

MORTGAGES

AN INFORMATION BULLETIN OF THE CORPORATE SERVICES GROUP

THE MORTGAGE AND PROPERTY LAW OF LAGOS STATE, 2010

In 2010, it was reported that eighty-five percent of the urban population lived in rented accommodation, spending more than 40% of their income on rent. Of these, 90% are self-built accommodations and this is mainly due to lack of mortgage financing.¹

In August 2010, the Lagos State Governor, Mr. Babatunde Raji Fashola SAN, signed into law 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. According to the Lagos State Governor, the signing of the Bill into law is a momentous step towards providing affordable housing in Lagos State bearing in mind that the issue sought to be addressed is not the lack of houses but lack of affordable and sustainable housing in the State.²

The legislation, known as the Mortgage and Property Law of Lagos State, 2010 (the "Law"), thus repeals the Conveyancing

Act, 1881 with respect to mortgage transactions in the State and encourages members of the private sector interested in real estate developments to undertake projects with the assurance of a guarantee to uptake and recoup the money back over a long term.

Highlights of the Law

The Lagos State Mortgage Board

The Law establishes a six-member Board known as the Lagos State Mortgage Board (the "Board")³ 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

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

² Kuramo Conference and Legal Framework for Friendly Land Reform:
<http://allafrica.com/stories/201012070749.html>

³ Sections 1 and 2



- persons who hold themselves out as offering funds on security by way of mortgage or charge of any property within the state;
- 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) report every breach or default of any such agreements to the government and advise the government on ways to remedy such breach or default;
 - f) encourage, promote and coordinate research on the mortgage lending industry, especially, as it relates to the economic wellbeing of the State and its residents, with particular respect to the stamping and registration system of mortgages in the State and the mode for application of Governor's consent on secured credit transactions;
 - g) advise government on the adoption of standards and policies under which property-secured credit should be provided;
 - h) maintain a central statistical database of mortgages and transactions secured on properties in the State;
 - i) mediate and or arbitrate in disputes arising between parties

from mortgage transactions made pursuant to the Law; and

- j) perform such other functions as may from time to time be referred to it by the Governor or the Lagos State Executive Council as the case may be.⁴

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.⁵ 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.⁶

Mode of Creating Legal Mortgages

Under the Conveyancing Act, 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 with a proviso for redemption.

While under Section 21 of the Registration of Titles Law, Chapter 66, Laws of Lagos State, 1994 which applies to the old Lagos State, creation of a Legal Mortgage is by filling Form 5 at the relevant Lands Registry, the Law under review prescribes

⁴ Section 7

⁵ Section 8(1)(f) and (g)

⁶ Section 12



the modes 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 by a charge by deed expressed to be by way of statutory mortgage.⁷ 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 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 by a deed expressed to be made by way of statutory mortgage.⁸

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.⁹

Equitable Mortgage

Against conventional practice, 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 provision above 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 under the Law.

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.¹⁰ 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

⁷ Section 15(1)

⁸ Section 16

⁹ Section 65(1)

¹⁰ Section 41 (1)



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.¹¹

Negotiating Lesser Fees for Documents Presented for Stamping and Registrations

The hardship experienced by mortgagees, particularly on payment of stamp duties, cannot be over emphasised. In view of this, the Law encourages the Board to promote concessions, deferred payments or instalmental payment of duties payable to the Commissioner of Stamp 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.¹²

It however remains to be seen how these concessions and instalmental 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, we cannot but wonder when such deeds of mortgage would be stamped in the event that the Board approves an instalmental payment of Stamp duties and how the penalty which accrues once stamp duties remains unpaid after 30days of the date of

execution would be treated. A paradox seems awaiting to be unfolded; instalmental payment in addition to penalties or a one off payment and the hardship remains unsolved.

Interestingly, the Law does not provide for concessions on consent fees (N20,000.00 per N1 Million) which is fast becoming a huge concern with respect to mortgage transactions.

Filing of Mortgage Instruments & Protection of the Mortgagor from Unconscionable Practices

One remarkable innovation of the Law is the requirement for mortgage institutions to file a copy of any instrument evidencing a mortgage transaction at the office of the Executive Secretary of the Board.¹³ 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.¹⁴

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

¹¹ Section 47 (1)

¹² Section 12

¹³ Section 53

¹⁴ Section 54 (1) (a)



understanding of the nature and costs of real estate settlement services.¹⁵

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.¹⁶

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.¹⁷

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.¹⁸

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 Law¹⁹ shall on conviction be liable to a fine not exceeding N500,000.00 (Five Hundred Thousand Naira) or a term of imprisonment not exceeding 1 (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 applies to lands located within the old colony of Lagos viz; Surulere, Yaba, Ikoyi, Apapa, etc; and 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 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 its provisions as to a registered charge shall, where the context so admits,

¹⁵ Section 54 (2) (a)

¹⁶ Section 58

¹⁷ Section 59

¹⁸ Section 60

¹⁹ On filing of mortgage instruments with the Board, protection of the mortgagor from unconscionable practices, regulation of mortgages and prohibition of collateral among others



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 incumbrance registered 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.²⁰ This implies that all mortgages within the state are registerable under the RTL.

Editorial

There is no doubt that this effort by the Lagos State Government is a commendable one particularly as the World Bank has described the performance of the mortgage sector to date as a disappointing one with less than twenty PMIs operationally active, formal housing investment constituting only 1.7%

of GDP, and a relatively-low home-ownership ratio.²¹ It is to this effect that any effort which could enhance commercial developments in the State and ultimately, the Country, is a welcome development.

According to the IMF²², Countries that experienced faster and deeper innovations in mortgage markets (the United States, the United Kingdom, Canada, Australia, and the Nordic countries) tend to have higher shares of household loans from nonbank financial institutions and a higher stock of mortgage debt as a ratio to GDP. Thus, if properly applied, it is unarguable that the Law would be a major force in revamping the mortgage sector of the State and perhaps cause a chain reaction amongst the other 35 states of the Country.

Nevertheless, it is important to state that while the attempt through the Law is commendable, the force of human dynamics is equally as important as the application of the Law. In other words, without a commensurate attitude by concerned officials of the State, the new law might at best remain another chapter in the Laws of Lagos State.

²⁰ Section 32

²¹ World Bank Nigeria Financial Sector Review; Volume 1 (Overview and Macro-financial Environment) 2000

²² http://www.imf.org/external/pubs/ft/weo/2008/01/c3/fig3_1.pdf



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, popularly known as the 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:

Abayomi Alabi

a.alabi@ainablankson.com

Eghosa Isibor

c.isibor@ainablankson.com

Gbemi Adekola

a.adekola@ainablankson.com

Tolulope Olaiya

t.olaiya@ainablankson.com

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