THE CONCEPT AND FUNCTIONS OF LEASES

Introduction

"The relationship between the property – and contract-based views of the leasehold nexus remains one of the continuing tension" Per Lord Browne-Wilkinson¹.

The above observation of His Lordship summarises the essence of this paper. This is because, for some tome now², and even more recently³, classification of a leasehold interest remains intractable. For instance, while it is the belief in some quarters that a leasehold interest cannot be divorced from being a contractual interest, especially tracing its historical evolution as a chattel interest⁴, another school of thought fervently believe that a lease is purely a proprietary interest⁵ which could only be classified as a 'real property'.

In the face of this contest however appears the liberalist who prefers to treat a leasehold interest as that encompassing both contractual and proprietary interests thereby constituting it a 'chattel real'⁶. The question which arises therefore is of what essence is the controversy? Is classification necessary once we can identify what a lease is? Does the issue not merely centre around the question of compartmentalization or otherwise? These various other puzzles may be in the mind of a follower of the controversy. However, from the point of view of this paper, the determination of the nature of a leasehold surpasses the above agitations, and goes even beyond a matter of semantics. This is because of the varying legal consequences that attach to the conclusion an analyst reaches. For instance, the question of applicability or otherwise of the doctrine of frustration has attracted a magnitude of literature incapable of exhaustion in this paper but suffice to refer to the following as instances: the debate on the subject in the Journal of private

¹ Hammersmith and Fulham LBC v. Mark [1992] 1 AC. 478 at 491E.

Presently towards the end of the 12th Century. See Peter Butt, Land Law, 2nd ed, Sydney Law Book Company, 1998, para 616; Hill and Redman-Law of Landlord and Tenant, 18th edn, Vol. I London Butterworths, 1991, p A1.

³ Progressive Maling House Property Ltd. v Tabali Property Ltd. (1985) 157 CLR 17 at 29; per Mason J.

⁴ National Carriers Ltd. v. Panalpina (Northern) Ltd (1981) 1 All E. R. 161 at p. 185 per Lord Roskill. See also E. H. Burn (ed), Maudsley and Burns Land Law Cases and Materials, Burn 6th ed. Butterworths, London, 1992 p. 408.

Megary and Wade – Law of Real Property 4th ed. (1975) p. 673. See also J. A. Omotola: "The Doctrine of Frustration –Its Applicability to Contract Relating to Land" (1984) 1 and 2 J. P.P.L. 1, 7. For further reference see Woodfalls' Law of Landlord and Tenant, Vol. 1, Sweet and Maxwell, London, Ch. 1, Susan Bright and Geoff Gilbert – Landlord and Tenant Law: The nature of Tenancies, Clarendon Press, Oxford, 1995 p. 1.

⁶ Lord Russell of Kilowen in National Carriers Ltd. v Panalpina (Northern) Ltd. [1981] All E. R. 168, 708 B. C See also Kevin Gray –Elements of Land Law, Butterworths, London, 1993, 677.

and property Law in 1984 and 1985, Forthwith A. D. NcMair's discussion of the matter in the Law Quarterly Review and a 1975 article on the subject in the Law Quarterly Review⁷. Again, in the event of a dispute arising from a leasehold transaction, the applicable rules depend on the classification of the interest. Furthermore, the issue of the liability of a statutory tenant, otherwise known as tenant at sufferance under the Common Law, to his original Landlord depends on the settlement of this knotty issue of categorizing leasehold interest. In addition, the appreciation and ascertainment of the nature of leases also dictates the operation of the various statutory provisions relating to the subject matter.

