

Chapter Three

Native Customary Land: The Trust as a Device for Land Development in Sarawak

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Introduction

The Sarawak government's strategy for economic growth through commercial development of agricultural land has resulted in vast areas of land being opened for large-scale plantations, including oil palm. In some places this has affected lands subject to 'native customary rights' (Sarawak Government 1997). When such rights are established over a tract of Interior Area Land, it becomes Native Customary Land. The latest type of development scheme, often dubbed Konsep Baru (New Concept), is one that uses the concept of fiduciary trust in the formation of joint ventures between native landowners, the government and large corporations.

This chapter examines native customary rights under existing legislation and the development strategy applied to Native Customary Land. It traces the chronology of past strategies and the culmination of those experiments in the joint venture concept. Are there any strengths in those strategies that may be built on or indeed be revisited? The evolution and rationale of a trust, and the nature of interests under a trust, are examined in the light of its suitability for the development of Native Customary Land in Sarawak. The duties of trustees and the fiduciary relationship are considered in order to ascertain the distribution of rights and possible remedies in the event of the trustees' breaches of duty. The chapter argues that, while the trust is a novel concept, the specifics of native customary rights in Sarawak may require further safeguards to be put in place to protect such rights.

Defining Native Customary Rights to Land

Sarawak has an anomalous and unique history as a British colony. A British protectorate in 1888, it was only annexed to British dominion in 1946 and became independent when it joined Malaysia in 1963. From 1841 to 1946¹ it was ruled by the Brooke family, whose members were themselves British subjects. This

¹ Sarawak was under Japanese occupation from 1942 to 1945.

historical legacy has shaped, and continues to influence, the development of the law and policies relating to native customary land.

Prior to James Brooke's arrival in Sarawak there was in existence a system of land tenure based on *adat* (native customary laws). That system remained virtually the same over the following century. Native customary rights to land consisted of rights to cultivate the land, rights to the produce of the jungle, hunting and fishing rights, rights to use the land for burial and ceremonial purposes, and rights of inheritance and transfer. According to native ideas, the clearing and cultivation of virgin land confers permanent rights on the original clearer (Geddes 1954; Freeman 1955; Richards 1961).

As the term implies, native customary rights may only be claimed by a native, or a person who has become identified with and has become subject to native personal law, and is therefore deemed to be a native.² 'Native' refers to the indigenous groups who inhabit the state, as listed in the schedule to the Sarawak *Interpretation Ordinance* and Article 161A, Clause 6 of the *Federal Constitution*. Despite the existence of numerous groups, the term 'Dayak' is colloquially used to refer to all the non-Muslim natives, differentiating them from the Malays, who by legal definition are Muslims (Bulan 1999; Hooker 2000). However, it is notable that the constitutional definition of natives in Sarawak includes the Malays. While the Malay-Melanau groups are coastal dwellers, the Dayaks are typically longhouse dwellers whose livelihood depends on the jungle and on swidden farming. Occupying the intermediate zones and the interior areas of Sarawak, their geographical locations and dependence on the land clearly determine the way that land administration affects them.

The Brookes did not interfere with the customary land rights of the Dayaks and Malays, allowing them a degree of self-governance. No scheme of alienation or land development was introduced except with respect to land where no rights or claims, whether documentary or otherwise, existed. There was a need to regulate the administration of land,³ and at every phase, there was an awareness of the existence of native customary rights. As the authorities discovered, the regulation of customary tenure and land use touched on a social consciousness in which land has economic, social and religious significance (Porter 1967: 11).

² See Sections 8 and 9 of the *Sarawak Land Code* 1958 and Section 20 of the *Native Courts Ordinance* 1992.

³ James Brooke's first attempt at codification of land tenure through the *Land Regulations* 1863 treated all land in the state as belonging to the government but only if it was 'unoccupied and waste lands'. Order VIII of 1920 consolidated and amended all preceding orders and defined state land to mean 'all lands which are not leased or granted or lawfully occupied by any person'. In 1931, Order L-2 redefined state land as 'all lands for which no document of title has been issued'. This was followed by Order L-7 of 1933, which required all lands to be registered on pain of nullity, and in effect marked the first introduction of the Torrens system in Sarawak, because it required an accurate cadastral survey as its basis, even though the government did not have the machinery to cope with a survey of the whole country.

After a number of regulatory orders, a memorandum on native land tenure was published by means of the Secretarial Circular No. 12 of 1939.⁴

Cultivated land and any land on which a fruit grove had been planted is heritable. Communities may also demarcate certain areas of primary jungle as *pulau* (reserved forest land) for communal use, within which rights over different resources may be established. Although judicial decisions have held these rights to have been lost upon personal abandonment, migration, or transfer, these losses must be seen in the light of the customary practices of each individual community.

Legislation on Land

English law was formally applied by the Brookes through *Order L-4 (Laws of Sarawak Ordinance)* 1928. This introduced English law subject to modifications by the Rajah, and was applicable to native customs and local conditions.

