

THE ASSETS MANAGEMENT CORPORATION OF NIGERIA ACT 2010 AND ITS EFFECTS ON SECURED CREDIT TRANSACTIONS IN NIGERIA: AN APPRAISAL

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ABSTRACT

The magnitude of financial fraud perpetuated by financial institutions in Nigeria and the urgent needs to prevent imminent collapse of Nigerian banks with attendant job loss propelled the Nigerian National Assembly to enact the Asset Management Corporation Act 2010 (AMCON Act) and to establish the Asset Management Corporation of Nigeria (the AMCON). The paper assesses the rescue intervention through the Asset Management Corporation of Nigeria on the financial crisis in the banks and its effects on secured credit transactions in Nigeria. In doing this, the Paper employs as a method, analytical exposition of the Act juxtaposing its provisions with extant laws governing interest in land such as the Land Use Act. The Paper finds that in carrying out its functions, the AMCON brazenly jettisoned the age long principles of privity of contract by dabbling into loan contracts it was non-party and alters preexisting contracts between banks and their borrowers/customers. The Paper notes that this had subjected borrowers to unforeseen hardship, ridicule and public opprobrium culminating in monumental assets forfeiture and sale to AMCON - a third party unknown to the customers at time of contracting for the loans. The Paper reasons that the operation of AMCON is too harsh on secured creditors and has impacted negatively on the economy. The Paper calls for a legislative rethink in making the AMCON Act comply with international best practices and using the Act as a legislative tool for national development.

Keywords: Rescue Intervention, Secured Credit, Corporate Finance law

JEL Classifications: G3, O16.

1. INTRODUCTION

All over the world and Nigeria in particular, Asset Management Companies (AMCs) are employed to address bad debts in the financial systems of Countries by resolving insolvent financial institutions. There are two classes of these AMCs. Those set up to help and expedite corporate restructuring and those set up as Rapid Asset Disposal Vehicles. Some countries had therefore at some point set up Asset Management Companies as Asset Disposition Vehicles.¹

¹These include; Mexico in 1994, Philippines in 1981-86, Spain in 1977-85, United States of America in 1984-91, Finland in 1991-94 and Ghana in 1982-89. Sweden in 1991-94 had adopted the Asset Management Companies as Restructuring Agencies. In Africa, Benin, Cote d ' Ivore , Senegal and Ghana set up the centralized Asset Management Companies. These are also called Public Asset Management Companies. In some other countries they are decentralized.

For example, the Spanish and American Agencies met their objectives of disposing 50% of their assets within the period of 5 years. Of the following; Finland, Ghana, Mexico, Philippines, Sweden, Spain and America; only Spain, Sweden and America achieved corporate restructuring/Asset Disposition while of the lot only Spain achieved growth of real credit being the broader objectives for setting up of Asset Management Companies generally thus leading to doubt whether Asset Management Companies have ever succeeded.²

The Asset Management Corporation of Nigeria Act (AMCON Act) which was signed into law on 19 July 2010; establishes the Asset Management Corporation of Nigeria (AMCON) for the purpose of efficiently resolving the non performing loan assets of Banks in Nigeria.³ The objects of the Corporation⁴ include: To assist eligible financial institutions to efficiently dispose of eligible bank assets in accordance with the provisions of the AMCON Act; To efficiently manage and dispose of eligible bank assets acquired by the Corporation in accordance with the provisions of this AMCON Act; and, To obtain the best achievable financial returns on eligible bank assets or other assets acquired by it in pursuance of the provisions of the AMCON Act having regard to: The need to protect or otherwise enhance the long term economic value of those assets; The cost of acquiring and dealing with those assets; The Corporation's cost of capital and other costs; Any guidelines or directions issued by the Central Bank of Nigeria in pursuance of the provisions of the AMCON Act; and any other factor which the Corporation considers relevant to the achievement of its objectives. The Act specifically accorded statutory functions to the Corporation thus⁵:

- To acquire eligible bank assets from eligible financial institutions in accordance with the provisions of the AMCON Act.
- To purchase or otherwise invest in eligible equities on such terms and conditions as the Corporation with the approval of the Board of the Central Bank of Nigeria, may deem fit.
- To hold, manage, realise and dispose of eligible bank assets (including the collection of interest, principal and capital due and the taking over of collateral securing such assets) in accordance with the provision of the AMCON Act.
- To pay coupons on and redeem at maturity, bonds and debt securities issued by the Corporation as consideration for the acquisition of eligible bank assets in accordance with the provision of the AMCON Act.
- To perform such other functions, directly related to the management or the realization of eligible bank assets that the Corporation has acquired, including managing and disposing assets acquired with the proceeds derived by the Corporation from managing or disposing of eligible bank assets acquired by it.
- To take all steps necessary or expedient to protect, enhance or realise the value of the eligible bank assets that the Corporation has acquired including; the disposal of eligible banks or portfolios of eligible bank assets in the market at the best achievable price, the

² See Klingebiel D., 'The Use of Asset Management Companies in the Resolution of Banking Crises: Cross Country Experiences'. Available at <www-wds.worldbank.org/evlet/WDScontent> Accessed 13 July 2013; Ma G., and Fung B.S.C., 'China's Asset Management Corporation', Available at <<http://docsrepec.org/p/bis/biswps/115.html>> Accessed 13 July 2013; Wawera G., and Kalami V M., 'Commercial Banking Crises in Kenya Causes and Remedies', Available at <www.globip.com/pdfpages/ofmanvol4_article2.pdf> Accessed 10 June 2013. According to these writers, as at 2000 the percentage of Non Performing Loans in Kenya was 33%, Zimbabwe 24%, South Africa 3% and Nigeria 11%. Because Non Performing Loans are closely associated with crises, controlling them is important for both the performance of the Banks and the financial environment of the economy of a country.

³ See the Head note which declares: 'An Act to Establish the Asset Management Corporation of Nigeria for the Purpose of efficiently resolving the non performing loan Assets of Banks in Nigeria and for related Matters'.

⁴ See section 4 Asset Management Corporation Act of Nigeria 2010 (the AMCON Act)

⁵ Section 5 AMCON Act

securitization or refinancing of portfolios of eligible bank assets, holding, realising and disposing of collateral securing eligible bank assets.

- To perform such other activities and carry out such other functions which in the opinion of the Board are necessary, incidental or conducive to the attainment of the objects of the Corporation.

The Central Bank of Nigeria is charged with the duty of providing guidelines on the class of bank assets described as 'eligible bank assets'.⁶ The Corporation is empowered under the provisions of section 25 to 'purchase, on a voluntary basis, eligible bank assets from any eligible financial institution desirous of disposing of such eligible bank assets at a value and price determined under guidelines issued by the Central Bank.'⁷

2. CONCEPTUAL FRAMEWORK

2.1 AMCON AS INTERVENTIONIST TOOL FOR BANK FAILURES

The use of Special Purpose Vehicles (SPVs) to rehabilitate the books of troubled financial institutions has been an age long practice.⁸ There are documented examples of the use of SPVs in the U.S., Sweden, Germany and Ireland.⁹ Recently in the U.S., the Troubled Asset Relief Program (TARP) was set up under the terms of the Emergency Economic Stabilization Act of 2008¹⁰ which authorized the U.S. Department of the Treasury to establish programmes to stabilize the U.S. financial system and prevent its systematic collapse. The TARP has nine components namely: capital assistance programme; consumer and business lending initiative; making home affordable programme; public-private investment programme; regulatory reform; capital purchase programme; asset guarantee programme; targeted investment programme; and automotive industry financing programme.¹¹ According to Kane, any SPV set up to buy up troubled assets of financial institutions should be proficient in four activities; namely: taking over the distressed assets (rescue); valuation of the assets (appraisal); protecting and enhancing the value of the assets (property management); and disposing of the assets (sales and related activities).¹² In addition, the SPV must have experts in each core activity together with experts in the types of assets within its supervision. On the hand, Cassell and Hoffman highlight ten

⁶Section 61 of the AMCON Act defines 'eligible bank assets' as assets of eligible financial institutions specified by the Governor of the Central Bank as being eligible for acquisition by the Corporation pursuant to section 24 of the Act. An 'eligible financial institution' is defined as a bank duly licensed to practice as such in Nigeria. This provision conferring on the Governor of the Central Bank of Nigeria the power to solely designate assets without inputs from the Banks, Debtors and Stakeholders may be smack of corporate dictatorship and contrary to the principles and ideas of corporate democracy and good governance.