Consequently, an inquiry into the nature of a leasehold interest, especially stemming from its historical origin, becomes inevitable. Having said this therefore, we wish to state further that the inadequacy of housing, either as a result of the limited supply of land, or the capital deficiency on the part of prospective buyers, and/or even inability to negotiate and perfect a house purchase⁸ necessitates the taking up of a leasehold interest by those under these disabilities, and consequently takes this paper beyond theoretical terrain. It is absolutely beyond doubt that leases play a prominent role in the search for a solution to the acute housing problem in Nigeria, and the World at large. In the circumstance therefore it is important that the concept of lease be thoroughly analyzed and understood to the awareness of the prospective lessee, as there is no area of the law that the rule of caveat emptor is more operational than in property transactions. Hence, it is our conviction that an indepth exposition of the evolution, nature and function of leases is a subject of primary importance in contemporary period, particularly when housing has no attracted global intervention9.

Thus, the aim of this paper is to demonstrate through historical analysis the hybrid character of the leasehold, and its practical significance in the provision of shelter for the ever teeming populace of Nigeria, and the world at large. This in our view will expose prospective lessees of property to the origin of the concept of leases and the intricacies of its incidents and nature.

J. A. Omotola: The Doctrine of Frustration – Its Applicability to Contracts Relating to Land, Vols. 1-2, (1984) JPPL. P. 1. Finnie Fekumo: Applicability of the Doctrine of Frustration to Land – A Reply (1985)3 JPPL P. 35; A. A. Utuama: Applicability of the Doctrine of Frustration to Land: A Rejoinder (1985) 4 JPPL p. 35; A. D. McMair, Wartime Impossibility of Performance, Vol. 35 L. Q. R, p35; Innovation in Nineteenth Century Contract Law, 1975 L. Q. R. Vol. 91, p. 247. etc.

⁸ See David Yates and A. J. Hawkins - Landlord and Tenant Law, 2nd ed., 1986 Sweet and Maxwell, London, p.6

See Article 25 (1) of the Universal Declaration of Human Rights, 1984. See also Article 11: 1 of the International Covenant on Economic, Social and Cultural Rights on the right to housing.

The purposes and advantage derivable from its encouragement will also form part of the focus of the paper. In order to accomplish this objective, we intend to divide the paper into four parts, viz:

- (a) The Historical Evolution of Leases;
- (b) The Nature and Concept of Leases;
- (c) Functions of Leases; and
- (d) Conclusion.

I. HISTORICAL EVOLUTION OF LEASES

In the early days, the impression used to be had that leasehold interests form part of the feudal tenure, which were tenures of real estate under the feudal system such as knight service, soccage, villeinage¹⁰, etc. the import of which is that a Lease has no separate development. This belief stems from the fact that medieval England was a feudal society in which it was impossible for a subject to personally own land. Land then belonged to the king. It was only he that could graciously grant tenures of land to lords, usually in consideration of certain services. The commonest assignments or undertakings where a knight service is involved are to provision of men and horses for battles. Upon the acquisition of this grant by lords, they in turn grant tenure to the villains in the manor for services equally rendered by them to their Lords. And as Prof. F. H. Lawson¹¹ said of leases, by the very fact of income sharing between parties to a lease, which is an impracticability under the feudal tenure, a lease could not have originated or formed part of the feudal tenure. In his words,

"The property buyer looks at leases in two different ways. In the first place, a lease creates a term of years, which is leasehold estate. Thus is divides the ownership of the land on a plane of time between a tremor, who holds the land now, and the reversioner who will come into possession of the land at the expiration of the term.

On the other hand, it divides the present income form the land between the lessor and the lessee, the former taking a fixed rent and the latter the undefined residue of the profits arising from the exploitation of the land. Thus, the interests of the lessor and the lessee are simultaneous in two different senses first, in the ordinary way, in which all estates are simultaneous in that they have a

¹⁰ See Black's Law Dictionary, 6th ed. St. Paul Minn. West publishing Co. 1990.

¹¹ Introduction to the Law of Property, 1958 ed., Oxford University Press, London p. 118 (emphasis mine).

present capital value although they may give successive rights to possession, but secondly, in giving them simultaneous rights to share in the income.

This second much more important aspect of the lease always makes it difficult to fit leaseholds into the feudal system. They were indeed, and had always been commercial intruder into a way of looking at property which was essentially uncommercial and which was primarily concerned with the public duties owned by the holders of land".

