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Alienations Under the Land Use Act and Express Declarations of Trust in Nigeria

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Abstract

Nigerian conveyancers routinely resort to powers of attorney and agreements to sell (estate contracts) as tools to avoid the prohibitory clauses of the Land Use Act. Judges have shown their sympathy through a strict (but beneficial) construction. Nevertheless, the current system exacerbates the risk of acquiring precarious titles in land transactions. Accordingly, this article suggests that the avoidance objective will be best achieved through the application of the principles of trust and the use of trust instruments such as express written declarations of trust.

INTRODUCTION

A narrow but fundamentally important question in the interpretation and application of the Nigerian Land Use Act (the Act)[1] might be asked: does a written express declaration of trust over land require the prior consent of a state governor or a local government authority? This is the focus of this article, though a proper development of the analysis would require an examination of the main provisions of the Act. Despite reigning supreme for three decades and opening its provisions with a restatement of the concept of trust, the Act and scholarly commentaries on it shockingly reveal a complete dearth of any systematic attempt to explore its relationship with the principles of trust law.[2] This gap needs to be plugged.

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1 Cap L5, Laws of the Federation of Nigeria 2000 (originally enacted in 1978).

2 But the concept of a state governor as a trustee under the Act has recently been examined in MA Banire "Trusteeship concept under the Land Use Act: Mirage or reality?" in IO Smith (ed) *The Land Use Act: Twenty Five Years After* (2003, Folar Prints) 90. O Adigun's promising title "The equity of the Land Use Act" in JA Omotola (ed) *The Land Use Act – Report of a National Workshop* (1982, University Press) 64–73 eventually turned on the equality of treatment in the distribution and management of land under the Act.

An important aspect of the Act, for which the trust analysis may be relevant, relates to the conditions for valid alienations under the Act. State control of land and statutory conditions for a valid alienation of land are not new in Nigeria and can be found in the Land Tenure Law (northern Nigeria),[3] the Native Lands Acquisition Act,[4] and the various state land laws,[5] all of which require the consent of an appropriate authority for a valid transfer of an interest in land. Similar requirements based on state control of land can be found in other African countries.[6] No Nigerian court has yet been called upon to determine whether an express written declaration of trust amounts to an alienation of land under any of the above statutes. The question remains relevant for the similar provisions of the Land Use Act. A reasoned answer will require full engagement with the principles of trust law which were received into the Nigerian legal system more than 140 years ago.

Trust has the benefit of flexibility and is certainly one of the most important legal imports to Nigeria. About a century ago Maitland observed that the law of trusts is the most distinctive contribution of English jurists to jurisprudence;[7] there are indications that this is as true in the 21st century as it was in 1909.[8] In light of the genius of trust, this article suggests that its principles bear more relevance to the interpretation and application of the Nigerian Land Use Act than is currently appreciated. Accordingly, it contends that an express written declaration of trust relating to land does not require the prior consent of a governor or a local government authority. It also contends that a trust instrument offers more protection to a purchaser than currently used conveyancing tools such as estate contracts and powers of attorney. Following this introduction, the next section gives a background analysis of the Act by examining the tenurial systems in Nigeria before the promulgation of the Act. The third section examines some of the important provisions of the Act. The next explores the cases on the validity of alienations under the Act; and the final section analyses the nature and incidents of declarations of trust and their relevance to the Act.

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3 Land Tenure Law, cap 59, Laws of Northern Nigeria 1963. This statute established state control and management of land in northern Nigeria. It also prohibited alienation without the prior consent of the state.

4 Native Lands Acquisition Act (no 32 of 1917). This legislation regulated the acquisition of land in southern Nigerian by non-Nigerians (aliens); it made the transfer of land to aliens subject to the approval of a designated officer of the government.

5 Almost every state in Nigeria has a state land law. State land laws regulate the use of land acquired by a state for the public purposes of that state. An individual is prohibited from transferring land allotted to him or her under a state land law, unless the prior consent of the state was sought and obtained.

6 For instance Kenya: Crown Lands Ordinance of 1915; and Tanzania: Tanzania Land Act of 1999.

7 FW Maitland *Equity: Also the Form of Action at Common Law – Two Courses of Lectures* (1929, Cambridge University Press) at 23.

8 D Hayton "Developing the law of trusts for the twenty-first century" (1990) 106 *Law Quarterly Review* 87.

BACKGROUND TO THE LAND USE ACT

A meaningful analysis of the Act (and its relationship with trust law) would naturally follow from the general history of land law in Nigeria which can be broken into two phases (pre-1978 and post-1978), with the introduction of the Act in 1978 providing the line of demarcation. A brief overview is given below.

Pre-1978 Nigerian land law: Southern Nigeria

Before 1978, there was a tripartite system of land tenure in Nigeria: a dual system in southern Nigeria and a monistic system characterized by state control in northern Nigeria.[9] In southern Nigeria (eastern, western and mid-western Nigeria), land was held either under customary law or under the estate system of the received English law, for instance a fee simple estate. In some cases, however, certain transactions involved both systems. For instance, a valid transfer of land under the relevant customary land tenure could be followed by an English style conveyance in respect of the same land and between the same parties. This often created an interpretation problem for the courts as to what system of law (customary or received English law) would provide the rule of decision.[10] The observations of the Privy Council in *Amodu Tijani v Secretary Southern Nigeria* provide a general description of land holding under most systems of customary law in southern Nigeria:

> "The next fact which it is important to bear in mind in order to understand the native land law is that 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. All members of the community, village or family have an equal right to the land, but in every case the Chief or Headman of the community or village, or head of the family, has charge of the land, and in loose mode of speech is sometimes called the owner. He is to some extent in the position of a trustee, and as such holds the land for the use of the community or family. He has control of it, and any member who wants a piece of it to cultivate or build upon, goes to him for it. But the land so given still remains the property of the community or family. He cannot make any important disposition of the land without consulting the elders of the community or family, and their consent must in all cases be given before a grant can be made to a stranger. This is a pure native custom along the whole length of this coast, and wherever we find, as in Lagos, individual owners, this is again due to the introduction of

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9 For a detailed analysis of the pre-1978 land law in Nigeria, see TO Elias *Nigerian Land Law* (4th ed, 1971, Sweet & Maxwell).

10 The decisions do not show any general principles as they depended heavily on the intention of the parties and the surrounding circumstances: *Griffin v Talabi* [1948] 12 WACA 371; *Akpalakpa v Igbaibo* [1996] 8 NWLR (pt 468) 553 (CA). For a detailed examination of the more general problem of when a system of customary law is excluded by an English-type transaction, see RN Nwabueze "The dynamics and genius of Nigeria's indigenous legal order" (2002) 1 *Indigenous Law Journal* 153 at 182–92.

> English ideas. But the native idea still has a firm hold on the people, and in most cases, even in Lagos, land is held by the family."[11]

If we ignore the pejorative description of Nigerians as "natives" in this quotation, it could be said that the observation of the Privy Council provides a fairly accurate and general description of the customary land law in most parts of southern Nigeria. Elias, however, cautioned that references to "communal land" or "communal ownership" could be misleading as the family is the main unit of land-holding in southern Nigeria. He contended that the so-called communal lands, such as land used as religious shrines or set aside for markets, churches and mosques, are better described as "public" land.[12] Thus, under most systems of customary law in southern Nigeria, land belongs to the family; it is controlled and managed by the head of the family for the benefit of every member of the family (including the head of the family).

Originally, a family member was prohibited from selling any portion of family land allotted to him or her and, even now, the head of a family cannot claim or use family land as his (or her)[13] private property since he acts only in the capacity of a trustee (though he is also one of the beneficiaries). But, as suggested by the Privy Council above, customary law evolves.[14] Customary land law in southern Nigeria evolved to permit individual ownership and alienation of land[15] and this was mainly due to contact with Europeans. Consequently, a family member can alienate the portion of family land allotted to him or her, provided all members of the family give their consent. What was once family land can also be reduced into individual ownership through a mode of partition consented to by all members of the family.[16] In *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co Ltd v Saka Chief Oshodi*, Webber J captured the mutation of customary land law in southern Nigeria:

> "It seems to me that [N]ative law existent during the last fifty years has recognized alienation of family land, even by a domestic, provided the permission of the family is obtained … . The chief characteristic of [N]ative law is its flexibility – one incident of land tenure after another disappears as the times change – but the most important incident of tenure which has crept in and become firmly established as a rule of [N]ative law is alienation of land."[17]

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11 *Amodu Tijani v Secretary Southern Nigeria* [1921] 2 AC 399 (PC) at 404–05.

12 Elias *Nigerian Land Law*, above at note 9 at 73–74.

13 In some parts of western Nigeria, a woman could become the head of family.

14 Also see M Gluckman *Ideas and Procedures in African Customary Law* (1969, Oxford University Press) at 9.

15 *Lewis v Bankole* [1909] 1 NLR 82.

16 Elias *Nigerian Land Law*, above at note 9 at 125–30.

17 *Barimah Balogun and Scottish Nigerian Mortgage and Trust Co Ltd v Saka Chief Oshodi* [1931] 10 NLR 36 at 51.

Pre-1978 Nigerian land law: Northern Nigeria

In contrast to the dual system (customary land law and English estate system) in southern Nigeria, northern Nigeria operated a system of land tenure based on state control and management of land.[18] State control of land in northern Nigeria dates back to the colonial days and can be traced to the report of the Northern Nigeria Lands Committee of 1908 which was adopted by the northern Nigerian colonial government. The report recommended that the colonial government should take over the control and management of land in northern Nigeria from the traditional rulers, and that the government should assume responsibility for making grants for the use and enjoyment of land in northern Nigeria. The report also recommended that transfers of title to the use and occupation of land should be prohibited without the prior consent of the governor. These recommendations were promulgated into law by the Land and Native Rights Proclamation of 1910. This was replaced by the Land and Native Rights Act no 1 of 1916 (amended in 1918) which was re-enacted by the Land Tenure Law of 1962. After declaring, in section 4 of the Land Tenure Law, that all land in northern Nigeria, with a few exceptions, should be considered "native lands",[19] section 5 then stated: "All native lands and all rights over the same are hereby declared to be under the control and subject to the disposition of the Minister and shall be held and administered for the use and common benefit of the natives, and no title to the occupation and use of any such lands by a non-native shall be valid without the consent of the Minister."

