



NATIONAL OPEN UNIVERSITY OF NIGERIA

SCHOOL OF LAW

COURSE CODE: LAW 521

COURSE TITLE: LEGAL DRAFTING AND CONVEYANCING LAW I

Course Guide

Course Code:	LAW 521
Course Title:	Legal Drafting and Conveyancing Law I
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Introduction

Conveyancing Legal Drafting Law II

This is a composite course consisting of Conveyancing and Legal Drafting. It is therefore a wide area of study. However, attempt has been made here to limit the course to some aspects of Conveyancing Law and Practice in Nigeria.

You will find some useful self-examination questions, exercises and tutor marked exercises in the course guide. Students should attempt all the questions and exercises as strictly as possible under real examination conditions. It is also advisable that students should try as much as possible to locate the answers to the exercises within the law and practice of conveyancing in Nigeria rather than relying on their personal experience or what they see people do.

What you will learn in this course

This course is about conveyancing law and practice. It is an elective course for students who are registered for Bachelor of Law Degree Programme. This course may also be useful to those who want to learn about transfer of interest in land and land registry practice in Nigeria. This course is a 4 credit units course. This means that a minimum study time of 4 hours per week for the duration of the semester.

In this course, LAW 522, we shall examine conveyancing practice generally. Attempt has been made to identify the applicable statutes to conveyancing, and their territorial

application. It is advisable that you should familiarize yourself with the laws, as you will come across them frequently as the learning progresses. It is equally important to acquaint yourself with some common terminologies and concepts frequently used by conveyancers.

The scope of conveyancing law is very wide. It covers wide range of issues like: contract of sale, deed of conveyance, lease mortgages etc, some of these aspects have been discussed in some detail. This is to ensure that you are better equip to handle conveyancing problems and to avoid being liable for professional negligence.

Importance of Cases and Statutes

This study guide, like any textbook on any aspect of law makes references to judicial decisions and some statutory enactments. Any statement of law has its foundation on a case or statute or both, which forms its authority. The issues you need to know about important cases or statutory provisions are set out in the study guide. However, you may want to refer to the statutes or the law report for detail in order to better understand specific aspect.

It is advisable that you refer to cases by the names of the parties to it. For example Savannah Bank v. Ajilo. It is an added advantage to be able to learn and quote the current names of cases. However, if you are not sure of the correct names of the parties to a case, it may suffice to cite the case by saying in the case of X v Y and proceed to give the summary of the facts and decisions. Do not invent cases. Also do not insist on quoting verbatim a statutory provision, a simple paraphrase may suffice.

Course Aims

This course aims at providing the participant with basic knowledge and understanding of conveyancing practice. In essence, the aims of the course include:

- Definition of conveyancing
- Nature and scope of conveyancing
- Contracts of sale of land in Nigeria
- Some important legislation on conveyancing in Nigeria
- Investigation of title

- Deed of assignment
- Leases and other related terms
- Mortgages
- Perfection of documents of title
- Registration of title system
- Challenges of conveyancing practice in Nigeria

Course Objectives

At the completion of the course, you should be able:

- i. to understand the nature of and applicable laws to conveyancing practice in Nigeria.
- ii. to appreciate the extent to which customary has impacted on conveyancing practice in Nigeria.
- iii. to understand conveyancing procedures in Nigeria
- iv. to perform some conveyancing transactions
- v. to identify the challenges of conveyancing in Nigeria.
- vi. to point to the direction of improvements in the law and practice of conveyancing in Nigeria
- viii. to understand impact of the Land Use Act on some conveyancing transactions

Study Unit

There are twenty eight study units in this course, as follows:

Module 1

Unit 1 Introduction to conveyancing practice in Nigeria

Unit 2 Contract of sale of land in Nigeria

Unit 3 Rights and duties of parties

Unit 4 Remedies for breach of contract of sale of land

Module II

Unit 1 Deducing and investigation of title

Unit 2 Proof of title to land in Nigeria

Unit 3 Certificate of occupancy

Unit 4 Deed of assignment

Module III

Unit 1 Introduction to transfer of land under registration of title system

Unit 2 Power of attorney

Unit 3 Leases and other related concepts distinguished

Unit 4 Requirements of a valid formal lease

Module IV Leases continued

Unit 1 Rents

Unit 2 Option to renew clause

Unit 3 Insurance covenant in a lease

Unit 4 Determination of leases

Module V

Unit 1 Meaning and mortgage institutions

Unit 2 Types of collaterals

Unit 3 Creation of mortgage

Unit 4 Rights and duties of parties to a mortgage deed

Module VI

Unit 1 Mortgage power of sale

Unit 2 Discharge of Mortgage

Unit 3 Forms and contents of a mortgage

Unit 4 Attestation and execution of deed

Module VII

Unit 1 Application for Governor's consent

Unit 2 Registration of instruments

Unit 3 Stamping of legal documents

Unit 4 Challenges of conveyancing practice in Nigeria

Course Marking Scheme

The following table lays out how the actual course marking is done.

Assessments	30% of course marks
A final examination	70% of overall course marks
Total	100% of course marks

Finally, you should endeavour to study all the exercises, assignments and tutor marked questions.

Good Luck

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Unit 2. Contract of sale of land in Nigeria

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Unit 1. Introduction to conveyancing practice in nigeria

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1.0 Introduction

Prior to the coming of the Europeans into the areas now known as Nigeria, every community in the territory had its own law through which property was acquired and regulated. The law that regulated acquisition and transfer of property was essentially customary law. Customary land tenure differs from community to community, however, certain features are universal amongst all the communities. Some of the universal features of customary land tenure are: communality, that is land as a general rule belongs to the family or community, inalienability this generally implies that land cannot be alienated, and unwritten nature of land transaction. This means that writing is not a requirement for validity of any land transaction under customary land law.

It must be noted however that alienation was not prohibited totally under customary land tenure. This theory gained acceptability because the economic conditions of the time in most parts of Nigeria did not warrant alienation. Thus, a community or family could and in fact in many cases alienate its land when conditions dictate such and upon fulfillment of certain conditions. Our contact with the Europeans, introduction of money, urbanization, mobility of labour, high commercial value of land, and introduction of statutory land law which in turn facilitate individualization of land tenure are some of the conditions that encourage alienation of land. Some of the conditions for valid alienation in the case of sale under customary land tenure are consent of the principal members is important, the head of the family must participate in the alienation, it must be in the presence of witnesses and the purchaser should be put in possession.

With time these conditions became insufficient to guarantee security of title for a purchaser of land under customary. Most often than not, a purchaser of property under customary law ends up with a law suit. In this regard verify in the case of *Ogunbambi v. Abowaba* (1951)¹³ WACA 222 at 223 said:

The case is indeed in respect like many which come before this court, one in which the Oloto family either by inadvertence or design sell or purport to sell the same piece of land at different times to different persons. It passes my comprehension how in these days, when such disputes have come before this court over and over again, any person will

purchase land from this family without the most careful investigation for more often than not they purchase a law suit, and very often that is all they get.

The advent of europeans and subsequent introduction of english law into Nigeria brought more challenges to customary land tenure including customary ways of transfer of property. According to Prof. Oluyede (1978) land had assumed a more dynamic role in the society. People now demand land free from the restrictions of customary land tenure, they want their interest in land be secured. Consequently, transfer of land under the general law developed as a matter of necessity in order to meet the challenges brought about by our contact with the europeans and the socio-economics realities of the time. This scenario brought about the application of two systems of transfer of land existing side by side in Nigeria. This course will essentially deal with transfer of property under the general law. However, this unit introduces a beginner to some rudiments of transfer of property under customary.

2.0 Objectives

At the end of this unit, you should be able to:

- define conveyancing
- account for the historical evolution of inalienability theory of land under customary law
- identify the various ways of transfer of land
- identify some important legislation relevant to conveyancing practice under the general law in Nigeria

3.0 Main Content

3.1 Conveyancing, Defined

- Conveyancing is concerned with the transfer of property. It is generally understood to include contracts of sale of land, the various stages of investigation of title and the forms and contents of conveyances, leases mortgages and some other documents.
- in simple language conveyancing is the transfer of interest in property.
- section 2(v) of the Conveyancing Act 1881 provides the definition of conveyance as follows:

A conveyance includes any assignment, appointment, lease, settlement and other assurances and covenants to surrender made by deed on sale, mortgage, demise or settlement of any property or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance.

- Also section 2(1) of the Property and Conveyancing Law, 1959 states that: A Conveyance is a mortgage, charge, lease, assent, vesting declaration and every other instrument except a will.

The two statutory definitions above only describe a conveyance which shows that a conveyance is a kind of document. On the other hand, conveyancing is the various processes of transfer of interest in real property from one person to another. A legal practitioner who prepares any document of transfer (conveyance) is called conveyancer.

The need for a document to support ownership of land arose because of the nature of real property. There are two types of property; personal and real property. Personal property could either be tangible such as cars, books, bikes etc. or intangible such as shares, stocks and copyrights. Tangible personal property are things we can physically own. Real property refers to land and all things attached to the land. Because real property is immovable and cannot be physically owned in the same way as tangible personal property, ownership of real property should be supported by a legal document which confers title on the owner.

Self Assessment Exercise

1. Account for the evolution of inalienability theory under customary land tenure
2. Give a functional definition of conveyancing
3. Distinguish between personal property and real property

3.2 Mode of Conveyancing under Customary Law

According to Obi (1963) conveyancing of land under customary law would arise by an outright or conditional grant; by gift and by partitioning Customary method of conveying land differs in its details from place to place, but generally it involves some common features throughout Nigeria. Oluyede (1978). In the case of an outright sale the following steps have generally been identified, in the case of *Cole v. Folani* (1956) 1 FSC at 68 the Court observed as follows:

1. An offer to buy by the purchaser,
2. A preliminary investigation by the vendor into the character of the purchaser,
3. Negotiation about the price and demarcation of the boundaries of the land;
4. In some cases, offering of some rituals to the gods of the vendor
5. Gift of kola nuts or any other symbolic gift;
6. Payment of all or part of the purchase price;
7. The purchaser being put in possession by the vendor, Oluyede (1978) and
8. All these especially points 2, 6 & 7 must be carried out before witnesses for both sides.

3.3 Conveyancing Procedures under the General Law

Prof. Oluyede has succinctly summarised the procedures as follows:

1. The vendor usually advertises his land for sale
2. The purchaser will show interest in the property by contacting the vendor or vendor's solicitor
3. The parties then enter into a contract for sale of land. At times, the purchaser is required to pay a deposit. At this stage, the agreement would generally be subject to a

formal contract in which case there would be no binding contract until the contract has been exchanged.

4. The vendor's solicitor will submit a draft contract
5. The purchaser's solicitor will make necessary inquiries upon receiving the draft contract.
6. Immediately the purchaser's solicitor is satisfied with the terms of the contract, the contract is then signed in two parts by both parties and the two parts are exchanged and, the contract becomes binding.
7. Delivery of the abstract follows soon after the exchange of contract.
8. The purchaser's solicitor may raise requisitions, if any.
9. Once the purchaser's solicitor is satisfied with the reply to his requisition, he will prepare a draft conveyance which he submits in duplicate to the vendor's solicitor.
10. If the draft conveyance is approved, completion takes place at the office of the vendor's solicitors. The purchaser pays the balance and collect all relevant papers relating to the property from the vendor's solicitor.
11. The purchaser's solicitor arrange to have the conveyance stamped and registered

What have been attempted above is to illustrate a typical conveyancing transaction. Regrettably however, this may not be the case in Nigeria. Most vendors and purchasers in Nigeria are illiterate and holds the view that conveyancing transaction is expensive, they do not consider it necessary to engage solicitors at the commencement of the transaction. They either engage a solicitor at the middle of the negotiation or at the end when the property might have been bought and the purchase receipt obtained. In this circumstances all that is required is only a conveyance to be drafted. Mr Adubi rightly advised Nigerian conveyancers to be wary of when they were consulted. Thus if a solicitor is consulted before negotiations are concluded the usual procedure of taking instructions on conveyance should be adapted, proper investigation of the clients title to the land should be adhered to. Also all provisions of the contract must satisfy vendor's obligation of disclosing all encumbrances except patent defects to which the rule of *caveat emptor* applies. See the case of *Yandle v. Sutton* (1922) 2 Ch. 199.

3.4 Nature and Scope of Conveyancing

Earlier in this unit we have defined conveyancing as a process by which legal documents are used to transfer interest in property from one person to another. These procedures include contract of sale of land, investigation of title and perfection of legal document. Also, the statutory definition of conveyance identified certain documents that qualify as conveyance. From the definition and the statutory descriptions scope of conveyancing include:

- Contract of sale of land
- Investigation of title
- Preparation of deed of assignment/conveyance
- Leases
- Mortgages
- Power of attorney
- Registration of title system etc

Self Assessment Exercise 2

1. Who prepares the draft copy of the following documents:
 - a. Contract of sale of land
 - b. Conveyance

3.5 Some Important Statutes Relevant to Conveyancing Practice in Nigeria

A good conveyancer must appreciate land law, equity and the law of contract. In addition to these you must understand the following statutes

1. The Land Use Act 1978. it was first promulgated as Land Use Decree No. 6 of 1978 but later redesigned as the Land Use Act by Adaption Law (Re Designation of Decree and Edict) Order No. 13 of 1980 now Cap L5 LFN 2004. The Act is applicable throughout Nigeria
2. Conveyancing Act 1881 and 1882. The full title of the statute is the conveyancing and law of property Act. Simply cited as the Conveyancing Act. This is a Statute of General Application applicable to some states of the Old Northern Nigeria and some Eastern states. However, some states have enacted their own law. For example Law

of Property Transfer of Interest in Property Law 1988 River States. Imo state enacted a similar law in 1994. See *Ihekwoaba v. ACB & Others* (1988)10 NWLR pt 571 at 626 where the Court ruled that in appropriate instance it will take judicial notice of Conveyancing Act.

3. Property and Conveyancing Law 1959. This is a Nigerian adaptation of both English Law of Property Act 1925 and the Conveyancing Act. 1881. The law is applicable in the states of the former western and mid western Nigeria
4. Land (Instrument) Registration Law. All states of the federation have their Land (Instrument) Registration Law.
5. Stamp Duties Act or Law
6. Town and Country Planning Law
7. Rent control and Recovery of Premises Law
8. Land Use Charge Law etc

There are other laws that are equally important but they are not mentioned here. It is important that you should acquaint yourself with laws relevant to transfer of property in jurisdiction where you practice or where the property the subject matter of transfer is situated.

4.0 Conclusion

You have been taken through some important points any student needs to know when being introduced to conveyancing practice in Nigeria. This unit is important because throughout the study of conveyancing practice, it will reoccur constantly and you will find yourself making reference to this unit.

5.0 Summary

In this unit you have studied the following

- a. The historical developing of conveyancing practice in Nigeria
- b. The meaning of conveyancing
- c. The procedures of conveyancing both under customary law and the General law
- d. The statutes relevant to conveyancing practice in Nigeria

6. Tutor Marked Assignment

Carefully identify some legislation relevant to the study of conveyancing practice in Nigeria and examine their territorial jurisdiction.

7. References/Further Reading

- a. Oluyede P.A. Nigerian Law of Conveyancing Ibadan University Press Ltd Ibadan 1978.
- b. Adubi, C.O Drafting, Conveyances and Wills Lighthouse Publishing Co. Ltd. Ikeja 1991
- c. Imhanobe, S.O Understanding Legal Drafting and Conveyancing. Secured Title Publishers, Abuja 2002.
- d. Obi, S.N. The Ibo Law of Property Sweet and Maxwell Ibadan, 1963.

Unit 2: Contract of Sale of Land in Nigeria

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1.0 Introduction

In unit of 1 of this course you have been introduced though briefly to procedures of ordinary conveyancing transaction under both the customary and the General law. In this unit, you will be taken through the procedures of conveyancing transaction which usually starts with a contract for sale of land. In practice, contract for sale of land precede, a conveyance. The parties, particularly, the purchaser uses the contract to hold the vendor to his bargain and at the same time the purchaser has time to investigate the vendor's title before paying the balance of the purchase price.

2.0 Objectives

At the end of this unit, you should be able to:

- Identify the types of contracts for sale of land
- State the significance of making pre contract enquiries
- Give example of special conditions of sale
- Identify what constitute an open contract
- How to enforce oral contract of sale of land other than under customary law

3.0 Main Content

3.1 Meaning and Types of Contract of Sale of Land in Nigeria

The existence and validity of a contract of sale of land depend on the ordinary rules of contract. For example, the parties must have capacity to contract; there must be offer and acceptance as well as consideration. In conveyancing however, there are some peculiarities to the contract of sale of land arising from the nature of the subject matter of the contract i.e. land which include house or other building. Hence, a contract of sale of land is a preliminary step in the transfer of interest in land from a vendor to a purchaser whereby the purchaser acquires an equitable interest in the property while, the legal interest is acquired later at completion. There are three types of contract of sale of land in Nigeria. These are: oral contract, open contract, and formal contract.

Self Assessment Question

Why is a contract of sale of land not very popular in Nigeria?

3.2 Oral Contract

Oral contract for sale of land is only valid under customary law. In many line of cases, the courts have held that documents are foreign to customary law see the case of *Izang v. Chaka* (2001)14 NWLR pt 734. p612. Therefore, parties can enter into oral sale of land under customary law provided they satisfy the following requirements

1. That payment of the purchase price;
2. The purchaser is put in possession; and
3. The transaction is concluded before witnesses. See the case of *Manya v. Idris* (2001)8 NWLR pt 716 p. 627 *Ajayi v. Jolaosho* (2004)2 NWLR pt. 856 p.89

3.3 Open Contract

An open contract of sale of land is a contract that only specify the intention to sell, name of the parties, the property and the price or enable them to be ascertained. The contract is open because it leaves most of the terms of the contract to be implied by law. According to Imhanobe (2002) an open contract is one that provides for only the minimum requirements of the law on formation of contract of sale of land. The law on formation of contract relating to land can be found section 5 of Law Reform (contract) Act No. 64 of

1961, Section 4 Statute of Frauds 1677 and Section 67 Property and Conveyancing Law 1959. Section 67 PCL provides that:

No action shall be brought upon any contract for the sale or other disposition of land or any interests in land, unless the agreement upon which such action is brought or some memorandum or note thereof is in writing and signed by the party to be charged ... (emphasis supplied).

A memorandum in the context of land cases was defined in the case of *Uzoegwu v. Ifekandu* (2001)¹⁷ NWLR pt 741 p. 49 at 70 as “a piece of evidence showing that some other transaction has taken place or will take place in respect of the land, and that some other things will be done to confer a legal title or right on the land. That other thing may take the form of the holder of the memorandum going into possession or executing a legal conveyance or some other thing to perfect his title. It does not perse confer a right or title to land”.

Section 67 PCL and its equivalent merely lays down a rule of evidence by making the contract unenforceable but not void. Although section 67 PCL and other laws of similar effect does not provide for what should be the contents of a memorandum or note evidencing the contract of sale of land, judicial authorities such as *Adeniran v. Olagunju* (2001)¹⁷ NWLR pt 741 p. 169 established that the following should be included in a memorandum. These are; the parties, the property, the price and the signature of the party to be charged.

Consequently, the following documents have been held to constitute memoranda

1. A receipt of payment
2. A simple letter repudiating an admitted contract
3. A pleading signed by counsel in proceeding other than for the enforcement of the contract
4. An entry in an Auctioneer's book
5. A will

Note that the memo need not consist of one document it may be made out from several documents if the documents can be connected together for example several letters in a correspondence see *Okoro v. Ogara* (1964)ENLR p. 99

The memo need not exist from the on set, it is sufficient if the memo is ready before the parties can enforce the contract.

Finally, a party may in some circumstances be able to enforce inadequate memorandum (i.e. oral contract) by order of specific performance if he has performed his own side of the bargain.

Self Assessment Question

Give good examples of an open contract of sale of land

3.4 Formal Contract

This is a contract of sale of land which in addition to the names of the parties the property and the price provides for some special conditions of sale as may be agreed by the parties. A formal contract of sale of land is usually divided into two parts namely;

- a. the particular of sale which include the description of the property and
- b. the special conditions of sale which states the special conditions which the parties are to be bound

The parties may consider the following special conditions in a contract of sale of land.

1. The capacity of the vendor
2. payment of deposit
3. payment of balance and interest on unpaid purchase price
4. Payment for chattel and fixtures
5. possession before completion
6. date of completion
7. exceptions and reservations
8. the risk and liability for insurance pending completion
9. when necessary, make the sale subject to mortgage and
10. subject to governor's consent

3.5 Void Terms and Conditions

Despite the fact that parties are free to provide for many conditions, there are some terms or conditions if inserted in a contract of sale, by statute are void. For example

- a. Section 69(1) of the PCL provides that a condition that a purchaser of a legal estate in land shall accept a title made with the concurrence of any person entitled to an equitable interest shall be void, if a title can be made discharged from the equitable interest without such concurrence. This is to ensure that the purchaser take the property free from these encumbrances
- b. Section 69(2) of the PCL provides that a condition that a purchaser of a legal estate in land shall pay or contribute towards the costs of or incidental to obtaining a vesting order, or the appointment of trustees of a conveyance on trust for sale; or the preparation, stamping or execution of a conveyance on trust for sale
- c. Proviso to section 71(1) PCL makes void any condition that has the effect of depriving the purchaser a right to request the production of certain documents. For example, power of attorney under which any abstracted documented is executed.
- d. Under section 73(1) any condition preventing a purchaser from appointing his own solicitor is void
- e. Under section 108 of the Stamp Duties Act any condition of sale that the purchaser shall not object to insufficiency of stamp duty shall be void.

4.0 Conclusion

In this unit, your attention has been drawn to the peculiarity of Nigerian legal system which recognizes the application of customary law side by side with the general law. Specifically, it is clear from this unit that despite the law that requires transaction in respect of land should be evidenced in writing customary law permit parties to enter into oral contract of sale of land provided certain conditions are fulfilled.

5.0 Summary

In this unit you have learnt

- a. What constitute an open contract of sale of land
- b. Circumstance under which a party may be able to enforce an inadequate memorandum
- c. Types of contract of sale of land
- d. Where customary law recognize oral contract of sale of land

6.0 Tutor Marked Assignment

- a. What are the shortcomings of open contract of sale of land
- b. Distinguish between memorandum and instrument

7. References/Further Reading

1. Adubi, C.O Drafting, Conveyances and Will. Light House Publishing Co. Ltd. Ikeja 1991
2. Imhanobe, S.O Understanding Legal Drafting and Conveyancing, Secured Publishers Abuja 2002
3. Willoughby, P.G A Guide to the Form and Drafting of Conveyances 1968 OUP

Unit 3 Contract of Sale of Land Cont'd

Table of Content

1.0 Introduction

This unit examines other aspects of contract of sale of land. Therefore, you will study important components of contract of sale of land in Nigeria. It is expected that both parties should be represented by a solicitor in the transaction. The advantage is that the solicitor will ensure that his client is able to take maximum benefit under the contract. He will also ensure that his client accept to carry out obligation or duties which he is in position to carry out to avoid being liable for breaches

2.0 Objectives

At the end of this unit, you should be able to:

- a. Understand when a contract is binding on the parties.
- b. Identify the duties of the parties under the contract
- c. State the advantages of entering into a formal contract
- d. When the contract stand discharged

3.0 Main Content

3.1 Procedures for making the contract binding

This is technically called the doctrine of exchange of contract. The signing of the contract does not necessarily make it binding on the parties. It becomes binding when there has been an exchange. In this regard, there are two possible scenario; 1. Where the parties are represented by separate solicitors. 2. Where the parties act by the same solicitor.

1. Where the parties act by separate solicitors in this case the vendor's solicitor drafts the contract which is amended by the purchaser's solicitor to reflect all the terms agreed by the parties. Then three copies are produced one is retained by the vendor, the purchaser takes one and the last copy is retained by the stamp duties office much later during post completion. Both the purchaser and the vendor sign the copy with him and the rule is that the purchaser should move the vendor by taking his own signed copy to the vendor in exchange for the vendor's signed copy. It is this exchange that makes the contract binding. In the case of *Eccles v. Bryant* (1948) ch. 931 it was held, inter alia, that until the contract is exchanged there is no binding agreement to entitle either party to specific performance.
2. Where the parties act by same solicitor. The rule is that parties should always act by separate solicitors. However, there are few instances where a solicitor may act for both parties such instances include where the title of the property is sound, or there is no likelihood of conflict of interest or where the value of the property is small. In these instances, one solicitor with the consent of the parties may act for the two parties. In such situation where parties act by the same solicitor, there is

no need for an exchange of contract as discussed in 1 above. Thus, the contract becomes binding when it is signed unconditionally by the parties. See the case of Smith v. Mansi (1962)3 ALL ER 875

3.2 Rights and Obligations of the Parties under the Contract

The exchange of the contract creates a binding agreement between the parties. Thus, the vendor is a kind of a trustee because except otherwise provided by the contract, he is still in possession of the property. He is entitled to the balance of the purchase money against which he has a right of lien. Where there is a tenant in the property, he collects rent therefrom until completion. The vendor as a trustee of a special kind is required to take reasonable care to maintain the property. The Supreme Court in the case of Osagie v. Oyeyinka (1987)6 SCNJ 94 held that:

A person to whom no conveyance of a piece of land has been made but who has paid a consideration for same has no legal but an equitable interest which he can enforce by an action of specific performance to execute a formal conveyance. Before this conveyance, the person whose duty it is to execute the said conveyance is an implied trustee of the land. Any improper dealing with the land by this implied trustee would constitute a breach of trust

On the part of the purchaser he is a beneficiary who may assign, or transfer his equitable interest to another person. He can by injunction restrain the vendor from dealing with the property in such a way that may affect his beneficial interest. The purchaser is under a duty to insure the property because the risk in the property passed to him under the contract.

