

EQUITY LECTURE

EQUITABLE INTERESTS AND THE DOCTRINE OF NOTICE

EQUITABLE INTERESTS IN PROPERTY

EFFECTS OF COMMON LAW REMEDIES/INTERVENTION BY EQUITY

In common law, certain legal formalities had to be observed in order to create or transfer legal estate in property.

The legal maxim was that corporeal hereditament lie in livery, incorporeal hereditament lie in grant.

Corporeal hereditament is an inheritable right in reality which is accompanied by physical possession.

Incorporeal hereditament is a right capable of being transferable by deed.

EFFECTS contd

At law especially after 1845 by virtue of the Real Property Act, no legal estate could be created or transferred without a deed. Accordingly, a sale of land without these formalities does not vest any interest in the purchaser until the legal interest of the seller in the property is passed to the purchaser in accordance with the legal formalities.

Similarly, the cestui que trust was not considered as having any legal interest in the property, the subject matter of the trust. See *Finch case* (1600) 4 Co. Inst. 84.

EFFECTS contd

The defects in the common law remedies necessitated the intervention of equity in the sphere of property law to recognise and protect certain interests which the common law failed to recognise.

For instance, The need to fill this obvious gap in the legal relationship between the trustee and the beneficiary led to the equitable development of the doctrine of trust.

Thus, the cestui trust was recognised as beneficial owner of the subject matter of the trust, and his interest as an equitable one. Hence, the trustee who was recognised as the legal owner of the trust property was compelled to carry out the terms of the trust in the interest of the beneficiaries.

EFFECTS contd

In addition, other legal transactions which are imperfect because they fail to comply with legal formalities have also given rise to equitable interests in property.

Equity therefore regarded an enforceable contract to create or convey an interest in land as effective as if the transaction had been properly carried out on the basis that 'equity treats as done which ought to be done.'

EFFECTS contd

This development brought about by equity was received into the Nigerian law. See *Eriosh v Owokoniran & Ors* (1965) NMLR 479; *Ogunbambi v Abowaba* (1951) 13 WACA 222; *Oransami v Idowu* (1959) 4 FSC 40 and *Griffith v Talabi* (1948) 12 WACA 371.

DIKKE EQUITABLE CREATION

Equity in addition to the above, created certain interests which have no legal equivalent such as estate contracts, the mortgagor's equity of redemption and restrictive covenants.

EQUITABLE CREATION

An estate contract arises where there is a valid contract to convey a plot of land. Here, the purchaser is at once considered as having an equitable interest in the property and it does not matter that the date for completion, when the purchaser may pay the purchase price and take possession, has not yet arrived.

Equity treating that as done which ought to be done, will decree specific performance for the enforcement of the terms of the contract. See *Walsh v Lonsdale* (1882) 21 Ch.D 1.

EQUITABLE CREATION

This right creates an equitable interest in property which is enforceable against anyone except a purchaser for value of the legal estate without notice of the equitable interest. See Jessel, M.R in *Lysaght v Edwards* (1976) 2 Ch.D 499 at 506.

Also, where the legal right of redemption of mortgaged property is lost, equity still allows the repayment of the loan with interest within a reasonable time withstanding that the contractual date has passed. This is the mortgagor's equitable right to redeem mortgaged property.

EQUITABLE CREATION

Equitable interest was also created where equity allowed restrictive covenants to run with the land and bind successors in title to the covenantor, thus imposing an equitable burden on the land.

Restrictive covenant is a covenant imposing a restriction on the use of land so that the value and enjoyment of adjoining land will be preserved.

EQUITABLE INTEREST contd

An assignee of the original covenantor is bound by the covenant only if the following conditions are fulfilled: the covenant must be restrictive in nature; that the covenantee, at the date of the covenant owns land which will benefit therefrom; that the covenant touches and concerns the land of the covenantee; and that the burden of the covenant is attached to the covenantor's land.

Note statutes have now restricted the creation of new equitable interest in land. See s 6(1), PCL, Ogun State.

LEGAL ESTATES AND EQUITABLE INTERESTS

A legal estate is the best and most secured interest that can exist in property because the right of the ownership vested in the estate owner is a right in *rem*, a right which is capable of being enforced against the whole world.

An equitable interest does not rank as high in that it is an interest which issues from the legal estate and therefore, binding only on the estate owner. It is often to be a right in *personam*, i.e right enforceable against the estate owner.

LEGAL AND EQUITABLE INTEREST contd

Note that equitable interest arising under trust and other relationship are wider than right in *personam* because the equitable owner can enforce his right not only against the trustees who accepted the trust and his representatives who claim through him, but also, against the purchaser of the legal estate who has notice.

It is however less than a right in *rem* as a purchaser for value without notice takes free from it.

