

Essays on the Lagos State Mortgage & Property Law 2010

Edited by

Prof. I. O. Smith, SAN, FCI Arb (UK), FCTI

Dr. B. A. Oni



**ESSAYS ON THE LAGOS STATE
MORTGAGE AND PROPERTY
LAW 2010**

Edited by

Prof. I.O. Smith, SAN, FCI Arb (UK), FCTI
Professor of Law, Department of Private & Property Law and
Former Dean, Faculty of Law, University of Lagos, Nigeria.

and

B. A. Oni, Ph. D (Lagos) B.L.
Senior Lecturer, Acting Head of Department,
Private & Property Law, Faculty of Law,
University of Lagos, Nigeria.

© DEPARTMENT OF PRIVATE & PROPERTY LAW

All rights reserved. No part of this publication may be reproduced or transmitted in any form by any means, including photocopying and recording, without the written permission of the copyright holder, application for which should be addressed to the publisher. Such written permission must also be obtained before any part of the publication is stored in a retrieval system of any nature.

Published in 2015 by the Department of Private and Property Law, Faculty of Law, University of Lagos.

ISBN: 978-978-947-184-3

LIST OF CONTRIBUTORS

1. **Professor I. O. Smith, SAN, FCI Arb (UK), FCTI**
Professor of Law,
Department of Private & Property Law and
Former Dean, Faculty of Law, University of Lagos, Nigeria.
2. **Professor Enefiok Essien,**
Professor of Property and Commercial Law,
Dean of Law, University of Uyo, Nigeria.
3. **Professor Emeka Chianu,**
Professor of Law, Faculty of Law,
University of Benin, Benin City, Nigeria.
4. **Professor Koyin Ajayi, SAN,**
Professor of Law, Babcock University,
Ilisan-Remo & Olaniwun Ajayi & Co. Lagos, Nigeria.
5. **Yemi Adeola,**
Managing Director / CEO,
Sterling Bank Plc. Nigeria
6. **Dr. O. G. Amokaye,**
Associate Professor of Law,
Department of Private & Property Law,
University of Lagos, Nigeria.
7. **Dr. Abiola Sanni,**
Associate Professor of Law,
Department of Commercial and Industrial Law,
University of Lagos, Nigeria.
8. **Dr. N. N. Chinwuba,**
Senior Lecturer,
Department of Private & Property Law,
University of Lagos, Nigeria.

9. **Dr. Babatunde Oni,**
Senior Lecturer, Acting Head of Department,
Private & Property Law, Faculty of Law,
University of Lagos, Nigeria.
10. **Dr. Kemi Adekile,**
Senior Lecturer, Department of Private & Property Law,
Faculty of Law, University of Lagos, Nigeria.
11. **Akintunde Otubu,**
Lecturer, Department of Private & Property Law,
Faculty of Law, University of Lagos, Nigeria
12. **Yinka Owoeye,**
Lecturer, Department of Jurisprudence and International Law,
Faculty of Law, University of Lagos, Nigeria.
13. **Dr. Simon Akaayar,**
Lecturer, Department of Commercial and Industrial Law,
Faculty of Law, University of Lagos, Nigeria.
14. **Mrs. Shade Adegbite,**
Lecturer, Department of Private and Property Law,
Faculty of Law, University of Lagos, Nigeria.
15. **Mrs. Bunmi Afinowi,**
Lecturer, Department of Private and Property Law,
Faculty of Law, University of Lagos, Nigeria.
16. **Mr. Idris Odekunle,**
Lecturer, Department of Private & Property Law,
Faculty of Law, University of Lagos, Nigeria.

TABLE OF CONTENTS

	Pages
Preface.....	ix - x
Table of Contents.....	xi - xii
Table of Cases.....	xiii - xviii
Table of Statutes.....	xix - xxii
Chapter One	
The Mortgagee's Power of Sale and Court Ordered Sale under The Lagos State Mortgage and Property Law 2010.....	1-26
Chapter Two	
Creation of Mortgages under the Mortgage and Property Law of Lagos State, 2010.....	27-48
Chapter Three	
Leases Granted over a Land Subjects a Mortgage: Some Issues of Priority.....	49-58
Chapter Four	
Balancing the Interests of Mortgagors and Mortgagees in the Recovery of Mortgage Loans under The Lagos State Mortgage Law.....	59-82
Chapter Five	
Possible Negative Impacts of Consent Fee on the Mortgage and Property Law 2010 – Need To Streamline the Regulatory & Fiscal Policies.....	83-102
Chapter Six	
Examination of the Composition, Role and Powers of the Lagos Mortgage Board	103-116

