

MORTGAGES

Quarterly Bulletin Of The Corporate Services Group

April 2011

THE MORTGAGE AND PROPERTY LAW OF LAGOS STATE, 2010

In Nigeria, eighty-five percent of the urban population live in and spend more than 40% of their income on rented accommodation¹. 90% of these residential blocks are self-built owing largely to the lack of domestic mortgage financing.² In addition, the World Bank has described the performance of the Nigerian mortgage sector to date as disappointing with less than 20 Primary Mortgage Institutions operationally active, formal housing investment constituting only 1.7% of GDP, and a relatively-low home-ownership ratio.³

To address this huge gap, the Lagos State Governor, Mr. Babatunde Raji Fashola SAN, signed into law in August 2010 a Bill to establish the Lagos State Mortgage Board with the aim of encouraging long term funding as well as affordable and sustainable housing delivery. It would appear that the signing of the Bill into Law

is a momentous step towards addressing the lack of affordable and sustainable housing in the State.⁴

The legislation, known as the Mortgage and Property Law of Lagos State, 2010 (the "Law"), repeals the Conveyancing Act, 1881 with respect to mortgage transactions in the State and encourages the participation of the private sector in the development of the real estate sector by making long term funding readily available.

Highlights of the Law

The Law makes certain innovative provisions with respect to mortgages in the state. It establishes the Lagos State Mortgage Board to monitor and regulate mortgage transactions, allows for the discharge and reconveyance of mortgages by indorsed receipts, and the negotiating of lesser fees for documents presented for stamping and registration. The Law also prohibits unearned fees, kick backs and negative amortisation amongst others.

¹ Overview of the Housing Finance Sector in Nigeria Commissioned by the EFinA and Fintrust, August 2010.

² Ibid

³ World Bank Nigeria Financial Sector Review; Volume 1 (Overview and Macro-financial Environment) 2000

⁴ Kuramo Conference and Legal Framework for Friendly Land Reform:

<http://allafrica.com/stories/201012070749.html>



Some of the highlights of the law are discussed below:

1) ***The Lagos State Mortgage Board***

The Law establishes a six-member Board known as the Lagos State Mortgage Board (the "Board")⁵ to amongst others:

- a) generate a conducive environment for citizens of Lagos State to secure affordable mortgages or charges to enable them purchase their own homes;
- b) advise the Governor on the funding, administration and structure of the State's Mortgage Finance Program or Policy, and articulate any Mortgage Scheme or Policy which the government has or may put in place from time to time in connection with mortgage lending;
- c) protect residents of the State and the stability of the State's economy from unconscionable practices of mortgage brokers, lenders and persons who hold themselves out as offering funds on security by way of mortgage or charge of any property;
- d) implement and honor on behalf of the State government all obligations in agreements between

the State and parties with respect to provision of funds for land ownership or development of estates in the State;

- e) advise government on the adoption of standards and policies under which property-secured credit should be provided; and
- f) maintain a central statistical database of mortgages and transactions secured on properties in the State.

In exercising these functions, the Board is empowered to ensure that the mortgage industry is operated fairly, honestly, efficiently and free from deception or non-competitive practices.⁶ To ensure that the powers conferred on the Board are given effect, the Board with the approval of the Commissioner for Finance may make regulations for the purpose of implementing the provisions of the Law subject to the approval of the House of Assembly.⁷

2) ***Mode of Creating Legal Mortgages***

Prior to the enactment of the Law, a Legal Mortgage could be created either by an assignment of the Mortgagor's interest in the property subject to a provision for cesser on redemption or by a sub-demise of the Mortgagor's interest in the property

⁵ Sections 1 and 2

⁶ Section 8(1)(f) and (g)

⁷ Section 12



with a proviso for redemption.⁸ While under the Registration of Titles Law⁹, which applies to the old Lagos State, creation of a Legal Mortgage is by filling Form 5 at the relevant Lands Registry.

The Law however prescribes the mode of creating a *mortgage of a right of occupancy* as; by demise for a term of years absolute, subject to a provision for ceaser upon redemption, or by a charge by deed expressed to be by way of Legal Mortgage; or in the alternative, by a charge by deed expressed to be by way of statutory mortgage.¹⁰ This provision is however made subject to the power of the first mortgagee to have the same rights to possession of documents as if his security included a right of occupancy.