Finally, it is interesting to note that the death of both or either of the parties will not affect the contract as their personal representative (executors or administrator) can perform the contract or be compelled to complete the contract.

Self Assessment Question

Enumerate the rights of the parties under a contract of sale of land.

3.3 Discharge of a Contract of Sale

This is sometimes referred to as merger of a contract of sale in the conveyance. The rule is that a contract of sale is discharged when its terms have been performed by which the property is conveyed to the purchaser by a deed of conveyance. In other words, the execution of a deed of conveyance embodying the terms of the contract of sale will discharge the contract. That is the contract will merge in the conveyance. However, terms which are contained in the contract but not repeated in the deed of conveyance either subsist or have been abandoned depending on the intention of the parties. This situation may occasion conflict, in order to avoid this, it is better to repeat terms of contract that should subsist in the deed of conveyance.

3.4 Advantages of the Formal Contract

Imhanobe (2002) has identified the following as advantages of entering into a formal contract of sale of land.

1. It crystallizes the position of the parties
2. It prevent last minute withdrawal by either of the parties
3. Parties may use it to confer special advantage on themselves
4. It may be used to transfer the legal interest in chattels so as to reduce the stamp duty payable at the completion stage.
5. The equitable doctrine of conversion is applicable to contracts of sale of land

3.5 Pre Contract Enquiries

This is sometimes called preliminary enquiries. The rule is that in a contract of sale of land the vendor is only required to disclose latent defects and other encumbrances. The penalty for failing to disclose or for any false misrepresentation is that the purchaser may be able to rescind the contract or claim damages. However, the vendor is under no duty to

disclose patent defects in respect of his property. It is the duty of the purchaser to conduct preliminary enquiries usually by way of physical inspection and where the purchaser fails to carry out this duty the principle is caveat emptor i.e. buyer beware.

The purchaser should inspect the property to see things for himself. Example of pre contract enquiries includes

1. physical state of the property
2. whether the property is fit for the purpose
3. accesses roads
4. drainage
5. local taxes and outgoings
6. easement
7. whether there are tenants in the property

4.0 Conclusion

Despite the fact that contract of sale of land is not famous among conveyancers in Nigeria, it is a very important preliminary stage for any conveyancing transaction. The parties under a contract of sale are able to negotiate many conditions that may be favourable to them. For example, the purchaser may request that he should be allowed to take possession of the property at the contract stage before completion.

5.0 Summary

In this unit you have studied the following

- a. Rights and duties of parties to a formal contract of sale of land
- b. Procedure for making the contract binding
- c. Importance of entering into a formal contract of sale of land
- d. Merger of contract of sale in the conveyance

6.0 Tutor Marked Assignment

1. Examine the significance of entering into a formal contract of sale of land
2. Clearly distinguish patent defects from latent defects

7.0 References/Further Readings

1. Bowman, E.G The Elements of Conveyancing
2. Barnsley, D.G Conveyancing law and practice (ed) Thompson, M. Butterworth. London 1978
3. Imhanobe, S.O Understanding Legal Drafting and Conveyancing Secured Title Publishers 2002 Abuja

Unit 4. Remedies for breach of contract of sale of land

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1.0 Introduction

It is trite that once there is a right there should be a remedy. Therefore once a party to a contract of sale of land establishes that the other party has committed a breach the party complaining is entitled to remedy. The remedies known under the general law of contract are equally applicable to contract of sale of land. These include, specific performance, damages, rescission, lien and so on. The type of remedy that may be available to a party will depend on many factors. Factor such as the nature of the breach, whether or not there is a binding contract existing at the time of the breach, intervention of innocent third party whether hardship may be occasioned etc generally, a breach of ordinary warranty may not entitle the innocent party to bring contract to an abrupt end.

2.0 Objectives

At the end of this unit, you should be able to

- a. Identify remedies available to an innocent party in a contract of sale
- b. Know the appropriate remedy(ies) for each breach
- c. The implication of Land Use Act on remedies
- d. Distinguish repudiation from rescission

3.0 Main Content

3.1 Specific Performance

A decree of specific performance is an equitable remedy by which the court directs the defendant to perform the contract which he has entered in accordance with its terms. It is the most potent remedy in contract to sell land. Specific performance is applicable only when there is a concluded contract. It is a discretionary remedy and the plaintiff is not entitled to it as a matter of right. In fact, a person seeking the remedy of specific performance must show that all conditions precedent have been fulfilled and that he has either performed or is ready and willing to perform all the terms which ought to be performed by him. See the case of *Fakoya v. St. Paul's Church Shagamu* (1966)1 ALR

Comm. 459 Australian Hardwood Property Ltd v. Commissioner for Railway (1961)¹ ALL ER 737.

Generally, the court may refuse to decree specific performance where it will impose hardship on the defendant or third party see Taylor v. Russel (1947)¹² WACA 179. Yusuf v Oyetunde (1998)¹⁰ SCNJ 1 or where the plaintiff is guilty of delay or other acts or default such that it will be inequitable to decree specific performance.

3.2 Damages

This is the commonest remedy readily granted by courts. The underlying basis for the remedy of damages was laid down in Robinson v Harman (1843-60)ALL ER 383 as follows: “The rule of the common law is that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed”. The plaintiff is only entitle recover for loss arising naturally from the breach or within the contemplation of the parties. This rule was crystallized in the case of Hadley v. Baxendale (1854)⁹ EX 341.

Also the vendor can only claim damages if he is able to prove that he has good title and that he is ready and willing to convey to the purchaser. For the purchaser to claim damages, he must prove that the vendor is unable to produce good title or he has refused to execute the conveyance tendered to him by the purchaser, or he resells the property to another or repudiates the contract. It must be noted that the rights of the parties to the remedies of specific performance and damages are affected by the provisions of the Land Use Act which prohibits alienation of right of occupancy without the governor’s consent. Grant of consent is discretionary. Governor cannot be compelled to grant consent. Consequently, if the contract is breached after the application for consent has been filed, but before consent is granted or rejected, breach of the contract by either of the parties could only give rise to damages and not specific performance.

Self Assessment Exercise

When do you think a court will refuse the remedy of specific performance?

3.3 Rescission

Rescission means a discharge at common law of the innocent party by the others breach of a fundamental term or condition of a contract. Rescission implies that the party who is entitled to rescind has repudiated the contract. Thus rescission implies the repudiation of the contract but the two concepts are different.

In the case of *Manya v Idris* (2001)8 NWLR pt 716 p. 627 at 639. The court states the law as follows:

If a party to a contract commits a breach or breaches, and such breach or breaches are of fundamental terms, the innocent party has an option. He may accept the breach or breaches as repudiation and treat the contract at an end and no longer binding on him and sue for damages in respect of the breach, or elect to affirm that the contract is still existing, continuing and enforceable by seeking specific performance.

3.4 Forfeiture and Recovery of Deposit

The vendor may forfeit (i.e. retain) the deposit. Similarly, the purchaser may recover the deposit. The right of the parties to forfeit or recover deposit depends on the terms of the contract. See *Biyo v. Aku* (1996)1 NWLR pt 422, *Manya v Idris* (supra). Where it is not possible to resolve the issue by reference to the terms of the contract, the court will consider the conduct of the parties.

3.5 Lien

Both the vendor and purchaser have right of lien.

- a. Vendor's lien. The vendor has a lien on the land until the full purchase money is paid. He may apply to court either for sale of the property or for an order restoring the possession of the property to him. The vendor may loose the lien if he executes a deed of conveyance in favour of the purchaser containing

a receipt clause stating that the money had been paid because a subsequent purchaser from the purchaser without notice of non payment will take free of the lien.

- b. Purchaser's lien. Where the purchaser is entitled to recover his deposit, the law allows him a lien over the property until the deposit is returned. He can enforce it by court order for the sale of the property, the lien being discharged out of the proceeds of sale. Adubi suggested that the purchaser who has fully paid the purchase price should obtain the title deeds to prevent the vendor from dealing with the property fraudulently.

4.0 Conclusion

From the proceeding discussions, you now know that once the contract is binding it creates rights and obligations for the parties and any breach will occasion remedies. The remedies available have been discussed above and the circumstances under which a party may be entitled to a particular remedy also been highlighted.

5.0 Summary

In this unit you have learnt the following:

- a. That the remedy of specific performance is discretionary
- b. That the damages awardable are limited by some factors
- c. That both the vendor and purchaser have right of lien

6.0 Tutor Marked Assignment

1. Why and when will you advise a party to a contract of sale of land to seek for the remedy of specific performance?
2. To what extent has the rule in Hadley v. Baxendale (1854) 9 Ex 341 Limit or qualify damages awardable to a plaintiff in an action for a breach of contract.

7.0 References/Further Reading

- a. Sagay, I.E Nigerian Law of Contract, spectrum Law Publishing, Ibadan, 1991.
- b. Adubi, C.O Drafting, Conveyances and Will. Lighthouse Publishing Co Ltd Ikeja, 1991
- c. Imhamobe S.O Understanding Legal Drafting and Conveyancing, Secured Title Publisher Abuja 2002.
- d. Barnsley's Conveyancing Law & Practice (ed.) Thompson, M. Butterworths, London, 1996

Module II: Deed of Conveyance

Unit 1 Deducing and Investigation of Title

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 - 3.4 Investigating of title
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1.0 Introduction

Land transaction is commonly fraught with fraud in Nigeria. Because of this, parties through their solicitor must take all steps necessary to ensure that they avoid litigation. In this regard it is the purchaser that must open his eyes to discover any defect that may eventually affect his title. You will recall that pre contract enquiries were only limited to issues. Such as: whether the property is fit for purpose, availability of access roads, drainages, easements and so on. At that stage, the purchaser is not necessarily concerned with title. It is at this stage now that the purchaser is required to investigate the title of the vendor before proceeding to completion. The purchaser is to verify the authenticity and genuineness of the documents the vendor relied upon to establish his title.

The procedure of investigation is very important and if not properly handled, the purchaser may instead of purchasing the property may end up buying a law suit. Also, the solicitor may be liable for professional negligence at the suit of his client.

2.0 Objectives

At the end of this unit, you should be able to:

- a. Identify documents that could be used as good root of title
- b. List documents that constitute defective root of title
- c. Examine how to investigate title
- d. Prepare requisition on title

3.0 Main Content

3.1 Deducing Title

Deducing title or establishment of title is the responsibility of the vendor to deduce title to the property he has agreed to sell to the purchaser. At the contract stage both the vendor and purchaser act on the promise that the vendor has good title to the property so the vendor is to deliver on his promise by deducing his title to the property. The law has imposed this duty on the vendor on the promise that the devolution of interest in a property is best known to the vendor.

The vendor deduce title by submitting to the purchaser an abstract of title or epitome of title. The abstract of title is usually a brief history of title of the property showing among other things how the interest in the property move from one person to another until the present vendor, encumbrances, or charges or any other thing that may affect the title to the property. According to Imhanobe (p.154) before the advent of photocopy technology, abstract was typed on a paper divided into six columns, for example.

Traditional form of an abstract of title

1	2	3	4	5	6
Date of document	Nature of event	Parties	Whether abstract is delivered or photocopied	Document number	Whether original document to be handed over on completion

However, with the advent of photocopier, writing of abstract has been replaced with a document called epitome of title. Epitome of title is a schedule of documents and other relevant information which constitute the title and is accompanied by photocopies of the documents.

The law required that a vendor must deduce title for a length of time. For example, section 70 of the PCL, provides the vendor shall deduce title for 30 years. While section 2 of the vendor and Purchasers Act requires the vendor to deduce title for 40 years. See the case of Gankon v. Ugochukwu (1993) 6 SCNJ 263. Finally, an abstract of title must start with a root of title.

Self Assessment Question

Explain the relevance of deducing title to the purchaser

3.2 Example of Documents that Constitute Sound Root of Title

Root of title is the base, fulcrum and foundation on which the right to title is built; therefore, an abstract of title must necessarily begin with a sound root of title, which may be grant, sale, conquest, succession, adverse possession etc if it is a document i.e. a document of title, then it must contain a sufficient description of the property, it must deal with the entire interest in the property and must not contain anything that is likely to cast doubt on the title.

Consequently, the following documents in absence of any encumbrance could generally constitute sound root of title

1. Certificate of occupancy issues pursuant to actual grant by the Governor. See Section 5(1) and 9 of the Land Use Act
2. A deed of assignment that is duly executed and perfected see *Odubeko v Fowler* (1993) 9 SCNJ 1. A deed of conveyance usually conveys all the estate the parties thereto have. That is the provisions of section 63 of Conveyancing Act and Section 88 of the Property and Conveyancing Law. Hereinafter called C.A. and PCL respectively.
3. A legal mortgage, generally, a mortgagee whose mortgage was created by a deed has power to sell the mortgaged property and an innocent purchaser who is not aware of the fact that the mortgagee's power of sale has not become exercisable takes free of the interest of the mortgagor. This protection is contained in section 21(2) CA and S 126 (2) PCL
4. A deed of gift
5. Registered titles, under registration of title system
6. Certificate of title
7. Assent. This is a document that is used to convey the legal interest in the property of a deceased to the beneficiary under a will or rules of intestacy. For states (i.e. western region and lagos state) where assent is required to convey interest, it must be in writing, named the beneficiary and signed by the executors or administrator before it become valid. In other parts of Nigeria, assent is not required because, the legal

interest in the property vests directly in the beneficiary. See *Renner v Renner* (1961)¹ ALL NLR 233 and *Bankole v William* (1966)² ALL NLR 236.

3.3 Example of Documents that are Defective or bad Root of Title

These documents are sometimes presented by the vendor to prove title. At the same, the purchaser may cite some of these document while conducting investigation. It is important that the purcahser should be very careful where the vendor rely solely on these or any of these as root of title. These documents include:

1. Certificate of occupancy. Certificate of occupancy that is issued by the Governor as evidence of deemed grant is usually precarious because there is no sufficient way of establishing the fact that the property was actually vested in the claimant before the commencement of the Land Use Act. Thus, if a certificate is issued and subsequently a different person is able to prove that he is more entitled by virtue of the fact that the property was actually vested in him and not the claimant before the Land Use Act, the court will set aside such certificate of occupancy. Justice Nnaemeka-Agu JSC said in *Ogunleye v Oni* (1990)² NWLR pt 35 at 784. “Indeed, a certificate of occupancy properly issued under section 9 of the Land Use Act ought to be a reflection and an assurance that the grantee has to be in occupation of the land. Where it is shown by evidene that another person had a better right to grant, the court will have no alternative but to set aside the grant if asked to do so, otherwise to ignore it”.
2. Power of attorney in ordinary parlance creates an agency relation whereby the donor asks the donee to do certain things. Unfortunately, conveyancers in Nigeria have in some circumstance used power of attorney to convey interest in land. This is bad practice and it cannot constitute good root of title.
3. Lease. A lease properly so called should be registered and stamped. Hence while conducting search at the land registry it is usual to cite a registered lease in the file. Sometimes if the head lease permit, a lessee of a long lease may assign his unexpired residue to another. This means another lease has been created out of the main lease.

It should be noted that both the leasee and the sublessee are not in position to investigate the title of the lessor their interest does not go beyond the terms of years granted. It is because of this that a lease cannot be a good root of title.

4. Equitable mortgage
5. A conveyance that is subject to any encumbrance e.g. mortgage

Self Assessment Exercise

- a. List documents that constitute good root of title
- b. What is a root of title.

3.4 Investigation of Title

Immediately, after the vendor has delivered to the purchaser an abstract or epitome of title, it is the duty of the purchaser to conduct an investigation on the title of the vendor. The purchaser is expected to go to the following places to investigate the vendor's title.

1. Land registry. The land instrument registration law of states and the land instrument registration Act for the Federal Capital Territory Abuja create for each state a land registry, where files and other documents relating to land within the jurisdiction are kept. Conveyancers desirous of conducting searches will apply and pay the necessary fee before being allowed to have access to a file kept in the registry.
2. Company registry i.e. Corporate Affairs Commission. Search at company registry is only relevant if the vendor or past owner of the property is a company.
3. Search at the probate registry of High Court. Where the transfer of title is by succession, you should check the probate division of the High Court to ensure that a letter of administration or probate was granted and to whom.
4. Physical inspection. At this point it is still important to visit the property to ensure that the measurement, description and other boundaries correspond with what is on the document of title. It is also important to ensure whether or not there are people in occupation. If yes, you should find out the condition under the occupants are there.
5. Finally, you may need to examine court judgment. The vendor might have delivered as one of the documents of title a court judgment, the purchaser should visit the court

that delivered such judgment to ensure that the parties and the subject matter are the same with the copy presented by the vendor. He is to ensure that the judgment is actually in favour of the vendor.

3.5 Requisition on title

These are questions the purchaser may raise as a result of the investigation carried out on the vendor's title. Any question or doubt arising from the investigation and abstract should be directed to the vendor for clarification. The vendor is expected to reply to such requisitions within a reasonable time.

The purchaser may accept the vendor's title expressly or by conduct. Once the purchaser accepts the title he is deemed to have waived all other objections that he was entitled to. The parties are finally required to complete by paying the balance, execute the conveyance, deliver the title documents.

Self Assessment Exercise

When should a conveyancer visit company's registry to conduct searches for conveyance of land?

4.0 Conclusion

Deducing and investigation of title are very important aspects of conveyancing transaction. Both the vendor and purchaser perform important duties. The purchaser cannot properly investigate the vendor's title, without the vendor producing epitome or abstract of titles. The purchaser's solicitor must act cautiously during investigation to be able to discover any defect or encumbrance on the vendor's property.

5.0 Summary

In this unit, you have been taken through

- a. The various documents you are likely to see when conducting searches
- b. The difference between good and bad root of title
- c. The definition of abstract and epitome of title
- d. Places you may visit of when conducting investigation

6.0 Tutor Marked Assignment

Distinguish between pre contract enquiry and investigation of title

7.0 References/Further Reading

1. Abayomi, Kole Wills: Law of Practice Mbeyi and associate Ltd, Lagos, 2004
2. Smith, I.O (ed) The Land Use Act Twenty Five Years After Dept of Private and Property Law Uni. Lagos 2003
3. Imhanobe S.O Understanding Legal Drafting and Conveyancing Secured Published Abuja 2002

Cases

Dzungwe v Gbishe (1985)2 NWLR Pt. 8. 528
Olohunde v Adeyuju (2000)10 NWLR pt 676 p62
Chiroma v Shaura (1986)1 NWLR pt 19 p 751
Mohammed v Dantsoho (2003)6 NWLR pt 817 p457
Ibrahim v. Mohammed(2003)6 NWLR pt 817 p615
Ilona v Idakwo (2003)11 NWLR pt 830 p. 53

Unit 2: Proof of Title to Land in Nigeria

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 - 3.2 Proof by Act of ownership
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 - 3.4 Proof by production of document
 - 3.5 Proof of possession of connected or adjacent land
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked assignment
- 7.0 Reference/further reading

1.0 Introduction

Most of the land cases in our courts turns on declaration of title or ownership of land. A party who claims ownership of land must establish such claim to the satisfaction of the court before a court will hold in his favour. In the case of *Fagunwa v Adebisi* (2004)17 NWLR pt 903 p544, the court held that title or ownership of land presupposes exclusive or immediate exclusive right to land that is total right of ownership unless the owner voluntarily transfers his right to another person. In order to prove title, the court on many cases like *Idundun v Akumagba* (1976)9-10 SC 227 identified five ways of proving title, see also *Atufe v. Ogbomeinor* (2004)13 NWLR pt 890 p 327 at 344. The five ways of proving title is the subject matter of this unit.

2.0 Objectives

At the end of this unit, you should be able to:

- Identify the five ways of proving title
- Explain each of the five ways of proving title
- Recognise what constitute possession in law

3.0 Main contents

3.1 Proof of ownership by traditional evidence

Evidence of traditional which is plausible and is not contradicted or in conflict can support a claim for declaration of title to land. See *Ogun v. Akinyede* (2004)18 NWLR pt 905 p 362 at 386. In support of traditional evidence section 45 of the Evidence Act provides that where the title to or interest in family or community land is in issue oral evidence of family or community, tradition concerning such title or interest is relevant. Traditional evidence will consist of facts history and story of how one claims to be a person with superior title. According judicial authority, where a person relies on traditional history in a land dispute, the pleading should aver to the founding of land in dispute, persons who founded the land and exercised original act of possession and the persons to whom the title in respect of the land has devolved since it was founded see *Morenikeji v. Adegbojin* (2003)8 NWLR pt 823 p. 411 at 444. The reason for accepting oral traditional evidence to prove title to land despite, the rule relating to hearsay evidence has been stated in the case of *Commissioner of Land v. Adagu* (1937)13 WACA 206. The court has held that it is undoubted practice in this country to accept as admissible evidence in cases of declaration to title to family land traditional evidence of family ownership. Literacy among the people does not go back very far and the oral tradition is generally the only evidence available as to the ownership of land earlier than the memory of the living people.

Self Assessment Exercise

Review the provisions of section 45 of the Evidence Act

3.2 Proof by Acts of Ownership

To prove title by acts of ownership, the plaintiff is required to show that he has been exercising for some time act of ownership over the property. Also, the plaintiff must not rely on the weakness of the defendants case. In the case of *Nwosu v. Udeaja* (1990)1 NWLR pt 25 p 196 the court held that the plaintiff must on the strenght of the evidence brought by him satisfy the court that he has been exercising acts of ownership extending over a sufficient lenght of time to warrant the inference that he is entitled to the property.

Self Assessment Exercises

How does a plaintiff prove title by acts of ownership.

3.3 Proof of ownership by acts of long possessions

Possession is important in law. This is because fact of possession of land entitles a person to retain the land against anyone in the world except someone who has a better title. Thus if Mr A, the owner of blackacre is dispossessed by B and B in turn is dispossessed by C then B having a good title against the world except Mr. A can claim possession from C. C cannot plead that B has no title since he B has dipossessed Mr. A.

In protecting somebody in possession section 146 of the Evidence Act provides that when the quesiton is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.

Self Assessment Exercise

List circumstances that could constitute possession in law.

3.4 Proof by Production of Document

Under customary law, the requirement of writing is not essential. Infact, documents are unknown to customary law. However, where inspite of this clear exemption, parties to land dispute who desires to prove title by production of document can do so. Parties to land

dispute may prove ownership by production of document such as contract of sale of land, deed of assignment etc. it should be noted generally that the fact that a customary transaction was reduced into writing will not take it away from the realm of customary law.

3.5 Proof of Possession of Connected or Adjacent Land

If adjacent land is in such circumstances rendering it possible that the owner of the land in dispute is the owner of the whole tract the court may declare so. In *Higgins v Nassanviah Ltd* (1975) AC 460. The court said that it is clearly settled that the acts of possession done on parts of a tract of land to which possessory title is sought may be evidence of the possession of the whole. In *Lord Advocate v. Lord Bantyre* (1879) 4 AC 770 Lord Blackburn Said, “and all that tend to prove possession as owners of the tracts tend to prove ownership of the whole tract, provided there is such common character of locality as would raise a reasonable inference that if the barons possessed one part, they possessed the whole. The weight depends on the nature of the tract, what line of possession would be had of it and what the kind of possession proved was”.

What is important here is that the land in dispute must be so connected to the land in possession of the plaintiff. The fact of possession raises only an inference that the plaintiff may also be the owner of connected land. However if the defendant can prove to the satisfaction of the court that such land did not belong to the plaintiff in spite of the connection, the court will not make such inference in favour of the plaintiff.

4.0 Conclusion

You have been introduced to one of the most important topics in conveyancing practice. Most of the civil litigation in our courts today centre on declaration of title to land i.e. question of ownership of land. It is important to remember that a plaintiff does not have to prove title by all the five means (methods) before he can succeed. One of the ways of proving title is sufficient for the plaintiff provided it is cogent and sound.

5.0 Summary

In this unit, you have learnt

- a. Ways of proving title to land in Nigeria
- b. How to establish each of the ways i.e. what the plaintiff needs to do in each of the cases

6.0 Tutor Marked Assignment

Explain the five ways of proving title to land in Nigeria.

7.0 References/Further Reading

1. J.G Riddal Introduction to Land Law, London Butterworths 1974
2. I.O Smith Practical Approach to Law of Real Property Ecowatch Lagos 1999
3. Megarry and Wade. The Law of Real Property 1966
4. Roff and Roper. The Law and Practice of Registered Conveyancing London 1972

Unit 3. Certificate of Occupancy

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 - 3.3 Contents of Certificate of Occupancy
 - 3.4 Duties and obligations of a holder of certificate of occupancy
 - 3.5 How to obtain certificate of occupancy
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- 6.0 Tutor Marked Assignment
- 7.0 References/Further Readings

1.0 Introduction

In the preceding unit, you were introduced to ways of proving ownership of land in Nigeria. One of the ways is by production of document. With the introduction of the Land Use Act in 1978, certificate of occupancy a by product of the Land Use Act – is one of the commonest document being used in Nigeria to establish ownership of right of occupancy. It must be pointed out right from out set that certificate of occupancy is neither an instrument of title nor document of title. See generally *Ogunleye v Oni* (1990)2 NWLR pt 135 p. 745 Per Nnaemeka Agu (JCA) but certainly, it is capable of transferring or conferring the right of occupancy granted or deemed granted. It has become fashionable among conveyancers and their clients to insist that the land the subject matter of conveyancing transaction should be covered by a certificate of occupancy. Similarly, for purpose of capital formation, banks and other financial institution may not give out facilities unless the property being mortgaged is covered by a certificate of occupancy. These and many other issues have made this unit an important components of study.