After the Brookes, the most significant period for Sarawak's land law was that which followed the cession of Sarawak to the British Crown in 1946. The Instrument of Cession transferred the rights of the Rajah, the Rajah in Council, and the State and Government of Sarawak in all lands to His Britannic Majesty 'but subject to existing private rights and native customary rights'. The *Application of Law Ordinance* 1949 provided for the reception (afresh) of English common law and doctrines of equity together with statutes of general application. These applied only 'so far as the circumstances of Sarawak and of its inhabitants permit and subject to such qualifications as local circumstances and native customs render necessary'.

One of the first pieces of legislation passed by the colonial government was the *Land (Classification) Ordinance* 1948. This instituted the system of land classification by which all land was divided into:

- Mixed Zone Land (land which may be held by any citizen without restriction);
- Native Area Land (land with a registered document of title but to be held by natives only);
- Native Communal Reserve (declared by Order of the Governor in Council for use by any native community, regulated by the customary law of the community);
- Reserved Land (reserved for public purposes);

⁴ The Memorandum recognised the practice of rotational swidden agriculture, which by and large was and is widely practised among the natives. With slight variations, each community had a communal right to land, which was a right to occupation and exploitation in a general area within a territory without a clearly demarcated or rigid boundary. Individually, the original feller of a virgin jungle had an exclusive right to cultivate land which he had cleared. That land might be left to fallow as *temuda* (an Iban term), and then be recultivated after a number of years. Once it reverted to forest, it was available to the community for fishing, hunting or gathering of forest produce, but the 'pioneer' household retained the pre-emptive right over the *temuda* for recultivation.

- Interior Area Land (land that does not fall within the Mixed Zone); and
- Native Customary Land (land in which customary rights, whether communal or otherwise, have been created).

The effect of the classification was that the non-natives could acquire rights only in the Mixed Zone Lands. The natives were restricted in their dealings with non-natives, as well as among themselves, in line with the government policy of preventing the natives 'from impoverishing themselves by disposing lightly of their rights to others, whether alien or natives'. Native Customary Land was preserved wherever it was already created, irrespective of the zone. Any transfer or dealing contrary to the code was subject to a penalty (Porter 1967: 77).

A significant provision of the 1948 Ordinance was that natives were entitled to occupy Interior Area Land for the purpose of creating customary rights but they were to be licensees of the Crown. Since by definition a licensee holds land at the discretion of the owner, in one stroke that ordinance removed proprietary rights to land from people who for generations had occupied and depended on that land.

The reduction of native rights to a mere licence advanced the presumption that natives had only a usufructuary right with no kind of ownership, and underpinned the colonial 'tendency, operating often at times unconsciously, to render that title conceptually in terms which are appropriate only to systems which have grown up under English law'.⁵ To deny the existence of a valid native perspective on land ownership, based on an elaborate system of rules and customs, was 'characteristic of the self-serving ethnocentricity upon which colonialism is based' (McNeil 1990: 92). The fact was that Sarawak was already inhabited by native groups who were not mere wanderers but were people in occupation of the land.

Amendments made through the *Land (Classification) (Amendment) Ordinance* 1955 precluded the creation of customary rights over Interior Area Land from 16 April 1955 unless a permit was obtained from the District officer. This continued to form the basis of the *Land Code* that came into force in January 1958, and remained an integral part of the land law system even after Sarawak joined Malaysia in 1963.⁶ However, the issue of permits was effectively halted in 1964 by means of a government directive (Zainie 1994).

⁵ 'Amodu Tijani v Secretary of State, Nigeria', *Appeal Cases* 1921(2): 399.

⁶ At the time of joining the Federation of Malaysia, the natives expressed the need to safeguard their customary rights to land. In 1962, a Commission of Inquiry instituted under Lord Cobbold of England recommended, among other things, that 'land, agriculture, forestry and native customs and usages' should be under the control of the state governments. The Federal Constitution thus bestowed the state governments with the jurisdiction in those matters under Article 64, Schedule 9, and the legal status quo in relation to the customary lands of Sabah and Sarawak has been allowed to remain. The federal government has limited powers to pass laws on land solely with the purpose of unifying the law.

The *Sarawak Land Code* 1958

The *Sarawak Land Code* 1958 is based on a Torrens registration system which only recognises registered interests in land. The person claiming ownership or interest must have a document of title in the form of a grant, lease or other document as evidence of title or interests. There is, however, a provision for the creation of Native Customary Land under Section 5(2) which is limited to six specific methods; namely:

- the felling of virgin jungle and the occupation of the land thereby cleared;
- the planting of land with fruits;
- the occupation of cultivated land;
- the use of land for a burial ground or shrine;
- the use of land for rights of way; and
- by any lawful method (deleted in 2000).

Numerous amendments have been made to the *Land Code*. For instance, in 1994 amendments were passed to empower the minister in charge of land matters to extinguish native customary rights to land. In 1996, the onus was placed on a native claimant to prove that he has customary rights to any land against a presumption that the land belongs to the State. In 1998, to pave the way for extinguishment or compulsory acquisition of land, the mechanisms for assessment and payment of compensation were put in place.

