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LAGOS STATE PROPERTIES PROTECTION LAW – A NEW ERA FOR PROPERTY TRANSACTIONS

Generally, the Land Use Act (1978) specifically vests the ownership of all lands in Nigeria in the Governor of the respective states. The same Act also requires that any person who wants to alienate or transfer his land must obtain Governor's consent to make the transaction valid in accordance with the Land Use Act. Notwithstanding the foregoing, the purchase or transfer of property in Lagos state has been greatly hindered by the activities of Land grabbers, otherwise known as the Omo Onile.

The practice of land grabbing entails the use of force, threats or violence to take possession or prevent a purchaser from acquiring legitimate interest and possession of property unless certain conditions are fulfilled. The said conditions are usually in the form of excessive levies or fines. Failure to adhere to the demands of the land grabbers in most cases result to the destruction any development on the land, or prevention of the land owner from taking possession.

In a bid to curb the unscrupulous activities of the Land grabbers in Lagos State, the Lagos State government recently signed into Law, a Law to prohibit forceful entry and illegal occupation of landed properties, as well as violent and fraudulent conducts in relation to landed properties in Lagos State. This new Law, known as the *Lagos State Property Protection Law 2016* protects the proprietary rights of Land and Property owners in Lagos State and also criminalizes actions of forceful and unlawful entry or occupation of premises. Some of the key provisions the widely applauded Law are provided below:

Section 2 of the Law prohibits the use of force, threats or self-help to take over any landed property, or engage in any act inconsistent with the proprietary right of the owner. Additionally, persons who have used force to take over the property of another and remains in possession after the commencement of the Law shall be held to have committed an offence and liable to ten (10) years imprisonment.

Under *Section 3* any person who without lawful authority, for himself or another, uses or threatens violence for the purpose of securing entry into any landed property commits an offence, notwithstanding whether the person using or threatening the use of force has a right over that property. Any offender under this section is liable to imprisonment for a term of 10 (ten) years.

Section 4 provides that any person who occupies a property as an encroacher and fails to leave the property upon a request by the owner, commits an offence punishable upon conviction with a fine not exceeding five million Naira or 5 (five) years' imprisonment, or both. More importantly, *Section 8* criminalizes any offer by any person to sell a property for which he has no lawful title or the requisite authority to sell. The same section also prohibits the sale or offer for sale of land that has been previously sold, without a court judgment repudiating the earlier sale. Any person found guilty of this offence is liable to pay a fine prescribed under the Law, or imprisonment or both, and the property resold to another shall revert to the lawful

owner. Additionally, this section prohibits the sale of family land without the consent of the family head and other accredited members of the family; and the sale of government land or property without the consent or authority of the State.

Whilst the above represents only a fraction of the Law, it is important to note that this Law applies to the whole of Lagos State, unlike most Lagos State Property Laws limited to specific parts of the State.

The *Lagos State Property Protection Law* has been widely applauded as it has the potential to boost property transactions in Lagos State. However, it is pertinent to state that the essence of this Law will be defeated if the Lagos state government fails to proactively enforce it. An example that comes to mind is the *Lagos Tenancy Law* of 2011 which, amongst other things, prohibits landlords from demanding from a new or sitting tenant rent in excess of one year. Till date, the said Tenancy



Law is openly and widely flouted and there has not been any reported case of prosecution and conviction of offenders under the Law. That said, in view of the promising nature of this Law, efforts must be made to ensure that the Law is enforced, the offenders are duly

prosecuted, as this will greatly encourage real estate investment in Nigeria.

An article by the firm's Real Estate Group, editors of Real Estate Watch, an E-Newsletter on reforms in the sector.

CONSEQUENCES OF THE TARIFF INCREASE

Introduction

Following the privatisation exercise that took place in the Nigerian power sector, investors that took over the power assets have been unable to realise a return on their investments. Many took loans from banks to finance the acquisition of these assets and their operations thereof, and have failed to meet up with their loan repayments due to a host of reasons including the adoption of a non-cost-reflective tariff.

In a bid to avert a crisis and promote commercial viability and further investment in the power sector, the NERC implemented a 45 per cent tariff increase, which came into effect on February 01, 2016. The tariff increase was however nullified by a recent decision of the Federal High Court (FHC) and has thus generated mixed reactions considering the controversial nature of the circumstances leading to the increase. Whilst organized labour has hailed the decision of the Court, others, mostly energy industry practitioners, have criticized it. Supporters of the nullification have insisted that the Nigerian Electricity Supply Industry (NESI) improve its performance before considering a tariff increase while the opponents have stated that an improved electricity supply hinges on the implementation of cost-reflective tariffs. In light of the foregoing, it becomes imperative to analyse the rationale behind the judgement of the Court with a view to understanding the possible consequences thereof.