2.0 Objectives

At the end of this unit, you should be able to;

- a. Define certificate of occupancy
- b. Distinguish between certificate of occupancy and right of occupancy
- c. List some terms usually found in a typical certificate of occupancy
- d. Identify persons entitle to a certificate of occupancy
- e. List documents/procedure for application of certificate of occupancy

3.0 Main Contents

3.1 Meaning and nature of certificate of occupancy

The Land Use Act introduced the right of occupancy system in Nigeria. Right of occupancy is a right to use and occupy land in accordance with the provisions of the Land Use Act. Right of occupancy is completely different from ownership of land known under both customary and common laws. All forms of ownership of land existing before the Land

Use Act was introduced were converted to right of occupancy. There are two types of right of occupancy under the Land Use Act.

1. Statutory right of occupancy which is either granted under section 5 of the Act or deemed granted under section 34(1)(2)
2. Customary right of occupancy usually granted by the Local Government, which is either granted under section 6(1) of the Land Use Act or deemed granted under section 36(1)(2) of the Land Use Act. A certificate of occupancy is therefore the evidence of the right of occupancy. A certificate of occupancy is a document that shows that the person disclosed there in is entitled to the right of occupancy. It must be noted that certificate of occupancy is the only method devised by the Land Use Act which links a person to a right of occupancy. Despite a great deal of debate, a certificate of occupancy can validly confers new interests in land and extinguish old ones existing in favour of another particularly when preceded by a valid grant. Prof Umezulike observes that a certificate of occupancy can perform three main functions:
 - a. As an instrument which confers the right granted or deemed granted by the state
 - b. As a conveyance of the right of occupancy being transferred to the grantee of right of occupancy and
 - c. As the ultimate document in the conveyance of right of occupancy ...

Self Assessment Exercie

1. Distinguish certificate of occupancy from right of occupancy

3.2 Who issues Certificate of Occupancy

While there are two types of certificate of occupancy, statutory and customary and the fact that both the Governor and the Local Government can grant right of occupancy, it is only the Governor that can issue either statutory certificate of occupayancy under the Land Use Act. In this connection section 9 of the Land use Act provides as follows:

9(1) it shall be lawful for the Governor

- a. When granting a statutory right of occupancy to any person or
- b. When any person is in occupation of land under a customary right of occupancy and applies in the prescribed manner; or
- c. When any person is entitled to a statutory right of occupancy, to issue a certificate under his hand in evidence of such a right of occupancy.

The provision shows clearly that it is only the Governor, to the exclusion of any other person, that can issue certificate of occupancy.

3.3 Contents of Certificate of Occupancy

Certificate of occupancy content both implied and express conditions, terms or covenants that binds the holder and the Governor. Certificate of occupancy as evidence of right of occupancy shows the conditions under which the holder holds his right of occupancy.

The implied conditions are specified in section 10 of the Land Use Act as follows:
every certificate of occupancy shall be deemed to contain provisions to the following effect:

- a. That the holder binds himself to pay the ... Governor the amount found to be payable in respect of any unexhausted improvements existing on the land at the date of his entering into occupation;
- b. That the holder binds himself to pay to the ... Governor the rent fixed by the ... Governor and any rent which may be agreed or fixed or revision in accordance with the provisions of section 16.

The express conditions, terms or covenants may vary from state to state. However, the salient express conditions include the following;

1. Purpose clause. i.e. the purpose for which the right of occupancy was granted. It may be for residential commercial, industrial or agricultural.
2. Development clause. It usually requires the grantee to develop the land the subject matter of right of occupancy within a specified period and sometimes the development should be to a specified value.

3. Quantum of interest clause. This clause usually shows that the grant is for specified years. Usually it is for 99 years, 55 years etc see section 8 of the Land Use Act.
4. Payment for unexhausted improvement clause
5. Payment of rent clause
6. Alienation clause. That the holder will not alienate without the consent of the Governor see Section 21 and 22 of the Land Use Act.
7. Right of entry clause. That the Governor or his agent shall have a right to enter and inspect the land.

Self Assessment Exercise

What is the relevance of the alienation clause in a certificate of occupancy

3.4 Rights and Duties of a Holder of a Certificate of Occupancy

The following are the rights of the holder:

1. Under section 14 of the Act, the holder shall have exclusive right to the land the subject of the right of occupancy against all persons other than the Governor.
2. Under section 15, of the Act, the holder during the term of a right of occupancy has ownership of all improvements on the land
3. The holder has a right to alienate the land or the improvements on the land or both provided he obtains the consent of the Governor.
4. The holder has a right to be informed of the rent payable from time to time.
5. The holder is entitled to compensation if his right of occupancy is revoked for public purpose.

The holder of a certificate of occupancy has the following duties

1. Payments of incidental expenses incurred by the Governor

2. Maintain all beacons or other land marks which delineate the boundary of the area covered by the right of occupancy
3. Comply with all the terms, conditions or covenants in the certificate of occupancy

3.5 How to Obtain a Certificate of Occupancy

The procedures for application of certificate of occupancy and the documents required greatly depend on the practice in jurisdiction where the land is located.

There are two ways of applying for a certificate of occupancy

1. By grant of state land i.e. actual grant by the Governor.
2. By ratification of existing rights over land i.e. rights existing before the enactment of the Land Use Act 1998. i.e deemed grant

Generally, to apply for certificate of occupancy following a grant by state i.e. actual grant, you need the following:

1. Application form duly completed
2. Two passport photograph
3. 3 years tax clearance receipt
4. The development levy receipt
5. The receipt of payment of application fees
6. Birth certificate or declaration of age

4.0 Conclusion

Certificate of occupancy is an important document under the Land Use Act. It is the only document introduced by the Act that links a person to a right of occupancy. It is because of its significance that lending institutions insist that before a property is accepted as a collateral it must be covered by a certificate of occupancy. Therefore, conveyancer must always ensure that land is covered by valid and genuine certificate of occupancy.

5.0 Summary

In this unit, you have learnt

- a. The meaning and nature of certificate of occupancy
- b. The difference between certificate of occupancy and right of occupancy
- c. The contents of certificate of occupancy

6.0 Tutor marked assignment

Examine the relevance or otherwise of certificate of occupancy to conveyancing transaction in Nigeria

7.0 References/Further Reading

1. Omotola, J.A. Essays on the Land Use Act 1978 Lagos University Press 1984.
2. Umezulike, I.A. The Land Use Act. More than Two Decades After, and Problems of Adaptive Strategies of Implementation. Igbinedion University Okada Edo State 2004.
3. Smith, I.O The Land Use Act. Twenty five Years After. Dept of Private and Property Law University of Lagos. 2003.
4. Madaki, A.M Introduction to Nigerian Land Law. Unpublished Lectures 2010
5. Imhanobe, S.O Understanding Legal Drafting and Conveyancing Secured Published Abuja 2002.

Unit 4 Deed of Assignment

Table of Contents

- 1.0 Introduction
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6.0 Tutor marked assignment

7.0 References/further reading

1.0 Introduction

Deed of assignment or deed of conveyance is important for many reasons. In the first place it is the document that is usually prepared at the completion stage where the legal interest in the property is transferred to the purchaser after the contract of sale of land. Secondly, most conveyancing transactions in Nigeria start with request for preparation of deed of assignment. This is generally due to apathy of Nigerians to entering into a formal contract of sale of land. Thirdly, Deed of Assignment is a document of title that can be used to prove ownership of land. It is therefore imperative that a good conveyancer should know the content of a deed of assignment. Most importantly, deed of assignment is the most commonest document of title in Nigeria today.

2.0 Objectives

At the end of this unit, you should be able to

- Identify parts of a deed of assignments
- Give reasons why certain clauses are included in a deed of assignment
- Prepare a simple deed of assignment
- Define some latin words commonly found in a deed of assignment

3.0 Main Content

3.1 Preliminary Parts

Deed of assignment can generally be divided into four broad parts. The first part is preliminary or introductory parts which consist of the commencement, the date and the parties.

Commencement: by virtue of section 82 of the PCL, a deed of assignment commences with the description of the nature of the document. In the case of assignment it will commence as this assignment.

Date. The date of a deed is always presumed to be correct until the contrary is proved. Where no date is inserted, under section 125 of the Evidence Act, a deed is presumed to have been made on the date of delivery. This shows that a deed can be left undated. However, date is very important for the purpose of stamp duty, under section 23 (3)&(4) of the Stamp Duties Act, a conveyance must be stamped within thirty days of its first execution, otherwise the person liable to stamp is guilty of an offence and also liable to pay penalty. To avoid this problem, the deed can be left undated until when the parties are ready to perfect the document. See generally *Awojugbagbe v. Chinukwe* (1995)4 SCNJ 162.

Parties. Parties to a conveyance must have full capacity. Their names and addresses should also be included. Section 102 (1) of the PCL has made it unnecessary to expressly extend parties to include heirs and successors-in-title.

3.2 The Operative Part

The operative part of a deed of assignment consists of the following:

1. Recitals. This usually give explanation or background to the transaction. There are two types of recitals namely; narrative, this gives past history of how the vendor became the owner of the property. Introductory, this explains how and why the existing state of affairs is to be changed. Recitals are not compulsory but if inserted in a deed it performs the following three functions:
 - a. A clear recital can be used to interpret any ambiguous operative part of a deed
 - b. A clear recital will estop the parties to that deed and persons who claim through them from showing the existence of a different state of affairs from that in the recital.
 - c. Section 130 of the Evidence Act provides that statements in the recitals of a document that is twenty years old at the date of contract are presumed to be sufficient evidence of the truth of such facts.
2. Testatum. Since recital is not mandatory, testatum is sometimes considered as the starting point of the operative part of a deed of assignment. It simply introduces a list of items usually in a numbered clauses as follows

- a. Consideration. This state the whole purchase price
- b. Receipt clause. This is optional, but if inserted, it shows that the vendor acknowledges the receipt of the purchase price. The advantage of this include the fact that it dispenses with issuance of a formal receipt. For innocent subsequent purchaser, it is sufficient evidence of payment. Also it is a sufficient authority to pay money to the vendor's solicitors upon production of a deed of assignment that is executed by the vendor with a receipt clause endorsed in it. See generally sections 54, 55 and 56 Conveyancing Act and Sections 92, 93 and 94 PCL
- c. The operative words. That is the capacity of the vendor. The vendor may convey as beneficial owner, trustee mortgagee, settlor etc. What is important is that the vendor should know his obligations in which ever capacity he conveys to the purchaser. See section 7(A)&(B) Conveyancing Act and section 100(1)(a)&(b) PCL
- d. Word of grant. In a deed of assignment the practice is to use assigns or convey. Transfer is used for conveyance under registered title system.
- e. Parcel. This provides for the correct description of the property. To ensure that the property is properly identified, the parties may use plan or words or both to describe the property.
- f. Habendum. This states the quantum of the interest granted to the purchaser in an assignment the interest granted to the purchaser is usually the unexpired residue of the vendor's interest in the property. Under the system introduced by the Land Use Act, the unexpired residue of the vendor's title will be unexpired term of years remaining in the right of occupancy.
- g. Exception and reservation. Exceptions means that which is withheld from the purchaser in the grant by the vendor. i.e. the vendor retain some rights existing in the property which otherwise would have been extinguished or passed to the purchaser. Reservations, on the other hand are creation of new rights by the parties to benefit the vendor, especially where the vendor retains a part of the land. Examples, easement and profit.

Self Assessment Exercise

With good examples distinguish between exception and reservation.

3.3 Miscellaneous Provisions

These are clauses that are inserted in a deed of assignment if circumstances demand.

Example of such clauses are:

- a. Indemnity clause. Indemnity means reimbursement against anticipated loss. It is usually inserted in a deed of assignment to protect the grantee i.e. (the vendor) against breaches committed by the purchaser. This is very common in states under the Conveyancing Act. However, in the states under the Property and Conveyancing Law, where the conveyance is for valuable consideration, there is no need to expressly provide for indemnity clause because, the clause is implied into the deed of assignment
- b. Safe custody and acknowledgment for production clause

At completion, the vendor is to hand over all the original title deeds to the purchaser. But he can retain any document which relates to the land retained by him. In such cases where, the vendor is not able to hand over all the original document, the purchaser should insert in the deed of assignment a safe custody and acknowledgement for production clause to protect himself against a fraudulent dealing in the property and to serve as a notice to subsequent purchaser from the same vendor that part of the property has been sold.

Self Assessment Question

What is the significance of safe custody and acknowledgement for production clause in a deed of assignment.

3.4 Final or Concluding Part of a Deed of Assignment

The final provisions of a deed of assignment consist of the testimonium, execution, attestation and franking.

- a. Testimonium. This is the part that link the contents of the deed with the parties seal and signature, testimonium is not a mandatory requirement, but its inclusion is an evidence that the deed was duly executed.
- b. Execution. This mean signing. Section 91(4) and 100 Evidence Act makes signing important. Usually it is the mode of execution of a document that determine whether or not it is a deed. A deed is always signed sealed and delivered. See generally *Faro Bottling Company Ltd v Asuji* (2002)1 NWLR pt 748 p. 311
- c. Attestation. This means witnessing, attestation is important to establish that the deed was duly executed. See section 127 of the Evidence Act. Although attestaton is not a requirement, relevant laws provides that some document must be attested otherwise they will be invalid. For example Wills, power of attorney, document executed by illiterate and companies.
- d. Franking. This is providing for the name and address on the conveyance of the solicitor who prepared it. A deed is valid whether or not is franked. But it is essential that a legal practitioner to endorse his name and address on documents prepared by him for the following reasons:
 1. Where a document is franked, it is not invalidated by the absence of the illiterate jurat. See *Edokoplor & Co. v Ohenhen*. (1994) 7-8 SC 500.
 2. It is only a legal practitioner that can prepare any instrument in expectation of a fee. Thus, Stamp Duties Commissioner may refuse to stamp a document that is not franked since it would be impossible to know whether or not it was prepared by a legal practitioner.

Self Assessment Exercise

Give reasons why you may include the following in a deed of assignment

- a. Testimonium
- b. Attestation
- c. Franking

3.5 Document that must be by Deed.

Deed is a document that is signed sealed and delivered. A deed must be in writing, sealed and delivered as the act of the person executing it as well as there must be an intention to be bound

Section 77(1) of the Property and Conveyancing Law PCL provides that all covenances of land or of any interest therein are void for the purpose of conveying or creating a legal estate unless made by deed.

2. A lease for a term of years exceeding three years must be by deed
3. A legal mortgage
4. A power of attorney appointing an agent authorized to execute a deed
5. Generally, a promise without consideration

4.0 Conclusion

Deed of Assignment or Deed of Conveyance is one document that you will constantly be required to prepare in your practice in Nigeria. It is a document that transfers legal interest in land from the vendor to the purchaser. You should be conversant with its features and characteristic.

5.0 Summary

In this unit you have learnt

- a. The features of a deed of assignment
- b. The importance of the features and parts of a deed of assignment
- c. The meaning of some Latin words used in a deed of assignment and
- d. The documents that should be by deed

6.0 Tutor Marked Assignment

1. When and why will you advise a conveyance to include the following clauses in a deed of assignment?

- a. Safe custody and acknowledgment for production
- b. Indemnity and
- c. Receipt

7.0 References/Further Readings

- a. Oluyede, P.A. Nigerian Law of Conveyancing Ibadan University Press, 1978
- b. Inhanobe, S.O Understanding Legal Drafting and Conveyancing, Secured Publishers Abuja 2002.
- c. Barnsley's Conveyancing Law and Practice (ed.) Thompson, M. Butterworths London 1996.

Module III

Unit 1. Introduction to conveyance (transfer) of land under registered title system

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- 1.0 Introduction
- 2.0 Objectives
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 - 3.4 Advantages of registered titles system
 - 3.5 Investigation and completion under registration of title system
- 4.0 Conclusion
- 5.0 Summary
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1.0 Introduction

Registration of title system or registered land or sometimes called the Torren system was introduced basically to confer on purchasers a title guaranteed by the state. Before the

introduction of registration of title system, investigation and verification of vendor's title is complex, and expensive because of the various documents a purchaser has to study. In fact it is so complex that only conveyancers with considerable care could attempt to verify title.

Prof. Riddal, graphically illustrate the complex nature of investigation of title thus.

A solicitor acting for a purchaser must be on the watch for any possible weakness, or missing links in the chain of title leading to the vendor. For example, if V sells land to P, P will need to satisfy himself that V has a good title to the land. V may produce as a root of title a conveyance by Q to L, a grant of probate to S (the executor appointed by R in his will), an assent by S to T (to whom R had devised the land) a conveyance on sale from U to V. only after all these documents have been scrutinized and found to be in order can P safely buy the land. Let us suppose that three months after purchasing the land P wishes to sell the land to X. X must verify P's title, and X's solicitor will inspect the same series of documents, this time including the conveyance by V to P. Each time the land changes hands ... the same costly and time consuming, procedures must be followed. Would it not be more sensible, it might be asked if the state once and for all officially verified who was the owner of the land and recorded this fact in a central registrar – a register showing who was the owner of that very plot of land in the country? Then if P wished to buy land from V all he would have to do would be to check this register if he found V registered as the owner, he could safely buy the land. V's name could be struck out and P's name substituted.

In summary, the system of registration of title was introduced to achieve Prof. Riddal's suggestion. Registered titles system has long existed in some jurisdiction like England. It was introduced in Nigeria by virtue of registration titles Ordinance No. 13 Later Registration Titles Act Cap 181, 1958 and much later Cap 546 of 1990. Although, the law is still in our statute books, it is only applicable to some parts of old colony of Lagos. Imhanobe has identified the following parts of Lagos where registration of titles Act applies as: Victoria Island, Ikoyi, Yaba, Surulere and some parts of Mushin. See also registration of Titles Law Cap. 166 (Lagos) 1994.

2.0 Objectives

At the end of this unit, you should be able to:

- a. Outline the procedures of transfer of land under registration of title system

- b. Explain some important terminologies commonly used under registered title
- c. Outline the advantages of the system
- d. Distinguish between registration of title system and registration of instruments

3.0 Main Contents

3.1 Procedures Registration

1. Usually the law (Registration of title Acts) will designate some areas as registered land
2. The law will provide that title to land in the areas so designated must be registered within two months of the creation of the registration district or execution of the conveyance. Otherwise the title is void. However, the registrar or court may extend the time.
3. Application requesting for registration is forwarded to the land registry office
4. The registrar will advertise the application, and will invite objections from any person who might be prejudiced by the registration
5. Where there is any objection it will be heard in the Land Registry Court, subject to the right of appeal to High Court and even to Supreme Court.
6. If the application is approved, it is entered into the register and a land certificate is issued to replace the title deed, to the applicant

Note generally, that the court can make an order, on the application of a person adversely affected for the register to be rectified

Self Assessment Exercise

Discuss the procedures for registration of title under the registration of title system

3.2 Some terminologies under registration of title system

- a. The Register. The register is divided into three parts. The property register which contains the description of the land. The proprietorship register which contains the

name and address of the registered proprietor. The charge register shows any encumbrances over the land. It is the entries in the register that constitutes the title of the proprietor.

- b. Land Certificate on registration, the proprietor is entitled to a land certificate. It is a document that carries a summary of the contents of the register. It is not the document of title. The actual content of the register remains the title of the proprietor. Note that once there is transfer of land to another, the land certificate must be deposited with the registry and a new certificate is issued to a new proprietor. Also if a charge is created over the property, the certificate must be deposited and a charge certificate is issued to the mortgagee.
- c. Third party interests overriding interests. These are third party interests that cannot be discovered by mere inspection of the register, yet proprietor's title is subject to them. For example, overriding interests. Overriding interests are third party interest that are subsisting in reference to the property, not registered in the register but subject to which the purchaser of a registered title takes his title. Despite the doctrine of notice, they bind the purchaser whether or not he has notice see *Williams and Glyn's Bank v. Boland* (1981) A.C. 487 at 504. Section 49 of the Registration of Titles Act lists example of interests that constitute overriding interest like easements. Any public high way, right of every person in possession of land to which he may be entitled etc
- d. General Map. The registry also keeps a general map of the registered land showing an index of the names of all registered proprietor and the registered number of their titles.
- e. Transfer. Under registration of title system proprietor can only transfer his interest to another. This is in contradistinction with deed of assignment where the vendor assigns or conveys his interest to another.

Self Assessment Exercise

What is the significance of the land certificate under registration of titles system?

3.3 Differences between Registration of Title and Registration of Instruments

1. Under the system of registration of instruments, the registry is open to the public and therefore, a prospective purchaser does not need the vendors consent to investigate his title. Consent of the proprietor is always required before his title can be investigated under the registration of title system since the registry is not open to the public.
2. Under the system of registration of instruments registration does not cure defect in title. While under registration of titles system registration cure defect because the state has guaranteed the title.
3. Proof of title under registration of instruments depend on the production of abstract of title but under the registration of title system, the proprietor is not required to produce any abstract of title or give history of devolution of interest in the property because the title is guaranteed by the state.
4. Under the system of registration of instruments the identity of the property has to be proved and described adequately (see parcel clause in a deed of assignment). This is not necessary under the registration of title systems because, the property register and the general map of the district have adequately identified and described the registered land.
5. Under the system of registration of instruments, a purchaser's title is subject to interests for whom he has notice, but under the registration of titles systems apart from overriding interests, the proprietor is not affected by notice of any unregistered interest affecting the property.
6. The terminologies are different. For example, under registration of instruments, the vendor assigns or conveys his interest to the purchaser. But the proprietor (vendor) transfers his interest to the purchaser under registration of title system.

Self Assessment Exercise

Define Overriding Interest and give examples

3.4 Advantages of the Registered Titles System

1. The procedures for transfer of registered land is simple

2. It is cost effective
3. It guarantees security of title
4. It provides some measure of privacy because the registry is not open to the public
5. In the long run, it will reduce land litigation. Unfortunately, registration of titles Act/Law though in our statutes books are not being operated because of ignorance of the general benefits of the advantages of the system, lack of machinery for the law to function and the advent of the Land Use Act.

Self Assessment Exercise

Account for the unpopularity of the registration of title system in Nigeria

3.5 Investigation of Title and Completion under the Registration of Titles System

The purchaser under this system is only required to depend on the entries in the register, because the entries constitute evidence of the title of the proprietor. Since, the registry is not open to the public; the purchaser is to obtain a letter of authority from the proprietor or depose to an affidavit that he has the authority of the proprietor to investigate his title. The purchaser after paying the necessary fee will be permitted to conduct searches. The purchaser should also carry out physical inspection of the property to discover third party interests if any that may exist on the property such as overriding interests. Completion under this system is effected by filling of forms.

4.0 Conclusion

Conveyance of land by deed of conveyance as recognize under the system registration of instrument is expensive and cumbersome yet, the purchaser's title is not guaranteed. Registration of titles system was introduced to simplify procedures for investigation of title and to ensure security of title. Transfer of land under this system is substitution of one person's name for another in the registry. At any point in time, only one person is the registered proprietor of his title. Thus, the purchaser under this system does not have to wade into many documents to investigate and ensures the genuineness of vendor's title.

5.0 Summary

In this unit, you have learnt

- a. The procedures for registration of title under the Torren system
- b. The meaning of overriding interest
- c. The difference between registration of instruments and registration of title
- d. The advantages of registered titles system

6.0 Tutor marked assignment

With clear example, differentiate the registration of title system from the system of registration of instruments

7.0 References/further reading

- a. Oluyede, P.A. Nigerian Law of Conveyancing Ibadan University Press, 1978
- b. Imhanobe, S.O Understanding Legal Drafting and Conveyancing, Secured Publishers Abuja 2002.
- c. Barnsley's Conveyancing Law & Practice (ed.) Thompson, M Butterworths London 1996.
- d. Owumi v p. 2(1972)2 ULR 327 Bucknor-Mcleans v Inlak (1980)8 -11 SC 1

Unit 2: Power of Attorney

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main Contents
 - 3.1 Capacity of create power of attorney
 - 3.2 Construction of power of attorney
 - 3.3 Revocation of power of attorney
 - 3.4 Execution of donee
- 4.0 Conclusion
- 5.0 Summary

6.0 Tutor marked assignment

7.0 References/further reading

1.0 Introduction

A power of attorney is an instrument by which one person called (donor) gives another person attorney or donee the power to act on his behalf for certain purposes such as to collect money, management of land, to prosecute a case in court. A power of attorney may be executed under hand but where the attorney is to execute a deed, his appointment must be by deed. *Abinar v Farhat* (1938)¹⁴ NLR 17. A power of attorney is a document of unique importance it is usually executed by one party i.e. the donor – but unfortunately it is often misused by conveyancers in Nigeria. It is not uncommon to see conveyancers purporting to convey land using power of attorney.

