

POSSIBLE NEGATIVE IMPACTS OF CONSENT FEE ON THE MORTGAGE AND PROPERTY LAW, 2010-ANEEDTO STREAMLINE THE REGULATORY & FISCAL POLICIES ¹

1.0 INTRODUCTION

The requirement of the consent of the Governor for alienation of various interests in land² under of the Land Use Act³ (LUA) still remains the most controversial aspect of the Act.⁴ Emphasis has always been on the examination of the legal effects of the failure by a transferor of a statutory right of occupancy, (who is obliged to obtain consent), seeking to rely on his/her dereliction ostensibly to perpetrate fraud by evading his/her contractual obligations.⁵ However, there is paucity of literature on the analysis of the prevalent abuse by the State Governments of the consent fee provisions for revenue generating purpose.

While it appears that the policy underpinning the requirement of Governor's consent under the Land Use Act (consent) was for regulatory/administrative purpose, in practice the various State Governments have leveraged on it for revenue purpose thus making transactions requiring consent prohibitive and out of reach of ordinary man. The Mortgage and Property Law, 2010 of Lagos State (MPL) has a laudable objective of promoting affordable housing for less privileged citizens⁶ through the regulation of loans for the acquisition of real properties which are mortgaged by the buyer (Mortgagor) to the lender usually financial institutions (Mortgagee). Thus, the property purchased is used to secure the loan under a mortgage while the legal interest in the property would be transferred to the mortgagor upon the full payment of the loan.

Normally, the transaction entails three stages transfer of interest in the property that ought to trigger consent requirement viz: the conveyance of the property by the seller to the buyer; the conveyance by the buyer to the financial institution, and the release of the property by the financial institution to the buyer upon the full payment of the loan. In order to obviate triple applications for consent, the practice

¹ Abiola Sanni, Ph.D, FCTI, Associate Professor, Commercial & Industrial Law, University of Lagos. asanni@unilag.edu.ng, asanni@abiolasanniandco.com, +2348033958020, +2348024065832. Being a paper delivered at a 2-Day Workshop on the Mortgage and Property Law of Lagos State, 2010 at Eko Hotels & Suites on 26-27 November, 2014. **I sincerely acknowledge the contributions of Thode Otubu,** without the errors and omissions which of course remain mine.

² The consent provisions of the Land 'Use Act sections 21, 22, 23, 26, 34(7)&(8) and 36(5)&(6). Focus are however always on section 22 which prohibits alienation of statutory right of occupancy without the consent of the Governor.

³ Cap L.5 Laws of Federation of Nigeria 2004

⁴ Adeoye, F.O. & Ogunniran H.D., "The Socio-Economic Implications of the Consent Provision of the Land Use Act, in (ed) Adigun, O, "The Land Use Act Administration and Policy Implications, (Lagos: Department of Private & Property Law, 1991), p.77.

⁵ See Nnamani, C., "The Land Use Act 11 year After" 2 GRBPL No.6 (1989) p.39, Utuama, A.A., "The Crocodile Tear in Savannah Bank v Ajilo and Anor" 2GRBPL no. 4 (1989) p.29, "Farewell to Consent Controversy: Savannah Bank v Ajilo, 2 GRBPL, p.29.

⁶ See section 12 MPL

is for the buyer, seller and financial institution to execute a tripartite agreement under which the seller will transfer the property to the financial institution such that consent is obtained only once.

This paper seeks to examine the extent to which the drafters of MPL envisaged the possible deleterious effect of the consent provisions on the attainment of the objectives of the Law. The paper discusses the inconsistent treatment of various levels of transfer of interests in the various transaction involved and advocate a clear exemption of transaction up to a particular threshold in order to further boost the objectives of the MPL. Elsewhere, I have forcefully argued that the structure of consent fee stands the risk of being successfully challenged and urged people to test the validity in the court of law.⁷

The remainder of the paper is divided into 6 parts. Part two discusses the theoretical basis and evolution of consent requirement in Nigeria while part three examines the current structure of consent fee in Lagos State. Parts four and five briefly examine the objective of the MPL and the structuring of asset-backed finance to effectuate the objective of the law. Part six highlights a number of major policy, legal and administrative issues arising from the divergence between the operation of the consent provisions of the LUA and the attainment of the objectives of the MPL. The paper is concluded in part seven.

