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Legal Alert ? July 2013 ? Mortgage and Property Law of Lagos State

What is a Mortgage?

A Mortgage is described by the Lagos State Mortgage and Property Law to be the transfer of any interest in a specific movable or immovable property, for the purpose of securing the repayment of a loan against an existing or future debt, or the performance of an engagement which may give rise to pecuniary liability.

A Mortgage also includes any charge or lien on any property for securing the repayment of money or money's worth.

Lagos State Mortgage Board

The Lagos State Mortgage and Property Law established the Lagos State Mortgage Board ("the Mortgage Board") to principally generate a conducive environment for accessible and affordable Mortgages or credit facilities for the benefit of the citizens of Lagos State, so that more of these citizens can acquire their own homes.

It is also the statutory function of this Board to advise the Executive Governor of Lagos State with regard to the funding, administration and structure of the State's Mortgage Finance Program or policy for the benefit of all the residents of Lagos State.

The Mortgage Board is further charged to make regulations which protect the residents of Lagos State from any unconscionable business practices or unfair terms that may be imposed by Mortgage lenders, providers, brokers and all such other persons holding themselves out as offering Mortgage facilities and services in Lagos State.

The Mortgage Board is also charged to mediate and arbitrate on any dispute which may arise from Mortgage transactions covered under the Mortgage and Property Law.

The activities of the Mortgage Board must not however be in direct or indirect competition with the activities undertaken by registered Mortgage lenders, Mortgage brokers or real estate developers.

The Mortgage Board is also statutorily required to promote the culture of concessions, deferred payments or instalmental payment of stamp duties and land title registration fees, with respect to the stamping of Mortgages and the registration fees payable to the Commissioner of Stamp Duties and the Registrar of Titles respectively.

Modes of Creating Legal Mortgages

Significantly, with the enactment of the Mortgage and Property Law, the provisions of the Conveyancing Act, 1881 no longer have any application or effect to mortgage transactions in Lagos State.

Generally, a Mortgage is created either by the temporary passing of the title to a property to a lender for a term of years, with the Mortgagor/Borrower's right of redeeming or repaying the loan; or by the execution of a Deed of Legal Mortgage.

A Mortgage of a leasehold is also created in the manner above described save that the term of years charged shall be at least less by One (1) day and subject to the provision for redemption or repayment of the loan.

Equitable Mortgages

Under the Lagos State Mortgage and Property Law, an Equitable Mortgage of a right of occupancy cannot be created by a mere deposit of the title deed or charge on a property except the deposit of the title deed is accompanied by an agreement to create a Legal Mortgage in favour of the Mortgagee/Lender.

Where the deposit of a title deed is accompanied by an agreement to create a legal mortgage, and such a legal mortgage is not executed, the Mortgagee may within thirty (30) days commence legal proceedings to compel the Borrower or Mortgagor to execute a legal mortgage in the Mortgagee's favour and thereafter exercise the powers of a mortgagee as conferred under the Mortgage and Property Law.

Realisation of Right of Occupancy

A Mortgagee ? i.e. the securer of the loan on a landed property - has, subject to the express terms of the Mortgage Agreement which must be registered with the Governor's consent affixed, the express power to sell the Mortgaged property where the Mortgagor or Borrower defaults in fulfilling the Mortgage repayment terms and conditions.

Subject to no prior superior charge, a valid legal title will thereon vest on the purchaser of the Mortgagee's legal entity where the conditions described in the above paragraph are fulfilled by the Mortgagee.

Realisation of Equitable Mortgage

A Mortgagee and a Purchaser of an equitable interest in land can by filing an Originating Summons in Court, obtain a vesting Court Order conveying the Mortgaged property to the Purchaser, or may appoint a person to so convey the equitable interest in land to the Purchaser. This and other similar provisions apply to Equitable Mortgages made or arising before or after the

commencement of the Mortgage and Property Law.

Other Mortgagor & Mortgagee Rights

THE RIGHT TO SUE. Where a Mortgagor or Borrower binds himself to repay a Mortgage loan, or the Mortgaged property is insufficient to liquidate the Mortgage loan, or the Mortgaged property is wholly or partly destroyed and the Mortgagor or Borrower is unable to provide such further additional security for the facility provided, the Mortgagee or Lender will automatically have the right to sue the Mortgagor for the repayment of the Mortgage loan, with the interest accruing thereof. The Courts are enjoined to have such proceedings heard and determined expeditiously.