With state control firmly entrenched, the minister was given several powers with respect to the management of land under his control, including the power to grant rights of occupancy to "natives and to non-natives".[20] Sections 27 and 28 prohibited the alienation of a right of occupancy without the consent of the appropriate authority. The minister was also given powers to revoke a right of occupancy for a good cause.[21] As many of the provisions of the Land Tenure Law are similar to those of the Land Use Act, it is accurate to say that the Land Use Act was modelled on the Land Tenure Law of northern Nigeria.

LAYOUT OF THE LAND USE ACT

In 1978, the Nigerian Government promulgated the Land Use Act and it came into force on 29 March 1978. The Act established a single tenure for the whole country, based on the right of occupancy system. All existing laws affecting

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18 Similar to those of Kenya and Tanzania, above at note 6.

19 Land Tenure Law, above at note 3, sec 4.

20 Id, sec 6. Sec 2 defines a "native" as "a person whose father was a member of any tribe indigenous to Northern Nigeria" and a "non-native" as "any person other that a native as above defined".

21 Id, sec 34.

title to land or the transfer of an interest in land (such as the Land Tenure Law) are subject to the provisions of the Act.[22] The policy and historical underpinnings of the Act were explored in an excellent monograph[23] and need not detain us here, although it is doubtful that the Act has achieved its policy of securing equitable land redistribution in Nigeria. Land in urban areas, as well as in some rural areas, remains very expensive and beyond the reach of most members of the Nigerian middle class (if it exists) and completely out of the reach of low income earners. Although many factors contribute to this, the expensive and dilatory process of securing the prior consent of a governor or a local government authority, as the case may be, has only exacerbated matters. But the concern here is with the basic question of interpretation and application of the provisions of the Act. Just like the Land Tenure Law, section 1 of the Act introduced the concept of state control by vesting all land in a state in the governor of that state to hold it on trust for the benefit of Nigerians: "Subject to the provisions of this Act, all land comprised in the territory of each state in the Federation is hereby vested in the Governor of that State, and such land shall be held in trust and administered for the use and common benefit of all Nigerians in accordance with the provisions of this Act."

The governor is given several powers with respect to the control and management of land in his or her state and can grant rights of occupancy to any person and for all purposes with respect to any land in the state. Under the Act, the only interest a person can have with respect to land is a right of occupancy granted or deemed to be granted by the appropriate authority. The Act prohibits an alienation of a right of occupancy without the consent of the appropriate authority. The governor can revoke a right of occupancy for public purposes or for failure to comply with the terms of the grant. Some of the issues raised by the major provisions of the Act are briefly examined under the headings below.[24]

Expropriatory or nationalizing act?

The Act is unquestionably radical in its elimination of the tripartite tenurial systems operating in the country[25] and their replacement with a monistic

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22 Land Use Act, above at note 1, sec 48.

23 RW James *Nigerian Land Use Act: Policy and Principles* (1987, University of Ife Press Ltd).

24 Some of the legal issues raised by the Act were also explored by JA Omotola *Essays on the Land Use Act* (1984, Lagos University Press); and Omotola (ed) *The Land Use Act*, above at note 2. It must be said, however, that the volume of recent cases on the interpretation of the Act is such that these pioneering works can only be regarded as being largely of historical importance.

25 For instance, the right of occupancy system in northern Nigeria based on the Land Tenure Law (above at note 3) and the dual system in southern Nigeria based on customary land law and the estate system received from English law. The nature and incidence of customary land tenure have been explored in a long line of cases in the context of the Land Use Act: *Abioye v Yakubu* [1991] 5 NWLR (pt 190] 130 (SCN); *Ogunola v Eiyekole* [1990] 4

system based on a statutorily determined term of years (the right of occupancy) which, by analogy, could be called a statutory lease. It is arguable, however, that the Act did not go as far as nationalizing land in the country since landowners still retain a significant measure of control over their land (whether granted or deemed granted to them under the Act) and could even alienate the same, subject to the conditions specified in the Act. Consequently, some judicial observations in favour of nationalization should be treated with caution.[26] Even if nationalization is discounted, the Act is certainly expropriatory in character as it divested landowners of their absolute proprietary interests and compensated them with less durable rights known as rights of occupancy.

The state governor as a trustee

Section 1 of the Act vests all land in a state in the governor of that state to hold on trust for the benefit of Nigerians.[27] Non-Nigerians, however, are not excluded from the governor's trusteeship since section 1 is subject to other sections of the Act which authorize the grant of a right of occupancy to "any person."[28] This phrase obviously includes non-Nigerians.[29] Land held by the federal government or any of its agencies in any state of the federation is excluded from the governor's trusteeship.[30] For administrative and

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NWLR (pt 146) 632 (SCN); *Anibire v Womiloju* [1993] 5 NWLR (pt 295] 623 (CA); *Abidoye v Alawode* [1994] 6 NWLR (pt 349) 242 (CA); *Nyagba v Mbahan* [1996] 9 NWLR (pt 471) 207 (CA). These cases also show that the Act has not successfully obliterated the incidence of customary tenancy under customary land law. Nor has it abolished the proof of ownership through traditional history: *Okpalugo v Adeshoye* [1996] 10 NWLR (pt 476) 77 (SCN). See generally OO Sholanke "The Nigerian Land Use Act – A volcanic eruption or a slight tremor?" (1992) 36 *Journal of African Law* 93; LK Agbosu "The Land Use Act and the state of Nigerian land law" (1988) 32 *Journal of African Law* 1.

26 In *Nkwocha v Governor of Anambra State* [1984] 1 SCNLR 634 at 652, the first case on the Act to reach the Nigerian Supreme Court, Eso JSC observed that the tenor of the Act was "the nationalization of all lands in the country by the vesting of its ownership in the State leaving the private individual with an interest in land which is a mere right of occupancy". A similar view was expressed by Musdapher JSC in *Kachalla v Banki* [2006] 8 NWLR (pt 982) 365 at 383. This view was, however, rejected in *Savannah Bank Ltd v Ajilo* [1989] 1 NWLR (pt 97) 305 at 332 (NSC) by Nnamani JSC.

27 It has been rightly argued that only a political trust was anticipated: EO Nwabuzor "Real property security interests in Nigeria: Constraints of the Land Use Act" (1994) 38 *Journal of African Law* 1 at 2–5. No court has jurisdiction to question this trust or the statutory vesting of land in the governor: sec 47. This section, however, seems to be void for inconsistency with sec 272 of the 1999 Nigerian Constitution; see *Lemboye v Ogunsiji* [1990] 6 NWLR 210 (CA); *Babalola v Obaoku-Ote* [2005] 8 NWLR 386 (CA).

28 For instance secs 5(1)(a), and 6(1)(a)(b) of the Act; also secs 34, 36 and 46.

29 OO Sholanke "Applicability of the Nigerian Land Use Act to non-Nigerians" (1992) 36 *Journal of African Law* 183.

30 The Act, sec 49. For interesting analysis of this section in respect of land held by the Nigerian police force before the commencement of the Act, see *Ofodile v COP Anambra State* [2001] 3 NWLR (pt 699) 139 (CA).

management purposes, land in a state is divided into urban and rural land.[31] All land in urban areas is under the control and management of the governor who is assisted in that regard by the Land Use and Allocation Committee (a statutory body).[32] Apart from determining disputes relating to compensation payable under the Act, the Land Use and Allocation Committee acts mainly in an advisory capacity and has no power, for instance, to grant a statutory right of occupancy to an applicant.[33] Nor is the governor bound to act on the advice of that committee.[34] In contrast, land in rural areas is managed and controlled by the relevant local government authority with the assistance of its Land Allocation Advisory Committee. However, nothing prevents the governor from directly exercising management authority over rural lands; after all, all land in the state is vested in the governor.[35] For the same reason, the governor can grant a statutory right of occupancy in respect of all land in the state (whether urban or rural) but might in practice restrict the exercise of this power to land in urban areas.[36]

It would follow from the governor's comprehensive powers to grant a statutory right of occupancy that a claimant seeking a judicial declaration of entitlement to a statutory right of occupancy does not need to prove that the land in dispute is in an urban area.[37] By use of the words "it shall be lawful", section 5(1) clearly confers a discretionary power on the governor to grant a statutory right of occupancy, but there is no duty to do so.[38] That power, however, might be coupled with a duty in order to effect a legal right, such as where an applicant for a statutory right of occupancy has complied with all the conditions for a grant.[39] Power to grant a statutory right of occupancy may be exercised by the governor in favour of an applicant who never had an interest in the land covered by the grant.[40] A statutory right of occupancy granted by the governor of a state is by no means

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31 Under sec 3 of the Act, the governor may by order designate parts of the state as urban land. It appears, however, that a court may properly infer that a piece of land is in a non-urban area if it is used for farming or other agricultural purposes: *Dieli v Iwuno* [1996] 4 NWLR (pt 445) 622.

32 The Act, sec 2. The Land Use and Allocation Committee seems to have its own separate legal personality: *Sachia v Kwande LGC* [1990] 5 NWLR 546 at 559 (CA).

33 *Usman v Garke* [2003] 14 NWLR (pt 840) 261 (SCN).

34 *Dabo v Abdullahi* [2005] 7 NWLR 181 (SCN).

35 The Act, sec 1.

36 Id, sec 5.

37 *Adeniran v Alao* [1992] 2 NWLR 350 (CA).

38 *Julius v Lord Bishop of Oxford* [1880] 5 app cas 214 (HL).

39 Compare *Anthony v Governor of Lagos State* [2003] 10 NWLR (pt 828) 288 (CA), where the payment for the statutory right of occupancy was not accepted on behalf of the governor. The court, accordingly, refused to order the governor to issue a statutory right of occupancy. Also, *Julius v Lord Bishop of Oxford*, above at note 38; *Stitch v AG Federation* [1986] 5 NWLR (pt 46) 1007. See generally OO Sholanke "Is the grant of governor's consent under the Land Use Act automatic?" (1990) 34 *Journal of African Law* 42.

40 *Ohenhen v Uhumuavbi* [1995] 6 NWLR (pt 401) 303 (CA).

indefeasible[41] and could be set aside if obtained by fraud,[42] based on invalid documents of title[43] or surreptitiously acquired while litigation is pending over the land.[44] It would also be disregarded if granted to a person unable to prove any pre-existing title to the land as against another claimant with prior interests in the same land.[45] But a right of occupancy over neighbouring land will not be set aside simply because the development on that land will devalue the claimant's land.[46]

To facilitate the due administration and management of land in a state, the Act provides the governor with further specific powers.[47] It appears that the governor even has common law powers to grant privileges not specifically mentioned in the Act, for instance power to grant a licence to operate a car-wash business on particular land.[48] The grant of a statutory right of occupancy by the governor must be for a specific number of years[49] and should be evidenced by a certificate of occupancy which embodies the terms of the grant other than those implied by the Act.[50] Consequently, a grant of a statutory right of occupancy for an indefinite period or in fee simple absolute is void.[51] On the other hand, a local government authority is authorized to grant a customary right of occupancy over non-urban lands within its jurisdiction for agricultural, grazing, residential or other purposes.[52] However, a local government authority has no power to grant a customary right of occupancy with respect to land within its territory designated as an urban area by the governor. Such a grant is ineffectual and illegal.[53]

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41 *Adebiyi v Williams* [1989] 1 NWLR 611 (CA).