The most comprehensive set of amendments were those set out in the *Land Code (Amendment) Ordinance* 2000. This included a definition of 'native rights' which was curiously missing in earlier legislation. Section 7A(1) streamlines 'native rights' into three categories; namely:

- rights lawfully created pursuant to Section 5(1) or (2);
- rights and privileges over any Native Communal Reserve under Section 6(1); and
- rights within a kampung reserve (Section 7).

The 2000 amendment harmonised the processes and procedures relating to Native Customary Land with those relating to other types of alienated land in respect of the resumption of land and the adjudication of payable compensation for termination of rights. It also provided for the creation of a Registry of Native Rights. Finally (and notably), the amendment deleted 'any lawful methods' under Section 5(2)(f), for what Fong (2000) described as the sake of legal certainty and clarity.

Some lawyers have argued that the implicit intention of the legislature in 1958 would have been to make a provision for certain customs and practices not covered by the *Land Code* (Bian 2000), but which were observed by different groups under their customary laws. The practice of customary land tenure

certainly did not cease in 1958 and, as Bian argues, some lands had been acquired through barter exchange or 'sale' within communities, or as marriage dowries, which were subsumed under the 'other lawful methods'. Given the inherent flexibility of *adat* (Cramb 1989; Sather 1990), and its ability to adapt to demographic and economic changes, Bian's argument is reasonable.

The restricted concept of native customary rights under Section 5 made it difficult to assert rights under the *Land Code* after 1958 (Bulan 2000). The line of restriction is not a new phenomenon (Majid Cooke 2002). As Porter commented on the inception of the code, it 'virtually prohibit[s] the creation of new customary rights' and the 'extremely detailed and rigid' provisions 'dictated government policy' (Porter 1967: 83, 99).⁷ Fong (2000) argues that the intention of the subsequent amendments was to restrict the methods of creating native customary rights to those stipulated under Section 5.

It is significant, therefore, that in a recent court case, Ian Chin recognised the existence of the Iban *pemakai menoa* — the area from which its members 'eat' (*makai*) — within which are found their *temuda* (secondary forest) and the *pulau galau* (land reserved for communal use).⁸ The concept of *pemakai menoa* goes beyond mere agricultural use and extends to hunting, fishing and living off the produce of the jungle. Ian Chin held that those customary rights had not been expressly abolished by earlier orders or other legislation.

The Court of Appeal overturned the High Court decision on 9 July 2005,⁹ holding that there was insufficient proof of occupation by the (Iban) respondents in the disputed area, although they had satisfied the test for native customary rights in the adjacent area. Nonetheless, the Court of Appeal did not disturb the High Court's finding that the Iban concept of *pemakai menoa* exists. This is a milestone for native customary rights in Sarawak

The Court of Appeal endorsed the exposition of the law by the learned judge of the High Court when he argued that the common law respects the pre-existence of rights under native laws or customs and that these rights do not owe their existence to statutes. Legislation is only relevant to determine how many of those native customary rights have been extinguished. It affirmed that the *Land Code* does not abrogate native customary rights that existed before the passing of that legislation, but held that natives are no longer able to claim new territory without a permit from the Superintendent of Lands and Surveys under Section 10 of the code. It also agreed with the High Court that the rights held under a licence 'cannot be terminable at will', for they can only be extinguished in accordance with laws subject to payment of compensation. Any discussion of

⁷ See Sarawak Government 1959, Paragraph 27; *Land Code*, Section 10(3) and (4); Adam 1998: 217.

⁸ 'Nor Anak Nyawai and Ors v Borneo Pulp Plantation Sdn Bhd and Ors', *Current Law Journal* 2001(2): 769.

⁹ 'Borneo Pulp wins appeal case on NCR land' (*Sarawak Tribune*, 9 July 2005).

the development of native customary rights must therefore bear in mind that, despite the provision of Section 5, the native concept of land is broader than the restrictive statutory provisions.

As the state seeks to accelerate land development under its broader 'politics of development' (Jitab and Ritchie 1991), the medium that is felt best suited to bring 'development and progress' to the natives is estate development. This involves lands which some native groups claim to be their communal lands.

Agricultural Policies and Land Development Schemes

To encourage native smallholders to participate in commercial land development, a series of land development schemes were undertaken from the 1960s to the 1980s. These have been documented by many writers such as Hong (1987), King (1988), Cleary and Eaton (1996), Ngidang (1998) and Majid Cooke (2002).