INJUNCTIVE RELIEF. A Mortgagor has the right to apply for an injunctive relief against the Mortgagee exercising any of the mortgagee's rights. The Courts are however required to obtain from the Mortgagor, as a condition precedent to such an injunctive relief being granted, the deposit of any outstanding unpaid balance of the principal loan into an interest yielding account, in the name of the Registrar of the High Court, to abide the final decision of the Court.

MEDIATION AND ARBITRATION. With the consent of both the Mortgagor and the Mortgagee, a Court of Law is also authorised to refer all or a part of a mortgage dispute to the Mortgage Board for mediation or arbitration. The decision of the Mortgage Board, on such judicial referral, shall be entered as the judgement of the Court which shall be binding and effectual as if such decision(s) was given by a Court of Law.

Other Significant Mortgage Provisions

Other provisions of the Lagos State Mortgage and Property Law, worthy of special mention, include:-

A. Provided there is no contrary provision in the Mortgage Deed, the Mortgagor has a right to redeem any one mortgage at a time, without necessarily redeeming other Mortgages on the same property at the same time as the one that he intends to redeem.

B. The Mortgagee's right to formally consolidate two or more Mortgages is not inhibited by the Mortgagor's legal right to redeem his mortgages one after the other.

C. Subject to the Mortgagee not being in possession of the mortgaged property, a Mortgagor is entitled to assign the mortgage debt and the mortgaged property to a third party.

D. The Mortgagor's right to make copies or abstracts of the documents relating to the title of a

mortgage property. Related costs and expenses for this service are required to be borne by the Mortgagor.

E. Every Mortgage affecting a legal interest in land, and entered into after the commencement of the Mortgage and Property Law, shall rank in order of priorities, according to its date of registration under the Registration of Titles Law.

Statutory Powers of a Mortgagee

Subject to the express provisions in a Mortgage Deed, the following powers are deemed to be incidental to the general powers of a Mortgagee:-

- i. The power to sell the Mortgage property when the Mortgage debt remains due and unpaid after prior notice has been served on the Mortgagor.
- ii. The power to insure the Mortgaged property against any loss or damage by fire or otherwise.
- iii. The power to appoint a Court approved Receiver to recover any income from the Mortgagor and or the Mortgaged property.
- iv. The power to cut and sell any arable products on the Mortgaged property.

A Mortgagee's power of sale can however only be exercised after a prior Two (2) months notice is served on the Mortgagor, for the repayment of the Mortgage loan with interest, and this prior two months notice is either ignored or the Mortgagor continues to default in repaying to the Mortgagee, the secured debt.

A Mortgagee's power of sale can also be exercised where there is a material breach of the Mortgage Agreement, or of the provisions of the Mortgage and Property Law.

A purchaser's title to a Mortgaged property shall not however be impugned on the ground that the Mortgagee did not follow due procedure in the exercise of its power of sale. The only relief open to a Mortgagor in such a situation is remedy in damages against the Mortgagee.

Registration of Mortgages

In addition to registering a Mortgage Deed under the Lagos State Registration of Titles Law, Section 53 of the Mortgage and Property Law mandatorily requires a Mortgage institution to file a copy of any Mortgage Instrument with the office of the Executive Secretary of the Mortgage Board.

Further Protection of Mortgagors

Mortgage institutions are now statutorily required to, in addition to other duties and practices imposed on the Mortgage trade, act in good faith, with reasonable skill, care, diligence and adherence to all regulatory guidelines for primary Mortgage financial institutions.

Mortgage institutions in Lagos State are also now statutorily required to prepare and distribute Information Booklets to assist prospective borrowers to better understand the nature, costs, interest rates, etc of the real estate settlement services that Mortgage institutions provide. The standard form of the Mortgage Information Booklet is required to be provided by the Mortgage Board.

Mortgagees are also now prohibited from imposing, as a pre-condition to the grant of, or the continuance of a Mortgage facility, collateral contracts of insurance, the provision of estate services or the like, on a Mortgagor or prospective Mortgagor.

Penalties for Contravention

Any contract of Mortgage that does not comply with the provisions of the Lagos State Mortgage and Property Law shall not be enforced by any Court of Law in Lagos State.

The penalties for contravening the provisions on the registration of Mortgage Deeds with the Mortgage Board, Mortgagees' unethical business practices including the non-circulation of sufficient Mortgage information and booklets amongst other things, attracts fines not exceeding Five Hundred Thousand Naira (N500,000) or a term of imprisonment of not more than One (1) year or both the fine and term of imprisonment, or to any non-custodial sentence provided under any Law.

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