Chapter Seven	
National Housing Policy and the Mortgage and Property Law of Lagos State, 2010.....	117-136
Chapter Eight	
Exploring Lagos State Mortgage and Property Law 2010: Perspective From Insurance Regulation.....	137-162
Chapter Nine	
The Role of Courts under the Mortgage and Property Law of Lagos State, 2010.....	163-178
Chapter Ten	
Priorities and the Lagos State Mortgage and Property Law.....	179-198
Chapter Eleven	
The Mortgage and Property Law of Lagos State and Financial Institutions.....	199-217
Chapter Twelve	
The Mortgage and Property Law of Lagos State, 2010: A Diagnosis.....	218-253
Chapter Thirteen	
The Mortgage and Property Law, 2010 of Lagos State: An Overview.....	254-275
Chapter Fourteen	
Restitution As A Means Of Securing Credible Transaction Under The Lagos Mortgage And Property Law, 2010.....	276-294
Index.....	295-307
Appendix.....	308-355

Chapter 13

THE MORTGAGE AND PROPERTY LAW, 2010 OF LAGOS STATE: AN OVERVIEW*

1.0 INTRODUCTION

The challenge of obtaining loans for the acquisition of real property/homes is a major socio-economic issue in Nigeria, in the light of its overwhelming population.¹ With one of the country's economic objectives being a pledge to direct its policy towards ensuring that suitable and adequate shelter are provided for all citizens, commitment to real property mortgage finance should be a pivotal portion of development plans.² The enactment of the Lagos State Mortgage and Property Law, 2010[MPL] has brought attention to the administration of mortgage transactions in real property in Lagos State. The MPL represents a dialectical shift towards home financing in Lagos State.³ Its scope is limited to the creation of mortgages over real property only, as against personal property. The Law established the Lagos State Mortgage Board [the Board], and has the objective of encouraging the growth of mortgages in real property and for the regulation of consumer loans for acquisition of property and realisation of securities. Until its enactment, real property, mortgage transaction in Lagos State, as in other parts of the country, was governed by a myriad of laws, without any centralised body with clearly stipulated objectives and policy direction. Mortgage finance, administration, and realisation were subsumed within

* Oluwakemi Adekile, LL.B(Hons.), B.L, LL.M., Ph. D, Senior Lecturer, Department of Private and Property Law, Faculty of Law, University of Lagos, oadekile@unilag.edu.ng +234 803 302 4357.

1 Nigeria has a population of 160 million.

2 Constitution of the Federal Republic of Nigeria, 1999, section 16 (c).

3 If precedents are to be followed, the ripple effect of the Law is likely to be felt across the country in the nearest future as other States begin to follow the direction of Lagos State; the Land Instruments Registration Law Cap L58 Laws of Lagos State, 2003.

the general land tenure and land use laws, devoid of institutionalized and formalized mortgage scheme to enable financing of⁴ real property mortgage.

The MPL has some fresh perspectives to creation of mortgages and protection of the reasonable expectations of parties to a mortgage, manifested in the establishment of a Mortgage Board to regulate mortgage transactions in Lagos State, the clearly defined court roles, and the inclusion of arbitration as an option to litigation. This work examines the legal and institutional framework of the MPL, its policy directions and socio-economic significance. It highlights the key features of mortgage and property transactions in Lagos State towards identifying the objectives of the MPL.

1.1 THE MORTGAGE AND PROPERTY LAW, 2010

Lagos State House of Assembly blazed the trail in 2010, with the enactment of the Lagos MPL which for the first time provides a composite framework for the regulation of mortgage in real property in the State. Though it builds on the existing land tenure system under the Land Use Act 1978, it has introduced some fundamental changes in the law of mortgages in the State.⁵ Comprised of 69 sections and two schedules with forms attached, the MPL provides the impetus for a state mortgage finance programme or policy,⁶ as well as standardised policies for property secured mortgage.⁷

4 These laws include the Land Use Act, 1978 cap L5 Laws of the Federation of Nigeria 2004; the Property and Conveyancing Act, 1881; perfection laws like the Registration of Titles Law Cap L58 Laws of Lagos State, 2003; the Land Instruments Registration Law Cap L5 Laws of Lagos State, 2003, Conveyancing Law is a Statute of General Applicable in Lagos State along with the Eastern and Northern States of Nigeria.

5 Cap L5 Laws of the Federation of Nigeria 2004.

6 Section 7 (1) (c).

7 Section 7 (1) (i).

1.2 THE BOARD

Section 1 establishes the Lagos State Mortgage Board as a body corporate with perpetual succession and a common seal, having power to sue and be sued in its corporate name, and power to hold, purchase, acquire and dispose of any property, whether movable or immovable. The Board is composed of six members to be appointed by the Governor:⁸ The Commissioner for Finance, who shall be the Chairman;⁹ the Commissioner for Housing;¹⁰ three members with fifteen years cognate knowledge and experience in mortgage finance, property law, consumer lending or consumer protection industry, estate surveyor and valuer,¹¹ and the Executive Secretary of the Board.¹² The Executive Secretary is to be responsible for the day to day management of the Board. The offices are not remunerative but allowance for attendance of meeting may be paid to non-official members, at a rate to be prescribed by the State Executive Council and payable from the funds of the Board.¹³ Ex-officio members hold office for the period they remain in the office that qualifies them for the appointment to the Board: non ex-officio members hold office for a period of three years and may be re-appointed for another term of three years.¹⁴ The Chairman shall call meetings ¹⁵ at least once a month, but with a power in the Executive Secretary to call meetings on the directive of the majority of members of the Board if the Chairman is unable, or