From 1964 to 1974, land resettlement schemes modeled after the integrated style of development adopted by the Federal Land Development Authority (FELDA) of Peninsular Malaysia were introduced and implemented — initially through the Agriculture Department and later (1972–80) through the Sarawak Land Development Board (SLDB). This involved clearing of new land and relocation of natives into resettlement schemes dedicated to the planting of cash crops (Ngidang 1997). Unlike the FELDA schemes, where landless workers were settled on state land, participants in Sarawak were relocated to areas where the local communities were established traditional landowners. The farmers were given loans that they had to repay out of incomes which were crucially dependent on the fluctuations of world commodity prices, and as a result, most were unable to make the repayments. The schemes also lacked the pool of workers and expertise required for their successful implementation (King 1988: 280) and all were eventually abandoned due to management problems (Ngidang 2001).

In 1976, the Sarawak Land Consolidation and Rehabilitation Authority (SALCRA) was established with the object of developing agricultural land *in situ* (Hong 1987; King 1988: 283). This was a joint venture between the SALCRA and native farmers in which the participating households retained their ownership (Munan 1980; Humen 1981: 95–106). Subject to payment of costs by the owner, large consolidated blocks of land have been planted with cash crops. The SALCRA's function includes consolidation and rehabilitation of land, and provision of advisers and training facilities in various aspects of farming and land management. When it appears that the participants have acquired the know-how to manage the schemes, the estate should be divided among the households, thus enabling them to obtain a demarcated piece of land to which they will be given a grant in perpetuity. Although there has not been any

rationalisation and distribution exercise yet,¹⁰ the eventual obtaining of titles for landowners through their participation appears to be an ideal solution to the problem of modernising agriculture in many native areas. Substantial alienation of land to non-native private companies with commercial interests has been avoided. To some extent, rural–urban migration has also been arrested. However, the success of the scheme is dependent on continued government funding.

Parallel to the SALCRA, the Land Consolidation and Development Authority (LCDA) was set up in 1981 to promote the development of both agricultural and non-agricultural projects. The LCDA has powers to acquire both state-controlled land and Native Customary Land for private estate development. It has powers to act as an intermediary between landowners and corporations so that private investors can be invited to participate in land development subject to allocation of shares in the relevant companies. The *Land Code* was amended in 1988 and 1990 to allow corporations, including foreign companies, to purchase land, including Native Customary Land, for this kind of development.

The formation of the LCDA was a further step in government involvement in large-scale land development as it became an agency and a conduit to ‘harness private capital for developing the land as estates’ (Sarawak Government 1997). This paved the way for the introduction of the joint venture company (JVC).

The New Model: Joint Venture Companies

The concept of the joint venture is premised on the assumption that Native Customary Land, which is now unorganised and fragmented, can be turned into an economic asset through the creation of a Native Customary Land Bank. Once pooled, it is assumed that large-scale plantation development and optimum returns can be realised. It is also assumed that large areas of Native Customary Land are attractive and viable for private investment.

As a prerequisite, there should be contiguous blocks of land of not less than 5000 hectares, which may cover land spanning the territorial domain of several longhouse communities. To date, the SLDB and the LCDA have been appointed as managing agents. Every landowner has to sign a trust deed to assign to the government agency all their respective rights, interests, shares and estate in the land. The government agency will then enter into the joint venture with the private corporation. When an area is marked for commercial development, the Minister may declare that area of land as a Development Area under Section 11 of the *Land Consolidation and Development Authority Ordinance* 1981, and the land will be classified as Native Area Land under Section 9(c) of the *Land Code*.¹¹

¹⁰ Personal communication, R.J. Ridu, former Speaker of Negeri Council, August 1999.

¹¹ Where a non-native has been issued with any permit relating to Native Area Land or Native Customary Land, the SLDB shall apply to the *Majlis Mesyuarat Kerajaan Negeri*, or the State Secretary to whom powers have been delegated, for a special direction that the company be deemed a native under Section 9(1)(d) of the *Land Code*.

A perimeter survey using the global positioning system is carried out by the JVC to determine the size of the area. One title will be issued to the JVC for a period of 60 years (two plantation cycles) for an agreed value. The owners have to agree amongst themselves to determine the approximate sizes of their landholdings, and their names are then to be listed in the appendix of the trust deed. Under Section 18 of the *Land Code*,¹² the Superintendent of Lands and Survey may issue a lease over any land within a Development Area¹³ for a term of not more than 60 years to a body corporate approved by the Minister. All adjoining land may be amalgamated.

In consideration for the use (or lease) of Native Customary Land, the JVC will issue to the trustee shares in the JVC credited as fully paid, equivalent to 60 per cent of the value of the said land, representing 30 per cent of the issued and paid up capital of the JVC. The value has been pegged at RM1200.00 per hectare. The JVC will pay to the trustee the equivalent balance of 40 per cent of the said land value. Out of that sum, 30 per cent will be invested in government-approved unit trusts and 10 per cent will be paid to the landowners.

In terms of equity ratio, the trustee will pay cash for 10 per cent of the issued share capital and the private company developer will pay cash for its 60 per cent share, while the landowners' equity of 30 per cent in the JVC will be paid through the land value. The said land may only be used for agricultural purposes, and the JVC cannot deal with or charge the land as security for loans to implement the project without the prior approval of the Minister.