Background to the Nullification

The suit, which was filed by Mr Toluwani Adebisi at the FHC, sought a declaration that the tariff increase was illegal, null and void having been made by the Nigerian Electricity Regulation Commission (NERC) without

following due procedure and without a corresponding improvement in electricity supply. The judge, Justice Mohammed Idris, found in favour of the plaintiff and ordered NERC to revert to the former tariff having failed to comply with the relevant provisions of the *Electricity Power Sector Reform Act (EPSRA) 2005*. The key provision in this regard being section 76(6), which states as follows –

“prior to approving a tariff methodology, the Commission shall give notice in the Official Gazette, and in one or more newspapers with wide circulation, of the proposed establishment of a tariff methodology indicating the period within which objections or representations in connection with the same may be made to the commission”.

The judge found that, of all the procedural requirements, the only one complied with was the announcement/notice given in newspapers. As a result of such a failure to comply with the relevant provisions, he described the increase as *“procedurally ultra vires, irrational, irregular and illegal”*. In addition, he restrained the NERC from further increasing the tariff unless it complies strictly with the relevant provisions.



Consequences of the Nullification

The nullification of the tariff increase could result in a crisis in the Nigerian power sector as most of the NESI stakeholders are operating at a deficit. For instance, some of the Distribution Companies had already declared force majeure even before the tariff was increased; most will be forced to completely shut down operations if the tariff remains at its present level. Consequently, such a crisis in the electricity sector will have far reaching effects; the financial institutions that financed the acquisition of the power assets during the privatisation exercise will ultimately be exposed to loan

defaults running into billions of Naira, which has the potential to destabilize the Nigerian economy at large.

Conclusion

On the face of it, it appears that the judge set aside the tariff based on what some might refer to as a 'slight' procedural omission by the NERC to give notice in the official gazette pursuant to *Section 76(6)* of the EPSRA. The rationale behind giving notice, is to invite members of the public to raise objections and make representations in connection with same should they wish to do so. However the Act does not impose an obligation on the NERC to adopt any representations made in this respect; their only obligation is to 'consider' any such representations as may be necessary or desirable. Thus one might argue that preparation and approval of tariff methodology is at the sole discretion of the NERC and as such any representations made by

industry stakeholders in this regard may not necessarily have had an effect on the tariff eventually approved.

Given the current state of the NESI, and the circumstances leading up to the tariff hike, some have criticized the decision of the Court and its failure to adopt a purposive approach in coming to its decisions. In other words the sustainability of the Nigerian Power Sector should take precedence over the procedural malpractice by the NERC. That said, it is important to reiterate the importance of rule of law. In other words, there is no justification for the NERC's failure to follow the procedural requirements for tariff increases as set out in the EPSRA.

An article by the firm's Energy & Infrastructure Group, editors of Power Today, a weekly e-publication containing updates on happenings in the energy/power sector of Nigeria on a weekly basis.

DE-RISKING LENDING THROUGH THE USE OF CREDIT DERIVATIVE INSTRUMENTS

The invention of Credit Derivate Instruments (CDI) has created a mechanism by which Banks and other credit-giving institutions are able to mitigate the risks associated with the loans they give to their customers. There has been talk of bringing this innovation to Nigeria via the use of Insurance Companies. That is, to have the Insurance Companies provide insurance to lenders against the default risk of borrowers; especially the small and medium scale business borrowers. The premise for this idea being a belief that once the credit risk is removed, the lenders would be more willing to advance loans to businesses. Thus spurring increased economic activities and ultimately, economic growth.

Essentially, a CDI allows for the transfer of credit risk without the necessity of transferring the underlying asset (i.e. bank loan). There are many ways by which this can be done. However, the instrument most commonly used is the Credit Default Swap (CDS). Under this arrangement, the lender and the insurance company enter into a contract whereby the lender pays a regular premium to the insurance company to provide cover

against the default risk of the borrower. So that, where the borrower defaults, the insurance company would pay to the lender an agreed amount of money to compensate the lender for the default.

Guarantees (personal and corporate) also produce the same type of effect as the CDI; it transfers the credit risk to the guarantor who would then be saddled with the obligation of seeking the repayment of the loan from the borrower. The difference between the two being that CDIs can, potentially, be easier to obtain than a guarantee; there being no need for a link between the insurance company and the borrower. Also, the insurance company gets paid to provide the cover

whereas the guarantor is usually not paid to provide the guarantee (except in cases of Bank Guarantees).

Another benefit of a CDI Scheme, less talked about but no less important, is that to be derived by investors. The CDI allows an investor to make money on the default risk of a company's debt obligation without having to actually buy the underlying debt security. This is due to



Although the CDI has been criticized by many due to its ability to engender systemic risk; especially the more exotic types. The flipside of being able to transfer credit risk is that a major default by a company in one sector may have the potential of affecting unrelated institutions in other sectors of the economy. Thus making it harder to contain a financial crisis.