The nature of the grant in both instance of both the King and the feudal lords would not however amount to ownership as they are usually of limited duration as determined by the respective grantors. This then under the feudal system constituted what was known as estate¹². Notwithstanding however the similarity of the holdings under this feudal tenure with the nature of leases, the point has been made that it does not at all form part of the tenure for the further reason that as far back as 12th century, the creation of leasehold interests was already prevalent¹³.

However, the development of leases was not unconnected with the need to raise money without infringing on the medieval church's prohibition on usury, and partly because of its prospect and potential of devolution by will, earlier impossible under the freehold regime before the Statute of Will 1540¹⁴. That the above account of the evolution of leases is highly probable is reinforced by the observation of Martin Pardington to the effect that the development of leases was motivated by lessors' desire to commercialise their lands¹⁵.

To elaborate further, during the early days of the evolution of a lease, the relationship was founded on purely contractual basis. In other words, the grant was not more than a covenant between the parties to enable the other party to make use of his Land, the breach of which could only attract damages rather than recovery of possession in the event of turning the party out wrongfully. The import of this is that where the supposed lessee was

15 Landlord and Tenant, Setting the Context, 1975, Weldenfeld and Wicolson, London, p.6.

¹² See Margaret Wikie and Godfrey Cole-Landlord and Tenant Law, 2nd ed, 1993 Macmillian Press International,. London, p. 3 See also Nigel P. Gravells, Land law: Tests and Materials, Sweet and Maxwell, London, 1995 pp. 14-15.

¹³ See Holdsworth: History of English Law, 1st ed., Methuen, 1923, Vol. 3, p. 213, See also D. R. Denman: Origins of Ownership, Allen and Unwin, 1948, esp. pp 144-5, and 152-5.

¹⁴ See Hill and Redman: Law of Landlord and Tenant, 18th ed., Butterworths, London 1997, P.A. 3. See also Parker and Mellows, The Modern Law of Trusts by A.J. Oakley, 6th ed., Sweet and Maxwell, London 1994, p.2.

displaced either by the lessor or a third party, all that he could enforce was the personal covenant between him and the lessor, and in case of the third party, at best a warranty. He enjoyed no possessory remedies like the hitherto freeholder who could put up a Writ on action disseisin. In fact, in Maitland's view¹⁶, at the initial stage, the interest of a leaseholder was not at all recognised because he lacked 'seisin' which is the possession of real property under claim of freehold, or a right to immediate possession according to the nature of the estate¹⁷. This then explains why the interest was the regarded as pure personalty, otherwise known as chattels. And as for a chattel, no estate can exist in it, the implication of which is that its hiring is primarily a contract by which the owner permits the other party to use the article hired in consideration of some form of hire charge.

During the same period, a right of "real action" as well as other remedies such as Writs of Rights, Writs of Entry and the Possessory Assizes were equally not available to a tremor due to lack of seisin which at all times resided in the lessor. The interest of a lessor then was equated to that of a 'mortgagee' occupying land and taking profits from it in lieu of interest in order to circumvent the ecclesiastical rules prohibiting usury. This precarious position of a lessee of that era was succinctly described by Holdsworth thus:

"The lessee may, it is true, repel force by force; he may, that is, resist the would be ejection if he can; but all the legal remedy he has is personal action against his lessor on the covenant, by which he may recover damages or, if the term has not expired, possession of the land leased. As against third persons, he has probably no remedy at all. An ejectment by a third person is a wrong to the freeholder, and it is the freeholder, therefore, and the freeholder alone, who can bring the assize of novel disseisin. The lessee's right is a *jus in personam*, and not a *jus in rem...*"¹⁸

This situation whereby the interest of the lessee continued to be devoid of estate persisted up till around 1235 when better although inadequate remedies were then developed to cater for the interest of the leaseholders. For instance, the writ called Quare ejecit infra terminum was invented by William Raleigh to deal with intruders. This seemingly protective writ was however frustrated in its application through restrictive interpretation accommodating only cases in which third parties who derived their interest

¹⁶ Forms of Action at Common Law, pp. 20 et. seq. noted in Simpson-History of the Land Law, 2nd ed., p.25-46.