2.0 Objectives

At the end of this unit, you should be able to:

- Identify the nature and limit of power of attorney
- List persons that can act as attorney
- How to revoke a power of attorney
- How an attorney is to execute document

3.0 Main Contents

3.1 Capacity to Create Power of Attorney

The applicable law here is the general contractual rule as to capacity of parties. For example, an attorney can only be appointed to carry out what the donor can himself lawfully do. And a donor or an attorney must be capable of understanding the nature and the effect of the contract at the time he executes it. Let us consider the capacity of the following persons:

a. Infant or minor

What an infant can lawfully do, he can equally appoint an attorney to do on his behalf. Thus, an infant could appoint an attorney for purpose of purchasing necessities or to enter into contract of service beneficial to the minor.

b. Persons with unsound mind.

Generally, where a person's mental capacity renders him incapable of understanding what is to be effected by the execution of the power of attorney, the power of attorney is invalid. And no body can acquire rights under such deed

c. Companies

A company registered under part A of the Companies and Allied Matters Act 1990 example ABC Ltd or ABC Plc may appoint attorney to act on its behalf such appointment must be by a resolution of the Board of Directors. The company can only appoint an attorney to do only those things the company is authorized by its memorandum and article to do. Therefore, unincorporated such as ordinary business names registered under part B of the companies and Allied Matters Act 1990 for example ABC and Co or ABC International Cannot be appointed an attorney. In the case of National Bank of Nigeria Ltd v. Korban Brothers (nig) and Others. (1976)¹ FNLR 116. The plaintiff obtained a power of attorney from the first defendants and relied on it for the substantive case. One of the defendants raised objection that the power of attorney was invalid since he was the manager of Ilorin Branch of National Bank of Nigeria who is not a juristic person. The court upheld the objection.

Thus, it is only a juristic person that can be appointed donee of a power of attorney.

Self Assessment Exercise

1. How can you differentiate a company from a business name in Nigeria
2. What advice will you give a person who is desirous of appointing partnership firm as attorney

3.2 Construction of a Power of Attorney

The court usually interpret a power of attorney strictly as given only that authority which it expressly confers and such authority as is necessarily implied. In other words, extrinsic evidence of what the power of attorney is or ought to have been is inadmissible. Thus in deciding the incidental power of an attorney, the court construes the power to include all the incidental powers which are necessary for its effective execution. For example, a power of attorney to “sell, lease, charge, mortgage or however deal with the property” may not be construed to allow the attorney collect compensation paid in respect of the property. See *Abina v. Farhart* (supra) in most cases power of attorney usually ends with a general clause or word such as “that my attorney may do all things as I may lawfully do”. This general word or clause is interpreted as being of the same kind as the specific acts mentioned in the deed, it will not enlarge it i.e. the court will apply the rule of *ejus dem generis* to limit the meaning of the general words.

3.3 Revocation of a Power of Attorney

A power of attorney can be revoked in the following ways:

1. Expressly. The donor can expressly withdraw the power conferred by the power of attorney,
2. Impliedly, example, if the donor takes steps which are inconsistent with the continue operation or existence of the power of attorney
3. By operation of law that is
 - a. Donor's death
 - b. Donor's bankruptcy
 - c. Donor's mental incapacity
 - d. The winding up or liquidation of a corporate attorney
 - e. The death, bankruptcy or mental incapacity of a sole attorney etc

The fact that a power of attorney is revocable may cause some problems especially to third parties. Consequently, statutes have provided two exceptions when the power of attorney is irrevocable. The exceptions are to protect third parties dealing with the donee.

The exceptions are: 1. where the power is given for valuable consideration or complied with interest see section 8(1) of the Conveyancing Act 1882 and section 143(1) PCL 1959. It cannot be revoked until the benefit for which it had been conferred is reaped or the security realized. 2. Where the power is stated to be irrevocable for a period of time not exceeding one year see section 9(1) CA 1882 and 144(1) PCL that power shall not be revoked during the period either by anything done by the donor without the concurrence of the donee or by the donor's death, disability or bankruptcy. Section 7(1) of the C.A. 1882 and 142(1) PCL further protects third party.

Self Assessment Exercise

List circumstance under which a power of attorney cannot be revoked.

3.4 Execution by Donee

A donee of a power of attorney may execute documents in his own signatures and name by virtue of section 14, PCL. A donee may choose to execute the document in the name of the donor see section 9(5) PCL which provides "where any such power for disposing of or creating a legal estate is exercisable by a person who is not the estate owner, the power shall, when practicable, be exercised in the name and on behalf of the estate owner".

However, when the donee executes documents in his own name it shall have effect as if it was done by the donor himself. The donee is only required to give particulars of the power of attorney under which he was appointed.

Self Assessment Exercise

What is the significance of section 141 of the property and conveyancing law PCL 1959

4.0 Conclusion

Power of Attorney is a document that is simple and important but often misused by Nigerian conveyancers. A donor cannot delegate act which attach to his personal status e.g. marriage, candidate for examination, priest etc. Third party must carefully investigate the document to ensure that the donee has specific powers, because specific powers are better than general powers.

5.0 Summary

In this unit you have studied

- a. The meaning of power of attorney
- b. Persons who can create power of attorney
- c. Circumstances under which a power of attorney may be revoked
- d. How the law has protected 3rd parties who may be dealing with a donee
- e. How the attorney may execute document

6.0 Tutor Marked Assignment

Analyse the protection the law has offers third parties who may be dealing with a donee of a power of attorney

7.0 References/Further Reading

1. Halsbury's Laws of England
2. Bowstead on Agency 13th edition
3. Imhanobe, S.O Understanding Legal Drafting and Conveyancing Secured Publishers 2002. Abuja.
4. Orojo, J.O Company Law and Practice in Nigeria, Mbeyi and Associate Nigeria Lagos 1992.

1. Tingley v Muller (1917)2 ch. 144
2. Chima v. Chima (2001)3 NWLR pt 701 527
3. Melwani v. Fivester Ind. Ltd (2002)3 NWLR pt 753 217

Unit 3. Leases and Other Related Terminologies Distinguished

- 1.0 Introduction
- 2.0 Objectives
- 3.0 Main contents
 - 3.1 Leases and tenancies
 - 3.2 Leases and assignment
 - 3.3 Leases and under-lease
 - 3.4 Leases and License
 - 3.5 Agreement for a lease
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor marked assignment
- 7.0 References/further reading

1.0 Introduction

From economic perspective leases and tenancies are very important to the landlord and even the tenant. An owner of a property who does not wish to stay or occupy the land himself may grant another person right to occupy and use the property for certain period in return for an agreed sum of money, under this arrangements, the owner is able to have some economic benefits arising from the property. On the part of the person who has been allowed to use the property, he is able to have the use for a term certain the property belonging to another person.

As a result of rapid urbanization compel with the introduction of white colour job, Nigerians have become increasingly mobile. These have greatly influenced our way of lives. People have moved from rural areas to urban centre in search of better lives, jobs and western education, accommodation became a major problem in urban centre leading to constant crisis between landlords and tenants. Attempt by successive government at regulating rents in Nigeria has not been very successful.

2.0 Objectives

At the end of this unit you should be able to:

- Distinguish leases from other related concepts
- State the relevance of such distinction
- Identify other related concepts

3.0 Main Contents

3.1 Leases and Tenancies

The words leases and tenancies are sometimes used interchangeably. However, there exist some difference between the two related concepts in terms of creation and perfection.

A lease is an agreement by deed whereby the owner of an estate in land grant the right to the exclusive possession of his land or part of it to another person to hold for a term of years certain. Strictly, the grantor is called the lessor and the grantee is called the lessee. The period granted is the terms of years and the interest retained by the lessor including the right to possession at the end of the term is called the reversion.

On the other hand, a tenancy agreement is a grant of a term less than 3 years which is not required to be by deed. It may be executed under hand i.e. it is sufficient if the agreement is in writing. In tenancy agreement, the grantor is called the landlord and the grantee, tenant. A tenancy may be for a fixed period example 2 years, at the expiration of 2 years the tenancy comes to an end. It may be periodic from week to week, month to month etc it must be emphasized that there is no much difference between tenancy and lease except in the mode of creation and perfection.

Self Assessment Exercise

There is only a thin line dividing a lease from a tenancy. Do you agree

3.2 Leases and Assignment

In a lease only a term of years is granted to the lease, the leasee has a right of reversion at the expiration of the term granted to the lessee. On the other hand an assignment conveys or assigns the entire interest of the vendor in the property to the purchaser and the vendor has no right of reversion. Before the introduction of the Land Use Act in 1978 it was possible for the vendor to assign or convey the fee. Simple interest in a property under the Land Use Act the vendor does not have fee. Simple, it has been converted to a term of years certain called right of occupancy see section 1 and 8 of the Land Use Act. Therefore, the vendor can only assign the unexpired residue of his term of years. In a layman's language assignment under the Land Use Act is an assignment of a lease.

3.3 Leases and Under Lease

The distinction between a lease and under lease or sub-lease is simple. A lease is a direct relationship between the lessor and lessee. But an under lease means that there is a head lease (that is a document creating the direct relationship between the lessor and lessee) meaning, the under lessor is a tenant of the head lessor. This distinction is important in view of the land tenure system introduced by the Land Use Act, 1978. Under the Land Use Act the governor of a state is the super land lord see section 1 of the Act. He may grant right of occupancy to anyone for a term of years, so what exist between the governor and the holder is similar to a lease. Thus, if the holder alienate the land by way of lease he is invariably creating a sublease or underlease because it is also a "tenant" of the governor. Therefore parties to a sublease must examine the head lease to ensure that conditions therein have been complied with.

3.4 Leases and License

A license is a relationship whereby the licensee is granted a right to enter into or use the premises without becoming entitled to exclusive possession. A licensee, has no interest in the premises he occupies but he can exclude the whole world from the premises except the grantor or licensor. There are three types of licensee a bare licence, licence coupled with

an interest and contractual licence. See *Igbuja v. Eregare* (1990)3 NWLR pt 139 p. 425. *Abioye v. Afolabi* (1998)4 NWLR pt 545 p. 296.

Licence merely gives the licensee a personal privilege but no exclusive possession or general control of the property. Thus the following have been held as licensees a lodger at a hotel. *Appah v. Parncliffe Investments Ltd* (1964)1 ALL ER 838. a person holding the right to use the refreshment room of a theater for the purpose of selling refreshment, *Clore v. Theatrical Properties Ltd* (1936)3 ALL ER 483 or where a person holds no interest in the land but merely a personal right to occupy the land for example as a result of family arrangement or act of friendship it generosity see generally. *Facchini v. Bryson* (1952)ITLR -. 1386. The distinction between leases and licenses is significant for many reasons. In the first place, if the relationship is that of a lease, and the lessor transfer the land to a 3rd party, lessee interest in the lease will bind the 3rd party. If the right grant is a licence, it will not bind the 3rd party. Secondly, if the relationship thereby create a lease, and the lessor enter the premises without lessee's consent, then lessor is a trespasser and liable to lessee as such. Thirdly, if the relationship create a lease or tenancy, the tenant will be able to enjoy the various, protections under the various rent and recovery of premises law. Such protection include unnecessary eviction and increase of rent.

4.0 Conclusion

It is imperative to know the distinction between a lease and other related concepts. In many instances parties agree on certain arrangements in the believe that they have created a lease which in the eye of the law is something else you should therefore ensure that the terminology used in a legal document reflect the actual intention or relationship between the parties.

5.0 Summary

In this unit you have learnt, the

- a. various concepts that are similar to a lease
- b. distinction between the concepts and a lease
- c. Significance and reasons for understanding the distinction

6.0 Tutor Marked Question

Why is the distinction between a lease and the licence significant

7.0 References/Further Readings

- a. Riddal, J.G Introduction to Land Law Butterworths, London, 1974
- b. Chianu, E Law of Landlord and Tenant Cases and Comments 2nd ed. Nigeria Printer Publication, Lagos, 1989.
- c. Oluyede, P.A Nigerian Law of Conveyancing Ibadan University, Press 1 978.
- d. Chukwumah v. Shell Petroleum Devept. Co. Ltd (1993)4 NWLR pt 289 p. 512
- e. Macrafft Wagons, Ltd v Smith (1951)2 ALL ER 271
- f. Street v Mountford (1985)AC 809

Unit 4. Requirements of a Valid Formal Lease

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1.0 Introduction

Generally a lease may be created orally or by deed. At common law an oral (parol) lease is valid in the fulfillment of the following conditions:

1. The lessee is put into possession 2. the best rent obtainable is reserved and 3. The lease must be for a period not exceeding three years. See section 79(2) PCL. Similarly, an agreement to create a lease under the rule of *Walsh v. Lonsdale* (1882) 21 Ch:D 9 is as good as lease at law provided it can be enforced by an action in specific performance. Despite the validity of oral lease as well as an agreement for a lease, it is still prudent to have a formal, lease for the following reasons, firstly, the validity of a formal lease does not depend on the availability of the remedy of specific performance, it is therefore easier to enforce a formal lease than an oral lease. Secondly, it is possible to claim damage in a formal lease where specific performance fail, but where part performance fails in an oral lease damages with also fail. In this unit however our concern is going to be on formal lease i.e. a grant of a term of 3 years and more.

2.0 Objectives

At the end of this unit, you should be able to

1. Identify the essential requirements of a formal lease
2. Explain the requirements of a formal lease
3. Ascertain whether or not a given transaction has created a lease or not

3.0 Main Contents

3.1 The Lease must be by a Deed

A deed is a document that is signed sealed and delivered. A formal lease i.e. where the lease is for a term above three years it must be created by a deed. A formal lease is different from agreement to lease in the following ways:

1. The value of an agreement to lease depends on the availability of the remedy of specific performance

2. Agreement to lease does not bind a bonafide purchaser for value of the legal estate without notice of the agreement
3. In an agreement to lease only benefit of the usual covenants run with the lease
4. Agreement to lease is not a conveyance under section 6 of the Conveyancing Act and section 87(1) PCL, thus, the tenant cannot take the benefit of the rights implied by these provisions.

It is therefore more advantageous for parties in a formal contract where they will have the opportunity to spell out terms and conditions that should govern the relationship. One of the requirements of a formal lease is that it should not only be in writing but must be executed as a deed. Thus, it is commonly said that a lease for more than three years must be created in the proper manner i.e. it must be executed as a deed.

Self Assessment Exercise

What is the significance of executing a lease above three years by way of a deed.

3.2 Parties and Property must be Sufficiently Identified

The names and addresses of the parties to the lease must be properly recorded. Lease should not be granted to a non juristic persons. In the case of *Idowu v. Williams* (1974)³ CCHCJ 344 a lease was granted to a church with the name of Idapo Mimo Cherubim and Seraphim, an unincorporated body. In an action by the plaintiffs who sued for themselves and on behalf of the members of the church for specific performance of the agreement, it was held that a lease could not be granted to an unincorporated association which had no legal entity. Prof. Chianu has suggested that where an unincorporated body desires to take a lease, it should either take the lease in the name of three or four of its member or the association may appoint trustees and register them under the companies and allied matters Act 1990 as a corporate body.

With regards to the property, the parcel clause should properly describe the property demised. You should be vigilant other wise you may end up giving the tenant more than he bargains for. See *Osue v. Maishadishi* (1973)³ ECSLR 811. to be able to achieve a proper

description of the property you may use both words and a survey plan to describe the premises.

Self Assessment Exercise

What would be your suggestion to an unincorporated association that wishes to take a lease.

3.3 Certainty of Duration

Certainty of duration implies two things.

- a. The commencement date of the lease must be fixed or capable of ascertainment
- b. The term granted must be certain or ascertain able

A lease cannot be granted for an indefinite period or for a duration that is not ascertainable. Thus in the case of *Lace v. Chantler* (1944) KB 368 it was held that a lease that was to last for no certain duration is void and cannot create a lease because the maximum duration is not certain or ascertainable. This requirement is cardinal to the creation of a lease because it distinguishes a leasehold from a freehold. Generally, the duration of a freehold is not ascertainable at the commencement of the interest, on the other hand, a leasehold must have a fixed or ascertainable term for the enjoyment of the interest at the commencement of the lease.

The commencement date of the lease must be fixed or capable of ascertainment before the lease takes effect. For example a contract by A to grant B a lease for seven years commencing when E vacates the premises cannot create any lease since the commencement date of the lease is neither fixed nor ascertainable before the lease commences. See *United bank for Africa Ltd v. Tejumola and Sons Ltd* (1988) NWLR pt 79 p. 662 *National Bank of Nigeria Ltd v Campagnie Frassiniet* (1948) 19 NLR 4.

Self Assessment Exercise

State whether or not a lease is created in the following examples

- a. A grant to be to determine on his death or the expiry of twenty years, whichever period is the longer
- b. A grant to B to determine on his death or the expiry of twenty years.

3.4 Exclusive Possession

This is a prime requirement because it distinguishes a lease from a licence. While a lessee must have exclusive possession of the property during the term of years granted, a licensee is only given a mere personal privilege with no interest in the property. Thus, in a lease, the lessee must have an interest in the property which entitles him to exclude all other persons, including the lessor from the premises. In *Umezurike v George* (1973) 3 CCHCJ 62. The appellant was a tenant of the Lagos Executive Development Board (LEDB). In 1967, the appellant left Lagos for the East. He alleged that before his departure he entered into an oral agreement with the defendant to occupy the premises and pay the monthly rent on the property to LEDB in the appellant's name. The issue on appeal was whether the arrangement between the parties created a lease or a licence. The court rejected the argument that a licence was created.

4.0 Conclusion

These are the requirements of a lease for oral lease. It is important that parties should ensure compliance with the requirements if a lease is contemplated. However, it must be mentioned that in determining whether or not a lease exists the court looks at all the circumstances. The court may not rely exclusively on the terminology used by the parties, it will consider their intention and previous relationship of the parties if any.

5.0 Summary

In this unit you have learnt;

- a. the requirements of a formal lease
- b. how the courts may determine whether or not a lease has been created in a particular situation
- c. the importance of using the right terminology by the parties to create a lease

6.0 Tutor marked question

Examine the requirements of a formal lease

7.0 References/Further Reading

- a. Riddal, J.G Introduction to Land Law Butterworths London, 1974
- b. Chianu, E. Law of Land Lord and Tenant Cases Comments 2nd ed. Nigeria Printer Publications, Lagos, 2006.
- c. Chianu, E Law of Landlord and Tenant Ambik Press Lagos 2004
- d. Oluyede, P.O Nigerian Law of Conveyancing Ibadan University Press 1978

Module 4 Leases Continued

Unit 1 Rents

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1.0 Introduction

Rent and covenants are important aspects of the study of leases. Although, it has been argued that payment of rent is not an essential requirement of a lease because there are instances for example a tenant at will, where tenancy is inferred but the tenant is not liable to pay rent. Similarly payment and acceptance of rent may not necessarily create the relationship of a landlord and tenant unless the clear intention is that rent was paid and accepted for that purpose. However, from economic perspective, a landlord who desire return on his investment must charge rent.

Lease is essentially a contract agreement between the lessee and lessor. Covenants in a lease represent the terms and conditions that governs the parties. This being the case it is imperative to set out the terms and condition with sufficient clarity.

2.0 Objectives

At the end of this unit you should be able to

- a. Identify various types of rent
- b. Define rents
- c. Explain the person to whom rent is payable
- d. Identify categories of covenant in a lease
- e. Explain the significance of covenants in a lease

3.0 Main Contents

3.1 Rents

Rents has been described as the compensation paid to the landlord by a tenant in exchange for the use of the land demised. It should be certain or capable of ascertainment. In other words, rent is a certain consideration due from a tenant under his lease or other contract of tenancy *Field v. Gover* (1944)1 KB 200. 204.

There are three kinds of rent.

- a. Ground rent. This is a kind of rent paid for the use of the ground. A good example of is the ground rent paid to government upon the grant of a right of

- occupancy and thereafter annually. The amount charged depend on the state's location of the land and the size of the land.
- b. Economic or rack rent. This is the rent paid for the use of the development on the ground. It is paid to the landlord i.e. the owner of the development. The amount payable depends on the nature of development on the land. It is usually paid in arrears, but it may also be paid in advance
 - c. Premium. Where it is permitted by rent control and recovering of premises laws, it is lump sum money paid as rent. It is usually paid in addition to the other kinds of rent. For example, at the grant of a right of occupancy the holder pays both the premium and the annual ground rents.

3.2 Implied Covenants

A lease agreement usually contains covenants agreed upon by the parties. However, where the parties are silent, the law implied into the relationship certain covenant because they are so essential.

Example of Landlord's implied covenants

1. Implied covenant for quiet enjoyment
2. Implied covenant not to derogate from grant
3. Implied covenant that the house is fit for habitation
4. Implied covenant that the landlord shall comply with the law in case he desires to recover the premises

Example of Tenant's Implied Covenants

1. Implied covenant to pay rent
2. Implied covenant not to commit waste
3. Implied covenant to keep and deliver the premises in a tenantable condition
4. Implied covenant to permit the landlord to enter the premises for the purpose of repairs.

Self Assessment Exercise

To whom is the following type of rents payable?

- a. Ground rent
- b. Economic rent
- c. Premium

3.3 Usual Covenant

Sometimes, the parties to a lease may provide that the lease is subject to the usual covenants or that the lease shall contain the usual covenants and conditions. The question that we must answer is what are the usual covenant? It has been argued that according to the practice of conveyancers, some covenants are usual by the custom of the locality in which the premises are situate, or by the usage of trade for the purpose of which they are let, or by other circumstances. In some instances whether particular covenants are usual is a question of fact for the court to decide on the evidence. In Nigeria the following covenants have been held to the usual covenants:

- 1. Covenant to pay rent
- 2. covenant to pay rates and taxes
- 3. covenant not to deny landlord's title
- 4. covenant of quite enjoyment
- 5. to use and deliver up the premises in tenantable conditions
- 6. to allow the landlord a right to view the state of repair
- 7. Right to assign or under let unless prohibited

Self Assessment Exercise

Distinguish implied covenants from usual covenants

3.4 Express Covenants

These are covenants that the parties to a lease expressly agreed upon. Sometimes it is not good to rely on the implied covenants because they may be insufficient for the parties or that the parties may wish to depart from the implied position. In this circumstance, it is prudent that you provide for express covenants in the lease. However, in providing for the express covenant, you must be meticulous because they are strictly construed according to the provision of the lease. The following are example of express covenants.

1. covenant to pay rates, taxes and charges
2. users covenant
3. insurance covenant
4. covenant to repair
5. covenant against assignment
6. covenant for renewal
7. covenant against alteration
8. covenant to deliver possession at the end of the term granted
9. option to purchase reversion

3.5 Proviso in a Lease

In addition to covenants in a lease, it is common to find a proviso in a lease. Proviso for forfeiture (take away) and re-entry provisos may be used to limit or qualify a general rule. In the case of a lease, the proviso for forfeiture and re entry is one of the ways on which a lease may be determined and unless expressly provided in the lease, the landlord cannot exercise that right against the tenant.

The landlord may forfeit and re enter the premises for either non payment of rent or breach of other conditions.

Self Assessment Exercise

What is the significance of proviso in a lease?

4.0 Conclusion

Both proviso and covenants are very important in a lease. Consequently, you must when drafting be careful because they are usually construed according to the expressed intention of the parties as manifested in the agreement.

5.0 In this Unit you have learnt

- a. the meaning and types of rents
- b. the person to whom each of the rents is payable
- c. the categories of covenants in a lease
- d. the reason why you may not rely in implied covenant in a lease

6.0 Tutor Marked Questions

How can you determine what constitutes usual covenants in a lease

7.0 References/Further Readings

1. Smith, I.O Practical Approach to Law of Real Property Ecowatch Publications Ltd Lagos. 1990
2. Woodfall's Law of Landlord and Tenant Vol. 1 18 ed.
3. Oluyede, P.A Nigerian Conveyancing Law Ibadan University Press Ibadan, 1978.
4. Imhanobe, S.O Legal Drafting and Conveyancing Secured Publishers Abuja 2002.
5. Chianu, E. Law of Landlord and tenant Ambik Press Ltd Lagos 2004.
 1. Osho v Foreign Finance Corporation (1994) 4 NWLR pt 184 p. 157
 2. G.B. Olivant Ltd v. Alakija (150) 13 WACA 63

Unit 2 Option to Renew Clause

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1.0 Introduction

Option to renew clause is one of the express covenants that is common in long leases. In this clause the landlord offer to the tenant that at the end of the term granted under the current lease, the landlord is willing and ready to extend the term for another period as may be agreed by the parties. The importance of this clause from the tenants perspective is that he may have improved on the property or where the premises is used for business, it is not convenient for the tenant to continue to change business address. On the part of the landlord, he will not have to advertise for the new tenant. The interest of both parties is certain. The tenant has confirmed term of years, the landlord has confirmed tenant who is to pay rent on the property. This unit is concerned with the content of an option to renew clause.

2.0 Objectives

At the end of this unit, you should be able to understand:

- a. the importance of option of renew clause
- b. the content of an option to renew clause
- c. the remedies available when there is a breach of the clause

3.0 Main contents

3.1 Time within which to exercise the option to renew

The option to renew clause must provide for the time within which the tenant must indicate his desire to renew the lease. This means that the tenant must accept the landlord's offer to renew the lease within that period. The lease should give sufficient time, this will enable the landlord in case, the tenant is not ready to renew the lease. For example, the lease may provide that the tenant must indicate his interest to renew before 3 months to the expiration of the term granted under lessee. This means that the tenant must exercise his option to renew the lease or it will lapse. Where time of renewal is specified, and the tenant fails to exercise the option to renew within the time specified it will lapse option for renewal is a contract and as such it must be accepted as it is. The practical relevance of providing sufficient is to avoid loss of rent to the landlord.