⁷ See section 28 AMCON Act. Under this section the Central Bank of Nigeria provides guidelines for the valuation of and purchase of the asset based on 'independent advice' amongst other things.

⁸ J.B. Thomson, 'Cleaning up the Refuse from a Financial Crisis: The Case for a Resolution Management Corporation', *Federal Reserve Bank of Cleveland Working Paper 10-15* of September 2010, p2. Available online at www.clevelandfed.org/research accessed 20 May 2013. For a complete historical perspective, see generally, J.H. Jones and E. Angly, *Fifty Billion Dollars: My Thirteen Years with the RFC, 1932-1945*, New York: The Macmillan Company 1951.

⁹ *Ibid* at p.3.

¹⁰ It was signed into law by the then President of the United States, George W. Bush, on 3rd October 2008.

¹¹ M. K. Cassell and S. M. Hoffmann, 'Managing a \$700 Billion Bailout: Lessons from the Home Owners' Loan Corporation and the Resolution Trust Corporation' in 'IBM Center for the Business of Government,' *Financial Management Series*, Washington: IBM Center for the Business of Government 2009, at p.7.

¹² E.J. Kane, 'Principal-Agent Problems in S&L Salvage', (1990) 45(3) *The Journal of Finance*, 755 at pp.756-757

lessons from the U.S. Home Owners' Loan Corporation and the Resolution Trust Corporation as follows:¹³ A temporary, dedicated administrative entity was key; Clear formulation of the critical task is crucial; Autonomy and discretion are needed in performing critical tasks; Flexibility to adapt in the field is essential; The temporary administrative entities must understand and be responsive to market conditions; Government must have the expertise to hit the ground running in responding to a financial crisis; Government must have the ability to effectively monitor and manage contractors; Government must have sufficient financial and personnel resources to complete the task; Government must have exit strategies; and, there must be clear and transparent oversight.

According to Thomson,¹⁴ Cassell and Hoffman's ten lessons complement Kane's four principles for asset salvage. However, eight key features can be deduced for SPVs used in the resolution of the troubled assets of banks. These are: temporary, dedicated entity; formulation of critical task; autonomy; flexibility; management of contractors; availability of financial and personnel resources; transparency; and exit strategy.¹⁵ These can be said to be international best practices on such SPVs as can be gleaned from experiences in other jurisdictions. It is apposite to undertake an evaluation of the existing framework for AMCON against these features of such SPVs as enunciated. International best practices in the use of SPV in the resolution of troubled assets of financial institutions are that they are separate entities established for such special assignment. They may be under the supervision of a Department or other agency of government, but they are usually a temporary, dedicated entity. This applies to the AMCON which is specifically created 'for the purpose of efficiently resolving the non-performing loan assets of banks in Nigeria.

While it is clear that the AMCON is a dedicated entity, its temporariness is not as certain. In the first place, the AMCON Act has no provision on the life span of the AMCON. It contemplates that it would be liquidated at some future date, but that date is not provided for in the AMCON Act. The general impression is that the AMCON would exist for ten years.¹⁶ A position that is supported by the fact that the bonds it creates should have a term of not more than seven years.¹⁷

Transparency is another crucial factor in the success of SPVs set up to resolve Non performing debts of financial institutions. Its benefits include ensuring stakeholders buy-in regarding the plans and actions of the SPV, providing a framework for effective monitoring of the performance of the SPV, freely and fully communicating with stakeholders on the activities of the SPV, and keeping the SPV focused on its goals. There are several provisions in the AMCON Act designed to make the AMCON transparent in its operations and activities. For example, section 20 enjoins the AMCON to keep proper books of accounts which comply with approved accounting standard. Also, the accounts of the AMCON are required to be audited by an independent audit firm.¹⁸ Moreover, AMCON's audited financial statement is to be published 'in widely available media within six months of its year-end.'¹⁹ Also, copies of the audited accounts are to be given to the National Assembly, the Federal Ministry of Finance and the

¹³ *Ibid* at p. 32.

¹⁴ J.B. Thomson, *supra* note 8 at p. 8.

¹⁵ On the features of such SPVs, see generally, O.E. Ergungor and J.B. Thomson, 2006. 'Systemic Banking Crises' in A.H. Chen (ed.) *Research in Finance* (Elsevier 2006) and O.E. Ergungor, 'On International Journal of Advanced Legal Studies and Governance, Vol. 3, No. 3, Dec. 2012 56 the Resolution of Financial Crises: The Swedish Experience', *Federal Reserve Bank of Cleveland Policy Discussion Paper No. 21*, June 2007, at pp.7 - 9.

¹⁶ O. Chima, 'AMCON: Stakeholders Propose Tenure Extension', *THISDAY* (Lagos, Nigeria, August 22, 2010). Available at <<http://www.thisdaylive.com/articles/amcom-stakeholders-proposetenureextension/80481/>> accessed 12 July 2013.

¹⁷ AMCON Act section 26(1).

¹⁸ AMCON Act section 23(1).

¹⁹ AMCON Act section 23(2). The financial year of the AMCON starts on 1 January and ends on 31 December: section 21(3).

CBN. Furthermore, examiners or any other person may be appointed by the CBN to undertake special or routine examination of the books or affairs of the AMCON. Again, the AMCON is required to submit an annual report to the Federal Ministry of Finance and the CBN within three months after the end of each financial year, the Federal Ministry of Finance or the CBN may require it to report to it, at any time and in any format, on any matter, including the performance of its functions and any information or statistics relating to such matters. The AMCON is also required to submit to both Houses of the National Assembly, through their relevant Standing Committees, a quarterly report of its operations. Certainly, it is clear that a deliberate effort was made to ensure that there is transparency in the operations of the AMCON. What may be suggested to improve on the transparency measures provided for in the AMCON Act is that the AMCON should use its website a lot more to publish information relating to its activities. For example, all reports, whether quarterly or annual, it submits to the Federal Ministry of Finance, CBN or National Assembly should be made available to the general public on its website. It is important that it communicates a lot with the general public as this would go a long way in dousing the negative impression being expressed about its intention and the purpose for its creation. In order for the AMCON to be truly effective and to restore confidence in the Nigerian banking system, it must be insulated from political pressure. Fraudulent practices among some of the rescued banks, previously ignored by certain regulators and encouraged by some politicians, contributed significantly to the banking crisis.

One way to insulate the AMCON from political pressure is to strengthen its governance through an independent board of directors. The AMCON Act attempts to do so. The board of AMCON consists of 10 directors appointed by the President of Nigeria and confirmed by the Nigerian Senate.²⁰ The Chairman of the Board is nominated by the Ministry of Finance; the Managing Director serving as the Chief Executive Officer is nominated by the Central Bank of Nigeria. The CBN also nominates 3 executive directors. The remaining five members of the Board are non-executive directors, two of whom are nominated by the Ministry of Finance, two by CBN, and one by the Nigerian Deposit Insurance Corporation. All directors serve a five year term, with the possibility of a reappointment to a second five year term. CBN appoints 6 of the 10 directors of the AMCON board and, therefore, has significant influence on the management of AMCON.

This paper criticizes the broad ability of the President and CBN governor to remove members of the board does not support the independence of AMCON because the board members could be susceptible to pressure from these two senior government officials. While the Jonathan administration appears to respect the independence of AMCON and the CBN, this statutory provision does not create a strong institutional barrier to removal of AMCON directors as they can be removed merely for expediency. While other provisions of the AMCON Act appear to state AMCON is an independent agency, these provisions include the following language: 'except as otherwise provided in this Act'.²¹ This proviso creates an exception that is used in other provisions of the Act.²² Section 8 of Part I of the Act provides: 'The Central Bank of Nigeria, in consultation with the Federal Ministry of Finance, may issue guidelines and directions in writing to the Corporation in connection with the performance of any of the Corporation's functions under this Act'. Furthermore, the AMCON Act provides that the CBN can supervise and regulate AMCON as necessary. One commentator stresses the lack of independence of AMCON could forecast its potential failure to reform the banking system of Nigeria.²³

²⁰ AMCON Act, Part I, § 10

²¹ AMCON Act, Part I, sections 1(4), 6 (3)

²² N. Ofo, 'Is the Asset Management Corporation of Nigeria Designed to Fail?', Available at <<http://ssrn.com/abstract=1751459>> accessed June 09, 2013.