Upon expiry of the term of the title, the customary landowners shall decide either to renew the title in favour of the JVC or request for the land to be alienated to themselves or to another company or another entity nominated by them in writing. In the event that the customary landowners are desirous to have the land subdivided and alienated to them individually, the JVC is empowered to undertake a survey of the land and to determine the most equitable and fair manner of subdivision, having due regard to the extent of each of the landowners' interest in the land. This is the stage at which the distribution and allotment of shares may be problematic because of uncertainty about the size of people's shares in the land.

Two pioneer schemes have been developed as pilot projects in the Baram and Kanowit districts (Ngidang 1997: 75; Songan and Sindang 2000: 251) with varying responses from the participants. Many people participated in the projects without a full understanding of what such alien concepts as the trust, a joint venture,

¹² By means of Section 6 of the *Land Code (Amendment) Ordinance* 1997.

¹³ By Section 11 of the *Land Consolidation and Development Authority Ordinance* 1981 and the Schedule to the *Land Development Board Ordinance* 1972.

or shares in a company entailed.¹⁴ This could give rise to the question of whether there has been effective consultation and informed consent on the part of the participants.

The next section discusses traditional rules relating to trusts and trustees, considers how those principles are applied in the JVC arrangement for development of Native Customary Land, and looks at possible remedies for landowners in the event of any breach.

The Trust and Protection of Property

The trust has tremendous utility because it is flexible and easy to create. It is usually set up for the purpose of 'the management of wealth', where property may be put on trust for an individual, an infant, a person of unsound mind or a group (Hayton 1998).

The modern trust evolved as a response of equity to the shortcomings and the rigid formalities of the common law. The trust was originally used to protect landowners who had transferred their land to another on the understanding that the transferee was to hold and administer the affairs relating to the land for the benefit of the transferor's family.

There would be no problem where the transferee kept his word, but when the transferee broke his promise, misused or administered the land for his own benefit, the question of rights and remedies would arise. Common law only recognises the ownership of the legal owner. In case of a breach, there would be no legal redress for the transferor and his family. The concept of the trust was developed as a way of requiring the friend to fulfill his promise, on the basis that it was unconscionable for him to claim the land for himself. In other words, equity imposed a *trust* on the transferee, called the trustee, to hold the property for the benefit of the beneficiaries.

The reliance placed on the transferee to deal with the property for the benefit of the beneficiary gave rise to a relationship of confidence or a *fiduciary* relationship. The transferee could not deal with the property in a way that would conflict with the interest of the transferor or the equitable owner.

Today the trust has become a valuable device in commercial and financial dealings where the fundamental principles of equity that were originally formulated apply as much to commercial trusts as they do to the traditional trusts.

¹⁴ The Baram project commenced in February 1997, involving 550 households from about 14 longhouses in a joint venture between Perlis Plantation Berhad and the SLDB, but the company reportedly withdrew from the project in early 2002. In Kanowit, 17 Iban longhouse communities are involved in a joint venture project between Kuala Sidim Bhd (a subsidiary of Boustead-Estate Bhd) and the LCDA acting as the trustee for the native customary landowners. A report of the Sarawak Development Institute found that 68.7 per cent of landowners in this area supported the JVC despite a low level of understanding, while 46.35 per cent did not understand the concept at all.

The Nature of the Trust

The significant feature of the trust is the dual ownership of the trustee (legal ownership) and the beneficiary (equitable ownership). There are four essential elements of a trust under ordinary principles of law:

1. There must be a trustee or somebody who holds the trust property.
2. There must be property, whether land or money, that is capable of being held on trust.
3. There must be an ascertained beneficiary or beneficiaries who could enforce their rights.
4. The trustee is under a personal (equitable) obligation to deal with the property for the benefit of the beneficiaries.

In 1840, Lord Langdale laid down three certainties in the creation of a trust, namely: the person establishing the trust (the settlor) must demonstrate a clear intention to create a trust; the subject matter (the beneficial interest) is clearly identified; and the beneficiaries as well as the quantum of entitlement must be certain.

Uncertainty of intention will cause the trust to fail, and the person on whom the gift is bestowed will take the gift absolutely unhampered by the trust. If the subject matter is not certain, no trust is created. It may be, however, that the property itself is certain but the beneficial shares are not. Unless the trustees have discretion to determine the amounts, the trust will fail and the property springs back to the settlor on a resulting trust (Martin 1997: 93). The beneficiaries of the trust must also be ascertainable, otherwise a trust would fail for uncertainty and the property reverts to the settlor (Hayton 1998: 82).

Apart from these three certainties, no rigid formalities are required. In Peninsular Malaysia, a trust concerning any property, including land and equitable interest in land, need not be in writing provided the words used in the transaction show a clear and unequivocal intention to create a trust.¹⁵ In Sarawak, however, a declaration of trust in respect of any interest in land, whether legal or equitable, must be in writing signed by a person who is able to declare the trust or by his will.¹⁶

The Trust and Native Customary Land Development

This 'new model' JVC is a type of development trust which is a 'facilitative commercial trust' (Bryan 2001). Creating a trust circumvents the requirements

¹⁵ 'Wan Naimah v Wan Mohamed Nawawi', *Malayan Law Journal* 1974(1): 41.