8 Section 2 (1).

9 Section 2 (2) (a).

10 Section 2(2) (b).

11 Section 2(2) (c).

12 Section 2(2) (d). The Secretary is to be appointed by the Governor on the recommendation of the Commissioner and hold office on such terms as the Governor may approve. See section 9.

13 Section 3.

14 Section 4.

15 Section 5 (1).

refuses to call a meeting for any reason. Service in the Board is construed as a public service. Therefore ex-officio members shall be entitled to such pensions, gratuities, and other retirement benefits as are prescribed under the State Pension Reform Law.

1.3 FUNCTIONS OF THE BOARD

The functions of the Board as listed under section 7, are extensive, as they range from oversight functions to advisory and adjudicative functions: to create conducive environment for accessible and affordable mortgage or charge, for the benefit of citizens of the State to acquire their own homes; advise the Governor on funding, administration, and structure of the State mortgage finance programme or policy for the benefit of residents of the State; articulate any Lagos Mortgage Scheme or Policy which the Government may put in place from time to time; protect the residents of the State¹⁶ and the stability of the State's economy from unconscionable practices of mortgage brokers, lenders, and all persons holding themselves out as offering funds or other security by way of mortgage, or charge on any property in the State for development, or the acquisition of homes or housing estates; implement and honour on behalf of the Government, all obligations in any agreement made between Government and other parties, with regards to the provisions of funds for land ownership or development of estates in the State; report to government any default or breach on the part of any of the parties to any obligations or requirements in the agreement mentioned in paragraph (e), and to inform Government with all despatch on ways of remedying such default or breach by defaulting parties; encourage, promote, and coordinate research concerned with the mortgage lending industry, as it relates to the economic wellbeing of the State and its residents, including perfection matters;¹⁷ ensure continued Government

¹⁶ MPL, Section 7 (1) (C).

¹⁷ Perfection ordinarily includes the process of stamping, registration, and obtaining Governors consent to secured credit transactions.

intervention in the Lagos Mortgage Scheme, through a formalized and institutional process; advise the Government on the adoption of standards and policies under which property secured credit should be provided; maintain a centralised statistical database of mortgages and transactions secured on property in the State; secure compliance with the provisions of the Law and protect the interest of mortgagors of residential houses and other real estate within the State, against unfair terms and unconscionable activities of mortgage finance providers; mediate and arbitrate in disputes between parties arising from the mortgage transaction under this Law.

A safeguard in the activities of the Board to ensure that it does not become a competitor with mortgage brokers, lenders and real estate developers is infused into the MPL with the provision of section 7 (2) which prohibits the Board from engaging in activities that may result in direct and indirect competition with mortgage brokers, lenders, and real estate developers. Towards the realisation of its functions, the Board shall establish and maintain a fund from which all expenditure incurred by the Board shall be defrayed.¹⁸

1.4 POWERS OF THE BOARD

Section 8 provides that the Board shall have the following powers to: borrow, deposit, accept any money from any person or corporation, in respect of its functions under the Law; sell, let, dispose off or grant rights over an undertaking or any property of the Board, for cash or for shares, or any security of any company, or for other consideration; encourage and negotiate sub-prime mortgage lending to the public on facilities provided by the State Government for Lagos State Mortgage Scheme, based on its

¹⁸ Section 13 (1).

intervention funding; appoint appropriate skilled personnel to advise the Board on the management and implementation of the mortgage scheme; act as intermediary between the public or any group or special interest and the mortgage brokers, lenders, and allied enterprises; give adequate protection to the members of the public seeking mortgage loans, and generally ensure that the mortgage industry is operated fairly, honestly, efficiently, and free from deception or non-competitive practices; assist in negotiating on behalf of the public or any group or special interest, reasonable interest rate with the Mortgage Lending Institutions, and ensure the availability of funds on reasonable terms to provide affordable housing on Lagos State Government facility.

The Board's powers are geared towards the realisation of the need to secure affordable homes a minimum level of inconvenience: it can promote concessions, defer payments or instalment payment of duties payable as stamp duties for the stamping of mortgages or charges as well as fees payable to the Lands Registry for the registration of titles. While the capability to realise the reduction of fees for the Lands Registry is understandable, the interference with the payment of stamp duties, regulated by Federal Law is doubtful.