2.0 THEORETICAL BASIS & EVOLUTION OF CONSENT

Generally, the owner of a property should be able to alienate his property without the consent of anyone. In the theoretical and pristine form, ownership connotes an infinite and absolute right in land. It has been defined as the totality or the bundle of rights of a person over and above every other person or thing.⁸ Ownership not only connotes right to possession mediate or immediate; it's also carries with it the right to use the property in any lawful way. Because the right to property is absolute in the sense that it is unconditional and not subject to the right of any person, the owner can dispose of it or give it away conditionally or unconditionally and may destroy same without legal consequences.⁹

Every legal system designs for itself the incidents of ownership. Foreexample, the concept of ownership in modern English law has an allodial character.

The allodial ownership of land in England is vested in the Crown and, in the result, a subject can have no more than a right to occupy and use land for a period of time which may be finite or infinite. The right to occupy and use land is by the complementary doctrine of estate, transformed into ownership with all the incidents of that concept. Thus, while in English law a subject can own an estate in land, he cannot own the physical land.¹⁰

⁷ See Sanni, A.O., "Taxation in the Guise of Administrative Charges - Imperative of Curbing Abuses of Regulatory Power for Revenue Purposes in Nigeria", Faculty of Law, UNILAG, Current Law Series, 2006, Vol 1, pp.1-41.

⁸ See Pollock, Jurisprudence and Legal Essays, London 1961; cited by Smith, p.42

⁹ Smith, I.O. *Practical Approach to Law of Real Property in Nigeria*, Revised Edition, (Lagos: Ecowatch Publication Ltd, 2013)pp.42-47.

¹⁰ *Ibid*, 43-44.

In Nigeria, before the LUA, there were at least four sources of ownership of land, namely communal, family, individual and state ownership respectively.¹¹The system of communal and family ownership of land combines individual/family rights to land with group oversight and rules to keep land within the group. It has mixed regimes, comprising variable bundles of individual, family, sub-group and large group rights and duties which are distinct from 'Western-legal' forms of private property, which are much more exclusive.¹²

Smith has rightly submitted that individual ownership precedes family ownership and the latter cannot exist independent of the former.¹³According to the learned writer, the fact that a Plaintiff in an action for declaration of title to land is expected to trace his right back to a point in time when his ancestor came to own and possess the property which eventually passed, lends credence to the existence of that source of ownership under the indigenous system of landholding.¹⁴

Outside customary law, individual ownership may evolve where a person acquires *inter vivos*, a legal or equitable interest in land for himself and in his own name (as it is the case under MPL), or where he owns a portion of the partitioned family land vested in him by a Deed of Partition, or where by a Deed of Assent, he becomes a legal or beneficial owner of his own devise from the deceased estate, or where he holds an actual grant made by the Governor under section 5(1) of the LUA.¹⁵

State ownership of land in Nigeria dates back to the Treaty of Cession of 1861 under which the colony of Lagos was ceded to the British Crown subject to the customary rights of the local people. The need to acquire land for agricultural and industrial development led to the promulgation of different land acquisition statute under which individual and communal land rights were compulsorily acquired in different parts of the country.

These parcels of land formed the subject of control and management by the various State Land Laws.¹⁶

With the introduction of the LUA, ownership structure in Nigeria has been radically transformed.¹⁷The radical title in all lands comprised in every state became vested in the Governor as a trustee for all Nigerians and the erstwhile absolute owners of rights and interests in the land retained a limited right, which he can no longer alienate or dispose as he wishes contrary to the contents of ownership.¹⁸

¹¹ *Ibid*, 44.

¹² Ben Cousins "Communal tenure reform: potential and pitfalls" Institute for Poverty, Land and Agrarian Studies World Bank conference on 'Land Governance in support of the MDGs' March 2009. Available online at https://www.fig.net/pub/fig_wb_2009/papers/trntrn_1_cousins_ppt.pdf

¹³ Smith, I.O, *Supra* note 9, p.45.

¹⁴ *Ibid*

¹⁵ *Ibid*

¹⁶ *Ibid*, p.46

¹⁷ Smith, 46.