¹⁶ 'Lee Phek Choo v Ang Guan Yau and Anor', *Malayan Law Journal* 1975(2): 146. The rationale for this, as explained by Chief Justice Lee Hun Hoe, is that Section 2 of the *Application of Laws Ordinance* and Section 3(1) of the *Civil Law Act* 1956 import into Sarawak and Sabah not only the rules of common law and equity but statutes of general application as well, hence Section 9 of the *English Law of Property Act* 1925, which requires that land transactions be in writing.

for a person or persons to be a party to the contract in order to enforce it. A third party cannot enforce the contract but he may enforce a trust even though he was not party to it. The beneficiaries include persons whose names appear in the appendix of the trust deed, their respective heirs, successors in titles, executors, administrators, personal representatives, trustees and any other person claiming title or interest in the name or on behalf of the native customary owners.

The trust also does away with the need to get into a partnership that will require the parties to contribute equally in order to share equally in the profits (Ladbury 1987). Most native landowners do not have the financial means to develop the land, so vesting the land in trustees is arguably one of the most appropriate mechanisms that can be used. Be that as it may, the intrinsic nature of native customary rights could give rise to problems peculiar to this kind of trust.

The JVC and the Nature of the Beneficiaries' Interests

The terms of the trust deed presume that the native customary owners have acquired the rights through one of the means prescribed under Sections 5(2), 7A, 7B or 7C, or had obtained a permit under Section 10, of the *Land Code*, or that there is evidence or records kept by the Land Office pertaining to the land, so that a registrable document of title may be issued in favour of the company.

This arrangement is different from some property development ventures which are financed through the marketing of shares in land trusts where the shares have clear proportions. In this case, while the beneficiaries may be entitled to the land as set out in the appendix of the trust deed, their respective interests, rights, and shares are undivided. With one master title, the owners cannot apply for subdivision for as long as the company is the registered proprietor.

Applying the traditional requirements of certainty, there is no exhaustive listing of all beneficiaries entitled under customary law. The question in this case is: could the trust be challenged as void for uncertainty of objects? If so, who is responsible to ensure that the land reverts to the owners? And finally, what are the powers of the trustees?

General Powers and Duties of Trustees

The trustee's powers are provided for by the trust deed, although general statutory powers are also provided by the *Trustee Act* 1949. The powers of a trustee are facilitative, enabling a trustee to act in a certain way but leaving the discretion to him as to whether to so act. Duties, on the other hand, are imperative. They compel or prohibit a trustee from acting in a certain way, failing which he may be liable for breach of duty.

The general powers of trustees under the *Trustee Act* include the powers to compound liabilities, to settle claims and to give receipts, to fix the value of

trust property, to concur with co-owners of land in disposing of trust property, and to insure trust property.

The trustee cannot put himself in a position where there is a conflict of interest, nor can he profit from his position without authorisation by the trust deed or consent of the beneficiaries. It is his duty to administer the trust honestly and impartially for the benefit of the beneficiaries, to account to the beneficiaries and to distribute the income to those entitled to it.

A breach of duty may result in a claim by the beneficiaries. Any loss caused by the trustee or trustees wrongfully disposing of the assets or any diminution in the value of the trust fund may have to be borne by the trustees. The same liability may be imposed on a trust corporation, although the standard of care and business prudence expected of a trust corporation is higher than that of an ordinary trustee, particularly where it holds itself out as capable of providing certain expertise which cannot be provided by an ordinary prudent man. The reasonable standard of care is one for the courts to decide based on the facts of the case.

Underlying these powers and duties is the fiduciary obligation of the trustee to the beneficiary.

The Fiduciary Relationship and its Ramifications

The word 'fiduciary' comes from the Latin *fiducia* meaning 'trust'. Inherent in the nature of the fiduciary relationship is one party's position of disadvantage or vulnerability which causes him to place reliance upon another and requires the protection of equity in acting upon the conscience of that other. It is important to determine whether a fiduciary relationship exists and, if so, whether any remedy is available in case of any breach of that fiduciary obligation.

The relationship between a trustee and the beneficiaries has been called the 'archetypal' fiduciary relationship.¹⁷ It is an established principle that the trustee must not use his position to make a gain for himself. This has been extended to apply generally to all cases where one person stands in a position of influence over another, enabling the court to intervene in circumstances where the person occupying a position of trust or confidence took improper advantage of that position. The question is: would these principles of fiduciary duty apply to a government and its agencies?

