duty and Interest (Loyalty)

In equity, a beneficiary is under the obligation always to ensure the separation of his or her personal interests from those of the beneficiary and that these should never collide. This principle in the context of agency has been succinctly stated by Lord Cairns LJ in *Parker v McKenna*<sup>52</sup> thus:

Now the rule of this Court ... as to agents is not a technical or arbitrary rule. It is a rule founded on the highest and truest principles of morality. No man can in this Court, acting as an agent, be allowed to put himself into a position in which his interest and his duty will be in conflict.<sup>53</sup>

At customary law, since land has always been regarded as 'an ancestral trust'<sup>54</sup> which the departed ancestors have entrusted to the living to hold for the benefit of themselves and generations yet unborn, it follows that a fiduciary is also entitled to beneficial enjoyment of the property. In that sense the fiduciary's interests coincide with those of the remainder

<sup>50</sup> *Barnes v Atta* (1871) *Sar. FCL* 148.

<sup>51</sup> *Bentley v Craven* (1853) 18 *Bean* 75; 52 *ER* 29.

<sup>52</sup> (1874) *LR* 10 *Ch* 96.

<sup>53</sup> *Id.* 118.

<sup>54</sup> See S.K. Asante, 'Interests in Land in the Customary Law of Ghana — A New Appraisal', (1965) 74 *Yale Law Journal* 849, 852.

of the group, a situation which in equity (though not at common law) would be anomalous since this would necessarily imply the resting of the legal and the equitable interests at once in one and the same person.

## Deriving a Benefit

Here also as we have observed in the case of the conflict of interest situation, the position under customary law is different from its equitable counterpart. The fiduciary is also a beneficiary of ancestral property. Attached to the right of participation in the enjoyment of the trust *res*, however, is the additional burden on the fiduciary to augment through every lawful means its value. This would seem to resemble the equitable duty of the trustee to exercise reasonable care in his or her dealing with the *res*. This means that he or she must act as a 'prudent person'. In this regard, he or she may invest trust property in any kind of investment provided it is prudent having regard to the circumstances of the trust. This duty has been codified in some jurisdictions.<sup>55</sup> Additionally, under West African customary law the preservation and enhancement of the value would entail the defence of litigation and prosecution of action involving the *res*, the legal costs of which the fiduciary is personally liable for.<sup>56</sup> Under the law of equity, however, a trustee who prosecutes a claim in respect of trust property doesn't have to pay from his or her own pocket. Such legal costs are incidental to the administration of the trust and are accordingly chargeable to the trust account.<sup>57</sup>

## The Duty to Account

In equity law, the duty to account is perhaps the most important of all the duties the law imposes on a fiduciary. So strictly is this duty enforced that sometimes it may become necessary to follow trust money into other funds — tracing.<sup>58</sup> The equity lawyer would be confounded perhaps to learn that, under West African customary law, this is the one duty which is almost invariably played down because of the tradition that old age was synonymous with sagacity and considered the prerogative of tribal

<sup>55</sup> See, for example, the *Trustee and Trustee Companies (Amendment) Act 1995* (Vic); also s. 26 of the *Trusts Act 1973* (Qld).

<sup>56</sup> *Ahoklui v Ahoklui*, reported in N.A. Ollennu, *Principles of Customary Land Law in Ghana* (London: Sweet & Maxwell, 1962), 215.

<sup>57</sup> *National Trustees Executors and Agency Co. (Aust/Asia) Ltd v Barnes* (1941) 64 CLR 268; *Re Raybould* [1900] 1 Ch 199; also s. 72 of the *Trusts Act 1973* (Qld).

<sup>58</sup> See, for example, *Re Hallett's Estate* (1880) 13 Ch D 686; *De Bussche v Alt* (1877) 8 Ch D 286; *Lyell v Kennedy* (1889) 14 App Cas 437; and *Foley v Hill* (1848) 2 HLC 28. It must be noted, however, that all remedies against the trustee must first be exhausted before tracing becomes available: see s. 109 of the *Trusts Act 1973* (Qld).

leaders and elders, that consensus is to be preferred to conflict and litigation, and that family 'problems' (feuds) must not be exposed for public consumption. Thus a chief<sup>59</sup> or family head<sup>60</sup> who abuses the trust of his or her people is only amenable to the sanction of deposition (destoolment or removal) and religious retribution from the ancestral spirits. Again, in Nigeria the judiciary appears to be more ready to embrace the modernising influence of trade and commerce and to jettison customs and traditions which only fostered injustice and conflict in the past. Thus, in *Akande v Akanbi*<sup>61</sup> the court said:

Times have changed considerably and the simple life of the people has become rather complex. Men and women have learnt to build for themselves some sort of financial empires, big or small, and it will be rather lamentable to allow heads of families to fend for themselves at the expense of their members.

[We] hold as [a] matter of law today that it is far better to impose restrictions on the heads of families by making them liable to account, even strict

<sup>59</sup> *Fynn v Gardner* (1953) WACA 260. This flows from the fiduciary's position as the representative of the clan or family. Under Ghanaian customary law, three exceptions were enunciated in *Kwan v Nyieni* (1959) 1 *Ghana LR* 67 to this general principle which are special circumstances in which any individual beneficiary could act to preserve the *res*. These are:

- (i) where the family property is in danger of being lost to the family, and it is shown that the head (either out of personal interest or otherwise) will not make a move to save or preserve it; or
- (ii) where, owing to a division in the family, the head and some of the principal members will not take any step; or
- (iii) where the head and the principal members are deliberately disposing of the family property in their personal interest, to the detriment of the family as a whole. (pp. 72-73)

Under Nigerian customary law the principle is more flexibly applied than under Ghanaian law. In *Bassey v Cobham & Ors* (1924) 5 *Nigeria LR* 90, Webber J said:

'This court (Divisional Court) has never deprived a beneficiary of his right to bring an action in respect of land vested in a trustee, which is the position of communal lands, and if the plaintiff were the humblest member of the family I could see no reason why he should be deprived of claiming his rights if the senior members neglect or refuse to assert them.' (p. 94)

<sup>60</sup> *Abude v Onanor*, *supra* n. 47.