LEGAL AND EQUITABLE INTEREST contd

EQUITABLE INTERESTS AND MERE EQUITIES

Equities has various other methods of intervention in the sphere of property law which are generally referred to as mere equities

The distinction between equitable interests and mere equities is the former is an actual right of property, while the latter is a right usually of a procedural nature ancillary to a right of property

EQUITABLE INTERESTS AND MERE EQUITIES

Hence, it is binding on a purchaser only if such mere equity is ancillary to or dependent upon the equitable interest in the property acquired by the purchaser. see *Nat Prov. Bank v Ainsworth*

A purchaser of an equitable interest in land need not obtain the legal estate before he takes free from prior mere equity affecting the property provided he is a bonafide purchaser for value without notice. The notice must be actual. See *Phillips v Phillips*

Examples include the right of a mortgagor to reopen a foreclosure order, the right to have a transaction set aside for fraud or undue influence (*Banbridge v Brown* (1881) 18 Ch.D 188), and the right to have a document rectified or set aside for mistake. See *Smith v Jones* (1954) 1 WLR 1089

THE DOCTRINE OF NOTICE

Equitable interests are not in such an unimpregnable position as the legal estate and therefore need to be protected. Hence, the doctrine of notice.

The doctrine can be discussed under two broad headings vis-à-vis the statutory provisions dealing with notice and the general provisions consisting of the rules which equity evolved for the protection of equitable interests.

THE DOCTRINE OF NOTICE/STATUTORY

Statutory Provisions

The discussion here focuses on relevant statutory provisions on registration only in so far as they affect the doctrine of notice.

It should be noted that the system of registration in Nigeria is one of the registration of instruments affecting land rather than the registration of transactions affected by them.

An instrument affects land whereby it confers, transfers, limits, charges or extinguishes any right, title or interest in land. S 2 Land Registration Act

THE DOCTRINE OF NOTICE/STATUTORY

Note also that since what is required to be registered is not an interest in land but merely an instrument affecting land, that act of registration of such instrument cannot cure any defect in any instrument nor confer upon such instrument any effect or validity which it would not otherwise have had. See s 25, LRA

These statutory provisions can be classified into two main groups vis-à-vis those operating in Ogun, Osun, Ekiti, Oyo, Ondo, Edo and Delta states (i.e States in the former Western region except Lagos), and those operating in the rest of Nigeria.

THE DOCTRINE OF NOTICE/STATUTORY

i) The position in Ogun, Osun, Oyo, Ondo, Ekiti, Edo, and Delta States.

Those states are governed by the Land Instrument Registration Law (LIRL), and the Property and Conveyancing Law (PCL).

The LIRL requires the registration of certain instruments whether executed before or after the commencement of the law. The legal effect of failure to comply with the provisions is:

THE DOCTRINE OF NOTICE/STATUTORY

To render the document void.

To render the document inadmissible, and

To cause the document to lose priority which runs from the date of registration.

This provision covers documents which affect land in the state where the grantor confers, transfers, limits, charges or extinguishes, in favour of the grantee, any right or interest in land and includes:

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An estate contract. See *Fakoya v St Paul's Church* (1966) 1 All NLR 75,

A certificate of purchase,

A power of attorney under which any instrument may be executed, and

A deed of appointment or discharge of trustee containing expressly or impliedly a vesting declaration and affecting land to which s 27 of the Trustee Law extends but not including a Will.

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By virtue of s 193 PCL, the registration of any instrument under the provision of the LIRL, shall be deemed to constitute actual notice of such instrument to all persons and for all purposes connected with the land, as from the date of registration, in so far as it affects any of the following: (a) an estate contract (b) an equitable easement (c) a general equitable charge or (d) restrictive covenant.

THE DOCTRINE OF NOTICE/STATUTORY

The combined effect of these statutory provisions is to strengthen the existing protection of equitable interests in property by providing that instruments affecting certain categories of interest in land must be registered.

The provision that registration of certain interest in property constitutes actual notice is a further extension of the equitable doctrine of notice.

The result is that it is difficult for a purchaser of legal estate for value to escape from having notice of a registrable interest affecting his title.

THE DOCTRINE OF NOTICE/STATUTORY

In essence, the consequence of non-compliance with these provisions can be fatal in that non-registration of registrable instruments affecting land not only makes it void, but also inadmissible in evidence.

However, the owner of an equitable interest can still rely on the equitable doctrine of notice

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(ii) The position in other parts of Nigeria

the law in force in other parts of Nigeria is the Land Instrument Registration Law (LIRL) which applies in the Lagos State, and the Land Registration Laws (LRL) which apply in the Eastern and Northern states.

s 15 provides that no instrument shall be pleaded or given in evidence in any court as affecting any land unless the same shall have been registered.

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s 16 provides:

Subject to the provisions of this law, every instrument registered under this law shall so far as it affects any land take effect, as against any other instruments affecting the same land, from the date of registration as hereinafter defined, and every instrument registered before the commencement of this law shall be deemed to have taken effect from the date provided by the law in force at the time of its registration.'

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However, unlike the position under Ogun state, the definition of registrable instruments under both the Lagos State LIRL and LRL do not include estate contract.