Dal Pont and Chalmers (1996: 118) argue that the government, like a trustee, is concerned with the control and distribution of wealth. Having been sourced from the people, the exercise of a government's power to affect the interests of

¹⁷ The categories are not closed but this may include the relationship between directors and company, principal and agent, solicitor and client, guardian and ward, parent and child, or partners in a joint venture.

its people is subject to an obligation to deal with this wealth for the benefit of its people. In this respect, the people can be characterised as 'beneficiaries' of the trust established by the conferral of their authority on the government to act on its behalf (Finn 1994: 45). The fiduciary duty that binds the Crown is similar to the duty that a constructive trustee owes to a beneficiary, which entails a duty not to compromise the beneficiary's interest in transactions with third parties.

The highest courts in the United States, Canada, New Zealand and, to some extent, Australia have recognised the existence of a fiduciary relationship between the government and aboriginal persons. The issue of fiduciary obligation towards aboriginal people has also arisen in Malaysia. In one recent case,¹⁸ the federal and state governments were both said to have owed a fiduciary duty to the Orang Asli (aborigines) of Peninsula Malaysia to protect them from unscrupulous exploitation and to safeguard their tribal organisation and way of life. That duty emanates from Article 8(5) of the *Federal Constitution*. This was affirmed by the Court of Appeal in 2005.

In the case of natives in Sarawak, Article 153 of the *Federal Constitution* also imposes a fiduciary obligation on the Yang di-Pertuan Agong (the King) to protect the interests of the natives of Sarawak and Sabah. Further preferential treatment as regards alienation of land by the state is contained in Article 161A(5), while protection of native law and custom is also enshrined under Article 150(6A), Clause 5.¹⁹ Clearly, there is legal recognition that natives are especially vulnerable to the power of government, and this justifies their preferential treatment. For natives in Sarawak, this is a reflection of the Brooke government's belief that Sarawak 'is the heritage' of its people and that land is their 'lifeblood'. In the 'Nine Cardinal Principles of the Rule of the English Rajahs', the government held itself as 'trustee' of the people and policies for protection of native interests against outside exploitation were put in place.²⁰

The state's fiduciary duty also arises because of the inalienability of the property. The state's power to impair native customary rights by way of alienation, and the fact that such rights are inalienable except to another native or by surrender to the state, gives rise to a fiduciary obligation on the state. The fiduciary obligation protects those rights so that they cannot be terminated without involving, informing, consulting and negotiating with the customary right holders in good faith, minimising the impact and detriment on the affected parties. It is imperative for the government to deal with the property surrendered to it with utmost good faith.

¹⁸ 'Sagong Tasi and Ors v The Government of Selangor and Anor', *Malayan Law Journal* 2002(2): 591.

¹⁹ In a period of emergency, Parliament may legislate on any matter, but that power shall not extend to any matter of Islamic law or the custom of the Malays or with respect to any matter of native law or custom in the states of Sabah or Sarawak notwithstanding anything in the Constitution.

²⁰ See the *Constitution Order No C-21 (Constitution)* 1941.

This means that, when native customary landowners surrender their rights to the LCDA as trustees, there is a clear fiduciary duty to protect the rights of the vulnerable right holders. A government agency that takes on the duties of a trustee under a commercial arrangement becomes a 'trustees twice over' (Finn 1992: 243), particularly where the vulnerable landowners depend on it to negotiate the best terms on their behalf (Lehane 1985: 98).

In the present JVC model, the relationship between the corporate developer and government agency (trustee) is contractual. Does a fiduciary relationship exist between them? It is suggested that the mutual confidence between the JVC and the LCDA (or its agents), in appropriate circumstances, does not exclude the possibility of a fiduciary relationship.

The Malaysian Federal Court has already held that the relationship between parties in a joint venture agreement is a fiduciary relationship.²¹ Thus, if a right is not sustainable in breach of contract, there may be an avenue in equity where there is a breach of the fiduciary obligation.²²

Breach of Trust and Remedies of Beneficiaries

What remedies are available to beneficiaries should there be any unauthorised act or in case of a breach?

At the core of the trust concept is also a right of the beneficiaries to make the trustees accountable to the trust and to ensure that they act within the terms of the trust deed. The remedy for the breach of a fiduciary duty includes declaration of rights or a claim in damages and compensation.

Beneficiaries have a right to have the trust property invested in a way that will keep a balance between them. They have a 'policing' right, to see the trust accounts from time to time, and to require the trustees to make good any breach of trust. While trustees are not bound to give reasons in exercising their discretion, the absence of reasons could create a presumptive case that a trustee's discretion has been miscarried or was not exercised upon real, sound and genuine consideration. Beneficiaries may also apply for an injunction to restrain a fiduciary from acting in a way that is detrimental to the trust.

The issue takes on a different angle where the trustee is a government agency. Section 29(1) and (2) of the *Government Proceedings Ordinance* 1956 debars an injunction being granted against a government or an officer of the state. An order for the preservation of property may be made if the plaintiff can show that irreparable damage not compensatable by damages would be caused. Despite

²¹ 'Sri Alam Sdn Bhd v Newacres Sdn Bhd', *All Malaysia Reports* 1996(3): 3293.