42 *Ugo v Gbatse* [1995] 6 NWLR (pt 401) 314 (CA).

43 *Angbazo v Sule* [1996] 7 NWLR (pt 461) 479 (CA); *Adebo v Omisola* [2005] 2 NWLR (pt 909) 149 (CA).

44 *Leko v Soda* [1995] 2 NWLR (pt 378) 432 (CA). OO Sholanke "Reflections on some judicial decisions on the construction of the Nigerian Land Use Act" (1993) 37 *Journal of African Law* 89 at 91.

45 *Musa v Osawe* [1991] 8 NWLR 238 (CA); *Ofoeze v Ogugua* [1996] 6 NWLR (pt 455) 451 (CA); *Dakat v Dashe* [1997] 12 NWLR (pt 531) 46 (SCN); *Kaigama v Namnai* [1997] 3 NWLR (pt 495) 549 (CA).

46 *Sehindemi v Governor of Lagos State* [2006] 10 NWLR 1 (CA).

47 Some of these powers are contained in secs 5, 11, 12, 17, and 28 of the Act.

48 *Kari v Ganaram* [1997] 2 NWLR (pt 488) 380 (SCN).

49 The Act, sec 8. This attracts the lease analogy.

50 Id, secs 8, 9 and 10. A certificate of occupancy merely has an evidential value, so that the grant of a statutory right of occupancy can be proved, in the absence of a certificate of occupancy, by other documents, such as a letter of grant from the governor: *Usman v Jorda* [1998] 13 NWLR (pt 582) 374 (CA).

51 *Ogulaji v Attorney General of Rivers State* [1997] 6 NWLR (pt 508) 209 at 223 (SCN); *Kari v Ganaram*, above at note 48.

52 The Act, sec 6.

53 *Adene v Dantunbu* [1994] 2 NWLR 509 (SCN); *Gankon v Ugochukwu Chemical Industries Ltd* [1993] 6 NWLR (pt 297) 55 (SCN).

Actual and deemed grants

The transitional provisions in part six of the Act tried to deal with some of the potential problems created by section 5(2).[54] For instance, section 34 provides that, where land in an urban area was vested in a person immediately before the commencement of the Act on 29 March 1978, that person will continue to hold the land as if he or she were granted a statutory right of occupancy by the governor and, upon making an application in the prescribed form, that person is entitled to be issued with a certificate of occupancy. Similar provisions are made in section 36 with respect to land in non-urban areas. But where a customary tenant of agricultural land remains in possession after incurring a forfeiture of his tenancy by a court order made before the commencement of the Act, that tenant is not protected by section 36 of the Act.[55] Nor does that section protect the occupation of a trespasser,[56] a mere possessor of land[57] or a person not in exclusive possession.[58] Sections 34 and 36 of the Act have given rise to what has come to be known in Nigerian property jurisprudence as a "deemed grant", distinct from a right of occupancy actually granted by the governor under section 5[59] or a customary right of occupancy actually granted by a local government under section 6.[60] Both deemed and actual grants are effective and legally recognizable.[61] Because sections 28 and 6(3), dealing with powers of revocation, expressly apply to grants made under sections 5 and 6, it is arguable that those sections do not apply to grants deemed to be made under sections 34 and 36. If this argument is right, it would mean

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54 Sec 5(2) of the Act reads: "Upon the grant of a statutory right of occupancy under the provisions of subsection (1) of this section, all existing rights to the use and occupation of the land, which is the subject of the statutory right of occupancy, shall be extinguished."

55 *Alade v Akande* [1994] 5 NWLR (pt 345) 468 (CA).

56 *Nwokoro v Onuma* [1994] 5 NWLR (pt 343) 191 (CA). *Iroegbu v Okwordu* [1995] 4 NWLR (pt 389) 270 (SCN).

57 *Okpalugo v Adeshoye* [1996] 10 NWLR 77 (SCN).

58 *Oja v Ogboni* [1996] 6 NWLR (pt 454) 272 (SCN).

59 Sec 34 nevertheless makes a distinction between a deemed grant of developed land in an urban area and undeveloped land in the same area. A deemed grantee is entitled to all his developed land, but only to a particular portion of his undeveloped land.

60 *Kyari v Alkali* [2001] 11 NWLR (pt 724) 412 at 440–43 (SCN). Sec 36 also makes distinctions relating to the deemed grant of rural land based on whether the land was developed or used for agricultural purposes. The result seems to be that, while the deemed grantee of agricultural land is the "occupier or holder", the deemed grantee of developed land is the person in whom the land is "vested." The semantic change in sub-secs 36(2) and (4) is not without significance and seems to capture the differences between title (a person in whom the land is vested) and actual possession (the holder or occupier who may or may not have legal title). While in *Onwuka v Ediala* [1989] 1 NWLR 182 the Supreme Court held that the customary landowner is the deemed grantee under sec 36, it held by a majority in *Abioye v Yakubu* [1991] 5 NWLR (pt 190) that the customary tenant is the deemed grantee under sec 36; *Ansa v Ishie* [2005] 15 NWLR (pt 948) (SCN) is to the same effect. The Court of Appeal has followed *Onwuka's* case in *Alade v Akande*, above at note 55, and *Laniyi v Oyedele* [1994] 6 NWLR (pt 348) 83.

61 *Provost, LACOED v Edun* [2004] 6 NWLR 476 at 499 (SCN).

that the governor or a local government authority has no power to revoke any right of occupancy deemed to be granted under sections 34 and 36. To avoid this absurdity, section 38 provides that: "Nothing in this part [part vi which covers sections 34 and 36] shall be construed as precluding the exercise by the Governor or as the case may be the local government concerned of the powers to revoke, in accordance with the applicable provisions of this Act, rights of occupancy, whether statutory or customary…".

Prohibition on alienation

For the purpose of this article, however, the most important provisions are the ones on alienation. A valid alienation of land under the Act requires the prior consent of an appropriate authority. Transactions and instruments completed without the necessary consent are null and void. In addition, an infringement of the consent provisions might lead to a revocation of a right of occupancy[62] or the imposition of a penal rent.[63] The relevant sections are reproduced for emphasis. Section 21 deals with the alienation of a customary right of occupancy: "It shall not be lawful for any customary right of occupancy or any part thereof to be alienated by assignment, mortgage, transfer of possession, sublease or otherwise howsoever … (b) … without the approval of the appropriate local government." This formulation apparently excludes the governor's consent and was the basis of an inference in *UBN Plc v Ayo Dare & Sons*[64] that a state governor does not have powers to consent to the alienation of a customary right of occupancy. However, this interpretation would appear to be contrary to sections 1 and 5 of the Act for not recognizing the governor's ultimate authority over all land in a state.

Section 22(1), on the other hand, applies to alienation of land in urban areas: "It shall not be lawful for the holder of a statutory right of occupancy granted by the Governor to alienate his right of occupancy or any part thereof by assignment, mortgage, transfer of possession, sublease or otherwise howsoever without the consent of the Governor first had and obtained…".

The most far-reaching provision, however, is section 26 which peremptorily states that: "Any transaction or any instrument which purports to confer on or vest in any person any interest or right over land other than in accordance with the provisions of this Act shall be null and void."

Construction of consent provisions

There is some ground for saying that sections 21 and 22 are not limited to "assignment," "mortgage," "transfer of possession" and "sublease" because

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62 The Act, sec 28(2)(a). Since sec 28 only deals with the power of a governor to revoke a statutory right of occupancy and sec 6(3) only allows a local government to revoke for public purposes, it is arguable that a local government cannot revoke a customary right of occupancy for failure to obtain prior consent before alienation.

63 Id, sec 5(1)(f) and sec 20.

64 *UBN Plc v Ayo Dare & Sons* [2000] 11 NWLR (pt 679) 644 (CA).

the phrase "or otherwise howsoever" implies a sense of inexhaustibility. But a counter argument would be that expropriatory statutes require strict interpretation. When that principle is added to the *ejusdem generis* [of the same kind] rule of construction, it becomes possible to limit the phrase "or otherwise howsoever" to the class already specified.[65] A few examples will suffice. In *Eton Rural District Council v Thames Conservators*,[66] Vaisey J had to consider whether a statutory duty imposed by section 9 of the Land Drainage Act 1930 on catchment boards to commute "all obligations imposed on persons by reason of tenure, custom, prescription *or otherwise* …" (emphasis added) included personal obligations imposed by covenant under deed. While accepting that the words "or otherwise" were wide in meaning and capable of general application, he nevertheless held that they should be interpreted *ejusdem generis* to restrict "tenure, custom, prescription" to obligations attached to land, excluding merely personal obligations. Both *Palmer v Snow*[67] and *Gregory v Fearn*[68] relate to the interpretation of a similar phrase, "other person whatsoever." Recall that the Land Use Act uses the word "howsoever" but connotes the same elasticity as "whatsoever." In the cases above, the courts were concerned with the construction of the Sunday Observance Act which prohibited a "… tradesman, artificer, workman, labourer *or other person whatsoever*" (emphasis added) from doing or exercising any worldly labour, business or work on the Lord's Day. The question was whether an estate agent (*Gregory's* case) and a barber (*Palmer's* case) came within the terms of the prohibition. Approving the decision in *Palmer's* case, Evershed MR in *Gregory's* case observed: "It has, however, long been established that those words 'other person whatsoever' are to be construed *ejusdem generis* with those which precede it; so that, for the defendant to succeed on this point, it must be shown that an estate agent is a tradesman or something sufficiently like a tradesman …".[69] These cases imply that sections 21 and 22 are not as broad as they appear. In *Okuneye v First Bank of Nigeria, Plc*[70] the Court of Appeal accepted the narrow confines of sections 21 and 22 of the Act based on the *ejusdem generis* rule

Whatever view one takes on the applicable principle of statutory interpretation, it is clear that the enumerations in sections 21 and 22 only capture acts of living parties that create an interest in land and would not, for instance, include alienations or transfers that take place by operation of law.[71]

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65 The *ejusdem generis* rule of statutory interpretation was applied by the Nigerian courts in *Nasr v Bouari* [1969] 1 All NLR 35; *Jammal Steel Structures Ltd v ACB* [1973] 11 SC 77; and *Onasile v Sami* [1962] 1 All NLR 272.