Self Assessment Exercise

What is an option to renew clause?

3.2 The manner in which the Option is to be exercised

The landlord may specify manner(s) in which the tenant may accept the offer. It is usually in writing. The reason why it is recommended to be in writing it will serve a documented evidence of the transaction. Note however, that where, the landlord has specified a particular method, the tenant should comply to avoid breach. In the case of *International Institute of Tropical Agriculture v. Khawan* (1975) WSCA 159, the lease

contained an option to renew clause, which provided that a further term of two years may be granted upon a written request by the tenant made three months before the expiration of the current term. The new term was granted on the same terms and conditions and the same rent reserved under the current term. The tenant ought to exercise the right in writing he complied with all the conditions except that he requested for the review of the rent. In an action by the landlord against the tenant for rent on the ground that the tenant did not exercise the option since he made a new offer for the payment of rent. And the option to renew by that fact lapsed.

3.3 The Condition(s) before the Option can be Exercised

The option to renew clause must state the condition(s) precedent to be fulfilled by the tenant before the option can be accepted. The conditions must be clear and certain. For example, that all repairs must be done or that rent must be paid before renewal. If the lessee has failed to perform the conditions, this may be held a bar to any possible renewal of the lease. If the conditions are vague, option to renew will be unenforceable.

The practical relevance of this is to enable the landlord assess the tenant, whether or not he has a good tenant and has observed the covenants in the lease. The courts are very strict in construing the performance of these conditions and no matter how trivial a breach of a condition precedent it is sufficient to prevent the tenant from exercising the option to renew. See *Finch v. Underwood* (1876) 2 Ch.D 310.

However, the landlord may waive the performance of a condition precedent. For example, if despite the breach, he still accepts rent from the tenant.

3.4 The Terms on which the New Term is Granted

The landlord must state the terms of the new term created under the lease otherwise, the presumption is that it is on the same terms and conditions as under the present lease. This is unwise because a perpetually renewable lease is thereby, created. In the case of *Rettopkin's Lease* (1972) 1 ALL ER 284, it was held that an option to renew for "a further term of five years from the expiration of the said term hereby granted at the same rent and

containing the like covenants and provisos as herein contained” creates a perpetually renewable lease and it followed that notice to exercise the option was not necessary.

Perpetually renewable lease as created in the above case is not good for the landlord because, the landlord may be compelled to charge the same old rent for the new term. Therefore when representing the landlord you should exclude the option to renew clause from the terms on which the new term is granted, also, you must exclude the present rent otherwise you will create a perpetually renewable lease.

The terms and conditions of the new term when granted must be specific and certain. See *Agboje v Williams* (1971)¹ ALL NLR 275. The following is an example of adoption to renew clause.

The landlord shall on the written request of the tenant served on him not later than 1st June 2011 if at the time of the service of the notice the tenant shall have performed and observed all the covenants, stipulations and provisos on the part of the tenants contained in this lease at the expense of the tenant, grant to him a lease of the premises for another term of 5 years from the expiration of the present term. At a rent to be determined under the rent review clause herein and containing the same covenants; stipulations and provisos as are contained in this lease with the exception of the present covenant for renewal.

Self Assessment Exercise

From the model option to renew clause provided above identify the essential element of an option to renew clause.

3.5 Remedies for Breach of Option to Renew Clause

Option to renew clause is important because it creates an interest which the parties can protect and at the same time enforce. Section of the PCL provides that the tenant can register and protect his option to renew as estate contract. Also, under the section 44 of the Registration of Titles Law Lagos, a tenant may protect his interest by entering a caution against future dealing in the property. Generally, where the landlord is in breach of the covenant to renew, the appropriate remedy is for the tenant to apply for an order to specific performance. Where specific performance cannot be decreed for example if such decree may

cause hardship in the party against whom it was made, the court may award damages for breach of contract. Also, where the tenant is in breach, the land lord may sue for damages.

4.0 Conclusion

Option to renew clause gives the lessee an option to renew his lease at the expiration of the current. The clause confers rights on the parties to the agreement. This right can be enforced by an order of specific performance. To be enforceable, the terms must be clear and certain. And the tenants must have complied strictly with the conditions stipulated in the clause.

5.0 Summary

In this unit you have learnt

- a. the basic components of an option to renew clause
- b. how to avoid creating a perpetually renewable lease
- c. the remedies for breach of the option to renew clause

6.0 Tutor Marked Question

1. What are the problems of perpetually renewable lease?
2. Examine the remedies available to landlord where the tenant is in breach of the covenant to renew

7.0 References/Further Readings

- a. Imhanobe, S.O Legal Drafting and Conveyancing Secured Publishers 2002 Abuja
- b. Oluyede, P.A Nigerian Conveyancing Law Ibadan University Press 1978
- c. Encyclopedia of Forms and Precedents 4th edn. Vo. 11
- d. Chianu, E Law of Landlord and tenant, Ambik Press Lagos 2004
- e. Adejumo v. David Hughes and Co Ltd (1989) NWLR pt 120 0. 146

Unit 3 Insurance Covenant in a Lease

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1.0 Introduction

Insurance covenant is usually inserted in a lease agreement to protect the parties either against loss of rent or property. The landlord is entitled to reversionary interest hence he should protect against damage. The tenant on the other hand may insure the demised premises to protect his interest while the lease last. Insurance covenant is also important as it provides some measures of protection for the parties in circumstances where frustration may not avail the parties in a lease. Under the law of contract frustration occurs where a party to a contract cannot perform the contract due to supervening events beyond his control. The consequence thereof is that the contract is discharged. Unfortunately, frustration is not common in leases. In the case of *National Carriers Ltd v. Panalpina Ltd* (1981)2 WLR 45 it was held that the doctrine of frustration was in principle applicable to leases, though the cases in which it could properly be applied were likely to be rare. Also, there are instances where a tenant may be required to continue to pay rent despite the destruction of the

property by fire. One of the ways to avoid these unpleasant situations is to provide for insurance covenant in a lease

2.0 Objectives

At the end of this unit, you should be able to

- a. Ascertain the significance of inserting an insurance covenant in a lease
- b. Identify the components of a standard insurance covenant
- c. Advise who is to insure the demised premises
- d. Apply the insurance money

3.0 Main Contents

3.1 Who should Insure the demised Premises

The answer to this question is very important because no premium no insurance. Both the landlord and tenants have insurable interest therefore either of the two may agree to insure. The tenant may insure the property either in his own name or jointly with the landlord. The landlord may insure in his own name and claim re-imbursement from the tenant or the tenant may contribute to the premium by way of additional rent. The policy ensure for the benefit of the parties. In case of loss, the tenant can compel the landlord to apply any compensation to reinstate the property.

It has been suggested that the following factors should be considered when advising who is to insure the demise premises.

- a. the nature of the premises
- b. existing obligations
- c. payment of service charges
- d. the risk in the use of the property

Self Assessment Exercise

What is the significance of an insurance covenant in a lease?

3.2 Identity of the Insurance Company and Risk Covered by the Policy.

The identity of the insurance company is important to the parties. Where the tenant is required to insure the demised premises, the landlord must know the company with whom the tenant has insured the property. Similarly, where the tenant contributes to the premium, he should know the identity of the insurance company. Where one of the parties has obligation to ensure, it is the duty of the other party to know the insurance company. This will serve as a check on the other by ensuring that proper insurance has been taken with a reputable company.

It should be noted that risks not insured will not be covered by the policy. It is therefore imperative to take up a comprehensive insurance policy. Risks covered by the policy should be clear and certain. The usual risks for which property may be insured are against loss by fire, flood, tornado etc.

3.3 The Amount of the Cover

To ensure comprehensive insurance, it is appropriate to value the property before any insurance. It is common to find a lease that provide that the property be insure “adequately” or full value of the property Imhanobe has rightly argued that these phrases are insufficient to provide a good insurance cover. This is because what is adequate or full value may not be sufficient to reinstate the property. It has been suggested that it is better to insure for the cost of in reinstatement see *Mumford Hotels Ltd. Wheler* (1964) Ch. 117

Self Assessment Exercise

Why may you advise a party to insure for the cost of reinstatement and not to the full value of the property?

3.4 Application of the Insurance Money

Generally the insurance money is to be applied to reinstate the property. There are three perspectives to issue of reinstatement.

1. Reinstatement may be contractual between the parties. The lease may expressly provide that the insurance money be applied for the purpose of reinstating the property.
2. Reinstatement may be implied from the conduct of the parties, where there is no express stipulation on the issue of insurance money; it may be implied from the conduct of the parties. This however depends on whether it is the landlord or the tenant that took the policy and paid the premium. Where the tenant takes the policy in his name and pays the premium, except the lease provides that insurance money shall be applied to reinstate, the landlord can not compel him to do so. This apply with equal force to where the landlord takes the policy in his own name and pays the premium except otherwise provide the tenant cannot compel him to use the money to reinstate the property. However, where the policy is taken in either the joint names of the landlord and tenant or the tenant contributes or reimburse the landlord for the premium, either the landlord or the tenant can compel the other to apply the money for the purpose of reinstating the property.
3. Statutory reinstatement is provided in section 67(1) of the Insurance Act (as amended) which states that where a house or other building insured against loss by fire is damaged or destroyed by fire, the insurer may on request by any person entitled or interested in the insured house or building use the insurance money to reinstate the property. The main problem with this statutory protection is that it applies to any loss by fire. Consequently, it is better to provide for express covenant to insure instead of relying on the statutory protection.

Self Assessment Exercise

Examine the provision of section 67(1) of the Insurance Act as amended

3.5 Remedies for Breach of Covenant to Insure

The breach may be in respect of any aspect of the components of a standard insurance covenant.

Where the tenant is in breach, the landlord may forfeit the lease for breach of covenant.

The innocent party may insure the property and claim reimbursement from the defaulting party. Also both the landlord and tenant are entitled to damages for losses suffered.

4.0 Conclusion

A comprehensive insurance covenant in a lease must provide for all the issues discussed in this unit. To avoid delay associated with litigation, the covenant should be clear and certain you must avoid using phrases that might result in hardship in the parties.

5.0 Summary

In this unit you have learnt

- a. the content of a standard insurance covenant
- b. issues to consider before you advise on who is insure
- c. the significance of including an insurance covenant in lease
- d. the limitation of statutory protection provided in section 67(1) of the Insurance Act

6.0 Tutor Marked Question

Identify the content of a standard insurance covenant in a lease.

7.0 References/Further Reading

- a. Imhanobe, S.O Legal Drafting and Conveyancing Secured Publishers Abuja 2002
- b. Oluyede, P.A Nigerian Conveyancing Law Ibadan University Press Ibadan 1978

- c. Smith, I.O Practical Approach to Law of Real Property Ecowatch Publication Lagos 1999.
- d. Adubi, C.O Drafting Conveyances and Wills Lighthouse Publciation, Lagos 1995.

Unit 4. Determination of Leases

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- 1.0 Introduction
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 - 3.2 Surrender/abandonment
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1.0 Introduction

In this unit you will be introduced to ways in which a lease may be determined, other wise than by expiry i.e. at the end of a fixed term and notice. It is a matter of course that a lease for five years term will come to an end at the expiration of the term granted or lease determinable when the event specified in a condition subsequently occurs terminate on the happening of such event. This will consider other ways by which a lease can be brought to an end.

2.0 Objective

At the end of this unit, you should be able to

- a. Identify ways of terminating a lease
- b. Know how to apply each of the ways
- c. The distinction between the various ways

3.0 Main Content

3.1 Forfeiture

Generally the landlord does not have power to forfeit the lease unless the lease expressly provides such power by including a proviso for forfeiture such as “provided always that if the tenant commits a breach of covenant it shall be lawful for the lessor to forfeit and re enter the premises. Proviso for forfeiture may either be for non payment of rent or for breach of other covenant in the lease.

The procedures for forfeiture and re-entry for non payment of rent are as follows:

1. The lease must expressly provide for the right of the landlord to forfeit and re-enter for non payment of rent
2. The rent must be reserved. This means that the rent must be certain or ascertainable.
3. Except where the parties in the lease dispense with a formal demand, the landlord must make a formal demand for payment of the rent at the time it becomes due and the tenant continues to default. See Section 14(8) of the Conveyancing Act and 161(10) of the PCL. Both section excludes the application of the CA and PCL to forfeiture for non payment of rent. The applicable law is the common law as outlined above. See *Da Rocha v Shell Company of Nigeria Ltd* (1938)14 NLR 1

The procedures for forfeiture and re-entry for breach of other covenant in the lease are outline in section 14(1) CA 1881 and 161(1) PCL.

1. The lease must expressly provide for the right of the landlord to forfeit and re-enter for breach of other covenant in the lease. This means that it cannot be implied.
2. The landlord must serve on the tenant notice specifying the particular breach complained of and if the breach is capable of remedy, requiring the tenant to remedy the breach.
3. Where the tenant fails within a reasonable time to remedy the breach, the landlord may exercise his right of forfeiture. See *Ishola Williams v. Hammond Project Ltd* (1988)1 NWLR pt 71 p.481

In any case, the tenant may be entitled to claim relief against forfeiture and re-entry especially if he is ready to remedy the breach

Self Assessment Exercise

When can a landlord forfeit the lease for non payment of rent?

3.2 Surrender of Leases

The surrender of a lease means the surrender of the term granted. For example, if a tenant surrenders his lease to his landlord, and the landlord accepts the surrender, then the tenants lease is merged in the landlord reversion and thus comes to an end. Surrender may be effected expressly by deed or by operation of law. S 2(4) C.A and 72(1) PCL requires that surrender by deed to be valid the following conditions must be satisfied:

- a. The lessee must be able to surrender and must be have an estate in possession
- b. The surrender must be made to the immediate reversionary.
- c. There must be privity of estate between the surrendered and the surrender
- d. The surrenderee must have a higher and greater interest than the surrender in the property.

- e. The surrenderee must hold the interest solely in his own right, not in the right of another.

A surrender of a lease only free the tenant from obligations that may accrue after the date of the surrender. The tenant is liable for past breaches, if any *Nigerian Construction and Holding Co. Ltd v. Owoyed* (1988)4 NWLR pt 90 p. 588. also surrender of a lease does not destroy the rights of the subtenants, it only operate as a re-grant to the lessor which is subject to the right of the subtenants.

Implied surrender may be illustrated by cases of abandonment of the premises by the tenant. The tenant may either abandon possession or return the key to the landlord abandonment is only effective where the tenant quit the premises without an intention to return to see *Ezeilo v. Obi* (1960) ERLR 19. It is not enough that the tenant is no longer using the premises; the landlord must prove that the tenant has indeed abandoned the property. Apart of the intention, for abandonment to be effective as surrender the landlord must either expressly accept it thereby bringing to an end the lease or impliedly by resuming possession such as leasing the property to another. *Ajax v. Aina* (1967)LLR 152 *Fasehun v Pharco Nigeria Ltd* (1965)2 ALL NLR 216.

Self Assessment Exercise

- a. What constitute surrender
- b. Can a tenant escape liability or obligation under a lease by a surrender.

3.3 Merger

Generally merger may occur in two situations firstly if a landlord sells his land to a lessee, that is the tenant acquiring the reversionary interest of the landlord, a merger has occurred. In this situation, merger is the converse of surrender.

Secondly, if the landlord's reversion and the tenant's interest pass into the hand of a third party, then, the lease being merged with reversion, comes to an end. From this analysis it is clear that if a merger is to take effect two conditions must be satisfied. In the interest in

the land must unite in the same person without any intervening interest and 2. The person in whom they unit must hold them both in the same right

Self Assessment Exercise

Distinguish merger from surrender

3.4 Disclaimer

There are instances where the law gives a trustee in bankruptcy power to disclaim onerous property which has become vested in him. For example if a tenant's lease is about to expire and imposes onerous liabilities on him such as repair, the lease may constitute more of a liability than an asset. The effect of disclaimer between the landlord and tenant is to determine the lease. It should be noted however that disclaimer does not affect the rights of third parties.

4.0 Conclusion

Apart from forfeiture, surrender, merger and disclaimer, there are other ways of terminating a lease. For example, lease can be terminated by a notice to quit. The lease can be determined by either the landlord or the tenant serving a proper notice to quit as may be provided in the deed. The length of notice to be given will depend on either the agreement of the parties, or common law rule or the provision of applicable rent and recovery of premises law.

5.0 Summary

In this unit you have learnt,

- a. the various method of terminating a lease
- b. what may constitute a surrender
- c. when a tenant is entitle to relief against forfeiture

6.0 Tutor Marked Question

List and briefly explain the ways to determine a lease.

7.0 References/Further Reading

1. Oluyede, P.A. Nigerian Conveyancing Law Ibadan University Press Ibadan 1978
2. Riddal, J.G Introduction to Land law Butterworths London, 1974
3. Chianu, E Law of Landlord and Tenant Ambik Press Lagos 1994.
4. Smith, I.O Practical Approach to Law of Real Property Ecowatch Publication Lagos 1999.

Module 5

Unit 1: Mortgages

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- 4.0 Conclusion
- 5.0 Summary

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1.0 Introduction

In this unit, you will be introduced to the meaning and features of a mortgage transaction, types of collateral as well as basic types of mortgages that can be created in Nigeria.

2.0 Objective

At the end of this unit, students should be able to

- a) Define Mortgage
- b) Understand the basic features of a mortgage transaction
- c) Know the various types of collateral available under mortgage transactions.
- d) Appreciate the distinction between the various types of mortgages in Nigeria
- e) Understand the basic advantages of each of these mortgages

3.0 Main Content

3.1 Mortgages

3.1.1 Definition of Mortgage

Mortgage is defined as the transfer of interest in land as security for the discharge of a debt or the performance of an obligation subject to redemption.

The Black's Law Dictionary (6th ed.) Pg. 1009, defines mortgage as an interest in land created by a written instrument providing security for the performance of a duty or payment of a debt. This definition seems to be too restrictive in two respects: First, a part from land, there are other assets like shares, insurance policy, etc. that are accepted by banks as security for loan. Secondly, equitable mortgage may or may not be in writing.

In a broader sense therefore, mortgage can be defined as a security for loan with an undertaken for repayment and cesser upon redemption.

Mortgage generally deals with the transfer of interest as a security for loan advanced. The transferor of the interest is known as mortgagor while the transferee of the interest is known as mortgagee, the sum of money over which the interest is transferred is known as the mortgage sum. Though the transaction is essentially between two parties (mortgagor and mortgagee) a third party may be involved as a guarantor or as a head lessor to give his assent to the assignment or sub-lease of the leasehold interest used as security for the loan.

Mortgage transaction therefore, is basically an agreement in which the mortgagee agrees to loan to the mortgagor a sum of money/credit facility and in order to secure repayment of the loan, the mortgagor charges/transfer his property in favour of the mortgagee.

3.1.2 Features of a Mortgage

A mortgage transaction consists of the following features:

- a) Conveyance or transfer of interest in land or some other properties by the mortgagor. This could be legal interest or equitable interest depending on the mode of creating the mortgage or the nature of the interest the mortgagor has in the property.
- b) Consideration must flow from the mortgagee in terms of sum of money advanced or in terms of sum of money advanced or released to the mortgagor.
- c) The conveyance or transfer is not absolute in that it is subject to cesser or redemption upon the repayment of the sum of money advanced to the mortgagor.
- d) Both the mortgagor and the mortgagee have a mutual right of action. The mortgagor can sue for the return of the security so long as the action is not statute-barred or the property is not sold, or his right of redemption is not foreclosed. On the other hand, the mortgagee has the right of action to sue for repayment of the outstanding sum and interest, or enforce other remedies usually available to a mortgagee.

3.1.3 Types of Collateral

Collateral can be defined as an obligation, pledge, mortgage, deposit, lien, etc. given by a debtor to make sure the payment or performance of his debt and furnishing the creditor with resources to be used in case of failure in the principal obligation in repayment of the loan.

The nature of collateral required in a mortgage agreement depends on the nature of the parties. Where the mortgagor is a natural person, a transfer of interest in land will suffice as a sufficient security. But where the mortgagor is an artificial or corporate person i.e. a company, the following may be used as collateral:

- a) Debenture: These are bonds given under seal of the company and evidence of the fact that the company is liable to pay the amount specified with interest and generally charge the payment of it on the property of the company.

Debenture consists of a debt owed by the company to another, secured by deed which prescribes the condition of realization of the debt. A debenture may be created over the floating or fixed assets of the company. When it is created over the floating assets, the company is entitled to continue to use the asset based on the conditions prescribed till its realization occur. **See Inter-contractors Nigeria Ltd vs. N.P.F.M.B. (1988) 2 NWLR Pt. 76, 280 pg. 292. See also Union Bank of Nigeria Ltd. vs. Tropic Food Ltd. (1992) 3 NWLR (pt. 228) 321.**

A better approach to debenture is to look at it as a document that may be either a mere promise to pay a debt or promise to pay the debt secured by a mortgage or a charge

- b) Shares: A share represent a unit of the bundle of rights and liabilities which a shareholder has in a company as provided in the terms of issue and the Article of Association of the company.

A share is a chose in action and is an interest that can be transferrable as provided in the Article of Association of the company. **See S.115 CAMA LFN 2004 and Okoye vs. Santili (1994) 4 NWLR (pt. 338) 256.**

A company has a right subject to its Article of Association to issue shares up to the total number authorized in the Memorandum. The shares issued may be in classes i.e. shares with different rights e.g. rights as to dividend or sharing of capital on winding up – **S.117 and 118 CAMA**.

A company under **S.120 CAMA** may issue share at premium, i.e. where the price at which they are issued is higher than nominal value of the shares or it may issue shares at a discount rate, i.e. where the price at which the shares are issued is lower than the nominal value of the shares.

3.2 Types of Mortgage

There are basically two types of mortgage, namely:

- i) Legal mortgage
- ii) Equitable mortgage

The distinction between these two types of mortgage is very significant, especially to solicitors who are engaged in advising banks; they are required to know how each of them is created, the right of mortgagee, mortgagor, guarantor (if any) and how the mortgage can be discharged. .

3.2.1 Legal Mortgage

3.2.2 Meaning of Legal Mortgage

This is a type of mortgage which transfers legal interest in land, whether leasehold or freehold. For there to be a legal mortgage, it must have been created by a deed or by use of a statutory form resulting in perfecting of instrument by which it is created.

A legal mortgage executed under seal transfers a legal title of the mortgage property from the mortgagor to the mortgagee with a proviso that, the mortgagor has a right of redemption, i.e. the right to re-conveyance upon payment of the mortgage debt in accordance with the covenants of the mortgage contract.

Activity/Self Assessment Exercise 1

Discuss the meaning and nature of a legal mortgage?

3.2.3 Advantages

importance of a legal mortgage are as follows:

- a) **Enforcement:** It is easier to enforce a legal mortgage, equitable mortgagee must obtain an order of the court before he can sell or take possession of the property or foreclosure or appoint a receiver/manager.
- b) **Priority:** A legal mortgagee without a prior notice of an equitable mortgage takes priority over the equitable mortgagee.
- c) It is easier to commit fraud in the case of equitable mortgage than legal mortgage; the borrower who has deposited the original title deeds with a bank may obtain a Certified True Copy of the deed from the registry for other fraudulent purpose.

Activity/Self Assessment Exercise 2

Highlight the advantages of a legal mortgage.

3.3.0 Equitable Mortgage

3.3.1 Meaning of Equitable Mortgage

This is a type of mortgage that transfers merely an equitable interest in land or some other properties to the mortgagee, essentially an equitable mortgage is an agreement to enter into a mortgage agreement, but it is created on the rules of equity. Hence, a mere deposit of title deeds in exchange of a mortgage loan without a written agreement is an equitable mortgage.

Equitable mortgage is the commonest form of mortgage. It does not involve much formalities and processes. It does not necessarily involve the consent of a Governor and registration. Any form of agreement involving a transfer of equitable interest in land as security for loan is essentially an equitable mortgage. **S. 6(1) Property and Conveyancing Law, 1959 (PCL)** provides that “interest in land validly created or arising after the

commencement of this law which are not capable of subsisting as legal estates, shall take effect as equitable interest...”

Activity/Self Assessment Exercise 3

- i. Examine the nature of an Equitable Mortgage

3.3.2 Advantages

The following are some of the notable advantages of an equitable mortgage:

- i) **Small Amount:** Where the loan is for a small amount of money, it is better to secure the loan by equitable mortgage which is cheaper than legal mortgage in terms of perfection.
- ii) **Short Period of Repayment:** Where the period of repayment is short, equitable mortgage is better because it is easier and quicker to achieve than the legal mortgage.
- iii) **Urgency:** Where there is urgency in transaction or the mortgagor is in urgent need of fund, which cannot wait for the long process of perfection of title, such as securing the Governor’s consent, equitable mortgages is better in this circumstance.

Activity/SelfAssessmentExercise4

Highlight the advantages of an Equitable Mortgage

4.0 Conclusion

In this unit, you have been taken through the essential principles a student is expected to learn when taken a course of this nature. Due to the relevance of these principles as discussed here, reference will be made to this unit subsequently, throughout the period of this course.