¹⁷ See Black's Law Dictionary (op. cit.), p.1358. See also Nigel P. Gravells (op. cit) p.14.

¹⁸ Supra at p.213. See also Street v.Mountford [1985] A.C. 809 at 814E per Lord Templeman.

directly from the lessor as a result of purchase was covered.¹⁹ However, towards the 15th Century, precisely 1499, a Liberal Construction was then applied to the word 'intruder' by the common pleas in order to cater for the interests of ejectors generally. This progressive interpretation of the common plea was subsequently confirmed by the King's Bench. This period equally witnessed the development of the action beyond ejectors alone to a remedy whereby the tremor could recover the land itself,²⁰ the import of which is that the occupation of the lessees was then protected as fully as seisin of the freeholder. Thus, the Writ became a potent remedy in the hands of lessees whose occupation is disturbed. Some of the factors responsible for this liberalization were partly legal and partly economic. Against the former was the need to expand the apparently inadequate remedy of the lessee which was limited to personal action for damages, and in the latter situation, government policy towards curbing the depopulation of the country through the conversion of arable land to pastoral land.

With this development, the erstwhile personal relationship of landlord and tenant became premised on the recognition of some form of estate ownership in the lessee.²¹ Thus, it is at this stage, that a lease truly acquires the status of a proprietary interest in land²², thereby justifying the observation of Lord Brown-Wilkinson that:

"The lease provides a classic reminder of the fact that a contract between two persons can, by itself, give rise to a property interest in one of them... The contract of tenancy confers upon the tenant a legal estate in the land; such legal estate give rise to rights and duties incapable of being founded in contract alone"²³

With this upgrading of the status of a lessee, and in view of the fact that the remedy of 'real action' and others exclusively for the freeholders were fast becoming obsolete and moribund, freeholders of land who earlier had been denying the remedy of "real action" to lessees became envious of the new remedy of trespass available to the lessee, having proved to be more potent and therefore struggled to gain access to it. In order to achieve their aim, the creation of spurious and fictitious leases by freeholders became the order of

¹⁹ See further, Holdsworth, op. cit. Vol.3, p.214.

²⁰ Ibid. at p.216; Peter Butt, op. cit., para. 618.

²¹ See generally T Plucknett- A Concise History of the Common Law (5th ed., 1956), p.574. See also Kevin Gray: Elements of Land Law, 2nd ed., Butterworths, London 1993, p.674.

²² See Hill and Redman – (op. cit.) At p. A.2. This is precisely around the 16th century. See Kate Green, Land Law, 2nd ed. Macmillan, 1993, p.51

²³ Hammersmith and Fulham LBC v.Monk (1992) 1 A.C. at 478 at 491 G-H or (1992) 1 All E.R. 1 at 10.

the day. The method adopted then according to Peter Butt²⁴ could be summarized as follows:

"Assume that Smith is the true owner of Blackacre and wishes to recover possession from the present wrongful occupant, Jones. Smith grants a lease of the land to Friend, "John Doe", who when evicted by Jones, brings an action in ejectment against Jones. This action is titled "Doe on the demise [that is, on the lease] of smith v. Jones", or more briefly, "Doe dem. Smith v. Jones" or "Doe d. Smith v. Jones". In this action Doe will succeed if he can show that the title of his lessor (Smith) is better than the title of his ejector (Jones). If this device depends upon Jones taking steps to evict Doe in time on the land and evict Doe; Doe would then commence proceedings against Roe, who in turn notified Jones that he (Roe) did not intend to defend the action but that Jones had better do so on the pain of being turned out of the land; and the court then permitted Roe to step out and Jones to defend in his stead. Eventually, the whole process becomes fictionalized, with no lease, entry or eviction actually occurring."