66 *Eton Rural District Council v Thames Conservators* [1950] 1 Ch 540.

67 *Palmer v Snow* [1900] 1 QB 725.

68 *Gregory v Fearn* [1953] 1 WLR 974.

69 Id at 976.

70 *Okuneye v First Bank of Nigeria, Plc* [1996] 6 NWLR (pt 457) 749.

71 *Ofodile v COP Anambra* State, above at note 30 at 164, per Olagunju JCA. Compare *Isichei v Allagoa* [1998] 12 NWLR (pt 577) 196 (CA) where a lessee paid annual rents and continued

Moreover, it is arguable that the enumerated modes of alienation in sections 21 and 22, whether they are taken to be exhaustive or not, relate only to transfers of title or interest in land. Therefore, the sections are not engaged unless there is an actual movement of title from the vendor to the purchaser. As explored below, this has some implications for the operation of a written declaration of trust. Is there such a movement of title when the vendor declares himself or herself a trustee for the purchaser? The highlighted limitations in sections 21 and 22 of the Act seem to have been anticipated by section 26 which attempted to fill the crack by nullifying all instruments and transactions that are inconsistent with the Act. Despite its all-encompassing nature, section 26 embodies its own inherent limitation: it applies only to those transactions or instruments that "confer on" or "vest" in any person any interest or right in land. The question then is whether an express written declaration of trust affecting land comes within the enumerations of sections 21 and 22 of the Act or could be regarded as a transaction or instrument that "confers on" or "vests in" any person any interest in land under section 26? Answers to this question will be greatly illuminated by a brief examination of the cases decided under the sections of the Act noted above, as well as by an analysis of the nature of declarations of trust.

VALIDITY OF ALIENATIONS UNDER THE LAND USE ACT

It is not certain whether the cases decided since the commencement of the Act have exhausted the subtleties of sections 21, 22 and 26 of the Act. This article examines these cases under the following categories: mortgage, partition of land, agreement to sell, court auction or judicial sales, and power of attorney.

Mortgage

Savannah Bank Ltd v Ajilo[72] is perhaps the most famous (if not infamous) case on the operation of the Act. In that case, a defaulting mortgagor put up a bold argument that his failure to obtain the governor's consent to the mortgage rendered it void so that the mortgagee's power of sale under the mortgage was not exercisable. The mortgagee's sole argument was that section 22 (consent provision) applied only to statutory grants made by the governor under section 5 (sometimes called "actual" or "express" grants by judges and commentators) and that it did not apply to a "deemed grant" under section 34 (2) which governed the transaction. In other words, that the mortgage of a "deemed" grant under section 34(2) of the Act does not require a governor's

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to be in possession after a void lease (for want of consent) had expired. The Court of Appeal seemed to have held that an annual tenancy could not have risen in the circumstances. It is, however, suggested that, since the initial possession was not illegal, an annual tenancy arose by operation of law and was outside secs 22 and 26 of the Act.

72 *Savannah Bank Ltd v Ajilo*, above at note 26.

consent. Unfortunately, defences such as the principle of non-derogation from grant or the equitable principle precluding one from benefiting from his or her own wrong were not raised in the statement of defence settled for the mortgagee/appellant, though it was canvassed by the mortgagee's counsel at the Supreme Court. Probably on account of this pleading flaw, four members[73] of the full court (of seven judges) refused to advert to or pronounce on the appellant's counsel's submissions relating to the principle of non-derogation from grant. Karibi-Whyte JSC only acknowledged the submission but did not comment on it.[74] Belgore JSC opined that the defect in pleading the defence precluded its consideration and hoped that "counsel will one day move further than [the] narrow confine this Court has been placed in this case."[75] While Obaseki JSC who delivered the lead judgment regretted that the plaintiff/respondent was benefiting from his own wrong he nevertheless observed that "the express provisions of the Land Use Act make it undesirable to invoke the maxim *exturpi cause non oritur action* [actions based on illegal or unlawful transactions are unenforceable] and the equitable principle enshrined in the case of *Bucknor-Maclean v Inlaks Ltd*".[76]

Ajilo's case contrasts sharply with the attitude of the Court of Appeal in the earlier case of *Adedeji v National Bank of Nigeria*.[77] The facts of *Adedeji's* case were very similar to that of *Ajilo* and the issue of the applicability of the principle of non-derogation from grant arose at the appellate level as well.[78] The Court of Appeal was, however, more willing to deal with the equities of the case. The justices frowned at the prospects of a defaulting mortgagor relying on his or her own wrongdoing to avoid the obligations arising from a mortgage and observed (per Akpata JCA, as he then was): "It cannot reasonably be supposed to have been intended by those who promulgated the Land Use Act that a holder who, without obtaining the consent of the Governor, mortgaged his property for a handsome amount and after collecting the money can say to the Bank, 'the mortgage is null and void, you cannot have my property' and get away with it."[79]

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73 Nnamani, Kawu, Agbaje and Craig JJSC.

74 *Savannah Bank Ltd v Ajilo*, above at note 26 at 339.

75 Id at 354.

76 Id at 324.

77 *Adedeji v National Bank of Nigeria* [1989] 1 NWLR 212.

78 *Adedeji's* case was recently followed in *Jegede v Citicon Nigeria Ltd* [2001] 4 NWLR (pt 702) 113 (CA). It has also been held that the lack of consent must be raised in the statement of defence: *Jibrin v Baba* [2004] 16 NWLR (pt 899) 243 (CA). Adedeji's principle has also been applied in the context of an irregular transfer of shares: *Inyang v Ebong* [2002] 2 NWLR 284 (CA).

79 *Adedeji v National Bank of Nigeria*, above at note 77 at 225. However, the principle of benefiting from one's own wrongdoing does not apply where a landowner conveyed his land (without the required consent) to his former employer, in exchange for freedom from criminal prosecution in respect of an unproven crime alleged by the employer against the landowner: *Calabar Central Co-Operative v Ekpo* [2001] 17 NWLR (pt 743) 649 (CA).

Regrettably, *Adedeji's* case was not mentioned in *Ajilo* although the principle it espoused could be found in earlier Supreme Court decisions.[80] It is not clear how the Supreme Court will react to *Adedeji's* case. Sadly, recent indications appear to be negative.[81] The Supreme Court, however, appears willing to have a second look at its decision in *Ajilo's* case.[82] The point is that *Ajilo's* and *Adedeji's* cases confirm that a mortgage instrument or transaction comes within the prohibition contemplated by sections 21, 22 and 26 of the Act.[83] It would also appear that an agreement to transfer the benefits of a mortgage to a third party (who paid off the mortgage debt with the consent of the mortgagor) is similarly prohibited, unless prior consent of the appropriate authority is obtained.[84]

Partition of land

It is important to know whether a partition of land pursuant to an order of court requires the consent of an appropriate authority.[85] Analogy may be drawn from *Stephen v Pedrocchi*,[86] decided under the Land Tenure Law (northern Nigeria), where it was held that a court wishing to make an order for the sale of land subject to a right of occupancy may not do so until consent to the sale has been obtained from the appropriate authority. *Stephen's* case would furnish a more persuasive precedent under the Land Use Act only if a partition of land were regarded as having the same legal effect as a sale of land.[87] In *Nkeaka v Nkeaka*[88] the Court of Appeal had to determine the nature of a court-ordered partition of land. The appellant in that case alleged that the partition of their deceased father's land by an order of the High Court of Asaba without the consent of the governor of Delta state was contrary to the provisions of the Land Use Act. Although this issue was raised for the first time

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80 For instance: *Bucknor-Maclean v Inlaks Ltd* [1980] 8-11 SC 1; *Solanke v Abed* [1962] 1 All NLR 230; *Quo Vadis Hotels & Restaurant Ltd v Commissioner of Lands, Mid-Western State & Others* [1973] 6 SC 71; *Oilfield Supply Centre Ltd v Joseph Lloyd Johnson* [1986] 5 SC 310.

81 In *Awojugbagbe Light Industries Ltd v Chinukwe* [1995] 4 NWLR (pt 390) 379 at 426 (SCN), Onu JSC thought that the ruling in *Ajilo's* case tempered that of the Court of Appeal in *Adedeji's* case.

82 *Ugochukwu v Cop & Comm Bank Ltd* [1996] 6 NWLR (pt 456) 524 at 542 (Ogundare JSC).

83 See generally PE Oshio "Mortgages under the rights of occupancy system in Nigeria" (1989) 33 *Journal of African Law* 19.

84 *Onamade v ACB* [1997] 1 NWLR (pt 480) 123 (SCN).

85 In England, where consent is required (under certain instruments) for a disposition or transfer of shares, some courts have considered whether a court order can amount to such a transfer or disposition of shares: *In re Holt's Settlement: Wilson v Holt* [1969] 1 Ch 100; *Sun Alliance Insurance Ltd v Inland Revenue Commissioners* [1971] 2 WLR 432; *Hambro v Duke of Marlborough* [1994] Ch 158. Therefore, to the extent that a court-ordered partition can be regarded as an act of disposition or transfer, English courts would seem to have considered a similar issue.

86 *Stephen v Pedrocchi* [1959] NRNLR 76.

87 It is argued below that a court-ordered partition has the same legal effect as the sale of land inter vivos.

88 *Nkeaka v Nkeaka* [1994] 5 NWLR (pt 346) 599.

at the Court of Appeal without the required leave of court (and thus incompetent), Ogebe J nevertheless observed that it "was not the duty of the trial court to apply for the consent of the Governor before it could partition family property among the parties."[89] This ruling appears to give little consideration to the legal effects of partition. A partition of land operates to vest in or confer property rights on the parties to the partition. It could also operate by way of assignment and falls within the provisions of the Act.[90] As Burn and Cartwright noted, the effect of partition is "to make each former co-tenant a separate owner of a specific portion of land, and thus to terminate the co-ownership for ever."[91] As such, the proper approach for a court faced with a petition for partition is to make the partition order subject to the approval or consent of the appropriate authority. It is, however, arguable that an order for partition does not (by itself) dispose of or alienate any interest in the land to the parties and, to that extent, does not require the consent of the appropriate authority under the Act. This argument is potentially viable where the parties contemplate the execution of a transfer instrument to effect the court order.[92] But there is little scope for success of the argument above where the order for partition is based on a scheme of partition already prepared by the parties and submitted to the court.