²³ *Ibid* at 24, (Section 53)

Other successful asset management companies designed to remove non-performing assets from the banking system similarly lacked independence from bank regulators. For instance, the Resolution Trust Corporation ('RTC') established in the late 1980s in the United States was created 'to manage and resolve failed savings associations that were insured by the Federal Savings and Loan Insurance Corporation'.²⁴ The RTC, officially established on the August 9, 1989, was to terminate all of its functions no later than Dec. 31, 1996.²⁵ The Thrift Depositor Protection Oversight Board was responsible for the general oversight and periodic review of the performance of the RTC. The Board is required, in consultation with the Resolution Trust Corporation, to develop and establish overall strategies, policies, and goals for the Corporation's activities, including the Corporation's overall financial goals, plans and budgets.

The governance of the RTC and AMCON is remarkably similar. While the AMCON legislation enumerates several areas in which the CBN may regulate AMCON's activities and the CBN in effect appoints a majority of the AMCON board, the Oversight Board of the RTC consisted of the senior officials of the central bank and other bank regulatory agencies in the United States who are political appointees. The RTC is considered one of the more successful asset management companies created within the last thirty years.²⁶

Unlike the RTC legislation, the AMCON Act contains no termination date. The current AMCON Managing Director Chike-Obi and Governor Sanusi have implied that AMCON will not operate for more than ten years. The maximum term of the bonds to be issued by AMCON, one of AMCON's principal sources of funds, is limited to seven years.²⁷ This time limit is a strong indicator that AMCON is intended to operate for a limited time.²⁸ The effects of the AMCON purchase of NPLs should become more apparent in 2012. AMCON's resolution of the rescued banks should release liquidity currently trapped in the banking system and encourage lending by banks. A key indicator of success will be an increase in prudent lending by Nigerian banks in 2012. According to a few initial reports, some debtors of banks were refusing to pay on existing loans with the idea that the loan would become non-performing and sold to AMCON. The debtor was expecting better terms from AMCON. AMCON and CBN have condemned this behaviour as widespread refusal by debtors to pay would undermine financial stability.

The creation of AMCON does raise the issue of moral hazard - both improper behaviour by debtors and risky behaviour by bank executives if they know they will be bailed out by the federal government. The recoupment of significant value from the NPLs purchased by AMCON will be a significant measure of success. However, the amount of recovery will not be known for several years as was the case with Danaharta in Malaysia and the RTC in the United States. The Nigerian banking sector has decreased from the 24 banks to 19 banks. With additional consolidation in the banking sector, competition will likely decrease resulting in higher charges to banking clients in an already high cost operating environment. On the other hand, the abolition of the universal banking model will allow for different types of financial institutions to operate in Nigeria and may attract some Nigerian or foreign investors who were discouraged by the high initial capital investment required to open a universal bank. The proper management and subsequent disposition of the three nationalized banks indicate the continued emphasis on reform of the banking system.

²⁴ U.S. Government Manual 693 (1990-91).

²⁵ 2 U.S.C.A. § 1441b(C) & (E) (2011).

²⁶ D. Klingebiel, 'The Use of Asset Management Companies in the Resolution of Banking Crises', *World Bank Policy Research Working Paper 2284* (Feb. 2000); L. Davison, 'Politics and Policy: The Creation of the Resolution Trust Corporation', 17 *FDIC Banking Review* 17 (2005).

²⁷ AMCON Act, Part IV, § 26(1).

²⁸ N. Ofo, *supra* n 22 at 23 (Section 5.1).

In addition to stabilizing the banking system, a stated goal of the nationalization of the three banks was to protect jobs in those banks. For instance, Mainstreet Bank employs 4,000 people in an economy with a high unemployment rate. A restructuring of the three banks, including a reduction or redeployment of staff, will be necessary to prepare the banks for eventual sale. Finally, Sanusi has made some provocative statements regarding the role of a central bank as an agent for economic development in an emerging market.²⁹ Sanusi has forcefully expounded on the role of the central bank in developing the economy not merely by focusing on price stability and financial stability, but also by directly encouraging growth in specific sectors.

The CBN has identified three key sectors for growth - power, transportation, and agriculture - and proposed specific financing programs for these sectors. Responding to criticism about expanding the CBN's mission beyond its original intent, Sanusi states: 'Some schools of thought have questioned the rationale for any central bank to pursue the so called multiple objectives. Let me emphasize the fact that in a developing economy such as ours in need of strong growth, typically a central bank's objectives should include developmental role in addition to its core mandate of ensuring price stability.' Indeed during the global financial crisis, most central banks subordinated the price stability objective to achieving financial stability and initiating growth. A concern with this additional role is that the CBN may be expanding its mission without the necessary financial or human resources to meet all these objectives successfully. The regulatory reform initiatives undertaken by the CBN and AMCON - more stringent banking regulation and supervision, the creation and ongoing management of AMCON, the sale and recapitalization of five rescued banks, and the management and eventual sale of the three nationalized banks - as well as monetary policy implementation consume a large amount of personnel and senior management time. Adding development initiatives to CBN's existing responsibilities could prove to be an enormous challenge. Additional monitoring is warranted.

2.2 AMCON AND SECURED CREDIT TRANSACTIONS

As earlier discussed in this work, the Asset Management Corporation of Nigeria Act 2010 which establishes the Asset Management Corporation of Nigeria is a Special Purpose Vehicle saddled with the task of acquisition of bad loans in the Nigerian Banks. Needless to say that many of these loans are secured or collateralised with landed assets and other valuable items of the borrowers. AMCON in its sweeping and rampaging rage to cleanse the Nigerian banks of bad loans dabbles into loan and mortgage contracts it was never a part of. AMCON buys bad loans from these banks even without the knowledge or consent of the borrowers, alters the mortgage agreement including charging of higher interests rate and crude means in its drive to recover these loans. The AMCON Act while considering the acquisition of eligible bank assets applies the following criteria:

- Non Performing Loans backed by shares of Companies listed on the Nigerian Stock Exchange: Such shares are valued at implied premium of approximately 60% on the 60 day average of recent prices ending on 15th November, 2010.
- Non Performing loans backed by perfected collateral: The Corporation applies the most current evaluation of the loan value supplied by the disposing Bank. This Estimate is based on the current market analysis of the collateral and the disposing Bank executes a Guarantee of good faith in favour of the Corporation. The bank executes a post transaction

²⁹L. Sanusi, 'Growth Prospects for the Nigerian Economy', 13, November 26, 2010. Available at http://www.cbn.gov.ng/out/speeches/2010/gov_convocation_lectureigbinedionuniversity- accessed 20 July 2013.

adjustment Agreement which allows the Corporation to independently carry out a valuation of the loan as at the 15th November, 2011.

- Unsecured loans are valued at 5% of the principal sum.
- Section 25(2) states: “The Central Bank of Nigeria shall by regulation prescribe the maximum percentage of eligible class of bank assets which an eligible financial institution may retain in its books and any eligible bank assets above the prescribed threshold shall be offered to the Corporation for acquisition.”

The disposing Bank is enjoined under sections 29 and 32 to in ‘utmost good faith’ furnish information, warranties representations and indemnities about the assets which ‘may materially affect the Corporations decisions to acquire or the value placed on such asset(s). The Bank must also produce ‘documentations’ ‘books’ and ‘records’ kept in respect of such assets. The disposing Bank then executes a ‘Purchase Agreement’ with the Corporation in respect of the Assets which Agreement contains an indemnity clause indemnifying the Corporation ‘for any loss in the event that the collateral turns out to be invalid or otherwise unenforceable.’ Sections 25, 29 and 32 relating to the transfer of bank assets to the Corporation covers security interests over land, security over debts as well as security over bank deposits and shares. These are discussed fuller below:

3. DISCUSSIONS

3.1 SECURITY INTEREST OVER DEBTS

Book debts arise from debts incurred in the ordinary course of business enters into properly kept books.³⁰ The Companies and Allied Matters Act (CAMA)³¹ provide for book debts and floating charge over the undertaking or property of the company that is registrable at the Corporate Affairs Commission.³² Floating charge is defined by CAMA³³ thus: “A ‘floating charge’ means an equitable over the whole or a specified part of the company’s undertaking and assets including cash and uncalled capital of the company both present and future, but so that the charge shall not preclude the company from dealing with such assets until- the security becomes enforceable and the holder thereof , pursuant to a power in that behalf in the debenture or the deed securing the same , appoints a receiver or manager or enters into possession of such assets; or the court appoints a receiver or manager of such assets on the application of the holder; or the company goes into liquidation.”