This practice continued unabated, and by the 19th century, the remedy of ejectment had matured into a remedy through which deprivation of possession of land could be successfully challenged. It now even became much more applied by the erstwhile freeholder, originally armed with 'real action'²⁵. At this stage however, when the leasehold interest was to catch up with the recovery remedies earlier enjoyed by freeholder, it was too late in the day as the gulf between the substantive law of freeholds and that of leaseholds which characterizes the English Land Law had already been created.

Expectedly, with the graduation of the lease from pure contractual interest to proprietary, and the simultaneous decay of the feudal system²⁶, the use of leases automatically gained prominence. In fact, amongst its erstwhile peers in the class of Chattel real, for example, wardships, it is pre-eminent and of relevance, even up till today.²⁷ It was at this stage that a lease fully acquired its estate nature, which then conferred on it the proprietary character by virtue of which it was shot into limelight. But for the simple fact that it cannot still divorce itself from the contract antecedent²⁸, it could not fit in strictly into the absolute class of estate per se.

²⁴ Supra paras. 618-619.

²⁵ Ibid. Para. 619. See also Maudsley and Burns op. cit. p.408.

See A.W.B.Simpson, supra, at p.233.Hill and Redman, supra, at p.A2.

²⁸ See Kate Green, supra, at p.51

However, in view of the leasehold interest's connection with land, they were graduated into the hybrid class of what used to be commonly referred to as 'Chattels real'.²⁹

The main sector where the impact of the new status of a leasehold was felt happened to by the agricultural area wherein farming land was tenanted. However, notwithstanding the acquisition of a proprietary nature, lessees of this land stall suffered insecurity of tenure as the rapacious landlords of the era still continued with their exploitation bid, hitherto enjoyed under the contractual stage of a lease; mostly through the grant of short and unrealistic terms. It then took legislative intervention by way of extending the tenant's tenure beyond that contracted by him, and also enabling of limited owners, particularly life tenants, to enjoy longer period than their common law entitlements, to checkmate these nefarious activities of the landlords. In fact, by the 16th and 17th Centuries, the length of leases had to be increased from the hitherto 21 years to virtually unlimited period, the longest however being 99 years for building leases.³⁰

Also identifiable with this era was the possible creation of leases by parole regardless of the length of time involved. This practice however demands actual entry of the lessee. In practice however, parties preferred using the bargain and sale method which dispenses with the need of actual entry, obtainable under the parole system. This Practice of avoiding actual entry brought about the curious interest otherwise known as interesi termini which unfortunately could not ground subsequent interests like subleases.³¹ This practice of oral leases did not however take long before it was exterminated by the statute of fraud, 1677.³²

The rate at which one could have expected the growth of leases in view of this enviable status was however frustrated by the unwholesome practice of most landlords "in denying their tenants security of tenure in order to manipulate them for elections, which adversely affected its growth in the agricultural sector and ultimately, agricultural practice also". On the side of residential accommodation however, significant progress was made by the use of leases. This is however not without its vices such as proliferation

31 Ibid

34 See Enid Gauldie: Cruel Habitations (Allen and Urwin, 1974), Passim.

²⁹ See Peter Butt, op.cit 2nd ed. Sydney Law Book Company, 1988, para. 616; Kevin Gray op.cit p.674. Although the term is now reputed to be archaic. Krago v Julian [1992] 1 WLR 372 at 377H.

³⁰ See Gen. Martin Pardington, op. cit. pp. 10 and 11.

³² A statute of general application in Nigeria.