1.5 THE ROLE OF THE COURT

For the first time, the State High Court is given specific role and statutory guidance in the dispensation of justice on mortgage transactions. Where any party seeks to enforce any right or obtain an order or reliefs from the court, arising from the operation of the Law, the court shall ensure that the proceedings are held and disputes determined expeditiously and treated with priority.¹⁹ The court must take into consideration the following items

¹⁹ Section 24.

before giving any order: the prevailing interest rates for mortgage lending;²⁰ the general availability of housing or lack of it; the comparative ability of either party to give monetary compensation. Section 27(2) empowers the court, with the consent of the parties, to refer all or part of the issues arising before it on the mortgage transaction, to the Board for mediation

2.0 MORTGAGES GENERALLY

Mortgages may be legal or equitable. The two systems of law are applicable subject to the provisions of the Land Use Act²¹. Legal mortgage may be created as follows:

- (a) a mortgage by a right of occupancy can only be affected by granting demise by a term of years absolute subject to ceaser on redemption. Since an assignment of the totality of the mortgagor's interest is not possible;²²
- (b) by a sub-demise of the leasehold of land to the mortgagee for a term of years, subject to ceaser in redemption.²³
- (c) where a legal mortgage of land is created by a charger or deed expressed to be by way of legal statutory mortgage.²⁴

Equitable mortgage is typically created when the mortgagor deposits the title deeds with the mortgagee with the intention for it to be a security as evidenced by a memorandum of deposit of title deed by an agreement to create a legal mortgage, which may be maintained by an action for specific

20 Section 25.

21 See Cap L5 LFN, 2004

22 I. O. Smith, *Practical Approach to Law of Real Property in Nigeria*, 2nd ed 2013 Ecowatch Publications Nig. Ltd. p. 366.

23 Ibid

24 Ibid

performance; an equitable charge of the mortgagor's property, with no conveyance of the interest in the property.

Mortgages and charges remain the most typical forms of security on land in Nigeria. The Land Use Act does not recognise any right higher than a right of occupancy, which is not an absolute grant on landed property. The overriding title to land in any State is in the Governor of the State, who shall administer the same for the benefit of all citizens of the State.

2.1 MORTGAGES UNDER THE MPL

Under the MPL, mortgage of real property may be created over a right of occupancy,²⁵ or over leasehold.²⁶ Such mortgages could be legal mortgages or equitable mortgages.

2.1.1 Creation of Legal Mortgages under the MPL

Mortgage of a Right of Occupancy

Recognizing that there is no permanent ownership of real property in Nigeria, section 65 provides that the only estate capable of subsisting or of being a subject matter of a mortgage under this Law or creation of others are: a right of occupancy absolute in possession evidenced in writing by a statutory or customary right of occupancy, issued under the Land Use Act or any other State Land Law; registered land under the Registration of Titles Law, and a term of years absolute. Furthermore, section 15 (2) provides that any purported assignment by way of mortgage made after the commencement of the Law shall to the extent of the estate of the mortgagor, operate as a demise of the land to the mortgagee for a term of years absolute but subject to redemption.

²⁵ Section 15 (1).

²⁶ Section 16 (1).

Section 15 of the MPL provides that a mortgage of a Right of Occupancy in land, shall be created at law either: by demise for a term of years absolute, subject to a provision for ceaser on redemption; or by a charge²⁷ by deed expressed to be by way of legal mortgage; or a charge by deed expressed to be by way of legal mortgage; or a charge by deed expressed to be by way of statutory mortgage in the forms provided under the Law.²⁸ Provided that a first mortgagee shall have the same right to possession of documents as if his security included a right of occupancy.²⁹

2.1.2 Legal Mortgage of a Term of Years under the MPL

A mortgage of a term of years absolute shall be created at law either by a sub-demise for a term of years absolute, less by one day at least than the term vested in the mortgagor, and subject to a provision for redemption, or by a charge by deed expressed to be by way of legal mortgage; or a charge by deed expressed to be by way of statutory mortgage in the forms provided under this Law; and where a license to sub-demise by way of mortgage is required, such licence shall not be unreasonably refused.³⁰ Provided that a first mortgage shall have the same right to the possession of documents as if his security had been effected by assignment.

Consequently, in the light of section 16 (2), mortgage of a term of years absolute by way of assignment is no longer obtainable. Any purported assignment of a term of years absolute made after the commencement of the MPL, shall to the extent of the estate of the mortgagor, operate as a

27 The nature of a charge is such that it does not transfer title to the land, unlike a mortgage, which does.

28 The Registration of Titles Law Cap xxx Laws of Lagos State, 2004 governs creation of mortgages in land located within its district by completing Form 5 under the Law.