On the happening of any of the vents mentioned in subsection (1) of this section above, the charge shall be deemed to crystallize and so become a fixed equitable charge on such of the company’s assets as are subject to the charge and if a receiver or manager is withdrawn with the consent of the chargee, the charge shall thereupon be deemed to cease to be a fixed charge and again become a floating charge. Floating charge was defined in the English case of *Illingworth v Houldsworth*³⁴ as:

³⁰ See *Shingley v Marshall* (1863)14 CB(NS) 566. Further see Oditah F. ‘Legal Aspects of Receivables Financing’, (London: Sweet & Maxwell, 1991) pp19-32.

³¹ See Sections 197(2)(e) and 197(2)(f) CAMA.

³² Cap C20 LFN 2004, section 179 states that a Fixed over a property has priority over a floating charge over the same property.

³³ Section 178(1) CAMA.

³⁴(1904) A C 355, 358 *per* Lord Macnaghten. Such bank ‘Assets’ will include debts which are assigned to the Corporation; an assignment is defined as ‘the immediate transfer of an existing proprietary right, vested or contingent, from the assignor to the assignee’. *Per* Windeyer J. in the case of *Norman v Federal Commissioner of Taxation* 1963) 109 CLR 9 at 26; See also *William Brandt’s Sons & Co v Dunlop Rubber Co Ltd* (1905) AC 454 at 462 *per* Lord Macnaghten . In the case of *Investors Compensation Scheme Ltd v West Bromwich Building Society* (1998) 1 WLR 896 at 913 Lord Hoffmann

“I should have thought that there was not much difficulty in defining what a floating charge is, in contrast to what a specific charge is, in contrast to what is called a specific charge. A specific charge, I think is the one that without more fastens on ascertained and definite property or property capable of being ascertained and defined, a floating charge, on the other hand, is ambulatory and shifting in nature, hovering over; and so to speak, floating with the property which it is intended to affect until some events occur or some act is done which causes it to settle and fasten on the subject of the charge within its reach and grasp.”

Under the provisions of section 48 of the Act, the Corporation is empowered to appoint receiver to realize the assets taken over by the Corporation or manage the affairs of a debtor company. It is submitted that this power is exercisable where there is fixed charge under the provisions of section 180(1) of CAMA. The provisions relating to ‘acquisition’ of banks assets by the Corporation are contained in sections 25, 29 and 30 of the Act. The provisions state that the Bank must be desirous of disposing the eligible assets which the Corporation must consider necessary and desirable to acquire from such Bank. Assets may also be acquired from the Nigerian Deposit Insurance Corporation.

3.2 SECURITY INTEREST OVER LAND INCLUDED IN BANK ASSET ACQUIRED

Generally it is for the above reason that in a security interest created in real property by way of a mortgage, the Mortgagee can transfer his security either absolutely or by way of sub mortgage³⁵ even without the concurrence of the debtor/mortgagor. In the case of the Corporation it is clear the Mortgagors are not included in the transfer proceedings with the Banks. Where the Mortgagor/debtor is not a party to the transfer, the transferee is bound by the state of accounts between the Mortgagor and the transferor.³⁶ Generally it is desirable that the debtor/Mortgagor be made a party to the transfer. In such instance, the debtor by the transfer enters into a new covenant with the Transferee to pay the debt and interest. Even though the Transferee can still sue, the new covenant postpones the effect of provisions of the Limitation Law.³⁷ The relevant consideration being the amount of the debt not the nature of the estate which is the security transfers. Therefore, the transferee going into possession of the legal estate does not thereby enhance his position.³⁸ The arrears of interest is capitalized where the transfer

stated that what is actually transferred is the chose in action. In an assignment of debt It must identify the subject matter of the assignment; It must identify the assignee. See *Stanley v English Fibres Industries Ltd* (1899) 68 LJ QB 839. Where the notice contained a wrong date it is invalid. A notice that does not contain such details or contains incorrect statement of such details is invalid. See *Comfort v Betts* (1891) 1 QB737 *Burlinson v Hall* (1884) 12 QBD 347, (20) see *Van Lyn Developments Ltd v Pelias Construction Co Ltd* (1969) 1 QB 607, 615 Upon assignment, the Assignee can sue debtor in his own name and give a good discharge. The Assignee then can sue on the debt once Notice has been given to the debtor, the debtor cannot discharge the debt by payment to the Assignor.

³⁵See section 134(1) (b) of PCL on the right to sue granted to the Transferee. The right to commence actions may be lost under certain circumstances. See generally Limitation Act LFN. See the case of *Re Tahiti Cotton Co; Ex Parte Sargent* (1874) LR 17 Eq. 273, *France v Clark* (1883) 22 Ch D 830; (1884) 26 Ch D 257. In a situation where the Mortgagee remained in possession he will be liable even after the transfer save he came into possession by an order of Court.

³⁶See *Parker v Jackson* (1936) 2 AER 281.

³⁷See section 134(1) (b) of PCL on the right to sue granted to the Transferee. The right to commence actions may be lost under certain circumstances .See generally Limitation Act, LFN. See *Parker v Jackson* (1936) 2 AER 281.

³⁸See the case of *Chambers v Goldwin* (1804) 9 Ves., 254 Where there is a new covenant to pay at a new date with a provision for redemption, creates a new mortgage. See the case of *Bolton v Buckenham* (1892) 1 Q B 278. This will attract an application for the consent provisions of the Land Use Act.

includes the Mortgagor³⁹ but not when the Mortgagor does not concur.⁴⁰ The transferee is bound by all the equities and account binding the transferor.⁴¹

The transfer of a mortgage consists of the assignment of the debt and the assignment of the mortgagee's estate which is the security for the debt which parts were, earlier by way of two separate transfers. The transferor in the deed of transfer first assigned the debt absolutely and then separately conveyed the property subject to the equity of redemption. This position was corrected by the England by the enactment of the Law of Property Act 1925.⁴² This is the position under the provisions of section 134 of The Property and Conveyancing Law⁴³ which states that a deed executed by a mortgagee purporting to transfer his mortgage or benefit thereof shall, unless a contrary intention is therein expressed, and subject to any provisions therein contained, operate to transfer to the transferee - the right to demand, sue for, recover, and give receipts for, the mortgage money or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon; and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee; and all the estate and interest in the mortgaged property then vested in the mortgagee subject to redemption or cesser, but as to such estate and interest subject to the right of redemption then subsisting. In this section 'transferee' includes his personal representatives and assigns. A transfer of mortgage may be made in the form contained in the Third Schedule to this Law with such variations and additions, if any, as the circumstances may require. This applies whether the mortgage transferred was made before or after the commencement of this Law, but applies only to transfers made after the commencement of this Law. This section does not extend to a transfer of a bill of sale of chattels by way of security.

Under the above provisions, the transfer must be under Deed so as to obtain the benefit of the law, so also is a Deed required to transfer a legal mortgage failing which the legal estate will remain in the transferor.⁴⁴ In the case where the transferor seeks to transfer an equitable interest in land or a personalty he must do so in writing.⁴⁵ For equitable mortgage the right to sue for the debt transferred is transferable by writing under the hand of the transferor alongside a Notice to the Debtor.⁴⁶ However where there is valuable consideration even if the formalities were not complied with equity treats it as valid between the transferor and the transferee. The transfer of an equitable mortgage by way of deposit of title documents is effected by delivery of the deeds to the transferee even if no memorandum is made.⁴⁷ To transfer a statutory mortgage, same is done by way of a deed expressed to be by way of a statutory transfer of Mortgage.⁴⁸ Under the provisions of section 34 (1) of the AMCON Act, it is stated that:

³⁹ See *Chambers v Goldwin* (supra), *Mangles v Dixon* (1852) 3 H LC 702, 737.

⁴⁰ See *Cottrel v Finney* (1874) 9 Ch App. 541.

⁴¹ See *Turner v Smith* (1901) 1 Ch 213.

⁴² This was under the provisions of section 114 of the Law of Property Law 1925. This law covers the states then comprising of the old Western Nigeria to wit Delta, Edo, Ondo, Ogun, Osun and Oyo States. For the states comprising of the old Eastern and Northern Nigeria, it is the Conveyancing and Law of Property Act of 1881. The Conveyancing Act 1881 does not have the provisions contained in section 134 of PCL. Both the PCL and the Conveyancing Act are existing laws, and under the provisions of section 48 of the Land Use Act 1978, Cap ..LFN 2004 all existing laws relating to registration of title, interest in land or transfer of title/interest in land are saved subject to such modification as would bring them into conformity with the Land Use Act. See also section 315(1) of the Constitution of Federal Republic of Nigeria 1999 (as Amended).