It further provides with respect to leaseholds that 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 at least one day 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 by a deed expressed to be made by way of statutory mortgage.¹¹

Suffice to state at this point that the Law provides that the only estates in land which are capable of subsisting or of being a subject matter of a mortgage under the Law 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 term of years absolute.¹²

3) **Equitable Mortgage**

Section 18 of the Law provides that an equitable mortgage shall not be created by a mere deposit of title or charge on a property except same 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 cesser on redemption.

However, there is a proviso to the effect that in the case of a mortgage by deposit of title or charge accompanied by an agreement to create a legal mortgage, a mortgagee may, within 30 days, file an originating summons in court requiring the mortgagor to execute a legal mortgage in his favour and thereafter exercise the powers of a legal mortgagee

⁸ Under the Conveyancing Act, 1881

⁹ Section 21 of the Registration of Titles Law, Chapter 66, Laws of Lagos State, 1994

¹⁰ Section 15(1)

¹¹ Section 16

¹² Section 65(1)



under the Law. The conventional practice is that Equitable Mortgages are created by mere deposit of title documents with the Mortgagee.

4) ***Discharge of Mortgages and Reconveyances of Mortgages by Indorsed Receipts***

The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this Law.¹³ Furthermore, a receipt indorsed on, written at the foot of, or annexed to a deed of mortgage for all money secured by it, which states the name of the person who pays the money and is executed by a charge expressed to be by way of legal mortgage or the person in whom the mortgaged property is vested and who is legally entitled to give a receipt for the mortgage money shall operate, without any conveyance, surrender or release.¹⁴

5) ***Negotiating Lesser Fees for Documents Presented for Stamping and Registrations***

There is significant *red tape* and stifling bureaucracy experienced by mortgagees, in the process of payment for stamp duties. In view of this, the Law encourages the Board to promote concessions, deferred payments or instalment payment

of duties with respect to the stamping of mortgage or charges and fees payable to the Registrar of Titles with respect to the registration of same at the Lands Registry.¹⁵

It however remains to be seen how these concessions and instalment payment of stamp duties would be implemented given that payment of Stamp Duties is regulated by the Stamp Duties Act which is a federal law. Further, there may be issues with the stamping of such deeds of mortgage in the event that the Board approves an instalment payment of Stamp Duties and how the penalty which accrues once Stamp Duties remains unpaid after 30 days of the date of execution would be treated. How would the instalment payment be enforced in the light of penalties which may accrue where payment is made out of time or where a one-off payment is retained?

Of interest, the Law does not provide for concessions on consent fees that is N20,000 .00 per N1 Million, a situation which is increasingly of huge concern with respect to mortgage transactions in the state.

6) ***Filing of Mortgage Instruments & Protection of the Mortgagor from Unconscionable Practices***

¹³ Section 41 (1)

¹⁴ Section 47 (1)

¹⁵ Section 12



One remarkable innovation of the Law is the requirement for mortgage institutions to file a copy of any instrument evidencing a mortgage transaction with the Executive Secretary of the Board.¹⁶ In addition each mortgage institution is required to act with reasonable skill, care and diligence obtainable in the code of ethics and professionalism for universal banks and guidelines on best practices for primary mortgage institutions.¹⁷

The Law also requires all registered mortgage institutions in the State to have booklets which will help borrowers seeking finance for the purchase of residential properties to have a better understanding of the nature and costs of real estate settlement services.¹⁸

7) ***Prohibition against Kickbacks, Unearned Fees, Collateral Contracts and Negative Amortisation***

The Law prohibits giving or receiving of any portion, split or percentage of any charge made or received for the rendering of any mortgage settlement service in connection with a transaction involving a State or Federal related mortgage loan other than for services actually performed.¹⁹

Any requirement under a mortgage agreement which imposes an obligation on a mortgagor to purchase other financial products including insurance from the same mortgage lender or other lenders is prohibited under the law, although the lender is not precluded from marketing such financial products to the potential mortgagors.²⁰

Interestingly, the Law prohibits payment schedules with regular periodic payments that cause or may cause the principal balance to increase and provides that a loan is considered to have such a schedule if the borrower is given the option to make regular periodic payments that cause the balance to increase notwithstanding that the borrower is given the option of regular periodic payments which does not cause the balance to increase.²¹

8) ***Enforceability and Liability or Penalties***

The Law provides that any mortgage contract made in contravention of its provisions will be unenforceable in a Court of Law while any person who violates sections 53-62 of the Law²² shall on

¹⁶ Section 53

¹⁷ Section 54 (1) (a)

¹⁸ Section 54 (2) (a)

¹⁹ Section 58

²⁰ Section 59

²¹ Section 60

²² On filing of mortgage instruments with the Board, protection of the mortgagor from unconscionable practices, regulation of mortgages and prohibition of collateral among others



conviction be liable to a fine not , 000.00 or a term of imprisonment not exceeding one year, or both or to any non custodial sentence provided by Law.