29 For Rights of Occupancy under section 15.

30 Section 16 (1).

sub demise of the leasehold land to the mortgagee for a term of years absolute, subject to redemption in the following manners, namely: the term to be taken by the first or only mortgagee, shall be ten days less than the term expressed to be assigned; the term expressed to be taken by the second or subsequent mortgagee, shall be one day longer than the term vested in the first or other mortgagee whose security ranks immediately before that of the second or subsequent mortgagee, if the length of the last mentioned term permits, and in any case for a term less by one day at least, than the term expressed to be assigned. The implication of these provisions is that it is only a maximum of ten mortgages that can be created on a term of years in Lagos State.

Furthermore, the MPL now entitles the mortgagee under a mortgage for a term of years absolute or sub-term to be by a written declaration signed by him, convert the mortgage into a charge by way of legal mortgage: the mortgagee shall have the same protection, powers, and remedies (including the power to initiate proceedings to obtain possession from the occupiers and the persons in receipt of rents and profits, or any of them as if the mortgage term or sub-term has been subsisting: the mortgagee may exercise the power directly or as a trustee or personal representative.³¹ By this token, the Law endangers insecurity of tenants put in possession earlier by the mortgagor before the creation of the mortgage. The MPL therefore empowers a legal mortgagee to obtain possession of the premises from the mortgagor's prior tenants. The legality of this consequence comes into question considering that such tenants may enjoy statutory protection, not being liable for eviction without due process under the Tenancy Law of the State.³²

³¹ Section 17 (2)

³² Lagos State Tenancy Law, 2011

2. 1. 3 Creation of Equitable Mortgages of a Right of Occupancy under the MPL

Under the MPL, an equitable mortgage of a right of occupancy shall not be created by a mere deposit of title or charge on a property, except it is accompanied by an agreement to create a legal mortgage in favour of the mortgagee, or in the case of mortgage of an equitable interest in a property by an assignment of an equitable interest in favour of the mortgagee, with a provision for ceaser on redemption. The Law permits that the mortgagee, in case of a mortgage by deposit of title or charge accompanied by an agreement to create a legal mortgage, may within 30 days by an originating summons, bring an action in court requiring the mortgagor to execute a legal mortgage in his favour and thereafter exercise the powers of a legal mortgagor under the Law.³³

2. 1. 4 Priorities and Enforcement and Perfection of Mortgages

By section 32, every mortgage affecting a legal interest in land made after the commencement of this Law, whether legal or equitable, shall rank according to its date of registration under the Registration of Titles Law.³⁴ In terms of registration, apart from registering the mortgage deed under the Registration of Titles Law, section 53 of the MPL requires a mortgage institution to file a copy of the mortgage instrument with the Executive Secretary of the Mortgage Board. Under the MPL, mortgages can be enforced by: sale of the mortgaged property³⁵, foreclosure³⁶, taking possession, litigation in court, and arbitration³⁷. Charges can be enforced by appointing a receiver; applying to court for an order of judicial sale.³⁸ With regards to perfection, it is putting the world on notice of the security interest in order to make the secured party's interest fully enforceable.

33 Section 18(2).

34 Cap xxx Laws of Lagos State, 2004

35 Section 19(1).realisation of right of occupancy that was mortgaged.

36 Section 19 (2).

37 Section 27.

38 Section 22(1).

Ordinarily, perfection relates to three steps in Nigeria: obtaining the Consent of the Governor of the State where the land is located; stamping the mortgage instrument by payment of stamp duties; and registration of the mortgage instrument at the State Lands Registry.³⁹ The MPL does not derogate from this, but in addition requires that copies of mortgages be filed with the Board.

2.2 POWERS OF MORTGAGOR AND MORTGAGEE

The MPL recognizes the conventional powers of the mortgagor and mortgagee as stipulated in earlier statutes like the Conveyancing Act and the Property and Conveyancing Law: the power to sell, power to obtain possession, and power to assign are all given recognition. However, there are modifications in some respects.

2.2.1 Power to make Building Leases

The MPL states that a mortgagor of land while in possession shall, as against every incumbrancer, have power to make building leases on the mortgaged land.⁴⁰ A mortgagee of land in possession, as against all prior incumbrances, if any, and as against the mortgagor, have power to make from time to time, leases.⁴¹ Therefore only building leases can be granted by legal mortgagor under the MPL, whereas hitherto under the repealed CA, both mortgagor and mortgagee in possession are permitted to create agricultural or occupational leases not exceeding 21 years, and building leases for any term not exceeding 99 years. This abridgement of rights also manifest in the PCL too: it permits both parties to grant a building lease not exceeding 99 years. But for occupational leases, the common law position remains in force in PCL states.

³⁹ Where the mortgagor is a company, a further step of registration at the Corporate Affairs Commission must be done. See Companies and Allied Matters Act, Cap xxx Laws of the Federation of Nigeria, 2004.

⁴⁰ Section 33 (1).

⁴¹ Section 33 (2).