¹⁸ Onuoha, R, "Governor's Consent Under Section 22 of the Land Use Act: the Position since Savannah Bank v Ajilo" in *The Land Use Act Twenty Five Years After* (ed.), Smith I.O., (Lagos: Department of Private & Property Law, Faculty of Law, UNILAG, 2003) pp 198-9

While the underlying philosophy of the consent provisions are not clearly articulated by the LUA, writers have attempted to articulate the rational basis. According to Onuoha, "the basis for its justification dates back to the customary jurisprudence of (1) consent of the family head before alienation of family property and (2) consent of the landlord in a leasehold relationship before the transfer of interest by the tenant where there is a covenant to that effect.¹⁹ While Onuoha had rightly alluded to instances where the consent of the owner is required before alienation, the learned writer had not really provided any particular rational basis for the consent provisions in the LUA. If we go by the instances cited by the learned writer, it will be clear that the dominant reason of consent is not revenue generation as no payment of money was and is still required for alienation in the instances referred to. For example, as a matter of tradition, a transferee is not required to make any payment of money as a condition for the consent to be granted by the head of the family or the lessor. At best, the transferee may give some form of traditional gift *ex-post facto* and not before the transaction.

Adeoye & Ogunniran on their part advanced four theories to explain the consent provisions viz: (i) the unearned increment or betterment theory, the land use control and planning policy, revenue-generation policy and control of land speculation policy.²⁰

The unearned increment or betterment theory posits that land value is normally enhanced by the infrastructural developments and amenities such as road, water, electricity, etc provided by the state, with little or no assistance from the acclaimed land owners.²¹ Since the public was partly responsible for the creation of unearned increment in the land value, the landowner should be compelled to share that increase. Thus, the implementation machinery for consent provisions is justified because it affords the state to realise, for the benefit of the nation, the betterment or unearned increment in land value.²²

The protagonists²³ of land use control and planning theory have justified the consent provisions on the premise that it may be used indirectly to control the use of land and promote planning. It is argued that the Governor, in considering application for consent to alienate or dispose land may take into account the "person" and purpose for which the land is required before deciding whether to give or withhold his assent.²⁴

Perhaps, the most frequently sought justification for the consent provisions are that it serves as a revenue avenue for the State. It is argued that it is the only opportunity opened to government to collect all outstanding payments due to it whether by way of ground rent, tenement rate, stamp duties

¹⁹ Ibid, p.199

²⁰ Adeoye&Ogunniran, *Supra* note 4, pp.78-80.

²¹ See James, R.W. Nigeria Land Use Act: Policies & Principles, University of Ife Press, 1987, p.62, Sonoiki, O., "Land Value and the Question of Compensation for Land: the Land Use Act, 1878, Report of a National Workshop, pp.43-44.

²² Adeoye&Ogunniran, *Supra* note 4, pp.81.

²³ Utuama, A.A., *Supra* note 5

²⁴ Adeoye&Ogunniran, *Supra* note 4, p. 79.

and income tax.²⁵ Adeoye & Ogunniran who described as "revenue generation consent" were particularly critical of this policy in the following words:

As a result of this, many states, especially Lagos State, have tied revenue generation consent to land transactions thereby compelling the applicants for consent to pay various sums of money masquerading as "consent fee". Apart from the desirability of this practice which is questionable, it is our respective opinion that the legality of the prescribed fee is seriously doubtful.

While I share the above view of the learned writers that the legality of the revenue generating consent may be successfully challenged, they have failed to provide the rational basis for their forward looking position. Elsewhere, I attempted to fill the gap in this paper by submitting that revenue generating consent may be challenged on the basis of being a disguised tax and abuse of regulatory power.²⁶

Another argument being frequently proffered in support of the consent provisions is that it strengthens the control of the State Government over land and thereby prevent land accumulation and discourage land speculation.²⁷

The four theories discussed by Adeoye & Ogunniran overlap. There is correlation between the Unearned Increment Theory and Revenue Generation Theory to the extent that they both focus on the transfer of part of the gains accruing to the owner from the transaction to the state for public good. Furthermore, there seems to be an overlap between the Land Use Theory and Planning Policy and Control of Land Speculation Policy to the extent that they focus on the power of the state to control the ownership, use, and management of the land which to my mind is the overall policy underpinning of the consent requirement. The claim that that consent requirement aims at discouraging land speculation appears to be far-fetched, as there are more direct provisions in the LUA to achieve that objective.

