CONSENT REQUIREMENT IN EQUITABLE MORTGAGES – JACOBSON ENG. CO. VS U B A REVISITED

History would have us believe that trust, and not security weighed more for bankers in considering loan applications. Global trends now emphases the quality of security in loan evaluations. In Nigeria the weak economy has led to a high rate of loan defaults causing bankers to keep a keen eye on the quality of security. Laws also exist which make securities mandatory. The Banks and Other Financial Institutions Decree stipulates that facilities exceeding certain sums require security. The Failed Bank's Decree makes it an offence for bank officers to advance unsecured or inadequately secured credit facilities. The above are some of the reasons that compel the banking industry to pay a lot more attention to security issues. Because it is fixed, appreciates in value, and an asset that can be easily liquidated, land is generally accepted as prime security. In dealing with land as a collateral, the banking industry has had to contend with the issues of interpretation that arise in the application of the Land Use Act of 1978.

The Court of Appeal case of **JACOBSON ENG CO & ANOR VS UBA LTD** reported in (1993) 3 NWLR part 283 at Page 586 has once more brought to the open the vexed issue of consent under the Act as it relates to mortgages. The facts of the case are that the 1st appellant obtained a facility from the Respondent. As security for this facility the 2nd appellant, Managing Director of the 1st appellant executed a personal guarantee in favour of the Respondent. In addition, he deposited his original title documents as further security for the facility. Following the failure of the 1st appellant to liquidate the debt as agreed, the Respondent filed an action claiming the debt plus interest, a declaration that as an equitable mortgagee, it (the mortgagee) was entitled to sell, and an order of sale of the property covered by the title document deposited. Based on this, the lower court granted judgment in favour of the Respondent as claimed. In an appeal to the Court of Appeal, Lagos Division, the 1st and 2nd appellants sought to set aside the lower court's judgment. A major plank of their contention was that the deposit of title documents was an equitable mortgage which required the consent of the Governor under the Act. As none was obtained the transaction was null and void pursuant to section 26 of the Act.

In a considered judgment, the Court of Appeal partially upheld the appeal and set aside, the part of the judgment of the lower court granting a declaration that an equitable mortgage existed, and ordering a power of sale. In the judgment, the court stated that "After the commencement of the Land Use Decree, whatever was created upon the delivery of the Title deeds whether *equitable* or *legal* mortgage, *the law is the same* and that is to the effect that the bank cannot sell nor an order be made that the bank should sell without the consent of the Minister first had and obtained".

Before the decision of the Supreme Court in *SAVANNAH BANK VS AJILO,* people were at sea as to the real expectations of the Act with regard to the issue of consent. The Supreme Court was therefore afforded the opportunity of stating through the Ajilo case, that consent was required in legal mortgages failure of which rendered the transaction a nullity .It was not before that court to determine whether an equitable mortgage also required consent and no decision was arrived at on this.

Before the Jacobson case, it was taken as given that an equitable mortgage was excluded from the consent requirement of S. 22 of the Act. This is because by its nature and characteristics, an equitable mortgage is inferior to a legal mortgage. Whereas a legal mortgage vests, transfers and confers title/interest for which, upon default, the mortgagee is at liberty to sell the mortgaged property, an equitable mortgage lacks these features. Its creation requires no particular formality and it is usually created by a mortgagor whose interest at best is equitable and who cannot create a mortgage interest

that is superior to that which he holds. It can also be created where the mortgagor indeed holds a legal interest but creates a security over it in an equitable way.

It is for this reason that the deposit of title deeds (in the absence of anything suggesting the deposit is for safe keeping) in itself qualifies as an equitable mortgage. See *OGUNDAINI VS ARABA VOL* 11 1978 *N.S.C.C.*

The Jacobson case has very far implications for the banking industry. Due to the very cumbersome and lengthy process, and the huge costs incurred in seeking the consent of the Governor, bankers have always had to work a very delicate balance between satisfying the requirements of the law on one hand, and protecting their funds on the other. It is therefore common place to execute an equitable mortgage (hitherto believed not to require consent) as a substitute for a legal mortgage for which the cumbersome and expensive rigours of consent prevail. What the Jacobson case is therefore saying is that irrespective of the nature or type of mortgage, the consent of the Governor is required. As stated earlier, the rationale for this is traced to Sections 22 and 26 of the Act. Section 22 states:

> "It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to *alienate* his right of occupancy or any part thereof by assignment, *mortgage,* transfer of possession, sublease *or otherwise howsoever without the consent of the Governor first had and obtained* ".