Also, unlike the PCL, the LRLs though dealing with matters such as admissibility of registered instrument in evidence and priority of registered instruments, do not expressly provide that the registration of instrument respecting land shall constitute notice of interest therein contained.

Despite this, the Supreme Court has held that such registration should be regarded as one of the factors fixing a purchaser with notice. See *Amankra v Zankely* (1963) 1 All NLR 304; *Akingbade v Lemosho* (1964) 1 All NLR 154.

THE DOCTRINE OF NOTICE/GENERAL PROVISIONS

Equity evolved the doctrine of notice to protect equitable interest which it has accorded recognition.

Thus, equitable interest is good until the property to which it is attached is acquired by a bona fide purchaser for value of the legal estate without notice of the equitable interest.

The salient points of the doctrine are as follows:

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Bona Fide

This requirement embodies the whole equitable idea of conscience. Hence, the conscience of one who pays for a legal estate, and who is ignorant of the equitable interest to which it is subject, is without blemish.

But if he has notice, and nevertheless purchases the property, he will forfeit the privileges of a legal purchaser in the eyes of equity on the ground that he had acted not in good faith. See *Viatonu v Odutayo* (1950) 19 NLR 119.

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Note that the bona fide purchaser of the legal estate is preferred to the equitable mortgagee despite the fact that the mortgagor in conveying the legal estate acted fraudulently, having previously created an equitable mortgage over the land which he failed to disclose to the purchaser. See *Oshinubi v Akintoye* (1932) 11 NLR 132.

GENERAL PROVISIONS

purchaser for value

The legal effect of the word 'for value' is that value has in fact been given, though this does not necessarily mean full value.

Value in this sense include consideration such as money or money's worth and marriage. See *Sallil v Atchi* (1961) AC 778.

Marriage to be a valuable consideration, must be in respect of forthcoming marriage and a settlement made before and in consideration of such marriage is made for value as regards both spouses and the issues of the marriage (*A-G v Jacob Smith* (1895) 2 Ch 360), and also settlement made after marriage if executed in pursuance of an ante-nuptial agreement. See *Re Holland, Gregg v. Holland* (1902) 2 Ch 360.

A settlement made after marriage without any ante-nuptial agreement to make, is without valuable consideration and therefore voluntary.

GENERAL PROVISIONS contd

A purchaser is not confined to a fee simple owner and may include mortgagee and lessee. See *Re Kings Leasehold Estate* (1873) L.R. 16 Eq. 521.

ii) Without Notice

There are three types of notice which equity devised to ensure the protection of equitable interest.

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a) Actual Notice.

- A purchaser is deemed to have notice of facts which actually comes to his knowledge. Accordingly, a caution notice pasted on the property for sale constitutes notice to the purchaser. See *Erikotola v Ani & Ors* (1941) 16 NLR 56.
- Further, a purchaser cannot disregard an information, even though indirectly received, if it is of such a nature that a reasonable man would act upon it. See *Lloyd v Banks* (1868) L.R. 3 Ch App. 488.
- But a purchaser is not affected by equitable interest if he had no notice of it. See *Ajose v Harworth & ors* (1925) 6 NLR 98; *Folashade v Duroshola* (1961) All NLR 87.

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- However, the doctrine of notice has been affected by the statutory provisions governing registration of instruments.

(b) Constructive notice

- Equity in its quest for a more effective protection, has extended the scope of the doctrine to cover facts which a purchaser could have discovered if he had acted prudently.
- Accordingly, a purchaser is deemed to have notice of facts which a reasonable purchaser could have discovered. See *Baley v Barness* (1894) 1 Ch. 25.
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- This requires a high standard of diligence that it has been said that '...a purchaser without notice of equitable rights is not very common object of the law courts.'

Constructive notice therefore makes it imperative for a purchaser, not only to inspect the land, but also, to investigate the title of the vendor. The consequence for a defaulting purchaser can be very serious because occupation of land by a tenant is a notice of his interest and the purchaser takes subject to the tenant's rights. See *Kogbe v UTC* (1926-29) Div Court Report 202; *Kaba & ors v Young* (1944) 10 WACA 135; *Omosanya v Anifowose* (1959) SCNLR 217.

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Moreover, a purchaser is deemed to have constructive notice of equitable interest which he could have discovered if he had investigated the vendor's title.

Presently, a purchaser is required as a matter of conveyancing practice, to investigate the title of his vendor for the past 40 years preceding the sale. See Ss 37 & 38, the Vendor & Purchaser Act 1371.

However, this period can be varied according to the agreement reached by the parties to the contract of sale

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(c) Imputed Notice

A purchaser who employs an agent to act on his behalf is treated as having notice of all the facts in respect of the transaction which comes to the knowledge of the agent. See *G.B. Ollivant v Alakija*

But a notice obtained other than by a person appointed by the purchaser as his agent will not be imputed to him. See *Bada v The Premier Thrifty Society*.