2.2.2 Power of Sale

Any person entitled to redeem a mortgaged property may have a judgement or order for sale instead of redemption in an action brought by him.⁴²

2.3 JUXTAPOSING THE MPL WITH THE CONVEYANCING ACT, 1881

The MPL repealed the application of the Conveyancing Act, 1881 in Lagos State. However the question arises whether it is a mere domestication of the Conveyancing Act, or constitution of a radical departure from the tenure of mortgages under the Act. Some salient areas of divergence can be noted: the right of a mortgagee to exercise his power of sale under the Conveyancing Act is contingent upon notice requiring payment of the mortgage money being served on the mortgagor or one of two or more mortgagors, and a default has occurred in the payment of the mortgage money for three months, interest on it or a part of it, for two months. Under the MPL, the requirement to exercise the mortgagee's power of sale is that default in payment of mortgage money, interest or part of it must have been in arrears for three months.

Both statutes provide that the application of the proceeds of sale are first to be expended on all costs and expenses related to the sale or attempted sale, then the debt (mortgage money, interests and costs) will be discharged. The residue goes to the person entitled to the mortgage property, or the person authorised to give receipts for the proceeds of sale.⁴³

⁴² Section 35(1)(i) of the MPL confers on the mortgagee, the power when the mortgagee money has become due, see also *Akomo v First Bank of Nigeria Plc.* (2004) 8 NWLR (pt 875) 318. Section 37(1) provides for situations where a mortgagee shall not exercise power of sale.

⁴³ Usually the mortgagor where there are no liens on the property.

2.4 PROTECTION OF BORROWERS FROM UNCONSCIONABLE MORTGAGE PRACTICES

In order to attain the objective of the Law in promoting mortgage by more people, section 54 provides that any mortgage institution in the State shall at the time of receipt or preparation of loan application, prepare and distribute booklets to help the borrowers seeking the finance to purchase a residential real estate understand the nature and costs of real estate settlement services.⁴⁴ Each booklet shall be in such form and detail as the Board shall prescribe, and in addition to such other information as the Board may provide, shall include in clear and concise language, a description and explanation of the nature and purpose of each cost, incident to a real estate settlement;⁴⁵ an explanation and sample of the standard real estate settlement form; a description and explanation of the purpose of escrow accounts when used in connection with loans secured by residential or home ownership scheme;⁴⁶ an explanation of the choices available to buyers of residential real estate in selecting persons who provide services incident to a real estate settlement;⁴⁷ and an explanation of the unfair practices and unreasonable and unnecessary charges to be avoided by the prospective buyer, with respect to a real estate settlement.⁴⁸ Furthermore this booklet shall include a good faith estimate of the amount or range of charges for specific settlement services borrower is likely to incur in connection with the settlement as prescribed by the Board.⁴⁹ Reasonable steps must be taken to ensure that the booklet does not omit any matters the omission of which may cause the housing and credit promotion not to be clear, fair, and misleading;⁵⁰ if it describes a feature of a secured loan, it gives no less

44 Section 54 (2) (a).

45 Section 54 (2) (b) (i).

46 Section 55 (2) (b) (iii).

47 Section 54 (2) (b) (iv).

48 Section 54 (2) (b) (v).

49 Section 55

50 Section 56(1) (a).

prominence to the possible disadvantages as to the benefits;⁵¹ it uses plain and intelligible language, and it is easily legible;⁵² the accuracy of all statements of fact in it can be substantiated;⁵³ its promotional purpose is not in any way disguised or misrepresented;⁵⁴ any statement of fact, promise, or prediction, is clear, fair and not misleading, and any relevant assumptions are clearly and prominently disclosed;⁵⁵ any statement of opinion is honestly held and unless consent is impracticable, given with the consent of the person concerned;⁵⁶ the facts on which any comparisons is made verified, or alternatively, that the relevant assumptions are prominently disclosed, and that the comparison or contrast is presented in a fair and balanced way, which is not misleading, and includes all factors which are relevant to the comparison contrasts;⁵⁷ it does not contain any false indications, in particular as to: the firm's resources and scale of activities or the scarcity of a secured loan, and it does not include any reference or approval to any Federal, State or Local Government body, unless such approval has been obtained in writing from that body. The Law also prohibits the imposition of collateral contracts of insurance on a mortgagor or prospective mortgagor as a pre-condition to the grant of or continuance of a mortgage facility.

Any contract of mortgage that does not comply with the provisions of the Law shall not be enforceable by any court in Lagos State.

51 Section 56 (1) (b).

52 Section 56 (1) (c).

53 Section 56 (1) (d).

54 Section 56(1) (e).

55 Section 56 (1) (f).

56 Section 56 (1) (g).

57 Section 56 (1) (h).

responsive to its people yearnings. Therefore, housing affordability involves a consideration of a medium household income as obtainable in the state, and not borrowed standard from elsewhere.