Agreement to sell land

Much judicial ink has been spilt on the relationship between the Land Use Act and agreements to sell land. Nigerian case law puts it beyond doubt that an agreement to sell land evidenced by a purchase receipt and coupled with a transfer of possession confers an equitable interest in the land on the purchaser. This equity is only defeated by a subsequent purchaser of the legal estate without notice of the equitable interest.[93] Since the commencement of the Act, however, it is doubtful whether such an equitable interest can be validly created without the consent of the appropriate authority. There are three ways of approaching the issue.

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89 Id at 605

90 Edozie JCA (as he then was) agreed in *Akpadiaha v Owo* [2000] 8 NLWR (pt 669) 439 at 454 that partition confers ownership. The Supreme Court appears to accept this conclusion in *Obasohan v Omorodion* [2001] 13 NWLR (pt 729) 206 and *Olurunfemi v Asho* [2000] NWLR (pt 643) 143, though it observed in the latter case that it is a question of fact whether what took place amounted to a partition or mere allotment under customary law. A Oludayo "Partition: Meaning and effect under customary law" (2003) 22 *Journal of Private & Property Law* 152.

91 EH Burn and J Cartwright *Cheshire and Burn's Modern Law of Real Property* (17th ed, 2006, Oxford University Press) at 459.

92 Which will make the instrument rather than the court order the relevant document for consent.

93 *Ogunbambi v Abowab* [1951] 13 WACA 222; *Orasanmi v Idowu* [1959] FSC 40 (SCN); *Okoye v Dumez Nigeria Ltd* [1985] 1 NWLR (pt 4) 783 (SCN); *Provost, LACOED v Edun*, above at note 61; *Agbabiaka v Okojie* [2004] 15 NWLR (pt 897) 503 (CA); *Aminu v Ogunyebi* [2004] 10 NWLR (pt 882) 457 (CA).

First, it is arguable that an equitable interest in the circumstances above arises by operation of law through the doctrine of constructive trust. As Jaffey rightly observed: "Where C has contracted to buy property from X, and the contract is specifically enforceable, X is said to hold the property on constructive trust."[94] Since agreements to sell land hardly ever contain an express provision making the vendor a trustee for the purchaser, it is difficult to argue that the trust arises from the agreement itself as opposed to operation of law through the doctrine of constructive trust. Accordingly, where possession of land was secured on the basis of an agreement to sell which did not evolve into legal ownership (because of non-compliance with formal requirements), equity will recognize the purchaser's beneficial interest and will oblige the vendor to act as a constructive trustee of the legal title for the purchaser. Jessel MR confirmed this proposition in *Lysaght v Edwards*:

> "The moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser, the vendor having a right to the purchase money, a charge or lien on the estate for the security of that purchase money, and a right to retain possession of the estate until the purchase money is paid, in the absence of express contract as to the time of delivering possession."[95]

The equitable intervention through constructive trust ensures proper transfer of the legal title to the purchaser and prevents the vendor from unconscionably denying the transaction or the purchaser's interest. As Millet LJ observed in *Paragon Finance v Thakerar*: "A constructive trust arises by operation of law whenever the circumstances are such that it would be unconscionable for the owner of property … to assert his own beneficial interest in the property and deny the beneficial interest of another."[96] Since transfers by operation of law are not covered by sections 21, 22 and 26 of the Act, an equitable interest created through a constructive trust on the basis of an agreement to sell does not come within the prohibitions of the Act.

Second, it is also arguable that, since sections 21 and 22 envisage instruments that transfer the legal as opposed to the equitable title, then an agreement to sell land is outside the Act as it is not an "assignment, mortgage, transfer of possession, [or] sublease." Uwaifo JCA (as he then was) adopted this approach in *Okuneye v FBN Plc*;[97] that approach however fails to explain away convincingly the mandatory provision of section 26.

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94 P Jaffey *Private Law and Property Claims* (2007, Hart Publishing) at 249.

95 *Lysaght v Edwards* [1876] 2 Ch D 499 at 506.

96 *Paragon Finance v Thakerar* [1999] 1 All ER 400 (CA) at 409. Also Lord Browne-Wilkinson in *Westdeutsche v Islington* [1996] AC 669 at 705–07 (HL).

97 *Okuneye v FBN Plc*, above at note 70. Also, *Doherty v Ighodaro* [1997] 11 NWLR (pt 530) 694 (CA).

The third way of looking at the issue is to accept that, in so far as the equitable interest was conferred by the agreement and transfer of possession, then it comes within the prohibitions of the Act and requires the prior consent of an appropriate authority. The cases have often favoured the second approach.

In *Ogbo v Adoga*,[98] the plaintiff brought an action for the specific performance of an agreement to execute a conveyance of land in his favour after he had paid the purchase price to the defendant and was put into possession. The plaintiff also developed the land by building a bungalow on it. In a preliminary objection to the plaintiff's suit, the defendant claimed that the transaction was void for want of consent under sections 22 and 26 of the Act. Muhammad JCA held that "an agreement to sell *simpliciter* is not unlawful. An agreement to sell, not being an agreement to sell even if the consent is withheld, is not unlawful by virtue of section 22 of the Act which is silent on agreement. An agreement to alienate is inchoate till consent is obtained."[99] Some objections might be raised. One, the case was not typical of an agreement to sell *simpliciter* [simply] since possession had already been transferred to the purchaser and the land was subsequently developed. *Ibekwe v Maduka*[100] more aptly represents the so-called cases of an "agreement to sell *simpliciter*" because the purchaser in that case was not given possession of the land by the vendor. But this distinction makes no difference since the non-possessing buyer in *Ibekwe's* case was eventually held to have acquired an enforceable interest in the land just as in *Ogbo's* case.

The view that an agreement to sell land is outside the provisions of the Act even when possession is transferred appears very artificial. This point was underscored by the observations of Ige JCA in *FMB v Akinola*: "The fact [that] the 2nd appellant took possession of the property with fresh instructions to the tenants about rent, confirmed that he was under the impression that he had already got a valid title. This is not correct. He has gone beyond an agreement to sell … . This is not possible under an inchoate contract."[101] Yet in one case it was held that the parties were still at the agreement stage notwithstanding the transfer of possession to the buyer, the erection of a four bedroom bungalow on the land and subsequent sale of the land and building to another buyer;[102] in another case it was similarly held that the substantial reconstruction of a building on the strength of possession gained pursuant to an agreement to lease the property did not take the parties out of the inchoate contract stage.[103] The second objection to *Ogbo's* case, and many other cases on agreement to sell land, is that section 26 was either not considered

98 *Ogbo v Adoga* [1994] 3 NWLR (pt 333) 469.

99 Id at 477 (emphasis original).

100 *Ibekwe v Maduka* [1995] 4 NWLR (pt 392) 716.

101 *FMB v Akinola* [1998] 4 NWLR (pt 545) 325 at 335–36.

102 *Igbum v Nyarinya* [2001] 5 NWLR (pt 707) 554 (CA).

103 *International Textile Industries (Nigeria) Ltd v Aderemi* [1999] 8 NWLR (pt 614) 268 (SCN). A better basis for the judgment in this case was the view articulated by Uwaifo JSC (at 298) that equity will not allow sec 22 of the Act to be used as an engine of fraud.

or significantly analysed. In these circumstances, *Ogbo's* case should be taken to represent the principle that a litigant should not be allowed to benefit from his or her own wrong by setting up the prohibitory clauses of a statute.[104] Better still, *Ogbo's* case could be rationalized on the basis of the first approach suggested above: that the equitable interest arose by operation of law and was therefore outside the provisions of the Act.

In *Awojugbagbe Light Industries Ltd v Chinukwe*[105] the Supreme Court appears to endorse the view that an agreement to sell land does not offend the provisions of the Act, but a closer examination reveals a contrary conclusion. The parties in that case obtained the consent of the governor to a deed of mortgage but that was not done until a few years after the execution of the deed. Evidence adduced in the case clearly showed that the mortgage was not intended to be effective until the consent was obtained. Consequently, the Supreme Court held that, since the mortgage was not complete and was conditional on consent being obtained, it was not prohibited by section 22 of the Act.[106] Apart from glossing over section 26, the Supreme Court actually implied that an unconditional agreement to sell land without the consent of the governor is unenforceable. In *FMB v Akinola*, Ogebe JCA fully appreciated the ratio of *Awojugbagbe's* case by emphasizing that an agreement to sell land must be incomplete and must be made subject to the governor's consent before it could escape the provisions of the Act: "The 1st appellant did not plead in the lower court that it merely entered into a sale agreement which would be completed when obtaining [sic] the consent of the Governor."[107] Unfortunately, *Awojugbagbe's* case has been interpreted to mean that a subsequent consent cures all documentary infirmities,[108] and that even a deed of assignment executed after an auction sale and intended to have an immediate effect is valid if the consent of the governor is eventually obtained.[109] This is an unjustifiable extension of *Awojugbagbe's* case. However, the Supreme Court has held in a recent case that a mortgagee is entitled to refuse to endorse an agreement to transfer the benefits of the mortgage to a third party who discharged the mortgage debt with the consent of the mortgagor, on the ground that it offends the provisions of sections 22 and 26 of the Act.[110]

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104 This was the basis of Orah JCA's concurring judgement in *Ogbo's* case, above at note 98 at 480.

105 *Awojugbagbe Light Industries Ltd v Chinukwe*, above at note 81.

106 *Adetuyi v Agbojo* [1997] 1 NWLR (pt 484) 705 (CA) epitomizes such conditional alienations. In that case the agreement to sell was conditional on the vendor obtaining a deed of release from his mortgagee and the consent of the governor. Also: *Best Nigeria Ltd v Blackwood Hodge Nigeria Ltd* [2001] 10 NWLR (pt 720) 35 (CA); *Oyebanji BMS Ltd v UBA Plc* [2001] 6 NWLR 80 (CA).

107 *FMB v Akinola*, above at note 101 at 334.

108 *Mainagge v Gwamna* [1997] 11 NWLR (pt 528) 191 (CA).

109 *Okonkwo v Co-operative & Commerce Bank Ltd* [1997] 6 NWLR (pt 507) 48 (CA); *Majekodunmi v Co-Op Bank Ltd* [1997] 10 NWLR (pt 524) 198 (CA).