³³ See Chambers and Mingay: The Agricultural Revolution: 1750-1880 (BartsFord, 1966), p.49.

the control of Beases

of slums due to neglect and/or refusal to maintain. In addition, discriminatory housing programmes became the order of the day, as houses were mainly built for the upper and middle classes to the exclusion of the poor.³⁵

In order to arrest the spate of this slum growth, the Commission set up to conduct enquires into the causes identified the creation of muitiple leases over a house as well as the nefarious activities of middlemen as being factors responsible for lack of maintenance, even where their original landlord had good intention. This is because it becomes difficult to ascertain the duty holder in such circumstances.³⁶

The above picture in sum, depicts the evolution and growth of leases in English Law. But before attempting to conclude this segment, we consider it apt to make a quick incursion into the origin and development of traditional tenancies also.

CUSTOMARY OR COMMUNAL TENANCIES

Under the traditional system of landholding in Nigeria, particularly in the southern part of the country where land was not statutorily controlled as it was in the northern part, the concept of corporate ownership constitutes the order of the day. In the words of the Privy Council³⁷;

"...the notion of individual ownership is quite foreign to native ideas. Land belongs to the community, the village or the family, never to the individual. This is a pure native custom along the whole length of this coast, and whenever we find, as in Lagos, individual owners, this is again due to the introduction of English ideas."

It would seem to us that his lordship is exaggerating the situation by denying individual ownership under the customary tenure, as that forms the origin of corporate ownership, as well as the ultimate consequence of partition of family property.³⁸ Notwithstanding this however, the fact still remains that land is largely held by communities which live and work together, and even

³⁵ Ian J. McDonald: The Leasehold System: Towards a Balanced Land Tenure for Urban Development in Urban Studies, 1969, Vol.6 at p. 185.

³⁶ See again, Martin Pardington op. cit., pp. 14-16.

³⁷ In Amodu Tijani v. Secretary, Southern. Nigeria (1915-21) 3 N.L.R. 24 at pp. 59-60 Per Lord Haden. See also Speed, C.J. in Lewis v. Bankole (1908) 1 N.L.R. 81 at p.83

³⁸ Chukwueke v. Nwankwo (1985)2 N.W.L.R., p. 195; See also Obaseki, J.SC (as he then was) in Otogbolu v. Okeluwa [1981]6 –7 S.C.; 115 at 116.

a non-member is usually regarded as a stranger.³⁹ This enthronement of stranger ship was informed by migration, e.g., from the south-east have migrated into Ondo and Ijebu provinces thousands of Urhobo who reap the oil palm and who are usually granted a small plot of land for growing cassava for their domestic use, and equally from the north-east have migrated the Igbirra into the Cocoa belt on arrival from poor areas to work as laborers, they also benefited from such allocation for planting of their crops.⁴⁰

However, with the decline in traditional ritual, political and social payments to rulers which used to evidence the dependency of these strangers on them, there was urgent need to put in place a new form of atonement for the title of the land owning group which was subsequently found either in the reaping of the oil palms or by enforcing the annual payment of a token number of yams or tins of palm oil in manner distinct from gift."⁴¹

By virtue of this device, several strangers to the community were able to be accommodated on communal land. The practice however classifies tenants into three categories, viz:

(a) customary tenant, someone who has begged for land (toro ile) for permanent farming;

(b) annual tenant who' borrows' (ya) land for seasonal farming purpose; and

(c) licensee of palm trees.

As evident from above, at the commencement stage of this practice, commercial reason did not form the premise of the relationship, but just out of need to accommodate fellow human beings. However, after some time, land became an essential commodity to the extent that giving out lands to strangers started jeopardizing the rights of communal members. To remedy the situation, what used to be a token payment in kind was converted into cash and then known as rent. This equally marks the turning point in the customary tenancy relationship⁴², and to a large extent, now assuming the features of English leases.

42 See P.C. Lloyd, op cit. p.89.

³⁹ See P.C.Lloyd: Yoruba Land Law by Nig. Institute. of Social and Economic Research, Oxford University Press, Ibadan, 1962, p. 92.

⁴⁰ Ibid. at p.88

⁴¹ See T.O. Elias - Nigeria Land Law, 4th edition, Sweet and Maxwell, 1971, pp. 159 160.