⁴³ Cap 100 Laws of Western Nigeria.

⁴⁴ see section 77(1) of PCL.

⁴⁵ see section 67(1) of PCL).

⁴⁶ See the case of *Brocklesby v Temperance Building Society* (1895) AC 173 at 182, 183

⁴⁷ This could be by way of any of Form Nos 2, 3 and 4) contained in Fourth Schedule to the PCL. Generally on Forms for the transfer see Vol. 14 Encyclopedia of Forms and Precedents (4th edition pp 755 et seq.

⁴⁸ See Cap L5 Laws of the Federation of Nigeria 2004. In the case of *Nkwocha v Governor of Anambra State & Ors* (1984) 1 SCNLR 634. The Supreme Court recognized the Land Use Act 1978 which came

“... Where the Corporation acquires an eligible bank asset, such eligible bank asset shall become vested in the Corporation and the Corporation shall exercise, all the rights and powers and subject to the provisions.”

Also section 36 of the AMCON Act provides that upon acquisition by the Corporation of an eligible bank asset secured in whole or in part by landed property or by collateral or security interest which restricts the alienation or contract as a matter of law (‘Restrictive Collateral’), the eligible financial institution from which such Restrictive Collateral is acquired shall hold such Restrictive Collateral, as bare trustee in trust for and the sole benefit of the Corporation and at the sole direction of the Corporation realize or otherwise deal with such Restrictive Collateral as may be directed by the Corporation and shall turn over all proceeds received from such realization or dealings to the Corporation.

Further mention must be made of the Land Use Act⁴⁹ as it relates to the AMCON Act on secured credit transaction. Section 1 of the Land Use Act states that ‘all land comprised in the territory of each state is vested in the Governor of that state’. Under sections 5, 6, 8, 34 and 36 of the Land Use Act the interest in land subject of which is of a security interest is the right of Occupancy – Customary and Statutory. In respect of such interest the Land Use Act provides as follows: “It shall not be lawful for the holder of a statutory 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.”⁵⁰

In the case of *Savannah Bank of Nigeria Limited v Ajilo*⁵¹ the Supreme Court held that the alienation by way of a mortgage of a right of Occupancy whether a deemed grant or actual grant required the consent of the Governor. In the words of Jummai Hannatu Sankey JCA in *Pharmatek Industrial Project Ltd vs. Trade Bank of Nig. Plc & Ors*, Unreported Suit No. CA/IL/71/2007: “The Defendants were attempting the impossible! Section 26 makes an absolute prescription in this regard. This is the position of the law on the first arm of the question. This is so, for the drafting technique employed in section 22 is not only watertight, it is actually airtight!” Holding that the mortgage transaction was null and void in the absence of the consent of the governor, the court continued: “... all said and done, we cannot wish away the binding decision of the Supreme Court in *Union Bank VS. Ayodare (2007) 13 NWLR (PT. 1052)* I am thus constrained by the impregnable doctrine of stare decisis to abide by the majority in the said *Union Bank VS. Ayodare (Supra)* ... I endorsed the findings of the lower court that the Appellant conduct had all the trappings of chicanery, nay more, outright obliquity. However, unlike the said lower court, I have no other choice than to allow it to benefit from its own perfidious pranks. It is an unfortunate situation but according to the Supreme Court in *Ayodare (supra)* that is the law!”

In *Union Bank v Ayodare*⁵² the Supreme Court held that the failure to obtain the required consent has rendered the deed of mortgage null and void ab initio and the mortgage transaction illegal. It went further to hold that accordingly, the power of sale under the mortgage

into force on the 30th September, 1979, before the Constitution of Nigeria 1979, which came in to force on the 1st October, 1979 as an ‘existing law’ under section 274(4)(b) thereof with extra ordinary status under section 274(5) and 274(6) of the said Constitution. The Land Use Act was said not to be an integral part of the Constitution but has a special protection under section 9(2) of the said Constitution.

⁴⁹ See Cap L5 Laws of the Federation of Nigeria 2004. In the case of *Nkwocha v Governor of Anambra State & Ors* (1984) 1SCNLR 634. The Supreme Court recognized the Land Use Act 1978 which came into force on the 30th September, 1979, before the Constitution of Nigeria 1979, which came in to force on the 1st October, 1979 as an ‘existing law’ under section 274(4)(b) thereof with extra ordinary status under section 274(5) and 274(6) of the said Constitution. The Land Use Act was said not to be an integral part of the Constitution but has a special protection under section 9(2) of the said Constitution.

⁵⁰ Section 22 of the Land Use Act

⁵¹ (1989) 1 SC Pt II p. 90

⁵² (2007) 13 NWLR (PT. 1052)

cannot be exercised. Section 26 of the Land Use Act⁵³ provides any transaction or any instrument which purports to confer or vest in any person any interest or right over land other than in accordance with the provisions of the Land Use Act shall be null and void. In *Union Bank v Ayodare*,⁵⁴ the Supreme Court held thus by the provisions of sections 21, 22 and 26 of the Land Use Act Cap. 202 Laws of the Federation of Nigeria, 1990, a holder of a statutory right of occupancy who wishes to mortgage the property by assignment must first obtain the consent of the Governor of the state where the land is situate before carrying out the mortgage transaction. Where the requisite consent is not obtained, the transaction or instrument which purports to confer or vest the property in any person shall be null and void. On what amounts to an illegal contract which no court of law is permitted to concern itself with, it a settled principle of law that a transaction or contract the making or performance of which is expressly prohibited by statute is illegal and unenforceable. Thus, where a contract made by parties is expressly forbidden by statute, its illegality is undoubted and no court ought to enforce it or allow itself to be used for the enforcement of alleged obligation arising from it if the illegality is duly brought to the notice of the court and if the person invoking the aid of the court in the instant case, is himself implicated in the illegality. The effect therefore of any illegal contract is that where a statute makes a particular or class of contract illegal or invalid, the court will refuse to allow an action to be maintained thereon even though the illegality is not pleaded by the Defendant or the person do not desire to rely on it. This is because once the illegality is brought to the attention of the court it overrides all questions of pleading including any admission made there.⁵⁵

This Paper submits that the mortgage transaction having not complied with the mandatory provision of section 22 of the Land Use Act on consent of the governor, the punitive provision of section 26 of the said Land Use Act declaring such transaction null and void must apply with no variation. The Land Use Act is recognized as an existing law under the provisions of section 315(1) of the Constitution of the Federal Republic of Nigeria 1999⁵⁶ and it has been held as such. I further argue that by virtue of the provisions of section 1 of the Land Use Act,⁵⁷ it is a State House of Assembly that can make laws or regulations in respect of land comprised in that State.

The provisions of the relevant laws of a State for instance the PCL,⁵⁸ the Conveyancing and Property Act or the Property and Mortgage Law of Lagos State⁵⁹ shall apply to transactions relating to creation of or transfer of security interest in land in such State even if such interests is vested in a Mortgagee covered by the provisions of the AMCON Act. The Paper reasons that it is in line with the above statutory provisions that section 34 of the AMCON Act is made subject to the provisions of the Land Use Act and section 36 of the AMCON Act which section 36 of the AMCON Act expressly mentions acquisition of an eligible bank asset secured in whole or in part by landed property. The Paper maintains that the provisions of the AMCON Act especially sections 39 and 45 purporting to exclude the operation and application of 'any enactment' containing contrary provisions to the Act and/or those sections in respect of interests relating to land must be modified or altered to harmonise same with the Land Use Act and/or such allied

⁵³ Land Use Act LFN 2004.

⁵⁴ *Supra* n. 52 Ratio 1 p.16.

⁵⁵ See *Sadiq v Lemminkainen* No. 2 (1986) 1NWLR (PT.15) 220.

⁵⁶ The Constitution of the Federal Republic of Nigeria (Promulgation) Decree 1999 No 24 of 1999 as Amended.

⁵⁷ See Mann R J., 'Explaining the Pattern of Secured Credit', (1997) Vol 110 Harvard Law Review, p. 625 at 638-639 wherein he said the security gives two types of advantages to the lender: the lender's direct legal rights to force repayment by taking collateral and the less direct advantage that operates before the lender tries to obtain payment forcibly. The direct legal advantage increases the likelihood that the lender can forcibly collect on default. The indirect advantages give the borrower a powerful incentive to repay voluntarily by enhancing the consequences of non – payment.

⁵⁸ See Omotola J., *The Law of Secured Credit Transactions*, Evans Brothers (Nig. Publishers) Limited p. 31.