The Registration of Title Law (RTL) and the Law

The Registration of Title Law Chapter R4 Laws of Lagos State is the law that applies implied covenants of a charge, the rights of a registered owner of a charge to create a sub-charge in the prescribed manner to the like extent as can a mortgagee of unregistered land or an unregistered lease create a sub-mortgage. The RTL further states that the provisions relating to registration of charges shall, where the context so admits, apply, with the necessary modifications, to a registered sub-charge.

In view of the foregoing, the question then becomes: which law would prevail between RTL and the Law in the event of a conflict?

The Law makes no reference to its application vis-a-vis the provisions of the RTL. It specifies the mode of creating a mortgage without limit thus giving an indication that its provisions would apply generally to all areas of the State. However, Section 47 of the Law restricts the re-conveyance of a mortgage by receipt from applying to the discharge of a charge or encumbrance registered

exceeding N500 to mortgage transactions in some areas of Lagos located within the old colony of Lagos viz; Surulere, Yaba, Ikoyi, Apapa, etc. It provides, inter alia, for the registration of charges on registered land, the mortgage by deposit of certificate of title, the rights conveyed by a charge and the

under the RTL. Also, with respect to priorities between mortgages, the Law provides that every mortgage affecting a legal interest in land made after its commencement whether legal or equitable, shall rank according to its date of registration under the RTL.²³ This by implication means that all mortgages within the state are registerable under the RTL.

Editorial

There is no doubt that the new law is a commendable intervention by the Lagos State Government. However, the Law cannot be said, in the strictest terms, to be significantly different from the Conveyancing Act, 1881 that was previously applicable in some parts of Lagos State, as most of its provisions appear to have been lifted from the Act. This therefore means that the difficulties hitherto encountered by lawyers in the interpretation of the 1881 Act, may not

²³ Section 32



have been totally overcome. Further, the force of human dynamics is equally as important as the application of the Law. In other words, without a commensurate effort by State officials to skilfully implement the new law, not much may change in real terms with respect to achieving the lofty objectives which the law was designed for.

Nonetheless, there is no doubt that the positive ripple effect of the Law in the Real Estate sector will be huge thus attracting a chain reaction across the other 35 states of the country and possibly influencing a replication of the Law in those states. It is to this effect that this pioneer effort by the Lagos State Government which is geared towards enhancing commercial developments in the State and ultimately, the country, is a welcome development.



DID YOU KNOW?

- That the contribution of mortgage finance to Nigeria's Gross Domestic Product(GDP) is close to negligible with real estate contributing less than 5%, and mortgage loans and advances at 0.5% of GDP, compared to 77% in the US, 80% in the UK, 50% in Hong Kong, and 33% in Malaysia.
- That the housing backlog in Nigeria is estimated at 14 million units and it will require N49 trillion (\$326 billion) to bridge the housing deficit of 14 million units based on an estimated average cost of N3.5 million (\$23,333) per housing unit.
- That the major factors affecting housing in Nigeria include limited access to funds, slow and bureaucratic procedures, and high cost of perfecting title over land.

[Culled from the Overview of the Housing Finance Sector in Nigeria commissioned by EFinIA and Fintrust: 2010]

ABOUT THE CORPORATE SERVICE GROUP

The Corporate Services Group of Aina Blankson LP, (CSG) is one of the six Practice Groups of the Firm which operates a near autonomous practice.

The CSG comprises of specialized professionals who operate through the Secretarial & Compliance Department, the Probate & Perfections Department and the Corporate Governance Department while providing services ranging from start-up incorporation, company secretarial to regulatory advisory services, title perfections and laws guiding foreign investments. The results achieved over the years, as well as our distinguished list of clientele, affirms the CSG as a frontline corporate service provider locally and internationally.

For more information please contact:

Eghosa Isibor
c.isibor@ainablankson.com
Gbemi Adekola
a.adekola@ainablankson.com
5/7 Ademola Street
South-West Ikoyi
Lagos
+234 (1) 898 0882-3

Disclaimer: This document serves merely as a note and is not intended to provide legal advice to any person or group of persons whether natural or corporate regarding the issues discussed herein. All persons desirous of legal advice should therefore contact a lawyer. Aina Blankson LP shall not be liable for any breach or loss resulting from reliance on any part of this Bulletin.