Due to the poor credit rating of an average Nigerian, mortgage finance of home schemes have been the exclusive preserve of the elite. For most people, home acquisition is a long term project commencing in the working years and towards retirement: advances are sometimes obtained from thrift societies, and / or cooperative societies, which the working class are members. Acquisition of homes is mostly a personal and laborious process, such that makes the objective of the MPL on sustainable and affordable housing a welcome development. The ability to obtain a home loan is therefore reserved for a few, who are able to enter into secured lending on a personal basis.⁶⁰

Many factors have been identified as militating against affordable housing, such as the fact that the fees paid to register property in Nigeria are extremely high and have some non-transparent components.⁶¹ It is recognized that high fees add to the cost of houses and usually take such houses out of the reach of people in the lower income bracket. Finding means to reduce perfection fees therefore forms a core measure in creating sustainable and affordable housing for low and medium income brackets.

60 Section 67 states that home loan means a home loan, including all inclusive credit plan, in which: the principal amount of the loan does not exceed the conforming loan size limit for comparable dwelling as established from time to time by the Board; the borrower is a natural person; the debt is incurred by the borrower primarily for personal, family or household purposes; the loan is secured by a mortgage, legal charge or deed of trust on land where there is allocated structure or structures intended principally for residential accommodation, or which will be occupied by the borrower as borrower's principal dwelling, and the property is located in Lagos State.

61 Akeju, Ajibola Andrew, "Challenges to Providing Affordable Housing in Nigeria" Paper Presented at the 2nd Emerging Urban Africa International Conference on Housing Finance in Nigeria, held at Shehu Yar'adua Center Abuja, October 17-19, 2007.

Another negative factor is the absence of social insurance for housing which makes risk sharing available, thereby encouraging lenders to extend credit to sub-prime lenders.⁶² Furthermore the absence of a credit information database that financial institution provide information to and can get the credit history of all individuals from, Nigerian financial institutions settle for lending to the rich.

Income is recognized as the primary factor that determines housing affordability, rather than price and availability. Nigerians have low income that makes houses beyond their reach. Mortgage availability through finance therefore becomes a core issue for planning development. Disparities in income and wealth have ensured that most houses are within the reach of a few privileged classes. Acquisition of a house therefore becomes a major life achievement for majority of low and middle income families; their house is also the greatest source of wealth. The rise in the costs of houses is tied to several factors, amongst which is availability of housing finance in a convergence of growing density like Lagos State and other cities of Nigeria.⁶³ Undoubtedly therefore, lack of affordable housing has implications on mental health as well as constitute a stretch on other socio-economic facilities.⁶⁴

62 Section 67 defines sub-prime lending as facilitating loans to citizens with poor or unfavourable credit history or rating, and includes any category of persons with financial or asset disadvantage. It is also a home loan in which the mortgage company carries a higher level or expectation of risk than that of a commercial and conventional mortgage lending and generally accompanied by higher interest rate charges.

63 According to the United Nations, majority of the more than seven billion people on earth now live in cities, and there are more than 500 city regions of more than one million inhabitants in the world.

64 Most of the factors that determine affordability of housing include demographic and behavioural factors, migration to cities and employment, increased life expectancy, building codes, a greater propensity for people to live alone or smaller family units.

The concept of the need for affordable housing under the MPL has resulted in the creation of mortgagee protection from unconscionable practices. A government's mortgage policy could be indices of its conception of the nature of housing. Housing policies provide a remarkable litmus test for the values of politicians at every level of office and of the varied communities that influence them. Often this test measures simply the warmth or coldness of heart of the more affluent, and a security towards families of a lower socio-economic status.⁶⁵ Therefore the MPL is a litmus test of the values of the Government of Lagos State towards housing needs of residents. By stipulating that the Board shall generate a conducive environment for accessible and affordable mortgage or charge for the benefit of citizens of the State to acquire their own homes, It stimulates the accessibility of citizens to home ownership. It would seem therefore that Lagos State has taken the need for affordable housing as a basic right.⁶⁶ One of the ways of addressing accessible and affordable housing needs is government policies, which determine mortgage lending practices as the MPL has done.

The question arises whether and to what extent the MPL will contribute to the creation of home ownership and human development? No doubt there are many provisions in the Law that offer hope for the classes of exclusion. For example section 62 makes a provision to address the hydra-headed problem of lack of access to home finance and hindrance to home loan by prohibiting the imposition of fees or charges upon any other person by a

65 John C. Bacher, *Keeping to the Marketplace: The Evolution of Canadian Housing Policy* (Montreal: McGill-Queen's University Press, 1993).