An article by the Capital Markets Group of Perchstone & Graeys

There is no doubt that the huge amount of data generated through the electronic systems in the ICT and Telecoms sectors (including the financial sector) creates several unique problems such as storage loss, identity theft, web attacks, unlawful and unauthorized use of personal information, etc. However, the key question is whether there are adequate legal safeguards and framework to protect customers from unauthorized use of personal information, loss of information or fraudulent use of same. Data protection laws exist to strike a balance between the rights of individuals to privacy and the ability of companies to use data for the purposes of their business.

There are however some industry specific legislations and/or regulations of general application that deal with some aspects of data protection. One such industry-specific regulation is the *Consumer Code of Practice Regulations* 2007 issued by the Nigerian Communications Commission (NCC). The Regulations provide that all licensees (i.e. the telecoms operators) must take reasonable steps to protect customer's information against "*improper or accidental disclosure*" and must ensure that such information is securely stored. It also provides that customer's information must "*not be transferred to any party except as otherwise permitted or required by other applicable laws or regulations*".

In order to protect the data of subscribers of telephone services in Nigeria, the NCC revised and amended the SIM Card Registration Regulation 2010. The amended regulation was cited as “*Regulation of Telephone Subscribers Regulation (RTS Regulation) 2011*”. It represented a wider perspective and afforded some protection of the data collected, collated, retained and managed by the telecommunication companies and independent agents

in respect of their obligations to collate and retain data of subscribers under the Regulations.

In 2013, the National Information Technology Development Agency (NITDA) published *Draft Guidelines on Data Protection (the Guidelines)*. The Guidelines were the first attempt in Nigeria at establishing a data protection framework of general application. However, since their publication, there has been no indication that the Guidelines have been fully adopted. It is interesting to note that a cursory look at the draft guidelines show that it is not more than it claims to be “draft guidelines” with little or nothing to show legislative authority or thoughtfulness.

Other attempts to fill the vacuum was the passage of the *Electronic Transaction Bill* in 2015 by the 7th National Assembly, which though contains data protection provisions of general application, falls far short of acceptable minimum standards and does not offer comprehensive data protection when compared with the *United Kingdom Data Protection Act, 1998* (DPA) and the *Protection of Personal Information Act* (POPI) enacted by the Republic of South Africa in 2013.

The relevance of a robust data protection legislation cannot be underestimated. It would bring about transparency and accountability in the way and manner the industry operators deal with individual’s sensitive data. Thus it would introduce basic rules of registration for users of data and right of access to that data for the individuals to which they are related. Furthermore, it would introduce uniformity and certainty in the

country’s data protection regime; and this has the tendency of making Nigeria a preferred investment destination in ICT. Interestingly, it would make industry operators to exercise reasonable care when dealing with subscriber’s data stored in their database and also ensure they comply at all times with the international minimum data protection standards.

In addition, the absence of a uniform/standard data protection framework may create some level of uncertainty in the procedure required to be followed before a customer’s data can be accessed by a third-party (individuals or relevant government institutions, or even foreign institutions). This is particularly so in view of the recent issues surrounding the grant of access rights without the consent of the customer. However, where a definite procedure is provided under the law and reflected in the agreements between service providers and their customers/other service provider’s, it becomes easy to either avoid the liability that may arise in such circumstance or properly apportion the risk or liability.

Finally, in light of the recent revolution in Nigeria’s ICT Sector, the time is now for Nigeria to have a single and robust Data Protection legislation so as to foster investors’ confidence in the industry. It is hoped that the policy makers and industry operators would identify this need and work in concert to propose a brand new Draft Bill on Data Protection to the National Assembly.

An article by the firm’s ICT Group.

IMPACT OF FOREIGN EXCHANGE POLICES ON FX DENOMINATED LOAN PORTFOLIOS

The fall in crude oil price in the international market, which is the main source of the nation’s foreign currency earnings, continues to exert pressure on the Naira and has prompted the Central Bank of Nigeria (CBN) to issue new Foreign Exchange (FX) policies/guidelines. The guidelines include the adoption of a single foreign exchange market structure and the introduction of derivatives such as forward and futures. Under this new regime, the exchange rate is determined by the forces of supply and demand at the close of each trading day.



Whilst many have argued that the new regime would reflect the true value of Naira against other currencies; one can safely say that it has also impacted negatively on all existing FX denominated contracts and credit facilities. This is primarily because most of the facilities denominated in other currencies especially the United States Dollars (USD) are created without provisions to mitigate the risks associated with the volatility of the exchange rate.