110 *Onamade v ACB*, above at note 84.

By this ruling it could mean that an agreement (to mortgage) is, after all, caught within the provisions of the Act.[111] More recently, the Court of Appeal came to the same conclusion when it observed (per Ogunbiyi JCA) that under "the provisions of sections 22, 26 and 51 of the Land Use Act … for an equitable mortgage to be enforceable, the consent of the Governor of the State where the property is situate must first be obtained for a valid and an enforceable transaction in law."[112]

Agreement to sell: Section 26 of the Act and *Denning v Edwardes*

Insufficient analytical engagement with section 26 of the Act has led to the indefensible exemption of an "agreement to sell" from the provisions of the Act. Current judicial attitude in that regard stems from a misinterpretation of the Privy Council's decision in *Denning v Edwardes*[113] on the proper construction of sections 88(1) and (3) of the Crown Lands Ordinance (Kenya).[114] Just like sections 21 and 22 of the Land Use Act, section 88(1) of the Crown Lands Ordinance envisages only instruments that are capable of achieving certain legal results or are able to transfer the legal title, such as a conveyance for sale or a deed of mortgage. Accordingly, it did not generally prohibit all instruments (and documents) or transactions that are capable of giving rise to an interest in land, for instance an agreement to sell land. Viscount Simonds who delivered the judgment of the Privy Council was therefore right to observe that "[s]ubsection (3) is applicable only to an instrument which 'purports to effect any of the transactions referred to in sub-section (1)', for instance, a conveyance which makes a sale effective. Their Lordships are of opinion that an agreement to sell does not 'effect a transaction' and that therefore subsection (3) is not applicable to the agreement in question."[115] If there were no section 26 in the Act then the above rationale would have been easily

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111 Incidentally, that was the decision of the Court of Appeal in *Jacobson Eng Ltd v UBA Ltd* [1993] 3 NWLR 586. Although the Court of Appeal held that the equitable mortgage in that case offended sec 22 of the Act, its decision is also justifiable under sec 26 of the Act.

112 *FBN Plc v Songonuga* [2007] 3 NWLR 230 at 262 (CA).

113 *Denning v Edwardes* [1961] AC 245.

114 Sec 88(1) reads: "No person shall, except with the written consent of the Governor, sell, lease, sub-lease, assign, mortgage or otherwise by any means whatsoever, whether of the like kind to the foregoing or not, alienate, encumber, charge or part with the possession of any land which is situate in the Highlands, or any right, title or interest whether vested or contingent, in or over any such land to any other person, nor, except with the written consent of the Governor shall any person acquire any right, title or interest in any such land for or on behalf of any person or any company registered under the Companies Ordinance; nor shall any person enter into any agreement for any of the transactions referred to in this subsection without the written consent of the Governor." Sec 88(3) reads: "Any instrument, in so far as it purports to effect any of the transactions referred to in subsection (1) of this section shall be void unless the terms and conditions of such transactions have received the consent of the Governor which shall be endorsed on the instrument."

115 *Denning v Edwardes*, above at note 113 at 253.

transposable to Nigeria. Some Nigerian decisions have wrongly equated section 88(1) and (3) of the Crown Lands Ordinance with sections 22 and 26 of the Land Use Act. While section 22 (and 21) of the Act is similar to the Kenyan provisions, section 26 has no equivalent in the Kenyan legislation. A critical distinction exists between sections 88(1) and (3) of the Crown Lands Ordinance and section 26 of the Act. While the Kenyan statute targets only particular instruments (like sections 21 and 22 of the Act), section 26 of the Act has a wider ambit and targets both instruments and transactions without limitation. That is why it was suggested earlier in this article that section 26 was intended to cover gaps that might be left by sections 21 and 22 due to statutory constructions such as the *ejusdem generis* rule.

The generous application of *Denning v Edwardes* in Nigeria fails to account for the fundamental difference (discussed above) between the two statutes. As usual, Uwaifo JSC brought his characteristic brilliance to shine on this much needed explanation and observed (impliedly) in *International Textile Industries (Nigeria) Ltd v Aderemi*[116] and *Okuneye v FBN*[117] that an agreement exempted from section 22 automatically escapes the prohibition of section 26. This line of reasoning was followed by Onalaja JCA in *Iragunima v Uchendu*.[118] Such interpretive attitude carries the implication that section 26 only provides a sanction for sections 21 and 22, and this again is traceable to *Denning v Edwardes*.[119] Unlike section 26 of the Act, section 88(3) of the Crown Lands Ordinance (Kenya) is clearly expressed to sanction breaches under section 88(1) of the Kenyan act. In further contrast, it is arguable that sections 21 and 22 of the Land Use Act contain their own sanctions by making an offending transaction unlawful and therefore unenforceable. This is not the case with section 88 (1) of the Crown Lands Ordinance. It is beyond argument that, when a statute says an act shall "not be lawful", as in sections 21 and 22, then that act is prima facie prohibited and unenforceable. As far as sections 21 and 22 are concerned, the sanction in section 26 indicates an excessively cautious approach. In other words, there is no reason to limit section 26 by reference to section 22, since section 26 applies equally to other breaches of the Act, such as the grant of a statutory right of occupancy to a minor or the governor's consent to an assignment of a statutory right of occupancy to such a person.[120] Considering that an agreement to assign a statutory right of occupancy to a minor is unenforceable under section 7,[121] and void under section 26, could you then say that the same agreement is outside the provisions of

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116 *International Textile Industries (Nigeria) Ltd v Aderemi*, above at note 103 at 298–99.

117 *Okuneye v FBN*, above at note 70 at 756–57.

118 *Iragunima v Uchendu* [1996] 2 NWLR (pt 428) 30. There was evidence in this case that consent had been applied and paid for, and there were follow-up visits. It is thought that in cases like this equity might perfect the imperfect transfer.

119 Extra-judicially, Niki Tobi JSC seems to support that approach: N Tobi "The Land Use Act and judicial activism" (2003) 23 *Journal of Private & Property Law* 1 at 12–13.

120 The Act, sec 7.

121 Sec 7 evinces a clear legislative intention that a person under the age of 21 shall not have

the Act because it is not within the prohibitions of section 22? Put differently, if a breach under section 7 (agreement to assign to a minor) is exempted by section 22 (being, by current judicial classification, a mere agreement to assign)[122] but is nevertheless prohibited by section 26, does it not show that section 26 is wider than section 22? In the circumstances, is it not arguable that section 26 is a free-standing section? Consequently, Muhammad JCA was incorrect to observe in *Ohiwerei v Okosun* that "section 26 expressly provides that any transaction which purports to confer on or vest [in] any person any interest or right over land other than in accordance with the provisions of section 22(1) shall be null and void".[123] There is no such limitation in section 26 either, in terms of the quotation above or otherwise. His lordship wrongly substituted "section 22" for the "Land Use Act" which was the form of words actually used in section 26. The difference is equally material since the application of section 26 to other provisions of the Act (without limitation to section 22) makes the restriction unjustifiable.

Though not without problems, it is arguable that section 26 of the Act is a free-standing provision with its own sanction. In contrast to section 22, section 26 prohibits any agreement to sell that confers an interest in land on the purchaser other than in accordance with the provisions of the Act. This implication is often glossed over. For instance Adamu JCA, after holding that an agreement to sell land or other "inchoate" documents (instruments not consented to by the governor) are permitted by the provisions of the Act, nevertheless observed that such an agreement "had effectively conferred or vested title on the 2nd respondent."[124] This quotation duplicates the two critical words of section 26 ("confer on" and vested in") and anchors the suggestion that an agreement to sell land is clearly within the prohibitions of the Act. Otherwise, it makes little sense that an agreement to sell can confer on (or vest in) a person an interest in land as contemplated by section 26 and yet be outside the provisions of the Act. To save beneficial interests arising from such agreements we rather need to employ the concept of constructive trusts (as suggested earlier). The contention that section 26 is a free-standing provision suffers, however, from the lack of any conditions of its own, such as consent. But this does not make right the present limitations based on sections 21 and 22 of the Act. Even if section 26 is not a free-standing section, it is capable of expounding sections 21 and 22 of the Act. The current approach gives little consideration to the impact of section 26. More than a strained construction that marginalizes the import of section 26, a constructive trust approach is

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contd
any interest in land except through a trustee or inheritance. See generally *In re Neath and Brecon Railway Co* [1874] LR 9 Ch App 263 (CA).

122 The Supreme Court restated the exemption for such agreements in *Owoniboys Technical Services Ltd v UBN Ltd* [2003] 15 NWLR (pt 844) 545, although the decision was obiter.

123 *Ohiwerei v Okosun* [2003] 11 NWLR (pt 832) 463 at 493 (CA).

124 *Majekodunmi v Co-Op Bank*, above at note 109 at 220.

better poised to deepen the dialogue between the legislature and the judiciary on the provisions of the Act.

Court auctions or court ordered sales of land

Sections 22 and 26 of the Act would seem to apply to judicial sales of land: for instance, a sale ordered by the court or conducted by a sheriff or other relevant officers of the court.[125] Transfers under judicial sales are usually carried out by a deed or other written instruments which demonstrate that title has been passed to the purchaser. Such transfers are contemplated by the provisions of the Act. In *Kachalla v Banki* the Supreme Court failed to seize an interesting opportunity to pronounce on this issue. In *Kachalla's* case, X bought a piece of land (together with the building) from B (a holder of a statutory right of occupancy) at a time when C's suit to recover a debt from B was pending in court. X obtained a purchase receipt from B and was put into possession of the land and building. The formal deed of assignment executed by B in favour of X was refused registration on the basis of a protest letter written by the registrar of the court where C's suit was pending. B did not obtain the prior consent of the governor for the sale to X. It was accepted as a fact that the purchase by X was done in good faith. About a year after the sale to X, C obtained judgment in his suit against B and the land was put up for sale by order of the court. D bought the land in the auction that took place but he failed to obtain the governor's consent. The Supreme Court unanimously held that X's interest, being first in time, ranked higher in priority to D's. More significantly, it held that D had constructive notice of X's interest. But the surprise really is that, apart from the question of priority, both X and D were held to have obtained valid interests in the land. This appears to be inconsistent with sections 22 and 26 of the Act. There was no attempt by any of the justices to engage with the impact of these sections on the facts of the case. In his lead judgment, Musdapher JSC declared that X was "the bona fide owner of the property",[126] and Kutigi JSC even thought that the sale to X was "full and complete".[127] Onnoghen[128] and Kalgo JJSC considered consent to be a mere formality. Kalgo JSC observed that X's title was "complete, except that the appellant (X) on his part has not perfected his interest in the property by obtaining the relevant consent and registering it in his name."[129] With respect, these observations are incorrect, for X (and D) could not have obtained a valid title in the light of sections 22 and 26 of the Act. If the transfer to X was full and complete, as contended by some of the justices, why was consent under the Act not required? Why was D's interest

125 The same conclusion was reached under the Land Tenure Law of northern Nigeria: *Stephen v Pedrocchi*, above at note 86.
126 *Kachalla v Banki*, above at note 26 at 385.
127 Id at 386.
128 Id at 388.
129 Id at 387.

validly created without the consent of the governor or without even making it subject to the governor's consent? One can readily appreciate the desire by the courts to save transactions that offend the prohibitory clauses of the Act.