While, the basis for the State to share in the revenue accruing to the transferor is sound, the profits or gains accruing to the transferor are taxable under the relevant tax statute such as Capital Gains Tax Act, Personal Income Tax Act or Companies Income Tax Act as the case may be. The question is whether another "tax" should be exerted under the guise of administrative charges at the point of obtaining consent, thus subjecting the transferor to double taxation. It is my position that the regime of taxation of income or capital gains should not be confused with the administrative action of granting consent to a transaction.

3.0 THE STRUCTURE OF CONSENT FEE

The LUA is a revolutionary piece of legislation that attempted to sweep away virtually all the traditional and common law interests in land and replace them with a "right of occupancy." The Act vests all land comprising the territory of each State in the Governor of that State in trust for the use and common

²⁵ Kasumu, A.B., "The Question of Consent to Alienation - Effect on Development in the land Use Act": *Reports of a National Workshop*, Omotola, J.A. (ed.) p.93., p.100.

²⁶ See Sanni, A.O., *Supra note 7*.

²⁷ Adeoye&Ogunniran, *Supra note 4*, p 81.

benefit of all Nigerians. The powers of control and management of land vested in the Governor includes granting statutory right of occupancy, easements, power to demand and revise rent for any land granted and power to impose penal rent. The statutory right of occupancy granted under the Act is for a definite term and subject to the terms imposed by the Governor. In effect, the Act places restrictions before a landowner can exercise his right of ownership. For instance, a landowner must now obtain the consent of the Governor before he/she could alienate his/her right of occupancy or any right thereof by assignment, mortgage, transfer of possession, sublease." otherwise the transaction will be void.

The consent fee varies from State to State but follows the same pattern of being based on the capital value of the property in respect of which an application is made. Until recently, the overall fee payable on application for the consent in Lagos State was about 30% of the capital value. The processing of the Governor's consent has been widely criticised as being protracted, expensive, cumbersome and stressful.²⁸ In an effort to address the problems, the Lagos State Government was constrained to review and streamline the procedure for processing Governor's consent under a procedure tagged "30- Day Consent", with effect from 11 August, 2005. One of the key features of the guidelines is the reduction of the overall fees from 30% to 15% of the capital value of the property, the breakdown of which is as follows: Consent fee 8%, Capital Gains Tax 2%, Stamp Duties 2%, Registration 3%, Mortgage transaction 0.20%.

While the effort of the Lagos State Government in streamlining the consent procedure is salutary, it is doubtful if it is far-reaching enough to address the problem of cost. This is because the consent is still based on the capital value which brings us to the consideration of the question whether it is appropriate for the application for consent should be based on capital value of the property when the role of the government was basically to review the application and verify ownership. Commenting on the quantum of consent fee, James has this to say:

A consent fee of 15% of the annual rental value of the property is at least a fee in the nature of a fine. It is unrelated to the cost of services rendered to examine and approve the transactions ...

"29

With due respect, James missed the point by characterising the consent fee as a fine. Rather, the fee is better characterised as a disguised tax. A fine is money that is paid as an official punishment for violation of a rule or breach of law. That being the case, it is inappropriate to describe the consent fee as a fine. The LUA contains clear provisions on fines and only the money payment imposed on applicants pursuant to those specific provisions can be appropriately described as fines.

A community reading of the provisions of the LUA would reveal that consent requirement is mainly for regulatory purpose and not revenue purpose. It is submitted that there is nothing so fundamental about

²⁸ See the acknowledgement in a publication titled "Inauguration of Government's Policy on the New Procedure for Obtaining Governor's Consent - 30-Day Consent" by Lands Bureau, Lagos State. Note: The Lagos State Governor, Babatunde Raji Fashola recently issued an Executive Order EQ/BRFOOI of 2015 reducing cost of land transaction in Lagos as follows: consent fee: 1.5%, Capital Gains Tax:0.5% Stamp Duties:0.5%, Registration Fee:0.5%.

²⁹ James, R.W., *Supra*, note 21.

the nature and procedure for processing application for consent to warrant basing the application fee on the capital value. The major procedure is the inspection of the property to take account of improvement on land. It is even arguable that the need for a physical inspection of a property is now less significant because the Land Bureau has its own valuation based on geographical location and type of property which will be ultimately be used as the basis of assessment irrespective of the actual value.