5.0 Summary

This unit defines mortgage as a security for loan with undertaken for repayment and cesser upon redemption. It further considered some of the basic features of mortgage, such

as transfer of interest in land by the mortgagor, consideration, etc. as well as some of the basic types of collateral which include land, debenture and shares.

The unit also defines legal mortgage as the type that transfer legal interest in land; whether leasehold or freehold. That a legal mortgage must be created by a deed; and that a legal mortgage has the following advantages:

- a) It is easier to enforce.
- b) It takes priority over equitable mortgage.
- c) It cannot be used as an instrument in committing fraud.

The unit further define equitable mortgage on the other hand as a type of mortgage which transfers equitable interest in a property to a mortgage. That equitable mortgage is the commonest form of mortgage, which can be created by mere deposit of title deeds.

And that an equitable mortgage has the following advantages:

- i) It is preferred where the mortgage involves only a small amount of money.
- ii) It is preferred where the period of repayment is short.
- iii) It is preferred in a situation of urgency.

6.0 Tutor-Marked Assignment

Discuss the basic differences between Legal and Equitable mortgage.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.

6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

UNIT 2: Creation of Mortgage

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1.0 Introduction

In this unit, you will be introduced to the creation of mortgage, particularly as it relates to both legal and equitable mortgage; and various laws that regulate this exercise in Nigeria.

2.0 Objective

At the end of this unit, the students should be able to:

- i) Understand how legal and equitable mortgage can be created
- ii) The law that regulates the creation of mortgage under the conveyancing Act states and the property and conveyancing Law states, as well as Lagos State.

3.0 Main Content

3.1 Creation of Mortgage

The method of creating a legal mortgage is different from that of an equitable mortgage. This will be considered separately.

3.1.1 Legal Mortgage

The creation of a legal mortgage largely depends on the location where the property is situated and the nature of interest acquired by the mortgagor under the Land Use Act, 1978.

Again, the legislation which will govern the creation of legal mortgage depends on the geographical location of the property in Nigeria. There are three legislations that are operational in this regard. These are:

a) The Conveyancing Act, 1881

This legislation applies to the old Northern, Eastern regions and places outside the old Lagos Colony. These states are Sokoto, Kano, Kaduna, Adamawa, Plateau, Abuja, etc. and Eastern States: Anambra, Abia, Rivers etc.

Generally, there is no statutory provision regulating the mode of creation of legal mortgage in these states, therefore, the applicable law is still the common law subject to some modifications introduced by the Land Use Act, 1978.

At common law, a legal mortgage of a lease-hold interest may be created by either **Assignment** or **Sub-demise**.

Assignment: Assignment of unexpired residue of a term of lease to the mortgagee out of the whole term held by the mortgagor, subject to a provision for reassignment or cesser on redemption. Here, the mortgagor conveys the whole of his beneficial interest to the mortgagee, with a covenant by the mortgagee that he will return the mortgage property to the mortgagor upon repayment of the loan and interest on the contractual date. If the mortgagor fails to repay the loan on the due date by himself or through his heirs or assigns "as the mortgagor" he loses his property and the mortgagee can legally

vest it in a purchaser without recourse to the mortgagor and yet the mortgagor remains liable to pay the mortgage debt at law.

The only remedy left for the mortgagor is the right to redeem or equitable right to redemption, where the court could allow him a new date to repay the loan and get back his property.

Sub-demise: Sub-demise of the mortgagor's term less few days with a proviso for repayment and re-conveyance upon redemption. By this method a mortgagor conveys a sub-lease of his interest to the mortgagee for a term less than his own with at least a day. The mortgagee will then be able to surrender the sub term when the debt is repaid; and this will give the mortgagor some time to put things in order before giving back the land to the head lessor. Under this method, subsequent legal mortgages can be created for the other sub-term.

Here, the mortgagee does not get custody of the title deeds of the mortgage property as in the case of assignment; and the mortgagee is free from liability to account to the head lessor.

Where the mortgagor fails to repay the loan at the end of the contractual date, the mortgagee cannot vest the property as a purchaser. The only remedy the mortgage has in such cases is to include a Trust Declaration or a Power of Attorney in the form of Contract. If this is done, the mortgagee can compel the mortgagor as a trustee to convey reversion to a purchaser.

Activity/Self Assessment Exercise 1

Discuss the creation of legal mortgage under the Conveyancing Act of 1881.

b) The Property and Conveyancing Law, 1959

The Property and Conveyancing Law, adopts two methods for the creation of mortgage, i.e. a charge by deed and sub-demise.

i) A Charge by Deed

A charge by deed expressed to be by way of a legal mortgage is provided for in S.108 & 109 PCL, 1959. This method does not convey any estate to the mortgagee during the subsistence of the mortgage. But where the mortgagor fails to repay the loan, the mortgagee has the same right and remedies as if he had a legal mortgage.

This form of mortgage is created and discharged by way of filling the prescribed forms in the fourth schedule of the Property and Conveyancing Act or third schedule of Conveyancing Act with such variation and conditions (if any) as the circumstances may require.

ii) Sub-demise

Sub-demise for a term certain with proviso for re-conveyance upon redemption. As will be noticed, this method is available under both the Conveyancing Act, 1881 and the Property and Conveyancing Act, 1959. This method also allows for the creation of successive legal mortgage over the same piece of property in favour of the same or different mortgages. See S.116 PCL.

The main difference by virtue of S.112 PCL, once the transaction is for valuable consideration, the mortgagor's reversionary right will automatically pass to the mortgagee, i.e. in the event of any default the mortgagee can validly confer legal title on a purchaser without recourse to the mortgagor.

c) Registration of Title Law Cap 121 of Lagos State

This legislation applies only within the registered district of Lagos State. Under this law, a legal mortgage can be created by completing and registering "Form 5" of the first schedule in the law. This legal mortgage is discharged by using "Form 6" of the same schedule.

Activity/SelfAssessmentExercise2

Differentiate between creation of legal mortgage using sub-demise and under the registration of title law Cap 121, Lagos State.

d) Charge by Companies

The Companies and Allied Matters Act, 2004, under S.197 provides that a company can take a charge over its property to a chargee (creditor). But unless the charge and the prescribed particulars are delivered to the Corporate Affairs Commission within 90 days after its creation or on such a day as may be directed by the court, it cannot be accepted for registration. And when a charge is not registered, it becomes void against the liquidator and creditor of the company; and the chargee becomes an unsecured creditor in the company's winding up.

e) Mortgage of Life Policy

Mortgage of life insurance are principal effected as collateral security to mortgage of land. Just like other mortgages, the mortgage of life policy need to be in writing, it must also be endorsed either on assignment or in separate instrument in the form given in S.8 of the Insurance (Special Provision) Act, 1988 and a written notice and purpose of the assignment must be given to the insurance company at their principal place of business. The insurance company is bound to give an acknowledgment of the receipt of the notice.

Activity/Self Assessment Exercise 3

Examine how a legal mortgage can be created using the following methods:

- i) Charge by company
- ii) Life insurance policy

3.1.2 Equitable Mortgage

An equitable mortgage is a type of mortgage that confers equitable interest on the mortgagee. This type of mortgage are preferred in creating security for short term loan, but it is not as secured as legal mortgage and can be more easily used for fraud than legal mortgage. Equitable mortgage can be created in four different ways:

a) Deposit of a Title Deed

Where there is a mere deposit of title deeds in exchange of a mortgage loan without a written agreement, it is clear indication of an equitable mortgage. This rule as set in *Russel vs. Russel* (1983) 1 Bros Ch. 269 is to the effect that the deposit of the title deeds constitute an intention to create legal mortgage as well as a sufficient act of part performance.

b) Agreement to Create a Legal Mortgage

Where there is an agreement to create a legal mortgage in favour of a mortgagee, but in its creation, the requirement falls short of creating a legal mortgage then it will be treated as an equitable mortgage. The rule is that a legal mortgage must be by deed; and not by agreement to grant a mortgage, this will, and can only create an equitable mortgage.

c) Equitable Charge of the Mortgagor's Property

This is the third method of creating an equitable mortgage. This method is different from the others, particularly in respect of the remedies it confers. Under this mode of creation, no interest is conveyed to the mortgagee, and the property charged is appropriated only to the discharge of a debt or some other burden in respect of which the property stand charged.

d) Equitable Mortgage of Registered Land

Equitable mortgage of registered land is by charge and the relevant form is "Form 59". Registration of Title Law of Lagos State provides that, the deposit by the registered owner of land or a charge of his certificate of title with the intention of mortgaging his land or charge shall have the same effect

as does the deposit of title deeds of unregistered land or mortgage deed of unregistered land with the same intention.

Activity/Self Assessment Exercise 4

Distinguish between creation of Equitable Mortgage by Equitable charge of the mortgagor's property and Equitable mortgage of a Registered Land.

4.0 Conclusion

In this unit, you are taken through the basic ideas and principles behind the topic creation of mortgage, due to the relevance of the unit, reference will be made to it in subsequent unit throughout the entire period of this course.

5.0 Summary

This unit discusses the creation of both the legal and equitable mortgage with a particular reference on the following as modes of creating legal mortgage:

- i) Assignment and sub-demise, as applicable under the C.A. States.
- ii) Sub-demise and charge by way of legal mortgage which applies in the PCL States.
- iii) The registration of Title law, which applies to Lagos State.

The unit further considers the following as modes of creating equitable mortgage:

- a) Deposit of Title Deeds.
- b) Agreement to create legal mortgage.
- c) Equitable charge of mortgagor's property.
- d) Equitable mortgage of registered land.

6.0 Tutor-Marked Assignment

Discuss the basic difference between creating a Legal Mortgage by Sub-demise under the Conveyancing Act and the Property and Conveyancing Law, 1959.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

Unit 3: Mortgage Institutions

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1.0 Introduction

In this unit, you will be introduced to the various licensed financial institutions which accept security and grant loan for purchase or construction of houses or the improvement of existing ones.

2.0 Objective

At the end of this unit, the students should be able to:

- a) Define mortgage institutions
- b) Understand the nature and the basic differences among the various types of mortgage institutions in Nigeria.

3.0 Main Content

3.1 Mortgage Institutions

The mortgage institutions are licensed Banks which accept deposit like other banks and grant loans for the purchase or construction of houses or the improvement or extension of the existing ones.

They provide loans that can be paid (principal + interest) by monthly installment at an agreed percentage (%) over a period of time, which varies from Bank-to-Bank. These Banks includes:

3.1.1 Federal Mortgage Bank of Nigeria

This bank is established by S.1 Federal Mortgage Bank of Nigeria Act CAP F16 LFN 2004. The bank is engaged in wholesale banking.

S.5 of the Act provides that the function of the Bank shall be to provide long-term credit to primary mortgage institutions (PMI) in Nigeria, licence, control and encourage the growth of secondary mortgage institutions. The bank also collect, manage and administer the National Housing Fund.

The bank gives PMI loan at the rate of 4%. This loan is given on a long-term basis with the interest as low as 6%.

The Federal Mortgage bank has it head office in Abuja with branches all over the 36 States of the Federation.

The greatest challenge facing this bank is how to recover the huge sum owed to it, and lack of sufficient fund to perform it statutory functions.

Activity/SelfAssessmentExercise1

Highlight the functions, importance and challenges facing the federal mortgage bank of Nigeria.

3.2.2 Housing Corporation

These institutions are found in most States of the Federation. They also lend money on mortgage to enable individuals to acquire houses or improve on existing ones. They operate on a similar terms with the Federal Mortgage Banks. The most notable example is the Federal Housing Authority, established by the Federal Housing Authority Act, Cap F14 LFN 2004, with the primary function of recommending to the government a National Housing Project. The Gwarinpa and Lugbe Housing Estate Projectall in Abuja are projects under the Federal Housing Authority.

Funds from these corporations attract low interest and there is security of title in respect of the property purchased from it. The corporation shares the same problems with the Federal Mortgage of Nigeria.

Activity/Self Assessment Exercise 2

Highlight the basic differences and similarities between Housing Corporation and the Federal Mortgage Bank of Nigeria.

3.2.3 Housing Scheme

This is an employer's scheme for the benefits of employee's to enable them acquire their own houses. The employer gives loan on the security of the property. The practice is that the employee is required to deposit the title document with the employer until the loan is fully paid. The interest rate is usually within the region of 2% and the loan is deducted by the employer from the employee's salary from source. Only few organizations are able to operate this scheme due to lack of money.

Activity/Self Assessment Exercise 3

Discuss the basic differences between Housing Scheme and Housing Corporation.

3.2.4 Private Property Developers

There exists in most cities or States of the federation, Private Property Developers, who build houses for sale to the public on mortgage basis. A successful example is the Crown Estate, Lekki Peninsular, Lagos, developed by Crown Realities Plc for sale to the public. A buyer is expected to pay 5% to take possession and the balance is payable over 15 years at an interest rate of 15% per annum upon delivery.

Activity/Self Assessment Exercise 4

Differentiate between Private Property Developers and Housing Scheme.

3.2.5 Commercial Banks

These banks provide credit facilities for financing projects. However, they lend on short-term basis and their interest rates are high. The customer is required to have between 20 – 40 percent of the cost of property, while the bank provides the balance. The period of payment is between 5 to 10 years and the interest rate is some times as high as 21%. This is not the best option for loan to acquire or build houses. The interest rate is high; and customers are often unable to provide the kind of collateral demanded by the banks.

Activity/Self Assessment Exercise 5

What are the major advantages and disadvantages of obtaining loans with commercial banks?

3.2.6 Life Endowment

This is a life insurance policy. It is in form of saving. It is provided by insurance company who provides money for purchaser of property or guarantees loan from a bank. The borrower will assign the policy to the lender and the notice of the assignment is given to the insurance company.

Life insurance as a security is good, but the lender usually has to wait for the number of years expressed in the policy before he can realize the security or until when the payment becomes due at the death of the borrower. Its example is the NICON Insurance.

Activity/Self Assessment Exercise 6

Highlight the advantages and the disadvantages of Life Endowment Policy.

4.0 Conclusion

In this unit, you have been taken through the basic points a student is required to know when considering mortgage institutions as a subject matter; and because of the relevance of the topic as discussed in this unit, reference will constantly be made to it in subsequent unit.

5.0 Summary

This unit defines mortgage institutions as licensed banks, which accept deposits and grant loans for either purchase, construction, improvement of an existing house(s).

The unit also considered the various types of mortgage institutions available in Nigeria, which includes Federal Mortgage Banks, Housing Corporation, Housing Scheme, Private Property Developers, Commercial Banks and Life Endowment.

6.0 Tutor-Marked Assignment

Discuss the establishment, functions and challenges of the following mortgage institutions:

- i) Federal Mortgage Bank; and
- ii) Federal Housing Authority.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

UNIT 4: Right and Duties of Parties to Mortgage

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1.0 Introduction

In this unit, you will be introduced to the basic rights and duties parties to a mortgage have and how these rights can be enforced in the event of default by either party.

2.0 Objective

At the end of this unit students should be able to:

- a) Understand the basic right and duties of a mortgage and the mortgagor.
- b) Provide a clear distinction between the two.
- c) Determine whether or not there are limit to such right and duties

3.0 Main Content

3.1.0 Right and Duties of Parties to Mortgage

3.1.1 Right and Duties of a Mortgagee

These are means by which a mortgagee may enforce the security so as to recover the loan. There are four of such rights. These are:

3.1.2 Power of Sale

Under section 19(1) C.A and 123(1) PCL 1959 every mortgagee (legal or equitable) whose mortgage is created by a deed, may enforce their security when the money become due by a sale of the mortgaged property.

Power of sale is automatic; the mortgagee does not require an order of the court to exercise it. However, before the power arises three basic conditions must exist. Namely:

- i) The mortgage must have been created by a deed.
- ii) Some interest under the mortgage is in arrears and unpaid for two months after becoming due.
- iii) There has been a breach of some provision in the mortgage deed or in the Act (C.A. or P.C.L) on the part of the mortgagor or some persons concurring in making the mortgage to be observed or performed.

Notwithstanding that the power of sale has arisen, the power only become exercisable where any of the following three requirements can be satisfied, these are:

- a) That despite the notice of repayment served on the mortgagor, the installmental payment of the principal mortgage debt is still in arrears for a period up to three months.
- b) That the interest payable on the mortgage is in arrears for a period up to two months.

That a provision contained in the mortgage deed or a covenant has been breached. See *Barker vs. Illingworth* (1908) 2. Ch. 20.

3.1.3 Order of Foreclosure

Foreclosure is an order of court that extinguishes the mortgagor's equity of redemption; it operates to vest the entire interest of the mortgagor in the mortgagee subject only to the right of other mortgagees that rank in priority above them.

The courts are always eager to protect the mortgagor's equity of redemption, for this reason an interim order of foreclosure is granted nisi, to become absolute after six (6) months if the mortgagor is still in default. The grant of foreclosure order nisi does not prevent the mortgagee from exercising his power of sale if he is entitled to it.

Re-opening Foreclosure Order

It is possible for the court to re-open a foreclosure order, if before the order is made absolute the mortgagor without delay applies to the court showing that his ability to redeem the property was due to circumstance beyond his control; and that the property is worth more than the amount of the loan and that it is just and equitable that he should be allowed to redeem the loan. Then the court may re-open the foreclosure order; and the mortgagor will be entitled to redeem the property.

Activity/Self Assessment Exercise 1

1. Under what circumstance can the power of sale arise and become exercisable?
2. Discuss the circumstance under which a foreclosure may be re-opened by the court.

3.1.4 Appointment of Receiver

Section 19(1) C.A 1881 and 123(1) PCL 1959 respectively provides for the power of the mortgagee, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property or any part of it. This statutory right is implied in every mortgage, legal or equitable created by a deed where the circumstances would allow the mortgagee to exercise a power of sale.

But equitable mortgage not created by a deed, must apply to the court for appointment of receiver. The receiver though appointed by the mortgagee, is an agent of

the mortgagor, hence, the mortgagee is not liable to account to the mortgagor. The receiver has power to recover the income of the property by auction, distress or otherwise; and he must apply the money to discharge the loan and interest.

3.1.5 Taking Possession

The law is that possession goes with legal ownership; hence a legal mortgagee is entitled to possession whether or not the mortgagor is in default of payment of the loan.

Where the mortgage takes possession, they are strictly liable to account to the mortgagor for the rent accruing from the property. It is for this duty that mortgagee do not find taking possession as an attractive option in the event of mortgagor's default; unless it is used as preliminary act to enforcing the power of sale.

Activity/Self Assessment Exercise 3

What are legal duties that accompanied taking possession of the mortgaged property in the event of the mortgagor's default in paying the loan.

3.2.0 Rights and Duties of Mortgagor

3.2.1 Legal Right to Redeem

A mortgagor, upon granting of his property to the mortgagee, has only the legal right of re-entry on payment of all sum due under the mortgage. At any time after the mortgage debt has been paid the mortgagor has a right to demand that the mortgagee deliver to him the mortgage deed and all documents relating to the mortgaged property which are in his possession.

Where the mortgagee entered into possession of the mortgaged property; and during which he made some improvement on the property, the mortgagor upon redemption shall not be liable to pay the cost of such improvement; except where it is provided otherwise in the contract.

Activity/Self Assessment Exercise 4

Examine the mortgagor's right to redeem under a deed of mortgage.

3.2.2 Equity of Redemption

Equity of redemption has been described as an estate and an interest or equitable right inherent in land, where even though the mortgagor had at law conveyed the land to the mortgagee, he is in equity considered the owner of the property subject only the mortgage.

A mortgagor may lose his right of redemption forever where the mortgagee exercises his power of sale or foreclosure. The mortgagee on the other hand, cannot exercise this right unless the time for repayment of the loan has passed. Therefore, it is advisable for parties to provide expressly in the mortgage deed the date of redemption and expiration.

Upon payment of the debt therefore, the mortgagor is entitled to have the mortgaged property restored to him free of the mortgagee's security.

3.2.3 Equitable Right to Redeem

Upon the mortgagor's default to pay and redeem the property on the legal due date, the property become lost to him forever; and he is still liable to pay the mortgage debt and the interest that accrued. However, to correct these imbalances, equity has stepped in favour of the mortgagor, by providing him with the equitable right to redeem. This gives the mortgagor the right to redeem the mortgage even after the legal due date has passed.

To exercise this equitable right to redeem, notice of the mortgagor intention to redeem on a particular date must be given to the mortgagee before he can be compelled to accept payment.

The notice is usually six (6) months or interest in absence of such notice. The notice is given to the mortgagee so as to afford him a reasonable time and opportunity to find a new investment for his money on redemption.

Activity/Self Assessment Exercise 5

Distinguish between Equity of Redemption and Equitable Right to Redeem.

4.0 Conclusion

In this unit, you have been taken through the main issues a student offering this course is required to know and because of the relevance of the issues discussed therein, reference will be made to this unit, in subsequent unit, throughout the period of this course.

5.0 Summary

In this unit, you have learnt the basic rights and duties of parties to a mortgage. The following were set out as rights and duties of the mortgages:

- i) Power of sale
- ii) Power of foreclosure
- iii) Appointment of receiver
- iv) Taking possession

While the following were considered as the basic rights and duties of the mortgagor:

- i) Legal right to redeem
- ii) Equity of redemption
- iii) Equitable right to redeem

6.0 Tutor-Marked Assignment

Examine the mortgagee power of foreclosure and the circumstance under which the court can re-open a foreclosure order.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

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Unit 1: Power of Sale

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1.0 Introduction

In this unit, you will be introduced to the rudimentary principles governing power of sale, as one of the most important remedy available to the mortgagee upon the mortgagor's default in repaying the mortgage sum.

2.0 Objective

By the end of this unit, student should be able to:

- i) Appreciate the nature of Power of Sale.
- ii) Know when the Power of Sale arises; and when does it become exercisable?
- iii) Know the modes of conducting a sale.
- iv) Know the timing of sale, as well as the application of the proceeds of sale.
- v) Know the circumstance under which the court can order for a sale.

3.0 Main Content

3.1 Power of Sale

Power of Sale is a remedy available to a mortgagee where the mortgagor is unable to re-pay the mortgage sum (loan). Sale has a great advantage over other remedies such as foreclosure, action on debt, entry into possession and appointment of receiver because it is automatic. In other words, sale does not require court approval, nor can it be set aside if properly carried out.

However, the extent to which a mortgagee can exercise this right depends largely on whether the mortgage is a legal (statutory) or equitable one created by a deed. S.19 (1) Conveyancing Act (C.A) 1881 and S.123 (1) Property and Conveyancing Law (PCL) 1959; provides that every mortgagee (legal or equitable) whose mortgage is created by deed, may enforce their security when the money become due by sale of the mortgaged property.

Activity/Self Assessment Exercise 1

Discuss the nature and importance of Power of Sale over other remedies available to the mortgagee.

3.2 Statutory Power Of Sale

Upon default by a mortgagor, a legal mortgagee can exercise his statutory Power of Sale, as provided under S.190 C.A and S.123 (1) PCL. In addition, the mortgagee can bring personal action against the balance of the debt over the money raised by sale. **See West Bromwich BS vs. Wilkinson (2005) U.K.H.L., 44.**

3.3 When Does the Power of Sale Arise?

As stated above, a statutory Power of Sale arises as soon as the date fixed for repayment of the mortgaged sum has passed or where the mortgage debt is payable by installments, as soon as an installment is due and unpaid. However this is subject to the following conditions, as can be inferred from **S.190 C.A** and **S.123 (1) PCL**.

- a) The mortgage must be by Deed: See *K.K. Shoronmu vs. J.A. Dophin XV NLR 87*.
- b) Date for payment must have expired or instalment fallen due.
- c) No agreement against sale must have been made.

The parties can expressly modify or exclude the Power of Sale. See *Timothy Omo-Base vs. New Nigerian Bank Ltd (1986) 1.SC 77*, where the parties appeared to have contracted out of the relevant provisions of the property and conveyancing law of Bendel State 1976; which provided for Power of Sale in the event of default by the mortgagor.

Activity/Self Assessment Exercise 2

What are the conditions to be satisfied before a Power of Sale can be said to have arisen?

3.4 When Does a Power of Sale Become Exercisable

Notwithstanding that the Power of Sale has arisen, the mortgagee is not entitled to sell the mortgaged property, unless the power has become exercisable. Under S.20 of the C.A and 125 of the PCL, the power only becomes exercisable when any of the following conditions are satisfied:

- a) Notice requiring payment of the mortgage money has been served on the mortgagor or one of the several mortgagors and default has been made in payment of the mortgage money or any part thereof for three months after such service.
- b) Some interest under the mortgage is in arrears and unpaid for two months after becoming due.
- c) There has been a breach of some provisions contained in the mortgage deed or in the Act (C.A. and PCL) on the part of the mortgagor or of some person concurring in making the mortgage, to be observed or performed, other than, and beside a covenant for payment of the mortgage or interest thereon.

The requirement of notice to the mortgagor includes notice to persons deriving title through him, for instance, where there is a subsequent mortgage.

Where the mortgagor is in default of payment of any installment or interest in arrears, it is not a defence that a substantial part of the loan has been paid. See *Okafor & Sons vs. N.H.D.S. Ltd* (1977) N.S.C.C. 271.

Activity/Self Assessment Exercise 3

Discuss the conditions required for the Power of Sale to become exercisable?

3.5 Equitable Power of Sale

Under S.190 C.A and S.123 PCL, an equitable mortgagee whose mortgage is created by a deed, may enforce their security when money becomes due, by sale of mortgaged property.