Perhaps the outcome in *Kachalla's* case could have been reached through a beneficial analysis that avoided violating the Act. For instance, the sale to X could have been held void under sections 22 and 26 of the Act. B nevertheless would have become a constructive trustee for X, since it would be unconscionable for B to deny X's beneficial interest.[130] Constructive trusts arise by operation of law and are not caught by sections 22 and 26 of the Act. Thus, when D bought the land, only the legal interest could have been transferred to him except he had no notice of X's equity. Since D did not obtain the governor's consent for his own purchase and was found on the facts to have notice of X's equity, he failed to acquire a better title than X. This point was missed by Onnoghen JSC when he observed that X "having bought the property, the original owner (B) ceased to have any interest therein, whether equitable or legal which could subsequently be attached and sold in execution of any judgement of the court."[131] At all times B remained the owner of the legal interest which was transferable to a subsequent bona fide purchaser for value without notice. B held that interest on a constructive trust for X. D's notice ensured the survival of that trust. The trust analysis would have helped to avoid the impression that the Act was not infringed in *Kachalla's* case.

Power of attorney

To avoid the provisions of the Act, many land transactions in Nigeria are carried out through the use of a power of attorney. As a conveyancing device, a power of attorney provides an easy escape from the prohibitory sections of the Act. But this comes at a huge cost as it leaves the donee with only a precarious interest in the land. Nnaemeka-Agu JSC's observation in *Ude v Nwara*[132] remains one of the clearest judicial expositions of the nature and impact of a power of attorney affecting land: "A power of attorney merely warrants and authorizes the donee to do certain acts in the stead of the donor and so is not an instrument which confers, transfers, limits, charges or alienates any title to the donee: rather it could be a vehicle whereby these acts could be done by the donee for and in the name of the donor to a third party."[133] Consequently, a power of attorney is not contemplated by sections 22 and 26 of the Act. This omission, however, puts the donee in a very vulnerable position. For instance, the donor could directly and validly sell the land to a third party during the subsistence of the power of attorney so long as the donee has

130 In certain circumstances void transactions can give rise to constructive trusts: *Yaxley v Gotts* [2000] Ch 162 (CA).

131 *Kachalla*, above at note 26 at 389.

132 *Ude v Nwara* [1993] 2 NWLR (pt 278) 638 (SCN).

133 Id at 665.

not exercised the power of sale.[134] A power of attorney is also revoked by the death (or bankruptcy) of the donor unless it was granted to secure a proprietary interest in land (for instance, in pursuit of an equitable mortgage) or to secure the performance of an obligation owed to the donee.[135] Worse still, the donee's powers are personal to him or her and are not transmissible to successors-in-title.[136] Due to the maxim *delegatus non protest delegare* [a delegate cannot delegate his authority], a donee cannot grant a power of attorney to a third party. For instance, a donee cannot avoid the provisions of the Act by granting another power of attorney to a third party.[137] Accordingly, the Court of Appeal observed in *Olorunfemi v NEB Ltd*[138] and *Ihekwoaba v ACB Ltd*[139] that a power of attorney granted by a mortgagee to a purported purchaser is not legally recognizable and cannot effectively confer any interest on the purchaser/donee. Since it is not an instrument of transfer or alienation of land, a power of attorney is not registrable. However, a power of attorney might become registrable if the power of alienation is given to the donee[140] which he or she then exercises.[141] A purchaser of land who opted for a power of attorney in order to avoid the provisions of the Act may end up with a worthless document. It is pertinent to bear in mind the admonition of Pats-Acholonu JCA (as he then was) that a power of attorney is not the equivalent of a lease or assignment, whether or not it is coupled with interest, and that it "is erroneously believed in not very enlightened circles particularly amongst the generality of Nigerians that [a] power of attorney is as good as a lease or assignment."[142]

DECLARATION OF TRUST

Declarations of trust have been used for centuries in the settlement of proprietary interests. No formality is required,[143] except that some written evidence is necessary for a valid trust affecting land, and there must be certainty of intention, object and subject of the trust.[144] Declarations of trust may take two forms. First, X declares a trust in favour of C and appoints B the trustee. In

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134 *Chime v Chime* [2001] 3 NWLR 527 (SCN); *Amadi v Nsirim* [2004] 17 NWLR (pt 901) 111 (CA); *Oshola v Finnih* [1991] 3 NWLR 192 (CA).

135 *Ndukauba v Kolomo* [2001] 12 NWLR 117 at 129–30 (CA); *Chime v Chime*, id at 555.

136 *Ndukauba v Kolomo*, id at 127.

137 *Olorunfemi v NEB Ltd* (2003) 5 NWLR 1 (CA).

138 Ibid.

139 *Ihekwoaba v ACB Ltd* [1998] 10 NWLR (pt 571) 590 (CA), per Uwaifo JCA (as he then was). Although the minority judgement considered the power of attorney in that case to amount to a sale or transfer of the mortgaged property to the donee of the power, it did not consider the effect of non-compliance with secs 22 and 26 of the Act.

140 *Johnson v Banjo* [1973] N.N.L.R. 187 at 189–90 (CA).

141 *Abu v Kuyabana* [2002] 4 NWLR 599 at 614 (CA).

142 *Ndukauba v Kolomo*, above at note 135 at 127.

143 *Paul v Constance* [1977] 1 WLR 527.

144 *Knight v Knight* [1840] 3 Beav 148.

this case the settlor and the trustee are different persons and the trust is properly constituted by the conveyance of the property to B. The Scottish Law Commission calls this type of trust "a standard trust" though it argues in favour of the trust being constituted upon the making of the declaration (and not when the property is transferred).[145] The property in a standard trust could be transferred simultaneously with the declaration; it could also be transferred before[146] or after the declaration. Without a valid transfer, the trust is improperly constituted and equity will not perfect an imperfect gift.[147] Exceptions to this rule have been recognized where the transferor did everything in his power to divest himself of the interest,[148] and where it is unconscionable for the transferor to deny the transferee's title.[149] A "standard" declaration of trust is tripartite in nature and it involves the transfer (or alienation) of property to the trustee who obtains the legal title. It is, therefore, caught within the provisions of the Act and would require prior consent of the appropriate authority. This article does not promote the standard trust.

A declaration of trust may take another form. For instance, a land owner declares himself a trustee for the purchaser.[150] The Scottish Law Commission calls this "truster-as-trustee trust". This trust is promoted in this article as a flexible device to overcome the onerous prohibitions of the Act. A declaration by X that he holds his land on trust for Y does not involve any disposition, alienation or transfer of property.[151] X was the landowner before the declaration and remains so after the declaration. By the declaration, however, X has come under an obligation in favour of Y which is enforceable in equity. Hayton has said that "a trust is an obligation and so requires the trustee to owe duties to the beneficiaries who have a correlative right to make the trustee account to them for the carrying out of those duties".[152] Parkinson was also confident that "an obligations-based approach helps more clearly to answer the question of what is the irreducible core content of the trust idea. There must be enforceable obligations".[153] The unquestionable character of these propositions has deep roots in antiquity. Maitland authoritatively observed that a "man who is intending to make himself a trustee intends to retain his rights but to come under an onerous

145 Scottish Law Commission *Discussion Paper on the Nature and the Constitution of Trusts* (2006, The Stationery Office).

146 For instance, *Tierney v Wood* [1854] 19 Beav 330; *M'Fadden v Jenkyns* [1842] 1 PH 153.

147 *Milroy v Lord* [1862] 4 De GF & J 264; *Richards v Delbridge* [1874] LR 18 Eq 11; *Jones v Lock* [1865] LR 1 Ch App 25.

148 *Re Rose, Midland Bank v Rose* [1949] Ch 78; *Re Rose, Rose v IRC* [1952] Ch 499.

149 *Choithram International SA v Pagarani* [2001] 1 WLR 1; *Pennington v Waine* [2002] 1 WLR 2075.

150 As in *London and County Banking Co v Goddard* [1897] 1 Ch 642.

151 JE Martin *Hanbury & Martin Modern Equity* (17th ed, 2005, Sweet & Maxwell) at 88 and 119.

152 D Hayton, "Developing the obligation characteristics of the trust" (2001) 117 *Law Quarterly Review* 96 at 97.

153 P Parkinson "Reconceptualising the express trust" (2002) 61 *Cambridge Law Journal* 657 at 679.

obligation".[154] This means that, while equity is prepared to enforce the obligation engendered by the declaration, it does not involve a transfer of title from the owner/trustee to the beneficiary. The Scottish Law Commission explored this matter in some considerable detail. Having accepted that there is a statutory requirement for writing (in Scotland) where an owner declares himself a sole trustee for another,[155] it observed, however, that writing is not required in a standard inter vivos trust involving a tripartite relationship.[156] The Scottish Law Commission tested this conclusion against the provisions of section 1(2)(b) of the Requirements of Writing (Scotland) Act 1995 which requires writing for "the creation, transfer, variation or extinction of a real right in land otherwise than by the operation of a court decree, enactment or rule of law". In other words, does the statute make writing mandatory when land is the subject mater of a standard trust? In returning a negative answer, the Scottish Law Commission observed: "A declaration of trust in respect of such property does not create, transfer, vary or extinguish a real right in land and consequently section 1(2)(b) of the 1995 Act does not apply."[157] Put simply, a declaration of trust does not create any interest in land, nor does it transfer, vary or extinguish one already in existence.