⁵⁹ *Supra*.

laws and legislations. The High Court is also empowered to declare such provisions invalid under the provisions of section 315(3) of the Constitution.

I submit that the Corporation as transferee of a Mortgagee in a prior transaction to which the consent of the Governor had been obtained need not apply to obtain the consent of the Governor before exercising its power to realize the mortgage. Authority for this view is section 50(1) of the Land Use Act⁶⁰ which defines the ‘holder’ of a right of Occupancy as: “A person entitled to a right of occupancy and includes any person to whom a right of occupancy has been validly assigned or has validly passed on the death of a holder but does not include any person to whom a right of occupancy has been sold or transferred without a valid assignment, nor a mortgagee, sub-lessee or sub-under lessee.” On the strength of this authority, the Paper submits that the Corporation does not have to apply for the consent of the Governor in its capacity qua mortgagee as the purchaser of ‘an eligible bank asset’ with interest in land. It is also not covered by the definition of an ‘Occupier’ contained in section 50(1) of the Land Use Act.⁶¹ In section 45 of the AMCON Act, the Corporation is exempted from registration as owner of security. The AMCON Act states:

Where an eligible bank asset has been acquired by the Corporation notwithstanding anything contained in any law, the Corporation shall not be required to become registered as owner of any security that is part of the eligible bank asset acquired by it and shall nonetheless have the powers and rights of a registered owner of such security under any law for the time being in force. Provided that the Corporation may, at its discretion, elect to register any interest capable of registration.⁶²

Section 41(1) and (2) of the AMCON Act any instrument under the seal of the Corporation that is expressed to convey any interest in an eligible bank asset to another person shall be taken for all purposes to validly convey the interest so expressed to be conveyed. Subsection 2 of provides that an instrument referred to in subsection (1) of section 41 shall without any further assurance operate to extinguish the interest of any other chargee or pledgee in an eligible bank asset concerned other than a charge or pledge which has priority to the interest of the Corporation and has not been redeemed or discharged under section 39 of the AMCON Act. On the question of Notice to be given, Section 33 of the Act states as follows: “As soon as possible, after the acquisition of an eligible bank asset from an eligible financial institution, the eligible financial institution shall notify the relevant debtor associated debtor and guarantor or surety of the debtor and any other person that the Corporation directs, of the acquisition of the eligible bank asset by the Corporation; and, the Corporation shall not be liable for any failure or delay in notifying any person under subsection (1) of this section and such failure or delay shall not invalidate the eligible bank asset concerned.”

Usually when a creditor in this instance, Bank advances money to a customer, the latter furnishes security for same. This is why it is said that credit and security are two sides of the coin. The need for security stems from the bank recovering its loan and interest thereon from the debtor/borrower. The security provided does the following:

- Reduces the incidents of risk and/or eliminates such risk.
- Increases the pool of assets from which the creditor bank could satisfy the debt.

⁶⁰ Land Use Act, *supra*.

⁶¹ *Ibid*.

⁶² Section 45 AMCON.

- Puts the creditor in a safe position should the debtor/borrower become incapable of paying back the loan by reason of insolvency (if a Corporate person) or bankrupt if a natural person.
- Provides an alternative source of recovery where the debtor is unable to pay his debt.
- The fear of losing his assets contracted as the security for the loan makes the debtor works towards repaying the loan.
- Enables the debtor to raise additional funds without removing assets from the enterprise.

Where the debtor/borrower furnished real property as security the performance of his obligations seem more certain. The creditor has a right of property which right includes a right of performance or priority.⁶³ The right of property and the right of pursuit or tracing into the hands of a third party is one assuring the creditor that he need not seek the intervention of a third party including the Court to recover the property from whatever new thing it survives. The right of tracing may be lost in the case of a bona fide purchaser for value without notice of such security interest. It is the right to proceed against the security after the debtor's default that separates a secured creditor from the unsecured. Though in some instances the secured creditor may have recourse to the court, the unsecured creditor seeks the intervention of court because he has no property rights in the debtor's assets before, during and after liquidation. The unsecured creditor has to secure judgment for his debt and then proceed to levy execution or attach the assets of the borrower judgment debtor. The secured creditor's right too appropriates the debtor's assets known as the right of priority or performance is available whether or not the debtor is in liquidation. Generally upon liquidation, the assets of the insolvent debtor are distributed *pari passu* among the creditors.

The secured creditor has ample rights to enforce his security notwithstanding the appointment of a Liquidator. The security interest created in favour of the secured creditor has been defined by Browne – Wilkinson VC., in the case of *Bristol Airport Plc v Powdrill*⁶⁴ as follows: "Security is created where a person ('the creditor') to whom an obligation is owed by another ('the debtor') by statute or contract, in addition to the personal promise of the debtor to discharge the obligation, obtains rights exercisable against some of the property in which the debtor has an interest in order to enforce the discharge of the debtor's obligation to the creditor." Apart from customary pledge of land (which is not relevant to this discussion) security in land is created in land by way of mortgage or charge. Equitable lien which may also exist over land is arguable an equitable charge.⁶⁵ Under the provisions of the Land Use Act 1978, the right of Occupancy may be Statutory or Customary.⁶⁶ Where a disposing Bank has transferred a debtor's asset including a mortgage on land to the Corporation, the rights available to the Corporation are here examined. In the case of a legal mortgage⁶⁷ the Corporation can exercise the rights of the legal mortgagee. However, where it is an equitable mortgage by way of a deposit of title document with an intention that it be held as security and the deposit is accompanied with a memorandum of deposit under seal, though the Corporation qua Mortgagee

⁶³ See the case of *Plicher v Rawlins* (1872) LR 7 Ch. App. 269 at 271. The claim of bona fide purchaser for value may be absolute and complete answer in equity.

⁶⁴ [1990] Ch 744).

⁶⁵ See *Re Henry Pound, Son and Hutchins* (1884) 42 AC 22 at 53. The enforcement of the powers of a secured creditor may be impaired under some circumstances see *Omotola J op cit*.

⁶⁶ See sections 5,6,8 , 34 and 36 of the Land Use Act 1978 (1990) Ch 744 at 760. See in respect of 'security interest' *Oditah F.*, ' Legal Aspects of Receivables Financing'(London: Sweet & Maxwell 1991) pp4-11; Allan 'Security: Some Mysteries, Myths and Monstrosities' (1989) 15 Monash University L R 337 ; Goode 'Security : A Pragmatic Conceptualist's Response', (1989) 15 Monash University L R 361. *Oditah F.*, "Issues and Problems in Corporate Financing in Nigeria" in 'Essays in Honour of Judge Bola Ajibola' edited by Okonkwo C.O Page 103 ff.

⁶⁷ This includes a charge created by way of a legal Mortgage. See section...PCL and section....The Property and Mortgage Law of Lagos State 2010.

has a statutory power of sale and/or appointment of Receiver, it cannot transfer the legal estate as it had not same as part of the security transferred,⁶⁸ but where there is a Power of Attorney contained in the Memorandum empowering the Mortgagee to transfer the legal estate, he can do so.⁶⁹ Flowing from the Supreme Court decision in *Savannah Bank Limited v Ajilo*,⁷⁰ the Paper submits that in practice, an equitable mortgage must comply with the consent provisions of the Act.⁷¹ Section 50(1) of the Land Use Act further defines a mortgage as ‘a second and subsequent mortgage and equitable mortgage’. In the case of an equitable charge, created when a right of Occupancy is made liable to the discharge of a debt,⁷² the chargee is given the right of payment out of proceeds of the right of occupancy without transferring the right of occupancy. There appear to be no ‘alienation’ of title or interest. It is submitted that an equitable charge involves a transfer of a right over the right of occupancy. This creates a proprietary interest. Consequently, the consent provisions of the Land Use Act must be complied with.⁷³ This is what accords with the policy of the Land Use Act. Obaseki JSC in the case of *Savannah Bank Ltd v Ajilo*⁷⁴ had commented as follows:

“A statute should not be given a construction that will defeat its purpose the construction *ut res magit valeat quam perat* must be given. If the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we shall avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that the legislature would legislate only for the purpose of bringing about an effective result.”