<sup>61</sup> Unreported judgment of the Federal Court of Appeal, Lagos, digested in (1966) 8 *Nigerian Bar Journal* 86. In respect of community land under a stool in Nigeria, the concern of government about the chief's proclivity for abuse of the trust position led to the promulgation of the *Communal Land Right (Vesting in Trustees) Law 1958* by the erstwhile Western Region under which elaborate provisions incorporating some aspects of trust principles at English law were made and designed to ensure accountability on the part of the chief and to make it possible to revoke his or her trusteeship powers without necessarily removing him from his stool. See also M.A. Jegede, 'Changes Affecting the Communal System of Land Holding and Its Incidental Fiduciary Principle', 1969 *Journal of Bus. & Soc. Stud.* 10.

In Ghana, the Nkrumah Government passed the *Ashanti Stool Lands Act 1958* for the same purpose. Much later, the *Family Head (Accountability) Act 1985* was passed to make the Ghanaian family head liable to a stricter standard of accountability to the family for his or her stewardship. See also A.K. Kludze, 'Accountability of the Head of Family in Ghana: A Statutory Solution in Search of a Problem', (1987) 31 *Journal of African Law* 107.

[sic] account than to lay them open to temptation by unnecessary laxity in the running of family affairs, which inevitably follows non-liability in that respect.

To hold otherwise will be outrageous to our present sense of justice and will open the flood-gate of fraud, prodigality, indifference or negligence in all its forms and cause untold hardships on several families, especially the young members.

As this writer commented elsewhere:

This decision is revolutionary but hardly surprising in a forward-looking judiciary. The rule which makes it impossible for junior members to call the family head to account was based on that which frowns on junior members of their community who harass their chiefs with frivolous destoolment charges which conduct often leads to breach of the peace and erosion of the power of legally constituted authority. The position of members of a family is not quite the same as that of members of a community and although the maintenance of family solidarity is essential it has to be weighed against the other equally essential competing interest; *viz* the need to preserve corporate property which can only be ensured through the observance of strict rules of accountability.<sup>62</sup>

## CONCLUSION

What becomes apparent from the discussion thus far of the law relating to the fiduciary obligation under West African customary law is that there are points of divergence between it and the received law of equity. However, it is also equally clear that there are cogent if sometimes 'esoteric' reasons for this divergence. The law of equity has been transplanted in a terrain different from the clime in which it originated. To gain acceptance, it had to be seen to be 'the law of the people'. This would inevitably involve carrying out legal surgery here and there. The end result was the inauguration of an entirely different 'breed' of 'law of equity' but quite suitable to the needs in the new terrain. In *Mabo*, the High Court saw the need to re-evaluate the common law doctrines of tenure and estates and to reject the *terra nullius* theory of the acquisition of Australia by the white settlers as inconsistent with current realities. The High Court also sought to borrow from the experiences of the legal systems of Canada and the United States. However, the judicial systems of those countries also had to adapt the common law to their peculiar environments. In the result, the court found itself on an uncharted sea. In *R v Sparrow*,<sup>63</sup> the Canadian Supreme Court opined that the Crown's honour 'was at stake in (its)

<sup>62</sup> 'African Political Tradition and Its Effect on Liberty — The Ghanaian Case', *Proceedings of the First Annual Conference of the African Society of International and Comparative Law* (London: Steven Austin & Sons, 1989), 148, 158.

<sup>63</sup> (1990) 70 DLR (4th) 185, 197–8.

dealing with aboriginal peoples'. That was a remarkable observation in relation to an institution whose head was universally held to be the 'fountain of justice'.<sup>64</sup> That dictum could be equally applied to the government of Australia in its dealing with indigenous Australians.

It is argued in this article that it would perhaps be in Australia's best long-term interest of developing a peculiarly Australian common law, and particularly in respect of our evolving jurisprudence on native title, that the judiciary sustain its innovative approach inaugurated with the *Mabo* case and avoid total reliance on pristine and unsullied principles and doctrines deriving wholly from English law. Our adoption of multiculturalism makes this approach to our system of dispensing justice a categorical imperative.

It would be beneficial, perhaps, for the judiciary to look to other common law jurisdictions to see how the *trust* concept has been adapted for dealing with native title where that interest has been given legal recognition right from the inception of the legal system. It is suggested that West African customary law could provide some insightful examples.<sup>65</sup>

---

<sup>64</sup> Megarry and Wade, *supra* n. 1 at 111.

<sup>65</sup> In *Mabo*, the High Court considered several West African decisions on the nature of native title — see, for example, *Adewu Inasa v Oshodi* [1934] AC 99; *Summonu v Raphael* [1927] AC 881; *Oshodi v Dakola* [1930] AC 667; *Oyekan v Adele* [1957] 1 WLR 878; [1957] 2 All ER 785; and *Amodu Tijani*, *supra* n. 44. Toohey J's quote (p. 186) from *Amodu Tijani* is instructive in this regard:

'[I]n interpreting the native title to [the] land... [t]here is a tendency, operating at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law. But this tendency has to be held in check closely.' (p. 403)