The same power is available to an equitable mortgage where the mortgage is accompanied by a memorandum of sale under seal or a memorandum declaring the mortgagor a trustee of the legal estate of the mortgaged property or a memorandum giving the mortgagee a Power of Attorney.

Activity/Self Assessment Exercise 4

Discuss the circumstances under which an equitable mortgagee can exercise, an equitable Power of Sale.

3.6 Protection of an Innocent Purchaser

Sections 21(2) C.A and 126(2) PCL have granted protection to a purchaser of a mortgaged property. However, this protection is only available where the purchaser for value is acting in good faith, where the purchaser has actual notice that the Power of Sale is not exercisable; or of any fact or circumstances that is improper or irregular, the exercise of the Power of Sale of the property to him will be defeated because equity will not allow him to benefit from his fraud; otherwise the purchaser takes free of the mortgagor's interest.

Where a prospective purchaser is investigating the title of the mortgagee to sell, he is only bound to inquire whether the power has arisen, but he need not concern himself with whether the power has become exercisable – that is whether the requisite notice has been given.

Activity/Self Assessment Exercise 5

Discuss the protection accorded to an innocent purchaser for value under the Act.

3.7 Conduct of the Sale

Where the mortgagee's power of sale has arisen and becomes exercisable, the sale is either by auction or private treaty. Where the sale is by auction, it must comply with the relevant Auctioneers Law, otherwise the sale is invalid.

In the conduct of sale, the mortgagee is not deemed to be the trustee of the mortgagor; they are not bound to sell at a particular price, provided they acted in good faith. A sale at a lower value is not proof of bad faith, but where the mortgagee sells to himself, nominee or persons interested, the court will infer bad faith. Thus, in **Kenedy vs. De Trafford (1877) A.C 180**, it was held that a mortgagee discharges his duty toward the mortgagor if he exercises his power of sale in good faith, but that if he willfully and

recklessly deal with the property in such a manner that the interest of the mortgagor are sacrificed, he cannot be said to have exercised his power of sale in good faith.

Activity/Self Assessment Exercise 6

In conducting a sale, discuss how the following can be established:

- i) Sale in good faith
- ii) Sale in bad faith

3.8 Timing of Sale

Once the power of sale has become exercisable, the mortgagee is free to sell at any time, thereafter; the court will not impeach the sale on the grounds of bad motive. See *Nash-vs-Eads* (1880) 25 Sol. Jol. 95; nor will the court restrain it by interim injunction. See *Sabbach vs. The West Africa Ltd.* (1962) 11r 174.

The conventional view is that mortgagee can choose when to sell; there can be no complaint that there should have been an earlier sale. See *China & South Sea Bank Ltd. vs. Tansoon Gin* (1990) 1 A.C 536.

Activity/Self Assessment Exercise 7

Is the mortgagee under any duty to sale within a particular period after the power become exercisable?

3.9 Application of the Proceed Of Sale

By S.21(2) C.A and 127 PCL requires that the money received by the mortgagee from the sale, after discharging any prior encumbrance, or after payment into court of any sum to meet any prior encumbrance, any sum remaining shall be held by the mortgagee in trust to be applied by him first in paying all costs charges and expenses properly incurred by him, which are incidental to the sale or any attempted sale or otherwise; secondly in discharge of the mortgage money, interest and cost and other money received shall be paid to the person entitled to the mortgaged property or the person authorized to give receipts for the proceeds of the sale of the property.

This means that the mortgagee is not trustee of the mortgagor for the conduct of sale, but he is trustee of the mortgagor for the proceeds of sale.

Activity/Self Assessment Exercise 8

Clearly explain the destination of the proceeds of sale of mortgaged property?

3.10 Court Jurisdiction to Order Sale

The court has jurisdiction to order sale. This jurisdiction is used in exceptional cases; for instance, where a power of sale has been defectively drafted. See *Twentieth Century Banking Corporation Ltd. vs. Wilkinsion* (1977) Ch. 99.

A valid power of sale may be useless if the mortgagor used a tactic of threatening purchasers with a challenge to the validity of the sale. So long as the chances of success of such challenge are remote the court may order a sale in order to protect the purchaser and ensure that a sale can go ahead.

NOTE: As to what a mortgagee must do to satisfy a duty to obtain a proper price, it is clear that a sale which may or may not be by auction, must be advertised properly. This involves advertising in normal range of places for type of property with a full description of it. *S. Cock mere Brick Co. Ltd. v. Manual Finance Ltd.* (1979) Ch. 149.... and allowing a reasonable time before auction or acceptance of an offer below a proper valuation. This does not prevent the acceptance of a high price within a short period: *Johnson vs. Robinson* (1975) 2 EGLR, 78). If these requirements are ignored, then arranging a public auction is no guarantee that the sale cannot be challenged.

Also, a mortgagee is liable for any carelessness of an agent conducting the sale. It is no defence that a competent auctioneer or estate agent has been employed as it was held in the case of *Predeth v. Castle Phillips Finance Co.* (1996) 2E GLR, 144.

Activity/Self Assessment Exercise 9

Under what circumstance can the court make an Order of Sale?

4.0 Conclusion

In this unit, you have been taught the basic principles a student is required to know, when being introduced to a course of this kind. The principles as discussed in this unit will re-occur constantly during the relevant period of this course, and you will find it relevant to make reference to it in the subsequent units, because of its significance and affiliation.

5.0 Summary

This unit discusses the power of sale as an important remedy available to a mortgagee in the event of the mortgagor's default in paying the mortgaged sum. It also explained the conditions under which the power of sale arises and becomes exercisable; the instances under which the court can make an Order for Sale. It further considered other matters such as whether or not the mortgagee is bound to sell at a particular price and the application of the proceeds of sale.

6.0 Tutor-Marked Assignment

The power of sale is one of the most important remedies available to a mortgagee in the event of a default by the mortgagor, however, the exercise of this power is subject to certain conditions, discuss.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

UNIT 2: Discharge of Mortgage

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1.0 Introduction

In this unit, you will be introduced to the basic idea behind the concept “Discharge of Mortgage” and the various modes under which a mortgage can be discharged.

2.0 Objective

By the end of this unit, the students should be able to:

- a) Define discharge of mortgage;
- b) Understand the various modes a mortgage can be discharged.

3.0 Main Content

3.1 Discharge of Mortgage

Discharge of mortgage is simply the repayment of the outstanding mortgage sum and interest; and transfer of the estate vested in the mortgagee to the person immediately entitled to the equity of redemption. Simply put, it means that the loan plus interest has been redeemed; and the mortgagee has released the property and returned to the mortgagor document deposited as security. S. 136 PLL.

Mortgage can be discharged by anybody interested in the equity of redemption. Therefore where another person repays the loan and interest, the person steps into the shoes of the mortgagor; and becomes vested with the estate in the property which was previously conferred in the mortgagee.

Usually, the mortgagor's solicitor prepares the document of discharge. S.135 PCL provides that a mortgage may be discharged by a receipt under hand endorsed on or written at the foot of or annexed to the mortgage deed, signed by the mortgagee and stating the name of the person paying the money.

The receipt serves two purposes, namely:

- i) It operates as a surrender of mortgage term and discharge the mortgage.
- ii) It also operate as a transfer where the money is paid by a person not entitled to equity of redemption to put the transferee in the position of the mortgagee as to powers, right and remedies against the mortgagor.

Activity/Self Assessment Exercise 1

- a) What is discharge of mortgage?
- b) Highlight the importance of receipt in discharging a mortgage

3.2 Modes of Discharge of Mortgage

The mode to be adopted in discharging a mortgage, depends on how it was created and where the mortgage property is situated.

Consider the following:

3.2.1 Discharge of Mortgage created by Sub-demise or Assignment

Where a mortgage is created by sub-demise or assignment, the mode of discharge or re-conveyance should be by a surrender of the lease or sub-lease as the case may be. See *Re-Moor & Hulms Contract* (1812) 2 Ch. 105. A separate release under seal is also requested where part only of the property is released from a legal mortgage.

The same can also be achieved through a deed of discharge; and this deed, should be registered at the Land Registry as an evidence of discharge.

3.2.2 Discharge of Equitable Mortgage created by Deposit of Title Deed

In the case of an equitable mortgage created by deposit of title deeds, a simple receipt under land may be used.

If the payment is to be made to the mortgagee's solicitor, the receipt should be under seal. This will protect the borrower who pays the money to the solicitor.

Where the property is sold to a purchaser whose money is to be used to repay the loan, the mortgagee may join the conveyance rather than making a statutory receipt or separate deed of surrender or release.

3.2.3 Discharge of Mortgage under the Registration of Title Law (RTL)

The release of mortgage under the RTL Cap 121 must be done with the prescribed Form 6 of the first schedule. In case of company charges, application should be made to the companies Registry in the prescribed Form C.05 for entry of the release in accordance with S. 204 of the Companies and Allied Matters Act, 2004.

3.2.4 Discharge of Legal Mortgage of an Endowment Policy

Legal mortgage of an endowment policy is discharged by re-assignment or receipt. The policy must be returned to the mortgagor and the notice of discharge should be given to the insurance company.

Where the right to redeem the mortgage has not arisen, a mortgagee who wishes to sell free from the mortgage may take advantage of statutory provisions enabling the court to

declare the property free of an encumbrance upon adequate money being paid into court this is provided under S. 75 PCL and S.5 C.A.

3.2.5 Discharge under the Statute of Limitation

Under the statute of limitation (though repealed now) the mortgagee's estate, is extinguished or discharged at the end of thirteen years from the date he receives the mortgage money, where there had been no re-conveyance; and the mortgagor had remained in possession. See *Sand V Thompson* (1883) 22 Ch. 614.

Activity/Self Assessment Exercise 2

Explain how the following mortgages can be discharged:

- a) Equitable mortgage created by deposit of title deed.
- b) Legal mortgage of an Endowment Policy.

4.0 Conclusion

In this unit, you have been taken through the essential things students are expected to know when offering a course of this nature and because of the relevance of the matters discussed therein; reference will be made to this unit throughout the period of this course.

5.0 Summary

This unit defines discharge of mortgage to mean a situation where the loan and the interest have been paid; and the document deposited as security, returned to the mortgagee.

The unit further considered the modes of discharging a mortgage with particular reference to:

- a) Mortgages created by sub-demise.
- b) Equitable mortgage created by deposit of Title Deed.
- c) Discharge under the Registration of Title Law.
- d) Legal mortgage of Endowment Policy.
- e) Discharge under the statute of limitation.

6.0 Tutor-Marked Assignment

In discharging a mortgage, the form to be adopted depends on the circumstance of each case. Discuss this statement in light of the various mode under which a mortgage can be extinguished.

7.0 Reference/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

Unit 3: Form and Content of a Mortgage

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- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 Introduction

In this unit, you will be introduced to the various form and content of a mortgage deed.

2.0 Objective

By the end of this unit, the student should be able to appreciate the following:

- i) The forms of a deed of mortgage with a particular reference to pre-1900 English Law, PCL 1959, registration of Title Law, Companies and Allied Matters Act 2004, Endowment Policy, Equitable Mortgage and Equitable Charge of Registered Title.
- ii) The content of a mortgage deed with emphasis on parties Recitals and the Operative parts.

3.0 Main Content

3.1 Form and Content of a Deed of Mortgage

3.1.1 The Form of a Deed of Mortgage

The form of a mortgage deed usually depends on the nature of the interest of the mortgagor. The interest acquired by individuals and companies under the Land Use Act, 1978 has the semblance of a lease. See *Savannah Bank (Nig.) Ltd. vs. Ajito* (1989 1.NWLR (pt. 97) p. 328. Therefore, the method applicable to lease holds under the received English Law should be adopted, but a distinction should be made between the rest of the country and the former Western Nigeria which has adopted the English Law of Property Act, 1925.

Activity/Self Assessment Exercise 1

What is the nature of the interest acquired by individuals and companies under the Land Use Act, 1978?

3.1.2 The Position under the Pre-1900 English Law

Under the Conveyancing Act (C.A) 1881 a mortgagee of leasehold (including certificate of occupancy) is done by assignment of the unexpired residue of the term of the lease or by granting sub-demise to the mortgagee out of the whole term held by the mortgagor subject to a proviso for re-assignment or cesser on redemption.

It is better to use sub-demise method to avoid risk incident to a mortgagee by assignment. If the whole term was assigned to a mortgagee, he become liable to be sued by the lessor for rent and also on the covenant whether or not he had entered into possession by privity of estate.

Activity/Self Assessment Exercise 2

Discuss how a mortgage can be created under the Conveyancing Act of 1881.

3.1.3 The Position under the Property and Conveyancing Law (PCL) 1959

The PCL 1959, following the English Law of Property Act 1925, adopted and made compulsory a demise (for freehold) a sub-demise (for leasehold) and a statutory provision is also made in case of sub-demise for getting in the nominal reversion when the security is to be released. Therefore, the insertion in a mortgage of trust of reversion is necessary.

A charge by deed expressed to be by way of legal mortgage is the other method permitted by S.108 & 109 PCL, 1959. The legal charge does not convey any estate to the mortgagee, but under the process, he has the same rights and remedies as if he had a legal mortgage. The charge system is preferred for its simplicity and could be easily understood by laymen.

Also, to the same effect is the practice of depositing title deeds used by businessmen to create an equitable charge over their land informally by handing the title deed to the lenders.

The deposit, unless if the borrower defaults, the lender cannot initiates a fore-closure, or sale proceeding to enforce his security.

Activity/Self Assessment Exercise 3

Discuss the form adopted in creating a mortgage under the property and conveyancing Law, 1959.

3.1.4 Statutory Mortgage

This is a special form of charge by way of legal mortgage. A mortgage of freehold or leasehold may be made by a deed expressed to be by way of statutory mortgage in all the states of the Federation. See S.137 PCL and S.26 C.A 1881. Such a mortgage must be in one of the forms in the 4th schedule of the PCL or 3rd schedule of C.A. However, the statutory mortgage is rarely used.

3.1.5 The Position under the Registration of Titles Law

In some part of Lagos State where Registration of Title Law Cap 121 applies, the statutory form of registered charge form (form 5 of the 1st schedule to the law) should be used. In order to incorporate the statutory covenant of title, you may add the word “... as beneficial owner” which are omitted. S.80 (2) of the law permits this.

Where the land is leasehold interest, there is an implied covenant to pay rent; and to observe all the covenant and condition contained in the registered lease.

However, where it's desirable to have express covenant, these can be introduced where the form says “add other covenant” by using the introductory word “I/We agree as follows” or “the borrower agree with the lender as follows”

Activity/Self Assessment Exercise 4

Discuss the form of a registered charge under the Registration of Title Law (RTL).

3.1.6 The Position under the Companies and Allied Matters Act (CAMA) 2004

By S.197 CAMA, 2004, charges made by way of legal mortgage are void against the liquidator and any creditor of the company; and the chargee becomes unsecured creditor in the company's winding up process unless the charge and the

prescribed particulars are delivered to the Corporate Affairs Commission within ninety (90) days after the creation of the charge, after the period of 90 days it cannot be accepted for registration without an order of the court. See S.295 CAMA.

Failure to register a charge does not invalidate the charge, as between the company and the chargee. The effect of S.197 is that it will not prejudice any contract or obligation for the repayment of the money secured. And when a charge becomes void under the section, the money secured shall immediately become payable so that the chargee can enforce his security by sale or fore-closure; and the liquidator in any subsequent winding up cannot set such sale or fore-closure aside.

Activity/Self Assessment Exercise 6

Examine the effect of failure to register a charge under S.197(1) of CAMA.

3.1.7 Mortgage of Endowment Policy

Mortgage of insurance policy are principally effected as collateral security to mortgage of land.

The formalities are that the assignment must be in writing either endorsed on the policy, or by separate instrument in the form given and written notice of the date and purpose of the assignment must be given to the insurance company at their principal place of business. The company is bound to give acknowledgment of the receipt of the notice. S. 8 & 9 Insurance (special provision) Decree 1988.

Activity/Self Assessment Exercise 7

What are the formalities required for the creation of a mortgage of Endowment Policy?

3.1.8 The Position under Equitable Mortgage

For securing a short-term loan, a short form of an equitable charge will suffice, this usually saves time and the expenses of legal mortgage.

Alternatively, the charge could be created by deposit of title deeds relating to the intent to create a security. Where this is done, it served as a sufficient act of part performance of an implied agreement to give security; notwithstanding the requirement of S.5(2) Law Reform (Contract Law) Cap 66, Laws of Lagos State that contract for the disposition of land must be evidenced in writing.

However, a mortgage created by deposit of title deeds is expected to be accompanied by a memorandum of deposit stating:

- a) Time of the payment of the loan;
- b) The rate of interest to be paid; and
- c) Agreement by the borrower to execute a legal mortgage if required to do so.

Activity/Self Assessment Exercise 8

- i) Explain how a charge could be created under equitable mortgage?
- ii) What are the items required to accompany the memorandum of deposit?

3.1.9 Equitable Charge of Registered Title

In case of registered title under Cap 121 Lagos State, there is a very short notice of deposit of land certificate. The notice in the prescribed form 15 creates a charge on the land and serves as a caution; and can be withdrawn with the consent of the chargee. The land certificate serves as a security which effectively prevents any entry on the land.

Activity/Self Assessment Exercise 9

Examine the effect of notice contain in form 15 of the Registration of Title La, Cap 121, Lagos State.

3.2 The Content of a Deed of Mortgage

A content of a deed of mortgage contain the following parts:

3.2.1 Commencement and Date

The practice is to mention the particular transaction which may be “THIS LEGAL CHARGE....” Or “THIS MORTGAGE...”

As for the date, in practice, a deed is left undated. There are two advantages for doing so:

- i) Section 125 Evidence Act provides that a deed is presumed to take effect from the date of delivery; and
- ii) Section 23 (3) & (4) of the Stamp Duties Act requires that all instrument liable to the payment of stamp duties must be stamped within 30 days of execution. Where the people liable to stamp the instrument default in payment, he shall be guilty of an offence; and in addition, liable to pay penalty.

For this reason, the deed should be undated until you are ready to stamp it. Commencement and date may be couched, thus: THIS LEGAL MORTGAGE is made the..... of March, 2011.

3.2.2 Parties

The terminologies used to describe the parties are Mortgagor/Mortgagee or Borrower/Lender. It is important that one is consistent; not Mortgagor/Lender. Where the lender insist on a Guarantor or surety as a further security for the loan; the guarantor or surety should join as a party.

In a deed of mortgage, the parties may be drafted thus:

BETWEEN Paul Abraham of plot 6 Abacha Road, Kaduna (“The Mortgagor”) of the one part AND Better Bank Plc., whose registered office is located at plot 7, Sabon Gida close, Lagos (“The Mortgagee”) of the other part.

3.2.3 Recitals

Under the old style, the word “WHERE AS” was commonly used in the opening paragraph of any recital, but the modern style has replaced the word WHERE AS, with “BACKGROUND”.

A deed should recite the following facts:

- a) The borrower’s title;
- b) The agreement to borrow;
- c) The fact that the surety or guarantor (if any) has agreed to guarantee or provide surety for the loan; and
- d) That the relevant consents where necessary, have been obtained.

3.2.4 Testatum

Testatum usually begins as follows: NOW THIS DEED WITNESSED s follows.

In a mortgage deed, unlike deed of assignment there are two testatum:

First Testatum: Here the borrower covenant to repay the principal sum and interest on an agreed date, which is the legal due date

Second Testatum: Here the mortgagor state the capacity in which he is mortgaging, usually he convey to the mortgagee as a “beneficial owner”.

The second testatum also contained the description of the property mortgaged.

3.2.5 Priviso for Redemption

The proviso for cesser or redemption usually provides that if the mortgagor shall on a given day pay to the mortgagee the mortgaged debt and interest, the mortgage term shall ceased.

The date for redemption should be the same as the date fixed by the covenant for payment.

Illustration:

“PROVIDED THAT if the mortgagor shall on the 21st May, 2011 pay to the mortgagee the principal sum with interest as contained in this deed of legal mortgage, the terms created under this mortgage, shall cease”

3.2.6 Borrower’s Covenant

The mortgage should includes all covenants on the mortgagor’s part such as covenant for repair, insurance granting of sub-lease; and consolidation.

Activity/Self Assessment Exercise 10

Draft a copy of a proviso for cesser.

4.0 Conclusion

In this unit, you have been taken through the main idea, as far as the subject matter of form and contents of a deed of mortgage is concerned. This unit will re-occur constantly throughout the period of this course; and you will find yourselves making reference to it because of it relevance and affiliation.

5.0 Summary

In this unit you have been taken through to identify:

- a) Form and contents of a deed of mortgage.
- b) Special features of the various part of a deed of mortgage.

6.0 Tutor-Marked Assignment

Discuss the form of mortgage under the Property and Conveyancing Law, 1959.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

UNIT 4: Attestation and Execution of Mortgage

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- 3.0 Main Content
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 - 3.1.1 Attestation
 - 3.1.2 Execution
- 4.0 Conclusion
- 5.0 Summary
- 6.0 Tutor-Marked Assignment
- 7.0 References/Further Reading

1.0 Introduction

In this unit, you will be introduced to the rudimentary idea on the attestation and execution of a deed of mortgage.

2.0 Objective

At the end of this unit, the students should be able to:

- a) Understand how a mortgage is attested to; and
- b) Understand how mortgage is executed.

3.0 Attestation and Execution of Mortgage

3.1 Attestation

It is not a strict requirement of the law that a deed must be attested to, however, where it is to be provided, this usually drafted thus;

“IN PRESENCE OF..... (Name of Witness)”. Ensure that the witnesses to the signature are disinterested parties.

For companies, the execution of a deed of mortgage depends on the provision of the Article of Association. Generally, companies execute documents in presence of a director and secretary or two directors.

3.2 Execution

This is the act that makes a transaction binding on the parties. Usually, the mode of execution of a deed of mortgage depends on the capacity of the parties, i.e. whether it is an individual or company.

The mortgagee is usually a corporate entity, in which case, they should affix their common seal as follows: “THE COMMON SEAL OF Better Bank Plc is affixed to the deed”. Every document executed by a company shall be attested to in accordance with the provision of the Article of Association of the company.

Where the mortgagor is an individual, then he should execute the mortgage deed as follows: “SIGNED, SEALED AND DELIVERD by the” In Presence of witness who must be disinterested parties.

4.0 Conclusion

This unit considers attestation and execution of mortgage which are regarded as acts required to make a transaction binding.

5.0 Summary

This unit stressed that attestation and execution are acts that make an agreement binding on the parties; that a deed of mortgage must be attested to in presence of witnesses who must be disinterested parties.

The mode of execution and attestation depends on the status of the parties.

6.0 Tutor-Marked Assignment

Examine the significance of a deed of mortgage in a mortgage transaction.

7.0 References/Further Reading

1. Adubi, C.O. (1995). **Drafting, Conveyancing and Wills**, The Light House Publishing Co. Ltd., Lagos, Nigeria.
2. Bansley, D.G. (1975). **Conveyancing Law and Practice**, Butter Worth.
3. Harry Silberberg (1975). **The Law of Property**, Durban, Butter Worth.
4. Kenny, P.H. *et al* (1980). **Conveyancing Law**, Macdonald and Evans.
5. Oniekoro, F.J. (2007). **Mortgage in Nigeria: Law and Practice**, Chenglo Ltd., Enugu.
6. Sylvester O. Imhanobe (2007). **Legal Drafting and Conveyancing**, Sylvester Imhanobe Legal Research Ltd., Abuja.
7. Tyler E.L.G. (1988). **Law of Mortgage**, Butter Worths.

Module 7 Post Completion matters in Conveyancing

Unit 1 Application for Governor's Consent

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- 2.0 Objectives
- 3.0 Main objectives
 - 3.1 Consent provisions in the Land Use Act
 - 3.2 Conveyancing transaction that requires governor's consent
 - 3.3 Procedures for obtaining governors consent
 - 3.4 Problems with requirement of consent
 - 3.5 Refusal of consent and effect of non compliance with the consent provisions

1.0 Introduction

Post completion matters or perfection of title consist of the application for governors consent under the Land Use Act, stamping of the document under the stamp duties

Act/Law and registration of documents under the various states land instrument registration laws. At the completion, the parties particularly the purchaser is required to comply with some statutory requirements for the protection and validity of his title. Some of the post completion matters like the application for the governor's consent is supposed to be the responsibility of the vendor but in most cases it is the purchaser who is usually anxious to protect his interest. Therefore, the parties can agree that the purchaser pursue the governor's consent while the vendor bears the expenses arising therefrom.

2.0 Objective

At the end of this unit you should be able to

- a. appreciate the laws that requires governors consent
- b. the conveyancing transactions that require Governor's consent and the exception
- c. the procedures for application of Governor's consent
- d. The effect of non compliance with the provisions on consent

3.0 Main Content

3.1 Consent Provisions in the Land Use Act

The Land Use Act in section 21 provides that it shall not be lawful for any customary right of occupancy or any part thereof to be alienated by way of assignment, mortgage, transfer of possession, sublease or otherwise howsoever

- a. Without the consent of the governor in cases where the property is to be sold by or under the order of any court under the provision of the applicable sheriffs and civil process law.
- b. In other cases, without the approval of the appropriate local government.

With regard to land situated in urban areas section 22 provides it shall not be lawful for the holder of a statutory right of occupancy granted by the governor to alienate his right of occupancy or any part thereof by assignment, mortgage transfer of possession, sublease or otherwise whatsoever without the consent of the governor first had and obtained.