Section 26 states:

> "Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void".

With due respect to the panel of Judges that handed down the decision in the Jacobson case, the interpretation given to section 22 and 26 is erroneous. It is correct that section 22 unqualifyingly lists mortgages (for which an equitable mortgage is one) as one of the transactions that should attract consent. The section in fact goes on to say "or otherwise howsoever" suggesting its application in the broadest terms.
Significantly however is the fact that the operative word in the section is *"alienation".* In other words, section 22 applies to transactions which by their very nature are capable of serving as a vehicle to alienate land i.e. transfer, convey interest/title etc. This position is further supported by section 26 which condemns any transaction or instrument purporting to "confer" or "vest" "interest" or "right" over land without consent.

Consequently, the important thing is not the form of transaction i.e. mortgages, but the substance and its ability to alienate. It is suggested that any transaction that is incapable of alienating, transferring, conferring or vesting interest/title etc. would not come under the purview of S. 22, and therefore requires no consent. Indeed, section 22(a) of the Act states that a legal mortgage would not require consent where consent has already been obtained in respect of an equitable mortgage on the same transaction. Clearly, the statute recognizes the difference in equitable and legal mortgages and goes on to treat each transaction on its merit, thus acknowledging the possibility that an equitable mortgage can exist which in fact vests/transfers interest. The critical issue at this point is can it be suggested that the deposit of title document in itself, vests, confers or transfers interest or title in another person? A resounding no. This is because at best, this represents an intention to create such an interest.

One can also not overcome the temptation of observing that, going through the judgment in Jacobson one comes away with a sense that the panel made no attempt in meeting the real justice of the case in a manner akin to the position the courts took in *SOLANKE VS ABED, ADEDEJI VS NATIONAL BANK, MOSES OLA VS BANK OF THE NORTH; OILFIELD VS JOHNSON* and a host of others. In these cases, the courts unhesitantly noted as despicable and unconscionable, the attitude of parties who had benefited from a transaction and turned around to attempt to nullify it because of a failure on their part to fulfill an obligation meant to satisfy the requirements of the law. Assuming therefore, that consent was required in the Jacobson case, on the strength of *AWOJUGBAGBE VS CHINUKWE* (1993) 1 *NWLR PART 270* such consent ought to have been applied for by the appellants/mortgagors. The court apparently saw nothing wrong in the obvious advantage they stood to gain in nullifying the transaction caused by their own inaction.

While Jacobson remains a sore area for the banking industry, the good news is that three years after the judgment another panel of the Lagos Division of the Court of Appeal in *OKUNEYE VS FBN PLC* (1996) 6 *NWLR AT PART* 457 held that the deposit of a title document is an equitable mortgage not requiring the consent of the Military Governor on the basis that it is not an alienation, but an agreement to alienate. In this case the appellant had appealed the judgment of the lower court that granted the order of sale of his property deposited as security for loan on the premise that the consent of the Governor was lacking. Unfortunately, in coming to this conclusion, the court in Okuneye did not consider at all the Jacobson case with a view to distinguishing it. Therefore, there exists two conflicting decisions of the Court of Appeal on the same subject matter. In the circumstances it is difficult to divine which of these authorities the lower courts would follow today. This is because in trying to guide the lower courts on the doctrine of stare decisis the Court of Appeal created more confusion.

A thread that runs through cases such as *ADEGOKE MOTORS VS ODESANYA, EBITEH V OBIKI, THOR VS FCMB AND NEPA VS ONOH* is that the lower court is free to decide which of the conflicting decisions of a higher court that it wants to follow. This must however be contrasted with the decision of *OKPOBO VS BENDEL NEWSPAPER* to the effect that of two conflicting judgments, the latter must be followed. The case *of ALHAJI VS EGBE* however stands alone in stating that a lower court is not at liberty in deciding, and that the superior court must have the opportunity of deciding which authority would prevail.

It is hoped that the Supreme Court in the very near future would have the chance of pronouncing on the correct position of law with regard to equitable mortgages and the requirement for consent.

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