This position is to be preferred as the charge in practice contains a power of attorney, power to execute a legal mortgage as Attorney of the charger or power to appoint a Receiver. Though the Supreme Court decision in *Savannah Bank v Ajilo*⁷⁵ is to the effect that failure to obtain consent to a mortgage transaction renders the mortgage void, in the latter case of *Awojugbagbe Light Industries v Chinukwe*,⁷⁶ the timing of the consent and status of the transaction before such consent was obtained was put to rest. In that case the Court stated the position of the law to be that consent to a mortgage transaction could be obtained at any time after execution of the mortgage deed without invalidating the transaction. In this case, the appellant charged by way of a legal mortgage a property to the second Respondent as security for a loan advanced to him. The loan had been granted to Appellant long before the execution of the mortgage deed. Subsequently, the deed was executed and consent obtained thereto. Upon default by the Appellant, the second Respondent sought to exercise its power of sale. It was contended on behalf of the Appellant that the consent of the Governor having been obtained well after the credit advanced same was not ‘first had and obtained’ and so invalid. The Supreme Court rejected this view and held that consent obtained after the credit had been advanced to the Appellant was valid and good. The Court continued to state that such

⁶⁸ See section 19 of the Conveyancing and Property Act 1881 and section 123 of PCL Cap 100 Laws of W N 1959.

⁶⁹ See *Re White Rose Cottage* at p. 955. To do so the consent of the Governor must be obtained to the Power of Attorney.

⁷⁰ (1989) 1 SC Pt II p. 103.

⁷¹ See section 22(1)(a) of the Land Use Act.

⁷² See the case of *Palmer v Carey* (1926) A C 703 at 706-707, *Swiss Bank Corporation v Lloyds Bank Ltd* (1982) AC 584 at 595.

⁷³ See section 22, 36, 50(1) of the Land Use Act.

⁷⁴ *Supra* n. 70 at p. 103 at 107-108. See further Oditah ‘Issues and problems’ op cit p. 143-135.

⁷⁵ *Supra* n. 70.

⁷⁶ (1995) 4 NWLR pt 390 p 379, see also pp435-436 per Iguh JSC..

transaction was inchoate or an escrow agreement incapable of conferring any rights until consent was obtained.

The position of the consent provisions of the Land Use Act in respect of security over land has been made a lot clearer by the Supreme Court case of *Ugochukwu v Cooperative and Commerce Bank Nig. Ltd*⁷⁷ in which the Court was of the view that it was inequitable for the mortgagor who had been advanced credit turn around and successfully rely on the absence of consent to the mortgage transaction to disenable the creditor from realizing the security. The Court further stated that it was the duty of the mortgagor to apply for the grant of the consent of the Governor to the transaction being the person seeking to dispose his interest in land. According to the Court per Ogundare JSC:

“It was the duty of the Plaintiff, as mortgagor, to seek the consent of the Governor for him to mortgage his property to the defendant. That is what the law says ... For him to turn round a few years after executing the mortgage deed (and when as a result of his default the mortgagee sought to exercise his rights under the mortgage deed) to assert that the mortgage deed was null and void for lack of the Governor’s consent, is to say the least ‘rather fraudulent and unconscionable. It has become a vogue these days for mortgagor in similar circumstances to fall upon the decision of those courts in *Savannah Bank v Ajilo* (supra) decides ... as a vehicle to escape their liability under the mortgage deeds they have entered into. I think that is an unfortunate development and I do not think that case, that is *Savannah Bank v Ajilo* (supra) decides such a thing ... To allow a mortgagor to resile from his liability on the ground of his failure to do that which the law enjoins him to do will only result in paralysis of economic activities in this country.”⁷⁸

The position of his Lordship accords with the decision of the Federal Supreme Court in the case of *Solanke v Abed & Anor*⁷⁹ in which the Court considering the similar consent provision contained in the Land and Native Rights Act 1916 of the then Northern Nigeria held that an occupier of land subject to the Land and Native Rights Act who, without the consent of the governor lets part of the land to a Tenant under a Tenancy Agreement and permits him to enter into occupation under the agreement, cannot, as against the Tenant, in an action for trespass brought by the Tenant, rely upon his own wrongful act, so as to allege that the Tenancy Agreement was null and void and unenforceable under section 11 of the Act. For the Corporation seeking to exercise its power of sale in the case of disposed eligible bank asset including land, a consideration of section 29(1) of the Land Use Act which states that where the

⁷⁷ (1996) 6 NWLR pt 546 p 525.

⁷⁸ *ibid* pp 542-543 paras f-h. See also *Adedeji v National Bank of Nigeria* (1989) 1 NWLR pt 96 212, at 226-227. In that case the Mortgagor seeking to rely on the absence of the consent of the Governor to the mortgage deed failed, Akpata JCA had commented that-“ Apart from the principle of law involved ...it is morally despicable for a person who has benefited from an agreement to turn round and say that the agreement is null and void” However, see *Oditah F.*, “ Issues and Problems op cit pp138-139 wherein he criticizes the application of the principle of wrongful self benefit to the breach of the provisions of section 26 of the Land Use Act.

⁷⁹ (1962) All N LR pt 1 230. The intervention of equity was invoked in the case of *Oilfield Supply Center Ltd v Johnson*(1987) All NLR446 by saying “equity will not permit an action, that is a complaint by a party based on their own default to arise”

In the English case of *Parker v Taswell* (1858) 2 De G & J 559 570, ER 1106,1111 the words ‘null and void’ were said not to mean that the document was bereft of all effects with the result that an ineffective conveyance of the legal estate constitutes an agreement to convey the legal estate. It is submitted that on this authority an action for specific performance ought to lie.

right of Occupancy is revoked for 'public use' or 'overriding public interest',⁸⁰ compensation payable is to the holder or occupier and for the unexhausted improvements. Since as submitted herein that the Corporation is neither a holder nor an Occupier, it cannot receive such compensation which it is submitted is payable to the mortgagor. However, he receives such compensation as a constructive trustee for the Corporation qua the mortgagee.⁸¹ In practice, upon the publication of the public Notice on the acquisition, the Corporation as Mortgagee can give notice of interest and thereby be paid such compensation. What is necessary to be considered is: Does the Corporation owe any duty to the mortgagor debtor in exercising its power of sale?

From the nature of a mortgage transaction it is not in doubt that the mortgagee has several powers to enforce the security interest and the proprietary rights vested in him. To this end the Corporation has the rights to foreclose, to enter into possession⁸² and the power of sale. As an asset Disposal Vehicle, it submitted that the Corporation would prefer to exercise the power of sale and this power of sale is considered most potent. As such sale could be by private sale or by public auction⁸³ without recourse to the mortgagor. As public Corporation it is likely the Corporation would prefer public auction. At common law, the mortgagee's primary remedy is in foreclosure.⁸⁴ The mortgagee's power of sale being proprietary, the mortgagee can transfer the proprietary interest of the debtor in the mortgaged property⁸⁵ subject to the equity of the debtor mortgagor.⁸⁶

Generally the power of sale is exercisable after the date of redemption passes and the mortgagor default in its financial obligation.⁸⁷ In the circumstances covered by the AMCON Act, it is expected that the eligible bank assets are those in which the date of redemption has passed. The power of sale is further regulated by statute such as the provisions of section 19 of the Conveyancing and Property Act⁸⁸ and section 123 of the Property and Conveyancing Law⁸⁹ section 35 of the Mortgage and Property Law of Lagos State⁹⁰ and section 123 of the Law of Property (Edict) Law of Kwara State.⁹¹

Section 123 of the PCL states a Mortgagee, where the mortgage is made by deed, shall by virtue of this Law have the following powers to the like extent as if they had been in terms

⁸⁰ On what is public purpose and overriding public interest see *Obikoya v LSDPC*.

⁸¹ See the case of *GE Crane Sales Ltd v Commissioner of Taxation* (1971)46 ALJR 15.

⁸² See section 209 of the Companies and Allied Matters Act, LFN 2004.

⁸³ The Auctioneers Laws of the various states apply. See for instance Auctioneers Law Cap 10 Laws of Northern Nigeria 1963 applicable to the states comprising of the old Northern Nigeria, Auctioneers Law of Lagos State Laws of Lagos State 2004.

⁸⁴ The reason for this being that- "in natural justice and equity the principal right of the mortgagee is to the money, and his right to the land is only as a security for the money" per Lord Nottingham in *Thornborough v Baker* (1673) 3 Swam 628, 630, Fisher & Lightwood 's *Law of Mortgage*(9th edition by Tyler E.L.G; London Butterworth 1977) chapters 21 and 22;, Sykes and Walker 'Law of Securities' (5th edition 1993).

⁸⁵ See the case of *Santley v Wilde* (1899) 2 Ch 474 where Lindley M R stated that the mortgage is a conveyance of land or assignment of chattels as a security for the payment of debt or the discharge of some obligations for which it is given.