Furthermore, if the Capital Gains Tax (which is the major tax applicable) is imposed at the rate of 2%, there can hardly be any rational basis why a consent fee, which is supposed to be a mere administrative charge, should attract a rate of 8% of the capital value. If the Governor desires to increase revenue from land within its territory in this regard, it should have done so by increasing either the Tenement Rate/Land Use Charge, or ensure that the Capital Gains Tax rate is increased by the National Assembly.

A registration fee of 3% of the capital value is equally remarkable. Registration is the act of making an official record or details about someone or something in an official list. The importance of keeping official records of companies, residents, births, deaths or vehicles in a particular community cannot be over emphasised. They provide or should provide reliable data or information for public and private uses such as planning, monitoring of activities, tracing and identification, etc. However, such a fee should be a flat rate since the process of registering two properties valued at N1,000,000,000 (One billion naira only) and N500,000.00 (Five hundred thousand naira only) respectively is basically the same. There is no reason in my view why the owner of the property valued at N 1,000,000,000.00 should be made to pay a disproportionate higher registration fee than the owner of the property worth N500,000.00. It is comparable to charging a differential fee for issuing birth certificates for babies based on the weight of each baby. Whereas, whatever may be the weight of a baby, the cost of producing a birth certificate and the rational basis for keeping official record of births are the same. The privilege of having one's property registered ought not to be based on value. Since certain owners of properties are charged differential registration fees for the same services in circumstances where some are charged higher, it is submitted that the registration fee charged as a component of the consent fee is equally a disguised tax and an abuse of regulatory power mainly for revenue purposes.

If the cost and administrative process of obtaining consent had been in tandem with the spirit and letters of the LUA for regulatory rather than revenue purpose, most of the properties across the States in Nigeria would have possibly processed their certificates of occupancies in the Land Registry Offices of their respective States. The socio-economic importance of having official records of ownership of land and how they are transferred cannot be overemphasised. It will minimize fraudulent transactions relating to land and also facilitate access to facilities from banks and other financial institutions, as more people will have title documents in respect of their properties. We must sincerely be concerned why the aforementioned objective is still far from being achieved almost three decades after the enactment of the LUA.

4.0. OVERVIEW & OBJECTIVE OF THE MPL

The long title of the MPL declared the objectives as to "encourage the growth of mortgages in real property and for the regulation of consumer loans for acquisition of property and realisation of

securities and for other connected purposes." Section 2 establishes a Board and vests it with far reaching powers. The Board is the engine room of the policy formulation and implementation on MPL. Apparently being mindful of the cost of perfecting of mortgage, especially on the less privilege, section 12 vests the Board with power to ameliorate the cost of stamp duties, charges and fees payable to the Registrar of Title:

The Board, in promoting affordable housing for the less privileged citizens, may use its best endeavours to promote concessions, deferred payments or instalmental payments of duties payable to the Commissioners of Stamp Duties with respect to the stamping of mortgage or charges and fees payable to the Registrar of Titles in respect of the registration of same at the Land Registry

The word "concession" above is wide enough to include waiver of the types of payment referred to in the provisions. For inexplicable reason however, the payment does not include consent fee which is the highest monetary burden on perfection of mortgage transactions in the State. Therefore, strictly speaking, the Board is bereft of any power to reduce or waive the consent fee. In other words, there is nothing in the MPL that seeks to reduce the financial burden occasioned by the amount payable as consent fees on parties to a mortgage transaction in Lagos State. For over 4 years after the enactment of MPL,³⁰the Board, to my knowledge, is yet to make public any of arrangement to effectuate any concession, deferred payment or instalment payment. Therefore, the Board is hereby called upon to leverage on the provisions of section 12 MPL to ameliorate the current financial burden on the mortgagors. In the long run, appropriate recommendation should be made for the provisions to be expanded to include consent fee.

5.0. STRUCTURING OF ASSET BACKED FINANCE TO EFFECTUATE THE OBJECTIVE OF THE LAW

The objective here is to describe what is being done in practice to obviate the requirement of consent. Generally, a mortgage-financed transaction should involve three layers of transfer of interests in property, which should trigger consent requirement. The first stage of the transaction is the agreement between a property owner and a prospective buyer. It is well-established that an agreement to alienate interest in land alone does not violate the consent provisions of the LUA. However, the agreement creates an equitable interest in favour of the buyer. For the buyer to have a legal interest, conveyance will have to be executed subject to the consent of the Governor being granted. Failure to obtain the Governor's consent renders the transaction void. But since a finance institution will provide the finance, it is unrealistic to expect the seller to execute a conveyance in favour of the buyer. This is because until the seller receives the consideration for the property he/she is not obliged to alienate his interest in the property. Thus once the financial institution is ready and willing to either partly or fully provide the purchase price the usual practice is to execute a tripartite agreement between the buyer, seller and the finance institution whereby the seller transfers the property to the financial institution while the financial institution will later transfer the property to the buyer upon the full satisfaction of the debt.