English law preserves the sanctity of this proposition despite Lord Radcliffe's obscure remarks in *Grey v Inland Revenue Commissioners*.[158] In that case Y, the legal and beneficial owner of shares, transferred the shares to X and Z to hold on bare trust for Y. Subsequently, Y orally directed X and Z to continue to hold those shares on the trust of other settlements declared in favour of Y's grandchildren. X and Z accepted the direction and this was evidenced by a deed in which X and Z recited the direction from Y and then declared that they (X and Z) were holding on trust of the children's settlements. The question in the suit was whether the declaration by X and Z was stampable ad valorem by the Crown as a voluntary disposition. In the course of the judgment, Lord Radcliffe observed:

> "In my opinion, it is a very nice question whether a *parol* [oral] declaration of trust of this kind was or was not within the mischief of section 9 of the Statute of Frauds. The point has never, I believe, been decided and perhaps it never will be … . Moreover, there is a warrant for saying that a direction to his trustee by the equitable owner of trust property prescribing new trusts of that property was a declaration of trust. But it does not necessarily follow from that that such a direction, if the effect of it was to determine completely or *pro*

154 Maitland *Equity*, above at note 7 at 74.

155 For instance, Requirements of Writing (Scotland) Act 1995, sec 1(2)(a)(iii). The Commission noted that this provision was intended "as a protection against impulsive gestures by the truster which he might later regret": Scottish Law Commission *Discussion Paper*, above at note 145 at 24.

156 Id at 22–23.

157 Id at 26.

158 *Grey v Inland Revenue Commissioners* [1960] AC 1 (HL).

> *tanto* [to a certain extent] the subsisting equitable interest of the maker of the direction, was not also a grant or assignment for the purposes of section 9 and therefore required writing for its validity."[159]

If Lord Radcliffe meant that a declaration of trust by itself transfers an interest in property or amounts to a grant or assignment, then that was not only obiter but glaringly incorrect. His lordship did not cite any authority for that proposition, nor could it be supported by legal history. The case obviously did not involve a declaration of trust by Y which could have made Lord Radcliffe's statement more worrisome. Y merely gave directions to trustees (regarding Y's equitable interest) which were equated (by X, Z and Y's counsel) to a declaration of trust.[160] But that analogy, though clever, was wrong since a declaration of trust and a direction to trustees are two different things. The former does not (technically) involve alienation but the latter entails a disposition or assignment of an existing interest in the property.[161] Some commentators have responded negatively to Lord Radcliffe's observation. Green thought that it was "an enigmatic passage",[162] while Battersby suggested that Lord Radcliffe could not have meant that "a direction may constitute both a declaration of trust and a disposition" since "there is a clear conceptual distinction between the two types of transactions, and to confuse them leads to inconsistent formal requirements".[163] It is evident that Lord Radcliffe's observation was made in answer to a false analogy drawn by the appellant's counsel. Happily, his lordship went back on track by observing that "it would be at any rate logical to treat the direction as being an assignment of the subsisting interest to the new beneficiary or beneficiaries or, in other cases, a release or surrender of it to the trustee".[164] Apart from Lord Radcliffe's obiter judgment, there does not appear to be any judicial challenge to the proposition that a declaration of trust by X in favour of Y does not alienate or transfer any interest in the subject matter.

If these principles were applied to the Act, it would become obvious that a declaration of trust (of the type promoted here) does not alienate or dispose of an existing interest in land in any of the manners mentioned in sections 21 and 22 of the Act or at all. To complete the picture, a little more needs to be said on the words "transfer of possession" in sections 21 and 22 of the Act. The phrase can only mean possession transferred pursuant to a valid

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159 Id at 16.

160 Id at 5.

161 Directions to trustees regarding an equitable interest have been clearly recognised as a disposition of the equitable interest: *In re Chrimes, Locovich v Chrimes* [1917] 1 Ch 30; *Timpson's Executors v Yerbury* [1936] 1 KB 645.

162 B Green "Grey, Oughtred and Vandervell - A contextual reappraisal" (1984) 47 *Modern Law Review* 385 at 394.

163 G Battersby "Some thoughts on the Statute of Frauds in relation to trusts" (1975) 7 *Ottawa Law Review* 483 at 487.

164 *Grey v IRC*, above at note 158 at 16.

alienation of land; the mere transfer of possession by A to B, without more, is therefore insufficient to engage the application of the sections. What is required instead is some possession based on a claim of ownership.[165] Otherwise, we would reach the absurd position that consent is required for the possession of a mere licensee. Interestingly, the Supreme Court has observed that the possession of a bare licensee is a revocable personal privilege which "does not operate to confer on or vest in the licensee any title, interest or estate in such property".[166] Since a declaration of trust does not amount to a disposition or alienation of land, any transfer of possession based on the declaration cannot come within the purview of sections 21 and 22 of the Act. Compliance with section 26 is trickier. It extends to any transaction or instrument that "purports to confer on or vest in any person any interest or right over land". The emphasis here is on the phrases "confer on" and "vest in". It is suggested that these are words of transfer or alienation and do not, for reasons analysed above, encompass a declaration of trust. This view is supported by the Supreme Court's decision in *Nkwocha v Governor* which accepted that to "vest" means "to give the property in".[167] To "confer" something on somebody similarly means "to give or bestow".[168] In contrast, a declaration of trust neither gives nor transfers anything but simply means that the declarant/owner of property is undertaking new obligations with respect to the property that is still vested in him. These obligations are enforceable at the instance of the beneficiary against the trustee, the trustee's heirs, executors, administrators and successors-in-title. They are also enforceable against the trustee's creditors, volunteers claiming through him, and anybody who acquired the trustee's interest with knowledge of the trust. Of course, the beneficiary has no remedy against a bona fide purchaser for value without notice of the trust. It is therefore extremely advantageous to the beneficiary to register the declaration (in the appropriate land registry), even when this is not a mandatory legal requirement.[169] The wide-ranging means of enforcing equitable beneficial interests have given rise to the notion that they are proprietary interests, rights *in rem* [in things] as opposed to rights *in personam* [against people]. It took Maitland three separate lectures to argue that: "Equitable estates and interests are rights *in personam* but they have a misleading

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165 However, it has been argued that, while a pledge and tenancy under customary law do not involve transfer of ownership, the possession given to the pledgee and the customary tenant comes within the purview of sects 21 and 22 of the Act and, therefore, requires the prior consent of an appropriate authority to be valid: PE Oshio "The Land Use Act and the institution of family property in Nigeria" (1990) 34 *Journal of African Law* 79 at 89–91.

166 *Kari v Ganaram*, above at note 48 at 397.

167 *Nkwocha v Governor*, above at note 26 at 647, per Eso JSC. Also *Onwuka v Ediala*, above at note 60 at 207, per Oputa JSC.

168 *The New Webster Encyclopaedic Dictionary of the English Language* (1984, Avenel Books) at 176.

169 *Heritable Reversionary Co Ltd v Millar (M'Kay's Trustees)* [1892] AC 598 (HL).

resemblance to rights *in rem*".[170] Interestingly, the obligation-based theory of trust has received recent support from commentators who, nevertheless, accept its proprietary incidents.[171] For instance, Parkinson observed that conceiving "the trust in terms of obligation would not be to deny the proprietary significance of many trust obligations. It would nonetheless, offer a more coherent explanation of the law as it has developed".[172] Although Maitland's proposition was assailed by Scott[173] and Matthews[174] (both of whom argued for a proprietary approach), and by some modern writers who prefer an eclectic approach,[175] his obligation-based approach supports the contention in this article that the rights of a beneficiary under a declaration of trust are not contemplated by sections 21, 22 and 26 of the Act.[176]

At this point, it is convenient to state the impact of a declaration of trust in three different but equally applicable ways. First, it does not alienate or transfer title from vendor/trustee to beneficiary, nor does it confer on or vest in the beneficiary any title in land contrary to the provisions of the Act. The trustee simply comes under an onerous obligation that is enforceable against him in equity and against anybody claiming through or under him, except the bona fide purchaser for value without notice. Second, a beneficiary under a declaration of trust affecting land certainly obtains an interest but not necessarily an interest in the land. It is arguably a personal obligation enforceable against the trustee which might carry some proprietary incidence.[177] Third, to the extent that the beneficiary obtained any interests or rights in the land, they arose by operation of law and beyond the contemplation of the Act.

CONCLUSION

The difficult consent provisions of the Land Use Act have generated conveyancing practices that are fraught with risks. In the context of the Act, there are doubts and legal uncertainties surrounding conveyancing tools such as agreements to sell and powers of attorney. Similarly, judicial sales and partition of

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170 Maitland *Equity*, above at note 7 at 122.

171 K Gray "Equitable property" (1994) 47 *Current Legal Problems* 157; Hayton "Developing the obligation characteristics", above at note 152; Parkinson "Reconceptualising", above at note 153.

172 Parkinson "Reconceptualising", id at 682.

173 Scott "The nature of the rights of the *Cestui Que Trust*" (1917) 17 *Columbia Law Review* 269.

174 P Matthews "From obligation to property and back again? The future of non-charitable purpose trusts" in Hayton (ed) *Extending the Boundaries of Trusts and Other Ring-Fenced Funds* (2002, Kluwer) 203; P Matthews "The comparative importance of the rule in *Saunders v Vautier*" (2006) 122 *Law Quarterly Review* 266.

175 Waters "The nature of the trust beneficiary's interest" (1967) 45 *Canadian Bar Review* 219; RC Nolan "Equitable property" (2006) 122 *Law Quarterly Review* 232.

176 Note that sec 26 of the Act deals with conferring on or vesting in any person "any interest or right over land", which suggests the creation of rights *in rem*.

177 As such, the beneficiary's interest is traceable, transferable and can be used in commercial transactions to secure a loan or used as security for a mortgage.

land are currently carried out under a climate of uncertainty, especially where the relevant court order is not made subject to the governor's consent. Some of these difficulties could be significantly reduced by the application of the principles of trust to the provisions of the Act. An express declaration of trust relating to land gives the beneficiary a beneficial interest that does not offend the consent provisions of the Act. It is a much more sophisticated (and advantageous) instrument than an agreement to sell or a power of attorney.

Even if the trust proposition in this article is considered to be technically unanswerable, it will be naïve, however, to think that its acceptability will be unaffected by policy considerations. It is likely that judicial attitude to consent in the context of declarations of trust will turn on the judicial view of the desirability of state control of land. But with the readiness of the Nigerian judiciary to exempt anything short of a formal deed from the consent provisions of the Act, it is easy to prophesy that the trust proposal in this article will receive the blessing of the courts. The cases examined above clearly show that Nigerian judges are not entirely happy with the consent provisions of the Act and, indeed, some members of the Supreme Court in *Ajilo's* case called for a radical overhaul of the Act. The trust model offers an exit route that avoids a potential conflict between the legislature and the judiciary.