⁸⁶ This is the right of the mortgagor to pay or perform his obligations, even time reserved therefor under the contract with the mortgagee, until a valid sale or foreclosure, and thereby get his title restored free of the mortgage. Foreclosure is the judicial process by which the Mortgagor's title is extinguished. An order absolute for foreclosure makes the mortgagee the absolute owner of the property. See *Wallace v Evershed* (1899) 1 Ch 89. The mortgagor may in some instances obtain a review of such order absolute thereby enabled to redeem. See *Lockhurst v Hardy* (1846) 9 Beav. 349.

⁸⁷ See the case of *Burrows v Molley* (1845) 2.

⁸⁸ 44 & 45 Vict., Cap 41 1881 a statute of general application vide Ordinance No3 of 1863.

⁸⁹ Cap 100 of Laws of Western Nigeria 1959.

⁹⁰ Laws of Lagos State 2010.

⁹¹ Cap 128 Laws of Kwara State which became operative on 15th August, 1991. These state laws are saved and recognized by section 48 of the Land Use Act.

conferred by the mortgage deed, but not further. A power, when the mortgage money has become due, to sell, or to concur in selling, the mortgaged property.

Section 35 of the Lagos State law and section 123 of the Kwara State law are to the same effect. The Mortgagee is enjoined to give notice of intention to sell the property to the mortgagor. That is the Corporation is obliged to do qua mortgagee. By the provisions of section 20(1) of the Conveyancing Act and section 125(1) of the PCL, the Mortgagee is to give a three month notice to the mortgagor, while under section 37 of the Lagos Law the mortgagor receives two months notice. A sale in breach of the contractual or statutory limitations is remediable in damages.⁹² On whether or not the Corporation owes the mortgagor any duty in exercising its power of sale, this Paper submits that there is no statutory duty so to do.

There are, however, some judicial pronouncements in respect of same. In the *Warner v Jacob*,⁹³ Kay J had stated that the mortgagee owed only the duty of good faith as he was not a trustee for the mortgagor of the power of sale. In the case of *Mc Hugh v Union Bank of Canada*,⁹⁴ it was held that the mortgagee in the exercise of his power of sale should exercise reasonable care and behave reasonably in the same manner a reasonable man would behave in the realization of his own property. In the case of *Downsview Nominees Ltd v First City Corporation Ltd*,⁹⁵ the Court refusing to extend the scope of the mortgagee's duty agreed that the mortgagee ought to take reasonable care to obtain a proper price when exercising his power of sale. It is submitted that the Corporation is bound to exercise reasonable care in selling the 'acquired' assets. This is supported by the provisions of section 28 of the Act, which is to the effect that valuation of such assets even at the point of acquisition by the Corporation is done by the Central Bank of Nigeria guided by 'independent advice.' In the case of *Viatonu v Odutayo*⁹⁶ the then Supreme Court held that the exercise of the power of sale by the Auctioneer was unfair and mala fide to the prejudice of the mortgagor. The Court then set aside the conveyance to the second Defendant husband of the first Defendant Mortgagee and ordered a reconveyance to the Plaintiff Mortgagor. In that case the Plaintiff/ Mortgagor mortgaged his property in favour of the first Defendant. Upon the due date, the first Defendant gave notice of intention to foreclose whereupon the Plaintiff sought for extension of time to pay the debt. This was agreed to by the mortgagee. In a strange turn of events, before the new date agreed upon, and on the date the Plaintiff turned up to pay the debt the First Defendant/ Mortgagee had sold by private treaty sold to the second Defendant who was, amongst other things, the First Defendant/Mortgagee's husband and a partner in the firm of in the Auctioneers who sold the property for 600 pounds. This sum the mortgagor contended was gross under value.

The next question to ask is: What time can the Corporation sell the 'acquired bank assets'? In view of the enormous room available to the Mortgagee in the exercise of his power of sale⁹⁷ to effectively preempt the exercise of that power, the mortgagor may have to pay the amount claimed into court or show on the terms of the mortgage that the claim is excessive, under the relevant statutes,⁹⁸ the Mortgagee can secure the intervention of the Court in respect of the sale by the Mortgagee.

⁹² See section 126(2) of the PCL. Section 23 of Conveyancing Act. Section 38 of the Mortgage and Property Law of Lagos State. In equity same position obtains see *Pilcher v Rawlins* 1881-82) 7 Ch. App. 256; *Ojikutu v Agbonmagbe Bank* (1966) 1 African LR Comm.433.

⁹³ (1882) 20 Ch D 220 at 224. On the duty of 'good faith' see generally Amokaye O.G., 'Duty of Mortgagee Exercising Power of Sale' in *Journal of Private and Property Law* Vol. 22 January 2003, p.97 - 112.

⁹⁴ (1913) AC 299 at 311.

⁹⁵ ([1993] 2 WLR 86, PC).

⁹⁶ 19 NLR 119.

⁹⁷ See generally Amokaye op cit at p.104.

⁹⁸ *Inglis v Commercial Trading Bank of Australia* (1972) 126 CLR 161.

Section 114(2)⁹⁹ of the Property and Conveyancing Law states that in any action, whether for foreclosure, or for redemption, or for sale, or for the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, an may direct a sale of the mortgaged property, on such terms as it thinks fit, including the deposit in court of a reasonable sum fixed by the court to meet the expenses of sale to secure the performance of the terms.

Under the provisions of section 22(2) (b) of the Mortgage and Property Law of Lagos State, the Court ‘may direct a sale of the mortgaged property, in accordance with the terms of the contract or on such terms as it thinks fit, including the deposit in Court of a sum equal to one third of the known value of the mortgaged property at the time of making the order for sale.’ The provision of Order 51 Rule 1 of the High Court of Lagos State (Civil Procedure) Rules 2004 contains the following:

“Any mortgagee or mortgagor, whether legal or equitable, or any person entitled to or having property subject to a legal or equitable charge, or any person having the right to foreclose or redeem any mortgage, whether legal or equitable, may take out an originating summons, for such relief of the nature or kind following as may be the summons be specified, and as the circumstances of the case may require; that is: (a) payment of money secured by the mortgage or charge; (b) sale; (c) foreclosure; (d) Delivery of possession, whether before or after foreclosure, to the mortgage or person entitled to the charge, by the mortgagor or person having the property subject to the charge, or by any other person in, or alleged to be in possession of the property; (e) redemption; (f) reconveyance; (g) delivery of possession by the mortgagee.”

In the English case of *Palk v Mortgagee Services Funding PLC*,¹⁰⁰ the Court held that the Mortgagee exercising its power of sale ‘must act fairly towards the mortgagor. Further that the exercise by the Court of its statutory power to direct a sale even against the wishes of the mortgagee is not dependent on the first having been a breach of duty by the mortgagee. The discretion given to the court by section 91(2) of the LPA 1925 (114(2) of PCL is not hedged about with pre conditions. In the exercise of the discretion the court would have due regard to the interests of all the parties. The Paper submits that this right is available to a debtor/Mortgagor against the Corporation in certain circumstances under the AMCON Act.

4. CONCLUSION

It is submitted with respects that the Asset Management Corporation of Nigeria in carrying out its statutory functions under the provisions of its Act, qua a Mortgagee is bound by some common law rules which have not been expressly replaced by statutory provisions. Further, in realizing security interests in land the Corporation is bound by the provisions of the Land Use Act and the relevant statutes relating to land in the States made by the Legislature of such state. This is clearly because the Land Use act has stated that the land in the state is vested in the Governor of that state. Save where a state of emergency has been declared in respect of a State, the National Assembly cannot make laws in respect of matters over which a State House

⁹⁹ See section 25(2) of the Conveyancing Act.

¹⁰⁰ (1993) Ch 330, (1993) 2 All ER 481. The decision was followed in the case of *Barret v Halifax Building Society* (1995) 28 HLR 634. It is submitted that for the exercise of the discretion of the Court sufficient materials must be presented as in cases for the exercise of discretion which must be judicious and judicial. See *Oyekanmi v NEPA* (20000 12 SC).

of Assembly can make laws. Matters relating to land are not included in the Exclusive and/or Concurrent Legislative List and over which the National Assembly can make laws as the Act purports to do. Sections 35(1), 39 and 45 purports to override any other law including some statutory provisions contained in State laws on land in such state. These state laws like the Auctioneers Laws and the Land Instruments Registration Laws are recognized by section 48 of the Land Use Act as existing laws which are modified or altered only by the Land Use Act or the Constitution of the Federal Republic of Nigeria.