³⁰ The Law commenced on 23rd August, 2010

The finance institution may be at the horns of dilemma when the tripartite mortgage is presented for assessment preparatory to obtaining Governor's consent. The officer in charge may, and will invariably, raise the point that the documents encompasses, in substance, two transactions, first a sale to the buyers which then enables him/her to undertake the second transaction which involves the mortgage of the property to the finance house. To a large extent, there is logic in the reasoning or approach of the officer except that it is usually contrived to make party seeking to obtain the Governor's consent to part with something. Where the party refuses to cooperate, the transaction may hit a brick wall except the party is prepared to pay consent fee twice. In majority of cases, the party is likely to cooperate with the officer by offering some gratifications which may be modest compared to the amount of money the party would have been forced to part with.

Thus, the officer is able to enrich himself at the expense of the state.

The third transfer is when the financial institution re-conveys the legal interest in the property to the Mortgagor upon the liquidation of the mortgage debt. Section 22(1)(b) of the Land Use Act expressly exempts a re- conveyance by the mortgagee to the mortgagor upon faster the discharge of the loan obligation from the requirement of consent.

6.0. POLICY, LEGAL AND ADMINISTRATIVE ISSUES ARISING

Having set out the structure to obviate triple consent in law and practice, it is necessary to examine the policy, legal and administrative issues arising. A policy is a set of ideas or plan that is used as a basis of making decisions, especially in government, business, organisation or even private lives. A policy serves as useful guide or barometer in determining what legislative and administrative action government mayor may not take. If tax policies are inconsistent or weak, it is certain that the entire system would be dysfunctional. It appears that the policy underpinning of the consent provisions has not been well articulated in view of the divergence in the analysis of writers. James described it as a fine while I characterised it as a disguised tax. There is therefore the need to properly characterise the nature of the fee in order to prevent the prevalent abuse.

There is the need to interrogate the legal basis of differential rates and divergent approaches of States on the subject matter. Section 46 (1)(a) vests the power to make regulation on the National Council of State thus:

(1) The National Council of States may make regulations for the purpose of carrying this Act into effect and particularly with regard to the following matters-

(a) the transfer by assignment or otherwise howsoever of any rights of occupancy, whether statutory or customary, including the conditions applicable to the transfer of such rights to persons who are not Nigerians;

Section 46(2) however goes further to confer certain powers on the Governor thus:

(2) The Governor may, subject to subsection (1) of this section, make regulations with regard to the following matters-

- (a) the method of application for any licence or permit and the terms and conditions under which licences may be granted;
- (b) the procedure to be observed in revising rents;
- (c) the fees to be paid for any matter or thing done under this Act;
- (d) the forms to be used for any document or purpose.

In view of the express power granted to the National Council of State to make regulations on for the purpose of carrying into effect the transfer by assignment or otherwise howsoever of any rights of occupancy, whether statutory or customary, the logical question to ask is whether the National Council of State had made any regulation in this regard. To my knowledge, the answer is in the negative. Since nature abhors vacuum, the State Governors have "proactively" filled the gap. While the power of the Governor is subject to any regulation that may be made by the National Council of State, in the absence of any such regulation by the National Council of State, the Governor can then arguably exercise limitless power in prescribing conditions and fees for carrying into effect any assignment of right under the LUA. Accordingly, perhaps the most effective way to curb the abuse of regulatory power in this regard by the states is for the National Council of States to make an appropriate regulation that would focus more on regulation than revenue generation.

We have seen that section 22(1)(b) LUA expressly exempts a re-conveyance of an interest in a mortgage property by the Mortgagee to the Mortgagor upon the full payment of the loan. What could be the basis of this exemption? Can it be said that the law is favourable to the Mortgagee who should have borne the cost? Although the cost, if required, should have been borne by the Mortgagee, but in practice, the likelihood is that it will be pushed to the Mortgagor and further increase his financial exposure.