²² 'Tengku Abdullah ibni Sultan Abu Bakar v Mohd Latiff bin Shah Mohd', *Malayan Law Journal* 1996(2): 265. Gopal Sri Ram (Court of Appeal) said that, depending on the commercial morality, courts in a particular jurisdiction may choose to impose a fiduciary obligation on parties to a transaction having regard to the cultural background and circumstances of the society in which they function.

the nomenclature, if the effect is the same as that of an injunction, it will not be granted. Thus, while it is open for claimants to take legal action to prove their claims, very few natives have the means to sustain such actions.

Questions of Proof and Reversion of Land

A fundamental aspect of the JVC is that native customary 'owners' become joint venture partners without having to provide financial capital. This means that 'their equity in the joint ventures would be based on the area of their land; and the irresistible part of it all is that their land would be returned to them when the government has no more use for it' (Jitab with Ritchie 1991: 66). To what extent can the beneficiaries be assured of the reversion of the Native Customary Land? The issue is not that 'the government will not cheat its own people'; rather, the problem lies in the discharging of the onerous burden of proof that is on the claimant.

Since Native Customary Lands are not individually surveyed, there are latent uncertainties in terms of the specific shares in the land. At the expiration of 60 years, persons who have surrendered their rights may no longer be alive. This could cause problems for the successors unless they can work out a clear system of partition and inheritance of the land. If the native claimants are not able to settle their claims among themselves, there is a possibility and danger of them losing their rights to the legal owner who has a registered (master) title to the land.

The new Section 7A of the *Land Code* provides for registration of Native Customary Land but does not provide indefeasibility of title. In Fong's words, it is treated merely as an acknowledgement of a claim to the land until the contrary is proved,²³ a certification to a right, and not a 'proprietary right in land'. The onus of proving an interest remains on a native claimant.²⁴ The problem reverts to the question of the restrictive provisions under Section 5 and the clash between statute and native concepts of land.²⁵

The commonly deployed method of determining the existence of native customary rights over a parcel of land is aerial photographs taken prior to 1 January 1958. However, these may not be available, and the claimant then has to show alternative physical evidence of occupation before 1958, or else show records of permits, which are virtually non-existent. Thus, upon amalgamation

²³ The *Land Code (Amendment) Ordinance* 1996 provides that 'whenever any dispute shall arise as to whether any native customary right exists or subsists over any state land, it shall be presumed until the contrary is proved, that such state land is free and not unencumbered by such rights.'

²⁴ *Land Code Amendment Ordinance* 2000, Section 7(A)(3)(b).

²⁵ This is a stark contrast to Section 66 of the Sabah *Land Ordinance*, where a native who establishes customary tenure and who has cultivated unalienated land for three years may apply for that land to be registered as native land and thereby acquires indefeasible interest, alleviating much of the anguish over uncertainty of title.

of all the contiguous lands by the Director of Lands and Surveys, land that is vested in the trustee becomes the legal property of the agency with no compensation paid to the claimant. With no payment of compensation at the point of amalgamation, is the amalgamation tantamount to summary taking of land without compensation?

One possible way to avoid this problem may be to survey the land and grant individual titles to the owners at the point of their joining the scheme. This would ensure that persons who join the scheme know their specific share and are able to stake a claim at the expiration of the 60-year provisional lease period. Before such a survey can be carried out, such rights must be fully investigated, demarcated and recorded before titles can be issued to replace the customary tenure (Goh 1969: 4). It has been argued that a full-scale statewide registration of native interests over land would be a time-consuming, tedious and costly operation (Fong 2000). However, in specific projects such as this, the advantages of a proper survey being done prior to implementation cannot be understated.

A prior grant of title to claimants would best serve the interest of the vulnerable owners and the sense of security would be an incentive for participation. It would go a long way in improving the implementation of Native Customary Land development (Songan and Sindang 2000: 251). With the passing of the *Land Surveyors Ordinance* 2002, the combined effect of Sections 20 and 23 entail that a person who is not a licensed surveyor cannot make, authorise or sign any cadastral map. Since map making by the communities themselves could be an offence, it is imperative that the authorities take steps to survey the land for the natives.

Concluding Remarks

The caution in commercial joint ventures is that, all too often, when there is no more money in the venture, it is easy for parties to forget their contractual obligations and the vulnerable parties often suffer. As an active sponsor of these schemes, it is all the more pertinent for the government to provide some kind of a guarantee that Native Customary Land will revert to the owners at the end of the venture. Similarly, in the event that a JVC withdraws without completing its job, is there some form of a guarantee the native customary owners will be adequately compensated?

Arguably the government's fiduciary obligation may be said to go beyond a mere commercial arrangement to become 'trustees twice over', based as it is on the customary owners' trust and confidence in the government. Perhaps there is scope here for application of Lord Browne-Wilkinson's (1995) caution 'that equity principles must follow developments in commercial law for commercial expediency, but such application has to be both thoughtful and sensitive'. What has been developed as an instrument to defeat unconscionable conduct should

not ironically become the very instrument that defeats the rights of those that it purports to protect.

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