Consequently, Banks and their borrowing customers are now faced with the onerous tasks of meeting their obligations under

the terms of these facilities. In other words, some Banks have existing obligations to fund credit facilities albeit at a higher cost of funds and the borrowers are now constrained to bear the cost of the lending at an extremely higher cost for the remainder of the tenor of the facility. This is because where repayment is to be made in FX, the cost of funding and repaying the facility will fluctuate on a daily basis as a result of the flexibility of the current FX regime. Indeed, the situation becomes even more precarious where the borrower's repayment source is naira denominated.

On a slightly related note, a flexible foreign exchange regime will also affect the adequacy of the assets provided as security for FX denominated facilities. Ordinarily, the availability and adequacy of the asset(s) provided as security is one of the conditions for the grant of any facility. It is expected that when it becomes non performing and is eventually cancelled, the assessed and forced sale value of the asset would be sufficient for the repayment of the facility. Thus, where the collateral is valued in Naira and matched against the value of the FX denominated facility at the time of creation, the possibility that the value of the collateral would depreciate when there is a decline in the value of the Naira as against the currency of the facility becomes inevitable. In other words, the Naira value of the collateral may become insufficient for the purposes of securing the borrower's continued indebtedness to the Bank under such facilities.

The questions that now beg answers are, what could have been done differently at the time of creating these facilities and what can be done to reduce the impact of the current flexibility in the FX market? First, perhaps the inclusion of clauses that anticipate a fluctuation in the exchange rates such as currency indemnity clauses, may have mitigated the risk. With this clause, the Bank would have created an obligation for the borrower to indemnify it for any difference in the value of the facility arising as a result of the fluctuation in the exchange rate. Second, to the extent there is no such provision and the facilities are now where they are, expensive and onerous to service by the Bank and the borrower, banks should consider restructuring the terms of these facilities so that this clause and others that will mitigate the effect of the risks that have now arisen. In fact, the Banks will also do well to request for additional security in case of devaluation of the assets or explore more ingenious means of creating security interests to protect their interests during these interesting times.

Without a doubt, the more pertinent issue remains the continued stability of the financial system in spite of the current state of the economy. Hence, one would expect Banks to do all that is reasonable fair to ensure the performance of their loan assets and Borrowers will find a more affordable approach to meeting their obligations under any facility.

An article by the Firm's Banking & Finance Group, editors of the Banking & Finance Nuggets.

AN INTRODUCTION TO OFFSHORE TRUSTS

An Offshore Trust is a legal entity created by an individual (*the "settlor"*) in another jurisdiction other than his or her country of domicile, whereby all his assets are transferred to another individual or company (*the "Trustee"*), who holds and manages the assets for the benefit of either the settlor, or any other nominated persons (the "*Beneficiaries*").

Offshore trusts are typically governed by the laws of the Offshore jurisdiction which provide the frame-work for the terms of the trust deed or instrument.

An offshore trust is usually used to protect the trust assets from

onshore creditors and claimants and disinherited family members which ultimately preserves the assets for future generations.

Uses of Offshore Trust

➤ Estate and Succession planning

An offshore trust can be used by the settlor to efficiently transfer his assets to his beneficiaries according to his will. It lacks the common issues that may be faced with a will such as the validity of the will, the possibility of the will being



contested and even the possibility of the courts to interfere with the original wishes of the testator.

➤ Confidentiality and flexibility

The use of offshore trust helps to maintain a quiet devolution of the settlor's assets to its beneficiary. This is because most offshore trust are not publicly registered. Unlike the use of a Will which is subject to the public process of Probate.

➤ Tax Planning

Assets placed in an offshore trust are not subject to estate or inheritance tax and duties because they do not form part of the settlor's estate. They are therefore free from claims from creditors and other government imposed levies such as the Capital Gains Tax.

➤ Ease of Administration

A settlor can place all his assets dispersed all over the world in a centralised structure for management. This is also critical to avoid the complicated probate processes in the different countries or jurisdictions where the settlor's assets are located.

Despite the various benefits of an offshore trust, the settlor will still need to create a will to make provision for any asset that has not been transferred to the trust or any omitted property.

Although the Nigerian government has not enacted a comprehensive network of legislation which makes provision for the recognition of the validity of trusts created in other jurisdictions, the creation of a trust, albeit one that is offshore, will not be deemed a violation of any provision of Nigerian law.

An article by the Firm's Private Client Group, editors of the Private Client Update, a bi-weekly publication dealing with issues touching on Succession Planning.

WHO WE ARE

Perchstone & Graeys is one of Nigeria's leading commercial law firms built on a tradition of providing excellent services in our core practice areas. With a board of accomplished Partners complimented by a diversely talented team, our unique approach to client engagement is fueled by our innovative and ethical culture, enabling us to continually extend the reach of our service offerings to a global market.



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