Nevertheless, section 22(1)(b) LUA is remarkable in the sense that the Governor, who is a trustee of the entire land within his territory and should be interested in when and how the legal estate on each land lies for proper management strategy, is theoretically not aware if and when the property is re-conveyed to the Mortgagor. It would appear that the exemption of this transaction from the requirement of consent can only be justified because it will be patently unreasonable and draconian to expect the parties to incur the exorbitant cost of consent twice or more.

From administrative perspective, it is worrisome that application for consent is protracted due to multi-layer bureaucratic procedure, This is the antithesis of the view of Western economists that that freedom and ease of transfer are absolutely vital to ensure that land gets into the hands of those best capable of developing and making the best use of it.³¹ The administrative procedure for obtaining consent may unwittingly be defeating the overall objective of facilitating access to land. According to Adeoye & Ogunniran:³²

³¹ Adeoye&Ogunniran, *Supra* note 4, p.80.

³² *Ibid*

The administration of the Act in the past twelve years has completely betrayed this lofty ideal. The implementation of the consent provisions in particular, has placed severe bottlenecks in the path of those willing to acquire or transfer land for industrial or commercial purpose. We cannot but agree with Nnamani JSC when he recently observed as follows:

Aspect of the Act which have brought untold hardship include the provisions relating to the issue of certificate and grant of consent to alienate. Both can take years and the applicant is subjected to vagaries of bureaucratic actions which demands for survey plans, interminable fees, documents and a lot of to and froing. These cumbersome procedure have adversely affected economic and business activity and make industrial take off a matter very much is the future.

7.0. CONCLUSION

Requirement of consent as a condition for alienation of interests in land under the LUA is not peculiar as it is also required under customary law and in England in relation to Crown land. The persistent basis of criticism however that is the cost is prohibitive and the procedure tedious and time consuming despite the recent review of the process in Lagos State. It appears that the policy underpinning of the provisions have eluded the administrators at the implementation stage.

Different writers have labelled the consent fee different names such as fine and tax. I have submitted in this paper and elsewhere that the structure of consent fee in most States in Nigeria, especially Lagos State, is best described as a 'disguise tax' to the extent that the amount being charged has no reasonable bearing to the level of benefits being conferred on the payer. If we take appropriate account of the historical evolution of the consent provisions in Nigeria, the dominant rational basis would be regulatory/administrative purposes. A proper historical account of the practice of charging exorbitant consent fee did not begin until the Second Republic when state governments were seeking to aggressively increase their internally generated revenue. Little wonder that there was no literature before then criticising consent fee on account of escalating cost. This is not because the States were not charging for their administrative services but because the costs were minimal or reasonable.

In the light of the relatively heavy burden of consent fee, astute transactional attorney, commercial men and women have devised different arrangements of "avoiding" the disguised tax through a tripartite agreement which will require only a single consent instead of three. While, this arrangement may meet the requirement of those who can afford it, the cost in terms of finance and time of concluding an application for consent will constitute a stumbling block in the path of preponderant majority of average Nigerians who may want to access the mortgage finance under the MPL. Also, the Board under the MPL is hereby called upon to leverage on the provisions of section 12 to ameliorate the current financial burden on the Mortgagors.

In the long run, appropriate recommendation should be made for the provisions to be expanded to include consent fee. The Board should however be mindful of the limit of the taxing power of the State and resist any temptation to go as far as Stamp Duties and Capital Gains Tax which are within the

legislative competence of the Federal Government. It is hoped that "stamp duties" should be deleted from the provisions of section 12 MPL whenever an opportunity comes for an amendment of the Law.

The root cause seems to be the absence of a regulation by the National Council of State on the procedure for the implementation of the consent requirement. If the National Council of State had exercised its power under section 46(1)(a)LUA, there would have been a uniform regulation throughout Nigeria compared to what presently obtains where different States have different rules. As an advocate of fiscal federalism, I recognise the need for decentralisation of administrative matters of this nature, but in the face of gross abuse of power by different states, it might be better for the National Council of States to come out with a regulation which will streamline the terms and procedure for obtaining Governor's consent in line with the objective of the LUA which States could then improve upon under their own regulations. In doing so, there should be a thorough research on the leading practice in the jurisprudence of other countries.

This approach may significantly pave way for the realisation of the objective(s) ofMPL and facilitate access to land in general.