66 The mortgage policy in place in a society may reflect its conception of housing- is it a right, a basic need, an entitlement, a public good, or even, as in the case of home purchasing in the United States, a civic duty? Or is it just another household-level consumer choice, a commodity or an investment within the free market system acquisition in the country?

mortgage institution in connection with a mortgage loan made by it. Section 60 prohibits negative amortization,⁶⁷ except as a result of a temporary forbearance sought by the borrower.⁶⁸ Mortgages of real property are typically amortization⁶⁹ loans,⁷⁰ as against bullet loans.⁷¹

Section 59 prohibits collateral contracts which can make the mortgage transaction burdensome to the mortgagor.⁷² The effort of Lagos State Government is laudable in the light of the provisions to enabling affordable housing, by creating a platform for sub-prime lending.⁷³ However, the enabling environment for the extension of credit to people with low credit rating who are ordinarily isolated or excluded from the credit market cannot really be said to exist until explicit platform for socially secured lending is

67 Section 62(1). In a traditional mortgage transaction, the mortgagor's monthly payment is enough to cover some interest and some principal. In a negative amortization the payments by the mortgagor are not even sufficient to cover the interest. The unpaid interest is added to the loan balance with the result that each time the mortgagor pays the lender/mortgagee, he owes the lender more as the loan balance increases over time.

68 Section 62 (3).

69 Amortization is the elimination of a liability such as a mortgage sum increasing over time.

70 An amortization loan is a loan where the principal of the loan is paid down over the life of the loan (that is amortized) according to an amortization schedule, most often through equal payments.

71 A bullet loan occurs where a large portion of the loan will be paid at the final date instead of being paid instalmentally over time.

72 No mortgage agreement shall contain a requirement imposing an obligation on a mortgagor to purchase other financial products, including insurance from the same lender or lenders. The provision of this section shall not preclude a mortgage lender from marketing such financial products to the potential mortgagors.

73 Sub prime lending means the availability of loans to people who may find it difficult to keep up with the repayment schedule contingent on such socio-economic factors as unemployment. They have low credit history and likely to default on the loan. The fall out is higher rates of interest to insulate the creditor against the higher credit risk.

available.⁷⁴ The Lagos Mortgage Scheme recognised by the Law must be used to serve this purpose to encourage mortgage finance institutions to extend credit to sub-prime lenders. The Lagos Mortgage Scheme under the Act is undefined, and so it is not certain if a social insurance scheme is planned for mortgages in the State. The provision of section 8 (1) (c) of the MPL can be advantageously utilized for the creation of the enabling environment and institution for lending favourably to sub-prime lenders on facilities provided by the State Government for Lagos State Mortgage Scheme.

Unless the Government is able to provide insurance for this category, the MPL would have failed to meet its major objectives. In addition it is needful for the Government to provide a favourable investment climate, infrastructure, and mortgage insurance, to first time home buyers, low as well as middle income families.⁷⁵

This would involve providing mortgage insurance to lenders for loans granted to first time buyers with no credit history, and low and middle income families, once such mortgage loans meet prescribed underwriting standards. In the event of a default the Government indemnifies the lenders to a prescribed level.⁷⁶

The Government of the United States has used this model to assist its citizens by the establishment of the Federal Housing Administration (FHA),

74 Such include people with little bank savings, the young, the unemployed, etc.

75 Akeju, Ajibola Andrew, "Challenges to Providing Affordable Housing in Nigeria" Paper Presented at the 2nd Emerging Urban Africa International Conference on Housing Finance in Nigeria, held at Sehu Yar'adua Center Abuja, October 17-19, 2007.

76 Ibid.

to provide insurance against mortgage defaults for lenders, under the Roosevelt administration. The provisions of section 7 (1) (a) and (b) of the MPL that give the Board the function to generate conducive environment for accessible and affordable mortgage and charge as well as advise the Governor on the funding, administration and structure of the State Mortgage Finance Program or Policy, ought to be utilized for the creation of a social security scheme for people who would qualify as sub-prime lenders. Hopefully the Lagos Mortgage Scheme would be an aperture for sustainable and affordable housing. In fact, the functions of the Board are well suited for the formalization and institutionalization of the mortgage scheme.

4.0 CONCLUSION

The above analysis establishes that the MPL promotes a new era in real property mortgage in Lagos State, towards the provision of a conducive environment for residents of the State to access finance for affordable housing. It is a commendable step in the fulfilment of its socio-economic duties. It recognizes the creation of legal and equitable mortgages over real property. It creates an institutional framework for the creation of mortgages and prevention of unconscionable mortgage practices that may endanger the rights of mortgagees. The Law is of significant socio-economic impact if properly implemented. The MPL reflects that policy direction of the State Government of housing is recognised as a need. It makes some significant changes to the practice of mortgage under the Conveyancing Act, 1881, which it repealed. The MPL creates an institutional and regulatory framework that, if properly utilized, can provide the platform for social secured mortgage transactions to assist sub-prime lenders towards the objective of affordable housing for residents of the State. The law is a catalyst for home ownership by the low income through stimulating information transmission and support for home mortgage transactions in Lagos state.