Section 21 is applicable to land situated in non urban areas and the appropriate local government is to give consent in case of transfer or any alienation. Section 22 deals with land situated in urban areas and in case of transfer or any form of alienation the governor must give consent to such transaction. See *Savannah Bank v. Ajilo and Another* (1989)¹ NWLR pt 97 p. 305. in that case the supreme court held inter alia that consent provisions of the Land Use Act applies to both deemed right of occupancy and the right of occupancy expressly granted by the governor. *Onamade v. ACB* (1997)¹ NWLR pt 480 p. 123 *Rockonoh Property Co. Ltd v. NITEL* (2001)⁷ SC Pt 111 p. 154

3.2 Conveyancing transaction that requires Governor's Consent

From the provisions of the Land Use Act the following transactions requires governor's consent

- a. Conveyance/deed of assignment
- b. Legal mortgage
- c. Lease
- d. Power of attorney if it relates to transfer of land

However, parties to the following transactions are not required to apply for governor's consent.

- a. Legal mortgage in favour of the holder of the equitable mortgage for which consent was already obtained
- b. Release of mortgage after the security had been refunded
- c. Where there is a clause for renewal of a lease and the consent of the governor was duly sought and received for the original lease.
- d. Case law has exempted equitable mortgage from governor's consent see the case of *Okuneye v FBN Plc* (1996)⁶ NWLR pt 457 p 749. the court held that a mere deposit of title deeds rank more or less with an agreement to create a legal mortgage and therefore consent of the governor is not required. However, section 51 of the Land Use Act defines mortgage to include second, and subsequent mortgage and equitable mortgage.

- e. Contract of sale of land being an agreement or preliminary stage of conveyancing transaction is excluded from governors consent. In the case of *International Textile Industries Ltd v. Aderemi*, the supreme court held that the position of section 22 of the Land Use Act is that a holder of a right of occupancy may enter into an agreement in contract with a view to alienating his said right of occupancy. See *Awojugbagbe Light Industries v Chinukwe* (1995)4 NWLR pt 390 p. 379

Self Assessment Exercise

1. Explain the exceptions in a , b and c above
2. Compare the definition of mortgage in section 51 of the Land Use Act, and decision in *Okuneye V FBN Plc* Do you think it is a good decision?

3.3 Procedures for obtaining Governor's Consent

The procedures for obtaining governor's consent greatly depend on the state. But generally, the application for consent must be accompanied with the deed of assignment of which consent is sought. The Land Use Act provides that the governor when giving his consent to an assignment, mortgage or sublease may require the holder of a statutory right of occupancy to submit an instrument executed in evidence of the assignment, mortgage or sublease and the holder shall when so required deliver the said instrument to the governor in order that the consent be given by the governor.

Imhanobe has provided the guideline for obtaining consent for assignment in Lagos state for which some of the important steps are reproduced below

- a. Application for consent is either written or in appropriate form is completed and signed by the parties to the transaction. The application is accompanied with the following
 1. A draft in favour of the state government for an amount equal to 15% of the consideration passing between the two parties
 2. Current tax clearance certificate of the two parties (for assignment). Where one of

3. the parties is a registered company, the company must supply the revenue certificate paper for its staff remitted to government and the current tax clearance certificate for the directors
4. the building plan of the property (if it is a developed property)
5. evidence of payment of ground rent and other land charges
6. evidence of economic development levy of both parties
7. charting fees
8. endorsement fees and
9. certified true copy of assignor's land document obtainable from the lands registry

Self Assessment Exercise

Explain the relevance or otherwise of the documents identified above required to process governor's consent

3.4 Problems with the Requirement of Consent

The requirement of Governor's consent for alienation under the Land Use Act is mainly to ensure that the governor has proper control and management as well as surveillance over lands in the state. Unfortunately, the wording and practical implementation of the consent provision has left behind some problems for conveyances. According to Nnamani JSC.

A part of the Act which has brought untold hardship include the provisions relating to the issue of certificates and grant of consent to alienate. Both can take years and the applicant is subjected to the vagaries of bureaucratic action which demands for survey plans, interminable fees, documents and a lot. These cumbersome procedures have adversely affected business activities and made industrial take off, a matter very much in the future

Prof. Adigun and Utuama also said:

The operations of consent provisions of the Act have made land transaction more difficult and less economic... Consequently, capital formations have not been satisfactory so also is the general development process in the country.

These passages summarize the problems with the requirement of Governor's consent. In some states, the requirement of governor's consent has turned to conveyancers nightmare. It is only hoped that the plan by the government to reform land policy and review the Land Use Act will be carried out to its logical conclusion.

Self Assessment Exercise

List 5 criticisms against the requirement of governor's consent

3.5 Refusal to give Consent and Effect of Non Compliance with the Consent Provision

The issue is can governor refuse to grant consent? The answer is that the governor has discretion whether or not to consent and where he refuses he cannot be compelled to give consent to the transaction. See *Queen v. Minister of Lands and Survey. Ex Parte Bank of the North Ltd* (1963) NRNLR p. 581

On the effect of non compliance, with the requirements for consent section 26 of the Land Use Act provides that any transaction of any instrument which purports to confer or vest any person any interest or right over land other than in accordance with the provisions of this Act, shall be null and void. In addition to the nullity of such transactions section 34(8) and 36(6) have imposed penalty on parties to such transaction see *Sholanke v Abed* (1962) NRNLR 92.

4.0 Conclusion

The consent provisions are wide to include almost all types of alienations and non compliance with the provisions renders the transaction null and void see *Ajilo's case* and *Adedoyin v National Bank* (1989)¹ NWLR 212. More worrisome, is the fact that the governor cannot be compelled to give his consent. Therefore, conveyancers may protect the parties against situations where the governor refuses to give his consent by making the contract of sale of land conditional upon obtaining the governor's consent.

5.0 Summary

At the end of this unit you have learnt

1. the provisions of the Land Use Act applicable to the governor's consent
2. the effect of non compliance with the consent provision
3. the problems of consent provisions of the Land Use Act
4. the basis for the provisions

6.0 Tutor Marked Question

Examine the exception to section 22 of the Land Use Act.

7.0 References/Further Reading

1. Nnamani JSC The Land Use Act 11 years after (1989) vol. 2 No. 6 GRPBL p37
2. Utuama, A.A. Nigerian Law of Real Property Shanneson Publications, Ibadan, 1989
3. Smith I.O Practical Approach to Law of Real Property Ecowatch Lagos 1999
4. Sholanke, O.O is the Grant to Governor's Consent under the Nigerian Land Use Act Automatic GRBPL No. 2 p. 13

Unit 2. Stamping of Documents

- 1.0 Introduction
- 2.0 Objective
- 3.0 Main content
 - 3.1 Documents that require stamping
 - 3.2 Applicable laws
 - 3.3 Procedures for stamping
 - 3.4 Effect of refusal to stamp legal document

1.0 Introduction

Stamping of document is one of the post completion matters which parties to conveyancing transaction must execute. Stamp Duties Act/Law requires that some documents should be stamped. Government generates revenue through taxes and rates. Stamp duties is essentially a way by which government generate revenue from imposition of tax on some transactions affection land.

2.0 Objective

At the end of this unit you should be able to

- a. analyse the effect refusal to stamp documents
- b. identify some transactions/documents that should be stamped
- c. explain the procedures for stamping

3.0 Main Contents

3.1 Documents that should be Stamped

- a. Deed of assignment. Conveyance
- b. Leases
- c. Mortgages
- d. Deed of release or surrender
- e. Power of attorney
- f. Contract of sale of land etc
- g. Deed of gift

3.2 Applicable Laws

- a. The Stamp Duties Act Cap 411 LFN 1990
- b. Stamp Duties Law of each states of the Federation.

Before 1989 parties to conveyancing transaction were subjected to payment of stamp duties twice or even more. This is very common where the parties or one of the parties is a company. The federal commissioner will stamp then document after the payment of the

necessary fee, on request for registration at the land registry of state where the property is located, the registry usually refused registration unless stamp duties is paid to the state commissioner. However the finance (miscellaneous taxation provision) Decree No. 31 1989 put to rest the problem of double taxation which hitherto existed. Section 25 of the Decree makes the following supplemental amendment to the Stamp Duties Act as follows:

1. The federal... Government shall be the only competent authority to impose, charge and collect duties upon instrument ... if such instrument relates to matter executed between a company and an individual, group or body of individuals.
2. The state governments shall collect duties in respect of instrument executed between persons or individual at such rates to be imposed or charged as may be agreed with the federal ... government
3. In this section the word “company” includes banks and other financial institutions

This means that where the transaction is between individual, the Stamp Duties is payable to state board of internal revenue of the place the land is located. If one of the parties is a company, the stamp duties are to be paid to federal internal revenue services. Some document like ordinary power of attorney and contract of sale of land attract a fixed stamp duty, while others attract ad valorem duty i.e the stamp duty is assess in the basis of the consideration on the document.

Self Assessment Exercise

1. Which law regulate stamp duty payable by banks in Nigeria
2. What is the difference between fixed stamp duty and ad valorem duty?

3.3 Procedures for Stamping

Section 23 of the Stamp Duties Act requires that a document should be stamped within thirty days of its execution. However under section 23(3) a penalty may be charged where a document is stamped out of time. The procedures for stamping of legal document

may vary from state to state but the essential steps are similar for example. After the execution of a deed of assignment, it should be taken to the stamp duties office for assessment, particularly if the stamp duty is to be paid ad valorem. Once the deed is assessed, you will then proceed to one of the designated banks appointed to receive stamp duties; payment is either in cash or a draft. If payment is either in cash or a draft if payment was made in cash you will approach a stamp duties commissioner with the teller as evidence of payment and receipt is issued to cover the amount. The document is stamped with the following words “Duty Stamped” impressed on it and the commissioner will sign on it.

Note that diplomats, ministries and some government institutions are exempted from the payment of commercial rate duty.

Self Assessment Exercise

Give example of documents that attract

- a. Fixed stamp duty

3.4 Effect of Refusal to Stamp Legal Documents

- a. Stamp duties being a form of tax refusal to pay is an offence, therefore non payment of stamp duties may constitute a crime
- b. Unstamped document will not be accepted for registration
- c. Unstamped document cannot be tendered in evidence to prove title. However, it may be used to prove the existence of a contract between the parties.

4.0 Conclusion

Payment of Stamp Duties is one of the most important aspects of the post completion matters. You must ensure that where applicable legal documents should be duly stamped after proper assessment. It is equally important to know the appropriate authority to collect stamp duties on each particular transaction. This is to avoid incidence of double taxation.

5.0 Summary

In this unit you have learnt the

- a. Procedures for stamping legal documents
- b. Difference between fixed stamp duty and ad valorem duty
- c. Appropriate authority to assess and collect stamp duties in each particular transaction

6.0 Tutor Marked Question

Analyse the consequences of failure to stamp legal documents

7.0 Reference/Further Readings

1. Babatunde, L. Hints on Land Documentation and Litigation in Nigeria. Law Deed Ltd Lagos
2. Adigun, O (ed) The Land Use Act Administration and Policy Implications. Dept of Private and Property Law University of Lagos 1991
3. Imhanobe, S.O Legal Drafting and Conveyancing. Secured Title Publishers Abuja 2002

Unit 3. Registration of Instruments

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1.0 Introduction

Registration of instrument is the oldest and commonest type of registration. Although, the registered in registering an instrument neither investigate nor guarantee the document registered, it helps in preventing the suppression of document and it assist a purchaser in verifying title and other related things. Most importantly, it serves to give notice to persons who are expected to examine the register. Once a document is registered it becomes a public document so also the content of the document. A purchaser is under a duty to investigate the title of the vendor, registered documents are deposited in land registry and purchaser is expected to have notice of content of documents duly registered. This will protect the purchaser against concealment of documents.

2.0 Objectives

At the end of this unit, you should be able to

- a. Identify the type of registration
- b. Define instruments
- c. List documents that are registrable as an instrument
- d. The procedures for registration and
- e. effect of non registration of instrument

3.0 Main Contents

3.1 Instrument defined

According to section 2 Land Registration Law Cap 85 of Laws of Kaduna State which is similar to other land instrument registration laws of other states, instrument means a document affecting land whereby one party ... confers, transfers, limits charges or extinguishes in favour of another party ... any right or title to or interest in land in and includes a certificate of purchase and a power of attorney under which any instrument may be executed, but does not include a will.

The test of determining whether or not a document is an instrument is to discover what the content of the document purport to achieve. If the transfer of other right or title to land is effected by the document, it is an instrument and therefore registrable. But if the content of the document is an evidence of some transaction future or past, the document is a memorandum and therefore not registrable.

Self Assessment Exercise

What is the difference between an instrument and a memorandum?

3.2 Types of Registration and Examples of Instrument

There are three types of land registration in conveyancing

1. Registration of instrument
2. Registration of title and
3. Registration of encumbrances

In the previous module you were introduced to registration of title system our concern in this unit is on registration of instruments. The definition of instrument as contained in section 2 of the Land Registration law of Kaduna state is wide. In fact in some places it includes a contract for sale of land. For example section 2(1) of the PCL applicable to states in the former western Nigeria contract of sale of land is an estate contract that is

registrable. In state of the former Eastern Nigeria, on the authority of *Okoye v. Dumez* (1985)6 SC3, contract of sale of land is a registrable instrument.

However, contract of sale of land is not a registrable instrument in states of the defunct northern Nigeria.

Finally, whether a power of attorney is registrable or not depends on whether it qualifies as an instrument under the land (instrument) registration law applicable in the state where it is used. See *Uzoечи v. Ali Anor* (2001)2 NWLR pt 696 p 203

3.3 Procedures for Registration of Instrument

The Land (instrument) registration law of all states in the federation establishes for the state land registry where documents relating to land within the state are registered and kept. The law requires that instruments must be registered within sixty days.

The procedures for registration may vary from state to state but in general the applicant is required to submit two copies of the instrument duly stamped to the registrar of deeds for registration for assessment and upon the payment of the ad valorem charges the registrar will then register the instrument. Registration means that the registrar will endorse a certificate of registration on the instrument in the following terms.

This instrument is registered as No. 123 at page 25 in volume 002 of the Lands Registry in the office at Kaduna state.

The registrar shall return the original copy to the applicant. He will also paste a certified true copy of the instrument on the register.

Self Assessment Exercise

Briefly describe the procedures for registration of instrument

3.4 Effect of non Registration of Instrument

1. Non registration renders the instrument void. *Zaid v. Diamonds* (1936)13 WACA 114

2. The instrument is inadmissible in any judicial proceedings to prove title *Ojugbele v Olasoji* (1982)4 SC 310
3. In competition, instruments rank in priority according to the date of registration. Thus, an unregistered instrument will lose priority against a later registered instrument. *Jammal v. Saidi Antoher* (1933)11 NWLR 86 see generally section 14, 15 and 16 Land (instrument) registration Act Cap 515 LFN 1990

4.0 Conclusion

Despite these problems, an unregistered instrument can be admitted as a receipt or as evidence of money transaction that is as evidence of contract. Similarly, where the document is not registrable, there is not adverse consequence if the parties did not register it.

5.0 Summary

In this unit, you have learnt

- a. the meaning of instruments
- b. the importance of registration
- c. the procedures for registration of instrument
- d. the consequences of non registration

6.0 Tutor Marked Question

What is the effect of non registration of instruments

7.0 References/Further Readings

1. Babatunde L Hints on Land Documentation and Litigation in Nigeria Law Bread Ltd Lagos.
2. Emmet on Title – Smith, J.G & Farrand J.T 15th ed. The Solicitors Law Stationery Society Ltd 1967
3. Idigbe, A Perfection of Legal Documentation. The Legal Practitioners' Review (1996) Vol. 3 No. 1 p. 8

4. Oluyede, P.A Nigerian Law of Conveyancing Ibadan University Press 1978
5. Imhanobe S.O Legal Drafting and Conveyancing Secured Title Publishers and Abuja 2002.

Unit 4. Challenges of Conveyancing Practice in Nigeria

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1.0 Introduction

Conveyancing practice in one form or the other has long existed in Nigeria. Conveyancing in its present form in Nigeria is traceable to the introduction of English law in territories that later became Nigeria. Conveyancing law and practice exist to provide recognizable steps or procedures for transfer of land which is to ensure easy transfer of interest in land and to guarantee security of title as well as reduce land litigation. There is perhaps no property that is more precious to man and his development activities than land. Little wonder that individual, people and state go to war to acquire land or defend their property rights.

In the preceding modules and units you have been introduced to some notable conveyancing practices in Nigeria ranging from various function related to the transfer of interests in land such as investigation of title conducting searches at the land registry to perfection of instruments. Despite these procedures title to land and conveyancing practice are still chaotic Nigeria. In Nigeria one may not be wrong to say that the field of conveyancing law and practice is more often litigated, in the field of civil matter, than any other.

2.0 Objectives

At the end of this unit, you should be able to:

- a. Identify some of the challenges of conveyancing practice in Nigeria
- b. Suggest ways to resolve or reduce some of the problems

3.0 Main Content

3.1 Multiplicity of Laws

Nigerian legal system consists of the: customary law, Islamic law and general law. For this reason, the main feature of our legal system is legal pluralism. Legal pluralism has manifested itself in the area of conveyancing law in Nigeria, because Nigerian law of conveyancing will generally involve conveyancing issues in customary law, Islamic and general law. Therefore the first problem or issue to be resolved when confronted with conveyancing in Nigeria is to determine the applicable system of law, whether Islamic law, customary law or general law. Determination of this issue is very important in Nigeria because the three systems are applicable to conveyancing and land law generally in Nigeria. For example under customary law and Islamic law contract of sale of land is valid. See *Alake v Awaue* (1932)11 NLR 39 *Izang v Bala Musa* (2001)14 NWLR pt 734 p. 612. Also, means of acquiring land and proof of ownership can all be accomplished under customary law, *Salati v. Shehu* (1986)4 NWLR pt. 15 p. 198.

However, it can be argued that modern conveyancing practice in Nigeria is under the general law, even at that there are so many applicable way to it. For example, Conveyancing

Act 881-882 *Ihakwoaba v ACB* (1998) 10 NWLR pt 571 590. property and conveyancing law, Land Use Act, Stamp Duties Act or Law, Land Instrument Registration Laws country and town planning laws, Rent and Recovery of Premises Law etc. This has made the practice of conveyancing a formidable task in Nigeria. One of the ways of resolving some of these problems is to harmonize and consolidate some of these laws.

Self Assessment Exercise

Identify 10 statutes that are applicable to conveyancing practice in Nigeria.

3.2 Archaic and Obsolete

Conveyancing law and practice in Nigeria is regulated by many archaic and obsolete laws. Conveyancing practice in Nigeria is still being regulated by statute. Like conveyancing and law of Property Act 1881 and 1882, English Law of Property Act 1925 which is reproduced as the property and conveyancing law 1959, some of these received laws or former statutes of General Application have either been reviewed or repealed in the United Kingdom where they originated but unfortunately we still apply them in Nigeria. For example will suffice to buttress this point section 1 of the vendor and Purchaser Act 1874(which is still applicable in some conveyance states in that applies Conveyancing Act) requires that the vendor must deduce title for 40 years and section 70 of the Property and Conveyancing Law, requires the vendor to deduce title for 30 years.

These provisions have been reviewed in the United Kingdom some many times to the present position of 15 years under Law of Property Act 1969. Furthermore, while Nigerian Conveyancers and the courts have to sweat it out to determine what beneficial owner actually means in a covenant for title in the UK under the Law of Property (Miscellaneous Provision) Act 1994 Covenant for title has been streamlined to reflect one of the following; “with full title guarantee”, Limited title guarantee or no title guarantee.

The Land Use Act 1978 which is the recent land legislation applicable throughout the federation is in dire need of review. Some of its provisions for example, the consent provisions have shifted capital formation through mortgages and general land transfer. There

is need to review and consolidate some of our laws that affect conveyancing practice generally. Perhaps estate should enact and implement fully registration of title laws. This may ensure security of title and facilitate land transfer.

Self Assessment Exercise

State, with good reason, three statutes in conveyancing that you will recommend for review.

3.3 Illiteracy

This is a major problem in Nigeria; it is not restricted to conveyancing but permeate all levels of development activities in Nigeria. Most Nigerian land owners are illiterate and do not see the need to engage a professional conveyance to assist them while alienating their interest in land. In a typical land transaction in Nigeria, a conveyance is either when the contract has been concluded what is required is a deed of assignment or when there is problem with the transaction. The reasons for this may not be unconnected with the high cost of conducting conveyancing practice in Nigeria. These ranges from cost of paying professionals, administrative cost of obtaining governor's consent and perfection documents of title. Added to this is the cumbersome procedures and delay associated with processes. An illiterate land owner may not see the need to convert his deemed right of occupancy to actual grant. Even among the educated, the cumbersome procedures has scared away many unless where the property is required for security for loan. These have combine to facilitate fraudulent dealing in land which often result in litigation waste of time, and money. This was stressed by verity in *Ogunbambi v. Abowaba* 13 WAC 222 at p. 223 when he said.

The case is indeed in this respect like many which come before this court; one in which the Oloto family either by inadvertence or design sell or purport to sell the same piece of land at different time to different persons. It passes my comprehension how in these days, when such disputes have come before this court over and over again, any person will purchase land from this family without the most careful investigation, for more often than not they purchase a law suit, and very often that is all they get.

To avoid this kind of result, land owner and prospective land owner should always engage professional conveyance for land transactions. However, conveyancers and other stakeholders must streamline conveyancing practice in Nigeria to achieve cost effectiveness.

Self Assessment Exercise

Explain why you think illiterate avoid professional conveyance when conducting land transactions.

3.4 Poor Land Registry Practices

Land registry is an important component of any conveyancing practice. It is usually established by a law. It is place where documents relating to land in that jurisdiction are kept. A conveyancer in the ordinary course of conveyancing practice either goes to the land registry to conduct investigation or perfection (documentation) or both. The three tiers of government each maintain a land registry established for the administration and documentation of land under its control. They are usually a unit or department under ministry of land or ministry of works and housing. Four problems are associated with land registry practices in Nigeria. These are:

1. They are being administered as part of the ordinary civil service. As a result, they suffer from bureaucracy of government. This has often led to delays in documentation
2. The staff is not professionals. In some states staff that have lost out of favour from their superior are sent to land registry to cool off with files and papers. Land registries should be managed by lawyer and other related professional with some rudimentary knowledge of land law. It has been rightly observed that the implication of unqualified person managing the land registries is that so much irregularities are perpetrated this has led to so many defective titles and frustrations.
3. Most of the land registries are not computerized. Consequently, title document and files are kept in on the open shelves with attendant risk being lost to fire or insects.

The process explains the delays and frustrations experienced by conveyancers when conducting searches and documentation in the land registries.

4. Lack of uniform standard of practices at the land registries is a big challenge to conveyancers. Land registries all over Nigeria do similar things unfortunately there is no uniform guideline across the land registries. The effect of this is that different procedures costs and forms for doing similar things has emerged across the land registries in Nigeria. Conveyancers have to keep learning new procedures as they move from one registry to another.

Some of these problems may be resolved by employing only professionals to administer land registries, standardization of practices and procedures across the land registries, computerization and improvement of title registration system through the use of geographic information system will greatly improve land registry practices. The Abuja geographic information system is a model in this regard.

1. What are the problems associated with land registry practice in Nigeria
2. How do you think land registries can be improved

3.5 Lack of Professionalism

Conveyancing practice is very rewarding perhaps this explains why every lawyer assumed that he is a good conveyancer. To be a good conveyancer, the lawyer must be dedicated, and experienced in the act of conveyancing practice. Although, a lawyer in Nigeria is both an advocate and a solicitor, rules of best practices all over the world require that a professional should specialize in particular are of the law this will breed professionalism and expertise. The era where the same lawyer is in Magistrate, High Court, Supreme Court, draft all documents from simple letter to the most complex conveyancing transaction has long passed. In order to rise to the challenges of this century and beyond Nigerian legal practitioners should specialize.

Closely related to this issuing of lack of professionalism is the infiltration of quacks and touts into legal practice. This trend is not peculiar to legal profession but to all other profession in Nigeria. Some of these touts can be seen around land registries and other

places soliciting for brief and enticing their client with cheap but unprofessional services. Lawyers should endeavour to update their knowledge through seminar, conferences workshop. To minimize the problem of touts, land registries could insist that documents deposited for registration must be franked by a accredited conveyancers.

4.0 Conclusion

Conveyancing practice is complex but quite rewarding to conveyancers and their clients. Therefore it is imperative that some of these challenges be resolved. The problems are many; we only discussed few as illustration of the challenges confronting conveyancing practice in Nigeria.

5.0 Summary

At the end of this unit you have been introduced to:

- a. The challenges of conveyancing practice in Nigeria
- b. The solutions to the challenges

6.0 Tutor Marked Question

Examine, with good example, the challenges of conveyancing practice in Nigeria.

7.0 References/Further Readings

1. Inhanobe, S.O Lgal Drafting and Conveyancing Secured Publishers 2002 Abuja.
2. Oluyede, P.A Nigerian Conveyancing Law Ibadan University Press, Ibadan 1978.
3. Babatunde, L. Hints on Land Documentation and Litigation in Nigeria Law Breed Ltd Lagos.
4. Smith, I.O Practical Approach to Law of Real Property EcoWatch Publication, Lagos 1998.